S.C.C. FILE NO. 37919

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF BRITISH COLUMBIA)

BETWEEN:

NEVSUN RESOURCES LTD.

APPELLANT
(Appellant)

- and -

GIZE YEBEYO ARAYA, KESETE TEKLE FSHAZION
AND MIHRETAB YEMANE TEKLE

RESPONDENTS
(Respondents)

- and –

INTERNATIONAL HUMAN RIGHTS PROGRAM, UNIVERSITY OF TORONTO FACULTY OF LAW, EARTHRIGHTS INTERNATIONAL, THE GLOBAL JUSTICE CLINIC AT NEW YORK UNIVERSITY SCHOOL OF LAW, AMNESTY INTERNATIONAL CANADA, INTERNATIONAL COMMISSION OF JURISTS, MINING ASSOCIATION OF CANADA and MINING WATCH CANADA

INTERVENERS

FACTUM OF THE INTERVENERS
EarthRights International
and The Global Justice Clinic at New York University School of Law
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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TABLE OF CONTENTS

PART I: OVERVIEW AND STATEMENT OF FACTS

1. The interveners, EarthRights International and the Global Justice Clinic at New York University School of Law,[*] are U.S. not-for-profit, non-governmental entities with a common mission to ensure that victims of universally recognized human rights violations can obtain effective remedies. The parties raise U.S. law in arguments to this Court. Interveners submit this factum to show that under U.S. law,[1] Respondents' claims would be adjudicated. Interveners take no position on the facts.

2. First, the act of state doctrine, as applied in the United States, would not bar Respondents' claims. The majority of U.S. courts to have considered an act of state defense against allegations of gross human rights violations have found the doctrine inapplicable, for a variety of reasons. Second, common law claims alleging violations of customary international law norms may be brought in U.S. courts. In U.S. federal courts, such claims are brought under the Alien Tort Statute (ATS), which is purely a jurisdictional grant, not a statutory cause of action, and which allows federal courts to hear common law claims already within the jurisdiction of state courts. Interveners take no position on whether customary international law forms part of Canadian law, but if it does, ATS jurisprudence supports the availability of a civil action based on violations of customary international law. ATS jurisprudence also confirms that international law leaves the means of its enforcement to states; international law need not establish the right to bring a civil claim in domestic court for violations of international norms or specify against whom such a claim may be brought.

PART II: STATEMENT OF QUESTIONS IN ISSUE

3. Under U.S. law, Respondents' common law claims, based on breaches of universal norms of customary international law, are actionable and would not be barred by the act of state doctrine. Interveners take no position on how the issues should be decided under Canadian law.

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[*] This communication does not purport to represent the institutional views, if any, of New York University ("NYU").

[1] "Circuit" courts are U.S. federal appellate courts. There are thirteen circuit courts, and their opinions are not binding on each other. "District" courts are federal trial courts.

PART III: STATEMENT OF ARGUMENT

A. In the United States, the act of state doctrine does not bar consideration of cases raising violations of fundamental human rights.

4. In the United States, the act of state doctrine is an affirmative defense,[2] not a question of subject matter jurisdiction.[3] The doctrine does not apply unless defendants prove that the acts in question were *official, public* acts[4] and that the lawsuit necessarily challenges their *validity* or legal "*effect.*"[5] Even if a case requires the court to rule on the validity of a foreign sovereign's act, that does not automatically bar adjudication; defendants must also show under a balancing test that the policy considerations underlying the doctrine require its application.[6]

5. The act of state defense fails in cases alleging violations of fundamental human rights for any one of four reasons: (1) violations of *jus cogens* norms cannot be official public acts; (2) even if they could be, the foreign state does not adopt the acts in question as official acts; (3) claims regarding the violation of norms that have attained such a high degree of international consensus raise little risk of disturbing foreign relations, and thus do not warrant the court's abstention; and/or (4) the case does not require the court to invalidate a foreign sovereign's acts.

i. *Jus cogens* violations are not official public acts.

6. *Jus cogens* norms are "binding on all nations," and "are the concern of all states."[7] Given this status, U.S. courts have recognized that "[a] violation of a *jus cogens* norm is not a sovereign act,"[8] and thus not an act of state.[9] Such violations "are exempt from the [act of state] doctrine."[10]

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[2] *Alfred Dunhill of London, Inc. v Republic of Cuba*, 425 US 682 at 691, 694 (1976) ["*Dunhill*"].
[3] *Republic of Austria v Altmann*, 541 US 677 at 700 (2004).
[4] *See Dunhill*, *supra* note 2 at 694-95.
[5] *W.S. Kirkpatrick & Co. v Envt'l Tectonics Corp., Int'l*, 493 US 400 at 405-06 (1990) ["*Kirkpatrick*"].
[6] *Kirkpatrick*, *supra* note 5 at 409; *Banco Nacional de Cuba v Sabbatino*, 376 US 398 at 427-28 (1964) ["*Sabbatino*"].
[7] *Siderman de Blake v Republic of Argentina*, 965 F (2d) 699 at 715 (9th Cir 1992) (internal citations omitted) ["*Siderman*"].
[8] *Siderman*, *supra* note 7 at 718; *accord Sarei v Rio Tinto, PLC*, 671 F (3d) 736 at 757 (9th Cir 2011) ["*Sarei* 2011"].
[9] *Sarei* 2011, *supra* note 8 at 757 *citing Siderman*, *supra* note 7 at 714, 718; *Warfaa v Ali*, 33 F Supp (3d) 653 at 661-62 (ED Va 2014) ["*Warfaa*"]; *Garcia v Chapman*, 911 F Supp (2d) 1222 at

7. This exemption applies regardless of the government actor's position. The Ninth Circuit "implicitly rejected the possibility" that the conduct of a country's president involving torture and murder could constitute sovereign acts, holding that they were justiciable torts.[11] Likewise, *jus cogens* violations committed by members of the military cannot be official, public acts, even if committed while performing legitimate government functions, like quelling an uprising.[12]

8. The abuses alleged by Respondents—forced labor, slavery, torture, and crimes against humanity—violate *jus cogens* norms.[13] Accordingly, there can be no act of state defense to Respondents' claims. Contrary to Appellant's argument,[14] adjudicating alleged *jus cogens* violations does not infringe on foreign sovereignty, as no state has a right to violate these norms.

ii. States disclaim rather than officially adopt human rights abuses.

9. Even if the doctrine *could* apply to *jus cogens* violations, defendants must prove that the conduct actually was an "act of state," *i.e.* "the public act of those with authority to exercise sovereign powers."[15] This requires that the conduct was a state's "officially approved policy,"[16] committed pursuant to a "statute, decree, order, or resolution of the [] Government itself."[17] Many acts by government officials would not meet this definition. Courts almost never dismiss human rights claims on act of state grounds in part because states themselves nearly always

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1242 (SD Fla 2012); *Presbyterian Church of Sudan v Talisman Energy*, 244 F Supp (2d) 289 at 345 (SDNY 2003) ["*Presbyterian Church of Sudan*"].

[10] *Sarei* 2011, *supra* note 7 at 757.

[11] *Hilao v Estate of Marcos*, 25 F (3d) 1467 at 1471-72 (9th Cir 1994) ["*Hilao*"].

[12] *See e.g. Sarei* 2011, *supra* note 7 at 757; *Sarei v Rio Tinto, PLC*, 487 F (3d) 1193 at 1210 (9th Cir 2007) ["*Sarei* 2007"] vacated by grant of reh'g en banc, 499 F (3d) 923 (9th Cir 2007); *Trajano v Marcos*, 978 F (2d) 493 at 496, 498 n.10 (9th Cir 1992); *Hilao*, *supra* note 11 at 1471-72; *Warfaa*, *supra* note 9 at 661-62; *Sharon v Time, Inc.*, 599 F Supp 538 at 542, 544 (SDNY 1984) ["*Sharon*"].

[13] *See, e.g.*, *Siderman*, *supra* note 7 at 716-717 (torture and slavery); *Sarei* 2007, *supra* note 12 at 1202 (crimes against humanity); *Doe v Unocal Corp.*, 395 F (3d) 932 at 945-47, 959 (9th Cir 2002)["*Unocal* 2002"], vacated by grant of reh'g en banc, 395 F (3d) 978 (9th Cir 2003) (forced labor); *Aragon v Che Ku*, 277 F Supp (3d) 1055 at 1066–67 (D Minn 2017) (forced labor) (collecting cases).

[14] *See* Appellant's Factum at para 53.

[15] *Dunhill*, *supra* note 2 at 691-94; *accord Siderman*, *supra* note 7 at 713.

[16] *Kadic v Karadzic*, 70 F (3d) 232 at 250 (2d Cir 1995). *See also Bowoto v Chevron Corp.*, No. C 99-02506 at 4-12 (ND Cal Aug. 14, 2007) (Order re Cross-Mots. Summ. J.).

[17] *Dunhill*, *supra* note 2 at 695; *see also ibid* at 691-93 & n.8.

officially *reject* human rights abuses rather than officially *adopt* them as sovereign acts.[18] This Court cannot simply assume Eritrea is different. Yet Appellant asks this Court to brand abuses that the nations of the world have universally disclaimed as Eritrea's *official* policy.

10. That government actors, including members of the military, committed the abuses does not automatically render them "official public acts."[19] In a case involving torture, extrajudicial killing, and arbitrary detention committed by members of the Indonesian military working for Exxon, a U.S. district court found that Exxon "made no showing that plaintiffs were injured pursuant to official military orders as [the act of state doctrine] required."[20]

11. To prevail on an act of state defense, Appellant would need to *prove* that the torture, forced labor and other abuses Respondents allege are official Eritrean policy. A failure to affirmatively demonstrate that these acts, which the nations of the world have universally disclaimed, are Eritrea's official policy would be fatal to any act of state defense.

iii. Even when claims concern official, public acts, the policies underlying the act of state doctrine do not bar adjudication of *jus cogens* violations.

12. Even if a defendant demonstrates that a case involves official acts of a foreign sovereign, it means only that the act of state doctrine *may* apply. The "policies underlying" the doctrine "may not justify its application."[21] Courts consider the degree of consensus concerning the legal

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[18] *See Filartiga v Pena-Irala*, 630 F (2d) 876 at 890 (2d Cir 1980); *Kadic*, *supra* note 16 at 250; *see also* S. Rep. 102-249, at 8 (1991), BOA Tab 4 (Senate Committee on the Judiciary recognizing act of state doctrine cannot bar torture claim because "no state commits torture as a matter of public policy").

[19] *See Siderman*, *supra* note 7 at 713; *Forti v Suarez-Mason*, 672 F Supp 1531 at 1546 (ND Cal 1987) ["*Forti*"]; *Doe v Exxon Mobil Corp*., 69 F Supp (3d) 75 at 88 (D DC 2014) ["*Exxon* 2014"]; *Sharon*, *supra* note 12 at 544.

[20] *Exxon* 2014, *supra* note 19 at 88. *See also Forti*, *supra* note 19 at 1536-38, 1544, 1546 (refusing to assume military abuses during declared state of siege were acts of state).

[21] *Kirkpatrick*, *supra* note 5 at 409.

norm allegedly violated and the implications of the dispute for foreign relations.[22] In cases alleging *jus cogens* violations, the balance typically favors adjudication for two reasons.

13. First, *jus cogens* norms enjoy the greatest international consensus. Since courts considering *jus cogens* violations apply universally agreed principles, the first factor supports adjudication.[23] For example, the Second Circuit held that, because only violations of universally accepted norms are actionable under the ATS, "it would be a rare case in which the act of state doctrine precluded" an ATS suit.[24] In a case alleging violations of *jus cogens* prohibitions on murder, torture, and forced labor, the Ninth Circuit found that this factor favored adjudication.[25]

14. Second, when the forum state has already condemned the foreign government's human rights violations, U.S. courts have found that adjudication will not impact foreign relations.[26] If Canada has condemned Eritrea's human rights record, that would cut strongly against any act of state defense.

15. Critically, however, even if the foreign policy and separation of powers considerations underlying the act of state defense—on which Appellant focuses—favor abstention, that is not enough to dismiss the suit; the conduct at issue must first be proven to be an act of state.[27]

iv. Under *Kirkpatrick,* the act of state doctrine is inapplicable where the suit does not challenge the *validity* of a foreign public act.

16. The act of state doctrine is inapplicable where, as here, the court need not *invalidate* a sovereign act to grant relief.[28] *Kirkpatrick* held that to be barred under the act of state doctrine,

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[22] *Sabbatino, supra* note 6 at 428. Courts may also consider whether the government that perpetrated the act(s) is still in existence, *id.*, and whether the foreign state was acting in the public interest, *Liu v Republic of China*, 892 F (2d) 1419 at 1432 (9th Cir 1989).

[23] *Sabbatino, supra* note 6 at 428.

[24] *Kadic, supra* note 16 at 250; *accord Presbyterian Church of Sudan, supra* note 9 at 345.

[25] *Unocal* 2002, *supra* note 13 at 959. *See also Mujica v Occidental Petroleum Corp.*, 381 F Supp (2d) 1164 at 1190-91 (CD Cal 2005); *Mamani et al. v Berzain et al.*, Nos. 07-22459 & 08-21063, at 17-18 (SD Fl Nov. 9, 2009) (Order Mot. Dismiss), rev'd in part on other grounds, 654 F (3d) 1148 (11th Cir 2011).

[26] *See, e.g., Presbyterian Church of Sudan, supra* note 9 at 346; *Unocal* 2002, *supra* note 13 at 959.

[27] *Kirkpatrick, supra* note 5 at 409.

the suit must seek to declare an official act ineffective as a "rule of decision"; the doctrine did not apply where the plaintiff "was not trying to undo or disregard the governmental action, but only to obtain damages from private parties who procured it."[29] It was irrelevant that the facts necessary for the plaintiff to prevail would also establish that officials acted unlawfully or might embarrass the foreign government.[30] The act of state defense does not automatically apply when a court's "factual findings would 'impugn' the foreign state's actions; the claims must call for the invalidation of those actions."[31]

17. In sum, where a plaintiff alleges conduct that violates *jus cogens* human rights norms, and merely seeks damages from a private party who "procured" such conduct, the act of state defense does not apply because the suit would not "invalidate" the universally condemned abuse; the issue "is not whether such acts are valid, but whether they occurred."[32]

B. In the United States, common law claims based on violations of fundamental human rights are actionable.

18. ATS jurisprudence, contrary to Appellant's assertion, supports the conclusion that common law claims based on violations of customary international law are actionable.[33] ATS suits *are* common law actions based on customary international law. Moreover, U.S. courts recognize that international law leaves the means of its enforcement to states; courts do not look to international law for a right to sue in domestic court, let alone for a right to sue corporations.

i. The ATS provides U.S. federal courts with jurisdiction; common law provides the cause of action.

19. The U.S. Supreme Court has repeatedly affirmed that ATS claims are *common law* claims, and that the ATS is not a statutory cause of action.[34] "[T]he ATS is strictly jurisdictional and does not by its own terms provide or delineate the definition of a cause of action for

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[28] *Ibid* at 404-10; *Exxon* 2014, *supra* note 19 at 88.
[29] *Kirkpatrick, supra* note 5 at 405, 407; *see also Exxon* 2014, *supra* note 19 at 88.
[30] *Kirkpatrick, supra* note 5 at 406, 409.
[31] *Exxon* 2014, *supra* note 19 at 88.
[32] *Sharon, supra* note 12 at 546, quoted with approval in *Kirkpatrick, supra* note 5 at 406.
[33] Appellant's Factum at paras 73-76.
[34] *Sosa v Alvarez-Machain*, 542 US 692 at 712-14, 720-21, 724 (2004) ["*Sosa*"]; *Kiobel v Royal Dutch Petroleum Co.*, 133 S Ct 1659 at 1663 (2013); *Jesner v Arab Bank, PLC*, 138 S Ct 1386 at 1398 (2018)["*Jesner*"], Appellant's Book of Authorities [BOA], Tab 6.

violations of international law."[35] The statute provides U.S. federal courts *jurisdiction* to hear "civil action[s] by an alien for a tort only, committed in violation of the law of nations,"[36] which allows federal courts to "recognize *a common-law cause of action* for claims based on the present-day law of nations."[37]

20. Appellant's contention that U.S. courts recognize claims for international law violations "only because of the ATS" is wrong.[38] When the ATS was enacted in 1789, torts in violation of the law of nations were already "within the common law," and actionable in state courts.[39] The ATS authorized *federal* courts—courts of limited jurisdiction—to hear cases for violations of the law of nations, "concurrent with" state courts—courts of general jurisdiction.[40] The statute was passed to provide the *national* government the ability to "cause infractions of … the law of nations to be punished,"[41] and "to ensure adequate remedies for foreign citizens."[42] Thus, the ATS, a product of U.S. federalism, is merely the vehicle through which common law claims based on international law violations, actionable in state court, may be brought in federal court.[43]

21. In *Sosa*, the Court limited ATS actions to violations of modern customary international law norms that are as widely accepted and specifically defined as those actionable when the ATS was adopted.[44] Appellant's assertion that this judicially created standard "confirms the centrality of the statute in making the claims actionable"[45] misreads *Sosa*. The *Sosa* Court called the notion that the ATS creates a statutory cause of action "frivolous" and rejected the argument that a

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[35] *Jesner*, *supra* note 34 at 1397 (internal citations omitted); *accord ibid* at 1409-10 (Alito, J., concurring).
[36] 28 USC § 1350.
[37] *Jesner*, *supra* note 34 at 1398 (citing *Sosa*, *supra* note 34 at 732).
[38] Appellant's Factum at para 74.
[39] *Sosa*, *supra* note 34 at 720. *See also* Brief of Professors of Federal Jurisdiction and Legal History as *Amici Curiae* in Support of Respondents, *Sosa v Alvarez-Machain*, 542 US 692 (2004), 2004 WL 419425, at 3-5, BOA Tab 1; *Sosa*, *supra* note 34 at 714 (adopting *amici's* views).
[40] An Act to Establish the Judicial Courts of the United States, c 20 § 9, 1 Stat 73, 77 (1789) [hereinafter "Judiciary Act of 1789"]. Now codified, as amended, at 28 U.S.C. § 1350.
[41] *Sosa*, *supra* note 34 at 716-17.
[42] *Jesner*, *supra* note 34 at 1396.
[43] *See Sosa*, *supra* note 34 at 714, 716, 722; *Jesner*, *supra* note 34 at 1396-97; Judiciary Act of 1789, *supra* note 40.
[44] *Sosa*, *supra* note 34 at 724-25, 729-31
[45] Appellant's Factum at para 75.

legislative cause of action was required.[46] *Sosa* concluded that "torts in violation of the law of nations were understood to be within the common law."[47] *Sosa* recognized a cause of action under federal common law for norms of the type the drafters would have recognized, consistent with the ATS's original intent.[48]

22. Appellant's other ATS arguments similarly fall flat. First, the existence of the Torture Victim Protection Act (TVPA) is irrelevant. Since the ATS only provides federal courts jurisdiction over actions by *aliens*, the TVPA was required to permit *U.S. citizens* to bring civil actions for torture in federal court.[49] Aliens can bring actions for torture under the ATS and/or the TVPA. The enactment of the TVPA does not alter the most salient fact: under the ATS, U.S. federal courts adjudicate breaches of customary international law as common law claims.

23. Second, in the United States, separation of powers and foreign policy concerns do not foreclose actions based on international law violations.[50] Instead, such claims are merely subject to "vigilant doorkeeping"[51] through the narrow construction of customary international law. Foreign relations considerations *favor* allowing civil suits based on international law violations, at least where, as here, they are against the forum nation's own citizens. Where a nation's citizens violate international law, the nation itself incurs responsibility. As Blackstone explained, if a sovereign failed to provide redress for its citizen's acts, it would be considered an abettor.[52]

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[46] *Sosa*, *supra* note 34 at 713-14, 724, 729-33.
[47] *Ibid* at 720; *see also* William Blackstone, Commentaries on the Laws of England, bk. 4, 67-68 (1791), BOA Tab 6.
[48] *Sosa*, *supra* note 34 at 724-25, 729-31 & n.18. When the ATS was enacted, the law of nations formed part of U.S. general common law, developed and applied by state and federal courts alike. *Sosa*, *supra* note 34 at 729. In 1938, the U.S. Supreme Court held there was "no federal general common law," *Erie R. Co. v Tompkins*, 304 US 64 at 78–79 (1938), barring federal courts from creating substantive common law rules in areas governed by state law. *Erie* does not, however, preclude federal courts from applying customary international law norms as part of the extant common law.
[49] Appellant's Factum at para 75 (emphasis added).
[50] Appellant's Factum at paras 79-80, 87.
[51] *Sosa*, *supra* note 34 at 726-29.
[52] Blackstone, *supra* note 47 at 67-68.

The U.S. government has recognized its interest in allowing its courts to hear claims for extraterritorial human rights violations by its own nationals, lest it incur international responsibility for "harboring the perpetrator."[53]

ii. International law leaves the means of its enforcement to individual states.

24. Appellant errs in suggesting that customary international law must "include an entitlement to damages" or expressly "apply to corporations."[54] *Sosa* recognized that international law itself need not provide a private cause of action; international law provides the norms of conduct, but the cause of action is brought under the *common law*.[55] As ATS cases have recognized, international law need not provide a right to sue in domestic court or specify the availability of damages from private actors; international law sets out the prohibited or required conduct and states determine how to enforce that prohibition or requirement.[56] International law distinguishes the question of remedy from that of rights violation.[57]

25. Because international law need not specify any right to sue, it need not specify a right to sue a corporation. *Jesner* did not hold otherwise. *Jesner* held that *foreign* corporations cannot be sued under the ATS,[58] but left the majority rule that corporations could be sued for international law violations[59] intact as to *domestic* corporations.[60] *Jesner* does not address whether

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[53] Suppl. Br. for the U.S. as *Amicus Curiae* in Partial Supp. of Affirmance at 4, 19-20, *Kiobel v Royal Dutch Petroleum Co.*, 133 S Ct 1659 (2013), 2012 WL 2161290, BOA Tab 5.
[54] Appellant's Factum at para 63. *See also ibid* at paras 68, 69.
[55] *Sosa*, *supra* note 34 at 714, 724, 729-31.
[56] *See Jesner*, *supra* note 34 at 1420-21, 1423-25 (Sotomayor, J., dissenting); *Kadic*, *supra* note 16 at 246; *Kiobel Royal Dutch Petroleum Co.*, 621 F (3d) 111 at 152, 172–76, 187–89 (2d Cir 2010) (Leval J., concurring); *Khulumani v Barclay Nat'l Bank Ltd*., 504 F (3d) 254 at 286 (2d Cir 2007) (Hall, J. concurring); *Tel-Oren v Libyan Arab Republic*, 726 F (2d) 774 at 777-78, 788 (DC Cir 1984) ["*Tel-Oren*"] (Edwards, J., concurring) (approved by *Sosa* at 731); *Flomo v Firestone Natural Rubber Co., LLC*, 643 F (3d) 1013 at 1019-20 (7th Cir 2011) ["*Flomo*"]; *Hilao*, *supra* note 11 at 1475; *Doe I v Nestle USA, Inc.*, 766 F (3d) 1013 at 1022 (9th Cir 2014) ["*Nestle* 2014"]; *Doe v Exxon Mobil Corp.*, 654 F (3d) 11 at 41-42, 51 (DC Cir 2011) ["*Exxon* 2011"] vacated in part on other grounds, 527 F. Appx. 7 (DC Cir 2013), BOA Tab 2.
[57] *See Flomo*, *supra* note 56 at 1019; *Exxon* 2011, *supra* note 56 at 41-42.
[58] *Jesner*, *supra* note 34 at 1403.
[59] Prior to *Jesner*, courts found corporate liability in federal common law *and* international law.

See e.g. Flomo, *supra* note 56 at 1021; *Exxon* 2011, *supra* note 56 at 41-42, 48-55, finding adopted in *Doe v Exxon Mobil Corp.*, No. 01-1357 at 4 (D DC July 6, 2015) (Mem. Op.); *Nestle* 2014, *supra* note 56 at 1021; *Sarei* 2011, *supra* note 7 at 764-65. *See also Doe v Drummond Co.*,

international law authorizes corporate liability, nor whether international law, by its structure, must supply the remedies available. Appellant's contrary argument incorrectly describes three Justices' *dicta* as the Court's holding.[61] Since *Jesner*, courts continue to allow ATS cases against U.S. corporations.[62]

26. Appellant's suggestion that international law does not provide civil remedies for international crimes again ignores the fact that international law provides norms of *conduct* and leaves modes of enforcement to states.[63] Indeed, "universal criminal jurisdiction necessarily contemplates a significant degree of civil tort recovery."[64] ATS jurisprudence has found civil liability for numerous international crimes—piracy, crimes against humanity, genocide, war crimes, slavery, and forced labor—including those at issue here.[65]

PARTS IV AND V: COSTS SUBMISSION AND ORDER SOUGHT

27. Interveners seek no order of costs, and ask that no award of costs be made against them.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

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782 F (3d) 576 at 584 (11th Cir 2015); *Al Shimari v CACI Premier Tech., Inc.*, 758 F (3d) 516 at 530-31 (4th Cir 2014).

[60] *Doe v Nestle, S.A.*, 906 F (3d) 1120 at 1124 (9th Cir 2018), BOA Tab 3.

[61] Appellant's Factum at para 69. Only those portions of Justice Kennedy's opinion that garnered five votes are the opinion of the Court. Appellant cites a passage in which three Justices questioned whether international law requires corporate liability; because those Justices recognized the Court need not resolve that issue, the cited passage was *dicta* even within their separate opinion. *Jesner*, *supra* note 34 at 1400-1402 (Kennedy, J., separate opinion). Four Justices concluded corporate liability is a domestic law question of enforcement and that "corporations are subject to certain obligations under international law." *Ibid.* at 1420-1424 (Sotomayor, J., dissenting).

[62] *Nestle* 2018, *supra* note 60 at 1124; *Al Shimari v CACI Premier Tech., Inc*., 320 F Supp (3d) 781 at 783, 787-88 (ED Va 2018).

[63] Appellant's Factum at paras 71, 84.

[64] *Sosa*, *supra* note 34 at 763 (Breyer, J., concurring); *accord Flomo*, *supra* note 56 at 1020; *see also Tel-Oren*, *supra* note 56 at 781-82 (Edwards, J., concurring).

[65] *See e.g. Sosa*, *supra* note 34 at 720 (piracy); *Sexual Minorities Uganda v Lively*, 960 F Supp (2d) 304 at 316-17 (D Mass 2013) (crimes against humanity); *Sarei* 2011, *supra* note 7 at 758-759, 763-764 (genocide, war crimes); *Unocal* 2002, *supra* note 13 at 947 (forced labor).

Dated: 7 January, 2019

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Per:

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PART VI: TABLE OF AUTHORITIES

PART VII: STATUTORY PROVISIONS

28 USC § 1350

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.

An Act to Establish the Judicial Courts of the United States, ch.20 § 9, 1 Stat. 73, 77 (1789)

9 The district courts (b) And shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States.