

A TURN FOR THE WORSE: FOREIGN RELATIONS, CORPORATE HUMAN RIGHTS ABUSE, AND THE COURTS

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Abstract: This Note examines recent interventions in corporate human rights lawsuits by the executive branch from both legal and political perspectives. It first identifies a nascent trend in human rights litigation in U.S. courts—namely, the propensity of the Bush administration to intervene on behalf of corporate defendants accused of violating human rights in the developing world—by examining the factual and procedural history of three contemporary lawsuits. It then explores the role of the political question, act of state, and international comity doctrines in these and similar suits, and advances a method for applying all three doctrines in a “human rights-friendly” manner. Finally, the Note examines the Bush administration’s interventions from a human rights policy perspective and concludes that for political, in addition to legal reasons, the executive branch should desist from intervening on behalf of corporate defendants in human rights lawsuits.

INTRODUCTION

In July of 2002, the Legal Adviser to the United States Department of State took the unusual step of writing a letter to a presiding judge to argue that a case should be dismissed because adjudication could adversely affect U.S. foreign relations.¹ The United States District Court for the District of Columbia, upon Defendant Exxon Mobil’s request, had sought the State Department’s opinion as a possible justification for dismissal in a case involving corporate human rights abuse in Indo-

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¹ Doe v. Exxon Mobil Corp., No. 01–CV–1357 (D.D.C. filed June 19, 2001); Letter from William H. Taft, IV, Legal Adviser to the U.S. Department of State, to Hon. Louis P. Oberdorfer, Judge, U.S. District Court for the District of Columbia, at 2 (July 29, 2002) [hereinafter Exxon Letter], available at <http://www.laborrights.org> (last visited Nov. 10, 2003).

nesia.² At issue was whether the court, by adjudicating the claims of Indonesian nationals who allegedly suffered murder, rape, and torture at the hands of Exxon's security guards in war-torn Aceh province, would offend Indonesia's government, damaging U.S.-Indonesia relations.³ At the time of this writing, the motion to dismiss is pending.⁴

Doe v. Exxon Mobil Corp. is the most striking example of a nascent trend in corporate human rights litigation in the United States.⁵ Corporate defendants, who have a number of procedural tools at their disposal in mass tort cases involving American statutes such as the Alien Tort Claims Act (ATCA), Torture Victim Protection Act (TVPA), and Racketeer Influenced and Corrupt Organizations statute (RICO), have increasingly invoked foreign relations as a defense to adverse human rights claims.⁶ Their arguments have been buttressed in several cases by letters and amicus curiae briefs by executive branch officials, in which the government argues that the cases should be dismissed because of their potential to create difficulties in America's foreign relations.⁷

The legal basis for dismissal in these cases is often provided by the political question, act of state, and international comity doctrines, which are rooted in principles of separation of powers, prudence, constitutional considerations, and diplomatic sensitivity.⁸ The use of

² Kenneth Roth, *U.S. Hypocrisy in Indonesia*, INT'L HERALD TRIB., Aug. 14, 2002, at 4.

³ *Id.*

⁴ Civil Docket, *Exxon* (No. 01-CV-1357).

⁵ See Peter Waldman & Timothy Mapes, *Administration Sets New Hurdles for Human Rights Cases*, WALL ST. J., Aug. 7, 2002, at B1 ("The growing movement to make multinational companies liable in U.S. courts for alleged human-rights abuses committed abroad has hit a snag—the Bush administration.").

⁶ Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 (1994); Alien Tort Claims Act, 28 U.S.C. § 1350 (1993); Torture Victim Protection Act, 28 U.S.C. § 1350 note (1993). Although the use of the Alien Tort Claims Act in human rights litigation has been persistently derided by corporate defendants, Congress explicitly re-affirmed the importance of the statute in 1991, referring to it as a parallel remedy to the Torture Victim Protection Act. H.R. REP. NO. 102-367 (I), at 4 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84.

⁷ See *Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d 1116, 1180 (C.D. Cal. 2002); Brief for the United States as Amicus Curiae, *Doe v. Unocal Corp.*, 2002 WL 31063976 (9th Cir. 2002), *reh'g en banc granted and opinion vacated*, 2003 WL 359787, at *1 (9th Cir. 2003) (Nos. 00-56603, 00-56608) [hereinafter Unocal Brief]; Exxon Letter, *supra* note 1, at 1.

⁸ See *Unocal*, 2002 WL 31063976, at *20; *Sarei*, 221 F. Supp. 2d at 1183, 1193, 1199; Plaintiffs' Memorandum in Opposition to Defendant's Motion to Dismiss at 31, 35, *Exxon* (No. 01-CV-1357) [hereinafter Plaintiffs' Memo]. In several recent letters to courts, the Bush administration has refrained from addressing the legal merits of the cases, or the legal bases for dismissal, instead offering its views only on the foreign policy ramifications of adjudication. See Exxon Letter, *supra* note 1, at 1; Letter from William H. Taft, IV, Legal Adviser to the U.S. Department of State, to Hon. Robert D. McCallum, Assistant Attorney

these doctrines by corporate defendants is not a novel basis for defending adverse claims.⁹ The Bush administration, however, has obliged corporate defendants' requests for intervention to a greater extent than previous administrations, arguing that marginal U.S. interests, such as the fragility of an implausible indigenous peace process, or self-serving interests, such as maintaining a robust investment climate for U.S. businesses, should outweigh the resolution of human rights disputes.¹⁰ In an era in which corporate human rights litigation in the United States is experiencing a dramatic boom, this new obstacle presents a substantial threat to human rights plaintiffs.¹¹

Commentators have proffered various solutions to the challenges presented by the political question, act of state, and international comity doctrines in human rights litigation. Some have proposed domestic legislation that would respond to the limited scope, in the case of the TVPA, or the arguable unsuitability, in the case of the ATCA, of U.S. statutes that are currently used to hold multinational corporations (MNCs) liable in U.S. courts.¹² Others have advanced the idea of a human rights exception to particular judicial doctrines because of

General, at 1 (Oct. 31, 2001) [hereinafter Sarei Letter], available at <http://www.state.gov/documents/organization/16529.pdf> (last visited Aug. 22, 2003).

⁹ See generally *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964). These cases involved the expropriation of U.S. businesses' assets by the government of Cuba. See *First Nat'l City*, 406 U.S. at 759–60; *Sabbatino*, 376 U.S. at 398–400. Not only do they provide an important early example of the act of state doctrine in litigation involving corporations and foreign sovereigns, they also illustrate the significant power the State Department wields in influencing whether a lawsuit with diplomatic undertones will be dismissed. See *Sabbatino*, 376 U.S. at 407, 420. *First National City* was a veritable ping-pong of dismissals and reversals that tracked the State Department's changing opinion of the impact of adjudication on foreign relations as the case made its way through the courts. See Andreas F. Lowenfeld, *Act of State and Department of State: First National City Bank v. Banco Nacional de Cuba*, 66 AM. J. INT'L L. 795, 796–801 (1972) (recounting the case's procedural history); see also note 235, *infra*.

¹⁰ See *Sarei*, 221 F. Supp. 2d. at 1181; Exxon Letter, *supra* note 1, at 2. The Bush administration's interventions against human rights plaintiffs have not been limited to corporate defendants; the administration has also intervened in suits on behalf of the political leaders of states with poor human rights records. See Oscar Avila, *Fahun Gong Face 2 Foes: U.S., China*, CHI. TRIB., June 23, 2003, at 10 (describing the Justice Department's efforts to dismiss a lawsuit filed against former Chinese President Jiang Zemin and other Chinese officials for human rights abuses); Joel Mowbray, *Mistrial: America Defends Robert Mugabe*, NEW REPUBLIC, July 28 & Aug. 3, 2003, at 13 (discussing the State Department's actions opposing a suit against Zimbabwe's president, Robert Mugabe, and his ZANU-PF Party under the Torture Victim Protection Act).

¹¹ See David Corn, *Corporate Human Rights*, NATION, July 15, 2002, at 31.

¹² See, e.g., Logan Michael Breed, Note, *Regulating Our 21st-Century Ambassadors: A New Approach to Corporate Liability for Human Rights Violations Abroad*, 42 VA. J. INT'L L. 1005, 1028 (2002).

the importance of accountability for rights abuse.¹³ On the specific problem of the Bush administration's interventions in recent human rights lawsuits, one commentator has recently argued that judges, when presented with a recommendation of dismissal by the executive branch, should assert their independence and refuse to dismiss human rights lawsuits.¹⁴

This Note takes a different approach, proposing a two-pronged solution to the developing trend, which is referred to below as *executive-corporate collusion*.¹⁵ It first suggests technical methods for applying the judicial doctrines in a manner that is more consistent with their language and purpose, and more amenable to human rights plaintiffs. It then offers a policy critique of executive intervention in diplomatically-sensitive human rights lawsuits, arguing that executive-corporate collusion is a public policy of dubious merit that represents a fickle commitment to human rights values. Thus, in the legal sense, when the executive branch intervenes on behalf of defendants in human rights lawsuits, the judicial doctrines do not necessarily offer easy bases for dismissal; upon examination, they are more "human rights-friendly" than the Bush administration might hope. In the policy sense, there is a solution to executive-corporate collusion that largely avoids the separations of powers issues that ordinarily permeate discussions of political questions, acts of state, and international comity: Lawyers and human rights advocates should pressure the executive branch not to intervene in the first place.

Part I of this Note explores the political question, act of state, and international comity doctrines individually, briefly recounting their history, current status, and mode of application in courts. Part II identifies

¹³ See, e.g., Rebecca A. Fleming, Comment, *Holding State Sovereigns Accountable for Human Rights Violations: Applying the Act of State Doctrine Consistently with International Law*, 23 MD. J. INT'L L. & TRADE 187, 207 (1999) (arguing that the act of state doctrine should be modified when its application would frustrate human rights plaintiffs); Sung Teak Kim, Note, *Adjudicating Violations of International Law: Defining the Scope of Jurisdiction Under the Alien Tort Statute—Trajano v. Marcos*, 27 CORNELL INT'L L.J. 387, 413 (1994) (arguing that international comity should not apply to Alien Tort Claims Act cases); Nancy S. Williams, Comment, *Political Question or Judicial Query: An Examination of the Modern Doctrine and Its Inapplicability to Human Rights Mass Tort Litigation*, 28 PEPP. L. REV. 849, 865-74 (2001) (arguing that the political question doctrine should not apply to human rights cases).

¹⁴ Brian C. Free, Comment, *Awaiting Doe v. Exxon Mobil Corp.: Advocating the Cautious Use of Executive Opinions in Alien Tort Claims Act Litigation*, 12 PAC. RIM L. & POL'Y J. 467, 483-86 (2003).

¹⁵ This term refers to instances in which the executive branch intervenes on behalf of corporate defendants—usually at the defendants' behest—in human rights lawsuits in the United States.

three contemporary corporate human rights abuse cases in which striking factual and legal similarities demonstrate the birth of a new trend in human rights litigation. Part III examines the judicial doctrines as applied in these cases, arguing that the doctrines, on their terms, are not applicable in many human rights cases. Part IV offers a broader context by identifying the potential for further abuse if executive-corporate collusion continues, and exploring the powerful role of the executive branch in courts' decisions whether to adjudicate human rights cases. Part IV also provides a policy critique of the Bush administration for its demonstrated willingness to intervene in human rights litigation on the behalf of corporate defendants. The Note concludes that human rights ideals, which are a staple of the administration's political rhetoric, should constitute an integral part of American foreign policy, and hence preclude future executive intervention in corporate human rights litigation.

I. THREE DOCTRINES

The political question, act of state, and international comity doctrines, which require dismissal for prudential and constitutional reasons in instances where jurisdiction is nonetheless appropriate, elude easy categorization.¹⁶ The political question doctrine is the subject of debate between courts and commentators, some of whom view it as a jurisdictional limitation, while others see it as a prudential or constitutional doctrine.¹⁷ The act of state doctrine is based on separation of powers concerns, yet it is also grounded in principles of diplomatic comity.¹⁸ International comity has no constitutional underpinning, but is a device of international relations that requires deference when one state's courts deal with the official acts of another state.¹⁹

The three doctrines share a common purpose, however, as tools that prevent diplomatically-sensitive litigation from frustrating the po-

¹⁶ See, e.g., *Bigio v. Coca-Cola Co.*, 239 F.3d 440, 452 n.7 (2d Cir. 2000) (illustrating the tension among courts as to whether the act of state doctrine is properly categorized as an abstention doctrine or a rule of decision). *Forum non conveniens*, another doctrine that is often invoked in mass tort cases also frequently presents a substantial obstacle to adjudication. See, e.g., *Aguinda v. Texaco, Inc.*, 303 F.3d 470, 480 (2d Cir. 2002) (dismissing, on *forum non conveniens* grounds, Ecuadoran plaintiffs' class-action lawsuit against oil company for environmental tort); *Villeda Aldena v. Fresh Del Monte Produce, No. 01-CV-3399* (S.D. Fla. filed Aug. 2, 2001).

¹⁷ See *Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d 1116, 1193 n.273 (C.D. Cal. 2002).

¹⁸ See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964); *Oetjen v. Central Leather Co.*, 246 U.S. 297, 303-04 (1918).

¹⁹ *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895).

litical branches' ability to conduct foreign relations.²⁰ Each has figured prominently in recent corporate human rights abuse cases.²¹

A. *The Political Question Doctrine*

The political question doctrine is a prudential and constitutional mechanism by which a court that has jurisdiction over a dispute declines to adjudicate if the case raises questions that should be addressed by the political branches of government.²² The doctrine stems from Chief Justice Marshall's dictum in *Marbury v. Madison* that articulated on non-textual constitutional grounds the president's "important political powers."²³ The Supreme Court issued the authoritative modern opinion on the doctrine 159 years later in the landmark civil rights case *Baker v. Carr*.²⁴ In that case, the Court called for the application of the doctrine in cases in which one of the following factors is "inextricably" involved:

[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; [2] a lack of judicially discoverable and manageable standards for resolving it; [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.²⁵

²⁰ See *Sarei*, 221 F. Supp. 2d at 1184, 1193–94, 1205.

²¹ See *Doe v. Unocal Corp.*, 2002 WL 31063976, at *20 (9th Cir. 2002); *Sarei*, 221 F. Supp. 2d at 1183, 1193, 1199; Plaintiffs' Memo, *supra* note 8, at 31, 35, *Exxon* (No. 01–CV–1357).

²² *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 483 (D.N.J. 1999).

²³ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 165 (1803).

²⁴ *Baker v. Carr*, 369 U.S. 186 (1962).

²⁵ *Id.* at 217. Some judges consider the political question doctrine generally, without analysis of the *Baker* factors. See *id.*; see, e.g., *Abebe-Jira v. Negewo*, 72 F.3d 844, 848 (11th Cir. 1996); *Linder v. Portocarrero*, 963 F.2d 332, 337 (11th Cir. 1992). This type of application, which focuses more on the rule's policy underpinnings than on doctrine, is also common in cases involving the international comity doctrine. See *infra* note 54 and accompanying text.

Non-justiciability is most often invoked in cases affecting U.S. foreign relations.²⁶ In the famous words of Justice Sutherland, the nonjusticiability of political questions touching on foreign relations is predicated upon the “very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations.”²⁷ *Baker* noted that the doctrine has particular relevance in cases touching on foreign affairs, but also carefully emphasized that not every such case presents non-justiciable political questions.²⁸

The use of the political question doctrine in human rights litigation is increasingly common; for example, several recent cases involving claims from the World War II era were dismissed because they raised non-justiciable political questions.²⁹ In *Iwanowa v. Ford Motor Co.*, the district court found a claim by a forced laborer for a German Ford subsidiary during World War II non-justiciable on four of the six *Baker* factors.³⁰ Under factor one, the court found a constitutional commitment to the executive branch in the issue of war reparations, which affected U.S. relations with the international community.³¹ The court found that adjudication would demonstrate a lack of respect for the political branches and could involve multifarious pronouncements by various branches of government under factors four and six because of an existing treaty dealing with war reparations.³² Finally, the court found that the existence of potentially thousands of 50-year-old claims resulted in a lack of judicially manageable standards under factor two.³³

B. *The Act of State Doctrine*

The act of state doctrine has been called the foreign relations equivalent of the political question doctrine.³⁴ It provides that out of

²⁶ *Baker*, 369 U.S. at 211; *Iwanowa*, 67 F. Supp. 2d at 484.

²⁷ *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319–20 (1936).

²⁸ *Baker*, 369 U.S. at 211.

²⁹ See *Hwang Geum Joo v. Japan*, 172 F. Supp. 2d 52 (D.D.C. 2001) (dismissing a suit by Japanese “comfort women” against the government of Japan on political question doctrine); *In re Nazi Era Cases Against German Defendants Litigation*, 129 F. Supp. 2d 370 (D.N.J. 2001) (requiring dismissal of a suit by forced laborers during World War Two (WWII) on political question grounds); *Iwanowa*, 67 F. Supp. 2d at 424–25 (dismissing case by Russian forced laborers during WWII against the Ford Motor Company on political question doctrine).

³⁰ *Iwanowa*, 67 F. Supp. 2d at 485–89.

³¹ *Id.* at 485.

³² *Id.* at 486–88.

³³ *Id.* at 489.

³⁴ *Trajano v. Marcos*, 878 F.2d 1439, **2 (9th Cir. 1989).

respect for other states' sovereignty, U.S. courts should not judge the acts of foreign heads of state made within their states' sovereign territory.³⁵ In the context of diplomatically-sensitive suits, the doctrine stands for the proposition that when the executive branch makes a determination on a matter affecting U.S. foreign relations, it is not for the judiciary to second-guess that branch's expertise by adjudicating what the executive concludes are sensitive claims.³⁶

Like the political question doctrine, the act of state doctrine has a foundation in separation of powers principles, although not in the constitution's text.³⁷ While the doctrine is not compelled by principles of international law or by the inherent nature of sovereignty, both contribute to its underlying policy.³⁸ In *Banco Nacional de Cuba v. Sabbatino*, the Supreme Court enumerated three considerations for courts deciding whether to adjudicate claims that implicate the act of state doctrine:

[1] the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it; [2] the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches; [3] [t]he balance of relevant considerations may also be shifted if the government which perpetrated the challenged act of state is no longer in existence.³⁹

Unlike the political question doctrine, the primary purpose of which is preserving the political branches' prerogative in matters of foreign relations, the act of state doctrine is theoretically concerned with the separation of powers on a level once-removed.⁴⁰ The doctrine's pri-

³⁵ *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897); see also Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1602–1611 (1994) (providing foreign sovereigns with immunity to suit).

³⁶ See *Banco Nacional de Cuba v. Farr*, 243 F. Supp. 957, 975 (S.D.N.Y. 1965), *aff'd*, 383 F.2d 166 (2d Cir. 1967).

³⁷ See *Sabbatino*, 376 U.S. at 423.

³⁸ See *Kirkpatrick Co. v. Env'tl Tectonics Corp.*, 493 U.S. 400, 404 (1990); *Sabbatino*, 376 U.S. at 421.

³⁹ *Sabbatino*, 376 U.S. at 428. Although this standard was offered in the context of expropriation of property by a foreign government, the *Sabbatino* factors have since been considered in a number of cases of corporate accountability that do not involve expropriation issues. See, e.g., *Env'tl Tectonics*, 493 U.S. at 401–02; *Doe v. Unocal Corp.*, 2002 WL 31063976 (9th Cir. 2002), *reh'g en banc granted and opinion vacated*, 2003 WL 359787, at *1, 19–20 (9th Cir. 2003) (Nos. 00–56603, 00–56608); *Bigio v. Coca-Cola Co.*, 239 F.3d 440, 444–51 (2d Cir. 2000); *Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d 1116, 1121–29, 1183 (C.D. Cal. 2002).

⁴⁰ See *Env'tl Tectonics*, 493 U.S. at 405.

mary function is to avoid passing judgment on the official acts of governments—in other words, maintaining respectful diplomatic relations between states.⁴¹ Because of the dominant role the political branches have typically played in that effort, however, the act of state doctrine implicates significant tensions that can arise between the judiciary and the executive.⁴²

The act of state doctrine, which has frequently been raised by defendant corporations,⁴³ has rarely been successful in defeating human rights claims.⁴⁴ *Wiwa v. Royal Dutch Petroleum Co.* illustrates the doctrine's application in a recent corporate human rights case that did not involve an intervention by the executive branch.⁴⁵ Citizens of the Ogoni region of Nigeria sued two European oil companies, which they claimed had directed Nigeria's security forces violently to suppress local opposition to the companies' development efforts in the region.⁴⁶ The court rejected the defendants' act of state defense, based largely on the third *Sabbatino* factor; since the regime responsible for the human rights abuse had, by the time of the lawsuit, been replaced by a democratic government critical of the prior regime, the court did not fear that adjudicating would strain U.S.-Nigeria relations.⁴⁷

⁴¹ *See id.*

⁴² *See id.*

⁴³ *See, e.g., Unocal*, 2002 WL 31063976, at *19–20; *Bigio*, 239 F.3d at 451; *Sarei*, 221 F. Supp. 2d at 1183; *Wiwa v. Royal Dutch Petroleum Co.*, 2002 WL 319887, at *27 (S.D.N.Y. 2002); *Sampson v. Federal Republic of Germany*, 975 F. Supp. 1108, 1121 (N.D. Ill. 1997), *aff'd*, 250 F.3d 1145 (7th Cir. 2001); *Beanal v. Freeport-McMoRan, Inc.*, 969 F. Supp. 362, 367 (E.D. La. 1997) (dismissing corporate human rights abuse case by Indonesian nationals against mining corporation on standing and statutory grounds, despite defendant's act of state defense); Plaintiffs' Memo, *supra* note 8, at 31, 35, *Exxon* (No. 01–CV–1357).

⁴⁴ *See Filartiga v. Pena-Irala*, 630 F.2d 876, 889 (2d Cir. 1980) (refusing to dismiss a case against the Paraguayan government for acts of torture on act of state grounds). *But see* *Burger-Fischer v. Degussa AG*, 65 F. Supp. 2d 248 (D.N.J. 1999) (dismissing claims against corporations for use of slave labor during WWII on act of state grounds). Since *Filartiga*, the act of state doctrine has been raised, usually unsuccessfully, in a number of human rights cases. *See, e.g., Sampson v. Federal Republic of Germany*, 250 F.3d 1145, 1156–59 (7th Cir. 2001) (dismissing suit against Germany for WWII slave labor on jurisdictional grounds, explicitly reversing the district court's dismissal on act of state doctrine); *Kadic v. Karadžić*, 70 F.3d 232, 250 (2d Cir. 1995) (allowing suit against Serbian war criminal over act of state defense); *Trajano v. Marcos*, 878 F.2d 1439, at **2 (9th Cir. 1989) (allowing adjudication of claims of torture against former Philippine President Ferdinand Marcos despite act of state defense); *Wiwa*, 2002 WL 319887, at *1 (allowing claims against Nigerian government despite act of state defense).

⁴⁵ *See* 2002 WL 319887, at *27.

⁴⁶ *Id.* at *1–2.

⁴⁷ *See Sabbatino*, 376 U.S. at 428; *Wiwa*, 2002 WL 319887, at *28; *see also* *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117, 130 (E.D.N.Y. 2000) (declining to dismiss suit against

C. *The International Comity Doctrine*

International comity is the deference a domestic court pays to the act of a foreign government that is not officially binding on the court.⁴⁸ Through comity, legal systems reflect the importance of reciprocal tolerance and good will.⁴⁹ Comity is not an obligation to dismiss sensitive cases; it is, however, more than a simple matter of courtesy among nations.⁵⁰ In its most recent statement on the doctrine, the Supreme Court found that a court with proper jurisdiction should dismiss a lawsuit on comity grounds only if an actual conflict exists between foreign and domestic law.⁵¹

International comity may properly be seen as the domestic equivalent of the international law principle of jurisdiction to prescribe.⁵² Thus, when a true conflict of laws exists, courts occasionally look to the *Restatement (Third) of the Foreign Relations Law of the United States*, which sets out a lengthy but non-exhaustive list of factors to determine whether or not adjudication is "reasonable."⁵³ In many diplomatically-sensitive cases, however, courts invoke comity concerns only generally, in order to strengthen other bases for their judgments.⁵⁴

French financial institutions for economic collusion with Nazi government on act of state grounds, because the government in question had long since been replaced).

⁴⁸ *Laker Airways Ltd. v. Pan American World Airways, Inc.*, 604 F. Supp. 280, 291 (D.D.C. 1984).

⁴⁹ *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for Southern Dist. of Iowa*, 482 U.S. 522, 555 (1987) (Blackmun, J., concurring in part and dissenting in part).

⁵⁰ *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895).

⁵¹ *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 798 (1993).

⁵² See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 cmt. a (1987).

⁵³ See *Sarei*, 221 F. Supp. 2d at 1199; RESTATEMENT, *supra* note 52, § 403(2). The factors are: (1) The link of the activity to the territory of the regulating state; (2) the connections, such as nationality, residence, or economic activity between the regulating state and the person principally responsible for the activity to be regulated; (3) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted; (4) the existence of justified expectations that might be protected or hurt by the regulation; (5) the importance of the regulation to the international political, legal, or economic system; (6) the extent to which the regulation is consistent with the traditions of the international system; (7) the extent to which another state may have an interest in regulating the activity; and (8) the likelihood of conflict with regulation of another state. *Id.*

⁵⁴ See, e.g., *Ahmad v. Wigen*, 910 F.2d 1063, 1067 (2d Cir. 1990) (overturning district court's decision to take testimony from witnesses concerning Israel's law enforcement procedures because the interests of international comity would be "ill-served" by such action); *Tachiona v. Mugabe*, 169 F. Supp. 2d 259, 309 (S.D.N.Y. 2001) (holding that principles of international comity do not preclude service of process to Zimbabwean President Robert Mugabe).

If the act of state doctrine is premised upon separation of powers concerns that are once-removed, then the international comity doctrine's separation of powers concerns are twice-removed.⁵⁵ Under the act of state and political question doctrines, deference to the executive in foreign relations matters appears plainly on the respective, court-decreed standards.⁵⁶ Lawsuits implicate the international comity doctrine, however, not when the *American* executive fears an encroachment on its ability to conduct foreign relations, but when adjudication would contravene a policy, law, or prerogative of a *foreign* state.⁵⁷ The United States has a clear foreign policy interest in a lawsuit once a foreign sovereign has articulated its discomfort with adjudication—namely, maintaining smooth diplomatic relations with the complaining state.⁵⁸

Recent litigation between Ecuadorian nationals and oil giant Texaco for the latter's human rights and environmental abuses in the Oriente region of Ecuador demonstrates the application of the international comity doctrine.⁵⁹ In a series of cases, the opinion of the Ecuadorian government—as opposed to the American executive—appears to have been dispositive in determining whether to dismiss the case.⁶⁰ A federal district court initially dismissed the claims based largely upon the indignant insistence of the Ecuadorian government.⁶¹ Yet several years later, when a new regime in Ecuador told the State Department that it had had a change of heart and wanted to see the claims adjudicated, a subsequent court vacated the dismissal order and the case proceeded.⁶² The suit was ultimately dismissed largely on *forum non conveniens* grounds and is now being pursued in Ecuador's courts.⁶³

⁵⁵ See *Sarei*, 221 F. Supp. 2d at 1199.

⁵⁶ See *supra* text accompanying notes 25 and 39.

⁵⁷ See *Hartford Fire*, 509 U.S. at 798.

⁵⁸ See *Sarei*, 221 F. Supp. 2d at 1205.

⁵⁹ See *Aguinda v. Texaco, Inc.*, 945 F. Supp. 625, 627 (S.D.N.Y. 1996) (dismissing suit on international comity and *forum non conveniens* grounds), *dismissal vacated* *Jota v. Texaco, Inc.*, 157 F.3d 153, 158–61 (2d Cir. 1998), *reversed as modified* *Aguinda v. Texaco, Inc.*, 303 F.3d 470, 480 (2d Cir. 2002).

⁶⁰ See *Jota*, 157 F.3d at 156; *Aguinda*, 945 F. Supp. at 627; *Sequihua v. Texaco, Inc.*, 847 F. Supp. 61, 63 (S.D. Tex. 1994).

⁶¹ See *Sequihua*, 847 F. Supp. at 63.

⁶² See *Jota*, 157 F.3d at 156, 163.

⁶³ *Aguinda*, 303 F.3d at 480. The dismissal order noted that Ecuadorian courts remained open to the plaintiffs and that any decision rendered there would be enforceable in the United States. *Id.* at 477; Tyche Hendricks, *Ecuadorans Put Chevron on Trial*, S.F. CHRON., Oct. 21, 2003, at A3. The trial in Ecuador began in October of 2003. Hendricks, *supra*, at A3.

II. THREE CASES

The three judicial doctrines have been the basis of decision in two recent cases of corporate human rights abuse abroad and will determine whether a third pending case may proceed.⁶⁴ The factual similarities of the cases are striking. Each involves allegations of massive human rights abuse committed by MNCs in the mining and energy sectors.⁶⁵ Two of the three corporations are based in the United States; the third has half a dozen group offices in the United States.⁶⁶ In each case, the abuse centers around natural resource exploration that has acutely impacted indigenous populations in remote corners of developing countries.⁶⁷ In all three suits, judges asked the State Department to predict the lawsuit's potential to interfere with U.S. foreign policy.⁶⁸ In the two cases that courts have ruled upon thus far, the courts' decisions whether to dismiss have followed the recommendations of the State Department.⁶⁹

A. Doe v. Exxon Mobil Corp.

The ongoing *Exxon* case involves the alleged complicity of the Exxon Mobil Corporation in acts of torture, rape, and murder committed over a period of years by its plant security detail in Aceh, Indo-

⁶⁴ See *Doe v. Unocal Corp.*, 2002 WL 31063976, at *19 (9th Cir. 2002); *Sarei*, 221 F. Supp. 2d at 1193, 1199; Plaintiffs' Memo, *supra* note 8, at 31, 35, *Exxon* (No. 01-CV-1357).

⁶⁵ See *Unocal*, 2002 WL 31063976, at *3-4; *Sarei*, 221 F. Supp. 2d at 1127; Plaintiffs' Complaint at 7, 14-19, *Doe v. Exxon Mobil Corp.*, No. 01-CV-1357 (D.D.C. filed June 19, 2001) [hereinafter Plaintiffs' Complaint].

⁶⁶ See *Unocal Around the World 2* (2002) (asserting that Unocal's corporate headquarters are in California), available at <http://www.unocal.com/aboutucl/uclataglance.pdf> (last visited Nov. 10, 2003); Rio Tinto Group Operations (asserting that while Rio Tinto's head offices are in London and Melbourne, among its 37 group offices are six offices in the United States), available at <http://www.riotinto.com/about/> (last visited Nov. 10, 2003); ExxonMobil Business Headquarters (asserting that ExxonMobil's business headquarters are located in Texas), available at http://www2.exxonmobil.com/Corporate/About/Corp_AboutXOM.asp (last visited Nov. 10, 2003).

⁶⁷ See *Unocal*, 2002 WL 31063976, at *1 (involving allegations of abuse in the Tensasirim region of Burma); *Sarei*, 221 F. Supp. 2d at 1120 (involving allegations of abuse in Bougainville, Papua New Guinea (PNG)); Plaintiffs' Complaint, *supra* note 65, at 12-14, *Exxon* (No. 01-1357) (involving allegations of abuse in Aceh, Indonesia).

⁶⁸ See *Sarei*, 221 F. Supp. 2d at 1180-81; Nat'l Coalition Gov't of the Union of Burma v. *Unocal, Inc.*, 176 F.R.D. 329, 335 (C.D. Cal. 1997), *rev'd in part*, 2002 WL 31063976, at *1, *reh'g en banc granted and opinion vacated*, 2003 WL 359787, at *1 (9th Cir. 2003); Civil Docket, *Exxon* (No. 01-CV-1357). The Department of Justice also intervened as amicus curiae in the en banc hearing of *Unocal*. See *Unocal Brief*, *supra* note 7.

⁶⁹ See *Unocal*, 2002 WL 31063976, at *21; *Sarei*, 221 F. Supp. 2d at 1198; see also note 235 *infra*.

nesia.⁷⁰ Exxon began its energy exploration in Indonesia over 100 years ago.⁷¹ Around 1971, Exxon Mobil's predecessor-in-interest, Mobil Oil, discovered a large natural gas field in Arun, located in Aceh Province, Indonesia.⁷² In return for exclusive access to the field's natural gas deposits, Mobil provided Indonesia's brutal military dictator, General Suharto, blank shares in Mobil Oil, among other forms of payment.⁷³ Mobil, now Exxon Mobil, continued to operate at the Arun site, which was one of the largest and most profitable natural gas projects in the world, until 2001.⁷⁴

Aceh has been the site of a violent separatist insurrection since 1976, and was under direct military control from 1990 to 1998.⁷⁵ Human rights abuses attributed to military troops in the region during and after that time include torture, rape, extra-judicial execution, and forced disappearances of civilians.⁷⁶ Amidst this conflict, Mobil allegedly contracted with a unit of the notorious Indonesian military to supply security for its Arun plant, paying monthly or annual fees for the troops' services, and providing them with facilities and supplies.⁷⁷ Throughout their tenure as security personnel at the Arun plant, Indonesian troops perpetuated a terror campaign against Acehnese citizens unaffiliated with the separatist movement.⁷⁸

The plaintiffs, eleven anonymous Acehnese citizens, filed suit in the United States District Court for the District of Columbia in 2001, under the aegis of International Labor Rights Fund, a U.S.-based human rights organization.⁷⁹ The citizens' allegations include physical and psychological torture, sexual assault, physical abuse, and murder.⁸⁰ Exxon Mobil moved to dismiss less than four months after the plaintiffs

⁷⁰ Plaintiffs' Complaint, *supra* note 65, at 14–23, *Exxon* (No. 01–CV–1357). The above statement of facts in *Exxon* comes from the plaintiffs' complaint, and should not be construed as proven at this stage in the litigation. *See id.*

⁷¹ *Id.* at 12, para. 31. The corporation began its exploration in Indonesia as Mobil Corporation, which was subsumed by Exxon in 1999, and is now a wholly-owned subsidiary of Exxon Mobil. *Id.*, at 7–8, para. 17. Exxon Mobil is currently the second largest privately-held American corporation. *Fortune*, *Fortune 500*, at 2002, available at <http://www.fortune.com/fortune/fortune500> (last visited Nov. 10, 2003).

⁷² Plaintiffs' Complaint, *supra* note 65, at 12, para. 31, *Exxon* (No. 01–CV–1357).

⁷³ *Id.* at 12, para. 32.

⁷⁴ *Id.* at 7, para. 17; *id.* at 13, para. 35.

⁷⁵ HUM. RTS. WATCH, INDONESIA: THE WAR IN ACEH 7–8 (2001), available at <http://www.hrw.org/reports/2001/aceh/> (last visited Nov. 10, 2003).

⁷⁶ Plaintiffs' Complaint, *supra* note 65, at 19–23, *Exxon* (No 01–CV–1357).

⁷⁷ *Id.* at 14–16.

⁷⁸ *Id.* at 15, para. 41.

⁷⁹ *Oily Diplomacy*, N.Y. TIMES, Aug. 19, 2002, at A16.

⁸⁰ Plaintiffs' Complaint, *supra* note 65, at 19–23, *Exxon* (No 01–CV–1357).

initiated the lawsuit, claiming *inter alia* that the act of state and political question doctrines barred adjudication.⁸¹ Roughly six months later, Exxon convinced the district court judge to solicit the views of the State Department regarding whether adjudication would interfere with U.S. foreign relations.⁸² In response, the Legal Adviser of the Department of State, William H. Taft IV, submitted a six-page letter to the court arguing that U.S. foreign policy favored dismissing of the suit for two reasons.⁸³ First, adjudicating the abuses of the Indonesian security forces could embarrass the Indonesian government, causing it to waver in its cooperation with the United States in the war against terrorism.⁸⁴ Second, the Indonesian government had threatened to retaliate by denying U.S. corporations lucrative government contracts in the future, which would harm U.S. economic and strategic interests.⁸⁵

Criticism of the State Department's intervention was swift and multifaceted. Legal experts,⁸⁶ the popular press,⁸⁷ human rights organizations,⁸⁸ and even members of Congress⁸⁹ denounced the move as a hypocritical betrayal of the principles behind the war on terror, as well as America's renewed drive toward corporate accountability in

⁸¹ Civil Docket, *Exxon* (No. 01-CV-1357); Plaintiff's Memo, *supra* note 8, at 31, *Exxon* (No 01-CV-1357).

⁸² Civil Docket, *Exxon* (No. 01-CV-1357).

⁸³ Exxon Letter, *supra* note 1, at 2.

⁸⁴ *Id.* at 3 ("This lawsuit could potentially disrupt the on-going and extensive United States efforts to secure Indonesia's cooperation in the fight against international terrorist activity.").

⁸⁵ *Id.* at 4-5 ("[W]e note that increasing opportunities for U.S. business abroad is an important aspect of U.S. foreign policy. Under the circumstances presented here, the adjudication of these claims could prejudice the Government of Indonesia and Indonesian businesses against U.S. firms bidding on contracts in extractive and other industries.").

⁸⁶ See Affidavit of Harold Hongju Koh, Professor at Yale Law School, Aug. 28, 2002, in Terry Collingsworth, *The Alien Tort Claims Act—A Vital Tool for Preventing Corporations from Violating Fundamental Human Rights*, Attachment C, available at <http://www.laborrights.org> (last visited Nov. 10, 2003); Roth, *supra* note 2, at 4.

⁸⁷ See, e.g., *State of Indifference: The White House Backs Corporate Irresponsibility over Human Rights*, PITTSBURGH POST-GAZETTE, Aug. 31, 2002, at A11; Mary McGrory, *Powell's Awkward Position*, WASH. POST, Aug. 29, 2002, at A31; *Oily Diplomacy*, *supra* note 79, at A16; Mike O'Donnell, *Moral Relativism Won't Defeat Terrorists*, CHRISTIAN SCI. MONITOR, Aug. 16, 2002, at 11.

⁸⁸ See, e.g., Human Rights Watch, *U.S./Indonesia: Bush Backtracks on Corporate Responsibility*, Aug. 7, 2002 [hereinafter *Bush Backtracks*], available at <http://www.hrw.org/asia> (last visited Nov. 10, 2003); Letter to Secretary of State Colin Powell from Directors of Human Rights NGOs, Aug. 26, 2002, available at http://www.lchr.org/workers_rights/wr_indonesia/wr_indonesia.htm (last visited Nov. 10, 2003).

⁸⁹ See Letter to Secretary of State Colin Powell from Members of the United States Congress, Oct. 8, 2002, in Collingsworth, *supra* note 86, at Attachment B.

the wake of a number of financial mismanagement scandals.⁹⁰ As the discussion below indicates, however, the intervention in *Exxon* was neither the Bush administration's first nor its last.⁹¹

B. Sarei v. Rio Tinto PLC

Rio Tinto PLC, a large, British-based mining firm with plants around the world and in the United States, collaborated with the government of Papua New Guinea (PNG) to build a mine on the PNG island of Bougainville in the 1960s.⁹² Allegedly, this venture necessitated displacing villages and destroying large amounts of rainforest.⁹³ Thus, Rio Tinto, in a move strikingly similar to Exxon Mobil's collusion with the Indonesian government, reportedly offered approximately 19% of the mine's profits to the PNG government in order to secure its cooperation in the effort.⁹⁴ Because Rio Tinto revenues were crucial to PNG, the government allegedly gave the company direct military control over its mining operations.⁹⁵ Though villagers in the path of the development fiercely resisted, PNG troops allegedly uprooted their homes and constructed the Panguna mine, which became one of the world's largest.⁹⁶ Popular opposition to the enormous mine grew during its construction, leading to acts of sabotage by citizens, harsh reprisals by the military, and eventually, a protracted civil war.⁹⁷

In addition to massive environmental torts and cultural degradation, the plaintiffs, twenty-two current and former residents of Bougainville, claimed war crimes, crimes against humanity, and massive human rights abuses stemming from Rio Tinto's mining operation and the civil war it sparked.⁹⁸ The war crimes charge was partly the result of the government's comprehensive blockade of the island during the civil war, which prevented the delivery of medical supplies, causing up-

⁹⁰ See Roth, *supra* note 2, at 4.

⁹¹ See Civil Docket, *Exxon* (No. 01-CV-1357).

⁹² Sarei v. Rio Tinto PLC, 221 F. Supp. 2d 1116, 1121 (C.D. Cal. 2002).

⁹³ *Id.* at 1122.

⁹⁴ *Id.* at 1121.

⁹⁵ *Id.* at 1124-25.

⁹⁶ *Id.* at 1123-24.

⁹⁷ Sarei, 221 F. Supp. 2d at 1124-26; see also Chris Sherwell, *Bougainville Secessionist War Worsens*, FIN. TIMES (London), Feb. 10, 1990, at 3.

⁹⁸ Sarei, 221 F. Supp. 2d at 1124-28; Michael Fathers, *Revolution in Paradise*, INDEPENDENT (London), July 21, 1991, at 8 (reporting "murder and atrocities" committed by both sides during the early stages of the civil war). In addition to human rights abuses, the scale of environmental degradation in Bougainville was truly staggering. See Fathers, *supra*, at 8. By 1987, as a result of the Panguna mine, one billion tons of waste from a hole in the earth six miles wide had infested the region's waterways. *Id.*

wards of 10,000 Bougainvillean deaths.⁹⁹ The plaintiffs also alleged violations of the laws of war, such as targeting civilian populations, pillage, rape, perfidious use of the Red Cross symbol, and wanton killing.¹⁰⁰ Because the Panguna mine was at the heart of the conflict, the plaintiffs sought to hold Rio Tinto, the impetus behind the project and its primary beneficiary, responsible for civilian losses.¹⁰¹

The court dismissed the plaintiffs' claims on several grounds.¹⁰² It dismissed their claims of environmental tort and racial discrimination incident to Rio Tinto's hiring and payment schemes under the act of state and international comity doctrines.¹⁰³ Significantly, these two doctrines did not preclude the plaintiffs' arguably more serious human rights claims of war crimes and crimes against humanity.¹⁰⁴ The court dashed any hope of a human rights victory in the case, however, by dismissing all claims under the political question doctrine.¹⁰⁵ If *Exxon* is the case-study, then *Sarei* is the danger of what it might hold.¹⁰⁶

C. Doe v. Unocal Corp.

Unocal Corporation, which maintains its headquarters in California, has owned a 28% interest in the Yadana natural gas field off the coast of Myanmar since 1992.¹⁰⁷ Along with a French oil company and the state-owned oil company of Myanmar, Unocal developed the Yadana field's deposits as part of an effort to ship natural gas from Myanmar's coast through a pipeline to Thailand.¹⁰⁸ The pipeline was to run through Myanmar's rural Tenasserim region.¹⁰⁹

The Myanmar military, which has long been criticized for violating human rights, allegedly forced villagers from the Tenasserim region to work on construction of the pipeline, committing acts of

⁹⁹ *Sarei*, 221 F. Supp. 2d at 1126–27.

¹⁰⁰ *Id.* at 1127.

¹⁰¹ *See id.*

¹⁰² *Id.* at 1208–09.

¹⁰³ *Id.* at 1193, 1207.

¹⁰⁴ *See Sarei*, 221 F. Supp. 2d at 1193, 1207.

¹⁰⁵ *See id.* at 1198–99.

¹⁰⁶ *See* discussion *supra* Part II.A. The defendants in *Exxon*, in seeking the State Department's opinion on the foreign policy implications of that case, simply followed the successful legal strategy of the *Sarei* defendant. Waldman & Mapes, *supra* note 5, at B1.

¹⁰⁷ *Unocal*, 2002 WL 31063976, at *1; *Unocal Around the World*, *supra* note 66, at 2. Unocal's corporate motto is "Improving People's Lives Wherever We Work." *Unocal Around the World*, *supra*, at 2.

¹⁰⁸ *Unocal*, 2002 WL 31063976, at *1.

¹⁰⁹ *Id.*

murder, torture, and rape in the process.¹¹⁰ Unocal and its partners on the Yadana project allegedly hired the military as their security detail, and directed troops in their daily operations.¹¹¹ The United States Court of Appeals for the Ninth Circuit found that Unocal was aware of the military's dismal human rights record before investing in the project, and that Unocal knew about allegations of continued abuse in connection with the project once construction had begun.¹¹²

The Unocal litigation involves three lawsuits.¹¹³ In 1996, four Tenasserim villagers, the Federation of Trade Unions of Burma, and the Burmese government-in-exile brought suit in federal district court under the ATCA, alleging human rights abuses and confiscation of property without compensation.¹¹⁴ In 1997, the court granted Unocal's motion to dismiss against two complainants, finding that the government-in-exile and the trade unions lacked standing to sue, but allowed the suit by the four villagers to proceed.¹¹⁵ Also in 1996, fourteen Tenasserim villagers sued Unocal and its partners in the Yadana project in district court under the ATCA and RICO for similar offenses.¹¹⁶ The court granted in part Unocal's motion to dismiss the claims against the Myanmar military and state oil company under the Foreign Sovereign Immunities Act.¹¹⁷

In 1997, the court in the case brought by the initial four villagers sought the opinion of the State Department regarding whether adjudicating the remaining issues could adversely impact U.S. foreign policy interests.¹¹⁸ In a letter to the judge, the Department opined that, although all pertinent facts had not yet come to the surface, the suit did not appear to pose a foreign relations problem.¹¹⁹ The district court then consolidated the remaining claims and granted Unocal's motion for summary judgment based on the absence of state action

¹¹⁰ *Id.* at *3-4; see also HUM. RTS. WATCH, WORLD REPORT 2001, at 172-79.

¹¹¹ *Unocal*, 2002 WL 31063976, at *2-3. At the least, Unocal was aware of the fact that the Myanmar military provided security and other services for this project. *Id.* at *2.

¹¹² *Id.* at *4-5.

¹¹³ *Doe v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997); *Nat'l Coalition Gov't of the Union of Burma v. Unocal, Inc.*, 176 F.R.D. 329, 329 (C.D. Cal. 1997); *Roe v. Unocal Corp. & Union Oil Co. of Cal.*, No. BC 237679 (L.A. Sup. Ct. filed Sept. 29, 2000).

¹¹⁴ See *Nat'l Coalition Gov't*, 176 F.R.D. at 334.

¹¹⁵ *Id.* at 360.

¹¹⁶ *Unocal Corp.*, 963 F. Supp. at 883.

¹¹⁷ Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602 (1976); *Unocal Corp.*, 963 F. Supp. at 897-98.

¹¹⁸ *Nat'l Coalition Gov't*, 176 F.R.D. at 354.

¹¹⁹ *Id.* at 362.

and subject matter jurisdiction.¹²⁰ In 2002, the Court of Appeals for the Ninth Circuit reversed in part the district court's dismissal order, finding that the ATCA case against Unocal could proceed in part because the act of state doctrine posed no barrier.¹²¹ In February of 2003, this ruling was vacated in preparation for a re-hearing before an eleven-member en banc panel of the Ninth Circuit. At the time of this writing, the en banc ruling is pending. A third case filed in California state court began in February 2003.¹²²

The Unocal litigation represents the best and worst of both worlds to human rights plaintiffs.¹²³ In contrast to the court in *Sarei*, the Ninth Circuit Court of Appeals, in its vacated judgment in *Unocal*, determined that the act of state doctrine did not bar the plaintiffs' claims of rights abuse—political questions and international comity did not figure into its decision—and remanded the case for trial.¹²⁴ This victory was celebrated far and wide as an unprecedented step in holding MNCs liable in U.S. courts.¹²⁵ *Unocal*, however, is also the most recent evidence that corporate defendants accused of human rights violations abroad have caught on to the current executive's willingness to intercede on their behalf.¹²⁶ After the highly public State Department intervention in *Exxon*, and one month before the Court of Appeals ruled against Unocal's motion to dismiss, defendant Unocal successfully petitioned the trial judge in the case's parallel state proceeding to seek the State Department's views on the lawsuit's foreign policy implications.¹²⁷ Although the Department had advised the district court in 1997 that it did not anticipate foreign relations problems stemming from the lawsuit, the defendant had urged the court to petition the Bush administration's State Department for its views on the matter.¹²⁸ As of this writing, the State Department has not yet made its views known to the court.¹²⁹

¹²⁰ Doe v. Unocal Corp., 110 F. Supp. 2d 1294, 1296 (C.D. Cal. 2000).

¹²¹ Doe v. Unocal Corp., 2002 WL 31063976, at *24 (9th Cir. 2002), *reh'g en banc granted and opinion vacated*, 2003 WL 359787, at *1 (9th Cir. 2003) (Nos. 00-56603, 00-56608).

¹²² Civil Docket, *Union Oil*, No. BC 237679; Lisa Girion, *U.S. Ruling Says Firms Liable for Abuse Abroad*, L.A. TIMES, Sept. 19, 2002, at A1.

¹²³ See Girion, *supra* note 122, at A1.

¹²⁴ *Unocal*, 2002 WL 31063976, at *21.

¹²⁵ See Girion, *supra* note 122, at A1.

¹²⁶ See Sonmi Efron, *Judge Lets Unocal Ask State Dept. to Intervene in Myanmar Lawsuit*, L.A. TIMES, Aug. 8, 2002, § 3, at 2.

¹²⁷ See *id.*

¹²⁸ See *id.*

¹²⁹ Civil Docket, *Union Oil*, No. BC237679.

Further, in anticipation of oral arguments before the en banc panel of the Ninth Circuit in the summer of 2003, the Justice Department intervened with an amicus brief, in which it bypassed criticizing a specific doctrine, advancing instead the bold position that the ATCA should no longer be interpreted to cover international human rights lawsuits.¹³⁰ Because of the Justice Department's intervention, the federal appellate-level of the hearing, and the Bush administration's increasingly recognizable fingerprint on corporate human rights suits, the pending Ninth Circuit case has attracted considerable attention¹³¹ and is now considered the forum for a final "showdown" over the ATCA.¹³²

III. HUMAN RIGHTS-FRIENDLY DOCTRINE

The executive interventions in *Unocal*, *Exxon*, and *Sarei* constitute a new trend in human rights litigation. Never before have so many victims of human rights abuse sought to hold MNCs accountable in U.S. courts for their actions abroad.¹³³ And never before has a president, invoking diplomatic sensitivity, demonstrated such a willingness to intercede in human rights litigation on the behalf of corporate defendants.¹³⁴ This situation makes for a litigation climate that is uniquely pernicious to human rights plaintiffs.¹³⁵

A close examination of the role of the judicial doctrines in these three cases, however, demonstrates that despite the Bush administration's propensity for intervening on behalf of defendants, the doctrines' ability to frustrate human rights plaintiffs may be tenuous.¹³⁶

¹³⁰ See Unocal Brief, *supra* note 7, at 4.

¹³¹ See, e.g., *Policing Human Rights*, WASH. POST, Aug. 14, 2003, at A18; *An Important Human Rights Tool*, N.Y. TIMES, Aug. 8, 2003, at A16; Marianne Lavelle & Joellen Perry, *The Court of Foreign Affairs*, U.S. NEWS & WORLD REP., June 23, 2003, at 31; *The Alien Problem*, ECONOMIST, June 21, 2003, at 51; Michael O'Donnell, *Capitalism vs Conscience: Companies Abuse Human Rights and the Feds Don't Care*, L.A. TIMES, June 9, 2003, at B11; Ka Hsaw Wa, *Court Is Villagers' Only Hope*, L.A. TIMES, June 9, 2003, at B11.

¹³² See Alex Markels, *Showdown for a Tool in Rights Lawsuits*, N.Y. TIMES, June 15, 2003, § 3, at 11.

¹³³ See Corn, *supra* note 11, at 31.

¹³⁴ See Anne-Marie Slaughter & David Bosco, *Plaintiff's Diplomacy*, FOREIGN AFF., Sept./Oct. 2000, at 102, 104-05 (stating that President Reagan attempted to limit the scope of the ATCA but did not intercede in litigation to a significant extent, while President Clinton preferred allowing human rights litigation); Waldman & Mapes, *supra* note 5, at B1 (stating that President Clinton's State Department generally remained neutral in diplomatically-sensitive human rights cases).

¹³⁵ See Waldman & Mapes, *supra* note 5, at B1.

¹³⁶ See discussion *infra* Parts III.A-C.

Legal deficiencies exist in the application of the political question and international comity doctrines in corporate human rights cases.¹³⁷ The act of state doctrine, by its own terms, is inapplicable in such cases.¹³⁸ In short, the three doctrines may be more human rights-friendly legal devices than *Sarei* and *Exxon* portend.¹³⁹

A. *Sarei*: A Political Question?

Of all three judicial doctrines, the political question doctrine, the basis for dismissal in *Sarei*, presents the biggest obstacle for human rights plaintiffs.¹⁴⁰ In particular, the latter three *Baker* factors have the potential to pose a significant threat.¹⁴¹ This doctrine is not, however, an insurmountable barrier to human rights adjudication.¹⁴² Af-

¹³⁷ See discussion *infra* Parts III.A, C.

¹³⁸ See discussion *infra* Part III.B.

¹³⁹ See *Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d 1116, 1195 (C.D. Cal. 2002); *Exxon* Letter, *supra* note 1, at 2.

¹⁴⁰ See *Sarei*, 221 F. Supp. 2d at 1195.

¹⁴¹ See *id.* at 1198; *Kadic v. Karadžić*, 70 F.3d 232, 249–50 (2d Cir. 1995) (resolving political question issue primarily on fourth through sixth *Baker* factors). The WWII-era human rights cases also demonstrate the importance of the latter three *Baker* factors, albeit in a litigation context that also allowed the courts to consider other *Baker* factors. See *In re Nazi Era Cases*, 129 F. Supp. 2d 370, 378 (D.N.J. 2001) (dismissing suit by forced WWII laborers against military parts company based on commitment to the political branches); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 485–89 (D.N.J. 1999) (dismissing case by WWII-era forced laborers against motor company on first, second, fourth and sixth *Baker* factors); *Burger-Fischer v. Degussa AG*, 65 F. Supp. 2d 248, 282–85 (D.N.J. 1999) (dismissing class-action suit against German corporation by WWII-era slave laborers on all *Baker* factors, but especially because of commitment to the political branches). The WWII-era cases list among their reasoning the unmanageability of the cases and the lack of clear standards. See *Iwanowa*, 67 F. Supp. 2d at 488–89. In the context of cases stemming from actions that were thirty or more years old, and which occurred on the massive scale of protracted, global war, this objection is perfectly reasonable. See *id.* But cases stemming from smaller-scale, contemporary abuses, such as the corporate human rights cases examined in this Note, do not suffer from the same unmanageability and lack of standards. See *Kadic*, 70 F.3d at 249.

¹⁴² See *Kadic*, 70 F.3d at 249. The *Baker* factors are:

- [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; [2] a lack of judicially discoverable and manageable standards for resolving it; [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker v. Carr, 369 U.S. 186, 217 (1962).

ter all, as the Supreme Court has noted, dismissal based on the political question doctrine should be the exception, not the rule.¹⁴³

In *Sarei*, the court dismissed all of the Bougainvillean plaintiffs' claims under the political question doctrine.¹⁴⁴ After the State Department argued that the executive opposed adjudication, the court dismissed pursuant to the fourth and sixth *Baker* factors, "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government," and "the potentiality of embarrassment from multifarious pronouncements by various departments on one question."¹⁴⁵ The court implicitly relied in turn on the fifth factor, "an unusual need for unquestioning adherence to a political decision already made," in the form of the State Department's letter arguing that adjudication would prejudice U.S. foreign relations.¹⁴⁶ Thus the *Sarei* court was wary of contradicting the expressed policy of the executive by adjudicating claims against the defendants for complicity in PNG troops' human rights abuses.¹⁴⁷

1. *Baker* Factors One Through Three: A Minor Threat

The first three *Baker* factors are ill-suited to corporate defendants in human rights cases.¹⁴⁸ Despite some courts' claims to the contrary, there is no constitutional commitment to the executive branch for handling foreign relations under factor one, and certainly no textual restraint by subject-matter on cases properly adjudicated by the judiciary.¹⁴⁹ Regarding factor two, barring the establishment of an arbitra-

¹⁴³ See *Baker*, 369 U.S. at 211.

¹⁴⁴ *Sarei*, 221 F. Supp. 2d. at 1198–99. While the international comity and act of state doctrines precluded adjudication of the plaintiffs' environmental tort and racial discrimination claims only, those claims and the plaintiffs' arguably more important human rights claims were dismissed as non-justiciable political questions. See *id.* at 1184, 1201. The political question doctrine was, in other words, the "double-lock" to the door of adjudication. See THOMAS M. FRANCK, *POLITICAL QUESTIONS/JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS?* 28 (1992).

¹⁴⁵ *Baker*, 369 U.S. at 217; *Sarei*, 221 F. Supp. 2d at 1198.

¹⁴⁶ See *Sarei*, 221 F. Supp. 2d at 1198. The State Department had also made several statements in support of the PNG government in its efforts to secure a peace accord ending the Bougainville civil war. *Id.* at 1196.

¹⁴⁷ See *id.* at 1198.

¹⁴⁸ See *Kadic*, 70 F.3d at 249–50. But see Williams, *supra* note 13, at 872–76 (arguing, in the context of WWII-era cases, that *Baker* factors four through six are less likely to present an obstacle to human rights plaintiffs than factors one through three).

¹⁴⁹ See FRANCK, *supra* note 144, at 15–16. Professor Franck argues that there is no constitutionally created authority over foreign relations, let alone one reserved to the executive. *Id.* Rather, he argues, the drafters enumerated a number of constitutional powers that could fall under the blanket category of "foreign relations" and divided them relatively

tion panel or bilateral reparations scheme, as in the Nazi forced labor cases, the resolution of disputes is indisputably the province of the courts.¹⁵⁰ Finally, under factor three, statutes such as the ATCA and TVPA, as well as universally accepted norms of international law, provide clear, judicially manageable standards for adjudicating private human rights claims.¹⁵¹

2. *Baker* Factor Five: “Adherence to a Political Decision Already Made”

A point of departure with the *Sarei* court’s application of the political question doctrine is factor five, “an *unusual* need for *unquestioning* adherence to a political decision already made.”¹⁵² The U.S. Court of Appeals for the Second Circuit, in the 1995 case *Kadic v. Karadžić*, articulated an interpretation of this factor that is more amenable to human rights plaintiffs, and more consistent with the spirit of *Baker*, than *Sarei* employed when it dismissed the plaintiffs’ claims as non-justiciable.¹⁵³ Circuit Judge Jon O. Newman rearticulated *Baker*’s admonition that not every case affecting foreign relations is a political question and went on to say that “judges should not reflexively invoke these doctrines to avoid difficult and somewhat sensitive decisions in the context of human rights.”¹⁵⁴ This interpretation of the doctrine in light of contemporary human rights litigation reflects *Baker*’s language: an *unusual* need for *unquestioning* adherence suggests that non-justiciability should be a rare diagnosis.¹⁵⁵ *Kadic*’s interpretation also reflects a policy position that accountability for human rights abuse, in its own right, is an important goal that should not easily be trumped.¹⁵⁶

Kadic, however, was a decision written with the confidence of a judge whose conclusion enjoyed the express support of the executive

equally among the branches. *Id.* at 16. For instance, the legislative branch has either an exclusive power or at least an important role over foreign commerce, declaring war, raising and funding the armed forces, spending on foreign affairs, appointment of ambassadors, and consent to treaties. *Id.* The judiciary, by contrast, was given the power to adjudicate disputes without any specific exceptions by subject matter, which, Franck maintains, suggests that it should adjudicate all disputes, including those touching on foreign relations. *Id.*

¹⁵⁰ See *Kadic*, 70 F.3d at 249; *Iwanowa*, 67 F. Supp. 2d at 486–87.

¹⁵¹ Alien Tort Claims Act, 28 U.S.C. § 1350 (1993); Torture Victim Protection Act, 28 U.S.C. § 1350 (1993); *Kadic* 70 F.3d at 249.

¹⁵² See *Baker*, 369 U.S. at 217 (emphasis supplied).

¹⁵³ See *id.*; *Kadic*, 70 F.3d at 249; *Sarei*, 221 F. Supp. 2d at 1196–98.

¹⁵⁴ *Baker*, 369 U.S. at 211; *Kadic*, 70 F.3d at 249.

¹⁵⁵ See *Baker*, 369 U.S. at 217; *Kadic*, 70 F.3d at 249.

¹⁵⁶ See *Kadic*, 70 F.3d at 249.

branch.¹⁵⁷ One wonders how strong *Kadic's* human rights language would have been in the face of a direct request by the State Department to dismiss the case.¹⁵⁸ In truth, when the department of the executive charged with foreign relations makes a clear recommendation on a matter of U.S. foreign policy, it would flout most mainstream theories of separation of powers for a judge simply to ignore that advice.¹⁵⁹ Although at least one commentator has forcefully argued that separation of powers does not limit the judiciary's authority to hear such cases, as a practical matter it is unrealistic at present to expect judges to ignore decades of precedent counseling an obeisance.¹⁶⁰ Thus, in the unusual case where the executive branch actually intervenes and makes a foreign relations argument, most judges can be expected to defer to its judgment.¹⁶¹ Barring a defiant act of independence by the trial judge in *Exxon*, this does not bode well for the Acehese plaintiffs.¹⁶²

3. *Baker* Factors Four Through Six

Baker factors four, five and six, which together require respect for another branch's "political decision already made," are nonetheless amenable to attack as they apply to corporate human rights cases.¹⁶³ Under the political question doctrine, the fourth and sixth *Baker* factors are relevant only if continued adjudication would contradict a prior decision made by a political branch.¹⁶⁴ Yet the Bush administration's inconsistent human rights policy could confuse judges about the executive's actual position, hindering their ability to determine whether a conflict between branches actually exists. President Bush has consistently and publicly denounced worldwide human rights abuses throughout his presidency, and his administration has fre-

¹⁵⁷ See *id.* at 250. In *Kadic*, the State Department argued in a letter to the judge that adjudication of a known Serbian war criminal should not be barred out of concern over U.S. foreign relations. *Id.*

¹⁵⁸ See *id.*

¹⁵⁹ See *Banco Nacional de Cuba v. Farr*, 243 F. Supp. 957, 975 (S.D.N.Y. 1965).

¹⁶⁰ See FRANCK, *supra* note 144, at 15–16; see also *infra* note 235.

¹⁶¹ See *infra* note 235.

¹⁶² See *Exxon*, No. 01–CV–1357. The same does not hold true for the en banc rehearing of *Unocal*: the Justice Department's amicus submission in that case was not a solicited recommendation on the foreign relations ramifications of the suit, but rather an exclusively legal argument that focused mainly on the perceived misuse of the ATCA by human rights plaintiffs. See *Unocal* Brief, *supra* note 7.

¹⁶³ See *Baker*, 369 U.S. at 217.

¹⁶⁴ *Kadic*, 70 F.3d at 249.

quently demanded accountability for human rights abusers, including members of the Indonesian military.¹⁶⁵ This forceful rhetorical support for human rights values could easily muddle the executive's actual policy position of dismissing nettlesome human rights claims—which arguably is not even a “decision” for political question purposes.¹⁶⁶ Hence, judges would be quite justified in their confusion over this stark contradiction in announced policy.¹⁶⁷

The administration's inconsistency in demanding a cessation of embarrassing human rights litigation while purporting to condemn human rights violations is painfully transparent in *Exxon*.¹⁶⁸ The State Department's letter to the judge in that case made the following assertions before enumerating its bases for requesting a dismissal:

[T]he [State] Department would like to reaffirm its condemnation of human rights abuses by elements of the Indonesian armed forces in locations such as Aceh. Without expressing a

¹⁶⁵ See Hon. Sichan Siv, NGO Member of the U.S. Delegation, Remarks to the 57th Session of the UN Commission on Human Rights (Apr. 17, 2001) (demanding accountability for those responsible for the deaths of four human rights activists in Aceh, Indonesia, Jafir Siddiq Hamzah, Idris bin Yusuf, Emita binti Abdul Wahab, and Bachtiar bin Usman), at <http://www.state.gov/g/drl/rls/rm/2001/2276.htm>; see also George W. Bush, *Securing Freedom's Triumph*, N.Y. TIMES, Sept. 11, 2002, at A33; *Is Torture Ever Justified?*, ECONOMIST, Jan. 11, 2003, at 9 (describing President Bush as “consistent in his claims to be defending human rights and democracy” throughout the war on terror). Mr. Bush's presidency has been couched in the rhetoric of principle and high moral tone to a greater extent than any in recent memory. See generally David S. Broder, *Bush's Unease with Ambiguity*, WASH. POST, April 9, 2002, at A19; Bill Keller, *The Radical Presidency of George W. Bush*, N.Y. TIMES, Jan. 26, 2003, § 6, at 26. See also Samantha Power, *Force Full*, NEW REPUBLIC, Mar. 3, 2003, at 28, 29 (reporting that in the Bush administration's National Security Strategy, the words “human rights” appear five times; “human dignity” nine times; “liberty” eleven times, “democracy” thirteen times, and “freedom” forty-six times). In an opinion-editorial in the *New York Times* on the first anniversary of the 9/11 terrorist attacks on the U.S., President Bush wrote about the American-led war on terror:

[W]e are determined to stand for the values that gave our nation its birth. We believe that freedom and respect for human rights are owed to every human being, in every culture. We believe that the deliberate murder of innocent civilians and the oppression of women are everywhere and always wrong.

Bush, *supra*, at 33.

¹⁶⁶ See Bush, *supra* note 165, at 33. The administration has also promoted human rights responsibility specifically to MNCs. See, e.g., U.S. DEPT. OF STATE, VOLUNTARY PRINCIPLES ON SECURITY AND HUMAN RIGHTS [hereinafter VOLUNTARY PRINCIPLES], available at <http://www.state.gov/g/drl/rls/2931.htm> (Dec. 20, 2000). This non-binding, joint effort of the U.S. and British governments to promote responsible relationships between companies in the extractive and energy sectors and governments in site countries was largely coordinated by the U.S. executive branch. See *id.*

¹⁶⁷ See Bush, *supra* note 165, at 33.

¹⁶⁸ See Exxon Letter, *supra* note 1, at 2.

view on the allegations in this specific lawsuit, we would like to reiterate that a lasting, peaceful solution to the Aceh conflict that maintains Indonesian sovereignty can only be achieved if the military and police end human rights abuses.¹⁶⁹

Had the State Department not later expressly recommended dismissing the *Exxon* case, the judge would have been justified in some confusion over which policy should govern for purposes of evaluating a political question conflict between the branches—the administration’s indignant denunciation of rights abuses (favoring adjudication) or its decision to brush aside embarrassing rights cases (favoring dismissal).¹⁷⁰ Thus, a future judge sympathetic to human rights plaintiffs could simply refrain from inviting the views of the State Department and allow adjudication, which would appear perfectly consistent with the executive’s careful denunciations of human rights abuse around the world.¹⁷¹ As the next section demonstrates, the implications of the administration’s inconsistent human rights policy could also prevent courts from dismissing claims under the act of state doctrine.

B. *Unocal*: No Act of State

The act of state doctrine should not continue to pose a threat to human rights plaintiffs.¹⁷² The *Unocal* court’s sensible rejection of the defendant’s act of state defense in its vacated opinion stemmed from a reading of the rule in light of its policy underpinnings and its unique ability to thwart human rights plaintiffs.¹⁷³ A similar application would prevent a dismissal under the doctrine in *Exxon*, and in future cases.¹⁷⁴ As this section will demonstrate, this “human rights-friendly” reading of the act of state doctrine is the only justifiable approach.¹⁷⁵

In its brief analysis of the act of state defense, the Court of Appeals for the Ninth Circuit in *Unocal* properly found that the doctrine

¹⁶⁹ *Id.*; see also Sarei Letter, *supra* note 8, at 1 (noting the State Department’s concern that its recommendation of dismissal not be seen as a step back from its earlier denunciations of human rights abuses in Bougainville).

¹⁷⁰ See Exxon Letter, *supra* note 1, at 2.

¹⁷¹ See *id.*; see also note 165, *supra*.

¹⁷² See discussion *infra* Part III.B.2.

¹⁷³ See discussion *infra* Part III.B.1.

¹⁷⁴ See discussion *infra* Part III.B.1.

¹⁷⁵ See discussion *infra* Part III.B.2.

did not bar adjudication.¹⁷⁶ On the first *Sabbatino* factor, which states that greater consensus concerning the area of international law to be applied favors adjudication, the court found the alleged human rights abuses of the Myanmar military to be universally condemned under international law, which supported allowing the suit to proceed.¹⁷⁷ On the second factor, stating that adjudication becomes more appropriate the less important an issue is to U.S. foreign relations, the court found that the State Department's consistent denunciations of Myanmar's rights abuses, as well as its letter stating that adjudication would not imperil U.S. foreign relations, demonstrated the absence of a foreign policy conflict.¹⁷⁸

The third *Sabbatino* factor, which weighs in favor of adjudication if the offending government is no longer in power, did not help the plaintiffs in *Unocal* because Myanmar's government had not changed between the time of alleged abuse and the court's decision.¹⁷⁹ The Court of Appeals for the Ninth Circuit has added a fourth factor to the three-part *Sabbatino* test: "whether the foreign state was acting in the public interest."¹⁸⁰ Given the severity of the alleged human rights violations, the court rejected any intimation that the Myanmar military was acting in the public interest; thus, this factor favored adjudication.¹⁸¹ Apparently using a quantitative balancing of the factors, the court found that two factors against dismissal (three counting the additional Court of Appeals for the Ninth Circuit factor) outweighed one factor in favor of it.¹⁸²

¹⁷⁶ See *Doe v. Unocal Corp.*, 2002 WL 31063976, at *19–21 (9th Cir. 2002), *reh'g en banc granted and opinion vacated*, 2003 WL 359787, at *1 (9th Cir. 2003) (Nos. 00–56603, 00–56608).

¹⁷⁷ See *id.* at *20; *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964). The *Sabbatino* factors are:

[1] the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it; [2] the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches; [3] [t]he balance of relevant considerations may also be shifted if the government which perpetrated the challenged act of state is no longer in existence.

Id.

¹⁷⁸ *Unocal*, 2002 WL 31063976, at *21.

¹⁷⁹ *Id.*

¹⁸⁰ *Liu v. Republic of China*, 892 F.2d 1419, 1432 (9th Cir. 1989).

¹⁸¹ *Unocal*, 2002 WL 31063976, at *21.

¹⁸² See *id.*

1. *Unocal* As an Example for *Exxon* and Future Cases

Unocal's quantitative treatment of the *Sabbatino* factors is an example for future corporate human rights abuse cases, including the en banc rehearing of that case, as well as *Exxon*.¹⁸³ If *Exxon* were to follow *Unocal's* approach, the defendant's motion to dismiss would be denied and adjudication would proceed on the merits.¹⁸⁴ Under factor one, the alleged abuses in *Exxon* were nearly identical to the universally condemned abuses in *Unocal*, favoring adjudication.¹⁸⁵ Barring judicial confusion over conflicting policy statements, *Sabbatino* factor two favors dismissal in *Exxon* because of the State Department's clear recommendation of dismissal in its letter to the judge.¹⁸⁶ Factor three, a change in government between alleged abuses and adjudication, would favor the plaintiffs.¹⁸⁷ The tumultuous nature of the handover of power from Abdurrahman Wahid to Megawati Sukarnoputri *after* the closure of Exxon's Arun plant would presumably resolve any fear that adjudication would seriously offend Miss Megawati's government, despite the protestations of Indonesia's foreign minister to the contrary.¹⁸⁸

¹⁸³ See *id.* at *19–21.

¹⁸⁴ See *id.*

¹⁸⁵ See *id.* at *20; Plaintiffs' Complaint, *supra* note 65, at 19–22, *Exxon* (No. 01–CV–1357).

¹⁸⁶ See *Sabbatino*, 376 U.S. at 428; Exxon Letter, *supra* note 1, at 1; see also discussion *supra* Part III.A.3.

¹⁸⁷ See *Sabbatino*, 376 U.S. at 428; *Megawati Takes Charge*, *ECONOMIST*, July 28, 2001, at 13 (reporting that in July of 2001, Megawati Sukarnoputri assumed the presidency of Indonesia in a precarious transition from the government of Abdurrahman Wahid). The *Exxon* plaintiffs alleged abuses during the period of direct military control of Aceh from 1989 to 1998 and subsequently until March 2001. Plaintiffs' Complaint, *supra* note 65, at 15, *Exxon* (No. 01–CV–1357); Plaintiffs' Memo, *supra* note 8, at 7, *Exxon* (No. 01–CV–1357). Because the complained behavior ended in March, several months before the assumption of power by Ms. Megawati, factor three weighs in favor of the plaintiffs. See Plaintiffs' Complaint, *supra* note 65, at 15, *Exxon* (No. 01–CV–1357).

¹⁸⁸ See *Megawati Takes Charge*, *supra* note 187, at 13; Letter from Soemadi Djoko M. Brotdiningrat, Indonesian Ambassador to the United States, to Richard Armitage, Deputy Secretary of State (July 15, 2002) [hereinafter Ambassador's Letter] (arguing that a U.S. court's adjudication of acts of the Indonesian military is offensive as a matter of principle, could imperil foreign direct investment in the Aceh region, and could complicate efforts to find a peaceful solution to the Aceh conflict), available at <http://www.laborrights.org> (last visited Nov. 10, 2003). Ambassador Soemadi's letter contains polite diplomatic implorations, but, more pointedly, a barely-veiled threat that U.S. nationals' investments in Indonesia would suffer if the *Exxon* case were allowed to proceed. See Ambassador's Letter, *supra* (stating that "adjudication . . . will definitely compromise the serious efforts of the Indonesian government to guarantee the safety of foreign investments, including in particular those from the United States") (emphasis supplied). The threat was apparently effective in motivating the State Department to argue for dismissal in its letter to the *Exxon* judge; the

Under the quantitative approach to the act of state doctrine employed by *Unocal*, two factors favoring adjudication and one factor favoring dismissal should dictate that the *Exxon* defendants' motion to dismiss be denied.¹⁸⁹ The Supreme Court, however, described the paramount objective in the act of state analysis as preserving the political branches' preeminence in matters of foreign relations, not assuring a rigid, quantitative application of the *Sabbatino* factors.¹⁹⁰ In light of that admonition, and the near-dispositive weight judges have typically ascribed to the executive's opinion on the diplomatic ramifications of lawsuits, it is distinctly possible that the *Exxon* court will give greater qualitative weight to factor two than factors one and three combined.¹⁹¹

2. A Human Rights Approach to the *Sabbatino* Factors

Notwithstanding balancing, a vigilant construction of *Sabbatino* factor one would preclude dismissal under the act of state doctrine in corporate human rights cases, including *Exxon*.¹⁹² Factor one, which links justiciability to the degree of consensus surrounding the law to be applied, demands dispositive weight in the act of state calculus.¹⁹³ Even *Sarei*, a human rights failure because it dismissed all of the plaintiffs' claims on political question grounds, employed this approach.¹⁹⁴ The act of state doctrine barred the plaintiffs' environmental and racial discrimination claims.¹⁹⁵ The court, however, found that acts of genocide, torture, rape, and pillage could not be considered acts of state; thus, an examination of the second two *Sabbatino* factors was unnecessary.¹⁹⁶

In holding that grave human rights violations cannot properly qualify as acts of state, *Sarei* employed the only plausible interpretation of the act of state doctrine, considering its title and policy under-

Legal Adviser lists the threat to U.S. economic interests as one of two key bases for dismissal. See *Exxon* Letter, *supra* note 1, at 2.

¹⁸⁹ See *Doe v. Unocal Corp.*, 2002 WL 31063976, at *20-21 (9th Cir. 2002), *reh'g en banc granted and opinion vacated*, 2003 WL 359787, at *1 (9th Cir. 2003) (Nos. 00-56603, 00-56608); Plaintiffs' Memo, *supra* note 8, at 33-35, *Exxon* (No. 01-CV-1357). The Ninth Circuit's fourth factor would also weigh in favor of adjudication if *Exxon* fell under its jurisdiction: Indonesia's military surely was not acting in the public interest by violating the human rights of the indigenous Acehnese. See *Unocal*, 2002 WL 31063976, at *21; Plaintiffs' Memo, *supra* note 8, at 33-35, *Exxon* (No. 01-CV-1357).

¹⁹⁰ See *Sabbatino*, 376 U.S. at 428.

¹⁹¹ See *id.*; see also *infra* note 235.

¹⁹² See *Sabbatino*, 376 U.S. at 428.

¹⁹³ See *Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d 1116, 1189 (C.D. Cal. 2002).

¹⁹⁴ See *id.*

¹⁹⁵ *Id.* at 1188.

¹⁹⁶ *Id.* at 1189.

pinnings.¹⁹⁷ It is well established that human rights violations cannot be acts of state; therefore, the adjudication of atrocities cannot be prevented under the act of state doctrine, regardless of a lawsuit's purported potential for diplomatic insensitivity.¹⁹⁸ Thus, even when the executive branch requests dismissal, cases involving collusion between exploitative MNCs and abusive governments simply cannot be dismissed under the act of state doctrine because, by the doctrine's own terms, the behavior in question was not an act of state.¹⁹⁹

Sabbatino factors two and three are necessarily inconsequential under this approach to the act of state analysis. Nevertheless, factor three is entirely dependant upon the factual circumstances surrounding the case at bar: either there has been a regime change between the dates of alleged abuse and trial, or there has not.²⁰⁰ Factor two is vulnerable to the same weakness of conflicting policy signals that casts doubt upon the political question doctrine in human rights cases.²⁰¹ Where the executive, by its consistent denunciation of rights abuses, makes an argument for dismissal that appears wholly inconsistent with its announced foreign policy of human rights accountability, judges will doubtless have difficulty deciding what "the implications of an issue are for our foreign relations."²⁰²

A proper interpretation of the act of state doctrine strongly favors the adjudication of human rights claims. Thus, the doctrine should only continue to deteriorate in its influence in corporate rights abuse litigation.²⁰³ As the analysis below demonstrates, the international comity doc-

¹⁹⁷ See *Kirkpatrick Co. v. Envt'l Tectonics Corp.*, 493 U.S. 400, 409 (1990) (stating the Court's position "that the policies underlying the act of state doctrine should be considered in deciding whether, despite the doctrine's technical availability, it should nonetheless not be invoked"); *Sabbatino*, 376 U.S. at 428; *Sarei*, 221 F. Supp. 2d at 1189.

¹⁹⁸ See *Doe v. Unocal Corp.*, 2002 WL 31063976, at *21 (9th Cir. 2002), *reh'g en banc granted and opinion vacated*, 2003 WL 359787, at *1 (9th Cir. 2003) (Nos. 00-56603, 00-56608); *Kadic v. Karadžić*, 70 F.3d 232, 250 (2d Cir. 1995); *Filartiga v. Pena-Irala*, 630 F.2d 876, 889 (2d Cir. 1980); *Sarei*, 221 F. Supp. 2d at 1189.

¹⁹⁹ See *Unocal*, 2002 WL 31063976, at *21; *Kadic*, 70 F.3d at 250; *Filartiga*, 630 F.2d at 889; *Sarei*, 221 F. Supp. 2d at 1189.

²⁰⁰ See *Sabbatino*, 376 U.S. at 428. This factor has led courts to reject defendants' motions to dismiss on act of state grounds in a number of cases. See *Bigio v. Coca-Cola Co.*, 239 F.3d 440, 452-53 (2d Cir. 2000); *Wiwa v. Royal Dutch Petroleum Co.*, 2002 WL 319887, at *28 (S.D.N.Y. 2002); *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117, 130 (E.D.N.Y. 2000).

²⁰¹ See discussion *supra* Part III.A.3.

²⁰² See *Sabbatino*, 376 U.S. at 428.

²⁰³ See Andrew Saindon, Note, *The Act of State Doctrine and International Human Rights Cases in United States Courts*, 7 MD. J. CONTEMP. INT'L LEGAL ISSUES 287, 308-09 (1995-96).

trine is also an inappropriate mechanism for frustrating human rights plaintiffs.

C. *Hopeful Signs for the International Comity Doctrine*

The international comity doctrine does not pose as great a threat to human rights plaintiffs in diplomatically-sensitive lawsuits as the act of state and political question doctrines.²⁰⁴ While international comity was an obstacle to adjudicating several of the plaintiffs' claims in *Sarei*, it did not bar the human rights claims in that case, in *Exxon*, or in *Unocal*.²⁰⁵ Further, with the notable exception of several recent cases involving World War II-era claims of corporate collusion with Nazi Germany, international comity has not generally kept human rights plaintiffs from their day in court.²⁰⁶ Given the doctrine's foreign policy underpinnings and the growing number of corporate human rights cases in U.S. courts, however, a brief evaluation of the doctrine early in its corporate human rights career seems appropriate.²⁰⁷

Courts have tended to apply the international comity doctrine in ways that prevent it from barring human rights claims.²⁰⁸ In *Sarei*, the district court interpreted the Supreme Court's most recent international comity decision to require an actual conflict between the laws of the U.S. and the state of the alleged abuse before considering dismissal

²⁰⁴ See *Jota v. Texaco, Inc.*, 157 F.3d 153, 161 (2d Cir. 1998) (reversing district court's dismissal on international comity grounds absent a showing of an adequate alternate forum in the plaintiffs' state of Ecuador); *Sarei*, 221 F. Supp. 2d at 1207 (refusing to dismiss plaintiffs' human rights claims under international comity doctrine); *Canales Martinez v. Dow Chemical Co.*, 219 F. Supp. 2d 719, 731 (E.D. La. 2002) (refusing to dismiss claims by foreign banana workers against chemical company on *forum non conveniens* grounds predicated on international comity concerns); *Bodner*, 114 F. Supp. 2d at 129–30 (refusing to dismiss a case against French financial institutions for collusion with Nazi government on comity grounds because of nonexistence of French forum).

²⁰⁵ See *Doe v. Unocal Corp.*, 2002 WL 31063976, at *1 (9th Cir. 2002), *reh'g en banc granted and opinion vacated*, 2003 WL 359787, at *1 (9th Cir. 2003) (Nos. 00–56603, 00–56608); *Sarei*, 221 F. Supp. 2d at 1207; Plaintiffs' Memo, *supra* note 8, at 32, *Exxon* (No. 01–CV–1357).

²⁰⁶ See *In re Nazi Era Cases Against German Defendants Litigation*, 129 F. Supp. 2d 370, 386–88 (D.N.J. 2001) (dismissing case against German corporation and American subsidiaries for Nazi collusion on international comity grounds because of German Foundation law); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 490–91 (D.N.J. 1999) (dismissing claims by WWII forced laborers against Ford based on international comity because of a multilateral treaty stipulating that claims would be addressed out of court).

²⁰⁷ See Corn, *supra* note 11, at 31.

²⁰⁸ See *Jota*, 157 F.3d at 158–60; *Sarei*, 221 F. Supp. 2d at 1201, 1207; *Bodner*, 114 F. Supp. 2d at 130.

on comity grounds.²⁰⁹ This threshold requirement, if employed in the future, would limit the dismissal of human rights cases to the rare instances in which the state of the alleged rights abuse actually created a viable alternate remedy to U.S. courts for the plaintiffs, such as an independent statute or compensation fund.²¹⁰ Another court found the lack of such an alternative remedy, notwithstanding the controversial conflict of laws threshold requirement, to be a fatal deficiency in the defendant's international comity defense.²¹¹ Yet another court reversed a dismissal on international comity grounds after the attorney general of the state of the alleged abuse intervened to argue the importance of human rights accountability in his country, although the court did not rely on the intervention in its explicit reasoning.²¹²

Sarei also incorporated into its international comity analysis a potentially far-reaching construction of the doctrine for human rights cases.²¹³ Although the court expressly declined to apply international comity to the plaintiffs' human rights claims because of the non-existence of a conflict of laws, it also stated that public policy favored adjudication, notwithstanding the express foreign policy concerns expressed by the State Department.²¹⁴ In the court's words, "The fact that the conduct in which defendants engaged is alleged to constitute war crimes and crimes against humanity argues strongly in favor of the retention of jurisdiction."²¹⁵ The court's refreshing deference to the importance of human rights in international affairs is undermined somewhat by the overall holding of *Sarei*, which dismissed all claims under the political question doctrine.²¹⁶ Nevertheless, this clear statement of the primacy of human rights over diplomatic, if not separation of pow-

²⁰⁹ See *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 798 (1993); *Sarei*, 221 F. Supp. 2d at 1201.

²¹⁰ See *Sarei*, 221 F. Supp. 2d at 1201 (describing the PNG Compensation Act, which offered redress for victims of environmental harm stemming from mining); *In re Nazi Era Cases*, 129 F. Supp. 2d at 379, 387 (describing the U.S.-German Foundation Law, which offered individual payments to Nazi-era victims of German industry).

²¹¹ See *Bodner*, 114 F. Supp. 2d at 130.

²¹² See *Jota*, 157 F.3d at 158–60.

²¹³ See *Sarei*, 221 F. Supp. 2d at 1207.

²¹⁴ See *id.*

²¹⁵ *Id.*

²¹⁶ See *id.* at 1195. *Sarei*'s lengthy discussions of the international comity doctrine despite its dismissal of all claims as political questions supports the inference that the judge intended to provide a basis for future courts to adjudicate diplomatically-sensitive human rights cases in the face of the international comity defense. See *id.* at 1188, 1207.

ers, concerns, is clearly progress.²¹⁷ Future courts interested in upholding human rights values would do well to emulate this reasoning not only in their international comity analysis, but also in applying the act of state or political question doctrines in human rights cases.²¹⁸

The *Restatement* factors themselves, so often ignored in international comity analysis, are conducive to *Sarei*'s human rights-friendly approach to the doctrine.²¹⁹ Factor two, which counsels adjudication when there are close ties between the adjudicating state (the United States) and the entity responsible for the behavior in question (the MNC), weighs in favor of adjudication where U.S.-based MNCs are accused of rights abuse.²²⁰ Factors three and five, which deal with the character of the activity to be regulated and its importance to the international system, similarly favor adjudication when the activity in question is abhorrent and internationally-denounced human rights abuse.²²¹ Factor four, which protects justified expectations that could be affected by adjudication, should not aid abusive corporations who might argue that they had expected to get away with abusive behavior because they relied on the weakness of domestic legal systems in the countries in which they maintained operations.²²² Factor six—the extent to which regulation is consistent with international traditions—also leans toward adjudication in an era of increasing sensitivity to human rights values.²²³ Although several other *Restatement* factors appear to favor dismissal, when coupled with the strong public policy interest in human rights accountability articulated in *Sarei*, the above arguments

²¹⁷ *See id.* at 1207. If the court viewed human rights accountability as more important than the separation of powers, it would not have dismissed the human rights claims under the political question doctrine. *See id.* at 1195.

²¹⁸ *See Sarei*, 221 F. Supp. 2d at 1207.

²¹⁹ *See supra* note 54 and accompanying text. The *Restatement* factors are: (1) The link of the activity to the territory of the regulating state; (2) the connections, such as nationality, residence, or economic activity between the regulating state and the person principally responsible for the activity to be regulated; (3) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted; (4) the existence of justified expectations that might be protected or hurt by the regulation; (5) the importance of the regulation to the international political, legal, or economic system; (6) the extent to which the regulation is consistent with the traditions of the international system; (7) the extent to which another state may have an interest in regulating the activity; and (8) the likelihood of conflict with regulation of another state. RESTATEMENT, *supra* note 52, § 403(2).

²²⁰ *See id.*

²²¹ *See id.*

²²² *See id.*

²²³ *See id.*

could certainly support a strong case for adjudicating human rights claims in the face of an international comity defense.²²⁴

Given the case history, the availability of a human rights-friendly interpretation of Supreme Court precedent, and *Sarei's* path-breaking statement of the importance of human rights accountability in international comity analysis, this doctrine, like the act of state doctrine and, to a lesser extent, the political question doctrine, is an eminently surmountable obstacle to corporate human rights adjudication.

IV. EXECUTIVE INTERVENTION: BAD PUBLIC POLICY

Part III of this Note demonstrates that the political question, act of state, and international comity doctrines are sufficiently flexible legal devices that they need not frustrate human rights plaintiffs.²²⁵ Nevertheless, so long as the executive branch is willing to intervene on corporate defendants' behalf, the three doctrines will probably remain available as a defense strategy in human rights litigation.²²⁶ This section buttresses the legal bases for rejecting the application of the judicial doctrines in corporate human rights cases by arguing that executive-corporate collusion is a hypocritical and ineffective public policy that is deleterious to U.S. interests, as well as the interests of human rights plaintiffs.²²⁷

A. *Setting a Trend*

Executive-corporate collusion threatens human rights plaintiffs for a number of reasons. First, because of a dramatic increase in ATCA corporate human rights litigation, a number of cases seeking to hold MNCs accountable for human rights abuses abroad face dismissal if the trend continues.²²⁸ Corporate defendants who have thus far sought dismissal on jurisdictional or *forum non conveniens* grounds will soon come to appreciate a strategy that provides an easy bar to adjudication.²²⁹ Indeed, the *Unocal* defendants' petition for a second executive opinion after the Clinton State Department was unavailing clearly

²²⁴ See *Sarei* 221 F. Supp. 2d at 1207; RESTATEMENT, *supra* note 52, § 403(2).

²²⁵ See discussion *supra* Part III.

²²⁶ See discussion *supra* Part III.B.

²²⁷ See discussion *infra* Part IV.B.

²²⁸ See, e.g., *Rodriguez v. Drummond Co.*, No. 02-CV-665 (N.D. Ala. filed Mar. 14, 2002); *Aldana v. Del Monte Fresh Produce, Inc.*, No. 01-CV-3399 (S.D. Fla. filed Aug. 2, 2001); *Sinaltrainal v. Coca-Cola Co.*, No. 01-CV-3208 (S.D. Fla. filed July 20, 2001).

²²⁹ See Efron, *supra* note 126, at 2.

demonstrates that corporate defendants have already caught on to the new trend.²³⁰

Second, contemporary cases will invariably influence the next generation of legal decision-makers.²³¹ Judges will be bound by precedent to the deference shown by higher courts to the executive branch. And future presidents, influenced by excessive notions of prerogative demonstrated by the Bush administration, could show even less solicitude for human rights lawsuits that interfere with their foreign policy agendas.²³² Also, other governments in states otherwise committed to the rule of law could follow the example set by the United States, a self-proclaimed human rights leader,²³³ and similarly intervene in private litigation to defeat embarrassing, but necessary, human rights claims.

A third factor demonstrating the significance of executive-corporate collusion is the executive branch's power to influence courts when it decides to intervene in sensitive lawsuits. The foreign relations defense presents intimidating and nearly irresistible grounds for dismissal to judges, who are often unfamiliar with foreign affairs and are wary of treading on the toes of the executive branch.²³⁴ For this reason, courts have tended to attach great significance to the opinion of the executive branch when it speaks on a lawsuit's propensity to affect the foreign relations of the United States.²³⁵ Indeed, Justice

²³⁰ See *id.*

²³¹ See Girion, *supra* note 122, at 1.

²³² See Waldman & Mapes, *supra* note 5, at B1.

²³³ See *Testimony Before the Int'l Operations and Terrorism Subcomm., S. Foreign Relations Comm., Hearing on U.S. Human Rights Policy*, 107th Cong. (2001) (testimony of Paula Dobriansky, Under Secretary of State for Global Affairs) (asserting that "[t]hroughout these years, our [the United States'] message has not wavered. Promoting democracy and protecting the individual against the excesses of the state is the policy of the United States," and quoting President Bush as saying "repressed people around the world must know this about the United States: We might not sit on some commission, but we will always be the world's leader in support of human rights"), available at <http://www.state.gov/g/rls/rm/2001/4134.htm> (last visited Nov. 10, 2003).

²³⁴ See *Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d 1116, 1198 (C.D. Cal. 2002).

²³⁵ The complete history of cases in which the executive has interceded in diplomatically-sensitive litigation is beyond the scope of this Note. Nonetheless, prominent cases reveal a breathtaking record of deference shown by judges to the executive branch. See, e.g., *Kirkpatrick Co. v. Env'tl Tectonics Corp.*, 493 U.S. 400, 408 (1990) (refusing to dismiss suit against corporation for collusion with corrupt Nigerian officials on act of state grounds, in part because of the State Department's recommendation in a letter to the district court); *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 761 (1972) (reversing, for various reasons, two opinions by the Second Circuit Court of Appeals to allow a case by a U.S. bank against a Cuban bank for damages arising from expropriation after receiving letter from State Department advising that the act of state doctrine was not a bar); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 420 (1964) (reversing, pursu-

Rehnquist, announcing the decision of a sharply-divided Supreme Court in *First National City Bank v. Banco Nacional de Cuba*, argued that courts *must* follow the executive branch's recommendation when it advises them not to apply the act of state doctrine in diplomatically-sensitive lawsuits.²³⁶ Thus, the "persuasive power of executive communication," makes it all the more imperative that human rights advocates impress upon the Bush administration the importance of abandoning its policy of intervening in lawsuits to frustrate human rights plaintiffs.²³⁷

ant to State Department's revised recommendation, lower court's denial of motion to dismiss on act of state doctrine, a claim involving the challenge to a Cuban expropriation decree); *Doe v. Unocal Corp.*, 2002 WL 31063976, at *20-21 (9th Cir. 2002) (denying motion to dismiss per State Department's opinion that case against oil company for human rights abuse in Burma did not threaten U.S. foreign relations), *reh'g en banc granted and opinion vacated*, 2003 WL 359787, at *1 (9th Cir. 2003) (Nos. 00-56603, 00-56608); *Kadic v. Karadžić*, 70 F.3d 232, 250 (2d Cir. 1995) (denying motion to dismiss case against former Serbian president Radovan Karadžić on political question doctrine pursuant to State Department's recommendation that the suit did not implicate foreign relations); *Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1361 (9th Cir. 1988) (refusing to dismiss case against former president of the Philippines for corruption after State Department as amicus foresaw no reason not to adjudicate), *aff'd on this issue*, *Trajano v. Marcos*, 878 F.2d 1439, **2 (9th Cir. 1989); *Allied Bank Intern v. Banco Credito Agricola de Cartago*, 757 F.2d 516, 518-19 (2d Cir. 1985) (reversing court's own dismissal on act of state grounds after the post-decision intervention of the Justice Department as amicus curiae; the Justice Department urged adjudication of the case, in which three state-owned Costa Rican banks defaulted on payments to a syndicate of American banks); *Filartiga v. Pena-Irala*, 630 F.2d 876, 876 (2d Cir. 1980) (allowing a case involving violations of international human rights law to proceed after a Justice Department amicus brief pressed for the same); *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F.2d 375, 375-76 (2d Cir. 1954) (reversing dismissal of case against Dutch company for economic collusion with Nazi party pursuant to a letter by the State Department's Legal Adviser); *Sarei*, 221 F. Supp. 2d at 1196-98 (dismissing, pursuant to State Department's recommendation, suit against mining corporation for human rights abuses in Papua New Guinea).

²³⁶ See 406 U.S. at 768. The plurality's stance on what is known as the Bernstein Exception involved a situation in which the act of state doctrine seemingly barred adjudication, but the executive requested adjudication nonetheless. See *id.*; see also Lowenfeld, *supra* note 9, at 796-801. Since *First National City*, the Court has clarified that courts need not take the executive's recommendation, but the case history suggests that courts still attach great significance to the executive's opinion. See *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 386 (2000) (stating that collected statements by the executive were "more than sufficient" to demonstrate a statute's incompatibility with U.S. foreign policy); *Env'tl Tectonics*, 847 F.2d 1052, 1062 (3d Cir. 1988) (stating that the State Department's findings of fact regarding a lawsuit's ability to frustrate its diplomatic aims are entitled to substantial respect), *aff'd* 493 U.S. 400 (1988). But see *Kadic*, 70 F.3d at 250 (announcing that the executive's argument for dismissal in political question cases does not preclude adjudication, but is nonetheless entitled to respectful consideration).

²³⁷ See Free, *supra* note 14, at 473.

B. *Public Policy and the Adjudication of Sensitive Claims*

Executive-corporate collusion is subject to policy criticism on many fronts.²³⁸ It sacrifices accountability for rights abusers for political and economic gain, undermining human rights policy goals and values in the process.²³⁹ Executive intervention is also short-sighted in its reckless contribution to anti-Americanism in the developing world, a major security concern since the attacks of September 11, 2001.²⁴⁰ In short, upon in-depth examination, the policy is indefensible.²⁴¹

1. Ineffective Human Rights Policy

The Bush administration has argued that long-term human rights goals support its recent interventions in diplomatically-sensitive human rights cases.²⁴² "Big picture" human rights policy, according to this argument, requires dismissing lawsuits that could interfere with broader U.S. diplomatic efforts geared toward increasing human rights sensitivity abroad.²⁴³ For instance, in *Sarei*, the State Department argued that only by dismissing the case at bar, which was embarrassing to the PNG government, could the United States allow PNG to continue to advance its politically fragile peace process; a verdict against the government could have jeopardized its decision to withdraw troops from Bougainville.²⁴⁴ The State Department made a similar appeal on behalf of the defendant in *Exxon*, arguing that adjudication would undercut U.S. pressure for military and judicial reform in Indonesia and could lead Indonesia to partner with businesses from states with poor human rights records.²⁴⁵ Thus executive-corporate collusion raises an important human rights policy question: does adjudicating diplomatically-sensitive cases better serve human rights goals than engagement with abusive regimes?²⁴⁶

A number of arguments support the view that executive-corporate collusion ultimately harms the current movement toward greater respect for human rights worldwide. First, engagement coupled with accountability is a more effective diplomatic answer to abusive regimes

²³⁸ See discussion *infra* Parts IV.B.1–2.

²³⁹ See discussion *infra* Part IV.B.1.

²⁴⁰ See discussion *infra* Part IV.B.2.

²⁴¹ See discussion *infra* Parts IV.B.1–2.

²⁴² See *Sarei* Letter, *supra* note 8, at 2.

²⁴³ See *id.*

²⁴⁴ See *id.*

²⁴⁵ See *Exxon* Letter, *supra* note 1, at 3.

²⁴⁶ See *id.*

than blind engagement.²⁴⁷ By the State Department's own admission, states that partner with MNCs cannot reach human rights goals until they effectively put a stop to rights abuses by their security services.²⁴⁸ Yet in *Exxon*, for instance, the Department, in claiming to seek an end to the Indonesian military's abuses through engagement while ignoring accountability for past abuse, presumed that an end to the years-old Aceh conflict would instantly transform an abusive military and a government inured to rights abuse into a model regime.²⁴⁹ The lack of human rights progress despite close U.S.-Indonesia ties during the brutal Suharto dictatorship undercuts such an assumption, as do a number of other instances where uncritical engagement with abusive regimes has failed to stem human rights abuses—in post-9/11 China and Uzbekistan, for instance, to cite just two contemporary examples.²⁵⁰ Engagement must include accountability as a disincentive to continued rights abuse in order to succeed in creating a rights-sensitive military and government.²⁵¹

²⁴⁷ See Human Rights Watch, *Powell Should Urge Accountability by Indonesian Military* (2002) [hereinafter Powell Should Urge Accountability], available at <http://hrw.org/press/2002/07/indo0731.htm> (last visited Nov. 10, 2003). As Human Rights Watch has reported, the administration's intervention on behalf of the defendant in *Exxon* came at the very moment the U.S. resumed direct military cooperation with the notorious Indonesian military. See Bush Backtracks, *supra* note 88.

²⁴⁸ Exxon Letter, *supra* note 1, at 2 (stating that "a lasting, peaceful solution to the Aceh conflict that maintains Indonesian sovereignty can only be achieved if the military and police end human rights abuses").

²⁴⁹ See Human Rights Watch, *The Indonesian Military and Ongoing Abuses* (2002), available at <http://hrw.org/backgrounder/asia/indo-bck0702.htm> (last visited Nov. 10, 2003).

²⁵⁰ See Walter LaFeber, *The Post September 11 Debate over Empire, Globalization, and Fragmentation*, 117 POL. SCI. Q. 1, 16 (2002) (arguing that U.S. engagement with China after September 11 has focused on terrorism cooperation to the expense of all other diplomatic goals, including human rights); *Accountable Aid: U.S. Foreign Military Assistance and Human Rights*, FOREIGN POL'Y, July 1, 2002, at 14 (stating that 51 of 180 states receiving military aid from the U.S. have been identified by the State Department as having "poor" human rights records); William F. Schulz, *Q: Has the White House Ignored Human-Rights in the Name of National Security? Yes: The Administration Has Given Itself and Its Coalition Partners a 'Pass' on Human Rights Violations*, INSIGHT ON NEWS, July 15, 2002, at 41 (recounting the U.S.'s abysmal record of securing human rights improvements despite engagement, including on human rights issues, with the governments of Russia, Pakistan, Uzbekistan, Columbia, Malaysia, and Kazakstan); Robert Templer, *Steppe Back*, NEW REPUBLIC, Aug. 18 & 25, 2003, at 11–13 (arguing that the U.S.'s unquestioning support of Uzbekistan's President, Islam Karimov, in return for strategic basing rights for use in the war on terror has stymied progress on the country's terrible human rights situation); Powell Should Urge Accountability, *supra* note 247. Engagement where the actual goal is human rights reform stands a chance of success; unfortunately, human rights is often a politically risk-free façade for other diplomatic concessions—recently, cooperation in the war on terror. See Schulz, *supra*, at 41.

²⁵¹ See Schulz, *supra* note 250, at 41.

Second, the Bush administration's casual willingness to sacrifice human rights plaintiffs calls into question the sincerity of its stated goal of achieving human rights progress in the developing world in the first place.²⁵² The State Department mentioned the human rights implications of adjudication in its letters in both *Sarei* and *Exxon*, but the executive's true concerns were more likely political and economic in nature.²⁵³ For instance, in the State Department's letter to the judge in *Exxon*, the human rights implications of adjudication were awkwardly lumped among the broader concerns of losing opportunities for U.S. investment in Indonesia and jeopardizing a critical alliance in the war on terror, arguments of dubious merit in their own right.²⁵⁴ Similarly, critics have accused the administration of urging dismissal in *Sarei* out of support for the mining industry, not because of a concern for long-term human rights policymaking.²⁵⁵ If human rights progress is not in fact the U.S. foreign policy interest in preventing adjudication in corporate human rights cases, experience shows that human rights concerns are likely to remain un-addressed.²⁵⁶

Third, executive intervention in corporate human rights cases undermines the United States' commitment to human rights, especially in the eyes of indigenous plaintiffs who lay their hopes for institutional redress in U.S. courts.²⁵⁷ Despite the inadequacies of the United States

²⁵² See Exxon Letter, *supra* note 1, at 3.

²⁵³ See *id.*; Sarei Letter, *supra* note 8, at 2. Indeed, a contemporaneous diplomatic visit to Indonesia by Secretary of State Colin Powell reinforces the suspicion of many human rights pundits that the Bush administration is able and willing to allow adjudication of sensitive cases when such cases serve American economic interests. See Bush Backtracks, *supra* note 88. When asked by Indonesia's foreign minister about an unrelated lawsuit brought by two U.S. firms against Indonesia's state energy firm, Powell reportedly stated that U.S. foreign policy does not involve interfering in private lawsuits. See *id.*

²⁵⁴ See Exxon Letter, *supra* note 1, at 3-5; see also Murray Hiebert & John McBeth, *Calculating Human Rights*, FAR E. ECON. REV., Aug. 15, 2002, at 18. Indonesia experts have emphasized the improbability of the Indonesian ambassador's threats to cut off lucrative government contracts for American businesses. See Hiebert & McBeth, *supra*, at 19. Indonesia has become economically dependant on the United States; the State Department's letter even portrays the Indonesian economy as so fragile as to be on the point of collapse without investment. See *id.*; Roth, *supra* note 2, at 4. The fear that Indonesia would reconsider its support for the U.S. war on terror if its demand for a dismissal was denied was similarly unfounded. See Oily Diplomacy, *supra* note 79, at A16. Indonesia has long struggled with radical Muslim terrorism and would almost certainly not have forgone its strategic alliance with the United States for the small victory of making an embarrassing lawsuit disappear. See Roth, *supra* note 2, at 4.

²⁵⁵ See Oily Diplomacy, *supra* note 79, at A16.

²⁵⁶ See *supra* note 253.

²⁵⁷ See William Glaberson, *U.S. Courts Become Arbiters of Global Rights and Wrongs*, N.Y. TIMES, June 21, 2001, at A1.

as a permanent forum for international human rights litigation, it is nonetheless an attractive option to plaintiffs in the developing world, both because of procedural mechanisms such as punitive damages and jury trials, and because of unresponsive legal systems at home.²⁵⁸ The administration's vainglorious human rights rhetoric, coupled with its unabashed pursuit of U.S. interests over human rights accountability, sends a message of hypocrisy to the international community.²⁵⁹ The damage of such a statement on U.S. credibility abroad outweighs any marginal economic and political gains secured by sacrificing human rights accountability.²⁶⁰

Rather than a long-term solution to human rights abuse abroad, executive-corporate collusion is a short-cut that sacrifices human rights values as expendable bargaining chips for short-term political and economic gain.²⁶¹ As the next section demonstrates, executive-corporate collusion is also a misguided foreign policy that jeopardizes long-term U.S. interests.²⁶²

2. Short-Sighted Foreign Policy

Executive intervention in diplomatically-sensitive lawsuits is also a disingenuous and ineffective foreign policy.²⁶³ Past executive interventions show that the executive branch is quite willing to allow domestic lawsuits to effect its foreign policy goals when it is convenient to do so.²⁶⁴ Further, intervening in corporate human rights cases breeds resentment abroad, because of perceived double-standards in American human rights policy and corporate responsibility rhetoric.²⁶⁵ Fanning the flames of anti-Americanism for so little gain is an ill-considered policy choice that ultimately is at odds with U.S. interests.²⁶⁶

Current²⁶⁷ and past administrations have conducted foreign policy, and even human rights policy, through U.S. courts in the past when it

²⁵⁸ See Slaughter & Bosco, *supra* note 134, at 102.

²⁵⁹ See Roth, *supra* note 2, at 4.

²⁶⁰ See Hiebert & McBeth, *supra* note 254, at 19 (reporting that Indonesia specialists dispute the assertion that Indonesia, with its economic woes and historic dependence on U.S. foreign direct investment, was in a position to abandon ties with U.S. multinationals if adjudication were allowed).

²⁶¹ See Oily Diplomacy, *supra* note 79, at A16.

²⁶² See discussion *infra* Part IV.B.2.

²⁶³ See McGrory, *supra* note 87, at A31.

²⁶⁴ See *infra* notes 267–274 and accompanying text.

²⁶⁵ See *infra* notes 275–278 and accompanying text.

²⁶⁶ See Schulz, *supra* note 250, at 41.

²⁶⁷ See *supra* note 253.

was expedient to do so.²⁶⁸ In a 1985 case before the U.S. Court of Appeals for the Second Circuit, the Reagan administration intervened in an appellate hearing to argue that the dismissal of a suit brought by a syndicate of American banks against Costa Rican banks for recovery of outstanding monies should be reversed.²⁶⁹ The executive argued that the district court had misapplied U.S. public policy by dismissing the case under the act of state doctrine.²⁷⁰ To the executive, securing debt repayment for U.S. banks outweighed any concern over the separation of powers or diplomatic niceties.²⁷¹ Similarly, when former Serbian President Radovan Karadžić raised a political question defense in a war-crimes suit, the State Department wrote two letters, including one with the support of the Attorney General and Solicitor General, emphatically stating that adjudication of his case would not adversely impact U.S. foreign relations.²⁷² The Clinton administration, while wary that the lawsuit could strain ongoing Balkan peace negotiations, nonetheless decided to endorse the suit as a means of distinguishing itself from past Republican administrations on the subject of human rights, according to a State Department memorandum.²⁷³ While in these two instances, the executive's foreign policy objectives warranted adjudicating diplomatically-sensitive lawsuits, improving the human rights records of developing states, without more, apparently does not rise to such importance for the Bush administration.²⁷⁴

In addition to the anti-American resentment fostered by duplicitous human rights policy, executive-corporate collusion creates an additional basis for resentment abroad in the arena of corporate responsibility.²⁷⁵ The State Department's letter arguing for dismissal of *Exxon* was written not three weeks after President Bush declared that "America's greatest economic need is higher ethical standards," and that "there is no capitalism without conscience."²⁷⁶ The administration's

²⁶⁸ See *Human Rights and Terror*, WASH. POST, Aug. 10, 2002, at A18 ("The State Department's real objection to the Exxon Mobil suit is that it doesn't think courts are the right place to make foreign policy.")

²⁶⁹ See *Allied Bank Intern v. Banco Credito Agricola de Cartago*, 757 F.2d 516, 519 (2d Cir. 1985).

²⁷⁰ See *id.*

²⁷¹ See *id.*

²⁷² *Kadic v. Karadžić*, 70 F.3d 232, 250 (2d Cir. 1995).

²⁷³ Neil A. Lewis, *U.S. Backs War Crimes Lawsuit Against Bosnian Serb Leader*, N.Y. TIMES, Sept. 27, 1995, at A10.

²⁷⁴ See *id.*

²⁷⁵ See Roth, *supra* note 2, at 4.

²⁷⁶ See Exxon Letter, *supra* note 1, at 1; Fred Kaplan, *Bush Targets 'Corporate Abusers'*, BOSTON GLOBE, July 10, 2002, at A1.

outrageous willingness to support severe corporate malfeasance abroad so soon after pledging to embark upon a new era of responsibility leads to the impression that American companies are only responsible “to the water’s edge.”²⁷⁷ This double-standard invites resentment against the United States by suggesting to indigenous plaintiffs that corporate accountability, the height of America’s concern for domestic businesses at the time of both the *Exxon* and *Sarei* interventions, is an unnecessary bother for American businesses operating in the developing world.²⁷⁸

The resentment and anger engendered by U.S. hypocrisy on human rights policy and corporate responsibility are antithetical to long-term U.S. interests, and represent an immediate security threat in an age of global terrorism.²⁷⁹ As the U.S. has become entrenched in the Middle East, an area of the world currently saturated by virulent anti-Americanism, its perception abroad has increasingly become a matter of national security policy.²⁸⁰ As one prominent human rights leader has noted, “Human rights are the foundation of national security, both domestically and around the world.”²⁸¹ Flagrant inconsistency between U.S. rhetoric and practice abroad provides anti-American extremists and terrorists with an invaluable propaganda tool for adding angry recruits to their ranks.²⁸² Because such antagonism is eminently preventable, U.S. double standards on human rights and corporate accountability represent a clear foreign policy failure.²⁸³

²⁷⁷ See Roth, *supra* note 2, at 4.

²⁷⁸ See *id.*

²⁷⁹ See Power, *supra* note 165, at 28 (“American decision-makers must understand how damaging a foreign policy that privileges order and profit over justice really is in the long-term.”); Schulz, *supra* note 250, at 41; see generally WILLIAM F. SCHULZ, IN OUR OWN BEST INTEREST: HOW DEFENDING HUMAN RIGHTS BENEFITS US ALL 38–65, 105–119 (2002).

²⁸⁰ See Dan Murphy, *U.S. Ads Miss Mark, Muslims Say*, CHRISTIAN SCI. MONITOR, Jan. 7, 2003, at 6 (describing the State Department’s \$600 million public relations campaign in the Arab world as a strategy to create a better understanding of America among Muslims).

²⁸¹ Schulz, *supra* note 250, at 41; see also Lorne W. Craner, Assistant Secretary for Democracy, Human Rights, and Labor, Remarks to the Heritage Foundation (Oct. 31, 2001) (“[T]here is often a direct link between the absence of human rights and democracy and seeds of terrorism. Promoting human rights and democracy addresses the fear, frustration, hatred, and violence that is the breeding ground for the next generations of terrorists. We cannot win a war against terrorism by halting our work promoting the universal observance of human rights. To do so would be merely to set the stage for a resurgence of terrorism in another generation.”), available at <http://www.state.gov/g/drl/rls/rm/2001/6378.htm> (last visited Nov. 10, 2003).

²⁸² See Schulz, *supra* note 250, at 41.

²⁸³ See *id.*

CONCLUSION

The new trend of executive-corporate collusion to dismiss diplomatically-sensitive corporate human rights lawsuits is troubling on many fronts. The trend evidences a startling lack of concern for human rights values in the United States' foreign policy, which is inconsistent with the Bush administration's frequent invocation of human rights values. The trend also points to hypocritical policy enforcement abroad in terms of corporate responsibility. Further, executive-corporate collusion is a tenuous legal maneuver, given the adaptability of all three judicial doctrines discussed in this Note to "human-rights friendly" application.

Rather than intervene for political and economic gain, the executive branch should allow human rights cases that embarrass foreign sovereigns to run their course. If the allegations of the lawsuits are without merit, corporate defendants can adequately defend their interests without the help of the executive branch.²⁸⁴ In cases where corporations are in fact guilty of complicity in human rights abuse, the parties have the option to settle outside of court, which could mitigate any diplomatic ramifications of the dispute.²⁸⁵ Above all, where corporate defendants are guilty of complicity in human rights abuse abroad, their shameful and exploitative acts must be exposed, redressed, and stopped.

A resolution to the increased use of the political question, international comity, and head of state doctrines will not, however, resolve the difficulties inherent in MNC liability in U.S. courts.²⁸⁶ Other procedural and jurisdictional requirements still make the adjudication of claims under the ATCA, for instance, less, rather than more, likely.²⁸⁷ Consistent accountability for rights abusers will require a series of deeper, structural changes to the international regime of human rights protections.²⁸⁸ Binding standards for corporate conduct abroad are one example.²⁸⁹ A U.S. commitment to the International Criminal

²⁸⁴ See *Human Rights and Terror*, *supra* note 268, at A18.

²⁸⁵ See *Slaughter & Bosco*, *supra* note 134, at 110.

²⁸⁶ See *Doe v. Unocal Corp.*, 2002 WL 31063976, at *7 (9th Cir. 2002) (restating the various procedural bases for piecemeal dismissal of the *Unocal* litigation at the district court level, including personal and subject matter jurisdiction, standing, and state action), *reh'g en banc granted and opinion vacated*, 2003 WL 359787, at *1 (9th Cir. 2003) (Nos. 00-56603, 00-56608).

²⁸⁷ See *Breed*, *supra* note 12, at 1016-20 (identifying subject matter jurisdiction, state action, and standing as persistent limitations to ATCA liability for corporate defendants).

²⁸⁸ See *Slaughter & Bosco*, *supra* note 134, at 115.

²⁸⁹ See VOLUNTARY PRINCIPLES, *supra* note 166. The United States, along with the United Kingdom, has pursued voluntary initiatives for promoting responsible relationships

Court is another.²⁹⁰ And it is conceivable that in some instances, long-term human rights goals, if doggedly pursued, could theoretically outweigh short-term adjudication of past abuse, in which case human rights-conscious policymakers would face a difficult choice between absolutes.²⁹¹

ATCA litigation in U.S. courts, however, is one of the only available solutions to the problem of unchecked corporate human rights violations abroad.²⁹² Because of executive-corporate collusion, that solution is perilously close to losing any vestige of effectiveness.²⁹³ Until the international community can realize an international human rights framework that holds accountability for rights abuse above dated notions of sovereign prerogative, plaintiffs, in the interest of justice, should have their day in U.S. courts.²⁹⁴

between companies in the extractive and energy sectors and governments in site countries. *See id.* However, until such initiatives attain binding legal force, MNCs have no responsibility to actually live up to promises made to great public-relations effect. *See id.*

²⁹⁰ *See Slaughter & Bosco, supra* note 134, at 111, 115. The United States has threatened to veto United Nations peacekeeping missions if the Security Council does not continue to grant it immunity from the ICC; it has also threatened—and in some cases, has proceeded—to cut off all military aid to countries that have ratified the ICC's Rome Statute but have not signed bilateral impunity agreements with the United States that would exempt its citizens from the ICC's jurisdiction. *The International Criminal Court: For Us or Against Us?*, *ECONOMIST*, Nov. 22, 2003, at 27.

²⁹¹ *See Slaughter & Bosco, supra* note 134, at 110. *But see* Collingsworth, *supra* note 86, at 3–4 (arguing that no corporation complicit in genocide and torture warrants protection under U.S. foreign policy for any reason).

²⁹² *See* Alien Tort Claims Act, 28 U.S.C. § 1350 (1993); Corn, *supra* note 11, at 31.

²⁹³ *See* Waldman & Mapes, *supra* note 5, at B1.

²⁹⁴ *See* Slaughter & Bosco, *supra* note 134, at 116.