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## United States Court Finds Unocal May Be Liable for Aiding and Abetting Human Rights Abuses in Burma

by John Cheverie\*

On September 18, 2002, the U.S. Court of Appeals for the Ninth Circuit reversed a lower court's decision to grant summary judgment to the defendant Unocal Corporation in the *Doe v. Unocal* lawsuit. The Ninth Circuit's decision, which allows the landmark case against the California-based gas and oil giant to go forward, stands for the important proposition that corporations can be held legally accountable for aiding and abetting a foreign government's human rights abuses in violation of international law.

In 1997, the United States District Court for the Central District of California agreed to hear *Doe v. Unocal*. The lawsuit filed by Burmese peasants alleging Unocal's legal responsibility for human rights abuses, including forced labor, murder, and rape, committed by the Burmese military on behalf of Unocal's Yadana gas pipeline project. The decision in *Doe v. Unocal* marked the first time a U.S. court asserted the jurisdictional authority, granted under the Alien Tort Claims Act (ATCA), to determine a corporation's liability for human rights abuses in violation of international law in a foreign country.

Three years after the initial filing, the district court found that the plaintiffs had presented evidence that Unocal knew of and benefited from the alleged human rights abuses. Despite these findings, however, the court dismissed the plaintiffs' case. The court reasoned that Unocal's knowledge of and deriving benefits from human rights violations were insufficient to establish that Unocal wanted these human rights violations to occur. Recently, the U.S. Court of Appeals for the Ninth Circuit reversed the lower court's decision, allowing the lawsuit against Unocal to proceed.

### Background

A man is shot at by Burmese soldiers for fleeing forced labor on the Yadana project. In retaliation for his flight, the soldiers kick his wife and baby into a fire. The child dies a few days later. Burmese soldiers assigned to the pipeline rape women in villages along the route and summarily execute villagers who are too weak to participate in the forced labor program connected with the Yadana project. These are only a few examples of the abuses connected with Unocal's Yadana project.

In 1992, Unocal acquired an interest in the Yadana natural gas pipeline project, becoming a co-venturer with France-based Total, S.A. (now Total-Fina-Elf) and the Burmese military junta's Myanmar Ministry for Oil and Gas Enterprises (MOGE). Unocal decided to invest in Burma, and

work in tandem with the Burmese government, despite Unocal's knowledge of the junta's notorious and well-deserved reputation as one of the worst human rights violators in the world. Unocal's own consultants pointed out that "the government habitually makes use of forced labour to construct roads" and that "in such circumstances Unocal and its partners will have little freedom of manoeuvre." A U.S. Department of State report from the same year mirrors the assessment of Unocal's consultants in pointing out that the Burmese military routinely conscripts forced laborers and porters.



Credit: Earth Rights International

Construction of the Yadana pipeline.

The project's goal was to exploit the Yadana natural gas field located off Burma's coast in the Andaman Sea by extracting gas from the underwater field and transporting it via a pipeline from Burma into Thailand. The portion of the pipeline in Burma is about 40 miles long, and extends from the Burmese coast across Burma's Tenasserim region to the Thai-Burma border. The Tenasserim region is a fragile area of pristine forests inhabited by indigenous ethnic minority groups as well as many endangered species. A Yadana project contract made MOGE responsible for providing security on the pipeline project.

Future abuse in Burma was particularly foreseeable at the time Unocal made its decision to invest in the Yadana project as Unocal entered Burma immediately following a 1988 military crackdown and an election fiasco in 1990. In 1988, the Burmese military junta violently repressed non-violent demonstrations calling for democracy and human rights, in what is often referred to as Burma's Tiananmen Square. The uprising resulted in thousands of deaths, and thousands of people were jailed without trial. Following the crackdown, the military dictatorship dubbed itself the "State Law and Order Restoration Council" (SLORC, herein used to describe the Burmese government and military and, at times, MOGE), renamed Burma "Myanmar," and instituted martial law.

In 1990, SLORC bowed to citizens' demands for multiparty elections but refused to recognize the election results when the National League for Democracy (NLD) won a convincing victory. SLORC further responded to the election results by intimidating and placing under house arrest NLD leaders, including 1991 Nobel Peace Laureate Aung San Suu Kyi, and placing some under arbitrary arrest and detention. Since the election incident, Aung San Suu Kyi and other NLD leaders have requested that the international community not invest in Burma in hopes of undermining the dictatorship's

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unjust rule. In 1997, the Clinton administration responded by imposing an embargo on new investments in Burma. Because the embargo did not have retroactive effect, however, the biggest U.S. investor in Burma, Unocal, was not forced to leave.

Due to Unocal's knowledge of past human rights abuse in Burma, the alleged human rights abuses that came with the Yadana pipeline project were completely foreseeable. Pursuant to its contract with Unocal and Total, MOGE drastically increased the SLORC military presence along the pipeline route. Not surprisingly, with the increased military presence came a corresponding increase in human rights abuses. SLORC used its well established modus operandi of human rights abuse to provide not only pipeline security, but also to forcibly relocate entire villages for the benefit of the construction of the pipeline. In addition, SLORC's use of forced labor and portering to clear land for the pipeline and to build pipeline infrastructure has been well documented. In the process of using forced labor, forced portering, and forced relocation to benefit the project, SLORC committed other human rights abuses including rape, torture, and extrajudicial killing.

To this day, Unocal is aware that both state governments, including the U.S. government, and non-governmental organizations, such as Amnesty International and Earth-Rights International (ERI), continue to cite the Burmese military dictatorship's egregious human rights violations. A 2001 U.S. Department of State report cites "the [Burmese] Government's extremely poor human rights record and longstanding severe repression of its citizens," and reports that the junta continues to maintain repressive control over the country through intimidation, arbitrary arrests and detentions, physical abuse, and other human rights abuses. The report goes on to describe Burma's security forces' "serious human rights abuses," citing credible reports of extrajudicial killing, rape, and torture, among others. The State Department also reports that over 1,500 political prisoners are being held in Burma. International organizations, including the United Nations and the International Labor Organization (ILO), also continue to document and decry the human rights situation in Burma. A 1998 ILO report found "abundant evidence . . . showing the pervasive use of forced labour imposed on the civilian population throughout Myanmar by the authorities and the military."

#### The Lawsuit's History

In 1996, plaintiffs from Burma's Tenasserim region brought a lawsuit against Unocal and two top Unocal executives John Imle and Roger Beach (Unocal), Total, MOGE, and SLORC for SLORC's abusive behavior connected to the Yadana pipeline project. ERI and others, including the Center for Constitutional Rights, Hadsell & Stormer, and the Law Offices of Paul Hoffman, filed the lawsuit on the plaintiffs' behalf in the U.S. District Court for the Central District of California. A similar lawsuit was filed by the International Labor Rights Fund. The plaintiffs sought damages and injunctive and declaratory relief from the defendants for SLORC's violations of U.S. federal and state law.

The plaintiffs claimed, in part, that Unocal was directly and vicariously liable for SLORC's human rights abuses in violation of international law, connected to the pipeline project, pursuant to the ATCA. The ATCA grants U.S. federal courts jurisdiction over "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 plaintiffs claimed that the defendants violated international laws prohibiting forced labor, murder, and rape.

#### The Federal District Court's Decision to Assert Jurisdiction over the Claims against Unocal

Unocal responded to the plaintiffs' complaint by filing a motion to dismiss for lack of jurisdiction. In 1997, the district court granted Unocal's motion in part by dismissing the plaintiffs' lawsuit against MOGE and SLORC. In addition, the court later dismissed the plaintiffs' claims against Total for lack of personal jurisdiction. However, the court denied Unocal's motion to dismiss in part, holding that the lawsuit could proceed against Unocal. The court's decision marked the first time a U.S. federal court held that it could find a private U.S.-based corporation liable for violations of international law committed abroad under the ATCA.

The court's decision to dismiss the plaintiffs' claims against MOGE and SLORC was based on its determination that it could not assert jurisdiction over them as a foreign state's agents or instrumentalities under the Foreign Sovereign Immunities Act (FSIA). In U.S. law, it is presumed that foreign states, and their agents and instrumentalities, are immune from U.S. courts' jurisdiction. The only way that this presumption of immunity can be rebutted, and jurisdiction can be established, is if one of the limited exceptions delineated in the FSIA is met. Here, the court held that MOGE's and SLORC's alleged activities did not fit into one of the exceptions provided for under the FSIA. As a result, the court refused to rebut the presumption that MOGE and SLORC were immune from U.S. courts' jurisdiction, and dismissed the plaintiffs' case against them.

At the same time, the court rejected Unocal's argument that the court should refuse jurisdiction over the defendants under the act of state doctrine. The act of state doctrine is a discretionary, judicially made doctrine (unlike the FSIA which is a statute) that directs U.S. courts to consider international comity and U.S. domestic separation of powers issues when deciding whether or not to hear a particular lawsuit. The doctrine suggests that courts ought to decline jurisdiction when hearing a case that would require a U.S. court to judge the acts of another sovereign state's government or require the U.S. judicial branch to interfere with responsibilities delegated to the other branches of government. Here, the court determined that comity and separation of powers considerations did not compel the court to decline jurisdiction over the case because of the U.S. government's overall condemnation of the Burmese regime.

Most notably at this stage, the court rejected Unocal's motion to dismiss the plaintiffs' ATCA claims. Unocal's motion contended that only states can violate international law and that, by definition, the ATCA failed to provide the

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court with subject matter jurisdiction over the plaintiffs' claims against a private, non-state actor like Unocal. The court rejected Unocal's argument, holding that state actors as well as states can violate international law, and that the state action requirement could be met if the plaintiffs established that Unocal was directly or vicariously liable for SLORC's international law violations.

Additionally, the court found that at least the plaintiffs' forced labor were of the kind that did not require any state action under international law. Specifically, the court noted that the plaintiffs' forced labor claims amounted to allegations of slavery, one of a limited number of egregious international law violations for which non-state actors can be held liable under the ATCA. Therefore, the district court asserted subject matter jurisdiction over the plaintiffs' claims by determining that the plaintiffs had pled sufficient facts to state a claim against Unocal pursuant to the ATCA.

### ***The Federal District Court's Decision to Grant Unocal's Summary Judgment Motion***

Following discovery, Unocal filed a motion for summary judgment. At this stage, Unocal argued before a different judge of the same court that the plaintiffs had failed to present evidence establishing a genuine issue of material fact such that a reasonable factfinder could return a verdict in the plaintiffs' favor. At the end of August 2000, the district court granted Unocal's motion for summary judgment as to the plaintiffs' federal claims and dismissed the plaintiffs' state law claims without prejudice.

Regarding the plaintiffs' ATCA claims requiring state action, namely the murder, rape, and torture claims, the court found that the plaintiffs presented evidence demonstrating that before joining the Project, Unocal knew that the military had a record of committing human rights abuses; that the Project hired the military to provide security for the Project, a military that forced villagers to work and entire villages to relocate for the benefit of the Project; that the military, while forcing villagers to work and relocate, committed numerous acts of violence; and that Unocal knew or should have known that the military did commit, was committing, and would continue to commit these tortious acts.

Despite these findings, the court nonetheless dismissed plaintiffs' claims by holding that the claims failed as a matter of law because the plaintiffs could neither show that Unocal engaged in state action nor controlled SLORC. In terms of Unocal's engagement, the court stated that the plaintiffs presented no evidence that Unocal "participated in or influenced" SLORC's unlawful acts or "conspired" with SLORC to commit the alleged human rights abuse. The court also held that the plaintiffs presented no evidence that Unocal "controlled" SLORC's decision to commit the alleged human

rights abuses. Therefore, the court decided that Unocal's knowledge of and benefiting from SLORC's unlawful conduct was not enough to hold Unocal potentially liable for the plaintiffs' ATCA claims requiring state action.

The district court held that the plaintiffs' forced labor claims, the ATCA claims not requiring state action, failed as a matter of law as well. In so ruling, the court found that Unocal's knowledge of and acceptance of benefits from SLORC's forced labor practices surrounding the pipeline project were not sufficient, but that proof of Unocal's "active participation in the unlawful conduct" was required to impose liability on the corporation. The court took the "active participation" standard from the Nuremberg Trials, and explained its overall position by stating that

The evidence does suggest that Unocal knew that forced labor was being utilized and that the Joint Venturers benefitted from the practice. However, because such a showing is insufficient to establish liability under international law, Plaintiffs' claim against Unocal for forced labor under the Alien Tort Claims Act fails as a matter of law.

The plaintiffs appealed the decision regarding the ATCA and other federal law claims to the U.S. Court of Appeals for the Ninth Circuit and filed the state law claims, which had been dismissed without prejudice, in a California state court. The lawsuit filed in California state court survived summary judgment and is set to go to trial in February 2003. The appeal was argued before a panel of Ninth Circuit judges in December 2001.

### ***The Ninth Circuit's Decision to Reverse the District Court's ATCA Ruling***

On September 18, 2002, the U.S. Court of Appeals for the Ninth Circuit (Court) reversed the district court's grant of Unocal's summary judgment motion on the plaintiffs' ATCA claims for forced labor, murder, and rape. Specifically, the Court found that Unocal may be liable for aiding and abetting SLORC's forced labor, murder, and rape practices.

### ***The Ninth Circuit Disagrees with the District Court's Liability Standards***

Regarding the forced labor claims, the Court agreed with the district court's decision on Unocal's motion to dismiss that the plaintiffs did not have to demonstrate Unocal was a state actor but could hold Unocal indi-

vidually liable for SLORC's violations under international law. In so doing, the Court identified forced labor as one of the limited number of international law violations not requiring state action by equating forced labor with "a modern variant of slavery." The Court disagreed, however, with the district court's ruling on summary judgment that the plaintiffs were



Helipad used to facilitate the construction of the Yadana pipeline.

Credit: EarthRights International

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required to show that Unocal's conduct rose to the level of "active participation" in SLORC's forced labor practices.

The Court explained that the district court mistakenly borrowed the "active participation" standard from the Nuremberg Trials. The Court pointed out that in Nuremberg the "active participation" standard was utilized to overcome the German industrialist defendants' necessity defense. The necessity defense is applicable when "it is shown that the act charged was done to avoid an evil both serious and irreparable; that there was no other adequate means of escape; and that the remedy was not disproportionate to the evil." Here, the Court found that Unocal did not and could not invoke the necessity defense. Unlike the industrialists under the Nazi regime, Unocal was under no compulsion to do business with the Burmese military. As such, deprived of the context required to invoke the necessity defense, the Court held that the district court erred by citing Unocal's "active participation" in SLORC's forced labor activities as the relevant standard.

The Court went on to say that, even if "active participation" had been the correct standard, the district court misapplied the standard considering the evidence presented by the plaintiffs. The Court determined that the plaintiffs had presented evidence sufficient to raise a genuine issue of material fact as to whether or not Unocal had "actively participated" in SLORC's forced labor practices. The Court explained that the evidence showed that Unocal resembled the defendants in the *Krupp* case before the Nuremberg Tribunal. In *Krupp*, the Tribunal held that the defendants met the "active participation" standard because they "well knew that any expansion [of their business] would require the employment of forced labor." Here, the Court stated that there was evidence that Unocal knew that expanding its business in Burma would require forced labor. The evidence cited by the Court includes Unocal President John Imle's statement that "if forced labor goes hand in glove with the military yes, there will be more forced labor [as a result of SLORC's protecting the pipeline]."

Regarding the murder and rape claims, the Court held that the District Court erred in requiring the plaintiffs to meet the state action requirement and show that Unocal "controlled" SLORC's decision to commit alleged murder and rape. The Court held that there is no state action requirement where the alleged international law violations were committed in the context of perpetrating crimes that do not require state action, such as slavery. The Court reasoned that, because the plaintiffs' allegations of murder and rape allegedly "occurred in furtherance of a forced labor program," and because forced labor is "a modern variant of slavery," the plaintiffs need not meet the state action requirement for their murder and rape claims. Therefore, as with the forced labor claims, the Court found that Unocal may be held individually liable, as a non-state actor, for SLORC's alleged murder and rape connected to the project.

It follows, and the Court so held, that the district court erred in requiring the plaintiffs to establish proximate cause by showing that Unocal "controlled" SLORC's alleged decision to murder and rape the plaintiffs. The Court found that, because no showing of state action is required, the plaintiffs need show only foreseeability to establish the requisite prox-

imate cause. Using the same reasoning, the Court concluded that the same liability standard should be used when assessing all of the plaintiffs' forced labor, murder, and rape claims.

#### *The Ninth Circuit's Aiding and Abetting Liability Standard*

The Court determined that aiding and abetting is the appropriate liability standard, and that under this standard the plaintiffs had established that Unocal may be liable for SLORC's violations of international law under the ATCA. The Court held that the aiding and abetting standard under the ATCA is "knowing and practical assistance or encouragement that has a substantial effect on the perpetration of the crime." The aiding and abetting standard that the Court applied was based in international law.

Given the record in *Doe v. Unocal*, the Court determined that international law was the appropriate source for the applicable aiding and abetting liability standard. The Court looked specifically to recent decisions of the International Criminal Tribunals for the former Yugoslavia and for Rwanda to help determine the current aiding and abetting standard to be used under the ATCA.

The Court found useful the aiding and abetting standard defined in the *Prosecutor v. Furundžija* case before the Yugoslavia Tribunal, describing it as "knowing practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of a crime." The Court also looked to the aiding and abetting standard in the U.S. domestic Restatement (Second) of Torts: "For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he . . . (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself." The Court ultimately applied a "slightly modified *Furundžija* standard." By taking out the "moral support" portion of the *Furundžija* rule, the Court was left with "knowing and practical assistance or encouragement that has a substantial effect on the perpetration of the crime." The Court explained that this aiding and abetting standard was appropriate because it was rooted in and consistent with the Nuremberg precedent in the context where the necessity defense was inapplicable.

Under this standard, the Court determined that the plaintiffs established genuine issues of material fact concerning Unocal's liability for aiding and abetting SLORC's forced labor, murder, and rape. The Court found that a reasonable factfinder could conclude that Unocal's alleged actions met the aiding and abetting standard's *actus reus* requirement because the plaintiffs submitted evidence that Unocal provided SLORC with "practical assistance or encouragement which had a substantial effect on the perpetration" of the crimes of forced labor, murder, and rape. The Court explained that Unocal's "practical assistance or encouragement" of SLORC's abuses was supported by evidence showing that Unocal may have hired SLORC to provide pipeline security and build pipeline infrastructure in exchange for money and food. The Court's assertion was also supported by evidence that Unocal used photos, maps, and surveys to show SLORC where to provide security and build infrastructure. In addition, the

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and facilities for the rehabilitation of delinquent minors who require care, guidance and control.” In Illinois, the purpose clause for delinquency proceedings includes the development of educational, vocational, social, emotional and basic life skills [to] enable a minor to mature into a productive member of society.” Meeting the purpose of rehabilitation requires that the juvenile detention system, both structurally and substantively, recognize and address the particular needs of the female population.

### **International Standards**

Many human rights requirements relating to incarcerated children are evaluated under international standards that do not have the legal authority of treaties. They have, however, been adopted by the UN General Assembly, providing a certain level of moral force. Additionally, the United States participated in their drafting and agreed on the necessity of their adoption. International minimum standards on juvenile justice, through their emphasis on rehabilitation and the best interests of the child, advocate for gender-specific programming. Rule 26.4 of the Beijing Rules reads, “Young female offenders placed in an institution deserve special attention as to their personal needs and problems.” Further, Point 28 of the UN Rules mandates that juvenile detention should only take place under conditions that take into account the unique needs and circumstances of the child, according to specified categories including gender. Finally, Point 12 of the UN Rules requires that, “[j]uveniles detained in facilities should be guaranteed the benefit of meaningful activities and programmes which would serve to promote and

sustain their health and self-respect, to foster their sense of responsibility and encourage those attitudes and skills that will assist them in developing their potential as members of society.”

### **Conclusion**

While national law has moved toward recognizing the dilemma posed by a growing number of girls entering a juvenile justice system ill-equipped to address their needs, the current voluntary standards have not been sufficient in encouraging many jurisdictions to improve their services for the female juvenile population. National lawmakers should create greater incentives and provide stricter guidelines, encouraging facilities to implement gender-specific programming. Considering the overwhelming number of traumatized and sexually abused girls who enter the juvenile justice system, it is unconscionable to deprive them of their liberty while also denying them access to counseling and treatment.

State legislatures must evaluate the effectiveness of the services provided to girls in state detention facilities and allocate funding for the development of appropriate programs and the hiring and training of staff. In addition, states should move toward exercising the “least restrictive alternative” by exploring community-based alternatives to incarceration. Community-based alternatives can move the United States away from a trend of over-incarceration of girls and closer to meeting both nationally and internationally prescribed goals of rehabilitation. ☹

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Court held that the plaintiffs provided evidence showing that Unocal’s alleged assistance had a “substantial effect” in perpetrating the alleged abuses because the abuses “most probably would not have occurred in the same way” if Unocal had not hired and directed SLORC.

Second, the Court held that a reasonable factfinder could conclude that Unocal’s actions met the *mens rea* requirement of the aiding and abetting standard because Unocal knew or should have known that its actions would assist SLORC in committing crimes. The Court based this finding on the district court’s holding that the plaintiffs’ evidence suggests that Unocal knew of and benefited from SLORC’s human rights abuses connected with the project.

It should be noted that the Court did not preclude other theories of liability by choosing to apply an aiding and abetting standard in *Doe v. Unocal*. The Court specifically stated that the plaintiffs’ claims that Unocal is liable for SLORC’s human rights abuses under other liability theories, like joint venture, agency, negligence, and recklessness, may be viable theories in this case and other ATCA cases. In fact, the concurring judge in the Ninth Circuit decision would have reversed the district court’s summary judgment decision for Unocal using the federal common law liability theories of agency, joint venture, and reckless disregard.

### **Conclusion**

The Ninth Circuit’s *Doe v. Unocal* decision is important for a number of reasons. Specifically, the decision reaffirms the important principle that forced labor is tantamount to slav-

ery. It also reaffirms the district court’s decision at the motion to dismiss stage that corporations can be held liable for violations of international law under the ATCA. Most importantly, however, the decision sets out a well reasoned liability standard that comports with well established principles of law.

The recent *Doe v. Unocal* decision is in no way revolutionary in that it simply applies legal standards, established since Nuremberg, in a way that holds transnational corporations accountable for their involvement in human rights abuses in violation of international law. At the same time, the decision does not go so far as to state that a corporation can be held liable for a government’s abuses simply by doing business in a country, as misinformed critics claim. The Ninth Circuit’s aiding and abetting liability theory tempers the unreasonably high “smoking-gun” liability standard that the district court attempted to apply at the summary judgment stage. This “smoking-gun” standard flew in the face of basic legal liability concepts by making it necessary for Unocal subjectively to want SLORC to commit human rights abuses.

The Ninth Circuit’s decision is important because it defines a standard for liability, based on well established legal concepts and plain common sense, that puts transnational corporations on notice that if a corporation knowingly assists or encourages the perpetration of a crime, the company will be held responsible for its actions. ☹

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