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THE NEW ALTERNATIVE TO A NARROWING ALIEN TORT STATUTE: TORTS BASED ON FOREIGN LAW

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For the last forty years, the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, has been the primary vehicle for enforcing human rights norms in United States courts. The statute authorizes jurisdiction over "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."[1] The Second Circuit, in Filartiga v. Pena-Irala, held that:

> *deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties. Thus, whenever an alleged torturer is found and served with process by an alien within our borders, [§] 1350 provides federal jurisdiction.[2]*

After Filartiga, human rights advocates brought dozens of lawsuits against individual and corporate perpetrators and aiders and abettors of human rights crimes. But in a series of cases starting with Sosa v. Alvarez-Machain, the Supreme Court narrowed the scope of the ATS, undermining the promise of Filartiga that the United States would not serve as a safe haven for human rights abusers and parting ways with court decisions implementing international law norms in Canada, the United Kingdom, the Netherlands, and elsewhere.[3] This has caused human rights litigators in the United States to seek other bases for relief for their clients. This article considers one of the main alternative avenues for relief, tort claims based on foreign law, and recent successes in such cases. Before

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1. 28 U.S.C. § 1350 (1948).

2. Filártiga v. Peña-Irala, 630 F. 2d 876, 878 (2d Cir. 1980).

3. See, e.g., Nevsun Resources Ltd. v. Araya, 2020 SCC 5 (Can.); The Hague District Court, Case number - C/09/581972 HA ZA 19-1099 and C/09/604819 HA ZA 20/1244, Judgment of 23-11-2022; available at https://uitspraken.rechtspraak.nl/#!/details?id=ECLI:NL:RBDHA:2022:12424; Affaire Lafarge S.A., Cour d'appel de Paris, ch. instr., 18 mai 2022 (Fr.) (upheld charges against the cement group Lafarge [now Holcim] for complicity in crimes against humanity); M. Gessen, Opinion, Can a Corporation Be Complicit in War Crimes? Sweden Is Trying to Find Out., N.Y. Times (Dec. 30, 2025), https://www.nytimes.com/2025/12/30/opinion/the-oil-company-drilled-government-slaughter-guilty.html?smid=nytcore-ios-share.

addressing this alternative avenue, we describe the current state of ATS litigation.

I. Current State of ATS Litigation

The Supreme Court did not take an ATS case until *Sosa* in 2004. Although *Sosa* itself concerned the kidnapping of a Mexican national from Mexico by U.S. agents, the briefing and argument before the Supreme Court concerned the scope of human rights litigation under the ATS generally, especially cases addressing the liability of corporations for human rights violations overseas.[4]

The *Sosa* decision established a new basic framework for ATS claims in U.S. courts. First, six members of the Court joined in Justice Souter's opinion, finding that the ATS was not a dead letter limited only to the litigation of 18th century claims like attacks on Ambassadors or piracy.[5] Although the Court rejected the particular arbitrary detention claim in the *Sosa* case,[6] the majority endorsed key previous ATS decisions, including *Filartiga*, and held that federal courts could recognize ATS claims if the evidence of their specificity and universal acceptance was similar to the evidence supporting the eighteenth-century Blackstone norms.[7] The Court did not identify which contemporary norms it believed met its new "historical paradigm" test.[8] Agreeing to enforce additional international human rights norms would be an exercise in federal common law discretion controlled by the courts.

Although the Court left the door "ajar" to the acceptance of additional actionable ATS norms, it also issued warnings that this federal common law discretion should be exercised with caution, taking into account the "practical consequences" of recognizing the norms in question.[9] Many courts and legal scholars interpreted *Sosa* to outline a two-step test that evaluates whether a claim can be brought under the ATS. First, claims under the ATS "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to" those causes of action that may be recognized today.[10]

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4. Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

5. Id. at 719-20. See also Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 815 (1984).

6. Sosa, 542 U.S. at 732 (citing In re Estate of Ferdinand Marcos, 25 F.3d 1467, 1475 (9th Cir. 1994); Filartiga, 630 F.2d at 890).

7. By the time the Sosa case reached the Court, the transborder element of the plaintiff's claim had been dropped and the only claim was his arrest without authority for a short period of time. The Court had little difficulty rejecting this narrow claim. Sosa, 542 U.S. at 737–38.

8. Id. at 732.

9. Id. at 729, 732.

10. Id. at 725.

Pertinent to the second step, the Court identified several considerations, including foreign relations and separation of powers, but did not provide a detailed framework for how this step of *Sosa* should be determined.[11]

In the aftermath of *Sosa,* courts focused on whether the international norms asserted by plaintiffs met the *Sosa* "historical paradigm" test. For the most part, the substantive claims in these pending cases were found to meet the *Sosa* test.[12] Because many of the cases were brought against corporate defendants who provided support to, for example, host government security personnel or paramilitaries who committed torture or other abuses, the most hotly litigated issue became the standard for aiding and abetting liability.[13] In particular, litigation focused on whether the *mens rea* for aiding and abetting liability was knowledge or some form of purpose or specific intent.[14] There is still a conflict in the Circuits on this issue.[15]

In 2013, the Court dramatically circumscribed the scope of the ATS in *Kiobel v. Royal Dutch Petroleum Corp.* Initially, the Court granted certiorari in *Kiobel* to decide whether corporations could be sued under the ATS.[16] However, after argument, the Court changed the question presented to whether the ATS was available to challenge human rights violations occurring on the territory of a foreign sovereign and set the case for reargument.[17]

Kiobel involved claims that Royal Dutch Petroleum (Shell) had aided and abetted the military dictatorship in Nigeria in committing human rights violations including its alleged complicity in the unlawful execution of the leaders of the Movement for the Survival of the Ogoni People (MOSOP), a non-governmental organization founded to protect the environment and promote self-determination. The Plaintiffs included the relatives of MOSOP's leader Ken Saro-Wiwa, a novelist who opposed Nigeria's military dictatorship, and other opponents of Shell's exploitation of the Ogoni region of Nigeria. At the first

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11. Id. at 727.

12. See Khulumani v. Barclay Nat. Bank Ltd., 504 F.3d 254, 260 (2nd Cir. 2023); Aziz v. Alcolac, Inc., 658 F.3d 388, 396 (4th Cir. 2011); Romero v. Drummond Co., 552 F.3d 1303, 1315 (11th Cir. 2008).

13. See Id.

14. See Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 259 (2nd Cir. 2009); Aziz, 658 F.3d at 400–01; Doe I v. Nestle USA, Inc., 766 F.3d 1013, 1023–26 (9th Cir. 2014); Cabello v. Fernandez-Larios, 402 F.3d 1148, 1158 (11th Cir. 2005).

15. Compare Doe I v. Cisco Systems, Inc., 73 F.4th 700, 729–34 (9th Cir. 2023), with Talisman, 582 F.3d at 259 ((acknowledging that "no such consensus exists for imposing liability on individuals who knowingly (but not purposefully) aid and abet a violation of international law")).

16. A divided Second Circuit panel had decided that corporations could not be sued based on an eccentric reading of Sosa footnote 20. Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 128 (2d Cir. 2010). Before that decision, it had not been seriously disputed that corporations, like any other defendant in tort, were subject to civil suits under the ATS.

17. Kiobel , 569 U.S. at 114.

oral argument, Justice Kennedy raised questions about whether a case arising out of violations in Nigeria against foreign corporations should be heard in U.S. courts.[18]

Kennedy's concerns animated the written opinion, which applied the principles underlying the presumption against extraterritoriality to hold that ATS claims could not be extraterritorial.[19] Four members of the Court found that the claims in the *Kiobel* case were extraterritorial because of the absence of any nexus between the plaintiffs' claims and the United States.[20] Justice Kennedy concurred and suggested that the extent of this principle would need to be determined in future cases.[21] Section IV of Chief Justice Roberts' majority opinion indicated that cases that substantially "touched and concerned" U.S. territory would not be considered extraterritorial.[22] The Court offered no guidance about how the "touch and concern" test could be met. The Court did not decide the original question, which was whether corporations could be liable.

In the aftermath of *Kiobel* a number of cases were dismissed as extraterritorial.[23] Other cases survived the "touch and concern" test.[24] In 2018, the Court returned to the ATS in *Jesner v. Arab Bank, PLC*. In *Jesner,* plaintiffs brought claims against Arab Bank, PLC alleging aiding and abetting suicide bombings by offering payments to the families of the suicide bombers.[25] The case went up to the Court on the issue of corporate liability.[26]

The Court again failed to reach the corporate liability issue.[27] Instead, the Court applied the second step of the *Sosa* analysis to determine that allowing ATS cases against foreign corporations inherently created the kind of friction with foreign States that the courts should avoid.[28] The Court referred to a series of protests by foreign governments on behalf of their corporate citizens in prior

18. Transcript of Oral Argument of Paul L. Hoffman on Behalf of the Petitioners at 4–6, Kiobel, 569 U.S. 108 (2013) (No. 10-1491).

19. Kiobel, 569 U.S. at 118–24.

20. Id. at 139.

21. Id. at 125.

22. Id.

23. Doe I v. Cisco Systems, Inc., 66 F. Supp. 3d 1239, 1247 (N.D. Cal. 2014); Chowdhury v. Worldtel Bangladesh Holding, Ltd., 746 F.3d 42, 49-51 (2d Cir. 2014); Warfaa v. Ali, 811 F.3d 653, 661 (4th Cir. 2016).

24. Al Shimari v. CACI Premier Technology, Inc., 684 F.Supp. 3d. 481, 491–92 (E.D. Cal. 2023); Mastafa v. Chevron Corp., 770 F.3d 170, 189–94 (2d Cir. 2014); Doe v. Nestle, S.A., 906 F.3d. 1120, 1126 (9th Cir. 2018).

25. Jesner v. Arab Bank, PLC, 584 U.S. 241, 249-50 (2018).

26. Id. at 252.

27. Id. at 274.

28. Id. at 272–74.

ATS cases and found that such cases should be barred.[29] This is the first and only time the Court has used *Sosa* Step Two to prohibit a category of ATS claims. After *Jesner*, the lower courts began dismissing foreign corporate defendants in pending cases arising out of overseas conduct.[30] This did leave U.S. corporate defendants as appropriate defendants in ATS cases, except in the Second Circuit.[31]

The most recent and last ATS case decided by the Court was *Nestle v. Doe* in 2021. The Nestle case involved allegations that Nestle USA and Cargill aided and abetted child slave labor in the Ivory Coast.[32] The Ninth Circuit decided that the actions taken on U.S. territory by corporate executives constituted domestic aiding and abetting for the purposes of the presumption against extraterritoriality.

The Trump Administration took the position that the Court should reject aiding and abetting liability altogether.[33] The chocolate companies argued that the "focus" of the ATS for extraterritoriality purposes should be the place of injury or the place where the underlying violations occurred, either of which would make the case extraterritorial.[34] Ultimately, the Court did not resolve those issues but held that general corporate oversight of overseas operations was not sufficient to make the case a domestic application of the ATS and dismissed the case as impermissibly extraterritorial.[35]

Justices Gorsuch and Alito, joined by the three dissenting Justices, would have decided that corporations could be sued under the ATS.[36] Though this was not a holding, as a practical matter a majority of the current justices agree that corporate defendants, like other legal persons, are liable for violations of international law, which will likely resolve the corporate liability issue in ATS cases.

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29. Id. at 253.

30. See City of New York v. BP P.L,C., 325 F. Supp. 3d 466, 475 (S.D.N.Y. 2018); Kaplan v. Cent. Bank of the Islamic Republic of Iran, 896 F.3d 501, 509 (D.C. Cir. 2018); Doe v. Nestle, S.A., 906 F.3d 1120, 1124 (9th Cir. 2018).

31. Jesner, 584 U.S. at 280 (Alito, S., concurring); See Balintulo v. Ford Motor Co., 796 F.3d 160, 168-70 (2d Cir. 2015).

32. Nestle, S.A., 906 F.3d at 1126-27.

33. Brief for the United States as Amicus Curiae at 13, Nestlé USA, Inc. v. Doe, 593 U.S. 628 (2021) (No. 19-416).

34. Nestle, 593 U.S. at 633.

35. Id. at 641.

36. Id. at 641 (Gorsuch, N., concurring).

A. So Where do ATS Cases Stand After this Series of Supreme Court Cases?

There are two pending cases that may determine the future of the ATS. In November 2024, a Virginia jury rendered a $42 million verdict against U.S. government contractor CACI for the torture and ill-treatment at detention facilities at Abu Ghraib.[37] In July 2023, the Ninth Circuit overturned the dismissal of an ATS complaint against Cisco Systems for aiding and abetting the persecution of Falun Gong adherents in China.[38] Both cases have long, tangled procedural histories but have made it through the obstacles presented in ATS cases to date. We will focus on the *Cisco* case as *Cisco* filed a Certiorari Petition on January 31, 2025, and may be the next case the Supreme Court considers.

The claim in *Doe I v. Cisco Systems, Inc.* is that Cisco, a California-based corporation, provided specifically tailored hardware and software adapted for the Chinese government's campaign of persecution and human rights abuses against Falun Gong members. In 2014, a San Jose district judge dismissed the case on the grounds that it was impermissibly extraterritorial.[39]

The appeal in the *Cisco* case has been pending since 2014 and was argued twice. In July 2023, a divided panel overturned the dismissal of the case.[40] The panel rejected the challenge to corporate liability under the ATS based on the fact that five Justices have expressed their view that corporate liability is available for domestic corporations.[41] The panel also found that the allegations of aiding and abetting activity on U.S. territory were more specific than the general corporate oversight allegations and were sufficient to make this a domestic application of the ATS.[42] Therefore, the panel found that plaintiffs' allegations met the aiding and abetting standard.

If the Court grants the cert petition, the case would be decided in the 2025-2026 term. On the other hand, the *Al-Shimari* case, the previously mentioned case involving mistreatment at Abu Ghraib, won't be ripe for

37. Sarah Sanbar, US Jury Awards $42 Million to 3 Iraqis Abused at Abu Ghraib Prison, Hum. Rts. Watch (Nov. 14, 2024), https://www.hrw.org/news/2024/11/14/us-jury-awards-42-million-3-iraqis-abused-abu-ghraib-prison.

38. Doe I v. Cisco Systems, Inc., 73 F.4th 700, 746 (9th Cir. 2023).

39. Doe I v. Cisco Systems, Inc., 66 F. Supp. 3d 1239 (E.D. Cal. 2014)

40. Cisco, 73 F.4th at 746. Judge Christen, the dissenting judge, focused primarily on her view that the State Department's views should have been sought in the case because of its foreign policy implications. Id. at 749-50 (Christen, M., concurring in part and dissenting in part). The majority rejected this argument and noted that the district court would be free to seek the Executive's views on remand. Id. at 719. To date no one has requested the State Department's views.

41. Id. at 715.

42. Id. at 735.

Supreme Court review until much later.

Over time, Congress responded to the uncertainty surrounding the ATS by enacting expressly extraterritorial civil remedies over specific international law offenses, including torture and extrajudicial killing (in the Torture Victim Protection Act, 28 U.S.C. § 1350, note) and human trafficking and forced labor offenses (in the Trafficking Victim Protection Act, 18 U.S.C. § 1595–1596) to supplement the jurisdiction provided by the ATS. Given the limitations the Court has placed on ATS cases, human rights litigators have looked to these statutes and to the transitory tort doctrine to obtain justice for their clients. In this last year, a string of jury verdicts (and a settlement) in several long-running cases have demonstrated that U.S. courts can effectively manage these cases, including by successfully managing foreign policy concerns, navigating evidentiary issues related to foreign discovery, and ensuring due process protections are met.

First, human rights attorneys are still able to use the ATS to obtain successful results for their clients. As noted above, a jury found CACI International, Inc., a Virginia-based government contractor liable for its role in the torture of Iraqi men at Abu Ghraib prison in 2003-2004 and ordered it to pay each of the three plaintiffs $3 million in compensatory damages and $11 million in punitive damages, for a total of $42 million. The lawsuit was filed in 2008 by Suhail Al Shimari, a middle school principal, Asa'ad Zuba'e, a fruit vendor, and Salah Al-Ejaili, a journalist. The case survived multiple motions to dismiss that raised challenges based on evolving ATS caselaw, was appealed to the Fourth Circuit five times, and tried twice—once ending in a mistrial before finally reaching a verdict in 2024. In denying CACI's final motion to dismiss, the court pointed to Justice Gorsuch's concurrence in *Jesner,* which explained that "[t]he law of nations required countries to ensure foreign citizens could obtain redress for wrongs committed by domestic defendants."[43] The district court also found that the plaintiffs' claims involved a sufficiently domestic application of the ATS: the alleged torts were committed by U.S. nationals, acting under a U.S. government contract issued in the United States, and in foreign territory controlled by the U.S. government.

43. Al Shimari v. CACI Premier Tech., Inc., 684 F. Supp. 3d 481, 496 (E.D. Va. 2023) (citing Jesner, 584 U.S. at 289 (Gorsuch, J., concurring in part and concurring in the judgment)).

II. Transitory Tort Principle

Next, we discuss in more detail two recent examples of successful human rights cases based on the transitory tort principle and the application of foreign law in U.S. courts: *Doe v. Exxon* and *In Re Chiquita Brands International Inc. Litigation*.

In 2001, eleven Indonesian villagers filed suit against Exxon Mobil, then the largest and most profitable corporation in the world, alleging that Exxon contracted to use Indonesian soldiers to guard its operations in rural Aceh, Indonesia, and that those soldiers inflicted horrific abuses on the villagers and their families, including murder, torture, sexual violence, and kidnapping.[44] The plaintiffs included women who saw their husbands shot to death, a woman who was forced to jump up and down repeatedly while eight months pregnant and then assaulted, and men who were detained and subjected to electric shocks, amputation of limbs, and other torture while held overnight at facilities within Exxon's gas exploration area. The villagers alleged that Exxon knew about the violence but nonetheless failed to take reasonable steps to supervise the soldiers stationed at its facilities, all while Exxon continued to expand its operations and increase its profits.

The 2001 Complaint pled claims under the ATS, the Torture Victim Protection Act ("TVPA"), and claims, including wrongful death, assault, battery, negligence and negligent supervision "under the laws of the District of Colombia, the laws of the United States and the laws of Indonesia."[45] The impact of the anticipated discovery on U.S. foreign policy was hotly contested, resulting in the district court banning discovery in Indonesia except documents Exxon intended to use in its defense. Nonetheless, the district court declined to dismiss the case, eventually ruling that the United States "has an overarching, vital interest in the safety, prosperity, and consequences of the behavior of its citizens, particularly its super-corporations conducting business in one or more foreign countries . . ."[46]

Roughly a half dozen lawsuits, involving roughly 5,000 plaintiffs, were filed against banana giant Chiquita Brands after Chiquita pled guilty in March 2007 to making payments to a designated terrorist organization.[47] The plaintiffs

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44. Complaint, Doe v. Exxon, No. 1-CV-1357 (D.D.C. June 19, 2001).

45. Id. at¶¶ 78–126.

46. Doe v. Exxon Mobil Corp., No. Civ.A.01-1357(LFO), 2006 WL 516744, at *2 (D.D.C. Mar. 2, 2006).

47. Chiquita Brands International Pleads Guilty to Making Payments to a Designated Terrorist Organization And Agrees to Pay $25 Million Fine, U.S. Dep't of Just. (Mar. 19, 2007), https://www.justice.gov/archive/opa/pr/2007/March/07_nsd_161.html.

are Colombian citizens, family members of the trade unionists, banana workers, political organizers, activists, and others killed by the Autodefensas Unidas de Colombia ("AUC"), a brutal paramilitary known for mass killing and designated by the United States as a Foreign Terrorist Organization. The plaintiffs alleged that Chiquita paid the AUC nearly $2 million, while facilitating shipments of arms, ammunition and drugs, despite knowing that the AUC was an illegal organization engaged in a reign of terror. The plaintiffs also alleged that the deaths of their relatives were a direct and foreseeable result of Chiquita's support of the AUC. As in Exxon, the complaints pled ATS, TVPA, and tort claims.[48] The multiple lawsuits were consolidated by the Judicial Panel on Multidistrict Litigation in the Southern District of Florida pursuant to 28 U.S.C. § 1407.

Both *Doe v. Exxon* and the cases against Chiquita were part of an early wave of cases filed under the ATS. Both cases also included TVPA and tort claims such as wrongful death and negligence. In both cases, the ATS claims and TVPA[49] claims pled against the corporate defendants were dismissed,[50] leaving only the tort law claims (e.g., negligence, assault).

Although *Doe v. Exxon* was one of the first modern international human rights cases to rely on the transitory tort doctrine, the transitory tort doctrine is not new. As the Supreme Court explained in *Kiobel*, it is a common law doctrine dating from at least 1774 that allows "courts to assume jurisdiction over such 'transitory torts,' including actions for personal injury, arising abroad."[51] And as the Second Circuit explained in *Filartiga*:

> It is not extraordinary for a court to adjudicate a tort claim arising outside of its territorial jurisdiction.... Thus, Lord Mansfield in Mostyn ...said: "(If) A becomes indebted to B, or commits a tort upon his person or upon his personal property in Paris, an action in either case may be maintained against A in England, if he is there found . . . . there is not a colour of doubt but that any action which is transitory may be laid in any county

48. E.g., Second Amended Class Action Complaint for Damages at ¶¶ 31–82, In re Chiquita Brands, No. 0:08-MD-01916 (S.D. Fla. Nov. 16, 2012)(claims pled "under the laws of New Jersey, the United States, and Colombia").

49. In the Chiquita case, TVPA claims against the individual corporate executives also remain, but those claims were stayed by agreement and not tried in the 2024 jury trial.

50. In 2012, the Supreme Court held that the TVPA authorizes liability only against individuals – that is, natural persons -- not corporations. Mohamad v. Palestinian Authority, 566 U.S. 449, 450 (2012).

51. Kiobel, 569 U.S. at 118–19 (citing Mostyn v. Fabrigas[1774] 98 Eng. Rep. 1021, 1030 (Mansfield, L.) and Dennick v. Railroad Co., 103 U.S. 11, 18 (1881)).

in England, though the matter arises beyond the seas."[52]

After the courts in *Exxon* and *Chiquita* determined that the tort law claims could go forward, both courts conducted a traditional choice of law analysis to determine what country's law would govern the tort claims, ultimately concluding, in *Exxon*, that Indonesian law would apply,[53] and in *Chiquita,* that Colombian law would apply to the substantive law governing the claims.[54] Both the District of Colombia, where *Exxon* was filed, and the Southern District of Florida, where the Judicial Panel on Multidistrict Litigation transferred the cases against Chiquita, follow the Restatement (2d) of Conflicts of Laws, and conducted a similar analysis of the Restatement factors.

The choice of law analysis was just the beginning of the story. In both cases, the parties filed multiple expert reports on various aspects of foreign law pursuant to Federal Rule of Civil Procedure 44.1 to assist the court in determining the content of the foreign law.[55] In *Exxon*, the parties filed over 20 expert reports on various elements of Indonesian law, from seven different Indonesian law experts. In *Chiquita*, the parties filed a dozen expert reports on different aspects of Colombian law by five different Colombian law experts.

The parties relied upon the Court's determination of the foreign law to guide discovery and to structure their presentations at summary judgement. In both cases, the civil statutes at issue provided for relatively broad liability. Both countries are civil law countries, unlike the United States, and rely on a written civil code, not common law precedent. In *Exxon*, the experts agreed on the civil law provisions that governed the claims. The direct liability claims (that the defendants negligently hired, retained, or supervised members of the Indonesian military acting as defendants' security personnel) were governed by Article 1365 of the Indonesian Civil Code, which provides that "a person who causes loss to another person by means of an unlawful act ... must because of his or her fault in causing the lost, compensate for that loss."[56] The indirect liability claims (for the intentional torts like wrongful death and assault) were governed by Article 1367 of the Code, which provides that a "party may be liable for the actions of

52. Filartiga, 630 F.2d at 885 (quoting McKenna v. Fisk, 42 U.S. 241, 248 (1843).

53. The district court first concluded that D.C. law would apply. Doe v. Exxon, 2006 WL 516744, at *1 (D.D.C. Mar. 2, 2006). That decision was overturned by the D.C. Circuit. Doe v. Exxon, 654 F.3d 11, 18 (D.C. Cir. 2011), vacated 527 F. App'x 7 (D.C. Cir. 2013). On remand, the district court applied Indonesian law. Doe v. Exxon Mobil Corp., 69 F. Supp. 3d 75, 102 (D.D.C. 2014).

54 In re Chiquita Brands Int'l, Inc., No. 08-01916-MD, 2012 WL 12876021, at 3 (S.D. Fla. Mar. 27, 2012).

55. See, e.g., Doe v. Exxon, 2022 WL 3043219, at *13 (D.D.C. Aug. 2, 2022) (setting out "standard for determining foreign law").

56. Id. at *12–13 (D.D.C. Aug. 2, 2022) (quoting Defendants' expert).

persons over which he has responsibility."[57] At summary judgment, the district court reviewed over 500 exhibits, testimony from forty-three depositions, and reports from experts on providing security for extractive industries, a historian, and former State Department officials. The district court issued an 85-page opinion finding that each Plaintiff had presented sufficient evidence tying Exxon to their injuries to proceed to trial.[58] The court also found that Exxon's characterizations of the evidence were "wrong" or "simply wrong" and concluded that "With only limited exceptions, defendants remaining arguments—about causation, quantifiable loss, ExxonMobil's liability, and due process—are entirely meritless."[59] A trial date was set, but the case never reached a jury. The parties entered into a confidential settlement two weeks before trial was to begin.[60]

In the *Chiquita* case, the experts described a similar civil law provision. Under Colombian Civil Code Article 2341, "he who has committed a crime or fault, which has caused damage to another, is liable to reparation, without prejudice to the principal penalty that the law imposes due to fault or the crime committed."[61] The court explained that "at the heart of these claims is the contention that Defendants acted imprudently, and at variance with the good businessperson standard of care imposed under Article 2341."[62] After reviewing the evidence submitted at summary judgment, the district court found:

> the record evidence adequate to show a triable issue on whether Chiquita's decision to pay the AUC represented a deviation from an objective "good businessperson" standard of care. A jury could plausibly interpret the evidence to find a departure from that standard, given the notoriety of the AUC's civilian attacks; evidence suggesting Chiquita executives' knowledge of the AUC terror tactics and civilian atrocities; evidence of Chiquita's continued support of the AUC notwithstanding its acquisition of that knowledge; Chiquita's knowledge of the AUC's designation as a foreign terrorist organization, and the illegality of its payments under both Colombian and United States law. Accordingly, both prongs of Defendants' motion for

57 . Id. at *15 (citing Defendants' experts).

58. Id. at *22–72.

59. Id. at *17–41.

60. Erin Mulvaney, Exxon Mobil Settles Indonesian's Long-Running Abuse Suit, Wall St. J. (May 15, 2023), https://www.wsj.com/articles/exxon-mobil-settles-indonesians-long-running-abuse-suit-95b07553.

61. In Re Chiquita Brands, No. 07-60821-CIV, 2022 WL 18957608, at *36 (S.D. Fla. Dec. 15, 2022) (citing Defendants' expert).

62. Id. at *35.

> summary judgment directed to the adequacy of proofs on "fault," as that concept is understood under the Colombian Civil Code, are rejected.[63]

Both Colombia and Indonesia are civil law countries and neither country relies on juries as fact finders. This created an additional challenge when the parties drafted and submitted proposed jury instructions.[64] During the six-week trial in West Palm Beach, Florida, the jury heard from sixty witnesses, including relatives of the decedents and eyewitnesses to their murders, former AUC paramilitaries, Chiquita executives, Chiquita's former outside counsel, the retired director of CIA operations, retired Colombian generals, and experts on Colombian history. The jury also reviewed eighty-four exhibits. Ultimately, the jury found Chiquita responsible for the wrongful deaths of nine men who were murdered by the AUC and awarded the surviving family members $38.3 million in damages.

The care with which the courts and the jury evaluated the evidence and reached their conclusions demonstrates that U.S. courts are well equipped to handle cases alleging that U.S. persons—including U.S. corporations—bear responsibility for their own conduct, even if that conduct is overseas.

Conclusion

The ATS has served as a primary vessel for the enforcement of human rights norms in the United States federal court system, led primarily by the life that was breathed into it after *Filartiga v. Pena-Irala*. But this statute, which authorizes jurisdiction over "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," has been significantly narrowed by the United States Supreme Court. This narrowing has forced human rights litigators in the United States to take advantage of another remedy–tort claims based on foreign law. This transitory tort principle, which allows federal "courts to assume jurisdiction over such 'transitory torts,' including actions for personal injury, arising abroad," has provided a tested means to redressing harms that ATS may no longer sustain, and this route may prove necessary in supplementing any future narrowing of the ATS.

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63. Id. at *39.

64. Joint Submission Regarding the Parties' Proposed Jury Instructions and Verdict Form, In re Chiquita Brands International, Inc. Alien Tort Statute and Shareholder Derivative Litigation, No. 0:08-01916 (S.D. Fla. Feb. 29, 2024).

April 2026 Postscript

On January 9, 2026, the Supreme Court granted Cisco's petition for a writ of certiorari on the issues of whether aiding and abetting liability was available under the ATS or the TVPA. At the suggestion of the Solicitor General, the Court declined to decide the applicable standard for such liability. The Solicitor General contends that aiding and abetting liability is not available under either statute. A decision is expected by June 2026.

On March 12, 2026, a divided panel of the Fourth Circuit affirmed the judgment in the *Al-Shimari* case in full. The Court dismissed CACI's third party complaint against the United States based on sovereign immunity. The *Al-Shimari* plaintiffs advanced a conspiracy theory of liability so it is unclear whether the Supreme Court's *Cisco* decision will affect the judgment. However, it is expected that CACI will seek Supreme Court review.