No. 11-88

In The
Supreme Court of the United States

ASID MOHAMAD, et al.,

Petitioners,

v.

PALESTINIAN AUTHORITY, et al.,

Respondents.

On A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF KBR, INC., AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the Torture Victim Protection Act, 28 U.S.C. § 1350 note § 2(a), permits actions against defendants which are not natural persons.

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INTEREST OF *AMICUS CURIAE*[1]

With more than 28,000 employees in 45 countries on five continents, *amicus curiae* KBR, Inc. ("KBR") is a global engineering, construction, and services company supporting the energy, hydrocarbon, government services, minerals, civil infrastructure, power, and industrial sectors. As a matter of policy and conviction, KBR unequivocally rejects and condemns the practices of torture and extra-judicial killing targeted by the Torture Victim Protection Act, 28 U.S.C. § 1350 note § 2 ("TVPA") and fully supports efforts to protect the human rights of all people. To that end, KBR's Code of Business Conduct unambiguously requires the Company and its employees, in every instance, to treat all persons with dignity and respect and to comply with all applicable governmental laws, rules, and regulations. The Code also establishes clear reporting procedures to ensure consistent accountability and compliance with these and other requirements.

KBR has a compelling interest in the Court's clarifying the proper objects of lawsuits alleging violations of international law and human rights norms. Despite its record of leadership and commitment to ethical business conduct, KBR is currently defending

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* certifies that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amicus* made a monetary contribution intended to fund the brief's preparation or submission. Letters from the parties consenting to the filing of this brief are filed with the Clerk.

against claims of alleged violations of human rights cognizable under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, Trafficking Victims Protection Reauthorization Act, 18 U.S.C. § 1595, and Racketeering Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962(c). *See Adhikari v. Dauod & Partners*, Case No. 09-cv-1237 (S.D. Tex.). These claims allege conduct occurring outside of the United States, principally by entities that are not party to U.S. litigation and with whom KBR had no business relationship but whose behavior the plaintiffs allege should be imputed to KBR. The problems presented by this litigation demonstrate precisely why "the customary international law of human rights has remained focused not on abstract entities but on the individual men and women who have committed international crimes." *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 119 (2d Cir. 2010).

The Court has recognized the close relationship between the TVPA and the ATS by ordering the instant case be argued in tandem with *Kiobel v. Royal Dutch Petroleum*, No. 10-1491. A ruling finding that corporate defendants may not be subject to the TVPA, consistent with the "'specific, universal, and obligatory'" norms of customary international law, *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004) (quoting *In re Estate of Marcos Human Rights Litigation*, 25 F.3d 1467, 1475 (9th Cir. 1994)), would vindicate Congress' purpose of allowing victims of state-sponsored torture to vindicate their rights through a U.S. enforcement regime, while preventing the U.S. courts

from becoming an all-purpose forum for private torts alleged to be suffered at the hands of multinational corporations. It would also provide certainty to global service providers like KBR, as well as other American firms doing business abroad.

Accordingly, KBR offers this brief as *amicus curiae* to discuss the plain meaning of the TVPA and the bedrock principles of customary international law that Congress observed in enacting it.[2]

SUMMARY OF THE ARGUMENT

The plain text of the Torture Victim Protection Act reflects and should be interpreted in light of the well-established norms of customary international law that recognize the liability of state officials and natural persons who work in concert with them, but not private corporations.

By employing the word "individual," Congress made unequivocally clear its intention that the TVPA would recognize only natural persons as defendants, and not corporations. The statutory context, mark-up history, and committee reports demonstrate that this was a considered choice for a statute that received extensive debate and scrutiny over several

[2] Though supporting the decision below and its reasoning, *amicus* takes no position on Respondents' juristic status as corporations, which was not contested below and is not properly before this Court.

Congresses. That, in one instance, this Court has bowed to overwhelming contextual evidence which overturned the usual presumption that "individual" means "natural person" does not relieve Petitioners of the burden of presenting such evidence in this case to support their proffered interpretation of the TVPA – a burden that they do not and cannot carry.

Moreover, Congress enacted the TVPA to codify certain aspects of customary international law in response to a judicial opinion questioning the availability of a private right of action for torture victims under the Alien Tort Statute. Consistent with the TVPA's text, history and practice unanimously confirm that this body of law does not recognize the liability of non-state collective entities such as corporations for the type of conduct covered by the TVPA. In this way, customary international law and the TVPA are mutually reinforcing with respect to the scope of liability for human-rights violations.

ARGUMENT

I. The Plain Text of the TVPA Precludes Collective Entities as Defendants

By using the word "individual" to describe who may commit an offense under the TVPA, Congress made clear its intention to exclude collective entities from liability, consistent with the clearly-established norms of customary international law.

First and foremost, an "individual" is, in common parlance, "a single human being[,] as contrasted with a social group or institution." *Webster's Third New International Dictionary* 1152 (1971); *Webster's Ninth New Collegiate Dictionary* 615 (1983) (identical). *Accord Oxford English Dictionary* (2011) ("A single human being"); *American Heritage Dictionary* (5th ed. 2011) ("A single human considered apart from a society or community."); *Black's Law Dictionary* (9th ed. 2010) ("Of or relating to a single person or thing, as opposed to a group."). Congress itself ascribed this same meaning to "individual" in the Dictionary Act, which, in defining "person" and "whoever," employs "individual" to refer to natural persons. 1 U.S.C. § 1. This plain meaning should prevail, consistent with the rule that, in the absence of a statutory definition, the Court "construe[s] a statutory term in accordance with its ordinary or natural meaning." *F.D.I.C. v. Meyer*, 510 U.S. 471, 476 (1994) (defining "cognizable").

Second, Congress specifically declined to employ either of two terms, "person" and "whoever," that it has defined to include, and regularly uses to reach, "corporations, companies, associations, firms, partnerships, societies, and joint stock companies." 1 U.S.C. § 1. When Congress has wished to extend liability to collective entities, "it had little trouble doing so." *Pinter v. Dahl*, 486 U.S. 622, 650 (1988); *see also Dole Food Co. v. Patrickson*, 538 U.S. 468, 476 (2003); *Central Bank of Denver v. First Interstate Bank*, 511 U.S. 164, 176-77 (1994). Here, as to defendants of TVPA claims, it did not.

Third, Congress's decision not to extend the TVPA to collective entities was a considered choice, not mere happenstance. In this regard, the first version of the TVPA, introduced in 1987, authorized claims against any "person" who subjected another to torture. *The Torture Victim Protection Act: Hearing and Markup before the H. Comm. on Foreign Affairs on H.R. 1417*, 100th Cong. 82, 85 (1988). In markup, however, the House Foreign Affairs Committee adopted an amendment which substituted "individual" for "person" to "make it clear [Congress was] applying it [the Act] to individuals and not to corporations." *Id*.; *see Bowoto v. Chevron Corp*., 621 F.3d 1116, 1127-28 (9th Cir. 2010) (discussing legislative history). This formulation was carried through to the version of the legislation passed into law in 1992, by a Congress cognizant of that specific choice of language. *See* S. Rep. No. 102-249, at 6 (1991) (explaining that "individual" was used "to make crystal clear that foreign states or their entities cannot be sued under this bill under any circumstances: only individuals may be sued"); H.R. Rep. No. 102-367 (1991), reprinted in 1992 U.S.C.C.A.N. 84, 87 (similar).

Fourth, and conspicuously, the TVPA does allow that a "person," as opposed to merely an "individual," "who may be a claimant in an action for wrongful death" may also be claimant in a TVPA action for extra-judicial killing. 28 U.S.C. § 1350 note § 2(a)(2). This distinct usage – the only instance in the TVPA where Congress employed a term other than "individual" – bears practical significance, authorizing claims

by juristic persons, such as the decedent's estate. As the court below concluded, "this further supports the significance of the Congress having used 'individual' rather than 'person' to identify who may be sued under the TVPA." *Mohamad v. Rajoub*, 634 F.3d 604, 608 (D.C. Cir. 2011). In drafting this precise legislation, where Congress wished to address a broader class of "persons," it did so specifically by textual distinction. *See Burlington Northern and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 63 (2006) (stating presumption that "Congress intended its different words to make a legal difference").

Fifth, Congress's use of the term "individual" to describe both victims and perpetrators of torture is not consistent with a reading of the term that includes collective entities. "A term appearing in several places in a statutory text is generally read the same way each time it appears." *Ratzlaf v. United States*, 510 U.S. 135, 143 (1994). This presumption is "at its most vigorous when a term is repeated within a given sentence." *Brown v. Gardner*, 513 U.S. 115, 118 (1994); *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 329-30 (2000). So it is here. The TVPA's operative provision employs "individual" five times in a single sentence, four of which refer to a victim of torture or killing and one of which refers to the perpetrator. 28 U.S.C. § 1350 note § 2(a). But only a natural person, and not a collective entity, may be a victim of torture or extrajudicial killing, particularly as those offenses are

defined in the TVPA.[3] *Id*. § 3(a) (defining "extra-judicial killing"); § 3(b)(1) (defining "torture" as the infliction of "severe pain or suffering" in certain circumstances).

Petitioners identify no contextual markers that oppose or undermine the "vigorous" presumption that Congress spoke with consistency. It is not enough to simply observe that the presumption "'readily yields' whenever the word is 'employed in different parts of the act with different intent.'" Pet. Br. at 27 (quoting *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 595 (2004), in turn quoting *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1933)). Rather, as the non-truncated quotation from *Atlantic Cleaners* explains, there must be "such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent." 286 U.S. at 433. Unsupported by such variation in statutory context, Petitioners' conclusion that Congress's use of "individual" to mean a natural person "has no bearing," Pet. Br. 28, on that word's meaning elsewhere in the same sentence is less argument than *ipse dixit*. *Cf. Brown*, 513 U.S. at 118 ("Ambiguity is a creature not of definitional possibilities but of statutory context.").

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[3] Petitioners concede as much. *See* Pet. Br. at 28 (acknowledging this point as a "fact").

Sixth, and finally, the Court did not hold in *Clinton v. New York*, 524 U.S. 417 (1997), that the terms "individual" and "person" "can be construed synonymously in a statutory context." Pet. Br. at 20. In *Clinton*, the Court recognized that "'person' often has a broader meaning in the law" than "individual," *id*. at 428 n.13 (citing Dictionary Act, 1 U.S.C. § 1), but it held that the expedited review provision of the Line-Item Veto Act "evidences an unmistakable congressional interest in a prompt and authoritative judicial determination of the constitutionality of the Act," such that there was "no plausible reason" why Congress would have denied expedited review to corporate entities by use of the word "individuals." *Id*. at 428-29. *Clinton* is simply one of those "'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters'" and in which, accordingly, "the intention of the drafters, rather than the strict language, controls." *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989) (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)). It is the exception, not the rule. And for the exception to apply, there must be some evidence of discord between strict language and congressional intent. *See* 524 U.S. at 429 (quoting *Griffin*, *supra*).

Yet petitioners can identify none save the generalization that Congress sought "to provide victims with remedies for torture and extrajudicial killing." Pet. Br. at 38. Of course, "no legislation pursues its purposes at all costs," *Rodriguez v. United States*, 480

U.S. 522, 525-26 (1987), and the TVPA is replete with limitations on the statute's applicability: it applies only to those who operate "under actual or apparent authority, or cover of law"; it applies only to actions taken under authority of "a foreign nation"; and it requires that plaintiffs "exhaust[ ] adequate and available remedies in the place in which the conduct giving rise to the claim occurred." 28 U.S.C. § 1350 note § 2. That Congress legislated with a general purpose – one which the ordinary meaning of the statutory text fairly carries out – falls far short of the strict standard articulated in *Clinton*, *Ron Pair*, and *Griffin*. It cannot give the Court license to ignore ordinary meaning, and to vary the meaning of a term used multiple times *within a single sentence*, or the Court would have that license in every instance where Congress declined to carry a general purpose to its logical ends. In any case, as explained *infra*, maintaining consistency with the well-established norms of customary international law provided Congress a compelling reason to decline to extend liability to non-state collective entities.

II. The TVPA Reflects Customary International Law's Focus on the Acts of Natural Persons, as Recognized Under the Alien Tort Statute

The TVPA's focus on "individuals" as natural persons confirms and is consistent with those customs and usages of civilized nations that are sufficiently "specific, universal, and obligatory" as to constitute

customary international law. The settled norms of international law, as demonstrated through practice, reinforce the ordinary meaning of the statutory text, and that ordinary meaning, in turn, provides further confirmation of the substance of international law. The two are mutually supportive.

A. The TVPA Codifies Customary International Law

As a general matter, Congress "legislate[s] against a background of common-law . . . principles," *Astoria Fed. Sav. & Loan Assn. v. Solimino*, 501 U.S. 104, 108 (1991), and the Court has long enforced "the presumption that Congress intended to retain the substance of the common law," *Samantar v. Yousef*, 130 S.Ct. 2278, 2289 n.13 (2010). Accordingly, the Court reads statutes to "favor[ ] the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident," *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952), and will not presume that Congress intended the opposite, *Midlantic Nat'l Bank v. New Jersey Dep't of Envt'l Protection*, 474 U.S. 494, 501 (1986).

In particular, statutes "should not be interpreted to regulate foreign persons or conduct if that regulation would conflict with principles of international law." *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 815 (1993) (Scalia, J., dissenting). This is a corollary of the *Charming Betsy* canon, holding simply that Congress is generally presumed to exercise its powers

consistent, rather than in conflict, with international law. *Id*. Following this approach, the Court in *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 382-84 (1959), held that Jones Act jurisdiction did not extend to a foreign seaman's claims against his foreign employer for injuries that occurred while temporarily in U.S. waters. Though the question before the Court was statutory in nature, the "controlling considerations," where the statute did not speak directly to the question at hand, "are the interacting interests of the United States and of foreign countries" and, in particular, the well-established international norm recognizing the "interests of foreign nations in the regulation of their own ships and their own nationals." *Id*. at 383-84. *Accord Lauritzen v. Larsen*, 345 U.S. 571, 576 (1953) (recognizing that Congress had legislated "not on a clean slate, but as a postscript to a long series of enactments governing shipping," and had acted "with regard to a seasoned body of maritime law"); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21-22 (1963) (interpreting National Labor Relations Act in harmony with "the well-established rule of international law that the law of the flag state ordinarily governs the internal affairs of a ship").

This canon unquestionably applies to the TVPA, and as more than a mere presumption as to Congress's intentions. In this regard, Congress enacted the TVPA "[t]o carry out obligations of the United States under the United Nations Charter and other international agreements pertaining to the protection

of human rights by establishing a civil action for recovery of damages from an individual who engages in torture or extrajudicial killing." Pub. L. No. 102-256, 106 Stat. 73, 73 (1992). The TVPA's operative provisions themselves incorporate international law. The statute's definition of "extrajudicial killing" encompasses killings "not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are *recognized as indispensable by civilized peoples*" and specifically exempts any execution "that, *under international law*, is lawfully carried out under the authority of a foreign nation." 28 U.S.C. § 1350 note § 3(a) (emphasis added). "Torture," meanwhile, parallels the definition contained in the United Nations Convention Against Torture ("CAT"), as clarified by the understandings included in the Senate's ratification of the Convention. *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1(1), Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85.

The detailed reports of the House and Senate committees responsible for the final legislation provide additional evidence of Congress's intention to codify existing customary international law. The report of the House Judiciary Committee explained, first, that "[t]he universal consensus condemning these practices [torture and summary execution] has assumed the status of customary international law" and, second, that the overriding purpose of the TVPA was to provide a means of enforcing that law, consistent with

the CAT. H.R. Rep. No. 102-367, at 85. The Senate Judiciary Committee's report echoed those points. S. Rep. No. 102-249, at 2.

Congress was driven to act, however, not by generalized concern, but by a specific court decision: Judge Bork's concurrence in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 813 (D.C. Cir. 1984), which cast doubt on the existence of a private right of action for victims of torture and terrorism under the ATS. Endorsing the view that the ATS "gave Federal courts jurisdiction over allegations of torture since torture violates the 'law of nations,'" Congress enacted the TVPA to "establish an unambiguous basis for a cause of action that has been successfully maintained under an existing law." S. Rep. No. 102-249, at 3; *accord* H.R. Rep. No. 102-367, at 86 ("The TVPA would establish an unambiguous and modern basis for a cause of action that has been successfully maintained under an existing law, section 1350 of the Judiciary Act of 1789. . . ."). Its stated intention was not to deviate, in any way, from customary international law, but merely to codify it into a cause of action under U.S. law.

B. Customary International Law Precludes Corporate Liability for the Acts Covered by the TVPA

Congress's intention to codify customary international law in the TVPA therefore speaks directly to the scope of liability under the TVPA. As this Court

explained in *Sosa*, customary international law itself "extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual." 542 U.S. at 732 n.20; *see also id*. at 760 (Breyer, J., concurring) (explaining that, to obtain customary status, a "norm [of international law] must extend liability to the type of perpetrator (*e.g.*, a private actor) the plaintiff seeks to sue."). Accordingly, where a private collective entity cannot be a proper defendant under customary international law, it cannot be one under the TVPA.

For substantially the reasons explained by the Second Circuit in *Kiobel*, and confirmed by recent surveys of international practice, customary international law does not recognize the liability of private collective entities for the type of conduct covered by the TVPA.

First, customary international law has traditionally defined the rights and obligations only of sovereigns:

> Since the Law of Nations is based on the common consent of individual States, States are the principal subjects of International Law. This means that the Law of Nations is primarily a law for the international conduct of States, and not of their citizens. As a rule, the subjects of the rights and duties arising from the Law of Nations are States solely and exclusively.

1 *L. Oppenheim, International Law: A Treatise* 19 (H. Lauterpacht 8th ed. 1955). Historically, this general rule recognized only a narrow exception for the perpetrators of such offenses as piracy, individuals long deemed *hostis humani generis* ("enemies of mankind"). *See Tel-Oren*, 726 F.2d at 781 (Edwards, J., concurring) (quoting *Oppenheim, International Law* 609). This Court has recognized the specific and narrow scope of this exception, defined both by conduct and by the status of perpetrators. *Sosa*, 542 U.S. at 732 (discussing "historical antecedents"); *The Malek Adhel*, 43 U.S. 210, 232 (1844) (defining piracy under "the general law of nations"); *United States v. Klintock*, 18 U.S. 144, 151-52 (1820) (anti-piracy offense "ought not to be so construed as to extend to persons under the acknowledged authority of a foreign State"). In all other instances, customary international law governed only the relations of states.

Second, the easing of "[t]hese formal and rigid categories of traditional international law" is a relatively recent phenomenon and has only advanced so far. Consensus over the liability of natural persons under customary international law for torture, extrajudicial killing, and other human-rights offenses has developed, and continues to develop, at a gradual pace. This Court recognized as much in *Sosa* by its approving citation of Judge Edwards's scholarly concurrence in *Tel-Oren*. *Sosa*, 542 U.S. at 732 n.20. Judge Edwards identified the difficulty with identifying an unequivocal international law norm applicable to private parties. Answering that question

> would require this court to venture out of the comfortable realm of established international law . . . in which states are the actors. It would require an assessment of the extent to which international law imposes not only rights but also obligations on individuals. It would require a determination of where to draw a line between persons or groups who are or are not bound by dictates of international law, and what the groups look like. . . . As firmly established as is the core principle binding states to customary international obligations, these fringe areas are only gradually emerging and offer, as of now, no obvious stopping point.

Tel-Oren, 726 F.2d at 791 n.20 (Edwards, J., concurring). The "degree of 'codification or consensus,'" Judge Edwards concluded, "is simply too slight" to establish a binding norm of private liability. *Id*. (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964)). Where the Court's decision in *Sosa* cited authority suggesting that an international law norm applicable to private individuals (not even private collective entities) was sufficiently universal to be cognizable under the Alien Tort Statute, *see Kadic v. Karadzic*, 70 F.3d 232, 239-41 (1995), the legal norm was codified by treaty and clearly established in the aftermath of the Second World War, placing a strong "limit upon judicial recognition" of private claims premised on customary international law. *Sosa*, 542 U.S. at 732.

Third is the absence of any precedent in the practices of nations holding private collective entities liable for violations of norms such as torture. A current survey of international legal sources finds "embarrassingly little evidence of an international consensus (or even of international support) in favor of imposing liability on private corporations for general violations of customary international law." Julian Ku, *The Curious Case of Corporate Liability Under the Alien Tort Statute*, 51 Va. J. Int'l L. 353, 355 (2011). This holds true from the very dawn of modern private-actor liability. As Judge Korman explained in his *Khulumani* dissent, the London Charter, which created the International Military Tribunal at Nuremberg, did not confer jurisdiction over corporations, only over "persons who, . . . as individuals or as members of organizations," committed certain crimes. *Khulumani v. Barclay National Bank Ltd.*, 504 F.3d 254, 321-22 (2d Cir. 2007) (Korman, J., dissenting) (quoting Charter of the International Military Tribunal, art. 6, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279). Practice bore this out: no corporations were named as defendants at Nuremberg. *Id.* at 322; *see also Ku*, *supra*, at 379-81 (collecting primary sources); *id*. at 381 (quoting Nuremberg Tribunal opinion's rejection of corporate liability).[4]

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[4] The dissolution of I.G. Farben is not to the contrary. First, Farben was not, in fact, a defendant of the Nuremberg Tribunals. *See* 8 *Trials of War Criminals Before the Nuernberg Military Tribunals* 1153 (1948) ("Farben [ ] is not before the bar

(Continued on following page)

Subsequent practice is consistent in rejecting collective-entity liability. In 1953, for example, the Committee on International Legal Jurisdiction, charged to consider aspects of a proposed international criminal tribunal under the auspices of the United Nations, rejected jurisdiction over corporations on the ground that "it was undesirable to include so novel a principle as corporate criminal responsibility in the draft statute." *Report of the Committee on International Criminal Court Jurisdiction*, U.N. GAOR, 9th Sess., Supp. No. 12, U.N. Doc. A/2645 ¶85 (1954). As Judge Korman recounts, a similar proposal was rejected in negotiations for the Rome Statute, which established the present International Criminal Court, for three reasons:

> (1) "from a pragmatic point of view it was feared that the ICC would be faced with

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of this Tribunal and cannot be subjected to criminal penalties in these proceedings. . . . But corporations act through individuals and, under the conception of personal individual guilt to which previous reference has been made, the prosecution, to discharge the burden imposed upon it in this case, must establish by competent proof beyond a reasonable doubt that an individual defendant was either a participant in the illegal act or that, being aware thereof, he authorized or approved it."). Second, Farben's breakup was not a result of the application of international law, and did not occur as the result of any judicial process, but was a political action by the Allies. Control Council Law No. 9, Providing for the Seizure of Property Owned by I.G. Farbenindustrie and the Control thereof (Nov. 30, 1945). The preamble to this law states, quite clearly, its pragmatic purpose: "to insure that Germany will never again threaten her neighbors or the peace of the world. . . ." *Id*.

> tremendous evidentiary problems when prosecuting legal entities"; (2) "from a more normative-political point of view it was emphasized that the criminal liability of corporations is still rejected in many national legal orders, and international disparity which could not be brought in concord with the principle of complementarity"; and (3) "it was felt morally obtuse for States to insist on the criminal responsibility of all entities other than themselves."

Khulumani, 504 F.3d at 323 (Korman, J., dissenting) (quoting Albin Eser, *Individual Criminal Responsibility, in 1 Antonio Cassese et al., The Rome Statute of the International Criminal Court: A Commentary* 767, 778-79 (2002)); *see* Rome Statute of the International Criminal Court, art. 25(1), July 17, 1998, 2187 U.N.T.S. 90 (limiting jurisdiction to "natural persons").

Nor do the international criminal tribunals established by the United Nations Security Council to prosecute war crimes in the former territories of Yugoslavia or Rwanda recognize corporate liability. *See Ku*, *supra*, at 383 (quoting and discussing authorizing resolutions). And in practice, neither tribunal brought charges against any juristic person. *Id*. This is particularly significant because these tribunals, while fashioning their own procedural rules, were charged by the Security Council to apply existing substantive international law norms. *Id*. at 384.

Fourth, treaty law does not evidence or support corporate liability for violations of the customary

international law norms at issue. As Professor Ku explains, most treaty law is generally incapable of providing direct support for corporate liability: "Almost every treaty regime imposes liability indirectly by formally imposing an obligation on state parties to impose duties on private parties. Treaties cannot impose duties on private parties directly because private parties are not competent to make treaties under international law." *Ku*, *supra*, at 384. Accordingly, for example, the Convention Against Bribery of Foreign Government Officials does not regulate juristic persons directly, but requires, instead, that state parties do so. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, art. 2, Dec. 17, 1997, 112 Stat. 3302 (1998), 37 I.L.M. 1; *see also* United Nations Convention Against Transnational Organized Crime art. 5(1)(b), Nov. 15, 2000, 2237 U.N.T.S. 319 (same approach).

Treaty law actually provides further evidence that private liability for violations of international norms concerning human rights is limited to natural persons. Whereas the Convention Against Bribery at least mentions juristic entities, the CAT does not even take that step; to the contrary, it strongly suggests that the offenses it defines may only be committed by natural persons. *See* CAT, arts. 6(1), 6(3) (referring to suspected perpetrators as "he" and "him"). Treaties addressing arguably analogous norms, such as genocide, similarly do not provide for the liability of juristic persons. *See* Convention on the Prevention and Punishment of the Crime of Genocide, art. 4, Dec. 9, 1948,

102 Stat. 3045 (1988), 78 U.N.T.S. 277. Based on these and other treaties, as well as international practice implementing treaties, a United Nations survey rejects corporate liability for human rights violations. *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises* ¶44, 4th Sess., Feb. 9, 2007, U.N. Doc. A/HRC/4/35 (Feb. 19, 2007) [hereinafter "U.N. Report"] (concluding that, while "corporations are under growing scrutiny by the international human rights mechanisms," "it does not seem that the international human rights instruments [surveyed in the Report] currently impose direct legal responsibilities on corporations").

Fifth, the substance of corporate liability lacks "a specificity comparable to the features of the 18th-century paradigms" like piracy, *Sosa*, 542 U.S. at 725, such that international law would provide a court with no firm guide to its judicial administration. When and how shall the acts of a corporate agent, employee, or officer be attributed to the corporate entity itself? What degree of intent need be demonstrated to hold the corporation liable? May courts "pierce the corporate veil" to reach parent companies and beneficial owners, and if so, what showing is required to do so? Most fundamentally, at what point is responsibility so attenuated that liability ends? Unlike the case with the obligations of states or individuals, there is no accepted answer to this question under customary international law, and national domestic practices vary widely. *See* U.N. Report

¶¶28-32, 34 (describing "significant national variations [that] remain in modes of attributing corporate liability").

This severe under-determination of the law is a result of the complete absence of precedent imposing corporate liability under international law and indicates the impossibility, under present doctrines, of applying norms of international law to corporate defendants in any consistent fashion. Once again, the "degree of 'codification or consensus' is simply too slight," *Tel-Oren*, 726 F.2d at 792 (Edwards, J., concurring), to establish a binding norm of corporate liability.

Sixth, and finally, the Court should not assume that Congress intended to establish an incongruity between the TVPA and the ATS. As described above, the plain language of the TVPA, exclusive of any of the baggage of customary law, restricts liability to natural persons. There is no apparent or obvious reason that Congress would have chosen to provide a cause of action for citizens that is limited to obtaining relief from natural persons, if the ATS (through its incorporation of customary international law) authorized citizens of foreign countries to sue natural persons and corporations in U.S. courts. A proper view of international law as not authorizing corporate liability avoids this incongruity.

Accordingly, the Court should read the TVPA, consistent with customary international law and the

plain meaning of the statutory text, to limit liability to natural persons.

C. Congress Did Not Accept the Tradeoffs That Deviating from Customary International Law Would Entail

By going against the grain of customary international law, Petitioners' proffered interpretation of the TVPA gives rise to serious policy concerns that Congress was unlikely to have intended.

First, the specter of litigation and eventual liability would put U.S. businesses at a distinct disadvantage relative to their international competitors that may not be subject to jurisdiction in U.S. courts. Defending against accusations of foreign misconduct is expensive, both in terms of legal fees and expenses and distraction of key personnel from their ordinary business duties. Perhaps even greater, though, is the reputational injury that comes with being named as a defendant in litigation alleging human rights abuses. Even successful litigation cannot, as a practical matter, fully clear the name of a company that has been accused of serious wrongs in court and has suffered years of adverse publicity as the case winds its way through the legal system. Congress is well aware of lawsuit abuse, particularly against U.S. businesses, *see*, *e.g.*, *The Lawsuit Abuse Reduction Act: Hearing Before the Subcomm. on the Const. of the H. Comm. on the Judiciary*, 112th Cong. (2011), and is justifiably proud of U.S. businesses' strong records of leadership

on human-rights issues. There is no reason to believe that Congress would have subjected domestic firms to a globally unique disability.

Second, these same risks would discourage foreign firms from doing business in the United States and subjecting themselves to the jurisdiction of its courts for claims arising from any of their foreign operations. *Cf.* U.S. Dep't of Commerce, *The U.S. Litigation Environment and Foreign Direct Investment* 5-6 (2008) (discussing how liability risks discourage foreign direct investment in the United States). Again, there is no reason to believe that a U.S. Congress so attentive to business investment in the United States and the international competitiveness of our domestic business environment would have taken such a step so casually.

Third, and most damaging, corporate liability would have the primary effect of discouraging U.S. firms from doing business in the developing world, where weak or ineffectual governance is often the norm. Due in part to political instability, alleged conduct within developing nations has been at the heart of most litigation against corporations under both the ATS and the TVPA. *See* John B. Bellinger, *Will Federal Court's* Kiobel *Ruling End Second Wave of Alien Tort Statute Suits?*, Wash. Legal Found. (2010), 2, http://www.wlf.org/Upload/legalstudies/legalbackgrounder/11-12-10Bellinger_LegalBackgrounder.pdf ("Virtually every major corporation doing business in conflict-torn regions has faced ATS litigation."). Business investment and engagement is crucial to lifting

the populations of these nations out of the condition of poverty, and encouraging such development is a cornerstone of U.S. foreign policy. *See*, *e.g.*, 22 U.S.C. § 2191 (declaring purpose of Overseas Private Investment Corporation). Litigation risk under the TVPA for operating in the developing world would have the perverse effects of discouraging foreign engagement and development in the regions where it is most important and, by reducing economic opportunities in these regions, causing enormous harm to their institutions and residents. *See*, *e.g.*, Brief for the United States as Respondent Supporting Petitioner at 44-45, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (No. 03-339) (describing the "potentially disruptive effects of [ATS] litigation on the foreign policy interests of the United States").

To be sure, Congress would be within its powers to weigh these tradeoffs and determine that the benefits of corporate liability exceed the costs, but it never did so, because it did not believe the TVPA to break with customary international law. It therefore intended to make no trade-off at all. The Court should defer to Congress's judgment on that point.

CONCLUSION

For the foregoing reasons, *amicus* urges this Court to hold that, consistent with customary international law and its plain meaning, the Torture

Victim Prevention Act does not permit actions against private collective entities.

Respectfully submitted,

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