

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 ESTHER KIOBEL, INDIVIDUALLY AND ON:

4 BEHALF OF HER LATE HUSBAND, :

5 DR. BARINEM KIOBEL, ET AL., :

6 Petitioners : No. 10-1491

7 v. :

8 ROYAL DUTCH PETROLEUM CO., ET AL. :

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10 Washington, D.C.

11 Monday, October 1, 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 L. HOFFMAN, ESQ., Venice, California; on
18 behalf of Petitioners.

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

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

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25

	C O N T E N T S	
		PAGE
1		
2	ORAL ARGUMENT OF	
3	PAUL L. HOFFMAN, ESQ.	
4	On behalf of the Petitioners	3
5	ORAL ARGUMENT OF	
6	KATHLEEN M. SULLIVAN, ESQ.	
7	On behalf of the Respondents	22
8	ORAL ARGUMENT OF	
9	DONALD B. VERRILLI, JR., ESQ.	
10	For United States, as amicus curiae,	40
11	supporting the Respondents	
12	REBUTTAL ARGUMENT OF	
13	PAUL L. HOFFMAN, ESQ.	
14	On behalf of the Petitioners	51
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1
2
3
4
5
6
7
8
9
10
11
12
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14
15
16
17
18
19
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22
23
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 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 -- and
11 the 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 I mean 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 -- it's unlikely
2 that -- that that would come up, because the suit could
3 be 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 -- that the case should be
11 dismissed, as I understand the U.S. position in past
12 cases like Doe v. Exxon, is that -- 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 -- 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 -- the -- yes, Justice.

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

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 guard -- safeguards the interests of third
8 states before the United States can --

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

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 -- 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. Their -- personal jurisdiction has not been
16 contested and no one made a forum non conveniens motion
17 in this particular case. Now, there was a forum non
18 conveniens motion in a companion case. So -- but I
19 think that 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, the -- if we're talking about the way that
8 the ATS should be structured, our belief is that forum
9 non conveniens, generally speaking, is going to deal
10 with the problem -- the problems that the Court has
11 raised. If -- if the Court believes that the Wiwa
12 decision was wrong or that that doctrine's wrong, that
13 doctrine should be changed.

14 JUSTICE GINSBURG: May I ask you a question
15 about your reliance on the Alien Tort Statute, but 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 -- the claim for relief
23 is the U.S. common law implementing the international
24 law?

25 MR. HOFFMAN: Well, I think this Court in
Alderson Reporting Company

1 Sosa said that its analysis did not necessarily apply to
2 1331, and I think that's because of the history of 1350.

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

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

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

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

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

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

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

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

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

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

25 This Court found, based on the history and
Alderson Reporting Company

1 intent of the Congress, that there was no reason to wait
2 for any congressional authorization to go forward on
3 those claims, and -- and therefore it was available to
4 bring claims. So --

5 JUSTICE GINSBURG: Well, maybe they had --

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

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

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

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

1 Tort Statute claim; he would be sent to the state courts
2 if he could -- the state courts were open, which is
3 exactly the opposite of the purpose of the Alien Tort
4 Statute, the fundamental known purpose of the Alien Tort
5 Statute.

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

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

17 JUSTICE GINSBURG: Yes, but under the Alien
18 Tort Statute.

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

1 U.S. citizen.

2 Can I reserve the balance of my time then?

3 CHIEF JUSTICE ROBERTS: You can.

4 Ms. Sullivan?

5 ORAL ARGUMENT OF KATHLEEN M. SULLIVAN

6 ON BEHALF OF THE RESPONDENTS

7 MS. SULLIVAN: Mr. Chief Justice and may it
8 please the Court:

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

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

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

23 Missing from the discussion you've just had
24 with Mr. Hoffman about possible ways to minimize the
25 dangers of applying the ATS in foreign countries is any

1 mention of Congress. And I'd like to return us to the
2 question presented on this round of the argument, which
3 is: Should the ATS and, Justice Ginsburg, Federal
4 common law be applied to conduct taking place entirely
5 within the borders of a foreign country? And our answer
6 is it should not, under the --

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

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

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

24 JUSTICE GINSBURG: But then you're at least
25 saying --

1 JUSTICE KENNEDY: Well, maybe it's just
2 history and background, but I would really like you to
3 answer Justice Ginsburg's question. Suppose we had
4 granted cert in *Filartiga* before Congress acted?
5 What -- under your position, what should have been the
6 result? I think that was the purport of her question,
7 and I would appreciate an answer to it.

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

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

25 MS. SULLIVAN: Well --

1 JUSTICE SCALIA: I find that -- you know,
2 extraterritorial means extraterritorial, but -- but you
3 contend that this -- as I think you must -- that this
4 statute applies on the high seas.

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

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

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

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

23 MS. SULLIVAN: At the time.

24 CHIEF JUSTICE ROBERTS: -- capture pirates.

25 MS. SULLIVAN: Our clear -- our position on

1 piracy is this. Even if you think the ATS and Federal
2 common law can extend to conduct on the high seas, which
3 are stateless, a place where no foreign sovereign rules,
4 that does not mean that the ATS and Federal common law
5 can apply to conduct within a foreign sovereign's
6 borders --

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

15 And we have treaties that say there is
16 universal jurisdiction. Other countries take it.

17 MS. SULLIVAN: Justice Breyer --

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

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

1 JUSTICE BREYER: Well, we did explicitly in
2 the torture treaty in respect to that particular
3 incident.

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

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

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

20 MS. SULLIVAN: Criminal is very different
21 from civil. And what we -- the precise argument we are
22 making here is that the presumption against application
23 of U.S. law to conduct within foreign sovereigns -- and
24 remember, the purpose of the presumption,
25 Justice Scalia, is to avoid conflict with foreign

1 because we many think that in rem actions were the
2 typical things contemplated. And as soon as
3 United States v. Palmer comes along, this Court applied
4 the presumption against extraterritorial application of
5 U.S. law to -- the application of the then-extant piracy
6 statute to a foreign-flagged vessel on the high seas.

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

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

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

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

1 Philadelphia, the French ambassador to Britain is
2 attacked in London, but is attacked by a United States
3 citizen, who then comes home to the United States, seeks
4 refuge in the United States. And the French
5 ambassador -- the French ambassador wants to bring an
6 action.

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

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

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

23 MS. SULLIVAN: Because Congress hasn't
24 clearly said so. And the point of the presumption is to
25 avoid all of the judge-made possible qualifications that

1 were discussed earlier: Exhaustion, political question,
2 the possible limitations suggested by the European
3 Union.

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

7 And, Justice Alito, in answer to your
8 question whether --

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

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

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

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

1 ever get to the exhaustion question.

2 MS. SULLIVAN: Correct.

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

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

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

21 Second, there could have been extradition.

22 Third, the point of the Marbois in
23 stimulating the ATS was that if -- if a U.S. citizen
24 attacks the French ambassador on U.S. soil, and we then
25 harbored him, that could have led to an incident of war.

1 But there is no incident of war or conflict posed in
2 your hypothetical because extradition was possible, and
3 State court tort violations -- State law tort -- State
4 court jurisdiction over a transitory tort should
5 have obtained.

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

10 MS. SULLIVAN: Well --

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

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

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

1 found it important to pass the ATS.

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

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

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

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

24 And the most important point about the ATS
25 and Federal common law, even if it were under section

1 1331, Justice Ginsburg, is that it's an application of
2 U.S. substantive and remedial law to another country.
3 And the offense is we're telling the other country that
4 they have to entertain private civil litigation. And
5 there is a difference, Justice Breyer, between criminal
6 and civil --

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

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

13 JUSTICE BREYER: Because?

14 MS. SULLIVAN: -- because he could have been
15 speaking about the high seas.

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

20 MS. SULLIVAN: And he --

21 JUSTICE BREYER: Yes. Go ahead.

22 MS. SULLIVAN: It was Americans, but
23 we -- we think, if properly read, the hostilities of
24 which he spoke was the high seas part of the conduct.
25 It was an American who piloted the French fleet 60 miles

1 from the Iles de Los to the Sierra Leone River. And
2 that was -- if you read grammatically, we think that is
3 what Attorney General Bradford was referring to.

4 JUSTICE KAGAN: But --

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

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

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

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

1 But here the offense is magnified because
2 the allegation is that an English and a Dutch company
3 aided and abetted the Nigerian Government. That is
4 where the offense to the principle against international
5 friction is at its highest. And so if you weren't to
6 adopt our position in full, at a minimum we think you
7 should hold that the presumption applies to foreign
8 cubed cases involving aiding and abetting a foreign
9 Government, where everything is foreign.

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

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

18 MS. SULLIVAN: Well --

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

21 MS. SULLIVAN: Yes.

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

1 in your favor?

2 MS. SULLIVAN: We think there is,
3 Justice Kennedy. And we think the principle of
4 extraterritoriality is -- is essentially a
5 democracy-forcing device to send these questions back to
6 Congress. And if we send it back to Congress --

7 CHIEF JUSTICE ROBERTS: Well, have we
8 crossed that -- we've crossed that bridge already,
9 didn't we, in Sosa?

10 MS. SULLIVAN: You have --

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

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

19 It's far worse to have judges --

20 JUSTICE SOTOMAYOR: But you're asking us to
21 overturn our precedents.

22 MS. SULLIVAN: We --

23 JUSTICE SOTOMAYOR: You're -- you're
24 basically saying *Filartiga* and *Marcos*, *Sosa*, they were
25 all wrong.

1 MS. SULLIVAN: We are not, Your Honor. Sosa
2 did not address the question we have before the Court
3 today.

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

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

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

1 JUSTICE KAGAN: But, Ms. Sullivan, I'm going
2 to read you something from Sosa, which -- it talks all
3 about the rule that it adopts and then it says: "This
4 is generally consistent with the reasoning of many of
5 the courts and judges who faced the issue before it
6 reached this Court. See *Filartiga*." And then it quotes
7 *Filartiga*: "For purposes of civil liability, the
8 torturer has become like the pirate and slave trader
9 before him, an enemy of all mankind."

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

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

22 Thank you.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 Ms. Sullivan.

25 General Verrilli.

1 ORAL ARGUMENT OF DONALD B. VERRILLI, JR.,
2 FOR THE UNITED STATES, AS AMICUS CURIAE,
3 SUPPORTING THE RESPONDENTS

4 GENERAL VERRILLI: Mr. Chief Justice, and
5 may it please the Court:

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

12 JUSTICE SOTOMAYOR: Is that the same -- is
13 that your simple rule? Is that how you want us to
14 rule --

15 GENERAL VERRILLI: Yes.

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

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

1 JUSTICE GINSBURG: What about in your -- you
2 do say in your brief that you think that Filartiga is
3 within the Alien Tort Statute.

4 GENERAL VERRILLI: Yes, we do,
5 Justice Ginsburg.

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

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

16 JUSTICE GINSBURG: Yes, but you -- you don't
17 --

18 GENERAL VERRILLI: And B --

19 JUSTICE GINSBURG: -- you don't offer us a
20 nexus. You don't offer us that reason why Filartiga was
21 okay.

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

1 And I do think when Congress enacted the
2 TVPA, that is what Congress looked to as the salient
3 features of the Filartiga situation that justified --

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

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

11 JUSTICE SCALIA: General Verrilli, the --
12 that's -- that is a new position for the -- for the
13 State Department, isn't it?

14 GENERAL VERRILLI: It's a new --

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

21 GENERAL VERRILLI: Well, Justice Scalia, in
22 a case like this one, in cases under the Alien Tort
23 Statute, the United States has multiple interests. We
24 certainly have foreign relations interests in avoiding
25 friction with foreign Governments; we have interests in

1 avoiding subjecting United States companies to liability
2 abroad. We also have interests in ensuring that our
3 Nation's foreign relations commitments to the rule of
4 law and human rights are not eroded.

5 JUSTICE SCALIA: I understand that, but --

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

10 JUSTICE SCALIA: It -- it was --

11 GENERAL VERRILLI: And we have done so.

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

17 GENERAL VERRILLI: Well, because we think
18 they are persuasive, Your Honor.

19 JUSTICE SCALIA: Oh, okay.

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

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

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

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

25 JUSTICE SOTOMAYOR: You are disavowing --

1 you are disavowing any forum of necessity view of the
2 ATS? You are disavowing what other countries do or say
3 with respect to citizens -- to aliens who are attacked?

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

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

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

17 Now, I will say --

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

24 GENERAL VERRILLI: Well, I think it would
25 depend on a weighing of the strength of the interests of

1 the United States, the foreign relations interests of
2 the United States, in applying this narrow category of
3 Sosa norms in order to avoid undermining the
4 credibility --

5 JUSTICE ALITO: Suppose everything is the
6 same except for --

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

17 GENERAL VERRILLI: Congress can always act
18 in this area, Justice Scalia.

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

22 GENERAL VERRILLI: Well, actually what we
23 are advocating here, Your Honor, is that the Court can
24 make categorical judgments, not pure case by case
25 factual judgments. We just think there is more than one

1 category. There are salient differences between a
2 situation like this one, in which there is no connection
3 to the United States at all, or the situation like the
4 one Justice Alito raised about an American corporation.
5 And there are also cases in which the suit is against a
6 direct perpetrator.

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

9 GENERAL VERRILLI: Well, I think the
10 categories are evident from the kinds of cases that have
11 been brought. But -- but certainly, the views of the
12 State Department do deserve deference.

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

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

22 JUSTICE SOTOMAYOR: Either it exists or it
23 doesn't.

24 GENERAL VERRILLI: It depends on a weighing
25 of interests, I believe, Your Honor, and that there are

1 interests that cut against recognizing causes of acts in
2 this area, and that's what Sosa said.

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

12 GENERAL VERRILLI: Well, if no one ever came
13 to the United States.

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

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

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

23 GENERAL VERRILLI: Well, if it's an
24 individual perpetrator like Filartiga we think that it
25 is because it's the direct perpetrator.

1 JUSTICE BREYER: If in the -- in fact in
2 Filartiga it was done through a corporation -- the
3 torture -- now?

4 GENERAL VERRILLI: If the -- if the -- it
5 was -- I think torture has to be --

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

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

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

17 GENERAL VERRILLI: If they do it directly.
18 If they are the direct violator of a norm that they can
19 violate directly, then yes they can.

20 JUSTICE BREYER: Okay. But if it's aiding
21 and abetting?

22 GENERAL VERRILLI: Then if it's a foreign
23 corporation and it occurred entirely in a foreign
24 country.

25 JUSTICE BREYER: Yes. So it turns on that.

1 And what I really want to know is what is the difference
2 between that? Is it like the criminal law difference of
3 accessory versus principle or what?

4 GENERAL VERRILLI: May I answer,
5 Mr. Chief Justice?

6 CHIEF JUSTICE ROBERTS: Briefly, yes.

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

17 CHIEF JUSTICE ROBERTS: Thank you, counsel.

18 Mr. Hoffman you have eight minutes
19 remaining.

20 REBUTTAL ARGUMENT OF PAUL L. HOFFMAN

21 ON BEHALF OF THE PETITIONERS

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

24 First, on the Bradford opinion. I think if
25 you read the diplomatic materials that we placed before

1 the Court, it's absolutely clear that what the British
2 were concerned about was pillaging and plundering on
3 land in the Sierra Leone colony. They were seeking
4 redress for those things, for destroying libraries, for
5 destroying Freetown, not just about things that happened
6 on the high seas and not just about things that happened
7 in territorial waters. It's obviously clear that that's
8 true, but obviously you have those materials and you can
9 read it. And Attorney General Bradford said there was
10 no doubt that there was an ATS action.

11 JUSTICE GINSBURG: There was also a U.S.
12 perpetrator.

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

20 I would like to give a hypothetical that I
21 think reveals why the U.S. Government position should
22 not be accepted.

23 Suppose there is -- there is an Iranian
24 corporation that secretly supplies poison gas to the
25 current Syrian regime in order to kill tens of thousands

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

1 jurisdiction, those have not really been litigated.
2 Whether they have been waived or not is something that
3 the lower courts can deal with. Whether they apply the
4 lower court --

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

10 MR. HOFFMAN: One of the problems that --
11 that we would have, Justice Ginsburg, in answering that
12 question is that there is no record about the contacts
13 between these defendants and -- and the jurisdiction in
14 2002. The Wiwa case, for example, where it was
15 litigated was dealt on a factual record that went back
16 to 1996 and 1997. So there is no record here about
17 personal jurisdiction because it hasn't been asserted.

18 Now if the defendants have not in fact
19 waived personal jurisdiction, then presumably the lower
20 courts would apply the tests that this Court has -- has
21 established or in the 2011 decisions. And the same
22 would be true of forum non conveniens or any of the
23 other defenses. They have raised other defenses in this
24 case that have not been fully litigated. So -- so my
25 basic position is that the Sosa framework actually is --

1 works. It has actually weeded out cases. These
2 alternative doctrines have weeded out cases, but the
3 court should not accept the categorical positions
4 asserted by either of the Respondents, which are the
5 broadest categorical positions even rejected by the
6 Government, or the Government's modified categorical
7 position. Those kinds of issues can be dealt with
8 within well-established doctrines where lower courts
9 have a body of jurisprudence that they can use to do
10 this.

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

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

21 MR. HOFFMAN: Well, the United Kingdom and
22 Netherlands have obviously asserted this position. But
23 the Netherlands have asserted that position while at the
24 same time 21 days after the -- the argument in
25 February a Dutch court gave damages to a Palestinian

1 doctor for wrongful imprisonment and torture that
2 occurred in Libya against two Libyan defendants that
3 were not even present in the courtroom.

4 JUSTICE SCALIA: It may have been wrong.

5 MR. HOFFMAN: Well, it may have been but
6 actually it seems perfectly consistent with Dutch law,
7 it is consistent with the exercise of universal
8 jurisdiction in many pieces of legislation --

9 JUSTICE SCALIA: I would rather listen to
10 the Dutch Government than one, one Dutch judge, frankly.

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

1 should accept international opposition and exhaustion of
2 local remedies.

3 JUSTICE KAGAN: And isn't that really the
4 way to reconcile the Dutch positions? The Dutch are
5 objecting because they think they have a fair forum, but
6 when the judges were faced with a case arising from
7 Libya, they thought that there was no fair forum there.
8 And that's the difference, that in one case there was
9 exhaustion and in the other there wasn't.

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

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

20 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

21 The case is submitted.

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

24

25

A				
abandoned 47:13	51:14 52:10	aid 10:23	48:4	15:19 18:1
abetted 22:12	actions 18:6	aided 22:11 37:3	Americans	19:19 26:5
37:3 41:9,24	28:18,23 29:1	41:9,24	35:22	28:14 29:7
abetting 36:21	active 53:24	aider 42:24	amici 13:10	31:12 36:18
37:8,15 41:17	activity 22:11	aiding 36:21	amicus 1:23	37:12 38:17
50:14,21 53:10	actor 48:15	37:8,15 41:17	2:10 12:23	51:14 52:16
53:15	acts 13:6 38:12	50:14,20 53:10	41:2	53:9 54:3,20
abettor 42:24	41:24 49:1,6	53:15	analysis 18:1	applying 22:25
ability 19:5	51:10	Al 1:5,8 15:6	announced	39:13 47:2
able 9:22 15:19	actual 42:13,14	alien 13:7 15:5	46:12	51:13
above-entitled	42:24,25 50:13	17:15,20 19:7	anomaly 21:7	appreciate 24:7
1:13 57:23	ad 7:13	19:23 20:13,23	answer 14:9	approach 37:12
abroad 8:23	add 11:6	20:25 21:3,4	19:18 20:19	appropriate
10:9 21:11	additional 8:16	21:17,19,20	23:5 24:3,7	39:13
23:13 44:2	address 23:18	32:7 36:9	31:7 36:25	appropriateness
absence 46:7,16	39:2,17,20	37:24 41:6	39:9 41:18	31:13
absent 24:16	41:7,22	42:3 43:22	50:11 51:4,16	approval 40:10
absolutely 22:21	addressed 39:6	53:9,13 55:11	answering 19:19	area 19:16 24:22
26:20 52:1	adjudicate 6:24	56:19 57:14	49:7 54:11	39:13 47:11,18
acceded 26:24	adjudicated 4:5	aliens 21:22	antecedents	49:2
27:9	4:6	46:3	25:13	areas 31:10
accept 8:11	administration	Alito 8:18,25 9:5	anybody 16:2	argue 29:9
33:23 36:11,11	44:16	9:16,24 12:15	apartheid 31:19	arguing 13:10
55:3 56:25	administrative	15:22 16:5,9	apparently 13:9	argument 1:14
57:1	8:7	28:21 31:7	appeal 9:13,17	2:2,5,8,12 3:3
accepted 9:20	adopt 37:6 42:6	34:13,17 45:4	28:7	3:7 16:13 22:5
52:22 53:16	44:21	46:18 47:5	appeals 43:20	23:2,9,14
access 21:23	adopted 6:22	48:4	APPEARAN...	27:11,21 29:22
accessory 51:3	32:16	allegation 36:21	1:16	39:21 41:1
accused 27:13	adopts 40:3	37:2 41:8	appears 13:5	51:20 55:24
acknowledge	advice 31:6	alleged 3:13	Appendix 22:20	56:25
31:11	advised 30:16	10:21,24 22:11	apples 33:12,12	arguments
act 15:13 21:16	advocating	34:7,15 41:24	applicable 23:15	14:14 15:14
23:21 33:22	47:23	allowed 32:17	application	53:17
47:17,20 48:15	affirmative 3:24	allowing 8:20	13:17 24:15,19	arises 21:21
acted 24:4	19:20 22:18	allows 28:10	24:21,22,23,24	28:3
acting 36:23	affirmed 22:19	alternative 5:10	27:22 28:16	arising 57:6
action 14:1 18:7	afford 41:6	53:23 55:2	29:4,5 35:1	asked 46:9,19
18:16 21:25	Africa 31:21	ambassador	36:17 38:18	56:15,17
29:15,19 30:6	African 31:19	20:21,25 25:16	applied 23:4	asking 26:9
30:8 31:13,21	aftermath 34:6	30:1,5,5,9	26:10 28:10	38:20 46:19
36:16 37:23	ago 53:20	32:24 49:9	29:3,11 31:15	47:11
40:17 41:7,22	agree 15:7 24:11	ambassadors	53:23 55:11	aspect 27:8
43:9 45:3 46:6	25:21 36:16	18:22 25:11	applies 25:4,6	Assad 53:1,10
48:20 49:20	40:14,15	49:5	31:11 37:7	assailant 30:15
	agreed 14:3	American 35:19	38:12 39:14	33:17
	ahead 35:21	35:25 45:9,13	apply 9:8 15:9	assault 25:11

<p>32:20 assert 5:7 asserted 54:17 55:4,22,23 assess 49:18 assume 5:22,24 9:20 36:10 37:22 assumed 10:1 assuming 33:23 47:19 49:14 asylum 3:11 4:16 21:9 53:5 53:8 atrocities 21:12 ATS 17:8 22:25 23:3 24:9,12 25:13 26:1,4 29:18 30:7,20 32:17,23 33:21 34:1,6,9,24 36:18 40:16 43:9,9 46:2 51:14 52:10 attack 25:14 30:9 attacked 20:22 20:24 29:25 30:2,2 46:3 attacker 32:10 attacks 18:22 32:24 49:5,9 53:6 attorney 36:3 40:18 52:9 Australia 28:14 authority 36:24 authorization 20:2 availability 46:14 available 17:18 18:8 20:3,15 52:18 avenues 13:8 avoid 27:25 30:25 45:16</p>	<p>47:3 avoiding 43:24 44:1 a.m 1:15 3:2 57:22</p> <hr/> <p style="text-align: center;">B</p> <hr/> <p>B 1:21 2:9 41:1 42:18 back 28:19 32:3 38:5,6 47:15 54:15 background 24:2 bad 47:13 balance 22:2 44:7 BARINEM 1:5 based 8:4 19:25 53:21 basic 54:25 basically 13:2 38:24 39:7 basis 4:19 36:8 57:11 began 27:11 beginning 5:16 5:17 behalf 1:4,18,20 2:4,7,14 3:8 22:6 41:17 51:21 belief 17:8 believe 5:1 6:7 6:11 14:15 23:17 24:20 29:17 48:25 believed 9:10 18:4,20 believes 17:6,11 belong 16:6 best 35:10 52:18 better 27:19 37:11 39:20 big 16:11 Blackstone 25:11</p>	<p>bodies 55:18 body 7:2 23:19 55:9 Bolchos 34:10 borders 23:5 26:6 borrow 13:2 Bradford 35:8 35:10 36:3 51:24 52:9 Breyer 11:3,11 11:17,20,23 12:2,10,17 26:7,17,18,23 27:1,4,17 35:5 35:7,13,16,21 50:1,6,10,20 50:25 bridge 38:8 brief 8:10 12:23 17:5 18:4 23:9 24:12 27:4 42:2 46:21 56:21 Briefly 51:6 bring 11:9 20:4 30:5 50:15 bringing 31:13 Britain 30:1 35:18 British 52:1 broad 29:22 broadest 55:5 brought 8:3,19 48:11 Brujaj 15:6 bulldozers 10:24 business 53:4</p> <hr/> <p style="text-align: center;">C</p> <hr/> <p>C 2:1 3:1 cahoots 12:3 California 1:17 called 11:24 candidly 36:6 canon 24:15</p>	<p>capture 25:24 care 23:19 carried 50:13 case 3:4,11 4:7 5:9,9 6:7,15 8:14,18,20 9:1 9:10 10:5,17 12:13 13:24 14:10 15:2,6 16:6,6,17,18 16:25 17:1,5 22:9,17 27:6 28:9 29:23,24 30:13 31:19 36:12,15 39:6 41:18 42:14 43:22 45:2,5,5 45:7,10,11,13 45:19,20,24 46:21 47:10,21 47:21,24,24 49:9 53:7,8,8 53:12,18 54:7 54:8,8,14,24 56:12,14,15,17 57:6,8,21,22 cases 5:13 7:14 9:12 13:4 26:19 34:9 36:11 37:8 41:10 43:8,19 43:22 48:5,10 55:1,2,12 categorical 37:12 47:24 55:3,5,6 categories 40:12 48:8,10 category 41:10 47:2 48:1 Caterpillar 10:21 cause 14:1 29:15 40:17 41:7,22 45:3 46:6 48:20 49:19 51:14</p>	<p>causes 29:18 43:9 49:1 century 57:14 57:16 cert 24:4 certain 18:5,20 18:20 40:11 certainly 25:13 39:5 43:24 48:11 certify 9:17 chance 33:9 53:19 change 12:14 changed 17:13 Chief 3:3,9 6:13 22:3,7 25:19 25:24 38:7,11 38:15,15 39:9 40:23 41:4 44:20 45:1 51:5,6,17,22 55:19 57:20 Circuit 16:22 22:18 37:23 cite 10:17 citizen 13:6 20:24 21:7,11 22:1 30:3,10 32:11,23 citizens 8:23 10:9 46:3 53:1 City 25:15 civil 26:25 27:8 27:19,21 29:15 30:21,21 35:4 35:6 40:7,17 56:23 civilized 25:21 claim 17:17,22 18:18 20:23 21:1 32:19 53:9 claims 5:20 6:24 7:19 20:3,4,16 20:17,19 21:23 class 36:15</p>
---	---	--	---	--

<p>clear 4:23 15:3 24:16 25:20,25 37:16 45:2 52:1,7 53:14 clearly 6:24 9:8 13:16 30:24 clients 16:14 closely 4:10 Cohen 9:22 colony 52:3 come 8:2 36:7,7 46:20 47:12 comes 7:18 29:3 30:3 comity 31:12 53:25 commenced 4:10 Commission 12:23 commit 57:15 commitment 45:17 commitments 44:3 commits 5:3 committed 6:5 common 17:17 17:23 18:6,14 18:24,25 19:2 19:13,17 23:4 24:10,13 25:8 26:2,4 29:19 34:25 40:16 48:20 Commonwealth 14:1 communities 53:7 companies 44:1 45:9 companion 16:18 22:17 company 22:11 37:2 45:13,16 comparable 45:8 51:8</p>	<p>competing 44:7 complaint 3:13 complications 10:10 compromised 44:23 concede 25:5 concern 51:13 concerned 52:2 concerns 39:24 51:12 53:22,24 conduct 22:12 23:4,23 25:12 26:2,5 27:14 27:23 34:20 35:24 39:14,15 41:7,23 conflict 27:25 28:3,4 33:1,18 34:21 Congress 20:1 21:14 23:1,19 23:20 24:4 28:22 30:23 31:4 32:4,5,6,9 33:19,25 38:6 38:6,12 39:12 40:20 43:1,2 47:17,19 congressional 18:7 20:2 21:21 24:16 connection 4:13 4:17 41:11 42:8 45:12,14 45:22 46:7,16 48:2 49:17,18 49:22 51:15 consequences 10:14 27:11 consider 8:12 14:1 considerably 11:5 considered 18:14 consistent 40:4</p>	<p>44:9 56:6,7 constable 25:15 constitutes 7:2 contacts 54:12 contemplated 29:2 30:7 contemplating 28:22 contend 25:3 contested 16:16 context 19:7 contingent 40:18 conveniens 5:12 8:4 16:16,18 16:23 17:3,4,9 53:25 54:22 convention 27:9 corporation 5:3 5:4 6:5 7:24 12:3,16 36:16 41:8,17,23 45:5,21 48:4 50:2,23 51:15 52:24 53:4 corporations 6:8 12:18 36:19 55:15 correct 24:9 32:2 49:11 57:16 correctly 23:9 Corrie 10:21 counsel 12:22 39:4 51:17 57:20 countervailing 51:13 countries 5:7 6:16 7:4 13:9 14:2 22:25 25:21 26:16 29:20 38:18 39:25 46:2 country 5:18 12:5 13:6,7 19:4 23:5</p>	<p>24:23 26:13 29:9 33:17 34:14 35:2,3 50:24 course 8:15 31:14 court 1:1,14 3:10 5:5,18 6:12 8:12,20 8:25 9:9,16 10:25 12:13 15:12,17 16:23 17:10,11,25 18:6 19:1,12 19:14,25 20:15 20:16,17 22:8 22:16 27:12 29:3 31:22 32:20 33:3,4 33:21,25 39:2 40:6 41:5 45:3 45:19,21,23 47:23 52:1 53:20 54:4,20 55:3,25 57:12 courtroom 56:3 courts 3:15,17 7:11,15,19,20 7:22 11:1 16:7 18:7 19:4 21:1 21:2,23 28:23 31:5,10,11 40:5 43:20 53:16,16 54:3 54:20 55:8 court's 54:5 covered 23:21 25:18 28:18 29:13 credibility 45:17 47:4 criminal 6:12 27:18,20 30:21 35:5 51:2 crossed 38:8,8 cubed 37:8 curiae 1:23 2:10</p>	<p>41:2 current 24:9 44:15 52:25 customary 19:3 cut 49:1</p> <hr/> <p style="text-align: center;">D</p> <hr/> <p>D 3:1 damages 40:18 40:19 55:25 dangers 22:25 Darrell 34:10 day 53:11,13 days 18:16 55:24 de 36:1 deal 17:9 53:23 54:3 57:14 dealt 53:20 54:15 55:7 decide 7:5,13,14 7:19 9:9 45:23 46:22 decided 17:6 18:16 deciders 7:21 decides 7:2 deciding 31:5 decision 7:15 9:14 15:4 17:12 39:16 decisions 47:16 54:6,21 deemed 15:17 defendant 13:5 16:11 23:23 41:9 45:4 defendants 3:14 3:15 4:17,20 54:13,18 56:2 defense 3:22,24 22:18,22 defenses 5:17 54:23,23 defer 44:15 deference 44:23 48:12</p>
--	---	---	---	---

defined 13:16	directed 34:15	E 2:1 3:1,1	events 4:14,16	41:7,23
definitively 46:20	direction 34:18	earlier 31:1	4:18 5:20	extraterritori...
deleterious 8:21	directly 39:6 46:10 50:15,17	effect 8:21 48:15	evidence 33:18	20:20 29:10
democracy-fo... 38:5	50:19	effects 4:9	52:18	37:25 38:4
denial 9:13	disagree 15:24	eight 51:18	evident 48:10	39:21 52:14
Department 1:22 8:19 11:7	disavowing 45:25 46:1,2	53:20	exactly 21:3	Exxon 9:12
31:6,17,20	discussed 31:1	either 13:5 15:19 48:15,22	27:10 30:7	<hr/>
43:13 47:12,12	discussion 22:23	55:4	32:6 39:15	F
47:21 48:8,12	dismiss 3:25 10:25 11:1	enacted 43:1	52:16	faced 40:5 57:6
depend 5:19	dismissed 9:11 29:23 56:15	enacting 23:20	example 6:7	fact 6:5,10 7:17
46:22,23,25	disputes 16:2	enclaves 19:15	10:21 28:11	12:2 15:4
depends 15:11	distinction 19:23 26:20	enemy 40:9	53:12 54:14	16:10 18:10
48:21,24	district 8:20,25 9:16 16:23	enforce 18:8 19:5,6	exception 46:11	20:18 26:12
deported 36:24	31:22	enforcing 6:12 14:4 19:10	exceptions 19:13	33:7 40:13
deserve 48:12	doctor 56:1	engines 7:15	exclude 23:16	44:24 50:1
design 21:21	doctrine 8:13 9:8,14 10:19	England 13:13	Excuse 31:9,9	54:18 55:16
desire 7:18	11:15 17:13	English 22:10 37:2 49:9	Excuse 31:9,9	facts 14:10 39:5
destroy 26:13	32:16 53:14	ensuring 44:2	exempt 53:13	factual 47:25
destroying 52:4 52:5	doctrines 5:10 5:12 8:4 31:12	entering 25:15	exercise 43:6 56:7	54:15
determinant 46:5	53:23 55:2,8	entertain 15:1 35:4	exhaust 14:11 14:15	failure 14:10
determine 7:23	doctrine's 17:12	35:4	exhausted 13:7	fair 15:24,25
determined 22:17	documents 53:2	entire 26:13	exhaustion 8:7,9	16:3 57:5,7
device 38:5	Doe 9:12	entirely 22:13 23:4,19 50:23	8:13,15 14:6	fairly 13:16
dictator 26:12	domestic 7:11 13:7	51:15	14:14,22 15:8	fall 11:8 12:16
difference 30:9 30:12 32:9	DONALD 1:21 2:9 41:1	entitled 44:23	15:12,18 31:1	falls 56:24
35:5 45:10	documents 53:2	equivalent 26:12,14	31:12 32:1	familiar 18:11
51:1,2,7 57:8	Doe 9:12	era 29:11 34:3,5 35:11 52:19	57:1,9	Fanny 34:10
differences 36:14 48:1	domestic 7:11 13:7	Erie 19:14,14	exist 4:11 45:10	far 19:21 38:19
different 6:16 12:20 13:12	DR 1:5	eroded 44:4	existence 12:11	Farben 53:12,13
27:20 29:24	driven 53:5	ESQ 1:17,19,21 2:3,6,9,13	existing 20:10 44:9	farther 15:5
31:25 32:10	Dutch 1:8 3:4 15:4 22:11	essentially 38:4	exists 48:22	favor 38:1
36:12 44:14,21	25:16 37:2	established 54:21 57:13	explain 13:1	fear 27:10,12
44:24 48:18	55:25 56:6,10	ESTHER 1:3	explicitly 27:1	features 43:3
49:15	56:10,11,16,21	ET 1:5,8	exposure 45:9	February 55:25
diplomatic 51:25	57:4,4,11	EU 13:24	expressed 53:22	Federal 7:19
direct 48:6	D.C 1:10,22	European 8:9 12:23 31:2	extend 26:2	14:1 17:17,19
49:25 50:18	<hr/>	56:20,22	extension 24:17	17:21 18:14,15
	E		extradition 30:15,18,19,22	18:18,18 19:11
			32:21 33:2,15	19:13,15,16,17
			extraterritorial 24:15,19,21,22	20:10,15 21:23
			25:2,2 28:16	21:23 23:3
			29:4 36:17	24:10,12 26:1
				26:4 29:19
				34:25 40:16
				48:20
				fee 40:18,19
				field 47:14

<p>figuring 47:8 Filartiga 23:10 23:16,18,18,21 24:4 26:18 36:7,14,22 37:14 38:24 39:11,15,17 40:6,7,10 42:2 42:9,12,20,23 43:3,5,7,8 49:24 50:2,16 55:12 Filartiga's 40:11 filed 31:21 find 25:1 finding 51:13 first 3:4 37:11 39:22 50:15 51:24 fix 31:23 fled 33:8 fleet 35:25 follow 15:15 29:13 46:18 foreclose 28:17 foregoing 46:10 46:10 foreign 8:22 10:10 11:7 19:16 20:25 22:25 23:5 24:23 26:3,5 27:23,25 28:1 28:5 29:9,19 34:14,20 36:21 37:7,8,9 38:18 39:13,25 41:8 41:9,23,25 43:24,25 44:3 45:8,21 47:1,8 47:16 50:22,23 51:9,15 56:15 56:18 foreign-cube 13:23 foreign-cubed 13:4</p>	<p>foreign-flagged 29:6,8 forum 4:19 5:11 8:4 13:8 16:16 16:17,23 17:2 17:4,8 34:23 36:8 46:1,11 46:14,15 53:25 54:22 57:5,7 forums 14:19 forward 8:21 9:2,9,14,21 20:2 found 18:6 19:2 19:15,25 34:1 foundation 7:17 founders 7:18 18:4,10 19:6 founding 29:11 34:3,5 35:11 frames 15:12 framework 53:19 54:25 57:12 France 30:14 33:8 frankly 56:10 Freetown 52:5 French 20:21,24 30:1,4,5,9 32:12,14,14,18 32:18,24 33:9 33:16 35:25 Frenchman 20:22 49:8 friction 37:5 39:25 43:25 45:8 51:9 full 37:6 fully 54:24 fundamental 14:4 21:4 further 18:7 57:19 futile 14:15</p> <hr/> <p style="text-align: center;">G</p> <hr/>	<p>G 3:1 gas 52:24 53:3,6 general 1:21 3:16 17:19 18:13,14,17,24 20:10 28:8 36:3 40:25 41:4,15,19,20 42:4,11,18,22 43:7,11,14,17 43:21 44:6,11 44:17 45:1,7 46:4,13,24 47:17,22 48:9 48:17,24 49:12 49:16,23 50:4 50:8,17,22 51:4,7 52:9 generally 5:8 17:9 40:4 General's 30:17 genocide 57:15 Ginsburg 3:20 4:1,4 8:6 14:18 14:25 16:20,24 17:2,14 20:5,8 21:6,17 22:14 23:3,7,24 26:19 35:1 36:5 42:1,5,6 42:12,16,19 43:4 52:11 54:5,11 Ginsburg's 19:19 24:3 37:20 give 7:22 52:20 given 19:21 26:21 53:19 54:5 glad 25:8 go 8:20 9:9,14 9:22 19:21 20:2 28:4 32:3 35:21 goes 14:5 15:5 16:19</p>	<p>going 9:2,21 17:9 40:1 good 47:8,13 Goodyear 54:7 gotten 53:8 governed 18:22 Government 10:10 12:4 22:12 31:21 36:22 37:3,9 37:17 43:16 52:21 55:6,17 56:10,11,13,14 56:16 Governments 43:25 Government's 55:6 grammatically 36:2 grant 26:20 granted 24:4 ground 25:8 grounds 11:1,2 56:16,18 guard 14:7</p> <hr/> <p style="text-align: center;">H</p> <hr/> <p>happen 9:5 31:17 34:13 happened 4:11 4:12 16:20 23:11,11,15 49:7 52:5,6 harbored 32:25 harboring 33:7 hear 3:3 heard 8:5 49:10 50:10 hiding 33:8 high 24:24 25:4 25:6 26:2 28:1 28:11 29:6,9 35:15,24 52:6 highest 37:5 hiring 50:6 historians 18:3</p>	<p>historical 53:21 history 18:2,3 19:25 21:22 24:2 Hitler 26:11 hoc 7:13 Hoffman 1:17 2:3,13 3:6,7,9 3:23 4:3,6,13 4:24 5:6,19,23 6:1,4,19 7:8 8:1,8,24 9:3,7 9:18 10:3,7,12 10:15,20 11:10 11:13,19,22 12:1,9,12,19 12:24 13:11,14 13:19,22 14:12 14:21 15:3,8 15:11 16:1,8 16:12,22,25 17:4,25 18:19 19:1,12,22 20:6,12 21:14 21:19 22:24 51:18,20,22 52:13 54:10 55:21 56:5,11 57:10 hold 37:7 home 25:15 30:3 homeland 6:22 Honor 28:15,25 32:13 34:2 36:13 39:1 44:18 45:11 47:23 48:25 hostilities 35:23 human 3:12,14 10:22,24 19:8 44:4 55:12 HUSBAND 1:4 hypothetical 5:15 6:3 9:24 30:13 33:2 34:4 46:21 49:8 50:12</p>
--	---	---	---	---

52:20 54:9	25:12	30:25 39:16	26:17,18,19,23	5:24 6:2 8:17
I	interferes 11:7	judgment 44:8	27:1,4,11,17	9:23 10:4,8,13
ICC 12:20	interlocutory	45:23 51:12	27:25 28:6,13	10:16 19:18
identical 45:6	9:13,17	judgments	28:21 29:21	24:1,8 27:11
ignored 31:22	international	47:24,25	30:16 31:7,9	37:14,19,22
Iles 36:1	5:3,25 6:12,23	judicial 15:24	31:16,23 32:3	38:3
imagines 20:20	7:3,7,12,16,25	jurisdiction	33:6,11,13,20	Kennedy's
immunity 47:11	8:11 10:2 13:3	3:16,22,23	34:13,17 35:1	39:11
47:14	13:8 14:5,6,16	4:21 5:7,11,21	35:5,7,13,16	key 28:19 46:5
implemented	14:16 15:15,17	6:6,24 7:5,13	35:21 36:4,5	kill 52:25
18:5	15:18 17:23	11:25 12:7	37:14,19,20,22	kind 11:16
implementing	19:3 25:20	13:25 16:15	38:3,7,11,15	13:23 18:11
17:23	33:18,23 34:6	17:19,22 18:12	38:20,23 39:4	32:6
important 34:1	37:4 39:22	19:21 20:10,23	39:11,19 40:1	kinds 19:5 48:10
34:24	45:16 49:6	21:15 22:15,16	40:23 41:4,12	55:7,15
imported 32:19	53:15,25 57:1	22:18,22 26:16	41:16,21 42:1	Kingdom 6:10
imprisonment	interpreted	26:25 27:8	42:5,6,12,16	6:18 16:3
56:1	40:16	33:4 54:1,6,8	42:19 43:4,11	55:20,21 56:16
incident 25:14	interpreting	54:13,17,19	43:15,21 44:5	56:21
27:3 29:25	38:12	56:8,23,24,24	44:10,12,19,20	Kiobel 1:3,5 3:4
32:9,25 33:1	intervening	jurisdictions 6:8	44:22 45:1,4	know 8:9 9:23
incidents 25:16	39:12	jurisprudence	45:25 46:5,9	14:22 15:4
including 13:10	invalidated	55:9	46:18 47:5,7	17:5 24:21
18:21	56:18	justice 1:22 3:3	47:18,19 48:4	25:1,8 28:9
incrementally	invoked 29:14	3:9,20 4:1,4,9	48:7,13,19,22	31:12 33:21
45:20	involve 10:8	4:22,25 5:14	49:3,8,14,21	35:9 36:25
indication 24:16	involved 10:23	5:22,24 6:2,13	50:1,6,10,20	44:14 47:9,20
individual 23:23	10:24 34:6,11	7:1,20 8:6,17	50:25 51:5,6	49:5 51:1
49:24	involves 34:4	8:17,18,25 9:5	51:17,22 52:11	known 21:4
INDIVIDUA...	45:21	9:16,23,23	54:5,11 55:14	Kurdish 53:1
1:3	involving 37:8	10:4,8,13,16	55:19 56:4,9	
inform 39:15	Iranian 52:23	11:3,11,17,20	57:3,20	L
injury 34:14,15	53:4	11:23 12:2,10	Justice's 39:9	L 1:17 2:3,13
34:19,22	issue 8:16 19:9	12:15,17,21,22	justification	3:7 51:20
instance 37:11	19:10 39:6	12:25 13:12,15	45:15	lack 36:17
intend 47:15	40:5 56:22,23	13:20 14:9,18	justified 43:3	land 52:3
intent 20:1	issues 5:9 53:20	14:25 15:7,16		LATE 1:4
interest 14:3	55:7	15:22 16:5,9	K	law 5:3,21,25
49:19	I.G 53:12,13	16:20,24 17:2	KAGAN 15:7	6:23 7:3,16,19
interested 37:19		17:14 18:12,13	29:21 30:16	7:25 8:11 10:2
interests 14:7	J	18:24 19:9,18	31:23 32:3	13:3 14:5,7,16
43:23,24,25	Joint 22:20	19:19 20:5,8	36:4 40:1 57:3	14:16 15:15,18
44:2,7 46:25	JR 1:21 2:9 41:1	21:6,17 22:3,7	Kagan's 49:8	15:18 17:17,23
47:1,8 48:25	judge 56:10	22:14 23:3,7	KATHLEEN	17:24 18:5,6
49:1	judges 38:19	23:24 24:1,3,8	1:19 2:6 22:5	18:14,14,15,15
interference	40:5 57:6	24:18 25:1,7	Kennedy 4:9,22	18:17,21,24,25
	judge-made	25:19,24 26:7	4:25 5:14,22	19:2,3,5,11,13

<p>19:15,17 20:15 21:22 23:4 24:10,11,13,13 24:15 26:2,4 27:13,23 28:5 29:5,14,19,19 32:18,18 33:3 33:14 34:7,11 34:22,23,25 35:2 38:13 39:13,16 40:16 44:4,9 45:16 47:10 48:20 51:2 53:15 56:6 laws 28:8,10 lays 18:4 leader 55:17 leadership 55:18 leaving 32:12 led 32:25 legal 16:2 legislation 56:8 Leone 36:1 52:3 letter 31:22 liability 40:7 44:1 libraries 52:4 Libya 56:2 57:7 Libyan 56:2 light 9:15 limit 39:8 limitations 31:2 limited 7:12 21:20 limiting 13:16 limits 14:6 listen 43:17 47:21 48:7 56:9 listened 31:18 litigate 20:15 litigated 5:13 20:16,17 54:1 54:15,24 litigation 35:4</p>	<p>live 6:21 living 4:15 10:9 53:6 local 8:9,13,15 14:22 57:2 London 30:2,11 long 13:5 longer 56:14 look 22:20 34:22 56:20 looked 43:2 looking 11:4 25:10 looks 15:14 35:17 Los 36:1 lost 19:4 lot 13:22 lower 53:16,16 54:3,4,19 55:8</p> <hr/> <p style="text-align: center;">M</p> <hr/> <p>M 1:19 2:6 22:5 magnified 37:1 maintain 36:18 making 7:16 23:14 27:22 38:13,16 mankind 40:9 Marbois 25:13 29:25 30:13 32:4,22 Marcos 23:12 23:16 36:7 38:24 42:10 43:5,6 match 33:12 materials 51:25 52:8 matter 1:13 5:17 11:5 13:25 37:13 52:15 57:23 matters 33:6 mean 7:11 9:3 12:12,19 15:3 15:11,12,15</p>	<p>16:3 21:20 23:7 26:4,7,8 27:18 30:8,19 31:10 36:6 40:14 50:14 56:20 Meaning 33:7 meaningful 41:10 46:7 means 24:22 25:2 44:22 meant 52:19 members 56:22 mention 8:6 23:1 43:5 mentioned 26:19 51:11 mercenary 33:8 miles 35:25 mind 17:20 33:12 54:6 mini 29:8 minimize 22:24 minimum 37:6 minutes 51:18 Missing 22:23 modern 53:11 53:12 modified 55:6 moment 36:10 Monday 1:11 motion 3:25 4:8 16:16,18 mouth 44:22 Moxon 34:10 multiple 43:23 murdering 53:10</p> <hr/> <p style="text-align: center;">N</p> <hr/> <p>N 2:1,1 3:1 narrow 11:5 47:2 narrower 41:20 nation 7:22 28:5 national 7:14,15 7:20,22</p>	<p>nations 7:19 15:1 18:5,21 19:6 20:15 21:23 27:13,15 29:14 34:11 40:14,15 Nation's 44:3 45:17 necessarily 18:1 necessity 13:9 46:1,11 need 19:21 23:18 39:10,16 39:18 49:18 50:11 57:16 neither 18:15 Netherlands 6:11,18 13:13 14:20 15:10,23 16:3 55:20,22 55:23 never 17:20 27:9 41:17 49:10 56:15,17 new 1:19,19 25:14,15 43:12 43:14 nexus 42:8,13 42:20 48:14,15 48:15,15 49:11 Nigeria 4:12,14 4:18 14:18 15:9 22:13 Nigerian 22:10 22:12 37:3 56:13 non 5:12 8:4 16:16,17,23 17:3,4,9 53:25 54:22 nonavailability 46:15 norm 6:6 7:7,24 17:17 25:20 33:23 50:8,18 norms 6:7 7:3,9 13:3,4 14:4</p>	<p>18:5,8,9,10,12 18:20 19:6,8 29:13 39:22 40:14 45:16,18 47:3 49:6 51:14 55:15 note 27:5 number 6:15,16 13:24</p> <hr/> <p style="text-align: center;">O</p> <hr/> <p>O 2:1 3:1 object 27:7 objected 27:7 objecting 57:5 objections 22:16 objective 26:21 obtained 33:5 obvious 20:13 obviously 14:13 16:4 52:7,8 55:22 occurred 13:6 23:13 30:10,11 32:9 34:7 50:23 56:2 occurs 7:21 34:14 October 1:11 offenders 40:12 offense 35:3 37:1,4 offer 42:19,20 office 30:17 offshore 23:16 Oh 25:7 44:19 okay 6:1 25:7 35:7 42:9,10 42:21,23 44:19 50:7,20 ones 13:10 on/off 49:17 open 21:2 27:13 operation 16:11 opinion 51:24 opposite 21:3 43:18</p>
--	--	--	---	---

<p>opposition 57:1 oral 1:13 2:2,5,8 3:7 22:5 41:1 order 47:3 49:18 52:25 ordinary 34:20 ought 45:3,20 46:6 48:8 overcome 35:12 51:12 override 46:15 overrule 39:10 39:18 overthrown 53:2 overturn 38:21 overturned 16:23,24</p> <hr/> <p style="text-align: center;">P</p> <p>P 3:1 package 8:11 page 2:2 24:12 pages 22:20 Palestinian 55:25 Palmer 29:3 paradigm 25:17 43:8,8 53:21 paradigms 25:11 Paraguay 23:23 Paraguayan 23:22,22 36:23 part 6:2 8:10 10:18 14:4 18:21 19:2 35:24 50:15 55:12 particular 7:3 10:5 16:17 27:2 particularly 54:7 parties 6:25 pass 34:1 39:14 passed 26:9 32:7</p>	<p>PAUL 1:17 2:3 2:13 3:7 51:20 Pennsylvania 20:22 people 53:11 55:14 perfectly 56:6 period 39:12 permit 13:4 40:21 perpetrator 42:14,15,24,25 48:6 49:24,25 52:12,15 person 21:13 personal 3:16,21 3:23 5:11 16:15 22:14,15 22:17,22 53:25 54:6,7,17,19 persuasive 44:18 Petitioners 1:6 1:18 2:4,14 3:8 35:11 51:21 Petroleum 1:8 3:5 Philadelphia 25:14 30:1,10 pieces 56:8,12 pillaging 52:2 piloted 35:25 piracy 18:21 25:12,17 26:1 28:17,21 29:5 29:11,12 33:22 49:4 pirate 26:11,14 40:8 pirates 25:24 26:10,11 28:23 33:20,24,24 40:12 57:13 place 4:18 22:12 23:4 26:3 27:14 32:10 34:19,19,22</p>	<p>placed 51:25 places 5:13 6:20 plaintiff 15:25 23:22 plaintiffs 3:11 4:15 6:15,20 21:20 22:10 53:7 please 3:10 10:17 13:1 22:8 41:5 plundering 52:2 plus 24:12 point 10:14 15:16 21:6 28:19 29:16 30:24 32:22 34:24 44:22 points 13:12 51:23 poison 52:24 53:3,5 policy 8:22 47:8 47:16 56:16,18 political 9:7,14 10:11,13,18 11:1,2,15 31:1 53:24 posed 33:1 position 4:1,7 5:1,1 9:2,11,19 13:24 15:20 20:7 24:5,19 25:25 37:6 43:12,18,18 44:8,14,25 45:2,18 49:18 51:16 52:21 54:25 55:7,18 55:22,23 56:13 56:19 57:11,11 positions 21:24 55:3,5 57:4 possibility 8:8 33:14 possible 4:21 5:6 6:19 22:24</p>	<p>30:19,25 31:2 33:2 45:7 potential 14:19 power 7:23 11:4 precedent 32:17 34:3,5 precedents 38:21 precise 27:21 predecessors 44:13,24 prescriptive 14:2 presence 49:21 present 56:3 presented 23:2 preserved 22:21 presumably 54:19 presumption 24:20 27:22,24 28:3 29:4,10 30:24 35:12 37:7,12 38:11 38:17 52:14,16 pretty 37:16 pre-congressi... 37:23 principle 26:24 28:8,10 37:4 37:25 38:3 51:3 principles 11:5 34:21 prior 47:10 private 35:4 probably 6:15 11:15 37:16 57:10 problem 11:12 11:14 16:19 17:10 problems 17:10 54:10 procedural 13:3 proceed 12:7 17:1 45:20</p>	<p>proceeding 10:4 proceedings 7:9 proclaimed 55:17 project 28:5 40:17 projecting 29:17 proper 23:19 30:14 43:6 properly 6:25 29:23 35:23 proposition 5:15 5:16 protect 9:24 21:25 Protection 15:13 21:16 23:21 protects 28:4 protest 31:20 provide 11:24 20:9 30:20 provided 21:15 45:14 provides 12:25 providing 10:23 provisions 6:11 prudence 31:5 public 53:3 punish 33:16 punitive 40:18 40:19 pure 47:24 purport 24:6 purpose 21:3,4 26:21 27:24 purposes 40:7 52:17 put 44:22</p> <hr/> <p style="text-align: center;">Q</p> <p>qualifications 30:25 qualifies 33:22 quarrel 33:22 question 9:8,14 9:17,25 10:11</p>
---	--	---	--	--

<p>10:18 11:1,2 11:15 14:19 17:14,19,21 19:19 20:10 22:15 23:2 24:3,6 26:8,10 29:23 31:1,8 31:24,25 32:1 37:20 39:2,10 39:11 45:13,19 46:8,9,14,19 48:19 49:4 50:10,14 53:24 54:12 questions 9:21 38:5 57:19 quite 27:5,19 quotes 40:6</p> <hr/> <p style="text-align: center;">R</p> <hr/> <p>R 3:1 race 26:13 radical 57:16 raised 3:22,24 3:24 4:8 5:9 17:11 48:4 54:23 raises 9:21 ratified 11:19,22 reached 40:6 read 35:17,23 36:2 40:2 51:25 52:9 really 16:14 24:2 28:7 46:21 51:1 54:1 57:3 reason 20:1,13 27:10 38:17 42:20 46:6 reasoning 39:6 40:4 reasons 10:6 42:22 REBUTTAL 2:12 51:20 received 3:11</p>	<p>reciprocal 45:9 reciprocity 51:11 recognize 45:3 48:19 recognized 43:10 recognizing 49:1 reconcile 57:4 record 14:13 54:12,15,16 redress 52:4 referring 32:6 36:3 refuge 30:4 32:11 regardless 27:14 regime 52:25 53:1,3,10 rejected 17:2,4 22:17 53:17 55:5 related 4:11 relations 11:8 19:16 43:24 44:3 45:8 47:1 reliance 17:15 relief 13:8 17:22 20:24 rem 29:1 remaining 51:19 remedial 24:10 24:13 35:2 remedies 8:7,9 8:13,15 14:6 14:23 21:24 30:20 32:14 40:15 57:2 remedy 30:14 30:19 32:12 remember 27:24 requirement 5:10,11 11:6 14:23 15:8,13 15:17</p>	<p>reserve 22:2 resident 42:25 respect 7:9 15:20 26:23,25 27:2 32:13 39:19 46:3 52:14 respectfully 34:18 37:11 Respondents 1:20,23 2:7,11 20:19,21 22:6 41:3 43:19 53:18 55:4 57:17 responsibility 44:6,13 restatement 34:21 result 24:6,9 45:6 return 23:1 revealing 53:2 reveals 52:21 reverse 30:13 32:4 34:4 revival 23:10 re-evaluation 57:17 rid 11:11,13 right 3:22 6:16 10:3,7 12:2,8,9 12:12,19 13:11 13:14 14:21 19:14 27:19 31:24 35:7 37:23 38:14 rights 3:12,14 10:22,25 19:8 44:4 55:12 risk 45:8,9 51:9 51:11 River 36:1 ROBERTS 3:3 6:13 22:3 25:19,24 38:7 38:11 40:23</p>	<p>44:20 51:6,17 55:19 57:20 role 3:14 round 23:2 Royal 1:8 3:4 rule 4:8 11:16 13:1,21,23 37:25 40:3 41:13,14 44:3 46:11 rules 13:16 15:18 26:3 40:17 runs 36:6</p> <hr/> <p style="text-align: center;">S</p> <hr/> <p>S 2:1 3:1 safe 25:12 safeguard 8:16 safeguards 14:7 salient 43:2 48:1 satisfy 14:24 15:19 saying 19:20 23:25 32:8 38:24 says 8:25 9:21 11:7 12:18 13:2 25:17 40:3 56:22 Scalia 7:1,20 18:13,24 19:9 24:18 25:1,7 27:25 28:6,13 31:9,16 43:11 43:15,21 44:5 44:10,12,19 47:7,18,19 48:7 56:4,9 Scalia's 44:22 scrutiny 51:10 seas 24:24 25:4 25:6 26:2 28:2 28:11 29:6,9 35:15,24 52:6 Second 16:22 22:18 32:21</p>	<p>36:20 37:23 secretly 52:24 section 34:25 securities 28:10 see 14:23 22:21 27:5 40:6 seek 27:15 30:14 30:15 31:20 33:16 seekers 53:5 seeking 32:11 52:3 seeks 30:3 send 38:5,6 sense 13:18 sent 21:1 serious 10:9 set 13:16 53:20 shake 15:25 Shell 22:15 shifting 40:18 shows 52:16 Sierra 36:1 52:3 sign 11:18 signed 11:20 12:6 significant 56:12 similar 18:9,11 simple 13:1,16 41:13,18 simply 28:17 39:11 simulated 34:5 single 34:3,4,5 situation 9:6 12:10 23:21 39:17 43:3 48:2,3 sky 18:18 slave 40:8 soil 20:25 25:16 32:24 34:7,12 34:20 Solicitor 1:21 30:17 solicitors 43:17</p>
---	--	---	--	--

<p>soon 29:2 34:6,9 sorry 5:23 27:6 27:6 sort 13:8,17 30:8 Sosa 8:12 11:4 18:1,6 19:2,21 19:23 25:10,17 28:16,17 32:5 36:11 38:9,24 39:1,8,18,19 40:2,16 47:3 49:2 53:18 54:25 57:13 Sotomayor 12:22,25 13:12 13:15,20 14:9 18:12 33:6,11 33:13,20 38:20 38:23 39:4,19 41:12,16,21 45:25 46:5,9 48:13,19,22 49:3,14,21 Sotomayor's 15:16 sounds 48:14 South 31:19,21 sovereign 26:3 28:1 41:9,25 47:11,14 sovereigns 27:23 28:1 sovereign's 26:5 51:9 speak 32:4,5 39:10 speaking 5:8 17:9 35:15 speaks 19:24 specific 39:14,23 39:23 50:11,11 specifically 39:22 spoke 35:24 stamp 40:10 standards 14:17</p>	<p>18:23 standpoint 16:13 17:7 started 16:13 state 8:19 11:6 18:15 20:16,17 21:1,2 31:6,17 31:20 32:20 33:3,3,3,14,21 33:25 43:13 47:11,12,21 48:7,12 53:24 stated 5:15 56:18 stateless 26:3 statement 3:21 41:21 states 1:1,14,23 2:10 3:12 4:10 4:11,14,15 5:2 5:4 6:17,23 7:23,24 8:3,19 9:10,21 10:9 10:22 12:3 14:3,8,8 16:7 16:10 17:5,18 18:8 21:7,9,11 21:25 22:10 23:12 24:11,12 24:14 26:24 27:7,12 28:24 29:3 30:2,3,4 30:10 32:11,11 32:15 34:16 41:2,11 42:8 42:13,25 43:16 43:23 44:1,8 45:12,16,22 46:8,16 47:1,2 47:9 48:3 49:10,11,13,22 51:10,16 53:5 53:6 55:16 56:14 57:18 state's 36:23 statute 7:18 11:6 11:8 13:17</p>	<p>15:5 17:15,21 19:7,24,24 20:14,23 21:1 21:4,5,18,19 25:4,6 26:9,21 29:6,18 31:11 32:7 36:9 37:24 39:14 41:6 42:3 43:23 52:18 53:9,14 55:11 56:20 57:14 step 39:22 stimulating 32:23 strength 46:25 stress 29:16 strongly 24:20 structured 17:8 stuff 35:9 subject 3:16 11:5 29:14 subjecting 44:1 45:15 51:9 submit 37:11 submitted 13:10 57:21,23 subsidiary 16:11 substantial 45:12,14 substantive 13:3 24:10,13 35:2 successors 44:20 sue 6:16,17 sued 3:13 5:4,18 6:9,20,21 32:15 33:21,25 sues 23:22 sufficient 45:15 46:15 sufficiently 39:23 suggest 34:21 suggested 31:2 57:17 suggesting 49:7</p>	<p>suggests 8:10 suing 3:18 4:19 17:21 22:10 suit 8:2,5 21:13 22:16 32:18 48:5 Sullivan 1:19 2:6 22:4,5,7 23:8,17 24:8 24:18,25 25:5 25:10,23,25 26:17,23 27:4 27:20 28:12,15 28:25 29:21 30:12,23 31:15 32:2,13 33:10 33:13 34:2,17 35:10,14,20,22 36:5,13 37:18 37:21 38:2,10 38:15,22 39:1 39:9 40:1,13 40:24 super 7:2 supplemental 30:20 supplies 52:24 supporting 1:23 2:11 41:3 suppose 6:13,14 8:18 24:3 45:4 47:5 52:23 53:1 supposed 34:11 Supreme 1:1,14 sure 5:2 7:20 20:14 21:22 switch 49:17 Switzerland 49:9 Syrian 52:25 53:3 systems 15:24 16:2</p> <hr/> <p style="text-align: center;">T</p> <hr/> <p>T 2:1,1</p>	<p>take 15:20,20 21:25 26:16 29:24 57:13 taken 23:18 43:18 45:18 takes 31:16 talked 39:7 talking 12:11 17:7 35:9 48:13,16,18 talks 40:2 Tasmania 12:5 tell 42:9 telling 35:3 tells 8:20 tens 52:25 53:11 term 3:4 territorial 52:7 territoriality 28:8 territory 24:23 34:14 test 48:14 53:21 tests 54:20 Thank 40:22,23 51:17,22 57:20 then-extant 29:5 theoretically 33:14 theory 17:16 20:21 33:24 42:7 thing 11:17 12:4 25:21 35:10 things 23:15 29:2 52:4,5,6 think 5:7,19,23 6:4,14 8:24 9:4 9:7,18,19,19 10:20 11:14 13:19,22 14:12 14:21,25 15:15 15:16 16:1,19 17:25 18:2 19:1,12,14,23 21:6 24:6,9,14 25:3 26:1</p>
--	--	--	---	---

28:16,22 29:1 30:16 32:5 33:6 34:20 35:23 36:2 37:6,10,15,22 38:2,3 42:2,11 42:22 43:1,7,9 44:17,21 45:19 46:13,24 47:25 48:9,17,20 49:24 50:5 51:24 52:21 55:20 56:19 57:5,10 thinking 33:19 third 14:7 25:17 32:22 thought 25:8,19 29:7 57:7 thousands 52:25 53:11 three 25:11 51:23 ties 21:8 time 5:10 19:3 20:11 21:10 22:2 25:23 30:18 32:16 33:19 36:6 55:24 Tire 54:7 today 36:7 39:3 39:16,21 55:13 55:13 today's 26:11,14 40:12 tort 15:5 17:15 17:21 18:6,16 19:7,24 20:13 20:23 21:1,3,4 21:18,19 28:23 32:6,7,15,16 33:3,3,4,15 36:9 37:24 41:6 42:3 43:22 53:9,13 55:11 56:19	57:14 tortfeasor 3:19 torts 19:24 torture 11:18,20 11:23 12:5,6 12:16,18 15:13 21:15 23:20 27:2,9,18 50:3 50:5,6,7,12,13 56:1 torturer 26:12 40:8 torturers 57:15 trader 40:8 transfer 53:3 transitory 32:16 33:4,15 treaties 26:15 30:18 treaty 11:18,21 11:23 12:5,6,7 12:18 27:2 trend 55:12,13 55:16 tribunals 7:12 7:14 tried 32:19 47:10 trouble 49:4 true 52:8,13 54:22 truth 11:14 try 27:13 32:19 turns 50:25 TVPA 23:20 39:14 40:20 43:2 two 34:9 36:10 56:2 typical 29:2	understand 9:11 23:8 28:6 30:20 33:11 44:5 46:22 understanding 40:11 understood 10:1 uniformly 53:17 Union 8:10 31:3 56:21,22 United 1:1,14,22 2:10 3:12 4:10 4:11,14,15 5:2 5:4 6:10,17,17 6:23 7:23,24 8:3,19 9:10,20 10:8,22 12:3 14:8 16:3,7,10 17:5,18 18:8 21:7,9,11,25 22:9 23:11 24:11,12,14 26:24 27:7,12 28:23 29:3 30:2,3,4,10 32:10,11,15 34:16 41:2,11 42:8,13,25 43:16,23 44:1 44:8 45:12,15 45:22 46:8,16 47:1,2,9 48:3 49:10,11,13,22 51:10,16 53:4 53:6 55:16,19 55:21 56:14,16 56:21 57:18 universal 6:6 11:24 13:25 17:16 18:12,23 19:7 26:16,25 27:8 39:23,24 55:14 56:7,23 56:24 unusual 3:18 12:4 upset 35:17,18	urge 34:18 use 37:25 55:9 U.K 14:19 15:10 15:22,22 U.N 55:18 U.S 3:15 5:2,4 6:5,8 8:21,22 8:22 9:11,19 10:23 17:23 20:24 22:1 24:15 25:16 27:23 29:5,15 29:17 30:15 32:23,24 34:7 34:8,11,12 35:2 40:17,17 45:5 51:14 52:11,15,21	48:11 vindicate 21:24 violate 50:19 55:15 violated 7:24 50:9 violating 12:5 violation 5:3,24 6:6 7:3,6,21 10:1,25 17:16 25:20 violations 3:13 3:15 7:9 10:22 33:3 34:7,11 violator 27:13 50:18
W				
V				
			v 1:7 3:4 9:12,22 10:21 29:3 34:10,10 variation 29:24 Venice 1:17 Verrilli 1:21 2:9 40:25 41:1,4 41:15,20 42:4 42:11,18,22 43:7,11,14,21 44:6,11,17 45:1,7 46:4,13 46:24 47:17,22 48:9,17,24 49:12,16,23 50:4,8,17,22 51:4,7 versus 51:3 vessel 29:6,8 victim 15:13 21:7,12,15 23:20 32:14 victims 21:8 view 43:6 44:21 46:1,4 50:16 viewed 19:17 views 44:15	wait 20:1 waive 22:15 waived 4:2,7 54:2,19 walk 47:14 walking 9:25 want 28:19 29:16,22 41:13 44:21 47:20 51:1 wanted 19:6 wants 26:13 30:5 war 32:25 33:1 33:9 Washington 1:10,22 wasn't 37:15 57:9 waters 34:8,12 52:7 way 5:14 11:14 11:18 13:17 16:13,24 17:7 37:24 46:20 57:4 ways 22:24 weeded 55:1,2 weighing 46:25

48:24	York 1:19,19			
welfare 8:22	25:14,15			
well-established				
24:14 53:14	<hr/> 1 <hr/>			
55:8	1 1:11			
went 39:21	10-1491 1:6 3:4			
54:15	10:02 1:15 3:2			
weren't 37:5	11 27:5			
We'll 3:3	11:03 57:22			
we're 12:10 17:7	111 22:20			
20:6 26:9 35:3	112 22:21			
38:13,13 48:17	12 4:8			
48:18,18	1331 17:18,21			
we've 11:19,20	18:2 19:20			
11:22 38:8	20:7 35:1			
wish 28:15	1350 18:2,3			
Wiwa 17:1,11	23:10			
22:17 54:14	1789 20:9 28:22			
words 44:22	49:6			
work 11:15	18th 57:14			
33:15,16 53:19	1996 54:16			
working 37:16	1997 54:16			
works 55:1				
world 5:5,18	<hr/> 2 <hr/>			
12:6 14:2	2 24:12			
27:14,15 40:14	2002 54:14			
40:15 55:13,13	2011 54:21			
55:18	2012 1:11			
worse 37:17	21 55:24			
38:19 39:20	21st 57:15			
worst 28:7	22 2:7			
wouldn't 11:12				
12:16 20:25	<hr/> 3 <hr/>			
30:7 52:15	3 2:4			
wrong 13:1,20				
13:23 17:12,12	<hr/> 4 <hr/>			
23:10,12,13	40 2:10			
38:25 56:4	48 27:5			
wrongful 56:1				
wrongly 17:6	<hr/> 5 <hr/>			
	51 2:14			
<hr/> X <hr/>				
x 1:2,9	<hr/> 6 <hr/>			
	60 35:25			
<hr/> Y <hr/>				
Yeah 6:4 16:1				
years 31:17				
53:20				