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# Using National Security to Undermine Corporate Accountability Litigation: The *ExxonMobil v. Doe* Controversy

Melody Saint- Saens<sup>1</sup> and Amy J. Bann<sup>2</sup>

## I. Introduction

The convergence of the war on terrorism and the drive for meaningful corporate accountability affect the development of legal strategies to address corporate misbehavior in international law. This comment explores the recent shift in U.S. foreign policy that focuses on national security and the war on terrorism and its relationship to litigation in U.S. courts on behalf of plaintiffs located outside the United States against abusive multinational corporations. Specifically, the *ExxonMobil v. Doe* case filed on behalf of plaintiffs in Indonesia and the United States State Department's letter urging the case's dismissal are analyzed as an example of this foreign policy shift.

Section II provides an overview of the litigation strategies that have been utilized to prosecute corporations in the United States and evaluates their progress. It also presents alternative strategies and assesses pending litigation. Section III explains *why* plaintiffs abroad are seeking redress in U.S. courts. The noteworthy *Unocal* litigation is discussed in light of its possible impacts on the case in point. Section IV outlines the circumstances surrounding the ExxonMobil case and the U.S. government response. Next, it provides an analysis of these developments and posits what the future may hold for human rights litigants.

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## II. Strategies Utilized to Sue Corporations for Wrongs Committed Abroad Under the ATCA and TVPA

### A. Nature of Litigation In U.S. Courts

Traditional litigation strategies for this issue are burdened with numerous procedural, jurisdictional, and substantive barriers that cripple their ability to provide meaningful remedies. Claims must be constructed narrowly to be remotely viable, which limits the effect of precedent or development of accepted jurisprudential standards.<sup>3</sup> Weakened precedent results in a fragmented sense of authority and the purposeful avoidance of any sweeping legal policy regarding such claims. Additionally, if a claim does pass the difficult jurisdictional and procedural requirements, *actual* redress for plaintiffs is not timely. However, the courts may provide useful precedent by legitimizing corporate accountability principles in relation to social practices as well as the viability of international law norms in domestic claims. Litigation is one strategy aimed at holding corporations accountable for wrongs committed outside the auspices of domestic environmental laws. With increased liability for corporate entities and a national accountability structure in place, litigation can continue as a bow in the quiver of international lawyers.

### B. Strategies Utilized: Domestic Litigation Under the Alien Tort Claims Act

#### 1. Overview

The Alien Tort Claims Act (ATCA)<sup>4</sup> has been used in actions against corporations in recent years in international human rights and environmental law.<sup>5</sup> It provides that: “[t]he district courts shall have

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<sup>3</sup> See Richard L. Herz, *Litigating Environmental Abuses Under the Alien Tort Claims Act: A Practical Assessment*, 40 VA. J. INT'L. L. 545 (2000) (a thorough exposition and discussion on this topic).

<sup>4</sup> 28 U.S.C. § 1350 (1994).

<sup>5</sup> See e.g., *Doe v. Unocal Corp.*, 110 F. Supp. 2d 1294 (C.D. Cal. 2000); *Doe v. Unocal Corp.*, 248 F.3d 915 (9<sup>th</sup> Cir. 2001); *Does I thru XXII v. Advanced Textile Corp.*, 214 F.3d 1058 (9<sup>th</sup> Cir. 2000); *Aguinda v. Texaco, Inc.*, No. 93 Civ. 7527, 1994 WL 142006 (S.D.N.Y.) Apr. 11, 1994; *Aguinda v. Texaco*, 200 WL 122143 (S.D.N.Y. Jan.31, 2000); *Jota v. Texaco, Inc.*, 157 F.3d 153 (2<sup>nd</sup> Cir. 1998); *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2<sup>nd</sup> Cir. 2000); *In re Union Carbide Corp. Gas Plant Disaster*, 809 F.2d 195 (2<sup>nd</sup> Cir. 1987); *Beanal v. Freeport McMoran, Inc.*, 969 F. Supp. 362 (E.D. LA 1997); *Ivanowa v. Ford*

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.”<sup>6</sup> Although other avenues, such as common law property or fraud claims under state laws, may be available, the ATCA has been the primary litigation vehicle for suing U.S. corporations at home for wrongs committed abroad. Most cases have been brought by non-state actors such as non-governmental organizations on behalf of plaintiffs. Its potential for addressing such claims is vast, but to date cases have shown limited results marred by a host of burdens in getting claims heard, let alone testing its ability to provide meaningful redress.

ATCA litigation has been used in human rights, labor, and environmental cases. The human rights and labor claims have involved security arrangements in which the American company hires a foreign military force to “protect” its facilities or instances of torture, forced labor, and other abuses.<sup>7</sup> Only a few human rights claims have been successful to some degree. That area of law is more settled and widely accepted than international environmental law. Complex procedural hurdles have stalled or prevented most cases from being considered on the merits. For instance, doctrines such as political question, sovereign immunity, forum non conveniens, international comity, collateral estoppel, separation of powers, standing, high transactional costs, and act of state requirements can bar claims.<sup>8</sup>

## 2. Challenges and Problems in Succeeding Under the ATCA

### a. Demonstrating International Customary Law

The largest problem for scholars and practitioners is identifying what constitutes the “law of nations” under the ambiguous language in

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Motor Co., 67 F. Supp. 2d 424 (D.N.J. 1999). There are numerous ATCA cases on behalf of individuals, including: *Filartiga v. Pena-Irala*, 630 F.2d 876 (2<sup>nd</sup> Cir. 1980); *Kadic v. Karadzic*, 70 F.3d 232 (2<sup>nd</sup> Cir. 1995) (holding that private individuals, regardless of whether they acted under the “color of state law,” can be held liable for certain violations of international law); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984).

<sup>6</sup> 28 U.S.C. § 1350.

<sup>7</sup> Sarah J. Adams Lien, *Employers Beware? Enforcing Transnational Labor Standards in the States Under the Alien Tort Claims Act*. 6 J. SMALL & EMERGING BUS. L 311, 313-15 (2002).

<sup>8</sup> Jean Wu, *Pursuing International Environmental Tort Claims Under the ATCA: Beanal v. Freeport –McMoran*, 28 ECOLOGY L. Q. 487, 493 (2001).

the statute.<sup>9</sup> The “law of nations” means international law defined as “those laws governing the legal relations between nations,” and the “relations with persons, whether natural or juridical.”<sup>10</sup> Courts have interpreted this expression to mean those norms that are universal, obligatory and definable.<sup>11</sup> Certain human rights violations have risen to this level and are considered customary law. The three-part test for deciding which jus cogens norms of international law fall under the ATCA is that the corresponding tort must be: (1) definable, (2) universal, and (3) obligatory.<sup>12</sup> In U.S. courts these have included torture, summary execution, genocide, war crimes, disappearance, arbitrary detention, slavery and cruel, inhuman, or degrading punishment.<sup>13</sup>

No plaintiff has yet to demonstrate that the “law of nations” includes environmental torts, but several claims have been brought and existing contemporary literature suggests that it does. A district court said that an environmental claim under the ATCA must be an egregious breach of universally recognized principles of international law in *Amlon Metals, Inc. v. FMC Corp.*<sup>14</sup> In that case, a European company brought an action against an American company under a U.S. environmental statute for fraudulent transfer of waste, arguing violation of a United Nations declaration.<sup>15</sup> International environmental legal norms do not yet enjoy consensus concerning their legal status, and have probably not acquired the acceptance necessary to be crystallized into principles of customary international law.<sup>16</sup> In *Beanal v. Freeport McMoran*,<sup>17</sup> an Indonesian citizen sued for environmental destruction and pollution

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<sup>9</sup> *Id.* at 492.

<sup>10</sup> BLACK'S LAW DICTIONARY 816, 886 (West 6<sup>th</sup> ed. 1990).

<sup>11</sup> Lisa Lambert, *At the Crossroads of Environmental and Human Rights Standards: Aguinda v. Texaco, Inc. Using the Alien Tort Claims Act to Hold Multinational Corporate Violators of International Laws Accountable in U.S. Courts*, 10 J. TRANSNAT'L L. & POL'Y 109, 132 (2000).

<sup>12</sup> *Tel- Oren*, 726 F. 2d at 774; Sarah Hall, *Multinational Corporations Post-Unocol Liabilities for Violations of International Law*, 34 GEO. WASH. INT'L L. REV. 401, 408 (2002).

<sup>13</sup> Sarah M. Hall, *Multinational Corporations' Post-Unocol Liabilities for Violations of International Law*, GEO. WASH. J. INT'L L. 401, 408 (2002).

<sup>14</sup> *Amlon Metals, Inc. v. FMC Corp.*, 775 F.Supp. 668 (S.D.N.Y. 1991). See Cyril Kormos et al., *U.S. Participation in International Environmental Law and Policy*. 13 GEO. WASH. J. INT'L L. 661, 681 (2001).

<sup>15</sup> Kormos et al., *supra* note 14.

<sup>16</sup> Halina Ward. *Securing Transnational Corporate Accountability Through National Courts: Implications and Policy Options*, 24 HASTINGS INT'L & COMP. L. REV. 451, 462 (2001).

<sup>17</sup> *Beanal v. McMoran, Inc.*, 197 F.3d 161, 167 (5<sup>th</sup> Cir. 1999).

against a U.S. based multinational corporation operating an open-pit mine.<sup>18</sup> The court held that the plaintiff failed to show that environmental rights are universally recognized and are governed by articulable standards. However, it did not address the bulk of environmental instruments and declarations that do establish a right to a healthy environment.<sup>19</sup> This case symbolizes a setback of such claims but is not indicative of the state of the law on this topic because claims in other circuits are currently pending.<sup>20</sup>

#### **b. Issues of Federal Power**

The United States Supreme Court has not addressed any ATCA cases involving human rights, labor, or environmental claims; the litigation landscape in this area could change dramatically if it does. An area of contention is whether the statute actually creates a private right of action and if so whether liability is imposed upon private actors for private conduct.<sup>21</sup> The tension surrounding foreign affairs in involved countries constitutes an additional concern relevant to pursuing litigation in the U.S. for human rights, labor, or environmental violations committed abroad. The U.S. courts may be concerned about separation of powers issues, and could claim that the action is barred because the executive should “speak with one voice” on issues of foreign policy if it characterized the claim as such. Courts can use doctrines of judicial abstention such as political question and act of state to duck such cases.<sup>22</sup> Countries where the actions occur may consider litigation elsewhere to

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<sup>18</sup> Wu, *supra* note 8.

<sup>19</sup> Richard Herz, *Text of Remarks on Panel: “Indigenous Peoples, Environmental Torts and Cultural Genocide.”* HASTINGS INT’L & COMP. L. REV. 503, 505 (2001).

<sup>20</sup> *Id.* (Pending litigation is discussed in a following section.)

<sup>21</sup> Wu, *supra* note 8, at 493.

<sup>22</sup> William J. Aceves, *Affirming the Law of Nations in U.S. Courts*, FEDERAL LAWYER 33, 38 (June 2002). India was not granted jurisdiction in the United States against Union Carbide after the Bhopal disaster on the grounds that the claims should be brought in India where the damage occurred, demonstrating U.S. courts’ hostility to foreign tort claims. Ward, *supra* note 16, at 456; Hanlon, Patrick, Matthew Hoffman, Shea & Gardner. *Availability of U.S. Courts for Asbestos Actions Arising out of Non-U.S. Exposures*, in AMERICAN LAW INSTITUTE, ABA COURSE OF STUDY: ASBESTOS LAW AND LITIGATIONS 42, 42-45 (2001); *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India* in Dec., 1984, F. Supp. 842, 844 (S.D.N.Y. 1986), *aff’d as modified*, 809 F.2d 195 (2d Cir. 1987).

be an infringement on their territorial sovereignty and want to adjudicate matters at home.<sup>23</sup>

Currently, an overall assessment of international human rights, labor, or environmental claims under the ATCA reveals that their chances for success are not great, but are possibly actionable.<sup>24</sup> Success depends upon many factors and the legal climate could change favorably or become more hostile as current events unfold. Litigants should pay acute attention to issues of federal power in order to employ the full potential of ATCA claims for environmental wrongs.

### c. Procedural Hurdles

Likely the most difficult procedural hurdle in bringing an ATCA suit, *forum non conveniens* has prevented some claims from going forward. This doctrine allows for the dismissal of a case without prejudice if the court otherwise has proper jurisdiction and venue, and an alternative forum must be shown to exist.<sup>25</sup> It is an important consideration for litigants in which the alternate forum might be a foreign jurisdiction.<sup>26</sup> Courts and defendants do not want to deal with the physical distance, choice of law issues, difficulty of depositions, and other aspects of litigation that become cumbersome with claims involving foreign countries.<sup>27</sup> Because of the severe nature of a dismissal under *forum non conveniens* ruling, plaintiffs bringing suit should carefully evaluate choice of venue. However, the challenge should not prevent lawyers from carefully crafting pleadings as it is possible to succeed.<sup>28</sup> The Court denied the *forum non conveniens* motion in *Unocal*. The current Chevron litigation adds that the law seems to expressly provide for U.S. jurisdiction, so *forum non* should not be the norm.<sup>29</sup> In contrast, a court dismissed a class action on behalf of Ecuadorian citizens for large-scale environmental harms on *forum non conveniens* grounds.<sup>30</sup>

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<sup>23</sup> Ward, *supra* note 16, at 459.

<sup>24</sup> See Kormos, *supra* note 14, at 683.

<sup>25</sup> Lambert, *supra* note 11, at 127.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> See generally Aric Short, *Is the Alien Tort Statute Sacrosanct? Retaining Forum non Conveniens in Human Rights Litigation*, N.Y.U. J. INT'L L. & POL. 1046 (2001).

<sup>29</sup> Hall, *supra* note 13, at 408.

<sup>30</sup> *Aguinda v. Texaco, Inc.*, No. 93 Civ. 7527, 1994 WL 142006 (S.D.N.Y.) Apr. 11, 1994), adhered to by 850 F. Supp. 282 (S.D.N.Y. 1994), dismissed by 945 F. Supp. 625 (S.D.N.Y. 1996), *vacated*, *Jota v. Texaco Inc.*, 157 F.3d 153 (2<sup>nd</sup> Cir.

Personal jurisdiction represents another possible stumbling block for ATCA plaintiffs. If the defendant's contacts with the United States are unclear, the court could choose not to hear the case.<sup>31</sup> American corporations, under *International Shoe*,<sup>32</sup> generally have the necessary minimum contacts necessary with the United States, but certain situations may be more difficult. For example, a company may be incorporated in the U.S. but conduct most of its manufacturing abroad; its stock might be owned by foreigners, or the primary defendants might be subsidiaries.<sup>33</sup>

International comity, the practice of deferring to another state's acts, laws, or jurisdictions, invokes sovereignty issues. State law claims and ATCA claims were dismissed on these grounds in *Aguinda*<sup>34</sup> as well as other cases.<sup>35</sup> Other possible stumbling blocks include the courts looking to whether a "true conflict between domestic and foreign law" exists, and/or whether the U.S. has an interest in prescribing conduct, and interests of the international system and foreign state.<sup>36</sup> Requirements concerning the act of state doctrine are unresolved due to the absence of a definitive standard for determining when the factual nature renders a claim to be precluded from substantive analysis. Attorneys considering bringing suit under the ATCA for human rights, labor, or environmental harms must remain cognizant of these pitfalls and draft complaints gingerly.

#### **d. Security Matters for Foreign Plaintiffs**

Security concerns are prevalent in litigating wrongs on behalf of those not in the United States. Plaintiff pseudonymity has been used in

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1998), *on remand*, 2000 U.S. Dist. LEXIS 745 (S.D.N.Y. Jan. 31, 2000). Another reason the court dismissed the case was the fact that Texaco was willing to participate in adjudication in Ecuador. Lambert, *supra* note 11, at 132

<sup>31</sup> Hall, *supra* note 13, at 407 ("Federal Rule of Civil Procedure 4(k)(2) permits federal courts to exercise personal jurisdiction over any person or corporation that has sufficient contacts with the United States, but that lacks contacts with any individual state").

<sup>32</sup> *International Shoe v. Washington*, 326 U.S. 310 (1945).

<sup>33</sup> Hall, *supra* note 13, at 407.

<sup>34</sup> Herz, *supra* note 1, at 571.

<sup>35</sup> See *Sequihua v. Texaco, Inc.*, 847 F. Supp. 61 (1994); *Torres v. Southern Peru Copper Corp.*, 965 F. Supp. 899 (S.D. Tex. 1996), *aff'd*, 113 F.3d 540 (5<sup>th</sup> Cir. 1997).

<sup>36</sup> Herz, *supra* note 1, at 570-71.

recent U.S. federal cases for non-U.S. nationals to sue corporations.<sup>37</sup> Federal courts common use of this mechanism reveals a sensitivity and understanding of the severe harms occurring.<sup>38</sup> The necessity of using anonymity is grave when victims' lives may be threatened if their identities are revealed. The challenges inherent in using pseudonyms originate in the value the American justice system places on due process rights.<sup>39</sup> Particularly during discovery, defendant's counsel will almost always merit some conditional disclosure, and the resulting protective orders vary according to circumstance.<sup>40</sup>

Plaintiff's lawyers should be aware of these concerns and only pursue claims when the plaintiffs are willing to face the possible dangers of inadvertent disclosure. It is imperative that counsel has close, competent assistance from professionals familiar with the specific locality and people. Despite the difficulties in maintaining communication with plaintiffs and striking the balance between security and due process rights, pseudonyms should continue to be utilized because many plaintiffs would not be able or willing to step forward without a high degree of protection.

**e. Non-legal Barriers**

Non-legal barriers, such as the political climate and the state of the economy, also affect ATCA litigation. If the focus in Washington and elsewhere is on national security and domestic protection, judicial willingness to prosecute American corporations for their activities abroad may decrease. Likewise, if the economy becomes tight, nongovernmental organizations or other funders may face more difficulties in bringing ATCA claims on behalf of aggrieved plaintiffs. A group that might have been interested in doing so may turn to matters that are more urgent and practical, rather than plunging into lengthy litigation. However, the focus on corporate scandals surrounding companies such as Enron and WorldCom may lend to a heightened interest in developing meaningful corporate accountability measures.<sup>41</sup>

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<sup>37</sup> Jed Greer, *Plaintiff Pseudonymity and the Alien Tort Claims Act: Questions and Challenges*, 32 COLUM. HUM. RTS. L. REV. 517 (2000).

<sup>38</sup> *Id.* at 558.

<sup>39</sup> *Id.* at 563.

<sup>40</sup> *Id.* at 559.

<sup>41</sup> Such initiatives include: Natural Heritage Institute, Nautilus Institute for Security and Sustainable Development, Human Rights Advocates. CALIFORNIA GLOBAL CORPORATE ACCOUNTABILITY PROJECT, BEYOND GOOD DEEDS: CASE STUDIES AND A NEW POLICY AGENDA FOR CORPORATE ACCOUNTABILITY (2002).

### C. The Torture Victim Protection Act (TVPA)

The Torture Victim Protection Act of 1991 (TVPA),<sup>42</sup> passed in 1992, complies with the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>43</sup> The TVPA codifies torture victims' right to sue by providing U.S. citizens with the same right to sue in U.S. court that the ATCA gives aliens to sue for torture or extra-judicial killing.<sup>44</sup> The TVPA differs from the ATCA in that it is limited to civil suits (the ATCA is not), it contains an exhaustion of remedies requirement for the place where the conduct occurred, and has a ten- year statute of limitations.<sup>45</sup> Although lawsuits filed under the TVPA enjoy considerably less procedural challenges than ATCA claims because they involve plaintiffs located in the U.S., forum non conveniens, doctrines of judicial abstention, and international comity may be applicable.

At present, the TVPA has not been a successful tool to prosecute corporations on its own, but has been useful on behalf of individuals prosecuting individuals. For example, the Center for Justice and Accountability in San Francisco has represented several victims in civil suits and won in June 2002 in a federal district court in Miami, Florida.<sup>46</sup>

### D. Pending Litigation

Ongoing ATCA litigation includes a case filed on July 20, 2002 in federal district court in Miami against Coca-Cola for human rights abuses including killings and torture of union leaders at its plant in Columbia that was filed on July 20, 2002.<sup>47</sup> Plaintiffs SINALTRAINAL,

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<sup>42</sup> 28 U.S.C § 1350 (1999); Hall, *supra* note 13, at 415 (Section (a) states: "An individual who, under actual or apparent authority, or color of law, of any foreign nation--(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death).

<sup>43</sup> Aceves, *supra* note 22, at 36.

<sup>44</sup> Hall, *supra* note 13, at 415.

<sup>45</sup> 28 U.S.C § 1350a-1350c (1999).

<sup>46</sup> Cases include: Armando Fernando Larios, 205 F. Supp. 2d 1325; Mehinovic v. Vukovic, 198 F. Supp. 2d 1322 (N.D. Ga. 2002). See [www.cja.org](http://www.cja.org) (The Center for Justice and Accountability (CJA) brings civil lawsuits in U.S. courts against human rights violators who live, visit or keep assets in the U.S.).

<sup>47</sup> See Press Release, United Steel Workers/International Labor Rights Fund, Coca-Cola (Coke) To Be Sued For Human Rights Abuses In Colombia; Coke

the union that represents bottlers at the Coke plant in Columbia, allege that the company maintains open relations with murderous death squads as part of a program to intimidate trade union leaders.<sup>48</sup> One plaintiff is the estate of a man who was killed while working at the Coke plant. Plaintiffs allege that Coke employees either ordered the violence directly, or delegated the job to paramilitary death squads that were acting as agents for Coke.<sup>49</sup> Moreover, plaintiffs argue that Coke knew about and benefited from the systematic repression of trade union rights.<sup>50</sup> The corporation denies having any notice of wrongdoing in their plants, and expects all its employees and associates to abide by a business code of conduct dating back to 1980.<sup>51</sup>

#### E. Alternatives

A legislation- based strategy might more effectively pierce the corporate veil of human rights abuses and environmental destruction by empowering citizens and lawyers to strengthen the existing possible causes of action with extensions of liability and creation of citizen suits for alien plaintiffs. The development of a normative framework embracing an international- right- to- know may best ensure an effective legal remedy for victims of harm caused by multinational corporations' operations in foreign countries. Currently, a coalition of over two hundred NGOs is working on a legislative and grassroots campaign to adopt such a system.<sup>52</sup>

Sets of substantive and/or procedural principles for social good, known as codes of conduct, have proliferated in the past several years in various forms.<sup>53</sup> Individual companies have put forth principles to which they pledge to adhere to, but these are largely if not all voluntary and

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Bottling Plants in Colombia Use Paramilitary Security Forces to Murder, Torture, and Kidnap Trade Union Leaders: Coke Controls All Aspects of Production and Operation of its Bottling Plants and Allows Local Managers to Engage in Systematic Human Rights Abuses, *available at* <http://www.globalexchange.org/colombia/pr071901.html> (last visited December 20, 2002) (a copy of the complaint is available at [www.laborrights.org](http://www.laborrights.org)).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> Jim Lobe, *Coca-Cola to be sued for Bottlers' Abuses*. *Inter Press Service* (July 20, 2001) *available at* [www.commodreams.org/headlines01/0720-01.htm](http://www.commodreams.org/headlines01/0720-01.htm) (last visited Dec. 20, 2002).

<sup>52</sup> This is the International-Right-to-Know Coalition. *See* [www.irtk.org](http://www.irtk.org).

<sup>53</sup> Natural Heritage Institute, *supra* note 41, at 8.

connote no obligatory changes in behavior.<sup>54</sup> The United Nations launched the Global Compact, a program comprised of general principles about the environment, labor, and human rights practices for corporations.<sup>55</sup> Companies sign on to the compact to express their willingness to abide by the principles, but again, this voluntary effort may serve more as a public relations tool for companies than as a mechanism for positive change. Several other international organizations have attempted to start codes, some with monitoring programs and certification processes.<sup>56</sup> Likewise, the United States, Europe, and a few other countries have limited but existing laws for disclosure.<sup>57</sup>

However, all are plagued by the same fundamental weakness: without legal liability, the programs have little leverage to enforce their

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<sup>54</sup> Elizabeth Erin Macek, *Scratching the Corporate Back: Why Corporations Have No Incentive to Define Human Rights*. MINN. J. GLOBAL TRADE 111 (2002).

<sup>55</sup> The UN Global Compact in 1999 is a creed of nine principles of which three relate to the environment, which corporations can pledge to abide by and strive. For a background discussion of the United Nations Global Compact, see Alexis Taylor, *The UN and the Global Compact*, 17 N.Y.L. SCH. J. HUM. RTS. 975 (2001).

<sup>56</sup> For an extensive discussion and comparative charts of the existing initiatives surrounding the environment, human rights and labor, see Susan Ariel Aaronson, *Can Governments Promote Global Corporate Citizenship?* NATIONAL POLICY ASSOCIATION 2001; Susan Ariel Aaronson, *Oh, behave! Voluntary codes can make corporations model citizens*, THE INTERNATIONAL ECONOMY, March/April 2001, at 40, available at [www.npa1.org](http://www.npa1.org) [hereinafter Global Citizenship]. Initiatives include: The Organization for Economic Cooperation and Development (OECD)'s Guidelines for Multinational Enterprises, the Global Sullivan Principles, the Caux Roundtable and Principles, Coalition for Environmentally Responsible Economies (CERES); the Global Reporting Initiative (GRI) of the United Nations Environment Program; ICC Charter for Sustainable Development (International Chamber of Commerce); the Apparel Industry Partnership Code of Conduct of 1997 for domestic and overseas apparel factories with monitoring procedures; the International Labor Organization's Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy; the Fair Labor Charter Agreement (U.S.); Code of Labour Practices; Ethical Trade Initiative Base Code; ICTI Code of Business Practices; Responsible Care (U.S.) and Electronic Privacy Principles. See Global Citizenship, *supra* at Appendix 2.

<sup>57</sup> See The Emergency Planning and Community Right-to-Know Act, 42 U.S.C. § 11001 et. seq. 1986; Title III of SARA and The Freedom of Information Act, 5 U.S.C. § 552A (1974). Europe has the Aarhus Convention and the Seveso Directive. Overall, Asia, Latin America, and Africa have relatively little voluntary reporting.

goals.<sup>58</sup> Continued abusive corporate social practices demonstrate that these approaches are inadequate, and corporations simply will not behave on their own.<sup>59</sup> Transnational litigation in U.S. courts can provide a useful and needed weapon against corporate misdeeds by providing a voice for victims.<sup>60</sup>

### III. Analysis

#### A. Reasons for Multiplicity of Lawsuits Against MNCs

The term corporate accountability connotes legal remedies and ramifications for a company's social practices. In contrast, the term corporate social responsibility implies a voluntary approach to corporate regulation in which no actionable liability exists.<sup>61</sup> The current business climate is far from being comprised of "accountability" measures. At best there have been attempts at corporate social responsibility.<sup>62</sup> Numerous sources call for a response to regulatory failures, the limits of voluntary initiatives, and information gaps about corporate practices.<sup>63</sup>

In the United States, numerous safety, health, environmental, and labor laws, constrain a company.<sup>64</sup> These laws emerged as Americans

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<sup>58</sup> See Meaghan Shaughnessy, *The UN Global Compact and the Continuing Debate About the Effectiveness of Corporate Voluntary Codes of Conduct*, 2000 COLO. J. INT'L ENVTL. L. & POL'Y 159, 163; Dickerson, Claire Moore. *Transnational Codes of Conduct Through Dialogue: Leveling the Playing Field for Developing-Country Workers*, 53 FLA. L. REV. 611, 651-67 (2001) (proposing a mandatory code).

<sup>59</sup> *Sincerity Test for Codes of Conduct*. EARTHRIGHTS INTERNATIONAL, January 28, 2001 at 2, available at [www.earthrights.org/news/codeconduct.html](http://www.earthrights.org/news/codeconduct.html); See Shaughnessy, *supra* note 58, at 1.

<sup>60</sup> Aceves, *supra* note 22, at 38.

<sup>61</sup> "When a corporation acts "responsibly," it means the company is conducting its business activities in a reliable, trustworthy, credible manner. "Accountability," however, means corporations must adhere to regulatory or legal requirements or otherwise be held liable or face sanctions. The fundamental difference between the two concepts is corporate accountability requires independent oversight and enforcement mechanisms to ensure compliance, whereas corporate responsibility relies on voluntary self-regulation." Summit, *Friends of the Earth, Corporate Accountability & the Johannesburg Earth Summit* at <http://www.foe.org/WSSD/sixreasons.html>.

<sup>62</sup> Natural Heritage Institute, *supra* note 41, at 5-6.

<sup>63</sup> Natural Heritage Institute, *supra* note 41, at iv.

<sup>64</sup> Laws such as ECPRA (Emergency Planning and Right-to-Know Act), SEC (Securities and Exchange Commission) laws and reporting requirements, OSHA

became willing to place certain values above profit and limit businesses' ability to function freely when their practices negatively affect human health or environmental concerns. However, in today's globalized economy, an American corporation can extract, manufacture, and produce its products abroad and avoid the United States' legal parameters. The corporation can then sell the products in the United States, reaping profits from the exploitation of cheaper labor and facilities abroad. Although many countries do have social and environmental laws, most of those laws are significantly weaker and countries are under tremendous pressure to issue exemptions or turn a blind eye to corporate practices. With foreign investment, they are more likely to qualify for loans from international institutions such as the IMF and World Bank even if the government and local people rarely receive any of the profits from the business operations.

The ATCA litigation attempts to address the dilemma of global markets operating under national regulation and ethics.<sup>65</sup> If plaintiffs abroad can obtain jurisdiction in the United States against corporations for their practices abroad, this strategy may begin to address the legal loophole through rulings that provide direct remedial relief. The threat of litigation can also deter corporations once they become aware that they can be held accountable for behavior abroad.

### 1. Significance of Litigation for Foreign Investments

Cross-border trade, investment, and production have increased dramatically in the past several years, as well as the disparity among who reaps the profits.<sup>66</sup> U.S. foreign direct investment (FDI) outflows nearly tripled over the last decade, and large multinational corporations are the main engines behind this development.<sup>67</sup> Their global networks and operations wreak enormous impacts on the communities in which they operate, yet there are few legal mechanisms to regulate their behavior. In fact, the current competitive scheme for multinationals' investment

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(Occupational Safety and Health), NLRA (National Labor Relations Act), and the environmental legal regime including the CAA (Clean Air Act), CWA (Clean Water Act), TSCA (Toxic Substances Control Act) and SDWA (Safe Drinking Water Act).

<sup>65</sup> For a discussion of this dilemma, see Natural Heritage Institute, *supra* note 41, at 5.

<sup>66</sup> Natural Heritage Institute, *supra* note 41, at 2-3; JOHN ALLEN AND CHRIS HAMNETT, *A SHRINKING WORLD? THE SHAPE OF THE WORLD 2, EXPLORATIONS IN HUMAN GEOGRAPHY* 236 (Oxford University Press 1995).

<sup>67</sup> Natural Heritage Institute, *supra* note 41, at 2.

functions as a disincentive for countries to raise their social and environmental standards.<sup>68</sup> Without global standards or accountability measures, the competition for investment keeps standards “stuck in the mud” with little catalysts for change.<sup>69</sup>

ATCA litigation may have a deterrent effect in which a corporation will begin to think twice about conducting activities abroad in ways that are contrary to what would be required at the least under international law standards and at most what is required under U.S. law.<sup>70</sup> Accountability measures could help to slow or prevent a “race to the bottom” in which companies are continually seeking out cheaper wages, more clandestine practices, as well as places where they can be aggressive and not be held responsible.<sup>71</sup> The possibility of adjudication and liability can “level the playing field” by providing protection for those who have been previously exploited.

## 2. The Unocal Litigation

The Unocal litigation is the most noted and watched ATCA claim to date. In *Doe v. Unocal Corp.*,<sup>72</sup> a U.S. district court held that the ATCA potentially covered litigation against oil companies accused of conspiring or acting in partnership with the Myanmar (formerly Burma) government to violate international law resulting in brutal environmental and human rights harms. The case has not been heard on the merits, but the 9<sup>th</sup> Circuit reversed an earlier Federal District Court’s dismissal decision to allow the case to go forward this year.<sup>73</sup> A parallel state case going forward as well.<sup>74</sup> It is the first case in U.S. history in which a corporation will stand trial for abuses committed abroad.<sup>75</sup>

The *Unocal* case points in a positive direction for ATCA litigants and those intending to bring future claims, as it allows prosecution of non-state actors for violations of international law absent

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<sup>68</sup>Natural Heritage Institute, *supra* note 41, at 5.

<sup>69</sup>*Id.* at 5.

<sup>70</sup>Hall, *supra* note 13, at 422 (this report suggests the problems with the current regulatory regime and emphasizes the need for policy and legal change).

<sup>71</sup>Shaughnessy, *supra* note 58, at 2.

<sup>72</sup>*John Doe I v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997).

<sup>73</sup>Press Release, Earthrights International, Unocal Can Be Held Liable For Human Rights Crimes in Burma, Says Appeals Court Washington, D.C. (Sept 18, 2002) *available at* [www.earthrights.org](http://www.earthrights.org) (last visited December 31, 2002).

<sup>74</sup>Press Release, Earthrights International, Court Orders UNOCAL to Stand Trial for Abuses in Burma: Burmese peasants and oil executives to meet in California courtroom (June 11, 2002), *available at* [www.earthright.org](http://www.earthright.org).

<sup>75</sup>*Id.*

state action, and if they acted under the color of law.<sup>76</sup> The district court looked to 28 U.S.C. § 1983 jurisprudence to determine whether the defendants had acted under the color of law.<sup>77</sup> The court found that Unocal knowingly used forced labor but was not liable because it did not control or commit the acts.<sup>78</sup> However, the 9<sup>th</sup> Circuit seems to point in a different direction.<sup>79</sup> If the case proceeds favorably to the plaintiffs, it could greatly expand the scope of substantive and jurisdictional ATCA claims.

The *Unocal* case carries much significance for multinational corporations evaluating their potential liability when making business decisions.<sup>80</sup> Companies should heed this warning that they may be found liable not only for their own actions but also those of partners and joint venturers, whether business or government.<sup>81</sup> An effect of the *Unocal* litigation may be that corporations may need to be more informed and selective about which governments and companies they partner with.<sup>82</sup>

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<sup>76</sup> Aceves, *supra* note 22, at 37. The required showing is a substantial degree of cooperation between state officials and private parties. *Id.*

<sup>77</sup> Aceves, *supra* note 22, at 37.

<sup>78</sup> Lien, *supra* note 7, at 342.

<sup>79</sup> Excerpts from U.S. Court of Appeals for the Ninth Circuit Decision on *John Doe et al v. Unocal Co. et. al.*, September 18, 2002:

“There...is some evidence that Unocal could influence the [Burmese] army not to commit human rights violations, that the army might otherwise commit such violations, and that Unocal knew this.”

“...[T]here is some evidence that Unocal knew that the Myanmar Military might used forced labor in connection with the [Yadana pipeline] Project.”

“The evidence also supports the conclusion that Unocal have practical assistance to the Myanmar Military in subjecting Plaintiffs to forced labor.”

“The evidence also supports the conclusion that Unocal gave ‘practical assistance’ to the Myanmar Military in subjecting Plaintiffs to these acts of murder and rape.”

“Thus, because Unocal knew that acts of violence would probably be committed, it became liable as an aider and abettor when such acts of violence, - specifically, murder and rape – were in fact committed.”

“...[A]ll torts alleged in the present case are jus cogen violations, and, thereby, violations of the law of nations.”

See Earthrights Press Release, *supra* note 74.

<sup>80</sup> Aceves, *supra* note 22, at 37 (Aceves states that it is significant, I add that it is the *most* important) (Aceves’ article was published before the 9<sup>th</sup> Circuit reversed the dismissal).

<sup>81</sup> *Id.*; see also Lien, *supra* note 7, at 347.

<sup>82</sup> Hall, *supra* note 13, at 401,422 (the author opines that if the *Unocal* plaintiffs succeed, companies may have to restructure the very nature and scope of their

#### IV. *Doe v. Exxon-Mobil*: ATCA Litigation Collides With the War on Terrorism

A product of the ATCA and TVPA litigation against multinational corporations for human rights violations abroad, *Doe v. ExxonMobil* offers a unique twist to the corporate accountability case for its role in the United States' war against terrorism. This section examines the territorial, political, social and economic tensions that have shaped Indonesia. Next, the origins of the Acehese conflict and ExxonMobil's impact in this province are discussed. Finally, this section concludes by analyzing the actual allegations against ExxonMobil and the repercussions of the *Doe v. ExxonMobil* lawsuit created in Indonesia, in the United States, and in the international community.

##### A. Historical Background

Indonesia's recent history reveals a bitter and violent struggle for independence that began at the start of the twentieth century in response to over three hundred years of colonialism under the hands of the Dutch and the Japanese occupation during World War II.<sup>83</sup> On August 17, 1945, the leaders of the independence movement announced the establishment of the Republic of Indonesia with a provisional government and constitution.<sup>84</sup> Nevertheless, actual independence occurred four years later when the Dutch finally relinquished their hold in Indonesia.<sup>85</sup>

However, the Dutch's presence in western New Guinea led to an armed conflict with Indonesia when the latter tried to incorporate this territory in the early sixties, ending in an agreement in August of 1962.<sup>86</sup> The following year, Indonesia took over the administration of West Papua.<sup>87</sup> In 1969, representatives of local councils in that territory announced their consensus to remain part of Indonesia, which the United Nations General Assembly recognized in a resolution.<sup>88</sup> Nevertheless,

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overseas operations, wreaking enormous changes on U.S. MNC's foreign operations).

<sup>83</sup> U. S. Department of State, *Background Note: Indonesia* (2001), available at <http://www.state.gov/r/pa/ei/bgn/2748pf.htm> .

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* The latter is also known as West Papua. *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

some inhabitants of West Papua still seek independence from Indonesia, even resorting to guerilla warfare.<sup>89</sup>

Simultaneously, Indonesia participated in territorial conflicts outside its borders, notably in the adjacent island of East Timor.<sup>90</sup> After the Portuguese's departure from East Timor in 1975, the Marxist group Fretilin rose to power.<sup>91</sup> At the request of the Timorese opposition to Fretilin, Indonesia invaded and took over East Timor.<sup>92</sup> Though Indonesia subsequently proclaimed East Timor its twenty-seventh province, the United Nations did not acknowledge this incorporation.<sup>93</sup> The latter aided Indonesia and Portugal negotiate the status of this territory, and, in mid 1999, oversaw the direct ballot by which the people of East Timor voted for their autonomy.<sup>94</sup> Upon the revelation that 78.5% of the people voted for independence, deadly violence broke out.<sup>95</sup> Since then, The Indonesian government revoked its annexation of East Timor.<sup>96</sup>

Fluctuations in Indonesia's internal politics complicated its precarious territorial situation. From 1949 until 1959, Indonesia operated under a parliamentary system rendered weak by rebellions in certain regions and disharmony among the political parties.<sup>97</sup> In 1959, President Sukarno reinstated the 1945 constitution and organized "an authoritarian regime under the label of 'Guided Democracy.'"<sup>98</sup> Under his leadership, the Indonesian Communist Party (PKI) grew and by the mid sixties directed the "mass and civic cultural organizations."<sup>99</sup> When PKI started "arming its supporters" the Army interjected, leading to violence between the rightists and the leftists, the ban of the communist party, and undermining President Sukarno's leadership.<sup>100</sup> Leader of the army and named provisional president by the People's Consultative Assembly (MPR), General Soeharto became formal president for five

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<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* The United Nations Transitional Authority in East Timor (UNTAET) administers East Timor until the latter achieves independence.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

years and was continuously re-selected by MPR until the late nineties.<sup>101</sup> Under Soeharto's "New Order," Indonesia concentrated on improving its economy and on development under the leadership of the military "but with advice from Western-educated economic experts."<sup>102</sup>

However, Indonesia's shaky economy in the last few years has aggravated its already arduous journey to establish a full and complete democracy. Early in Soeharto's last term, Indonesia's economy started to crumble with the Asian financial and economic crisis, a drought, and a significant decrease in the "prices for oil, gas, and other commodity exports."<sup>103</sup> Popular demonstrations clamoring the fall of the rupiah, the increase in inflation, and the acceleration of capital flight, caused the MPR to select Vice President B.J. Habibie as the new president in May of 1998.<sup>104</sup>

President Habibie created a cabinet and sought help from the International Monetary Fund and the international community for an economic stabilization program.<sup>105</sup> He released political prisoners, promoted the freedom of speech and association, and organized elections for the parliaments at all geographical levels.<sup>106</sup> In October of 1999, the MPR elected Abdurrahman Wahid and Megawati Soekarnoputri as Vice President.<sup>107</sup> However, "regional, interethnic, and inter-religious conflict" in various areas of the country including Aceh plagued President Wahid's endeavors for democratization and economic growth.<sup>108</sup> In August 2000, President Wahid decreed that Vice President Megawati would control the daily administration of the government.<sup>109</sup> Less than a year later, Megawati ascended to the presidency.<sup>110</sup>

The Aceh conflict, which depicts the political, economical, and territorial tensions of Indonesian history, has become a central problem for President Megawati. Joined to Indonesia as a result of Dutch colonialism, Aceh is distinguishable because of its older version of Islam, which "lacks the Hindu, Buddhist, and animist strains of Islam

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<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> Human Rights Watch, *HRW Documents on Indonesia: The Indonesian Military and Ongoing Abuses* (2002), available at <http://www.hrw.org/backgrounder/asia/indo-bck0702.htm>.

elsewhere in Indonesia,” and its “language and literary tradition.”<sup>111</sup> To the demands for separation by some inhabitants of the Aceh, the Indonesian government has historically responded by using repression through the use of military and police.<sup>112</sup>

The presence of foreign investments, especially oil companies like ExxonMobil, has worsened the conflict. The Acehnese have come to perceive that “energy revenues are diverted to benefit outsiders” rather than their province.<sup>113</sup> Today “80% of the government revenues” produced by ExxonMobil’s gas fields “are diverted back to Jakarta.”<sup>114</sup> The Acehnese also resent the differences in the style of living of ExxonMobil’s employees of the Arun Project that reside in Bukit Indah, the enclosed company neighborhood which “is a fenced-off and fortified oasis of ranch-style homes and green lawns, a place where kids ride bikes, carefree, on tree-lined streets.”<sup>115</sup> More significantly, oil companies like ExxonMobil, have entered into contracts with the military to use as security from GAM’s attacks on employees and its sabotage of company property.<sup>116</sup> This type of arrangement has resulted in violence not only against members of GAM but also against innocent inhabitants:

[A]ccording to locals, riding . . . in front of ExxonMobil’s facilities has become a deadly game of dodge-bullet, with soldiers taking potshots at just about anybody who moves. Those who pass at the wrong time of day are sometimes dragged into ExxonMobil’s warehouses and taught a lesson. New military camps

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<sup>111</sup> Rajan Menon, *Another Year of Living Dangerously*, THE NATIONAL INTEREST (Fall 2001),

available at [http://www.campaignexxonmobil.org/learn/news\\_ni\\_091901.shtml](http://www.campaignexxonmobil.org/learn/news_ni_091901.shtml).

<sup>112</sup> *Id.* Between 1989 and mid-1998, General Suharto labeled Aceh as a “military operational area” (DOM) and ordered Aceh’s occupation by units of his military, the Tentara Nasional Indonesia (TNI), which resulted in the killing, torturing, and disappearances of numerous Acehnese civilians not linked to GAM or any separatism movement. John Doe I et al. v. ExxonMobilCorporation et al, Complaint for the Equitable Relief Damages, U.S. Dist. Ct. D.C., June 11, 2001, at 1-2, available at <http://www.laborrights.org/proj.PDF>.

<sup>113</sup> *Id.*

<sup>114</sup> Mark R. Mitchell Lhokseumawe & Jason Tedjasukmana, *The Unmaking of a President*, TIME, Aug. 6, 2001, available at [http://www.campaignexxonmobil.org/learn/news\\_time\\_080601.html](http://www.campaignexxonmobil.org/learn/news_time_080601.html).

<sup>115</sup> *Id.*

<sup>116</sup> Menon, *supra* note 111.

have been established at 500 intervals along the company's pipeline. By night, troops from these camps go to new settlements in search of food, women and (sometimes) rebels. If they don't find what they're looking for, they break homes and bones.<sup>117</sup>

Attempts at concluding the Aceh conflict through ceasefires between the Indonesian army and GAM demanding the independence of this province have failed.<sup>118</sup> Even diplomatic efforts such as mediation through foreign parties have not resulted in the termination of this conflict.<sup>119</sup> Human rights activists in the region have encountered outright violence or lack of success. A report issued in 1998 to Mobil Oil (issued prior to its merger with Exxon in 1999) by "a coalition of 17 local human rights groups" discussed the company's deliberate ignorance of the troops' use of "the corporation's earthmoving equipment to bury their victims in mass graves."<sup>120</sup> Despite the company's inclusion of clauses forbidding the troops from using the gas fields for their "offensive operations," numerous reports by local residents state that this preventive measure has been ineffective because both the company's

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<sup>117</sup> Mitchell, *supra* note 114. See also John Doe I et al. v. ExxonMobilCorporation et al, Complaint for the Equitable Relief Damages, U.S. Dist. Ct. D.C., June 11, 2001, at 14-17, available at <http://www.laborrights.org/proj.PDF>. Interestingly, the separatists first started targeting Mobil Corp and its subsidiaries (now known as ExxonMobil Corp.) due to the corporation's ties to the unpopular Suharto regime. *Id.* at 14. Mobil exchanged payments through shares in its stock for the Suharto family in return for the permission to extract and liquefy oil and gas in Aceh. *Id.* Though General Suharto is no longer in power, the security contracts between the government and the oil companies have continued and the number of troops augmented at the request of ExxonMobil so that it could resume its operations in Aceh. *Id.* at 17.

<sup>118</sup> Human Rights Watch, *HRW Documents on Indonesia: The Indonesian Military and Ongoing Abuses*, July 2002, available at <http://www.hrw.org/backgrounder/asia/indo-bck0702.htm>. Since the writing of this article, Indonesia and Aceh signed a "cessation of hostilities" on December 9, 2002. *The Peacemakers from Switzerland*, THE ECONOMIST, Dec. 21, 2002, at 53. The Henry Dunant Centre will be in charge of the "peace operation," which will delineate "peace zones" for the storage of GAM's weapons. *Id.* If history is any indicator, the quest for independence by the Acehnese and the violence will continue for a long time.

<sup>119</sup> *Id.*

<sup>120</sup> Mitchell, *supra* note 114.

property and equipment have been used by the military for security matters.<sup>121</sup>

### **B. The Legal Action and the U.S. Government's Response**

Faced with by this situation, local residents affected by the security troops' activities took action. The International Labor Rights Fund<sup>122</sup> represented seven men, on behalf of themselves, and three women, both as themselves and as the administrators of the estates of their deceased spouses [collectively referred to hereafter as the Plaintiffs] and filed a complaint against ExxonMobil Corporations, ExxonMobil Oil Indonesia, Inc., Mobil Corporation, and PT Arun LNG, Co. [collectively referred to hereafter as the Defendants].<sup>123</sup> The Plaintiffs used the pseudonyms "John Doe" and "Jane Doe" to maintain their anonymity. This choice reflects their fear that the disclosure of their identity or that of their village would endanger both their lives and the lives of "their fellow villagers."<sup>124</sup>

The Plaintiffs alleged that they have suffered injury from the Indonesian military hired as security on the worksites - "the operation of their natural gas extraction and processing facilities- of the defendants in Aceh."<sup>125</sup> The Plaintiffs seek declaratory judgment, compensatory and punitive damages, and injunctive relief for "serious human rights abuses,

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<sup>121</sup> *Id.*

<sup>122</sup> The International Labor Rights Fund is a nonprofit advocacy organization based in Washington D.C. dedicated to promoting a "just and humane treatment of workers" everywhere. See <http://www.laborrights.org/>.

<sup>123</sup> John Doe I et al v. ExxonMobilCorporation et al, Complaint for the Equitable Relief Damages, U.S. Dist. Ct. D.C., June 11, 2001, at.1-2, *available at* <http://www.laborrights.org/proj.PDF>. ExxonMobil Corp. is the result of a merger between Exxon and Mobil Corp. on November 30, 1999. *Id.* at 7. Mobil Corp. is the wholly owned subsidiary of ExxonMobil. *Id.* at 8. Mobil Oil Corp. is the wholly owned subsidiary of Mobil Corp. *Id.* at 9. Mobil Oil Indonesia, Inc. (MOI) was originally the subsidiary of Mobil Oil responsible for the development of oil and natural gas fields in Indonesia including at Arun in Indonesia. Now it is known as Exxon Mobil Indonesia, Inc. (EMOI) and is a subsidiary of Exxon Mobil. *Id.* at 10. PT Arun consists of "a joint venture company that is owned 55% by Indonesia's state owned oil and gas company, Pertamina, 35% by Exxon Mobil, and 10% by" Japan Indonesia LNG Company, Limited. *Id.* at 11. Together, these companies exploit an LNG Project in the Arun area of Aceh, where ExxonMobil (originally Mobil) extracts natural gas and PT Arun liquefies it. *Id.* at 12-3.

<sup>124</sup> *Id.* at 3-7.

<sup>125</sup> *Id.* at 2.

including genocide, murder, torture, crimes against humanity, sexual violence, and kidnapping in violation of ATCA,<sup>126</sup> TVPA,<sup>127</sup> international human rights law, and the statutory and common tort law of the District of Columbia.”<sup>128</sup>

The Plaintiffs explain that their choice of the United States District Court is the appropriate forum for their claims. They further argue that they have no “access to an independent or functioning legal system within Indonesia” that would hear their complaints.<sup>129</sup> Moreover, the Plaintiffs fear punitive retaliation from the Indonesian militaries if they were to bring their complaints to the latter.<sup>130</sup> Additionally, the Plaintiffs assert that they have made their claims to the United States Court “within a reasonable time.”<sup>131</sup> Finally, the Plaintiffs allege that the United District Court for the District of Columbia possesses “jurisdiction pursuant to 28 U.S.C. § 1331, the ATCA and the TVPA for the international human rights violations.”<sup>132</sup> They reason that jurisdiction over the state law causes of action under the 28 U.S.C. § 1367.<sup>133</sup> They add that D.C. Statutes § 13-423 provides the Court with personal jurisdiction over the Defendants.<sup>134</sup> As for venue, the Plaintiffs claim that it lies in the Judicial District under 28 U.S.C. § 1391 (b) and (c).<sup>135</sup>

Reacting to the Plaintiffs’ complaint, the Honorable Louis F. Oberdofer from the United States District Court for the District of Columbia sent a letter to the Department of State on May 10<sup>th</sup>, 2002, seeking direction.<sup>136</sup> In the letter, Judge Oberdofer requested for a “non-binding” opinion by the Department of State as to the “adverse impact,” if any, of the adjudication of the lawsuit on “interests of the United States” and the extent of said impact.<sup>137</sup> Shortly thereafter, in June, sixteen congressmen and two U.S. senators asked the State Department

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<sup>126</sup> *Id.* ACTA is situated at 28 U.S.C. § 1350.

<sup>127</sup> *Id.* TVPA is situated at 28 U.S.C. § 1350.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> Letter from William H. Taft, IV, Legal Advisor of the Department of State, to Honorable Louis F. Oberdorfer, United States District Court for the District of Columbia 1, (July 29, 2002), available at <http://www.laborrights.org/> [hereinafter “D.O.S. Letter”].

<sup>137</sup> *Id.*

not to get involved in the case, warning that "intervention" would convey "the wrong message: that the United States supports the climate of impunity for human-rights abuses in Indonesia."<sup>138</sup> Nonetheless, the U.S. State Department issued a response dated July 29, 2002, relegating its focus to the U.S. interests potentially affected by the lawsuit, not by the legal issues presented by the letter.<sup>139</sup>

In its urgent answer to Judge Oberdofers' request, the Department of State offers several reasons to indicate that the adjudication of the lawsuit would have an adverse impact on U.S. interests.<sup>140</sup> Prior to expanding on these reasons, the Department of State declares its opposition to the human rights violations by "elements of the Indonesian armed forces in locations such as Aceh."<sup>141</sup> The Department of State adds that long lasting peace to the "Aceh conflict that maintains Indonesian sovereignty can only be achieved if the military and police end human rights abuses."<sup>142</sup> Simultaneously, the Department of State assumes an ongoing role in the process of terminating these abuses through diplomacy and other methods.<sup>143</sup>

The Department of State then turns to the adverse effects the litigation would cause the United States.<sup>144</sup> Though it admits there is no "certainty" to these effects, the Department of State still lists several political and economic concerns the United States may have.<sup>145</sup> In particular, the Department of State predicts that the Indonesian Government may view this litigation as an affront to its sovereignty.<sup>146</sup> More specifically, the Department of State believes the involvement of a United States court in the adjudication of this matter will be deemed as an attempt to put the Indonesian Government on trial for its civil war.<sup>147</sup> Furthermore, "[t]his issue presents special sensitivities for Indonesia because it is deeply concerned about maintaining national cohesion in the

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<sup>138</sup> Peter Waldman & Timothy Mapes, *Corporate Governance: Administration Sets New Hurdles for Human-Rights Cases*, WALL ST. J., Aug. 7, 2002, available at <http://loper.org/~george/archives/2002/Aug/83.html>.

<sup>139</sup> See D.O.S. Letter, *supra* note 136, at 1.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 2.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

face of strong anti-government secessionist movements in Aceh and elsewhere.”<sup>148</sup>

Most importantly, the Department of State remarks that the adjudication of *Doe v. ExxonMobil* would render the Indonesian government uncooperative in areas that matter to the United States. In particular, “the full spectrum of diplomatic initiatives, including counterterrorism, military and police reform, and economic and judicial reform” that the United States could use to help Indonesia would be jeopardized.<sup>149</sup> Of greater emphasis for the Department of State, however, is the impact of this case on the “United States efforts to secure Indonesia’s cooperation in the fight against international terrorist activity.”<sup>150</sup> The Department of State explains the United States’ peculiar interest for Indonesia:

Indonesia is the fourth largest state in the world, with a population of some 210 million. It is also the largest Muslim nation, and serves as a focal point for U.S. initiatives in the ongoing war against Al Quaida and other dangerous terrorist organizations. U.S. counterterrorism initiatives could be imperiled in numerous ways if Indonesia and its officials curtailed cooperation in response to perceived disrespect for its sovereign interests.<sup>151</sup>

In addition to Indonesia’s importance in the War against Terrorism, the Department of State also advises that the adjudication of this case would also upset the efforts of the United States in assisting Indonesia in ending the human rights abuses there.<sup>152</sup> Specifically, this case would impact two methods used by the United States to accomplish the termination of human rights abuses in the Aceh province. First, the adjudication of this case would affect the “improved training and support of security personnel, as well as judicial reform,” which “are designed to establish a higher degree of professionalism, and respect for individual rights.”<sup>153</sup>

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<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 3.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

Secondly, the United States' goal to terminate human rights abuses in Indonesia might also be affected because, as a consequence of the adjudication of *Doe v. ExxonMobil* in the former, the latter might reject U.S. companies' bids "for new contracts."<sup>154</sup> Interestingly, the Department of State depicts this potential reaction as carrying the most negative impact for the Indonesian government. "Working side-by-side with U.S. firms," indicates the Department of State, "Indonesian companies and government agencies see the advantages of modern business practices including transparency, respect for contracts, fair labor practices, anti-corruption, efficiency, and competitiveness."<sup>155</sup> Not only would Indonesia not be able to profit from the alleged benefit to the protection of human rights, it would also be relegated to contracting with companies from other countries that "would be far less concerned about human rights abuses, or about upholding best business practices."<sup>156</sup>

The Department of State comments that the economic and political consequences on Indonesia's stability constitute another reason for the United States not to adjudicate *Doe v. ExxonMobil*. However, the Department of State frames its argument in a manner that concentrates on the negative impact on the United States:

Given Indonesia's large population, resources, key geographic location and proximity to key U.S. allies, instability, there could create problems ranging from interruption in vital shipping lanes, to refugee outflows, to a new home for terrorists. To the extent this litigation contributes to a worsening of the economic conditions in Indonesia that breed instability it would adversely affect U.S. interests.<sup>157</sup>

The Department of State also observes that the litigation of the case would worsen the already decreasing "foreign investment climate" especially "in extractive industries in remote or unstable areas that require security protection" and in oil and gas industries.<sup>158</sup> Since the financial crisis that hit it in 1997 and 1998, Indonesia must increase its development of "new fields" and investments to keep the same amount

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<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 3-4.

<sup>158</sup> *Id.* at 4.

of revenues from the oil and gas sectors coming.<sup>159</sup> Without these efforts, Indonesia will not be able to “maintain a growing economy.”<sup>160</sup> Consequently, the Department of State projects that “[e]fforts by the U.S. and other donors to enhance Indonesia’s fiscal sustainability through debt rescheduling and international lending programs will be undermined if Indonesia cannot sustain its own commitments.”<sup>161</sup>

Moreover, the Department of State also expresses how crucial “a viable, well-funded [Indonesian] central government” is to the United States.<sup>162</sup> First, more “public services” of heightened quality is essential to decreasing poverty and keeping “political stability.”<sup>163</sup> Secondly, any political instability in Indonesia might cause a chain reaction and harm the “security of U.S. treaty allies Australia and Thailand” and other regional areas.<sup>164</sup> Economic stability is required to fund and provide for “properly trained and equipped security forces” that will not give in to corruption.<sup>165</sup> The Department of State also adds: “Professional personnel are also crucial for making progress on a host of U.S. priorities, including promoting regional stability, countering ethnic and sectarian violence, combating piracy, trafficking of persons, smuggling, narcotics trafficking, and environmentally unsustainable levels of fishing and logging.”<sup>166</sup>

The Department of State concludes its letter by reminding Judge Oberdofers that the adjudication of the case would both impact the U.S. and Indonesian economies. The litigation would supposedly reduce investment in Indonesia causing the latter’s economy to suffer.<sup>167</sup> This case, if tried by a U.S. court, could cause a hostile reaction from Indonesia, prompting the latter’s government and private businesses to reject U.S. bids for “contracts in extractive and other industries.”<sup>168</sup> To emphasize its points, the Department attaches a copy of the letter from Indonesia’s Ambassador to the United States, Soemadi Djoko M. Brotodiningra to the latter’s Deputy Secretary of State, Richard Armitage, the Deputy Secretary of State.

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<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 5.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

In this letter, dated July 15, 2002, Ambassador Brotodiningra encourages for the dismissal of the lawsuit on various grounds.<sup>169</sup> While qualifying the “allegation of abuses of human rights by the Indonesian military against the separatist Free Aceh movement” as being, “at best questionable,” the Ambassador Brotodiningra employs jurisdictional, economic, and political arguments to prevent the United States court from hearing the lawsuit.<sup>170</sup> Ambassador Brotodiningra specifies that this conflict is not one involving the United States for this is “an allegation against an Indonesian government institution, e.g. the Indonesian military, for operations taking place in Indonesia.”<sup>171</sup>

Additionally, Ambassador Brotodiningra explains that the litigation would have economic consequences. The lawsuit “will definitely compromise the serious effort” of the Indonesian government to guarantee the safety of foreign investments, including to particular these from the United States.<sup>172</sup> If this happens, Indonesia will have a harder time securing “economic recovery.”<sup>173</sup> Furthermore, the solution to the Aceh conflict itself would be harmed by the adjudication of the lawsuit.<sup>174</sup>

In response to the letter issued by the Department of State, ExxonMobil released a media statement on August 13, 2002, regarding the lawsuit denying once more their involvement in any human rights violations in the Aceh province of Indonesia.<sup>175</sup> ExxonMobil alleges that it or any of its subsidiaries operating in Aceh have not done any “direct wrongdoing.”<sup>176</sup> According to ExxonMobil, the real conflict alluded to by the Plaintiffs revolves around “the conduct of the Indonesian military in a civil war.”<sup>177</sup>

ExxonMobil continues by focusing on the role of the Indonesian government in the Aceh conflict. Under ExxonMobil’s version of the

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<sup>169</sup> *Id.* The letter from Ambassador Someadi M. Brotodiningra Deputy Secretary of State Richard L. Armitage, is dated July 15, 2002 and is annexed to the D.O.S. Letter from Taft to Oberdofer.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Media Statement- Statement Regarding NGO Human Rights Lawsuit- Aceh, Indonesia*, EXXONMOBIL CHEMICAL, Aug. 13, 2002, available at [http://www2.exxonmobil.com/Corporate/Newsroom/Newsreleases/Corp\\_xom\\_nr\\_130802.asp](http://www2.exxonmobil.com/Corporate/Newsroom/Newsreleases/Corp_xom_nr_130802.asp).

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

story, Pertamina, the national oil company of Indonesia, is the owner of the Arun Field that are operated by an ExxonMobil affiliate.<sup>178</sup> Pertamina carries the responsibility for hiring security for the project in Arun Field.<sup>179</sup> In turn, the Indonesian government provides this security to protect what it believes to be “a vital national industry.”<sup>180</sup> Therefore, ExxonMobil distances itself from what it characterizes as a civil conflict.

Under the aforementioned reasoning, ExxonMobil calls for the dismissal of the lawsuit based on several reasons.<sup>181</sup> First, ExxonMobil employs a separation of powers argument that has been recognized by United States Courts. Specifically, ExxonMobil characterizes this lawsuit as an issue of foreign policy thus mandating its dismissal “under the constitutional principle that matters of foreign affairs should be handled by the political branches of the government, not the courts.”<sup>182</sup>

Secondly, ExxonMobil implies the existence of a jurisdictional problem, claiming the lawsuit concerns a conflict that solely involves Indonesia.<sup>183</sup> In the words of ExxonMobil, “the case must be dismissed because the plaintiffs seek to use a U.S. Court to judge the official acts of the Indonesian government towards its own citizens engaged in a regional rebellion.”<sup>184</sup> In other words, this conflict does not involve the United States but, rather, has its roots in Indonesia and regards only Indonesian parties.

To combat the negativity of the lawsuit, ExxonMobil reiterates its longstanding relationship with Indonesia, emphasizing its economic aspect. Thus, ExxonMobil remarks: “Between employees and contractors, ExxonMobil affiliate operations in Aceh provide employment for more than two thousand Acehnese and many more through the subcontractors supporting its business in Aceh.”<sup>185</sup> Furthermore, the gas collected in the Arun Field fuels “the other major businesses in North Aceh that also employ thousands of Acehnese,”<sup>186</sup> because of this, ExxonMobil prides itself on being a “stabilizing force” in Aceh.<sup>187</sup>

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<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

Moreover, ExxonMobil also argues its own role in preserving and protecting human rights in Indonesia. Its efforts include offering health care for two decades with the Civic Mission Clinic.<sup>188</sup> ExxonMobil also mentions its support for certain community projects such as the maintenance of “schools.”<sup>189</sup> Finally, ExxonMobil addresses the construction of “water systems, roads, bridges” as projects related to community development and the improvement of infrastructure.<sup>190</sup>

Thus, *Doe v. ExxonMobil* is situated in a complex historical background. The next section will explore the possible fate of this case.

### C. Possible Effects of the Exxon-Mobil Case on Corporate Accountability Litigation

Despite the possible positive influence of the *Unocal* decision, the United States’ position vis-à-vis *Doe v. ExxonMobil* is unlikely to change because of its corporate agenda and foreign policy focused on national security. The Department of State displays this attitude by labeling the Aceh conflict a “civil war.”<sup>191</sup> This tactic purposefully differentiates the separatist struggle in Aceh from the East Timor situation. The United States perceives the latter as involving a valid bid for independence. This is a view it formally expressed by cutting off all financial and military aid to Indonesia after violence erupted following the referendum that determined East Timor’s independence in 1999.<sup>192</sup> The United States could have maintained this strategy to send a message that it opposed human rights violations by the Indonesian military and by American companies.

However, the United States prioritizes its own economic and political needs over the lives of the Acehnese inhabitants such as the plaintiffs in *Doe v. ExxonMobil*. This attitude reveals that the United States values oil and gas, especially since its access to these fuels may be currently jeopardized by President Bush’s inclusion of Iran and Iraq in the “axis of evil” in his first State of the Union Address in the aftermath of September 11<sup>th</sup>, 2001.<sup>193</sup> These words may have caused discontent in

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<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> See D.O.S. Letter, *supra* note 136.

<sup>192</sup> Xinhua News Agency, *Indonesian Minister says US is not intended to fight Islamic Hardliners*, July 31, 2002, at [http://news.xinhuanet.com/english/2002-07/31/content\\_505952.htm](http://news.xinhuanet.com/english/2002-07/31/content_505952.htm).

<sup>193</sup> Powell, *Rice Defend Bush’s ‘Axis of Evil’ Speech*, CNN.COM, Feb. 18, 2002, at <http://www.cnn.com/2002/US/02/17/bush.axis>. National Security Adviser Condoleezza Rice described the three countries included in the axis of evil- Iran,

the oil rich states neighboring these two Middle Eastern Countries towards the United States' anti-terrorism policy. Unsurprisingly, the United States seeks to safeguard its ties to Indonesia- the fifteenth biggest oil producer in the world and the sole Asian member of the Organization of Petroleum Exporting Countries (OPEC).<sup>194</sup> The United States' will probably continue to do so in light of the increasing prospect of its war against Iraq.

The deputy director of the International Labor Rights Fund, Bama Athreya, stated that the current administration is much closer to corporate interests than in the past.<sup>195</sup> In regards to the case in point, Exxon Mobil was the second-largest campaign donor in the 2000 election cycle among oil and gas companies-- after Enron Corp. -- with 89% of its contributions going to Republicans, according to the Center for Responsive Politics in Washington.<sup>196</sup>

Just as it is unlikely that the current U.S. administration will shift towards a human rights protection, it is unlikely that the Indonesian government will render Aceh independent. Indonesia needs ownership over the latter's abundance of oil. Because "domestic demand for petroleum" is increasing, Indonesia actually needs new oil reserves and cannot afford to lose any existing reserves.<sup>197</sup> Without Aceh as its province, Indonesia will exert less influence in OPEC. Furthermore, Indonesia needs its oil production to strengthen its precarious economy characterized by a huge external debt, budget deficit, and a falling rupiah.<sup>198</sup> However, military oppression of the Acehnese for security purposes will only cause more violent retaliation of GAM against the Indonesian Government and its business partners including ExxonMobil.<sup>199</sup>

The United States favors preserving Indonesia's territorial integrity, to continue having the largest Muslim state on its side in the

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Iraq, and North Korea- as "oppressive regimes that are opaque [...] that have been very, very harsh on their people" and "are aggressively seeking weapons of mass destruction." *Id.* Her description characterizes these three countries as rogue states depicting them to be as dangerous as any terrorist group.

<sup>194</sup> See U.S. Department of State, Background Note on Indonesia, *supra* note 83.

<sup>195</sup> See Walman & Mapes, *supra* note 138.

<sup>196</sup> *Id.*

<sup>197</sup> See U.S. Department of State, Background Note on Indonesia, *supra* note 83.

<sup>198</sup> See Menon, *supra* note 111. As of the fall of 2001, Indonesia had an external debt of \$ 65 billion, a budget deficit equal to 6.5% of the GDP, and a rupiah that had fallen from 6,800 to the dollar in 1999 to 12,000 to the dollar in 2001. *Id.*

<sup>199</sup> *Id.*

War Against Terrorism.<sup>200</sup> Consequently, the United States resumed its military and economic aid to Indonesia in July and August, 2002, around the time of the filing *Doe v. ExxonMobil*.<sup>201</sup> Indirect military assistance reserved for anti-terrorism purposes will allow Indonesian military officers to attend an “international military education and training program.”<sup>202</sup> Secondly, the Indonesian police will get \$50 million “over several years” though a current “ban on weapon sales” will persist.<sup>203</sup> Both types of aid aim at fighting terrorism and ensuring that Indonesia remains whole. Nevertheless, a risk exists that the separatists in the Aceh province will be categorized as terrorists increasing the involvement of the Indonesian military in Aceh.

Recent acts of terrorism within its territory have forced the Indonesian government to cooperate more in the United States’ war against terrorism. The Indonesian government investigated, interrogated and arrested suspected terrorists responsible for the bombing in Bali resulting in 190 deaths in October 12, 2002.<sup>204</sup> Assessing these efforts, Indonesia’s Ambassador to the United States, Soemadi D. M. Brotodiningrat, declared that the United States could express confidence in having Indonesia as a serious ally in combating terrorism.<sup>205</sup> Subsequently, President Megawati issued regulations for the detention “of suspected terrorists for up to six months without charges” by authorities, and “for the death penalty in extreme cases.”<sup>206</sup> Simultaneously, the Indonesian police have been investigating Islamic radicals thought to be responsible for the two explosions in Sulawesi in early December and possibly linked to “Jemaah Islamiyah,” an “al Qaeda-linked Southeast Asian militant group accused of plotting the Bali

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<sup>200</sup> See Xinhua News Agency, *supra* note 192.

<sup>201</sup> *Id.* In July of 2002, the U.S. Senate Committee also voted to give “\$400,000 to resume training of civilian elements of the Indonesian Defense Ministry.” *Indonesia gets Us aid against terror*, BBC NEWS, Aug. 2, 2002, at <http://news.bbc.co.uk/2/hi/asia-pacific/2167588.stm>.

<sup>202</sup> See Xinhua News Agency, *supra* note 192.

<sup>203</sup> *Indonesia gets Us aid against terror*, BBC NEWS, Aug. 2, 2002, at <http://news.bbc.co.uk/2/hi/asia-pacific/2167588.stm>.

<sup>204</sup> Berni K. Moestafa, *RI- U.S. ties improving after Bali Bombing*, *Say Ambassadors*, JAKARTA POST, Dec. 17, 2002, at P2, available at 2002 WL 102098525.

<sup>205</sup> *Id.*

<sup>206</sup> Ellen Nakashima, *Megawati labors to fight terrorism while placating moderates*, CONTRA COSTA TIMES, Dec. 15, 2002, at 26, available at 2002 WL 103950793.

attacks.”<sup>207</sup> Though “only 31 percent of Indonesians” agree with “America’s war on terror,” Indonesia’s alliance in the fight against terrorism appears to be crystallizing.<sup>208</sup>

In light of these recent developments in the relationship between the United States and Indonesia, the Acehese plaintiffs in the ExxonMobil case may see their case dismissed. In fact, it is the second letter the State Department has sent urging dismissal of a human rights case this year. Claims arising from the operations of Rio Tinto’s copper mine on the island of Bougainville in Papua New Guinea, for environmental damages and human rights abuses were filed in a Federal District Court in California.<sup>209</sup> However, in March 2002 the Judge dismissed the claim, relying on the statement of interest filed by the State Department, citing similar reasons to that in the Exxon-Mobil/ Indonesia letter.<sup>210</sup> These reasons include adverse effects on US foreign policy interests, interference with the Bougainville peace process,” the [U.S.’s] reputation for good governance in the eyes of international financial institutions, foreign aid donors, banks, investors, trading and other partners.<sup>211</sup>

The mine had been closed in 1989 after protests in the Bougainville community, followed by ten years of civil war.<sup>212</sup> Although there is merit in the argument that the local conflict that could be affected by litigation in the United States, the State Department succeeding in sending a clear message that the company that committed abuses while operating the mine should not be held accountable. In fact, Rio Tinto PLC is the largest mining company in the world.<sup>213</sup> Again, the focus on economic benefit prioritized over human welfare and environmental protection is embodied in the United States’ foreign policy. Some human rights advocates assert that the Bush administration is returning to

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<sup>207</sup> Timothy Mapes, *Indonesia Finds New Terror Links: Ties Between Militants May Be More Extensive Than First Thought*, ASIAN WALL ST. J., Dec. 13, 2002, at A1, available at 2002 WL-WSJA 104249662.

<sup>208</sup> *US’ Image Pushing Asian Countries Into China’s Embrace*, STRAITS TIMES, Dec. 17, 2002, available at 2002 WL 103123733. This lack of support results from the Indonesian’s perception of the United States “as a bully,” an image that may propel them towards another big power: China. *Id.*

<sup>209</sup> Unrepresented Nations and Peoples Organization, UNPO NEWS, Feb. 2002, at [www.unpo.org/news/news2002feb-apr](http://www.unpo.org/news/news2002feb-apr).

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> Project Underground, *Drillbits*, Vol. 7, No. 4, Apr./May 2002 at [http://www.moles.org/ProjectUnderground/drillbits/7\\_04/hotspots.html](http://www.moles.org/ProjectUnderground/drillbits/7_04/hotspots.html).

<sup>213</sup> See Waldman & Mapes, *supra* note 138.

a foreign policy akin to the Cold War era, in which the U.S. tolerates egregious misbehavior by its allies.<sup>214</sup>

#### V. Conclusion

Could these State Department letters have a chilling effect on ATCA litigation? At present it is too early to evaluate the effects in Exxon-Mobil, because the case is still pending. However, the judge adhered to the government's wishes in *Rio Tinto*. Yet, if the Unocal litigation goes forward favorably to the plaintiffs, the scope of ATCA litigation may expand for prosecution of corporate misbehavior in U.S. courts.

With *Doe v. ExxonMobil*, the United States, through its judicial and administrative officers, has the opportunity to render an American multinational company accountable for human rights violations committed on its behalf and under its knowledge. If taken, this approach would further legitimize ATCA as a powerful tool and encourage multinational companies to take a proactive approach to human rights situations, creating and renovating their own policies towards the safety and welfare of individuals, not just employees, present on and around their property. However, the United States' own foreign policy centers on the war against terrorism rather than on the protection of human rights in what it considers a civil war in Aceh. Thus, for political and economical purposes, the United States is willing to make concessions in the human rights arena, in exchange for help from Indonesia in the war against terrorism. The question that remains is whether the United States' courts are willing to do the same.

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<sup>214</sup> *Id.*