
2005

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Recommended Citation

Armin Rosencranz & David Louk, *Doe v. Unocal: Holding Corporations Liable for Human Rights Abuses on Their Watch*, 8 CHAP. L. REV. 135 (2005).

Available at: <https://digitalcommons.chapman.edu/chapman-law-review/vol8/iss1/6>

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**DOE V. UNOCAL:
HOLDING CORPORATIONS LIABLE FOR
HUMAN RIGHTS ABUSES ON THEIR
WATCH**

*Armin Rosencranz**
*David Louk***

I. INTRODUCTION

In the last twenty-five years, the Alien Tort Claims Act (ATCA), a little known provision of the Judiciary Act of 1789, has become a leading tool for pursuing human rights abusers in U.S. courts.¹ Allowing foreigners to sue in U.S. courts for customary international law violations committed abroad, the ATCA seems to enable victims of human rights abuses to sue both individuals and corporations.² After an eight year legal battle, the plaintiffs in the most notable ATCA case against a corporation, *Doe v. Unocal*, recently settled with Unocal out of court for an undisclosed sum just prior to a jury being empanelled in a California state case that paralleled the federal ATCA-based case.³

As *Unocal* advanced through both the federal and state court proceedings, the judges upheld the plaintiffs on many of their motions.⁴ Notwithstanding the settlement, the United States

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¹ 28 U.S.C. § 1350 (1993) ("The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."). The Alien Tort Claims Act is also often referred to as the Alien Tort Statute. See, e.g., LOUISE ELLEN TEITZ, TRANSNATIONAL LITIGATION 70-71 (1996).

² See Terese M. O'Toole, *Amerada Hess Shipping Corp. v. Argentine Republic: An Alien Tort Statute Exception to Foreign Sovereign Immunity*, 72 MINN. L. REV. 829, 839 (1988).

³ 395 F.3d 932 (9th Cir. 2002), *vacated and reh'g en banc granted*, 395 F.3d 978 (9th Cir. 2003), *district court opinion vacated by* 403 F.3d 708 (9th Cir. 2005) [hereinafter *Unocal III*].

⁴ See *Unocal v. Super. Ct.*, No. S114884, 2003 Cal. LEXIS 3270 (Cal. May 14, 2003); *Doe v. Unocal*, 963 F. Supp. 880 (C.D. Cal. 1997) [hereinafter *Unocal I*]; *Doe v. Unocal*,

Court of Appeals for the Ninth Circuit's decision upholding the ATCA's reach has given human rights activists reason to believe that, in certain instances, the ATCA grants the federal jurisdiction necessary to hold corporations liable for human rights offenses that corporations commit or contribute to abroad.⁵

II. *DOE V. UNOCAL*: U.S. DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, THE QUESTION OF JURISDICTION

The case of *Doe v. Unocal* involved the construction of the Yadana pipeline in Burma.⁶ The plaintiffs, villagers from the Tenasserim region of Burma, sued Unocal for its complicity in human rights atrocities committed by the Burmese government and military during the construction of the pipeline.⁷ The plaintiffs claimed that Unocal, through the Burmese military, intelligence and/or police forces, used violence and intimidation to relocate whole villages, enslave villagers living in the area of the pipeline, steal property, and commit assault, rape, torture, forced labor, and murder.⁸

The plaintiffs' lawsuit first came before Judge Richard Paez of the United States District Court for the Central District of California in 1996 (*Unocal I*).⁹ In *Unocal I*, Judge Paez' role was to determine whether the plaintiffs had shown sufficient evidence to survive Unocal's motion to dismiss under Rule 19 of the Federal Rules of Civil Procedure (FRCP).¹⁰ The *Unocal I* lawsuit included Myanmar Oil and Gas Enterprise (MOGE) and State Law and Order Restoration Council (SLORC) as

110 F. Supp. 2d. 1294 (C.D. Cal. 2000) [hereinafter *Unocal III*]; *Unocal III*, 395 F.3d 932.

⁵ See *Unocal III*, 395 F.3d 932.

⁶ *Unocal I*, 963 F. Supp. at 884-85.

⁷ *Id.* Since 1988, the military junta in Burma has promoted the name of the state as Myanmar. *Id.* at 884. The U.S. continues to refer to the state as Burma. Although referenced as Burma in this document, both names are used throughout the *Doe v. Unocal* lawsuits.

⁸ *Id.* at 883.

⁹ *Id.*

¹⁰ *Id.* at 884. Rule 19 of the Federal Rules of Civil Procedure states that a person is a necessary party if:

(1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and joinder of that party would render the venue of the action improper, that party shall be dismissed from the action.

FED. R. CIV. P. 19(a).

defendants in the case.¹¹ Due to immunities granted by the Federal Sovereign Immunities Act,¹² Judge Paez found that MOGE and SLORC, entities controlled by the Burmese government, were immune from prosecution.¹³ They were dropped as co-defendants in the case.¹⁴

In its motion to dismiss, Unocal argued that under FRCP Rule 19, SLORC and MOGE were required parties in the lawsuit.¹⁵ Judge Paez disagreed: because plaintiffs were claiming Unocal was liable as a joint tortfeasor, compensatory relief could be accorded, even if SLORC and MOGE were not defendants.¹⁶ Because plaintiffs were seeking injunctive and declaratory relief, the case went forward without MOGE or SLORC as named defendants.¹⁷ Judge Paez' ruling was significant in that it allowed the plaintiffs to seek damages from a U.S. corporation, even if it was only one of several named responsible parties for a violation of the ATCA. In addition, he recognized that corporations are viable defendants for plaintiffs claiming an ATCA violation.¹⁸

III. *DOE V. UNOCAL*: U.S. DISTRICT COURT, MOTION FOR SUMMARY JUDGMENT

Unocal then moved for summary judgment on all of the plaintiffs' claims before U.S. District Judge Ronald Lew.¹⁹ In arguing for summary judgment, Unocal contended that plaintiffs provided no evidence that made their case actionable under the

¹¹ *Unocal I*, 963 F. Supp. at 883.

¹² 28 U.S.C § 1330 (1993). *See, e.g.*, *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1 (D.D.C. 1998) (holding that under the Foreign Sovereign Immunities Act (FSIA), a foreign state enjoys general immunity from civil actions for damages unless the damages occurred in the United States or the matter falls within one of FSIA's enumerated exceptions to foreign sovereign immunity); *Argentine Republic v. Amerada Hess Shipping*, 488 U.S. 428, 434-39 (1989) (holding that FSIA's enumerated exceptions provide the only mechanism for obtaining jurisdiction over a foreign state and its agencies or instrumentalities). The FSIA is, therefore, often crucial to a plaintiff's attempt to bring not only a U.S. multinational corporation before the court, but also its foreign state business partners as well.

¹³ *Unocal I*, 963 F. Supp. at 887.

¹⁴ *Id.* at 888.

¹⁵ *Id.* at 889.

¹⁶ *Id.*

¹⁷ *Id.* at 889. Unlike similar ATCA cases in which the plaintiffs sought environmental cleanup or other forms of equitable relief, the Doe plaintiffs sought "an order directing defendants to cease payment to SLORC, and an order directing defendants to cease their participation in the joint enterprise until the resulting human rights violations in the Tenasserim region cease." *Id.*

¹⁸ *Id.* at 891.

¹⁹ *Unocal II*, 110 F. Supp. 2d at 1295. Summary judgment is appropriate when no genuine issue of material fact exists. *Id.* at 1303 (citing FED. R. CIV. P. 56(c)). If the moving party can show that there is insufficient evidence for a reasonable fact finder to return a verdict for the non-moving party, the case must be dismissed. *Id.*

ATCA.²⁰ For the ATCA to grant jurisdiction over a suit, the defendant must either be a state actor, linked to state action, or have committed one of the “handful” of *jus cogens* violations.²¹

A. Requirement of State Action

After MOGE and SLORC were removed as defendants, Unocal, the remaining defendant, could not reasonably be considered a state actor.²² However, plaintiffs sought to prove that the Burmese army’s actions were linked to Unocal’s will and for Unocal’s benefit.²³ To determine whether Unocal’s actions could be considered “state action,” Judge Lew used two tests: the joint action test,²⁴ and the proximate cause test.²⁵ Because the joint action test is only appropriate in instances where the private actor is accused of having committed the crime and is aided by the state, he found it inapplicable.²⁶

Instead, Judge Lew used the proximate cause test. To prove proximate cause, a plaintiff must show that a non-state actor exercised control over the government’s decision to commit a

²⁰ *Id.* at 1303.

²¹ *Id.* at 1304. *Jus Cogens* violations are acts that are so heinous that, when committed by any party, state or private, they violate “the law of nations.” *Id.* at 1303-04 (quoting 28 U.S.C § 1350 (1993)). Violations of the law of nations violate customary international law, which governs the actions of both state and non-state actors. The norms of customary international law emerge over time through widespread repetition by the practice of states. *Id.* at 1304-05.

²² *Id.* at 1306-07.

²³ *Id.* at 1303-10.

²⁴ *Id.* at 1305. The Supreme Court first established the joint action test in *Dennis v. Sparks*, 449 U.S. 24, 27 (1980). In a unanimous opinion written by Justice White, it noted that to act “under color of state law . . . does not require that the defendant be an officer of the State. It is enough that he is a willful participant in *joint action* with the State or its agents.” *Id.* at 27 (emphasis added). In *Dennis*, the defendant bribed a judge to obtain an illegally issued injunction. The judge’s immunity from liability did not change the character of his actions or that of his conspirators, who together jointly acted under color of law in granting the injunction. Since the judge had immunity only because his act was an official judicial action, the injunction must have been granted under color of law. *Id.* at 24.

Since *Dennis*, courts have varied in their application of the joint action test. To find joint action, some courts require a conspiracy between the two parties. See *Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442, 1454 (10th Cir. 1995). In the case of *Cunningham v. Southlake Ctr. for Mental Health*, 924 F.2d 106, 107 (7th Cir. 1991), the Court of Appeals for the Seventh Circuit found that “[a] requirement of the joint action charge . . . is that both public and private actors share a common, unconstitutional goal.” Other courts have simply required a more complicit state role to qualify as joint action. For instance, the Court of Appeals for the Ninth Circuit found that “[j]oint action . . . requires a substantial degree of cooperative action.” *Collins v. Womancare*, 878 F.2d 1145, 1154 (9th Cir. 1989). Moreover, in *Hoai v. Vo*, 935 F.2d 308, 313 (D.C. Cir. 1991), the D.C. Circuit Court determined that “joint activity” requires, “at a minimum, some overt and significant state participation in the challenged action.” (internal quotation and citation omitted).

²⁵ *Unocal II*, 110 F. Supp. 2d at 1307.

²⁶ *Id.* at 1306-07.

violation.²⁷ The proximate cause test first arose in *Arnold v. IBM*.²⁸ In *Arnold*, state officials searched the plaintiff's property with a warrant granted because of IBM's withholding of specific information regarding the allegations against him.²⁹ He sued, claiming that IBM's actions were under color of law since IBM was part of a conspiracy with state officials.³⁰ The U.S. Court of Appeals for the Ninth Circuit found that proving proximate cause requires more than action by the state.³¹ Although it was undisputed that IBM was involved in the task force investigating Arnold (it would not have existed but for IBM's actions), no evidence indicated that the defendants exerted control over the decisions of the task force.³² The court therefore ruled that IBM's involvement with the task force did not proximately cause Arnold's injuries.³³ In *Brower v. County of Inyo*, the court specifically stated that for a complaint to sufficiently prove a private party acted under color of law, "it must allege that specific conduct by a party was a *proximate cause*" of the act.³⁴

In considering Unocal's motion, Judge Lew chose to interpret proximate cause as the Ninth Circuit did in *King v. Massarweh*.³⁵ There, the court cited *Arnold* in determining that "absent some showing that a private party had some control over state officials' decision" to commit the alleged act, "the private party did not proximately cause the injuries stemming from [it]."³⁶ Because "[p]laintiffs present[ed] no evidence [alleging that] Unocal 'controlled' the Myanmar military's decision to commit the alleged tortious acts[.]" Judge Lew found that Unocal did not act under "color of law" for purposes of the ATCA.³⁷

In addition, plaintiffs claimed that a tort claim of forced labor, an act akin to modern slavery, is actionable under the ATCA regardless of whether the actor is a private individual or acting under the "color of law."³⁸ Judge Lew agreed and dismissed Unocal's claims that the forced labor was more akin to a public service requirement of limited duration.³⁹

²⁷ *Id.* at 1307.

²⁸ 637 F.2d 1350, 1354 (9th Cir. 1981).

²⁹ *Id.* at 1353.

³⁰ *Id.* at 1354.

³¹ *Id.* at 1355-56.

³² *Id.* at 1357.

³³ *Arnold v. Int'l Bus. Machs. Corp.*, 637 F.2d at 1357.

³⁴ 817 F.2d 540, 547 (9th Cir. 1987) (emphasis added).

³⁵ *Unocal II*, 110 F. Supp. 2d at 1307 (citing *King v. Massarweh*, 782 F.2d 825, 829 (9th Cir. 1986)).

³⁶ *King*, 782 F.2d at 829.

³⁷ *Unocal II*, 110 F. Supp. 2d at 1307.

³⁸ *Id.*

³⁹ *Id.*

B. Secondary Liability

Plaintiffs also had to prove “that Unocal [was] legally responsible for the Myanmar [Burmese] military’s forced labor practices.”⁴⁰ Plaintiffs cited decisions during the U.S. Military Tribunals after World War II as setting the precedent that the knowledge and approval of slave labor practices by an industrialist profiting from such actions is sufficient for a finding of liability.⁴¹ The court disagreed and found that, under international law, the vicarious liability of directors requires participation and cooperation in the practice of forced labor.⁴² Although Judge Lew acknowledged that the evidence pointed to Unocal’s knowledge of the forced labor practices, he dismissed plaintiffs’ claims that Unocal could be held legally responsible for the forced labor because none of the plaintiffs’ evidence suggested Unocal actively sought to employ forced labor.⁴³

The plaintiffs thereafter amended their suit. In *Unocal II*, they invoked the Racketeer Influenced Corrupt Organization Act (RICO), which makes it illegal for organized criminal conspiracies to operate legitimate businesses.⁴⁴ Plaintiffs also invoked federal court jurisdiction under 28 U.S.C. § 1331⁴⁵ in addition to filing under California state law.⁴⁶ Again, Judge Lew dismissed the plaintiffs’ claims.⁴⁷ He declined to exercise supplemental jurisdiction over the claims under California state law, which, under 28 U.S.C. § 1367(c), he could have done if all federal claims are dismissed.⁴⁸

Because Judge Lew found that no genuine issue of material fact existed, he granted Unocal summary judgment and

⁴⁰ *Id.* at 1309.

⁴¹ *Id.* See, e.g., United States v. Alfred Felix Alwyn Krupp von Bohlen und Halbach (The Krupp Case), 9 Trials of War Criminals Before the Nuremberg Military Tribs. Under Control Council Law No. 10 (1950).

⁴² *Unocal II*, 110 F. Supp. 2d at 1310.

⁴³ *Id.*

⁴⁴ See 18 U.S.C. §§ 1961-1968 (2003). Unocal believed that RICO could not be used to hold corporations liable for acts committed extraterritorially. *Unocal II*, 110 F. Supp. 2d at 1310-11. Judge Lew agreed. *Id.* And because he found plaintiffs’ evidence of “substantial acts in furtherance of the Project [that] occurred within the United States,” he rejected their claim under RICO. *Id.* at 1311.

⁴⁵ 28 U.S.C. § 1331 (1993). Plaintiffs argued that the law of nations is incorporated into federal common law such that, under the federal question statute, the district court would have jurisdiction over a violation of the law of nations. *Unocal II*, 110 F. Supp. 2d at 1311. Judge Lew found that plaintiffs’ claims lacked jurisdiction under the federal question statute for the same reasons he found them lacking under the ATCA: plaintiffs provided insufficient proof of Unocal’s direct or vicarious liability for the actions of the Myanmar military. *Id.*

⁴⁶ *Unocal II*, 110 F. Supp. 2d at 1303.

⁴⁷ *Id.* at 1310-12.

⁴⁸ *Id.* at 1311-12.

dismissed the plaintiffs' claims without prejudice.⁴⁹ As the state law claims were dismissed without ruling on them, both plaintiffs appealed Judge Lew's ruling to the Court of Appeals for the Ninth Circuit and re-filed the claims in California state court.⁵⁰ At this point, *Doe v. Unocal* split into two cases: one federal and one state.

IV. *DOE V. UNOCAL*: UNOCAL'S NINTH CIRCUIT SUMMARY JUDGMENT APPEAL

A three-judge panel of the U.S. Court of Appeals for the Ninth Circuit heard the plaintiffs' appeal of summary judgment in favor of Unocal.⁵¹ The panel agreed with the lower court's ruling that state agencies MOGE and SLORC were immune from prosecution under the Foreign Sovereign Immunities Act.⁵² However, the court reversed the lower court's grant of summary judgment in favor of Unocal and determined that a reasonable fact finder could find genuine issues of material fact upon the evidence submitted.⁵³ Although all three judges found in favor of the plaintiffs, Judge Stephen Reinhardt filed a concurring opinion to Judge Harry Pregerson's majority opinion.⁵⁴

The majority disagreed with the lower court's finding that no evidence suggested that Unocal could be held accountable for the actions of the Burmese military under the ATCA.⁵⁵ The majority cited *Kadic v. Karadžić*, a Court of Appeals for the Second Circuit ruling in which the court found that certain crimes, such as rape, torture and summary execution, while ordinarily requiring state action under the ATCA, do not need to be committed under "color of law" if done so in the furtherance of other more heinous crimes, such as slave trading, genocide, or war crimes.⁵⁶ These crimes, known as *jus cogens* crimes, do not require state action and are so egregious that they violate the law of nations regardless of whether they are committed under "color of law."⁵⁷

⁴⁹ *Id.* at 1312.

⁵⁰ See *Unocal III*, 395 F.3d 932 (9th Cir. 2002); Pl.'s Compl., *Doe I v. Unocal Corp.*, Nos. BC 237 980 & BC 237 679 (Cal. Super. Ct. Oct. 4, 2000), available at <http://www.earthrights.org/unocal/statecomplaint2003.doc> (last updated Oct. 15, 2004).

⁵¹ *Unocal III*, 395 F.3d at 936.

⁵² *Id.* at 958.

⁵³ *Id.* at 962.

⁵⁴ *Id.* at 963 (Reinhardt, J., concurring).

⁵⁵ *Id.* at 947.

⁵⁶ *Id.* at 945-46 (citing *Kadic v. Karadžić*, 70 F.3d 232, 242-43 (2d Cir. 1995)).

⁵⁷ The court in *Kadic* investigated whether other crimes committed by private individuals could be *jus cogens* violations, under which the ATCA grants jurisdiction. *Kadic*, 70 F.3d at 241. The court looked at three crimes: genocide, war crimes, and torture. *Id.* at 241-43. First, it determined that genocide is a crime applicable to private non-state actors since the Genocide Convention Implementation Act of 1987 criminalizes acts of genocide regardless of whether the perpetrator acts under color of law. *Id.* at 242

The majority also reversed the lower court's determination that the plaintiffs provided insufficient evidence to prove "active participation" on the part of Unocal, as was necessary during the Nuremberg War Tribunals after World War II.⁵⁸ The majority noted that during the Nuremberg Tribunals, "active participation" was only required to overcome the defendants' "necessity defense."⁵⁹ Since Unocal did not, and could not, argue necessity, plaintiffs did not need to prove "active participation."⁶⁰

The majority agreed to apply international law and considered whether a private actor had to act "under color of law."⁶¹ Instead of looking solely at the Nuremberg trials, the court found the two-pronged "aiding and abetting" test, *actus reus* and *mens rea*, set by the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda instructive.⁶² For *actus reus*, the court relied on the ICTY's ruling in *Prosecutor v. Furundzija*, which found that *actus reus* "requires practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime."⁶³ The ICTY determined that the acts of the accomplice must have had a "substantial [enough] effect on the commission of the crime" that it would have been unlikely to occur in "the same way [without] someone act[ing] in the role that the [accomplice] in fact assumed."⁶⁴

(citing Genocide Convention Implementation Act of 1987, 18 U.S.C. § 1091(a) (1988)). Second, considering war crimes, it found that they too granted jurisdiction because of the long standing liability of private individuals committing war crimes. *Id.* at 242-43. Finally, courts have recognized this liability since before World War I and reconfirmed it at the Nuremberg Trials after World War II. *Id.* at 243.

Other courts have supported that a "handful of crimes" violate *jus cogens* norms. In *Tel-Oren v. Libyan Arab Republic*, Judge Edwards supported the notion that although most violations of the law of nations require state action for the ATCA to attach liability, there are a "handful of crimes" that violate *jus cogens* norms and are actionable when committed by non-state actors. 726 F.2d 774, 795 (D.C. Cir. 1984). The U.S. District Court for the Eastern District of Louisiana, in *Beanal v. Freeport-McMoran, Inc.*, came to the same conclusion, finding that courts have "universal jurisdiction" for such acts as genocide, war crimes and terrorism. 969 F. Supp. 362, 371 (E.D. La. 1997). The Court of Appeals for the Fifth Circuit declined to disagree when it heard the case on appeal. *See Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 169 (5th Cir. 1999). The Court of Appeals for the Ninth Circuit, in *United States v. Matta-Ballesteros*, also concluded that certain crimes such as murder, genocide and slavery are all violations of *jus cogens* norms. 71 F.3d 754, 764 (9th Cir. 1995).

⁵⁸ *Unocal III*, 395 F.3d at 947-48.

⁵⁹ *Id.* at 947.

⁶⁰ *Id.* at 948.

⁶¹ *Id.*

⁶² *Id.* at 949-51.

⁶³ *Id.* at 950.

⁶⁴ *Id.* (quoting *Prosecutor v. Tadic*, Case No. IT-94-1-T, 112 I.L.R. 1 (Int'l Crim. Trib. For Former Yugoslavia Trial Chamber II May 7, 1997)).

For the *mens rea*, the court also relied upon the ICTY's decision in *Furundzija*. The tribunal found that *mens rea* is fulfilled when the accomplice has reasonable knowledge that his or her "actions will assist the perpetrator in the commission of the crime."⁶⁵ The tribunal said it was unnecessary for the accomplice to know the precise nature of the crimes.⁶⁶ The accomplice need only know that one of a number of crimes would likely be committed, and that the abettor would be facilitating the commission of that crime.⁶⁷ The accomplice does not have to *intend* to commit the offense, but only have the knowledge that he will be aiding and abetting it.⁶⁸

The court determined that a reasonable fact finder could conclude that Unocal's conduct could meet the *actus reus* and the *mens rea* requirements of aiding and abetting the Burmese military's actions.⁶⁹ Evidence that Unocal provided practical assistance to the military in subjecting plaintiffs to forced labor, without which the perpetration of forced labor would likely not have occurred, was sufficient for *actus reus*.⁷⁰ For *mens rea*, the court found genuine issues of material fact regarding Unocal's knowledge that forced labor was being used to the benefit of the pipeline's owners.⁷¹

The court found that there were genuine issues of material fact regarding whether Unocal aided and abetted the forced labor practices of the Burmese military.⁷² This holding, combined with the conclusion that the plaintiffs' other claims of rape and murder did not need to be committed "under color of law" as long as they were committed in furtherance of the forced labor,⁷³ compelled the Ninth Circuit to overturn the District Court's grant of summary judgment for Unocal.⁷⁴ The Ninth Circuit declared that the plaintiffs had offered sufficient evidence for their case to move forward.⁷⁵

⁶⁵ *Id.* at 951 (quoting Prosecutor v. Furundzija, Case No. IT-95-17/1-T (Int'l Crim. Trib. For Former Yugoslavia Trial Chamber Dec. 10, 1998), *reprinted in* 38 I.L.M. 317 (1999)).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 952.

⁷⁰ *Id.* at 952.

⁷¹ *Id.* at 953.

⁷² *Id.*

⁷³ *Id.* at 954 (quoting *Kadic v. Karadzic*, 70 F.3d 232, 243-44 (2d Cir. 1995)).

⁷⁴ *Id.* at 962-63 (reversing District Court's grant of summary judgment in favor of Unocal on plaintiffs' ATCA claims for forced labor, murder, and rape; affirming District Court's grant of summary judgment in favor of Unocal on plaintiffs' ATCA claims for torture).

⁷⁵ *Id.* at 962-63.

A. Concurring Opinion

In his concurring opinion, Judge Reinhardt went a step further and argued that it was unnecessary to apply international criminal law standards of aiding and abetting.⁷⁶ Instead, he asserted that “federal common law tort principles, such as agency, joint venture, and reckless disregard,” were entirely appropriate for ATCA cases.⁷⁷ For the claims of forced labor, Judge Reinhardt found it irrelevant whether forced labor was a modern equivalent of slavery, and therefore a *jus cogens* violation.⁷⁸ Because plaintiffs were alleging that the Burmese military committed the forced labor abuses, and that Unocal should be held responsible under the theory of third-party liability, it was unnecessary for them to prove that the alleged abuses were *jus cogens* violations.⁷⁹

Judge Reinhardt also looked more favorably on the plaintiffs’ claims of Unocal’s third-party liability. He determined that their alleged complaints of joint venture, agency, and reckless disregard are all common third-party liability theories in federal common law, so federal common law – not international law – should be applied to their claims.⁸⁰

Under federal common law, the judge found that, for joint venture liability, any member of the joint venture can be liable for the torts of its co-venturers.⁸¹ Unocal argued that a separate, independent corporation, Moattama Gas Transportation Co. (MGTC), oversaw construction of the pipeline.⁸² However, plaintiffs provided evidence to the contrary, including a Unocal business manager stating that the appearance of two separate entities was nothing but an illusion.⁸³ Since the evidence suggested that MGTC was part of the joint venture, and not a separate corporation as Unocal contended, Judge Reinhardt determined that the plaintiffs could proceed to trial on their joint venture claim.⁸⁴

For the agency liability claim, plaintiffs argued that Unocal should be held liable for the Burmese military’s actions because the military acted as its agent.⁸⁵ Judge Reinhardt found significant evidence that Unocal asserted control over aspects of

⁷⁶ *Id.* at 963 (Reinhardt, J., concurring).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 964.

⁸⁰ *Id.* at 971.

⁸¹ *Id.* at 970.

⁸² *Id.* at 971-72.

⁸³ *Id.*

⁸⁴ *Id.* at 972.

⁸⁵ *Unocal III*, 395 F.3d at 972.

the military's operations in relation to the construction of the pipeline.⁸⁶ Internal documents, memoranda by Unocal executives, and public statements that Unocal had control over the military all suggested that Unocal had control over aspects of the military's operations.⁸⁷ This was sufficient evidence for Judge Reinhardt to find that the plaintiffs' claim that Unocal's control over aspects of the Burmese military's actions, if proven, would indicate a relationship of agency.⁸⁸

Judge Reinhardt then considered the claim that Unocal was liable for reckless disregard of the human rights abuses committed by the Myanmar military in performing tasks related to the pipeline project.⁸⁹ Under his interpretation of recklessness, proof of acting in conscious disregard to known dangers, even without the proof of intent, is all that is necessary to be considered reckless disregard.⁹⁰ Plaintiffs provided considerable evidence suggesting that Unocal knew of the likely outcome of its involvement with the Myanmar military, including meetings with human rights groups in which Unocal was informed of the military's brutal treatment of its people; a risk management consulting firm's report prior to Unocal's joining the project, suggesting that the risk of forced labor abuses in connection with the project was high; and testimony from Unocal executives acknowledging their concerns before entering into the project, in particular the potential for human rights abuses.⁹¹ Judge Reinhardt found the evidence supporting the claim of reckless disregard satisfactory for the plaintiffs to move to trial with the claim.

Finally, Judge Reinhardt considered the plaintiffs' claims of

⁸⁶ *Id.* at 973. Judge Reinhardt turned to the Supreme Court for guidance in developing his agency argument:

The theory of agency liability is also well-supported in the federal common law. The Supreme Court has observed in the context of the Copyright Act that "when we have concluded that Congress intended terms such as employee, employer, and scope of employment to be understood in light of agency law, we have relied on the general common law of agency, rather than on the law of any particular State, to give meaning to these terms."

Id. at 972 (citation omitted).

⁸⁷ *Id.* at 973.

⁸⁸ *Id.* at 974.

⁸⁹ *Id.* at 974-76.

⁹⁰ *Id.* at 975. Judge Reinhardt considered objective recklessness and subjective recklessness. As to objective recklessness, he stated that the "Supreme Court has stated that '[t]he civil law generally calls a person reckless who acts or (if the person has a duty to act) fails to act in the face of an unjustifiably high risk of harm that is either known or so obvious that it should be known.'" *Id.* at 974 (citation omitted). Judge Reinhardt then considered subjective recklessness, stating that "[t]his doctrine requires actual knowledge of a substantial risk which the defendant subsequently disregards." *Id.*

⁹¹ *Id.* at 976.

Unocal's liability for murder and rape.⁹² Once again, he agreed with the majority that the plaintiffs could bring the claims to trial, but disagreed with their reasoning.⁹³ He determined that if plaintiffs could prove the acts of murder and rape were committed in furtherance of the forced labor program, and if they could prove Unocal was liable for the forced labor practices of the Burmese military, then it would again be unnecessary for them to prove third party liability.⁹⁴

V. FEDERAL *DOE V. UNOCAL*: NINTH CIRCUIT *EN BANC* ORDER

After the three-judge panel's ruling, *Doe v. Unocal* was ready to go to a jury trial. However, on February 14, 2003, the Ninth Circuit, upon a vote of the majority of non-recused judges on the court, ordered that the case be reheard *en banc*.⁹⁵ This order vacated the previous three-judge panel ruling in favor of the plaintiffs and held that the decision cannot be cited as precedent in future cases.⁹⁶ This was as far as the federal *Doe v. Unocal* case went before the December 2004 settlement, although the *en banc* panel was days away from hearing evidence when the settlement aborted that process.

VI. STATE *DOE V. UNOCAL*: CALIFORNIA SUPERIOR COURT

A. Phase I

Because the plaintiffs' causes of action for violation of the California Constitution Article I § 6 and violation of the California Business and Professions Code § 17200 were never considered by the federal district court, plaintiffs re-filed these claims in California state court.⁹⁷ Phase I of the state trial focused on "piercing the corporate veil." Plaintiffs alleged that Unocal was the alter ego of the subsidiaries that had contracted with the Burmese government.⁹⁸ The scope of Phase I was limited to determining whether there was such a unity of interest and ownership between Unocal and its subsidiary that the individuality, or separateness between Unocal and its

⁹² *Id.* at 976-77.

⁹³ *Id.* at 977.

⁹⁴ *Id.*

⁹⁵ *Doe I v. Unocal Corp.*, 395 F.3d 978, 978-79.

⁹⁶ *Id.*

⁹⁷ Pl.'s Compl., *Doe I v. Unocal Corp.*, Nos. BC 237 980, BC 237 679, (Cal. Super. Ct. Oct. 4, 2000), available at <http://www.earthrights.org/unocal/statecomplaint2003.doc>.

⁹⁸ *Doe I v. Unocal Corp.*, Nos. BC 237 980, BC 237 679, at 3-9 (Cal. Super. Ct. Jun. 7, 2002), at <http://www.earthrights.org/unocal/PlaintiffMSARuling.doc> (Court order denying Plaintiffs' Motion for Summary Adjudication)

subsidiaries ceased to exist.⁹⁹ The question was control: Did Unocal have control over its subsidiaries' actions? Superior Court Judge Victoria Chaney found that it did not, and that Unocal's subsidiaries were not sham entities.¹⁰⁰

B. Phase II

Phase II of the trial discussed liability and damages.¹⁰¹ Unocal moved for summary judgment on the grounds that the factual findings in Phase I precluded going forward to Phase II on the agency, control, joint enterprise and joint venture theories.¹⁰² In Phase I of the trial, to pierce the corporate veil, plaintiffs had to provide evidence to suggest that the parent controlled the subsidiary sufficiently to deprive the subsidiary of its independent personality.¹⁰³ The court found that plaintiffs did not show this.¹⁰⁴ Unocal argued that because the court ruled that Unocal did not control its subsidiary, it should not be held liable for its subsidiary's actions.¹⁰⁵ The court disagreed: It found no reason why a principal cannot be held liable for the wrongdoing of its agent, committed in the scope of its agency, merely because the agent is a distinct corporation.¹⁰⁶ Judge Chaney ruled that although the case was bound by the applicable factual determinations made in Phase I, the question before the court in Phase I was alter ego, not agency or joint venture.¹⁰⁷ Thus, because both the burdens of proof and the claims made in each phase of the trial were different, the finding of fact in Phase I did not preclude a finding of fact in Phase II.¹⁰⁸ Therefore, the court found that the finding of fact in Phase I did not automatically transfer to Phase II to resolve the issues of agency, control, enterprise or joint venture.¹⁰⁹ Judge Chaney denied

⁹⁹ *Id.*

¹⁰⁰ *Doe v. Unocal* (Oct. 15, 2004), at <http://www.earthrights.org/unocal/index.shtml> (stating that in the first phase of the trial, Judge Chaney concluded that the Unocal subsidiaries involved in the Project are not sham entities).

¹⁰¹ *Doe I v. Unocal Corp.*, Nos. BC 237 980, BC 237 679 (Cal. Super. Ct. Sept. 14, 2004), at <http://www.earthrights.org/unocal/doevunocal09142004.pdf> (Court order denying Defendant's Motion for Judgment).

¹⁰² *Id.*

¹⁰³ *Doe I v. Unocal Corp.*, Nos. BC 237 980, BC 237 679, at 3-9 (Cal. Super. Ct. Jun. 7, 2002), at <http://www.earthrights.org/unocal/PlaintiffMSARuling.doc> (Court order denying Plaintiff's Motion for Summary Adjudication)

¹⁰⁴ *Id.*

¹⁰⁵ *Doe I v. Unocal Corp.*, Nos. BC 237 980, BC 237 679, at 3 (Cal. Super. Ct. Sept. 14, 2004), at <http://www.earthrights.org/unocal/doevunocal09142004.pdf> (Court order denying Defendant's Motion for Summary Judgment).

¹⁰⁶ *Id.* at 4.

¹⁰⁷ *Id.* at 6-8.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

Unocal's motion for summary judgment.¹¹⁰

VII. *DOE V. UNOCAL* SETTLEMENT

After Judge Chaney's ruling, the next step for the *Doe v. Unocal* state case was to empanel a jury to hear the case. However, before this began, Unocal and the plaintiffs reached an out-of-court settlement. In a joint-announcement made on December 14, 2004, Unocal and EarthRights International, the human rights group representing the Burmese plaintiffs, announced that they had reached a settlement that would end both the state and federal cases against Unocal.¹¹¹

Although EarthRights International declared it was "thrilled" and "ecstatic" at the settlement, many questions were unanswered regarding the ATCA's applicability and Unocal's liability.¹¹² Because of the *en banc* order from the Ninth Circuit, the plaintiffs' earlier victories in the Ninth Circuit cannot be used as precedent for future cases. And because the settlement prevents the case from being heard before the full *en banc* court, no ruling will ever be issued on the merits of the plaintiffs' claims.

VIII. FUTURE ATCA CASES AGAINST CORPORATIONS

Although the Ninth Circuit three-judge panel's rulings are not legal precedent, they do suggest that the Alien Tort Claims Act is a promising avenue for holding corporations liable for international human rights violations. The Ninth Circuit ruling, combined with the California Superior Court's denial of Unocal's Motion for Summary Judgment on the vicarious liability claims, seems to verify the ATCA's ability to grant jurisdiction for certain torts against U.S. corporations for their actions overseas. These two cases were likely to set new precedents as to the applicability of the ATCA.

A. Aiding and Abetting

The three-judge Ninth Circuit ruling was voided by the *en banc* order, but the ruling suggests that at least some of the judges on the Ninth Circuit take an expansive view of the jurisdiction granted by the ATCA. In applying the standards of both the ICTY and the Nuremberg Tribunals, the court arrived

¹¹⁰ *Doe v. Unocal*, Nos. BC 237 980, BC 237 679, at 8.

¹¹¹ Jim Lobe, *Foreign crimes come home to the US*, ASIA TIMES (Dec. 16, 2004), at http://www.atimes.com/atimes/Southeast_Asia/FL16Ae01.html.

¹¹² Duncan Campbell, *Energy Giant Agrees Settlement with Burmese Villagers*, THE GUARDIAN, Dec. 15, 2004, available at <http://www.guardian.co.uk/international/story/0,,1373704,00.html>.

at lenient requirements for aiding and abetting.¹¹³ The *actus reus* and *mens rea* tests are less restrictive than other tests used in federal courts (such as the joint action and proximate cause tests), though they are commonly used in international courts.¹¹⁴

B. Judge Reinhardt's Concurring Opinion

More promising for future plaintiffs was Judge Reinhardt's concurring opinion in the Ninth Circuit's overruling of the district court's grant of summary judgment. Judge Reinhardt found that plaintiffs did not need to produce international law tests of liability to hold Unocal accountable.¹¹⁵ In using the federal common law theories of joint venture liability, agency liability, and reckless disregard liability, Reinhardt created more viable ways for future plaintiffs to pursue corporations under the ATCA.¹¹⁶ Even more promising is that he found the Burmese plaintiffs had provided sufficient evidence for all three theories of liability.¹¹⁷

Judge Reinhardt's concurring opinion on the plaintiffs' burden to prove liability for violations that are not *jus cogens* crimes is also more lenient. Reinhardt concluded that plaintiffs' third party liability claims against Unocal do not need to be *jus cogens* violations themselves, since they are actionable under federal common law.¹¹⁸ It remains to be seen whether future courts will agree with Judge Reinhardt's reasoning.

C. Vicarious Liability

In the state case, the California Superior Court rejected Unocal's Motion for Summary Judgment in Phase II.¹¹⁹ Judge Chaney's finding that under California law a principal can be held liable for the acts of its agent, committed in the scope of its agency, gives future plaintiffs firmer ground for holding corporations liable for their subsidiaries' and joint venturers' actions.¹²⁰ Going forward, corporations will have a stronger burden to prove that they should not be held liable in any way for their subsidiaries' actions, even if they do not control the entire subsidiary.

¹¹³ See *Unocal III*, 395 F.3d at 949-53.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 965 (Reinhardt, J., concurring).

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 976.

¹¹⁸ *Id.* at 964 (Reinhardt, J., concurring).

¹¹⁹ *Doe I v. Unocal Corp.*, Nos. BC 237 980, BC 237 679 (Cal. Super. Ct. Sept. 14, 2004), at <http://www.earthrights.org/unocal/doevunocal09142004.pdf> (denying Unocal's Motion for Summary Judgment).

¹²⁰ *Id.* at 6.

D. California Business and Professions Code § 17200

Judge Chaney's rulings in the California state case also suggested that the *Doe v. Unocal* plaintiffs could have shown, in Phase II of the trial, that Unocal was unjustly enriched by the human rights abuses of its pipeline project, and that its involvement with the Burmese military amounted to an unfair business practice under the California Business and Professions Code § 17200.¹²¹

E. Indispensable Parties

By setting aside Unocal's argument that Burmese entities were indispensable parties in both the state and federal cases, the courts signaled to plaintiffs that corporations can be held liable as third-party actors for violations committed overseas, even if U.S. courts have no jurisdiction over the foreign party committing the violations.¹²² Given the close relationships between many corporations and foreign regimes in constructing and operating projects that result in human rights abuses, this ruling bolsters plaintiffs' ability to pursue corporations for their knowing participation in violating customary international law.

IX. SUPREME COURT REVIEW OF THE ATCA: *SOSA V. ALVAREZ-MACHAIN* (2004)

Although the Supreme Court has not yet addressed questions relating to whether, and under what circumstances, the ATCA creates a cause of action for plaintiffs to sue corporations for violations of customary international law, it did recently rule on the ATCA generally. In *Sosa v. Alvarez-Machain*, the Court unanimously indicated that the ATCA creates a cause of action in a "modest" number of cases involving clear international law violations.¹²³ Because it did not go into specific causes of action, the Court did not settle the ongoing matter of what claims, if any, are actionable under the ATCA. Harold Koh, Dean of Yale Law School, and an expert on international law, suggested that the ATCA probably still creates a cause of action

¹²¹ *Doe I v. Unocal Corp.*, Nos. BC 237 980, BC 237 679, at 13-16 (Cal. Super. Ct. Jun. 7, 2002), at <http://www.earthrights.org/unocal/TortLiabilityMSARuling.doc> (granting Unocal's Motions For Summary Adjudication as to the intentional torts and negligence causes of action, but denying Unocal's motion as to the California Business and Professions Code § 17200).

¹²² *See Doe v. Unocal Corp.*, 963 F. Supp. 880, 889 (C.D. Cal. 1997); *NCGUB v. Unocal, Inc.*, 176 F.R.D. 329, 358 (C.D. Cal. 1997); *Doe I v. Unocal Corp.*, Nos. BC 237 980, BC 237 679, at 14-15 (Cal. Super. Ct. Jun. 7, 2002), at <http://www.earthrights.org/unocal/VicariousLiabilityMSARuling.doc> (denying Unocal Defendants' Motion for Summary Judgment Based on Absence of Vicarious Liability).

¹²³ 124 S. Ct. 2739, 2744 (2004).

for torture, genocide, slavery, apartheid, and other widespread and commonly accepted violations.¹²⁴

It is unclear from *Sosa* whether corporations that “aid and abet” repressive foreign governments with whom they do business may be held liable under the ATCA. Outside of clearly actionable causes, the Court’s ruling did not clarify just how much discretion federal court judges have to find causes of action under the ATCA. A 6-to-3 majority seemed to leave it up to federal judges to decide (a) which international standards apply in a case, and (b) whether the conduct in question violates those standards under the ATCA.¹²⁵ However, in his concurring opinion, Justice Scalia observed that the federal judiciary “is neither authorized nor suited to” make decisions on which international law standards to apply and when certain conduct violates them.¹²⁶ In response to this, Justice Souter, joined by Justices Stevens, O’Conner, Kennedy, Ginsburg, and Breyer, suggested that as long as independent judicial recognition of actionable international norms is conducted vigilantly, federal judges may still have some discretion over finding causes of action in customary international law.¹²⁷ Thus, at least for now, a narrow range of cases involving violations of *jus cogens* norms are actionable under the ATCA, and federal judges may continue to use limited discretion in adjudicating such cases.

X. CONCLUSION

Both the state and the federal *Doe v. Unocal* cases were on the verge of setting major new precedents for the liability of American corporations for human rights abuses committed abroad in which they aided and abetted or from which they benefited. Although many of the plaintiffs’ arguments were rejected, substantial portions of their case withstood multiple motions for summary judgment by Unocal. Undoubtedly, Unocal had cause for alarm. The *Doe v. Unocal* case also must have frightened the Justice Department, as it filed *amici curiae* briefs on Unocal’s behalf throughout the lawsuit.¹²⁸ As one journalist observed, “Unocal . . . probably calculated that the bad publicity they would face in a trial is worse than the high cost of settling the claim.”¹²⁹

¹²⁴ Warren Richey, *Ruling Makes It Harder for Foreigners to Sue in US Courts*, CHRISTIAN SCIENCE MONITOR, Jun. 30, 2004, at 3.

¹²⁵ *Sosa*, 124 S. Ct. at 2761-70.

¹²⁶ *Id.* at 2769-70 (Scalia, J., concurring in part and concurring in the judgment).

¹²⁷ *Id.* at 2764.

¹²⁸ See, e.g., Brief of Amici Curiae United States, *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004) (No. 03-339).

¹²⁹ Campbell, *supra* note 112.

The suggestions of aiding and abetting, vicarious liability, and unjust enrichment seemed ripe for adjudication. It was quite probably a sound business decision on Unocal's part to settle both cases before risking the establishment of such powerful precedents. In view of the federal judges' various rulings in the Doe v. Unocal lawsuit, future plaintiffs seem on firm ground for pursuing corporations in federal court under the ATCA for their human rights abuses committed abroad. Such plaintiffs may have even greater success pursuing comparable state claims based on state constitutional and statutory provisions forbidding forced labor, unfair competition, and unjust enrichment.