Nos. 19-416 and 19-453

In the Supreme Court of the United States

NESTLE USA, INC.,

Petitioner

v.

JOHN DOE I, ET AL.,

Respondents.

CARGILL, INC.,

Petitioner

v.

JOHN DOE I, ET AL.,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF INTERNATIONAL HUMAN RIGHTS ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS AND AFFIRMANCE

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INTEREST OF *AMICI*

Amici curiae (listed in the Appendix) are international human rights organizations with an interest in the proper understanding and assessment of the liability of corporations for the conduct at issue in this case.[1] As part of their work in countries around the world, *Amici* regularly examine through practice, advocacy and scholarship, the various ways that corporations are held liable for conduct constituting violations of international norms, including conduct that aids and abets or otherwise substantially furthers the commission of serious harms.

The issue presented in this case is whether, contrary to international consensus, U.S. corporations should be immune from liability in their home jurisdiction when they provide knowing practical assistance that furthers the commission of child slavery and forced labor in violation of international law. *Amici* submit that such conduct violates general principles of law – an established source of international law – and as such, falls squarely within the ambit, or "focus," of the Alien Tort Statute, 28 U.S.C. § 1350 ("ATS").

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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 for the preparation or submission of this brief. All parties have consented to the filing of this brief pursuant to Rule 37(3)(a) of the Rules of the Supreme Court of the United States.

Amici join this brief to aid the Court in determining the content of international law through an examination of general principles of law, on the issue of corporate liability and aiding and abetting liability.[2] Because they are based in different countries representing all regions of the world, with varying legal backgrounds, *Amici* are able to provide a unique consensus position on the norms accepted as general principles in major legal systems and the appropriate use of general principles of law in relation to corporate liability and secondary liability. Drawing on their collective and comparative expertise, *amici* demonstrate the overwhelming support in law and practice for holding corporations liable, particularly in their home jurisdiction, when they knowingly assist, further, facilitate or otherwise aid and abet the commission of serious violations such as child slavery and forced labor.

Amici further confirm that recognizing such liability under the ATS – rather than immunizing the unlawful conduct of U.S. corporations – "promote[s] harmony in international relations."

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[2] *Amici* have been informed that *amicus curiae* briefs addressing international law in the form of treaties and customary international law are being submitted in support of Respondents. This brief therefore focuses exclusively on general principles as an independent source of international law. *Amici* further observe that that the conclusions they arrive at regarding corporate liability and aiding and abetting liability as constituting general principles of law is in accord with the principles of international human rights law, including the right to a remedy, that also informs claims brought under the ATS.

Jesner v. Arab Bank, PLC., 138 S. Ct. 1386, 1406 (2018).

SUMMARY OF ARGUMENT

In *Kiobel v. Royal Dutch Petroleum Co.,* this Court held "claims" that "touch and concern the territory of the United States [. . .] with sufficient force" can "displace the presumption against extraterritorial application" of the ATS. 569 U.S. 108, 124-125 (2013). Two questions are raised in this case by Petitioners and their supporting *amici curiae*, and in particular, the United States Acting Solicitor General: whether domestic corporations can be held liable under the ATS, and whether conduct that substantially assists or facilitates the commission of a violation of a well-recognized norm of international law constitutes part of the "claim" to be scrutinized under the *Kiobel* "touch and concern" test.

Amici respectfully submit that the court below was correct when it found that there is no categorical rule of corporate immunity from liability, and that a U.S. corporation can – and indeed, should – be held accountable in its home jurisdiction when it knowingly and substantially assists in the commission of a serious violation of international law.

General principles of law are recognized as an authoritative source of international law by the Statute of the International Court of Justice and are applied by international tribunals and domestic courts alike, including this Court. To the extent that

this Court decides that international law informs the analysis of whether domestic corporations can be held liable under the ATS, and further, whether aiding and abetting liability is available under the ATS and how it informs the "touch and concern" test, general principles of law on these matters are relevant.[3]

Corporate liability continues to be a fundamental feature of all major legal systems and indeed, corporations continue to be subject to suit and sanction in courts throughout the world for conduct that violates national and international norms. While the form of accountability for egregious acts may vary, corporate liability for such conduct is a recognized general principle of law, and therefore, a part of international law.

Furthermore, the Ninth Circuit was correct to find that conduct which constitutes aiding and abetting is "relevant conduct" to be assessed for "touch and concern" purposes, as conduct violative of international law comes within the ATS's "focus" and is part of the "claim".[4] Acts which constitute

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[3] While *amici* take no position on whether courts should look to international law rather than domestic law to address these questions, they recall that international law forms part of federal common law. *See The Paquete Habana*, 175 U.S. 677, 700 (1900); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 729-31 (2004).

[4] This Court recently explained that "[t]he focus of a statute is the object of its solicitude, which can include the conduct it seeks to regulate, as well as the parties and interests it seeks to protect or vindicate." *WesternGeco LLC v. ION Geophysical Corp.*, 138 S. Ct. 2129, 2137 (2018). The Fourth Circuit Court

practical assistance that has a substantial effect on the commission of the violation, when committed with knowledge of the violation, is widely recognized as a form of accessory liability – a general principle of law – and as a basis for a legal claim. For *Kiobel*-test purposes, when that conduct occurs in the United States, it adds to the "force" by which such claims touch and concern the United States.

ARGUMENT

I. 'General Principles of Law' Is a Well-Recognized Source of International Law.

General principles of law are legal norms that are "accepted by all nations in *foro domestic*" and are discerned by reference to the common domestic legal doctrines in representative jurisdictions worldwide.[5] General principles "constitute both the

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of Appeals – a court that is noticeably excluded from Petitioner Cargill's survey of court of appeals' assessments of "relevant conduct" for purposes of *Kiobel's* "touch and concern" test, Brief for Petitioner Cargill, Inc., at 34-35 *Cargill Inc. v. Doe I* (Nos. 19-416 & 19-453) (Aug. 31, 2020) – has included domestic conduct and nationality of the defendant as among the factors it gave weight to as part of its "fact-based analysis" ATS "claims" to determine whether they displaced the presumption against extraterritoriality. *See Al Shimari v. CACI Premier Tech., Inc.,* 758 F.3d 516, 529-31 (4th Cir. 2014).

Amici agree with Respondents' position that the "focus" of the ATS is providing redress for international law violations without which the U.S. would be deemed "responsible" and risk international discord. Brief of Respondents in 19-416 20-23, *Nestlé USA, Inc. v. Doe I; Cargill Inc. v. Doe I* (Nos. 19-416 & 19-453) (Oct. 14, 2020).

[5] *See* CHARLES T. KOTUBY, JR. & LUKE A. SOBOTA, GENERAL

backbone of the body of law governing international dealings and the potent cement that binds together the various and often disparate cogs and wheels of the normative framework of the community."[6]

General principles of law are recognized as one of the primary sources of international law, having been codified as such in the Statute of the International Court of Justice ("ICJ"), of which the United States is a party. Statute of the International Court of Justice, art. 38(1)(c), June 26, 1945, 59 Stat. 1055, 1060, 33 U.N.T.S. 993.

Other major international treaties, such as the Rome Statute of the International Criminal Court ("ICC"), recognize general principles as a source of international law.[7] In their decisions, international

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PRINCIPLES OF LAW AND INTERNATIONAL DUE PROCESS (2017); ANTONIO CASSESE, INTERNATIONAL LAW 151 (2001) (general principles are drawn from the rules of the most significant "common points" of law); Bin Cheng, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS 390 (1953) (noting that general principles encompass "the fundamental principles of every legal system" and that they "belong to no particular system of law but are common to them all"); Frances T. Freeman Jalet, *The Quest for the General Principles of Law Recognized by Civilized Nations – A Study*, 10 U.C.L.A. L. Rev. 1041, 1056 (1963) (describing general principles as "those basic legal principles which underlie, and are common to, every legal system and which, being universally recognized, are known to all nations").

[6] Cassese, *supra* note 5 at 151.

[7] *See, e.g.*, Rome Statute of the International Criminal Court art. 21(1)(c), July 17, 1998, 2187 U.N.T.S. 90, 37 I.L.M. 1002 (1998); International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 (1967) art.

institutions routinely establish the content of international law through this exercise in comparative law, as a review of the jurisprudence of the ICJ[8] and specialized international tribunals[9] demonstrates. Notably, investor-State arbitration

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41(1)(c) (invoking general principles in relation to domestic exhaustion) & art.15(2) (looking to "general principles of law recognized by the community of nations" as the basis for identifying acts and omissions as crimes). *See also* In'tl Crim. Trib. for the former Yugoslavia, Rules of Procedure and Evidence, IT/32/Rev. 50 (2015), Rule 89 (B) ("In cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.").

[8] *See, e.g.,* Case Concerning the Factory at Chorzow (*Ger. v. Pol.*) (Claim for Indemnity) (Merits), 1928 P.C.I.J. (ser. A) No. 17, at 29 (Sept. 13) ("[I]t is a general conception of law that every violation of an engagement involves an obligation to make reparation."); Corfu Channel Case (Merits), Judgment, 1949 I.C.J. 4, 84 (Apr. 9) (relying on general principles of law after concluding that no treaty applied to the conduct at issue).

[9] *See, e.g., Prosecutor v. Šainović*, Case No. IT-05-87-A, Appeals Judgment, ¶ 1643, (Int'l Crim. Trib. for the Former Yugoslavia Jan. 23, 2014) (looking to national laws to define elements of aiding and abetting liability pursuant to "doctrine of general principles of law recognized by nations"); *Gonzalez. v. United States*, Case 1490-05, Inter-Am. Comm'n H.R., Report No. 52/07, OEA/Ser.L/V/II.130, doc. 22, rev. 1 ¶ 42 (2007) (relying on "generally recognized principles of international law" to hold that remedies for domestic violence "must be both adequate . . . [and] effective."). *See also* Case 11/70, *Internationale Handelsgesellschaft*, 1970 E.C.R. 1125, ¶ 2 (finding "respect for fundamental rights forms an integral part of the general principles of law" and that the protection of those rights in international law is "inspired by the constitutional traditions common to the Member States").

tribunals regularly look to general principles of law as a source of international law in their decisions.[10]

The law of the United States, and the decisions of this Court, are fully receptive to general principles of law as a source of international norms. The Restatement provides that "[a] rule of international law is one that has been accepted as such by the international community of states . . . by derivation from *general principles common to the major legal systems of the world*." RESTATEMENT (THIRD) OF U.S. FOREIGN RELATIONS LAW § 102(1)(c) (AM. LAW INST. 1987) (emphasis added). This Court has repeatedly turned to general principles to determine the content of international law. *See United States v. Smith*, 18 U.S. 153, 160-61 (1820); *Pearcy v. Stranahan*, 205 U.S. 257, 270 (1907); *First Nat'l City Bank v. Banco Para El Comercio Exterior De Cuba*, 462 U.S. 611, 623, 633 (1983).[11] This use of

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[10] *See, e.g., Lemire v Ukraine*, ICSID Case No ARB/06/18, Award, ¶ 155 (Mar. 28 2011) (looking to general principles on matters related to burden of proof); *The Renco Group, Inc. v Peru*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, ¶ 175 (July 15, 2016) ("The abuse of rights doctrine is an aspect of the principle of good faith and is a well-established general principle of international law"). *See also Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, ¶ 78 (Apr. 15, 2009) (observing that "nobody would suggest that ICSID protection should be granted to investments made in violation of the most fundamental rules of protection of human rights, like investments made in pursuance of torture or genocide or in support of slavery or trafficking of human organs").

[11] *See also Graham v. Florida,* 560 U.S. 48, 79-82 (2010) (continuing "longstanding practice in noting the global consensus" and noting United States was only nation to

general principles would have been entirely familiar to the founding generation and the drafters of the ATS, *see, e.g.*, *Smith*, 18 U.S. at 160-61, and contemporary litigation under the ATS routinely turns to general principles as a source of *Sosa*-qualified norms. *See e.g., Flomo v. Firestone Natural Rubber Co., LLC,* 643 F.3d 1013, 1019 (7th Cir. 2011) (finding corporate liability under the ATS because "corporate tort liability is common around the world"); *Doe v. Exxon Mobil Corp.*, 654 F.3d 11 (D.C. Cir. 2011), *vacated on other grounds*, 527 F. App'x 7 (D.C. Cir. 2013) (establishing corporate liability in principle under the ATS and admonishing the majority in *Kiobel I* for overlooking general principles); *Jean v. Dorelien*, 431 F.3d 776 (11th Cir. 2005) (consulting general principles determine exhaustion of domestic remedies requirements in the context of the Torture Victim Protection Act).

The three distinct, but interrelated, primary sources of international law – treaties, custom or customary international law, and general principles – serve to ensure that appropriate and sufficient guidance exists for determining the content of international law across a continuum of formation and practice. Each source, by definition, manifests a form of international consensus. Both customary international law and general principles look to municipal or national systems in defining their

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impose life without parole sentences on juvenile nonhomicide offenders); *Roper v. Simmons,* 543 U.S. 551, 575-78 (2005) (finding reference to the laws of other countries "instructive" for interpretation of Eighth Amendment).

content. The relationship between customary international law and general principles can be a close one, but each concept remains distinct: the former can be said to be concerned with usage and practice, while the latter turns on the recognition of an underlying principle.

Treaties and customary international law do not, and were not intended to, address every question regarding the content of international law, as evinced by the inclusion of general principles in the Statute of the ICJ. To the extent that these two sources leave questions unaddressed, general principles of law are intended to fill any "gaps that are bound to exist in the normative network of any community."[12]

Accordingly, Petitioners contention that proof of *opinio juris*, *i.e.,* the conviction that a state's conformity to some general practice of States is a matter of legal obligation, or a treaty is necessary to recognize corporate liability, including for aiding and abetting, is inapt. General principles are a

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[12] Cassese, *supra* note 5 at 151; *See also* Separate Opinion of Vice-President Alfaro, *Temple of Preah Vihear (Cambodia v Thailand),* Merits, Judgment, 1962 I.C.J. 6, at 42-43 (June 15), ("While refraining from discussing the question whether the principle of the binding effect of a State's own acts with regard to rights in dispute with another State is or is not part of customary international law, I have no hesitation in asserting that this principle, known to the world since the days of the Romans, is one of the 'general principles of law recognized by civilized nations' applicable and in fact frequently applied by the International Court of Justice in conformity with Art 38, para. I (c) of its Statute").

distinct source of international law, proved not through the universal practice of states *inter se* combined with *opinio juris*, as customary international law is, but by seeking the common denominator among domestic legal systems. *See* Statute of the ICJ, art. 38(1).

A general principles analysis does not look for "one law" for the entire world, but should be understood as "crystallizing a core of legal principles." Rudolf B. Schlesinger, *Research on the General Principles of Law Recognized by Civilized Nations*, 51 AM. J. INT'L L. 734, 741 (1957). Thus, "outside of that common core the detailed legal rules followed by the various nations necessarily differ, and perhaps should differ." *Id*. It is not required that a legal principle exists in the legal systems of all nations in order for it to be considered a "general principle of law recognized by civilized nations." *See* CHARLES S. RHYNE, INTERNATIONAL LAW: THE SUBSTANCE, PROCESSES, PROCEDURES AND INSTITUTIONS FOR WORLD PEACE WITH JUSTICE 62 (1971).

Notably, a 'general principles' analysis has aided the development of a number of areas of law related to corporate operations with international dimensions, including contract, anti-trust and trademark law.[13] *See* Wolfgang Friedmann, *The*

[13] Legal "responsibility" has been recognized as a general principle: "[i]t is a logical consequence flowing from the very conception of law and is an integral part of every legal order." Cheng, *supra* note 5, at 389. Responsibility and liability for breaches of law must be an integral part of the legal order applicable to corporations to provide sufficient legal certainty

Uses of 'General Principles' in the Development of International Law, 57 AM. J. INT'L L. 279 (1963). *See also* Lord McNair, Q.C., *The General Principles of Law Recognized by Civilized Nations*, 33 BRIT. Y.B. INT'L L. 1 (1957) (discussing use of general principles in contract law in the context of international development or natural resource concessions involving multinational corporations); Freeman Jalet, *supra* at 1043 (submitting that use of general principles has occurred primarily in the area of private international law to "enlighten the international business world"). Accordingly, it is appropriate to look to general principles in this case.

II. Corporate Liability is a General Principle of Law Recognized by Legal Systems around the World.

A review of developments at the national and international level demonstrate that with the rise of transnational business enterprises, and concomitant denials of fundamental rights as a result of those operations, a clear principle crystallizes that corporations can be held legally responsible for egregious conduct, including conduct constituting a specific breach of a universal and obligatory norm under international law. For example, the International Commission of Jurists found that "in

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allowing parties to enter into contracts and otherwise engage in business with corporations, including those corporations that conduct business across borders. Such responsibility is also a necessary corollary to granting rights to corporations. *See, e.g., Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

every jurisdiction, victims of gross human rights abuses or their families can initiate civil claims themselves." INT'L COMM'N OF JURISTS EXPERT LEGAL PANEL ON CORPORATE COMPLICITY IN INT'L CRIMES, CORPORATE COMPLICITY & LEGAL ACCOUNTABILITY: CIVIL REMEDIES, vol.3, at 4 (2008). Likewise, a 2006 study of sixteen geographically representative countries found that fifteen responded that it would be possible to bring civil legal claims against businesses associated with international humanitarian law or international criminal law breaches. *See* ANITA RAMASASTRY & ROBERT C. THOMPSON, COMMERCE, CRIME AND CONFLICT: LEGAL REMEDIES FOR PRIVATE SECTOR LIABILITY FOR GRAVE BREACHES OF INTERNATIONAL LAW: A SURVEY OF SIXTEEN COUNTRIES 22 (FAFO ed., 2006).[14]

In tandem with the rise of multinationals has been the development of an enhanced framework to regulate corporate conduct at the domestic and international levels and increased enforcement in the case of breaches. While the mechanisms and laws under which such accountability is rendered may vary across legal systems—including civil, criminal and administrative penalties,[15] the

[14] Only Indonesia reported no procedures for civil recovery in its code at that time. Ramasastry & Thompson at 22. *See also* Clifford Chance, Corporate Liability in Europe (2012) (examining corporate liability in twelve European countries).

[15] Proceedings in civil law countries often allow for victims to seek damages from a defendant as part of a criminal case, a practice highlighted by Justice Breyer in his discussion of international comity in *Sosa*. 542 U.S. at 762-63.

common core remains constant: corporations must respect the law, including human rights law, and can be held liable when they fail to do so.

Indeed, ensuring the legal accountability of business enterprises and access to effective remedy for persons affected by such abuses is a vital part of a State's duty to protect against business-related human rights abuse. *See* Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Report, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework United Nations*, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) ("U.N. Guiding Principles"), Principle 25 & Commentary.[16] The United States, like other countries, developed a National Action Plan, *inter alia* to promote awareness and implementation of the U.N. Guiding Principles.[17] The U.S. National

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[16] *See also* Committee on the Rights of the Child, General Comment 16: On State obligations regarding the impact of the business sector on children's rights, ¶ 44, U.N. Doc. CRC/C/GC/16 (Feb. 7, 2013) ("States should enable access to effective judicial and non-judicial mechanisms to provide remedy for children and their families whose rights have been violated by business enterprises extraterritorially when there is a reasonable link between the State and the conduct concerned"); *Soc. & Econ. Rights Action Ctr. v. Nigeria*, Comm. No. 155/96, African Comm'n on Human & Peoples' Rights, 15th A.C.H.P.R. AAR Annex V, ¶ 59 (Oct. 13-27, 2001) (finding that the government of Nigeria had failed to exercise due diligence in discharging its positive duties to protect these rights because it failed to ensure that the private companies did not infringe human rights).

[17] U.S. Dep't of State, Responsible Business Conduct: First

Action Plan recognizes that "countries are responsible for taking appropriate steps to establish means by which those allegedly affected by human rights abuses may seek effective remedies."[18] As such, failure to provide a legal framework to hold U.S. corporations accountable when they fail to respect human rights (or taking away a means of accountability, like the ATS) will constitute a breach of U.S. obligations.

All legal systems recognize – and have long recognized – the liability of corporations. *See First National City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 628-29, n.20 (1983); *see also Exxon*, 654 F.3d at 53 (finding that "[l]egal systems throughout the world recognize that corporate legal responsibility is part and parcel of the privilege of corporate personhood"). Among multiple authorities supporting this Court's conclusion in *FNCB* was the seminal decision of the International Court of Justice in *Case Concerning Barcelona Traction, Light & Power Co. Ltd. (Belg. v. Spain)*, 1970 I.C.J. 3, 38-39 (Feb. 5), which found a "wealth of practice already accumulated on the subject" of corporate personhood under domestic law around the world.

As in the United States, civil liability against corporations, including for conduct constituting violations of international norms, is imposed in

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National Action Plan for the United States of America, 2016, *available at* https://2009-2017.state.gov/e/eb/eppd/csr/naprbc/265706.htm.

[18] *Id.* at p. 23.

jurisdictions around the world. In both civil and common law countries, legal actions against corporations for egregious conduct, including in the context of transnational or extraterritorial operations, have been increasing – and brought most often in the "home state" of the corporation. *See, e.g., Lubbe v. Cape Plc,* [2000] 1 W.L.R. (H.L.) 1545 (appeal taken from Eng.) (claims for damages of over 3,000 miners who claimed to have suffered as a result of exposure to asbestos and its related products in the English defendant corporation Cape's South African mines); *Lungowe & Others v. Vedanta & Another*, [2019] UKSC 20, [2017] EWCA (Civ.) 1528 (Eng.); *Flores v. BP Exploration Co.* (Colom.*),* Claim No. HQ08X00328 [Filed Dec. 1, 2008] EWHC (QB) (complaint against BP in Colombia for serious environmental harm with devastating impact on the local population); *Khumalo v. Holomisa* 2002 (5) SA 401 (CC) (S. Afr.); *Jabir et al. v. KiK Textilien und Non-Food GmbH*, 7 O 95/15 (Landgericht Dortmund) (Ger.) (case on behalf of Pakistani textile factory laborers addressing supply chain liability of German retailing company for death of relatives and physical injury); *Fidelis A. Oruru v Royal Dutch Shell*, *plc*, District Court of the Hague, Jan. 30, 2013 (Neth.); *Nevsun Res. Ltd. v. Araya*, [2020] SCC 5 (Can.) (finding that Canadian corporation can be held liable in tort action in Canadian court for breaches of customary international law that caused injury in Eritrea); *Garcia v. Tahoe Resources Inc.*, [2017] BCCA 39 (Can.) (suit by Guatemalan protestors against Tahoe for negligence and battery resulting from a shooting by security personnel at Tahoe's

mine); *Bil'in (Vill. Council) v. Green Park Int'l Ltd*., [2009] QCCS 4151, para. 190 (Can. Que.) ("if the Plaintiffs' allegations are true, a trial judge could find that the Corporations are at fault" for war crimes) (dismissed on other grounds). *See also Chandler v Cape plc* [2012] EWCA (Civ) 525 (Eng.) (Court of Appeal of England and Wales addressing the availability of damages for a tort victim from a parent company, in circumstances where the victim suffered industrial injury during employment by a subsidiary company).

Indeed, many cases involving transnational activity brought under domestic law look quite similar to the fact-patterns that arise in ATS cases.[19] *See Prosecutor v TotalFinaElf et al*., [Court of Cassation] March 28, 2007 PAS. No. P.07.0031.F (2007) (Belg.) (brought by Myanmar residents in Belgium against the French oil company, Total, arising out of the same pipeline construction project at issue in *Doe v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002)); *Dagi v. BHP*, (1997) 1 VR 428 (Austl.) (suit in the Supreme Court of Victoria, Australia by 30,000 natives of Papua New Guinea, against a mining company for damages to their lands); *Union Carbide Corporation v. Union of India* (1991) 4 S.C.C. 584 (India) (case filed by residents of Bhopal,

[19] At the same time, it would be an error to expect or require that other countries have an exact replica of the ATS. *See generally* Beth Stephens, *Translating Filártiga: A Comparative and International Law Analysis of Domestic Remedies For International Human Rights Violations*, 27 YALE J. INT'L L. 1, 13 (2002) (explaining that each State translates its international law obligations into proceedings that are appropriate to its domestic civil and legal system).

India, against the Union Carbide Company for extensive injuries and loss of life arising from the release of toxic gases from a chemical plant); *Hiribo Mohammed Fukisha v. Redland Roses Limited* [2006] eKLR Civil Suit 564 of 2000 (Kenya) (case filed in Kenya in which tort law provided the remedy for serious bodily harm caused by exposure to hazardous chemicals when spraying herbicides and pesticides); *Choc v. Hudbay Minerals Inc.*, 2013 ONSC 1414 (Can. Ont. Sup. Ct.) (QL) (three related suits by Guatemalan women, the widow of a murder victim, and a survivor of a shooting, against HudBay and its subsidiaries for claims of negligence resulting in *inter alia* death and gang rapes); *Araya v. Nevsun Res. Ltd.*, (2016), 408 D.L.R. 4th 383 (Can. B.C. Sup. Ct.) (allowing a civil lawsuit to proceed against a Canadian mining company for human rights abuses in Eritrea).

The global trend at the national level is for increased enforcement of national laws against corporations – especially domestic corporations – when they commit or are complicit in the commission of human rights breaches. Recent developments in France are particularly notable. For example, a French court held that it had jurisdiction over a criminal action against two French companies for actions allegedly taken in violation of international humanitarian law. Although the court ultimately dismissed the action, it indicated that the suit would have been able to proceed had the plaintiffs proved that the companies violated customary international law. *See* Cour d'appel [CA] Paris Pôle 7, 6ème ch., Jan. 15, 2013, N°2012/05160 (Fr.). *FIDH/LDH/Gurman and*

others v X (case against French surveillance technology company Amesys for complicity to torture in respect of material supplied to Libyan regime used in repression of civilian population) (Fr.). Moreover, the French Parliament has specifically contemplated civil liability for corporate violations of international human rights law. In 2017, the French parliament passed a "duty of vigilance" law, which requires corporations to publish annual "public vigilance plans" describing the steps that they will take to prevent "severe violations of human rights and fundamental freedoms, serious bodily injury or environmental damage or health risks" resulting from the corporation's presence abroad.[20] If a company does not publish a plan, victims of human rights violations can sue for damages "for the harm that due diligence would have permitted it to avoid."[21]

These developments at the national level

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[20] *See* Loi 2017-750 du 23 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre [Law 2017-750 of Mar. 23, 2017 on the duty of oversight of parent companies and commissioning enterprises], Journal officiel de la République française [J.O.] [Official Gazette of France], Mar. 23, 2017 (Fr.). English translation *available at* http://corporatejustice.org/documents/publications/ngo-translation-french-corporate-duty-of-vigilance-law.pdf.

[21] Other countries have passed laws with similar effect. *See Crimes against Humanity and War Crimes Act,* S.C. 2000, c. 24 s.6; *Interpretation Act,* R.S.C., 1985 c.I-21, s.35(1) (Can.) (offences outside Canada can be committed by "every person," which includes corporations); Modern Slavery Act 2015, c. 30, § 54 (Eng).

dovetail with the consistent and increasingly concrete effort at the international level, to strengthen the regulatory framework for transnational business operations. The first significant effort was the 2003 UN Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises - Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003). In 2011 the U.N. Human Rights Council adopted "The Guiding Principles on Business and Human Rights," which outline the respective duties and responsibilities of States to "protect" human rights, and business enterprises to "respect" human rights. *See* U.N. Guiding Principles. The U.N. Guiding Principles set forth the "need for rights and obligations to be matched to appropriate and effective remedies when breached." *Id.*, General Principles.[22]

In 2015, the UN Human Rights Council passed

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[22] The U.N. Guiding Principles are rooted in international law, principles of State responsibility in public international law and human rights law:

> States may breach their international human rights law obligations where such abuse can be attributed to them, or where they fail to take appropriate steps to prevent, investigate, punish and redress private actors' abuse…. States also have the duty to protect and promote the rule of law, including by taking measures to ensure equality before the law, fairness in its application, and by providing for adequate accountability, legal certainty, and procedural and legal transparency." Guiding Principles, Principle 1, Commentary.

Resolution 26/9 which established the United Nations open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, with a mandate to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises. UN Human Rights Council Res. 26/9, UN Doc A/HRC/26/L.22/Rev.1 (June 25, 2014).[23] Negotiations on the "Second Revised Draft" will take place in Geneva later this month.[24] Corporate

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[23] Notably, the treaty under negotiation is understood to clarify and codify existing obligations and ensure redress for corporate-related abuses; as such, it is aimed at enforcing existing obligations. *See, e.g.,* FIDH, Business and Human Rights: Enhancing Standards and Ensuring Redress, N°629a, (2014).

[24] *See* Legally Binding Instrument to Regulate, In International Human Rights Law, The Activities of Transnational Corporations and Other Business Enterprises, OEIGWG Chairmanship Second Revised Draft, Aug. 6, 2020, *available at* https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/OEIGWG_Chair-Rapporteur_second_revised_draft_LBI_on_TNCs_and_OBEs_with_respect_to_Human_Rights.pdf.

A global civil society movement has engaged with the OEIGWG process, while also advocating for enhanced regulation of corporate conduct at the national level. *See, e.g.*, Treaty Alliance, *available at* http://www.treatymovement.com/.

The United Nations High Commissioner on Human Rights has also increased attention on this issue. *See, e.g.,* Jennifer Zerk, *Corporate Liability for Gross Human Rights Abuses: Towards a Fairer and More Effective System of Domestic Law Remedies, A Report Prepared for the Office of the UN High*

liability, whether criminal, civil or administrative, has been included in the International Law Commission's draft Crimes Against Humanity Convention – a notable development in light of the omission of such liability from the jurisdiction of the International Criminal Court.[25] And while the ICC does not currently have jurisdiction over legal persons, a more recently constituted international tribunal has affirmed its jurisdiction of legal entities. *New TV S.A.L. Karma Mohamed Tashin Al Khayat*, Case No. STL-14-05/PT/AP/AR126.1, Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings, (Special Trib. for Leb. Oct. 2, 2014) (finding that the STL can exercise criminal jurisdiction over legal persons, following examination of evolving international standards on human rights and corporate accountability as well as national laws).

Regional systems have likewise responded with codifications of obligations on businesses with respect to human rights and transnational operations.[26] Of particular relevance to the question

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Commissioner for Human Rights, (2014), available at: http://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticeLawRemedies.pdf.

[25] International Law Commission, *Report, Draft Articles on Prevention and Punishment of Crimes Against Humanity*, with commentaries, Art. 6(8), U.N. Doc. A/74/10 (Aug. 20, 2019).

[26] *See also Ubaser S.A. v Argentina*, ICSID Case No. ARB/07/26,¶1193 et seq. and in particular 1210 (Dec. 8, 2016) (International investment tribunal concluded that a prohibition to commit acts violating human rights can be of immediate application upon private parties).

before the Court with regard to domestic corporate liability, it has been codified that courts of member states of the European Union have jurisdiction over corporations domiciled in any member State for torts, including those that occur outside the jurisdiction of the home-State. European Council Regulation 44/2001, arts. 2, 60, 2001 O.J. (L 12) 3, 13 (EC), and amendment Regulation (EU) No 1215/2012 of 12 December 2012 ("Recast Brussels Regulation") on jurisdiction and the recognition and enforcements of judgments in civil and commercial matters, arts. 4, 63, 2012 O.J. (L 351) 1.[27] *See Daimler AG v.* Bauman, 571 U.S. 117, 141-42 (2014) (foreign government object to general jurisdiction for foreign subsidiaries 'just doing business' in the United States, favoring suit against corporations in nation where domiciled). Moreover, a corporation can be sued in EU member countries where it has branches or subsidiaries for conduct arising out of the operations of those branches or subsidiaries. *See, e.g.*, *Motto v. Trafigura Ltd.*, [2011] EWCA (Civ) 1150 (Eng.) (Plaintiffs from Cote d'Ivoire sued Dutch corporation with English branch in English courts for damages from toxic waste dumping in and around Abidjan, Côte d'Ivoire). The European Court of Justice clarified in 2005 that the *forum non*

[27] Art. 2 provides: "persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State." Pursuant to Article 60(1) of the Brussels Regulation, a company or other legal person or association of natural or legal persons is domiciled at the place where it has its: (a) statutory seat, or (b) central administration, or (c) principal place of business. *See* EU Regulation No 1215/2012, art. 4.

conveniens doctrine is incompatible with Brussel Convention of 1968, therefore EU Member States could no longer invoke *forum non conveniens* to dismiss a case from their jurisdiction when the company involved is domiciled in the E.U. without facing the risk of being sanctioned by the ECJ.[28]

Furthermore, the 2014 Protocol to the African Court of Justice and Human and Peoples' Rights has a section titled 'Corporate Criminal Liability' which establishes jurisdiction for the court over the actions of legal persons, including corporations. African Union Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, June 27, 2014.[29]

Accordingly, holding U.S. corporations accountable under the ATS for child slavery and forced labor accords with the general principles of law of civilized nations regarding corporate liability.

III. Aiding and Abetting Liability is a General Principle of Law Recognized by Legal Systems around the World.

Aiding and abetting liability has long been recognized under international law, including as applied to or for the conduct of corporate actors. *See, e.g., The Zyklon B Case* (Trial of Bruno Tesch and Two Others), 1 Law Reports of Trials of War

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[28] Case C-281/02, *Andrew Owusu v. N.B. Jackson*, agissant sous le nom commercial "Villa Holidays Bal-Inn Villas" e.a., 2005 E.C.R. I-01383.

[29] The new article 46C(1) states: "For the purpose of this Statute, the Court shall have jurisdiction over legal persons, with the exception of States."

CRIMINALS 93 (1947) (Brit. Mil. Ct., 1-8 March 1946) (recognizing liability for supplying Zyklon B to Nazi gas chambers); *The Flick Case*, 9 Law Reports of Trials of War Criminals (1949) (U.S. Mil. Tribunal, Nuremberg Apr. 20–22, 1947) (recognizing aiding and abetting through financial contributions).

Because conduct that constitutes aiding and abetting is conduct that "violates international law" – precisely that which the ATS "seeks to regulate" in giving federal courts jurisdiction over international law violations – it falls squarely within the ambit of the ATS. *See, Adhakari v. Kellogg Brown & Root, Inc.,* 845 F.3d 184, 197 (5th Cir.), *cert. denied* 138 S. Ct. 134, 199 (2017) (quoting *Morrison v. Nat'l Australia Bank*, *Ltd.,* 561 U.S. 247, 267 (2010)).

International treaties that define international law offenses routinely oblige state parties to recognize and incorporate an array of forms of complicity or accessory liability, including aiding and abetting, into their domestic legal frameworks. *See, e.g.,* Convention on the Prevention and Punishment of the Crime of Genocide, *adopted* Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 4(1), *adopted* Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987). The statutes of all modern international tribunals and courts include aiding and abetting and other forms of secondary liability, as well as recognize that serious international law violations are often committed by a group acting with a "common purpose." *See, e.g.,* ICTY Statute, art. 7(1); ICTR Statute, art. 6(1);

Prosecutor v Tadić, Case No. IT-94-A, Judgment, July 15, 1999.

Notably, the Rome Statute for the International Criminal Court codifies various forms of complicity: article 25(3)(c) prescribes individual criminal liability to those who aid, abet or otherwise assist in the commission of a crime, including by providing the means for its commission, while article 25(3)(d) prescribes liability for a crime when a person "[i]n any way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose" when either made with the aim of furthering the criminal activity of in the knowledge of the intention of the group to commit the crime. *See, e.g., Prosecutor v. Mbarushimana*, ICC-01/04-01/10-465-Red, Decision on the Confirmation of Charges, ¶¶ 278-85 (Dec. 16, 2011); *Prosecutor v. Katanga*, ICC-01/04-01/07, Trial Judgment, ¶¶ 1617-1621 (Mar. 7, 2014); *Prosecutor v. Charles Blé Goudé*, ICC-02/11-2/11-186, Decision on the confirmation of charges against Charles Blé Goudé, ¶ 167 (Dec. 11, 2014) (finding that art. 25(3)(c) requires a person "provides assistance to the commission of a crime and that, in engaging in this conduct, he or she *intends to facilitate* the commission of the crime") (emphasis added). The latter is akin to "joint criminal enterprise" or civil conspiracy, which has long been applied against corporate actors.

In assessing individual criminal responsibility in cases, each of these courts assesses the *actus reus* and *mens rea* of both the charged "mode of liability" and substantive violation for each count; the

satisfaction of the elements of the mode of liability and the substantive violation charged are both necessary to arrive at a conviction and then, assessment of each informs a given sentence. *See, e.g., Prosecutor v. Vasiljević*, Case No. IT-98-32-T, Judgment, ¶¶ 117-18, 214-15 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 29, 2002); *Prosecutor v. Taylor*, Case No. SCSL-03-1-A, Judgment, ¶¶ 362-85 (Special Court for Sierra Leone Sept. 26, 2013) ("*Taylor* Appeal Judgment"). Accordingly, the international tribunals and courts regard the underlying conduct, e.g., aiding and abetting as part and parcel of the international law violation. *See, e.g., Prosecutor v. Brđanin*, Case No. IT-99-36-T, Judgment, ¶¶ 367-69, 466-76, 1110 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 1, 2004); *Taylor* Appeal Judgment, ¶¶ 651-52, 661-70.[30]

The International Criminal Tribunal for the former Yugoslavia conducted a comprehensive review of laws and practice regarding aiding and abetting in the seminal case, *Prosecutor v. Furundžija*, and concluded that aiding and abetting is a well-established theory of liability under international law that consists of knowingly providing practical assistance or encouragement that had a substantial effect on the commission of the offense. Case No. IT-95-17/1/T, Judgment, ¶¶

[30] *Amici* are aware that another *amicus curiae* brief assesses the jurisprudence of the international criminal tribunals as it relates to aiding and abetting and other forms of secondary liability, and respectfully refer the Court to Brief of International Law Scholars, Former Diplomats, and Practitioners as *Amici Curiae* in Support of Respondents, Section II, for further discussion.

235, 249 (Dec. 10, 1998).

Domestic jurisdictions around the world have long relied upon various forms of secondary liability to reach parties that knowingly and substantially assist other actors in breaching international or domestic law, and have regularly applied the standard set forth in *Furundžija*.[31] This includes in ATS cases, where the acts of assistance have occurred in multiple countries including in the United States when the injury occurred in another jurisdiction. *See, e.g., Al Shimari v. CACI Premier, Tech.*, 324 F. Supp. 3d 668, 696-97 (E.D. Va. 2017); *Mwani v. Bin Laden*, 947 F. Supp. 2d 1 (D.D.C. 2013).

More recent comparative studies have affirmed that corporations can be held legally liable for their role in furthering, assisting or otherwise aiding and

[31] Companies have long been on notice that this is the standard that applies to their activities. *See, e.g.,* OHCHR Briefing paper, "The Global Compact and Human Rights: Understanding Sphere of Influence and Complicity" states that: "A company is complicit in human rights abuses if it authorizes, tolerates, or knowingly ignores human rights abuses committed by an entity associated with it, or if the company knowingly provides practical assistance or encouragement that has a substantial effect on the perpetration of human rights abuse. The participation of the company need not actually cause the abuse. Rather the company's assistance or encouragement has to be to a degree that, without such participation, the abuses most probably would not have occurred to the same extent or in the same way." Business Leaders Initiative on Human Rights United Nations Global Compact and the Office of the High Commissioner for Human Rights, "A Guide for Integrating Human Rights into Business Management" (2006).

abetting egregious violations, and most regularly are held to account in their home jurisdictions as States enact specific legislation or bring enforcement actions to meet their duty to protect human rights in the context of business activities. *See* INT'L COMM'N OF JURISTS EXPERT LEGAL PANEL ON CORPORATE COMPLICITY IN INTERNATIONAL CRIMES, 1-3 CORPORATE COMPLICITY & LEGAL ACCOUNTABILITY (2008); John Ruggie (Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises), *Clarifying the concepts of "sphere of influence" and "complicity"*, U.N. Doc. A/HRC/8/16, (May 15, 2008); UN Guiding Principles (noting that corporations can be complicit when contributing to adverse human rights impacts committed by primary perpetrators and explains that civil actions can be based on a corporation's alleged contribution to human rights harms). *See also* "Legally Binding Instrument To Regulate, In International Human Rights Law, The Activities of Transnational Corporations and Other Business Enterprises," Open-Ended Intergovernmental Working Group On Transnational Corporations and Other Business Enterprises with Respect to Human Rights (OEIGWG), Second Revised Draft, Aug. 6, 2020, art. 8 (requiring States provide measures to establish legal liability over legal persons for *inter alia* complicity in commission of customary international law, treaty or domestic law violations).

Corporate complicity in international human rights abuses often involves supplying individual perpetrators with the necessary equipment or

support to carry out the atrocity. To that end, countries have enacted or strengthened domestic laws to hold corporations and corporate actors accountable through complicity theories, including aiding and abetting. *See, e.g.,* International Crimes Act 2003 (Wet Internationale Misdaden), article 2(2) (Neth.) (prohibits the commission of war crimes and crimes against humanity by Dutch nationals and companies including acts that amount to complicity in crimes, such as the facilitation or the aiding and abetting of crimes). The French Penal Code imposes corporate liability in cases where legal persons contributed some form of assistance in the commencement of international crimes.[32] Investigations against French companies have been initiated under this law, including, including against Qosmos, a French company, alleged to be complicit in acts of torture in Syria. *See also* Alstom-Veolia case, Cour d'appel [CA] [regional court of appeal] Versailles, 3e ch., Mar. 22, 2013 (Fr.).

Corporations have been held to account for their role in aiding and abetting or otherwise being complicit in human rights violations in their home state through civil actions and criminal investigations. *See, e.g., Guerrero v. Monterrico Metals plc,* [2009] EWHC 2475 (tort action against U.K. based mining business Monterrico Metals and

[32] French Penal Code of 31 December 2005, Act 2004-204 of 9 March 2004; Re: Criminal liability of private law legal entities under French law and Extraterritoriality of the laws applicable to them: Review of the situation and discussion of issues, (Ministère des Affaires étrangères, Human Rights Coordination Mission, 5 June 2006), 5 June 2006, p. 1. (Human Rights Coordination Mission).

its Peruvian subsidiary, Rio Blanco Copper, alleging complicity in violence against protesters of their mining project); *Nevsun Resources Ltd. v. Araya*, [2020] SCC 5 (Can.), para. 113 ("it is not "plain and obvious" that corporations today enjoy a blanket exclusion under customary international law from direct liability for violations of "obligatory, definable, and universal norms of international law", or indirect liability for their involvement in […] "complicity offenses").

CONCLUSION

For the foregoing reasons, the decision of the court below should be upheld.

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APPENDIX A - LIST OF *AMICI CURIAE*

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ALTSEAN-Burma

Canadian Lawyers for International Human Rights (Canada)

Canadian Network on Corporate Accountability (Canada)

Center for Constitutional Rights (United States)

European Center for Constitutional and Human Rights (Germany)

Global Rights Compliance LLP (Ukraine/United Kingdom)

Global Witness (United Kingdom, with offices in Washington, D.C. and Brussels)

Human Rights Law Network (India)

International Association of Democratic Lawyers (Secretariat in Belgium, with members in more than 90 countries)

International Commission for Labor Rights (United States)

International Federation for Human Rights (Secretariat in France, comprised of 192 human rights organizations from 117 countries, representing all regions of the world)

Justice and Corporate Accountability Project (Canada)

MiningWatch (Canada)

Rights and Accountability in Development-RAID (United Kingdom)