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 YALE LAW SCHOOL CENTER FOR GLOBAL LEGAL CHALLENGES AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*

The Yale Law School Center for Global Legal Challenges is an independent Center that promotes the understanding of international law, national security law, and foreign affairs law.[1] The Center aims to close the divide between the legal academy and legal practice by connecting the legal academy to U.S. government actors responsible for addressing international legal challenges. In the process, the Center aims to promote greater understanding of legal issues of global importance—encouraging the legal academy to better grasp the real legal challenges faced by U.S. government actors and encouraging those same government actors to draw upon the expertise available within the legal academy. The Center files this brief to promote accurate interpretation of international law by providing the Court with an examination of the prohibitory norms of international law at issue in this case and their applicability to corporations.

[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief. The views expressed in this brief are not necessarily those of the Yale Law School or Yale University.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

As children, respondents were, they maintain, subjected to slavery, forced labor, and human trafficking on cocoa plantations in the Ivory Coast in violation of some of the most deeply rooted norms of international law. Each of these three norms is specific, universal, and obligatory, and each extends to corporations. Violations of these norms by petitioners are, therefore, actionable under the Alien Tort Statute (ATS), 28 U.S.C. § 1350.

Respondents allege that petitioners, private corporations headquartered in the United States, knowingly aided and abetted these international law violations. The Ninth Circuit has twice affirmed that the prohibition against slavery applies to corporations and is actionable under the test set forth by this Court in *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 725 (2004), and has remanded the case for further proceedings. *Doe I* v. *Nestle USA, Inc.*, 766 F.3d 1013, 1022-1023 (9th Cir. 2014); *Doe* v. *Nestle, S.A.*, 906 F.3d 1120, 1124 (9th Cir. 2018). Petitioners would now have this Court short-circuit those proceedings and deny respondents the opportunity to make their case.

This Court has previously held that Congress gave federal courts jurisdiction over violations of the law of nations through the ATS. *Sosa*, 542 U.S., at 700. The First Congress enacted the ATS to provide a federal forum in which foreigners could recover for injuries perpetrated by U.S. citizens, because failure to allow

for relief could provide "just cause for reprisals or war." *Jesner* v. *Arab Bank, PLC*, 138 S. Ct. 1386, 1416 (2018) (Gorsuch, J., concurring) (quoting Anthony J. Bellia Jr. & Bradford R. Clark, The Alien Tort Statute and the Law of Nations, 78 U. Chi. L. Rev. 445, 476 (2011)). At the time, states frequently cited both violations of international law and tortious interference as just causes of war. See Oona Hathaway *et al.*, War Manifestos, 85 U. Chi. L. Rev. 1139, 1187-1189, 1198-1200 (2018). Although torts in violation of the law of nations are no longer considered just causes for war, the ATS today serves the same basic purpose as in 1789: to "ensure *our* citizens abide by the law of nations." *Jesner*, 138 S. Ct. at 1419 (Gorsuch, J., concurring).

The ATS is a jurisdiction-granting statute, and it does not provide jurisdiction over *all* alleged violations of international law: it allows for a "civil action" filed by "an alien," "for a tort only" that is "committed in violation of the law of nations * * *." 28 U.S.C. § 1350. Moreover, this Court has held that to be actionable under the ATS, the violation must "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the [three] 18th-century" torts the Court has already recognized. *Sosa*, 542 U.S. at 725. To meet this threshold, a plaintiff must demonstrate that the alleged conduct violates "a norm that is specific, universal, and obligatory." *Id.* at 732 (quoting *In re Estate of Marcos Human Rights Litigation*, 25 F.3d 1467, 1475 (9th Cir. 1994)). If any international law norms meet that test, they are the norms at issue here: the

prohibitions on slavery, forced labor, and human trafficking are among the most deeply established norms of international law. Over the past two centuries, these norms have crystallized into rules of customary international law as a result of the general and consistent practice of states stemming from a sense of legal obligation. See Restatement (Third) of Foreign Relations Law § 102 (1987). These customary prohibitions are today reflected in numerous international treaties that reaffirm and codify these norms.

To be actionable under the ATS, a norm must not only be specific, universal, and obligatory; it must also extend "to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual." *Sosa*, 542 U.S. at 732, n. 20. Contrary to petitioners' claims, international law need not provide the particular way in which the international law norm is enforced, such as civil or criminal liability. International law decides whether the norms apply to the perpetrator, but it leaves enforcement to states. See Brief of International Law Scholars as *Amici Curiae* in Support of Respondents at 7-12, *Nestlé USA, Inc.* v. *Doe I*; *Cargill Inc.* v. *Doe I* (Nos. 19-416; 19-453).

Determining whether a particular norm extends to a given perpetrator requires a norm-by-norm analysis. As the Ninth Circuit has recognized, courts should consider "separately each violation of international law alleged" and "which actors may violate" the norm on which it rests. *Sarei* v. *Rio Tinto, PLC*, 671 F.3d 736, 748 (9th Cir. 2011) (en banc), vacated on other grounds, 569 U.S. 945 (2013). Here, the norms at issue—slavery,

forced labor, and human trafficking—bind both natural and juridical persons. Indeed, corporations have been held liable for participating in the slave trade for centuries. They should not be exempted now.

ARGUMENT

I. THE PROHIBITION AGAINST SLAVERY IS A SPECIFIC, UNIVERSAL, AND OBLIGATORY INTERNATIONAL LAW NORM THAT APPLIES TO CORPORATIONS

A. The Slavery Prohibition is Among the Oldest Specific, Universal, and Obligatory Norms

The prohibition on slavery is one of the most well-established, longstanding, and universal human rights protections under international law. The development of the prohibition on slavery began with the prohibition on the slave trade and cemented into the absolute prohibition of all forms of enslavement.

Beginning in the eighteenth century, Christian abolitionism ignited a global movement to end slavery and the international slave trade. Among the earliest abolitionists were Members of the Religious Society of Friends, or Quakers, who deemed slavery a "notorious Sin." Benjamin Lay, All Slave-Keepers That Keep the Innocent in Bondage, Apostates . . . (1737). In 1772, a British court held, in *Somerset* v. *Stewart*, that slavery could not be justified by English common law, finding that slavery was "so odious, that nothing can be

suffered to support it, but positive law." (1772) 98 Eng. Rep. 499, 510 (K.B.). A few years later, after the Revolutionary War, several U.S. states began to gradually dismantle slavery, including Vermont in 1777, Pennsylvania in 1780, and Connecticut in 1784. See David Menschel, Note, Abolition Without Deliverance: The Law of Connecticut Slavery 1784-1848, 111 Yale L.J. 183, 183-184 & nn. 3, 4 (2001) (citing state constitutions, statutes, and judicial interpretations).

In the early nineteenth century, several nations abolished the slave trade, presaging the subsequent widespread eradication of slavery itself. In 1807, both the United States and the United Kingdom passed legislation abolishing the slave trade. See Act for the Abolition of the Slave Trade, 47 Geo. III Sess. 1 c. 36 (1807) (U.K.); Slave Trade Prohibition Act, Pub. L. No. 9-22, 2 Stat. 426 (1807) (banning the importation of slaves into the United States effective January 1, 1808). At the Congress of Vienna, in 1815, Austria, France, Great Britain, Portugal, Prussia, Russia, Spain, and Sweden proclaimed that "the African slave-trade has been regarded * * * as repugnant to the principles of humanity and universal morality." "[A]t last," they said, "the public voice has made itself heard in all civilized countries, requesting that [the slave trade] might be suppressed as soon as possible." Declaration of the Eight Courts, Relative to the Universal Abolition of the Slave-Trade, Congress of Vienna, protocol of the 8th February, 1815, N. 674, Translation, in Papers Relating to the Foreign Relations of the United States, Transmitted to Congress, with the Annual Message of

the President, December 6, 1875, Volume 1. "By the early 1840s, more than twenty nations * * * had signed treaties committing to the abolition of the slave trade"—making it one of the most widely accepted international legal obligations of its era. Jenny S. Martinez, Antislavery Courts and the Dawn of International Human Rights Law, 117 Yale L.J. 550, 555-556 (2008); see also W.E. Burghardt Du Bois, The Suppression of the African Slave-trade to the United States of America, 1638-1870, at 144 (1896) (detailing that Denmark abolished the slave trade in 1802, followed by Sweden in 1813, the Netherlands in 1814, Portugal north of the equator in 1815 and fully in 1830, Spain north of the equator in 1817 and fully in 1820, and France in 1818).

Slavers and slave traders, like pirates before them, came to be regarded as enemies of humanity. Several nations even declared that anyone participating in the slave trade was engaged in piracy. See, *e.g.*, Statute I. May 15, 1820, ch. cxiii, § 4 ("[A]ny citizen of the United States, being of the crew or ship's company of any foreign ship or vessel engaged in the slave trade * * * shall be adjudged a pirate");[2] Slave Trade Act 1824, 5 Geo. VI Sess. 1 c. 113 (U.K.); Treaty for the Suppression of the African Slave Trade, Dec. 20, 1841, 30 British and Foreign State Papers 269 (1858) (Austria,

[2] While this Court held in *The Antelope* that the recognition of the slave trade as piracy was "only by statute; and the obligation of the statute cannot transcend the legislative power of the state which may enact it," 23 U.S. 66, 122 (1825), the analogy between piracy and the slave trade reveals the severity with which Congress viewed the slave trade.

Great Britain, Prussia, Russia, and France); see also Jenny S. Martinez, The Slave Trade and the Origins of International Human Rights Law 126-127 (2012) (describing bilateral treaties concluded between Britain and Argentina, Belgium, Borneo, Brazil, Chile, Ecuador, Haiti, Mexico, Uruguay, and Venezuela that declared the slave trade was piracy).

Even in the nascent days of the global abolitionist movement, enforcement of the bans on the slave trade "had a strong international dimension." David Eltis & David Richardson, Atlas of the Transatlantic Slave Trade 271 (2010). The 1807 law prohibiting the importation of slaves into the United States instructed "commanders of armed vessels * * * to seize, take, and bring into any [U.S.] port * * * all such ships or vessels * * * found on the high seas contravening the provisions of this act." Pub. L. No. 9-22, 2 Stat. 426 (1807). During the Napoleonic Wars, from 1803 to 1815, Britain seized foreign slave ships flying American, Spanish, Portuguese, Dutch, and French flags. See Martinez, 117 Yale L.J. at 566. European nations signed several conventions, treaties, and declarations establishing duties to prohibit, prevent, and prosecute illegal slave trading. See M. Cherif Bassiouni, Enslavement as an International Crime, 23 N.Y.U. J. Int'l L. & Pol. 445, 459-463 (1991) (cataloguing international agreements).

Nations created the first international human rights tribunals specifically to combat the slave trade abroad, reflecting the transnational nature of the prohibitory norm. Beginning in 1817, Britain established bilateral tribunals with the Netherlands, Portugal,

and Spain to adjudicate seizures of merchant vessels suspected of illegal slave trading. Martinez, 117 Yale L.J. at 552-553. The mixed courts, located in Cuba, Brazil, Sierra Leone, and Suriname, condemned over 600 slave trading vessels and liberated nearly 80,000 slaves. *Id.* at 553, 579. In 1862, the U.S. Senate ratified the Lyons-Seward Treaty between the United States and Great Britain, which allowed each country to search suspected slave vessels from the other and send them to the mixed courts for trial. Treaty Between United States and Great Britain for the Suppression of the Slave Trade, U.S.-Gr. Brit., Apr. 7, 1862, 12 Stat. 1225. These tribunals had the power to enforce penalties against private actors by seizing ships carrying out the slave trade and by punishing slave traders. Steven R. Ratner, Corporations and Human Rights: A Theory of Legal Responsibility, 111 Yale L.J. 443, 465 (2001). By the mid-1860s, these concerted international sanctions had contributed to the eradication of the trans-Atlantic slave trade. Martinez, 117 Yale L.J. at 628-629; see also Jenny S. Martinez, International Courts and the U.S. Constitution: Reexamining History, 159 U. Penn. L. Rev. 1069, 1072 (2011).

As nations outlawed the slave trade, so too did they abolish the practice of slavery, freeing hundreds of thousands of men, women, and children from bondage. From 1833 to 1843, Britain abolished slavery across its empire. Sweden abolished slavery in 1846, followed by Denmark and France in 1848, Portugal in 1856, Holland in 1860, the United States in 1865, Spain in 1872 (in Puerto Rico), Brazil in 1884 and

1890, and Cuba in 1898. Bassiouni, 23 N.Y.U. J. Int'l L. & Pol. at 451-452.

In 1926, the League of Nations adopted the Slavery Convention, which formalized and enshrined the longstanding customary prohibition on slavery, defined as "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised." Slavery Convention, Art. 1, Sept. 25, 1926, 46 Stat. 483, 60 L.N.T.S. 254 (99 state parties, including the United States). The "customary international law status" of the provisions of the Slavery Convention "is evinced by the almost universal acceptance of that Convention and the central role that the definition of slavery in particular has come to play in subsequent international law developments in this field." *Prosecutor* v. *Kunarac*, Case No. IT-96-23-T & IT-96-23/1-T, Judgment, ¶ 520 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001), available at https://www.icty.org/x/cases/kunarac/acjug/en/kun-aj020612e.pdf.

The Slavery Convention affirmed that contracting parties were obligated not only to cease direct participation in slavery but also to take the steps necessary to eliminate the slave trade and slavery. Slavery Convention, Art. 2. Ever since, it has been indisputable that a state violates the international prohibition on slavery "if, as a matter of state policy, it practices, encourages, or condones * * * slavery or slave trade." Restatement (Third) of Foreign Relations Law § 702(b) (1987). Today, the customary international law prohibition against "slavery and the slave trade * * * in all their forms" is reflected in numerous international

instruments. Universal Declaration of Human Rights (UDHR) Art. 4, G.A. Res. 217(III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948); see American Convention on Human Rights, Art. 6, § 1, Nov. 22, 1969, 1144 U.N.T.S. 123, 146; African Charter on Human and Peoples' Rights, Art. 5, June 27, 1981, OAU Doc. CAB/LEG/67/3/Rev.5, 21 I.LM. 58, 60 (1982).

Freedom from slavery is an inviolable right. The International Covenant on Civil and Political Rights (ICCPR), to which the United States is party, sets out a short list of rights that are so fundamental that they may not be derogated, even "[i]n time of public emergency which threatens the life of the nation." ICCPR, Art. 4(1), Dec. 19, 1966, S. Exec. Doc. E, 95-2 (1978), 999 U.N.T.S. 171, 174. Among them is the prohibition on slavery and the slave trade. *Id.* Arts. 4(2), 8(1). U.S. courts have repeatedly affirmed that the prohibition against slavery is a *jus cogens* norm. See *Doe* v. *Unocal Corp*., 395 F.2d 932, 945 (9th Cir. 2002) (reaffirming that slavery, torture, and murder are "*jus cogens* violations"); *Siderman de Blake* v. *Republic of Argentina*, 965 F.2d 699, 715 (9th Cir. 1992) (recognizing that the fundamental rights identified at Nuremberg, including against enslavement, "are the direct ancestors of the universal and fundamental norms recognized as jus cogens"); *Comm. of U.S. Citizens Living in Nicaragua* v. *Reagan*, 859 F.2d 929, 941 (D.C. Cir. 1988) (noting the prohibition of slavery among *jus cogens* norms).

The international prohibition against slavery and the slave trade is as fundamental a prohibition as exists in international law. It has been recognized as a

specific, universal, and obligatory norm for over a century. Just "like the pirate[,] the slave trader" has long been "*hostis humanis generis*, an enemy of all mankind." *Sosa*, 542 U.S. at 732 (quoting *Filartiga* v. *Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980)) (internal quotation marks omitted).

B. The Slavery Prohibition Applies to Corporations

From its inception, the slave trade was a corporate activity. Enforcing the prohibition against the slave trade has thus for centuries entailed enforcement against private companies.

Mercantile and joint stock companies played a leading role in the transatlantic slave trade. The Royal African Company, a private mercantile company established in 1660, shipped more enslaved Africans to the Americas than any other organization. See William Pettigrew, Freedom's Debt: The Royal African Company and the Politics of the Atlantic Slave Trade, 1672-1752 11 (2013). Other European nations, including Denmark, France, the Netherlands, and Spain also "incorporated companies as an organized method to finance the slaving expeditions." Patricia M. Muhammad, The Trans-Atlantic Slave Trade: A Forgotten Crime Against Humanity as Defined by International Law, 19 Am. U. Int'l L. Rev. 883, 912 (2003).

Analogues of modern corporations, these trading companies featured a familiar hierarchy of headquarters controlling managers in overseas offices. See Ann

M. Carlos & Stephen Nicholas, Theory and History: Seventeenth-Century Joint-Stock Chartered Trading Companies, 56 J. Econ. Hist. 916, 916-924 (1996). Because companies carried out the trade in enslaved African men, women, and children, national bans on the slave trade necessarily applied to companies and their conduct. And the companies knew that. Companies "clearly believed that the treaties banning the slave trade applied to them; otherwise, an easy way to avoid the ban would have been simply to incorporate." Jenny Martinez, The Slave Trade and the Origins of International Human Rights Law 164 (2012). Instead, they avoided responsibility for violating the ban by not participating in the slave trade. In 1815, for example, Simon Cock, the Secretary to the African Company of Merchants wrote that "since the abolition of the Slave Trade" the Company's "directions [had], upon every occasion, been calculated * * * to abolish the Slave Trade and to introduce legitimate commerce." Letter from Mr. Simon Cock, Secretary to the African Company, to the Right Honourable C. Arbuthnot (June 10, 1815), in Papers Relating to the African Company, at 5 (1815).

States imposed liability on slave ships, owned or contracted by individuals and companies alike, that carried out the slave trade. Over the course of the nineteenth century, bilateral antislavery tribunals seized and condemned hundreds of ships for participating in the slave trade. Although many vessels were owned by individuals, the tribunals scrutinized merchants' courses of trade and mercantile establishments. See Martinez, 117 Yale L.J. at 587.

Ownership by a company certainly provided no immunity. In 1837, the slave ship *Veloz* was captured with 228 slaves on board and condemned by the Mixed Court at Sierra Leone. Papers found on the ship indicated that the *Veloz* was owned by a joint stock company formed at Pernambuco, Brazil, even though the company's treasurer appeared in the ship's register and passports as its "ostensible owner." Her Majesty's Judge to Viscount Palmerston, Sierra Leone (May 30, 1838), in Correspondence with the British Commissioners at Sierra Leone, the Havana, Rio de Janeiro, and Surinam. Relating to the Slave Trade 1838-9, at 44, House of Commons Parliamentary Papers Online, available at https://parlipapers.proquest.com/parlipapers/docview/t70.d75.1839-018670?accountid=15172 (describing the ownership structure of the *Veloz*). The tribunal focused on the company's slave trading activities and its collective intent, describing the firm's lack of even "the slightest apprehension" in violating the law. *Id.* at 46. Companies whose ships were found to have illegally participated in the slave trade were subject to civil liability—here, the loss of the property that enabled the illegal activity. After a ship was condemned, the Mixed Courts usually authorized auctioning off the vessel, with the proceeds divided between the two states. Martinez, Antislavery Courts and the Dawn of International Human Rights Law, 117 Yale L.J. at 590-591.

The seizure and condemnation of slave ships mirrored the enforcement actions states had long undertaken against ships engaged in piracy. See *The*

Marianna Flora, 24 U.S. (11 Wheat.) 1, 40-41 (1825) ("[P]iratical aggression by an armed vessel * * * may be justly subjected to the penalty of confiscation for such a gross breach of the law of nations."). Indeed, *in rem* proceedings against pirate ships are one of the earliest examples of enforcing claims for violations of the law of nations against juridical entities. See *Flomo* v. *Firestone Nat. Rubber Co.*, 643 F.3d 1013, 1021 (7th Cir. 2011); see also *The Malek Adhel*, 43 U.S. (2 How.) 210, 233 (1844) ("[T]he vessel in which or by which, or by the master or crew thereof, a wrong has been done [is treated] as the offender * * * as the only adequate means of suppressing the offence or wrong, or insuring an indemnity to the injured party."). Sitting on circuit, Chief Justice Marshall rationalized imposing liability on a ship in a case involving violations of national embargo laws:

> [This] is a proceeding against the vessel, for an offence committed by the vessel, which is not less an offence * * * . It is true, that inanimate matter can commit no offence. The mere wood, iron, and sails of the ship, cannot, of themselves, violate the law. But this body is animated and put in action by the crew, who are guided by the master. The vessel acts and speaks by the master.

The Little Charles, 26 F. Cas. 979, 982 (C.C.D. Va. 1818). Ships served as the juridical vehicles for conducting business, whether legal or illegal, paralleling the role of the corporation today. Although piratical vessels were condemned in *in rem* admiralty proceedings, "the

burden of confiscation of a pirate ship [fell] ultimately on the ship's owners," just as, today, "the burden of a fine imposed on a corporation falls ultimately on the shareholders." *Flomo*, 643 F.3d at 1021.

Nearly a century after the Mixed Courts condemned ships carrying out the slave trade, the Nuremberg tribunals condemned corporate exploitation of slave labor. The trials of corporate officers demonstrate that the United States Military Tribunal understood the prohibition on slavery to extend to corporate entities. In 1947, the directors of I.G. Farben, a German chemical and pharmaceutical manufacturer, were prosecuted for the enslavement of civilians and concentration camp inmates based on "the role of Farben in the slave-labor program of the Third Reich" and the "unlawful and inhuman practices * * * in connection with Farben's plant at Auschwitz." *United States* v. *Krauch (Farben Case)*, 8 Trials of War Criminals Before the Nuremberg Military Tribunals No. 10, at 1167-1168 (1981). The Tribunal noted that the corporation *itself* had violated international law, explaining that "Farben * * * utilized involuntary foreign workers in many of its plants * * * [that] unless done under such circumstances as to relieve the employer of responsibility, constitutes a violation of [international law]." *Id.* at 1173-1174.

A few months later, in the Krupp trial, which saw the weapons manufacturer's directors accused of using slave labor, the Tribunal once again pointed the finger at the firm itself. Krupp, the Tribunal declared, had displayed "not only its willingness but its ardent desire

to employ forced labor". *United States* v. *Krupp* (*Krupp Case*), 9 Trials of War Criminals Before the Nuremberg Military Tribunals No. 10, at 1440 (1950). As the Tribunal wrote:

> In June 1943, the Krupp firm started to employ concentration camp inmates at Auschwitz. * * * The facts connected with Auschwitz clearly show not only the use of concentration camp labor, but also the desire to do so. They permit no opportunity for the conclusion that this labor was forced upon the Krupp firm.

Id. at 1415-1416. "[I]t is obvious," the Tribunal concluded, that "the employment of these concentration camp inmates was * * * a violation of international law * * *." *Id.* at 1434.[3] The decision of the Tribunal not to hold companies directly liable in this particular prosecution does not imply that corporations are somehow "exempt" from liability under international law or

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[3] The Control Council dissolved the companies before the trials were initiated and prosecutors decided not to bring criminal prosecutions against them. See Control Council Law No. 9, Providing for the Seizure of Property Owned by I.G. Farbenindustrie and the Control Thereof, Nov. 30, 1945, reprinted in 1 Enactments and Approved Papers of the Control Council and Coordinating Committee 225 (1945); General Order No. 3 (Pursuant to Military Government Law No. 52—Blocking and Control of Property): Firma Friedrich Krupp, Military Government Gazette, Germany, British Zone of Control, No. 5, at 62 (1945); Jonathan Bush, The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said, 109 Colum. L. Rev. 1094, 1229 (2009) ("Corporate and associational criminal liability was seriously explored and was never rejected as legally unsound.").

that the prohibition against slavery does not apply to them. *Flomo*, 643 F.3d at 1019; see generally Brief of *Amici Curiae* Nuremberg Scholars in Support of Respondents, *Nestlé USA, Inc.* v. *Doe I*; *Cargill Inc.* v. *Doe I* (Nos. 19-416; 19-453). Quite the opposite: the Tribunal recognized the applicability of international law to corporate actors even though they fell outside its jurisdiction.

In the years following World War II, the Allies recognized in various agreements, cases, and settlements that victims had legal claims against private corporations that took advantage of their slave and forced labor. See Brief of *Amici Curiae* Nuremberg Scholars in Support of Petitioners at 25-28, *Jesner* v. *Arab Bank, PLC*, 138 S. Ct. 1386 (2018). Many German companies even faced the equivalent of the "corporate death penalty"—dissolution and liquidation—for their actions. See *id.* at 28 (citing Control Council Directive No. 39, Liquidation of German War and Industrial Potential (Oct. 2, 1946)).

U.S. courts have similarly found that the prohibition against slavery and the slave trade extends to non-state actors, including corporations. See *Kadic* v. *Karadzic*, 70 F.3d 232, 239 (2d Cir. 1995) (finding that the slave trade violates the law of nations "whether undertaken by those acting under the auspices of a state or only as private individuals."); *Flomo*, 643 F.3d at 1019 ("[I]f the board of directors of a corporation directs the corporation's managers * * * to use slave labor, the corporation can be civilly liable."); *Iwanowa* v. *Ford Motor Co.*, 67 F. Supp. 2d 424, 440 (D.N.J. 1999)

(holding that Iwanowa "was literally purchased, along with 38 other children from Rostock" during World War II by a representative of the German company Ford Werke, which "suffice[s] to support an allegation that Defendants participated in slave trading").

Similarly, in a recent case brought by Eritrean refugees involving alleged forced labor and slavery at a mine operated by a Canadian company's subsidiary in Eritrea, the Canadian Supreme Court held that Canadian corporations may be liable in tort for violations of customary international law norms. See *Nevsun* v. *Araya*, [2020] S.C.R. 5 (Can.) ("It is not plain and obvious that corporations today 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." (citations and internal quotation marks omitted)). For further examples of corporate liability for international law violations in other nations, see generally Brief of Foreign Lawyers as *Amici Curiae* in Support of Respondents, *Nestlé USA, Inc.* v. *Doe I*; *Cargill Inc.* v. *Doe I* (Nos. 19-416; 19-453).

In short, for over a century, the international law prohibition on slavery has been a specific, universal, and obligatory norm that extends to corporations.

II. THE PROHIBITION AGAINST FORCED LABOR IS A SPECIFIC, UNIVERSAL, AND OBLIGATORY INTERNATIONAL LAW NORM THAT APPLIES TO CORPORATIONS

A. The Forced Labor Prohibition is a Specific, Universal, and Obligatory Norm

The prohibition against forced labor derives from the prohibition against slavery and is also a specific, universal, and obligatory norm of international law.

The customary prohibition on forced labor has been enshrined in several international instruments. The 1926 Slavery Convention recognized the "grave consequences" of forced labor and required states to prevent forced labor "from developing into conditions analogous to slavery." Slavery Convention, Art. 5. Four years later, the Forced Labour Convention crystallized the prohibition against forced labor, which it defined as "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily." International Labour Organization Convention No. 29 Concerning Forced or Compulsory Labour (Forced Labour Convention), Art. 2(1), June 28, 1930, 39 U.N.T.S. 55. The Forced Labour Convention outlawed forced labor "in all its forms," with narrowly circumscribed exemptions.[4] That prohibition was again reaffirmed and

[4] These were for work performed as the result of compulsory military service, minor communal services which form part of a citizen's normal civic obligations, work extracted in cases of war or other emergency, and work carried out by convicted prisoners. See Forced Labour Convention Art. 2(2), June 28, 1930, 39

further elaborated in the 1957 Abolition of Forced Labour Convention, June 25, 1957, 320 U.N.T.S. 291. See also UDHR, Art. 23 (providing for the right "to free choice of employment"); ICCPR, Art. 8 (prohibiting, with limited exceptions, "forced or compulsory labour"); European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 4, Nov. 4, 1950, 213 U.N.T.S. 221; 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (Supplementary Convention), Art. 1(d), Sept. 7, 1956, 18 U.S.T. 3201, 226 U.N.T.S. 3 (ratified by 124 countries, including the United States).

U.S. courts have repeatedly affirmed that the prohibition on forced labor is a universally accepted norm. See, *e.g.*, *Unocal*, 395 F.3d at 946 (concluding that international law prohibits forced labor as a "modern variant" of slavery); *Aragon* v. *Che Ku*, 277 F. Supp. 3d 1055, 1067 (D. Minn. 2017) ("[T]he Court concludes that international norms prohibit forced labor.").

Forced labor is so abhorrent that it can also be prosecuted as a war crime. In the wake of World War II, Justice Robert Jackson explained that the 1945 London Charter "made explicit and unambiguous what was theretofore * * * implicit in International Law"—that forced labor was a war crime. Robert H. Jackson,

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U.N.T.S. 55. Several of these were done away with in the 1957 Abolition of Forced Labour Convention. See Abolition of Forced Labour Convention, June 25, 1957, 320 U.N.T.S. 291.

Final Report to the President Concerning the Nurnberg War Crimes Trial (1946), reprinted in 20 Temp. L.Q. 338, 342 (1947) (citing the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal (London Charter), Art. 6, Aug. 8, 1945, 82 U.N.T.S. 282)); see also *Khulumani* v. *Barclay Nat. Bank Ltd.*, 504 F.3d 254, 271 (2d Cir. 2007) (Katzmann, J., concurring) (declaring that the London Charter "crystalliz[ed] preexisting customary international law").

Of the nearly 25 million people subjected to forced labor around the world, over 4 million are children, Global Estimates of Modern Slavery: Forced Labour and Forced Marriage at 10, International Labour Organization (Geneva 2017), and children receive additional protection against forced labor under international law. Under the Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (Worst Forms of Child Labor Convention), to which the United States is party, ratifying states are required to eliminate the "forced labor" of children, which is among "the worst forms of child labor." Worst Forms of Child Labor Convention, June 17, 1999, S. Treaty Doc. No. 106-5, 2133 U.N.T.S. 161.

Likewise, the 1956 Supplementary Convention requires state parties to abolish certain practices "similar to slavery," including any "practice whereby a child or young person under the age of 18 years is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with

a view to the exploitation of the child or young person or of his labour." Supplementary Convention, Art. 1. Other international instruments have repeatedly affirmed the prohibition on forced child labor. The Convention on the Rights of the Child, with 196 state parties, recognizes the right of children not to be subject to "economic exploitation" or made to carry out "any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development." Convention on the Rights of the Child, Art. 32, Nov. 20, 1989, 1577 U.N.T.S. 3; see also Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, Art. 3, May 25, 2000, T.I.A.S. No. 13,095, 2171 U.N.T.S. 277 [hereinafter Optional Protocol on the Sale of Children] (ratified by 176 countries, including the United States, and requiring parties to outlaw the use of children in forced labor).

In sum, the international prohibition on forced labor, particularly the forced labor of children, is a specific, universal, and obligatory norm of international law.

B. The Forced Labor Prohibition Applies to Corporations

The international law norm against forced labor extends to corporations and their conduct. The Forced Labour Convention covers "*all* work or service" performed involuntarily, no matter who extracts the labor.

Forced Labour Convention, Art. 2 (emphasis added). The Optional Protocol on the Sale of Children, moreover, requires states to outlaw the "[o]ffering, delivering, or accepting" of a child when "transferred by any person or group of persons to another for renumeration or any other consideration" for the purpose of "[e]ngagement of the child in forced labour," "whether such offenses are committed domestically or transnationally or on an individual or organized basis." Optional Protocol on the Sale of Children, Arts. 2, 3.

The prohibition on forced labor has applied to individuals and corporations since its inception. In 1930, when the League of Nations' Assembly created a commission to investigate slavery and forced labor in Liberia, the commission recognized that, although forced labor was permitted for limited "public purposes," the use of forced labor by private employers was "universally agreed" to be impermissible. Report of the International Commission of Enquiry into the Existence of Slavery and Forced Labour in the Republic of Liberia 116, League of Nations Doc. C.658 M.272 1930 VI (1930).

Later, in the I.G. Farben and Krupp trials, the Nuremberg Tribunal traced the commission of forced labor to the companies themselves. See Part I.B., *supra*; see also Brief of *Amici Curiae* Nuremberg Scholars in Support of Respondents at pt. II, *Nestlé USA, Inc*. v. *Doe I*; *Cargill Inc.* v. *Doe I* (Nos. 19-416; 19-453).

Since then, U.S. courts have repeatedly recognized that the norm against forced labor applies to corporations. See *Flomo*, 643 F.3d at 1017, 1019 (holding that a corporation can be held civilly liable for using "slave labor"); *Licea* v. *Curacao Drydock Co.*, 584 F. Supp. 2d 1355, 1366 (S.D. Fla. 2008) ("[T]he Defendant has not only gone unpunished, but has profited from 15 years of forced labor * * * Those profits should be disgorged."). Consistent with these decisions, a Korean court found Mitsubishi Heavy Industries liable for crimes against humanity for subjecting 13- and 14-year old girls to forced labor during the Japanese occupation of Korea in World War II in violation of the Forced Labour Convention. See *Yang* v. *Mitsubishi Heavy Industries Limited*, Gwangju District Court [Dist. Ct.], 2012 Ga-Hap10852, Nov. 1, 2013 (S. Kor.), translated in Oxford Reports on International Law in Domestic Courts (2014), available at https://opil.ouplaw.com/view/10.1093/law:ildc/2105kr13.case.1/law-ildc-2105kr13.

In short, as with slavery, the international law prohibition on forced labor has long been recognized as a specific, universal, and obligatory norm that extends to corporations.

III. THE PROHIBITION AGAINST HUMAN TRAFFICKING IS A SPECIFIC, UNIVERSAL, AND OBLIGATORY INTERNATIONAL LAW NORM THAT APPLIES TO CORPORATIONS

A. The Human Trafficking Prohibition is a Specific, Universal, and Obligatory Norm

The international law prohibition on human trafficking followed from the nineteenth century prohibition against the slave trade. As the international community outlawed chattel slavery and the state-sanctioned slave trade, international law responded to related practices that continued to exploit human beings. Today, in addition to being prohibited in its own right, human trafficking can be evidence of slavery. See, *e.g.*, *Kunarac*, Case No. IT-96-23-T & IT-96-23/1-T, Judgment, ¶ 542 ("Further indications of enslavement include * * * human trafficking.").

The norm against human trafficking coalesced in the early twentieth century, as states combatted the exploitation of women and children,[5] and it now is

[5] The first international anti-trafficking efforts focused on the exploitation of women and children for immoral purposes. See International Agreement for the Suppression of the White Slave Traffic, May 18, 1904, 35 Stat. 1979, 1 L.N.T.S. 83; International Convention for the Suppression of the White Slave Traffic, May 4, 1910, 211 Consol. T.S. 45, 103 B.F.S.P. 244; International Convention for the Suppression of the Traffic in Women and Children, Sept. 30, 1921, 9 L.N.T.S. 415; International Convention for the Suppression of the Traffic in Women of Full Age, Oct. 11, 1933, 150 L.N.T.S. 431; Convention for the Suppression of the Traffic in

understood to cover trafficking of all persons for all forms of exploitation. See United Nations Convention Against Transnational Organized Crime, Nov. 15, 2000, S. Treaty Doc. No. 108-16, 2225 U.N.T.S. 209 (ratified by 190 States, including the United States); Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention Against Transnational Organized Crime (Palermo Protocol), Art. 3(a), Nov. 15, 2000, S. Treaty Doc. No. 108-16, 2237 U.N.T.S. 319 (ratified by 178 countries including the United States); David Weissbrodt & Anti-Slavery International, Abolishing Slavery and its Contemporary Forms 18-21, U.N. Doc. HR/PUB/02/4 (2002).

The human trafficking prohibition covers the "recruitment * * * of persons, by means of the threat or use of force or other forms of coercion * * * for the purpose of exploitation," including "forced labor or services [and] slavery or practices similar to slavery." Palermo Protocol, Art. 3(a). The Palermo Protocol requires that each state party "ensure that its domestic legal system contains measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered." *Id.* Art. 6(6).

U.S. courts have affirmed that the human trafficking prohibition is a universal and well-established norm of international law. See, *e.g.*, *United States* v. *Baston*, 818 F.3d 651, 670 (11th Cir. 2016) (" 'The international community has repeatedly condemned

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Persons and of the Exploitation of the Prostitution of Others, Mar. 21, 1950, 96 U.N.T.S. 271.

slavery and involuntary servitude, violence against women, and other elements of trafficking, through declarations, treaties and United Nations resolutions and reports.'" (quoting 22 U.S.C. § 7101(b)(23))). Similarly, the European Court of Human Rights has concluded that "[t]here can be no doubt that trafficking threatens the human dignity and fundamental freedoms of its victims and cannot be considered compatible with a democratic society." *Rantsev* v. *Cyprus and Russia*, 2010-I Eur. Ct. H.R. 65, 124.

Like the slave trade prohibition, the human trafficking prohibition encompasses transnational conduct, as victims are often trafficked across national borders. See Dept. of State, Trafficking in Persons Report (20th ed., 2020) (describing human trafficking as a "global crime"). Even in its earliest forms, the norm was understood to be borderless. The 1910 International Convention for the Suppression of the White Slave Traffic, for example, required states to punish violations "even when the various acts which together constitute the offence were committed in different countries." International Convention for the Suppression of the White Slave Traffic, Arts. 1, 2, May 4, 1910, 211 Consol. T.S. 45, 103 B.F.S.P. 244.

Today, the Palermo Protocol also obligates the "prevention, investigation, and prosecution" of human trafficking offences "where those offences are transnational in nature." Palermo Protocol, Art. 4. Congress has recognized that the human trafficking prohibition is not restricted geographically and has provided extraterritorial jurisdiction for offenses under the

Victims of Trafficking and Violence Protection Reauthorization Act (TVPRA), 18 U.S.C. § 1596(a). Other nations also apply the prohibition extraterritorially. See, *e.g.*, Modern Slavery Act 2015, c. 30, § 6 (U.K.) (providing that a British national commits the offence of human trafficking "regardless of (a) where the arranging or facilitating takes place, or (b) where the travel takes place"); Criminal Law (Human Trafficking) Act of 2008 (Act No. 8/2008) § 7 (Ireland); Counter-Trafficking in Persons Act (2012) Cap. 12 § 25 (Kenya); see also Council Directive 2011/36/EU, Art. 10, 2011 O.J. (L 101), 6 (requiring European Union member states to establish jurisdiction over trafficking offenses committed by their nationals irrespective of the location of the offence).

Children, who make up around 30 percent of the victims of human trafficking worldwide, are particularly vulnerable to exploitation. See Global Report on Trafficking in Persons 2018 at 27, United Nations Office on Drugs and Crime (Vienna 2018). That vulnerability has led to heightened protection under international law. The Palermo Protocol provides that the recruitment, transportation, transfer, harboring or receipt of children for the purpose of exploitation constitutes a violation of international law even if it does not involve any coercive means. Palermo Protocol, Art. 3(c). The Optional Protocol on the Sale of Children also specifically notes with concern the "increasing international traffic in children." Optional Protocol on the Sale of Children, pmbl.

The international prohibition on human trafficking, like the prohibition on slavery, is a specific, universal, and obligatory norm of international law.

B. The Human Trafficking Prohibition Applies to Corporations

The prohibition on human trafficking applies to corporations. Like slavery and forced labor, human trafficking is often carried out by private individuals and organizations. For the prohibition to be effective, therefore, it must extend to private actors. In the State Department's 2019 Trafficking in Persons Report, Secretary of State Michael Pompeo emphasized that businesses can take steps to "eradicate human trafficking" and "eliminate forced labor from their supply chains." Message from the Secretary of State, in Dept. of State, Trafficking in Persons Report (19th ed. 2019).

U.S. law recognizes that the only way to combat global violations of the human trafficking prohibition is to hold corporations accountable for their roles in these violations. In the TVPRA, Congress recognized both individual and corporate liability, declaring that "[w]hoever knowingly benefits, financially or by receiving anything of value," from human trafficking has committed a violation. 18 U.S.C. § 1593A. The Second Circuit affirmed that corporations can be held liable under the TVPRA. See *Adia* v. *Grandeur Mgmt., Inc.*, 933 F. 3d 89, 94 (2d Cir. 2019). Indeed, 66 percent of civil trafficking cases brought under the TVPRA's private right of action, 18 U.S.C. § 1595, between 2003

and 2018 have included a corporation or organization as a defendant. See Alexandra F. Levy, Federal Human Trafficking Civil Litigation: 15 Years of the Private Right of Action at 18, The Human Trafficking Legal Center (2018). U.S. courts have also found that the TVPRA does not preclude human trafficking suits against corporate defendants under the ATS. See *Magnifico* v. *Villanueva*, 783 F. Supp. 2d 1217, 1226 (S.D. Fla. 2011) (denying motion to dismiss brought by defendants, including corporations Star One Staffing and Star One Staffing International, and holding that "Congress did not intend to preempt recovery for human trafficking and forced labor under the ATS when it passed the TVPRA").

Moreover, U.S. courts have found that the prohibition on human trafficking, like the prohibition on the slave trade, extends to corporations and is actionable under the ATS. See *Doe* v. *Exxon Mobil Corp*., 654 F.3d 11, 48 (D.C. Cir. 2011), vacated on other grounds, 527 F. Appx. 7 (D.C. Cir. 2013) (rejecting the idea that the law of nations "support[s] corporate immunity under the ATS where, for example, a corporation operates as a front for piracy, engages in human trafficking, or mass-produces poisons for purposes of genocide").

States have also enacted legislation requiring companies to report on efforts to eradicate human trafficking from their business practices, demonstrating that the human trafficking prohibition applies to corporations. See, *e.g*., Modern Slavery Act 2015, c. 30, § 54 (U.K.) (creating civil liability for a corporation that fails to issue a statement of the steps, if any, it is taking

to remove slavery and human trafficking from its supply chains); California Transparency in Supply Chains Act, ch. 556, 2010 Cal. Stat. 2641 (imposing a reporting requirement on Californian businesses to prevent the use of human trafficking).

Additionally, the United Nations Convention Against Transnational Organized Crimes, which the Palermo Protocol supplements, requires liability for legal persons. United Nations Convention Against Transnational Organized Crime, Art. 10, Nov. 15, 2000, S. Treaty Doc. No. 108–16, 2225 U.N.T.S. 209 (requiring states to "establish the liability of legal persons for participation in serious crimes involving an organized criminal group"). The Palermo Protocol specifically requires states to adopt legislation to criminalize human trafficking, no matter who is responsible for it—explicitly including private entities, such as criminal organizations. Palermo Protocol, Arts. 4, 5. The Council of Europe Convention on Action Against Trafficking in Human Beings also requires state parties to "adopt such legislative and other measures as may be necessary to ensure that a legal person can be held liable for a criminal offence * * * committed for its benefit by any natural person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person" under the Convention. Council of Europe Convention on Action Against Trafficking in Human Beings, Art. 22(1), May 16, 2005, C.E.T.S. No. 197.

In sum, the prohibition on human trafficking is a specific, universal, and obligatory international law norm that extends to corporations.

CONCLUSION

Slavery, forced labor, and human trafficking constitute the worst forms of human exploitation. The law of nations has long prohibited these practices in specific, universal, and obligatory terms. Indeed, these prohibitions are among the most longstanding, deeply rooted prohibitions in international human rights law. Each of these prohibitory norms of international law extends, moreover, to natural and juridical persons alike. The judgment of the court of appeals should therefore be affirmed.

Respectfully submitted.

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OCTOBER 20, 2020