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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

JOHN DOE I, et. al.,

v.

EXXON MOBIL CORPORATION, et. al.,

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Civ No. 01-1357 (LFO)

**PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES
IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**

I. INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiffs' claims against Exxon Mobil¹ for human rights violations occurring at the company's natural gas facility in Aceh, Indonesia are now routine applications of the Alien Tort Claims Act (ATCA), 28 U.S.C. §1350 (1993), and the Torture Victims Protection Act (TVPA), 28 U.S.C. §1350 note (1993). Defendants' baseless assertions of floodgates and unprecedented claims notwithstanding, the ATCA dates back to 1789, and Congress, in its 1991 passage of the TVPA, expressed approval of the ATCA's application to modern human rights cases.² Numerous courts have since applied the ATCA to claims of genocide, extrajudicial killing, torture, and unlawful detention very similar to those brought by Plaintiffs herein.³

More fundamentally, Defendants' Motion to Dismiss should be denied because they failed to meet their extremely high burden of establishing that Plaintiffs cannot prevail under any set of facts. Exxon Mobil mischaracterizes Plaintiffs' allegations and selectively omits key facts to construct nonexistent flaws in Plaintiffs' claims. Most significantly, Exxon Mobil bases its entire defense on the false premise that Plaintiffs merely alleged that Defendants are passive observers of violence stemming from the civil war in Aceh.⁴ Plaintiffs specifically allege that Exxon Mobil knowingly hired murderous thugs to protect their natural gas facilities in Aceh, and knowingly aided

¹ The Defendants in this case are Exxon Mobil Corporation, Exxon Mobil Oil Indonesia Inc, Mobil Corporation, and PT Arun LNG, Co. (hereinafter collectively referred to as "Exxon Mobil" or "Defendants" unless otherwise specified).

² See H.R. Rep. No. 102-367(I), at 4 (1991), reprinted in 1992 U.S.C.C.A.N. 84, attached as Exhibit 1, (explaining that the TVPA was passed to codify *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), and that the ATCA should be viewed as a parallel remedy that can also accommodate future evolution of customary international law).

³ See *infra*, authorities cited in Section IV(A)(2).

⁴ See Defendants' Memorandum in Support of Motion to Dismiss (Defs.' Mem.) at 1-4, 11-12, 19-20.

and abetted these hired guns in committing human rights violations. *See, e.g.*, Complaint at ¶¶ 39-47, 68, 71,74,78, 81,87,91,96. Plaintiffs limit their claims to harms they suffered at the hands of Exxon Mobil's security forces, and distinctly do not, contrary to Defendants' assertion, seek redress for the more generalized violence from the civil war in Aceh. *See, e.g.*, Compl. at ¶¶ 48-58.

Thus, Plaintiffs' legal theory is essentially identical to the claim made in *NCGUB v. Unocal, Inc.*, 176 F.R.D. 329 (C.D. Cal. 1997) (hereinafter "Unocal I"), where the court, in denying a motion to dismiss, held that plaintiffs' allegations allowed the inference that defendants participated with hired military security forces in using forced labor to construct a gas pipeline in Burma. *Id.* at 345-48. Based on *Unocal I*, and numerous other recent cases, Plaintiffs demonstrate below that their claims satisfy the requirements for ATCA and TVPA jurisdiction. Further, Plaintiffs' allegations, which must be taken as true, specifically allege Exxon Mobil's complicity in the human rights violations. Plaintiffs need not prove that Exxon Mobil employees held the guns, tortured the victims, or even affirmatively hoped for these things to happen. Defendants are liable for knowingly aiding and abetting, and benefitting from, hired security forces that, across a period of years, brought terror to Aceh residents living near the Exxon Mobil facility.

Exxon Mobil's effort to avoid liability by invoking the act of state and political question doctrines is therefore misplaced. Plaintiffs' claims are squarely within the ATCA and TVPA. Through these statutes, Congress has spoken expressly on whether international human rights violations can and should be subject to federal litigation. Moreover, Exxon Mobil has not met its burden of showing that their extreme human rights violations are the result of the official policy of the Indonesian government, a specific requirement of the act of state doctrine. Exxon Mobil also has not shown that opposition to these atrocities, through litigation or otherwise, is inconsistent with

U.S. foreign policy objectives.

Exxon Mobil's attempt to evade the merits by asserting *forum non conveniens* is equally flawed. To reach the balancing test that is the focus of Defendants' argument, there must be an adequate alternative forum. The likelihood of severe harm that Plaintiffs, their witnesses, and even their lawyers would face by litigating this case in Indonesia precludes any serious consideration of transferring the case there. Moreover, contrary to Defendants' argument, this Court has a legitimate interest in this dispute. Indeed, both the ATCA and TVPA make "violation[s] of international law... 'our business,' as such conduct not only violates the standards of international law but also as a consequence violates our domestic law." *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 106 (2d Cir. 2000), *cert. denied*, 121 S.Ct. 1402 (2001).

Finally, Defendants' effort to dismiss Exxon Mobil Indonesia (EMOI) for lack of personal jurisdiction must be denied because EMOI is the alter ego of Exxon Mobil, which, Defendants concede, is subject to personal jurisdiction in this Court. The law is clear that an alter ego is subject to jurisdiction in a forum where the parent company is subject to jurisdiction. Defendants' Motion must therefore be denied in its entirety.

II. BACKGROUND FACTS

Within the last two years, all of the Plaintiffs were either tortured, unlawfully detained, or subjected to other human rights abuses by state security forces working for and paid by Exxon Mobil Compl. at ¶¶ 39, 48-58. For example, Exxon Mobil's security forces picked up Plaintiff John Doe II, blindfolded him, tied his hands behind his back, and took him to what he later learned was Defendant PT Arun's liquefaction plant. *Id.* at ¶ 49. For three months, he was blindfolded, beaten severely, and tortured with electricity all over his body, including his genitals. The soldiers then took

off his blindfold, took him outside, and showed him a large pile of human heads. *Id.* Plaintiff John Doe V was taken by Exxon Mobil's security forces to a building inside the Exxon Mobil compound where he was burned with cigarettes, beaten severely, and shocked with electricity. *Id.* at ¶ 20. He was released, but the soldiers later came to his house, burned it down, and beat his son, breaking his son's leg. *Id.* Exxon Mobil's state security force kidnaped Plaintiff Jane Doe III's husband at gunpoint. *Id.* at ¶ 57. He has not been found, and is believed to have been killed. *Id.* Plaintiff Jane Doe II's husband was shot and killed while working in his rice field by Exxon Mobil's soldiers. *Id.* at ¶ 56.

If there ever existed a time when Exxon Mobil could have claimed they were unaware their hired security forces were committing human rights violations, it has long passed. Furthermore, Mobil (and now Exxon Mobil) retained at all times the ability to exercise control over its hired security force. *Id.* at ¶ 39.

Aceh, Indonesia is unquestionably an area with a history of civil conflict. *Id.* at ¶¶ 32-38. Currently there is an ongoing conflict pitting forces seeking independence against Indonesian government troops. *Id.* at ¶¶ 37-38. Aceh has seen various governments and their armies come and go, but a constant for the last 31 years is that Exxon Mobil and its predecessor companies have made whatever arrangements were required to purchase armed security forces from the current version of the Indonesian government to protect the "Arun Project," the major natural gas fields and the gas liquification plants it owns and operates in Aceh. *Id.* at ¶¶ 31, 39-40.

Exxon Mobil's predecessor in interest, Mobil Oil, first managed to buy off the brutal, corrupt regime of General Suharto by giving the dictator's family "blank shares" in Mobil Oil Indonesia, and providing other forms of direct and indirect payments. *Id.* at ¶ 32. In return, Mobil secured its own

private army to protect its Arun Project. At least one unit of the notorious Tentara Nasional Indonesia (“TNI”), Unit No. 113, was assigned exclusively to provide security for the company. *Id.* at ¶ 39. As part of the transaction, Mobil set up a joint venture with the Indonesian Government’s state owned oil and gas company, Pertamina. Under this arrangement, Mobil, and now Exxon Mobil, have rights to explore for and produce natural gas in exchange for payment of royalties and other consideration. *Id.* at ¶ 60. To liquify for shipment the extracted natural gas, the parties created Defendant PT Arun,⁵ a joint venture owned 55% by Pertamina, 35% by Exxon Mobil, and 10% by the Japanese company, Japan Indonesia LNG Company, Limited. *Id.* at ¶ 29. After General Suharto was overthrown in 1998, the company continued to use TNI Unit No. 113 for security and to make regular payments for salaries and supplies. *Id.* at ¶¶ 39, 40, 44.

Defendants have had the ability to control and direct, and have indeed controlled and directed, the activities of the TNI units assigned to protect the Arun Project. *Id.* at ¶ 40. Defendants have conditioned payment on the provision of specific security services and made decisions about where to place bases, performed strategic mission planning, and made decisions about specific deployment areas. *Id.* The Mobil companies provided logistical and material support to the Indonesian security forces, including: the construction and/or provision of buildings and supplies for two military barracks located on or next to the Mobil Companies’ natural gas extraction facilities and Defendant PT Arun’s liquefaction plant, which were used to interrogate, torture and murder Achenese victims and the provision of heavy equipment such as excavators so that the Indonesian security forces could dig mass graves. *Id.* at ¶ 41. In addition to making direct payments to the TNI

⁵ Defendant PT Arun has yet to answer the Complaint, and Plaintiffs are preparing a Motion for Default Judgment.

security forces, Defendants have also purchased military equipment and paid mercenaries to provide advice, training, intelligence and equipment for them. *Id.* at ¶ 46. Once Exxon Mobil consumed Mobil to become the largest corporation in the world, and the largest private investor in Indonesia, the company maintained control over its hired security forces.

Indeed, by November 30, 1999, following the merger of Exxon Corporation with Mobil, there was a clear public record of pervasive and systematic human rights violations perpetrated upon the innocent villagers of Aceh by the TNI troops hired to provide security for the Arun Project. *Id.* Numerous human rights groups, including several based in Aceh, repeatedly requested that Exxon Mobil cease its operations in Aceh until it could operate without using the murderous TNI for security. *Id.* at ¶ 44. All of these requests were refused. *Id.* Defendant continued to pay for the TNI's security services, knowing and expecting that they would continue to take any and all measures in order to ensure that the Arun Project would continue without interruption. *Id.*

On March 9, 2001, after continuously operating during years of genocide, murder, torture, rape, kidnaping, unlawful detainment, and other human rights violations inflicted upon the people of Aceh by their "security" forces, Exxon Mobil shut down most of the Arun Project, and evacuated its employees, because the TNI could no longer "guarantee" the security of the project facilities. *Id.* at ¶ 45. Demonstrating again the control Exxon Mobil always had, the government of Indonesia complied with the demand, and provided additional troops. *Id.* at ¶ 40, 44. The Arun Project is now operating again with increased security. *Id.* at ¶ 44. Exxon Mobil did not, however, demand that the new security forces refrain from human rights violations. *Id.* at ¶ 46.

III. STANDARD OF REVIEW

Defendants filed their Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b) (2) and (6). As

the moving parties, Defendants bear the burden of proof, which they have failed to meet. Plaintiffs' allegations of fact must be taken as true, and construed in the light most favorable to them. *See, e.g., Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Moreover, "[a] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim..." *Id.* It is well-settled that "a motion to dismiss for failure to state a claim upon which relief can be granted is generally viewed with disfavor and rarely granted." *Doe v. U.S. Dep't of Justice*, 753 F.2d 1092, 1102 (D.C. Cir. 1985). To survive a motion to dismiss, a plaintiff is merely required to make a "short and plain statement of the claim that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley*, 355 U.S. at 47. Plaintiffs clearly meet this standard.

Plaintiffs have attached affidavits to respond to those submitted by Exxon Mobil. Because the affidavits respond to specific points raised in Defendants' Motion to Dismiss for lack of subject matter and personal jurisdiction, their consideration by the Court does not convert the motion into one for summary judgment. *Overseas P'ship, Inc. v. PROGEN*, 15 F. Supp.2d 47, 48-49 (D.D.C. 1998), *citing, Haase v. Sessions*, 835 F.2d 902, 905 (D.C. Cir. 1987); *Wilson-Cook Med., Inc. v. Wilson*, 942 F.2d 247, 252 (4th Cir. 1991); *Bensusan Rest. Corp. v. King*, 937 F. Supp. 295, 298 (S.D.N.Y.), *aff'd*, 126 F.3d 25 (2d Cir.1997).

IV. LEGAL ARGUMENT

A. Plaintiffs' Complaint States A Claim Under the ATCA.

Based on allegations of genocide, extrajudicial killing, torture, kidnaping and sexual violence, Plaintiffs have brought a civil action under the ATCA, 28 U.S.C. § 1350. Defendants have moved to dismiss on the grounds that the ATCA does not create a cause of action, and that the torts

of unlawful detention, crimes against humanity and violence toward women do not constitute actionable violations of international law under the ATCA. Defendants also incorrectly argue that they cannot be held liable under the ATCA for acts committed by their state security forces.

There is overwhelming authority that the ATCA establishes a cause of action for Plaintiffs' claims, which allege violations of the "law of nations." Moreover, the ATCA clearly allows private parties engaged in joint action with state actors to be held liable for human rights violations. Specifically, Plaintiffs allege that Defendants are directly liable under the ATCA because they knowingly aided and abetted the security forces. Defendants are also vicariously liable because of their joint venture relationship with the Indonesian government, and because violations were committed by state security forces hired by and under the direction of Exxon Mobil.

1. This Court Has Subject Matter Jurisdiction Based on The ATCA.

It is well-settled that the ATCA provides both subject matter jurisdiction and a private right of action for violations of the law of nations. *Kadic v. Karadzic*, 70 F.3d 232, 240-41 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 2524 (1996); *Filartiga v. Pena-Irala*, 630 F.2d 876, 887 (2d Cir. 1980); *In re Estate of Marcos Human Rights Litig.*, 25 F.3d 1467, 1475 (9th Cir.), *cert. denied*, 115 S. Ct. 934 (1995); *Abebe-Jira v. Negewo*, 72 F.3d 844, 847 (11th Cir. 1996); *Doe v. Major Gen. Johnny Lumintang*, Civil Action No. 00-674 (D.D.C. 2001), attached hereto as Exhibit 2. *See also* 14 Federal Practice and Procedure §3661.1 at 152 (3d ed. 1998).

Defendants rely solely on an outdated concurring opinion by Judge Bork in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), which has since been rejected by this Court. In *Doe v. Islamic Salvation Front*, 993 F. Supp. 3, 8 (D.D.C. 1998), the Court held that "[t]he interpretation of international law in [*Kadic*] in 1995 is far more timely than the interpretations set

forth in *Tel-Oren*, which examined international law as it stood almost 15 years ago.” *See also, Bao Ge v. Li Peng*, No. 98-1986, 2000 U.S. Dist. LEXIS 12711, * 17 n.5 (D.D.C. Aug. 28, 2000); *Lumintang*, Civil Action No. 00-674. Judge Bork’s concurrence has been widely rejected. *See, e.g., Kadic*, 70 F.3d at 240 n.5; *Iwanowa v. Ford Motor Co.*, 67 F. Supp.2d 424, 444 (D.N.J. 1999). Indeed, in passing the TVPA, Congress expressly endorsed *Filartiga*, and explicitly rejected Judge Bork’s concurrence in *Tel-Oren*. *See* H.R. Rep. 102-367, at 3-4; S. Rep. 102-249, at 4-5 (1991).⁶ Defendants’ position that the ATCA does not create a cause of action therefore must be rejected.

2. Plaintiffs Allege Actionable Violations of the Law of Nations Under the ATCA.

Defendants necessarily concede that Plaintiffs’ allegations of genocide, extrajudicial killing and torture state a claim for a violation of the law of nations. Defs.’ Mem. at 13. These claims are well-established. *See, e.g., Kadic*, 70 F.3d at 240-44. *See also Filartiga*, 630 F.2d at 876; *Marcos*, 25 F.3d at 1467; *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995).

Defendants argue that unlawful detention, violence against women, and crimes against humanity do not state a claim under the ATCA. Defs.’ Mem. at 13. Recent cases firmly establish that these claims are within the law of nations.⁷ For example, this Court recently held that crimes against humanity, and cruel, inhuman and degrading treatment violate international law, and are actionable under the ATCA. *See Lumintang*, C.A. No. 00-674 at 23. Other courts have specifically held that unlawful detention and kidnaping violate the law of nations and are actionable under the ATCA. *See, e.g., Alvarez-Machain v. U.S.*, 266 F.3d 1045 (9th Cir. 2001) (arbitrary detention and

⁶ The Senate Report on the TVPA is attached hereto as Exhibit 3.

⁷ Judge Edwards’ concurrence in *Tel Oren* noted that the “‘law of nations’ is not stagnant and should be construed as it exists today among the nations of the world.” 726 F. 2d at 777. *See also, Kadic*, 70 F. 3d at 238 (courts must interpret international law under the ATCA as “it has evolved and exists among the nations of the world today”).

kidnaping); *Martinez v. City of Los Angeles*, 141 F.3d 1373, 1384 (9th Cir. 1998) (arbitrary arrest and detention); *Abebe-Jira v. Negewo*, 72 F.3d 844, 847(11th Cir. 1996) (torture and unlawful detention); *Eastman Kodak Co. v. Kavlin*, 978 F. Supp. 1078, 1090-92 (S.D. Fla. 1997)(unlawful detention); *Xuncax v. Gramajo*, 886 F. Supp. 162, 184 (D. Mass. 1995) (torture, arbitrary detention, cruel, inhumane, and degrading treatment).

Acts of sexual violence, such as those alleged by Plaintiff Jane Doe I, also violate the law of nations. In *Kadic*, the Second Circuit held that jurisdiction was proper under the ATCA for “genocide, rape, forced prostitution and impregnation, torture and other cruel, inhuman, and degrading treatment, assault and battery, sex and ethnic inequality, summary execution, and wrongful death.” *Kadic*, 70 F.3d at 237. International criminal tribunals have also found that sexual violence violates the law of nations.⁸ See, e.g. *Prosecutor v. Tadic*, Opinion and Judgment, No. IT-94-1-T at 477, 666 (May 7, 1997)(Criminal Tribunal for the former Yugoslavia found Tadic guilty of international law violations, specifically including rape and sexual violence, although he himself had not committed acts of sexual violence directly, he aided and abetted the violence as part of a general campaign of terror.); *Prosecutor v. Akayesu*, Judgment No. ICTR-96-4-T at 598 (Sept. 2, 1998) (Criminal Tribunal for Rwanda found Akayesu guilty of crimes against humanity, which explicitly included rape and sexual violence, and held that many acts of sexual violence amount to torture.). Jane Doe I likewise has alleged that the sexual assault upon her amounted to torture. Compl. at ¶¶ 71, 74 - 76.

Finally, Defendants strain credibility in arguing that insufficient international consensus

⁸See also, Kelly D. Askin, *Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals*, 93 AMJIL 97 (1999); Beth Stephens, *Humanitarian Law and Gender Violence*, 3 HOFPLS 87 (1999).

exists to classify crimes against humanity as universally condemned. Defs.' Mem. at 13, n.5. The core of the law of nations is found in the work of the Nuremberg tribunals which articulated fundamental principles of human decency. The Nuremberg tribunals held that "complicity in the commission of a . . . crime against humanity as set forth in Principle VI is a crime under international law." See U.N. General Assembly, *Report of the International Law Commission*, Official Records: 5th Sess., Supp. No. 12 (A/1316) (1950) at 11-14. Federal courts have unequivocally held that "[t]he Nuremberg Code is part of the law of humanity. It may be applied in both civil and criminal cases by the federal courts in the United States." *In re Cincinnati Radiation Litigation*, 874 F. Supp. 796, 821 (S.D. Ohio 1995). The wrongs alleged by Plaintiffs are therefore clearly sufficient to state a claim under the ATCA.

3. Defendants' Collaboration with State Security Forces Satisfies Any Requirement of "State Action."

Contrary to Defendants' assertion,⁹ ATCA law has evolved to permit private parties to be directly liable for violations of the law of nations.¹⁰ However, given the clear participation of state

⁹Although they mischaracterize it as an "exception" to the "general rule," Defendants concede that for certain crimes, private individuals may be held liable for violations of international law even if they were not operating under color of authority. See Defs.' Mem. at 15 n.7.

¹⁰*Kadic* was the seminal case that allowed private actors to be held liable for international law violations in the context of war crimes and genocide. 70 F.3d at 243. Numerous courts have since found that private parties may be held liable for certain international law violations. See, e.g., *Bao Ge*, 2000 U.S. Dist. Lexis 12711 at * 17 n. 5, *Bigio v. Coca-Cola Co.*, 239 F.3d 440, 447-48 (2d Cir. 2000); *Islamic*, 993 F. Supp. at 8; *Beanal*, 969 F. Supp. at 371, *aff'd*, 197 F. 3d 161 (5th Cir. 1999); *Doe v. Unocal Corp.*, 110 F. Supp.2d 1294, 1307-09 (C.D. Cal. 2000); *Iwanowa*, 67 F. Supp.2d Cert., 445; *JAMA v. U.S. I.N.S.*, 22 F. Supp.2d 353, 362 (D.N.J. 1998). See also, Beth Stephens, *Human Rights Accountability: Congress, Federalism and International Law*, 6 ILSA J. Int'l & Comp. L. 277, 282 (2000); Saman Zia-Zarifi, *Suing Multinational Corporations in the U.S. for Violating International Law*, 4 U.C.L.A. J. Int'l L. & Foreign Aff. 81, 92 (1999). Moreover, the events of September 11 will no doubt lead to an even greater recognition of individual liability in the international legal arena. See, e.g.,

actors with Exxon Mobil in the wrongful acts, the “state action” requirement is easily satisfied in this case. As the *Eastman Kodak* Court reasoned, the interesting issue of whether state action is necessary under the ATCA need not be resolved when state action is plainly present. *See Eastman*, 978 F. Supp. at 1091. *See also, Unocal I*, 176 F.R.D. at 348.

Defendants’ argument that they did not act under color of law misapplies the law. To determine whether a private party acts under color of law for purposes of the ATCA, courts look to 42 U.S.C. § 1983 (1994) jurisprudence as a relevant guide. *Kadic*, 70 F.3d at 245; *Unocal I*, 176 F.R.D. at 348. The Supreme Court has articulated several approaches to the question of whether a private entity can be said to act under law of law: joint action, compulsion, symbiotic relationship, or, most recently, entwinement. *Brentwood Academy v. Tennessee Secondary School Athletic Assoc.*, 531 U.S. 288, 296 (2000). Exxon Mobil’s relationship with its state security forces meets the test for joint action, as well as the symbiotic relationship and entwinement tests.

Moreover, “[w]hether the concerns are treated as separate tests or as factors for consideration, courts must necessarily make a fact-bound inquiry ... the state-action inquiry is [therefore] more easily resolved on summary judgment than on a motion to dismiss.” *Unocal I*, 176 F.R.D. at 346.

Plaintiffs allege that Defendants are joint venture partners with the Indonesian government in the exploration and production of liquefied natural gas in Aceh. Complaint at ¶ 29. In furtherance of the joint venture, the Indonesian government furnished military personnel, and at least one unit of the TNI, No. 113, to provide security for the Arun Project. *Id.* at ¶ 39. Defendants thereafter

S.C. Res. 1368, U.N. SCOR, 56th Sess. (2001) (calling on states, in the wake of September 11, to “work together urgently to bring to justice the perpetrators of those attacks...and those responsible for aiding, supporting...the perpetrators...of these acts”); G.A. Res. 56/1, U.N. GAOR, 56th Sess., (2001) (stressing that those responsible for aiding and supporting terrorists “will be held accountable”).

“employed Unit 113, as well as other units of the TNI.”*Id.* at ¶ 60. Defendants paid a salary, a regular monthly or annual fee for such services. *Id.* Defendants have had the ability to control and direct the activities of its security units and have conditioned payment on the provision of specific services. *Id.* at ¶ 40. In addition, Exxon Mobil provided other direct support to its hired guns, including military equipment, supplies, and facilities where many of the Plaintiffs were tortured. *Id.* at ¶¶ 40, 41. Defendants have hired mercenaries to train its security forces. *Id.* at ¶ 46. Exxon Mobil is well aware of the clear public record of pervasive and systemic human rights violations perpetrated by its security forces. *Id.* Numerous human rights groups have called on Exxon Mobil to cease using the murderous TNI for security. *Id.* Yet, Exxon Mobil continued to pay for security services knowing and expecting that its military units would continue to take any and all actions, including extreme violence, in order to ensure that the Arun Project would operate without interruption. *Id.* at ¶ 44.

Defendants clearly meet the joint action test. The core of the joint action theory is that “[p]rivate persons, jointly engaged with state officials in the challenged action, are acting ‘under color’ of law...” *Dennis v. Sparks*, 449 U.S. 24, 27-28 (1980). Joint action exists where the private party is a “willful participant” in the challenged activity, such that there is a “substantial degree of cooperative action.” *Id.* Here, as in the *Unocal I* case, Plaintiffs’ allege that Defendants engaged in “joint action” with state actors through their joint venture relationship, and by hiring and/or contracting with state military units. *See Unocal I*, 176 F.R.D. at 336-37. As the Court described the joint action in *Unocal I*, “plaintiffs allege that Unocal and SLORC, the controlling government in Burma, are joint venturers or implied partners,” and that these “allegations are sufficient to support subject matter jurisdiction under the ATCA because, when construed in the light most favorable to

plaintiffs, they suggest that Unocal may have been a willful participant in joint action with the State or its agents.” *Unocal I*, 176 F.R.D. at 348.

Moreover, through the joint venture, Exxon Mobil, like *Unocal I*, “did more than cloak itself with the authority of the State: it hired an instrument of the state’s power.” *Id.* at 347, n.21, *citing*, *Groom v. Safeway, Inc.* 973 F. Supp. 987, 991-92 (W.D. Wash. 1997). In *Groom*, the court found that Safeway acted under color of law when it hired a state police officer to protect its store and the officer then unlawfully detained and searched the plaintiff. *Id.* at 989. The Court reasoned that “the employment relationship gives the private entity and the state agent an overlapping identity and interest and sufficiently involves the state in the relevant actions of the private entity to bring those actions under color of state law.” *Id.* at 991-92. *See also West v. Atkins*, 487 U.S. 42, 51 (1988) (holding that a physician hired as an independent contractor by a prison acted under color of law due to their contractual and cooperative relationship). Thus, Plaintiffs’ allegations are more than sufficient to establish joint action between Exxon Mobil and the Indonesian military.

Defendants’ argument that no joint action exists is based on a fundamental misunderstanding that joint action always requires the participants to share a “common, unconstitutional goal.” Defs.’ Mem. at 17. However, “joint action exists, not only where a conspiracy is alleged,¹¹ but also where a private party is ‘a willful participant¹² in joint action with the state or its agents’.” *Unocal I*, 176

¹¹ Nevertheless, Plaintiffs also allege sufficient facts to support a theory of conspiracy. *See, e.g.*, Compl., ¶¶ 68, (alleging that Defendants “acted in concert” to violate ATCA and TVPA).

¹²Consequently, Defendants’ heavy reliance on *Cunningham v. Southlake Ctr For Mental Health, Inc.*, 924 F.2d 106 (7th Cir. 1991), is misplaced. The *Cunningham* court narrowly construes joint action exclusively as “an agreement between private and public actors to violate plaintiff’s constitutional rights.” 924 F.2d at 107. In *Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442 (10th Cir. 1995), the court required the parties to share a common, unconstitutional goal only in the context of establishing joint action through a conspiracy. 49 F.3d at 1454. The

F.R.D. at 346, *citing Collins v. Womancare*, 878 F.2d 1145, 1154 (9th Cir. 1989). Here, Exxon Mobil is a “willful participant.” It chose to engage state actors as its private security force knowing their murderous record. Compl. at ¶¶ 40-44.

The allegations of substantial interaction between Exxon Mobil and its state security force also satisfy the “entwinement” test for state action, as recently articulated by the Supreme Court in *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Assoc.*, 531 U.S. 288, 298 (2000). *See also*, *United Steelworkers of America v. Phelps Dodge Corp.*, 865 F.2d 1539 (9th Cir. 1989) (en banc), (holding that the evidence presented, including the sharing of intelligence, daily coordination of activities, and the use of state security personnel by the union, would be sufficient to prove close relations between the private defendant and state actors); *D’Amario v. Providence Civic Center Authority*, 783 F.2d 1 (1st Cir. 1986)(The use of public civic center employees to enforce a concert promoter’s rules was sufficient state involvement to meet nexus test.). In *Brentwood*, the Supreme Court also held that “it avails the Association nothing to stress that the State neither coerced nor encouraged the actions complained of When, therefore, the relevant facts show pervasive entwinement to the point of largely overlapping identity, the implication of state action is not affected by pointed out that the facts might not loom large under a different test.” *Brentwood*, 531 U.S. at 303.

4. Exxon Mobil is Liable for the Acts of its Security Forces.

Gallagher Court explicitly noted that joint action could also be established if defendant willfully participated with state actors in depriving plaintiff’s rights. *Id. See also Collins*, 878 F.2d at 1154. In *Gallagher*, a private company leased a University of Utah arena for a concert. The Court found that the mere presence of University police did not turn the actions of the private security staff hired by the concert promoter into state action. Here, plaintiffs have alleged substantial cooperation and control – far more than “mere presence.”

Exxon Mobil is liable for the acts of its security force under international law dating from the Nuremberg Tribunals, domestic law, and the black letter law of agency and partnership. Plaintiffs have alleged both that Exxon Mobil is directly liable for aiding and abetting the security forces, and that Exxon Mobil is vicariously liable for the acts of the military through its joint venture and agency relationship with the Indonesian government and its military units. Compl. at ¶¶ 60, 124-126. There is a clear delineation between the use of § 1983 to establish state action and the standards used to determine liability. *See* S. Rep. No. 102-249, at 8-9, Exhibit 3. In other words, § 1983 covers solely “who” the defendant aids and abets. Defendants confuse these concepts by arguing that Exxon Mobil cannot be liable as a state actor because Exxon Mobil did not intend to control, direct or otherwise proximately cause plaintiffs’ injuries. Defs.’ Mem. at 20. The issues of intent and causation are issues of liability distinct from the analysis of whether Exxon Mobil is a state actor. Plaintiffs have established that Exxon Mobil acted under color of law because it was either a wilful participant with or otherwise sufficiently entwined with the Indonesian military. Having established that Exxon Mobil acted under color of law, Exxon Mobil can be held liable because it aided and abetted the security forces or otherwise hired the military as its agents.

a. Exxon Mobil is liable for knowingly aiding and abetting human rights violations.

ATCA does not itself contain specific standards of liability. However, courts applying the ATCA have relied on American and international norms to establish liability. *See, e.g., Kadic*, 70 F.3d at 246; *In re Ferdinand Marcos*, 978 F.2d 493, 502 (9th Cir. 1992) ; *Filartiga*, 630 F.2d at 886. Congress, in passing the TVPA, confirmed that having established state action using § 1983 principles, “under international law, responsibility for torture, summary execution, or disappearances

extends beyond the person or persons who actually committed those acts [to] anyone with higher authority who authorized, tolerated or knowingly ignored those acts.” See S. Rep. No. 102-249, at 8-9, Exhibit 3. Liability therefore exists “against persons who ordered, abetted, or assisted in the torture.” *Id.*

The standard of liability relied upon by Congress is based on international standards derived from the Nuremberg cases.¹³ The Nuremberg principle of aiding and abetting liability has since been confirmed, without exception, by the War Crimes Tribunals for Rwanda and the former Yugoslavia. Their decisions emphasize that the requisite “participation” for aiding and abetting is lending “practical assistance, encouragement, or moral support which has a substantial effect upon the perpetration of the crime.”¹⁴ There is therefore no requirement that an aider and abettor share the perpetrator’s specific intent. *Furundzija*, ICTY-95-17/1, at ¶¶ 236, 245-46. Rather what is required is “practical assistance” in committing the violation. *Id.* at 246.

Consistent with international law, this Circuit has also broadly construed aiding and abetting liability. In *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983), the Court upheld aiding and

¹³ See, e.g., *U. S. v. Friedrich Flick*, 6 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10 (1952). The Tribunal found Flick guilty based on approval of his employee’s decision to increase company production quotas knowing forced labor would be required to meet the increase. Significantly, the Tribunal held Flick fully responsible although the slave labor program had its origin in the Nazi regime, and he did not “exert any influence or [take] any part in the formation, administration or furtherance of the slave-labor program.” *Id.* at 1198. It was not a requirement for liability that Flick specifically sought to use forced laborers. In fact, Flick testified that it was not his intent to use slave labor, and denied full knowledge of slave labor until very late in the war. *Id.* at 807.

¹⁴ *Prosecutor v. Furundzija*, ICTY-95-17/1, Trial Judgment (Dec. 10, 1998) at ¶ 235. See also, *Prosecutor v. Delalic*, ICTY-96-21, Appeals Judgment (Feb. 20, 2001) at ¶ 345; *Prosecutor v. Georges Anderson Nderubumwe Rutaganda*, ICTR-96-3 (December 6, 1999). These cases are available at www.ictor.org.

abetting liability against Hamilton, although she did not directly aid the commission of the burglaries or the subsequent murder. Assessing Hamilton's defense of lack of intent, the Court stated, "[a]lthough her own acts were neutral standing alone, they must be evaluated in the context of the enterprise they aided, *i.e.*, a five year long burglary campaign against private homes." *Id.* at 488. The court further noted that "[i]f . . . Hamilton's assistance was knowing, then it evidences a deliberate long-term intention to participate in an ongoing illicit enterprise; . . . it was no passing fancy or impetuous act." *Id.* On the scope of Hamilton's liability, the court held her liable for the murder, which was incidental to the burglary, because "it was a natural and foreseeable consequence of the activity Hamilton [undertook]." *Id.*

Plaintiffs establish that Exxon Mobil was aware of its role in the illegal activity that resulted in injury to Plaintiffs, and that Defendants substantially assisted in that activity. Specifically, Plaintiffs allege that Defendants knowingly hired murderous security forces and then aided and abetted them in carrying out human rights abuses against Plaintiffs. Compl. at ¶¶ 39-47, 68, 71, 74, 78, 81, 87, 91, 96. Plaintiffs further allege that Exxon Mobil's predecessor-in-interest (Mobil) established a joint venture with Suharto's regime and that Defendant retained the ability to exercise control over the hired security forces. *Id.* at ¶¶ 29, 32, 39. The Complaint identifies ways in which Defendants exercised this control, for example by making certain strategic decisions about placement of missions. *Id.* at ¶ 40. Plaintiffs also allege that certain residents and human rights groups pleaded that Mobil and later Exxon Mobil cease using the security forces as protectors due to the human rights violations being committed, but Defendants refused their requests. *Id.* at ¶ 44. Defendants' acts of aiding and abetting were therefore "knowing" because, despite these direct requests as well as public reports of the forces' acts of terror, Defendants demanded an increase in security forces on

their payroll. *Id.*

In addition, based on the Nuremberg standard adopted in the TVPA, Exxon Mobil can be liable because it “tolerated or knowingly ignored” the wrongful acts of its security forces. S. Rep. No. 102-249, Exhibit 3, at 8-9. There is no question that by the time of Plaintiffs’ injuries, Exxon Mobil’s security forces had a long record of human rights violations in Aceh, such that even major media outlets had raised serious questions.¹⁵ Failing to take appropriate measures once the violations became clear is itself a basis for liability. *See, e.g., Parker v. District of Columbia*, 850 F.2d 708, 712 (D.C. Cir. 1988); *Daskalea v. D.C.*, 227 F.3d 433, 441 (D.C. Cir. 2000); *Griffin v. City of Opa-Locka*, 261 F. 3d 1295, 1311 (11th Cir. 2001).

These actions taken together are therefore more than sufficient to raise an inference that Defendants aided and abetted the Indonesian security forces in their human rights violations such that Defendants can be held liable under the ATCA.

b. Exxon Mobil Is Vicariously Liable for Plaintiffs’ Injuries Based on Its Joint Venture and Agency Relationship With the Indonesian Government.

As was recognized as a basis for liability in *Unocal I*, Plaintiffs herein also allege that Defendants may be held vicariously liable for their joint venture and agency relationship with the Indonesian government and military units hired by Exxon Mobil to protect its property. *See* 176 F.R.D. at 348. Plaintiffs set forth in their Complaint numerous acts for which Defendants may be held vicariously liable.

¹⁵ *See, e.g.,* Michael Shari, *Indonesia: What Did Mobil Know?*, Business Week, Dec. 28 1998 at 2, attached hereto as Exhibit 4. The article reports that a former top government official from Aceh concluded that “there wasn’t a single person in Aceh who didn’t know that massacres were taking place.”

Plaintiffs allege that Defendants are joint venturers with the Indonesian government in the exploration and production of liquefied natural gas in Aceh.¹⁶ Compl. at ¶ 29. Plaintiffs also allege that Defendants hired and paid state-operated security forces, and exerted control over many of the forces' actions. For example, Defendants provided funds, supplies, equipment, and facilities for the security troops. See Compl. at ¶¶ 40-41. They also made decisions about where to deploy troops, and conditioned payment on the provision of plans. See *id.* Thus, Plaintiffs have alleged conduct exhibiting Defendants' substantial degree of cooperative action which necessarily supports Plaintiffs' allegations of vicarious liability.

It is well-established that joint venturers are jointly and severally liable to an injured third party for the torts of another partner or venturer acting in furtherance of the enterprise. *Faison v. Nationwide Mortgage Corp.*, 839 F.2d 680, 685 (D.C. Cir. 1988). This is so even if the tort is willful and malicious and not simply negligent. *Id.*

Similarly, a principal is liable for the intentional torts of his agent committed within the scope of employment. *Weinberg v. Johnson*, 518 A.2d 985 (D.C. Ct. App. 1986)(Laundromat owner liable for shooting by employee where employee is motivated at least in part by desire to serve his employer's interest.); *Safeway Stores Inc. v. Kelly*, 448 A.2d 856 (D.C. Ct. App. 1982)(Safeway was liable for assault and battery by security guard from a guard service company); *Penn Cent. Transp. Co. v. Reddick*, 398 A.2d 27, 31 (D.C. Ct. App. 1979); Restatement (Second) of Agency § 228, § 245

¹⁶ Exxon Mobil denies that its relationship with the Indonesian government constitutes a joint venture. Defs.' Mem. at 11, n. 3. However, Plaintiffs' allegations must be accepted as true. *Schever v. Rhodes*, 416 U.S. 232, 236 (1974). Defendants' characterization of their relationship with the Indonesian government is not controlling. Rather, the existence of a joint venture relationship is a question of fact. *Jonathan Woodner Company v. Laufer*, 531 A.2d 280, 285 (D.C. Ct. App. 1987); *O'Brien v. Cacciatore*, 591 N.E.2d 1384, 1389 (App.Ct.Ill. 1992).

(Master is responsible for the use of force where force is not unexpected in view of the duties of the servant, even where the act was unauthorized); *See also* Restatement (Second) of Torts § 416 (The employer of an independent contractor is liable to third parties for the failure to take reasonable precautions where the work creates a risk of physical harm to others.). This includes acts committed by state police officers hired to provide security. *Cervantez v. J.C. Penney Company, Inc.*, 595 P.2d 975, 979-80 (Cal. Sup. Ct. 1979); *McChristian v. Popkin*, 75 Cal. App. 2d 249, 255-56 (Cal. Dist. Ct. App. 1946).

Moreover, ratification of the unauthorized acts of another may be established by the principal's knowing acceptance or retention of the benefits of the act. *Lewis v. Washington Metropolitan Area Transit Authority*, 463 A.2d 666, 671 (D.C. Ct. App. 1983). Here, Plaintiffs' allegations undoubtedly raise the inference that Exxon Mobil knowingly hired and accepted the benefits of the TNI security forces.

5. Defendants Caused Plaintiffs' Injuries Because They Aided and Abetted The Military's Human Rights Violations.

Defendants finally attempt to evade ATCA jurisdiction on the faulty notion that Plaintiffs' allegations do not support a finding of proximate cause. As discussed above, Plaintiffs allege that Defendants' liability is premised on its aiding and abetting of state actors, thereby requiring knowing assistance of, but not direct control or direct participation in, the state's acts. However, even if proximate cause did require some element of "control," as Defendants suggest, Plaintiffs have alleged such control by Defendants. In fact, not only have Plaintiffs alleged facts establishing Defendants' *attempts* at controlling the state's military units, through their provision of funds, supplies, facilities and strategic decision-making about the troops' deployment, but Plaintiffs also

alleged facts showing that Defendants *succeeded* in their control. Complaint at ¶ 40. Notably, when Defendants began shutting down the Arun Project because the military no longer could “guarantee” security of the facilities, the Indonesian government complied with Defendants’ demand for increased troops, and now the Arun Project is operating at full force. *Id.* at ¶45. Plaintiffs thus assert that Exxon Mobil had sufficient control to take action to prevent further abuses of the thousands of villagers being victimized by the security forces, but chose instead to focus exclusively on ensuring the safety of its small group of employees, and, of course, its property.

Defendants’ reliance on *Arnold v. IBM*, 637 F.2d 1350 (9th Cir. 1981) and *King v. Massarweh*, 782 F.2d 825 (9th Cir. 1986), to argue that it did not have sufficient control over the military units, is also misplaced.¹⁷ In *Arnold*, the Court held that plaintiffs could not demonstrate that IBM had control over the police task force because despite receiving funding and information from IBM, the task force conducted an independent investigation. 637 F.2d at 1537. Unlike Exxon Mobil, the task force had no joint venture or agency relationship with IBM, and thus there was no evidence that IBM could assert any control over those officials. Most significantly, IBM, again unlike Exxon Mobil, had no advance knowledge of the wrongful search and seizure that occurred, and thus had no basis for attempting to exercise control to prevent it. Exxon Mobil also has an

¹⁷ Again, Defendants inappropriately rely on the *Unocal II* summary judgment opinion. *Unocal II*, 110 F. Supp.2d at 1307. That the court ultimately found Plaintiffs’ evidence in *Unocal* insufficient to establish proximate cause is irrelevant to Plaintiffs’ current allegations against Exxon Mobil at the dismissal stage. As evidenced by Plaintiffs’ discussion on joint action, the proper comparison is more aptly found in the *Unocal I* court’s decision at the motion to dismiss stage. *See Unocal I*, 176 F.R.D. at 345-348. Defendants’ attempt to distinguish *Unocal* at the motion to dismiss stage by arguing that forced labor was linked to the project in a way that security cannot be linked to the Arun project is totally baseless. Defs.’ Mem. at 16, n.9. The Complaint makes the specific allegations that “security was an essential element of the Arun project...[and that] the extraction and liquefaction activities could not have been performed without a heavy military presence by the Indonesian military...” Compl. at ¶ 39.

ongoing relationship with the Indonesian military, and acts of violence were committed numerous times. See Compl. at ¶¶ 39,41. In *Arnold*, the police committed a single wrongful act with which IBM cooperated. See 637 F.2d at 1357-8 (distinguishing *Smith v. Brookshire Bros., Inc.*, 519 F.2d 93, 94 (5th Cir. 1975), where there was a continuous program of allowing arrests for shoplifting based solely upon the request of a store official). See also *Howerton v. Gabicia*, 708 F.2d 380, 384 (9th Cir. 1983)(finding proximate cause and that landlord acted under color of law where he repeatedly and continually relied on police to “stand by in case of trouble”).

In *King*, a landlord called the police in the wake of a rent dispute with tenants and the police then illegally searched the tenants’ apartment. The police in *King* were not under the control of the landlord, who could not have prevented the police, once there, from searching the apartment. 782 F.2d at 829. Also, as in *Arnold*, the landlord had no advance knowledge of the alleged wrongful conduct, and had no basis to try to act in advance to exercise control to prevent it. As the violation of the tenants’ rights was not a continuing one, there was also no opportunity to prevent further violations. Here, Exxon Mobil had an ongoing relationship with the Indonesian government and could have stopped continuing violations but chose not to do so.

More fundamentally, and irrespective of the applicability of *Arnold* and *King* to this case, issues of proximate cause are questions of fact that are not properly resolved in a motion to dismiss. *De los Rios v. NationsBank, N.A.*, 911 F. Supp. 8, 10 (D.D.C. 1995). Plaintiffs have alleged control, and it is now their right to gather further evidence to support their allegations.

B. This Court has Subject Matter Jurisdiction Based on the TVPA.

Congress enacted the TVPA, 28 U.S.C. § 1350, note, to supplement, not displace, the ATCA, and, by its terms, it applies only to claims of torture and extrajudicial killing. See, e.g., *Karadzic*, 70

F.3d at 241; *Beanal*, 969 F. Supp. at 380-81. Defendants do not dispute this, but raise three defenses to Plaintiffs' claims under the TVPA, all of which are inapplicable.

1. Private Corporations Can Be Sued Under the TVPA.

Defendants' argument that corporations cannot be sued under the TVPA is an overly simplified effort at illusion. The TVPA imposes civil liability on individuals who subject others to torture or extrajudicial killing. 28 U.S.C. § 1350 note §2(a). The weight of authority combined with the relevant statutory history indicates that "individual" is equivalent to "persons," which includes private corporations. *Metrop. Life Ins. Co. v. Ward*, 470 U.S. 869, 881 (1985).

The TVPA's legislative history in no way demonstrates an intent to exclude private corporations from the definition of "individual." Senator Specter, the sponsor of the Senate bill, specifically stated that "[t]he bill is limited to suits against **persons** who specifically ordered, abetted, or assisted in the torture." 137 Cong. Rec. S1369-01, S1378 (emphasis added). Moreover, the Senate Report's only reference to the term "individual" states that "the legislation uses the term to make crystal clear that foreign states or their entities cannot be sued under this bill under any circumstances." S.Rep. No. 102-249 at 7 (Exhibit 3). This clearly shows that the Senate was concerned with sovereign immunity issues, rather than shielding corporations from liability. Nowhere does the legislative history state that corporations cannot be sued.

Defendants rely exclusively on *Beanal v. Freeport-McMoran, Inc.*, 969 F. Supp. 362 (E.D. La. 1997), to argue that the term "individual" as used in the TVPA does not include corporations. Defs.' Mem. at 22. While the *Beanal* Court ruled, after consulting a dictionary, that "individual" did not include corporations, the court acknowledged that the legislative history of the TVPA stated only that "Congress purposefully chose the term so as to circumscribe foreign state liability under the

Act”, and that “Congress does not appear to have had the intent to exclude private corporations from liability under the TVPA.” *Beanal* at 382. The court’s conclusion that corporations cannot be sued under the TVPA was therefore contrary to its own conclusion regarding the legislative history. The tenuousness of the Court’s ruling is reinforced by the Fifth Circuit’s express decision to decline to affirm this specific conclusion. *See Beanal* 197 F.3d at 169.

Other courts’ interpretation of the term “individual” supports Plaintiffs’ argument that the term includes corporations. In *U.S. v. Feldman*, 853 F.2d 648 (9th Cir. 1988), the Ninth Circuit determined that a “group of individuals” could be comprised of both natural persons and corporations. *Id.* at 655. In *U.S. v. Turkette*, 452 U.S. 576, 583 (1981), Justice White used the term “individual” and “persons” interchangeably. *See also U.S. v. Cooper*, 91 F. Supp.2d 60 (D.D.C. 2000); *U.S. v. Aimone*, 715 F.2d 822 (3rd Cir. 1983); *U.S. v. Thevis*, 665 F.2d 616 (5th Cir. 1982); *U.S. v. Middleton*, 231 F.3d 1207, 1210 (9th Cir. 2000).

The Supreme Court also recently examined the meaning of “individual” in *Clinton v. New York*, 524 U.S. 417 (1998). There, the question was whether the term “individual” in the Line Item Veto Act allowed a corporation to challenge the President’s authority to cancel provisions in federal statutes. The Supreme Court held that “Congress undoubtedly intended the word ‘individual’ to be construed as synonymous with the word ‘person’” although the Line Item Veto Act allows “[a]ny Member of Congress or any **individual** adversely affected’ by [the Act] to bring an action for declaratory judgment or injunctive relief.” *Clinton*, 524 U.S. at 428 (emphasis added).

Despite the clarity in numerous cases that “individual” is equivalent to “person,” and therefore includes private corporations, there are cases reaching the opposite conclusion, based on

the specific statutory context.¹⁸ Thus, while it appears that there is solid authority to support the assertion that “individual” and “person” can be equivalent in this case, the legislative history of the TVPA offers the best source for determining the purpose of using the term “individual.”

Both Congress and the *Beanal* court agree that the term “individual” was used to make clear that sovereign states could not be sued. There is absolutely no expression of intent to immunize private corporations from liability. Indeed, the issue of corporate liability is not even discussed.¹⁹ Surely such a radical limitation would have warranted discussion, if intended. Rather, as Senator Kennedy stated, “we have an obligation to make our courts accessible to ... victims to the maximum extent that Constitution allows to assure that torturers feel the full weight of international law.” 137 Cong. Rec. S1369-01, S1379.²⁰

2. Plaintiffs Need Not Reside in the U.S. to Bring TVPA Claims.

¹⁸ See, e.g., *In Re Oliver North*, 13 F.3d 252 (D.C. Cir. 1994) (holding that “individual” as used in the Ethics in Government Act should be narrowly construed not to include corporations since the act is carving out an exception to sovereign immunity); *Cell Assoc. v. Nat. Inst. of Health*, 579 F.2d 1155, 1157 (9th Cir. 1978) (holding that the language of the Privacy Act defining an “individual” as being a “citizen of the United States” does not include corporations).

¹⁹ Exxon Mobil attempts to argue that corporations cannot be liable for torts committed by agents or employees under the TVPA because of the need for a defendant to “subject” the victim to torture. Defs.’ Mem. at 23, n.13. Wholly apart from the implications of this assertion, the legislative history of the TVPA states that the TVPA applies to “persons who ordered, abetted, or assisted in the torture.” S. Rep. 102-249, Exhibit 3, at 8. Thus, the TVPA is not limited to the person who does the dirty work, but applies also to those who provided support and assistance to the direct perpetrators, which is consistent with Plaintiffs’ allegations against Exxon Mobil. See Compl. at ¶¶ 60-62.

²⁰ If this Court concludes that corporations cannot be named as defendants under the TVPA, Plaintiffs request leave to amend their Complaint to name as individual defendants the corporate officers at Exxon Mobil responsible for the atrocities committed against them.

Defendants' novel and meritless argument that only U.S. residents can bring TVPA claims has no support in the statutory language or the legislative history. Defs.' Mem. at 23-25. The TVPA reads in pertinent part that any individual who: "(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death." 28 U.S.C.A. § 1350, note. There is plainly no residency restriction. It has been an ancient and cardinal tenet of statutory construction that "where a law is expressed in plain and unambiguous terms, whether those terms are general or limited, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction." *Lake County v. Rollins*, 130 U.S. 662, 670-71 (1889); *U.S. v. Oregon*, 366 U.S. 643, 648, (1961); *accord, U.S. v. Bost*, 87 F.3d 1333, 1336 (D.C. Cir. 1996).

While review of legislative history on this issue is unnecessary due to the clarity of the statutory language, it is important to note that Defendants significantly mischaracterize the legislative intent. Both the official House and Senate reports indicate that the TVPA expanded the ATCA's access to individuals, regardless of U.S. residence or citizenship: "[w]hile the Alien Tort Claims Act provides a remedy to aliens only, the TVPA would extend a civil remedy *also* to U.S. citizens who may have been tortured abroad." H.R. Rep. 102-367, Exhibit 1 at 3; S. Rep. 102-249, Exhibit 3, at 5 (emphasis added). This statement conveys the intent to expand statutory coverage for victims of torture, not to constrict it. There is no indication in the official legislative history indicating a discussion, let alone an intent, to severely restrict the TVPA to apply only to U.S. resident aliens.

Defendants' effort to use out of context statements from the legislative history to support limitation of the TVPA to U.S. residents does not overcome the clarity of the statutory language.

As Father Robert F. Drinan, one of the individuals quoted in Defendants' Memo at 24, makes clear:

My testimony, which is taken out of context, **expressed no view whatsoever about whether a TVPA plaintiff would need to reside in the U.S.** Rather, my testimony was intended to emphasize that the TVPA confirms a cause of action for human rights violations occurring outside of the U.S.²¹

Since passage of the TVPA, numerous cases have included TVPA claims by non-resident plaintiffs, and there was no question raised or discussed regarding a limitation to U.S. residents. *See, e.g., John Doe I v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997); *Hillao v. Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996); *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161 (5th Cir.1999); *Estate of Cabello v. Fernandez-Larios*, 157 F. Supp.2d 1345 (S.D. Fla. 2001); *Aguinda v. Texaco, Inc.*, 142 F. Supp.2d 534 (S.D.N.Y. 2001). Defendants' argument thus conflicts with the statutory language and the legislative history, and therefore must be rejected.

3. Plaintiffs Need Not Allege that They Have Exhausted Local Remedies.

Without citing any TVPA cases or referring to the statute's own requirements, Defendants assert that Plaintiffs' TVPA claims must be dismissed because they have not exhausted their remedies in Indonesia. Defs.' Mem. at 25-26. Defendants again ignore the applicable law. The legislative history of the TVPA expressly states that Plaintiffs do not have the burden of pleading exhaustion of remedies, but that there is a presumption of exhaustion, which Defendants may rebut as an affirmative defense:

²¹ Decl. of Father Robert F. Drinan, attached hereto as Exhibit 5, at ¶ 4 (emphasis added).

Cases involving torture abroad which have been filed under the [ATCA] show that torture victims bring suits in the United States against their alleged torturers only as a last resort. . . . **Therefore, as a general matter,. . . litigation under this legislation will be virtually prima facie evidence that the claimant has exhausted his or her remedies in the jurisdiction in which the torture occurred.** The committee believes that courts should approach cases brought under the proposed legislation with this assumption. [Moreover][t]he ultimate burden of proof and persuasion on the issue of exhaustion of remedies... lies with the defendant. S. Rep. 102-249 at 9-10, Exhibit 3. (Emphasis added).

Relying on this legislative history, the Court in *Hilao v. Estate of Marcos*, 103 F.3d at 777-78, upheld the district's court's refusal to issue jury instructions on the exhaustion of remedies because, as with Exxon Mobil, the Estate had "pointed to no evidence that it put forth even to raise the issue that [plaintiff] had unexhausted remedies available elsewhere, let alone evidence sufficient to carry its burden." *See also, Cabiri v. Assasie-Gyimah*, 921 F. Supp. 1189, 1197 n.6 (S.D.N.Y. 1996) ("The legislative history of the Torture Act indicates that the exhaustion requirement of § 2(b) was not intended to create a prohibitively stringent condition precedent to recovery under the statute [and that] . . . exhaustion of remedies in a foreign forum is generally not required when foreign remedies are unobtainable, ineffective, inadequate, or obviously futile.").

While Plaintiffs are under no burden to demonstrate futility until Defendants make an affirmative showing of non-exhaustion of remedies, there is no question that if plaintiffs had tried to exhaust any remedies in Indonesia, they would have been placed in great danger. As discussed below in the context of the *forum non-conveniens* discussion, Plaintiffs, and anyone who takes on the powerful military security forces in Indonesia, would be at great risk from retaliation. *See infra* Section IV(D)(2)(a). Further, even if charges could be brought against the perpetrators, there is no independent or functioning legal system within Indonesia. Exxon Mobil is well aware of these

conditions, and knows that Plaintiffs do not have the option of seeking justice there for human rights violations.

C. Plaintiffs' Claims Against Exxon Mobil, a Private Corporation, are Justiciable.

Defendants, attempting to manufacture a non-existent tension between this litigation and U.S. foreign policy, assert that the act of state and political question doctrines require dismissal of this case. These assertions are without merit. This litigation is completely consistent with U.S. foreign policy interests, and furthermore, “[n]ot every case touching foreign relations is non justiciable, and judges should not reflexively invoke these doctrines to avoid difficult and somewhat sensitive decisions in the context of human rights.” *Kadic*, 70 F.3d at 249.

1. Plaintiffs' Claims Do Not Implicate the Act of State Doctrine.

Defendants assert that the act of state doctrine shields them from liability for the human rights violations of its paid security force, a special unit of the Indonesian military. The act of state doctrine prevents U.S. courts from questioning the legitimacy of an official act taken by a foreign government in its own territory, unless that act violates a treaty or other unambiguous principle of international law. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964); *See also* Restatement (Third) of Foreign Relations Law § 443. Plaintiffs' claims do not implicate the act of state doctrine because the acts at issue — torture, genocide, extrajudicial killing — are not official acts of the Government of Indonesia. “Act of state issues only arise when a court must decide —that is, when the outcome of the case turns upon -- the effect of official action by a foreign sovereign. When that question is not in the case, neither is the act of state doctrine.” *W.S. Kirpatrick & Co., Inc. v. Env't Tectronics Corp., Int'l*, 493 U.S. 400, 406 (1990). Furthermore, even if the act of state doctrine applied, a balancing of the factors outlined in *Sabbatino* weighs against dismissal.

a. Genocide, Torture and Extrajudicial Killings Are Not Official Acts of The Indonesian Government.

Plaintiffs' action is governed by the Supreme Court's decision in *W.S. Kirkpatrick & Co., Inc. v. Environmental Tectronics Corp., Int'l*, 493 U.S. 400, 409 (1990), which unequivocally held that the act of state doctrine has no application unless the validity of a foreign state act is at issue.

Genocide, torture, murder, extrajudicial killing and the other violations of international law alleged here are not the official, public, acts of the Indonesian government and are not entitled to the protection of the act of state doctrine. *See In re Estate of Marcos Human Rights Litig.*, 25 F.3d 1467, 1471 (9th Cir. 1994); *Filartiga v. Pena-Irala* at 889; *Sharon v. Time*, 599 F.Supp 538, 544-545 (S.D.N.Y. 1984); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1545 (N.D.Ca. 1987); *Paul v. Avril*, 812 F.Supp. 207, 212 (S.D.Fl. 1997). In *Kadic*, 70 F.3d at 250, the Second Circuit observed that "We think it would be a rare case in which the act of state doctrine precluded suit under section 1350," and suggested that genocide, mass rape, torture and extrajudicial killing could never be considered acts of state: "appellee has not had the temerity to assert in this Court that the acts he allegedly committed are the officially approved policy of a state." *Id.*

The burden of proving acts of state rests on the party asserting the applicability of the doctrine. *Liu v. Republic of China*, 892 F.2d 1419, 1431 (9th Cir. 1989); *See also WMX Machinery Inc. v. Werkzeugmaxchinehandel*, 960 F. Supp. 734, 744 (S.D.N.Y. 1997) ("An act by an official may qualify as an act of state only upon a showing 'that the official had the authority to act for and bind the state The burden of establishing the act and its character as an act of state is on the party invoking the doctrine'." (Citing Restatement Sec. 443 comment i.)). Here, Exxon Mobil merely asserts, without any support, that genocide and torture are the official acts of the Indonesian

government. Defendants have therefore failed to meet their burden of proving that the acts complained of are official acts of the Indonesian government, and their act of state argument must accordingly be rejected.²²

b. The *Sabbatino* Factors Weigh in Favor of Justiciability.

Even if the act of state doctrine applied, its proper application requires a balancing of interests and it should not be invoked if the policies underlying the doctrine do not justify its application. *Bigio*, 239 F.3d at 451, citing, *W.S. Kirkpatrick*, 493 U.S. at 400. In *Sabbatino*, the Supreme Court held that the act of state doctrine is not required by international law or the Constitution, but that “its continuing vitality depends on its capacity to reflect the proper distribution of functions between the judicial and political branches.” *Banco Nacional*, 376 U.S. at 427. The Court outlined the following factors as determinative: “the greater the degree of international consensus concerning a particular area of international law the more appropriate it is for the judiciary to render decision regarding it;... the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches.” *Id.* at 428. A balancing of these factors shows that the act of state doctrine should not be applied to bar Plaintiffs’ claims. See *Virtual Def. and Dev. Int’l, Inc. v. Republic of Moldova*, 133 F. Supp.2d 1, 8 (D.D.C. 1999)(“In balancing these interests a court should be mindful that the decision to deny judicial relief

²² Defendant’s reliance on *Roe v. Unocal*, 70 F. Supp. 2d 1073 (C.D. Cal. 1999) is misplaced. In that case, the Court held that the act of state doctrine precluded review of a Burmese military officer’s order to a subordinate because the Court “places great reliance on the fact that requiring military officers to perform labor on civilian public works projects does not violate United States law.” *Id.* at 1080. That reasoning does not extend to violations of human rights by military officials. In fact, the same court concluded that the act of state doctrine should not be applied to allegations of slavery and torture by the Burmese military. See *Doe v. Unocal*, 963 F. Supp. 880, 894 (C.D. Cal. 1997).

to a party should not be made lightly.”) Here, plaintiffs have alleged violations of jus cogens norms of international law, which by definition represent the highest possible level of international consensus. The law regarding genocide, torture, extrajudicial killings, unlawful detention, violence toward women, and crimes against humanity is well settled and it is certainly appropriate for the judiciary to render a decision regarding these violations against a complicit private actor.

Secondly, the U.S. government has long expressed its concern about human rights violations in Indonesia. *See, e.g.*, S. Res. 91, 107th Cong. (2001)(expressing the view that the Government of Indonesia must end the climate of impunity that shields perpetrators of extrajudicial killings). Further, the U.S. government developed as part of its policy an elaborate program to encourage compliance with human rights in countries like Indonesia. The program created the *Voluntary Principles on Security and Human Rights*, a set of rules designed to encourage companies in the extractive industries to meet the standards.²³ Significantly, Exxon Mobil refused to participate in the program, undoubtedly because it knew it could not comply due to the known human rights violations occurring in Aceh.²⁴ For Exxon Mobil to refuse to cooperate in a U.S. effort to combat human rights violations, and to now assert U.S. policy as a shield is breathtakingly cynical.

²³ In December, 2000, the Governments of the United States and the United Kingdom, issued the “Voluntary Principles on Security and Human Rights.” *Voluntary Principles on Security and Human Rights, United States Department of State, Dec. 19, 2000*, attached hereto as Exhibit 6 [hereinafter “Principles”]. These Principles are intended “to guide Companies in maintaining the safety and security of their operations within an operating framework that ensures respect for human rights and fundamental freedoms.” Principles, at 1. The Principles note that “Companies have an interest in ensuring that actions taken by governments, particularly the actions of public security providers, are consistent with the protection and promotion of human rights” and provide a list of recommendations for companies using public and private security. *Id.* at 3.

²⁴ *See* Peter Behr, *Companies Sign Pact on Human Rights*, Wash. Post, Dec. 21, 2000, attached hereto as Exhibit 7.

U.S. foreign policy, as expressed by the State Department's reports and actions, as well as Congress in passing the TVPA, is clearly not inconsistent with using federal statutes to address human rights violations. *See, e.g. Daliberti v. Republic of Iraq*, 97 F. Supp.2d. 38, 55 (D.D.C. 2000)(“While the act of state doctrine seeks to prevent courts from interfering in the foreign affairs powers of the President and Congress, it does not prohibit [them] from using the threat of legal action in the courts as an instrument of foreign policy ... For this Court to grant defendant's motion to dismiss on act of state grounds would constitute more of a judicial interference in the announced foreign policy. . . than to allow the suit to proceed under the explicit authorization of Congress.”).

Thus, a weighing of the *Sabbatino* factors, particularly the international consensus against the violations alleged and the compatibility of Plaintiffs' claims with expressed U.S. foreign policy objectives, clearly indicate that the act of state doctrine cannot bar Plaintiffs' claims.

2. Exxon Mobil Cannot Invoke the Political Question Doctrine.

Defendants next raise the political question doctrine to re-argue the foreign policy issues, identified above. The political question doctrine is a narrow body of law rooted in separation of powers principles. 13A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure*: 3534.2 (2d ed. 1984). It does not bar courts from adjudicating every dispute that relates to international affairs or has foreign policy implications. In *Baker v. Carr*, 369 U.S. 186, 211 (1962), the Supreme Court held that “it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.” As long as the courts have manageable judicial standards to draw upon, they are duty bound to address and resolve “a bona fide controversy” presented to them. *See id.* at 215.

Plaintiffs in this case seek to hold a U.S. corporation liable in U.S. court for its participation in egregious human rights violations pursuant to the ATCA and TVPA. Plaintiffs restrict their claims to actions of Exxon Mobil's security forces. This case is not about the actions of the Indonesian government, nor will this case require the Court to pass judgement on any action by the United States government.²⁵ The political question doctrine is simply not implicated here.

In *Baker*, the Supreme Court established a six-part test for determining whether an issue constitutes a political question that is inappropriate for judicial resolution:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department or a lack of judicially-discoverable and manageable standards for resolving it; or the impossibility of deciding it without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing a lack of respect for coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker, 369 U.S. at 217. None of the concerns discussed in *Baker* are evident here.

a. Claims under the Alien Tort Claims Act and Torture Victims Protection Act are properly heard by the courts

First, the issues in the present dispute are certainly not "constitutionally committed to a coordinate branch of government." *Id.* Claims under the Alien Tort Claims Act and the Torture

²⁵ The cases cited by Defendants offer no guidance in the present case. In both *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 24 (D.N.J. 1999) and *In re Nazi Era Cases Against German Defs.' Litig.*, 129 F. Supp.2d 370 (D.N.J. 2001) the court dismissed claims for compensation by former forced and slave laborers on political question grounds, holding that claims for war reparations arising out of World War II were resolved by a series of treaties. Similarly, in *Belk v. U.S.*, 858 F.2d 706 (Fed. Cir. 1988), former United States hostages of the Iran crisis filed suit against the United States challenging the provisions of the Algiers Accords, pursuant to which the United States had negotiated their release. Plaintiffs here challenge no treaty. Furthermore, plaintiffs' claims here are entirely consistent with U.S. policy.

Victim Protection Act are authorized by statute and properly heard by the courts. *See, e.g., Tel-Oren* at 406. (“in implementing section 1350, courts merely carry out the existing view of the legislature that federal courts should entertain certain actions that implicate the law of nations.” (opinion of Edwards, H., concurring)); *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996)(holding that political question doctrine did not bar consideration of claims involving torture against Ethiopian official under the Alien Tort Claims Act). Defendant’s claim that all questions of foreign policy are reserved to the executive and legislative branches is over broad. *See Baker* at 211; *Committee of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929 (D.C. Cir. 1988)(noting that the Supreme Court has repeatedly found that claims based on liberty and property rights are justiciable even if they implicate foreign policy decisions); *DKT Memorial Fund, Ltd. v. Agency for Int’l. Dev.*, 810 F.2d 1236, 1238 (D.C. Cir. 1987)(claims alleging non-compliance with the law are justiciable, even where review by the court has an effect on foreign affairs). The Supreme Court firmly rejected Defendants’ arguments in *Japan Whaling Ass’n v. American Cetacean Soc.*, 478 U.S. 221, 230 (1986), when it held the political question doctrine did not bar consideration of a case with a direct impact on foreign affairs: “interpreting congressional legislation is a recurring and accepted task for the federal courts We cannot shirk this responsibility merely because our decision may have significant political overtones.” Here, as in *Japan Whaling*, Plaintiffs are asking the Court to undertake the standard judicial task of statutory interpretation.

Second, this case does not involve a "lack of judicially discoverable or manageable standards for resolving" the issues in question, or an "impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion." *Baker* at 217. The relevant standards are well known and have been applied by courts for decades. No intricate foreign policy issues need be

unraveled to apply them to these facts. In *Kadic*, the Second Circuit Court of Appeals held that “Our decision in *Filartiga* established that universally recognized norms of international law provide judicially discoverable and manageable standards²⁶ for adjudicating suits brought under the Alien Tort Act, which obviates the need to make initial policy decisions of the kind normally reserved for nonjudicial discretion.” *Kadic* at 249. Here, as in *Kadic*, plaintiffs have alleged violations of universally recognized norms of international law: torture, extrajudicial killing, and other wrongs. *See also Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 49 (2d Cir. 1991)(Declining to dismiss suits against the Palestine Liberation Organization related to the seizure of a passenger ship and murder of a passenger and holding “the fact that the issues before us arise in a politically charged context does not convert what is essentially an ordinary tort suit into a non-justiciable political question.”).

Moreover, adjudicating a case involving eleven villagers subjected to similar treatment by a single defendant during a limited time period poses no manageability concerns whatsoever.²⁷ The Court can, using well-settled legal principles, determine whether wrongdoing occurred and what relief is appropriate.

Third, this Court would in no way express “a lack of respect” for other coordinate branches of government by deciding this case, nor create the possibility of “embarrassing” multiple standards.

²⁶ The Court also held that the existence of judicially discoverable and manageable standards “further undermines the claim that such suits related to matters that are constitutionally committed to another branch.” *Kadic* at 249.

²⁷ Defendant’s reliance on *Kelberine v. Societe Internationale Etc.*, 363 F.2d 989 (D.C. Cir. 1965) is misplaced. In *Kelberine*, Holocaust survivors alleged that a Swiss corporation was part of the Nazi conspiracy and should be liable for damages to plaintiffs and all others who suffered at the hands of the Nazis. The Court held the claims were unmanageable because they were too vague and adjudication would be too complicated. *Id.* at 263. *Kelberine* offers no guidance on manageability where, as here, eleven plaintiffs have alleged specific wrongs by one corporation during a limited time.

As noted above, there has been no indication of any kind that any branch of government does not support Plaintiff's efforts; indeed all indications are to the contrary.

This case does not raise the question of "whether U.S. companies should be barred from doing business in Indonesia." Defs.' Mem. at 36. The issue in this case is not whether Defendants can or cannot conduct business in Indonesia,²⁸ but whether they are liable for the human rights abuses committed by their security forces.

None of the *Baker* concerns are evident here. Thus, the political question doctrine does not prevent the adjudication of this case.

D. This Court Is the Only Adequate Forum For Plaintiffs to Seek Relief.

Plaintiffs brought suit in the U. S. because no adequate remedy is available in Indonesia, and to sue there would endanger their lives. Congress contemplated this exact circumstance when it passed the TVPA, authorizing cases such as Plaintiffs' to be brought in U.S. courts:

Judicial protection against flagrant human rights violations is often least effective in those countries where such abuses are most prevalent. A state that practices torture and summary execution is not one that adheres to the rule of law. Consequently, the TVPA is designed to respond to this situation by providing a civil cause of action in U.S. courts for torture committed abroad.
S. Rep. 102-249, at 3-4 (Exhibit 3).

²⁸ Defendants contend this is a question for the political branch. As noted above, the United States has already made a policy determination in this area and embarked on an effort to combat human rights violations by corporate security forces. *See Voluntary Principles on Security and Human Rights*, United States Department of State, Dec. 19, 2000 (Exhibit 6). Although Exxon Mobil has declined to support the U.S. policy, it now alleges that consideration of this lawsuit may hinder the conduct of foreign affairs. To the contrary, this litigation is entirely consistent with U.S. policy. It is Defendant's record in Indonesia that is inconsistent with both U.S. policy and U.S. law.

Defendants' attempts to treat Plaintiffs as foreigners who have no business bringing suit in a U.S. court contravenes clear statutory language and legislative intent and should be rejected by this Court. Moreover, specific threats against Americans by extremist groups in Indonesia since September 11 have heightened risks to such an extent that even the lives of Plaintiffs' counsel would be in danger if the case were removed to Indonesia. Although Defendants portray Indonesia as a newly stable country with a clean and fearless judiciary, the reality is that Indonesia represents one of the least adequate fora in the world for the litigation of human rights claims.

1. Standard of Review

The framework for *forum non conveniens* analysis involves: 1) determining the availability of an adequate alternative forum and, if that is found, 2) a balancing of private and public interests. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 236-56 (1981). Defendants bear the burden of proof in both steps. *Leon v. Millon Air, Inc.*, 251 F.3d 1305, 1311 (11th Cir. 2001). First and foremost, they must prove that an adequate alternative forum exists for litigating the claims. *El-Fadl v. Cent. Bank of Jordan*, 75 F.3d 668, 676-7 (D.C.Cir. 1996). Only then can the court proceed to the second step of balancing the private and public factors. *Id.* at 677. There, Defendants bear the burden of showing that the relevant factors tilt strongly in favor of trial in the foreign forum. *R. Maganlal & Co. v. M.G. Chemical Co., Inc.*, 942 F.2d 164, 167 (2d Cir. 1991); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947). Finally, the court must insure that plaintiffs could reinstate suit in the alternative forum without encountering undue inconvenience or prejudice *El-Fadl*, 75 F.3d at 679. Here, no adequate alternative forum exists given the potential risk to Plaintiffs' and counsel's lives in the event of removal. Moreover, the balance of factors weighs significantly against dismissal.

2. No Adequate Alternative Forum Exists.

a. Plaintiffs Will Be Placed in Extreme Danger if Trial is Held in Indonesia.

The Supreme Court held in *Piper Aircraft* that if the remedy offered by the alternative forum is “so clearly inadequate or unsatisfactory that it is no remedy at all,” the District Court may not dismiss the case in the interests of justice. 454 U.S. at 254. Following the *Piper* Court’s analysis, other courts have found that a forum is inadequate if a plaintiff’s life would be in danger were he to return to the foreign country to attempt to resolve his claim(s). See *Cabiri v. Assasie-Gyimah*, 921 F.Supp. 1189, 1199 (S.D.N.Y. 1996); *Rasoulzadeh v. Associated Press*, 574 F. Supp. 854, 861 (S.D.N.Y. 1983), *aff’d without op.*, 767 F.2d 908 (2d Cir. 1985)

Plaintiffs confront even greater danger than that faced by the *Cabiri* and *Rasoulzadeh* plaintiffs because they still reside in Aceh, and must do so in hiding.²⁹ Defendants’ Affidavit of Judge Bismar Siregar does little to counter the certain danger Plaintiffs would face if the case were tried in Indonesia, and most certainly fails to establish an adequate alternative forum. The Affidavit omits critical facts concerning the current state of affairs in Indonesia, and Aceh specifically. A defendant must provide enough information to enable the District Court to evaluate the alternative forum in order to decide if it constitutes an adequate alternative. *El-Fadl*, 75 F.3d at 677, *citing Piper Aircraft Co.*, 454 U.S. at 258. A motion to dismiss will not be granted if defendants’ affidavit asserting the adequacy of the alternative forum contains “substantial gaps.” See, e.g., *El-Fadl*, 75 F.3d at 677, *citing Mercier v. Sheraton Int’l, Inc.*, 935 F.2d 419, 425 (1st Cir. 1991).

²⁹ On June 19, 2001, this Court issued an order allowing Plaintiffs to proceed in this action under pseudonyms because of fear of retaliation if their identities are revealed. See copy of order attached as Exhibit 8.

The Siregar Affidavit is so inaccurate that it rises to the level of dishonesty. There is ample evidence from general press and human rights reports that shows Indonesia to be a country replete with human rights abuses that are not only increasing, but continue with impunity.³⁰ Mr. Siregar omits the fact that Indonesian citizens who speak out against human rights abuses, particularly those committed in Aceh, often suffer terrible consequences. For example, Jafar Siddiq Hamzah, a prominent New York-based Acehnese refugee who founded the International Forum for Aceh, disappeared from the streets of Medan on August 5, 2000.³¹ His tortured body was found a month later.³² Tragically, Mr. Hamzah had returned to Aceh to investigate human rights violations.³³ Aceh experienced the “worst conditions” of various problematic areas in Indonesia and “assassinations were commonplace and perpetrators seldom identified.”³⁴ Since Mr. Hamzah’s death, human rights abuses have only increased in Aceh.³⁵ Importantly, the very institutions that are supposed to protect Indonesian citizens, the police and the military, often are the perpetrators.³⁶ Indeed, Aceh has

³⁰ This Court may take judicial notice of facts pertaining to history and politics “generally known” and widely reported within the territorial jurisdiction of the court. *Bridgeway Corp. v. Citibank*, 45 F.Supp.2d 276, 278 (S.D.N.Y. 1999).

³¹ U.S. Embassy Press Release, U.S. Dep’t of State, “*Death of Jafar Siddio Hamzah*,” Sept. 7, 2000 (hereinafter STATE DEP’T RELEASE), attached hereto as Exhibit 9.

³² *Id.*; Stephanie Brancaforte, *A Martyr For Aceh*, *The Progressive*, April 2001, attached as Exhibit 10 (hereinafter *Progressive*); U.S. Dep’t. of State, *Indonesia: Country Report on Human Rights Practice-2000*, at 2 (hereinafter *State Dep’t Report*), attached as Exhibit 11.

³³ *Progressive*, Exhibit 10, at 2.

³⁴ Human Rights Watch, *Indonesia: Defending Human Rights*, *World Report 2000*, attached as Exhibit 12.

³⁵ *See generally*, Human Rights Watch *Indonesia: The War in Aceh*, Vol. 13, No.4(C), Aug. 2001 (hereinafter “*War In Aceh*”), attached as Exhibit 13. Among those killed have been several other high profile human rights figures including Teungku Kamal, a respected religious leader from South Aceh, who was assassinated on March 29, 2001 with his lawyer, Suprin Sulaiman, a human rights advocate, and their driver just after they being deposed by the South Aceh police. *Id.* at 14.

³⁶ The U.S. State Dep’t reported in February 2001 that Indonesian security forces were responsible for “numerous instances of, at times indiscriminate, shooting of civilians, torture, rape, beatings and other abuse, and arbitrary detention” in various areas of Indonesia. STATE

become so dangerous that the U.S. State Department has advised Americans to halt all travel to Aceh, while the Indonesian government does not generally allow travel there by foreign officials.³⁷ Although the Siregar Affidavit alleges, at ¶ 5, an improving situation in Aceh, the conflict in Aceh has “worsened dramatically.”³⁸ By July of this year, so many killings were occurring in Aceh that human rights groups found it impossible to keep count of them.³⁹ Defendants' argument that Indonesia is an adequate forum is therefore only credible if made from the standpoint of a foreign employee living inside the heavily guarded Exxon Mobil compound.⁴⁰ Plaintiffs are simple farmers who do not have the protection of a private army. Forcing them to confront their torturers in Indonesia would inevitably endanger their lives.

b. Plaintiffs' Counsel Would be Placed in Certain Danger if Trial Were Held in Indonesia.

Apart from the great risk to Plaintiffs if the claims were heard in Aceh, the lives of American counsel also would be endangered were this case to be removed to Indonesia. Since the events of September 11, Americans have become specific targets of violence in Indonesia.⁴¹ The State Department warns that “the security situation in many parts of Indonesia puts Americans at potential

DEP'T REPORT at 2 (Exhibit 11). For example, three workers were murdered at close range by men who witnesses described as “plainclothes military personnel.” *Id.* at 3. Military police also detained three workers and beat them in detention, pulling out one worker's fingernails and burning him with cigarettes. *Id.*

³⁷ Indonesia Consular Information Sheet, Aug. 10, 2001. *See* www.travel.state.gov)

³⁸ War in Aceh at 7 (Exhibit 13).

³⁹ War in Aceh at 14 (Exhibit 13).

⁴⁰ Exxon Mobil's managers and engineers live in a “surreal cocoon... behind walls and guard posts. . . nestled on tidy lawns stands a cluster of villas that might look at home in Palm Springs.” Jay Solomon, *Mobil Sees Its Gas Plant Become Rallying Point for Indonesian Rebels*, WALL ST. J., Sept. 7, 2000, at 3, attached hereto as Exhibit 14. *See also*, Mark R. Mitchell Lhokseumawe, *Who Knew?*, TIME ASIA, Aug. 13, 2001, at 1, attached as Exhibit 15.

⁴¹ Jay Solomon, *Rising Anti-Americanism In Indonesia Sparks Concern*, WALL ST. J., Oct. 15, 2001 at A16, attached as Exhibit 16.

risk.”⁴² Eight multinational companies have left Indonesia because of this increased instability, and according to public statements, Exxon Mobil has been closely monitoring these developments.⁴³

Defendants’ public acknowledgment of security concerns does not harmonize with their suggestion that Indonesia represents a perfectly fine forum to try Plaintiffs’ claims. The situation could not be remedied by a substitution of Indonesian counsel for Plaintiffs, because those lives would be in even greater danger. Moreover, Plaintiffs already have secured experienced counsel from the United States, and forcing them to obtain new counsel would be unacceptably burdensome. *Wiwa*, 226 F.3d at 108, n. 13.

c. The Siregar Affidavit Does Not Cure Its Defective *Forum Non Conveniens* Analysis.

The Siregar Affidavit alleges that legal and judicial reform movements, as well as isolated prosecutions of human rights cases, make Indonesia an adequate alternative forum. Aff. at ¶ 5. However, the evidence from the numerous human rights reports cited above reveals that the affidavit omits critical factors regarding human rights conditions in Indonesia. Again, a defendant’s affidavit should not contain “substantial gaps,” and must provide enough information to enable the Court to evaluate the alternative forum in order to determine its adequacy.⁴⁴ Exxon Mobil’s own internal documents reveal a glaring contradiction between the Siregar Affidavit and reality. In a June 14, 2001 document produced by Exxon Mobil in discovery, EMOI reports that “[t]he judicial system remains weak and corruption is a problem. Indonesia was rated 86th of 90 countries in last year’s

⁴² “Department of State Travel Warning: Indonesia, Nov. 23, 2001. See www.travel.state.gov.

⁴³ Jay Solomon, *U.S. Envoy Departs Indonesia—but Not Quietly*, WALL ST. J., Oct. 9, 2001 at A10, attached as Exhibit 17.

⁴⁴ *El-Fadl*, 75 F.3d at 677, citing both *Mercier*, 935 F.2d at 425 and *Piper Aircraft*, 454 U.S. at 258.

Corruption Index report of Transparency International.”⁴⁵ This is consistent with public reports on the Indonesian judicial system. The U.S. State Department determined in 2001 that despite efforts to transition into a democratic system, Indonesia's human rights record actually worsened in 2000.⁴⁶ The judicial system contains “widespread corruption” and “judges are subject to considerable pressure from government authorities, who often exert influence over the outcome of numerous cases.” *Id.* at ¶ 10. Moreover, most human rights abuses committed by the military and police went unpunished. *Id.* at ¶ 3.

The Siregar Affidavit also does not even pretend to describe the current state of the judicial system in Aceh. Its only reference to Aceh is in the fifth paragraph in which it references sentences that have been recently handed down by courts in Aceh against military personnel. *Id.* at ¶ 5. However, as of early this year, thousands of human rights violations that had occurred in Aceh had still not been addressed.⁴⁷ Only five cases of past human rights abuses have been prioritized for investigation, and only one of those has come to trial.⁴⁸ *Id.* Moreover, things have deteriorated to such an extent that as of August of this year, Aceh has no functioning legal system; there has been a collapse of rule of law and a *de facto* destruction of the courts, with the rule of the gun having replaced the rule of law.⁴⁹ In North Aceh, the district court has not been operational for two years, while most legal personnel have abandoned the area due to intimidation and threats. *Id.*

⁴⁵ The heavily redacted document is attached hereto as Exhibit 18.

⁴⁶ State Dep't Report at 2 (Exhibit 11).

⁴⁷ Amnesty International, Annual Report 2001: Indonesia, at 2, attached hereto as Exhibit 19.

⁴⁸ Even that trial was overshadowed by allegations of impunity of military officers and the failure of witnesses to testify because their security could not be guaranteed. *Id.*

⁴⁹ War in Aceh at 34 (Exhibit 13).

The most glaring manipulation of the truth by Mr. Siregar pertains to his conclusion that the Indonesian court system is adequate because it convicted the son of ex-President Suharto. Affidavit, ¶ 5. In fact, Supreme Court Justice Syafiuddin Kartasasmita who upheld the original conviction of Suharto's son, Hutomo Mandala Putra, a.k.a "Tommy," was murdered in a drive-by shooting in broad daylight on July 26, 2001, and evidence indicates that Tommy provided the murder weapon to two men whom he paid to carry out the assassination.⁵⁰ Moreover, on October 1, 2001, the Supreme Court ultimately acquitted Tommy of the original criminal conviction, and one of the three Indonesian Supreme Court judges who acquitted him was forced to publicly deny allegations that he had accepted bribes from the Suharto family to acquit Tommy.⁵¹

The real story of Tommy's "conviction" demonstrates the very opposite of a judicial system on the mend. Rather, it shows that the highest court in Indonesia can still be manipulated successfully by powerful interests and its members subjected to intimidation and violence. This kind of "substantial gap" prevents dismissal of Plaintiffs' claims on *forum non conveniens* grounds as Defendants have clearly failed to meet their burden. *El-Fadl*, 75 F.3d at 677. Indeed, Plaintiffs have "plainly demonstrate[d]" that they are "highly unlikely to obtain basic justice" in Indonesia. *Vaz Borralho v. Keydril Co.*, 696 F.2d 379, 393-94 (5th Cir. 1983).

3. Both Private and Public Interests Compel Adjudication in a U.S. Court.

As Plaintiffs have shown, no adequate alternative forum exists, rendering unnecessary the weighing of relative conveniences to the parties against the presumption of Plaintiffs' forum

⁵⁰ The assassination of the judge was widely viewed as a warning to the new president not to fight corruption. Michael Schuman and Pupsa Madani, *Arrests in Murder of Judge in Indonesia Raise Questions*, Wall St. J., Aug. 8, 2001, attached as Exhibit 20.

⁵¹ BBC News Online, *Fight Over Tommy Suharto Acquittal*, Oct. 4, 2001, attached as Exhibit 21.

selection. *El-Fadl*, 75 F.3d at 676-77. Nevertheless, the balance of factors weighs significantly against dismissal. Such balancing should occur in deference to Plaintiffs' choice of forum. *Alnwick v. European Micro Holdings, Inc.*, 137 F. Supp.2d 112, 120-29 (E.D.N.Y. 2001). Even if the Plaintiffs are foreign, their choice of forum still receives a certain degree of deference. *Piper Aircraft*, 454 U.S. at 256. Moreover, *Gilbert* requires that Plaintiffs' choice of forum rarely be disturbed; removal should occur only if Defendants meet their burden of showing that the balance tilts strongly in favor of trial in a foreign forum. *Gulf Oil*, 330 U.S. at 508; *Iragorri v. Int'l Elevator, Inc.*, 203 F.3d 8, 12 (1st Cir. 2000), *citing Mercier.*, 935 F.2d at 423-24.

a. The Balance of Private Factors Weigh in Favor of Adjudication in This Court.

Important private interest factors include: access to sources of proof; availability of compulsory process; cost of witness attendance; ability to view the premises if necessary; and the overall ability to make trial of a case easy, expeditious and inexpensive. *Gulf Oil*, 330 U.S. at 508. Defendants argue that all sources of proof are in Indonesia. Defs.' Mem. at 42. Importantly, those sources of proof are primarily witnesses, many of whom would experience great inconvenience and risk to their lives if they testified in Indonesia. Even if a U.S. court could not subpoena witnesses in Indonesia, surely both parties are likely to produce more witnesses in a U.S. court than in Indonesia due to the security offered by a U.S. forum. Moreover, Exxon Mobil, as the largest corporation in the world, has not proven that the costs of securing witnesses or otherwise trying this case in a U.S. court would be "excessively burdensome especially in light of defendant's vast resources." *Wiwa*, 226 F.3d at 107. Indeed, it will be quicker to transfer witnesses and documents to the U.S. than to transfer a lawsuit. *Id.* Defendants' need to view the premises is equally

unpersuasive because viewing the site does not depend upon where the trial is held. Indeed, the sole concern relating to whether the parties can view the premises is whether this can be done given the extreme security concerns. Finally, the government of Indonesia is not an indispensable party to this lawsuit. *See, e.g., Unocal*, 176 F.R.D. at 358 (holding that the Court can distribute liability among the tortfeasors without the government of Burma being a party). Moreover, contracts in the oil industry typically contain provisions for contribution, and Defendants almost certainly could activate that provision upon termination of this trial.⁵² Finally, if Defendants have a dispute with Pertamina the Indonesian government-owned entity that is the party to the contract with Exxon Mobil,⁵³ they can serve process on Pertamina at its office in Houston, Texas.⁵⁴

b. Public Factors Compel Adjudication in a U.S. Forum.

Recently, the Second Circuit held that the ATCA, as reinforced by the TVPA, expresses a policy favoring the adjudication of human rights claims in U.S. courts, and that this public policy interest should be significantly weighed in the *Gilbert* factors. *Wiwa*, 226 F.3d at 103-106. Specifically, the TVPA makes violations of international law “our business” by giving plaintiffs substantive rights to damages under U.S. law. *Id.* at 106. Indeed, the *Wiwa* court held that a dismissal can represent a "huge setback" to plaintiffs' efforts to seek reparations for torture, and that even though a dismissal assumes that there is an adequate alternative forum, the reality is that plaintiffs generally must start from the beginning in the courts of another nation. *Id.* at 105-6. The TVPA therefore demonstrates a policy favoring U.S. courts' adjudication of ATCA cases of torture

⁵² Plaintiffs have requested documents from Defendants that address its relationship with Pertamina, but Defendants have refused to produce such documents until this Court rules on the Motion to Dismiss.

⁵³ *See* Compl. at ¶ 32.

⁵⁴ *See* Exhibit 22, Pertamina Contact Sheet.

unless the defendant fully meets the burden of proving that the *Gilbert* factors "tilt strongly in favor of trial in the foreign forum." *Gulf Oil*, 226 F.3d at 106.

The additional public factors to be weighed include: 1) administrative burdens of the court; 2) significance of the case in the forum; and 3) familiarity of the forum with the law to be applied. *Gulf Oil*, 330 U.S. at 508. There is no local interest in trying the case in Indonesia. Countless reports, previously referenced, indicate a high probability that this case would be violently suppressed were it to be brought in Indonesia. Defendants further overlook that U.S. law and international law are at the center of Plaintiffs' claims. Courts applying the ATCA have generally agreed that they are applying federal common law and that "the law of nations may be ascertained by consulting the work of jurists, writing...on public law; or by the general usage and practice of nations, or by judicial decisions recognizing and enforcing that law." *Filartiga*, 630 F.2d at 880, citing *U.S. v. Smith*, 18 U.S. 153, 160-61 (1820). Plaintiffs are confident that this Court is well-suited to apply the applicable legal doctrines. Finally, it would be impossible for this Court to insure that Plaintiffs could reinstate their suit in Indonesia without encountering undue inconvenience or prejudice. *El-Fadl*, 75 F.3d at 679. Indeed, Plaintiffs would face the greatest inconvenience or prejudice of all--loss of life. This ultimate risk, balanced against even some degree of inconvenience to Exxon Mobil, the world's largest corporation, undoubtedly tips the scale decisively in Plaintiffs' favor. Accordingly, this case should remain with this Court.

E. This Court Has Personal Jurisdiction Over EMOI.

Defendant EMOI's Motion to Dismiss for lack of personal jurisdiction must be denied because Plaintiffs sufficiently pled that EMOI is the alter ego of its Defendant parent, Exxon Mobil. Specifically, Plaintiffs alleged, and Defendants have not contested, that Exxon Mobil is subject to

personal jurisdiction within the District of Colombia. Compl. at ¶ 21. Moreover, Exxon Mobil created EMOI as a mere instrumentality for the sole “purpose of exploring, exploiting and developing oil and natural gas located in Indonesia,” and ultimately used this instrumentality to shield itself from liability for wrongful acts in furtherance of such activities. Compl. at ¶ 25 and 27. Finally, Plaintiffs allege that Exxon Mobil is fully liable for the acts of its alter ego subsidiaries, directly or indirectly under its ownership and control, including EMOI. Compl. at ¶ 28.

There can be no question that these facts are sufficient to raise a prima facie case of alter ego jurisdiction. EMOI does not counter Plaintiffs’ prima facie allegations, but argues that EMOI does not possess sufficient minimum contacts in the District to subject it to personal jurisdiction. First, EMOI’s failure to even attempt to address Plaintiffs’ alter ego allegations speaks volumes about EMOI’s true alter ego status. Indeed, representation of EMOI by Exxon Mobil’s lawyers should erase any argument by Exxon Mobil of EMOI being a separate entity.⁵⁵ Second, EMOI’s minimum contacts, or lack thereof as asserted by Defendant, are irrelevant to a jurisdictional analysis based on an alter ego theory. EMOI’s Affidavit of R.I. Wilson therefore does not rescue it from this Court’s jurisdiction. Nowhere in the Affidavit does EMOI address the issues necessary to counter Plaintiffs’ prima facie showing of alter ego jurisdiction. The Court should therefore find EMOI’s challenge insufficient and deny its motion to dismiss for lack of personal jurisdiction.

1. Plaintiffs’ Alter Ego Allegations Comport With Well-Established Notice Pleading Requirements.

⁵⁵ *See, e.g., BE & K Const. v. NLRB*, 23 F.3d 1459, 1466-1467 (8th Cir. 1994) (relying on cases from several courts, the Eighth Circuit concluded that a union’s legal defense of employees who engaged in misconduct demonstrated that these employees were the union’s agent and that the union was therefore liable for their misdeeds). Exxon Mobil’s legal representation, standing alone, therefore supports the finding that Exxon Mobil is acting as an agent for EMOI such that Exxon Mobil’s jurisdictional contacts are properly imputed to EMOI.

To survive a motion to dismiss, a plaintiff is not required “to set out in detail the facts upon which he bases his claim . . . all the Rules require is a short and plain statement of the claim that will give the defendant fair notice of what the plaintiff’s claim is and the grounds upon it rests.” *Conley*, 355 U.S. at 47, *accord*, *Sparrow v. United Airlines, Inc.*, 216 F.3d 1111, 1118 (D.C. Cir. 2000). With regard to personal jurisdiction, plaintiffs “may defeat [such] a motion...by making mere factual allegations to establish a prima facie showing of jurisdiction.” *GTE New Media Services Inc. v. Ameritech Corp.*, 21 F. Supp. 2d 27, 36 (D.D.C. 1998). Plaintiffs at this stage therefore have a “relatively light” burden. *Holman v. Cook*, 879 F. Supp. 113, 115 (D.D.C. 1995). Moreover, “in determining whether the plaintiff has made a prima facie showing, any doubt is resolved in the plaintiff’s favor.” *Yahoo, Inc. v. La Ligue Contre Le Racisme et L’Antisemitisme*, 145 F. Supp.2d 1168, 1173 (N.D. Cal. 2001). *See also*, *Metropolitan Life Ins. Co. v. Neaves*, 912 F.2d 1062, 1064 (9th Cir. 1990). Dismissal is proper only if it appears beyond doubt that Plaintiffs can prove no set of facts in support of their claim which would entitle them to relief. *Material Supply Int’l. V. Summatch Indus. Co.* 62 F. Supp.2d 13, 19 (D.D.C. 1999).

2. Alter Ego Jurisdiction Is An Alternative Means of Satisfying Personal Jurisdiction Which Comports With Due Process.

It is well-settled that a party may establish personal jurisdiction over a non-resident corporation by demonstrating that it is the alter ego of a corporation which itself is subject to personal jurisdiction. *See, e.g., Shapiro, Lifschitz & Schram v. R.E. Hazard*, 90 F. Supp.2d 15, 22 (D.D.C. 2000) (holding that “where affiliated parties are alter egos of a corporation over which the Court has personal jurisdiction. . . the corporations contacts may be attributed to the affiliated party for jurisdiction purposes.”). *See also*, *El-Fadl*, 75 F.3d at 676; *Color Sys., Inc. v. Meteor Photo*

Reprographic Sys, Inc., Civ. A. No. 86-2516, 1987 WL 11085 at *4 (D.D.C. May 8, 1987). The rationale behind these holdings is that when the alter ego doctrine is applied and the corporate veil is pierced, the corporation and the entity that dominates it are treated as one person under the law. *See, e.g., Shapiro, Lifschitz & Schram*, 90 F. Supp.2d at 22. The alter ego jurisdictional analysis is therefore an alternative means of satisfying personal jurisdiction in which due process is satisfied. *Id. See also, Color Sys., Inc.*, 1987 WL 11085 at * 4; *Minnesota Mining & Mfg. Co. v. Eco Chem., Inc.* 757 F.2d 1256, 1265 (Fed. Cir. 1985).

In assessing whether a plaintiff has sufficiently pled the alter ego theory of personal jurisdiction, the issue is not whether the plaintiffs may ultimately prevail on piercing the corporate veil, but whether the allegations are sufficient to allow them to conduct discovery in an attempt to prove their allegations. *See El-Fadl*, 75 F.3d at 676 (noting “even though [the plaintiff’s] present jurisdictional allegations are insufficient, he has sufficiently demonstrated that it is possible that he could supplement them through discovery”).⁵⁶ *See also, Material Supply Int’l*, 62 F. Supp.2d at 22;

⁵⁶ Should the Court find Plaintiffs’ allegations insufficient, however, Plaintiffs request the Court allow leave for Plaintiffs’ to file a motion to compel limited jurisdictional discovery. *See, e.g., El-Fadl*, 75 F.3d at 676; *Material Supply Int’l*, 62 F. Supp.2d at 22-23 (both allowing plaintiffs’ jurisdictional discovery with regard to alter ego allegations). *See also, Bracewell v. Nicholson Air Services, Inc.*, 748 F.2d 1499, 1501 (11th Cir. 1984), (recognizing that facts which support an alter ego theory are “necessarily more within the defendant’s knowledge than plaintiff’s” and plaintiffs who have complied with notice pleading should be “permitted to develop these facts through discovery”). Here, Plaintiffs served Exxon Mobil with their first discovery request on July 18, 2001. To avoid burdening the Court with a motion to compel, Plaintiffs streamlined their Request to documents necessary to fully respond to Exxon Mobil’s Motion to Dismiss. *See* Plaintiffs’ October 17, 2001 letter to Exxon Mobil, attached as Exhibit 23. With regards to personal jurisdiction over EMOI, Plaintiffs requested documents responsive to Requests Nos. 17-23. *See* Plaintiffs’ October 11, 2001 letter to Exxon Mobil, attached hereto as Exhibit 24. However, to date, Exxon Mobil has wrongfully refused to produce these and other relevant documents. Despite Exxon Mobil’s objections, Plaintiffs’ believe that they are legally entitled to the requested documents regarding EMOI’s alter ego status and are prepared to move to compel, should the Court find it necessary for Plaintiffs’ to supplement their alter ego allegations.

United Mine Workers of America Int'l Union v. Arch Mineral Corp., 145 F.R.D. 3, 6-7 (D.D.C. 1992). Therefore, while Plaintiffs' claims cannot rest on bare allegations or conclusory statements, Plaintiffs need not "allege all components of alter ego status" to survive a motion to dismiss; "[a] complaint just initiates a case; it need not set out all of the applicable law or facts, provided it notifies the defendant of the claim's nature." *Bd. of Trustees, Sheet Metal Workers Nat'l Pension Fund Electops, Inc. v. Elite*, 212 F.3d 1031, 1038 (7th Cir. 2000). Indeed, courts have recognized that the types of facts which support corporate veil piercing are "necessarily more within the defendant's knowledge than plaintiffs," and "plaintiffs who have complied with the requirements of notice pleading should therefore be permitted to develop these facts through discovery." *Bracewell v. Nicholson Air Services, Inc.*, 748 F. 2d 1499, 1501 (11th Cir. 1984).

3. Plaintiffs' Alter Ego Allegations Establish A Prima Facie Case of Personal Jurisdiction.

As an initial matter, the finding that two or more separately-incorporated entities are in fact alter-egos of one another, and therefore can fairly be said to constitute one entity, represents a form of corporate veil piercing. As the Supreme Court has explained, an incorporated entity is "'an artificial being, invisible, intangible, and existing only in contemplation of law . . .'" *First Nat'l City Bank v. Banco Para El Comercio*, 462 U.S. 611, 629 (1983). More specifically, the Court explained that "when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime," or is necessary "to protect third persons," the corporate veil will be pierced to hold one corporation responsible for the misdeeds of another or to hold individual owners liable for the misfeasance of their corporate entity. *Id.* at 628, ns. 19, 20. Here, Plaintiffs, innocent third parties, seek to hold EMOI liable as the alter ego of Exxon Mobil for human rights violations, and

should be given an opportunity to pursue these claims against Defendants. *See, e.g., Kundrat v. District of Columbia*, 106 F. Supp.2d 1, 4 (D.D.C. 2000) (applying a more liberal standard to a determination of personal jurisdiction for civil rights statute).

The D.C. Circuit has established a two-prong test for determining whether the court should disregard the corporate veil: 1) whether there is such unity of interest and ownership that the separate personalities of the corporations no longer exists; and 2) if the acts are treated as those of the corporation alone, whether an inequitable result follow. *Shapiro, Lifschitz & Scharam*, 90 F. Supp.2d at 23, *citing, Labadie Coal Co. v. Black*, 672 F.2d 92, 97 (D.C. Cir. 1982). Further, a finding of unfairness does not require fraud or willfully wrongful conduct. *Id.* at 26. “The essence of the fairness test is simply that...[an entity] cannot hide from the normal consequences of carefree entrepreneuring by doing so through a corporate shell.” *Id.*

As previously stated, Plaintiffs alleged, and Defendants have not challenged, that Exxon Mobil is subject to personal jurisdiction within the District of Colombia. Compl. at ¶ 21. Plaintiffs also alleged that EMOI was created by Exxon Mobil for the sole “purpose of exploring, exploiting and developing oil and natural gas located in Indonesia.” Compl. at ¶ 25. Plaintiffs further allege the Exxon Mobil “for the purpose of attempting to shield themselves from liability or responsibility from wrongful acts committed in furtherance of their natural gas activities in Indonesia’s Aceh Province, created or caused to have created several wholly-owned subsidiaries” necessarily including EMOI. Compl. at ¶ 27. Finally, Plaintiffs allege that Exxon Mobil is fully liable for its own acts and the acts of any subsidiaries...directly or indirectly under its ownership and control, including ...EMOI... [and that] any such subsidiaries...are the alter egos of Defendant Exxon Mobil or alternatively are in an agency relationship with it. Compl. at ¶ 28. These allegations, read in

Plaintiffs' favor, as they must be, are sufficient to provide Defendants with notice that they intended to establish jurisdiction and ultimately liability based on alter ego principles. Again, to survive a motion to dismiss, all the Rules require is "a short and plain statement of the claims." *See Conley*, 355 U.S. at 47; *Sparow*, 216 F.3d at 1118.

Defendants' minimum contacts argument does not counter Plaintiffs' alter ego theory of jurisdiction. First, a minimum contacts analysis is not relevant to alter ego jurisdiction. Second, and more important, EMOI misrepresents the true extent and nature of its contacts with the District of Columbia. For example, there is evidence that Exxon Mobil, through its International Relations Manager, Robert Haines, acted on behalf of and in furtherance of EMOI's corporate interests while attending meetings in the District of Columbia.⁵⁷ This not only supports Plaintiffs' alter ego argument, but also shows that EMOI has contacts in the District through its agent parent acting on its behalf.⁵⁸ This is consistent with the District's long arm statute, D.C. Code §13- 423, which

⁵⁷ See Decl. of Bama Athreya at ¶¶ 2, 3, attached hereto as Exhibit 25. In considering a motion to dismiss for lack of personal jurisdiction, a court may rely upon affidavits to establish jurisdictional facts. *Prousalis v. Van Krevel*, No. 81-2257 1982 WL 1564 at *1 (D.D.C. Jan. 15, 1982). Moreover, all factual discrepancies between Defendants' and Plaintiffs' affidavit must be resolved in favor of Plaintiffs. *See, e.g., Crane v. New York Zoological Soc'y*, 894 F.2d 454, 456 (D.C. Cir. 1990); *Reuber v. U.S.*, 750 F.2d 1039, 1052 (D.C. Cir. 1984). Notably, Exxon Mobil has refused to provide Plaintiffs with documents regarding their contacts in the District on behalf of EMOI, including specifically contacts made to lobby the World Bank, Washington-based press, or Washington-based private organizations regarding Exxon Mobil's project in Aceh. See Plaintiffs' October 17, 2001 (Exhibit 23). Although Plaintiffs focused primarily on EMOI's alter ego relationship with Exxon Mobil, they do raise a minimum contacts argument, based on an agency theory, and are prepared to amend the Complaint to include these allegations should the Court find it necessary.

⁵⁸ An agency or instrumentality test is one way in which an alter ego relationship can be established. *See, e.g., Material Supply Intern., Inc.*, 62 F. Supp.2d at 19-20. The rationale is that the subsidiary is not just simply an agent, but that the parent and subsidiary are the same entity because of the relationship. *Id.* at 22. In the case of personal jurisdiction based an agency theory, however, a minimum contacts due process analysis is used.

provides that a “court may exercise personal jurisdiction over a person, who acts directly or by an agent...” *See, e.g., Smith v. Jenkins*, 452 A.2d 333, 337 (Dist. Ct. App. 1982) (finding allegations of agent’s activities within local forum showed sufficient minimum contacts to subject non-resident principal to jurisdiction under D.C.’s long arm statute); *Rose v. Silver*, 394 A.2d 1368, 1370-1371 (Dist. Ct. App. 1978). This Court should therefore find that Plaintiffs’ alter ego theory of jurisdiction is sufficient or, at minimum, allow Plaintiffs’ to amend the Complaint where necessary.

V. CONCLUSION

For the foregoing reasons, Plaintiffs request that this Court deny Defendants’ Motion to Dismiss. Further, if there are any allegations of the Complaint that require a more definite statement, Plaintiffs request leave to amend their Complaint accordingly.

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Respectfully submitted,

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