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IN THE SUPREME COURT OF THE UNITED STATES

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ESTHER KIOBEL, INDIVIDUALLY AND ON:
BEHALF OF HER LATE HUSBAND, :
DR. BARINEM KIOBEL, ET AL., :

Petitioners : No. 10-1491

v. :

ROYAL DUTCH PETROLEUM CO., ET AL. :

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Washington, D.C.

Monday, October 1, 2012

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

APPEARANCES:

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

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

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

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P R O C E E D I N G S

(10:02 a.m.)

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

Mr. Hoffman?

ORAL ARGUMENT OF PAUL L. HOFFMAN
ON BEHALF OF THE PETITIONERS

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

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

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

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

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

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

3 MR. HOFFMAN: Yes.

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

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

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

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

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

24 MR. HOFFMAN: Yes.

25 JUSTICE KENNEDY: -- it's your

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

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

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

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

22 JUSTICE KENNEDY: Well, we assume --

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

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

1 MR. HOFFMAN: Okay.

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

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

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

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

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

23 The United States, under international law,
24 clearly has jurisdiction to adjudicate claims between
25 parties properly before them.

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

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

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

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

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

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

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

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

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

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

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

25 JUSTICE ALITO: The district court says:

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

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

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

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

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

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

23 JUSTICE KENNEDY: Well, you know, Justice
24 Alito can protect his own hypothetical, but it seems to
25 me you're walking away from it. The question as I

1 understood it assumed that there is a violation of
2 international law.

3 MR. HOFFMAN: Right.

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

7 MR. HOFFMAN: Right --

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

12 MR. HOFFMAN: Well, it could be.

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

15 MR. HOFFMAN: Well --

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

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

1 political question grounds, and the courts did dismiss
2 on political question grounds.

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

10 MR. HOFFMAN: Well --

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

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

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

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

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

22 MR. HOFFMAN: We've ratified --

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

1 MR. HOFFMAN: Yes.

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

9 MR. HOFFMAN: Right.

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

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

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

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

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

21 But the -- yes.

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

24 MR. HOFFMAN: Yes.

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

11 MR. HOFFMAN: Right.

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

14 MR. HOFFMAN: Right.

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

19 MR. HOFFMAN: Well, I think --

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

22 MR. HOFFMAN: I don't think there is a lot
23 wrong with the rule, actually. In a foreign cube kind
24 of case, it seems to me the EU position is, number one,
25 that there is universal jurisdiction no matter whether

1 you consider the Federal Commonwealth cause of action
2 prescriptive or not. And so, the countries of the world
3 have agreed that all states have an interest in
4 enforcing these fundamental norms and that's part of
5 international law. And that -- that what goes with that
6 are limits of exhaustion of remedies under international
7 law, which safeguards the interests of third states
8 before the United States can litigate it.

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

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

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

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

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

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

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

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

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

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

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

8 MR. HOFFMAN: Well --

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

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

20 JUSTICE GINSBURG: And what happened to
21 that?

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

24 JUSTICE GINSBURG: Overturned it which way?

25 MR. HOFFMAN: It said that the case -- that

1 the Wiwa case could proceed and --

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

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

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

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

24 MR. HOFFMAN: Well, I think this Court in
25 Sosa said that its analysis did not necessarily apply to

1 1331, and I think that's because of the history of 1350.

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

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

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

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

23 JUSTICE SCALIA: Common law. It's general
24 common law.

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

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

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

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

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

24 This Court found, based on the history and
25 intent of the Congress, that there was no reason to wait

1 for any congressional authorization to go forward on
2 those claims, and therefore it was available to bring
3 claims. So --

4 JUSTICE GINSBURG: Well, maybe they had --

5 MR. HOFFMAN: -- we're not taking the
6 position that 1331 --

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

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

17 And in fact, one of the -- and, also, in
18 answer to the Respondents' claims about
19 extraterritoriality, if one imagines -- under the
20 Respondents' theory, you could -- a French ambassador
21 could be attacked by a Frenchman in Pennsylvania and
22 have Alien Tort Statute jurisdiction and a claim for
23 relief. If a U.S. citizen attacked the French
24 ambassador on foreign soil, he wouldn't have an Alien
25 Tort Statute claim; he would be sent to the state courts

1 if he could -- the state courts were open, which is
2 exactly the opposite of the purpose of the Alien Tort
3 Statute, the fundamental known purpose of the Alien Tort
4 Statute.

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

13 MR. HOFFMAN: Well, Congress provided for
14 some jurisdiction in the Torture Victim Protection Act.

15 JUSTICE GINSBURG: Yes, but under the Alien
16 Tort Statute.

17 MR. HOFFMAN: Well, the Alien Tort Statute
18 is limited to alien plaintiffs. I mean, and that was
19 the congressional design, and it was -- that arises out
20 of the history, to make sure that aliens with law of
21 nations claims had access to Federal courts and Federal
22 remedies to vindicate those positions. The United
23 States could still take action to protect the U.S.
24 citizen.

25 Can I reserve the balance of my time then?

1 CHIEF JUSTICE ROBERTS: You can.

2 Ms. Sullivan?

3 ORAL ARGUMENT OF KATHLEEN M. SULLIVAN

4 ON BEHALF OF THE RESPONDENTS

5 MS. SULLIVAN: Mr. Chief Justice and may it
6 please the Court:

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

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

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

21 Missing from the discussion you've just had
22 with Mr. Hoffman about possible ways to minimize the
23 dangers of applying the ATS in foreign countries is any
24 mention of Congress. And I'd like to return us to the
25 question presented on this round of the argument, which

1 is: Should the ATS and, Justice Ginsburg, Federal
2 common law be applied to conduct taking place entirely
3 within the borders of a foreign country? And our answer
4 is it should not, under the --

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

12 Does your -- the argument you're making now
13 that this is not applicable to things that happened
14 offshore exclude *Filartiga* and Marcos?

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

22 JUSTICE GINSBURG: But then you're at least
23 saying --

24 JUSTICE KENNEDY: Well, maybe it's just
25 history and background, but I would really like you to

1 answer Justice Ginsburg's question. Suppose we had
2 granted cert in Filartiga before Congress acted?
3 What -- under your position, what should have been the
4 result? I think that was the purport of her question,
5 and I would appreciate an answer to it.

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

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

23 MS. SULLIVAN: Well --

24 JUSTICE SCALIA: I find that -- you know,
25 extraterritorial means extraterritorial, but -- but you

1 contend that this -- as I think you must -- that this
2 statute applies on the high seas.

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

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

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

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

21 MS. SULLIVAN: At the time.

22 CHIEF JUSTICE ROBERTS: -- capture pirates.

23 MS. SULLIVAN: Our clear -- our position on
24 piracy is this. Even if you think the ATS and Federal
25 common law can extend to conduct on the high seas, which

1 are stateless, a place where no foreign sovereign rules,
2 that does not mean that the ATS and Federal common law
3 can apply to conduct within a foreign sovereign's
4 borders --

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

13 And we have treaties that say there is
14 universal jurisdiction. Other countries take it.

15 MS. SULLIVAN: Justice Breyer --

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

21 MS. SULLIVAN: Justice Breyer, with respect,
22 the United States has not acceded to the principle of
23 universal civil jurisdiction. And with respect --

24 JUSTICE BREYER: Well, we did explicitly in
25 the torture treaty in respect to that particular

1 incident.

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

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

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

18 MS. SULLIVAN: Criminal is very different
19 from civil. And what we -- the precise argument we are
20 making here is that the presumption against application
21 of U.S. law to conduct within foreign sovereigns -- and
22 remember, the purpose of the presumption,
23 Justice Scalia, is to avoid conflict with foreign
24 sovereigns. There is no foreign sovereign over the high
25 seas.

1 The conflict arises, and the presumption
2 protects against this conflict, when we go into a
3 foreign nation, we project our law.

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

10 MS. SULLIVAN: Well --

11 JUSTICE SCALIA: -- even though they can
12 apply in Australia.

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

17 But I want to get back to the key point,
18 which is --

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

23 MS. SULLIVAN: No, we do not, Your Honor,
24 because we many think that in rem actions were the
25 typical things contemplated. And as soon as

1 United States v. Palmer comes along, this Court applied
2 the presumption against extraterritorial application of
3 U.S. law to -- the application of the then-extant piracy
4 statute to a foreign-flagged vessel on the high seas.

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

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

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

19 JUSTICE KAGAN: Well, Ms. Sullivan, your
20 argument is very broad, and I want to ask you a
21 question. Your case might properly be dismissed. But
22 take a different case, and it's a -- just a variation on
23 the Marbois incident, where instead of being attacked in
24 Philadelphia, the French ambassador to Britain is
25 attacked in London, but is attacked by a United States

1 citizen, who then comes home to the United States, seeks
2 refuge in the United States. And the French
3 ambassador -- the French ambassador wants to bring an
4 action.

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

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

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

21 MS. SULLIVAN: Because Congress hasn't
22 clearly said so. And the point of the presumption is to
23 avoid all of the judge-made possible qualifications that
24 were discussed earlier: Exhaustion, political question,
25 the possible limitations suggested by the European

1 Union.

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

5 And, Justice Alito, in answer to your
6 question whether --

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

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

17 In the South African apartheid case, not
18 only did the State Department seek to protest the
19 action, but the government of South Africa filed a
20 letter, and the district court ignored both.

21 JUSTICE KAGAN: Well, we should fix that
22 then. But that's not the question here, right? The
23 question here is -- is the different one of whether you
24 ever get to the exhaustion question.

25 MS. SULLIVAN: Correct.

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

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

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

19 Second, there could have been extradition.

20 Third, the point of the Marbois in
21 stimulating the ATS was that if a U.S. citizen attacks
22 the French ambassador on U.S. soil, and we then harbored
23 him, that could have led to an incident of war. But
24 there is no incident of war or conflict posed in your
25 hypothetical because extradition was possible, and State

1 court tort violations -- State law tort -- State court
2 jurisdiction over a transitory tort should
3 have obtained.

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

8 MS. SULLIVAN: Well --

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

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

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

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

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

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

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

22 And the most important point about
23 the ATS and Federal common law, even if it were under
24 section 1331, Justice Ginsburg, is that it's an
25 application of U.S. substantive and remedial law to

1 another country. And the offense is we're telling the
2 other country that they have to entertain private civil
3 litigation. And there is a difference, Justice Breyer,
4 between criminal and civil --

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

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

11 JUSTICE BREYER: Because?

12 MS. SULLIVAN: -- because he could have been
13 speaking about the high seas.

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

18 MS. SULLIVAN: And he --

19 JUSTICE BREYER: Yes. Go ahead.

20 MS. SULLIVAN: It was Americans, but
21 we -- we think, if properly read, the hostilities of
22 which he spoke was the high seas part of the conduct.
23 It was an American who piloted the French fleet 60 miles
24 from the Iles de Los to the Sierra Leone River. And
25 that was -- if you read grammatically, we think that is

1 what Attorney General Bradford was referring to.

2 JUSTICE KAGAN: But --

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

8 But assume for the moment that those two
9 cases -- that we accept them -- to accept them. Is
10 there anything different about your case?

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

17 Second, there is -- there was a -- there's
18 an allegation here of aiding and abetting a foreign
19 government. It was unclear in Filartiga whether the
20 Paraguayan was acting within or without the state's
21 authority, but -- and he was later deported, so we don't
22 know the answer.

23 But here the offense is magnified because
24 the allegation is that an English and a Dutch company
25 aided and abetted the Nigerian government. That is

1 where the offense to the principle against international
2 friction is at its highest. And so if you weren't to
3 adopt our position in full, at a minimum we think you
4 should hold that the presumption applies to foreign
5 cubed cases involving aiding and abetting a foreign
6 government, where everything is foreign.

7 But we don't think you should do that in the
8 first instance. We respectfully submit the better
9 approach is to apply the presumption as a categorical
10 matter.

11 JUSTICE KENNEDY: But in *Filartiga*, why
12 wasn't there an aiding and abetting? I think it was
13 pretty clear. He probably was working for the
14 government, which is even worse.

15 MS. SULLIVAN: Well --

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

18 MS. SULLIVAN: Yes.

19 JUSTICE KENNEDY: Just assume we think the
20 Second Circuit was right, pre-congressional action under
21 the Alien Tort Statute. Is there any way in which we
22 can use the principle of extraterritoriality to rule in
23 your favor?

24 MS. SULLIVAN: We think there is,
25 Justice Kennedy. And we think the principle of

1 extraterritoriality is -- is essentially a
2 democracy-forcing device to send these questions back to
3 Congress. And if we send it back to Congress --

4 CHIEF JUSTICE ROBERTS: Well, have we
5 crossed that -- we've crossed that bridge already,
6 didn't we, in Sosa?

7 MS. SULLIVAN: You have --

8 CHIEF JUSTICE ROBERTS: The presumption
9 applies to interpreting acts of Congress. We are over
10 that. We're -- we're making this law up ourselves,
11 right?

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

16 It's far worse to have judges --

17 JUSTICE SOTOMAYOR: But you're asking us to
18 overturn our precedents.

19 MS. SULLIVAN: We --

20 JUSTICE SOTOMAYOR: You're -- you're
21 basically saying Filartiga and Marcos, Sosa, they were
22 all wrong.

23 MS. SULLIVAN: We are not, Your Honor. Sosa
24 did not address the question we have before the Court
25 today.

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

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

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

23 JUSTICE KAGAN: But, Ms. Sullivan, I'm going
24 to read you something from Sosa, which -- it talks all
25 about the rule that it adopts and then it says: "This

1 is generally consistent with the reasoning of many of
2 the courts and judges who faced the issue before it
3 reached this Court. See *Filartiga*." And then it quotes
4 *Filartiga*: "For purposes of civil liability, the
5 torturer has become like the pirate and slave trader
6 before him, an enemy of all mankind."

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

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

19 Thank you.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 Ms. Sullivan.

22 General Verrilli.

23 ORAL ARGUMENT BY GEN. DONALD B. VERRILLI, JR.,

24 FOR THE UNITED STATES AS AMICUS CURIAE,

25 SUPPORTING THE RESPONDENTS

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1 GENERAL VERRILLI: Mr. Chief Justice, and
2 may it please the Court:

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

9 JUSTICE SOTOMAYOR: Is that the same -- is
10 that your simple rule? Is that how you want us to
11 rule --

12 GENERAL VERRILLI: Yes.

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

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

23 JUSTICE GINSBURG: What about in your -- you
24 do say in your brief that you think that Filartiga is
25 within the Alien Tort Statute.

1 GENERAL VERRILLI: Yes, we do,
2 Justice Ginsburg.

3 JUSTICE GINSBURG: You don't -- don't adopt
4 a theory that many of the -- these do, that there has to
5 be some connection, some nexus to the United States.
6 You just tell us that Filartiga is okay. And how about
7 Marcos, is that okay?

8 GENERAL VERRILLI: Well, we think in
9 Filartiga, Justice Ginsburg, that the -- the -- that
10 there is a nexus to the United States. The actual
11 perpetrator was -- A, it was a case against the actual
12 perpetrator.

13 JUSTICE GINSBURG: Yes, but you -- you don't
14 --

15 GENERAL VERRILLI: And B --

16 JUSTICE GINSBURG: -- you don't offer us a
17 nexus. You don't offer us that reason why Filartiga was
18 okay.

19 GENERAL VERRILLI: Yes, I think our reasons
20 for why Filartiga was okay is that -- that it was the
21 actual perpetrator, not an aider and abettor, and the
22 actual perpetrator was resident in the United States.

23 And I do think when Congress enacted the
24 TVPA, that is what Congress looked to as the salient
25 features of the Filartiga situation that justified --

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

4 GENERAL VERRILLI: I -- I think Filartiga is
5 the paradigm, and cases like Filartiga are the paradigm
6 that -- where we think ATS -- ATS causes of action
7 should be recognized.

8 JUSTICE SCALIA: General Verrilli, the --
9 that's -- that is a new position for the -- for the
10 State Department, isn't it?

11 GENERAL VERRILLI: It's a new --

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

18 GENERAL VERRILLI: Well, Justice Scalia, in
19 a case like this one, in cases under the Alien Tort
20 Statute, the United States has multiple interests. We
21 certainly have foreign relations interests in avoiding
22 friction with foreign governments; we have interests in
23 avoiding subjecting United States companies to liability
24 abroad. We also have interests in ensuring that our
25 Nation's foreign relations commitments to the rule of

1 law and human rights are not eroded.

2 JUSTICE SCALIA: I understand that, but --

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

7 JUSTICE SCALIA: It -- it was --

8 GENERAL VERRILLI: And we have done so.

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

14 GENERAL VERRILLI: Well, because we think
15 they are persuasive, Your Honor.

16 JUSTICE SCALIA: Oh, okay.

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

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

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

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

22 JUSTICE SOTOMAYOR: You are disavowing any
23 forum of necessity view of the ATS? You are disavowing
24 what other countries do or say with respect to
25 citizens -- to aliens who are attacked?

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

6 JUSTICE SOTOMAYOR: I asked you a question
7 directly. Are you foregoing -- are you foregoing any
8 forum necessity exception to the rule you've just
9 announced?

10 GENERAL VERRILLI: We don't think that the
11 question of the availability of a forum or
12 nonavailability of a forum is sufficient to override the
13 absence of any connection to the United States.

14 Now, I will say --

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

21 GENERAL VERRILLI: Well, I think it would
22 depend on a weighing of the strength of the interests of
23 the United States, the foreign relations interests of
24 the United States, in applying this narrow category of
25 Sosa norms in order to avoid undermining the

1 credibility --

2 JUSTICE ALITO: Suppose everything is the
3 same except for --

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

14 GENERAL VERRILLI: Congress can always act
15 in this area, Justice Scalia.

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

19 GENERAL VERRILLI: Well, actually what we
20 are advocating here, Your Honor, is that the Court can
21 make categorical judgments, not pure case by case
22 factual judgments. We just think there is more than one
23 category. There are salient differences between a
24 situation like this one, in which there is no connection
25 to the United States at all, or the situation like the

1 one Justice Alito raised about an American corporation.
2 And there are also cases in which the suit is against a
3 direct perpetrator.

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

6 GENERAL VERRILLI: Well, I think the
7 categories are evident from the kinds of cases that have
8 been brought. But certainly, the views of the State
9 Department do deserve deference.

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

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

19 JUSTICE SOTOMAYOR: Either it exists or it
20 doesn't.

21 GENERAL VERRILLI: It depends on a weighing
22 of interests, I believe, Your Honor, and that there are
23 interests that cut against recognizing causes of acts in
24 this area, and that's what Sosa said.

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

9 GENERAL VERRILLI: Well, if no one ever came
10 to the United States.

11 JUSTICE SOTOMAYOR: Well, assuming someone
12 came. So how is that different from here.

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

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

20 GENERAL VERRILLI: Well, if it's an
21 individual perpetrator like Filartiga we think that it
22 is because it's the direct perpetrator.

23 JUSTICE BREYER: If in fact in Filartiga it
24 was done through a corporation -- the torture -- now?

25 GENERAL VERRILLI: If the -- if the -- it

1 was -- I think torture has to be --

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

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

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

13 GENERAL VERRILLI: If they do it directly.
14 If they are the direct violator of a norm that they can
15 violate directly, then yes they can.

16 JUSTICE BREYER: Okay. But if it's aiding
17 and abetting?

18 GENERAL VERRILLI: Then if it's a foreign
19 corporation and it occurred entirely in a foreign
20 country.

21 JUSTICE BREYER: Yes. So it turns on that.
22 And what I really want to know is what is the difference
23 between that? Is it like the criminal law difference of
24 accessory versus principle or what?

25 GENERAL VERRILLI: May I answer,
Alderson Reporting Company

1 Mr. Chief Justice?

2 CHIEF JUSTICE ROBERTS: Briefly, yes.

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

13 CHIEF JUSTICE ROBERTS: Thank you, counsel.

14 Mr. Hoffman you have eight minutes
15 remaining.

16 REBUTTAL ARGUMENT OF PAUL L. HOFFMAN

17 ON BEHALF OF THE PETITIONERS

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

20 First, on the Bradford opinion. I think if
21 you read the diplomatic materials that we placed before
22 the Court, it's absolutely clear that what the British
23 were concerned about was pillaging and plundering on
24 land in the Sierra Leone colony. They were seeking
25 redress for those things, for destroying libraries, for

1 destroying Freetown, not just about things that happened
2 on the high seas and not just about things that happened
3 in territorial waters. It's obviously clear that that's
4 true, but obviously you have those materials and you can
5 read it. And Attorney General Bradford said there was
6 no doubt that there was an ATS action.

7 JUSTICE GINSBURG: There was also a U.S.
8 perpetrator.

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

16 I would like to give a hypothetical that I
17 think reveals why the U.S. Government position should
18 not be accepted.

19 Suppose there is an Iranian corporation that
20 secretly supplies poison gas to the current Syrian
21 regime in order to kill tens of thousands of Kurdish
22 citizens. And suppose after the Asad regime is
23 overthrown, those -- the documents revealing that poison
24 gas transfer to the Syrian regime was made public and
25 that Iranian corporation does business in the United

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

1 JUSTICE GINSBURG: Given the court's recent
2 decisions on personal jurisdiction, and I have in mind
3 particularly the Goodyear Tire case, is there personal
4 jurisdiction in this case or in the case of your
5 hypothetical?

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

14 Now if the defendants have not in fact
15 waived personal jurisdiction, then presumably the lower
16 courts would apply the tests that this Court has
17 established or in the 2011 decisions. And the same
18 would be true of forum non conveniens or any of the
19 other defenses. They have raised other defenses in this
20 case that have not been fully litigated. So my basic
21 position is that the Sosa framework actually is --
22 works. It has actually weeded out cases. These
23 alternative doctrines have weeded out cases, but the
24 court should not accept the categorical positions
25 asserted by either of the Respondents, which are the

1 broadest categorical positions even rejected by the
2 government, or the government's modified categorical
3 position. Those kinds of issues can be dealt with
4 within well-established doctrines where lower courts
5 have a body of jurisprudence that they can use to do
6 this.

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

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

17 MR. HOFFMAN: Well, the United Kingdom and
18 Netherlands have obviously asserted this position. But
19 the Netherlands have asserted that position while at the
20 same time 21 days after the argument in February a Dutch
21 court gave damages to a Palestinian doctor for wrongful
22 imprisonment and torture that occurred in Libya against
23 two Libyan defendants that were not even present in the
24 courtroom.

25 JUSTICE SCALIA: It may have been wrong.

1 MR. HOFFMAN: Well, it may have been but
2 actually it seems perfectly consistent with Dutch law,
3 it is consistent with the exercise of universal
4 jurisdiction in many pieces of legislation --

5 JUSTICE SCALIA: I would rather listen to
6 the Dutch government than one, one Dutch judge, frankly.

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

24 JUSTICE KAGAN: And isn't that really the
25 way to reconcile the Dutch positions? The Dutch are

1 objecting because they think they have a fair forum, but
2 when the judges were faced with a case arising from
3 Libya, they thought that there was no fair forum there.
4 And that's the difference, that in one case there was
5 exhaustion and in the other there wasn't.

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

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

16 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

17 The case is submitted.

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

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