

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 ESTHER KIOBEL, INDIVIDUALLY AND :

4 ON BEHALF OF HER LATE HUSBAND, :

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

6 Petitioners :

7 v. :

8 ROYAL DUTCH PETROLEUM CO., ET AL. :

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10 Washington, D.C.

11 Tuesday, February 28, 2012

12

13 The above-entitled matter came on for oral

14 argument before the Supreme Court of the United States

15 at 10:02 a.m.

16 APPEARANCES:

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

18 Petitioners.

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

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

21 United States, as amicus curiae, supporting

22 Petitioners.

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

24 Respondents.

25

C O N T E N T S	
	PAGE
1	
2 ORAL ARGUMENT OF	
3 PAUL HOFFMAN, ESQ.	
4 On behalf of the Petitioners	3
5 ORAL ARGUMENT OF	
6 EDWIN S. KNEEDLER, ESQ.	
7 On behalf of the United States,	
8 as amicus curiae, supporting the Petitioners	15
9 ORAL ARGUMENT OF	
10 KATHLEEN M. SULLIVAN, ESQ.	
11 On behalf of the Respondents	24
12 REBUTTAL ARGUMENT OF	
13 PAUL HOFFMAN, ESQ.	
14 On behalf of the Petitioners	53
15	
16	
17	
18	
19	
20	
21	
22	
23	
24	
25	

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
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24
25

P R O C E E D I N G S

(10:02 a.m.)

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

Mr. Hoffman.

ORAL ARGUMENT OF PAUL HOFFMAN
ON BEHALF OF THE PETITIONERS

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

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

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

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

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

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

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

11 MR. HOFFMAN: It does. Yes.

12 (Laughter.)

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

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

25 What they have tried to -- to conflate is

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

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

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

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

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

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

8 JUSTICE GINSBURG: Mr. Hoffman --

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

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

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

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

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

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

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

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

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

19 JUSTICE ALITO: Where?

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

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

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

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

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

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

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

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

15 MR. HOFFMAN: Well, it was motivated by the
16 Marbois incident and a similar incident to -- with
17 regard to a Dutch ambassador in New York at the time of
18 the Constitutional Convention. But if -- if the Court
19 looked to the Bradford incident -- the incident about
20 which Attorney General Bradford expressed his opinion in
21 1795, which was an opinion that this Court found very
22 important in terms of interpreting the Alien Tort
23 Statute, the Bradford opinion had to do with an assault
24 on the British colony in Sierra Leone. And so, it was
25 not only extraterritorial in the sense of piracy, and I

1 think everybody agrees that -- that this statute was
2 intended to deal with piracy and maritime-related
3 violations of the law of nations.

4 It -- the Bradford opinion there said, even
5 though U.S. criminal jurisdiction was limited, the civil
6 jurisdiction under the Alien Tort Statute provided that
7 the corporation that -- whose property was attacked
8 within the territory of Sierra Leone --

9 JUSTICE ALITO: Have all the judges who have
10 interpreted that opinion interpreted it the way you just
11 did?

12 MR. HOFFMAN: The Bradford opinion?

13 JUSTICE ALITO: Yes.

14 MR. HOFFMAN: I'm not sure in which sense.
15 I mean, the -- yes, the -- I think that the Bradford
16 opinion has been used --

17 JUSTICE ALITO: Well, what did -- how did
18 Judge Kavanaugh interpret that on the D.C. Circuit?

19 MR. HOFFMAN: Well, I think -- I don't
20 recall specifically. I know that there has been some
21 controversy about whether that was an attack in the high
22 seas. I know there's some scholarship about that. What
23 I would suggest to the Court, if the Court went back to
24 the original documents that the -- that were sent to
25 Attorney General Bradford which -- from the British

1 government, I think the Court would find that -- that
2 this attack actually took place in the territory of
3 Sierra Leone.

4 And so, one of the reasons that we've
5 suggested that -- that -- that the extraterritoriality
6 issue deserves full treatment if the Court is troubled
7 by it, in a case where there is full briefing, because
8 in this case it was raised by the -- by -- by the
9 Respondents' amici largely, although the Respondents
10 have raised it, and there -- the historians that have
11 expressed opinions on corporate liability and others
12 that would be interested in this question have not been
13 able to put the other side before the Court.

14 And I think there's a very -- there are
15 very --

16 JUSTICE ALITO: The first statement - the first
17 sentence in your brief in the statement of the case is really
18 striking: "This case was filed ... by twelve Nigerian
19 plaintiffs who alleged ... that Respondents aided and abetted the
20 human rights violations committed against them by the
21 Abacha dictatorship ... in Nigeria between 1992 and
22 1995." What does a case like that -- what business does
23 a case like that have in the courts of the United
24 States?

25 MR. HOFFMAN: Well --

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

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

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

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

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

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

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

10 JUSTICE GINSBURG: That sounds --

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

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

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

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

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

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

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

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

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

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

25 I'm sorry.

26 JUSTICE BREYER: I just want some

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

5 MR. HOFFMAN: Okay.

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

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

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

12 Mr. Kneedler.

13 ORAL ARGUMENT OF EDWIN S. KNEEDLER

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

15 SUPPORTING THE PETITIONERS

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

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

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

1 the briefs, there seems to be an assumption that
2 respondeat superior liability is -- is permissible, and
3 the only issue is whether corporate liability is. Is
4 there a difference between the two doctrines?

5 MR. KNEEDLER: Well, I think the difference
6 is really a matter of degree. I mean, under respondeat
7 superior liability, a corporation is normally
8 responsible, liable for the acts of its agents.

9 Judge Posner, in the Seventh Circuit *Flomo*
10 decision, suggested that in the nature -- in this
11 category of cases, assuming that the ATS would allow a
12 common law cause of action for conduct in another
13 country, that maybe there should be more limited
14 respondeat superior principles because the action would
15 occur in circumstances where the corporation sought to be
16 held liable may not have much -- much control over it.

17 Where the corporation itself is liable --
18 and this would be true in criminal law and presumably in
19 -- in tort law -- would usually require some action by
20 those responsible for running the corporation or high
21 enough up the chain of command --

22 JUSTICE KAGAN: But, Mr. Kneedler, when
23 you --

24 MR. KNEEDLER: -- that policy --

25 JUSTICE KAGAN: Excuse me.

1 MR. KNEEDLER: I'm sorry.

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

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

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

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

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

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

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

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

16 JUSTICE SCALIA: Yes.

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

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

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

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

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

1 MR. KNEEDLER: Right.

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

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

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

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

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

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

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

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

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

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

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

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

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

24 MR. KNEEDLER: Yes.

25 CHIEF JUSTICE ROBERTS: But it doesn't work

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

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

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

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

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

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

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

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

22 (Laughter.)

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

1 think possibly of counterexamples. Pirates,
2 Incorporated.

3 MR. KNEEDLER: Right.

4 JUSTICE BREYER: You know? I mean -- so --
5 so, why isn't that -- why are we going into -- I mean,
6 you have good reason for doing it, and I want to hear
7 why.

8 MR. KNEEDLER: Well, our -- our position is
9 straightforward. Just as you said, the question of
10 whether a corporation can be held liable we think should
11 be based on the fact that the ATS refers to torts. And
12 in applying -- this question we think is not
13 complicated.

14 In -- in fashioning Federal common law to
15 decide whether there should be a common law cause of
16 action, the ATS's reference to tort law, I think,
17 directs the Court to domestic tort law, and the question
18 of whether a corporation can be held liable under
19 domestic tort law. And it clearly can be. It could be
20 at the time this statute was enacted, and it can be
21 today.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 Mr. Kneeder.

24 Ms. Sullivan.

25 ORAL ARGUMENT OF KATHLEEN M. SULLIVAN

1 ON BEHALF OF THE RESPONDENTS

2 MS. SULLIVAN: Mr. Chief Justice, and may it
3 please the Court:

4 I'd like to begin with the answer to
5 Justice Kennedy's first question. Justice Kennedy
6 asked, and Justice Breyer renewed the question, is there
7 any source in customary international law throughout the
8 world that holds corporations liable for the human
9 rights offenses alleged here?

10 And the answer is there is none.

11 JUSTICE BREYER: You say there is not a
12 case. That's a different matter.

13 MS. SULLIVAN: Not a case --

14 JUSTICE BREYER: Yes, but that's a different
15 matter because you can have a principle that applies
16 even though there isn't a case. And the principle that
17 here would apply is what I said, Pirates, Incorporated.
18 Do you think in the 18th century if they brought
19 Pirates, Incorporated, and we get all their gold, and
20 Blackbeard gets up and he says, oh, it isn't me; it's
21 the corporation -- do you think that they would have
22 then said: Oh, I see, it's a corporation. Good-bye.
23 Go home.

24 (Laughter.)

25 MS. SULLIVAN: Justice Breyer, yes, the

1 corporation would not be liable.

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

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

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

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

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

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

1 post-Nuremberg human rights offenses.

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

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

14 They failed --

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

25 MS. SULLIVAN: But, Justice Kagan,

1 international law does speak to who may be liable, which
2 you correctly identified as a substantive question, not
3 a question of enforcement. And international law holds
4 corporations liable for some international law
5 violations. Look to the convention on the suppression
6 of the financing of terrorism, which speaks about legal
7 entities, or the convention on bribery of public
8 officials, which speaks about legal persons.

9 But the human rights offenses here do not
10 arise from conventions like those, which allow corporate
11 liability. To the contrary. The human rights offenses
12 here arise from conventions that speak to individual
13 liability. The liability of individuals.

14 And, Justice Breyer, in precise answer to
15 your question about the convention on genocide, if you
16 look to the Chevron brief on page 20 -- this is the
17 amicus brief of Chevron filed by Professor Goldsmith.
18 On page 20, it quotes in full the relevant passage from
19 the genocide convention, article IV.

20 I'm sorry. There are many briefs, but
21 perhaps if I could read it to Your Honors, I'll read it
22 in full.

23 It says that "persons committing genocide or
24 any of the other acts enumerated in article III shall be
25 punished, whether they are constitutionally responsible

1 rulers, public officials or private individuals."

2 And, Justice Kagan, all the other relevant
3 conventions also speak about natural persons. The
4 convention against torture speaks about "him," not "it."
5 And when Congress -- in the one time it implemented the
6 conventions that are the source of the human rights
7 offenses that are alleged here, Congress, in the Torture
8 Victim Protection Act, said that the suit may be brought
9 against individuals. And it expressly declined to use
10 the term "persons," which could embrace corporations.

11 And we --

12 CHIEF JUSTICE ROBERTS: You're getting ahead
13 of yourself. We haven't --

14 (Laughter.)

15 CHIEF JUSTICE ROBERTS: We haven't decided
16 that question just yet.

17 (Laughter.)

18 JUSTICE GINSBURG: But this statute doesn't
19 use the word "individual," and it doesn't use the word
20 "person." As far as a corporate entity is concerned, a
21 corporate -- a corporation could sue, could be a
22 plaintiff under the Alien Tort Statute, could it not?

23 There's no --

24 MS. SULLIVAN: Justice Ginsburg, a
25 corporation could sue if it were an alien, and if you

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

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

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

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

20 I just want to go back and --

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

23 MS. SULLIVAN: Exactly. Exactly.

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

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

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

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

10 MS. SULLIVAN: Could absolutely.

11 JUSTICE SCALIA: Yes.

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

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

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

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

24 MS. SULLIVAN: Yes, Your Honor.

25 JUSTICE KAGAN: Now, all of United States'

1 law and mostly other countries' law would hold the
2 corporation liable for the individual's act. Isn't that
3 right? That's a general principle of law.

4 MS. SULLIVAN: Justice Kagan, let's be clear
5 to separate two very different causes of action. There
6 is no country -- and to answer Justice Ginsburg's first
7 question, there is no country in the world that provides
8 a civil cause of action against a corporation under
9 their domestic law for a violation of the law of
10 nations. In Mr. Hoffman's hypothetical, if there were a
11 suit in England or in the Netherlands, it would be for
12 assault and battery, wrongful death, or --

13 JUSTICE KAGAN: Ms. Sullivan that would be
14 true against an individual as well. The ATS is just a
15 unique statute. It's unique against individuals, and
16 it's unique against corporations. That doesn't answer
17 the question that you're here to address, which is
18 whether corporations are meaningfully different from
19 individuals.

20 MS. SULLIVAN: They are meaningfully
21 different from individuals under international law,
22 which is the crucial choice of law question you need to
23 answer here. The crucial question that's at the
24 threshold is which law determines whether corporations
25 are liable?

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

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

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

13 MS. SULLIVAN: -- international law apply.

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

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

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

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

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

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

1 JUSTICE KENNEDY: Can you tell me why --

2 MS. SULLIVAN: -- jurisdiction over
3 corporations.

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

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

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

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

1 not until later that year that the international
2 military tribunal began. It prosecuted no corporations.

3 When the Allies prosecuted perpetrators of
4 the Nazi horrors in later cases, they prosecuted, again,
5 only individual officers, not any corporations.

6 There are two amicus briefs on the Nuremberg
7 history, one in support of Petitioners filed by Jennifer
8 Green and one in support of neither party filed by
9 Jonathan Massey. Both of them agree on one proposition,
10 and that is that no corporation was prosecuted by either
11 the international military tribunal in 1945 and '46 nor
12 in any of the subsequent U.S. tribunals. In fact, in
13 U.S. v. --

14 JUSTICE GINSBURG: But there's no -- there
15 was no civil liability adjudicated in Nuremberg. It was
16 about criminal.

17 MS. SULLIVAN: That's correct, Your Honor.
18 And to answer your question, when I.G. Farben was
19 dissolved, it was part of denazification,
20 decartelization, and the destruction of the Nazi war
21 machine of which I.G. Farben was an integral part. It
22 was practically viewed as an enemy state in and of
23 itself.

24 That is a -- so, the precedent of Nuremberg,
25 like the precedent of the ICTY, the ICTR, the ICC, all

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

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

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

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

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

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

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

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

1 questions of aiding and abetting liability. Like
2 questions of individual private liability as opposed to
3 state actor liability. You should look at all of those
4 questions as substantive questions answered by
5 international law. And that's because footnote 20 of
6 Sosa says you look to whether international law extends
7 liability to the perpetrator being sued.

8 You can't just find an act out there and fan
9 out to anyone in the entire world, including consumers
10 pumping gas in Ohio, and say there's been an act of --
11 an international law violation.

12 JUSTICE KAGAN: But the question of who can be
13 sued --

14 MS. SULLIVAN: It's a question of who.

15 JUSTICE KAGAN: -- is a remedial question.

16 MS. SULLIVAN: It's not.

17 JUSTICE KAGAN: The question of who has an
18 obligation is a substantive question.

19 MS. SULLIVAN: Respectfully, Justice Kagan,
20 we disagree. The question of who may be sued is
21 fundamentally part of the question of whether there has
22 been a tort committed in violation of the law of
23 nations. It would read the verb "committed" out of the
24 statute, if you just said find a violation of the law of
25 nations anywhere and then apply it to whoever you want.

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

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

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

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

1 would be the amount of damages. So would be the choice
2 of compensatory or punitive damages.

3 JUSTICE GINSBURG: If you look --

4 MS. SULLIVAN: Those are matters of remedy
5 for domestic law to decide.

6 JUSTICE GINSBURG: If you look to the law of
7 the place where the corporation is headquartered, well,
8 suppose that has a typical respondeat superior liability
9 that says corporations are liable for the acts of their
10 agents. So -- and most -- correct me if I'm wrong, I
11 think most countries in the world have such a notion,
12 that corporate -- corporations are responsible for the
13 acts of their agents. So, how does the -- looking to the
14 law where the corporation is headquartered, where does
15 that get you when that country has the very same law
16 that we do, that, yes, corporations are liable for the
17 acts of their agents?

18 MS. SULLIVAN: Justice Ginsburg,
19 respectfully, we don't think the world is all of one
20 when it comes to issues of corporate responsibility for
21 the acts of its agents. If you look at the ICJ --
22 sorry. If you look at the Rome statute, the Rome
23 statute itself has very particular sections about when
24 an -- a corporate superior is liable for the actions of
25 a corporate inferior. It looks to a knowledge and

1 deliberate indifference standard.

2 Not every nation of the world agrees on what
3 standard must -- there must be for even attributing the
4 agent's act at the bottom of the corporate hierarchy to
5 a senior officer, much less to the corporation as an
6 entity.

7 In answer to your question about -- earlier
8 about respondeat superior, Justice Kagan, the only way a
9 corporation can do anything is through the acts of human
10 beings; thus, there's always the question, when it comes
11 to corporate liability, to ask how to attribute the
12 action of the human beings who work for the corporation
13 to the corporation. And we respectfully submit that
14 Sosa footnote 20 commits that question, as does the ATS
15 itself, to international law.

16 JUSTICE KENNEDY: Well --

17 MS. SULLIVAN: Yes?

18 JUSTICE KENNEDY: -- I wonder if you don't
19 concede away too much when you say, well, there's a
20 difference in substance and -- and remedy and questions
21 of jury trial, damages, and so forth. That's domestic.

22 Those were the concerns that the U.K. and
23 the Netherlands addressed in their brief as saying why
24 corporations shouldn't be liable for acts committed on
25 foreign -- foreign territories. Those -- that was the

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

2 MS. SULLIVAN: Justice Kennedy, I agree
3 completely, and let me be very clear on one thing. I've
4 addressed only step one of Sosa, which is, does
5 international law provide for a specific universal and
6 obligatory norm of corporate liability? It does not.
7 In fact, it refutes it. The Rome statute rejected
8 liability for corporations. The jurisdictional statutes
9 of the ICTY and the ICTR apply jurisdiction only to
10 natural persons. The international community at step
11 one has rejected it.

12 But, Justice Kennedy, it's very important
13 that Sosa puts a second screen into your inquiry. You
14 must ask, at the second step, even if international law
15 had provided any source of corporate liability, which it
16 does not, you would still have to ask -- footnote 30 of
17 Sosa says it's a higher bar -- should Federal common
18 law, should Federal common law now embrace these kinds
19 of actions? And the answer is "no."

20 Even if you found this were a question of
21 domestic remedy, we think you cannot. This is a
22 question of substance. But even if this were a question
23 of -- domestic remedy, you should not find liability for
24 corporations for the same reasons you rejected corporate
25 liability in Malesko.

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

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

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

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

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

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

8 MS. SULLIVAN: You may --

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

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

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

24 JUSTICE BREYER: No, I see. Yes.

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

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

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

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

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

1 the other way. In maritime law, in *Miles v. Apex*, you
2 didn't -- you didn't decide to go contrary to the
3 Congress in the Jones Act; you said if there's a Jones
4 Act statutory statement about wrongful death, we should
5 follow it in Federal common law.

6 Similarly here, even if the international
7 community thought there was anything to incorporate
8 liability -- which it doesn't. It disagrees. Our two
9 allies the U.K. and Netherlands disagree, and Germany
10 has filed a brief saying it also disagrees with the ATS
11 as it has been applied. Even if there was international
12 consensus, you would still have to ask, should the
13 Federal courts, through free-form Federal common law
14 making, do the opposite of what Congress is saying?

15 JUSTICE BREYER: Well, we know the way to do
16 it. I mean, in *Skinner*, even if it was English common
17 law, the court reasons -- it says the taking of the ship
18 on the high seas was "odious and punishable by all laws
19 of God and man." So, we -- could you not say, where an
20 action is forbidden by the international law, and it is
21 punishable or -- by all laws of God and man, in such a
22 circumstance there being no reason to deny corporate
23 liability here, even under the moral person rule, it --
24 we interpret the Federal common law to permit that
25 remedy?

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

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

21 But also -- and this is --

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

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

1 to -- representing the corporations to say what is in the
2 interests of the United States, when the United States
3 representative told us they think that individuals and
4 corporations are both subject to suit.

5 MS. SULLIVAN: Well, Your Honor,
6 respectfully, we -- we accept that the United States
7 here before you today doesn't speak to the foreign --
8 foreign policy consequences of this kind of ATS
9 liability, and we haven't even gotten to the alternative
10 ground Justice Alito and the Chief Justice referred to
11 earlier, which is Charming Betsy canon says don't
12 lightly construe your law to offend international law.
13 But just back to the -- the United States, I
14 respectfully suggest you should look to the TVPA, rather
15 than simply to what the United States says here today.
16 And the TVPA, which is Congress interpreting --

17 JUSTICE KAGAN: Well, the TVPA is one
18 limited statute dealing with one particular category of
19 offense, and it was specifically meant to supplement,
20 not to supplant, the ATS. So, between those two things,
21 the fact that it's limited to torture and that there was
22 no design to supplant the ATS, I guess I think that if
23 your best shot is the TVPA, that's a -- that's a weak
24 one.

25 MS. SULLIVAN: Well, far -- it's -- it's one

1 of many sources, Your Honor.

2 Just to go back to the key point about
3 international community, the international community --
4 Justice Breyer says don't just look for adjudicated
5 opinions, but every convention for every international
6 tribunal excludes corporations.

7 Look to the U.N. process. The Petitioners
8 make a great deal out of a U.N. process that's taken
9 place since 2007. We cite the U.N. special
10 representative, saying I have looked at the
11 international human rights instruments that are out
12 there, and I find no basis --

13 JUSTICE KAGAN: Ms. Sullivan, if I asked
14 you --

15 MS. SULLIVAN: -- for corporate liability.

16 JUSTICE KAGAN: If I asked you --

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

19 JUSTICE KAGAN: You said the international
20 community draws this line. And as far as I can see, the
21 international sources are simply silent as to this
22 question. So, if I said to you, Ms. Sullivan, I want to
23 go back and read the best thing you have saying that the
24 international law sources draw this line, what do I
25 read?

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

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

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

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

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

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

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

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

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

7 JUSTICE ALITO: Could I ask you this --

8 MS. SULLIVAN: -- human rights violations.

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

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

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

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

1 Tinto.

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

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

14 CHIEF JUSTICE ROBERTS: Please.

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

22 Thank you, Your Honor.

23 CHIEF JUSTICE ROBERTS: Thank you, counsel.

24 Mr. Hoffman, you have 5 minutes remaining.

25 MR. HOFFMAN: Thank you.

1 REBUTTAL ARGUMENT OF PAUL HOFFMAN
2 ON BEHALF OF THE PETITIONERS

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

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

12 How do we deal with that incongruity?

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

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

1 And obviously, the next case will discuss in
2 greater detail whether the TVPA applies to corporations
3 or not. If -- I don't know.

4 If I could just make a couple of additional
5 points.

6 If -- if it was true that international law
7 barred corporate liability, then our friends the United
8 Kingdom and the Netherlands have violated international
9 law by passing legislation that imposes criminal
10 liability on corporations for violating genocide, crimes
11 against humanity, and war crimes.

12 And I think that brief makes it pretty clear
13 that whatever they're saying, if -- if the Alien Tort
14 Statute is a domestic enforcement of international law,
15 then their views don't apply.

16 And -- and this is a tort statute. That's
17 what -- there was a meaning to torts. Skinner's case,
18 for example, was a tort not only under English common
19 law; it was -- it was a tort in violation of the law of
20 nations. It was robbery on the sea. The law of nations
21 was incorporated in English common law, just as it was
22 in the founding in our country and, under the Paquete
23 Habana, is still part of our land -- the law of our
24 land.

25 "Tort" meant to the founders "tort

1 remedies." It meant -- it meant that the means of
2 enforcement would be done by the common law. That's all
3 that was available then. It's all that's available now.

4 And -- and international law places no
5 restriction on the way domestic jurisdictions enforce
6 international law. There is a general principle law of
7 corporate civil liability for all of the things that we
8 allege in this case.

9 In every legal system in the world, one can
10 get redress for this kind of thing. Countries don't
11 necessarily call it a violation of the law of nations.
12 They didn't fashion the statute the way our Founders did
13 for the reasons that they did --

14 CHIEF JUSTICE ROBERTS: I'm sorry. In every
15 nation in the world, you can get redress for this sort
16 of thing, but I thought you told us earlier that there
17 was no place where this suit could be brought --

18 MR. HOFFMAN: No, no. If --

19 CHIEF JUSTICE ROBERTS: In other words, a
20 suit by an alien against another alien for conduct that
21 takes place overseas.

22 MR. HOFFMAN: Well, what I'm suggesting -- I
23 don't know whether in every domestic jurisdiction, the
24 extraterritoriality issue is taken in the same way.

25 What I'm suggesting is that, for these kinds

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

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

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

16 JUSTICE SCALIA: What's your position --

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

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

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

25 JUSTICE SCALIA: I don't care about the

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

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

8 I think my -- my time is up.

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

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

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Abacha 11:21	56:1	51:18,20 53:14	39:10	arguing 27:8
abetted 11:19	add 14:14	53:16,25 54:13	analyses 53:23	argument 1:14
abettors 45:4	additional 52:8	55:20,20	analysis 19:7	2:2,5,9,12 3:3
abetting 38:1	54:4	aliens 53:9,10	anchored 31:7	3:7 4:10 15:13
43:13,17 56:19	address 7:12	Alito 7:7,15,19	answer 6:19	21:16 24:25
56:24 57:2,4	32:17	7:24 10:9,13	7:15,18 14:11	51:18 53:1
able 11:13 12:18	addressed 7:3	10:17 11:16	15:4 23:1,15	article 28:19,24
53:11	20:2 37:17	12:1,16 30:4	23:20 25:4,10	51:9
above-entitled	41:23 42:4	37:6 48:10	26:23,24 27:6	asked 6:12 15:2
1:13 57:12	43:12,20	51:7,9,13	28:14 32:6,16	25:6 49:13,16
abroad 6:15	adjudicate 8:12	Alito's 50:24	32:23 36:18	aspect 20:9
absolutely 31:10	adjudicated	allege 55:8	41:7 42:19	aspects 30:11
abstract 35:14	27:9 36:15	alleged 3:22,25	45:6,19 50:24	assault 9:23
45:23	49:4	11:19 21:10	51:2	32:12
abuses 4:1	adjudications	25:9 29:7	answered 38:4	assaulted 30:13
accept 48:6	52:5	allies 34:12 36:3	apart 53:15	assaulting 30:18
accepted 13:14	adopted 21:5	46:9	Apex 46:1	assaults 9:13
account 37:5	agent 30:15 31:3	allow 16:11 18:6	appeals 15:18	assets 26:14
47:25	39:3	28:10	43:12,13 45:2	35:20
act 13:15 17:19	agents 16:8	allowed 26:11	appear 53:8	assume 13:22
18:2,5,9,11	22:10 40:10,13	allowing 8:17	APPEARAN...	30:12 47:24
27:24 29:8	40:17,21	allows 39:22	1:16	assuming 16:11
32:2 35:24	agent's 41:4	alternative 48:9	applicable 27:2	37:6
38:8,10 41:4	agree 13:21 30:3	ambassador	34:14	assumption 16:1
46:3,4 53:21	36:9 42:2 45:2	9:17 13:2	application	ATS 16:11
56:7	50:23	30:13,18 31:2	22:23	24:11 31:22
action 8:5 13:14	agrees 4:24 10:1	ambassadors	applied 13:8	32:14 39:22
16:12,14,19	34:3 41:2	9:13	19:5,9 46:11	41:14 45:11
24:16 32:5,8	45:21	ambassador's	applies 25:15	46:10 47:1,15
41:12 45:12	ahead 15:3	22:11	27:23 30:19	47:20 48:8,20
46:20 47:11	29:12 47:19	amend 45:11	53:16 54:2	48:22 51:3,11
52:20	aided 11:19	Amerada 18:3	57:5	51:19,21 52:20
actions 4:18	aiders 45:3	18:14	apply 5:2,20	ATS's 24:16
26:11 40:24	aiding 38:1	American 8:16	13:19 14:17	attack 10:21
42:19	43:12,17 56:19	22:14 37:18	19:7 25:17	11:2 30:14
activity 43:8	56:24 57:2,4	53:10	27:20 33:13	attacked 10:7
actor 19:3,3,22	AL 1:5,8	amici 11:9	38:25 42:9	12:23 13:1
20:9 23:14,18	Alfred 35:16	amicus 1:21 2:8	54:15 57:7	30:13
23:19 38:3	alien 3:14 6:19	3:23 6:23,24	applying 24:12	Attorney 9:20
43:4,7 56:9,12	7:4 8:23 9:22	15:14 28:17	appropriate	10:25 22:6
actors 20:4	10:6 12:3,8,9	34:20 36:6	14:16 37:22	30:2
27:18 45:3	14:17,20 15:20	50:12	arbitrary 4:16	attribute 41:11
acts 4:23 16:8	18:19,20 20:13	amount 40:1	area 5:7	attributing 41:3
27:17 28:24	21:4 22:6,9	analogous 5:8	areas 53:18	authority 4:4
40:9,13,17,21	29:22,25 30:1	20:3	argue 9:2	available 55:3,3
41:9,24 53:9	30:16 43:5	analogue 7:4	argued 9:3	aware 9:6
	51:15,15,16,17	analogy 27:18	argues 23:21	a.m 1:15 3:2

57:11	30:2,6,6	C 2:1 3:1	challenged 53:24	clearly 5:21 8:12 17:6 24:19
B	branches 45:25	California 1:17	Chandler 21:6	colony 9:24
back 10:23	Breyer 14:10,26	call 55:11	Charming 48:11	come 43:5
14:10 27:7	15:6 22:25	called 43:21	Chevron 3:23	comes 5:19 7:13 40:20 41:10
30:20,25 37:11	23:23 24:4	canon 48:11	28:16,17	command 16:21
47:23 48:13	25:6,11,14,25	care 56:25 57:1	Chief 3:3,9 6:9	commit 26:25
49:2,23 56:6	26:2,6,16	careful 44:12	8:14 9:12	commitment
balance 15:9	28:14 31:18	case 3:4,20 4:15	15:10,16 21:1	12:11,13
bar 42:17	33:1,11,14	6:3 8:2,7,11	21:8,22,25	commits 22:14 41:14
BARINEM 1:5	43:19,24 44:9	11:7,8,17,18	24:22 25:2	committed
barred 54:7	44:21,24 46:15	11:22,23 13:23	29:12,15 30:3	11:20 18:5
based 24:11	49:4 52:7	14:3,18,18,19	45:18 47:14	26:12 33:5,6,7
56:7	Breyer's 30:25	17:5 18:3,10	48:10 52:14,23	38:22,23 39:2
bases 53:24	bribery 28:7	18:18 23:8,12	55:14,19 56:5	39:3 41:24
basic 33:5 56:6	bridge 44:23	23:13 25:12,13	57:9	47:2
basis 4:15 49:12	brief 3:21,23	25:16 26:25	choice 32:22	committing
51:14 56:14	6:24,24 11:17	27:4,9,21	40:1	27:24 28:23
battery 32:12	17:2 19:11	30:12 39:21	choosing 45:16	common 14:18
bear 20:12	23:1 26:9	43:20,20 45:19	Circuit 10:18	16:12 19:13
began 6:9 36:2	28:16,17 33:3	51:19,23 54:1	13:23 16:9	23:5,6 24:14
beginning 50:25	34:10,11,12,20	54:17 55:8	43:14,14	24:15 37:17,18
52:8	41:23 42:1	57:10,11	circumstance	42:17,18 44:6
behalf 1:4 2:4,7	46:10 50:12,12	cases 7:1,22	46:22	45:7,12 46:5
2:11,14 3:8	54:12	13:19 16:11	circumstances	46:13,16,24
15:14 25:1	briefed 9:3	31:18 36:4	16:15 44:11	47:10 52:20
53:2	briefing 11:7	45:1 51:19,23	cite 49:9 52:9	54:18,21 55:2
beings 41:10,12	briefs 4:3 8:20	51:25	cited 26:9	community
56:15	16:1 28:20	categorical	citizens 22:15	12:14 34:3,16
believe 7:17 8:4	33:15 36:6	15:19 23:24	53:10	42:10 46:7
8:8 52:9	bring 14:19	categorically	citizenship 7:25	47:12,19 49:3
believed 9:10	31:22	8:22 14:8	civil 3:25 5:5	49:3,20
best 4:4 48:23	bringing 33:23	category 16:11	6:13 10:5 32:8	company 22:7
49:23	34:24	18:10 44:5	34:22 36:15	22:10 43:21
Betsy 48:11	British 9:24	48:18	39:21,22,24	compelled 45:20
beyond 20:11	10:25	cause 16:12	50:11,13,20,23	compensatory
35:10	broader 52:3	24:15 32:8	51:1 55:7	40:2
big 35:6	53:16	45:12 47:10	claim 3:18	complement
binding 13:22	brought 7:11,21	causes 32:5	claims 7:11 8:13	50:7
bit 53:8	8:2,15 14:2	52:20	13:15	completely 42:3
Blackbeard	25:18 29:8	centers 3:16	clarification	complicated
25:20 26:17	55:17	century 25:18	15:1	23:24 24:13
blanks 33:17	burden 31:4	certain 5:12	clear 5:21 9:9	concede 39:22
bottom 41:4	business 11:22	17:15 18:6	26:22 27:8	41:19
Bradford 9:19	businessmen	23:8,14 27:17	32:4 33:9	concern 8:17
9:20,23 10:4	35:15	27:24 44:10,18	37:13 42:3	
10:12,15,25	C	certainly 12:10	53:20 54:12	
		chain 16:21		

concerned 29:20	39:14	40:14 41:5,9	course 4:10	customary 6:14
concerns 37:7	control 16:16	41:12,13 44:4	27:23 30:1	25:7
41:22	35:23	44:12,14 52:10	31:21	
concluded 22:7	controversy	52:12 56:1	court 1:1,14	D
conduct 6:15	10:21	corporations	3:10,11,24	D 3:1
16:12 17:15	conveniens	3:15 5:10,15	5:17,20 8:24	damages 40:1,2
18:1 20:9,10	14:15	5:20,23 6:14	9:18,21 10:23	41:21
20:17 21:10,14	convention 9:18	8:22 14:3,8	10:23 11:1,6	deal 10:2 14:15
22:2 30:4,5	27:7 28:5,7,15	19:9 20:7 21:5	11:13 12:18	35:6 49:8
43:3,5 55:20	28:19 29:4	21:7 25:8	13:20 14:20	53:12
57:4	31:19 49:5	26:25 28:4	15:17,18 18:3	dealing 43:5
conducting 22:2	50:17	29:10 30:1,19	18:14 23:3	48:18
conflate 4:25	conventions	32:16,18,24	24:17 25:3	deals 18:9
Conflicts 39:11	27:11 28:10,12	33:15 34:8,14	43:7,8,13 44:5	death 32:12 46:4
Congress 9:7	29:3,6	34:19,22 35:3	46:17	decartelization
12:17 29:5,7	corporate 3:22	36:2,5 37:1	courts 6:5 7:1,5	36:20
31:8,12 45:8	11:11 13:17	40:9,12,16	8:12 11:23	decide 23:6
45:10,13,15	15:25 16:3	41:24 42:8,24	12:19 43:11	24:15 27:4
46:3,14 48:16	17:11 19:8	45:13,20 48:1	45:2,23,24	40:5 46:2
49:18 53:17	20:20 28:10	48:4 49:6 50:8	46:13 56:22,23	decided 8:24
Congress's	29:20,21 30:14	50:16,21 51:5	57:1	29:15 30:1
51:22	31:3,6 34:2,4	51:24 52:21	Court's 21:6	53:17,19
connection 4:2	37:3,5,12,12	53:9,11 54:2	coverage 8:23	decision 16:10
7:8 12:1	37:25 39:3	54:10 56:15	covered 17:22	21:6
consensus 5:4	40:12,20,24,25	correct 21:20	created 34:23	decisionmaking
12:4 46:12	41:4,11 42:6	36:17 40:10	creates 12:6	45:25
consequences	42:15,24 45:15	51:6	creating 44:13	declined 29:9
22:18,19 47:13	46:7,22 47:8,8	correctly 28:2	credit 30:7	34:25
48:8	49:15 50:16	Council 35:23	crimes 4:16 5:18	defendant 6:16
consider 43:6	52:3,8,16,16	counsel 3:19	5:19 54:10,11	18:21,22 19:22
consideration	54:7 55:7	52:23 57:9	criminal 5:6,8	20:19 23:7,8
19:18	corporation	counterexamp...	5:13,16,19,24	30:9
considered	3:12 4:20 5:2	24:1 33:23	10:5 16:18	defendants 7:25
50:14	10:7 15:19	counterpart	22:12 23:15	12:19 13:17,17
constitutional	16:7,15,17,20	6:13	34:19 36:16	47:5,7
9:18 51:14	17:8 19:23	countries 5:23	39:22,23,25	define 56:6
constitutionally	20:24 22:14,16	8:4 14:4 30:5	50:5,16 54:9	defined 4:18,19
28:25	22:24 23:7,17	32:1 33:16	criminally 5:16	56:14
construe 48:12	23:19,25 24:10	40:11 55:10	50:8	definition 22:5
consumers 38:9	24:18 25:21,22	country 7:10,24	criteria 19:19	degree 16:6
contacts 14:5	26:1,4,15,18	7:25 8:15 13:1	critically 21:9	deliberate 41:1
contrary 20:25	26:18,20 27:3	16:13 22:17	crossed 44:25	denazification
21:4 28:11	27:10 29:21,25	23:8 32:6,7	crucial 32:22,23	36:19
33:4 43:9 46:2	30:7,9,15 31:3	40:15 44:14	curiae 1:21 2:8	deny 46:22
contravenes	32:2,8 33:7	54:22	15:14	Department
8:18	35:9 36:10	country's 12:13	custom 27:13	1:20
contribution	39:4,19 40:7	couple 4:8 54:4	31:19	Deputy 1:19

deserves 11:6	dispute 37:4	eliminate 18:12	events 7:8,21	fact 5:15 24:11
design 48:22	dissolved 35:20	embrace 29:10	everybody 10:1	27:4 36:12
designed 53:22	35:23 36:19	34:25 42:18	27:24	42:7 44:2
despite 17:20,20	distinct 22:23	embraced 30:1	exact 7:4 45:24	48:21 50:8
destruction	distinction 5:9	employed 6:16	Exactly 30:23	fact-dependent
36:20	5:11 17:22	employees 52:18	30:23	23:3
detail 54:2	distinguish	enacted 12:3	example 5:17,22	failed 27:11,13
detain 3:17	56:12	24:20	12:22 23:16	27:14
detention 4:17	diversity 51:17	endorsed 13:20	30:11 33:24	fairly 33:23
determine 26:24	51:20	enemy 36:22	39:1 53:15	falls 43:3
39:13,15 44:6	doctrine 14:14	enforce 6:6 55:5	54:18	fan 38:8
determined	doctrines 14:7	enforced 5:5	examples 22:8	far 5:14 29:20
43:17 45:4	14:17 16:4	enforcement	exclude 37:1	48:25 49:20
determines	documents	17:4,9,10,15	excluded 8:23	Farben 35:17,20
32:24 39:20	10:24	19:13,15 20:12	17:20	35:23 36:18,21
diametric 45:14	doing 24:6	28:3 39:6	excludes 45:20	fashion 55:12
dictatorship	domestic 5:5,24	44:23 54:14	49:6	fashioning
3:16 11:21	6:5,5,6 7:1,1,5	55:2	exclusion 14:8	24:14
difference 15:24	7:5 8:16 20:23	enforcing 6:20	Excuse 16:25	February 1:11
16:4,5 41:20	21:18 22:3	44:20	executions 4:17	Federal 14:21
differences	24:17,19 32:9	engaged 27:12	exercise 3:25	19:13 23:6,6
53:14	39:10 40:5	engines 6:6	explain 15:24	24:14 42:17,18
different 9:1	41:21 42:21,23	England 32:11	30:21	44:5 45:7,11
20:2 25:12,14	52:19 54:14	English 43:23	expressed 9:20	45:12,23,24
32:5,18,21	55:5,23 56:20	46:16 54:18,21	11:11	46:5,13,13,24
33:16 50:5	domestically	entire 38:9 56:8	expression	47:10 52:20
56:23	50:9	entirely 19:13	12:11	figure 47:6
differently 34:8	DR 1:5	entities 21:19	expressly 29:9	Filartiga 13:13
difficult 17:18	draw 27:18	28:7	extend 4:23 30:4	13:14,22 53:23
23:2,11	49:24	entity 4:20	extended 30:3,5	filed 8:7 11:18
direct 17:10	draws 49:20	29:20 35:14	extends 19:20	28:17 34:12
37:12 52:18	Dutch 1:8 3:5	41:6	20:6 38:6	36:7,8 46:10
directs 24:17	9:17	enumerated	extrajudicial	filled 33:17
disagree 38:20	D.C 1:10,20	28:24	4:17	financing 28:6
39:9 43:11	10:18 43:14	era 13:8 37:2	extraterritorial	find 4:4 11:1
44:22 45:5		erred 15:18	4:1 9:11,25	15:3 17:17
46:9	E	ESQ 1:17,19,23	22:23	21:17 23:2,11
disagreed 43:15	E 2:1 3:1,1	2:3,6,10,13	extraterritori...	23:21 30:25
disagrees 46:8	earlier 41:7	essentially 37:21	7:14 9:1 11:5	38:8,24 42:23
46:10	47:13,14 48:11	establish 53:22	13:19 30:11	44:1,3 47:10
discuss 54:1	55:16	established 31:5	37:7 55:24	49:12
discussed 7:22	East 43:21	31:17 34:5,18	56:4	finding 27:9
34:18,21	EDWIN 1:19	35:11,11,12		finish 14:12
disempowered	2:6 15:13	establishes 30:7	F	finished 14:11
9:8	effect 31:9	ESTHER 1:3	Fabrigas 8:10	firm 35:17
displacing 51:21	either 35:25	ET 1:5,8	8:10	first 3:4 11:16
dispose 51:18,23	36:10 50:15	event 21:17	face 45:7 47:11	11:16 12:9,17

15:1 19:16 25:5 32:6 43:20 44:21 50:1 Flomo 16:9 fly 45:7 47:11 focus 37:2 foiling 47:19 follow 46:5 footnote 19:2,17 19:17,24 26:10 38:5 41:14 42:16 forbidden 46:20 foreclosed 52:4 foreign 17:19 18:2,4,5,9,11 18:23,25 20:25 39:12,15,20 41:25,25 47:12 48:7,8 51:24 51:24 former 17:13 forth 41:21 forum 14:14,16 14:21 47:16 forward 18:24 found 5:15 8:7 9:21 37:23 42:20 56:24 founders 6:4,21 9:10 14:23 54:25 55:12 founding 9:8,9 54:22 four 56:13 France 47:16 free-form 46:13 French 12:17,18 12:25 13:5 30:12 31:2 friends 54:7 full 11:6,7 28:18 28:22 fundamental 3:13 fundamentally	38:21 further 15:8 22:14 <hr/> G <hr/> G 3:1 gas 38:10 gather 9:13 general 1:19 7:13 9:20 10:25 22:7 30:2 32:3 55:6 generally 14:6 genocide 5:18 23:16,20 27:7 28:15,19,23 33:2 34:4 54:10 Germany 46:9 getting 23:4 29:12 Ginsburg 6:8,11 13:10,12 29:18 29:24 35:19,22 36:14 40:3,6 40:18 43:1,10 45:1 47:4,24 50:19,22 Ginsburg's 32:6 give 30:7 given 19:21 27:2 giving 13:6,9 go 8:21 14:10 15:2 18:24 20:21 22:13,13 25:23 27:7 30:20 43:25 46:2 47:17,18 49:2,23 God 46:19,21 goes 20:9,17,18 22:4 30:24 going 4:5 14:14 15:6 21:3 24:5 56:8,13 gold 25:19 Goldsmith	28:17 33:3 good 24:6 51:18 Good-bye 25:22 gotten 48:9 government 11:1 12:25 13:5 22:20 Governmental 21:13 great 49:8 greater 54:2 Green 36:8 ground 48:10 group 21:11 guess 19:6,14 48:22 <hr/> H <hr/> Habana 54:23 happened 35:19 harm 44:18 harmed 6:16 haven 13:9 headquartered 39:20 40:7,14 hear 3:3 24:6 heinous 37:2 held 3:12 15:19 16:16 17:25 18:3 21:5,7 22:24 24:10,18 35:14 37:5 45:14 Hess 18:3,15 hiding 35:14 hierarchy 41:4 high 10:21 16:20 30:5 46:18 higher 42:17 highly 23:2 historians 11:10 history 36:7 50:2 Hoffman 1:17 2:3,13 3:6,7,9 4:7,11,13 5:11 6:8,11,18 7:12	7:17,20 8:1,19 9:15 10:12,14 10:19 11:25 12:8,20 13:11 13:18 14:6,13 15:5,8,11 17:14 52:24,25 53:1,3,13 55:18,22 56:10 56:17,22 57:3 Hoffman's 32:10 hold 17:8,18 18:15 32:1 39:4 45:2 50:8 holding 51:20 holds 25:8 28:3 Holland 7:21 home 5:23 25:23 Honor 26:22 30:17 31:24 36:17 43:22 45:22 47:1 48:5 49:1 51:12 52:15,22 Honors 28:21 Honor's 27:6 45:6 horrors 36:4 house 22:11 human 3:13 4:1 4:14,18,19 6:23,24 11:20 22:15 25:8 27:1 28:9,11 29:6 34:14,24 35:13 41:9,12 49:11 50:24 51:1,8 52:17 53:17 56:15 humanity 4:16 5:18 54:11 HUSBAND 1:4 hypothetical 32:10 45:9 <hr/> I <hr/>	ICC 31:20 34:18 34:23 36:25 50:17,17 ICJ 40:21 ICTR 36:25 42:9 ICTY 36:25 42:9 50:17 identified 28:2 identifies 18:19 identify 18:21 III 28:24 51:10 illegal 22:2 Immunities 18:2 18:5,9,11 immunity 18:23 20:17,19 implemented 29:5 implementing 5:24 important 6:2,3 9:22 13:22 18:15,18 20:12 34:11,23 42:12 45:8 impose 39:23 imposes 5:24 6:13 54:9 impossibly 23:2 impunity 52:16 incident 9:16,16 9:19,19 12:15 12:22 47:16 incidents 12:15 includes 56:9 including 35:15 38:9 43:14 incongruity 53:8,12 incorporated 24:2 25:17,19 54:21 indemnity 39:14 independent 20:23 India 43:21
--	--	---	---	---

<p>indicted 35:16 indifference 41:1 individual 13:16 13:25 17:6 19:23 21:11 28:12 29:19 31:22 32:14 33:5,6 35:15 35:17 36:5 38:2 individually 1:3 30:22 individuals 5:10 28:13 29:1,9 32:15,19,21 34:7 35:12,15 37:9 44:2 45:16 48:3 51:5 individual's 32:2 inferior 40:25 innocent 35:10 inquire 17:21 inquiry 42:13 instances 44:1 44:16 instruments 34:24 49:11 integral 36:21 intended 10:2 14:23 53:24 intent 51:22 interested 11:12 interests 48:2 international 3:21 4:14,22 5:1,2,3,8,13,16 5:19 6:4,7,15 6:23,24 8:18 9:5 12:5,7,11 12:13 17:7,14 19:20 20:6,23 21:9,11,13 22:18,19 25:7 27:9,20 28:1,3</p>	<p>28:4 31:1,6,17 32:21 33:4,8 33:13 34:3,6 34:13,16 35:7 35:25 36:1,11 37:14,16,18,22 38:5,6,11 39:7 41:15 42:5,10 42:14 43:16,17 44:2,17 45:4 46:6,11,20 47:12,19 48:12 49:3,3,5,11,19 49:21,24 50:7 53:17 54:6,8 54:14 55:4,6 56:7,11,20 57:7 interpret 10:18 23:5 46:24 interpreted 10:10,10 18:12 interpreting 9:22 44:5 48:16 involvement 15:22 involves 4:9 35:9 involving 51:24 irrelevant 4:6 irrigation 22:7 isn't 35:6 issue 3:11,12 8:19,24 9:2,3 11:6 16:3 31:14 45:14 55:24 56:4,8 issues 7:3,6 13:19 14:6,16 40:20 it's 13:23 IV 28:19 I.G 35:16,19,22 36:18,21</p> <hr/> <p style="text-align: center;">J</p> <hr/>	<p>Jennifer 36:7 jointly 3:15 joke 33:24 Jonathan 36:9 Jones 46:3,3 Judge 10:18 16:9 judges 10:9 jurisdiction 3:25 5:6,6,12 8:12 10:5,6 14:15 35:2 42:9 44:16 51:10,17,20,22 55:23 jurisdictional 31:19 42:8 jurisdictions 55:5 jury 41:21 Justice 1:20 3:3 3:9,19 4:9 5:7 6:8,9,11,12 7:7 7:15,19,24 8:14 9:12 10:9 10:13,17 11:16 12:1,16 13:10 13:11,12,21 14:10,26 15:1 15:6,10,16,23 16:22,25 17:2 17:17 18:7,8 18:16 19:1,24 20:2,15,20 21:1,8,22,25 22:13,25 23:23 24:4,22 25:2,5 25:5,6,11,14 25:25 26:2,6,8 26:16 27:15,25 28:14 29:2,12 29:15,18,24 30:3,4,10,21 30:24,25 31:8 31:11,13,14,18 31:21,25 32:4 32:6,13 33:1</p>	<p>33:11,14 34:9 35:1,4,8,19,22 36:14 37:4,6,8 37:10,24 38:12 38:15,17,19 39:1,8 40:3,6 40:18 41:8,16 41:18 42:2,12 43:1,10,19,24 44:9,21,24 45:1,10,18 46:15 47:4,13 47:14,22,24 48:10,10,17 49:4,13,16,19 50:4,19,22,24 51:4,7,9,13 52:7,14,23 53:5,6,20 55:14,19 56:5 56:16,18,25 57:9</p> <hr/> <p style="text-align: center;">K</p> <hr/> <p>Kagan 13:11 16:22,25 17:2 18:7 19:1,24 20:2 27:15,25 29:2 30:10,21 30:24 31:21,25 32:4,13 37:4,8 37:10,24 38:12 38:15,17,19 39:1,8 41:8 47:22 48:17 49:13,16,19 50:4 51:4 53:6 53:20 KATHLEEN 1:23 2:10 24:25 Kavanaugh 10:18 Kennedy 3:19 4:9 5:7 6:12 13:21 15:1 22:13 25:5</p>	<p>34:9 35:1,4,8 41:16,18 42:2 42:12 47:13 Kennedy's 25:5 kept 33:19,22 key 49:2 kill 3:17 kind 4:20 9:1 12:6 23:8 27:24 43:8 44:4 48:8 55:10 kinds 4:23 7:3,6 8:13 9:8 42:18 43:5 55:25 Kingdom 5:22 7:21 54:8 Kiobel 1:3,5 3:4 Kneedler 1:19 2:6 15:12,13 15:16,23 16:5 16:22,24 17:1 17:12,24 18:7 18:14,17 19:1 19:16 20:1,8 20:18,22 21:3 21:20,24 22:4 22:22 24:3,8 24:23 know 8:1,2 10:20,22 23:12 23:20 24:4 27:18,19 33:11 33:18 46:15 50:6 54:3 55:23 56:3 knowledge 40:25 Krupp 35:16</p> <hr/> <p style="text-align: center;">L</p> <hr/> <p>lack 44:3 land 54:23,24 language 17:20 47:2 large 3:20 largely 11:9</p>
--	--	--	---	---

<p>LATE 1:4 Laughter 4:12 23:22 25:24 29:14,17 law 3:21 4:22 5:1,2,8 6:4,7 6:15,21,22,22 8:16,18 9:5 10:3 12:12,13 12:21 13:2,7 14:18,22 16:12 16:18,19 17:7 17:14 18:23 19:14,20 20:6 20:23,24 21:7 21:9,18 23:4,5 23:6,15 24:14 24:15,16,17,19 25:7 27:20 28:1,3,4 31:1,6 31:17 32:1,1,3 32:9,9,21,22 32:24 33:4,5 33:13 34:6 35:7,23 37:14 37:16,17,18,19 37:23 38:5,6 38:11,22,24 39:2,7,10,12 39:15,18,20 40:5,6,14,15 41:15 42:5,14 42:18,18 43:3 43:4,9,16,18 43:23 44:2,6 44:17 45:4,7 46:1,5,13,17 46:20,24 47:3 47:5,6,7,10 48:12,12 49:24 52:19,20 54:6 54:9,14,19,19 54:20,21,23 55:2,4,6,6,11 56:11,20,20 57:7 laws 46:18,21</p>	<p>50:7 52:19 lawsuit 12:6 51:10,14 left 17:15 legal 28:6,8 55:9 56:2,2,3 legislate 53:18 legislation 5:24 6:6 7:2,5 54:9 legislative 50:2 legitimate 8:17 Leone 9:24 10:8 11:3 let's 26:22 30:12 32:4 liability 6:14 11:11 15:25,25 16:2,3,7 17:5 17:11 18:12 19:8,20 28:11 28:13,13 31:7 34:2,5,19,22 35:18 36:15 37:1,3,12,13 37:21,25 38:1 38:2,3,7 39:23 39:24,25 40:8 41:11 42:6,8 42:15,23,25 43:13,16 45:16 46:8,23 47:8,9 48:9 49:15 50:6,11,13,16 50:20,23 51:1 52:3 54:7,10 55:7 liable 3:13 5:16 13:17 15:20 16:8,16,17 17:8,19,25 21:5,7 22:24 24:10,18 25:8 26:1,5 27:10 28:1,4 32:2,25 35:13 39:16 40:9,16,24 41:24 45:3</p>	<p>50:8 52:17 lightly 48:12 likes 51:25 limit 51:22 limitations 18:6 18:22 limited 10:5 16:13 48:18,21 50:20 limiting 53:6 line 49:20,24 litigated 56:8 little 53:8 living 13:1 locus 15:21 Longchamps 12:23,24 look 12:15 17:3 22:19 26:8 28:5,16 31:19 37:20,25 38:3 38:6 39:10,12 39:14,18 40:3 40:6,21,22 48:14 49:4,7 looked 9:19 49:10 looking 19:16 40:13 looks 26:10 40:25 Lord 8:11 lost 26:21 lot 13:18 lower 56:22</p> <hr/> <p style="text-align: center;">M</p> <hr/> <p>M 1:23 2:10 24:25 machine 36:21 making 46:14 47:15 Malesko 42:25 man 46:19,21 Mansfield 8:11 Marbois 9:16 12:15,22,23</p>	<p>47:16 maritime 46:1 maritime-rela... 10:2 married 6:22 Massey 36:9 matter 1:13 16:6 25:12,15 33:22 39:25 56:19 57:12 matters 40:4 mean 9:2 10:15 16:6 24:4,5 26:21 35:5 46:16 47:25 53:15 meaning 19:18 54:17 meaningfully 32:18,20 means 5:17 55:1 meant 48:19 50:6 54:25 55:1,1 member 12:14 mentioned 53:6 Miles 46:1 military 3:16 36:2,11 mind 20:12 33:17 minutes 52:24 misconduct 39:19 modern 5:12 13:8 34:24 37:2 moral 33:16 46:23 52:11 morning 3:4 Mostyn 8:9,10 motivated 9:13 9:15 multiple 27:12</p> <hr/> <p style="text-align: center;">N</p> <hr/> <p>N 2:1,1 3:1</p>	<p>narrow 3:12 18:10 nation 3:24 4:1 6:13 17:16 41:2 50:25 51:3 55:15 national 35:25 nations 6:21,22 10:3 12:14,21 13:2,7 14:22 27:12 32:10 34:6,22 38:23 38:25 39:2 43:3,9 47:3,5,6 47:7 52:5,19 54:20,20 55:11 Nation's 12:11 natural 29:3 42:10 nature 15:21 16:10 navy 21:12 Nazi 36:4,20 necessarily 55:11 need 9:6 21:17 32:22 needs 27:8 neither 36:8 Nestle 51:25 Netherlands 5:22 32:11 34:11 41:23 46:9 54:8 never 15:19 23:25 new 1:23,23 9:17 12:13 14:1,2 50:17 Nigeria 3:16 7:22 11:21 Nigerian 11:18 Ninth 43:14 non 14:14 non-binding 27:12 non-state 20:4</p>
---	--	--	---	---

<p>norm 15:21 17:7 19:5,9,19,21 20:10 22:5 27:2,20 30:18 31:5 33:8 34:5 34:13 42:6 44:3 56:7 57:5 57:6 normally 16:7 norms 3:13 4:14 4:18 5:2,4,17 5:18,25 17:14 21:11,13 26:23 33:4,5 34:3 56:13,14 norm-by-norm 56:14 Norwegians 27:20,21,22,23 notion 35:13 40:11 number 8:20 35:23 53:13 Nuremberg 35:11,17 36:6 36:15,24</p> <hr/> <p style="text-align: center;">O</p> <hr/> <p>O 2:1 3:1 obligation 19:15 20:5 37:14 38:18 obligatory 42:6 obviously 9:2 54:1 occur 16:15 occurred 6:15 odious 46:18 offend 48:12 offense 47:17 48:19 offenses 3:22 25:9 27:1 28:9 28:11 29:7 34:15 35:13 37:2,6 50:24 officer 41:5</p>	<p>officers 36:5 37:3,5 52:16 officials 28:8 29:1 35:16 Ogoni 3:18 oh 25:20,22 Ohio 38:10 Okay 15:5 23:15 43:24 once 37:22 operated 3:15 operations 3:18 opinion 9:20,21 9:23 10:4,10 10:12,16 30:2 30:6 opinions 11:11 49:5 opponents 3:17 opposed 5:6 19:11 38:2 opposite 45:15 46:14 oral 1:13 2:2,5,9 3:7 15:13 24:25 order 27:10 organizations 6:25 original 10:24 ought 9:3 outcome 43:15 outside 12:23 18:1 overseas 55:21 owned 26:18</p> <hr/> <p style="text-align: center;">P</p> <hr/> <p>P 3:1 page 2:2 3:20 28:16,18 34:10 34:21 pages 6:25 34:13 Paquete 54:22 part 3:20 12:9 20:4,17 36:19 36:21 38:21</p>	<p>44:7 54:23 particular 7:7 19:19 21:19 40:23 48:18 particularly 5:5 17:13 parts 6:19 party 36:8 pass 31:9 passage 28:18 passed 5:23 12:10 passing 54:9 PAUL 1:17 2:3 2:13 3:7 53:1 penalties 5:25 people 52:9 permissible 16:2 permit 46:24 permits 3:24 43:16 perpetrator 4:19 19:21 38:7 perpetrators 35:10 36:3 person 5:3 6:16 17:6 26:17 29:20 30:22 39:16 46:23 personal 14:15 persons 17:21 28:8,23 29:3 29:10 33:17 42:10 45:17 52:11 pertinence 21:16 pertinent 21:9 Petitioners 1:6 1:18,22 2:4,8 2:14 3:8 15:15 27:10 31:5 34:20 36:7 49:7 53:2 Petroleum 1:8 3:5</p>	<p>pierced 35:13 piracy 9:25 10:2 21:12,17 26:10 26:10,12,15 34:4 Pirates 24:1 25:17,19 26:24 27:3,4 33:24 place 11:2 13:24 39:18,19 40:7 49:9 55:17,21 places 55:4 plaintiff 18:19 18:20 29:22 30:8 plaintiffs 4:15 7:10 8:6 11:19 14:19 51:25 please 3:10 15:17 25:3 52:14 point 18:17 20:16 33:2,3 33:15,25 47:5 47:14 49:2 pointed 45:10 points 23:5 34:21 54:5 policy 16:24 47:12 48:8 political 35:24 45:25 position 4:24 5:14 21:23 24:8 56:16,18 57:1 Posner 16:9 possibly 24:1 post-Nurembe... 27:1 practically 36:22 practice 27:13 52:4,5 preceded 35:24 precedent 13:23 36:24,25 53:23</p>	<p>precise 8:1 28:14 precisely 20:21 premise 45:6 presence 14:4 presented 8:25 presumably 16:18 pretty 44:18 54:12 prevent 12:4,5 prevents 27:23 primarily 12:12 primary 6:6 45:3 principal 3:11 principle 8:3,4 9:5 13:4,8 25:15,16 32:3 55:6 principles 6:3 16:14 private 19:22 21:11,14 23:13 23:18,19 29:1 38:2 process 22:9,11 49:7,8 Professor 28:17 prohibit 27:17 prohibition 20:23 prolonged 4:16 property 10:7 proposition 4:5 4:6 26:7 36:9 proscribe 17:14 prosecuted 36:2 36:3,4,10 prosecutions 34:25 Protection 29:8 53:21 proved 9:7 provide 14:21 42:5 45:11 provided 10:6</p>
--	---	---	---	--

<p>18:13 42:15 provides 8:16 32:7 51:1,3 providing 9:8 provoke 47:18 public 28:7 29:1 pumping 38:10 punishable 46:18,21 punished 28:25 punitive 40:2 purpose 47:20 put 11:13 puts 42:13</p> <hr/> <p style="text-align: center;">Q</p> <p>question 5:1 6:1 7:5,9,16 8:22 8:25 11:12 12:21 13:16 15:1 17:3,4,8,9 17:10 19:2,4,6 19:7,11,12,14 20:3,3,4,5,6,9 20:21 22:22,24 23:2,11,13,17 24:9,12,17 25:5,6 27:6 28:2,3,15 29:16 30:8,25 32:7,17,22,23 33:10,21 36:18 37:11,13,15,16 37:17,21,21 38:12,14,15,17 38:18,20,21 39:4,6,9,13 41:7,10,14 42:20,22,22 43:6,12,15 44:22,23 45:5 45:6,8,14,22 49:22 50:25 questions 4:8 15:9 37:25 38:1,2,4,4 41:20</p>	<p>quick 53:4 quotes 28:18</p> <hr/> <p style="text-align: center;">R</p> <p>R 3:1 raised 8:20 11:8 11:10 range 53:16 rationale 33:19 44:1 reach 52:2 read 28:21,21 33:14 38:23 49:23,25 50:1 50:10 reading 4:3 15:2 realize 45:18 really 8:21,24 11:17 12:16 14:22 16:6 19:12 45:19 reason 23:18 24:6 26:20 33:14 44:3 46:22 reasoning 42:1 reasons 11:4 34:7,17 35:9 42:24 46:17 53:5,18 55:13 REBUTTAL 2:12 53:1 recall 10:20 recognize 3:21 5:9 44:13 recognized 44:17 red 3:20 redress 55:10,15 56:1 reference 24:16 referred 26:23 47:13 48:10 refers 24:11 33:18 refuge 12:24 13:6</p>	<p>refute 4:4 refutes 42:7 regard 9:17 regardless 8:16 15:20 regime 35:11 regulating 57:5 rejected 42:7,11 42:24 45:15 50:11,14,15,19 rejects 47:8,8 related 19:18,18 relevant 19:4 28:18 29:2 rem 26:11 remaining 52:24 remedial 17:3 37:16 38:15 44:7 remedies 9:9 37:17 39:21 55:1 remedy 37:22 39:6,22,25 40:4 41:20 42:21,23 46:25 52:10 56:9 removed 30:12 renewed 25:6 reports 50:3 representative 48:3 49:10 50:13 representing 48:1 require 16:19 reserve 15:3,9 residences 14:4 resident 6:17 residents 8:6,7 resolved 14:7 resolving 23:9 respect 5:4 17:24 56:3,12 56:13 respectfully 38:19 39:9</p>	<p>40:19 41:13 43:11 48:6,14 52:2 respondeat 15:24 16:2,6 16:14 35:5 39:13 40:8 41:8 Respondents 1:24 2:11 3:14 4:21 5:13 7:11 11:9,9,19 25:1 26:9 34:10,12 response 13:5 responsibility 3:22 40:20 responsible 8:9 16:8,20 28:25 39:5 40:12 Restatement 39:11,16 restrict 53:25 restriction 55:5 rests 31:4 Revolution 12:17 right 15:9 20:1 23:10 24:3 26:2 31:23 32:3 33:1,18 33:21 43:24 rights 3:13 4:1 4:14,18 6:23 6:24 11:20 25:9 27:1 28:9 28:11 29:6 34:15,24 35:13 49:11 50:24 51:2,8 52:17 53:17 Rio 51:25 rise 22:9 robbery 54:20 ROBERTS 3:3 6:9 8:14 9:12 15:10 21:1,8 21:22,25 24:22</p>	<p>29:12,15 52:14 52:23 55:14,19 56:5 57:9 Rome 31:20 34:17 40:22,22 42:7 50:1,4,5,6 50:10,15 Royal 1:8 3:4 rubric 7:13 rule 23:25 46:23 52:8,13,16 rulers 29:1 ruling 15:19 52:3 running 16:20</p> <hr/> <p style="text-align: center;">S</p> <p>S 1:19 2:1,6 3:1 15:13 safe 13:9 satisfies 19:19 save 43:13 saw 14:1 saying 3:24 4:14 19:24 34:12 41:23 44:10,14 45:1 46:10,14 49:10,23 54:13 says 3:21 9:7 19:17 25:20 28:23 38:6 40:9 42:17 46:17 47:2 48:11,15 49:4 Scalia 17:17 18:8,16 20:15 20:20 31:8,11 31:13,14 45:10 56:16,18,25 Scheffer 34:20 50:11,12 scholarship 10:22 scope 19:20 37:22 screen 42:13 sea 54:20</p>
--	---	---	--	---

<p>seas 10:22 30:5 46:18 second 12:9 13:23 42:13,14 43:18 sections 40:23 see 23:21 25:22 33:2 44:24 49:20 seize 26:11,13 26:14,16 seized 27:5 seizes 21:12 senior 41:5 sense 9:25 10:14 sent 10:24 sentence 11:17 separate 32:5 separating 37:11 series 6:25 serve 22:11 serving 22:10 Seventh 16:9 Shell's 3:17 shield 53:23 ship 21:12 26:11 26:14,17 27:5 46:17 ships 26:13 shot 48:23 show 27:11,13 31:5,6 52:11 shows 52:9 side 11:13 23:21 Sierra 9:24 10:8 11:3 signatories 34:18 silent 49:21 similar 9:16 Similarly 46:6 simple 35:6 simply 48:15 49:21 51:19 Skinner 43:21 46:16</p>	<p>Skinner's 54:17 slave 26:13 slavery 33:2,3 34:1,4 Smith 26:9 Solicitor 1:19 somebody 13:1 22:2 27:19 sorry 14:25 17:1 21:2 28:20 40:22 55:14 sort 55:15 Sosa 13:13,20 19:1,17,19 26:23 38:6 41:14 42:4,13 42:17 43:2,4 44:25 SOTOMAYOR 15:23 53:5 sought 16:15 sounds 13:10,12 source 25:7 26:3 26:6 29:6 31:18 42:15 51:10 53:7,7 sources 18:23 49:1,21,24 sovereign 17:25 18:2,4,5,9,11 18:23,25 20:16 20:19,25 sovereigns 17:19,21,25 sovereignty 47:18 sovereign's 18:12 speak 28:1,12 29:3 30:8 48:7 speaking 14:7 speaks 28:6,8 29:4 special 49:9 specific 18:8 26:23 42:5 specifically</p>	<p>10:20 27:22 48:19 specify 47:4 spoke 45:13 stakeholders 35:10 standard 41:1,3 start 4:13 12:9 state 14:20 15:22 19:3,3 20:8 22:1,1 35:14 36:22 38:3 52:19 statement 11:16 11:17 12:12 21:22 46:4 states 1:1,14,21 2:7 4:24 7:2,9 8:8 9:7,14 11:24 12:2,5 12:19,24,25 13:3,4,24 15:14 18:1,4 22:16,21 23:3 30:14 31:2,25 47:25 48:2,2,6 48:13,15 50:7 statute 3:14 6:20 7:4 8:23 9:10 9:23 10:1,6 12:3,10 14:9 14:18,20 15:20 18:13,19 20:13 21:4 22:6,9 24:20 29:18,22 30:16 31:9,20 32:15 34:17 38:24 40:22,23 42:7 43:6 44:7 48:18 50:2,4,5 50:6,10,15 53:15,16,25 54:14,16 55:12 statutes 31:20 42:8 statutory 45:12 45:24 46:4</p>	<p>step 42:4,10,14 stop 47:15,17 Story 26:8 straightforward 24:9 streets 13:25 14:2 striking 11:18 strong 33:24 stronger 53:22 suable 27:5 subject 18:6 43:4 48:4 submission 56:6 submit 41:13 submitted 57:10 57:12 subsequent 36:12 substance 41:20 42:22 45:5 substantive 19:5 19:9,15 20:5 23:15 28:2 34:5 37:14 38:4,18 39:6 39:10 52:12 sue 12:18,18 13:24 23:25 26:18 29:21,25 30:22 31:3 53:9,11 sued 19:22 20:19 21:19 22:8,17 23:14 23:19 30:16 31:2 38:7,13 38:20 44:6,22 51:24 suggest 10:23 19:11 48:14 56:11 suggested 11:5 16:10 suggesting 55:22,25 suing 20:24</p>	<p>51:15,17 suit 8:15,17 14:2 18:24 29:8 31:22 32:11 44:11,13 48:4 55:17,20 suits 52:18 Sullivan 1:23 2:10 24:24,25 25:2,13,25 26:4,8,22 27:15,25 29:24 30:10,17,23 31:4,10,12,16 31:24 32:4,13 32:20 33:9,13 34:2 35:2,8,22 36:17 37:9,24 38:14,16,19 39:8 40:4,18 41:17 42:2 43:1,10,22 44:8,21,25 47:1,22 48:5 48:25 49:13,15 49:17,22 50:1 50:10,22 51:6 51:8,11,16 52:15 superior 15:25 16:2,7,14 35:6 39:13 40:8,24 41:8 supplant 48:20 48:22 supplement 48:19 supplemental 53:7 support 34:12 34:20 36:7,8 supporting 1:21 2:8 15:15 suppose 22:14 40:8 suppression 28:5</p>
---	--	--	---	--

<p>Supreme 1:1,14 23:3 sure 10:14 47:15 surveyed 21:6 system 23:6 55:9 56:2,3,3</p> <hr/> <p style="text-align: center;">T</p> <hr/> <p>T 2:1,1 take 5:13 12:24 22:5,6,8 30:10 37:11 47:22 taken 7:6 35:21 47:25 49:8 55:24 takes 55:21 Talisman 51:25 talk 27:17 talking 8:11 13:15 17:10 22:1 tell 35:1,4 tension 12:5,7 term 29:10 45:16 terms 6:21 8:5 9:22 territories 41:25 territory 10:8 11:2 terrorism 28:6 Thank 15:10 24:22 52:22,23 52:25 57:9 thing 14:13 20:21 42:3 49:23 52:8 53:20 55:10,16 things 8:21 48:20 55:7 57:5 think 4:21 6:2 7:9,13,20,22 9:6 10:1,15,19 11:1,14 12:12 12:16,20,20 13:3,3 16:5</p>	<p>17:12,13 18:7 18:10 19:12,14 20:11,12 21:20 23:23 24:1,10 24:12,16 25:18 25:21 26:20 27:15 33:18,23 35:5 39:10 40:11,19 42:21 44:23 45:8,19 47:17 48:3,22 54:12 56:23 57:3,3,8 thinking 17:5 43:25 44:19 thinks 47:6 thought 6:12 13:13,15 23:13 35:20 46:7 50:19 55:16 threshold 32:24 time 6:4 9:17 15:3,9 21:4 22:12 24:20 29:5 45:13 51:22 57:8 Tinto 52:1 today 6:5 13:16 24:21 48:7,15 told 48:3 55:16 tomorrow 31:12 45:11 tort 3:14 6:20,22 7:4 8:5,13,23 9:9,22 10:6 12:3,9 13:15 14:17,18,20 15:20 16:19 18:5,19 20:13 20:13 21:4,7 22:6,9 24:16 24:17,19 29:22 30:16 38:22 39:1,5,16 43:6 43:23 47:2 53:15,16,25 54:13,16,18,19</p>	<p>54:25,25 tortfeasor 8:8 torts 8:3,9,11 14:21 24:11 54:17 torture 3:15,17 4:16 21:13,17 29:4,7 34:4 48:21 50:18 53:21 torturers 13:9 track 56:20 trading 26:13 trafficking 22:15 transitory 8:3 8:11 treated 34:7 56:22 treaties 27:12 33:20 treatment 11:6 treaty 22:8 trial 41:21 tribunal 36:2,11 49:6 tribunals 5:13 6:5 35:25 36:12 tried 4:25 22:11 troubled 11:6 true 16:18 32:14 37:10 54:6 trying 4:4 Tuesday 1:11 turns 3:20 TVPA 45:15,20 48:14,16,17,23 53:6,10,14 54:2 twelve 11:18 two 5:22 6:18 8:20 16:4 17:23 32:5 33:23 34:11 36:6 46:8 48:20</p>	<p>typical 40:8</p> <hr/> <p style="text-align: center;">U</p> <hr/> <p>underlying 5:17 8:5 understand 17:18 20:16 22:21 43:2 undertaking 21:10 unified 23:4 uniform 47:7 52:4,4 unique 6:20 32:15,15,16 United 1:1,14,21 2:7 4:24 5:22 7:8,21 8:8 9:7 9:14 11:23 12:2,5,19,24 12:25 13:3,4 13:24 15:14 18:1,4 22:15 22:21 23:3 30:14 31:2,25 47:24 48:2,2,6 48:13,15 54:7 universal 3:25 42:5 44:16 unnecessarily 23:24 urge 52:2,15 use 29:9,19,19 uses 6:5 20:13 usually 16:19 U.K 34:11 41:22 42:1 46:9 U.N 49:7,8,9,17 U.S 6:17 8:6,6 10:5 22:15,16 26:9 36:12,13 45:21</p> <hr/> <p style="text-align: center;">V</p> <hr/> <p>v 1:7 3:4 8:9,10 26:9 36:13 43:21 46:1</p>	<p>various 7:2 34:7 Venice 1:17 verb 38:23 versus 39:24 viable 13:14 vicarious 17:5 37:12,20 victim 14:1 29:8 53:21 victims 3:18 12:17 view 3:14 22:16 22:20 viewed 36:22 51:21 53:7 57:4 views 54:15 violate 20:10 21:10 44:2 52:12 56:15 57:6 violated 13:7 17:7 54:8 violates 21:13 43:8 violating 3:13 22:8 54:10 violation 12:22 13:2 14:22 19:21 22:12 32:9 33:8 37:23 38:11,22 38:24 39:2 47:3 54:19 55:11 violations 5:25 6:14,22 10:3 11:20 23:14 28:5 34:14 51:2,8 52:17 53:17</p> <hr/> <p style="text-align: center;">W</p> <hr/> <p>walking 13:25 14:1 want 14:11,26 15:3 23:1 24:6</p>
---	---	---	---	--

<p>27:8 30:20 38:25 49:22 wanted 12:17 13:4 war 5:18 36:20 47:15,17,18 54:11 Washington 1:10,20 wasn't 43:7 50:20 way 6:20,21 10:10 20:24 23:4,9 30:13 33:12 41:8 44:19 46:1,15 53:25 55:5,12 55:24 ways 56:15,23 weak 48:23 went 10:23 14:10 22:10 We'll 3:3 we're 17:10 27:8 44:5,9,10 56:13 we've 9:2 11:4 whatsoever 12:2 win 27:10 won 26:21 wonder 41:18 word 20:13 29:19,19 words 17:6 19:8 39:15 55:19 work 21:25 41:12 world 3:24 7:2 7:10 22:17 23:4 25:8 32:7 34:6,23 38:9 39:23 40:11,19 41:2 44:14 51:1,3 52:6 55:9,15 wouldn't 27:4 47:16</p>	<p>written 27:16 wrong 4:22 5:21 15:21 40:10 wrongful 32:12 46:4</p> <hr/> <p style="text-align: center;">X</p> <hr/> <p>x 1:2,9</p> <hr/> <p style="text-align: center;">Y</p> <hr/> <p>year 36:1 York 1:23,23 9:17 14:1,2</p> <hr/> <p style="text-align: center;">1</p> <hr/> <p>10-1491 1:5 3:4 10:02 1:15 3:2 11 34:13 11:04 57:11 12 26:10 1350 6:13 15 2:8 34:13 1666 43:23 17 3:20 26:19 34:10 1774 8:10 1795 9:21 30:2 18 6:25 26:19 34:21 18th 25:18 1907 22:6 1945 35:24 36:11 1992 11:21 1995 11:22 1998 34:17 50:2</p> <hr/> <p style="text-align: center;">2</p> <hr/> <p>20 19:2,17,25 28:16,18 38:5 41:14 2007 49:9 2012 1:11 22 6:25 24 2:11 28 1:11 35:16</p> <hr/> <p style="text-align: center;">3</p> <hr/>	<p>3 2:4 30 42:16</p> <hr/> <p style="text-align: center;">4</p> <hr/> <p>46 36:11</p> <hr/> <p style="text-align: center;">5</p> <hr/> <p>5 52:24 53 2:14</p> <hr/> <p style="text-align: center;">9</p> <hr/> <p>9 35:23 96 26:19</p>		
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