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Courtney Shaw*

INTRODUCTION

On August 31, 2000, a federal district court judge in California handed down a decision that disposed of a potentially groundbreaking human rights case.[1] In *Doe v. Unocal Corp.*,[2] Judge Ronald S.W. Lew granted defendant Unocal's motion for summary judgment,[3] thereby dismissing claims brought by fifteen Burmese villagers[4] under the Alien Tort Claims Act, 28 U.S.C. § 1350 (ATCA).[5] The plaintiffs sought to hold the defendant, a California-based energy company, liable for human rights violations committed by the Burmese military in furtherance of defendant's pipeline venture. An earlier version of the case, *National Coalition Government of the Union of Burma v. Unocal*,[6]

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1. Doe v. Unocal Corp., 110 F. Supp. 2d. 1294 (C.D. Cal. 2000) (*Unocal V*).

2. I will refer to the various *Unocal* decisions with Roman numerals reflecting the order in which they were decided.

3. *Id.* at 1312.

4. *Id.* at 1295.

5. *Id.* at 1303. Plaintiffs also filed claims under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961, et seq., and the federal question statute, 28 U.S.C. § 1331. These claims were disposed on summary judgment; additionally, a number of pendent California state causes of action were dismissed without prejudice. *Id.* at 1312.

6. 176 F.R.D. 329 (1997) (*Unocal II*). The plaintiffs in this proceeding included a group of unions. One union consisted of the displaced Burmese government. The court determined that the union did not have standing to sue in its capacity as a foreign government, because it was not currently the official government of Burma. *Id.* at 338. Nor did the displaced government have the capacity to sue on behalf of the people of Burma. *Id.*

had held that allegations that Unocal "may have been a willing participant" in the Burmese military action would permit the federal district court to exercise subject matter jurisdiction.[7] However, the decision in *Unocal V* held that the evidence was insufficient to survive a summary judgment motion. Although the litigation was dismissed, the issues raised by the case remain pertinent and unresolved.[8] When an energy company undertakes ventures abroad, is it liable in United States federal court for human rights violations committed in connection with its operations in those foreign countries?[9]

This issue is important to multinational companies, and to energy companies in particular. Multinational energy companies are among the largest companies in the world. Their ventures around the globe tend to expose them to a wide variety of societal conditions, including many human rights and environmental problems.[10] Additionally, energy companies face a unique set of circumstances in performing their work. First, the resources they are seeking are often found in less-developed countries. For the governments of such countries, these resources are often a primary supply of income.[11] Second, resource extraction work usually involves constructing complicated infrastructure at the site and utilizes a good deal of hard labor.[12] As a result, energy companies often confront particularly grave human rights conditions. Finally, many energy companies engage in a practice that has been termed "militarized commerce," meaning that they rely on the military forces of their host country to provide security for their projects.[13] Certainly when companies engage foreign military or paramilitary forces in this fashion, they run the risk of fending off lawsuits for any human rights abuses committed by those forces in conjunction with the projects.

A proliferation of recent litigation demonstrates that extraterritorial liability under the ATCA has become a serious issue for the operation of multinational energy companies. The *Unocal* litigation in the Ninth Circuit is but one example of this trend. For example, in the late 1990s, two cases in the Second Circuit dealt with multinational oil companies being sued by foreign plaintiffs

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at 340. The court also found that the plaintiff did not have standing to sue as a representative of the people of Burma. The court also dismissed claims under the ATCA by a private organization, the Federation of Trade Unions of Burma (FUTB). While the FUTB had standing for separate negligence claims, it did not have standing, either in its own right or as an association on behalf of its members, to sue for the ATCA claims. *Id.* at 343, 344.

7. *Id.* at 348.

8. As of this writing, these issues have not been affirmed or overturned on appeal.

9. This Note will not address possible liability in state court.

10. *See* Saman Zia-Zarifi, *Suing Multinational Corporations in the U.S. for Violating International Law*, 4 UCLA J. INT'L L. & FOREIGN AFF. 81, 82 (1999).

11. *Id.*

12. *Id.*

13. Craig Forcese, *ATCA's Achilles Heel: Corporate Complicity, International Law and the Alien Tort Claims Act*, 26 YALE J. INT'L L. 487, 489 (2001).

under the ATCA for violation of international law.[14] One case, which was ultimately dismissed on forum non conveniens grounds, involved environmental claims against Texaco for its operations in Ecuador.[15] The second case, which was also dismissed on forum non conveniens, involved human rights claims against Shell in Nigeria.[16] More recently, a lawsuit has

14. Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88 (2d Cir. 2000), *cert. denied*, 532 U.S. 941 (2001); Aguinda v. Texaco, Inc., No. 93 Civ. 7527, 2000 U.S. Dist. LEXIS 745 (S.D.N.Y. Jan. 31, 2000).

15. This case involved a set of purely environmental claims. Texaco conducts oil-producing activities in the Oriente region of Ecuador. The plaintiffs in the case alleged that this American oil company, as part of a joint venture with the national Ecuadorian oil company, injured the environment in the region by mishandling waste generated by oil exploration and extraction, rupturing pipelines, and initiating oil spills. In addition, environmental activists reported that the damage to the environment has caused dislocation of indigenous peoples and exposed them to disease. *See* Zia-Zarifi, *supra* note 10, at 99-100.

The litigation was originally commenced as *Sequihua v. Texaco*, 847 F. Supp. 61 (S.D. Tex. 1994), in state court in Texas with no ATCA cause of action. The case was removed to federal court and subsequently dismissed. *Sequihua*, 847 F. Supp. at 63. A different set of plaintiffs then filed claims arising out of the same set of violations, this time under the ATCA in federal court in New York, Texaco's home base. Zia-Zarifi, *supra* note 10, at 100. The substantive issues raised by the allegations have not yet been reached. Instead, the motions have all involved issues of international comity and forum non conveniens. The Second Circuit held in 1998 that, unless Texaco was willing to submit itself to jurisdiction in Ecuador, the case could go forward in the Southern District of New York. Jota v. Texaco, Inc., 157 F.3d 153, 155 (2d Cir. 1998). Texaco then consented to the jurisdiction of the Ecuadorian courts and renewed its motions to dismiss in district court. Aguinda v. Texaco, Inc., No. 93 Civ. 7527, 2000 U.S. Dist. LEXIS 745, at *4 (S.D.N.Y. Jan. 31, 2000). New political developments in Ecuador, however, challenged the previous findings that the country would be able to provide a just forum for adjudication of the case. *Id.* at 5. The district court ordered that the record be reopened so that the parties could submit more information on this issue. *Id.* at 10. In May of 2001, however, the court declined to find that the new conditions rendered Ecuador an unacceptable forum and dismissed the case on forum non conveniens grounds. Aguinda v. Texaco, Inc., 142 F. Supp. 2d 534, 554 (S.D.N.Y. 2001).

16. This case involves purely human rights claims in Nigeria. One part of Nigeria, known as Ogoniland, is a prolific oil-producing region, providing up to 75 percent of the budget that supports the military dictatorship in Nigeria. Zia-Zarifi, *supra* note 10, at 94-95. The Nigerian government has had a history of mismanagement of government money, resulting in poor social and economic conditions. *See* Scott Dolezal, *The Systematic Failure to Interpret Article IV of the International Covenant on Civil and Political Rights: Is There a Public Emergency in Nigeria?*, 15 AM. U. INT'L L. REV. 1163, 1165 (2000). Despite promises that the people of Ogoniland would see more of the revenue brought in by the oil industry, very little progress has been made, and human rights violations continue. *Id.* at 1165-66. In addition, the oil companies operating in Ogoniland (including Shell, Elf Aquitaine, Agip, Mobil, Texaco, and Chevron) have caused extensive environmental damage in the region. Zia-Zarifi, *supra* note 10, at 95. After being ignored by both the government and the oil companies, the native people, led by a man named Ben Saro-Wiwa, began to retaliate through various acts of sabotage. Dolezal, *supra*, at 1166. In response, Shell's Nigerian subsidiary, Shell Petroleum Development Company of Nigeria (SPDC), asked the Nigerian military for assistance. A brutal military crackdown ensued. Zia-Zarifi, *supra* note

been filed in the District of Columbia against Exxon Mobil for alleged human rights abuses committed by the Indonesian military, which the company had used as security in its natural gas projects in that country.[17] Although none of these ATCA cases has yet resulted in a successful judgment for the plaintiffs, they represent a trend with which multinational oil companies must contend.

One problem in determining whether a company might potentially be liable for its actions abroad is that there is no federal statute that squarely addresses the answer to this question.[18] Commentators and lawyers alike have called for statutory codification of guidelines to aid American multinational oil companies in making decisions in this regard.[19] For example, one lawyer stated:

> So, why am I troubled by the Unocal doctrine? That's the problem—it should not be a judicial doctrine, it should be a statute. As a doctrine, it's much easier

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10, at 95. Leaders of the Ogoni people, including Saro-Wiwa, were tortured and eventually hanged. *Wiwa*, 226 F.3d at 92.

Saro-Wiwa's estate and the widow of another Ogoni leader then filed suit against the Royal Dutch Shell family under the ATCA in the Southern District of New York. Zia-Zarifi, *supra* note 10, at 95. Complainants alleged that SPDC actively recruited the Nigerian military to attack and suppress the Ogoni people who opposed the company. *Wiwa*, 226 F.3d at 92-93. They contended that the SPDC had either conspired or endorsed extrajudicial murder, torture, and crimes against humanity. Zia-Zarifi, *supra* note 10, at 95-96. As in the Texaco litigation, the district court never reached the merits of the claims and dismissed the case on forum non conveniens grounds in 1998. Wiwa v. Royal Dutch Petroleum Co., No. 96 Civ. 8386, 1998 U.S. Dist. LEXIS 23064, at *1 (S.D.N.Y. Sept. 25, 1998). The Second Circuit then reversed and remanded the case back to the district court. *Wiwa*, 226 F.3d at 108. The United States Supreme Court denied certiorari in March of 2001. Royal Dutch Petroleum, Co. v. Wiwa, 532 U.S. 941 (2001).

17. Eric Marcks, *Avoiding Liability for Human Rights Violations in Project Finance*, 22 ENERGY L.J. 301, 301 n.4 (2001). *See also* Exxon Mobil Sued in U.S. Court for Human Rights Abuses in Indonesia, *available at* http://www.laborrights.org (last visited Jan. 7, 2002). Reportedly, the Indonesian government had a history of oppressing the Indonesian province of Aceh, and a separatist movement had developed within that region. Aceh had been designated by the former dictator of Indonesia as a military operational area in 1989. Subsequent to this designation, the Indonesian military maimed, tortured, raped, and killed thousands of citizens of Aceh. Aceh is also an area rich in oil and natural gas, and Exxon Mobil developed resource extraction facilities there. In doing so, it contracted with the government of Indonesia, which was still under a brutal dictatorship, to obtain security for the project. The complaint alleges, among other things, that Exxon Mobil entered into those contracts with the government of Indonesia knowing that military troops would be deployed as security, and that such troops were likely to inflict grave human rights abuses on the people of Aceh, including genocide, murder, torture, crimes against humanity, sexual violence, and kidnapping. Complaint of Plaintiff, Doe v. Exxon Mobil Corp. (D.D.C. June 11, 2001), *available at* http://www.laborrights.org (last visited Jan. 7, 2002).

18. Such federal legislation has been proposed. *See* David I. Becker, *A Call for the Codification of the UNOCAL Doctrine*, 32 CORNELL INT'L L.J. 183, 202-205 (1998) (setting out pertinent parts of such legislation and describing its effects).

19. *See, e.g., id.* at 205-07 (detailing arguments that support the enactment of such federal legislation).

20. Referring to the 1997 decision of *Unocal II*.

> to applaud than to apply. It strikes a blow for human rights against an alleged violator, but it offers virtually no guidance to companies that want to avoid a violation. All the doctrine does is warn companies very generally that they should not knowingly benefit from a governmental business partner's violations of human rights.[21]

In the absence of such legislation, however, the only guidelines that energy companies can utilize are a patchwork of doctrines developed in the recent cases dealing with the subject.

This Note examines the most important of those doctrines: a responsibility standard articulated by Judge Lew in the *Unocal V* decision. This standard, which essentially attempts to define when a company may be held responsible for the bad acts of foreign governments, determines whether subject matter jurisdiction will lie under the ATCA. In this regard, Part I of this Note explores the legal foundations of the *Unocal* case—the history of the ATCA and issues encountered in its early use in human rights litigation. Specifically, these issues are the problems of establishing the ATCA as a substantive right of action, determining that private actors are liable under the ATCA in some circumstances, and defining the boundaries of the class of violations that the ATCA covers. In Part II, this Note reviews the circumstances of the *Unocal* case itself and details the actual standard for responsibility laid out in the *Unocal V* case, a standard that is premised on imputing color of state law on private actors through a joint action test developed in American civil rights jurisprudence. In Part III, this Note describes several possible alternatives to the responsibility standard articulated in *Unocal V*, some of which could be more problematic for multinational energy companies. First, it explores other possible interpretations of the joint action test. Second, it explores other tests in civil rights jurisprudence for imputing color of law on private actors. After finding that applying any of the civil rights doctrine may not be appropriate, it finally explores several alternative standards of liability: state responsibility, joint liability for a tort, and accomplice liability. This Note concludes that the last two alternatives may be more appropriate than the *Unocal* standard, but that substantial uncertainty for multinational oil companies remains, since the standard has yet to be addressed on appellate review or by a statute.

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21. Gregory Wallace, *Fallout From Slave-Labor Case is Troubling*, N.J.L.J., Dec. 8, 1997, at 24, *available at* LEXIS, News, News Group File, All (referring to the 1997 decision of *Unocal II*).

I. THE ALIEN TORT CLAIMS ACT

A. *Early History*

The Alien Tort Claims Act, 28 U.S.C. § 1350, was part of the Judiciary Act of 1789.[22] The original statute said: "[The district courts] shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States."[23] It has been modified three times subsequently[24] and now reads: "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."

Several reasons have been posited as to the original purpose of the ATCA. One view is that it was primarily a response to national security concerns—its drafters were concerned about the consequences of denying a judicial forum to foreigners.[25] Another theory is that the drafters did not want to discourage settlement and investment in the United States by foreigners, and felt that declining to provide a judicial forum would have such a negative effect.[26] A third idea is that the ATCA's chief purpose was to provide a judicial forum to foreign ambassadors in America.[27] One final theory is that it was intended to be a "badge of honor"[28] for the young United States, indicating that the country was ready to shoulder a perceived national duty to enforce international law as it related to individual conduct.[29] Although it is improbable that the clear rationale of the statute's original drafters can be discerned, it is generally thought that the statute now covers a more broad range of violations of the law of nations than those recognized at the time of its enactment.[30] Now it creates a forum available to aliens in any situation in which the United States has a duty to hear claims under international law.[31]

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22. Judiciary Act of 1789, ch. 20, 9(b), 1 Stat. 73, 77 (1789).

23. Becker, *supra* note 18, at 189.

24. *Id.*

25. Jeffrey Rabkin, *Universal Justice: The Role of Federal Courts in International Civil Litigation*, 95 COLUM. L. REV. 2120, 2125 (1995).

26. *Id.*

27. *Id.* at 2125-26.

28. Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L L. 461 (1989).

29. *Id.* at 475.

30. Professor Abraham D. Sofaer, Transnational Human Rights Litigation in the United States: Present Status and Future Potential, Presentation to Susman Godfrey L.L.P. Retreat 8-9 (Sept. 2000) (transcript available from Prof. Sofaer, Hoover Institution, Stanford University).

31. *Id.*

Although some claims were brought under the ATCA at the beginning of nationhood, the statute traditionally was overlooked and was not considered an especially important piece of legislation.[32] Indeed, the statute was invoked successfully only five times in its first 200 years, making it a rather ineffective source of relief.[33] Judge Henry Friendly described the ATCA as "a kind of legal Lohengrin; although it has been with us since the first Judiciary Act . . . no one seems to know whence it came."[34] The ATCA was resuscitated as a tool for human rights litigation in 1980 with the Second Circuit's decision in *Filartiga v. Pena-Irala*, where the court held that the ATCA authorized liability for torture committed under color of state authority.[35] In 1995, it gained further attention in another Second Circuit decision, *Kadic v. Karadzic*, which expanded the statute's reach to private actors in some circumstances.[36]

B. *Mere Jurisdiction or a Substantive Right of Action?*

One important issue that has been raised in past ATCA litigation is whether the statute actually creates a substantive cause of action. The statute could be read as simply a grant of subject matter jurisdiction to the kinds of cases it covers.[37] Several recent cases, however, have interpreted the statute more broadly, holding that in addition to conferring jurisdiction, it creates an actionable claim.[38] The first case to do so was the *Filartiga* decision.[39] In that case, two Paraguayan citizens accused the former Inspector General of Paraguay of torturing and killing one of their family members. They alleged that such official torture violated the law of nations and was actionable under the ATCA.[40] The district court dismissed the case before reaching its merits.[41] The Second Circuit, however, reversed this finding and allowed the case to proceed.[42] Although the court never explicitly stated in the case that the ATCA

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32. Rabkin, *supra* note 25, at 2126.

33. *Id.* at 2126 n.31.

34. ITT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975). Lohengrin was a legendary figure most famously depicted in Wagner's opera of the same name. He was an enigmatic knight who would not reveal his full identity to his bride. *See* Rabkin, *supra* note 25, at 2126 n.32.

35. 630 F.2d 876 (2d Cir. 1980).

36. 70 F.3d 232 (2d Cir. 1995), *cert. denied*, 519 U.S. 1005 (1996).

37. *See, e.g.*, Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 811 (Bork, J., concurring).

38. *See Filartiga*, 630 F.2d 876; *Karadzic*, 70 F.3d 232.

39. Hon. John M. Walker, Jr., *Domestic Adjudication of International Human Rights Violations Under the Alien Tort Statute*, 41 ST. LOUIS U. L.J. 539, 540 (1997).

40. Becker, *supra* note 18, at 190.

41. *See Filartiga*, 630 F.2d at 880.

42. *See id.*

created a substantive right of action, it indirectly supported this proposition; and subsequent authorities have taken *Filartiga* to stand for this idea.[43]

Because the Supreme Court has not addressed the issue of a private right of action under the ATCA,[44] whether such a right currently exists may depend on the circuit in which the case is brought. The Second Circuit reaffirmed its decision in *Filartiga* with its decision in *Karadzic*. That case found a substantive right of action for citizens with respect to certain war crimes, such as genocide, rape, forced prostitution, arbitrary detention, summary execution, and wrongful death.[45] Three other circuits have reached the cause of action issue, and two of them have followed the lead of the Second Circuit.[46] The Ninth Circuit did so in 1994 with its decision in *In re Estate of Ferdinand E. Marcos Human Rights Litigation*;[47] the Eleventh Circuit followed suit in 1996 with *Abebe-Jira v. Negewo*.[48]

The remaining circuit to encounter the question was the D.C. Circuit, which dealt with the issue in *Tel-Oren v. Libyan Arab Republic*.[49] The claims in that case, brought by survivors of a group of Palestinian Liberation Organization (PLO) murder victims, were dismissed by a three-judge panel, each of whom wrote a separate concurring opinion. They differed in their views of the ATCA.[50] Judge Edwards, while supporting the dismissal of the claims because non-state actors committed them, did accept the proposition that the ATCA granted a substantive right of action in some cases.[51] Judge Bork, on the other hand, supported dismissal of the claims because in his view, the ATCA only conferred jurisdiction.[52] Any right of action would have to come from a separate source, not including customary international law or the federal common law.[53] Judge Robb declined to address the issues raised by Edwards and Bork about the ATCA and concluded instead that the courts should not decide the claims because they were inherently political.[54]

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43. Becker, *supra* note 18, at 190.

44. *Id.* at 192.

45. Rabkin, *supra* note 25, at 2128-29.

46. Becker, *supra* note 18, at 191.

47. 25 F.3d 1467, 1475 (9th Cir. 1994) ("We thus join the Second Circuit in concluding that the Alien Tort Act, 28 U.S.C. § 1350, creates a cause of action for violations of specific, universal and obligatory international human rights standards. . . .").

48. 72 F.3d 844, 848 (11th Cir. 1996) ("[The ATCA] establishes a federal forum where courts may fashion domestic common law remedies to give effect to violations of customary international law.").

49. *Tel-Oren*, 726 F.2d 774.

50. Becker, *supra* note 18, at 191.

51. *See Tel-Oren*, 726 F.2d at 777-82 (Edwards, J., concurring).

52. *See id.* at 801 (Bork, J., concurring).

53. *See id.* at 809-11.

54. *See id.* at 823 (Robb, J., concurring).

Part of the controversy was settled in a federal statute passed in 1992. The Torture Victims Protection Act created a cause of action for anyone (including both aliens and U.S. citizens) for torture or extrajudicial killing committed by anyone acting under "actual or apparent authority, or color of law, of any foreign nation."[55] The TVPA would seem to replace the ATCA as the basis for a private cause of action with respect to official torture. Its implications for ATCA causes of action generally, however, are perhaps less clear. On the one hand, the passage of the TVPA could mean that Congress only intends a cause of action for violations of international law that it has expressly enumerated through legislation, and that the ATCA is merely a jurisdictional statute.[56] On the other hand, the House Report on the TVPA indicates that Congress felt official torture is something that merits individual attention, and that the TVPA does not limit the ATCA's application to other violations of international law.[57] Given this statement, it is more likely that the TVPA will not strip the ATCA of its ability to grant a cause of action.[58]

C. *State or Private Action?*

Another important issue for ATCA litigation is whether plaintiffs may invoke the statute against both state and private actors. It is clear that the ATCA does not grant federal courts jurisdiction over foreign sovereigns—the Supreme Court has held that the only source of jurisdiction over foreign states is the Foreign Sovereign Immunities Act (FSIA).[59] The FSIA, 28 U.S.C. § 1330, *et. seq.*, codifies the common law doctrine that foreign sovereigns, their agencies, and their instrumentalities are generally immune from suit in U.S. courts.[60] The FSIA is subject to numerous exceptions;[61] and if a plaintiff seeks

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55. 28 U.S.C.A. § 1350 (West 2000). This Act effectively implemented through legislation the Torture Convention, which the United States ratified in 1988. *See* Sofaer, *supra* note 30, at 26.

56. Walker, *supra* note 39, at 551; *see also* Christopher W. Haffke, *The Torture Victims Protection Act: More Symbol than Substance*, 43 EMORY L.J. 1467, 1481 (1994).

57. H.R. Rep. No. 102-367, at 4 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 86 ("Official torture and summary execution merit special attention in a statute expressly addressed to those practices. At the same time, claims based on torture or summary execution do not exhaust the list of actions that may appropriately by covered by section 1350. That statute should remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law.").

58. Haffke, *supra* note 56, at 1481.

59. Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 434 (1989).

60. Rabkin, *supra* note 25, at 2132. This doctrine was first clearly articulated by Chief Justice John Marshall in The Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116 (1812). The grant of immunity is set out in § 1604: "Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter."

to bring suit against a sovereign state in federal court, then it must produce evidence that such an exception applies.[62] Only when one of these exceptions has been established[63] can the ATCA be invoked as a source of jurisdiction.[64]

Although the FSIA limits the range of possible state defendants, it says nothing about *private* defendants. The Second Circuit's decision in *Karadzic* established that, at least in some circumstances, a private actor can be held liable under the ATCA. Although prior decisions, including the district court's ruling in *Karadzic*, had assumed that the ATCA required state action,[65] the circuit court held that this was not always the case.[66] *Karadzic* involved a group of Croat and Muslim citizens who filed a claim under the ATCA in New York against Radovan Karadzic, leader of the "Srpska" area of Bosnia-Herzegovina. They accused him of various atrocities, including genocide, war crimes, rape, and forced prostitution.[67] The Second Circuit found that private parties could be liable for certain classes of international violations. It noted that private parties had previously been held liable for piracy, the slave trade, and war crimes.[68] It then divided the plaintiffs' claims into three different categories: (1) genocide; (2) war crimes; (3) other instances of inflicting death, torture, and degrading treatment. It found that a private actor such as Karadzic could be held liable for the first two categories.[69]

In addition to sovereign states and purely private parties, a third category of possible defendants is private parties acting under the color of state law.

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61. *See* 28 U.S.C. § 1605 (detailing exceptions for waivers, commercial activities carried on in the United States, property rights, and money damages for personal injury, wrongful death, or damage or loss of property). For an interesting discussion about how state violation of certain international norms may be analogous to Eleventh Amendment implied waivers, see Rabkin, *supra* note 25, at 2149-54.

62. Phaneuf v. Republic of Indonesia, 106 F.3d 302 (9th Cir. 1997).

63. An extensive discussion of FSIA jurisprudence is beyond the scope of this paper. A large body of law exists on the proper invocation of the § 1605 exceptions. *See, e.g.*, Republic of Argentina v. Weltover, Inc., 504 U.S. 607 (1992) (discussing the proper interpretation of the commercial exception); Saudi Arabia v. Nelson, 507 U.S. 349 (1993) (analyzing the proper scope of the commercial exception); De Letelier v. Republic of Chile, 488 F. Supp. 665 (D.D.C. 1980) (dealing with the proper interpretation of the exception for money damages for tortious property damage).

64. *See Amerada Hess*, 488 U.S. at 443.

65. *See* Doe v. Karadzic, 866 F. Supp. 734, 740-41 (S.D.N.Y. 1994).

66. Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995).

67. Lawrence W. Newman & Michael Burrows, *The Alien Tort Claims Act*, N.Y.L.J., Dec. 29, 1995, at 3.

68. *Karadzic*, 70 F.3d at 239-40; Newman & Burrows, *supra* note 67, at 4.

69. *Karadzic*, 70 F.3d 241-44; Newman & Burrows, *supra* note 67, at 4. The court relied on the 1946 United Nations General Assembly decision that private parties could be liable for genocide, as well as the Convention on Genocide (ratified by 120 countries) to support its decision on genocide. It also relied on the Geneva Convention, which stated that all parties to a conflict are prohibited from committing certain crimes during war, as authority for its decision on war crimes. *Id.* at 241-42.

These cases are treated similarly to cases involving state officials with no immunity.[70] Such defendants must be involved in the illegal conduct of state officials to a sufficient degree that they can be deemed responsible for such conduct. This particular classification of defendants is especially important in cases involving multinational energy companies.[71] The issue that must be resolved is the standard applied in assessing responsibility.

D. *What Constitutes a Violation of International Law?*

The United States Supreme Court has yet to review any case invoking the ATCA.[72] Most ATCA claims have therefore followed a pattern laid out in the two recent Second Circuit cases.[73] According to these decisions, a claim should present three elements: (1) alien plaintiffs (2) suing for a tort (3) committed in violation of international law.[74] The first requirement seems fairly straightforward.[75] The second requirement has resulted in the expenditure of some judicial energy in ascertaining what the statute intended;[76] however, the third prong is the most heavily contested issue because "it forces American courts to identify customary international law or treaties, establish their contents, and enforce their provisions in contexts where they have seldom, if ever, been used . . . ."[77]

Originally, some courts held that the violation must not only be the breach of an internationally accepted customary law principle, but also one that requires private remedy.[78] For example, the case of *Dreyfus v. Von Finck*[79] held that deprivation of property due to religious discrimination did not constitute a claim under international law.[80] The decision in *Filartiga* changed this norm. Now, most courts hold that a violation of international law is established if the conduct is universally recognized as wrong through international agreements, decisions, resolutions, and scholars.[81] Absent such formal agreement, universal

70. Sofaer, *supra* note 30, at 14-15.

71. *Id.* at 15.

72. Zia-Zarifi, *supra* note 10, at 90 n.27.

73. *See Filartiga*, 630 F.2d 876; *Karadzic*, 70 F.3d 232.

74. Zia-Zarifi, *supra* note 10, at 90; Walker, *supra* note 39, at 544.

75. Some commentators believe that there is an asymmetry with this requirement, because they feel it could afford more protection to aliens than to U.S. citizens for violations of international law. *See* Sofaer, *supra* note 30, at 9.

76. Zia-Zarifi, *supra* note 10, at 90. *See also* Sofaer, *supra* note 30, at 10 (noting that maritime libel, contract violations, and pure injunctive relief have all been held to be invalid).

77. Zia-Zarifi, *supra* note 10, at 90-91.

78. Sofaer, *supra* note 30, at 11.

79. 534 F.2d 24 (2d Cir. 1976), *cert. denied,* 429 U.S. 835 (1976).

80. "Like a general treaty, the law of nations has been held not to be self-executing so as to vest a plaintiff with individual legal rights." *Dreyfus*, 534 F.2d at 31.

81. Sofaer, *supra* note 30, at 11.

norms against certain conduct (for example, stealing) do not rise to the level of a violation.[82] This standard closely resembles that of a *jus cogens* norm.[83] Claims that have been consistently upheld as sufficient include: piracy, slavery, torture, summary execution, genocide, and disappearance.[84] Claims that have been rejected as insufficient include: censorship, libel, stealing, fraud, embezzlement, conversion, tortious interference with business relationships, refusal to pay moneys due, misrepresentation, negligence, unseaworthiness, wrongful picketing, and environmental harms.[85]

II. THE *UNOCAL* CASE AND THE CURRENT STANDARD FOR RESPONSIBILITY

A. *Case Background*

Multinational energy companies have faced several significant lawsuits brought against them under the ATCA.[86] The litigation against Unocal is currently the most advanced of all the suits commenced against an oil company. The case arises out of what have been described as "the pharaonic excesses of Burma's military junta."[87] The military took over Burma in 1988 under the name State Law and Order Restoration Council (SLORC). In addition to changing Burma's name to Myanmar, SLORC imposed martial law and conducted an intense campaign to repress any pro-democracy movements within the country.[88] It also pushed a substantial portion of the Burmese population into forced labor and subjected them to many forms of abuse, including rape, torture, and killing.[89]

Beginning in 1991, several multinational oil companies began negotiating with SLORC about possible oil and gas ventures in Burma. In 1993, Unocal agreed to participate in a joint venture drilling project with the French oil company Total and the Myanmar Oil and Gas Enterprise (MOGE). The project involved the construction of the Yadana gas pipeline, which would transport oil and gas from the Andaman Sea across the Tenasserim region of Burma.[90] The government, in furtherance of the goals of the project and funded by the oil companies, allegedly forced Burmese villagers to relocate, took away their

82. *Id.* at 12.

83. Zia-Zarifi, *supra* note 10, at 91. A *jus cogens* norm is defined as "a mandatory norm of general international law from which no two or more nations may exempt themselves or release one another." BLACK'S LAW DICTIONARY 695 (7th ed. 2000).

84. Sofaer, *supra* note 30, at 11-12.

85. *Id.* at 12.

86. *See* notes 14-17, *supra*, and accompanying text.

87. Zia-Zarifi, *supra* note 10, at 97.

88. Doe v. Unocal Corp., 963 F. Supp. 880, 884 (C.D. Cal. 1997) (*Unocal I*).

89. Zia-Zarifi, *supra* note 10, at 97.

90. *Unocal I*, 963 F. Supp. at 884-85.

property, forced them to labor on the pipeline, and killed or tortured those who objected.[91] Meanwhile, much of the world condemned the situation in Burma.[92] For example, the United States has issued sanctions on new private investment in Burma, although it preserved existing investments in that country.[93] President Bill Clinton renewed them in May of 2000.[94]

Plaintiffs filed suit in federal court in the Central District of California against Unocal, Total, MOGE, and SLORC, as well as two Unocal executives.[95] A majority of their claims were based on the ATCA.[96] The displaced government of Burma and Burmese labor unions filed a related case for claims arising out of the same circumstances.[97] Judge Richard Paez rejected a motion to dismiss by Unocal[98] and dispensed with several other preliminary matters.[99] When Judge Lew took over the case, however, he finally granted the company's motion for summary judgment.[100] Plaintiffs planned to appeal the decision to the Ninth Circuit.[101]

B. *The Current Standard of Responsibility*

Multinational oil companies deal with numerous specialized issues with respect to human rights litigation under the ATCA.[102] None is so significant as the standard for responsibility for the abuses allegedly committed against the

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91. Zia-Zarifi, *supra* note 10, at 97.

92. *See Burma: The Role of the International Community*, Human Rights Watch World Report 2001, *at* http://www/hrw.org/wr2kl/asia/burma3.html (last visited Apr. 12, 2001).

93. Sarah H. Cleveland, *Norm Internalization and U.S. Economic Sanctions*, 26 YALE J. INT'L L. 1, 11 (2001).

94. *Id.*

95. *Unocal I*, 963 F. Supp. at 883.

96. *Id.* at 889.

97. *Unocal II*, 176 F.R.D. 329. The case granted in part and denied in part Unocal's motion to dismiss. The reasoning in this case parallels the reasoning in the *Unocal I* line of cases.

98. *Unocal I*, 963 F. Supp. at 898.

99. *Unocal I*, 963 F. Supp. at 888 (granting motion to dismiss SLORC and MOGE due to immunity under the FSIA); Doe v. Unocal Corp., 27 F. Supp. 2d 1174, 1190 (C.D.C. 1998) (granting motion by French defendant Total for lack of personal jurisdiction) [hereinafter *Unocal III*]; Doe v. Unocal Corp., 67 F. Supp. 2d 1140, 1147 (C.D.C. Aug. 5, 1999) (denying plaintiff's motion for class certification) [hereinafter *Unocal IV*].

100. *Unocal V*, 110 F. Supp. 2d at 1312.

101. *Special Issues and Campaigns: The Role of the International Community*, Human Rights Watch World Report 2001, *at* http://www.hrw.org/wr2k1/special/corporations3.html (last visited Jan. 7, 2002).

102. There are many examples of such issues. Among the most important seem to be forum non conveniens (*Aguinda*, U.S. Dist. LEXIS 6981 at 29-36, 57-58; *Wiwa*, 226 F. 3d at 106), personal jurisdiction (*Unocal III*, 27 F. Supp. 2d at 1184-89; *Wiwa*, 226 F.3d at 95-99), and the failure to join indispensable parties who are immune under the Foreign Sovereign Immunities Act (*Unocal I*, 963 F. Supp. at 888).

plaintiffs. As noted previously, a multinational oil company faces different issues of liability depending on whether a court finds that it is purely private or that it is acting under the color of law. Both issues are addressed in depth in the *Unocal* litigation, and these considerations proved to be dispositive in the decision to grant summary judgment to Unocal.

1. *Purely private action.*

As discussed earlier, private liability under the ATCA has been limited to a short list of the most well established human rights violations. A multinational oil company would presumably be held to this standard, though it does seem possible that an ambitious court could add more categories to that list. One category that has definitely been included, however, is the slave trade. The two judges who dealt with the *Unocal* litigation indicate that forced labor might reasonably be considered part of the slave trade for purposes of the ATCA.[103] The first judge, Judge Paez, dealt with the case during a Rule 12(b)(6) motion for failure to state a claim, and he allowed the plaintiffs to proceed.[104] Later, however, Judge Lew considered the claim as part of the more stringent standard for summary judgment.[105] Lew said that the facts asserted by the plaintiffs were insufficient to prove that Unocal was responsible for the alleged forced labor. The plaintiff at this stage in the litigation must assert facts that could prove that the defendant had taken "active steps" in participating in the violation. Simply having knowledge that the violations were taking place was insufficient under this test.[106]

One notable area of concern with respect to this stringent standard of liability for purely private actors is that in cases like *Unocal*, a potential plaintiff's only viable recourse is to sue the private company under the ATCA. Although they are usually the primary actors committing the violation, the state actors themselves will likely not be good targets for those plaintiffs. For one thing, they will probably not be subject to the jurisdiction of the United States unless they fulfill the requirements of the FSIA;[107] accordingly, victims will not be able to sue them under the ATCA. For another, they may face difficulties in

103. *See Unocal I*, 963 F. Supp. 896; *Unocal V*, 110 F. Supp. 2d at 1307-08.

104. *Unocal I*, 963 F. Supp. at 895 ("[A] court must not dismiss a complaint for failure to state a claim unless 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" (citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957))).

105. Summary judgment is appropriate when there is "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c).

106. *Unocal V*, 110 F. Supp. 2d at 1307-10.

107. *See* notes 60-65, *supra*, and accompanying text (discussing jurisdictional requirements).

obtaining personal jurisdiction over such defendants.[108] Finally, the victims will probably not be able to sue them in their own countries, since most such governments have set up judicial systems that render them immune from this type of judgment.[109] Since the ability to sue a private defendant is clearly of vital importance, plaintiffs have attempted to ensnare such private parties by an alternative means—impugning them with responsibility for the actions of state actors through the color of state law doctrine.

2. *Color of state law.*

As discussed in Part I, a private organization may incur the same type of liability as a state would face, provided that it is acting under color of state law. The *Unocal* series is the only one of the energy company cases to reach this issue.[110] In determining whether Unocal could be held liable as a state actor, Judge Lew imported the jurisprudence of civil rights litigation under 42 U.S.C. § 1983 as his guide. Using the § 1983 standard was first suggested in the *Kadic* case, which called the statute "a relevant guide to whether a defendant has engaged in official action for purposes of jurisdiction under the Alien Tort Act."[111] The case, however, offered little guidance as to how that statute would be applied in ATCA cases, thus leading to a rather ad hoc application of its principles in such instances.[112] Under the interpretation of that statute in *Unocal V*, a private party acts under the auspices of the state when it "acts together with state officials or with significant state aid."[113] Judge Lew noted that "the Ninth Circuit and the Supreme Court have recognized that 'cases deciding when private action might be deemed that of the state have not been a model of consistency.'"[114] He identified four different tests that had been used to examine whether a certain case met the state action requirement: public function, state compulsion, nexus, and joint action.[115]

Plaintiffs in this case premised their claim on the joint action test, arguing that Unocal's involvement in the joint venture with SLORC and MOGE constituted joint action.[116] The joint action test says that if a private party is a

108. Forcese, *supra* note 13, at 494.

109. *Id.* For example, in Burma, the government simply ruled by decree and was not bound by any constitutional provisions. Although a British-era judicial system remained in place to some degree, its functioning was severely flawed, especially with respect to politicized cases.

110. *Unocal V*, 110 F. Supp. 2d at 1305-07.

111. *Karadzic*, 70 F.3d 232, 245.

112. Forcese, *supra* note 13, at 501.

113. *Unocal V*, 110 F. Supp. 2d at 1305.

114. *Id.* (citing George v. Pacific-CSC Work Furlough, 91 F.3d 1127, 1230 (9th Cir. 1996)).

115. *Id.*

116. *Id.*

"willful participant in joint action with the State or its agents," then it is operating under the color of state law.[117] Judge Lew noted that under this test, the state and private entities involved must share a common goal to commit the violations.[118] Although Unocal and SLORC shared the goal of "a profitable project," the judge did not think this was enough. Plaintiffs had not presented evidence that Unocal had actually participated in the military's abusive conduct, nor did they present evidence of a conspiracy to commit such violations.[119]

Next, Judge Lew stated that the state action test deals with situations where the private party itself, in concert with the state, had committed the challenged acts. In this case, however, it was the *state* that had committed the violations. When it is the state or its agents that commit the violations, then the private party must be the proximate cause of the violation, meaning that it exercised control over the decision to commit the violation.[120] Judge Lew found that nothing in the record supported the proposition that Unocal had controlled the decisions of the Burmese military to commit the alleged violations; therefore, it could not be found to have acted under color of state law.[121]

Because Unocal could not be liable either as a private or a state actor, Judge Lew granted summary judgment to the oil company. Should Lew's decision survive appeal, it has a number of important implications for future ATCA cases. First, mere knowledge of human rights violations will not be enough to hold a multinational company liable; the company must have taken a more active role in the violations. The requirement of some action or decision making by the company appears essential in satisfying either the private action or the joint action test. Second, if future cases use § 1983 state action tests, the only test that has been applied to energy companies is the joint action test. Because the plaintiffs premised their claim on joint action, the other three tests were never addressed in the *Unocal I* litigation. Third, Judge Lew's decision relied on American civil rights jurisprudence to come up with a standard of responsibility of companies for state actors. If a court chose to use a different standard, the analysis of responsibility might look very different. These last two points will be discussed further in the next part.

III. ALTERNATIVE STANDARDS OF LIABILITY

The liability standard articulated by Judge Lew is perhaps the most important issue a multinational energy company will encounter in ATCA

117. *Id.* (citing Dennis v. Sparks, 449 U.S. 24, 27-28 (1980)).

118. *Id.* at 1306 (citing Gallagher v. Neil Young Freedom Concert, 49 F.3d 1442, 1454 (10th Cir. 1995)).

119. *Id.* at 1306-07.

120. At least in the Ninth Circuit. *Id.* at 1307.

121. *Id.*

litigation. His interpretation of when a private company may be held responsible for human rights violations greatly limits the instances in which liability may attach. The question remains, however, whether the *Unocal* standard is the right one.

There are two possible ways that future plaintiffs may attempt to get around this standard. One way is to work within the framework set up by Judge Lew. In analyzing how § 1983 state action requirements might apply to multinational oil companies, Judge Lew examined joint action, which is only one out of the four tests that have been articulated under that statute. His analysis of the joint action test might be questioned. Additionally, the other three tests might supply a rationale for liability. A second method would be to argue that the § 1983 standard is inapplicable—that some other standard is more appropriate. These are discussed below.

A. *Options Under § 1983*

In *Unocal*, the plaintiffs premised their defeated claims about state action on the § 1983 concept of joint action. Some commentators have challenged the correctness of the judge's ruling on joint action in that case.[122] Additionally, three other avenues are available under traditional § 1983 doctrine—the public function test, the nexus test, and the state compulsion test.[123] None is directly addressed in the *Unocal V* opinion.

1. *The joint action test.*

Judge Lew's decision about the application of the joint action test is possibly incorrect itself. First, its analysis of the proximate cause requirement—that the private actor control the decisions of the state actor—may not take sufficient account of recent cases dealing with proximate cause in the Ninth Circuit.[124] The judge relied here on *Arnold v. IBM*, which held that the defendant must personally participate in the deprivation, which included both foreseeability and some degree of control over the other actor.[125] The principle established in this case about control was seriously weakened in later decisions about proximate cause.[126] A very recent Ninth Circuit decision, for example, held that the appropriate analysis for determining proximate cause

122. Forcese, *supra* note 13, at 513.

123. *Unocal V*, 110 F. Supp. 2d at 1305.

124. Forcese, *supra* note 13, at 513.

125. 637 F.2d 1357 (9th Cir. 1981), as cited by *Unocal V*, 110 F. Supp. 2d at 1307.

126. *See, e.g.* Tidwell v. Schweiker, 677 F.2d 560 (7th Cir. 1982), *cert. denied*, 61 U.S. 905 (1983) (holding that if a defendant sets in motion a series of acts that it knew or should have known would lead to the harm, then proximate cause is satisfied).

would be the traditional tort law examination of reasonable foreseeability.[127] Under this test, proximate causation would probably be satisfied in the *Unocal* case, given that there was evidence that the company contracted with SLORC knowing that the military organization was committing human rights violations.[128]

A second reason that the joint action test may have been misapplied is that the court may have overlooked the argument that Unocal did personally participate in the violation. The joint action in question may be defined as providing security for the pipeline project. Here, the company provided material and financial resources to the military organization. These resources were designed to help in the rendering of security services. Since the act of providing security here had as a reasonably foreseeable consequence the infliction of abuse on the people of Myanmar, the company could certainly be considered to be the proximate cause of those violations.[129]

2. *The three alternative tests.*

In addition to the joint action test, several other tests under § 1983 could be used to impugn responsibility for human rights abuses onto multinational companies. The *Unocal* decision did not discuss any of these tests. Since the door has been left open in this regard, it seems likely that future plaintiffs might marshal facts to try to satisfy one of the following three tests:

a. *Public function.*

The public function doctrine holds that if the private entity is engaging in a traditionally governmental function with respect to the plaintiff, then it may be considered to be a state actor.[130] Under this test, if liability were to attach in energy company cases, the venture in which the company was participating would have to be considered a traditionally governmental function. In some cases, this criterion might readily be met. For example, some governments own and control substantial portions of oil industrial operations in their countries.[131] Ventures of this nature might fairly be characterized as a traditional governmental function in such a country. One limiting issue might be the standard a court used to judge a traditional governmental function: Would it have to be a traditional governmental function in the United States, or a traditional governmental function in the country where the violation takes place?

127. Tahoe-Sierra Preservation Council, Inc. v. Tahoe, 216 F.3d 764 (9th Cir. 2000).

128. Forcese, *supra* note 13, at 512.

129. *Id.* at 513.

130. George v. Pacific-CSC Work Furlough, 91 F.3d 1227, 1230 (9th Cir. 1996).

131. Zia-Zarifi, *supra* note 10, at 138.

b. *Nexus.*

The nexus test holds that there must be a sufficiently close relationship between the state and the challenged actions of the regulated entity so that it is fair to treat the actions by the entity as actions of the state itself.[132] This might be characterized as a symbiotic relationship. State regulation alone does not convert the activity of a private actor into state activity.[133] The inquiry under this test seems to be very situation-specific.[134] For ATCA plaintiffs, a threshold matter under this test would be proving some sort of regulation by the foreign state. Beyond that, the factors used in the inquiry become less clear. Some cases hold that the state must have some involvement in the decision to commit the alleged violations.[135] Others consider whether the actions were traditionally public functions or could make the state a partner in the private actor's enterprise.[136] The major shortcoming of this test is simply that most courts seem reluctant to conclude that it is satisfied, probably because the Supreme Court itself seems to have attempted to limit the test to situations where the involvement between the two actors is extremely significant.[137] Many courts seem to view the scope of the test as only extending to situations where both parties benefited not just from their overall relationship, but also from the wrongful act itself.[138] In other words, to be assured a reasonable chance of success under this test, plaintiffs would have to persuade a court that both the foreign government and the multinational company benefited from their abuse.

c. *State compulsion.*

The state compulsion test says that a private entity acts as the state when its actions are compelled under state law or state custom.[139] Here, plaintiffs would have to prove that state law somehow compelled the energy companies' participation in the illegal ventures. Conceivably, an ATCA plaintiff might argue that such a company has to follow the laws that a foreign state establishes with respect to such ventures; if these laws mandated certain behaviors that led to the challenged acts, then they might meet the state compulsion test.

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132. Gorenc v. Salt River Project Agricultural Improv. & Power Dist., 869 F.2d 503, 506 (9th Cir. 1989).

133. Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 176-77 (1972).

134. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 350 (1974).

135. *See, e.g., George*, 91 F.3d at 1230-31.

136. *See, e.g., Gorenc*, 869 F.2d at 506.

137. Forcese, *supra* note 13, at 504.

138. *Id.*

139. *Gorenc*, 869 F.2d at 508.

3. *Special issues with § 1983 doctrine.*

All three of the alternative doctrines, like the joint action test, seem to deal with action by the private entity, and not the state. The fact that these tests only seem to apply when the private actor itself is committing the violation highlights one preliminary issue. If it is indeed the private company itself that is committing the violation, it may be unnecessary in some cases to even reach the state action inquiry at all. If the violations rise to a sufficiently egregious level, then the *Unocal* case indicates that a private actor may be liable in its own right if it has taken "active steps" in committing those violations. In cases where the allegations include things like forced labor, which courts have equated with slavery, then any company actively participating in these events is liable in its capacity as a private actor and will not have to meet a state action test at all. As noted previously, however, the bar for active participation is fairly high.[140]

In cases like *Unocal*, the harm is actually inflicted by the foreign governments, not by the energy company itself. Under all of the current § 1983 tests, the private company would probably have to be the proximate cause of the violation under such circumstances.[141] If Judge Lew's decision is upheld, this standard would probably mean establishing that the private company exercised some power of control over the decision making of the state actors. These doctrines therefore seem insufficient to establish liability in most cases. Using § 1983, therefore, seems to significantly work to the advantage of multinational energy companies behaving questionably.

There seems to be some intuitive problem, however, with applying the § 1983 doctrine at all. As noted, the law seems to contemplate situations where the actions themselves are committed by a *private* actor who bears some imprimatur of the state actor. The instances involving multinational energy companies and abusive foreign governments, in contrast, are situations where the actions are committed instead by a *state* actor who bears some imprimatur of the private actor. Applying § 1983 in these cases, therefore, requires an inversion of the usual relationships found in color of state law cases.[142]

B. *Other Standards of Liability*

The chances of success for future plaintiffs under § 1983 seem relatively slim. The question remains whether using § 1983 as the measuring stick for responsibility is appropriate at all. Several other standards could be imported

140. *See* note 107, *supra*, and accompanying text.

141. At least if Ninth Circuit precedent is followed. *See, e.g.*, Brower v. Inyo County, 817 F.2d 540, 547 (9th Cir. 1987); King v. Massarweh, 782 F.2d 825, 829 (9th Cir. 1986).

142. Forcese, *supra* note 13, at 510.

into ATCA doctrine. Such alternatives could be imported from either international law or from the federal law of the United States.

Some commentators contend that the most logical source for a standard of responsibility under the ATCA comes from international law itself. Since the ATCA imports international standards to define the nature of an ATCA violation, the argument goes, it would be most logical to import international standards of responsibility in order to judge those violations.[143] While this line of reasoning is appealing in the sense that it might make discovering the proper responsibility standard relatively easy, it is certainly not the logical necessity that its proponents would make it seem.

Importing international violation standards under the ATCA does not compel the importation of international responsibility standards. A better way to conceptualize the function of the international violation standards is as an outer boundary. In other words, the United States does not have an inherent duty to make its courts available to aliens for international violations. The ATCA, however, expresses a policy in favor of providing a forum in the United States for such wrongdoings. The question remains open as to what constitutes an international violation, and it is up to the courts to construct an acceptable definition. In looking to define what might be the appropriate kind of violations to be heard in this type of forum, the courts in the United States have chosen *only* those wrongs that are so egregious that they are universally condemned. Other sorts of international harms are not included. The courts effectively are expressing a willingness to entertain international claims of this high magnitude, but nothing less. The use of international standards, therefore, seems to have a limiting effect on the kinds of cases heard by U.S. federal courts.

In contrast, importing international liability standards seems to operate more expansively. In effect, it would convert the federal courts into international tribunals that happen to be located within the United States. Such international standards, rather than helping the federal courts ascertain when something is so terrible that they should open their limited forum, seem merely to unnecessarily invade the courts' discretion with respect to the types of cases they will consider. For one thing, the standards provided as to international violations fill in a true gap in the law—the United States does not seem to have a pre-existing definition of what constitutes a justiciable international violation. Such a gap, however, does not exist with respect to doctrines of responsibility. The United States has a fully developed body of law on when actors are responsible for harms. This seems especially true when the actors at issue are American—the United States already has a set of pre-existing liability standards to apply if those same actors were being sued for events that took place on their home soil.

143. *Id.* at 502.

Additionally, importing international liability standards directly contradicts the policy behind importing international *jus cogens* norms for judging violations. As previously noted, the policy behind using *jus cogens* norms seems to be that the courts want to open their doors on a limited basis. Had the courts wanted to import international law wholesale into their chambers, they would not have constructed such a strict test for what constitutes an actionable violation. In contrast, adopting international standards of responsibility would seem to indicate a more deferential attitude toward the authority of international law generally, since it allows international law to usurp the authority of standards already developed in American federal courts. The federal courts simply do not seem to view international standards in such a manner.

Accordingly, the alternative standards that build on responsibility concepts already existing in federal law seem to be stronger hooks on which an ATCA plaintiff could hang her case. Likewise, such American standards also seem to be more logical guidelines for American energy companies to follow when assessing their actions in foreign countries. Several examples are explored below.

1. *State responsibility.*

One possible option would be to hold private actors to the same standard as a sovereign nation might face. This standard was addressed in a famous environmental suit, known as *The Trail Smelter Case*, involving a dispute between the United States and Canada. A private Canadian mining and smelting company was operating a smelter just north of the border between British Columbia and the state of Washington. Pollution from the smelter did significant damage in Washington.[144] Eventually Canada and the United States set up a commission to deal with the problem.[145] In handing down its final decision, the tribunal formed by the commission noted, "A State owes at all times a duty to protect other States against injurious acts by individuals from within its jurisdiction."[146] The tribunal found that Canada was responsible for the conduct of the private company and had the duty to bring this conduct within internationally recognized legal norms.[147]

State responsibility for actors is a concept that is relatively developed in international law generally. A recent decision by the International Criminal Tribunal of Yugoslavia also provides guidance in interpreting when a state

144. The Trail Smelter Case (1941), *available at* http://www.gwu.edu/~jaysmith/Trail.html.

145. Convention for Settlement of Difficulties Arising from Operation of Smelter at Trail, British Columbia, April 15, 1935, U.S.-Can., U.S. Treaty Series 893.

146. The Trail Smelter Case, *supra* note 144.

147. *Id.*

might be held liable for actors within its province.[148] The standards seem to vary according to the nature of the party committing the action. When the actor in question is a military or paramilitary organization, all that must be proved is that the state exercises control over the organization by equipping and financing it, as well as helping with its general coordination. It is not necessary, however, that the state itself be the source for the particular orders that lead to the commission of the alleged harm.[149]

Hypothetically, this standard could be applied in some cases. A private energy company might, in extraordinary circumstances, be found to have a duty to protect against injury from state actors. Several complications with importing this standard, however, seem evident. First, it would be necessary to determine what the "jurisdiction" of such private companies might be. Perhaps if the company had entered into agreements with the state actors, then those actors might fairly be characterized as within the company's jurisdiction. Second, the degree of control a private company may exercise over a foreign government seems considerably less than what a sovereign state might exercise over its own citizenry. Without such tools as criminal and civil law at its behest, the best leverage that such a company seems to have is financial, such as the withdrawal of funding for the project. Third, a court would have to determine that a private duty to control existed under international law. Considering the relatively low degree of control a company like Unocal would exercise over a state military regime like SLORC, it is difficult to imagine that any court would be willing to find such a duty.

This last problem highlights a larger weakness with importing the state responsibility standard in this instance. Just as with the § 1983 analysis, importing state responsibility requires that the court be prepared to substitute a private actor where the doctrine requires a state actor. It makes little sense to replace the § 1983 doctrine with one that does not cure the problems that doctrine had raised.

Additionally, as noted previously, replacing pre-existing federal doctrines with international concepts seems to go against the policy of limited availability expressed by the courts in importing *jus cogens* norms to define ATCA violations. By importing a state responsibility standard to replace § 1983, the courts would seem to weaken their own authority to develop their own standards for judging ATCA cases.

2. *Joint liability for a tort.*

With respect to directing or permitting conduct of another, the Restatement Second of Torts says in part:

148. Prosecutor v. Tadic, Judgment of the Appeals Chamber, IT-94-1-A (July 15, 1999), as discussed in Forcese, *supra* note 13, at 508.

149. Forcese, *supra* note 13, at 508.

> For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he:
>
> (a) orders or induces the conduct, if he knows or should know of circumstances that would make the conduct tortious if it were his own, or (b) conducts an activity with the aid of the other and is negligent in employing him, or (c) permits the other to act upon his premises or with his instrumentalities, knowing or having reason to know that the other is acting or will act tortiously . . . .[150]

This standard, if applied to defendants in an ATCA case, could lead a court in some cases to find such companies responsible for serious human rights violations committed by state entities in furtherance of their projects. With respect to part (a), it would not be necessary for a company to order or request that a state actor like SLORC commit the violations benefiting the project. If the company knew that the state was committing violations in furthering the particular ends of the venture, then all that would be necessary would be facts that proved the company had ordered or requested that those ends be furthered, knowing that the conduct that follows is liable to be tortious.[151] For example, if Unocal directed the SLORC military to provide security for a certain portion of its project, and Unocal knew or should have known that the military was likely to commit human rights violations in the course of providing that security, this would make Unocal liable for those actions.

For part (b), the theory is that a company might be subject to liability for negligent hiring—that is, if the company had reason to know that someone it hired was dangerous, retaining that person could be considered negligent.[152] Responsibility under this standard in some cases might depend on whether other members of a joint venture might be considered employees for this purpose. It seems reasonable to view "military protection," such as that provided by SLORC to Unocal in the terms of their contract, as employment by those companies, since SLORC was providing Unocal with the particular service of security. It would seem to impute responsibility in any case where such companies were paying governmental agencies to provide such services to them in their project operations.

Under part (c), a company might be liable for violations if they take place on land the company owns, or if it owns any of the property used in committing the violations, provided that it has reason to know that its property is being used in such a way. Therefore, any inappropriate use of project equipment by the state actors might be a source of liability for the oil companies.

Joint liability for a tort, therefore, could be a potentially potent weapon against multinational oil companies. The most significant change in the

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150. RESTATEMENT (SECOND) OF TORTS § 877 (1965).

151. *See id.* at cmt. a.

152. *See id.* at cmt. c; Koehring v. E.D. Etnyre & Co., 254 F. Supp. 334 (N.D. Ill. 1966).

responsibility standard would be a shift away from active participation in the violation. In fact, the standard implied here is even weaker than a requirement of actual knowledge; instead, it is the traditional "should have known" negligence standard of responsibility. A defendant such as Unocal could clearly be held responsible under this kind of standard, since it knew that such human rights violations had taken place.

Another interesting aspect of this particular standard is that it would hold American oil companies to the same standard they would face at home. It seems anomalous that an American company could be responsible for negligent torts against American citizens, but would incur no liability for participating in and profiting from conduct by states abroad that constitutes gross human rights abuses. Using the standard for joint liability would correct this disparity and remove an incentive for misbehavior abroad.

One potential problem, however, in using this test is precisely that it employs a negligence standard. Mere negligence as a cause of action itself has been rejected as insufficient under the ATCA.[153] Violations that have been considered sufficient have all been of the intentional variety—genocide and torture and the like. Whether a party could be held responsible for negligent participation in an intentional tort under this view of the ATCA is a difficult question.

3. *Accomplice liability.*

Another possible way to judge whether a private company can be held liable for a state actor's violation is accomplice liability in the criminal law. There are two forms of accomplice liability to consider: liability as a conspirator and liability for aiding and abetting. Because the ATCA is a federal statute, it is probably most appropriate to examine the federal standards for accomplice liability.

To prove conspiracy in federal criminal cases, the government must show: (1) an agreement (2) to engage in criminal activity and (3) one or more overt acts in furtherance of the conspiracy.[154] If this standard were imported into ATCA jurisprudence, plaintiffs could satisfy the last element either by showing overt acts by the state actor or the private company.

The conspiracy test might be a bit daunting for plaintiffs to satisfy. It might be relatively easy to prove that an agreement of some sort exists between private energy companies and the offending governmental organizations—especially when they are involved in a joint venture. Whether such agreements are to engage in criminal activity is a more difficult matter. As Judge Lew said in his opinion, the companies and the governmental organizations will often

153. Sofaer, *supra* note 30, at 12.

154. United States v. Wright, 215 F.3d 1020, 1028 (9th Cir. 2000); *see* 18 U.S.C. § 371 (2002).

have the common goal of a "profitable project."[155] This common goal does not itself constitute criminal activity, and Judge Lew reasoned that simply agreeing upon this goal and no other would be insufficient to establish a conspiracy.[156] Conspiracy seems to require that the parties agree that the ends to achieve such a legitimate goal would be of the kind that violated the ATCA standard. In cases like *Unocal*, where the evidence merely established knowledge of the illegal practices, this seems a difficult standard to prove. Judge Lew rejected the notion that the plaintiffs had proved a conspiracy in that case.[157]

There is support, however, for the proposition that knowledge of the criminal objectives satisfies the conspiracy test. Knowledge of the illegal design may be proved through circumstantial evidence.[158] If a defendant was aware of the violations by its governmental partner and still participated in the venture in order to profit from those violations, it might be fair to infer that the company had implicitly agreed to accept actions that resulted in those illegal ends.

A more dangerous test for multinationals under accomplice liability might be the test for aiding and abetting. In federal criminal cases, the government proves this by establishing that the defendant participated in the criminal venture and intentionally assisted the venture's illegal purpose.[159] Additionally, if a defendant "knew, but did not care" that the other person was conducting illegal activities, but continued to help, then he might be considered an accomplice.[160] Such a standard might be enough to snare defendants like Unocal. Arguably, mere knowledge of the violations by the governmental partners would be enough, provided that the company continued to engage in activities that helped those governmental actors carry on those violations. Continuing to fund and build the projects could satisfy that requirement—entering the joint venture helps organizations like SLORC commit the violations because it gives them an end to which to direct their forced labor. Additionally, the resources contributed by the oil companies make it possible for the questionable projects to continue.

The appropriateness of accomplice liability also finds support in international law. The concept of "complicitous guilt" clearly exists at international law, and it was in fact relied upon in the recent ICTY decision.[161] That case detailed a "common design" theory of accomplice liability: if the two actors form a common design to pursue one course of conduct, and one actor

155. *Unocal V*, 110 F. Supp. 2d at 1306.

156. *Id.* at 1306-07. Judge Lew had stated that proving a conspiracy would satisfy the joint action test.

157. *Id.*

158. *Wright*, 215 F.3d at 1028.

159. United States v. Disla, 805 F.2d 340, 352 (9th Cir. 1986).

160. *See* United States v. Wrobel, 2001 U.S. App. LEXIS 7289 (9th Cir. April 2, 2001).

161. Forcese, *supra* note 13, at 500.

performs an act that falls outside the common design but is a natural and foreseeable consequence of the action, then the other actor might be liable. Foreseeability here would require that the second actor be aware that the actions of the other person were most likely to result in that outcome.[162] Noting that this standard exists does not imply that the federal courts should be compelled to adopt this particular complicity standard. It merely suggests that the adoption of a complicity standard is appropriate not only because it exists in federal law, but also because it is supported internationally.

One objection to incorporating either of the accomplice liability standards is that those doctrines have been built up through criminal law, not civil law. This concern, however, seems misplaced. First, the vast majority of the violations that take place under the ATCA are acts that would be criminal in U.S. courts. The fact that they are also intentional torts is relevant only to the extent that it permits private parties to bring these claims in civil court as well. Additionally, the standard used in criminal cases is much stricter than that used in civil cases. If a party could be convicted of being an accomplice to a crime, it would seem paradoxical not to hold that same party responsible for the same actions under the less rigorous civil standard.

CONCLUSION

In examining the growing jurisprudence on the relationship between multinational oil companies and human rights violations, several conclusions seem apparent. First, much of the doctrine is new and evolving. Cases involving these issues have only arisen in a few circuits, and none of these cases has even proceeded to the stage of a trial. Additionally, some of the decisions—most notably the current *Unocal* decision based on the § 1983 responsibility standard—have not yet been confirmed at an appellate level; none of the cases have reached the Supreme Court. While many of the relevant considerations, such as forum non conveniens, are older doctrines with established roots in federal case law, their application to human rights/multinational company cases is novel. Based on these facts, the potential for liability could change dramatically as the cases progress.

Second, as scholars and practitioners have previously noted, codification of a standard for multinational companies would be a vast improvement over the current state of affairs. First, it would give courts a clearer basis for deciding these types of cases. Second, it would give private companies like Unocal a guide as to what their behavior should be. Pressure from human rights groups and an increasing trend by other companies to pull out of countries like Myanmar may contribute to a new reluctance by such companies to stay involved in potentially problematic operations. A more clearly defined statute, such as the TVPA, would help these companies make better judgments.

162. *Tadic*, IT-94-1-A, para. 220, *as quoted in* Forcese, *supra* note 13, at 501.

Companies like Unocal purport to believe that economic engagement with oppressive governments is a better alternative to isolation in terms of trying to change the social and political conditions of those countries.[163] A statute would encourage these companies to develop operating standards that encouraged such positive engagement, instead of potential abuse.

Third, the current *Unocal* standard of responsibility may not be the correct one. It seems ironic that § 1983, an important tool for domestic civil rights litigation, might slam the door on future human rights litigation. Additionally, it seems strange that a test traditionally used to impute state responsibility onto private action is used in a situation where the state itself is actually acting. As this Note has suggested, several alternatives to that standard exist. These doctrines would be more likely to assign responsibility for these violations to multinationals like Unocal. A change in the doctrine would certainly be bad for such companies, in the sense that plaintiffs would more easily be able to hold them liable. However, two such alternatives—joint liability for a tort and accomplice liability—do seem to be more logical doctrines to import into ATCA jurisprudence. Additionally, the current § 1983 doctrine may be incorrectly and incompletely interpreted. Multinationals should be aware of the potential for change in their post-*Unocal* legal responsibilities. Whether the Ninth Circuit changes the standard in the pending appeal remains to be seen. One thing, however, seems certain: until and unless a definitive standard becomes codified or more firmly entrenched in precedent, multinational companies cannot reliably gauge the circumstances under which they will be held liable for human rights violations. They are left to decide in each case if their expensive investments abroad are worth the gamble.

163. *The Story You Haven't Heard About Unocal in Myanmar*, *at* http://www.unocal.com/myanmar/index.htm.