Human Rights Brief

Volume 13 | Issue 1 Article 4

2005

The Unocal Settlement: Implications for the Developing Law on Corporate Complicity in Human Rights Abuses

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The *Unocal* Settlement: Implications for the Developing Law on Corporate Complicity in Human Rights Abuses

by Rachel Chambers

On March 21, 2005, parties to the long-running litigation in *Doe v. Unocal* announced that a final settlement had been reached.[1] The announcement brought widespread cheer to those who hope to make transnational corporations accountable for their perpetration of and complicity in human rights abuses. But perhaps those most encouraged by the news were the claimants in the matter, the Burmese villagers, who will benefit from a settlement that includes direct compensation and "substantial assistance" via funds for programs to improve living conditions, health care, and education. It is unquestionable to those who have followed the *Unocal* litigation since its launch in 1996 how much the Burmese deserve this restitution.

Unocal was accused of knowingly using forced labor to construct its Yadana gas pipeline, which stretches through Burma into Thailand. Unocal contracted with the notorious military junta in control of Burma to provide security for the project. The junta forced local people to work to clear the way for the pipeline and its accompanying infrastructure. Soldiers used tactics such as murder and rape to compel people to work. In their case against Unocal, the Burmese villagers claimed that the California oil giant was liable on the basis of its complicity in the junta's wrongdoing. The Burmese citizens sued Unocal in the United States because they believed that the political situation in Burma strongly militated against the possibility of justice being achieved in Burmese courts.[2]

This article will examine the *Unocal* litigation as part of the international movement to make transnational corporations accountable for human rights violations. Specifically, it argues that a corporation's role in such violations creates indirect legal liability to victims, even if the direct harm was caused by another party. A growing phenomenon in the pursuit of making corporations accountable is to initiate litigation in the country where the corporation is incorporated. Since there is currently no binding international legal framework to govern the behavior of transnational corporations, civil litigation represents one of the only avenues through which these results may be achieved. Because there is very little legal precedent in this area, or a detailed statute on which to rely in bringing such litigation, each court decision frames the extent of a corporation's legal liability. Although the *Unocal* settlement has left some questions unanswered regarding corporate complicity in human rights violations, it is a positive legal development and will serve as a practical precedent for further developments in this important arena.

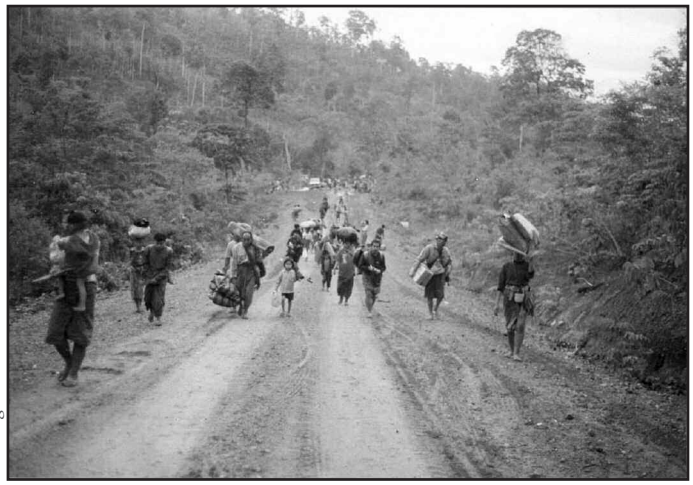
The Alien Tort Claims Act

The Alien Tort Claims Act (ATCA) of 1789 grants jurisdiction to the U.S. courts to hear claims brought by aliens for torts committed in breach of the law of nations or a treaty of the United States. Initially enacted to provide redress for torts such as piracy, the ATCA has been interpreted in recent times to permit aliens to sue individual defendants for violations of their rights.

The *Unocal* Litigation

The *Unocal* litigation,[3] brought under the ATCA, is one of a number of cases against corporations that alleged liability for human rights violations in foreign countries. Other cases included a case against the Anglo-Dutch oil company Shell for its complicity in grave human rights abuses in Ogoniland, Nigeria[4] and a case against the Canadian company Talisman Energy for its complicity in genocide in Sudan.[5]

The *Unocal* litigation had proceeded farther than any other case against corporations brought under the ATCA. Before the case settled it was due to be tried before a jury in California in 2005, along with parallel litigation alleging violations of the state's tort laws. Many considered that it might be the first case to successfully charge a corporation with indirectly violating human rights.



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Displaced Burmese villagers.

Thus far, cases brought under the ATCA have been bogged down by procedural difficulties, dismissed, or settled.[6] At the very least, a jury trial in the *Unocal* litigation could have shone public light on the evidence against the company and brought about accountability for the alleged wrongdoings.

The Tides Turns Against Contemporary Use of the ATCA

Toward the end of 2004 the tide of ATCA litigation — both legal and political — was turning against claimants in these matters. The Bush administration had, through a series of *amicus* briefs, made evident its strong opposition to the contemporary use of the Act against corporations and other defendants accused of human rights violations.[7] In the Supreme Court's *Sosa* decision, the Court limited the ATCA's jurisdictional application to violations of the law of nations. Also of particular relevance to the *Unocal* claimants was

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the dismissal of *Khulumani, et al. v. Barclays* in a New York District Court, which held that the ATCA does not provide for an aiding and abetting theory of liability.[8]

The *Sosa* Decision

The long-awaited decision last year in *Sosa v. Alvarez-Machain* was the first Supreme Court pronouncement on contemporary use of the ATCA. The case concerned the abduction of Mexican national Dr. Alvarez-Machain by a fellow Mexican, José Francisco Sosa, who had been hired by the U.S. Drug Enforcement Agency to detain Alvarez-Machain to bring him to stand trial in the United States. Those opposed to an expansive interpretation of the ATCA saw the litigation as an opportunity to limit its applicability to the original intentions of Congress.

On June 29, 2004, human rights advocates celebrated the Supreme Court decision that held that the ATCA continues to allow victims to sue in U.S. courts for the most serious human rights abuses, which are classified as violations of the law of nations under the ATCA.[9] But the victory was not absolute. The Supreme Court limited ATCA claims to those involving violations of "specific, universal, and obligatory" international norms — violations of safe conduct, infringement of the rights of ambassadors, and

> "The vast majority of serious complaints about transnational corporations concern their alleged role in supporting, encouraging, and benefiting ... from egregious human rights abuses ..."

piracy — and ruled that an illegal detention of less than one day did not violate a well-defined norm of customary international law. Despite the Supreme Court's restrictive approach, courts should not be slow to accept new causes of action under the ATCA.

The *Khulumani* Litigation

The judgment in *Sosa* paved the way for cases against corporations for complicity in gross human rights abuses, albeit on somewhat reduced footing. A few months after the *Sosa* decision, the *Khulumani* complaint came before a District Court in New York. *Khulumani*, a South African NGO representing 32,000 victims of the apartheid regime, sued transnational corporations, including banks such as Barclay's and Citigroup, and mining companies, such as Rio Tinto, for their alleged role in supporting and profiting from the apartheid regime in South Africa. Judge Sprizzo, the federal district judge sitting on the case, dismissed the case because he determined that judgments from the Nuremburg tribunals and the international courts for the former Yugoslavia and Rwanda were not binding sources of international law, even though these sources had been used by judges in the *Talisman*[10] and *Unocal*[11] litigation to underpin liability for aiding and abetting. These judgments explore the nature of aider and abettor liability under international human rights law, which is of significance to the corporate complicity claims that judges must decide based upon whether the action in question was a breach of the law of nations.

The *Unocal* Position on Complicity

Before the *Unocal* case was settled in 2002, Judge Pregerson of the U.S. Court of Appeals for the Ninth Circuit wrote an opinion for the panel holding that, as constructed by international jurisprudence, *Unocal* could be held liable on the basis of aiding and abetting under the ATCA for abuses that it knew about and substantially assisted through practical encouragement or support. Such encouragement and support included hiring the Burmese military to protect the pipeline.[12] This decision overturned a lower court ruling that *Unocal*'s liability rested upon its intention to commit these abuses. The importance of this judgment cannot be understated. The vast majority of serious complaints about transnational corporations concern their alleged role in supporting, encouraging, and benefiting from the egregious human rights abuses committed by joint venture partners, suppliers, and other groups with whom they do business. But, in the majority of these cases it is hard to prove that the corporations in question *intended* to commit the abuses. Although the Ninth Circuit accepted that *Unocal* may be liable under the ATCA if it was found to have aided and abetted the Burmese Junta, Judge Sprizzo, in *Khulumani*, completely rejected the notion that aiding and abetting liability is contained within the ATCA. Judge Sprizzo concluded that if Congress had intended such liability to be covered by the statute it would have expressly included such a provision.

Unocal and *Khulumani* — Understanding the Contradicting Decisions on Complicity

The diverging approaches have been attributed by one commentator to the differing political persuasions of the judges in the two cases: Judge Pregerson has a reputation for being liberal while Judge Sprizzo is seen as conservative.[13] This observation, however, fails to note a more fundamental difference between the two cases. Although the *Khulumani* claims against the mining companies alleged direct collusion with the South African government in the violation of workers' rights, the other claims were more general, alleging that the corporate defendants aided and abetted the South African government in the human rights abuses it perpetrated under the system of apartheid. The impugned conduct of the corporations included supplying goods to the South African military with the knowledge that such goods would be used in the maintenance of the apartheid system and the decision to invest in South Africa per se. The requisite causal connection between the companies and the human rights violations suffered in the country may be tenuous in these other cases. Indeed, the broader policy concern of those favoring a more restrained use of the ATCA against transnational companies is that imposing such an expansive conception of liability might discourage these corporations from investing in developing countries and inhibit vital economic growth.

The difference between the two cases is clear. In *Unocal,* the corporate defendant provided direct support and assistance to those who committed the human rights violations, while in *Khulumani*, the allegations extended to "mere" beneficial or indirect complicity in the state's wrongdoing.[14] This latter type of complicity has not been accepted by international tribunals such as the

International Criminal Tribunal for the Former Yugoslavia (ICTY) as a breach of international criminal law.

Further, *Khulumani* is a large scale and "unwieldy" lawsuit, brought by multiple plaintiffs against multiple defendants and covering events that took place over many years in different locations. Although the manageability of a case does not have any impact on legal liability, it may have been an underlying consideration that helped to persuade Judge Sprizzo to reject the *Khulumani* complaint. *Unocal*, on the other hand, involved only

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Workers assemble the Yadana gas pipeline.

15 plaintiffs, one defendant,[15] and a number of clearly defined incidents that amounted to egregious human rights abuses.

The fact remains, however, that Judge Sprizzo's decision came after the Supreme Court in *Sosa* had circumscribed the contemporary use of the ATCA and has been interpreted as following a more restrictive approach.[16] Although in the past federal courts may have been open to arguments that novel torts amounted to breaches of the law of nations actionable under the ATCA,[17] Judge Sprizzo looked to the strict letter of the statute, found that it did not cover aiding and abetting liability, and refused to extend its reach beyond the three traditional torts contemplated when the ATCA was created (violations against safe conduct, infringement of the rights of ambassadors, and piracy). Despite *Khulumani*'s disappointing result, it cannot be discarded entirely because it followed the *Sosa* precedent. What remains to be seen is whether courts will follow Judge Sprizzo in holding that aiding and abetting liability is not actionable under the ATCA given that this contradicts the decision in *Unocal*. As discussed below, the first signs suggest that they will not.

Conclusion

The *Unocal* settlement took place on December 13, 2004, just one day before the Ninth Circuit was due to hear an appeal en banc from the 2002 decision. As a result, it is unknown where the law now stands. The *Unocal* and *Khulumani* decisions present differing understandings of aiding and abetting liability, which will need to be resolved. Fortunately the wait will not be long; *Khulumani* is now under appeal in the Second Circuit and other cases that address this issue are being heard in courts around the country. Key amongst these is *Talisman*, mentioned above, which concerns genocide, war crimes, and torture perpetrated by the Sudanese government. As set out in the most recent decision,[18] the complaint alleges that "Talisman and the Government worked together to devise a plan for the security of the oil fields"; that Talisman "hired its own military advisors to coordinate military strategy with the Government"; and that there were regular "meetings involving Talisman, Army intelligence, and the Ministry of Energy and Mining where Talisman would map out areas intended for exploration and they would discuss how to dispose of civilians in those areas."

In June 2005 the district court in *Talisman* held that aiding and abetting or "secondary" liability is actionable under the ATCA.[19] The court refused an appeal on this point in August 2005.[20] Talisman had argued, relying on *Sosa*, that secondary liability was not sufficiently accepted in international law to support an ATCA claim. Citing the Ninth Circuit's decision in Unocal, the court held that the notion of liability in international law "for knowing practical assistance or encouragement which has a substantial effect on the perpetration of the crime" is a core principle that forms the foundation of customary international legal norms.[21] The Second Circuit should follow this approach when it hears the *Khulumani* case on appeal.

The settlement of the *Unocal* litigation signifies that there will be no further judicial scrutiny of the circumstances of that case and the applicability of secondary liability to them; however, Unocal's willingness to pay substantial sums rather than continue to litigate, coupled with the recent trend in enforcing accountability for aiding and abetting liability as exemplified in the recent *Talisman* decisions, will hopefully make corporations who operate in close contact with perpetrators of human rights abuses think very carefully about their role in these wrongdoings. ***HRB***

ENDNOTES: Chambers

[1] EarthRights International, *Final Settlement Reached in* Doe v. Unocal, http://earthrights.org/news/unocalsettlefinal.shtml (May 10, 2005); Unocal News Release Archive, *Settlement Reached in Yadana Pipeline Lawsuit,* http://www.unocal.com/uclnews/2005news/032105.htm (March 21, 2005).

[2] The U.S. Department of State, *Burma Country Report on Human Rights Practices for 1998* 815 (Dep't. of State 1999), states, "the Government continued to rule by decree and was not bound by any constitutional provision providing for fair public trials or any other rights. Although remnants of the British legal system were formally in place, the court system and its operation remained seriously flawed, particularly in the handling of political cases."

[3] The *Unocal* litigation was the first in which it was held that ATCA actions could apply to private corporations. *Doe I v. Unocal Corp.,* 963 F. Supp. 880 (C.D. Cal. 1997).

[4] *Wiwa v. Royal Dutch Petroleum*, 392 F.3d 812 (5th Cir. 2004). This case concerned events leading up to the execution of campaigner Ken Saro-Wiwa.

[5] *Presbyterian Church of Sudan v. Talisman Energy,* 374 F. Supp. 2d 331(S.D.N.Y. 2005).

[6] Sarah Joseph, *Corporations and Transnational Human Rights Litigation* (Hart Publishing 2004). Chapter 4 details the "formidable" procedural obstacles plaintiffs must overcome to bring ATCA claims. Examples of cases that have failed to surmount these hurdles include *Sarei v. Rio Tinto,* 221 F. Supp. 2d 1116 (C.D. Cal. 2002), *In re* Union Carbide Corp Gas Plant Disaster at Bhopal, 634 F. Supp 842, 850-51 (S.D.N.Y. 1986), and *Flores v. Southern Peru Copper Corp*., 253 F. Supp. 2d 510, 526 (S.D.N.Y. 2002).

[7] Example briefs include Department of State, *Brief for the United States as Amicus Curiae in Support of Reversal of the Judgment Against Defendant-Appellant Jose Francisco Sosa*, http://www.state.gov/documents/organization/6595.doc (March 20, 2000) and EarthRights International, *Brief for United States of America as Amicus Curiae,* http://www.earthrights.org/atca/dojbrief.pdf

continued on page 36

munity's "responsibility to protect" those whose governments leave them vulnerable to gross human rights violations. Commonly known as R2P, this doctrine obliges each Member State to protect its citizens and others within its jurisdiction from war crimes, genocide, ethnic cleansing, and crimes against humanity. It also calls for international diplomatic and humanitarian intervention, as well as the use of peacekeeping troops in situations where mass atrocities and gross human rights violations are taking place, and where peaceful means are inadequate to counter such abuses. Notably, the doctrine supports the collective intervention of the international community, rather than that of a single state or small group of states.

Peacebuilding Commission

Although R2P does not specifically address post-conflict situations, Member States agreed to formulate an inter-governmental Peacebuilding Commission (PC). This advisory body will assemble relevant actors to coordinate the reconstruction and institution-building efforts for effective and integrated post-conflict development. Participants will include the country or countries in question, regional governments, major contributors to the relief effort, UN experts, and international financial institutions. Each PC meeting will address a specific country or sub-region. The PC will also have a standing organizational committee that can refer situations to the PC and that will be composed of members of the Security Council, ECOSOC, top UN donors, and those states providing the bulk of military aid. To fund these initiatives, Member States asked the Secretary-General to establish a post-conflict Peacebuilding Fund, supported by voluntary contributions. The PC is scheduled to begin its work by the end of this year.

Additionally, Member States endorsed creating a standing police force that would provide start-up capability and general assistance to the policing component of UN peacekeeping missions. The idea grew from the need to have a rapid response team that would be able to assist operations in crisis. This police force is less powerful than the standing military force some member countries sought to establish, and questions remain regarding its constitution, funding, and size.

Conclusion: Mainstreaming Human Rights

The United Nations' new initiatives represent the international community's increased focus on mainstreaming human rights. The Human Rights Council, the Responsibility to Protect, and the Peacebuilding Commission signify a step forward in the protection and promotion of human rights around the world. Moreover, the decision of Member States at the 2005 World Summit to double the funding for the Office of the High Commissioner for Human Rights over the next five years is another good indicator of an increased commitment to defending human rights. The remaining question is whether the funding and political will exist to make these organizations as transparent, credible, and effective as possible. Critics fear that to make only cosmetic changes from a Commission to a Council, or to proclaim a specific responsibility and then fail to execute it, would not only defeat the reform efforts, but would further endanger current and future victims of gross human rights violations. ***HRB***

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The *Unocal* Settlement Endnotes: continued from page 16

(May 8, 2003). The United States government is not the only government to oppose the use of the ATCA in claims against transnational corporations. In July 2005 the Toronto Star newspaper reported that the Canadian government had for the third time attempted to put pressure on U.S. authorities to have the *Talisman* case thrown out. *See* Sudan: The Passion of the Present, *Canada Asked U.S. to Intervene in Talisman Case,* http://platform.blogs.com/passionofthepresent/2005/07/canada_asked_us.html (July 7, 2005), http://www.bloomberg.com/apps/news?pid=10000082&sid=aiVqEtJAcbI0&refer=canada (July 6, 2005).

[8] *In re* South African Apartheid Litigation, 346 F. Supp. 2d 538 (S.D.N.Y. 2004).

[9] EarthRights International, *In Our Court: ATCA, Sosa and the Triumph of Human Rights: A report about the Alien Tort Claims Act*, http://www.earthrights.org/pubs/inourcourt.html (July 2004).

[10] *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289 (S.D.N.Y. 2003), as cited in Joseph, *Corporations* (Hart Publishing 2004). In *Presbyterian Church of Sudan v. Talisman Energy*, the court agreed that international criminal law was the appropriate source of law in determining whether the corporate defendant had aided and abetted the Sudanese government in committing war crimes and genocide.

[11] *Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002).

[12] Joseph, *Corporations* (2004).

[13] Anthony J. Sebok, *Unocal Announces it will Settle a Human Rights Suits: What is the Real Story Behind its Decision*?, http://writ.news.findlaw.com/sebok/20050110.html (Jan. 10, 2005).

[14] *See* Andrew Clapham and Scott Jerbi, *Categories of Corporate Complicity in Human Rights Abuses*, 24 Hastings Int'l & Comp. L. Rev. 339 (2001), for a discussion of the different types of complicity and the use of the terms "beneficial" or "indirect" complicity. Note that the authors classify the *Unocal* litigation in this category rather than as an example of direct complicity based on a different understanding of the facts of the case.

[15] Initially, Unocal's business partner French oil company Total SA was a co-defendant, but it was held in *Doe I v. Unocal Corp.*, 27 F.Supp.2d 1174 (C.D. Cal. 1998), that the California court did not have jurisdiction over the company.

[16] Sebok, *Unocal Announces it will Settle a Human Rights Suits*, http://writ.news.findlaw.com/sebok/20050110.html.

[17] For example, it was held in *Ralk v. Lincoln County*, 81 F. Supp. 2d 1372, 1380 (S.D. Ga. 2000), that the plaintiff could bring a claim under the ATCA for violations of the International Covenant on Civil and Political Rights.

[18] *Presbyterian Church of Sudan v. Talisman Energy*, No. 01 Civ.9882, 2005 WL 2082847, at *2 (S.D.N.Y. Aug. 30, 2005).

[19] *Talisman*, 374 F. Supp. 2d 331.

[20] Note, however, that the court refused to grant leave to appeal on this point, stating that the case would proceed whether or not secondary liability was accepted because the plaintiffs also alleged primary liability.

[21] *Talisman*, 374 F. Supp. 2d at 340-341.