COURT OF APPEAL FILE NO. CA 44025

COURT OF APPEAL

ON APPEAL FROM the order of the Honourable Mr. Justice Abrioux of the Supreme Court of British Columbia, pronounced on October 6, 2016

BETWEEN:

GIZE YEBEYO ARAYA, KESETE TEKLE FSHAZION AND MIHRETAB YEMANE TEKLE

Respondents
(Plaintiffs)

AND:

NEVSUN RESOURCES LTD.

Appellant
(Defendant)

AND:

EARTHRIGHTS INTERNATIONAL

Intervenor

INTERVENOR'S FACTUM

Counsel for the Intervenor, EarthRights International

Alison M. Latimer
Underhill, Boies Parker, Gage & Latimer LLP
1710-410 West Georgia Street
Vancouver, BC V6B 5A1
Tel: 604.696.9828 / Fax: 1.888.575.3281

Tamara Morgenthau
EarthRights International
1612 K Street NW, Suite 401
Washington, DC, 20006

Counsel for the Appellant, Nevsun Resources Ltd.

Andrew I. Nathanson, Andrew D. Borrell and Gavin R. Cameron
Fasken Martineau DuMoulin LLP
2900 – 550 Burrard Street
Vancouver, BC V6C 0A3
Tel: 604.631.3131 / Fax: 604.631.3232

Counsel for the Respondents, Gize Yebeyo Araya, Kesete Tekle Fshazion and Mihretab Yemane Tekle

Joe Fiorante, Q.C., Reidar Mogerman, and Jennifer D. Winstanley
Camp Fiorante Matthews Mogerman
#400 – 856 Homer Street
Vancouver, BC V6B 2W5
Tel: 604.689.7555 / Fax 604.689.7554

Charles M. Wright, Nicholas Baker
Siskinds LLP
680 Waterloo Street
London, ON N6A 3V8
Tel: 519.660.7868 / Fax 519.660.7869

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OPENING STATEMENT

EarthRights International (ERI) has been granted leave to intervene to address the act of state doctrine and the application of customary international law. ERI's intervention focuses on U.S. jurisprudence.

The act of state doctrine, as applied in the U.S., would not bar adjudication of the claims in this case. The majority of U.S. courts considering the act of state doctrine in cases alleging gross human rights violations have found that it does not bar adjudication. Courts have refused to apply the doctrine for a number of reasons, but the most persuasive and fundamental is that violations of universally recognized, nonderogable human rights cannot be considered public acts and thus are not acts of state.

Common law claims based on customary international law are actionable in the U.S., and not because of any *sui generis* statute. The Alien Tort Statute (ATS) provides U.S. federal courts with jurisdiction over "civil action[s] by an alien for a tort only, committed in violation of the law of nations." 28 U.S.C. § 1350. U.S. Supreme Court jurisprudence and the history of the ATS make clear that it is a jurisdictional statute only. A claim under the ATS is not a statutory cause of action; it is a common law claim, based on an international law violation—which forms part of the U.S. federal common law. If anything, the uniqueness of the ATS stems from U.S. federalism—the statute gave federal courts authority to hear cases that were already within the jurisdiction of state courts. The intervenor takes no position on whether customary international law forms part of Canadian law; but if that is the case, the ATS is relevant.

U.S. ATS jurisprudence is instructive in showing that international law need not provide a right to bring a civil claim for violations of international norms. International law leaves the means by which it is to be enforced to states. Moreover, the majority of U.S. courts have found that corporations can be held liable for international law violations brought under the ATS. Corporate liability is found both in U.S. common law and international law. Suggesting that a private action cannot flow from prohibitions in international criminal law is mistaken; enforcement is within a state's realm.

PART 1 - STATEMENT OF FACTS

1. ERI is a U.S. registered non-profit, non-governmental human rights organization that litigates and advocates on behalf of communities facing human rights and environmental abuses perpetrated by corporations.

2. On May 5, 2016 Justice Dickson granted ERI leave to intervene on two issues: the act of state doctrine and the application of customary international law.

3. ERI takes no position on the facts alleged in this case.

PART 2 – ISSUES ON APPEAL

4. ERI's intervention is limited to two issues. First, ERI shows that the act of state doctrine (the "Doctrine"), under U.S. jurisprudence, does not bar claims for serious human rights abuses. Second, ERI addresses the application of customary international law and shows that ATS jurisprudence recognizes civil claims for international law violations based on the common law; that international law need not provide a right to sue because it leaves the means of its enforcement to states; that corporations are not immune from liability for violations of customary international law; and that prohibitions in international law that are crimes can also be torts.

PART 3 – ARGUMENT

I. In the U.S., the Doctrine would not bar consideration of cases like this

5. When plaintiffs have alleged violations of fundamental human rights norms, U.S. courts have repeatedly rejected the act of state defense. *E.g. Sarei v. Rio Tinto PLC*, 671 F.3d 736 (9th Cir. 2011) ("*Sarei*") p. 757, *vacated by grant of* certiorari *and remanded on other grounds*, 133 S.Ct. 1995 (2013); *Trajano v. Marcos*, 978 F.2d 493 (9th Cir. 1992) (*"Trajano"*), p. 498 n.10; *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995) ("*Kadic*"), p. 250; *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (*"Filartiga"*), pp. 889-90; *Forti v. Suarez-Mason*, 672 F. Supp. 1531 (N.D. Cal. 1987) ("*Forti*"), p. 1546; *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992) (*"Siderman"*), p.713; *John Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002) *("Unocal")*, pp. 958-960*; Presbyterian Church of Sudan v. Talisman Energy*, 244 F. Supp. 2d 289 (S.D.N.Y. 2003*)* ("*Talisman*"*),* p. 345*; Warfaa v. Ali,* 33 F. Supp. 3d 653, (E.D. Va. 2014)

("*Warfaa*"), pp. 661-62; *Garcia v. Chapman*, 911 F. Supp. 2d 1222 (S.D. Fla. 2012) p. 1242.[1]

6. Under U.S. jurisprudence, acts that violate *jus cogens* norms cannot be official sovereign acts, and are justiciable. This is so regardless of whether government personnel, such as military, are involved. In any event, defendants must *prove* that the acts in question were official, and that the case challenges the *validity* of an official act. Even if it does, courts conduct a balancing test to determine whether the doctrine should bar adjudication. And this test would still allow adjudication where the acts violate norms with international consensus or where condemnation of such acts would not strain foreign relations.

A. In the U.S., the Doctrine is a defense on the merits, not a question of subject matter jurisdiction

7. The act of state doctrine is a defense that must be proven by the defendant. *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682 (1976) ("*Dunhill*"), pp. 691, 694. Appellant asserts that the doctrine is an immunity, akin to state immunity, and thus a rule of subject matter competence. Appellant's Factum, para. 63. But in the United States, as the Respondent notes, the act of state doctrine is not a question of subject matter jurisdiction. *See* Respondents' Factum, para. 83. As stated by the U.S. Supreme Court: "Unlike a claim of sovereign immunity, which merely raises a jurisdictional defense, the act of state doctrine provides foreign states with a substantive defense on the merits." *Republic of Austria v. Altmann*, 541 U.S. 677 (2004), p. 700.

B. The Doctrine only applies to official acts

8. The Doctrine is narrow. It applies only if the *validity* of an *official*, *public* act is at issue. *W.S. Kirkpatrick & Co. Inc. v. Environmental Tectonics Corp. Int'l.*, 493 U.S. 400 (1989) ("*Kirkpatrick*"), p. 409. If the validity of an official act is not at issue, the Doctrine is not triggered, even if the case may embarrass a foreign government. *Kirkpatrick*, p. 409.

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[1] "Circuit" courts are United States federal appellate courts. There are thirteen circuits, and their opinions are not binding on each other. "District" courts are federal trial courts.

9. Appellant argues that this case falls within the Doctrine because it would require the court "to sit in judgment over the sovereign conduct of the State of Eritrea." Appellant's Factum, para. 61. Regardless of the facts, that is wrong under U.S. law. As detailed below, U.S. courts consistently find that violations of fundamental human rights norms are not sovereign acts. Even if they could be, the defendant must show an officially approved policy of the state, or acts taken at the direction of an official state order.

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

10. Violations of "*jus cogens* norms are exempt from the [act of state] doctrine." *Sarei*, p. 757. A *jus cogens* or "peremptory" norm is one "recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, 1155 U.N.T.S. 332, 8 I.L.M. 679. *Jus cogens* norms are "binding on all nations," are "derived from values taken to be fundamental by the international community" and "are the concern of all states." *Siderman*, p. 715 (internal quotation marks omitted). They "enjoy the highest status within international law" and prevail over any conflicting international rules. *Siderman,* pp. 715-16 (internal quotation omitted). Accordingly, "[a]cts of state to the contrary [of a *jus cogens* norm] are invalid." *Talisman,* p. 345. "[A] violation of a *jus cogens* norm is not a sovereign act." *Sarei*, p. 757; *accord Siderman,* p. 718.

11. Precisely because *jus cogens* norms forbid any derogation and violations are not sovereign acts, they cannot be acts of state. *Sarei,* p. 757, citing *Siderman,* p. 718. In *Hilao v. Estate of Marcos*, 25 F.3d 1467 (9th Cir. 1994) ("*Hilao*"), p. 1471, the Appellate Court "implicitly rejected the possibility" that a former foreign president's conduct involving torture and murder could be official, public sovereign acts; they were justiciable torts, not acts of state. In a recent decision, a district court in Virginia held the doctrine inapplicable because the plaintiff alleged acts that violated *jus cogens* norms. *Warfaa*, pp. 661-62.

12. This *jus cogens* exception to the act of state doctrine broadly accords with Respondents' description of the public policy exception. Respondents' Factum, paras. 75-76, 106, 123-25. Both have the same the end result: courts adjudicate the case.

13. The Appellant's argument that Eritrean law is the only standard by which the alleged acts can be judged—and that adjudicating them, even under international law, violates Eritrean sovereignty—ignores the import of a *jus cogens* norm. *See* Appellant's Factum, paras. 92, 97. Under U.S. law, adjudicating alleged *jus cogens* violations does not infringe on foreign sovereignty, because no state has a right to violate these norms.

14. The analysis does not change in the context of military abuses. U.S. cases hold that *jus cogens* violations carried out by a military are not acts of state, even where the military was responding to a civic emergency and involved acts that would otherwise be legitimate governmental functions but for the abuse. For example, in *Sarei*, the Ninth Circuit held that the alleged military abuses, genocide and war crimes committed while quelling an uprising and during a civil war were not sovereign acts or acts of state. *Sarei*, p. 757. And in *Trajano*, the Ninth Circuit held that the torture or execution of up to 10,000 people by military personnel acting under the head of military intelligence's direction, pursuant to martial law declared by the nation's president, were not official, public acts of state. *Trajano*, pp. 496, 498 n.10; *Hilao*, pp. 1469, 1471-72. Similarly, in *Sharon v. Time, Inc.*, 599 F. Supp. 538 (S.D.N.Y. 1984) ("*Sharon*"), pp. 542, 544, a New York district court held that an Israeli Defense Minister's alleged approval of a massacre by Lebanese militiamen—during Israel's 1982 invasion of Lebanon—was not an act of state. The massacre was "intended to eliminate strongholds from which terrorists of the Palestine Liberation Organization [] had been launching attacks on Israel." *Sharon,* p. 544.

15. Appellant claims that the public policy exception cannot be "triggered solely by allegations." Appellant's Factum, at para. 89. But plaintiffs do not "trigger" the public policy exception. As discussed below, under U.S. law, *defendants* bear the burden to prove that the alleged acts are official actions, and to justify the application of the Doctrine. *Talisman,* pp. 344-345. The act of state doctrine is often raised in a motion to dismiss and rejected based on the pleadings. *See e.g. Sarei,* pp. 757, 770; *Talisman,*

pp. 296, 344-347.

ii. Defendants must prove the alleged acts were official sovereign acts

16. "Act of state" is a term of art. Most acts by government officials would not rise to the level of an "act of state." Even if the doctrine could apply to claims of *jus cogens* violations, defendants must "offer some *evidence* that the government acted in its sovereign capacity." *Siderman,* p. 713 (emphasis added). They must show that the act was "the officially approved policy of a state." *Kadic*, p. 250. Failure to do so is fatal.

17. Courts almost never dismiss human rights claims on act of state grounds because states nearly always officially *reject* human rights abuses rather than officially *adopting* them as sovereign acts. *See Filartiga*, p. 890 (noting that Paraguay renounced torture as a legitimate instrument of state policy); *Kadic*, p. 250 ("Moreover, the appellee has not had the temerity to assert in this Court that the acts he allegedly committed are the officially approved policy of a state.").

18. That officials or soldiers committed the abuses does not make their conduct acts of state. Indeed, where a plaintiff sued over the seizure of property by military officials, the appellate court required "evidence that the government acted in its sovereign capacity" even though the Government of Argentina itself was the defendant. *Siderman*, p. 713. Similarly, a California district court held that it could not assume that torture, prolonged arbitrary detention, and summary execution were acts of state, even though the abuses were committed by police and soldiers under the direction of a general with responsibility for suppressing terrorism, and during a declared state of siege that authorized the military to detain suspects. The court held it was not clear whether the defendant's actions were ratified by the *de facto* military government, and noted that evidence showed that the alleged acts were illegal under Argentine law. *Forti,* p. 1546.[2]

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[2] *See also Republic of Philippines v. Marcos*, 862 F.2d 1355, (9th Cir. 1988) (en banc), p. 1361 (holding Ferdinand Marcos's alleged illegal acts, committed while he was President of the Philippines, could not be considered acts of state since Marcos provided no evidence supporting his claim that they were).

19. In *Dunhill*, the U.S. Supreme Court defined the type of evidence required to prove an official sovereign act. It held that Cuba's refusal to pay a debt was not an act of state because Cuba had not submitted evidence of any "statute, decree, order, or resolution of the Cuban Government itself" indicating that Cuba had, as a sovereign matter, repudiated its obligation. *Dunhill,* pp. 691-93, n.8, 695. Cuba did not admit it owed the debt, and therefore its nonpayment was not an official repudiation of its obligation, but rather implied only a denial that Cuba had incurred any obligation. *Dunhill,* pp. 691-93, n.8, 695.

20. In a case involving abuses—including torture, extrajudicial killing, and arbitrary detention—committed by Indonesian military working for Exxon, the D.C district court found that Exxon "made no showing that plaintiffs were injured pursuant to official military orders as required by the act of state doctrine." *Doe v. Exxon Mobil Corp.*, 69 F. Supp. 3d 75 (D.D.C. 2014) ("*Exxon* 2014"), p. 88.

21. If this case were litigated in the U.S., under *Dunhill,* Appellant would need to prove that the Eritrean government has admitted to the forced labor and other alleged abuses and produce a statute, decree or order approving it as official policy. Any failure to identify legislation that would justify the practices that form the basis of the plaintiffs' claim would be fatal to any act of state defense.

C. Under *Kirkpatrick*, the Doctrine does not apply unless the action challenges the *validity* of any public act

22. Both parties and the trial judge have raised the applicability of the U.S. Supreme Court's *Kirkpatrick* decision. Even if the alleged abuses were considered sovereign acts, adjudication is appropriate if the case does not require deciding the legal *validity* of the sovereign acts, or the "effect" of official action. *Kirkpatrick,* p. 406. In *Kirkpatrick* the Supreme Court suggested that the doctrine did not apply where a plaintiff "was not trying to undo or disregard the governmental action, but only to obtain damages from private parties who procured it." *Kirkpatrick,* p. 407. In *Doe v. Exxon,* the D.C. district court, applying *Kirkpatrick,* found that "the Indonesian soldiers' conduct as a matter of Indonesian law [wa]s not at issue" because the action only sought damages from the

private parties who "'procured' the soldiers conduct." *Exxon* 2014, p. 88. Where a case involves universally recognized human rights norms, the issue "is not whether such acts are valid, but whether they occurred." *See Kirkpatrick,* p. 406, quoting *Sharon*, p. 546.

23. The doctrine does not apply in cases alleging private party involvement with state actors where the suit will not invalidate a sovereign act, but will simply issue a remedy against the private actor for its own torts. *See Kirkpatrick*, pp. 404-10; *Exxon* 2014, p. 88.

24. It is not correct that the *Kirkpatrick* limitation applies only if the court need not decide whether the acts were lawful. Appellant's Factum, paras. 75-76; Respondents' Factum, para. 127. *Kirkpatrick* held it irrelevant that the facts necessary for the plaintiff to prevail would also establish that officials acted unlawfully. *Kirkpatrick,* p. 406.

D. Even when official acts are alleged, the Doctrine is not applied when doing so does not support its underlying policies

25. The U.S. Supreme Court has emphasized that even where a defendant passes the first hurdle and shows that the validity of a foreign sovereign's act is at issue, "the policies underlying the act of state doctrine may not justify its application." *Kirkpatrick*, p. 409. Courts do not bar adjudication of an act of state unless a balancing test favors abstention. *Kirkpatrick*, p. 409; *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964) ("*Sabbatino*"), p.428.

26. One factor is the consensus that the conduct at issue violates international law.

> [T]he greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice. *Sabbatino*, p. 428.

27. This factor is particularly apt when *jus cogens* norms are alleged; there are no norms with greater international consensus. The Second Circuit has stated that, because the ATS requires a human rights norm with international consensus, "it would be a rare case in which the act of state doctrine precluded [an ATS] suit." *Kadic,* p. 250. Applying this factor in a case involving genocide, a New York district court held that the claims could be adjudicated: "acts of state to the contrary [of a *jus cogens* norms] are invalid." *Talisman,* p. 345. The Ninth Circuit also found this factor satisfied in a case alleging *jus cogens* norms of murder, torture, slavery and forced labor. *Unocal,* p. 959.

28. The test also considers the "implications of an issue . . . for our foreign relations." *Sabbatino,* p. 428. In *Talisman,* the court found that the U.S. condemnation of Sudan meant that "any criticism of Sudan that would arise as a result of the adjudication of this case would be a mere drop in the bucket." *Talisman,* p. 346. In *Unocal,* the Court also noted that branches of the U.S. government had already denounced Myanmar's human rights abuses and imposed sanctions. The State Department also advised that adjudication would not impede U.S. foreign relations. *Unocal* 2002, p. 959. ERI does not opine on the content of Canada's foreign policy, but notes that if Canada has condemned the kind of abuses alleged here, that would cut against any act of state defense.

II. U.S. case law supports claims based on customary international law

29. United States courts have repeatedly addressed questions of whether a plaintiff can seek a common law remedy of damages based directly on breaches of customary international law norms. This includes whether the common law can provide the cause of action; whether international law must provide a private right to sue; and whether corporate liability must be a norm in international law. In large part, the U.S. courts have addressed these issues under the ATS. The ATS provides U.S. federal courts with jurisdiction over a common law cause of action, based on an international law violation; as Respondents also raise a common law cause of action, based on an international law violation, ATS jurisprudence is relevant here.

A. The ATS provides jurisdiction; common law provides the cause of action

30. To understand the nature of the ATS as a purely jurisdictional statute, one first

has to understand the division between state and federal courts in the U.S. judicial system. Both can hear common law claims. But while state courts are typically courts of general jurisdiction, federal courts are not. Federal courts can only hear a claim, including a common law claim, if there is a specific statutory grant of jurisdiction over that claim. The ATS is just such a grant of jurisdiction over a specific type of common law claim.

31. The U.S. Supreme Court has affirmed the jurisdictional nature of the ATS, finding that the ATS does not provide statutory "authority for the creation of a new cause of action for torts in violation of international law." *Sosa v. Alvarez-Machain*, 542 U.S. 692, (2004) ("*Sosa*"), p. 713. Instead, "the statute provides [federal] district courts with jurisdiction to hear certain claims, but does not expressly provide any causes of action." *Kiobel v. Royal Dutch Petro. Co.*, 133 S. Ct. 1659 (2013) ("*Kiobel II*"), p. 1663.

32. As the U.S. Supreme Court recognized, the ATS "was intended as jurisdictional in the sense of addressing the power of [federal] courts to entertain cases concerned with a certain subject." *Sosa,* p. 714. The subject—torts in violation of the law of nations—was already "within the common law." *Sosa,* p. 720. The ATS did not "grant[] new rights . . . but simply . . . open[ed] the federal courts for adjudication of the rights already recognized by international law." *Filartiga*, p. 887.

33. The U.S. Supreme Court affirmed that "the [ATS] jurisdictional grant is best read as having been enacted on the understanding that the common law would provide [the] cause of action." *Sosa,* p. 724. While there must be a "violation . . . of [an] international law norm," ATS claims are "claims under federal common law." *Sosa,* p. 732. Since "the domestic law of the United States recognizes the law of nations," even the international law that courts look to in considering the threshold question of whether there has been a jurisdiction-conferring violation is in some sense U.S. common law. *Sosa,* p. 729.

34. The need for the ATS arose out of the U.S. division between state and federal courts. When the statute was passed, *state* courts could hear torts that implicated the law of nations under the common law; the ATS simply provided a *federal* forum for those common law claims. *Sosa* pp. 714, 716, 722; *Tel-Oren v. Libyan Arab Republic,* 726 F.2d 774 (1984) ("*Tel-Oren*") pp. 783-784, 790-791 (Edwards, J., concurring).

35. At that time, these cases were solely within the jurisdiction of *state* courts. *Sosa,* pp. 716, 722; *Tel-Oren,* p. 790 (Edwards, J., concurring); In *Sosa,* the U.S. Supreme Court recognized that even without any statutory cause of action, the common law in 1789 already recognized tort claims in violation of international law. The Supreme Court adopted the views in an *amicus* brief submitted by "professors of federal jurisdiction and legal history," who noted that "torts in violation of the law of nations would have been recognized within the common law of the time." *Sosa*, p. 714. *See also* Brief of Professors of Federal Jurisdiction and Legal History as Amici Curiae in Support of Respondents, *Sosa v. Alvarez-Machain*, No. 03-339, pp. 3-5.

36. The ATS was needed not to provide a cause of action, but to provide jurisdiction in federal courts, whose jurisdiction was limited. State courts were courts of general jurisdiction and could hear actions based on common law claims for violations of the law of nations. The Supreme Court noted that remedies for violations of international law were "already available at common law" in state courts. *Sosa,* p. 722.

37. The First Congress was concerned about "the inadequate vindication of the law of nations." *Sosa,* at 715-719. Congress was afraid that *state* courts could not be trusted to give aliens a fair hearing and might come to divergent conclusions about the content of the law of nations; it therefore wanted to provide an alternative, *federal* forum. *Tel-Oren*, pp. 783-84, 790-91 (Edwards, J., concurring); Brief of Professors of Federal Jurisdiction and Legal History, pp. 4, 8-10.

38. Under the U.S. Constitution, the national government was given the jurisdiction to redress violations of the law of nations, and the First Congress used this authority to pass the ATS. Brief of Professors of Federal Jurisdiction and Legal History, at 8. The provision was passed in the First Judiciary Act, ch.20 § 9, 1 Stat. 73, 77 (1789). Inclusion in the Judiciary Act, a "statute otherwise exclusively concerned with federal-court jurisdiction," confirms the jurisdictional nature of the ATS. *Sosa,* p. 713. The focus on jurisdiction is also evident in its text: "the district courts (b) shall also have cognizance, concurrent with the courts of the several States, or the circuit courts . . . 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."[3]

39. Appellant concedes that claims under the ATS are common law claims. Appellant's Factum, para. 125. Appellant's attempt to distinguish the ATS and its caselaw misconstrues the ATS and ignores its history. As Appellant seems to concede at para. 127 of its Factum, the *Sosa* threshold test for determining whether the violation of an international norm affords jurisdiction is a judicially made standard. Thus, it is a common law inquiry. Appellant suggests that this standard "confirms the centrality of the statute in making the claims actionable." That makes little sense; the Court looked to the statute in requiring that the international norm must have "[no] less definite content and acceptance" among nations than the "historical paradigms familiar when [the ATS] was enacted," because the ATS provides the Court's jurisdiction. *Sosa,* p. 732. But this is still a judicially created standard that allows courts to recognize new international norms under the common law.

40. Appellant quotes *Kiobel II*'s observation that it is the ATS that "allows federal courts to recognize certain causes of action based on sufficiently definite norms of international law" to suggest that such a claim exists solely because of the ATS. Appellant's Factum, paras. 125, 126. But *Sosa, Kiobel II* and the ATS's history make clear that the ATS was simply passed to allow these common law claims, which could already be heard in state courts, to be heard in *federal* courts, which are courts of limited jurisdiction.[4] The "law of nations" (international law) forms part of U.S. common

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[3] Now codified at 28 U.S.C. § 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." The change from "cognizance" to "jurisdiction" is immaterial; the Supreme Court has used the terms interchangeably. *See Sosa*, p. 713.

[4] Appellant misquotes Justice Breyer's concurrence, which states that "the statute provides *today's federal judges* with the power to fashion 'a cause of action'," *Kiobel II,* p. 1671 (emphasis added), not "today's courts ...". The actual language confirms that the statute simply gives *federal* courts jurisdiction; it is consistent with *Sosa*'s holding that the ATS allows federal courts to hear common law claims that already could have been heard in state court at the time the ATS was passed. Thus, it provides no support

law. *Sosa,* p. 729. Intervenor takes no position on whether international law is also part of Canadian common law, but if it is, the ATS is directly relevant.

B. There is no need for customary international law to provide a right to sue

41. Appellant's argument that customary international law does not itself provide a right to sue misconstrues the nature of international law. Appellant's Factum, para. 106. International law does not generally prescribe the means of its enforcement. Instead, "[i]nternational law imposes substantive obligations and the individual nations decide how to enforce them." *Flomo v. Firestone Natural Rubber Co., LLC*, 643 F.3d 1013 (7th Cir. 2011) *("Flomo")*, p.1020. *See also Kiobel I,* p. 152 (Leval J. concurring). This aspect of customary international law has been explained by US courts applying the ATS.

42. Thus international law "generally does not create private causes of action to remedy its violations, but leaves to each nation the task of defining the remedies that are available." *Kadic*, p. 246. *See also Kiobel I,* p. 152 (Leval J. concurring); *Flomo,* p. 1019; *Hilao,* p. 1475 ("It is unnecessary that international law provide a *specific* right to sue."); *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007) p.286 (Hall, J. concurring) (collecting cases).

43. Appellant cites *Doe v. Exxon Mobil Corp.,* to support its argument that plaintiffs have no right to bring a private claim, but this case refutes Appellant's position. Appellant's Factum, para. 106. While noting that international law does not provide a right to sue, the D.C. Circuit recognized that international law provides only the "conduct-governing norms," and "does not provide the rule of decision" for other aspects of claims—such as a right to sue corporations. *Doe v. Exxon Mobil Corp.,* 654 F. 3d 11, (D.C. Cir. 2011) ("*Exxon* 2011") p. 41, vacated on other grounds, 527 F. Appx. 7 (D.C. Cir. 2013). The court found that "the fact that the law of nations provides no private right of action to sue corporations addresses the wrong question and does not demonstrate that corporations are immune from liability under the ATS." *Exxon* 2011, p. 42. Relying on federal common law, the Court held that the ATS does apply to corporations, *Exxon*

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for Appellant's suggestion that without the ATS, international law would not be part of the common law.

2011, pp. 42-43, 57, a finding adopted in the most recent Exxon decision. *Doe v. Exxon Mobil Corp.*, 2015 U.S. Dist. LEXIS 91107 (D.D.C. July 6, 2015) ("*Exxon* 2015"), p. 8.

C. Corporations can be held liable for international law violations

44. Both international law and U.S. common law provide for corporate liability. International law leaves the manner in which it is enforced to domestic law. Recognizing this, Courts have found corporate liability for international law violations, relying on federal common law. *E.g. Flomo*, p. 1021; *Exxon* 2011, p. 41-42.

45. Moreover, courts have also found that corporate liability is consistent with both international law and general principles of law. *John Doe I v. Nestle USA,* 766 F.3d 1013, (9th Cir. 2014) ("*Nestle*"), p. 1021; *Sarei,* pp. 764-65; *Exxon* 2011, pp. 408-415.[5]

46. Virtually every U.S. court that has considered the issue has found that corporations can be liable for international law violations under the ATS. *See e.g. Flomo*, p. 1021; *Exxon* 2011, p. 41, relevant portion of decision adopted in *Exxon* 2015, p.8; *Nestle,* p. 1021; *Doe v. Drummond Co.,* 782 F.3d 576 (11th Cir. 2015), p. 584. *See also Al Shimari v. CACI Premier Tech., Inc.,* 758 F.3d 516 (4th Cir. 2014), pp. 530-31 (finding ATS claims against a U.S. corporation displaced the presumption against extraterritorial jurisdiction).

47. Only one court—the Second Circuit Court of Appeals—has come to the opposite conclusion, in the sharply divided decision in *Kiobel I.* After this decision, the U.S. Supreme Court agreed to hear the case. The U.S. Government argued that corporate liability is a matter of federal common law, and allows for corporate liability. Brief for the United States as Amicus Curiae Supporting Petitioners, *Kiobel v. Royal Dutch Petroluem,* No. 10-1491 (U.S. Dec. 2011). But the Supreme Court did not reach the issue, because it decided *Kiobel II* on other grounds. *Kiobel II,* pp. 1663, 1669.

48. The Second Circuit has recognized that it is an outlier; it recently noted that "on the issue of corporate liability under the ATS, *Kiobel I* now appears to swim alone against the tide." *In re Arab Bank, PLC Alien Tort Statute Litig.,* 808 F.3d 144 (2d Cir.

[5] For additional discussion, see Respondents' Factum, paras. 174-197.

2015), p. 151. The Court recognized the "growing consensus among [their] sister circuits that the ATS allows for corporate liability." *Arab Bank*, p. 151.

49. After the Second Circuit reaffirmed its decision against corporate liability, the Supreme Court granted *certiorari* in *Jesner v. Arab Bank, PLC,*[6] to consider "whether the [ATS] categorically forecloses corporate liability." Petition for a Writ of Certiorari, *Joseph Jesner, et al. v Arab Bank*, PLC, No. 16-499, p. i.

50. Appellant states that U.S. jurisprudence cannot be relied upon as its "judicial consensus [that there is] corporate liability is based on poor understanding of international law." Appellant's Factum, para. 109. The article Appellant relies upon advocates for the minority view of the Second Circuit from *Kiobel I.* But in rejecting that position, every other U.S. court did not misunderstand international law. As detailed above, they found corporate liability based on careful consideration and correct understanding of international law, concluding either that international law leaves remedies like corporate liability to domestic law, or that international law allows for corporate liability, or both.

D. Private remedies are available for international crimes and violations of norms that require state conduct

51. Appellant's submission that international law does not provide for civil remedies for breaches of international crimes once again misconstrues the structure of international law. Again, enforcement of international law norms is left to states. They can enforce international criminal norms through civil liability. As Justice Breyer noted in his concurrence in *Sosa,* "universal criminal jurisdiction necessarily contemplates a significant degree of civil tort recovery as well." *Sosa,* p.763; *accord Flomo,* p. 1020; *see also Tel-Oren,* pp. 781-82 (Edwards, J. concurring) (looking to international crimes to determine norms civilly actionable under the ATS).

52. Indeed, ATS jurisprudence has found civil liability for numerous international crimes—piracy, crimes against humanity, genocide, war crimes, slavery, and forced

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[6] Supreme Court of the United States, Joseph Jesner, et al. v Arab Bank, PLC, No. 16-499, https://www.supremecourt.gov/search.aspx?filename=/docketfiles/16-499.htm

labor.[7] This follows from the fact that international law does not specify its means of enforcement, and criminal proscriptions may be enhanced through civil remedies.

53. Appellant's focus on states being subjects of international law is also misplaced. Certain international *norms,* such as torture, require state action. *Kadic*, p. 240. Where international law requires state action, it is an element of the offense and thus part of what defines whether any international right has been violated. Thus, if state action is shown, courts allow ATS cases for such norms, including against responsible private parties. *See Kadic*, p. 244-45. Customary international law prohibits other abuses, such as forced labor, regardless of state involvement. *Unocal*, p. 946. Again, however, neither the right of action nor the ability to sue a private party for complicity need come from international law; states themselves determine the appropriate remedy for a violation.

PART 4 - NATURE OF ORDER SOUGHT

54. ERI seeks leave to make oral submissions at the hearing of the appeal.

55. ERI seeks no order for costs and asks that none be ordered against it.

All of which is respectfully submitted.

Dated at the City of Vancouver, Province of British Columbia, this May 26th of 2017.

Alison Latimer and Tamara Morgenthau
Counsel for the Intervenor

[7] *See e.g.* Sosa, p. 720 (piracy); *Sexual Minorities Uganda v. Lively,* 960 F. Supp. 2d 304 (D. Mass. 2013), p.317 (persecution as a crime against humanity); *Sarei,* pp.758-759, 763-764 (genocide, war crimes); *Unocal* 2002, p.947 (forced labor).

APPENDIX: ENACTMENTS

28 U.S.C.S. § 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.

Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, 1155 U.N.T.S. 332, 8 I.L.M. 679.

Article 53. TREATIES CONFLICTING WITH A PEREMPTORY NORM OF GENERAL INTERNATIONAL LAW ("JUS COGENS")

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

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