John Doe VIII v. Exxon Mobil Corp.: The D.C. Circuit Affirms Corporate Liability Under the Alien Tort Statute

I. OVERVIEW

Exxon Mobil Corporation (Exxon) began operating a natural gas extraction and processing facility in the Aceh province of Indonesia, in 2000, and hired members of the Indonesian military as security—despite Exxon's knowledge of the military's history of human rights abuses.[1] In the months that followed, Exxon's security forces murdered, tortured, raped, and falsely imprisoned members of the population.[2] Men were killed "as part of a systematic campaign of extermination of the people of Aceh by [Exxon's] security forces," and their widows were "beaten, burned, shocked with cattle prods, kicked and subjected to other forms of brutality and cruelty amounting to torture, as well as forcibly removed and detained for lengthy periods of time."[3] Exxon was not only aware of the atrocities, but also provided logistical and material support to the security forces by hiring mercenaries to provide advice, training, intelligence, and equipment to the unit, all while Exxon profited from the operation of the facility.[4]

1. Doe VIII v. Exxon Mobil Corp., 654 F.3d 11, 15-16 (D.C. Cir. 2011).
2. *Id.* at 16.
3. *Id.* (citations omitted) (internal quotation marks omitted).
4. *Id.*

Eleven villagers from the Aceh province filed a tort suit in the United States District Court for the District of Columbia in 2001 against Exxon under the Alien Tort Statute (and other charges), alleging that Exxon violated the law of nations by aiding and abetting the Indonesian military as they committed rape, genocide, crimes against humanity, extrajudicial killing, arbitrary prolonged detention, and torture.[5] The district court held that aiding and abetting was not actionable under the Alien Tort Statute (ATS) and that rape is not sufficiently recognized as a violation of the law of nations.[6] The court ruled that Exxon could not be liable for genocide and crimes against humanity because the prosecution of such claims would "be an impermissible intrusion in Indonesia's internal affairs."[7] Finally, the district court held that under the Supreme Court's decision in *Sosa v. Alvarez-Machain*, the plaintiffs could not assert the claims of arbitrary detention, torture, and extrajudicial killing because they had not alleged sufficiently that Exxon was "acting under the color of law."[8]

On appeal to the United States Court of Appeals for the District of Columbia Circuit, the plaintiff-appellants challenged the dismissal of their ATS claims for extrajudicial killing, torture, and prolonged arbitrary detention, but accepted the lower court's dismissal of the claims for genocide, crimes against humanity, and sexual violence.[9] They also contended that aiding and abetting liability is available under the ATS.[10] Exxon cross-appealed contending that corporations enjoy immunity under the ATS because customary international law does not recognize corporate liability for human rights violations—in effect, asking the D.C. Circuit to rule in accord with the United States Court of Appeals for the Second Circuit's holding, just months earlier, in *Kiobel v. Royal Dutch Petroleum Co.*, in which the Second Circuit concluded that corporations are immune to suits under the ATS.[11] The United States Court of Appeals for the District of Columbia Circuit *held* that corporations are not immune under the Alien Tort Statute because domestic law, which holds corporations liable for torts, provides the remedy for a suit alleging a violation of international law; the legislative history behind the statute

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5. *Id.* at 15.
6. *Id.* at 16 (citing Doe I v. Exxon Mobil Corp., 393 F. Supp. 2d 20, 24-25 (D.D.C. 2005)).
7. *Id.* (quoting *Doe I*, 393 F. Supp. 2d at 25).
8. *Doe I*, 393 F. Supp. 2d at 26.
9. *Exxon*, 654 F.3d at 17.
10. *Id.* The D.C. Circuit held that aiding and abetting is available under the ATS, thus eliminating the requirement that Exxon acted under the color of law. *Id.*
11. *Id.* at 17, 49; Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2d Cir. 2010).

indicates that corporations should be held liable; and a proper analysis of customary international law reveals that corporations are held liable for violations of human rights. *Doe VIII v. Exxon Mobil Corp.*, 654 F.3d 11, 15, 57 (D.C. Cir. 2011).

II. BACKGROUND

The Alien Tort Statute states, "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."[12] The suit of the Indonesian villagers is just one example of several ATS suits brought over the last fifteen years by similarly situated plaintiffs against major corporations (often oil and gas companies) for similarly horrifying human rights violations caused while manufacturing or extracting mineral resources in far-away lands.[13]

The ATS has not only been invoked for human rights abuses, but also increasingly by plaintiffs claiming environmental injuries. To date, there have been no successful environmental claims brought under the ATS, namely because the courts have found that no universally recognized right to a clean or healthy environment exists under customary international law.[14] In 1999, the United States Court of Appeals for the Fifth Circuit heard *Beanal v. Freeport-McMoRan, Inc.*, in which the plaintiffs alleged, under the ATS, that Freeport caused the "destruction, pollution, alteration, and contamination of natural water-ways, as well as surface and ground water sources; deforestation; destruction and alteration of physical surroundings."[15] The court held for the defendant, stating that the plaintiffs relied on international environmental principles that only represented a "general sense of environmental responsibility" and "abstract rights and liberties devoid of articulable or discernable [sic] standards."[16] Similarly, in *Flores v. Southern Peru Copper Corp.*, the Second Circuit ruled against Peruvian residents who sued under the ATS alleging that pollution from a copper mining,

12. 28 U.S.C. § 1350 (2006).

13. *See Kiobel*, 621 F.3d 111; Galvis Mujica v. Occidental Petroleum Corp., 564 F.3d 1190 (9th Cir. 2009); Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244 (2d Cir. 2009); Romero v. Drummond Co., 552 F.3d 1303 (11th Cir. 2008); Sarei v. Rio Tinto, PLC, 487 F.3d 1193 (9th Cir. 2007); Aguinda v. Texaco, Inc., 303 F.3d 470 (2d Cir. 2002); Doe I v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002); Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88 (2d Cir. 2000); Abecassis v. Wyatt, 704 F. Supp. 2d 623 (S.D. Tex. 2010); Bowoto v. Chevron Corp., 557 F. Supp. 2d 1080 (N.D. Cal. 2008).

14. *See* Richard L. Herz, *Litigating Environmental Abuses Under the Alien Tort Claims Act: A Practical Assessment*, 40 VA. J. INT'L L. 545, 580-83 (2000).

15. 969 F. Supp. 362, 369 (E.D. La. 1997), *aff'd*, 197 F.3d 161 (5th Cir. 1999).

16. Beanal v. Freeport-McMoRan, Inc., 197 F.3d 161, 167 (5th Cir. 1999).

refining, and smelting operation caused fatal lung disease among the population.[17] The plaintiffs brought their environmental injury (right to clean air) under a human rights claim—the "right to life, . . . health, and . . . sustainable development"—which the district court struck down as too vague to be considered "well-established, universally recognized norms of international law."[18]

However, other courts have given reason to believe environmental claims might someday be heard under the ATS. In *Aguinda v. Texaco, Inc.*, the district court suggested, in a preliminary decision, that the United States' domestic and international commitments to control hazardous waste indicated that the plaintiffs (a class of thirty thousand Ecuadorians suing Texaco for rainforest destruction and large-scale disposal of inadequately treated hazardous waste) could have a valid ATS claim if there "were established misuse of hazardous waste of sufficient magnitude to amount to a violation of international law."[19] Additionally, in *Sarei v. Rio Tinto, PLC*, the district court held that the defendant's marine pollution violated two provisions of the United Nations Convention on the Law of the Sea (even though the United States has not ratified it), and therefore the plaintiffs had a valid ATS claim.[20] The United States Court of Appeals for the Ninth Circuit affirmed the district court's ruling and then overruled itself upon a petition for rehearing en banc, without addressing whether marine pollution violations fell under the "law of nations."[21]

Despite the lack of success for environmental claims under the ATS to date, plaintiffs will continue to try, and judges have opened the door to the idea—if just a crack. But to hold that corporations are immune under the ATS, as the Second Circuit held in 2010 in *Kiobel*,[22] would eliminate any chance to bring environmental claims against corporations, under the

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17. 414 F.3d 233, 236-37 (2d Cir. 2003).

18. Flores v. S. Peru Copper Corp., 253 F. Supp. 2d 510, 519, 525 (S.D.N.Y. 2002) (quoting Filartiga v. Pena-Irala, 630 F.2d 876, 888 (2d Cir. 1980)), *aff'd*, 414 F.3d 233 (2d Cir. 2003).

19. Aguinda v. Texaco, Inc., No. 93 Civ. 7527 (VLB), 1994 WL 142006, at *1, *7 (S.D.N.Y. Apr. 11, 1994).

20. 221 F. Supp. 2d 1116, 1161-62 (C.D. Cal. 2002), *aff'd in part, vacated in part, rev'd in part*, 456 F.3d 1069 (9th Cir. 2006), *withdrawn and superseded on reh'g*, 487 F.3d 1193 (9th Cir. 2007), *reh'g granted*, 499 F.3d 923 (9th Cir. 2007), *heard on other grounds*, 550 F.3d 822 (9th Cir. 2008). The case was brought by Papua New Guinea residents against a mining group for dumping into the local river system, which destroyed the island's environment and the population's health. *Id.* at 1120.

21. Sarei v. Rio Tinto, PLC, 487 F.3d 1193, 1196-97, 1210 (9th Cir. 2007), *reh'g granted*, 499 F.3d 923 (9th Cir. 2007), *heard on other grounds*, 550 F.3d 822 (9th Cir. 2008).

22. Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 149 (2d Cir. 2010).

ATS, in the future—even if the right to a healthy environment becomes a widely accepted norm of customary international law.

While the early ATS cases were predominantly against individuals, since the filing of *Doe v. Unocal Corp.*[23] in 1997, corporations have been the subject of more than 155 suits under the ATS: extracting companies (mining, oil, gas, and coal), financial institutions, pharmaceutical companies, communications companies, manufacturers, the food and beverage industry, and more.[24] In almost every single ATS case against a corporation, the question of whether a corporation could be held liable was assumed, as defendants never raised the argument, and courts did not consider the idea.[25] Then, in 2010, the Second Circuit in *Kiobel* ruled that corporations are immune from suits under the ATS, despite the fact that the defense did not even raise the issue—the court raised it on its own.[26] The road to this ground-breaking decision has been long and winding.

A. Historical Circumstances Surrounding the Enactment of the ATS

Under the Articles of Confederation, "The Continental Congress was hamstrung by its inability to 'cause infractions of treaties, or of the law of nations to be punished.'"[27] In 1781, the Congress passed a resolution asking state legislatures to provide adequate punishment for the violation of the law of nations.[28] Only Connecticut acted upon the resolution, and so Congress worried that a lack of forum to try international cases could lead to problematic entanglements in foreign affairs.[29] For example, in 1784, a French citizen assaulted the French Consul General on the streets of Philadelphia, causing the French Ambassador to complain to the Continental Congress and the Dutch Ambassador to threaten to withdraw his office if nothing was done.[30]

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23. 963 F. Supp. 880 (C.D. Cal. 1997), *aff'd in part, rev'd in part*, 395 F.3d 932 (9th Cir. 2002).

24. *See* Jonathan C. Drimmer & Sarah R. Lamoree, *Think Globally, Sue Locally: Trends and Out-of-Court Tactics in Transnational Tort Actions*, 29 BERKELEY J. INT'L L. 456, 460-62 & n.34 (2011) (citing Michael Goldhaber, *The Life and Death of the Corporate Alien Tort*, AM. L. LITIG. DAILY (Oct. 12, 2010) (on file with author)).

25. *See* cases cited *supra* note 13.

26. *Kiobel*, 621 F.3d at 149.

27. Sosa v. Alvarez-Machain, 542 U.S. 692, 716 (2004) (quoting JAMES MADISON, JOURNAL OF THE FEDERAL CONVENTION 60 (E.H. Scott ed., 1893)).

28. *Id.*

29. *See id.* at 715.

30. Doe VIII v. Exxon Mobil Corp., 654 F.3d 11, 44 (D.C. Cir. 2011) (citing Respublica v. De Longchamps, 1 U.S. (1 Dall.) 111 (1784)).

In 1789, Congress passed the Judiciary Act, which stated in section 9 that district courts "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."[31] While there is no legislative history concerning what causes of action Congress intended, Blackstone wrote at the time of three specific violations of the law of nations addressed by the criminal law of England, "[V]iolation of safe conducts, infringement of the rights of ambassadors, and piracy."[32]

At the time of enactment, ships were juridical entities that merchants used to conduct commerce, much like a corporation. Courts enforced claims against ships, not individuals, for violations of the law of nations.[33] Justice Story held that piracy may be subject "to the penalty of confiscation" for breaching "the law of nations," while Justice Marshall held that "it is a proceeding against the vessel."[34] Moreover, several decisions and treatises dating back to 1774 indicate that corporate liability was an accepted legal concept at the time: "[F]rom the earliest times to the present day, corporations have been liable for torts."[35] American courts reached the same conclusions England had (when dealing with suits over the East India Company), in that corporate tort was not a corporate *action*, but a way of allocating damages for the torts committed by a corporation's agent.[36]

Though the ATS is a jurisdictional statute, it "is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time."[37] So, at the time of the passage of the act, the founding fathers would have been familiar with a mixed approach to violations of international law, in which international

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31. An Act To Establish the Judicial Courts of the United States § 9, 1 Stat. 73, 77 (1789). The original draft was slightly modified before being codified in 28 U.S.C. § 1350 (2006) as the Alien Tort Statute: "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."

32. *Sosa*, 542 U.S. at 715, 724.

33. *See* The Palmyra, 25 U.S. (12 Wheat.) 1, 14-15 (1827); The Marianna Flora, 24 U.S. (11 Wheat.) 1, 40-41 (1825); United States v. The Little Charles, 26 F. Cas. 979, 982 (C.C.D. Va. 1818).

34. *The Marianna Flora*, 24 U.S. at 40-41; *The Little Charles*, 26 F. Cas. at 982.

35. *Exxon*, 654 F.3d at 48 (quoting JOSEPH K. ANGELL & SAMUEL AMES, A TREATISE ON THE LAW OF PRIVATE CORPORATIONS: AGGREGATE 221 (1832)).

36. Gary T. Schwartz, *The Character of Early American Tort Law*, 36 UCLA L. REV. 641, 649-51 (1989).

37. *Sosa*, 542 U.S. at 724.

law defined the conduct, while the domestic law defined the remedies.[38] In the early cases with ships, courts used domestic principals to calculate damages.[39] As a practical matter, there were no international tribunals at the time when Congress passed the ATS, and so Congress must have envisioned a process in which domestic courts prosecuted the law of nations according to their own remedies.[40]

The mixed-law approach was affirmed by the Supreme Court in *United States v. The Paquete Habana*.[41] There, the Court held that the seizure during the Spanish-American War of a Spanish fishing vessel by the United States was illegal because under customary international law, unarmed fishing vessels were not prizes of war.[42] The Court stated that "[i]nternational law is part of our law" and emphasized that the law of nations must be administered by the courts of proper jurisdiction—here, the federal courts.[43]

B. Birth of the Modern ATS Cases and the Controversy over Causes of Action

Although enacted in 1789, the ATS was only used twice in its first two hundred years—in 1795 and 1961.[44] However, in 1980, in *Filartiga v. Pena-Irala*,[45] the Second Circuit became the first appellate court to uphold a claim under the ATS.[46] In *Filartiga*, the court held that deliberate torture (committed under state authority) was a violation of the law of nations, and held that the ATS provided federal jurisdiction over a claim by a resident alien against a Paraguayan official for the death of his son in Paraguay.[47] In effect, the court held that a foreigner can sue another foreigner in federal court for an action that happened outside the United States. And so *Filartiga* was "the birth of the modern line of [ATS] cases."[48]

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38. *Id.* at 723-24; *see* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 777-78 (D.C. Cir. 1984).

39. *See* Dean v. Angus, 7 F. Cas. 294, 295 (Adm. Pa. 1785) (No. 3,702); The Malek Adhel, 43 U.S. 210, 233 (1844); *The Little Charles*, 26 F. Cas. at 982.

40. *See Sosa*, 542 U.S. at 723-24.

41. 175 U.S. 677 (1900).

42. *Id.* at 678-79, 708.

43. *Id.* at 700.

44. Doe VIII v. Exxon Mobil Corp., 654 F.3d 11, 18 (D.C. Cir. 2011) (citing Adra v. Clift, 195 F. Supp. 857 (D. Md. 1961); Bolchos v. Darrel, 3 F. Cas. 810 (D.S.C. 1795)).

45. 630 F.2d 876 (2d Cir. 1980).

46. *Exxon*, 654 F.3d at 18 (citing *Filartiga*, 630 F.2d at 876).

47. *Id.*

48. *Id.* (alteration in original) (quoting Sosa v. Alvarez-Machain, 542 U.S. 692, 724-25 (2004)).

The *Filartiga* court held that the ATS can be evoked to sue civilly if the tort is the result of the law of nations and stressed that the law of nations should be derived from the present, not the law of nations that existed at the time of the enactment of the ATS.[49] The court relied upon various treaties which condemned torture and various international tribunal decisions, despite the fact that not a single torturer had ever been found civilly liable under any of the treaties, nor had any of the tribunal decisions involved a private right of action for civil damages against the torturer himself.[50]

The court also reiterated the contention that customary international law has always been a part of the federal common law.[51] The court implicitly granted a cause of action for tort when granting the jurisdiction.[52] What the *Filartiga* court implied, but left unanswered explicitly, was whether the ATS provided for its own private cause of action, in addition to the three named by Blackstone.

The debate was fleshed out by two concurring judges in the D.C. Circuit in *Tel-Oren v. Libyan Arab Republic*, a civil suit brought by survivors of a bus attack in Israel.[53] Judge Edwards followed *Filartiga* and found that the ATS provides a right of action.[54] Judge Bork, by contrast, held that the ATS does not confer such a right—in the absence of a right to sue conferred by international law (a ratified treaty) or an additional statute from Congress, the plaintiffs did not have a cause of action.[55] Bork "would deny jurisdiction to any plaintiff . . . who could not allege a specific right to sue apart from the language of section 1350 itself."[56]

Edwards disagreed, stating that plaintiffs need not point to a specific right to sue under the law of nations, but only need to show that the defendant's actions violated the substantive law of nations.[57] Edwards stated, "[I]nternational law itself . . . does not require any particular reaction to violations of law. . . . Whether and how the United States wished to react to such violations are domestic questions . . . ."[58] Because

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49. *Filartiga*, 630 F.2d at 880-81 (citing Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796)).

50. *Id.* at 882-84; Brief of *Amici Curiae* International Law Scholars in Support of the Petition for Writ of *Certiorari* at 8-9, Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2d Cir. 2010), *cert. granted*, No. 10-1491, 2011 WL 4905479 (Oct. 17, 2011) (No. 10-1491).

51. *Filartiga*, 630 F.2d at 885.

52. *See id.* at 887.

53. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984).

54. *See id.* at 777-78 (Edwards, J., concurring).

55. *See id.* at 808-19 (Bork, J., concurring).

56. *Id.* at 777 (Edwards, J., concurring).

57. *See id.* at 777-78.

58. *Id.* (quoting LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 224 (1972)).

states decide how to apply their own laws, "the law of nations never has been perceived to create or define the civil actions to be made available by each member of the community of nations; by consensus, the states leave that determination to their respective municipal laws."[59] In contrast, Bork held that the only causes of action available are the three recognized by Blackstone at the time of ATS enactment, unless the law of nations provides the substantive rules and also the cause of action of another norm.[60]

C. Sosa—*The Supreme Court Provides Some Guidance but No Final Answer*

The Supreme Court of the United States finally addressed the issue in *Sosa v. Alvarez-Machain*—the Court's only ATS case.[61] The Court sided with Judge Edwards, and held that while the ATS is only a jurisdictional statute, "the jurisdiction was originally understood to be available to enforce a small number of international norms that a federal court" could recognize as within the common law.[62] The Court stated that in the exercise of their federal common law discretion (a discretion that federal courts would have had at the time of enactment of the ATS), courts today can open the door slightly to a narrow class of international norms—beyond the three norms considered at the time of drafting the ATS.[63]

The Court cautioned restraint and held "that federal courts should not recognize private claims . . . for violations of any international . . . norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when [the ATS] was enacted."[64] Noting that while any clarification from Congress would be preferable, "nothing Congress has done is a reason for us to shut the door to the law of nations entirely."[65] So the question of what constitutes customary international law must be determined with reference to the "present-day law of nations," a standard that recognizes that the international norms upon which ATS can be invoked will evolve over time.[66]

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59. *Id.* at 778.
60. *Id.* at 813-14 (Bork, J., concurring).
61. 542 U.S. 692 (2004).
62. *Id.* at 729.
63. *Id.* at 731-32 ("[T]he 'limits of section 1350's reach' [are] defined by 'a handful of heinous actions—each of which violates definable, universal and obligatory norms.'" (quoting *Tel-Oren*, 726 F.2d at 781 (Edwards, J., concurring))).
64. *Id.* at 732 (citing United States v. Smith, 18 U.S. (5 Wheat.) 153, 163-80 (1820)).
65. *Id.* at 731.
66. *Id.* at 725.

The Court stated in footnote 20 that "the determination whether a norm is sufficiently definite to support a cause of action" is "related [to] whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual."[67] Despite answering the question at issue in *Tel-Oren*, and agreeing with Judge Edwards that the ATS provides a cause of action, the Court, with footnote 20, fueled the new, current controversy over corporate immunity. The question is whether the Court's language in footnote 20 delineates between state and nonstate actors, or whether the phrase delineates between individuals and corporations.

D. Kiobel—*The Second Circuit Grants Corporations Immunity Under the ATS*

In 2010, the Second Circuit held, in a 2-1 decision, that corporations could not be held liable under the ATS because there is no norm of customary international law that recognizes the liability of corporations for violations of international law.[68] There, the plaintiffs—residents of Nigeria—alleged that Shell aided and abetted the Nigerian government in several abuses over a three-year period, including extrajudicial killings, beatings, rapes, arbitrary arrests, and destruction and theft of property.[69] The judgment was earthshaking in the legal world because it reversed thirty years of Second Circuit precedent, as well as overwhelming precedents from the Ninth Circuit, Eleventh Circuit, and other lower courts, which held that corporations could be found liable under the ATS.[70]

The majority arrived at its conclusion in a two-step process. First, the court determined that customary international law determines whether a corporation can be held liable for a violation of the law of nations in a federal common law torts suit.[71] Next, drawing extensively from the statutes and practices of various international criminal tribunals, the majority determined that corporations cannot be liable under customary international law because there is no "norm of corporate liability" in customary international law.[72] Specifically, the majority

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67. *Id.* at 732 & n.20.

68. Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 120 (2d Cir. 2010).

69. *Id.* at 123.

70. *See* Galvis Mujica v. Occidental Petroleum Corp., 564 F.3d 1190 (9th Cir. 2009); Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252 (11th Cir. 2009); Abecassis v. Wyatt, 704 F. Supp. 2d 623 (S.D. Tex. 2010); Bowoto v. Chevron Corp., 557 F. Supp. 2d 1080 (N.D. Cal. 2008).

71. *Kiobel*, 621 F.3d at 127-31.

72. *Id.* at 145.

found that the *Charter of the International Military Tribunal at Nuremberg*,[73] along with the statutes of the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the International Criminal Court (ICC) grant the tribunals jurisdiction over natural persons only;[74] that United States military tribunals never prosecute corporations; and that the few treaties that do provide for corporate liability are either not widely ratified or have a limited subject matter.[75] The court stated flatly: "[N]o international judicial tribunal has so far recognized corporate liability, as opposed to individual liability, *in a civil or criminal context* on the basis of a violation of the law of nations or customary international law," and "[T]here is not, and never has been, any assertion of the criminal liability of corporations in international law."[76]

Judge Leval concurred with the judgment but disagreed with the majority, holding that corporations are not immune under the ATS.[77] Judge Leval gave various reasons as to why the majority's reasoning is flawed: the improbability that international law would adopt a rule exempting corporations from liability; the absence of any precedent for the majority's rule in either U.S. law or international law; the misinterpretation of the judgments and statutes of international criminal tribunals; and the majority's misunderstanding of the *Sosa* Court's reference to a "norm."[78]

III. THE COURT'S DECISION

In the noted case, the United States Court of Appeals for the District of Columbia Circuit held that corporations are not immune from liability under the ATS. First, the court established that *Sosa* is not controlling because it decided whether a certain norm of behavior violated

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73. Agreement for the Prosecution of the Major War Criminals of the European Axis (London Charter), Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279.

74. *Kiobel*, 621 F.3d at 136 (citing International Criminal Tribunal for the Former Yugoslavia Statute, S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993); International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994); The Rome Statute of the International Criminal Court art. 25(1), *opened for signature* July 17, 1998, 37 I.L.M. 1002, 1016; Albin Eser, *Individual Criminal Responsibility*, *in* 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 767, 778 (Antonio Cassese et al. eds., 2002)).

75. *Id.* at 134-38.

76. *Id.* at 143 (quoting Declaration of James Crawford ¶ 10, Presbyterian Church of Sudan v. Talisman Energy, Inc., No. 07-0016 (2d Cir. Jan. 22, 2009); Second Declaration of Christopher Greenwood ¶ 13, Presbyterian Church of Sudan v. Talisman Energy, Inc., No. 01 Civ. 9882 (S.D.N.Y. July 10, 2002)).

77. *Id.* at 154 (Leval, J., concurring only in judgment).

78. *Id.* at 154-65, 176-78.

international law, whereas the issue in *Exxon* is about agency.[79] In *Sosa*, the issue was "whether the alleged illegal arrest and brief detention (of less than 24 hours) could support a cause of action—i.e., whether a substantive norm of conduct" (condemning detentions of less than 24 hours) existed in international law that could support the claim—so the Court looked to customary international law.[80] Here, the court separated the issue of whether the cause of action (the crime) is a violation of international law, from whether the principal (of an agent) will pay the damages for the crime.[81] The court assumed, in its analysis of corporate liability, that Exxon's security forces, acting as Exxon's agents, violated substantive international law norms when they murdered, tortured, and made arbitrary arrests.[82] The court stated that *Sosa* did not answer whether domestic or international "law supplies the rules governing 'the technical accoutrements to [a cause of] action'"[83] that should be used to determine whether Exxon, the principal, can be held liable for the acts of the Indonesian military security force, the agent—*Sosa* only held that the substantive content of the cause of action has its source in customary international law.[84]

According to the court, the law of nations creates no civil remedies or private causes of action, so federal courts are left to determine the nature of the remedy by looking to federal common law, not customary international law.[85] The basic concept, according to the court, is that international law establishes rights, duties, and remedies for state action against another state, but does not require or demand (except for treaties explicitly saying so) any particular domestic reaction to violations of international law.[86] The court referred to Judge Edwards' concurrence in *Tel-Oren*: "[T]he law of nations never has been perceived to create or define the civil actions to be made available by each member of the community of nations; by consensus, the states leave that determination to their respective municipal laws."[87] Therefore, because the ATS grants

79. Doe VIII v. Exxon Mobil Corp., 654 F.3d 11, 41 (D.C. Cir. 2011).
80. *Id.*
81. *Id.*
82. *See id.*
83. *Id.* (quoting Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 778 (D.C. Cir. 1984) (Edwards, J., concurring)).
84. *Id.*
85. *Id.* at 41-42.
86. *Id.* at 42 (quoting LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 245-46 (2d ed. 1996)).
87. *Id.* (quoting *Tel-Oren*, 726 F.2d at 778 (Edwards, J., concurring)).

jurisdiction for conduct qualifying under the test in *Sosa*, United States domestic law will provide the remedy.[88]

Second, the court turned to the text and history of the statute. The Supreme Court has observed that the text of the ATS "does not distinguish among classes of defendants."[89] Given the lack of legislative history, the court looked to historical context to help determine whether the purpose of the ATS supports corporate liability. The ATS was enacted in 1789 because Congress feared there would be unnecessary entanglement in foreign conflict and the nation would lose respect abroad.[90] The Judiciary Act of 1789 limited federal jurisdiction over civil suits to a specific list of causes and created diversity jurisdiction in the federal courts (subject to $500 amount-in-controversy requirement), along with establishing the ATS.[91] Consequently, aliens alleging domestic common law or international nontort claims were restricted to state courts unless their suit was for $500 or more.[92] As the court noted, "Clearly the Judiciary Act evidences that the First Congress knew how to limit, or deny altogether, subject matter jurisdiction over a class of claims and declined to do so with respect to torts in violations of the law of nations and treaties when brought by aliens."[93]

The court further reasoned that nothing suggests that the First Congress would have wanted to prevent natural persons from entangling the nation in foreign entanglements, but would have been content with letting a corporation do the same.[94] Moreover, Congress in its early days punished piracy and charged boats as entities, referring to the conduct of defendant "persons," a term applicable both to individuals and to corporate entities.[95] Nor did the early courts reject applying the common law of agency.[96] Thus, there is no historical context to support the conclusion that the First Congress sought to prevent drawing the United States into foreign conflict when the perpetrator was a natural person, but not when it was a corporation.[97]

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88. *Id.*

89. *Id.* at 43 (quoting Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 438 (1989)).

90. *Id.* at 46.

91. *Id.* at 45-46 (citing *Tel-Oren*, 726 F.2d at 779 n.3; An Act To Establish the Judicial Courts of the United States, § 11, 1 Stat. 73, 78-79 (1789)).

92. *Id.* at 46.

93. *Id.*

94. *Id.* at 47.

95. *See id.* (citing Crimes Act of 1790, § 10, 1 Stat. 112, 114 (1790); Act of May 15, 1820, § 3, 3 Stat. 600 (1820); 1 U.S.C. § 1 (2006)).

96. *Id.* (citing Bolchos v. Darrel, 3 F. Cas. 810 (D.S.C. 1795)).

97. *Id.*

Third, the court found that corporate liability in tort was an accepted principle of tort law in the United States in 1789.[98] The court reasoned that the First Congress would have been aware that corporations, just as they are today, could be liable for torts.[99] "The general rule of substantive law is that corporations, like individuals, are liable for their torts."[100]

Fourth, the court looked to international law to conclude that, even if courts must look to the law of nations to determine the scope of liability, corporations still would not enjoy immunity under the ATS. The court referred to a specific holding of the ICTY that a crime against humanity involves actions "instigated or directed . . . by any organization or group."[101] The court also referenced international law scholars who state that juridical entities can be held liable for violating the law of nations, and cited to other scholars who do not distinguish between natural and juridical individuals in determining violations of international law.[102] Finally, the court mentioned various actors and entities of the United Nations' human rights establishment who believe "corporations are responsible for violations of the law of nations."[103]

Next, the court took aim at arguments Exxon borrowed from the Second Circuit's reasoning in *Kiobel*: "[T]hat corporate liability 'has not attained a discernible, much less universal, acceptance among nations of the world in their relations *inter se*.'"[104] The Second Circuit looked to international law to determine who may be a defendant and determined that under *Sosa*, corporate liability is not a "specific, universal, and obligatory" norm and could not be applied under the ATS.[105] The D.C. Circuit stated that the Court in *Sosa* never addressed the question of corporate liability, nor gave precise guidance on where to look for answers to "questions ancillary to the cause of action itself, such as corporate liability."[106]

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98. *Id.*

99. *Id.* at 48.

100. *Id.* (quoting White v. Cent. Dispensary & Emergency Hosp., 99 F.2d 355, 358 (D.C. Cir. 1938)) (citing Daniels v. Tearney, 102 U.S. 415, 420 (1880); Lyon v. Carey, 553 F.2d 649, 652-53 (D.C. Cir. 1976)).

101. *Id.* (quoting Prosecutor v. Tadic, Case No. IT-94-1-T, Trial Chamber Opinion and Judgment, ¶¶ 654-55 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997)).

102. *Id.* at 49 nn.35-36 (citations omitted).

103. *Id.* (citing Brief of *Amici Curiae* International Law Scholars in Support of Plaintiffs-Appellants-Cross-Appellees at 7-10, Kiobel v. Royal Dutch Petroleum Corp., 642 F.3d 268 (2d Cir. 2011) (Nos. 06-4800-cv, 06-4876-cv), 2010 WL 6288874, at *7-10 [hereinafter Law Scholars Brief]).

104. *Id.* (quoting Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 145 (2d Cir. 2010)).

105. *Id.* at 50 (quoting *Kiobel*, 621 F.3d at 145).

106. *Id.*

The court's main criticism of the *Kiobel* decision was that the Second Circuit disregarded "the key distinction between norms of conduct and remedies . . . and instead conflate[d] the norms and the rules (the technical accoutrements) for any remedy found in federal common law."[107] The Second Circuit incorrectly relied on footnote 20 of *Sosa*[108] to delineate between corporations and individuals, but here the D.C. Circuit stated that the footnote was actually a comparison between state and nonstate actors, because the court in *Sosa* was comparing two cases (*Tel-Oren* and *Kadic v. Karadžić*[109]) dealing with the state-actor issue.[110] The D.C. Circuit reasoned, "Nothing in either opinion suggests that either court considered a dichotomy between a natural and a juridical person, even though *Tel-Oren* involved a juridical defendant."[111] For centuries, there has been a distinction between private and state actors in international law, and it is this distinction to which footnote 20 refers.[112]

The delineation that actually matters, according to the court, is the difference between the cause of action, which is governed by international norms, and the "technical accoutrements" of the proceedings, which are found in federal common law.[113] Although *Sosa* does not specifically rule on whether federal or international law is to decide the accoutrements, international law only defines its enforcement through specific treaties, but otherwise leaves enforcement to each nation to decide,[114] and here, "the tort cause of action under the ATS is derived from federal common law."[115] In other words, "federal common law . . . suppl[ies] the rules regarding remedies . . . inasmuch as all claims under the ATS are federal common law claims."[116]

Next, the court criticized the Second Circuit's conclusion that corporations have never been held liable under customary international law. The court stated that the Nuremberg court did indict six Nazi

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107. *Id.*

108. "A related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual." Sosa v. Alvarez-Machain, 542 U.S. 692, 732 n.20 (2004).

109. 70 F.3d 232 (2d Cir. 1995).

110. *Exxon*, 654 F.3d at 50 (citing *Kiobel*, 621 F.3d at 128-29 & n.31).

111. *Id.*

112. *Id.* at 50-51 (citing Law Scholars Brief, *supra* note 103, at 7).

113. *Id.* at 51 (citing *Sosa*, 542 U.S. at 725-26).

114. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 778 (D.C. Cir. 1984) (Edwards, J., concurring).

115. *Exxon*, 654 F.3d at 51 (citing *Sosa*, 542 U.S. at 720-21).

116. *Id.* at 55 (citing *Sosa*, 542 U.S. at 721-22; Ali v. Rumsfeld, 649 F.3d 762, 773-79 (D.C. Cir. 2011)).

organizations and directed the dissolution of I.G. Farbenindustrie A.G.[117] The court stated that "I.G. Farben[] knowingly and prominently engaged in building up and maintaining the German war potential."[118] Therefore, the Allies prosecuted I.G. Farbenindustrie A.G. for committing violations of the law of nations.[119]

The court then criticized the *Kiobel* majority for focusing on criminal tribunals while ignoring "general principles of international law" as an important source of customary international law.[120] The Statute of the International Court of Justice codifies general principals of law as a primary source of customary international law.[121] General principles of law become international law through widespread domestic application by civilized nations,[122] and the court found, "[C]orporate liability is a universal feature of the world's [domestic] legal systems and . . . no domestic jurisdiction exempts legal persons from liability."[123]

Finally, the D.C. Circuit rejected Exxon's arguments based on *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*[124] and a statutory reading of the Torture Victims Protection Act (TVPA).[125] In conclusion, the court summed up its disagreement with the holding of *Kiobel*: "[I]t would create a bizarre anomaly to immunize corporations from liability for the conduct of their agents in lawsuits brought for 'shockingly egregious violations of universally recognized principles of international law.'"[126]

Judge Kavanaugh wrote a dissent in which he disagreed with several aspects of the majority's decision, including whether a corporation can be held liable under the ATS. Kavanaugh argued along the same lines as the *Kiobel* majority, relying on footnote 20 of *Sosa* to

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117. *Id.* at 52 (citing Brief of Amici Curiae Nuremberg Scholars in Support of Plaintiffs-Appellants-Cross-Appellees' Petition for Rehearing and Rehearing En Banc at 4-9, 11, Kiobel v. Royal Dutch Petroleum Co., 642 F.3d 268 (2d Cir. 2011) (No. 06-4800-cv) [hereinafter Nuremberg Scholars Brief]).

118. *Id.* (alteration in original) (quoting Control Council Law No. 9, *Providing for the Seizure of Property Owned by I.G. Farbenindustrie and the Control Thereof* (Nov. 30, 1945), *reprinted in* 1 ENACTMENTS 225 (1945)).

119. *Id.* (citing Nuremberg Scholars Brief, *supra* note 117, at 11-12).

120. *Id.* at 53.

121. Statute of the International Court of Justice, U.N. Charter annex, art. 38(1)(c) (1945).

122. *Exxon*, 654 F.3d at 54.

123. *Id.* at 53 (citing Law Scholars Brief, *supra* note 103, at 12). The court also noted that the Supreme Court had observed that the principle of corporate liability is "common to both international law and federal common law." *Id.* at 54 (quoting First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba, 462 U.S. 611, 623 (1983)).

124. 403 U.S. 388 (1971).

125. TVPA, Pub. L. No. 102-256 (1992) (codified at 28 U.S.C. § 1350 (2006)).

126. *Exxon*, 654 F.3d at 57 (quoting Zapata v. Quinn, 707 F.2d 691 (2d Cir. 1983)).

hold that the Supreme Court states that customary international law not only informs the substantive content but also the categories of defendants who can be sued.[127] The dissent stated that the plaintiffs failed to meet their burden in showing that customary international law imposes liability against corporations for the crimes alleged—it would be insufficient to show separately that the crimes themselves violate international law and that corporations are generally liable in international law for certain torts.[128] The dissent emphasized the *Sosa* Court's admonition of judicial constraint and great caution in ATS cases.[129]

IV. ANALYSIS

The D.C. Circuit's decision in the noted case, holding corporations liable under the ATS, is consistent with prior jurisprudence and is consistent with the purpose of the existing law. Most important, the court correctly interpreted footnote 20 of *Sosa*. The language of the phrase clearly indicates that the Supreme Court is making a distinction between state and nonstate actors when considering the scope of liability: "A related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, *if the defendant is a private actor such as a corporation or individual*."[130] Nothing in the language indicates that corporations and individuals should be treated differently—a conclusion further supported by the historical divide in ATS cases between state and nonstate actors, which the *Sosa* court was specifically contemplating.[131] The Second Circuit in *Kiobel* simply misread the footnote, especially considering the language and purpose of the ATS.

The language of the ATS, though it contains limiting language defining the general cause of action as "torts only," places no limit whatsoever on the type of defendant that can be charged.[132] Because the purpose behind enacting the ATS was to help the young nation avoid foreign entanglements, it would make no sense to hold only individuals, and not corporations, liable for violations of the law of nations.[133] Additionally, at the time of enactment, corporate liability was an

127. *Id.* at 72, 81 (Kavanaugh, J., dissenting).
128. *See id.* at 82.
129. *Id.* at 72-73 (citing Sosa v. Alvarez-Machain, 542 U.S. 692, 725-29 (2004)).
130. *Sosa*, 542 U.S. at 732 n.20 (emphasis added).
131. *Exxon*, 654 F.3d at 50 (majority opinion).
132. *See* 28 U.S.C. § 1350 (2006).
133. *Sosa*, 542 U.S. at 715-16.

accepted concept of law,[134] and moreover, the accepted practice was to charge ships as legal entities—including pirate ships guilty of violations of the law of nations.[135] Congress must have been aware of this practice and so chose not to prohibit such suits in the ATS.

The D.C. Circuit correctly identified that, because international law does not proscribe specific remedies,[136] states are free to remediate for violations of international law according to their own domestic laws.[137] The ATS only requires that the tort is "committed" in violation of an international norm—not that international law outline a specific remedy.[138] Otherwise the Second Circuit's decision in *Filartiga* would need to be overturned because, in that case, there was no prior precedent holding a torturer civilly liable.[139] Importantly, in 1789, there were no international criminal tribunals, such as the Nuremberg Court, the ICC, ICTY, ICTR, or ICJ, so the domestic courts would have been unable to look to international law for specific remedies or procedures. Therefore, once the cause of action alleging a violation of the law of nations was brought within the common law, domestic law would have provided the rules—an idea supported by the Supreme Court in *Paquete*.[140]

Additionally, because there were no international tribunals, Congress in 1789 must have considered that general principals of law would inform the law of nations to determine qualifying norms of behavior, an area that the *Kiobel* majority completely ignored.[141] The ICJ statute codifies general principals of law as a primary source of customary international law.[142] As stated in *Exxon*, in every jurisdiction of the United States and in every civilized country, corporations can be held liable for torts.[143] Moreover, the *Kiobel* court's analysis is flawed because criminal and civil liability against multinational corporations for

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134. ANGELL & AMES, *supra* note 35, at 221.

135. The Marianna Flora, 24 U.S. (11 Wheat.) 1, 40-41 (1825); United States v. The Little Charles, 26 F. Cas. 979, 982 (C.C.D. Va. 1818).

136. Except in the case of Genocide Conventions, for example, that require states to enact certain criminal laws at home. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 778 (Edwards, J. concurring) (citing L. HENKIN ET AL., INTERNATIONAL LAW 116 (1980)).

137. Doe VIII v. Exxon, 654 F.3d 11, 41-42 (D.C. Cir. 2011).

138. 28 U.S.C. § 1350 (2006).

139. Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980). The remedy should be determined by federal common law because the form of procedure is determined by domestic law. *Id.* at 885.

140. The Paquete Habana, 175 U.S. 677, 700 (1900).

141. *Exxon*, 654 F.3d at 53.

142. Statute of the International Court of Justice, U.N. Charter annex, art. 38(1)(c) (1945).

143. *Exxon*, 654 F.3d at 57.

egregious conduct *is* exercised abroad with increasing regularity.[144] Finally, there is absolutely no precedent domestically or internationally to give corporations immunity for egregious crimes.[145]

As a policy matter, the Second Circuit's ruling would allow governments to privatize their way around their human rights obligations. The D.C. Circuit's ruling in *Exxon* correctly holds major corporations responsible for their destructive acts around the globe. Despite the fact that no successful environmental claim has yet been brought under the ATS, there is a growing global trend to acknowledge some type of environmental right,[146] and therefore the "right to a clean environment" might someday soon be a norm recognizable under the law of nations. The D.C. Circuit correctly held corporations liable under the ATS, keeping the door open to future suits alleging environmental harms under the ATS.

V. CONCLUSION

The D.C. Circuit was correct to hold that corporations are not immune from suits under the Alien Tort Statute.[147] The language and historical precedent of the statute show that Congress intended the defendant class to be unlimited, and that Congress was aware that corporations could be held liable, even for violations of international law, as in the case of pirate ships. The D.C. Circuit correctly interprets footnote 20 from *Sosa* to read that there is no delineation between

144. *See* Lubbe v. Cape PLC, (2000) 1 WLR 1545 (H.L.) (claims by South African miners exposed to asbestos while working for an English company); Florez v. BP Exploration Co., [Pending Claim No. HQ08X00328] (Colom.) (claim against BP for environmental harm on existing population); *Dagi v. BHP*, (1997) 1 VR 428 (Austl.); Hiribo Mohammed Fukisha v. Redland Roses Ltd. (2006) eKLR Civil Suit 564 of 2000 (Kenya).

145. Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 160-61 (2d Cir. 2010) (Leval, J., dissenting).

146. *See* cases cited *supra* note 144; United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3-14, 1992, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26 (Vol. I), Annex I (Aug. 12, 1992); African Charter on Human and Peoples' Rights art. 24, *adopted* June 27, 1981, 1520 U.N.T.S. 217 (entered into force Oct. 21, 1986); Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights: "Protocol of San Salvador," art. 11, *adopted* Nov. 17, 1988, [1989] O.A.S.T.S. 69 (entered into force Nov. 16, 1999); Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, S. TREATY DOC. No. 100-10, 1522 U.N.T.S. 29 (entered into force Jan. 1, 1989); The Environment (Protection) Act, 1986, No. 29, Acts of Parliament, 1986 (India).

147. *Exxon*, 654 F.3d at 57.

individuals and corporations, but rather between state and nonstate actors.

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