No. 16-499

IN THE

Supreme Court of the United States

JOSEPH JESNER et al.,

Petitioners,

v.

ARAB BANK, PLC,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF OF INTERNATIONAL LAW SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI

Amici curiae are scholars of international law who believe that the decision below rests on a fundamental misunderstanding of how international law works. *Amici* have academic expertise and a strong interest in the proper application of international law. A list of *amici* and their qualifications is provided in the appendix.[1]

INTRODUCTION

Petitioners were the victims of terrorist attacks in Israel, the West Bank, and Gaza. They allege that Respondent Arab Bank knowingly and intentionally financed this terrorism through activities in New York. Petitioners also allege that Respondent distributed millions of dollars to terrorists and their families through its New York branch.

Because Petitioners are aliens, they brought their claims under the Alien Tort Statute (ATS), which provides: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. In *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), this Court concluded that the ATS was "enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time." *Id.* at 724. *Sosa* held that federal courts may "recognize private claims under federal common law"

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici curiae* or their counsel contributed money to the preparation or submission of this brief. The parties have consented to this filing.

for violations of modern international law norms that are as well defined and generally accepted as "the historical paradigms familiar when § 1350 was enacted." *Id.* at 732. In footnote 20, this Court added: "A related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual." *Id.* at 732 n.20.

Relying on footnote 20, the Second Circuit majority held in *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), that claims under the ATS could never be brought against corporations because "[t]he concept of corporate liability for violations of customary international law has not achieved universal recognition or acceptance as a norm in the relations of States with each other." *Id.* at 149. Judge Leval disagreed with this conclusion and concurred only in the judgment. He pointed out that the customary international law of human rights "prohibit[s] conduct universally agreed to be heinous and inhumane" but "leaves the manner of enforcement, including the question of whether there should be private civil remedies for violations of international law, almost entirely to individual nations." *Id.* at 152 (Leval, J., concurring in the judgment). Judge Leval wrote, "the majority's contention that there can be no civil remedy for a violation of the law of nations unless that particular form of civil remedy has been adopted throughout the world misunderstands how the law of nations functions." *Id.* at 175.

This Court granted certiorari in *Kiobel* to consider the question of corporate liability but, after oral

argument, asked for additional briefing on the geographic scope of the ATS cause of action. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1663 (2013). In the end, this Court declined to resolve the corporate liability question in *Kiobel* and affirmed the decision below on the ground that the claims did not "touch and concern" the United States "with sufficient force to displace the presumption against extraterritorial application." *Id.* at 1669.

Following this Court's decision in *Kiobel*, the district court dismissed Petitioners' claims against Respondent Arab Bank on the sole ground that, under Second Circuit precedent, "plaintiffs cannot bring claims against corporations under the ATS." *In re Arab Bank, PLC Alien Tort Statute Litigation*, 808 F.3d 144, 148 (2d Cir. 2015) (quoting district court docket entry). On appeal, the Second Circuit panel concluded that this Court's *Kiobel* decision "cast[s] a shadow" on circuit precedent, noting that *Kiobel* "appears to reinforce Judge Leval's reading of *Sosa*, which derives from international law only the conduct proscribed, leaving domestic law to govern the available remedy." *Id.* at 155. But the panel decided to "leave it to either an en banc sitting of this Court or an eventual Supreme Court review to overrule" the Second Circuit's precedent categorically barring corporate liability. *Id.* at 157.

The Second Circuit declined to rehear the case *en banc*. *In re Arab Bank, PLC Alien Tort Statute Litigation*, 822 F.3d 34, 35 (2d Cir. 2016). Judge Pooler dissented. She noted that "the panel majority erred by framing the question in the wrong way: whether there is a 'norm of corporate liability under customary international law.'" *Id.* at 42 (quoting *Kiobel*, 621 F.3d

at 131). Judge Pooler explained: "'International law does not work that way.' Customary international law does not contain general norms of liability or non-liability applicable to actors." *Id.* (quoting William S. Dodge, *Corporate Liability Under Customary International Law*, 43 Geo. J. Int'l L. 1045, 1046 (2012)). This Court granted certiorari.

SUMMARY OF ARGUMENT

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

First, the Second Circuit framed the question as whether there is a general "norm of corporate liability under customary international law." *Kiobel*, 621 F.3d at 131. That question makes no sense, because customary international law leaves the question whether to impose liability to the decision of states. The proper question under customary international law is instead the one this Court framed in *Sosa*: "whether international law extends the scope of liability for a violation of a *given norm* to the perpetrator being sued." *Sosa*, 542 U.S. at 732 n.20 (emphasis added).

Second, the Second Circuit confused limits on particular mechanisms for enforcing customary international law norms with limits on the substantive applicability of the norms themselves. International criminal tribunals generally have been given jurisdiction only over natural persons because many nations have concerns about imposing criminal liability on corporations. In concluding suppression conventions, like the Genocide Convention and the Torture Convention, nations have similarly limited their obligations to prosecute or extradite to natural persons. But these limitations on particular enforcement mechanisms are not limitations on the underlying norms themselves. This is confirmed by the widespread practice of states providing both criminal and civil liability for human rights violations, including corporate violations, in their domestic laws.

ARGUMENT

I. Customary international law prohibits violations of fundamental human rights but does not provide the particular means of enforcing those norms.

Modern international law takes two principal forms: (1) customary international law and (2) international agreements, also known as treaties or conventions. *See* 1 Restatement (Third) of Foreign Relations Law of the United States § 102(1) (1987); Statute of the International Court of Justice art. 38, 59 Stat. 1005, T.S. No. 993 (ICJ Statute).[2] "Customary

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[2] International law also includes "general principles of law." ICJ Statute art. 38(1)(c). These general principles "may be invoked as supplementary rules of international law where

international law results from a general and consistent practice of states followed by them from a sense of legal obligation." 1 Restatement (Third) of Foreign Relations Law of the United States § 102(2) (1987); *see also North Sea Continental Shelf (F.R.G. v. Den., F.R.G. v. Neth.)*, 1969 I.C.J. 3, 44 (Feb. 20) (customary international law requires "a settled practice" and "a belief that this practice is rendered obligatory by the existence of a rule of law requiring it"). Rules of customary international law "have equal force for all members of the international community." *North Sea Continental Shelf*, 1969 I.C.J. at 38. By contrast, a treaty is "an international agreement concluded between States in written form and governed by international law." Vienna Convention on the Law of Treaties, art. 2(1)(a), 1155 U.N.T.S. 331, T.S. No. 58, 8 I.L.M. 679. "Every treaty in force is binding upon the parties to it," *id.* art. 26, but "[a] treaty does not create either obligations or rights for a third State without its consent," *id.* art. 34; *see also* 1 Restatement (Third) of Foreign Relations Law of the United States § 102(3) (1987) ("International agreements create law for the states parties thereto.").

Much international law concerns the rights and obligations of states. *See* 1 Restatement (Third) of Foreign Relations Law of the United States, Part II, Intro. Note (1987) ("The principal persons under international law are states."). But some rules of customary international law and some provisions of treaties apply to natural and to juridical persons. *See id.* ("In principle, . . . individuals and private juridical

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appropriate." 1 Restatement (Third) of Foreign Relations Law of the United States § 102(4) (1987). Examples include the principles of laches and *res judicata*. *See id.* § 102, Comment *l*.

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

Customary international law today prohibits violations of certain fundamental human rights, creating both rights and obligations for persons other than States. *See* 1 Restatement (Third) of Foreign Relations Law of the United States § 702 (1987) (listing customary international prohibitions of genocide, slavery or slave trade, the murder or causing the disappearance of individuals, torture or other cruel, inhuman, or degrading treatment or punishment, prolonged arbitrary detention, systematic racial discrimination, and a consistent pattern of gross violations of internationally recognized human rights).[3] Some of these customary

[3] The Restatement (Third) notes that this list "is not necessarily complete, and is not closed." *Id.* § 702, Comment *a*.

international law norms, like the norm prohibiting genocide, apply to all actors, regardless of state involvement. *See* Convention on the Prevention and Punishment of the Crime of Genocide, art. II, *adopted* Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 (Genocide Convention) (defining "genocide" for purposes of the convention as "any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group"). Others, like the norm prohibiting torture, sometimes apply only to those who act with state involvement. *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1, *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85 (Torture Convention) (defining "torture" for purposes of the convention as pain or suffering "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity").[4] None of these norms applies only to natural and not to juridical persons. *See* Brief for the United States as Amicus Curiae in Support of Petitioners 7, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (First U.S. *Kiobel* Br.) ("At the present time, the United States is not aware of any international-law norm of the sort identified in *Sosa*

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[4] In other contexts, the norm prohibiting torture may apply regardless of state involvement. *See Prosecutor v. Kunarac*, Case No. ICTY 96-23-T & 96-23/1-T, Trial Judgment ¶ 496 (Feb. 22, 2001) (holding "that the presence of a state official or of any other authority-wielding person in the torture process is not necessary for the offence to be regarded as torture under international humanitarian law"); *Prosecutor v. Kunarac*, Case No. ICTY 96-23-A & 96-23/1-A, Appeals Chamber Judgment ¶ 148 (June 12, 2002) (agreeing with the Trial Chamber).

that distinguishes between natural and juridical person. Corporations (or agents acting on their behalf) can violate those norms just as natural persons can.").

Although customary international law establishes norms that *apply* to certain actors in certain contexts, customary international law does not itself provide the means for *enforcing* those norms against the actors to whom they apply. Instead, customary international law generally leaves questions of enforcement to the decision of states. *See* Eileen Denza, *The Relationship Between International Law and National Law*, in *International Law* 423, 423 (Malcolm Evans ed., 2d ed. 2006) ("[I]nternational law does not itself prescribe how it should be applied or enforced at the national level."); Louis Henkin, *Foreign Affairs and the United States Constitution* 245 (2d ed. 1996) ("International law itself . . . does not require any particular reaction to violations of law."); *see also* 1 Restatement (Third) of Foreign Relations Law of the United States § 111, Comment *h* (1987) ("In the absence of special agreement, it is ordinarily for the United States to decide how it will carry out its international obligations."). This Court acknowledged the general relationship between customary international law and domestic law in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), when it noted that "the public law of nations can hardly dictate to a country . . . how to treat [a violation of international law] within its domestic borders." *Id.* at 423.

What is true for customary international law in general is true for the customary international law of human rights as well. The Solicitor General explained during the first round of briefing in *Kiobel* (in a brief also signed by the Department of State) that

"international law . . . establishes the substantive standards of conduct and generally leaves the means of enforcing those substantive standards to each state." First U.S. *Kiobel* Br. 18.

As described in Part III of this brief, states have acted both collectively and separately to enforce customary international law norms prohibiting violations of fundamental human rights. Collectively, states have established international criminal tribunals to enforce certain norms against certain actors during certain conflicts. Collectively, states have also concluded treaties—commonly called "suppression conventions"—in which they agree to prohibit violations of certain norms in their domestic laws and either to prosecute or to extradite individuals who violate those norms. Separately, states have enacted domestic laws to enforce certain norms of international human rights law in ways that are not required by treaty. In doing so, each state has acted according its own policies, priorities, and legal traditions. Some have enacted criminal prohibitions, some have provided civil remedies, and some have done both.

The resulting patchwork of enforcement mechanisms for customary international law norms of human rights does not necessarily extend as far as the norms themselves. The jurisdiction of international criminal tribunals is limited in various ways. Suppression conventions require their parties to take only some actions in response to violations. And the domestic laws of individual states do not provide every possible remedy against every possible violator. But limitations on the enforcement mechanisms that have been created under treaties and domestic law must not

be confused with limitations on the human rights norms themselves. That is a mistake the Second Circuit majority made in *Kiobel*. *See* 621 F.3d at 132-37 (treating limitations on the jurisdiction of international criminal tribunals as limits on the applicability of human rights norms). That is a mistake this Court should not repeat.

II. The proper question is not whether there is a general norm of corporate liability under customary international law, but whether the particular norms at issue distinguish between natural and juridical persons.

In footnote 20 of the majority opinion in *Sosa*, this Court said:

> A related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual. Compare *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 791-795 (C.A.D.C.1984) (Edwards, J., concurring) (insufficient consensus in 1984 that torture by private actors violates international law), with *Kadic v. Karădzíc*, 70 F.3d 232, 239-241 (C.A.2 1995) (sufficient consensus in 1995 that genocide by private actors violates international law).

Sosa, 542 U.S. at 732 n.20. In light of the structure of international law, it makes perfect sense to ask "whether international law extends the scope of liability for a violation of a *given norm* to the

perpetrator being sued." *Id.* (emphasis added). Each norm of customary international law has a different content and scope, and some norms may apply to some actors and not to others. It makes no sense, however, to ask, as the Second Circuit majority did in *Kiobel*, whether there is a general "norm of corporate liability under customary international law." *Kiobel*, 621 F.3d at 131. Customary international law "does not contain general norms of liability or non-liability applicable to categories of actors." William S. Dodge, *Corporate Liability Under Customary International Law*, 43 Geo. J. Int'l L. 1045, 1046 (2012).[5]

Customary international law does, by contrast, contain doctrines of immunity. For example, the International Court of Justice has concluded, after careful review of state practice, that customary international law "require[s] that a State be accorded immunity in proceedings for torts allegedly committed on the territory of another State by its armed forces and other organs of the State in the course of conducting an armed conflict." *Jurisdictional*

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[5] Customary international law does contain rules governing the responsibility of states for internationally wrongful acts. *See* Draft Articles on the Responsibility of States for Internationally Wrongful Acts, Report of the International Law Commission on the work of its fifty-third session, 19 U.N. GAOR Suppl. No. 10, U.N. Doc. A/56/10 (2001), *reprinted in* [2001] Y.B. Int'l L. Comm'n 26, U.N. Doc. A/CN.4/SER.A/2001/Add. 1. However, these rules do not apply to actors other than states. *Id.* General Commentary (4)(d) ("The articles are concerned only with the responsibility of States for internationally wrongful conduct, leaving to one side issues of the responsibility of international organizations or of other non-State entities.").

Immunities of the State (Germ. v. It.), 2012 I.C.J. 97, 135 (Feb. 3). But doctrines of immunity do not affect the applicability of substantive law. To the contrary, the ICJ has made clear that "rules of State immunity are procedural in character" and "do not bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful." *Id.* at 140; *see also id.* at 145 ("[T]he Court's ruling on the issue of immunity can have no effect on whatever responsibility Germany may have."). In any case, corporations do not enjoy immunity from suit under international law, much less benefit from a general norm of non-liability that even states do not enjoy.[6]

It is clear from the examples this Court cited in footnote 20 of *Sosa* that the Court was concerned not with whether international law provides general norms of liability and non-liability but rather with whether *particular* norms *apply* to particular actors. Specifically, this Court referred to the well-established distinction between norms that sometimes apply only to state actors and norms that apply to non-state actors as well. Footnote 20 cited Judge Edwards's

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[6] The United States has chosen to grant some immunity to state-owned corporations under the Foreign Sovereign Immunities Act. *See* 28 U.S.C. § 1603(a) (defining "foreign state" to include "an agency or instrumentality of a foreign state"). Other states, however, have not done so. *See* Xiaodong Yang, *State Immunity in International Law* 232-86 (2012) (discussing diverse approaches). There is no customary international law rule immunizing corporations from suit because, in the words of the *North Sea Continental Shelf* decision, there is no "settled practice" of states, accompanied by "a belief that this practice is rendered obligatory by the existence of a rule of law requiring it." *North Sea Continental Shelf*, 1969 I.C.J. at 44.

concurring opinion in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 791-95 (D.C. Cir. 1984), for the proposition that the prohibition against torture applies only to those who act with some involvement of a state. *See also* Torture Convention art. 1 (defining "torture" for purposes of the convention as pain or suffering "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity"). Footnote 20 also cited the Second Circuit's decision in *Kadic v. Karădzíc*, 70 F.3d 232, 239-41 (2d Cir. 1995), for the proposition that prohibition against genocide applies to all actors. *See also* Genocide Convention art. II (defining "genocide" for purposes of the convention as "any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group").[7]

While the distinction between norms that apply only to state actors and those that also apply to non-state actors is the most prominent modern example of whether "a given norm" applies "to the perpetrator being sued," *Sosa*, 542 U.S. at 732 n.20, historically other norms of customary international law were also limited to particular actors. The law of nations with respect to piracy, for example, considered the capture of a ship to be lawful privateering if done by a ship carrying a valid commission but considered it to be piracy if done by a ship lacking such a commission. *See The Palmyra*, 25 U.S. (12 Wheat.) 1, 16 (1827) (noting

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[7] As explained below, customary international law prohibits torture and genocide independently of the conventions adopted for their enforcement. *See infra* Section III.B. The content and scope of customary international law norms may vary depending on the context in which they are applies. *See supra* note 4.

that a void commission would "render[] the exercise of belligerent rights piratical"). The law of nations with respect to neutrality considered the capture of a ship to be a violation of neutrality only if the captors were citizens of a neutral country. *See Talbot v. Jansen*, 3 U.S. (3 Dal.) 133, 155-56 (1795) (Patterson, J.) (noting that, because the captor "was a citizen of the United States," cruising against nations at peace with the United States "were violations of the principles of neutrality, and highly criminal by the law of nations").

Thus, it makes sense under international law to ask, as this Court suggested in *Sosa*, whether the "given norm[s]" that Respondent is alleged to have violated apply to juridical persons. The United States informed this Court in *Kiobel* that it was "not aware of any international-law norm, accepted by civilized nations and defined with the degree of specificity required by *Sosa*, that requires, or necessarily contemplates, a distinction between natural and juridical actors." First U.S. *Kiobel* Br. 20. The United States cited as examples the norms against torture, genocide, and war crimes, each of which prohibits particular acts without regard to whether the perpetrator is a natural or juridical person. *Id.* at 20-21; *see also* Brief of Yale Law School Center for Global Legal Challenges as *Amicus Curiae* in Support of Petitioners, *Jesner v. Arab Bank, PLC* (No. 16-499) (performing norm-by-norm analysis). In the present case, neither the district court nor the court of appeals addressed this question because both were bound as a matter of precedent by the Second Circuit's mistaken holding in *Kiobel* that customary international law rejects corporate liability. If this Court determines, as it should, that customary international law does not categorically bar corporations from being held liable

for violations of human rights, *amici* respectfully suggest that this Court should remand so that the lower courts may consider in the first instance whether the norms at issue in this case apply to juridical persons.

III. The Second Circuit erred by treating limitations on particular enforcement mechanisms for international human rights norms as limitations on the applicability of the norms themselves.

The Second Circuit's misunderstanding of how international law works not only caused it to ask the wrong question but also to draw the wrong conclusion from the variety of ways that states have acted to enforce customary international law norms of human rights. *Sosa* required broad international consensus regarding the *substance* of a norm of customary international law. But as the United States explained during the first round of briefing in *Kiobel*, international law does not require "an international consensus on how to enforce a violation of [a] norm." First U.S. *Kiobel* Br. 18. Rather, it "generally leaves the means of enforcing those substantive standards to each state." *Id.*

Because the customary international law of human rights does not provide for its own enforcement, states have had to develop various enforcement mechanisms, including international criminal tribunals, suppression conventions, and domestic laws imposing criminal and civil liability. *See Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.)*, 2002 I.C.J. 63, 78 (Feb. 14) (joint separate opinion of Judges Higgins, Kooijmans, and Buergenthal) ("[T]he international consensus that the

perpetrators of international crimes should not go unpunished is being advanced by a flexible strategy, in which newly established international criminal tribunals, treaty obligations and national courts all have their part to play.").[8] Each of these enforcement mechanisms has its limitations, but those limitations are not limitations on the customary international law norms of human rights themselves.

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

The Second Circuit in *Kiobel* relied heavily on limits circumscribing the jurisdiction of international criminal tribunals. *See Kiobel*, 621 F.3d at 132-37. In so doing, the Second Circuit majority made the fundamental error of conflating limits on jurisdiction with limits on substantive law. As the Solicitor General explained during the first round of briefing

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[8] In the course of their joint opinion, Judges Higgins, Kooijmans, and Buergenthal remarked that the Alien Tort Statute represented "a very broad form of extraterritorial jurisdiction" that "has not attracted the approbation of States generally." *Id.* at 77. Nothing in that remark bears on the question whether nations may hold corporations civilly liable for violating customary international law norms. First, the judges were writing before this Court limited the geographic scope of the ATS cause of action in *Kiobel*. Second, because states are free to provide as they see fit for the enforcement of customary international law in their own domestic laws, the fact that other nations have not adopted enforcement mechanisms exactly like the ATS is irrelevant to whether the United States may do so. Third, nothing in the joint opinion suggests a distinction between natural and juridical persons.

before this Court in *Kiobel*, "each international tribunal is specially negotiated, and limitations are placed on the jurisdiction of such tribunals that may be unrelated to the reach of substantive international law." First U.S. *Kiobel* Br. 28.[9]

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

[9] A 2014 protocol amending the Statute of the African Court of Justice and Human Rights would expressly grant that court jurisdiction "over legal persons, with the exception of States." Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, art. 22, *available at* https://www.au.int/web/sites/default/files/treaties/7804-treaty-0045_-_protocol_on_amendments_to_the_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_e.pdf (adding Article 46C).

apply to other persons.[10] By the same token, that the Nuremberg Tribunal only had jurisdiction over natural persons does not show that the prohibitions of customary international law did not apply to juridical persons.

Indeed, the London Charter expressly provided that "[a]t the trial of any individual member of any group or organization the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organization of which the individual was a member was a criminal organization." *Id.* art. 9; *see also id.* art. 10 ("In cases where a group or organization is declared criminal by the Tribunal, the competent national authority of any Signatory shall have the right to bring [an] individual to trial for membership therein before national, military or occupation courts. In any such case the criminal nature of the group or organization is considered proved and shall not be questioned.").

Additional trials for crimes against peace, war crimes, and crimes against humanity were conducted by the Allied Powers under Control Council Law No. 10. *See* Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, in 1 *Enactments and Approved Papers of the Control Council and Coordinating Committee, Allied Control Authority Germany* 306 (1945). None of these prosecutions were brought against corporations directly, but the trials of corporate executives under Control Council Law No.

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

10 leave no doubt that corporations were considered to have violated customary international law. *See, e.g.*, *The Farben Case*, 8 *Trials of War Criminals Before the Nuernberg Military Tribunals* at 1132 (1952) ("Where private individuals, including juristic persons, proceed to exploit the military occupancy by acquiring private property against the will and consent of the former owner, such action . . . is in violation of international law."); *id.* at 1140 (finding "beyond a reasonable doubt that offenses against property as defined in Control Council Law No. 10 were committed by Farben"); *see also Kiobel*, 621 F.3d at 180 (Leval, J., concurring) (giving additional examples from the *Krupp* and *Flick* cases); Brief of *Amici Curiae* Nuremberg Scholars in Support of Petitioners, *Jesner v. Arab Bank, PLC* (No. 16-499) (discussing Nuremberg tribunals at length). As these decisions show, limits on the jurisdiction of these tribunals were not limits on the applicability of customary international law.

2. *Yugoslav and Rwandan Tribunals*. In the wake of widespread violations of humanitarian law in the former Yugoslavia and Rwanda, the United Nations Security Council established international criminal tribunals with limited jurisdiction to prosecute these violations. *See* International Criminal Tribunal for the Former Yugoslavia Statute, S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993), *adopting* The Secretary-General, Report Pursuant to Paragraph 2 of Security Council Resolution 808, U.N. Doc. S/25704 (May 3, 1993), *reprinted in* 32 I.L.M. 1192 (ICTY Statute); Statute of the International Tribunal for Rwanda, S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994), *reprinted in* 33 I.L.M. 1598 (1994) (ICTR Statute). The jurisdiction of the ICTY was limited to grave breaches of the Geneva Conventions, violations of the laws or

customs of war, genocide, and crimes against humanity. ICTY Statute arts. 2-5. It was further limited to violations committed in the territory of the former Yugoslavia since 1991. *Id.* art. 1. The jurisdiction of the ICTR was limited to genocide, crimes against humanity, and violations of Common Article 3 of the Geneva Conventions and of Additional Protocol II. ICTR Statute arts. 2-4. It was further limited to violations committed in the territory of Rwanda and violations committed in the territory of neighboring states by Rwandan citizens during 1994. *Id.* art. 1. The jurisdiction of each tribunal was also limited to "natural persons." ICTY Statute art. 6; ICTR Statute art. 5.

The limitations of these tribunals' jurisdiction to natural persons does not reject the applicability of customary international law to juridical persons, any more than the limitations of these tribunals' jurisdiction to certain offenses, places, and times rejects the existence of other norms of customary international law or that law's applicability to other places and times. Indeed, during the course of a trial of three individual defendants, the ICTR specifically found that a radio station, a newspaper, and a political party had been responsible for genocide. *See Prosecutor v. Nahimana*, Case No. ICTR 99-52-T, Judgment ¶ 953 (Dec. 3, 2003) ("The Chamber therefore considers the killing of Tutsi civilians can be said to have resulted, at least in part, from the message of ethnic targeting for death that was clearly and effectively disseminated through RTLM, Kangura and CDR, before and after 6 April 1994."). As with the Nuremburg Tribunals, limitations on the jurisdiction of the ICTY and ICTR did not reflect limitations on substantive law.

3. *Rome Statute*. The same is true with respect to limitations on the jurisdiction of the International Criminal Court (ICC). The Rome Statute established a permanent International Criminal Court with jurisdiction over genocide, crimes against humanity, and war crimes (and later the crime of aggression). Rome Statute of the International Criminal Court art. 5, July 17, 1998, 2187 U.N.T.S. 90 (Rome Statute). The ICC is intended to "be complementary to national criminal jurisdictions." *Id.* art. 1. This means that a case will be considered inadmissible if a state is able and willing genuinely to carry out the investigation or prosecution. *Id.* art. 17. It is in part for this reason that the drafters of the Rome Statute limited the ICC's jurisdiction to natural persons. *See id.* art 25(1). Extending jurisdiction to juridical persons would have posed significant complementarity problems for those legal systems that do not recognize criminal liability for juridical persons. *See* Micaela Frulli, *Jurisdiction Ratione Personae*, in *The Rome Statute of the International Criminal Court: A Commentary* 527, 532-33 (Antonio Cassese et al. eds. 2002) ("There is no uniformity whatsoever among the different national systems on the issue of the criminal liability of juridical persons and this lack of a common approach could affect the full functioning of the principle of complementarity, one of the cornerstones of the ICC.").

These limitations on the jurisdiction of the ICC do not reflect limits on the substantive norms of customary international law. That the ICC's jurisdiction is limited to only a few norms of customary international, *see* Rome Statute art. 1, does not show

that other norms do not exist.[11] That the ICC's jurisdiction is limited to crimes committed after the Statute's entry into force, *see id.* art. 11, does not show that crimes committed before that time do not violate customary international law. That the ICC's jurisdiction is limited to persons over 18, *see id.* art. 26, does not mean that customary international law is inapplicable to persons under 18. By the same logic, that the ICC's jurisdiction is limited to natural persons, *id.* art. 25(1), does not mean that customary international law norms of human rights do not apply to juridical persons.

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

Another mechanism that states collectively have adopted to enforce customary international law norms of human rights are suppression conventions, which typically require their parties to prohibit violations of such norms in their domestic laws and to prosecute or extradite those who violate them. *See* Restatement (Fourth) of Foreign Relations Law of the United States: Jurisdiction § 217, Reporters' Note 2 (Tent. Draft No. 2, Mar. 22, 2016) (listing a number of suppression conventions). Because of the nature of the enforcement obligations they impose—to prosecute or to extradite—these conventions are often limited to natural persons. But limitations on the treaty

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

obligations of states under these conventions are not limitations on the customary international law norms they are intended to enforce.

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

To enforce the customary international law norm against genocide, the parties to the Genocide Convention agreed to enact "the necessary legislation . . . to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III [conspiracy, incitement, attempt, and complicity]." Genocide Convention art. V. The parties further agreed that genocide and the other acts "shall not be considered as political crimes for the purpose of extradition" and "to grant extradition in accordance with their laws and treaties in force." *Id.* art. VII. Because the Genocide Convention obligates states to impose criminal punishment and to grant extradition,

Article IV of the Convention logically refers to natural persons. *Id.* art. IV ("Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals."). But Article IV simply reflects a limitation on the obligations imposed under the Convention—obligations to impose criminal punishment and to extradite—not on the norm against genocide itself.

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

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

person alleged to have committed torture with the word "him." *See, e.g.*, *id.* art. 7(1) ("The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution."). To the extent references to natural persons limit the obligations of the Convention's parties to natural persons,[12] however, such references limit only the parties' treaty obligations. Such references do not, and could not, limit the scope of the customary international law norm prohibiting torture.

C. Nations are free to enforce international human rights norms by creating criminal and civil liability under their domestic laws.

Although suppression conventions require states to enact domestic laws enforcing customary international law norms, and the complementarity system of the International Criminal Court encourages them to do so, states are free to go beyond their treaty obligations and to create additional criminal and civil enforcement mechanisms in their own domestic laws. As the United States noted in its first brief in *Kiobel*: "Until the twentieth century, domestic law and domestic courts were the primary

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

means of implementing customary international law." First U.S. *Kiobel* Br. 31. The development of international criminal tribunals and suppression conventions during the twentieth century has not displaced the role of domestic law and domestic courts. *See Arrest Warrant of 11 April 2000*, 2002 I.C.J. at 78-79 (joint separate opinion of Judges Higgins, Kooijmans, and Buergenthal) ("We reject the suggestion that the battle against impunity is 'made over' to international treaties and tribunals, with national courts having no competence in such matters.").

1. A number of states have criminalized certain violations of fundamental human rights in ways that go beyond their treaty obligations. The Rome Statute does not require its parties to prohibit genocide, crimes against humanity, and war crimes in their domestic laws, but its system of complementarity encourages states to do so because a prosecution at the ICC is inadmissible if a state is able and willing to carry out the prosecution. *See* Rome Statute art. 17. A large number of states have therefore adopted national complementarity legislation making genocide, crimes against humanity, and war crimes criminal offenses under their domestic laws. *See* The Coalition for the International Criminal Court, 2013 Status of the Rome Statute Around the World 9, *available at* http://www.iccnow.org/documents/RomeStatuteUpdate_2013_web.pdf (reporting that, as of 2013, "59 countries, including those who are not states parties of the Rome Statute, have national complementarity legislation and an additional 23 countries have partial legislation in place. In addition, 38 nations are in the process of enacting national complementarity legislation."); Library of Congress, Multinational

Report: Crimes Against Humanity Statutes and Criminal Code Provisions (2010), *available at* https://loc.gov/law/help/crimes-against-humanity /crimes-against-humanity.pdf (reviewing laws in 52 jurisdictions).

Significantly, in adopting criminal legislation, a number of states have gone beyond what would be necessary to implement even the Rome Statute's system of complementarity. In particular, although the ICC has jurisdiction only over natural persons, *see* Rome Statute art. 25(1), a number of states have applied their criminal prohibitions against genocide, crimes against humanity, and war crimes to juridical persons. *See* Robert C. Thompson, Anita Ramasastry & Mark B. Taylor, *Translating* Unocal*: The Expanding Web of Liability for Business Entities Implicated in International Crimes*, 40 Geo. Wash. Int'l L. Rev. 841, 871 (2009) (noting that "Australia, Belgium, Canada, France, India, the Netherlands, Norway, and the United Kingdom . . . make it a general practice to recognize no distinction between natural and legal persons, thus giving [international criminal law] a wider reach at the domestic level").

For example, in 2001 the United Kingdom adopted its International Criminal Court Act, which made the Rome Statute's three original offenses punishable under domestic law. International Criminal Court Act, 2001, c. 17, § 51 (U.K.). Under U.K. law, "unless a contrary intent appears," the word "'person' includes a body of persons corporate or unincorporated." Interpretation Act, 1978, c. 30, § 5, sch. 1 (U.K.). Because the United Kingdom did not exempt corporations from the International Criminal Court Act, its criminal prohibitions apply to them. Indeed, in

its first *Kiobel* brief filed with the Netherlands—a brief arguing that customary international law did not *directly* impose liability on corporations—the Government of the United Kingdom acknowledged that "some countries, when incorporating the Rome Statute into their domestic law, imposed criminal liability on legal persons for the group of crimes included in the Rome Statute." Brief of the Governments of the United Kingdom of Great Britain and Northern Ireland and the Kingdom of the Netherlands as *Amici Curiae* in Support of the Respondents 20, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013); *see also* First U.S. *Kiobel* Br. 29 (noting that "several countries (including the United Kingdom and the Netherlands) that have incorporated the Rome Statute's three crimes . . . into their domestic jurisprudence themselves impose criminal liability on corporations and other legal offenses for such offenses"). International law does not require the United Kingdom and other countries to extend criminal liability to corporations for violating customary international law norms of human rights. But international law certainly permits them to do so.

2. A number of states also provide civil liability for certain violations of fundamental human rights in ways that go beyond their treaty obligations. Suppression conventions typically require states to provide only criminal sanctions in their domestic laws,[13] but a large number of states permit the victim of a crime to append a claim for civil compensation to a criminal proceeding in an action commonly known as an *action civile*. *See* Brief of the European Commission

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[13] Article 14 of the Torture Convention is an exception to this general practice. *See supra* note 12.

on Behalf of the European Union as *Amicus Curiae* in Support of Neither Party 18 n.48, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) ("Such proceedings are available in Austria, Belgium, Denmark, Finland, France, Germany, Greece, Italy, Luxembourg, the Netherlands, Poland, Portugal, Romania, Spain, and Sweden."); Restatement (Fourth) of Foreign Relations Law of the United States: Jurisdiction § 211, Reporters' Note 5 (Tent. Draft No. 2, Mar. 22, 2016) (additionally listing Argentina, China, Ghana, and Russia); *see also Sosa*, 542 U.S. at 762-63 (Breyer, J., concurring) (noting that "the criminal courts of many nations combine civil and criminal proceedings"). International law generally does not require states to provide civil liability for violations of customary international law norms of human rights. But international law certainly permits them to do so.

3. The United States has a number of statutes providing criminal and civil liability for violations of customary international law. To implement the Genocide Convention and the Torture Convention, Congress has made genocide and torture criminal offenses. *See* 18 U.S.C. § 1091 (criminalizing genocide); 18 U.S.C. § 2340A (criminalizing torture). Congress has also criminalized slavery, 18 U.S.C. §§ 1583-1584, as required by the Slavery Convention. Convention to Suppress the Slave Trade and Slavery, art. 6, Sept. 25, 1926, 46 Stat. 2183, 2191, 60 L.N.T.S. 253. But Congress also has criminalized violations of customary international law in the absence of a treaty obligation. *See* 18 U.S.C. § 1651 (criminalizing piracy). Each of these federal criminal statutes applies to both natural and juridical persons. *See* 1 U.S.C. § 1 (providing that the word "whoever" includes

"corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals").

In some instances, Congress has provided civil liability for violations of customary international law. The Torture Victim Protection Act, 28 U.S.C. § 1350 note (TVPA), makes natural persons civilly liable for torture and extrajudicial killing under color of foreign law. *See Mohamad v. Palestinian Authority*, 566 U.S. 449 (2012) (holding that only a natural person can be held liable under the TVPA). In providing a civil remedy for extrajudicial killing, Congress went beyond its obligations under the Torture Convention, which does not cover extrajudicial killing. Congress has also provided a private right of action under the Foreign Sovereign Immunities Act against state sponsors of terrorism and their officials "for personal injury or death caused by [an act of torture, extrajudicial killing, aircraft sabotage, or hostage taking]." 28 U.S.C. § 1605A(c). And Congress has provided a civil remedy for victims of slavery, 18 U.S.C. § 1595, which extends to anyone who violates the federal criminal prohibitions including juridical persons as discussed above.

In short, just as other nations have gone beyond the strict scope of their treaty obligations to provide additional enforcement of customary international law norms against natural and juridical persons under their domestic laws, so too the United States has gone beyond its treaty obligations to provide additional enforcement of customary international law norms against natural and juridical persons under its domestic law. In doing so, the United States is not bound to follow the patterns established by other

nations. Nor are other nations bound to follow the patterns established by the United States. Beyond the obligations that states have adopted by treaty, international law leaves each state free to decide how to enforce customary international law norms within its own legal system.

4. Despite the advent of international criminal tribunals and suppression conventions, the domestic laws of individual states remain an important mechanism for enforcing customary international law norms of human rights. In providing for criminal or civil liability under domestic laws, states must of course observe customary international law limitations on jurisdiction to prescribe. *See* Restatement (Fourth) of Foreign Relations Law of the United States: Jurisdiction §§ 211-217 (Tent. Draft No. 2, Mar. 22, 2016) (describing customary international law governing jurisdiction to prescribe). Under the principle of universal jurisdiction, states may have jurisdiction to prescribe violations of human rights norms "even if no specific connection exists between the state and the persons or conduct being regulated." *Id.* § 217. In many cases, a specific connection will provide an additional basis for jurisdiction to prescribe, like Respondent's conduct in the United States in this case. *See id.* § 212 ("International law recognizes a state's jurisdiction to prescribe law with respect to persons, property, and conduct within its territory."). Within those limitations, however, states are free under international law to enforce applicable norms of human rights in a wide variety of ways.

The Second Circuit drew the wrong lesson from the variety of state enforcement practices in *Kiobel*. It

looked at this variety and concluded that, because there was no consensus about how customary international law norms of human rights should be enforced, international law therefore prohibited their enforcement against corporations. *Kiobel*, 621 F.3d at 149 (observing that "[t]he concept of corporate liability for violations of customary international law has not achieved universal recognition or acceptance"). The proper lesson is quite the opposite. That states have acted in a variety of ways to enforce customary international norms of human rights shows that international law *permits* states to enforce those norms against any actor subject to the norm in whatever ways are consistent with its own legal traditions.

In 1789, the First Congress decided that aliens should be able to seek recovery in tort for violations of the law of nations. In *Sosa*, this Court gave effect to that decision by recognizing a federal-common-law cause of action for a limited number of modern customary international law norms. Allowing claims against juridical persons, as well as natural persons, for the violations of those norms is a choice that international law permits the United States to make. The Second Circuit's conclusion to the contrary is based on a fundamental misunderstanding of international law.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX

LIST OF AMICI[14]

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