FEDERAL STATUTES — ALIEN TORT STATUTE — D.C. CIRCUIT HOLDS CORPORATIONS NOT IMMUNE FROM ATS CLAIMS. — *Doe VIII v. Exxon Mobil Corp.*, Nos. 09-7125, 09-7127, 09-7134, 09-7135, 2011 WL 2652384 (D.C. Cir. July 8, 2011).

Before 1980, courts rarely heard cases involving the Alien Tort Statute[1] (ATS), which gives federal courts "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[2] Nearly 200 years after the statute's enactment, the Second Circuit revitalized it in *Filártiga v. Peña-Irala*,[3] and in 2004 the Supreme Court, in *Sosa v. Alvarez-Machain*,[4] established a standard for determining when tortious conduct is cognizable under the ATS.[5] A current circuit split has called into question whether corporations — perhaps the most appropriate targets of ATS litigation — can be sued under the ATS.[6] Recently, in *Doe VIII v. Exxon Mobil Corp.*,[7] the D.C. Circuit held that corporations are not immune from liability under the ATS.[8] This outcome represents the most reasonable application of the ATS's broad text to modern circumstances. In addition, by addressing corporate liability under the ATS as a question of domestic law, the court's approach promotes judicial restraint and accuracy in future decisions.

Exxon operated a natural gas facility in Indonesia's Aceh province from 2000 to 2001 and hired Indonesian soldiers to serve as security forces at the facility.[9] Exxon retained these soldiers despite allegedly knowing of the Indonesian military's previous abuse of civilians and

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[1] 28 U.S.C. § 1350 (2006).

[2] *Id.*

[3] 630 F.2d 876 (2d Cir. 1980). In *Filártiga*, the court held that "deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights." *Id.* at 878. Since 1980, courts have issued more than 170 opinions in cases involving the ATS. *See* Julian G. Ku, *The Curious Case of Corporate Liability Under the Alien Tort Statute: A Flawed System of Judicial Lawmaking*, 51 VA. J. INT'L L. 353, 357 (2011).

[4] 542 U.S. 692 (2004).

[5] This standard dictates that a claim should not be recognized unless it involves conduct that is viewed today as a violation of the law of nations with at least the same level of "definite content and acceptance among civilized nations" that characterized the short list of identifiable violations in 1789. *Id.* at 732.

[6] Before recent cases directly considered corporate liability under the ATS, *see infra* note 8, numerous suits involved corporations but did not explicitly raise the question of corporate liability in a controlling opinion. *See, e.g.*, Doe I v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002).

[7] Nos. 09-7125, 09-7127, 09-7134, 09-7135, 2011 WL 2652384 (D.C. Cir. July 8, 2011).

[8] The Seventh and Eleventh Circuits have also held that corporate liability is possible under the ATS. *See* Flomo v. Firestone Natural Rubber Co., 643 F.3d 1013 (7th Cir. 2011); Romero v. Drummond Co., 552 F.3d 1303 (11th Cir. 2008). The Second Circuit is the only circuit to have held that corporations are immune from liability. *See* Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2d Cir. 2010), *cert. granted*, No. 10-1491, 2011 WL 4905479 (U.S. Oct. 17, 2011).

[9] *Exxon*, 2011 WL 2652384, at *1.

the likelihood that the soldiers would violate the human rights of Aceh villagers if hired as security forces.[10] The soldiers allegedly committed various atrocities against the plaintiffs or their family members, including "genocide, extrajudicial killing, torture, crimes against humanity, sexual violence, and kidnaping."[11]

In 2001, eleven Aceh residents filed a complaint alleging that Exxon's security forces committed tortious acts for which Exxon was liable under the ATS and the Torture Victim Protection Act of 1991[12] (TVPA), and at common law.[13] In 2005, the district court dismissed the statutory claims since Exxon "did not act under color of law."[14] In 2009, the district court dismissed four additional villagers' common law tort claims for lack of standing.[15] The fifteen villagers appealed the dismissals. Exxon filed a cross-appeal, arguing for the first time that corporations are immune from liability under the ATS.[16]

The D.C. Circuit remanded the cases to the district court, reversing the dismissal of the ATS claims and holding that corporations are not immune from liability under the statute.[17] Writing for the two-judge majority, Judge Rogers[18] began her analysis by differentiating between "norms of conduct"[19] and "technical accoutrements to [a cause of] action."[20] In *Sosa*, the Supreme Court established the standard "to be applied where a norm relating to the *conduct* of an actor is at issue."[21] When a plaintiff's claims involve conduct internationally viewed as a violation of the law of nations, the ATS supplies federal jurisdiction. Corporate liability, on the other hand, "presents a conceptually different question"[22] from that analyzed in *Sosa* since it is a technical accoutrement to a cause of action rather than a form of conduct.[23] Accordingly, Judge Rogers held that while international law dictates whether jurisdiction is available for an ATS claim, "the law of the

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[10] *Id.*

[11] *Id.*

[12] Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 note (2006)).

[13] Doe I v. Exxon Mobil Corp., 393 F. Supp. 2d 20, 21 (D.D.C. 2005).

[14] *Id.* at 28.

[15] Doe VIII v. Exxon Mobil Corp., 658 F. Supp. 2d 131, 132, 135 (D.D.C. 2009).

[16] *Exxon*, 2011 WL 2652384, at *1.

[17] *Id.* The court also held that the ATS recognizes aiding and abetting liability and that appellants had standing to bring their state tort claims; the court dismissed appellants' TVPA claims and Exxon's justiciability objections. *Id.* These holdings are beyond the scope of this analysis.

[18] Judge Rogers was joined by Judge Tatel.

[19] *Exxon*, 2011 WL 2652384, at *21.

[20] *Id.* at *22 (alteration in original) (quoting Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 778 (D.C. Cir. 1984) (Edwards, J., concurring)) (internal quotation mark omitted).

[21] *Id.* at *21 (emphasis added).

[22] *Id.* at *22.

[23] *Id.*

United States and not the law of nations must provide the rule of decision in an ATS lawsuit," including the procedure to be applied.[24]

Next, Judge Rogers explained that the purpose of the ATS supports the conclusion that corporations are not immune from liability under the statute.[25] According to Judge Rogers, the Constitutional Convention was convened in part to address the challenge of enforcing the law of nations, since no mechanism to provide federal jurisdiction over alleged violations existed under the Articles of Confederation.[26] The Founders recognized the need to respond "when a single citizen abroad offended a foreign power by violating the law of nations."[27] Judge Rogers found that the historical context of the ATS "suggests no reason to conclude that the First Congress was supremely concerned with the risk that natural persons would cause the United States to be drawn into foreign entanglements, but was content to allow . . . corporations[] to do so."[28]

Judge Rogers then responded to Exxon's arguments for corporate immunity, which relied heavily on the Second Circuit's decision in *Kiobel v. Royal Dutch Petroleum Co.*[29] In holding that corporations were immune from liability under the ATS, the Second Circuit had relied on a careful parsing of footnote 20 in *Sosa*.[30] There, the Supreme Court had raised the question "whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual."[31] The Second Circuit had read this observation to mean that courts should "look[] to customary international law to determine *both* whether certain conduct leads to ATS liability *and* whether the scope of liability . . . extends to the defendant being sued."[32] According to Judge Rogers, in doing so, the Second Circuit "conflate[d] the

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[24] *Id.* at *23. "International law itself . . . does not require any particular reaction to violations of law . . . ." *Id.* at *22 (alterations in original) (quoting LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 245 (2d ed. 1996)).

[25] Regarding the text of the ATS, Judge Rogers noted that "the phrase 'any civil action' is inclusive and unrestricted." *Id.* at *23. "The text demonstrates that the ATS . . . did not exclude corporate defendants. Congress was focused not on . . . the defendant's identity but rather on the right that had been violated . . . ." *Id.* at *27 (quoting Brief of *Amici Curiae* Professors of Federal Jurisdiction and Legal History in Support of Plaintiffs-Appellants Seeking Petition for Rehearing En Banc at 6, Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2d Cir. 2010) (Nos. 06-4800-CV, 06-4876-CV)).

[26] *See id.* at *24–25.

[27] *Id.* at *26.

[28] *Id.* at *27. Judge Rogers also noted that the common law already recognized corporate liability in tort cases when the ATS was enacted. *Id.* at *28.

[29] 621 F.3d 111.

[30] *See id.* at 127 (citing Sosa v. Alvarez-Machain, 542 U.S. 692, 732 n.20 (2004)).

[31] *Sosa*, 542 U.S. at 732 n.20 (citing Kadic v. Karadzic, 70 F.3d 232, 239–41 (2d Cir. 1995); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 791–95 (D.C. Cir. 1984) (Edwards, J., concurring)).

[32] *Kiobel*, 621 F.3d at 128.

norms and the rules (the technical accoutrements) for any remedy found in federal common law."[33] She explained that the distinction between natural and juridical persons, if any, was never addressed in *Sosa*. Rather, footnote 20 referenced "[t]he distinction between private and state actors, . . . [which] was briefed before the Supreme Court, as opposed to an argument about corporate liability, which was not."[34] Thus, footnote 20 treated both individuals and corporations as private actors, to be distinguished from state actors, rather than from each other. Judge Rogers then noted that *Sosa* does not provide direct guidance "on which particular body of law is to provide answers to questions ancillary to the conduct underlying the [violation of a] norm"[35] and that the question "whether civil liability should be imposed for violations of [the] norms" of international law is left to domestic courts.[36]

Finally, Judge Rogers concluded that, even accepting Exxon's argument that international law is the proper domain in which to examine this issue, the law of nations recognizes corporate liability. She argued that the Allies applied customary international law during the Nuremberg trials in deciding to dissolve I.G. Farbenindustrie A.G., a corporation that provided significant support to the German war effort.[37] Judge Rogers also argued that the majority in *Kiobel* "overlooked general principles of international law"[38] and failed to acknowledge that "a general principle becomes international law by its widespread application domestically by civilized nations."[39]

Judge Kavanaugh dissented in part, arguing that customary international law does not recognize corporate liability and noting the Supreme Court's emphasis in *Sosa* on judicial restraint in ATS-related cases.[40] According to Judge Kavanaugh, *Sosa* directed courts to "look to customary international law not only for the substantive content of the tort but also for the categories of defendants who may be sued,"[41] making corporate liability under the ATS a question of international law. After reviewing various sources, Judge Kavanaugh found that customary international law does not recognize corporate liability.[42]

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[33] *Exxon*, 2011 WL 2652384, at *30.

[34] *Id.* (footnote omitted).

[35] *Id.* at *31.

[36] *Id.* (quoting *Kiobel*, 621 F.3d at 152 (Leval, J., concurring in the judgment)).

[37] *Id.* Judge Rogers also referred to the International Criminal Tribunal for the Former Yugoslavia, several treaties, and human rights advocates' views to support her position. *Id.* at *29.

[38] *Id.* at *32.

[39] *Id.* at *33. As the more developed field, domestic law often fills in the gaps of international law. *See id.* (citing J.L. BRIERLY, THE LAW OF NATIONS 62–63 (6th ed. 1963)).

[40] *Id.* at *48 (Kavanaugh, J., dissenting in part).

[41] *Id.* at *55 (citing Sosa v. Alvarez-Machain, 542 U.S. 692, 732 n.20 (2004)).

[42] *Id.* at *56. Judge Kavanaugh relied on the Nuremberg trials, subsequent international tribunals, and a U.N. Report to support his conclusion. *Id.* at *56–57.

The D.C. Circuit's decision reflects the ATS's purpose as applied to modern circumstances[43] since corporations play an important role in the realm of human rights and U.S. "soft power." In addition, the *Exxon* majority's approach limits judicial discretion while promoting accuracy in future decisions. Congress enacted the ATS at least partly to protect U.S. foreign policy by avoiding the potential for "any indiscreet member to embroil the Confederacy with foreign nations."[44] While U.S. foreign relations originally hinged mostly on diplomacy, today "soft power," or the maintenance of the country's image as perceived by not only government officials but also private individuals, plays an important role in foreign relations.[45] The ATS helps to protect the perception of the United States "as a purveyor of human rights."[46] Corporations, which inevitably affect international opinion of the United States,[47] have increased in size and number in foreign countries.[48] Accordingly, providing a forum under the ATS for holding corporations accountable enhances "soft power," an increasingly important asset.[49] Thus, corporate liability is consistent with the original policy rationale of the ATS as applied today.

Furthermore, the *Exxon* majority properly applied the broad text of the ATS to modern circumstances. Corporations may be the most appropriate defendants in ATS cases. In the context of multinational corporations, holding individual employees accountable for human rights violations is impractical and may not lead to significant changes in corporate behavior.[50] In addition, because of their dependence on

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[43] The decision also reflects the *Sosa* Court's limited but implicit approval of the modern line of ATS cases, which uses the statute as a tool for protecting human rights. *See* Beth Stephens, Sosa v. Alvarez-Machain*: "The Door Is Still Ajar" for Human Rights Litigation in U.S. Courts*, 70 BROOK. L. REV. 533, 555 (2005).

[44] *Exxon*, 2011 WL 2652384, at *24 (quoting THE FEDERALIST NO. 42, at 260 (James Madison) (Henry Cabot Lodge ed., 1888)); *see also* Laura Wishik, Recent Development, Hanoch Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984),* cert. denied*, 105 S. Ct. 1354 (1985)*, 60 WASH. L. REV. 697, 699 (1985) (describing the ATS as a law enacted to allow federal courts to address cases related to foreign affairs).

[45] *See generally* JOSEPH S. NYE, JR., SOFT POWER 127–47 (2004).

[46] HARRY AKOH, HOW A COUNTRY TREATS ITS CITIZENS NO LONGER EXCLUSIVE DOMESTIC CONCERN 216 (2009).

[47] *See* Joseph S. Nye, Jr., *The Information Revolution and the Paradox of American Power*, 97 AM. SOC'Y INT'L L. PROC. 67, 74 (2003) ("American corporations . . . represent global capitalism, which some see as anathema."); Crocker Snow, Jr., *The Privatization of U.S. Public Diplomacy*, FLETCHER F. WORLD AFF., Winter 2008, at 189, 196–97.

[48] Chris Jochnick & Nina Rabaeus, *Business and Human Rights Revitalized: A New UN Framework Meets Texaco in the Amazon*, 33 SUFFOLK TRANSNAT'L L. REV. 413, 414 (2010).

[49] *See* Lorelle Londis, Comment, *The Corporate Face of the Alien Tort Claims Act: How an Old Statute Mandates a New Understanding of Global Interdependence*, 57 ME. L. REV. 141, 150 (2005).

[50] *See In re* "Agent Orange" Prod. Liab. Litig., 373 F. Supp. 2d 7, 58 (E.D.N.Y. 2005) ("[I]ndividuals who acted on behalf of the corporation and for its profit are often gone . . . before they or the corporation can be brought to justice."); Brent Fisse & John Braithwaite, *The Alloca-*

foreign corporations, many countries fail to enforce human rights.[51] Consequently, excluding corporate defendants would severely curtail effective application of the ATS in the modern era, a result that would contradict the Supreme Court's decision in *Sosa* to leave the door open to compelling ATS claims[52] without imposing any limitation on the types of defendants, corporate or otherwise.[53]

The *Exxon* majority's decision to apply domestic law to the corporate liability question not only permits a modern application of the ATS but also promotes judicial restraint and accuracy. This approach limits judges' discretion: instead of attempting to decipher international norms with respect to the "technical accoutrements" of a cause of action, judges need only apply domestic law to these issues.[54] This task often is simpler because, generally speaking, domestic law is more developed than international law.[55] In particular, the concept of corporate liability is well established under domestic law,[56] but its status under international law is much less certain.[57] Accordingly, relying on international law broadens the scope of judges' discretion to "find"

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tion of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability, 11 SYDNEY L. REV. 468, 489 (1988) ("[P]revention of offences committed on behalf of a collectivity requires . . . collective punishment costs sufficient to influence a law-abiding collective choice.").

[51] *See* Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 461 (2001) ("Corporations are powerful global actors that some states lack the resources or will to control."); Gregory T. Euteneier, Comment, *Towards a Corporate "Law of Nations": Multinational Enterprises' Contributions to Customary International Law*, 82 TUL. L. REV. 757, 765 (2007) ("With [corporations'] increase in global economic power comes a corresponding increase in the potential for human rights abuses, particularly in developing states where [a multinational enterprise] may wield [considerable] power . . . .").

[52] *See* Stephens, *supra* note 43, at 555.

[53] *See Exxon*, 2011 WL 2652384, at *30.

[54] The court's decision to apply domestic law after using international law to determine the conduct over which it had jurisdiction can be analogized to the Supreme Court's approach in one of its most important cases. In *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), the Court held that when a federal court has acquired jurisdiction over a case through diversity, it must then apply the law of the state court in which it sits. *Id.* at 78. Thus, precedent exists to support the idea that while the location of an alleged act controls the issue of substantive law, the adjudicating court applies its own procedural rules to the claim at hand.

[55] *See* BRIERLY, *supra* note 39, at 62–63; *see also* LOUIS HENKIN, INTERNATIONAL LAW 29 (1995) (describing customary international law's "soft, indeterminate character").

[56] *See* Andrei Mamolea, *The Future of Corporate Aiding and Abetting Liability Under the Alien Tort Statute: A Roadmap*, 51 SANTA CLARA L. REV. 79, 89 (2011) (citing Cook County v. United States *ex rel.* Chandler, 538 U.S. 119, 125–26 (2003); MODEL PENAL CODE § 2.07 (2001)).

[57] *Compare* Flomo v. Firestone Natural Rubber Co., 643 F.3d 1013, 1017–21 (7th Cir. 2011) (holding that corporations can be held liable under international law as applied in the ATS context), *and* BETH STEPHENS ET AL., INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS 310 (2d ed. 2008) (arguing that international law recognizes corporate liability), *with* Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 131–45 (2d Cir. 2010) (holding that corporations cannot be held liable under the ATS), *and* Brief of *Amicus Curiae* Professor Christopher Greenwood, CMG, QC in Support of Defendant-Appellee at 10–19, Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244 (2d. Cir. 2009) (No. 07-0016) (arguing that corporations are not subjects of international law).

(and hence create) international norms[58] since judges may selectively choose sources that favor a desired result.[59] Although reliance on domestic law offers its own avenues of discretion, it avoids a less precise (and thus more subjective) foray into international law, not only because domestic law is better developed, but also because it is supported by extensive precedent. By reducing the scope of discretion to an analysis of domestic law, the *Exxon* court's restrained approach protects the democratic principle that judges must refrain from making decisions based on subjective whims.[60]

The court's decision to recognize corporate liability may appear to contrast with the cautious approach to ATS cases espoused by the Supreme Court in *Sosa*.[61] Yet well-established modes of interpretation disfavor providing judges with discretion not only to broaden the scope of a narrowly written statute but also to narrow the scope of broad statutory language.[62] The *Exxon* court did well to avoid reading additional requirements into the statute, particularly given the sparse and open-ended nature of its text. Thus, Judge Rogers rightly noted that concerns about expanding the scope of the ATS by allowing for corporate liability are "better addressed to Congress."[63] In addition, given the absence of "definite content and acceptance"[64] regarding corporate liability's status under international law, the court's approach promotes accuracy in future decisions. By encouraging courts to analyze "technical accoutrements" under domestic law, the *Exxon*

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[58] *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 750 (2004) (Scalia, J., concurring in part and concurring in the judgment) (criticizing the majority's approval of decisions by "unelected federal judges" that usurp the legislative branch's "power by converting what they regard as norms of international law into American law"); Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 855 (1997) ("Given . . . [its] 'soft, indeterminate character,' it makes no sense to say that judges 'discover' an objectively identifiable [customary international law]." (footnote omitted) (quoting HENKIN, *supra* note 55, at 29)).

[59] *See* Robert Knowles, *A Realist Defense of the Alien Tort Statute*, 88 WASH. U. L. REV. 1117, 1149 (2011) ("Indeterminacy in [customary international law] empowers the U.S. judges interpreting that law . . . ."); Nelson P. Miller et al., *Federal Courts Enforcing Customary International Law: The Salutary Effect of* Sosa v. Alvarez-Machain *on the Institutional Legitimacy of the Judiciary*, 3 REGENT J. INT'L L. 1, 23 (2005) ("Selection of foreign sources appears to be non-empirical and even arbitrary except in relationship to the desired outcome.").

[60] *See* STEPHEN BREYER, MAKING OUR DEMOCRACY WORK 80 (2010) ("How could a legal system work if each judge decided even a few important cases on the basis of personal views about what is 'good' or 'bad'? . . . Why would a public, aware of that kind of decision making, accept the views of those unelected judges as legitimate?").

[61] *See Exxon*, 2011 WL 2652384, at *60 (Kavanaugh, J., dissenting in part).

[62] *See, e.g.*, Smith v. United States, 508 U.S. 223, 229 (1993) ("Had Congress intended [a] narrow construction . . . it could have so indicated. It did not, and we decline to introduce that additional requirement on our own.").

[63] *Exxon*, 2011 WL 2652384, at *35.

[64] Sosa v. Alvarez-Machain, 542 U.S. 692, 732 (2004).

majority replaced ambiguity with a clear standard[65] that provides better guidance and also requires fewer resources.[66]

The court's decision to look to domestic law with respect to corporate liability also avoids concerns about judicial restraint and accuracy that would likely arise in future cases involving other "technical accoutrements." Examples of "technical accoutrements" that might implicate ambiguities in international law include the use of market share liability, comparative fault, or contributory negligence for apportioning blame; the viability of class action suits; and "matters like *res judicata*, burdens of proof, and *respondeat superior*."[67] In light of the underdeveloped nature of international law and significant variation across domestic legal systems,[68] asking plaintiffs to prove the existence of an international norm for the technical elements to a cause of action would often be equivalent to preordaining the denial of certain claims. Given domestic judges' typically limited knowledge of international law, to require its application would likely result in inconsistent results across courts[69] and entail the expenditure of additional judicial resources without guaranteeing an increase in the accuracy of judges' findings.[70]

The D.C. Circuit's decision in *Exxon* maintains the vitality of the ATS, and Congress retains the power to clarify the statute. The *Exxon* majority's approach promotes order in the realm of U.S. foreign relations by reflecting a modern interpretation of the ATS's original purpose, thus helping to protect the country's image abroad. The decision also places limits on judges' use of discretion and encourages accuracy in future decisions by directing courts to look to domestic rather than international law. On balance, the *Exxon* decision will benefit U.S. interests, enhance the protection of human rights, and maintain the proper role of the courts.

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[65] This "clear standard" also "allow[s] corporations to assess the risks of foreign investment more accurately." Hannah R. Bornstein, Note, *The Alien Tort Claims Act in 2007: Resolving the Delicate Balance Between Judicial and Legislative Authority*, 82 IND. L.J. 1077, 1080 (2007).

[66] For a similar argument discouraging a judicial practice (specifically, the use of legislative history) because of its high costs and lack of proven benefits, see ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY 192–95 (2006).

[67] *Exxon*, 2011 WL 2652384, at *23.

[68] *Id.* at *22 ("[G]iven the existing array of legal systems within the world, a consensus would be virtually impossible to reach — particularly on the technical accoutrements to an action . . . ." (quoting Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 778 (D.C. Cir. 1984) (Edwards, J., concurring))).

[69] Liability for aiding and abetting provides an illustrative example of the inconsistencies among courts attempting to discern international norms. *Compare* Cabello v. Fernandez-Larios, 402 F.3d 1148, 1157–58 (11th Cir. 2005) (holding that international law recognizes liability for aiding and abetting), *and* Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 320–24 (S.D.N.Y. 2003) (same), *with In re* South African Apartheid Litig., 346 F. Supp. 2d 538, 549–50 (S.D.N.Y. 2004) (finding that international law does not recognize such liability).

[70] *Cf.* VERMEULE, *supra* note 66, at 192–95.