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## Unocal Corporation Can Be Liable for Human Rights Abuses in Burma

by Carlyn Carey\*

In early 1993, Unocal Corporation (Unocal), a U.S. multinational corporation, joined as a co-venturer in the Yadana gas pipeline project, located off the southern coast of Burma in the Andaman Sea. Total, S.A. (Total), a multinational petrochemicals corporation based in France, and the Myanmar Ministry for Oil and Gas Enterprises (MOGE), previously had established the Yadana natural gas exploration, development, and production project in July 1992. MOGE is a petroleum company that is wholly owned and operated by the State Law and Order Restoration Council (SLORC), the military government of Burma. In 1993, just prior to Unocal joining the venture, Total and MOGE discovered a giant natural gas field. This discovery made the production and exportation of gas a profitable possibility for Burma and its corporate co-venturers.

By 1997, however, Unocal, along with Total, SLORC and MOGE, were facing civil liability in U.S. federal court under the Alien Tort Claims Act for violating the human rights of Burmese citizens (because MOGE is owned by SLORC, SLORC will be used in this article for the purposes of identifying MOGE with the project). The Burmese plaintiffs alleged that SLORC committed such acts as torture, rape, and slavery in connection with the Yadana pipeline project. The resulting case, *John Doe I, et al. v. Unocal Corporation, et al. (Unocal)*, is groundbreaking because it marks the first time that a U.S. federal district court has held that private corporations based in the United States can be liable for violations of international law committed abroad. The court ruled that the Alien Tort Claims Act provided jurisdiction over the plaintiff's claims against Unocal. The court also ruled that the Act of State doctrine did not preclude consideration of the claims, but did rule that the Foreign Sovereign Immunity Act prevented the court from holding SLORC accountable for alleged human rights abuses.

Unocal, which is based in California and incorporated in Delaware, produces and sells energy sources of varying types and is extensively involved in the international exploration, production, and sale of oil and natural gas. Approximately one-half of the company's production sources are located outside of North America. Unocal is currently developing energy projects in Latin America, Central Asia, and South Asia, and has existing operations in Thailand, Indonesia, Bangladesh, the Netherlands, Azerbaijan, the Democratic Republic of Congo, and Burma. Unocal also owns a chain of 1,200 "76" gasoline stations across the continental United States.

Burma, with a population of approximately 46 million people representing 20 major ethnic groups and 100 different dialects, has a notorious human rights record as documented by the U.S. Department of State, and non-governmental organizations such as Human Rights Watch. In December 1994, the United Nations General Assembly passed a resolution condemning human rights violations in the country and in March 1995, the United Nations Commission on Human Rights passed a similar resolution.

In 1988, Burma's military junta, which came to power in a 1962 coup, violently repressed widespread, non-violent, anti-government demonstrations, killing between 3,000 and 10,000 demonstrators and incarcerating thousands more without trial. That same year, the junta renamed itself SLORC, imposed martial law, and renamed the country Myanmar. In response to citizens' demands for elections, SLORC held multi-party elections in 1990. The National League for Democracy (NLD), founded by Tin Oo and 1991 Nobel Peace Laureate Aung San Suu Kyi, won a clear electoral victory, capturing 392 of the possible 474 parliamentary seats.

SLORC refused to honor the election results, and subjected NLD leaders to intimidation, house arrest, and detention. Two hundred NLD leaders remain in government custody. According to the U.S. Department of State, SLORC is "a highly authoritarian military regime" that acts with the assistance of its military intelligence organization, the Directorate of Defense Services Intelligence, and continues to maintain repressive control over the country, subjecting the country's citizens to arbitrary arrests and detentions, extrajudicial killings, and rapes. The State Department also reports that there are currently 1,000 political prisoners in Burma and that SLORC still forces citizens to work as porters and to labor on public works and food production projects. In response to SLORC's authoritarian rule, NLD leaders have called on the international community to end foreign direct investment in Burma, which would serve to deplete resources necessary for SLORC to maintain its control.

In response to deteriorating human rights conditions since Burma's 1990 elections, President Clinton, in 1997, imposed an embargo on new investments in Burma. The embargo did not apply to Unocal, the biggest U.S. investor in Burma, because Unocal's financial involvement in the Burmese pipeline construction predated the imposition of the embargo. Furthermore, 20 state and local governments in the United States, such as Massachusetts and New York City, passed selective purchasing laws prohibiting companies doing business in Burma from competing for government contracts. Industry trade groups, however, have challenged the constitutionality of several of these state laws. The passage of laws restricting business with Burma by all levels of government in the United States indicates the U.S. public's common concern for Bur-

ma's human rights record and the controversial role foreign direct investment may play in financially strengthening repressive regimes.

### Yadana Gas Pipeline Project

The Yadana pipeline project will transport natural gas produced from two offshore drilling platforms, located 345 kilometers off the southern coast of Burma in the Andaman Sea, across the 63 kilometers of the Tenasserim region of southern Burma, and across the Thai border. As part of the pipeline contract, MOGE was responsible for clearing and leveling tracts of land for the pipeline route; providing sufficient labor and materials; allowing physical access to the pipeline construction areas for corporate employees; and providing security for corporate employees working in the region. As an entity of the Burmese government, MOGE arranged for the dispatch of over 3,000 SLORC soldiers to the Tenasserim region to fulfill these contractual obligations. In February 1995, the Petroleum Authority of Thailand (PTT) contracted with the joint venture to purchase gas for the next 30 years, the first foreign direct investment contract to use gas from the Yadana pipeline. The pipeline is predicted to earn US \$200 to \$500 million annually for Burma, and is the country's largest single source of foreign direct investment.

Once construction began, residents of the areas in and around the pipeline corridor began to suffer human rights abuses at the hands of SLORC troops. According to a March 1999 report published by *The Nation*, SLORC authorities forcibly relocated thousands of villagers residing in the pipeline's path and seized the villagers' property. Based on victim testimonies and eyewitness accounts, soldiers also conscripted villagers from the region to labor involuntarily on the pipeline or to serve as porters in the pipeline

The court ruled that the Alien Tort Claims Act provided jurisdiction over the plaintiff's claims against Unocal.

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Burmese people seeking refuge near the Thai border, after being displaced by the pipeline construction.

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region. Often, forced laborers died from inadequate food, water, and medical care. SLORC soldiers also executed laborers for failing to carry loads or attempting to escape. In addition, SLORC troops routinely confiscated food and property from villagers and demanded money, calling the forced donation a "pipeline tax."

#### The Lawsuit

In response to SLORC's abuse of the people living in the Tenasserim region, EarthRights International (ERI), the Center for Constitutional Rights, and two California-based law firms, Hadsell & Stromer and the Law Offices of Paul Hoffman, assisted 11 plaintiffs from the Tenasserim region of Burma in bringing a lawsuit against Unocal, two top Unocal executives (John Imle and Roger Beach), Total, MOGE, and SLORC (SLORC renamed itself the State Peace and Development Council in late 1997, but it will be referenced by its name at the time of the original filing of the lawsuit). The Burmese plaintiffs, whose identities are protected under seal, filed suit in the U.S. District Court for the Central District of California on October 3, 1996.

The plaintiffs in the *Unocal* lawsuit are seeking compensation for damages on 18 claims, arguing that SLORC military and intelligence personnel, as agents of Unocal and Total, used illegal force under international law to the direct benefit of the joint venture project. The claims against Unocal include crimes against humanity, forced labor, torture, loss of their homes and property, and rape. The plaintiffs also are seeking injunctive and declaratory relief under U.S. law, including a court order directing Unocal to cease payments to SLORC and to cease participating in the Yadana joint enterprise until the corporation can guarantee that no further human rights abuses will occur on the Yadana pipeline project.

#### The Alien Tort Claims Act

The Burmese plaintiffs were able to file their unprecedented lawsuit in U.S. federal court because of the federal Alien Tort Claims Act (ATCA). The ATCA never before had been used against a corporation based in the United States. Established in 1789, the ATCA remained virtually unused and forgotten until 1980, when a federal court in *Filariga v. Pena-Irala* construed the statute to permit the exercise of jurisdiction over a Paraguayan defendant accused of torturing a fellow citizen in Paraguay. The *Filariga* case referred to torture as a crime that "violates internationally accepted norms of international law." The ATCA grants a federal court subject matter jurisdiction over a claim when a non-U.S. citizen or alien sues for a tort committed in violation of a United States

treaty or other international law. Under the ATCA, the plaintiff may sue a U.S. or non-U.S. citizen. In this *Unocal* case, the plaintiffs claimed Unocal violated international laws prohibiting torture, slavery, and crimes against humanity. In *Unocal*, the court noted that when applying the ATCA, a court must conclude whether applicable international law exists; whether the United States recognizes the applicable law; whether the applicable law is still valid; and whether the defendant has violated that law.

#### Unocal's Motion to Dismiss

Unocal was the only defendant to respond to the complaint and it filed a motion to dismiss the suit based on several jurisdictional grounds. Unocal argued that the Foreign Sovereign Immunities Act precluded subject matter jurisdiction over SLORC; that the ATCA did not provide subject matter jurisdiction; and that the Act of State doctrine prevented the court from considering the plaintiff's claims. In reviewing the motion to dismiss, the federal court determined only whether it has jurisdiction over the plaintiff's claims. The court

does not conduct an evidentiary hearing to assess the validity of the plaintiff's allegations.

#### Foreign Sovereign Immunities Act

Unocal first argued that the court lacked subject matter jurisdiction over the claims against SLORC because the Foreign Sovereign Immunities Act (FSIA) limits the jurisdiction U.S. courts can obtain over a foreign state and its agency or instrumentality. The FSIA defines "agency or instrumentality" as a separate legal person (e.g., a state-owned business) that is a subdivision of a foreign state and grants a foreign state immunity from U.S. jurisdiction unless the state's action fits particular exceptions.

The exceptions to immunity are based on either (1) a foreign state's commercial activity in the United States; (2) an act performed in the United States in connection with a foreign state's commercial activity conducted outside U.S. territory; or (3) an act performed outside the United States connected to a foreign state's commercial activity conducted outside U.S. territory, but which causes a direct effect within the United States. The FSIA defines a "commercial activity" as "either a regular course of commercial conduct or a particular commercial transaction or act." The FSIA further explains that the commercial character of an activity is determined according to the nature of the activity, not the purpose of the activity. A U.S. Seventh Circuit case, *Wolf v. Federal Republic of Germany*, held that a government is engaged in a commercial activity "only when it exercises powers that can also be exercised by private citizens, or when it acts like a private player in the market." For example, the levying of taxes is not a commercial activity because only a government has the power to tax citizens.

The court in *Unocal* recognized that although SLORC engaged in commercial activity through its involvement in the Yadana pipeline project, SLORC's alleged violations of international human rights law were "peculiarly sovereign in nature," relating to a sovereign's police power. Consequently, SLORC's acts did not meet the commercial activity exception to the FSIA, which is required for the U.S. federal court to obtain jurisdiction.

#### Subject Matter Jurisdiction under the Alien Tort Claims Act

A plaintiff must prove that the defendant committed an act in violation of international law in order for a U.S. court to have subject matter jurisdiction over a claim under the ATCA. Unocal asserted that the court lacked subject matter jurisdiction over the plaintiffs' claims because only foreign sovereigns can violate international law. The court rejected this argument on two grounds. First, the court stated that if Unocal authorized SLORC to act on its behalf, or if Unocal established an agency relationship with SLORC, then the

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court could determine that Unocal committed a state action in violation of international law, thereby warranting subject matter jurisdiction under the ATCA. The court also noted that the allegations were sufficient, under a Motion to Dismiss standard, to allow a review of evidence concerning Unocal's liability for SLORC's alleged human rights violations. Second, the court confirmed that under the ATCA, individuals can be held liable for certain egregious forms of conduct that violate international law, such as slave trading, without being state actors. The court proposed that the plaintiffs' allegations of forced labor were "sufficient to constitute an allegation of participation in slave trading." Although acknowledging the absence of allegations that SLORC was selling Burmese villagers to Unocal, the court asserted that Unocal, by paying SLORC for the provision of labor and security, was "essentially treating SLORC as an overseer, accepting the benefit of and approving the use of forced labor." These actions were sufficient to establish subject matter jurisdiction under the ATCA.

#### Act of State Doctrine

Unocal also argued that the Act of State doctrine prohibited the court from hearing the matter. The court rejected this argument and found that the Act of State doctrine does not apply in this case. U.S. courts apply the Act of State doctrine, as defined in *Banco Nacional de Cuba v. Sabbatino*, when a defendant is a foreign sovereign. Traditionally, the application of the Act of State doctrine rested on the notion of comity between sovereign states, or that the "courts of one country will not sit in judgment on the acts of the government of another." Modern formulations of the doctrine, however, emphasize the doctrine's use in maintaining the separation of powers between the judicial, executive, and legislative branches of the U.S. government.

Unocal argued that if the federal district court heard the case against Unocal, the court would be interfering with congressional and executive foreign policy efforts. The court determined its exercise of jurisdiction would not interfere inappropriately with the responsibilities granted to the executive and legislative branches and dismissed this argument. The court reasoned that the Act of State doctrine did not bar judicial involvement where the coordinate branches previously and clearly denounced Burma's human rights abuses.

#### Court's Decision Sets New Precedent

By denying, in part, Unocal's motion to dismiss, the court in *Unocal* set new precedent in granting subject matter jurisdiction over the plaintiffs' claims against Unocal. This decision marks the first time a U.S. federal court has held a private U.S.-based corporation liable under the ATCA for violations of international law committed abroad. Such a decision is awesome in its potential implications for U.S. multinational corporations and is an invaluable judicial deci-

**Unocal argued that if the federal district court heard the case against Unocal, the court would be interfering with congressional and executive foreign policy efforts.**

sion for those seeking to prevent companies from benefiting from human rights abuses occurring in countries where the companies invest. Supporters of the decision emphasize that a business entity no longer can avoid liability simply because the human rights abuses took place in a foreign state. According to Katharine Redford, Director of ERI, this use of the ATCA can provide compensation and a sense of justice for victims. Before this precedent-setting decision, victims of U.S. corporate-subsidized abuse could

rely on only a condemning report from the UN Commission on Human Rights or Resolution from the General Assembly, if the victims' home country petitioned on their behalf. Otherwise, victims would face the logistical difficulty of suing the U.S.-based corporation in the foreign country where the abuses took place.

Critics of the district court's decision argue that the court's holding significantly limits the exceptions to immunity under the FSIA. The critics argue that, according to this decision, state actions that violate human rights may more commonly be defined as "police power" and not "commercial activity." Plaintiffs, therefore, must prove that a foreign sovereign is engaged in a commercial activity if the court is to exempt a foreign government from immunity. Police or military actions that violate human rights would not be considered "commercial activity" if they performed such actions in the course of ensuring law and order or targeting armed rebels, activities unique to governments. The critics complain that the court's categorization of the human rights abuses committed by SLORC as "police power" will make it more difficult for future victims to hold sovereign states accountable under the ATCA for human rights violations.

Other critics of the decision argue that the court did not sufficiently ground its decision in precedent in that the decision potentially holds U.S. companies accountable for violations of international law committed primarily by foreign sovereign business partners. By only providing a general warning to multinational corporations doing business with repressive foreign governments, they argue that the decision provides little guidance that companies could use as precedent when seeking to avoid human rights violations. In addition, while the decision exposes U.S. companies to liability for violations of international human rights, foreign sovereigns such as SLORC escape accountability.



The pipeline facility in Nat Ei Taung, Burma that will pump the natural gas into Thailand.

#### Consequences of the Decision

The Burmese plaintiffs and Unocal are in the deposition stage of the pre-trial process and the court has yet to set a date for an evidentiary hearing. According to ERI's Redford, SLORC has not produced any official statements and did not respond when notified of the lawsuit. ERI's Redford and Ka Hsaw Wa, founder of ERI and a former human rights activist in Burma, continue to interview and depose witnesses and victims in the Tenasserim region.

If the court is unwilling to grant the plaintiffs' requested injunction of corporate payments to Burma, Redford hopes the court will agree to fashion a monitoring system with independent human rights observers, journalists, or other identified persons to track the occurrence of violations in connection with the Yadana pipeline project. Such a monitoring system would set yet another precedent for future plaintiffs utilizing the ATCA.

In addition to the lawsuit filed by the Burmese plaintiffs, Unocal faces other difficulties. Although construction of the pipeline

continued on page 32

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was completed in the summer of 1998, the Thai government has failed to purchase gas because of delayed construction of a power plant that the Yadana pipeline was to fuel and because of low consumer demand. In August 1999, Unocal, MOGE, Total, and the Petroleum Authority of Thailand renegotiated their original contract purchasing agreement. PTT agreed to pay for the 1998 contractual quantity of gas and to accept future quantities of gas every contractual year at a reduced price.

Furthermore, at the Unocal shareholders meeting held in Brea, California on May 24, 1999, protestors and shareholders confronted Unocal executives with accounts of forced labor used to construct the Yadana pipeline. At the annual meeting of stockholders, the Free Burma Coalition introduced a resolution calling on Unocal to respond to these allegations. Although the resolution received 7.1% of shareholders' votes, this percentage was not sufficient to require Unocal's Board of Directors to act. Coincidentally, Unocal's vice chairman and architect of the Yadana gas pipeline project, John Imle, resigned from his position three months later.

#### Conclusion

The *Unocal* case illuminates a new option for human rights advocates pursuing corporate liability claims and seeking to provide justice for victims of corporate-subsidized abuses. As transnational and multinational corporate entities become even more powerful than the governments of the countries in which they invest, this effective use of the Alien Tort Claims Act provides individual victims with the possibility of holding corporations accountable for the human rights violations from which corporations benefit. ☉

*\*Carlyn Carey is a J.D. candidate at the Washington College of Law.*

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