

# NOTE

## **Criminalize It: A Proper Means of Addressing Environmental Abuses Perpetrated by Multinational Corporations in the Extractive Industry**

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### ABSTRACT

*This note advocates for a United States statute that would prevent multinational resource extraction corporations from degrading the environment of the people inhabiting the land above the resources that the corporations wish to extract. This proposed statute would protect all people, whether they live inside the United States or abroad. It would also ensure that multinational extraction corporations demonstrate a minimum level of respect for the environment where they operate. The statute would apply to all multinational corporations regardless of their headquarters or place of incorporation. As this note explains, the proposed statute would be consistent with both the limits that international law imposes on universal jurisdiction and the narrow extent to which the Constitution permits Congress to criminalize offenses outside of the United States. Additionally, this note explains the extent to which harming the environment can be characterized as a crime of universal jurisdiction. Finally, this note explains, outlines, and refutes some inevitable critiques of the proposed statute.*

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## I. INTRODUCTION

In 1967, Rio Tinto, PLC, an international mining group, entered into an agreement with the Australian colonial administration, which later became the government of Papua New Guinea (“PNG”). Pursuant to this agreement, Rio Tinto would construct and operate a mine in the village of Panguna, on the island of Bougainville.<sup>1</sup> According to the agreement, the profits of the mine would be shared: 60% would go to the Papua New Guinea government, 35% would go to Rio Tinto, and 5% would go to the island of Bougainville.<sup>2</sup> The PNG Parliament implemented the agreement under the Mining Act of 1967.<sup>3</sup>

The native Bougainvilleans opposed Rio Tinto’s operation from the moment the company arrived on the island. Even before the agreement was signed, in 1965, a group of Bougainvilleans attacked and expelled a Rio Tinto exploration

1. *Sarei v. Rio Tinto, PLC*, 221 F. Supp. 2d 1116, 1122 (C.D. Cal. 2002), *aff’d in part, vacated in part, rev’d in part*, 456 F.3d 1069 (9th Cir. 2006), *withdrawn and superseded on reh’g in part*, 487 F.3d 1193 (9th Cir. 2007), *reh’g en banc granted by* 499 F.3d 923 (9th Cir. 2007), *remanded by* 550 F.3d 822 (9th Cir. 2008), *on remand*, 650 F. Supp. 2d 1004 (C.D. Cal. 2009), *aff’d in part, rev’d in part*, 671 F.3d 736 (9th Cir. 2011) (*en banc*), *cert. granted, judgment vacated*, 133 S. Ct. 1995 (2013).

2. JOANNE WALLIS, CONSTITUTION MAKING DURING STATE BUILDING 196 (2014).

3. *Id.*

team working on the island.<sup>4</sup> Rio Tinto, backed by the Australian government, responded with force. The Australian government arrested two hundred Bougainvilleans who had participated in the attack and sent riot police armed with batons, shields, rifles, and tear gas to force the men, women, and children off the land.<sup>5</sup> Rio Tinto cleared the area of trees, destroying large parts of the rainforest in preparation for its copper mine.<sup>6</sup>

Rio Tinto committed several human rights abuses during its mining operations in Bougainville. However, the most lasting ones arose out of massive environmental pollution and degradation of the island's environment. After destroying "huge portions of the rainforest," Rio Tinto began digging what would become one of the world's largest opencast copper mines.<sup>7</sup> The hole in the ground was "one-half kilometer deep and seven kilometers wide."<sup>8</sup> It was as wide as two Golden Gate Bridges and nearly as deep as one Empire State Building.<sup>9</sup>

Further, Rio Tinto began a practice of depositing the waste from its operations into the local river system, the Kawerong-Jaba.<sup>10</sup> The pollution diminished the river's fish population, cutting off a major food supply of the Bougainvilleans.<sup>11</sup> Eventually, Perry Zeipi, PNG's minister for environment and conservation, observed that the water was no longer safe for drinking or bathing.<sup>12</sup> Rio Tinto's operations also caused air pollution in the form of both dust clouds from the mine and emissions from the copper concentrator.<sup>13</sup> The air pollution caused many residents to suffer from respiratory infections and asthma.<sup>14</sup> The combined environmental effects included a change in the island's climate, damage to its crops, losses of fish and wildlife, and air and water pollution.<sup>15</sup> As a result, the Bougainvilleans' food supply diminished and their health deteriorated.<sup>16</sup>

The poor environmental standards on the island and the suppression of any opposition led the Bougainvilleans to organize politically into the Panguna Land Owners Association ("PLOA") in 1988.<sup>17</sup> They marched against Rio Tinto and submitted a petition to the mine's operators that called for greater local control over the operation and better environmental standards.<sup>18</sup> The PLOA also staged a

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4. *Sarei*, 221 F. Supp. 2d at 1122.

5. *Id.*

6. *Id.*

7. *Id.* at 1123 (internal quotation marks and citation omitted).

8. *Id.* (internal quotation marks and citation omitted).

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* at 1124.

13. *Id.* at 1123.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* at 1124.

18. *Id.* at 1125.

sit-in, which managed to halt operations at the mine for a full day.<sup>19</sup> Initially, the PNG government ignored the PLOA's advocacy, as mining interests largely controlled domestic politics.<sup>20</sup> However, ignoring the PLOA soon became impossible as the Bougainvilleans eventually resorted to violence.<sup>21</sup> Rio Tinto informed the PNG government that it was considering withdrawing from the operation if the uprising was not suppressed.<sup>22</sup> The government responded by sending in a defense force in 1989.<sup>23</sup> Soon thereafter, the region erupted into a ten-year civil war.<sup>24</sup>

During the civil war, the PNG government committed several human rights abuses and war crimes. On one occasion, the government imposed a blockade that was intended to starve the Bougainvilleans.<sup>25</sup> The government's other alleged human rights violations and war crimes include:

- (a) Aerial bombardment of civilian targets; (b) Wanton killing and acts of cruelty; (c) Burning of houses and villages; (d) Making the civilian population and individual civilians objects of attack; (e) Outrages upon personal dignity, acts of rape, humiliating and degrading treatment; (f) Perfidious use of the Red Cross emblem; and (g) Pillage.<sup>26</sup>

In 2000, a local politician and twenty-one Bougainvilleans filed a class action lawsuit against Rio Tinto under the Alien Tort Statute ("ATS"),<sup>27</sup> which permits "a civil action by an alien for a tort . . . committed in violation of the law of nations or a treaty of the United States."<sup>28</sup> The complaint demanded relief for several torts against international law, including acts carried out by the government of PNG.<sup>29</sup> Of relevance, the plaintiffs claimed that Rio Tinto's mining operation "destroyed Bougainville's environment and the health of its residents and that defendants [were] liable as a consequence."<sup>30</sup>

Of the many claims brought by the plaintiffs,<sup>31</sup> the district court dismissed the claim that the plaintiffs had been deprived of their right to a clean and healthy

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19. *Id.*

20. *Id.* at 1124.

21. *Id.* at 1125.

22. *Id.*

23. *Id.* at 1124.

24. *Id.*

25. *Id.* at 1126.

26. *Id.* at 1127.

27. *Id.*; 28 U.S.C. § 1350 (2015).

28. 28 U.S.C. § 1350 (2015).

29. *Sarei v. Rio Tinto, PLC*, 650 F. Supp. 2d 1004, 1007 (C.D. Cal. 2009), *aff'd in part, rev'd in part*, 671 F.3d 736 (9th Cir. 2011) (*en banc*), *cert. granted, judgment vacated*, 133 S. Ct. 1995 (2013).

30. *Id.*

31. *See id.* at 1028 ("Specifically, [the plaintiffs'] complaint pleads claims for crimes against humanity; war crimes/murder; violation of the rights to life, health, and security of the person; racial discrimination; cruel, inhuman, and degrading treatment; violation of international environmental rights; and a consistent pattern of gross violations of human rights.").

environment on two grounds. First, the court found that it was barred under the act of state doctrine, a federal common law doctrine that prevents United States courts from assessing the validity of the public acts of a foreign sovereign within its own territory.<sup>32</sup> Second, the court found that the environmental tort was not a sufficiently specific, universal, and obligatory norm of customary international law.<sup>33</sup> Accordingly, the court dismissed those claims.<sup>34</sup> The case, however, has a long procedural history. The plaintiffs appealed to the Ninth Circuit, where several different panels of judges heard the case at different stages over several years.<sup>35</sup>

Ultimately, the entire suit was dismissed after the Supreme Court decided *Kiobel v. Royal Dutch Petroleum*.<sup>36</sup> In *Kiobel*, the Court held that a claim made under the ATS must “touch and concern the territory of the United States . . . with sufficient force to displace the presumption against extraterritorial application.”<sup>37</sup> The Court added, “[c]orporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices.”<sup>38</sup> The plaintiffs’ claims in *Sarei v. Rio Tinto* had no connection to the territory of the United States as the alleged offenses took place in Papua New Guinea and were carried out by an Australian mining company.<sup>39</sup> The fact that Rio Tinto conducted some operations in the United States amounted to mere corporate presence, which did not satisfy the Court’s test. Accordingly, the Ninth Circuit dismissed the case.<sup>40</sup>

This note advocates for a federal criminal statute in the United States that would bring offenders such as Rio Tinto to justice. The statute, included as an appendix, would permit federal courts to exercise universal jurisdiction over human rights violations caused by multinational corporations (“MNCs”) that engage in resource extraction operations internationally. Part II explains two important public policy reasons to enact this statute. Part III specifically defines when causing environmental harm amounts to a gross violation of internationally recognized human rights. Part IV explains how the principle of universal jurisdiction under international law permits the prosecution of gross violations of human rights. Part V describes how this statute would justify recognizing corporate liability for international crimes and, more specifically, international

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32. *Sarei v. Rio Tinto, PLC*, 221 F. Supp. 2d 1116, 1188 (C.D. Cal. 2002); see *infra* Section VII(A) for a discussion on the applicability of the act of state doctrine to this case.

33. *Sarei*, 650 F. Supp. 2d at 1031.

34. *Id.*

35. See *Sarei*, *supra* note 1.

36. *Kiobel v. Royal Dutch Petroleum*, 133 S. Ct. 1659 (2013).

37. *Id.* at 1669.

38. *Id.*

39. *Sarei*, 221 F. Supp. 2d at 1121.

40. *Sarei v. Rio Tinto, PLC*, 722 F.3d 1109, 1110 (9th Cir. 2013), *aff’g* 650 F. Supp. 2d 1004 (C.D. Cal. 2009), *on remand*, 550 F.3d 822 (9th Cir. 2008), *aff’g in part, rev’g in part, vacating in part*, 221 F. Supp. 2d 1116 (C.D. Cal. 2002).

human rights violations. Part VI demonstrates how the U.S. Constitution permits Congress to exercise universal jurisdiction. Finally, Part VII lays out and refutes anticipated criticisms of this proposal.

## II. THE PROPOSED STATUTE WOULD SUPPORT PUBLIC POLICY BY PROMOTING ACCOUNTABILITY IN A PROPER LEGAL FRAMEWORK

It is important to enact a U.S. statute to protect people living in resource-rich areas in developing countries from actions by MNCs that commit gross violations of environmental human rights for two reasons. First, there is a particularly strong connection between resource extraction operations and environmental destruction, which can result in human rights violations. Second, the proposed statute would aid the environmental human rights claims brought pursuant to the ATS by allowing criminal cases to proceed before civil suits and giving courts a well-defined cause of action to apply to ATS claims.

### A. LINK BETWEEN HUMAN RIGHTS ABUSES AND RESOURCES

There is a close connection between extractive operations and human rights abuses, as noted in an article by Saman Zia-Zarifi, the Regional Director for the Asia & Pacific International Commission of Jurists.<sup>41</sup> Zia-Zarifi explains that MNCs that engage in resource extraction are particularly likely to be involved in human rights violations.<sup>42</sup> He offers several possible explanations for why these violations occur, namely resources typically located in the developing world are usually the main source of income for the government.<sup>43</sup> Additionally, Zia-Zarifi explains that the process of extracting resources requires a “massive physical presence . . . including construction of large-scale infrastructure and intensive use of labor.”<sup>44</sup>

Situations similar to the incident in Bougainville are not uncommon.<sup>45</sup> Resource-rich states often have low environmental standards due to their eagerness to attract foreign companies and profit from exports.<sup>46</sup> These low standards leave extractive companies free to disregard the environment surrounding their opera-

41. *Asia & Pacific Regional Office (Bangkok)*, INTERNATIONAL COMMISSION OF JURISTS, [www.icj.org/staff/asia-regional-office/](http://www.icj.org/staff/asia-regional-office/) (last visited Sept. 26, 2015).

42. Saman Zia-Zarifi, *Suing Multinational Corporations in the U.S. for Violating International Law*, 4 *UCLA J. INT'L & FOREIGN AFF.* 81, 82 (1999).

43. *Id.*

44. *Id.*

45. *See, e.g.,* *Aguinda v. Texaco, Inc.*, 945 F. Supp. 625 (S.D. N.Y. 1996), *vacated sub nom. Jota v. Texaco, Inc.*, 157 F.3d 153 (2d Cir. 1998); *Beanal v. Freeport-McMoRan, Inc.*, 969 F. Supp. 362 (E.D. La. 1997), *aff'd*, 197 F.3d 161 (5th Cir. 1999); *Kiobel v. Royal Dutch Petroleum Co.*, 456 F. Supp. 2d 457 (S.D.N.Y. 2006), *aff'd in part, rev'd in part*, 621 F.3d 111 (2d Cir. 2010), *aff'd*, 133 S. Ct. 1659 (2013).

46. Philippe Heitzmann, *The Global Race to the Bottom*, INT'L POL'Y DIGEST (Jan. 12, 2015), <http://www.internationalpolicydigest.org/2015/01/12/global-race-bottom/>.

tions. The local population is often forcibly removed from its land to nearby areas where environmental standards are diminished from the operations.<sup>47</sup> Once the environmental damage is done, the offending corporation and home country often use intimidation tactics to deter individuals who seek remedies.<sup>48</sup>

These trends are reflected by the large amount of ATS cases against companies in the extractive industry for either their environmental practices or other related human rights abuses.<sup>49</sup> A 2010 note in the *Berkeley Journal of International Law* examines five such cases.<sup>50</sup> In most ATS cases concerning environmental-related human rights abuses, the defendant—a multinational corporation—caused environmental destruction while operating in a developing country, which allegedly led to the plaintiff's harm.<sup>51</sup>

### B. CURTAILING ALIEN TORT STATUTE OVERUSE

The proposed statute would be an effective way to streamline the large number of environmental cases brought under the ATS because it would permit a court to stay civil proceedings until the criminal proceedings have finished.<sup>52</sup> Additionally, the statute would provide plaintiffs with a well-defined cause of action when asserting jurisdiction under the ATS, rather than force them to look to customary international law. In several environmental ATS cases, courts have determined that the claims reflect “a general sense of environmental responsibility and state abstract rights and liberties devoid of articulable or discernable standards.”<sup>53</sup> Consequently, no environmental ATS case has ever been successfully litigated.<sup>54</sup>

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47. See, e.g., George Henton, *Foreign Firms and Human Rights Abuses in Myanmar*, AL JAZEERA (Feb. 10, 2015), <http://www.aljazeera.com/indepth/features/2015/02/foreign-firms-human-rights-abuses-myanmar-150210040854291.html> (describing the experience of a group of villagers in northern Myanmar: “[C]ommunities are displaced from land on which they have lived and farmed for generations, often without adequate compensation to be able to rebuild their lives elsewhere, while others’ land or water are contaminated by harmful waste.” (quoting Jessica Spanton, Myanmar Program Deputy Director, Earth Rights International)).

48. See, e.g., *Kiobel*, 456 F. Supp. 2d at 464.

49. See Pauline Abadie, *A New Story of David and Goliath: The Alien Tort Claims Act Gives Victims of Environmental Injustice in the Developing World a Viable Claim Against Multinational Corporations*, 34 GOLDEN GATE U. L. REV. 745, 746 (2004) (“[M]any of the most serious environmental threats to human rights have come from oil development, mining, commercial forestry operations, and similar large-scale development projects carried out by MNCs.”).

50. Kathleen Jaeger, *Environmental Claims Under the Alien Tort Statute*, 28 BERKELEY J. INT’L L. 519, 526-34 (2010).

51. *Id.* at 526.

52. *Benevolence Intern. Found., Inc. v. Ashcroft*, 200 F. Supp. 2d 935, 938 (N.D. Ill. 2002) (stating that a court may stay the proceedings after balancing “the civil plaintiff’s right to prepare his case promptly against the public interest in withholding full disclosure sought by the civil plaintiff”). In the situation presented here, the public interest would weigh strongly in favor of staying the civil action, given how long ATS cases are.

53. *Beanal v. Freeport-McMoRan*, 197 F.3d 161, 167 (5th Cir. 1999); *Flores v. Southern Peru Copper Corp.*, 414 F.3d 233, 240 (2d Cir. 2003).

54. Jaeger, *supra* note 50, at 526.

By defining this norm and incorporating it into a criminal statute, courts would have a legal framework and, in many cases, a criminal conviction to build upon when faced with an ATS case alleging an environmental tort. At a minimum, plaintiffs would have a cause of action under environmental human rights law that they could use to assess whether a similar offense could be actionable as a tort. At most, the court could apply the doctrine of offensive non-mutual collateral estoppel to prevent re-litigating the same issue.<sup>55</sup> This doctrine prevents a plaintiff from relitigating an issue that the defendant previously litigated and lost against another plaintiff.<sup>56</sup> For these reasons, the proposed statute would streamline civil litigation under the ATS that would otherwise last several years.

### III. THE RIGHT TO A CLEAN AND HEALTHY ENVIRONMENT UNDER CUSTOMARY INTERNATIONAL LAW

Establishing a cause of action for the proposed statute requires identifying the extent to which the right to a clean and healthy environment is a norm of customary international law. The right to a clean environment is relatively new to the debate over what constitutes human rights.<sup>57</sup> International human rights law now recognizes that a minimum level of protection of a group's use and enjoyment of its environment is a necessary condition to its ability to exercise other rights. The late Czech jurist and former secretary-general of the International Institute of Human Rights Karel Vasak first articulated this conception of human rights law, known as generational understanding, in 1984.<sup>58</sup>

According to Vasak, the first generation of rights consists of civil and political rights.<sup>59</sup> Vasak refers to these rights as *opposables à l'État*, or enforceable against the state.<sup>60</sup> Ensuring respect for these rights requires that the state abstain from acting in certain ways.<sup>61</sup> The modern source of first generation rights is the International Covenant on Civil and Political Rights,<sup>62</sup> but it dates to the eighteenth century.<sup>63</sup>

The second generation of human rights consists of economic, social, and cultural rights. Vasak refers to these rights as *exigibles de l'État*—they impose an

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55. See *Parkland Hosiery Co. v. Shore*, 439 U.S. 322, 331-34 (1979) (discussing the standard for applying the doctrine of offensive non-mutual collateral estoppel).

56. *Id.* at 329.

57. Jennifer A. Downs, *A Healthy and Ecologically Balanced Environment: An Argument for a Third Generation Right*, 3 DUKE J. COMP. & INT'L L. 351, 368 (1993).

58. Karel Vasak, *Pour une troisième génération des droits de l'homme*, in *ETUDES ET ESSAIS SUR LE DROIT INTERNATIONAL HUMANITAIRE ET SUR LES PRINCIPES DE LA CROIX-ROUGE* 837 (Christophe Swinarski ed., 1984).

59. *Id.* at 839.

60. *Id.*

61. *Id.*

62. International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

63. See, e.g., U.S. CONST. amend. IX.

affirmative duty on the state to take steps to provide such rights. The modern source of second-generation rights is the International Covenant on Economic, Social, and Cultural Rights.<sup>64</sup> They include the right to an adequate standard of living and the right to the enjoyment of the highest attainable standard of physical and mental health.<sup>65</sup> The second-generation rights give meaning to the exercise of the first generation rights.<sup>66</sup> The Committee on Economic, Social, and Cultural Rights, a United Nations body charged with implementing the Covenant, recognizes their “progressive realization and acknowledges the constraints due to limits of available resources.”<sup>67</sup> A state commits a consistent pattern of gross violations of economic, social, and cultural rights if it, “as a matter of policy, purposely starve[s] or denie[s] other basic human need[s] to some or all of its people.”<sup>68</sup>

Finally, Vasak argues for a third generation of rights.<sup>69</sup> These rights are the most recently developed and least widely recognized.<sup>70</sup> Third generation rights include the right to development, peace, environment, communication, and a common heritage of mankind.<sup>71</sup> Ensuring these rights, Vasak points out, imposes both negative and affirmative duties on the state.<sup>72</sup> They cannot be realized without the combined efforts of all of society.<sup>73</sup>

The Rio Declaration on Environment and Development provides the clearest articulation of an environmental human right: “[h]uman beings are . . . entitled to

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64. International Covenant on Economic, Social, and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 2-3 (entered into force Jan. 3, 1976).

65. *Id.* at arts. 11(1), 12(1).

66. See Downs, *supra* note 57, at 360 (“[D]eleterious social conditions such as hunger, poverty, inadequate health care, the lack of educational opportunity, and hazardous workplaces inhibit the individual realization and enjoyment of first generation rights and freedoms.”).

67. Committee on Social, Economic, and Cultural Rights, *General Comment No. 3: The Nature of States Parties’ Obligations (Art. 2, Para. 1, of the Covenant)*, ¶1, U.N. Doc. E/1991/23 (Dec. 14, 1990).

68. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 702, Reporter’s Note 10 (1987) [hereinafter RESTATEMENT].

69. Vasak, *supra* note 58, at 839.

70. These rights are also called group rights because they are exercised collectively. Critics originally used this distinction to point out the illegitimacy of recognizing group rights. See, e.g., JACK DONNELLY, UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE 145-47 (2013) (explaining the dangers of recognizing group rights). Advocates downplay this distinction, arguing (1) that each generation of rights ultimately has individual and collective elements, such as the freedom of religion and association, and (2) that some third generation rights, such as the right to environment, are in fact individual rights because ultimately the individual is the beneficiary of a clean and healthy environment. Downs, *supra* note 57, at 365-66. Alternatively, some legal instruments embrace the concept of group rights. See, e.g., African (Banjul) Charter on Human and Peoples’ Rights, June 27, 1981, 21 I.L.M. 58, 2 [hereinafter Banjul Charter].

71. Vasak, *supra* note 58, at 840.

72. *Id.* at 839.

73. *Id.*

a healthy and productive life in harmony with nature.”<sup>74</sup> Approximately fifty countries have recognized the right to a healthy environment in their constitutions.<sup>75</sup> He concludes that this may be sufficient evidence of state practice to establish the right as a norm of customary international human rights law.<sup>76</sup> However, the third generation rights themselves are not sufficiently well-defined to be actionable.<sup>77</sup>

Given the nature of the three generations of rights, a criminal statute aimed at protecting a group’s right to a clean and healthy environment should be written narrowly and specify whether it protects any additional, related rights. This is because first and second generation rights, such as the right to life, the right to an adequate standard of living, and the right to health may indirectly depend on a healthy environment.<sup>78</sup> Rio Tinto’s conduct in Bougainville, for example, arguably violates Bougainvilleans’ rights to an adequate standard of living and health by purposefully denying them their “basic human needs.”<sup>79</sup> This note’s proposed statute recognizes such indirect harm as a violation of the right to a clean and healthy environment, a strategy that is consistent with Lee’s analysis of environmental violations as human rights violations:

[A]n environmental violation becomes significant enough to become a human rights violation when, as a result of a specific course of state action, a degraded environment occurs with either serious health consequences for a specific group of people or a disruption of a people’s way of life.<sup>80</sup>

Thus, to demonstrate a gross violation of internationally recognized human rights, the proposed statute requires that victims show such a chain of causation from state action to serious consequences for their health or way of life.

Indeed, in 2009, the European Court of Human Rights decided a case on such grounds.<sup>81</sup> In 2000, a mining accident caused cyanide to spill into several rivers in Romania.<sup>82</sup> A man and his son complained that the cyanide aggravated the son’s asthma.<sup>83</sup> The court, relying on Romanian law, European law, and norms of customary international law, held that the Romanian government had failed to

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74. U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, princ. 1, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. 1), annex I (June 14, 1992) [hereinafter *Rio Declaration*].

75. John Lee, *The Underlying Legal Theory to Support a Well-Defined Human Right to a Healthy Environment*, 25 COLUM. J. ENVTL. L. 283, 314 (2000).

76. *Id.* at 314 n.160 (Lee argues that evidence for customary human rights law differs from that of customary international law generally.).

77. *Id.* at 285 (pointing out that the fundamental underlying issue of when an environmental violation is also a human rights violation currently has no universally accepted, rigorous definition).

78. *Id.* at 305.

79. See RESTATEMENT, *supra* note 68, at § 702, Reporter’s Note 10.

80. Lee, *supra* note 75, at 285.

81. *Tătar v. Romania*, App. No. 67021/01 at ¶ 112 (Eur. Ct. H.R., Jan. 27, 2009).

82. *Id.* at ¶ 24.

83. *Id.* at ¶ 42.

take adequate steps to protect the plaintiffs' right to a clean and healthy environment.<sup>84</sup> The court noted that the government could have prevailed if it had simply made its 1993 environmental impact assessment of the mining operation publicly available.<sup>85</sup>

Similarly, Rio Tinto's actions in Bougainville deprived the Bougainvilleans of their right to a clean and healthy environment and thus other essential rights, as well.<sup>86</sup> The dumping of chemicals and waste into the Kawerong-Jaba river system rendered it unsafe for drinking and bathing and sickened many residents. By violating Bougainvilleans' right to a clean and healthy environment, Rio Tinto also violated their rights to health, and to life; some residents died from upper respiratory infections, asthma, and tuberculosis.<sup>87</sup> The harm was perpetrated on a wide scale on all Bougainvilleans who drank from the river and lived within close enough proximity to breathe the polluted air.

Thus, the right to a clean and healthy environment under customary international law is necessary to fully protect the rights to life, health, and an adequate standard of living. Plaintiffs should be empowered to hold defendants liable for violating the right to a clean and healthy environment by showing violations of these other rights. Such a liability scheme would enable plaintiffs such as the Bougainvilleans to show how their suffering is the distinct result of a defendant's course of conduct.

#### IV. UNIVERSAL JURISDICTION AND GROSS VIOLATIONS OF INTERNATIONAL HUMAN RIGHTS

A state could permissibly exercise universal jurisdiction over gross violations of international human rights if the universal jurisdiction statute were specifically defined and limited to include only severe human rights violations. International jurisdictional norms are based on the *Lotus* principle,<sup>88</sup> which presumes the validity of a state's exercise of jurisdiction. The principle of universal jurisdiction, however, is a limited one.<sup>89</sup> It provides that a state may punish certain offenses even where neither the offense nor the offender has any connection to the state, based solely on the nature of the crime.<sup>90</sup> Despite its limited nature, the principle is not an unchanging one—it recognizes that new causes of action

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84. *Id.* at ¶ 112.

85. *Id.* at ¶ 113.

86. A significant distinction between the situation in *Bougainville* and the decision in *Tatar* is that the court in *Tatar* held the state responsible for not adequately regulating the conduct of the mining company. *Tatar*, App. No. 67021/01, at ¶ 112. Section IV discusses the important issue of recognizing corporate responsibility for these violations.

87. See *Sarei*, *supra* note 1.

88. S.S. *Lotus* (France v. Turkey), 1927 P.C.I.J. (ser. A) No. 10, at 19 (Sept. 7).

89. *United States v. Shibin*, 722 F.3d 233, 239 (4th Cir. 2013).

90. THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION 28 (Stephen Macedo ed., 2001) [hereinafter PRINCETON PRINCIPLES].

permitting a state to exercise universal jurisdiction may emerge.<sup>91</sup> Additionally, the universal jurisdiction statutes of some states are beginning to reflect a concern for human rights rather than merely codifying the list of accepted international crimes.<sup>92</sup>

#### A. REBUTTING KISSINGER'S CRITIQUE OF UNIVERSAL JURISDICTION

The first issue is where a state should look to assess the legality of its universal jurisdiction statute. Under the *Lotus* principle, a state's exercise of jurisdiction is presumed to be valid absent some express limitation imposed by international law.<sup>93</sup> International law therefore permits a state to exercise "jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law."<sup>94</sup>

The issue, therefore, is whether there is an affirmative rule against universal jurisdiction over human rights abuses by corporations. This note's proposed statute does not implicate any affirmative rules against the exercise of universal jurisdiction. Former U.S. Secretary of State Henry Kissinger outlines three major arguments against universal jurisdiction.<sup>95</sup> Kissinger's arguments stem from the concern that domestic courts of one state will prosecute the officials of another who have engaged in criminal acts. First, Kissinger argues that a new democratic government of the state where offenses occur should be allowed to establish reconciliation procedures to resolve past human rights abuses.<sup>96</sup> Kissinger points to South Africa's reconciliation procedure and notes that it would be improper for a prosecutor in another state to determine that this procedure is inadequate and begin criminal proceedings.<sup>97</sup>

Certainly, it is important to defer to the state in which the offenses occurred in determining the reconciliation process. However, in the situations covered by this statute, which involve environmental human rights abuses by a MNC,<sup>98</sup> the forum state is often unable to carry out an effective prosecution. A set of facts similar to the situation in Bougainville illustrates why domestic reconciliation procedures, promoted in Kissinger's first argument, are not always adequate. From 1964 to

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91. *Id.*

92. *See infra* notes 87-92 and accompanying text.

93. S.S. *Lotus*, *supra* note 88, at 19.

94. *Id.* at 19.

95. Henry Kissinger, *The Pitfalls of Universal Jurisdiction*, in *THE INTERNATIONAL CRIMINAL COURT: GLOBAL POLITICS AND THE QUEST FOR JUSTICE* 93 (William Driscoll et al. ed., 2004).

96. *Id.* at 96.

97. *Id.* at 97.

98. This distinction is different from the issue of corporate liability for international crimes, which is addressed in Part V. The issue addressed in this section depends on whether MNCs have the ability to perpetrate human rights abuses and whether they deserve the same treatment as state actors under international jurisdiction statutes. Part V discusses whether a state can apply its domestic universal jurisdiction law to corporate actions.

1992, Texaco extracted oil from the Ecuadorean rainforest and, in the process, improperly disposed of toxic waste.<sup>99</sup> The waste allegedly caused residents of the area to develop pre-cancerous growths.<sup>100</sup> The victims brought a case under the ATS,<sup>101</sup> which was dismissed on *forum non conveniens* grounds after Texaco submitted to jurisdiction in Ecuador.<sup>102</sup> However, in 2001, Chevron acquired Texaco.<sup>103</sup> and Chevron had no assets in the country when the plaintiffs initiated the civil suit there in 2003.<sup>104</sup> When the Ecuadorean court entered a judgment against Chevron, the company refused to pay.<sup>105</sup> The plaintiffs are still seeking to enforce the judgment around the world.<sup>106</sup>

The problem in this case was not that exercising U.S. jurisdiction over the matter would disturb Ecuador's own national reconciliation procedure. Texaco had withdrawn its assets from Ecuador long before the case was brought in

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99. *Jota v. Texaco, Inc.*, 157 F.3d 153, 155 (2d Cir. 1998), *aff'd sub nom*, *Aguinda v. Texaco*, 303 F.3d 470 (2d Cir. 2002). Specifically, the plaintiffs alleged that Texaco deposited the toxic waste into local rivers, released them into the air by burning them, and spread them along dirt roads. *Id.*

100. *Id.* at 156.

101. The Alien Tort Statute is a civil remedy for violations of customary international law, rather than the criminal proceeding suggested by this paper. However, universal civil jurisdiction implicates the same concern raised by Kissinger that a proceeding will interfere with domestic reconciliation processes. *See Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 295 (2d Cir. 2007) (Korman, J., dissenting) (“[T]he Republic of South Africa, a democratically elected government representative of all South Africans, including the victims of apartheid, has asserted the right to define and finalize issues related to reparations for apartheid-era offenses within its own legal framework—thus making this lawsuit an insult to the post-apartheid, black-majority government of a free people.”); Eliot J. Schrage, *Judging Corporate Accountability in the Global Economy*, 42 COLUM. J. TRANSNAT'L L. 153, 166 (2003) (“A court decision to hear an Alien Tort Statute claim over actions in South Africa reflects the worst sort of judicial imperialism. It would send the message that the United States does not respect the ability of South African society to administer justice by implying that U.S. courts are better placed to judge the pace and degree of South Africa's national reconciliation.”) (internal quotation marks omitted); Ernest A. Young, *Universal Jurisdiction, the Alien Tort Statute, and Transnational Public-Law Litigation after Kiobel*, 64 DUKE L. J. 1023, 1092-1102 (2015) (suggesting that litigation under the Alien Tort Statute will inevitably cause clashes between U.S. law and foreign law in light of unique features of the American civil justice system).

102. *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534, 538, 545-46 (S.D.N.Y. 2001); *aff'd*, *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002).

103. Paul M. Barrett, *Epic Chevron Oil Pollution Case Goes Before Canadian Supreme Court*, BLOOMBERG BUS. (Dec. 11, 2014), <http://www.bloomberg.com/bw/articles/2014-12-11/epic-chevron-oil-pollution-case-goes-before-canadian-supreme-court>.

104. Alexander Zaitchik, *Sludge Match: Inside Chevron; \$9 Billion Legal Battle with Ecuadorean Villagers*, ROLLING STONE (Aug. 28, 2014), <http://www.rollingstone.com/politics/news/sludge-match-chevron-legal-battle-ecuador-steven-donziger-20140828>.

105. Clifford Krauss, *Big Victory for Chevron Over Claims in Ecuador*, N.Y. TIMES (Mar. 4, 2014), [http://www.nytimes.com/2014/03/05/business/federal-judge-rules-for-chevron-in-ecuadorean-pollution-case.html?\\_r=0](http://www.nytimes.com/2014/03/05/business/federal-judge-rules-for-chevron-in-ecuadorean-pollution-case.html?_r=0).

106. The Ecuadorean plaintiffs have sought to enforce the judgment in Canada, Argentina, and Brazil. Zaitchik, *supra* note 104.

Ecuador's courts.<sup>107</sup> When the U.S. district court dismissed the case, it permitted Chevron to avoid accountability by simply refusing to pay. In a situation where a government is conducting a national peace and reconciliation process and that process includes MNCs, the court could certainly dismiss a case under this note's proposed statute on international comity grounds. However, Kissinger's first argument that universal jurisdiction can disrupt a state's national reconciliation process generally does not apply to environmental human rights abuses by MNCs.

Kissinger's second argument against universal jurisdiction is that it can be used in an arbitrary and politically charged manner.<sup>108</sup> Kissinger points to the invocation of universal jurisdiction in the prosecution of Pinochet, a "reviled man of the right,"<sup>109</sup> while human rights abusers in the Caribbean, Middle East, and Africa have not been prosecuted. Though Kissinger correctly points out that universal jurisdiction could be used to target political enemies rather than promote a universal rule of law, it is easy to distinguish a prosecution of a MNC.

MNCs are non-state actors and thus do not enter into treaties or share the immunities enjoyed by foreign officials. Prosecuting extractive MNCs does not invoke foreign policy considerations in the same manner as prosecuting heads of state and foreign officials. Thus it is likely that prosecutions under this note's proposed statute will be less politically motivated than the ones Kissinger has described.

Kissinger's third and final critique of universal jurisdiction is that the International Criminal Court ("ICC") would be a better forum for prosecuting international crimes than domestic prosecutions.<sup>110</sup> However, the prosecutions under the proposed statute would never be brought in the ICC because the treaty that established the court does not extend jurisdiction to corporations.<sup>111</sup> Prosecuting MNCs for environmental human rights abuses, therefore, does not implicate the arguments against universal jurisdiction. The prosecutions would not interfere with national reconciliation processes and would be less politically motivated than prosecutions against foreign leaders. The ICC is not available as a forum for these claims.

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107. Texaco ceased oil production in Ecuador in 1990. Paul M. Barrett, *Ecuadorian Court Cuts Chevron's Pollution Bill in Half*, BLOOMBERG BUS. (Nov. 3 2013), <http://www.bloomberg.com/bw/articles/2013-11-13/ecuadorian-court-cuts-chevrons-pollution-bill-in-half>.

108. Kissinger, *supra* note 95, at 97.

109. *Id.* at 97-98.

110. *Id.*

111. Rome Statute of the International Criminal Court art. 25(1), July 17, 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute]. Specifically, Kissinger argues that the Rome Statute should be amended to accommodate U.S. interests. Although the same argument could be made here—that the Rome Statute should be amended to permit prosecutions of MNCs, the procedural obstacles to amending the treaty render this option impracticable. *See id.* at art. 121(4) ("[A]n amendment shall enter into force for all States Parties one year after instruments of ratification or acceptance have been deposited with the Secretary-General of the United Nations by *seven-eighths* of them." (emphasis added)).

B. THE U.S. RESTATEMENT ON FOREIGN RELATIONS LAW AND THE PRINCETON PRINCIPLES

State jurisdictional principles have evolved around the *Lotus* decision.<sup>112</sup> These principles hold that states' laws do not grant states exclusive jurisdiction over their own citizens.<sup>113</sup> Nonetheless, universal jurisdiction is a relatively recent development that is viewed as a narrow exercise of a state's powers.<sup>114</sup> The U.S. Restatement of Foreign Relations Law ("the Restatement") section 404, limits such crimes to those that are "recognized by the community of nations as of universal concern."<sup>115</sup> The Restatement provides an additional ground for universal jurisdiction in section 702, which lists specific violations of international human rights law and provides that a violation by a state "may permit prosecution of individual officials responsible for such acts under the laws of any state, as an exercise of universal jurisdiction."<sup>116</sup>

Notably, section 702 provides that "a consistent pattern of gross violations of internationally recognized human rights" is a violation of customary international human rights law.<sup>117</sup> However, it omits this violation from its list of universal jurisdiction offenses.<sup>118</sup> Despite this omission, violations of international human rights law are not necessarily precluded under universal jurisdiction.

The Princeton Principles, which have helped to clarify this area of law,<sup>119</sup> provide for "[t]he application of universal jurisdiction to the crimes listed . . . without prejudice to the application of universal jurisdiction to other crimes under international law."<sup>120</sup> Notably, the Princeton Principles themselves expanded the

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112. S.S. *Lotus*, *supra* note 88, at 19. See also Mark A. Summers, *The International Court of Justice's Decision in Congo v. Belgium: How has it Affected the Development of a Principle of Universal Jurisdiction that would Obligate all States to Prosecute War Criminals*, 21 B.U. INT'L L. J. 63, 95 (2003) ("[T]he *Lotus* case . . . says that in applying their criminal laws extraterritorially states have a wide measure of discretion only limited in certain cases by prohibitive rules.")

113. Mugambi Jouet, *Spain's Expanded Universal Jurisdiction to Prosecute Human Rights Abuses in Latin America, China, and Beyond*, 35 GA. J. INT'L & COMP. L. 495, 511 (2007).

114. *United States v. Shibin*, 722 F.3d 233, 239 (4th Cir. 2013).

115. RESTATEMENT, *supra* note 68, at § 404. The Restatement provides a non-exhaustive list of crimes for which the exercise of universal jurisdiction is permissible: "piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism." *Id.*

116. *Id.* at § 702. This section suggests that universal jurisdiction is permissible over genocide, slavery or slave trade, the murder or causing the disappearance of individuals, torture or other cruel, inhuman, or degrading treatment or punishment, prolonged or arbitrary detention, and systematic racial discrimination.

117. RESTATEMENT, *supra* note 115, at § 702(g).

118. *Id.* at § 702(a)-(f), n.12.

119. See Joaquin Gonzalez Ibanez, *Legal Pedagogy, the Rule of Law and Human Rights*, 7 INTERDISC. J. HUM. RTS. L. 147, 156 (2013) ("[The Princeton Principles] help clarify and bring order to an increasingly important area of international criminal law: prosecutions for serious crimes under international law in national courts based on universal jurisdiction, absent traditional jurisdictional links to the victims or perpetrators of crimes.") Domestic courts have, at least once, looked to the Princeton Principles to help determine the permissibility of exercising universal jurisdiction. See *United States v. Bellaizac-Hurtado*, 700 F.3d 1245, 1261 (11th Cir. 2012) (Barkett, J., concurring).

120. PRINCETON PRINCIPLES, *supra* note 90, at 29.

list of crimes from the list articulated in section 404 of the Restatement to include torture.<sup>121</sup> Therefore, the progression of universal jurisdiction from 1987, when the Restatement was published, to 2001, when the Princeton Principles were published, demonstrates that the list of recognized international crimes is expanding.

### C. GROSS VIOLATIONS OF HUMAN RIGHTS

The next issue that arises in analyzing the use of universal jurisdiction is whether to expand the list of universal jurisdiction crimes and, if so, how. Jordan Paust, a professor of international law at the Law Center of the University of Houston, notes that human rights are increasingly intertwined in international crimes, including the law of armed conflict, genocide, and general crimes against humanity.<sup>122</sup> Paust uses the example of a situation involving an extradition request of two aircraft hijackers. He points out that the U.S. government characterized the hijackers' actions as "an offense against the human rights of the passengers and crew."<sup>123</sup> Paust suggests that human rights violations themselves permit universal jurisdiction.<sup>124</sup>

An emerging state practice of exercising universal jurisdiction based not on a specific list of crimes, but on the interest in punishing human rights abuses, lends support to Paust's suggestion. Paust, writing in 1986, noted, "violations of human rights, in times of relative peace or armed conflict, might increasingly be responded to with criminal sanctions."<sup>125</sup> Indeed, a 2011 survey by Amnesty International of universal jurisdiction worldwide identifies three countries whose universal jurisdiction statutes reflect human rights concerns, rather than rigid lists of crimes: Costa Rica, El Salvador, and Honduras.<sup>126</sup> Costa Rica's universal jurisdiction statute permits jurisdiction over "any other punishable acts contrary to human rights and International Humanitarian Law under any treaties signed by Costa Rica or under [Costa Rica's Criminal Code]."<sup>127</sup> El Salvador's universal

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121. *Id.*; see RESTATEMENT, *supra* note 115, at § 404.

122. Jordan J. Paust & Albert P. Blaustein, *War Crimes Jurisdiction and Due Process: The Bangladesh Experience*, 11 VAND. J. TRANSNAT'L L. 2, 29 (1978).

123. Jordan J. Paust, *Aggression Against Authority: The Crime of Oppression, Politicide and Other Crimes Against Human Rights*, 18 CASE W. RES. J. INT'L L. 283, 291 (1986).

124. Paust, *supra* note 122, at 29 ("It is incorrect to categorically state that violations of human rights may not be prosecuted as an international crime.").

125. Paust, *supra* note 123, at 291.

126. AMNESTY INTERNATIONAL, UNIVERSAL JURISDICTION: A PRELIMINARY SURVEY OF LEGISLATION AROUND THE WORLD 43, 51, 62 (2011), <https://www.amnesty.org/en/documents/IOR53/004/2011/en/> (last visited Oct. 30, 2015).

127. While this provision could be read to give jurisdiction only when a treaty recognizes a specific crime, this reading would make this a statute implementing those treaties, which would be inconsistent with Costa Rica's status as a monist state. Alan O. Sykes, *International Law*, in HANDBOOK OF LAW AND ECONOMICS, 780 (A. Mitchell Polinsky & Steven Shavell eds., 2007) ("Costa Rica is a monist state, and even goes so far as to elevate international law above its own constitution."). An alternate reading of this provision would give Costa

jurisdiction statute extends beyond those protected by specific international agreements to offenses that entail a serious breach of universally recognized human rights.<sup>128</sup> Finally, the 1997 Honduran Penal Code recognizes universal jurisdiction “when so provided in a treaty to which Honduras is a party or the crimes seriously violate human rights universally recognized.”<sup>129</sup>

In addition to the three states that exercise universal jurisdiction over human rights abuses by statute, Colombia appears to follow suit. In a 2005 opinion, Colombia’s Constitutional Court stated, “it is in the interests of all states to investigate and punish the most serious violations of human rights and international humanitarian law, such as genocide, torture, and enforced disappearance.”<sup>130</sup> Although the opinion provides a list of recognized offenses, the court emphasized that universal jurisdiction extends to violations of both human rights and humanitarian law, which suggests that the list is not exhaustive.

The four examples listed above provide evidence that Paust’s 1986 prediction is coming true. Universal jurisdiction is expanding to include human rights abuses. At least four states recognize this type of universal jurisdiction rather than recognizing merely a specific list of international crimes. This emerging state practice suggests that the U.S. government could exercise universal jurisdiction over the environmental human rights abuses that occurred in *Sarei v. Rio Tinto*.

## V. CORPORATE LIABILITY FOR INTERNATIONAL CRIMES

Corporate liability for international crimes is not prohibited by international law; in fact, states with universal jurisdiction statutes merely incorporate international criminal law into their domestic legal systems, which recognize corporate liability. Although it is commonly seen as an obstacle to the enforcement of human rights violations, corporate liability is neither too new nor too sparsely accepted to be a permissible domestic enforcement method of international criminal law.<sup>131</sup> First, many states throughout the world recognize corporate criminal liability and apply it to their universal jurisdiction statutes. Second, federal courts, in determining whether corporate liability exists under the ATS, have suggested that corporate liability is permissible under international criminal law.<sup>132</sup> Corporate liability is thus a matter of domestic application of international

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Rican courts jurisdiction over punishable acts contrary to human rights as defined by treaties signed by Costa Rica. Indeed, this is the interpretation endorsed by Amnesty International. AMNESTY INTERNATIONAL, *supra* note 126, at 43 (citing Código Penal [Cód. Pen.] [Criminal Code] art. 7 (2003) (Costa Rica)).

128. AMNESTY INTERNATIONAL, *supra* note 126, at 50-51 (citing Código Penal [Cód. Pen.] [Criminal Code] art. 10 (2010) (El Sal.)).

129. *Id.* at 62 (citing Código Penal [Cód. Pen.] [Criminal Code] art. 5(5) (1997) (Hond.)).

130. Corte Constitucional [C.C.][Constitutional Court], septiembre 26, 2005, Dr. J. Córdoba Triviño, Sentencia C-979/05, Gaceta de la Corte Constitucional [G.C.C.], at 28 (Colom.), <http://www.corteconstitucional.gov.co/RELATORIA/2005/C-979-05.htm>.

131. *See infra* notes 133-148 and accompanying text.

132. *See infra* notes 149-167 and accompanying text.

law rather than a norm of customary international law.

#### A. CORPORATE LIABILITY IN A TRANSNATIONAL LEGAL SYSTEM

Many states recognize corporate liability for international crimes when they incorporate international crimes into their own legal systems. As Professor James Stewart, a practitioner and scholar of international criminal law, points out, legislation that permits the prosecution of a corporation for an international crime is common throughout domestic legal systems.<sup>133</sup> Domestic legal systems that recognize corporate liability codify the substantive international crimes into their domestic legislation and apply it according to their domestic procedural law in a process akin to “downloading” it.<sup>134</sup> States prescribe substantive international criminal law according to their own domestic legal norms.<sup>135</sup> Recognizing corporate liability is therefore a reflection of the state’s domestic criminal procedure, while international criminal law influences the elements of the crime. The result is that many domestic legal systems recognize corporate liability for international crimes under their criminal codes.<sup>136</sup> Consequently, domestic criminal investigations into alleged corporate activities constituting international crimes are becoming more common. Three recent examples highlight this trend.

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133. James G. Stewart, *The Turn to Corporate Criminal Liability for International Crimes: Transcending the Alien Tort Statute*, 47 N.Y.U. J. INT’L L. & POL. 121, 163 (2014).

134. *Id.* at 165. Stewart describes this process as a product of Harold Koh’s transnational legal process. Koh describes three types of transnational law:

(1) law that is ‘downloaded’ from international to domestic law: for example, an international law concept that is domesticated or internalized into municipal law, such as the international human rights norm against disappearance, now recognized as domestic law in most municipal systems; (2) law that is ‘uploaded, then downloaded’: for example, a rule that originates in a domestic legal system, such as the guarantee of a free trial under the concept of due process of law in Western legal systems, which then becomes part of international law, as in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, and from there becomes internalized into nearly every legal system in the world; and (3) law that is borrowed or ‘horizontally transplanted’ from one national system to another: for example, the ‘unclean hands’ doctrine, which migrated from the British law of equity to many other legal systems.

Harold Koh, *Why Transnational Law Matters*, 24 PENN ST. INT’L L. REV. 745, 745-46 (2006).

135. Stewart points to three ways in which this could be achieved:

First, a large number of states that adopt a comprehensive criminal code dedicate a specific provision within these codes to corporate criminal liability, before going on to prohibit international crimes in subsequent sections . . . . Second, a range of states create corporate criminal liability within their criminal codes, then specify a limited subset of criminal offenses that corporations can commit. Sometimes, this subset includes international offenses . . . . Third, in a slightly more circuitous route, another group of jurisdictions have promulgated separate legislation mandating that the term ‘person’ (or its equivalent) be read as including both natural and legal persons in all other legislative enactments.

Stewart, *supra* note 133, at 164-66.

136. *Id.* at 163.

In 2002, Belgium began criminal proceedings against Total, a French corporation, for allegedly committing and aiding and abetting crimes against humanity in Myanmar.<sup>137</sup> The criminal charges were brought under Belgium's formerly expansive universal jurisdiction law, which was curtailed in 2003.<sup>138</sup> The amended law requires claims to have a connection to Belgium.<sup>139</sup> The charges were ultimately dismissed under the new law because they had no connection to Belgium, as Total was a French corporation and the offenses occurred in Myanmar.<sup>140</sup>

In 2005, the Australian police began an investigation into Anvil Mining for its alleged complicity in war crimes committed in the Congo.<sup>141</sup> Australia's Commonwealth Criminal Code provides for corporate criminal prosecutions for genocide; the crimes against humanity of murder, imprisonment or other severe deprivation of physical liberty, torture, and rape; and war crimes.<sup>142</sup> However, the case was never tried in Australia because prosecutors terminated their investigation after Congolese courts, in a trial that was ongoing, acquitted the company on all charges.<sup>143</sup> Significantly, Anvil Mining is a Canadian company that maintained an office in Australia and, therefore, this case would have been an exercise of universal jurisdiction similar to this note's proposed statute.

Finally, in 2013, Switzerland brought criminal charges against Argor-Heraeus, a Swiss gold refining company.<sup>144</sup> Argor-Heraeus was charged with the war crime of pillage.<sup>145</sup> Specifically, Argor-Heraeus was accused of "refining three tons of gold ore pillaged from the Democratic Republic of the Congo between 2004 and 2005."<sup>146</sup> The Swiss attorney general dropped the case on March 10, 2015, concluding that there was not sufficient evidence to support the allegations.<sup>147</sup>

The three investigations discussed above illustrate that states, in prosecuting international crimes, target corporations as defendants as long as their domestic legal frameworks permit criminal prosecutions to be brought against corporations

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137. Jean-Marc Golier & Yves De Cordt, *Belgium*, in *GLOBAL BUSINESS AND HUMAN RIGHTS: JURISDICTIONAL COMPARISON* 108 (James Featherby ed., 2011).

138. *Id.*

139. *Id.*

140. *Id.* at 108-09.

141. Adam McBeth, *Crushed by an Anvil: A Case Study on Responsibility for Human Rights in the Extractive Sector*, 11 *YALE HUM. RTS. & DEV. L.J.* 127, 150 (2008).

142. *Criminal Code Act 1995* ch. 8 div. 268 (Austl.). *But see* Joanna Kyriakakis, *Australian Prosecution of Corporations for International Crimes*, 5 *J. INT'L CRIM. JUST.* 809, 815-16 (2007) (suggesting that the Australian Parliament may not have intended the international criminal provisions to apply to corporations).

143. McBeth, *supra* note 141, at 151.

144. Stewart, *supra* note 133, at 123.

145. *Id.* at 123.

146. Kerry A. Dolan, *Swiss Gold Refiner Accused of Aiding and Abetting Congo War Via Money Laundering*, *FORBES*, (Nov. 4, 2013), <http://www.forbes.com/sites/kerryadolan/2013/11/04/swiss-gold-refinery-accused-of-abetting-congo-war-via-money-laundering/>.

147. *News*, ARGOR-HERAEUS (Apr 14, 2015), [www.argor.com/index.php/eng/NEWS/2015](http://www.argor.com/index.php/eng/NEWS/2015).

generally. Corporate liability for crimes is recognized by several states, including a majority of European states, the African Court of Justice and Human Rights, and Australia.<sup>148</sup> It is therefore not uncommon for states to attach criminal liability to corporate abuses in the process of incorporating international criminal law into their domestic legislation.

## B. ALIEN TORT STATUTE JURISPRUDENCE

In deciding ATS cases, the Second and Ninth Circuits have examined whether corporations can be held liable for violating international law.<sup>149</sup> The Second Circuit has analyzed whether international law recognizes corporate liability. By contrast, the Ninth Circuit has focused on whether international interest in preventing violations of international law provides for the recognition of corporate liability.

### 1. *Kiobel v. Royal Dutch Petroleum Co.*

The Second Circuit has rejected corporate liability under the ATS.<sup>150</sup> In considering a war crimes claim by Nigerian nationals against a Dutch oil company,<sup>151</sup> the court pointed to the absence of any decision holding a corporation liable by an international tribunal for violating a law of nations.<sup>152</sup> The court noted that post-World War II prosecutions of Nazi war criminals were against individuals, such as corporate executives, and not corporations themselves.<sup>153</sup> The court also pointed out that the jurisdiction of other international tribunals—specifically, the International Criminal Tribunal for Rwanda, the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Court—had limited their jurisdictions to natural persons.<sup>154</sup>

Looking to treaties for evidence of corporate liability, the court found that there were “relatively few international treaties that impose particular obligations on corporations.”<sup>155</sup> Finally, the court noted that the work of publicists and jurists “reluctantly acknowledge that ‘the universe of international criminal law does

148. Dolan, *supra* note 146, at 174.

149. The Alien Tort Statute provides jurisdiction as a matter of tort law, as the name suggests, and therefore does not address corporate criminal liability. These two opinions however address important related questions. *Rio Tinto* answers the question “whether a corporate actor can violate a norm of international law” *Sarei v. Rio Tinto PLC*, 671 F.3d 736, 748 (9th Cir. 2011), *vacated*, 133 S. Ct. 1995 (2013). *Kiobel* addresses whether “customary international law of human rights . . . impose[s] any form of liability on corporations (civil, criminal, or otherwise).” *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 147 (2d Cir. 2010) (emphasis omitted), *aff’d*, 133 S. Ct. 1659 (2013).

150. *Kiobel*, 621 F.3d at 145.

151. *Id.* at 117.

152. *Id.* at 120.

153. *Id.* at 119.

154. *Id.* at 136.

155. *Id.* at 141.

not reveal any prosecutions per se.”<sup>156</sup> Ultimately, the court held, “corporate liability is not a norm that we can recognize and apply in actions under the ATS because the customary international law of human rights does not impose any form of liability on corporations (civil, criminal, or otherwise).”<sup>157</sup>

## 2. *Sarei v. Rio Tinto, PLC*<sup>158</sup>

Conversely, in *Sarei*, the Ninth Circuit found that corporate liability was actionable under the ATS.<sup>159</sup> The court considered the plaintiffs’ claims that Rio Tinto had committed an act of genocide during its operations in Bougainville.<sup>160</sup> The court’s opinion relied on an International Court of Justice (“ICJ”) decision that held, “genocide is a violation of international law whether committed by an individual, an amorphous group, or a state, consistent with all other sources of international law recognizing the universality of genocide.”<sup>161</sup> The court found that the ICJ’s ruling made clear that, “if an actor is capable of committing genocide, that actor can necessarily be held liable for violating the *jus cogens* prohibition on genocide.”<sup>162</sup> The court pointed out that its divergence from the *Kiobel* decision was rooted in its belief that the proper inquiry is not whether a specific precedent exists whereby corporations have been held liable, but rather “whether international law extends its prohibitions to the perpetrators in question.”<sup>163</sup> This reasoning addresses the error of the *Kiobel* decision: the issue is not whether corporate liability is a “specific, universal, and obligatory norm,”<sup>164</sup> but rather, whether “an actor is capable of committing”<sup>165</sup> the offense.

## 3. U.S. Supreme Court

The U.S. Supreme Court has yet to answer the question of corporate liability under the ATS. After the Second and Ninth circuits reached differing results on the issue, the Supreme Court in *Kiobel* mentioned corporate liability without deciding the issue: “[c]orporations are often present in many countries and it would reach too far to say that mere corporate presence suffices [to displace the

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156. *Id.* at 144 (quoting Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 477 (2001)).

157. *Id.* at 147 (emphasis omitted).

158. *Sarei v. Rio Tinto, PLC*, 671 F.3d 736 (9th Cir. 2011), *aff’g in part, rev’g in part*, 221 F. Supp. 2d 1116 (C.D. Cal. 2002), *vacated on other grounds*, *Rio Tinto, PLC v. Sarei*, 133 S. Ct. 1995 (2013).

159. *Id.* at 761.

160. *Id.* at 742.

161. *Id.* at 760 (citing Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. Rep. 91, ¶ 167 (Feb. 26)).

162. *Id.* at 759-760 (quoting *Bosn. & Herz. v. Serb. & Montenegro*, 2007 I.C.J. at 167). *Jus cogens* refers to fundamental international law principles that are not subject to derogation. See *Jus Cogens*, WEX LEGAL DICTIONARY, LEGAL INFO. INST., [https://www.law.cornell.edu/wex/jus\\_cogens](https://www.law.cornell.edu/wex/jus_cogens) (last visited Jan. 15, 2016).

163. *Id.* at 760.

164. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 145 (2d Cir. 2010) (internal quotations and citation omitted), *aff’d*, 133 S. Ct. 1659 (2013).

165. *Sarei*, 671 F.3d at 759-60.

presumption against extraterritorial application].”<sup>166</sup> Although at first glance this dicta seems to suggest that the Court decided to implicitly allow corporate liability under the ATS, subsequent holdings have been less clear.<sup>167</sup>

### C. SUMMARY

Recognizing criminal liability for international crimes committed by corporations is therefore a permissible exercise of the accepted practice in the United States of recognizing corporate criminal responsibility generally. To incorporate norms of international law—even human rights norms—would not run counter to any principle of international law.<sup>168</sup> However, whether a corporation can commit an environmental human rights abuse is a different question. Although states are ultimately responsible for promoting and protecting human rights, it is well-established that corporations should be held responsible for the harms that they cause. According to *Sarei*, a court must determine whether the corporation is in fact capable of committing the act. Therefore, the next question concerns the definition of a gross violation of environmental human rights and whether a corporation can commit it.

### VI. THE PROPOSED STATUTE’S CONSISTENCY WITH THE FOREIGN COMMERCE CLAUSE AND THE “DEFINE AND PUNISH” CLAUSE OF THE U.S. CONSTITUTION

The final issue is whether this note’s proposed statute would survive a constitutional challenge. Congress’s constitutional authority to pass a statute such as the one proposed here comes from the Foreign Commerce Clause<sup>169</sup> and the “Define and Punish” Clause.<sup>170</sup> Such a statute would likely be held valid under either of these powers. However, jurisprudence analyzing the limits of each clause is relatively undeveloped.

#### A. THE FOREIGN COMMERCE CLAUSE

The proposed statute would likely be upheld as a valid exercise of congressional authority under the Foreign Commerce Clause. Congress’s Foreign Com-

166. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013).

167. *See generally In re South African Apartheid Litigation*, 15 F. Supp. 3d 454 (S.D.N.Y. 2014) (discussing case law on corporate liability subsequent to *Kiobel* and concluding that corporations can be held liable under the ATS); *Doe I v. Nestle USA, Inc.*, 766 F.3d 1013, 1020-23 (9th Cir. 2014) (reaffirming decision that corporate liability applies under the ATS without mentioning the Supreme Court’s decision in *Kiobel*). *But see* *Chowdhury v. Worldtel Bangladesh Holding, Ltd.*, 746 F.3d 42, 49 n.6 (2d Cir. 2014) (in dicta, “the Supreme Court decision in *Kiobel* did not disturb the precedent of this Circuit . . . that corporate liability is not presently recognized under customary international law and thus is not currently actionable under the ATS.”).

168. John G. Ruggie, *Business and Human Rights: The Evolving International Agenda*, 101 AM. J. INT’L L. 819, 833 (2007) (“Nothing prevents states from imposing international legal responsibilities for human rights directly on corporations.”); *see also* S.S. Lotus (France v. Turkey), 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7).

169. U.S. CONST. art. I, § 8, cl. 3.

170. U.S. CONST. art. I, § 8, cl. 10.

merce Clause authority is expansive, although not unlimited.<sup>171</sup> In *United States v. Clark*, the Ninth Circuit determined whether it was an unconstitutional exercise of the Foreign Commerce Clause to criminalize commercial sex with a minor by any U.S. citizen who travels in foreign commerce.<sup>172</sup> The Ninth Circuit noted that the Supreme Court “has been unwavering in reading Congress’s power over foreign commerce broadly.”<sup>173</sup> The court used the test articulated in *Gonzalez v. Raich*<sup>174</sup> and framed the issue as “whether the statute bears a rational relationship to Congress’s authority under the Foreign Commerce Clause.”<sup>175</sup> The court had no trouble finding that the statute required the defendant to travel in foreign commerce and that the regulated activity—commercial sex—is “quintessentially economic,” and therefore was a permissible application of the Foreign Commerce Clause.<sup>176</sup>

The Third Circuit, in *United States v. Pendleton*, applied a more searching inquiry into the same issue that the Ninth Circuit faced.<sup>177</sup> The court addressed

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171. CURTIS A. BRADLEY, *INTERNATIONAL LAW IN THE U.S. LEGAL SYSTEM*, 192 (2013). The Supreme Court has not explicitly ruled on the extent of Congress’s Foreign Commerce authority but it has suggested that the authority is more expansive than the Interstate Commerce Clause. *See, e.g.*, *United States v. Forty-Three Gallons of Whiskey*, 93 U.S. 188 (1876) (“Congress now has the exclusive and absolute power to regulate commerce with the Indian tribes, a power as broad and as free from restrictions as that to regulate commerce with foreign nations.”); *Buttfield v. Stranahan*, 192 U.S. 470, 493 (1904) (“[C]ongress has . . . exerted a police power over foreign commerce by provisions which in and of themselves amounted to the assertion of the right to exclude merchandise at its discretion.”); *Japan Line, Ltd. v. Los Angeles County*, 441 U.S. 434, 448 (1979) (“Although the Constitution, art. I, § 8, cl. 3, grants Congress power to regulate commerce ‘with foreign nations’ and ‘among the several States’ in parallel phrases, there is evidence that the Founders intended the scope of the foreign commerce power to be the greater.”).

172. *United States v. Clark*, 435 F.3d 1100, 1101 (2006); 18 U.S.C. § 2423(c) (2015).

173. *Id.* at 1113 (citing *California Bankers Ass’n v. Shultz*, 416 U.S. 21, 59 (1974) (“The plenary authority of Congress to regulate foreign commerce . . . is well established.”); *Buttfield v. Stranahan*, 192 U.S. 470, 493 (1904) (noting that Congress has “complete power” over foreign commerce.”); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 813-14 (1993) (Scalia J., dissenting) (“Congress has broad power under Article I, § 8, cl. 3, to regulate Commerce with foreign Nations, and this Court has repeatedly upheld its power to make laws applicable to persons or activities beyond our territorial boundaries where United States interests are affected.” (internal quotation marks omitted)).

174. *Gonzalez v. Raich*, 545 U.S. 1, 15 (2005). The Supreme Court held that Congress did not exceed the Interstate Commerce Clause when it passed the Controlled Substances Act, which prohibited “intrastate manufacture and possession of marijuana for medical purposes.” The Court found that the constitutional issue was whether Congress had a “rational basis” for concluding that the respondent’s intrastate activity, “taken in the aggregate, substantially affect[ed] interstate commerce.” *Id.* at 22. The Court concluded, “[p]rohibiting the intrastate possession or manufacture of an article of commerce is a rational (and commonly utilized) means of regulating commerce in that product.” *Id.* at 26.

175. *Clark*, 435 F.3d at 1114.

176. *Id.* at 1115.

177. *United States v. Pendleton*, 658 F.3d 299, 306–07 n.5 (2011) (noting that while the court in *Clark* claims to have applied the same rational basis test applied in *Raich*, the analysis in *Raich* depended on several factors: “(1) whether the regulated activity is economic in nature; (2) whether the statute contains an ‘express jurisdictional element’ linking its scope in some way to interstate commerce; (3) whether Congress made express findings regarding the effects of the regulated activity on interstate commerce; and (4) attenuation of the link between the regulated activity and interstate commerce.”) (quoting *United States v. Morrison*, 529 U.S. 598, 611-12 (2000)).

whether a provision of the same statute at issue in *Clark*, which criminalizes noncommercial illicit sexual conduct outside the United States,<sup>178</sup> is a valid exercise of Congress's power to regulate the channels of foreign commerce. The court noted that Congress's authority "to keep the channels of interstate commerce free from immoral and injurious uses . . . is no longer open to question."<sup>179</sup> The court also placed great emphasis on the jurisdictional element present in the statute.<sup>180</sup> The presence of the jurisdiction requirement shows an "express connection to the channels of foreign commerce."<sup>181</sup> Therefore, under *Pendleton*, Congress can legislate out of a desire to keep the channels of foreign commerce free from immoral and injurious uses. However, a statute must have an express jurisdictional element. Because the court found that the statute was a permissive regulation of the channels of foreign commerce, it did not reach the question of whether the court in *Clark* correctly analyzed the substantial effects prong of the Foreign Commerce Clause.<sup>182</sup>

The proposed statute would therefore be a permissible exercise of the Foreign Commerce Clause under two separate rationales. First, the statute could include an express jurisdictional element, requiring that it be a regulation of the channels of foreign commerce. Second, the statute would be permissible under the "substantial effects" prong if Congress were to conclude that the extractive activity in question substantially affects foreign commerce. Under the more searching analysis that the court suggested in *Pendleton*, the statute would be constitutional if it satisfied the factors stated by the court. Alternatively, the statute could be a permissible regulation of the channels of foreign commerce because it seeks to keep the mineral resource trade free from immoral and injurious uses.

#### B. THE "DEFINE AND PUNISH" CLAUSE

The proposed statute could also be upheld under Congress's power to "define and punish" offenses against the law of nations.<sup>183</sup> The Eleventh Circuit, in *United States v. Bellaizac-Hurtado*, found that the Define and Punish clause limits Congress's power to act.<sup>184</sup> Whether Congress can pass this note's proposed statute pursuant to its Define and Punish power will depend on the extent to which Congress has discretion to define offenses as being against the law of nations.

In *Bellaizac-Hurtado*, the court considered whether federal prosecutors could

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178. 18 U.S.C. § 2423(c); *Clark*, 435 F.3d at 1101.

179. *Pendleton*, 658 F.3d at 308.

180. *Id.* at 311.

181. *Id.* (internal quotation marks and citation omitted).

182. *Id.* at 308.

183. U.S. CONST. art. I, § 8, cl. 10.

184. *United States v. Bellaizac-Hurtado*, 700 F.3d 1245, 1250 (11th Cir. 2012).

constitutionally prosecute Panamanian drug smugglers who were found in Panama and later brought to the United States under the Maritime Drug Law Enforcement Act (“MDLEA”).<sup>185</sup> The case arose after the U.S. Coast Guard, operating in conjunction with the Panamanian National Frontier Service, pursued a flagless vessel until the occupants fled into the Panamanian jungle.<sup>186</sup> The Frontier Service apprehended the suspects in the jungle and found 760 kilograms of cocaine on the boat.<sup>187</sup> The Panamanian government later agreed to extradite the suspects to the United States to be prosecuted under the MDLEA.<sup>188</sup> The Eleventh Circuit found the statute unconstitutional as applied to the defendants.<sup>189</sup> The court first held that customary international law limits Congress’s power under the clause,<sup>190</sup> finding that the clause gives Congress little more than the power to codify offenses against the law of nations.<sup>191</sup>

The court also raised, but did not answer, the important issue of whether the limitation imposed by the Define and Punish clause is defined by the law of nations, as it existed at the time of the founding, or by modern customary international law.<sup>192</sup> The court concluded that because drug smuggling is not a violation of customary international law today, it did not need to resolve the issue.<sup>193</sup> The court did, however, point out the disagreement among scholars on the matter.<sup>194</sup>

The court’s decision in *Bellaizac-Hurtado* suggests that the proposed statute will be carefully scrutinized as an exercise of the Define and Punish power. If Congress’s power is limited by the drafters’ version of the law of nations, the proposed statute will almost certainly be struck down as unconstitutional. Violations of customary international law during the founding period were limited to violations of safe conduct, infringement of the rights of ambassadors,

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185. *Id.* at 1247–48.

186. *Id.* at 1247.

187. *Id.* at 1248.

188. *Id.*

189. *Id.* at 1258.

190. *Id.* at 1250.

191. *Id.* The court concluded that the word “define” was chosen by the drafters because it “enabled Congress to provide notice to the people through codification, it did not enable Congress to create offenses that were not recognized by the law of nations.” *Id.*

192. *Id.* at 1253.

193. *Id.* at 1253–54.

194. *Id.* at 1253. See also Beth Stephens, *Federalism and Foreign Affairs: Congress’s Power to “Define and Punish . . . Offenses Against the Law of Nations*, 42 WM. & MARY L. REV. 447, 454 (2000) (“[T]he constitutional language is not limited to the particular international law norms existing at the time the Constitution was ratified, or to any categories indicated by the types of violations recognized in the eighteenth century, but rather evolves over time as international law continues to develop.”); Charles D. Siegal, *Deference and its Dangers: Congress’s Power to ‘Define . . . Offenses Against the Law of Nations*, 21 VAND. J. TRANSNAT’L L. 865, 869 (1988) (“The limited evidence available suggests that the framers knew that the list of international law offenses would expand with time. It is doubtful, however, that they anticipated several developments which would undermine the balance implicit in the offenses clause.”).

piracy, counterfeiting of foreign currency, and violations of the laws of war.<sup>195</sup> Additionally, like drug trafficking, environmental protection was not a subject of international concern at the time of the founding. Therefore, it is reasonable to conclude that this statute would be unconstitutional under this reading of the Define and Punish clause.

The proposed statute would have a much better chance of surviving judicial scrutiny under a more expansive reading of the Define and Punish clause. Under such a reading, the court would determine whether an offense is a violation of customary international law as it exists today.

One major criticism that is likely to be made on this ground is that the right to a clean environment is not a well-defined norm of international law. This claim would be based on the absence of a clear definition of the right to a clean environment. However, the fact that the right to a clean environment is not yet universally defined does not prevent Congress from defining it. According to the Define and Punish clause, Congress has the power to define an otherwise undefined but recognized norm of customary international law.

## VII. CRITICISM OF THE PROPOSED STATUTE

### A. ACT OF STATE DOCTRINE

Critics will undoubtedly assert that this note's proposed statute conflicts with the act of state doctrine. Indeed, this was one of the grounds under which the district court originally dismissed the environmental claim in *Sarei*.<sup>196</sup> The act of state doctrine is a federal common law doctrine that prevents United States courts from assessing the validity of the public acts of a foreign sovereign within its own territory.<sup>197</sup> Admittedly, it is foreseeable that the proposed statute could conflict with the environmental laws of another state; however, such a conflict is not inevitable. The court in *Sarei* was wrong to dismiss the case based on the act of state doctrine.

The Supreme Court, in *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.*, drew a sharp line defining what conduct falls outside of the jurisdiction of U.S. courts under the act of state doctrine. The case involved a civil suit under the Racketeer Influenced and Corrupt Organizations ("RICO") Act<sup>198</sup> and the Robinson-Patman Act,<sup>199</sup> in which a bidder for a contract with the Republic of Nigeria alleged that it lost its bid because of a bribe paid to government officials by the successful bidder.<sup>200</sup> The court decided whether the conduct at issue could be

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195. *Bellaizac-Hurtado*, 700 F.3d at 1254.

196. *See Sarei*, *supra* note 1.

197. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964).

198. *See* 18 U.S.C. § 1961 *et seq.* (2012).

199. *See* 15 U.S.C. § 13 *et seq.* (2012).

200. *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.*, 493 U.S. 400, 401-02 (1990).

challenged without having to assess the validity of an act by the government of Nigeria:

[W]hether the act of state doctrine bars a court in the United States from entertaining a cause of action that does not rest upon the asserted invalidity of an official act of a foreign sovereign, but that does require imputing to foreign officials an unlawful motivation . . . in the performance of such an official act.”<sup>201</sup>

The court pointed out that all parties agreed that Nigerian law prohibited bribes.<sup>202</sup> It also found that determining whether the act of state doctrine applies does not depend on whether the case or controversy will embarrass a foreign government.<sup>203</sup> Rather, it held that the act of state doctrine merely requires that domestic courts uphold the validity of the acts of foreign sovereigns.<sup>204</sup> The court accordingly declined to apply the act of state doctrine.<sup>205</sup>

Similarly, the *Sarei* court was not required to judge the validity of Papua New Guinea’s laws, but rather to determine whether the Rio Tinto mining company committed offenses against the people of Bougainville under the law of nations. Although the government of Papua New Guinea might have been embarrassed that Rio Tinto was able to carry out the abuses in the country, the legitimacy of the government’s acts, like the legitimacy of the acts of the Nigerian officials, was “simply not a question to be decided.”<sup>206</sup> The conduct at issue was that of Rio Tinto, not the conduct of the government of Papua New Guinea. Accordingly, the proposed statute will not displace the act of state doctrine as long as it does not explicitly conflict with a state’s own environmental laws. It will certainly approach the line established in *W.S. Kirkpatrick*,<sup>207</sup> but its application would be limited to human rights abuses perpetrated during extractive activities, rather than a regulation of the environment. If at any time the act of state doctrine is implicated, a court would be free to dismiss the case accordingly.<sup>208</sup>

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201. *Id.* at 408, *overruling* *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 358 (1990) (holding that antitrust action by plaintiff was barred because defendant’s acts were permitted by Costa Rican law, “[t]he very meaning of sovereignty is that the decree of the sovereign makes law.”).

202. *Id.* at 402.

203. *Id.* at 409.

204. *Id.*

205. *Id.* at 409-10.

206. *Id.* at 406.

207. *See id.*

208. This will likely preclude the statute from applying to state-run extraction operations since the actions of those corporations can be directly attributed to the state. *See Banco Nazionale de Cuba v. Sabbatino*, 376 U.S. 398, 439 (1964) (holding expropriation of sugar by a state-run bank—an instrument of the state—to be protected from judgment by a U.S. court under act of state doctrine).

## B. UNILATERAL APPROACH

One possible critique of the proposed statute is that a multilateral agreement would be more appropriate and more consistent with other international criminal enforcement regimes. Alan Neff has addressed this claim in “Not In Our Backyards, Either,” an article proposing a similar environmental statute with extraterritorial application.<sup>209</sup> His article points out that it takes many years for states to come to agreement and, due to diverging interests among high contracting parties, the language of agreements are generally vague and unenforceable. The author also points to “development of precedents and experience upon which other countries can draw, wide-ranging beneficial impacts in the case of certain kinds of unilateral environmental action, and the promotion of the development of relevant international environmental agreements.”<sup>210</sup>

## VIII. CONCLUSION

A statute permitting the exercise of universal criminal jurisdiction with respect to human rights abuses committed anywhere in the world over MNCs in the extractive sector is essential to bringing such actors to justice. To be consistent with international law, the reach of the proposed statute would need to be limited to human rights abuses beyond minor instances of pollution. A gross environmental violation would occur under the statute when a corporation causes a degraded environment that results in serious health consequences for a group of people or a disruption of their way of life.<sup>211</sup>

This note’s proposed statute would be enforceable against corporations because it would incorporate international norms into domestic legislation and address the actor causing the health consequences. To avoid being struck down under a restrictive reading of the Define and Punish clause, the statute would require that the defendant corporation be acting in foreign commerce. Consequently, a multinational extraction corporation acting in foreign commerce that degrades the environment to the point of causing serious health consequences for a specific group of people or a disruption of a people’s way of life would be found guilty under this statute. A statute criminalizing this activity would be sufficiently broad to hold MNCs accountable for human rights abuses. It would also be sufficiently narrow to fall within the limits of both the U.S. Constitution and international jurisdictional principles.

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209. Alan Neff, *Not in Their Backyards, Either: A Proposal for a Foreign Environmental Practices Act*, 17 *ECOLOGY L. Q.* 477, 479-83 (1990).

210. *Id.* (citing Richard Bilder, *The Role of Unilateral State Action in Preventing International Environmental Injury*, 14 *VAND. J. TRANSNAT’L L.* 51, 79-83 (1981)).

211. Lee, *supra* note 75, at 285.

## IX. APPENDIX

## A PROPOSED LAW: THE EXTRACTIVE INDUSTRIES ETHICAL PRACTICES ACT

Section I. Purpose of the Act. The purposes of this Act are to promote:

- (a) The right of all people to have a healthy and productive life in harmony with nature;
- (b) The ethical practice of mineral extraction by multinational corporations;
- (c) Fair and equitable relations between multinational corporations and the countries in which they operate;
- (d) The efficient, speedy, and just adjudication of disputes between parties to civil suits.

Section II. Definitions. For the purposes of this Act, the following terms have the definitions provided below:

- (a) Multinational Corporation: A corporation that has its facilities and other assets in at least one country other than its home country.
- (b) Multinational Extractive Operation: An operation whereby mineral resources are extracted from one country by a corporation whose principle place of business and headquarters are located outside of that country.
- (c) Mineral resource: A concentration or occurrence of natural, solid, inorganic, or fossilized organic material in or on the Earth's crust in such form or quantity, grade, or quality that it has reasonable prospects for economic extraction.

Section III. Persons subject to the Act: Persons subject to the Act shall include:

- (a) Multinational corporations that conduct multinational extractive operations yielding mineral resources that pass through the channels or instrumentalities of foreign commerce;
- (b) Multinational corporations whose extractive activities have a substantial effect on foreign commerce;
- (c) Any multinational corporation, which, in the process of conducting an extractive operation, commits an offense against the law of nations as, defined by customary international law and Section IV of this Act.

Section IV. Offenses. Offenses punishable under this Act include:

- (a) It shall be unlawful for any multinational corporation, in foreign commerce, while in control of a multinational extractive operation, to substantially contribute to a degraded environment with either:
  - (i) Serious health consequences for a specific group of people; or
  - (ii) A substantial disruption of a people's way of life.
- (b) A degraded environment, as described in Section IV(a) shall include:
  - (i) Substantial pollution of the land, air, or waterways upon which a group depends for basic human needs;
  - (ii) Substantial modification or disruption of a group's natural environment without previously obtaining that group's consent;

(iii) Any other activity consistent with Section IV(a).

Section V. Affirmative Defenses: A defendant may escape criminal liability under this Act if it can show that:

- (a) In the process of deciding the case before it, the court would be required to declare invalid an official act of a foreign sovereign;
- (b) Adjudicating the case would interfere with a national reconciliation process or any other judicial proceeding approved by the state where the offense took place;
- (c) The defendant undertook adequate measures to protect the plaintiff's right to enjoy a clean and protected environment by preparing and making public an environmental impact assessment and undertaking steps to ensure that the risks identified in the impact assessment and the measures used were proportionate to the risks they pose.

Section VI. Criminal Penalties for Violations of this Act. Any person subject to this Act who violates, attempts to violate, or conspires to violate section IV of this Act shall be placed under supervision of the court which entered the judgment of conviction for a period not longer than ten years.

Section VII. Civil Action to Prevent Violations of this Act. Section IV of this act shall provide a cause of action pursuant to 28 U.S.C.A. § 1350 (Alien Tort Statute).