EXXON SHRUGGED:[1] HOW A 200 YEAR OLD STATUTE TORMENTS THE TITANS

I. INTRODUCTION

In 2001, a group of Indonesian villagers filed suit against Exxon Mobil Corporation (ExxonMobil) in federal court alleging genocide, extrajudicial killing, torture, crimes against humanity, sexual violence, and kidnapping.[2] According to the villagers, ExxonMobil's private security forces committed international human rights abuses while acting under the direct control of ExxonMobil.[3] *Doe VIII v. Exxon Mobil Corp. (Exxon)* is part of a recent group of decisions that examined the extent of corporate liability under the Alien Tort Statute (ATS).[4]

In *Exxon*, the D.C. Circuit Court held that, under the ATS, ExxonMobil may be held liable for tort violations of customary international law alleged by

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1. Discussions related to both human rights concerns and corporate responsibility inevitably result in highly emotional or politically polarized exchanges. While the author strives to undertake an objective legal analysis, the reality is that there is a great deal of money at stake, and it is the "titans" of the private sector who bear the lion's share of the litigation. In response to these pressures, some have advocated corporate immunity.

> '[I]f you saw Atlas, the giant who holds the world on his shoulders, if you saw that he stood, blood running down his chest, his knees buckling, his arms trembling but still trying to hold the world aloft with the last of his strength, and the greater his effort the heavier the world bore down upon his shoulders - What would you tell him?' 'I. . .don't know. What. . .could he do? What would you tell him?' 'To shrug.'

AYN RAND, ATLAS SHRUGGED 422 (Signet 1996).

2. DOE VIII v. Exxon Mobil Corp. (*Exxon*), 654 F.3d 11, 16 (D.C. Cir. 2011).

3. *Id.*

4. 28 U.S.C. §1350 (2006).

Indonesian villagers.[5] The divided panel rejected corporate immunity[6] and created a split in the circuits. The court in *Exxon* strongly criticized the Second Circuit's opinion in *Kiobel v. Royal Dutch Petroleum Co.*,[7] which declared corporations immune from ATS tort liability.[8] Three days after *Exxon*, the Seventh Circuit, in *Flomo v. Firestone Natural Rubber Co.*, joined *Exxon* in rejecting corporate immunity.[9] Since then the Fourth and Ninth Circuits have addressed the issue, deepening and complicating the circuit split.[10] The Supreme Court has granted certiorari to *Kiobel* and will consider the issue of corporate liability under the ATS.[11] Ultimately, the Supreme Court should adopt the D.C. Circuit's reasoning in *Exxon* extending liability under the ATS to corporate actors.[12]

II. BACKGROUND

A. Natural Gas Development, Civil War, and the Ensuing Litigation

In 1971, Mobil Oil Corporation found natural gas in the Aceh province of Indonesia.[13] By 1978, it began exporting liquefied natural gas (LNG) from the large Arun field to Japan.[14] The field quickly began prolific production,[15] and by 2001, Indonesia had become the world's largest exporter of LNG.[16] Notwithstanding that success, existing turmoil in the region only escalated with increased production.[17] Preceding significant LNG production, the Aceh region of Indonesia was embroiled in decades of bitter civil war.[18] The wealth of the

5. *Exxon*, 654 F.3d at 15.

6. *Id.* ("[A]iding and abetting liability is well established under the ATS. . . . [N]either the text, history, nor purpose of the ATS supports corporate immunity for torts based on heinous conduct allegedly committed by its agents in violation of the law of nations.").

7. Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2d Cir. 2010), *cert. granted*, 132 S. Ct. 472 (2011).

8. *Exxon*, 654 F.3d at 50.

9. Flomo v. Firestone Natural Rubber Co., 643 F.3d 1013, 1021 (7th Cir. 2011).

10. Sarei v. Rio Tinto, PLC (*Rio Tinto*), 671 F.3d 736, 765-66 (9th Cir. 2011), *petition for cert. filed*; Aziz v. Alcolac, Inc., 658 F.3d 388, 398 (4th Cir. 2011) (finding corporate liability but limiting it based on mens rea requirements).

11. *Kiobel*, 132 S. Ct. 472. Shortly after hearing oral arguments in February of 2012, the Court ordered supplemental briefing on the issue of extraterritoriality and "restor[ation] to [the] calendar for reargument." Kiobel v. Royal Dutch Petroleum Co., 132 S. Ct. 1738 (2012). The Supreme Court heard reargument on October 1, 2012.

12. The D.C. Circuit addressed several other issues in *Exxon* that may play a critical role in future litigation; however, this comment will focus solely on the issue of corporate liability under the ATS.

13. Wayne Arnold, *Exxon Mobil, in Fear, Exits Indonesian Gas Fields*, N.Y. TIMES (Mar. 24, 2001), http://www.nytimes.com/2001/03/24/business/exxon-mobil-in-fear-exits-indonesian-gas-fields.html?pagewanted=all&src=pm. Subsequently, Mobil merged with Exxon in 1999 to form ExxonMobil Corporation (ExxonMobil). *Id.*

14. EXXON MOBIL, EXXONMOBIL IN INDONESIA 4 (2010), *available at* http://www.exxonmobil.com/Indonesia-English/PA/Files/pub_cp_052010_en.pdf.

15. *Id.* at 6. ("At its peak, the Arun Field produced about 3.4 billion cubic feet of gas per day (1994) and about 130,000 barrels of condensate per day (1989).").

16. Arnold, *supra* note 13.

17. *Id.*

18. Answering Brief of Defendants-Appellees/Cross-Appellants at 4, DOE VIII v. Exxon Mobil Corp., 654 F.3d 11 (D.C. Cir. 2011) (No. 09-7125) [hereinafter Exxon Answering Brief].

Arun field made it a valuable asset contested between warring factions within Indonesia.[19] Despite efforts to maintain stability, escalating violence in March of 2001 forced ExxonMobil to shut down its natural gas operations in Aceh.[20]

During those tensions, ExxonMobil hired members of the Indonesian military to act as private security personnel to protect its natural gas facilities.[21] Allegedly, ExxonMobil knew these individuals were engaging in a campaign of systematic genocide against the Aceh people and that performance under the security contract would likely continue those abuses.[22] The private commandos reportedly committed numerous human rights violations with the support of ExxonMobil.[23]

In response, angry Aceh villagers filed suit against ExxonMobil and several of its subsidiary companies in June of 2001.[24] Subsequently, several more groups of villagers filed complaints against ExxonMobil making similar claims.[25] Initially, the district court dismissed the statutory claims, ruling that the ATS did not recognize liability for aiding and abetting or for sexual violence.[26] As the litigation against ExxonMobil grew over time, the district court dismissed the claims in a piece-meal fashion.

B. The Alien Tort Statute

As part of the Judiciary Act of 1789, the first Congress created the ATS to give non-citizens a narrow path to civil remedy in the new federal courts.[27] Relatively unaltered since its creation,[28] the statute in its entirety succinctly grants: "The district courts shall have original jurisdiction of any civil action by an alien for tort only, committed in violation of the law of nations or a treaty of the United States."[29]

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19. *Id.* at 6.

20. Arnold, *supra* note 13.

21. DOE VIII v. Exxon Mobil Corp., 654 F.3d 11, 15-16 (D.C. Cir. 2011). There is some dispute as to the structure of the relationship between ExxonMobil and the security forces. Exxon Answering Brief, *supra* note 18, at 6-7. However, the district court found evidence that ExxonMobil maintained significant control over the forces. Reply Brief of Plaintiffs-Appellants-Cross-Appellees at 2-3, DOE VIII v. Exxon Mobil Corp., 654 F.3d 11 (D.C. Cir. 2011) (No. 09-7125). The factual and legal examination of this relationship is beyond the scope of this comment.

22. *Exxon*, 654 F.3d at 15-16.

23. Neela Banerjee, *Lawsuit Says Exxon Aided Rights Abuses*, N.Y. TIMES (June 21, 2001), http://www.nytimes.com/2001/06/21/business/lawsuit-says-exxon-aided-rights-abuses.html ("The suit contends, for example, that Exxon Mobil provided barracks where the military tortured detainees and lent heavy equipment like excavators that, the suit says, were used to dig mass graves.").

24. *Id.* In addition to allegations of extrajudicial killings, the complaints claim that, "as part of a systematic campaign of extermination of the people of Aceh by defendants' Indonesian security forces, the plaintiffs-appellants were beaten, burned, shocked with cattle prods, kicked and subjected to other forms of brutality and cruelty amounting to torture." *Exxon*, 654 F.3d at 16.

25. *Exxon*, 654 F.3d at 15.

26. *Id.* at 16. Further, the district court barred the adjudication of other claims based on prudential standing and color-of-law concerns. *Id.* at 16-17, 39. These issues were subsequently addressed by the D.C. Circuit court on appeal in *Exxon* but are beyond the limited scope of this paper.

27. Sosa v. Alvarez-Machain, 542 U.S. 692, 712 (2004).

28. *Id.* at 713 n.10.

29. 28 U.S.C. § 1350 (2006). The ATS extends this right of action exclusively to "aliens" or non-citizens; United States citizens must find other grounds to bring actions based on violations of international law

1. The Law of Nations

The ATS invokes the authority of the law of nations, a source of law unfamiliar to many modern readers. Drawing largely from natural law,[30] the operative jurisprudential model at the time of ATS enactment was strikingly different than our Post-*Erie* notions.[31] Underlying the theory of natural law is the presumption of an objective moral order discoverable through reason.[32] Perhaps because of the shift away from natural law, or possibly due to unfamiliarity with the term, modern courts have consistently chosen to use "customary international law" as a synonym for "law of nations."[33]

Unfortunately, despite being a more modern concept, "customary international law" is nearly as elusive as previous paradigms. Lacking a single governing rule for determining the content of customary international law, the most common formulation requires (1) a consistent state practice that (2) adheres to a norm out of a sense of legal obligation.[34] Nonetheless, despite attempts at clarification, this exchange of archaic for more current terminology did little to simplify the application of the statute.[35]

2. Renaissance of ATS Litigation

The statute remained virtually ignored until its revival in 1980 in *Filartiga v. Pena-Irala* where the Second Circuit upheld jurisdiction under the ATS for the alleged torture of Paraguayan citizens.[36] *Filartiga* recognized that the ATS provides federal jurisdiction over tort claims brought by aliens for violations of

in United States courts. *See, e.g.*, Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 Note (2006) (supplementing the ATS and extending a civil remedy to United States citizens tortured abroad).

30. Theories of natural law fill countless volumes attributable to some of the great legal minds in history. Mercifully, in this comment, the author refrains from forcing the reader to peer over the edge of this abyss.

31. *Sosa*, 542 U.S. at 694 (explaining that before *Erie*, "[w]hen [the ATS] was enacted, the accepted conception was that the common law was found or discovered, but now it is understood, in most cases where a court is asked to state or formulate a common law principle in a new context, as made or created"). See discussion *infra* note 32.

32. ALFRED P. RUBIN, ETHICS AND AUTHORITY IN INTERNATIONAL LAW 48-49 (James Crawford & David Johnston, eds. 1997). When the ATS was written and continuing thirty years into the next century, the "Law of Nations" by Emerich Vattel was the most widely read and cited authority regarding international law. *Id.* at 45. Vattel did not propose revolutionary ideas; rather, similar thoughts from contemporaries such as Christian Wolff, Jean Jacques Burlamaqui, and Sir William Blackstone were also widely read and popularly quoted by American founding fathers. *Id.* at 43, 48, 65. Ironically, the concept of "discovering" new law through reason that was embraced by the "original" framers arguably stands in contrast to modern "originalists" perspectives. *See, e.g., Sosa*, 542 U.S. at 740-41 (Scalia, J., concurring in part and concurring in the judgment). However, as noted previously, discussions of natural law philosophies are beyond the scope of this comment.

33. Flores v. S. Peru Copper Corp., 414 F.3d 233, 237 n. 2 (2d Cir. 2003).

34. STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 18 (2d ed. 2001).

35. *Sosa*, 542 U.S. at 732, 737 (linking customary international law to "the historical paradigms familiar when [the ATS] was enacted" when analyzing whether alleged conduct violated norms).

36. *See generally* Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980). The Supreme Court subsequently recognized *Filartiga* as "the birth of the modern line of [ATS] cases." *Sosa*, 542 U.S. at 724-25.

customary international law.[37] The central issue addressed in *Filartiga* was whether the alleged conduct violated the established norms of international law.[38] *Filartiga* looked to works of scholars, usage and practice of nations, international conventions, and judicial decisions[39] to establish the evolving norms of customary international law.[40] In the court's assessment, the allegations of torture in *Filartiga* clearly violated universally recognized basic human rights.[41] Future cases would not be so clear.

As litigation under the umbrella of the ATS increased, the complexity of applying the statute became more apparent.[42] These suits began pursuing not only individuals but also corporate actors. By 2001, human rights litigation brought under the ATS often targeted transnational corporations including Shell, Chevron, Unocal, Coca-Cola, and ExxonMobil.[43] With stakes higher than ever, courts struggled with the relatively undeveloped ATS jurisprudence coupled with uncertainty regarding how a court should define customary international law.[44] Despite seemingly simple text and substantial scholarly attention, the development of the ATS through litigation following *Filartiga* resulted in more uncertainty.[45]

3. *Sosa*: The Supreme Court's Approach to the ATS

The first full examination of the statute by the Supreme Court occurred more than 200 years after the statute's enactment,[46] and *Sosa v. Alvarez-Machain*[47] did little to clarify the application of the ATS. In *Sosa* the Court struggled with radically different interpretations of the statute.[48] Ultimately

37. Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 116 (2d Cir. 2010) (explaining that "the statute was given new life, when our Court first recognized in *Filartiga v. Pena-Irala* that the ATS provides jurisdiction over (1) tort actions, (2) brought by aliens (only), (3) for violations of the law of nations").

38. *Filartiga*, 630 F.2d at 880. *Filartiga* was brought by two citizens of the Republic of Paraguay against a former Paraguayan police inspector. *Id.* at 878 ("The Filartigas claim that [their son] was tortured and killed in retaliation for his father's political activities and beliefs.").

39. *Id.* at 880 ("The law of nations 'may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law.'" (quoting United States v. Smith, 18 U.S. (5 Wheat.) 153, 160-61, 5 L. Ed. 57 (1820))).

40. *Id.* at 881 (explaining that to determine "the general assent of civilized nations . . . it is clear that courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today").

41. *Id.* at 890 ("[T]he international community has come to recognize the common danger posed by the flagrant disregard of basic human rights . . . . Indeed, for purposes of civil liability, the torturer has become like the pirate and slave trader before him hostis humani generis, an enemy of all mankind.").

42. *Kiobel*, 621 F.3d at 116.

43. Neela Banerjee, *Lawsuit Says Exxon Aided Rights Abuses*, N.Y. TIMES (June 21, 2001), http://www.nytimes.com/2001/06/21/business/lawsuit-says-exxon-aided-rights-abuses.html.

44. *Kiobel*, 621 F.3d at 117.

45. Sosa v. Alvarez-Machain, 542 U.S. 692, 718-19 (2004) (explaining that "a consensus understanding of what Congress intended has proven elusive").

46. Aziz v. Alcolac, Inc., 658 F.3d 388, 394-95 (4th Cir. 2011).

47. *Sosa*, 542 U.S. 692.

48. *Sosa,* 542 U.S. at 713. The respondent in *Sosa* argued for an interpretation of the ATS giving aliens a cause of action under international law, whereas the petitioner viewed the ATS as giving the courts only "cognizance" without any power to "mold substantive law." *Id.*

characterizing the statute as a jurisdictional grant to aliens,[49] the Court also anticipated that the statute would require continued judicial participation in the development of the underlying common law causes of action.[50] Specifically, because the Court viewed the jurisdictional grant as enabling causes of action based on evolving customary international law, courts must continue to develop a common law interpreting international norms.[51]

This dynamic view is necessary because of the somewhat unique structure of the ATS. More than merely opening the doors to federal courts, the statute obtains efficacy through its incorporation of international law.[52] However, even the most cursory examination of international law reveals the murky waters of uncertainty surrounding customary norms.[53] *Sosa* offers little clear guidance beyond admonishing "that federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when [the ATS] was enacted."[54]

Due to the complexity of international norms coupled with the potential for multibillion-dollar liabilities, many ATS claims settle before trial.[55] As a result, appellate review is uncommon and "there remain a number of unresolved issues lurking in our ATS jurisprudence."[56]

III. THE D.C. CIRCUIT'S HOLDING IN *EXXON*

After years of complicated discovery and procedural posturing, the *Exxon* cases were combined, and the core issues common to many of the claims were argued before the D.C. Circuit Court of Appeals in January of 2011.[57] The plaintiff-appellants challenged the dismissals of the actions by the district court, and ExxonMobil filed a cross-appeal claiming corporate immunity under the

49. *Aziz*, 658 F.3d at 395.

50. *Sosa*, 542 U.S. at 724. "Erie did not in terms bar any judicial recognition of new substantive rules . . . . For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations." *Id.* at 729.

51. *Id.* at 730 ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination." (quoting The Paquete Habana, 175 U.S. 677, 700 (1900))).

52. *Sosa*, 542 U.S. at 724-25.

53. Flores v. S. Peru Copper Corp., 414 F.3d 233, 247-48 (2d Cir. 2003) ("All of these characteristics give the body of customary international law a soft, indeterminate character that is subject to creative interpretation."); s*ee generally Sosa*, 542 U.S. at 734-38; *Paquete Habana*, 175 U.S. at 686-712; Flomo v. Firestone Natural Rubber Co., 643 F.3d 1013, 1016 (7th Cir. 2011); and Filartiga v. Pena-Irala, 630 F.2d 876, 880-85 (2d Cir. 1980).

54. *Sosa*, 542 U.S. at 732.

55. Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 116 (2d Cir. 2010).

56. *Id.* at 116-17.

57. A cursory review of the voluminous docket sheets provides an insightful glimpse into the complexity of the litigation. *See, e.g.*, Docket Sheet, John Doe v. Exxon Mobil Corp., 654 F.3d 11 (D.C. Cir. 2011) (No. 09-7135) (D.C. Cir. Nov. 6, 2009); Docket Sheet, John Doe VIII v. Exxon Mobil Corp., 654 F.3d 11 (D.C. Cir. 2011) (No. 09-7134) (D.C. Cir. Nov. 4, 2009); Docket Sheet, John Doe v. Exxon Mobil Corp., 654 F.3d 11 (D.C. Cir. 2011) (No. 09-7127) (D.C. Cir. Oct. 29, 2009); Docket Sheet, John Doe VII v. Exxon Mobil Corp., 654 F.3d 11 (D.C. Cir. 2011) (No. 09-7125) (D.C. Cir. Oct. 29, 2009); Docket Sheet, DOE VIII v. Exxon Mobil Corp., 654 F.3d 11 (D.C. Cir. 2011) (No. 1:07cv01022) (D.C. Cir. June 6, 2007).

ATS.[58] In a lengthy opinion, the D.C. Circuit reversed the district court's dismissal of the ATS claims.[59]

After a historical examination of the ATS and consideration of several counter arguments,[60] the court rejected ExxonMobil's arguments for corporate immunity under the ATS. Even though the district court did not address the issue of corporate liability, ExxonMobil raised the issue on appeal, and the appellate court agreed to consider the issue because the appellants responded to the issue on the merits in their reply brief.[61] In accepting the question, the court exercised its discretion to consider the issue because of "'uncertainty in the state of the law'" and the "'novel, important, and recurring question of federal law'" presented by the issue of corporate immunity under the ATS.[62] The D.C. Circuit explored several main arguments in finding corporate liability under the ATS.

First, the court pointed out that corporate liability is a fundamentally different question than the conduct-based norms *Sosa* addressed.[63] The Supreme Court in *Sosa* set forth the standard for determining causes of action based on international norms, but corporate liability, according to the court in *Exxon*, is a question about the right of action.[64] According to the court, international law does not provide a right of action against anyone.[65] Rather, Congress made a right of action available through the ATS's grant of federal jurisdiction.[66] So for the purposes of determining who may be sued, federal common law governs.

Second, because of the short text and lack of recorded legislative history,[67] the court made a lengthy examination into the history and purpose of the ATS. Implemented by the First Congress in response to several international disputes arising from the tortious conduct of Americans against foreigners, the purpose of the ATS was to provide a remedy to aliens for such torts.[68] The court asserted that the First Congress recognized the gravity of such torts and the likelihood that, without a means for redress, violations of the law of nations could lead to international disgrace or even war.[69] This history and purpose, according to the court, "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 formal legal associations of individuals, i.e., corporations, to do so."[70]

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58. DOE VIII v. Exxon Mobil Corp., 654 F.3d 11, 15 (D.C. Cir. 2011).

59. *Id.* at 17, 57, 71. The other holdings of the court are beyond the scope of this comment.

60. *Id.* at 18-29.

61. *Id.* at 39 (including specifically, the "amicus briefs on corporate liability under the ATS that were lodged with the Second Circuit in *Kiobel*" and now before the Supreme Court).

62. *Id.* at 40 (quoting Roosevelt v. E.I. Du Pont de Nemours & Co., 958 F.2d 416, 419 n.5 (D.C. Cir. 1992)).

63. *Id.* at 41.

64. *Id.* at 41-42.

65. *Id.* at 42 (proclaiming that "[t]here is no right to sue under the law of nations; no right to sue natural persons, juridical entities, or states").

66. *Id.*

67. *Id.* at 43.

68. *Id.* at 43-45.

69. *Id.* at 46.

70. *Id.* at 47.

Third, contemporaneous legal principles support corporate liability. Citing numerous state and federal Supreme Court cases, the court in *Exxon* explained that at the time of the ATS's enactment, the concept of corporate tort liability would not be surprising or unforeseen by Congress.[71] The court held that the law regarding corporate liability was the same in 1789 when the ATS was enacted as it is today.[72]

Fourth, the court looked to customary international law and found no support for corporate immunity.[73] Much of the court's inquiry focused on critiquing and criticizing the position taken by ExxonMobil and the majority opinion in *Kiobel* that international law must actively extend liability to a specific type of defendant before there can be liability under the ATS.[74] Further, according to the court in *Exxon*, much of *Kiobel's* erroneous conclusion relies on a patent misreading of a footnote from *Sosa*.[75] These faults aside, the court in *Exxon* then explained that even if it acquiesced to *Kiobel's* framework and looked to international law to determine the rules for any remedy, corporate responsibility is recognized by customary international law.[76]

Finally, the court rejected the other arguments for corporate immunity proposed by ExxonMobil. Specifically, the court distinguished ATS actions from actions brought under *Bivens v. Six Unknown Federal Narcotics Agents*,[77] which refuse to recognize corporate liability.[78] The court explained that the ATS provides a statutory basis for a right of action as opposed to the unique

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71. *Id.* at 47-48. The court cited Justice Story's explanation "that an 'aggregate corporation, at common law, is a collection of individuals, united into one collective body, . . . possess[ing] the capacity of suing and being sued . . . as distinctly as if it were a real personage'" and highlights the Court's assertion that corporate liability is not unique to the United States at the time, but "a great variety of these corporations exist, in every country governed by the common law." *Id.* at 48 (quoting Trustees of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 667-68, (1819)).

72. *Id.* at 48 ("[C]orporations, like individuals, are liable for their torts.").

73. *Id.* at 48-49.

74. *Id.* at 50-51. The court highlighted the inconsistency of *Kiobel's* understanding of international law and repeatedly quoted the concurring opinion of Judge Leval from *Kiobel*:

> If the absence of a universally accepted rule for the award of civil damages against corporations means that U.S. courts may not award damages against a corporation, then the same absence of a universally accepted rule for the award of civil damages against natural persons must mean that U.S. courts may not award damages against a natural person.

Id. at 55 (quoting Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 152-53 (2d Cir. 2010) (Leval, J., concurring only in the judgment)).

75. *Id.* at 50-51, 54-55 (citing Sosa v. Alvarez-Machain, 542 U.S. 692, n. 20 (2004)). Specifically, footnote 20 highlighted two cases that raised the question "whether certain forms of conduct were violations of international law only when done by a state actor, or at least under color of state law or jointly with a state, and not when done by a private actor." *Id.* at 50. The court goes on to say that it is clear that neither court "considered a dichotomy between a natural and a juridical person." *Id.* Rather, it was the dichotomy between private and state actors that *Sosa* examined in footnote 20, not corporate liability. *Id.* at 50-51.

76. *Id.* at 51-55. The court posited that "corporate liability is a universal feature of the world's legal systems[,] that no domestic jurisdiction exempts legal persons from liability," and that the International Court of Justice and "legal systems throughout the world recognize that corporate legal responsibility is part and parcel of the privilege of corporate personhood." *Id.* at 53.

77. Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971) (recognizing a cause of action for damages based on unconstitutional invasions of rights by federal agents).

78. In actions subsequent to *Bivens*, the Court chose not to expand the scope of *Bivens* and impose corporate liability because the underlying basis for the creation of *Bivens* liability, individual responsibility, was inconsistent with corporate liability. DOE VIII v. Exxon Mobil Corp., 654 F.3d 11, 55 (D.C. Cir. 2011).

individual liability extended in *Bivens*.[79] The court also rebuffed ExxonMobil's argument that because the Torture Victim Protection Act (TVPA)[80] recognizes only individual liability, the ATS should be viewed in the same light.[81] ExxonMobil failed to convince the court to adopt the new line of reasoning advocated by *Kiobel*, and the court concluded that, under *Sosa*, federal common law recognizes corporate liability for ATS claims.[82] So holding, the court remanded the claims to the district court for trial on the merits.[83]

IV. ANALYSIS

Despite copious pages devoted to this sentence-long statute, few opinions present a cogent exposition. In the years since *Sosa's* first steps, courts continued to struggle with the unsettled and unfamiliar nature of ATS litigation.[84] Circuit level ATS decisions are often divided with lengthy and passionate disagreement.[85] *Exxon* is no different.[86] However, an exploration of the decision in *Exxon* reveals a well-developed analysis of the ATS and its practical application, specifically, its analysis of corporate liability.

Clear direction is needed from the Supreme Court to address this politically charged issue, which is fraught with practical complications. The D.C. Circuit's approach to corporate liability under the ATS created a decisive split in the circuits and provided ammunition for the *Kiobel* plaintiffs' petition to the Supreme Court, appealing the Second Circuit's extension of corporate immunity.[87] On October 17, 2011, the Court granted certiorari to *Kiobel* to consider the issue of corporate liability under the ATS.[88] The Court could look

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79. *Id.*

80. Torture Victim Protection Act of 1991, 28 U.S.C. §1350 Note (2006) (supplementing the ATS and extending a civil remedy to United States citizens tortured abroad).

81. *Exxon*, 654 F.3d at 55-56. The D.C. Circuit noted its recent TVPA decision in *Mohamad v. Rajoub*, 634 F.3d 604 (D.C. Cir. 2011) (finding that in contrast to the ATS, the TVPA does not extend liability to corporate actors) and the circuit split over the issue. *Exxon*, 654 F.3d at 57-58 (citing the 9th Circuit's decision in *Bowoto v. Chevron Corp*., 621 F.3d 1116 (9th Cir. 2010) and the 11th Circuit's opinion in *Aldana v. Del Monte Fresh Produce, N.A., Inc*., 416 F.3d 1242 (11th Cir. 2005)). Subsequently, the Supreme Court addressed the TVPA circuit split and affirmed *Mohamad*. Mohamad v. Palestinian Auth., 132 S. Ct. 1702 (2012).

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

83. *Id.* at 71.

84. *See, e.g.*, Andrei Mamolea, *The Future of Corporate Aiding and Abetting Liability Under the Alien Tort Statute: A Roadmap*, 51 SANTA CLARA L. REV. 79, 84-89 (2011); Anna Sanders, Note, *New Frontiers in the ATS: Conspiracy and Joint Criminal Enterprise Liability After* Sosa, 28 BERKELEY J. INT'L L. 619, 619 (2010).

85. *See, e.g.*, Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 149-96 (2d Cir. 2010) (Leval, J., concurring only in the judgment).

86. *Exxon*, 654 F.3d at 71-91 (Kavanaugh, J., dissenting).

87. In the interim, the Ninth, Fourth, and Seventh Circuits also decided cases addressing this issue. Sarei v. Rio Tinto, PLC, 671 F.3d 736 (9th Cir. 2011); Aziz v. Alcolac, Inc., 658 F.3d 388 (4th Cir. 2011); Flomo v. Firestone Nat. Rubber Co., 643 F.3d 1013 (7th Cir. 2011). Likewise, even before *Kiobel* or *Exxon*, the Eleventh Circuit recognized the availability of corporate liability under the ATS. Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252, 1263 (11th Cir. 2009) ("[C]orporate defendants are subject to liability under the ATS and may be liable for violations of the law of nations."); Romero v. Drummond Co., 552 F.3d 1303, 1315 (11th Cir. 2008); Aldana v. Del Monte Fresh Produce, Inc., 416 F.3d 1242, 1263-64 (11th Cir. 2005).

88. Kiobel v. Royal Dutch Petroleum Co., 132 S. Ct. 472 (2011). Shortly after hearing oral arguments in February of 2012, the Court ordered supplemental briefing on the issue of extraterritoriality and restoration

to the text, history, and purpose of the ATS and adopt the reasoning of *Exxon* recognizing corporate liability. Ultimately, this approach would reduce the need to ascertain international norms in determining proper defendants, effectively limiting judicial responsibility for analyzing ever-expanding international norms.

A. Kiobel *Held International Law Does Not Recognize Corporate Liability*

Historically, though the defendants may raise the issue, courts have not directly addressed the question of corporate liability under the ATS.[89] Following *Sosa*, there was little change in ATS litigation until 2010 when the Second Circuit's decision in *Kiobel* radically shifted the approach to the ATS by asserting that international law does not extend liability to corporations.[90] In *Kiobel*, the Second Circuit relied on *Sosa's* use of customary international law to narrowly construe the ATS.[91] The Second Circuit emphasized that the ATS was merely a jurisdictional grant.[92] Specifically, *Kiobel* required customary international law to supply not only the cause of action for tort violations of specific norms but more importantly, the right of action against particular defendants.[93] In doing so, the court relied on a footnote from *Sosa* and an undercurrent of support from various sources that had been percolating for nearly a decade.[94] *Kiobel* marked the first time a circuit court refused to extend liability under the ATS to a corporate defendant.[95]

B. Exxon *Split the Circuits by Finding Corporate Liability*

Almost immediately after the groundbreaking decision in *Kiobel, Exxon* undercut these new developments. The court in *Exxon* was careful not to question the holding of *Sosa*; instead, the D.C. Circuit directly criticized

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to the calendar for reargument. Order to File Supplemental Briefs, *Kiobel*, 132 S. Ct. 472 (No. 10-1491), *available at* http://www.supremecourt.gov/orders/courtorders/030512zr.pdf. Rehearing took place on October 1, 2012. Transcript of Oral Argument, *Kiobel*, 132 S. Ct. 472 (No. 10-1491), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-1491rearg.pdf.

89. As a classic example, the Second Circuit in 2009 assumed without deciding "that corporations . . . may be held liable for the violations of customary international law . . . . Because we hold that plaintiffs' claims fail on other grounds, we need not reach, in this action, the question . . . . ." Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 261 n.12 (2d Cir. 2009).

90. *See generally* Frank Cruz-Alvarez & Laura E. Wade, *The Second Circuit Correctly Interprets the Alien Tort Statute: Kiobel v. Royal Dutch*, 65 U. MIAMI L. REV. 1109 (2011).

91. Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 127-28 (2d Cir. 2010) (refusing to recognize ATS jurisdiction unless international law specifically extends liability to the type of perpetrator sued).

92. *Id.* at 125.

93. *Id.* at 128 ("[We] look[] to customary international law to determine *both* whether certain conduct leads to ATS liability *and* whether the scope of liability under the ATS extends to the defendant being sued.").

94. Since 2001, when a large number of ATS suits named corporations as defendants, fears over corporate liability have grown markedly within the business community. Paul Magnusson, *Making a Federal Case Out of Overseas Abuses,* BUSINESSWEEK (Nov. 25, 2002), http://www.businessweek.com/magazine/content/02_47/b3809088.htm. As early as November of 2002, transnational companies met to develop a comprehensive strategy to circumvent the problem posed by ATS litigation against corporate defendants. *Id.* The history of such efforts on the part of the business community and countervailing pressures from human rights groups are beyond the scope of this paper.

95. "Without any support in either the precedents or the scholarship of international law, the majority take the position that corporations, and other juridical entities, are not subject to international law." *Kiobel*, 621 F.3d at 150 (Leval, J., concurring only in the judgment).

Kiobel's extension of the role of customary international law.[96] The *Exxon* court explained that, contrary to *Kiobel*, even though customary international law provides the norms giving rise to a cause of action, international law does not define rights of action.[97] Because international law only defines norms, it is up to states to provide remedies.[98] Within this framework, the ATS permits a domestic remedy for violations of international law.[99] Under this more foundational approach in *Exxon,* the ATS provides both the jurisdictional grant clearly established in *Sosa* and a right of action to sue for tort violations of the law of nations.[100] Essentially, the approach by the court in *Exxon* follows the conservative holdings in *Sosa* and achieves greater domestic control over decisions based on customary international law.

1. Historical Analysis Explains the Purpose of the ATS

ATS opinions characteristically spend considerable time recounting the history surrounding ATS's adoption by the First Congress. When the Supreme Court analyzed the history and purpose of the ATS, they did so in no less than twenty pages.[101] Courts draw broadly from Blackstone, The Federalist Papers, attorney general opinions, state and federal court cases, and other contemporary sources.[102] However, the scope is so broad that the result is often muddled or underdeveloped. *Exxon* avoided the trap of over-breadth through logical organization of its comprehensive survey of the historical record.[103]

The historical analysis of the D.C. Circuit provides a clear understanding of the original purpose of the ATS and its intended scope. Specifically, *Exxon* opined that the ATS was intended to help prevent and diffuse international conflicts arising from unresolved tortuous conduct.[104] Once the purpose behind the statute is fully understood, the idea of corporate immunity seems inconsistent.[105] Further, the court's approach enables the modern reader to comprehend contemporaneous understandings of both corporate entities'

96. DOE VIII v. Exxon Mobil Corp., 654 F.3d 11, 55 (D.C. Cir. 2011) (quoting with approval Judge Leval's concurrence in *Kiobel* criticizing the legal framework the majority followed).

97. *Id.* at 54-55 (accusing the majority in *Kiobel* of misreading *Sosa* and "ignoring *Sosa's* conclusion that federal common law would supply rules regarding remedies").

98. *Id.* at 41-42. The court explains that "the law of nations . . . creates no civil remedies and no private right of action." *Id.* at 41. Consequently, "the law of the United States and not the law of nations must provide the rule of decision in an ATS lawsuit." *Id.* at 42.

99. *Id.*

100. *Id.* at 32, 41-43 (explaining that international law does not provide rights of action but rather conduct based norms, and subsequently, individual countries are responsible for providing the right of action).

101. Sosa v. Alvarez-Machain, 542 U.S. 692, 712-32 (2004).

102. *See, e.g.*, *Sosa*, 542 U.S. 692, Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2d Cir. 2010); Flores v. S. Peru Copper Corp., 414 F.3d 233 (2d Cir. 2003); Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).

103. *Exxon*, 654 F.3d at 43-49. Doubtlessly, the *Exxon* court benefited from the lengthy historical analysis synthesized by other courts over the past three decades.

104. *Exxon*, 654 F.3d at 46-47.

105. *Id.* at 47 ("The historical context . . . 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 formal legal associations of individuals, i.e., corporations, to do so.").

potential for liability and the meaning behind the phrase, "law of nations."[106] The court's broader articulation of the historical context and purpose of the ATS points clearly toward corporate liability.

2. Corporate Liability Under Federal Common Law

There are two basic approaches used to determine whether there is corporate liability under the ATS, either to look to customary international law or federal common law.[107] The Second Circuit in *Kiobel* took the first approach, but the court in *Exxon* took the second approach, explaining that international law establishes conduct based norms, but domestic law shapes remedies.[108] The court recognized that the ATS itself provides the right to a remedy in federal courts by extending subject matter jurisdiction.[109] As a result, looking to customary international law for liability is the wrong inquiry because it only supplies the norms related to tort violations but not necessarily the law related to the remedy. Under *Exxon*, federal courts are empowered by the ATS to fashion a remedy under federal common law when an alien sues for a violation of international conduct based norms.[110]

There is a third approach advanced by some international law scholars[111] and the Ninth Circuit in *Sarei v. Rio Tinto*,[112] but it aligns in large part with the rationale of the *Exxon* court, and reaches the same result—corporate liability. The basic framework of this approach is to look to domestic law to extend a right of action and, then, to determine if international law defines the conduct norm in question as to extend immunity to a certain *type* of actor. Without specifically adopting this methodology, *Exxon* essentially does just this.

The *Exxon* court's position is not a new idea. Essentially, the court adopts much of the reasoning from Judge Edward's concurring opinion from an earlier D.C. Circuit case,[113] which has also been echoed by courts such as the Ninth Circuit.[114] Although ostensibly simplistic, it is this modest transparency that argues persuasively for *Exxon's* position. Furthermore, international law appears generally consistent with this principle.[115] Notably, *Exxon's* framework leaves room for a further inquiry, when examining the specific norm of customary international law at issue, as to whether the norm limits its application to conduct

106. As discussed earlier, the law of nations has experienced a great paradigm shift due to various factors. However, inquiries into the more nuanced effects of the Erie Doctrine, Post-modernism, and shifting political climates are well beyond the scope of this comment.

107. Other more complicated approaches generally fall within these two broad categories.

108. *Exxon*, 654 F.3d at 41-44.

109. *Id.* at 40.

110. *Id.* at 41-42. A re-reading of *Sosa*, after understanding the reasoning articulated in *Exxon*, makes *Sosa* more meaningful and coherent.

111. *See, e.g.*, Motion to File and Brief of Amici Curiae Int'l Law Scholars in Support of the Petition for Writ of Certiorari, Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2nd Cir. 2010) (No. 10-1491), 2011 WL 2743197, *granted*, 132 S. Ct. 472 (2011).

112. *See generally* Sarei v. Rio Tinto, PLC, 671 F.3d 736 (9th Cir. 2011), *petition for cert filed*.

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

114. *See, e.g.*, *In re* Estate of Ferdinand Marcos, Human Rights Litig., 25 F.3d 1467 (9th Cir. 1994); *Rio Tinto*, 671 F.3d 736.

115. Flomo v. Firestone Nat. Rubber Co., 643 F.3d 1013, 1020 (7th Cir. 2011).

by a specific type of actor.[116] Arguably, this is why *Exxon* takes the time to continue in its analysis and examine customary international law.

3. Corporate Immunity Rejected Under International Law

The court did not stop with its analysis under domestic law; it went on to explain that even under international law, immunity is not extended to corporations.[117] In examining this important secondary position, the court in *Exxon* reached essentially the same conclusion regarding corporate liability when scrutinizing international law: corporations can be liable for violations of international law.[118]

Although the court in *Exxon* treated this inquiry as more of a fallback position, this examination of customary international law could be incorporated as a second step.[119] However, caution should be exercised in adopting this best-of-both worlds approach. Much of the clarity and simplicity gained through *Exxon's* reliance on federal common law could be lost. For example, when the court in *Kiobel* made this inquiry, the court did not find corporate liability under customary international law.[120] These inconsistent results raise the important point that such inquiries into the unfamiliar and hazy realms of international law do not yield tidy, consistent answers.[121] This may be one reason the court in *Exxon* preferred to circumvent the inquiry entirely.

C. Limiting the Reach of the ATS

Over the last decade, ATS suits targeting the deep pockets of corporations have increased the dangers of abusive litigation.[122] Currently, these dangers are more real for the transnational energy sector than nearly any other industry.[123] In addition to ExxonMobil, suits target some of the largest oil, natural gas, and mining companies in the world including: Chevron,[124] Unocal,[125] Talisman

116. DOE VIII v. Exxon Mobil Corp., 654 F.3d 11, 50-51 (D.C. Cir. 2011) (explaining that this secondary inquiry was recognized by the Court in footnote 20 of *Sosa* (citing Sosa v. Alvarez-Machain, 542 U.S. 692, 732 n.20 (2004)). This approach was developed more fully by the 9th Circuit in its recent decision in *Rio Tinto*, 671 F.3d at 747-49, 758-61, 763-65, 767-70.

117. *Exxon*, 654 F.3d at 48-55.

118. *Id.* at 53-55.

119. As mentioned in earlier, the 9th Circuit utilized this approach more when examining plaintiffs' claims of genocide, war crimes, crimes against humanity, and racial discrimination. *Rio Tinto*, 671 F.3d at 747-49, 758-61, 763-65, 767-70.

120. Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 145, 148-49 (2d Cir. 2010).

121. Differences may be attributable not only to ambiguity in international law, but also due to the two courts' contrasting approaches. Simply put, *Kiobel* asked whether customary international law extends liability, whereas *Exxon* looked for an extension of immunity under customary international law.

122. Curtis A. Bradley, *The Costs of International Human Rights Litigation*, 2 CHI. J. INT'L L. 457, 473 (2001) ("Now that Alien Tort Statute litigation has expanded to include corporate defendants, which have deeper pockets than individual foreign officials, the incentives to bring this litigation are only heightened, as are the dangers of its abuse by some plaintiffs' attorneys.").

123. *Exxon 'Helped Torture in Indonesia,'* BBC NEWS (June 22, 2001), http://news.bbc.co.uk/2/hi/business/1401733.stm ("Many of the world's potential hotspots for oil are also located in areas of political unrest. . . . Oil companies are often forced to weigh the risks of entering a particular area against the value of the assets they believe to be awaiting discovery below the surface.").

124. Bowoto v. Chevron Corp., 621 F.3d 1116 (9th Cir. 2010).

125. John Doe I v. Unocal Corp., 403 F.3d 708 (9th Cir. 2005).

Energy,[126] Occidental Petroleum,[127] Shell,[128] Rio Tinto,[129] and Drummond.[130] Public relations concerns and the uncertainty of protracted litigation force many ATS defendants to settle.[131] In cases where defendants have refused to settle, international law grants victims sweeping compensatory and punitive damages resulting in substantial awards.[132] Furthermore, although the State Department was willing to intervene in support of corporations under the Bush administration,[133] the current State Department position supports corporate liability under the ATS.[134]

However, extending liability to corporate defendants does not preclude other, perhaps more practical, methods of limiting baseless suits against corporations conducting business abroad. Structural safeguards can provide significant protection.[135] By strictly defining the torts recognized under the ATS, specifically, by proscribing aiding and abetting liability absent intent,[136] corporations could be afforded greater certainty. Likewise, through justiciability or prudential exhaustion doctrines, the ATS's reach can be effectively limited.[137]

Significantly, in the ATS case currently before the Supreme Court, after hearing argument on the issue of corporate liability the Court asked for further briefing on the issue of extraterritoriality.[138] As a result, this issue is emerging as a leading edge in ATS debate and may well represent the pivotal question in the anticipated Supreme Court ruling in *Kiobel*.[139] In short, contemporary fears regarding the ATS's practical implications for transnational corporations do not warrant a wholesale reinterpretation of the statute.

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126. Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244 (2d Cir. 2009).

127. Galvis Mujica v. Occidental Petroleum Corp., 564 F.3d 1190 (9th Cir. 2009).

128. Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2d Cir. 2010), *cert. granted*, 132 S. Ct. 472 (2011).

129. Sarei v. Rio Tinto, PLC, 671 F.3d 736 (9th Cir. 2011).

130. Baloco *ex rel*. Tapia v. Drummond Co., 640 F.3d 1338 (11th Cir. 2011).

131. *Kiobel*, 621 F.3d at 116.

132. Joel Slawotsky, *Doing Business Around the World: Corporate Liability Under the Alien Tort Claims Act*, 2005 MICH. ST. L. REV. 1065, 1099-1101 (2005).

133. Derek Baxter, *Protecting the Power of the Judiciary: Why the Use of State Department "Statements of Interest" in Alien Tort Statute Litigation Runs Afoul of Separation of Powers Concerns*, 37 RUTGERS L.J. 807, 811-15 (2006).

134. Brief for the United States as Amicus Curiae Supporting Petitioners, Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 2011 WL 6425363, at *22-31 (2d Cir. 2010), *cert. granted* 132 S. Ct. 472 (2011) (No. 10-1491).

135. Andrei Mamolea, *The Future of Corporate Aiding and Abetting Liability Under the Alien Tort Statute: A Roadmap*, 51 SANTA CLARA L. REV. 79, 145-51 (2011).

136. *See, e.g.*, Aziz v. Alcolac, Inc., 658 F.3d 388, 390 (4th Cir. 2011) (finding corporate liability but limiting it based on mens rea requirements).

137. Robert Knowles, *A Realist Defense of the Alien Tort Statute*, 88 WASH. U. L. REV. 1117, 1157-59, 1162 (2011).

138. Kiobel v. Royal Dutch Petroleum Co., 132 S. Ct. 1738 (March 5, 2012) (restoring the case for reargument and directing the parties "to file supplemental briefs addressing the following question: 'Whether and under what circumstances the Alien Tort Statute, 28 U.S.C. § 1350, allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States'").

139. The issue of extraterritoriality and other approaches that may significantly limit ATS suits against transnational corporations deserve a full analysis beyond the confines of this comment.

V. CONCLUSION

In ATS litigation, courts are faced with two basic determinations. First, who may be liable, and second, for what torts? The second question's inquiry into international norms cannot be completely avoided. However, when addressing the first question, the Supreme Court should not allow courts to become burdened with another, even more complicated, analysis of international law: reassessing proper defendants every time a new suit arises.

Customary international law creates amorphous and evolving norms. As evidenced by the past few decades of ATS litigation, this complexity has confounded courts and created conflicting recognitions of norms. Without clear guidance, ATS litigation will only result in greater uncertainty and disharmony between the circuits. As the ultimate arbiters, the Supreme Court should adopt the approach of the court in *Exxon*, look to federal common law, and find corporate liability available under the ATS. This approach would maintain the integrity of the ATS and consistency with international law, while limiting uncertainty in complicated ATS litigation.

The framework is still defensible. Arguably, the ATS is as indispensable today as it was two hundred years ago, but wiser avenues of protection exist than wholesale claims of corporate immunity. The titan corporations should keep their wits about them and shoulder the responsibility. It is not time to shrug yet.

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* Candidate for Juris Doctorate, University of Tulsa, College of Law, 2013. The author thanks Colin Hughes for his tireless patience and editorial endurance. Further, she gratefully acknowledges the benefit of editorial review by Stu Conrad, Howard Berkson, and Nichole Saunders. The author is indebted to her father for insisting upon reading at the dinner table and lively discussions that fostered an inquisitive mind and the moxie to speak.