No. 09-7125 (Lead)
Consolidated with Nos. 09-7127, 09-7134, 09-7135

UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA CIRCUIT

JOHN DOE VIII, ET AL.,
Plaintiffs-Appellants,

v.

EXXON MOBIL CORPORATION, ET AL.,
Defendants-Appellees / Cross-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
CASE NOS. 01-1357, 07-1022
HON. ROYCE C. LAMBERTH, CHIEF JUDGE

PETITION FOR REHEARING EN BANC

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STATEMENT OF THE ISSUES AND THEIR IMPORTANCE

1. Whether there is corporate liability under the Alien Tort Statute, 28 U.S.C. § 1350 ("ATS"), is an issue of exceptional importance. Appellees Exxon Mobil Corp., et al. ("Exxon") respectfully submit that the panel majority erred in failing to abide by the Supreme Court's directive in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725, 732 n.20 (2004), to look to customary international law to determine whether a corporation may be sued under the ATS. Under customary international law, there is no corporate liability, and the panel majority's conclusion that corporate liability exists under the ATS is in direct and acknowledged conflict with a decision of the Second Circuit. *See Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 125 (2d Cir. 2010), petition for cert. pending, 10-1491 (filed June 6, 2011). Additionally, the panel majority erred in recognizing corporate liability under the ATS notwithstanding that Congress, in a directly analogous context, has established that citizens cannot sue corporations for committing acts of torture or extrajudicial killing. *See Doe v. Exxon Mobil Corp.*, No. 09-7125, slip op. at 28-33 (D.C. Cir. July 8, 2011) (Kavanaugh, J., dissenting).

2. Whether there is aiding and abetting liability under the ATS, and the proper standard for any such liability, also are issues of exceptional importance. The panel majority erred in failing to follow the general presumption against implying civil aiding and abetting liability. *See Central Bank of Denver, N.A. v.*

First Interstate Bank of Denver, N.A., 511 U.S. 164 (1994). That presumption should apply *a fortiori* to a federal common-law cause of action created under the ATS given the Supreme Court's instruction that courts should exercise great caution before recognizing new causes of action under the ATS, *see Sosa*, 542 U.S. at 725, and given that Congress (in an analogous context) has determined that citizens may not sue for aiding and abetting torture or extrajudicial killing, *see* Slip op. at 3-4 (Kavanaugh, J., dissenting).

Moreover, even if aiding and abetting liability were available under the ATS, the panel majority erred in concluding that the proper standard for such liability is "knowledge" of a substantial effect on the alleged commission of a human rights violation. That conclusion is in direct and acknowledged conflict with the Second Circuit's holding that the proper standard for aiding and abetting liability under the ATS is "purpose" to commit the alleged human rights violation, *see Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 247 (2d Cir. 2009), and it would expose U.S. corporations conducting operations abroad to expansive liability for the actions of foreign governments.

3. Whether the ATS applies extraterritorially is also an issue of exceptional importance. The panel majority erred in failing to adhere to the well-established presumption against extraterritoriality, *see, e.g.*, *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2877 (2010), and there is nothing in the ATS's

text or history that suggests that it should apply to conduct that occurred abroad.

INTRODUCTION

The complaints in these consolidated cases allege that Indonesian plaintiffs were injured by Indonesian soldiers on Indonesian soil during an Indonesian civil war. But Plaintiffs did not sue Indonesia or its military; nor do they look to the Indonesian courts for relief. Instead, Plaintiffs sued Exxon in a U.S. court under, *inter alia*, the ATS. By holding that the ATS extends liability (i) to corporations, (ii) for aiding and abetting torture, extrajudicial killing, and prolonged detention, that (iii) occurred in a foreign country, the panel's opinion vastly expands the ATS's scope in contravention of the Supreme Court's admonition to exercise great "caution" when "considering the kinds of individual claims that might implement" the ATS's jurisdiction. *Sosa*, 542 U.S. at 725.

The length of the panel's opinions—at over 150 pages—attests to the exceptional importance of the issues presented. The panel's decision warrants en banc review not only because its incorrect expansion of ATS liability threatens to unleash a flood of litigation in U.S. courts for actions lacking any salient connection to the United States, but also because it is in direct and acknowledged conflict with decisions of the Second Circuit, which recognize that there is no corporate liability under the ATS, *see Kiobel*, 621 F.3d at 125, and that the proper standard for aiding and abetting liability (if it exists at all) is purpose to commit the

alleged violation, *see Talisman*, 582 F.3d at 247. This Court should re-hear this case en banc to address these issues of exceptional importance.

FACTUAL STATEMENT AND PROCEDURAL BACKGROUND

Since the 1970s, appellee ExxonMobil Oil Indonesia Inc. has operated a natural gas extraction and processing facility in the Aceh province of Indonesia under contract with the Indonesian government. Slip op. at 3. An Indonesian separatist movement targeted the natural resources in Aceh, including the natural gas facility, and the Indonesian government sent thousands of troops into the area to protect the facility. *See, e.g.*, JA54; JA1091-92; JA1120-21; JA1747. Under Exxon's contract with Indonesia, the Indonesian government bore responsibility for providing security for these vital national assets and facilities. *See* JA2163.

In 2001, a group of 11 plaintiffs filed a complaint against Exxon, seeking recovery for injuries allegedly sustained at the hands of uniformed Indonesian soldiers during the civil war in Aceh. The complaint alleged that Exxon "controlled and directed the activities of the [military] units assigned to protect [their] interests," including by "making decisions about where to place bases, strategic mission planning, and making decisions about specific deployment areas." JA298; *see also* JA299. The complaint contained no allegation that Exxon at any point directed anyone to harm Acehnese civilians, or that Exxon even knew that anyone affiliated with Exxon had done so. Plaintiffs brought claims under,

inter alia, the ATS, alleging that Exxon violated international law by aiding and abetting the Indonesian military's conduct of torture, extrajudicial killing, and prolonged arbitrary detention. JA309-24.

On October 14, 2005, the district court granted Exxon's motion to dismiss plaintiffs' ATS claims on the ground that there is no aiding and abetting liability under the ATS. 393 F. Supp. 2d 20, 24 (D.D.C. 2005) (Oberdorfer, J.). The court noted the Supreme Court's "'admonition … that Congress should be deferred to with respect to innovative interpretations' of the Alien Tort Statute." *Id.*; *see also id.* (noting "'collateral consequences and possible foreign relations repercussions that would result from allowing courts in this country to hear civil suits for the aiding and abetting of violations of international norms across the globe").

A divided panel of this Court reversed. As relevant here, the panel first held that the "common law causes of action that federal courts recognize in ATS lawsuits may extend to harm to aliens occurring in foreign countries." Slip op. at 19. Second, the panel held that the ATS recognizes claims premised upon aiding and abetting liability. *Id.* at 29-35. But, in direct and acknowledged conflict with the Second Circuit, *see Talisman*, 582 F.3d at 247, the panel held that only a "knowledge" standard is required to establish this liability, slip op. at 50. Finally, the panel concluded, again in direct and acknowledged conflict with the Second Circuit, that there is corporate liability under the ATS. *Id.* at 53.

Judge Kavanaugh dissented on all three points. First, relying on the well-settled "presumption against extraterritoriality," Judge Kavanaugh concluded that "the ATS does not apply to conduct that occurred in foreign nations." Slip op. at 2 (Kavanaugh, J., dissenting). Second, he rejected the idea that corporate liability exists under the ATS, concluding, as did the Second Circuit, that "[c]ustomary international law does not recognize corporate liability." *Id.* at 3. Third, he concluded that there is no corporate liability *or* aiding and abetting liability under the ATS for torture or extrajudicial killing because, "[i]n exercising the restraint mandated by the Supreme Court in ATS cases, [courts] must follow Congress's approach to fashioning the [Torture Victims Protection Act ("TVPA")] for U.S. citizens and similarly fashion the ATS for aliens." *Id.* at 4. Because Congress concluded that *citizens* should not be able to sue corporations for aiding and abetting torture and extrajudicial killing under the TVPA, it would be "incongruous" to allow *aliens* to do so under the ATS. *Id.* at 3, 4.

ARGUMENT

I. The Panel Majority Erred In Concluding That There Is Corporate Liability Under The ATS, And Its Decision Is in Direct Conflict With A Decision Of The Second Circuit.

The ATS provides district courts with "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." 28 U.S.C. § 1350. In *Sosa*, the Supreme Court

explained that a tort is "committed in violation of the law of nations" only if it "rest[s] on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized." 542 U.S. at 725. Whether a tort has been "committed in violation of the law of nations" depends not only on the conduct alleged, but also on the identity of the defendant. *Id.* at 732 n.20 (explaining that courts must consider "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"); *see also Sosa*, 542 U.S. at 760 (Breyer, J., concurring) (explaining that a norm of international law "must extend liability to the type of perpetrator (*e.g.*, a private actor) the plaintiff seeks to sue").

Heeding the Supreme Court's guidance in *Sosa*, the Second Circuit, the only other circuit to meaningfully analyze the question in a case squarely presenting the question, held that there is no corporate liability under the ATS.[1] As the Second

[1]Although the panel described itself as "join[ing] the Eleventh Circuit" in holding that there is corporate liability under the ATS, slip op. at 4, the Eleventh Circuit has offered no analysis of the issue. *See Romero v. Drummond Co.*, 552 F.3d 1303, 1315 (11th Cir. 2008) ("The text of the Alien Tort Statute provides no express exception for corporations ... and the law of this Circuit is that [the ATS] grants jurisdiction from complaints of torture against corporate defendants" (citing *Aldana v. Del Monte Fresh Produce, Inc.*, 416 F.3d 1242 (11th Cir. 2005) (no mention of corporate liability))).

The Seventh Circuit has also recently concluded that "corporate liability is possible under the Alien Tort Statute," *Flomo v. Firestone Natural Rubber Co.*,

Circuit explained, "[t]he concept of corporate liability for violations of customary international law has not achieved universal recognition or acceptance as a norm in the relations of States with each other." *Kiobel*, 621 F.3d at 149; *see also id.* at 186 (Leval, J., concurring) ("It is true that international law, of its own force, imposes no liabilities on corporations or other private juridical entities."); slip op. at 22-23 (Kavanaugh, J., dissenting) ("[F]or plaintiffs to maintain their claims, customary international law must impose liability against corporations for aiding and abetting torture, extrajudicial killing, or prolonged detention," and "[i]t does not. In fact, customary international law does not impose liability against corporations at all.").

The reason for this is straightforward: under customary international law, only individuals—not corporations—can be held responsible for violating the types of human rights norms (torture, extrajudicial killing, and prolonged detention) plaintiffs press in their complaints. As the Second Circuit explained, "the moral responsibility for a crime so heinous and unbounded as to rise to the level of an 'international crime' has rested solely with the individual men and women who have perpetrated it." *Kiobel*, 621 F.3d at 119. This concept has been settled in international law since Nuremberg, and modern international tribunals continue to

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No. 10-3675, --- F.3d ---, 2011 WL 2675924 at *8 (7th Cir. July 11, 2011), but the court's discussion was ultimately immaterial to its conclusion that the plaintiffs' suit must fail in any event because they did not allege a violation of customary international law, *id.* at *10.

reject corporate liability. *See id.* at 136-37. Indeed, the panel majority recognizes as much, observing "that the law of nations provides no private right of action to sue corporations." Slip op. at 56.

Instead of looking to customary international law, the panel majority concluded that "federal courts must determine the nature of any remedy in lawsuits alleging violations of the law of nations by reference to federal common law." *Id.* at 55. But determining whether a particular defendant can be sued is not a question of the proper *remedy*; it is necessarily a question about the "scope of liability for a violation," which (again) *Sosa* makes explicitly clear must be determined by reference to "international law." 542 U.S. at 732 n.20. To conclude otherwise would produce a "very odd result: A defendant who would not be liable in an international tribunal for violation of a particular customary international law norm nonetheless may be liable in a U.S. court in an ATS suit for violation of that customary international law norm." Slip op. at 27-28 (Kavanaugh, J., dissenting); *see also Kiobel*, 621 F.3d at 122 (describing such a result as "inconceivable").

But even assuming, *arguendo*, that the corporate liability question were governed by federal common law, the panel majority's conclusion would still be wrong. In *Sosa*, the Supreme Court made clear that courts should exercise "great caution in adapting the law of nations to private rights" when fashioning federal common law under the ATS. 542 U.S. at 725-28. That caution strongly militates

against the significant expansion of ATS liability engendered here. Indeed, in the context of the most analogous federal common-law action—damages suits under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), to enforce the Constitution, *see Sosa*, 542 U.S. at 743 (Scalia, J., concurring in judgment) ("*Bivens* provides perhaps the closest analogy")—the Supreme Court has held that there is no corporate liability, *see Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 63 (2001). It follows that courts should decline to recognize corporate liability when fashioning federal common law under the ATS.

Finally, the panel majority disregarded *Sosa*'s direction that courts should defer to "congressional guidance in exercising jurisdiction with such obvious potential to affect foreign relations." 542 U.S. at 731. Here, Congress has provided clear guidance. Congress addressed the subject of corporate liability in a directly analogous context when it excluded corporations from the scope of the Torture Victims Protection Act, 28 U.S.C. § 1350 note § 2(a), which creates an express cause of action for most of the human rights norms plaintiffs press here. In light of that congressional guidance, it would be entirely inappropriate for federal courts to recognize a federal common-law cause of action for aliens under the ATS which is broader than the express cause of action Congress established for citizens. To conclude otherwise would (again) produce an inconceivable result: *aliens* would be able to bring suit against corporations for violations of torture and human

rights norms as a matter of federal common law even though Congress has precluded *citizens* from doing so. Slip op. at 28-29 (Kavanaugh, J., dissenting).

II. The Panel's Decision Recognizing Aiding And Abetting Liability Is Wrong, And Its Conclusion That The Proper Standard Is Knowledge Conflicts With A Decision Of The Second Circuit.

A. There is no aiding and abetting liability under the ATS.

In *Sosa*, the Supreme Court made clear that international law supplies the substantive content for any violation of the law of nations. 542 U.S. at 732. But the Court also made clear that recognition of private claims under the law of nations is an exercise of federal common law authority. *See id.* at 729 (noting that the ATS's "jurisdiction was originally understood to be available to enforce a small number of international norms that a federal court could properly recognize as within the common law enforceable without further statutory authority"); *id.* at 732 (recognizing that these claims arise "under federal common law").

Because a cause of action under the ATS is necessarily a cause of action under *federal common law*, courts must apply the strong presumption against implying aiding and abetting liability that exists under federal law. *See Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 175 (1994). Indeed, given the strong presumption against implying aiding and abetting liability even in the case of an express, congressionally-conferred cause of action, *see id.*, courts should necessarily decline to recognize aiding and abetting liability

when fashioning federal common law under the ATS.

Accordingly, the United States argued to the Supreme Court in an ATS case that courts should decline to recognize aiding and abetting liability under the ATS. As the United States explained, "while aiding and abetting is a useful tool for prosecutors, it vastly expands liability to allow private parties, unconstrained by prosecutorial discretion, to sue alleged aiders and abettors." Br. for the United States as Amicus Curiae in Support of Petitioners ("U.S. *Ntsebeza* Br."), *Am. Isuzu Motors, Inc. v. Ntsebeza*, No. 07-919, 2008 WL 408389, at *9. Given the strong presumption against implying aiding and abetting liability, it would make little sense for courts to infer a cause of action for aiding and abetting liability where the Supreme Court has directed courts to exercise "great caution" before exercising jurisdiction. *See Sosa*, 542 U.S. at 728. This Court should adopt the United States' position and reject recognizing aiding and abetting liability under the ATS.

The panel's conclusion that the ATS reaches aiding and abetting liability also runs afoul of the Supreme Court's admonition to "look for legislative guidance before exercising innovative authority over substantive law" in ATS cases. *Sosa*, 542 U.S. at 726. This means that ATS plaintiffs must not only show that their alleged claim is firmly grounded in customary international law, but also that Congress has cast no doubt on their ATS claim. *Id.* at 732. In enacting the TVPA, however, Congress gave "U.S. citizens a cause of action for tortious

conduct that is also a violation of customary international law," but pointedly did not provide for aiding and abetting liability. Slip op. at 31 (Kavanaugh, J., dissenting). As Judge Kavanaugh explained, it only makes sense that "the statutory limits on U.S. citizens' recovery under that statute should presumptively apply to aliens' recovery under the ATS as well," thus "avoiding the bizarre result that would ensue if aliens—but not U.S. citizens—could bring suit in U.S. court for the same injuries caused by the same defendants." *Id.* The panel majority, in recognizing aiding and abetting liability, achieved precisely that "bizarre result."

B. Even if aiding and abetting liability exists, the panel majority erred in concluding that the proper standard is knowledge, and its decision conflicts with a decision of the Second Circuit.

Even assuming, *arguendo*, that aiding and abetting liability exists under the ATS, the panel erred when it concluded, in direct conflict with recent decisions of the Second Circuit, that the proper standard for such liability is knowledge, rather than purpose. *Sosa* makes clear that the scope of the federal common law rule must derive from international law. *See Talisman*, 582 F.3d at 259 (internal citation omitted). The panel opinion correctly looked to customary international law, Slip op. at 38, but found the wrong result when it looked there.

As the Second Circuit has explained, "international law at the time of the Nuremberg trials recognized aiding and abetting liability only for purposeful conduct," and "[t]hat purpose standard has been largely upheld in the modern era,

with only sporadic forays in the direction of a knowledge standard." *Talisman*, 582 F.3d at 259. Thus, "[o]nly a purpose standard … has the requisite 'acceptance among civilized nations' for application in an action under the ATS." *Talisman*, 582 F.3d at 259 (internal citation omitted). The United States has recognized as much, filing an amicus brief in the Second Circuit in which it argued that a knowledge standard "differs materially from the most recent formulations adopted in international practice." Br. for the United States as Amicus Curiae, *Khulumani v. Daimler Chrysler Corp.*, No. 05-2141, 2005 U.S. 2nd Cir. Briefs 2141, *35 (2d Cir. filed Oct. 14, 2005). Even if this Court decides to recognize aiding and abetting liability, it should, at a minimum, hold that it requires more than mere knowledge of the underlying activity.

III. The Panel Majority Erred When It Concluded that the ATS Reaches Conduct Occurring Outside the United States.

Finally, the panel erred in concluding that the ATS should apply extraterritorially. There is a strong presumption in American law that statutes do not apply extraterritorially, even where an express cause of action exists. *See, e.g.*, *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2877 (2010). There is nothing in the text or history of the ATS sufficient to trump this strong presumption. As Judge Kavanaugh explained, "the mere fact that statutory language could plausibly apply to extraterritorial conduct does not suffice to overcome the presumption against extraterritoriality." Slip op. at 10 (Kavanaugh, J., dissenting).

Moreover, "the ATS's specific reference to alien plaintiffs [does not] establish that the statute applies extraterritorially. That language merely ensures that alien plaintiffs can sue under customary international law for injuries suffered *within the United States*." *Id.* Indeed, the ATS was enacted in response to international incidents caused by assaults on foreign ambassadors *within the United States*, *see Sosa*, 542 U.S. at 716-17, and the only two reported ATS decisions in the decades following the statute's enactment involved events on U.S. soil or in U.S. territorial waters, *see Moxon v. The Fanny*, 17 F. Cas. 942 (D. Pa. 1793); *Bolchos v. Darrel*, 3 F. Cas. 810 (D.S.C. 1795); *see also Breach of Neutrality: Op. of Hon. William Bradford, of Pennsylvania*, 1 Op. Att'y Gen. 57, 58 (1795) (recognizing that "[a]cts of the kind occurring in a foreign country … are *not* within the cognizance of our courts" (emphasis added)). This Court should reject the notion that the ATS can be used as a vehicle to bring suit in U.S. courts for alleged misconduct that occurred abroad. *See Sarei v. Rio Tinto, PLC*, 625 F.3d 561, 564 (9th Cir. 2010) (Kleinfeld, J., dissenting) ("It is risible to think that the first Congress wrote the [ATS] intending to enable federal courts to adjudicate claims of war crimes committed abroad. … The point of the [ATS] was to keep us out of international disputes, not to inject us into them.").

CONCLUSION

For the foregoing reasons, rehearing en banc should be granted.

Respectfully submitted,

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