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A Close Shave in Burma: Unocal Corporation and Private Enterprise Liability for International Human Rights Violations

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Lucien J. Dhooge[†]

> We must make democracy the popular creed. We must try to build up a free Burma in accordance with such a creed. If we should fail to do this, our people are bound to suffer. If democracy should fail, the world cannot stand back and just look on, and therefore Burma would one day be despised.
>
> —Bogyoke Aung San[1]

> Burma has become the South Africa of the 1990s.
>
> —Simon Billenness[2]

I. Introduction

In July 1992, the French petrochemicals company Total, S.A. (Total) and the Burmese government entered into a production-sharing agreement for a gas drilling project in the Yadana natural gas field located in the Gulf of Martaban off the coast of southern

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[1] Joe Cummings & Tony Wheeler, MYANMAR LONELY PLANET TRAVEL SURVIVAL KIT 16 (1996). Bogyoke Aung San was the father of Burmese dissident and 1991 Nobel Peace Prize winner Daw Aung San Suu Kyi. *See infra* notes 109 and 111 and accompanying text.

[2] Louis Kraar, *Big Oil's Gamble on a Pariah Regime* (visited Apr. 26, 1998) <http://www.soros.org/burma/pariah.html>. Mr. Billenness is a senior analyst at Franklin Research & Development Corporation, a Boston-based company specializing in "socially responsible investments." *Id.*

Burma.[3] The Yadana pipeline, when complete, is expected to collect natural gas and oil from offshore deposits located in the Andaman Sea and deliver such gas and oil to Ratchburi, Thailand via the Tenasserim region of southern Burma.[4] Unocal Corporation (Unocal), an American company with its headquarters in Los Angeles,[5] also agreed to participate in the project, thereby creating the joint venture as presently structured (Joint Venture).[6]

Estimated at over $1.2 billion in value, the Yadana gas pipeline represents the single largest foreign investment in Burma.[7] Upon completion, the pipeline will be Burma's single largest source of revenue and foreign currency, earning the country between $200 and $500 billion annually.[8] The 416-mile pipeline will provide 525 million cubic feet of natural gas per day to Thailand to power a 2800-megawatt power station.[9] A 172-mile pipeline is scheduled to provide an additional 125 million cubic feet of gas to a 700-megawatt power station and fertilizer plant

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[3] *See* Plaintiffs' Opposition to Motion to Dismiss at 2, *John Doe I v. Unocal Corp.*, 963 F. Supp. 880 (D.C. Cal. 1997) (No. 96-6959). Total actually entered into this agreement with Myanmar Oil and Gas Enterprise (MOGE). *See id.* MOGE is a Burmese company owned in its entirety by the State Law and Order Restoration Council (SLORC), the military body which controlled the Burmese government. *See infra* note 92 and accompanying text. At that time, SLORC was reorganized and rechristened the State Peace and Development Council. *See* Robert Horn, *Burmese Reshuffle Maintains Unity Among Military Rulers*, ASSOCIATED PRESS POLITICAL SERVICE, Nov. 16, 1997, *available in* 1997 WL 2563282.

[4] *See* Opposition to Motion to Dismiss at 2, *Unocal* (No. 96-6959).

[5] *See infra* note 60 and accompanying text.

[6] *See* Opposition to Motion to Dismiss at 2, *Unocal* (No. 96-6959). Unocal maintains a 28.26% interest in the Joint Venture. *See* Agis Salpukas, *Burma Project Tests Unocal Resolve*, N.Y. TIMES, May 22, 1997, at D1. Total, MOGE and PTT Exploration and Production Public Company of Thailand maintain 31.24%, 15%, and 25.5% interests respectively. *See id.*

[7] *See* Yindee Lertcharoenchok, *US Court to Hear Yadana Rights Abuses Claim*, THE NATION (visited Mar. 28, 1998) <http://www.soros.org/burma/uscourts.html>. The pipeline project is estimated to account for 33% of all foreign investment in Burma. *See id.*; *see also Firm Denies Responsibility for Atrocities*, INT'L PRESS SERVICE, Oct. 31, 1996, *available in* 1996 WL 13588832.

[8] *See* Farhan Haq, *Government Critics Target Gas Companies Over Pipeline*, INT'L PRESS SERVICE, Jan. 15, 1997, *available in* 1997 WL 7073197; *see also Firm Denies Responsibility for Atrocities*, *supra* note 7.

[9] *See Burma Yadana Gas Platform Seen in Place Mid-Year* (visited Apr. 26, 1998) <http://www.soros.org/burma/platform.html>.

near the Burmese capital.[10]

According to the contract, SLORC is obliged to provide access and security in the pipeline construction areas and to guarantee the safety of employees working in these areas.[11] As a result, SLORC has dispatched approximately 10,000 soldiers to the pipeline project.[12]

Following commencement of the project, allegations of human rights violations by these Burmese military forces surfaced almost immediately. Reports arose that the security forces engaged in numerous acts violating the right to life established by Article 3 of the Universal Declaration of Human Rights.[13] It was alleged that the Burmese military conducted executions, including those of ten Karenni villagers, in retaliation for an attack on Total's headquarters in Ohn Bin Gwinby by Karenni militia in February 1996.[14] It was further alleged that civilian laborers and porters were killed if they "failed to carry their loads or attempted to escape."[15] Villagers reported that suspected members of Burmese rebel groups located in the pipeline's path, such as the Karen National Liberation Army and the Mon National Liberation Army, were summarily executed.[16]

Indeed, the United Nations Special Rapporteur documented "persistent reports of arbitrary and excessive use of force by members of the security forces who seem to enjoy virtual

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[10] *See id.*

[11] *See Firm Denies Responsibility for Atrocities*, *supra* note 7; *see also* Opposition to Motion to Dismiss, *supra* note 3.

[12] *See Firm Denies Responsibility for Atrocities*, *supra* note 7.

[13] Article 3 of the Universal Declaration of Human Rights provides that "[e]veryone has a right to life, liberty and security of person." *Universal Declaration of Human Rights*, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948) [hereinafter Universal Declaration].

[14] *See Free Burma, Total Denial*, (visited Mar. 25 1998) <http://sunsite.unc.edu/freeburma/docs/totaldenial/td.html> ch. 3, at 2 [hereinafter *Total Denial*]. After downloading this document, its pagination depends on the software program used to view it. The page numbers included throughout this Article reflect the page numbers as they appeared to the author. Using different software may result in slightly different pagination.. Ed.

[15] *Id.*

[16] *See id.*

impunity."[17] Burmese security forces have been accused of engaging in widespread acts of torture and brutality[18] in violation of Article 5 of the Universal Declaration.[19] This torture is alleged to consist primarily of beatings and barbaric working conditions for villagers who labor on the pipeline project.[20] Burmese security forces have also been accused of confiscating personal property and food from villagers located in the path of the pipeline.[21] Additionally, there have been allegations that the Burmese military is unilaterally imposing a "pipeline tax" on villagers located in the pipeline's route.[22] The imposition of this tax has no basis in Burmese law, and, along with other fees imposed by the military, such as forced labor and porter fees,[23] it has prevented villagers from being able to provide for themselves.[24]

The Burmese military has also been accused of depriving villagers of their "choice of livelihood"[25] in violation of Article 23(1) of the Universal Declaration.[26] Human rights activists contend that the Burmese military prohibits fishermen on penalty of death from plying the waters surrounding Heinze Island which are presently being used for equipment storage by the Joint Venture.[27] Additionally, passenger and fishing vessels have been subject to travel restrictions in the vicinity of the docking facilities that are presently being used for the transportation of fuel and

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[17] U.N. ESCOR, U.N. Doc. E/CN.4/1995/6 ¶ 230 (1995).

[18] *See Total Denial*, *supra* note 14, ch. 3, at 3.

[19] Article 5 of the Universal Declaration provides, in part, that "[n]o one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment." Universal Declaration, *supra* note 13, art. 5.

[20] *See Total Denial*, *supra* note 14, ch. 3, at 4.

[21] *See id.* ch. 3, at 5.

[22] *Id.* ch. 3, at 6.

[23] *See infra* notes 35-39 and accompanying text.

[24] *See Total Denial*, *supra* note 14, ch. 3, at 5.

[25] *Id.* ch. 3, at 7.

[26] Article 23(1) of the Universal Declaration provides, in part, that "[e]veryone has the right to work, to free choice of employment [and] to just and favourable conditions of work." Universal Declaration, *supra* note 13, art. 23(1).

[27] *See Total Denial*, *supra* note 14, ch. 3, at 7.

equipment by the Joint Venture.[28] Farmers have allegedly been forbidden from leaving their villages to harvest their crops.[29] Instead, the Burmese military offered to harvest the crops for a fee.[30]

Burmese security forces are also reported to have forcibly relocated villagers in the path of the pipeline.[31] Such relocations are designed to clear the pipeline route and reduce potential threats to the project by armed militias and dissenting villagers.[32] Although Total has denied the existence of such forced relocations,[33] the Electricity Generating Authority of Thailand, a major potential purchaser of gas transported in the pipeline, has disclosed the relocation of at least eleven Karenni villages in the path of the project.[34] Additionally, the U.S. Department of State has determined that there is "credible evidence" that Burmese security forces leveled villages in the pipeline's path and forcibly relocated or impressed their inhabitants.[35]

Finally, SLORC has been accused of utilizing forced labor on the pipeline project on a scale not seen since the concentration camp system of Nazi Germany[36] in violation of the Convention Concerning Forced or Compulsory Labor.[37] Villagers have been

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[28] *See id.*

[29] *See id.*

[30] *See id.*

[31] *See id.* ch. 5, at 1.

[32] *See id.*

[33] Total spokesman Joseph Daniels stated: "[N]o population has been moved to the best of our knowledge." *Id.*

[34] *See* Somsak Kerdlarp, *Myanmar Gas for Ratchburi Power Plant: The Good Impact on Salween Dam*, BANGKOK POST, Apr. 17, 1995, at 29.

[35] David E. Senger, *Unocal Signs Burmese Gas Deal; U.S. May Ban Such Pacts* (visited Mar. 28, 1998) <http:// www.soros.org/burma/unocsign.html>.

[36] *See* Gene Kramer, *U.S. Government Panel Gathers Data on Forced Labor in Burma*, ASSOCIATED PRESS, June 27, 1997, *available in* 1997 WL 4872967.

[37] Article 1(1) of the Convention Concerning Forced or Compulsory Labor provides that each ratifying member state "undertakes to suppress the use of forced or compulsory labor in all its forms." Convention Concerning Forced or Compulsory Labor, June 28, 1930, 39 U.N.T.S. 55, 56. Forced or compulsory labor is defined as "all work or service which is exacted from any person under the menace of penalty and for which the said person has not offered himself voluntarily." *Id.* at 58. Article 4(1) prohibits governmental authorities from imposing or permitting the imposition of forced

forced to clear and level the pipeline route, construct barracks, build roads, and work as military porters.[38] The sole method of avoiding porter duty has been the payment of large "porter fees" to local military commanders.[39] If a village has been unable to pay such fees and provide porters, the village head has been subject to torture and other physical abuse.[40] Porters who have failed to perform their duties adequately or attempt to escape have been subject to physical abuse including beatings and summary execution.[41] Unocal and SLORC have denied the utilization of forced labor on the pipeline project.[42] However, Total has stated that it is unable to guarantee that the military has not used forced labor.[43] Moreover, the U.S. Department of State has deemed reports of forced labor to build the pipeline, roads, and railroads as "credible."[44]

Unocal's response to the allegations of human rights violations on the pipeline project, the resultant international condemnation, and the imposition of sanctions was immediate and multi-faceted.[45] In addition to denying the existence of human rights violations,[46]

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or compulsory labor "for the benefit of private individuals, companies or associations." *Id.*

[38] *See Total Denial*, *supra* note 14, ch. 4.

[39] *Id.*

[40] *See id.*

[41] *See id.*

[42] Unocal President John Imle stated: "The troops assigned to provide security on our pipeline are not using forced labor." Gregory Millman, *Troubling Projects*, INFRASTRUCTURE FINANCE, Feb.-Mar. 1996, at 18. SLORC has maintained that villagers working on the pipeline are acting of their free will in compliance with the long-standing Burmese tradition of volunteerism. *See* Kramer, *supra* note 36.

[43] Total spokesman Heve Chagneaux stated that he "could not guarantee that the military is not using forced labor . . . . What is being done nearby we do not know." Millman, *supra* note 42, at 18.

[44] Kramer, *supra* note 36.

[45] By contrast, Suu Kyi welcomed the imposition of sanctions as preventing companies such as Unocal from "prolong[ing] the agony of [Burma] by encouraging the present military regime to persist in its intransigence." Haq, *supra* note 8.

[46] Unocal termed the allegations of human rights violations on the pipeline project as "false, irresponsible and frivolous." *Pipeline of Controversy: Unocal Called to Court by Opponents of Burma Regime*, SAN DIEGO UNION-TRIB., Nov. 10, 1996, at I5; *Total Denial*, *supra* note 14, at 1. However, Total has expressed less confidence as to the absence of such human rights violations. Total officials have admitted that they "do

Unocal condemned what it characterized as "the growing trend toward using the business community as an instrument of foreign policy."[47] Unocal pointed out that, unlike other industries, oil companies have little choice in exploration sites as they are distributed haphazardly based on geology with no regard to the human rights records of nations.[48] According to Unocal President John Imle, Unocal is motivated by "geology and geography–not geopolitics."[49] Further, Unocal condemned the imposition by the United States of unilateral sanctions as an ineffective instrument of promoting political change.[50] Instead, Unocal insisted that "economic engagement and investment are the keys to starting a Third World country on the road to political reform."[51] In any event, Unocal noted the inconsistency with which unilateral sanctions are imposed and contrasted its case with that of businesses operating free of sanctions in the oppressive human rights atmosphere of the Peoples' Republic of China.[52]

Unocal also condemned sanctions and other efforts to derail its investment in the pipeline as serving to "hurt people, not regimes."[53] Unocal contended that the pipeline project would better the lives of the Burmese people.[54] Unocal pointed to the creation of high-paying jobs as but one positive aspect of the

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not share Unocal's confidence in the good conduct of Burmese troops" providing security to the project. Millman, *supra* note 42, at 18.

[47] John Imle, *A Case for Investment in Burma* (visited Mar. 24, 1998) <http://www.soros.org/burma/johnimle.html>. Julia Nanay, a director of the Petroleum Finance Company, has condemned this trend as "devastating for the U.S.' [sic] oil industry." Salpukas, *supra* note 6, at D1. Ms. Nanay noted that the effects of such linkage will only become more damaging to the American oil industry as the list of potential targets grows to include such countries as Nigeria and Indonesia. *See id.*

[48] *See U.S. Oil Companies Step Up Anti-Sanctions Efforts*, REUTERS, June 5, 1997.

[49] Kraar, *supra* note 2.

[50] *See* George Gedda, *U.S. Announces Ban on New Investment in Burma*, ASSOCIATED PRESS, Apr. 22, 1997, *available in* 1997 WL 4863171.

[51] Kenneth Silverstein, *Local Lobbyists and Unocal Shill for Burma's Military Junta* (visited Mar. 24, 1998) <http://www.soros.org/burma/locallob.html>; Gedda, *supra* note 50; Kraar, *supra* note 2.

[52] *See* Salpukas, *supra* note 6, at D1.

[53] Imle, *supra* note 47.

[54] *See* Reese Erlich, *Oil Giant Suffers Legal Setbacks*, INT'L PRESS SERVICE, May 8, 1997, *available in* 1997 WL 7075250.

pipeline project.[55] Unocal noted the provision of "improved medical care, better schools and sustainable livestock and agricultural development" alleged to have resulted from the pipeline project.[56] Unocal Chief Executive Officer Roger C. Beach stated that "[e]very Unocal stockholder should be proud of our investment in [Burma]."[57]

Finally, Unocal refused to abandon its investment in Burma and, in fact, sought to expand its role in the pipeline project.[58] At their annual meeting in June 1997, Unocal shareholders rejected a proposed resolution to investigate damage to Unocal's public image as a result of its investment in Burma.[59] Additionally, Unocal sold most of its U.S. refineries and gas stations and announced that it was planning to move its corporate headquarters from Los Angeles, California to Kuala Lumpur, Malaysia.[60] In January 1997, Unocal entered into a contract to expand its exploration and development rights in the Andaman Sea.[61] At the

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[55] *See* Silverstein, *supra* note 51; *see also* Imle, *supra* note 47.

[56] Imle, *supra* note 47; *see Unocal Defends Position (Investments in Myanmar)*, THE OIL DAILY, June 4, 1997, *available in* 1997 WL 8665955; *Protesters Picket Unocal Meeting Over Burma Project*, ASSOCIATED PRESS, June 2, 1997, *available in* 1997 WL 4868940.

[57] Imle, *supra* note 47; Erlich, *supra* note 54.

[58] *See* Imle, *supra* note 47.

[59] *See id.* The shareholders also rejected a second resolution to investigate damage to Unocal's image as a result of alleged drug money laundering by MOGE. *See id.* The proposed resolutions called for Unocal to report the costs of boycotts, litigation, and lobbying resulting from the Joint Venture's operations and to investigate allegations that MOGE was laundering money from the heroin trade through the Joint Venture. *See Protesters Picket Unocal Meeting Over Burma Project*, *supra* note 56. Ninety-five percent of the company's approximately four hundred shareholders opposed these resolutions. *See id.*

[60] *See* Erlich, *supra* note 54.

[61] *See Unocal, Total Plunging Deeper into Burma Play*, PLATTS' OILGRAM NEWS, Jan. 31, 1997, *available in* 1997 WL 8877068. The production sharing agreement provided for natural gas exploration in a 4275-square mile region of the Andaman Sea known as Block M8. *See id.* Unocal maintains a 47.5% stake in this venture while Total maintains a 52.5% interest. *See id.* MOGE has an option for a 15% interest in the venture which would reduce Unocal and Total's interests proportionately if exercised. *See id.* Coincidentally, Unocal announced the creation of this venture on the same day that the U.S. Department of State released its annual review of human rights around the world which condemned the killing, arrest, and torture of dissidents and ethnic minorities in Burma by SLORC. *See* Keith B. Richburg, *Clinton OKs Ban on Burma*

present time, Unocal continues its participation in the Yadana gas pipeline project with its joint venture partners.

As a result of these alleged human rights violations, Burmese farmers from the Tenasserim region of Burma brought suit in *John Doe I v. Unocal Corp.* against the members of the Joint Venture in the U.S. District Court for the Central District of California, alleging tortious conduct and violations of international human rights.[62] Plaintiffs sought unspecified compensatory damages, punitive damages, and injunctive and declaratory relief directing the Defendants to cease participation in the Joint Venture until SLORC ceases to commit human rights violations in the Tenasserim region.[63] On March 25, 1997, Judge Richard A. Paez denied Unocal's Motion to Dismiss the Complaint, finding that, while the court did not have jurisdiction over the allegations made against Total, MOGE, and SLORC,[64] Unocal could be held liable for claims "based on violations of international law" pursuant to the Alien Tort Claims Act (ATCA).[65] As a result, Plaintiffs were entitled to continue with their suit.[66]

The decision in *Unocal* came at a time of tension between SLORC and foreign governments and international organizations. Amnesty International characterized 1996 as "the worst year ever for human rights in Burma."[67] The U.S. Department of State's

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Investments Because of Rights Abuses, S.F. CHRON., Apr. 22, 1997, at A6. Unocal subsequently suspended exploration and development activities in Burma in response to President Clinton's Executive Order banning new investments in Burma. *See Ban on Investment in Burma Takes Effect*, ASSOCIATED PRESS, May 21, 1997, *available in* 1997 WL 2527538.

[62] *See* 963 F. Supp. 880 (D.C. Cal. 1997). Plaintiffs were identified as John Does I through XI, Jane Does I through III, all other persons similarly situated, and Louisa Benson, a resident of California, on behalf of herself and the general public. *See* Complaint paras. 1-3, at 1-10, *John Doe I v. Unocal Corp.*, 963 F. Supp. 880 (D.C. Cal. 1997) (No. 96-6959). Plaintiffs named Unocal, Total, MOGE, and SLORC as defendants. *See id.* John Imle, the President of Unocal, Roger C. Beach, the Chairman of the Board of Directors and Chief Executive Officer of Unocal, and unidentified defendants Moes 1 through 500 were also named individually as defendants. *See id.*

[63] *See Unocal*, 963 F. Supp. at 884-85.

[64] *See id.* at 885-89.

[65] *Id.* at 889.

[66] *See id.* at 897-98.

[67] *Amnesty International: Burma Arrested More Than 1,000 in 1996*, ASSOCIATED PRESS, June 18, 1997, *available in* 1997 WL 4871249.

Report on Human Rights Practices in Burma for 1996 condemned SLORC for its "serious human rights abuses."[68] U.S. Secretary of State Madeline Albright publicly characterized SLORC as "a repressive, unrepresentative regime that profits from illicit narcotics trafficking."[69] The Clinton administration further characterized SLORC as engaging in a deepening and large-scale repression of its peoples.[70] Accordingly, on May 20, 1997, President Clinton issued Executive Order 13,047 prohibiting new investments in Burma by U.S. persons, effective May 21, 1997.[71] Other countries and organizations including Great Britain, Canada, and the European Union are also considering or have imposed similar restrictions on future investments by their nationals in Burma.[72]

Against this backdrop, this Article examines Judge Paez's opinion and its potential impact upon American companies operating overseas. Part II examines Burma's history, with particular emphasis on Burma's human rights record and American-Burmese relations.[73] Part III examines Unocal's investment in the Yadana gas pipeline project and the controversy accompanying this investment.[74] Part IV analyzes the *John Doe I v. Unocal Corp.*[75] decision with emphasis on its implications for American companies doing business overseas.[76] Ultimately, this

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[68] BUREAU OF DEMOCRACY, HUMAN RIGHTS & LABOR, U.S. DEPT. OF STATE, BURMA REPORT ON HUMAN RIGHTS FOR 1996 1 (1997) [hereinafter BURMA REPORT].

[69] Keith B. Richburg, *Albright Attacks Burmese Rule at Annual Southeast Asia Forum*, WASH. POST, July 28, 1997, at A13.

[70] Memorandum of President William J. Clinton to the U.S. Congress on the Imposition of Sanctions Against Burma, 33 WEEKLY COMP. PRES. DOC. 750 (May 20, 1997), at 1-2; *see also* Statement of President William J. Clinton on Investment Sanctions in Burma, 33 WEEKLY COMP. PRES. DOC. 573 (April 22, 1997), at 1.

[71] Exec. Order No. 13,047, 62 Fed. Reg. 28,301 (1997).

[72] *See Britain to Axe Burma Trade Support*, AGENCE FRANCE-PRESSE, June 20, 1997, *available in* 1997 WL 2137833; *Canada to Impose Sanctions on Burma*, CHICAGO SUN TIMES, July 30, 1997, at 62; Burma Action Group UK Press Release, *European Parliament Gives Unanimous Support to American Burma Law*, June 16, 1997 (visited Apr. 27, 1998) <http://www.soros.org/burma/eusupprt.html>.

[73] *See infra* notes 78-197 and accompanying text.

[74] *See infra* notes 198-307 and accompanying text.

[75] *See* 963 F. Supp. 880 (D.C. Cal. 1997).

[76] *See infra* notes 308-445 and accompanying text.

Article concludes that Judge Paez's opinion may herald the dawning of a new era in the interrelationship between international commercial transactions and human rights law fraught with peril for American businesses.[77]

II. The Historical Background to *John Doe I v. Unocal Corp.*

A. An Introduction to Burma

Although a complete history of Burma is beyond the scope of this Article, a brief review is necessary to place the *John Doe I v. Unocal Corp.* case in its proper context. Traditionally, Burma was ruled by Burmese monarchs and ethnic chieftains until its conquest by Great Britain in the nineteenth century.[78] Widespread opposition to British rule had emerged by the outbreak of the Second World War, and some nationalist factions turned to Japan for assistance in ousting the British.[79] Led by General Bogyoke Aung San, a group of Burmese independence fighters known as the Thirty Comrades received military training from Japan[80] and assisted in the Japanese invasion of Burma in 1941.[81] Burmese nationalists, however, quickly discovered that their hopes of independence were not shared by the Japanese.[82] Accordingly, nationalists switched their alliance and assisted the British in expelling the Japanese from Burma in 1945.[83] Great Britain subsequently yielded to Burmese hopes for self-rule, and Burma, the largest country on the Southeast Asian mainland, achieved independence on January 4, 1948.[84]

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[77] *See infra* notes 446-66 and accompanying text.

[78] *See Burma: the Place, the Politics, the People*, at 1 (visited Mar. 25, 1998) <http://www.soros.org/burma/burmhist.html> [hereinafter *Burma: the Place*].

[79] *See id.*

[80] *See id.*

[81] *See id.*

[82] *See id.*

[83] *See id.*

[84] *See* CIA 1997: The World Factbook, 3 (visited Nov. 3, 1998) <http://www/odci.gov/cia/publications/factbook/bm.html> [hereinafter CIA World Factbook]. The celebratory mood accompanying independence was tempered by the earlier assassination of General Aung San and several of his closest advisors in Rangoon on July 19, 1947. *See Burma: the Place*, *supra* note 78, at 2; *see also* FREDERICA M.

A democratically-elected civilian government ruled Burma until a military coup d'etat in 1962.[85] Led by General Ne Win, one of Aung San's Thirty Comrades, the coup deposed elected Prime Minister U Nu, replacing all democratic institutions with a military bureaucracy.[86] Ne Win outlawed all political parties other than his own Socialist Programme Party, banned the free press, and nationalized the Burmese economy.[87] Ne Win initiated the ill-conceived "Burmese Way to Socialism," which led to economic stagnation, falling production, and shortages.[88]

The voice of Burmese democracy advocates grew in strength as economic conditions worsened in the 1970s and 1980s. In 1988, university students led the Burmese people in massive demonstrations, demanding democracy, respect for human rights, economic freedom, and an end to single-party rule.[89] The military response to the uprisings was swift and brutal. Leaders of the movement and thousands of protesters were arrested and incarcerated without a trial.[90] More than three thousand people were killed by the Burmese military during the demonstrations.[91]

B. Burma as a Military State: The Rise of the State Law and Order Restoration Council

Subsequent to its crushing of the democracy movement, the military government reorganized itself into the form which controls Burma today. On September 18, 1988, the military government suspended the 1974 constitution and declared a new regime known as the State Law and Order Restoration Council (SLORC).[92] Martial law was immediately imposed, and the

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BUNGE, BURMA: A COUNTRY STUDY 45 (1983).

[85] *See Burma: the Place*, *supra* note 78, at 2.

[86] *See Total Denial*, *supra* note 14, at 6. The military governance of Burma was formally ratified in a new constitution which was adopted on January 3, 1974. *See* CIA World Factbook, *supra* note 84, at 3.

[87] *See Total Denial*, *supra* note 14, at 6.

[88] *Id.* at 7.

[89] *See id.*

[90] *See id.*

[91] *See Rebel Students Fighting Burmese Army*, ASSOCIATED PRESS, Apr. 18, 1997, *available in* 1997 WL 4862666.

[92] *See Total Denial*, *supra* note 14, at 7. Ne Win ceded power to the military on

country's name was changed to Myanmar.[93] SLORC outlined three goals for its governance of the newly-rechristened country: (1) the prevention of disintegration of the Burmese union; (2) national solidarity; and (3) the perpetuation of national sovereignty.[94]

The government of Burma under SLORC consists of three branches. The executive branch is headed by a prime minister and chairman appointed by SLORC,[95] a post presently occupied by General Than Shwe.[96] The legislative branch, or the People's Assembly (Pyithu Hluttaw), was elected on May 27, 1990, but has yet to convene.[97] The judicial branch is subject to the control of the executive branch.[98] SLORC appoints justices to the Supreme Court who, in turn, appoint lower court judges subject to SLORC approval.[99] There is no established right to a fair trial, and judicial corruption is pervasive.[100]

Control over the general populace is enforced by a military security body, headed by the Directorate of Defense Services Intelligence.[101] Burmese citizens are restricted in their contact with foreigners and subject to constant surveillance.[102] Political activists and other perceived threats to government security are subjected to harassment, intimidation, arrest, detention, and

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July 23, 1988. *See Reclusive Retired Burmese Dictator Ne Win Arrives in Indonesia*, ASSOCIATED PRESS, Sept. 23, 1997, *available in* 1997 WL 4884695.

93 *See Total Denial*, *supra* note 14, at 7. Despite the change, the author will use the previous name, Burma, throughout this Article.

94 *See BBC: Government News Conference on U.S. and E.U. Sanctions*, Nov. 1, 1996 (visited Mar. 25, 1998) <http://www.soros.org/burma/1101/nscf.html>.

95 *See* CIA World Factbook, *supra* note 84, at 3.

96 *See id.* General Shwe assumed office on April 23, 1992. *See id.*

97 *See id.* at 4. The National Coalition Government of the Union of Burma (NCGUB) consists of individuals who are legitimately elected to the People's Assembly, although not recognized by the military regime. *See id.* The group ultimately joined with insurgents to form a parallel government after fleeing the border area. *See id.*

98 *See* BURMA REPORT, *supra* note 68, at 5.

99 *See id.*

100 *See id.*

101 *See id.* at 1.

102 *See id.*

physical abuse.[103] Additionally, the government tightly controls ownership of computers, printing machines, video recorders, and fax machines.[104] Literature which officially circulates is subject to government approval.[105] In fact, the *New Light of Myanmar* is the only state-approved English newspaper.[106]

Upon completing the governmental restructuring, SLORC announced that multi-party elections would be held on May 27, 1990.[107] In the face of upcoming elections, ninety-three political parties sprang up throughout Burma.[108] The main opposition party to the military regime was the National League for Democracy (NLD), founded by former Socialist Programme Party member U Tin Oo and Daw Aung San Suu Kyi, the daughter of General Bogwoke Aung San.[109] Fearing rejection at the polls, SLORC engaged in a campaign of harassment and intimidation directed at members of opposing political parties.[110] This campaign included placing Suu Kyi under house arrest on July 20, 1989 and barring her candidacy.[111] Nevertheless, the 1990 elections took place, and leadership by SLORC was overwhelmingly rejected.[112] The NLD won 392 of the 474 seats at stake in the People's Assembly, while the pro-regime National Unity Party captured a mere eleven seats.[113]

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[103] *See id.*

[104] *See* R. Jeffrey Smith, *Letter from Burma: The Other Lost World*, WASH. POST, June 5, 1997, at C1.

[105] *See id.*

[106] *See id.* Smith characterized the *New Light of Myanmar* as devoting nothing but "page after mind-numbing page to denouncing Suu Kyi and the United States." *Id.*

[107] *See Total Denial*, *supra* note 14, at 7.

[108] *See id.*

[109] *See id.*

[110] *See id.*

[111] *See id.* While under detention, Suu Kyi won the Nobel Peace Prize in 1991 for her commitment to nonviolent change in Burma. *See Burma: the Place*, *supra* note 78, at 1.

[112] *See Burmese Democracy Organizer Dies in Jail*, ASSOCIATED PRESS, June 9, 1997, *available in* 1997 WL 2531336; Smith, *supra* note 104, at C1.

[113] *See* Smith, *supra* note 104, at C1. The remainder of seats were captured by a broad range of small political parties. *See id.*; *see also Burmese Democracy Organizer Dies in Jail*, *supra* note 112 (stating that the military refused to recognize 82% of the

Stinging from defeat, SLORC refused to honor the election results and intensified its campaign against anti-government activists.[114] SLORC held a constitutional convention consisting primarily of delegates selected by it in January 1993.[115] Not surprisingly, the 1974 constitution was repealed.[116] Although the NLD was invited to participate, NLD withdrew from the convention after protesting convention procedures.[117] To date, the convention has failed to complete the drafting of a new constitution, and SLORC remains in control despite the absence of a document legitimizing its rule.[118]

By 1995, there were hopeful signs that SLORC was moderating its repressive policies. On March 15, 1995, U Tin Oo and U Kyi Maung were released from prison, and, on July 10, 1995, Suu Kyi was released from six years of house arrest.[119] Unfortunately, this atmosphere of hope was short-lived. In May 1996, SLORC arrested 262 members of the NLD in an attempt to prevent participation in a party congress.[120] In 1997, the number of NLD members detained rose to 316.[121] In addition, Suu Kyi was prevented from making any public speeches from November 1996

Parliament seats that the NLD legitimately won).

[114] *See Total Denial*, *supra* note 14, at 7. U Tin Oo and NLD vice chairman U Kyi Maung were placed under arrest as part of SLORC's post-election crackdown. *See id.*; BURMA REPORT, *supra* note 68, at 10.

[115] *See* BURMA REPORT, *supra* note 68, at 10. The Convention proceedings were carefully orchestrated, and despite having no mandate from the people, the convention worked to draft principles for a new constitution designed to provide a dominant role for the military in Burma's political future. *See id.*

[116] *See Total Denial*, *supra* note 14, ch. 6.

[117] *See id.*; *Burma Military Says Suu Kyi's Party Wants to Rejoin Convention*, ASSOCIATED PRESS POLITICAL SERVICE, June 24, 1997, *available in* 1997 WL 2535235. Subsequent to the NLD's refusal to participate in the convention, they were formally expelled from the constitutional convention as well. *See* BURMA REPORT, *supra* note 68, at 10.

[118] *See Total Denial*, *supra* note 14, at 3.

[119] *See id.* ch. 1, at 7.

[120] *See Burmese Junta Arrests More Pro-Democracy Party Members*, ASSOCIATED PRESS, May 26, 1997, *available in* 1997 WL 4868059.

[121] *See id*; *Burma Blocks Opposition Meeting*, WASH. POST, May 27, 1997, at A16. According to Amnesty International, Burma has more than one thousand political prisoners currently under detention. *See Burma Urged to Free Ailing Political Prisoners*, ASSOCIATED PRESS, Oct. 11, 1997, *available in* 1997 WL 4887666.

until September 1997, when she was allowed to address a gathering of NLD delegates.[122] In April 1997, Burmese universities were closed with no announced date for re-opening.[123] The Burmese military became more active, utilizing approximately 100,000 troops to carry out a fierce offensive against the Karen National Union, an ethnically-based political party with a long-standing tradition of opposition to SLORC.[124] Finally, human rights violations, to be discussed in greater detail later in this Article, also sharply increased.[125]

C. Modern Burma: The People, the Society, and the Economy

Modern Burma possesses an ethnically and religiously diverse population numbering approximately forty-six million individuals.[126] While the eighty-three percent literacy rate exceeds that of other developing countries,[127] conditions remain abysmal for most Burmese citizens.[128] While over forty percent of the annual budget goes to the military, less than five percent of the budget is devoted to education.[129] Not surprisingly, only twenty-seven percent of children complete a five-year primary school

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[122] *See Suu Kyi Calls for Unity in Fight Against Burmese Government*, WASH. POST, Sept. 28, 1997, at A26.

[123] *See* R. Jeffrey Smith, *Burma's Army Keeps Its Grip*, WASH. POST, May 18, 1997, at A18.

[124] *See id.* More than fifteen thousand Karens fled this offensive and joined an estimated seventy thousand Burmese refugees living in Thailand. *See Burma's Suu Kyi Urges International Action to Protect Her Party*, ASSOCIATED PRESS, Apr. 8, 1997, *available in* 1997 WL 4861002.

[125] *See infra* notes 147-58 and accompanying text.

[126] *See* CIA World Factbook, *supra* note 84, at 3. Modern Burmese society consists of the following ethnic groups: Burman (68%), Shan (9%), Karen (7%), Rakhine (4%), Chinese (3%), Mon (2%), Indian (2%), and miscellaneous minority ethnic groups (5%). *See id.* Eighty-nine percent of the population identify themselves as Buddhists. *See id.* Other religious affiliations in Burma include Christianity (4%), Islam (4%), and miscellaneous animist beliefs (3%). *See id.*

[127] *See id.* The most recent Burmese literacy rate estimate is for 1995. *See id.*

[128] *See Burma: the Place*, *supra* note 78, at 2.

[129] *See id.* Defense expenditures exceeded $135 million in fiscal year 1995-96. *See* CIA World Factbook, *supra* note 84, at 7. This sum supports army manpower estimated at 372,000, an amount that has doubled since 1988. *See* Smith, *supra* note 123, at A18.

course of study.[130] In addition, there is less than one doctor per twelve thousand individuals, and more than one-third of the population lacks access to health services.[131] In rural areas, fifty percent of the population has no access to safe drinking water.[132] Malaria and HIV are among the leading causes of death.[133]

Although blessed with an abundance of mineral resources including petroleum, natural gas, copper, tin, zinc, lead, and coal, Burma has not shared in the spectacular economic success experienced by some of its Southeast Asian neighbors such as Singapore, Hong Kong, and China.[134] Burma remains an impoverished country. The nation has a mixed economy, with approximately seventy-five percent based on private activity primarily in the agricultural, light industrial, and transportation sectors, and twenty-five percent controlled by the state in the energy, heavy industrial, and foreign trade sectors.[135] Agriculture accounts for sixty percent of the gross domestic product, with services and industry accounting for thirty percent and ten percent respectively.[136] Over sixty-five percent of the labor force is employed in the agricultural sector.[137] Wages remain depressed, and average per capita income ranges between one hundred and three hundred dollars per year.[138] Inflation exceeds thirty-eight percent annually, and the country is saddled with an estimated $5.5 billion foreign debt.[139] It is widely believed that the illicit drug trade is the savior of the Burmese economy, a business that

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130 *See* BURMA REPORT, *supra* note 68, at 14.

131 *See Burma: the Place*, *supra* note 78, at 2.

132 *See* Smith, *supra* note 104, at C1.

133 *See id.*

134 *See* CIA World Factbook, *supra* note 84, at 5.

135 *See id.*

136 *See id.*

137 *See id.* Fourteen percent of the labor force is employed in the industrial sector, 10% are employed in foreign trade, and 6% are employed by the government. *See id.*

138 *See* Smith, *supra* note 104, at C1 (estimating the average per capita income to be one hundred dollars); BURMA REPORT, *supra* note 68, at 1 (noting the U.S. Department of State estimates income to be between two and three hundred dollars annually).

139 *See* CIA World Factbook, *supra* note 84, at 5-6. The rate of inflation is based on a 1994 estimate. *See id.* The amount of foreign debt is based on estimates for fiscal year 1994-95. *See id.*

thrives in an atmosphere of government corruption and indifference.[140]

As a result of its impoverished state, the Burmese economy is heavily dependent on foreign investment, and Burma has been successful in promoting foreign investment since 1988. As of April 1997, such investments were in excess of $6 billion.[141] Great Britain is the largest single investor in Burma with approximately $1.3 billion, followed by Singapore with $1.2 billion, and Thailand with $1 billion.[142] The United States is the fourth largest investor in Burma with investments valued at approximately $542 million.[143] Moreover, foreign oil companies account for approximately sixty-five percent of all foreign investment in Burma since 1988.[144] In recent years, however, the Burmese economy has been significantly impaired by numerous corporate withdrawals, including PepsiCo, Motorola, Hewlett-Packard, Apple Computer, Macy's, Eddie Bauer, Liz Claiborne, Amoco, and Levi Strauss and Company.[145] These withdrawals were the

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[140] *See id.* Burma is the world's largest illicit producer of opium, with a production of over 2,340 tons in 1995. *See id.* Additionally, Burma is the source for over 60% of the heroin imported annually into the United States. *See id.* at 5. The illicit drug trade nets the Burmese economy in excess of $1 billion annually, which, according to the U.S. Embassy in Rangoon, matches its legal exports. *See* Laura Myers, *Albright Urges Nations to Fight Burma's Rampant Drug Trade*, BUFFALO NEWS, July 28, 1997, *available in* 1997 WL 6450885. As a result, "drug traffickers . . . are now leading lights in Burma's new market economy and leading figures in its new political order" according to U.S. Secretary of State Madeline Albright. *Id.* Additionally, Francois Casanier, an associate researcher for Paris-based Geopolitical Drugwatch, has alleged that MOGE "has been the main channel for laundering the revenues of heroin produced and exported under the control of the Burmese army." Dennis Bernstein & Leslie Kean, *Drugs and Oil in Myanmar*, S.F. BAY GUARDIAN, Apr. 23, 1997, at 23.

[141] *See Total Foreign Investment in Burma Rises to $6 Billion*, ASSOCIATED PRESS, June 4, 1997, *available in* 1997 WL 4869122.

[142] *See id.*

[143] *See id.* Unocal's investment in the Yadana pipeline project constitutes the majority of U.S. investment in Burma. *See id.*

[144] *See Corporate Investments and Corporate Withdrawals* (visited on Mar. 28, 1998) <http://www.soros.org/burma/forcorps.html>. The largest foreign oil companies maintaining investments in Burma are Unocal and Texaco from the United States, Total Petroleum of France, and Premier of Great Britain. *See id.*

[145] *See id.* PepsiCo withdrew from Burma in January 1997. Motorola, Hewlett-Packard, and Apple Computer withdrew their investments in Burma in November 1996. *See id.* Macy's and Eddie Bauer withdrew their investments in 1995, and Liz Claiborne

result of consumer and shareholder pressure in response to the perceived deterioration of political legitimacy and human rights protection in the country.[146]

D. Human Rights Issues in Modern Burma and the International Response

The stated basis for much of the pressure on foreign investors to withdraw from Burma is SLORC's human rights record. Human rights abuses by SLORC have sharply escalated in the past two years such that Amnesty International characterized 1996 as the worst year for human rights in Burma since 1990.[147] In its 1996 human rights report for Burma, the U.S. Department of State deemed credible reports of disappearances, rape, and torture engaged in by SLORC.[148] The report also found that SLORC subjects political dissidents to arbitrary arrest, detention, and trial[149] and restricts freedoms of speech, assembly, and association.[150] Burmese citizens, especially ethnic minorities, were subjected to forced relocation and confiscation of their property.[151] In addition, discrimination, violence, and exploitation of women and children also remained problems.[152]

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and Amoco left Burma in 1994. *See id.* Levi Strauss and Company was one of the first foreign companies to withdraw its investments from Burma in June 1992. *See id.* Significant non-American investors that have abandoned Burma include Heineken and Carlsberg, which withdrew in July 1996. *See id.*

[146] *See id.*

[147] *See Amnesty International: Burma Arrested More Than 1,000 in 1996*, *supra* note 67.

[148] *See* BURMA REPORT, *supra* note 68, at 3.

[149] *See id.* at 4-5. According to Amnesty International, more than 2000 political activists were arrested and more than 1000 were sentenced to prison in 1996. *See Amnesty International: Burma Arrested More Than 1,000 in 1996*, *supra* note 67. Amnesty International characterized prison conditions as harsh and replete with cruel, inhuman, or degrading treatment, lack of medical care and inadequate diet. *See id.*

[150] *See* BURMA REPORT, *supra* note 68, at 6-8.

[151] *See id.* at 5-6. The U.S. Department of State estimated that the Burmese military forcibly relocated 30,000 Karenni villagers and tens of thousands of Shan villagers in 1996. *See id.* at 6. Amnesty International has placed this figure at 100,000, and Human Rights Watch Asia has estimated that 200,000 Karenni and Shan villagers were subject to forced relocation. *See Burma's Children Suffer from Forced Labor*, REUTERS, Jan. 15, 1997.

[152] *See* BURMA REPORT, *supra* note 68, at 11-13. For example, the U.S. Department

Perhaps the most troubling were reports of forced labor on government projects throughout Burma. In January 1997, the International Confederation of Free Trade Unions maintained that 800,000 Burmese have been forced to work without pay or against their will.[153] The Confederation alleged that nearly one-tenth of Burma's economic output is attributable to forced labor.[154] The U.S. Department of State likewise found credible evidence of forced labor for the construction of roads, railroads and hotels.[155] The State Department concluded that SLORC has "increasingly supplemented declining investment with uncompensated people's 'contributions' of labor to build or maintain irrigation, transportation and tourism infrastructure projects."[156] The forced laborers suffer harsh working conditions and are subject to brutal mistreatment that often leads to illness or death.[157] SLORC denies these allegations, maintaining that the thousands of Burmese who contribute their free labor to the government do so to conform with Burmese cultural traditions.[158]

Several western countries and international organizations have condemned the excesses of SLORC by imposing sanctions. In March 1997, the European Union suspended favorable trading benefits for Burma because of its pattern of forced labor.[159] On June 19, 1997, Great Britain suspended financial support for companies trading with Burma "until there is progress towards democratic reform and respect for human rights in Burma."[160]

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of State concluded that working women in Burma did not consistently receive equal pay for equal work and the minimum age of thirteen for the employment of children was routinely disregarded. *See id.*

153 *See Burma's Children Suffer from Forced Labor*, *supra* note 151.

154 *See id.* The International Labor Rights Fund has claimed that "not since the concentration camp system of Nazi Germany has a nation instituted such an extensive system [of forced labor]." Kramer, *supra* note 36. The International Labor Rights Fund condemned Americans who profit from exploitation of Burma's "free-market, forced labor economy." *Id.*

155 *See* Kramer, *supra* note 36.

156 BURMA REPORT, *supra* note 68, at 13.

157 *See id.*

158 *See* Kramer, *supra* note 36.

159 *See* Peter Baker, *U.S. to Impose Sanctions on Burma for Repression*, WASH. POST, Apr. 22, 1997, at A1.

160 *Britain Suspends Backing for Companies Trading with Burma*, ASSOCIATED

Canada announced that it would ban new investments and limit trade "to counter Burma's attempts to encourage foreign investment."[161] In April 1997, the United Nations Human Rights Commission unanimously condemned SLORC for its pattern of continuing violations.[162] Moreover, the World Bank and International Monetary Fund stopped lending to Burma in response to SLORC's actions against pro-democracy demonstrators in 1988.[163] The Asian Development Bank also banned financial assistance to Burma in 1988 and renewed the ban in April 1997.[164]

Despite these efforts, total foreign investment in Burma rose from $5.3 billion in December 1996 to $6 billion in April 1997.[165] Condemnation of SLORC has not been universal. In June 1997, Japan expressed interest in resuming aid to Burma.[166] Also in 1997, the Association of Southeast Asian Nations (ASEAN) unanimously admitted Burma as a member despite its human rights record and U.S. objections.[167] ASEAN members maintain

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PRESS, June 19, 1997, *available in* 1997 WL 4871568. Great Britain's prohibition applied to companies maintaining trade missions in Burma and to trade promotion activities in Burma. *See id.*

[161] Hari S. Maniam, *Canada to Impose Sanctions on Burma*, ASSOCIATED PRESS, July 29, 1997, *available in* 1997 WL 2541873.

[162] *See* Baker, *supra* note 159, at A1.

[163] *See Suu Kyi Praises Clinton for Imposing Sanctions on Burma*, ASSOCIATED PRESS, Apr. 25, 1997, *available in* 1997 WL 2519955.

[164] *See id.*

[165] *See Foreign Investment Rises to $6 Billion in Myanmar*, J. COM., June 5, 1997, at A4. However, it bears note that the source of this information, the Myanmar Investment Commission, is controlled by SLORC, which renders its statistics inherently suspect.

[166] *See Envoy of Japan Premier Meets Top Member of Burmese Junta*, ASSOCIATED PRESS, June 12, 1997, *available in* 1997 WL 4870507. Japan suspended aid in September 1988. *See id.* It resumed aid for projects under way in February 1989, but it has not extended aid for new projects since September 1988. *See id.*

[167] *See* Hari S. Maniam, *Rejecting International Pressure Asian Economic Bloc to Admit Burma*, ASSOCIATED PRESS, May 30, 1997, *available in* 1997 WL 4868590; Seth Mydans, *Asian Alliance Ignores U.S., Lets Burma Join*, S.F. EXAMINER, June 1, 1997, at D3. Formed in 1967, ASEAN consists of Malaysia, Indonesia, the Philippines, Singapore, Brunei, Vietnam, Thailand, and Laos as well as Burma. *See Albright Delivers Scathing Critique of Former Burma; Secretary Urges Southeast Asian Bloc to Promote Reforms*, BALTIMORE SUN, July 28, 1997, at A1. ASEAN represents 450 million people and is the United States' fourth largest trading partner. *See* Robin

that Burma's human rights situation is an internal matter.[168] Rather than further isolate SLORC, ASEAN members elected to continue their policy of promoting change in Burma through constructive engagement.[169] Burma characterized its admission as "a victory over the divisive legacies of different colonial masters that [have] ruled the region."[170]

At the other end of the spectrum, the United States has played a leading role in condemning the actions of SLORC. In response to SLORC's actions against the pro-democracy movement in 1998, the United States cut off direct financial assistance and blocked multinational aid, such as international loans.[171] The

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Wright, *Albright, Malaysian Leader Clash over Rights, Soros*, S.F. CHRON., July 29, 1997, at A9. Secretary of State Madeline Albright downplayed the significance of Burma's admission to ASEAN by stating that although "Burma [was] inside ASEAN . . . it will remain outside of the Southeast Asian mainstream." *Albright Delivers Scathing Critique of Former Burma; Secretary Urges Southeast Asian Bloc to Promote Reforms*, BALTIMORE SUN, July 28, 1997, at A1. Additionally, Albright reminded ASEAN members that by admitting Burma, ASEAN assumed greater responsibility for the resolution of Burma's problems. *See id.*

However, opposition to ASEAN's decision to admit Burma was not unanimous. One commentator praised ASEAN's decision on the following grounds:

> Burma, as the West isolates it, is rapidly developing closer ties with China . . . . China is wooing Burma, with a likely aim of achieving naval access to the Bay of Bengal and Indian Ocean—a quantum leap in China's strategic position in Asia . . . . The West's sanctions on Burma are thus a great strategic boon to China.

Peter W. Rodman, *The Burma Dilemma*, WASH. POST, May 29, 1997, at A23.

[168] In voting to admit Burma to ASEAN, Ghaffar Fadyl, a spokesman for Indonesia's Foreign Ministry, stated that "sanctions against Burma will not bear fruitful results." *Burma's Neighbors Shrug Off Sanctions*, S.F. CHRON., Apr. 24, 1997, at C18; Grant Peck, *Burma and Neighbors Cool to U.S. Sanctions*, ASSOCIATED PRESS, Apr. 23, 1997, *available in* 1997 WL 4863277. In support of his vote to admit Burma, S. Jayakumara, the Foreign Minister of Singapore, stated that "[t]he prevailing position among the foreign ministers is that the criteria must not be the internal system of government." Maniam, *supra* note 167.

[169] *See* Steven Erlanger, *Asians are Cool to Albright on Cambodians and Burmese*, N.Y. TIMES, July 28, 1997, at A3. The "constructive engagement" approach involves "a hands-off policy toward the 'internal affairs' of other nations and the primacy of economic relationships over political and human rights concerns." Mydans, *supra* note 167, at D3. This approach has been criticized as nothing more than "a euphemism for doing business with thugs." *When Sanctions Make Sense*, WASH. POST, Apr. 24, 1997, at A24.

[170] Myers, *supra* note 140.

[171] *See* Baker, *supra* note 159, at A1.

failure of these sanctions to positively impact the human rights situation in Burma led Congress and the Clinton administration to impose more severe sanctions.[172] Signed into law on September 30, 1996, Title II of the Foreign Operations, Export Financing and Related Appropriations Act of 1997 grants financial assistance to democratization efforts in Burma and imposes severe sanctions on Burma in the absence of appreciable improvement in its human rights record.[173] The Act grants not less than $2.5 million to groups supporting democratization in Burma.[174] Section 570(a)(1) of the Act continues to prohibit bilateral assistance to the Burmese government until they make "measurable and substantial progress in improving human rights practices and implementing democratic governance."[175] Section 570(a)(2) directs the Secretary of the Treasury to instruct American executive directors of all international financial institutions to oppose any loan or other utilization of funds that benefit Burma.[176] Moreover, section 570(a)(3) bars Burmese government officials from obtaining entry visas to the United States.[177] Finally, section 570(b) authorizes the prohibition of new American investments in Burma if the President certifies to Congress that "the Government of Burma has physically harmed, rearrested . . . or exiled Suu Kyi or has committed large-scale repression of or violence against the Democratic opposition."[178]

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[172] *See* Foreign Operations, Export Financing and Related Programs Appropriations Act, Pub. L. No. 104-208 § 570, 110 Stat. 166-67 (1996).

[173] *See id.*

[174] *See id.*

[175] *Id.* § 570(a)(1). Humanitarian and counter-narcotics assistance and assistance promoting human rights and democratic values were exempted from this prohibition. *See id.* §§ 570(a)(1)(A)-(C).

[176] *See id.* § 570(a)(2). "International financial institutions" are defined in the Act as including the International Bank for Reconstruction and Development, the International Development Association, the International Finance Corporation, the Multilateral Investment Guarantee Agency, the Asian Development Bank, and the International Monetary Fund. *Id.* § 570(f)(1).

[177] *See id.* § 570(a)(3).

[178] *Id.* § 570(b). The term "new investment" was defined to include the following activities:

> (A) the entry into a contract that includes the economical development of resources located in Burma, or the entry into a contract providing for the

Unfortunately, the legislation had no effect upon SLORC's behavior. Based on the "constant and continuing pattern of severe repression" by SLORC,[179] including the detention of political dissidents, the prevention of free expression by Suu Kyi and her supporters, forcible manual labor, and the continued production and export of opium and heroin,[180] President Clinton issued Executive Order 13,047.[181] This Order implemented a ban on new investments in Burma by "United States persons," effective May 21, 1997.[182] In addition, the Order prohibited any facilitation by Americans of a transaction by a foreign person where the

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general supervision and guarantee of another person's performance of such a contract;

(B) the purchase of a share of ownership, including an equity interest, in that development;

(C) the entry into a contract providing for the participation in royalties, earnings of profits in that development, without regard to the form of participation.

Id. § 570(f)(2)(A-C).

The Act further imposed a requirement upon the President to report to the chairmen of the Committee on Foreign Relations, the Committee on International Relations and the House and Senate Appropriations Committees every six months on progress towards democratization and improvement in the quality of life in Burma. *See id.* at § 570(d). Further, the President was granted the authority to temporarily or permanently waive the sanctions set forth in subsections (a) and (b) upon certifying to Congress that the application of such sanctions would be contrary to the national security interests of the United States. *See id.* § 570(e).

The sanctions were limited to new investments in order to address concerns raised by Unocal lobbyists that complete divestiture would result in aggregation of existing investments by foreign companies. *See* Salpukas, *supra* note 6, at D1. This concern was based in part upon statements made by Thierry Desmaret, the President of Total, that his company was ready to assume Unocal's interest in the Yadana pipeline project in the event Congress required Unocal to forfeit its investment. *See Total Eyes Partner's Burma Stake Despite US-Led Boycott*, AGENCE-FRANCE PRESSE, Feb. 12, 1997.

[179] *Total Eyes Partner's Burma Stake Despite US-Led Boycott*, *supra* note 178.

[180] *See id.*; Thomas W. Lippman, *Escalation of Rights Abuses Triggered Burma Sanctions*, WASH. POST, Apr. 23, 1997, at A4; Gedda, *supra* note 50.

[181] *See* Executive Order No. 13,047, *supra* note 71.

[182] *Id.* The Order defines U.S. persons as "any United States citizen, permanent resident, alien, juridical person organized under the laws of the United States (including foreign branches), or any person in the United States." *Id.* at Section 4(c); *see also* Memorandum of President William J. Clinton to the U.S. Congress on the Imposition of Sanction Against Burma, *supra* note 70, at 1-2; *Clinton Bans New Investments in Burma*, ASSOCIATED PRESS, May 20, 1997, *available in* 1997 WL 4867176.

transaction would constitute a new investment prohibited by the Order, or any other transaction designed to evade the investment prohibition.[183] The Order, however, exempted transactions for the purchase and sale of goods, services, or technology so long as American companies were not compensated with shares of ownership in or profits from any new investment.[184] Nonprofit activities and programs were also exempted from the prohibition.[185]

Despite Burma's abysmal human rights record, the imposition of these sanctions was not greeted with unanimous domestic praise. Although President Clinton's order received strong political support,[186] critics on both sides quickly labeled the sanctions as counterproductive.[187] Several American business leaders condemned the imposition of sanctions "as the latest example of the administration hurting domestic companies to make a political point."[188] Unocal Chairman Roger C. Beach condemned the sanctions as costing the United States jobs without ensuring an improvement in human rights.[189] Others argued that sanctions created a power vacuum in Southeast Asia which would invariably be filled by other countries, such as a resurgent China.[190] Senators Mitch McConnell and Daniel Moynihan declared the

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[183] *See* Executive Order No. 13,047, *supra* note 71, §§ 2(a) & (b).

[184] *See id.* §§ 3(a) & (b).

[185] *See id.* § 4(f).

[186] For example, the Washington Post editorialized that although "[s]anctions aren't the answer for every bad regime . . . [r]arely has a nation been more deserving of economic sanctions [than Burma]." *When Sanctions Make Sense*, *supra* note 169, at A24.

[187] *See, e.g.*, Baker, *supra* note 159, at A1.

[188] *Id.* George David, Chairman of United Technologies Company, characterized the attitude of American businesspeople towards sanctions when he stated that "[although we] tenaciously and passionately believe in human rights, workers' rights and democracy . . . we don't believe in unilateral sanctions." Grant Peck, *Opposition Praises Sanctions Against Burma; Some Businesses Object*, ASSOCIATED PRESS, Apr. 22, 1997, *available in* 1997 WL 4863141.

[189] *See* Peck, *supra* note 188.

[190] *See* Rodman, *supra* note 167, at A23. Former secretary of the treasury Lloyd Bentsen stated that "[c]onstructive engagement is much more important for the United States. We shouldn't lose what little influence we have by pulling out." Peck, *supra* note 188.

prohibitions upon new investments insufficient and threatened to offer legislation designed to restrict current investments and the right to obtain royalties from said investments.[191]

SLORC responded immediately and bluntly to international condemnation and the imposition of sanctions by the United States. Burmese Foreign Minister Ohn Gyaw categorically denied the existence of human rights violations in Burma.[192] Gyaw accused the Western press of presenting a distorted picture of Burma, and blamed this distortion with the resulting international condemnation and retribution towards the Burmese government.[193] Gyaw also condemned the United States for imposing its views of democracy on the Burmese populace[194] and for attempting to overthrow SLORC.[195] Moreover, SLORC sponsored anti-American rallies in several Burmese cities.[196] Ultimately, SLORC

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[191] *See* Keith B. Richburg, *Clinton OKs Ban on Burma Investments Because of Rights Abuses*, S.F. CHRON., Apr. 22, 1997, at A6. Senator McConnell is a Republican from the state of Kentucky. Senator Moynihan is a Democrat from the state of New York.

[192] Gyaw specifically stated: "[W]e were accused of grossly violating human rights, but we do not have such [violations] in our country in existence in such a manner." *BBC: Government News Conference on U.S. and E.U. Sanctions*, *supra* note 94, at 1.

[193] *See Asians, West Clash Over Human Rights*, WASH. POST, July 30, 1997, at A1.

[194] Gyaw stated that Burma was "proceeding toward democracy whether that democracy accords with the outside world's perception or is in accordance with our own values." Maniam, *supra* note 161.

[195] The *New Light of Myanmar* condemned the U.S. investment ban as an attempt "to unseat a government which it cannot manipulate." *Burma: U.S. in "Pickle" over Economic Sanctions*, ASSOCIATED PRESS, Apr. 27, 1997, *available in* 1997 WL 4863820. SLORC member General Khin Nyunt identified several American congressional appropriations to labor and pro-democracy groups that he stated were planning to "commit atrocities, cause chaos and confusion and thus bring down the government and install a puppet government that would take orders from Western powers." *Burma Accuses U.S. of Aiding and Abetting Terrorist Attacks*, ASSOCIATED PRESS, June 27, 1997, *available in* 1997 WL 4872849. Among the groups identified by General Nyunt were the American Refugee Committee, the International Rescue Committee, the Center for International Private Enterprise, and the Asian-American Free Labor Institute. *See id.*

[196] *See Burmese Government Supporters Denounce U.S. Democracy Leader*, ASSOCIATED PRESS, May 5, 1997, *available in* 1997 WL 4864984. More than 65,000 people participated in the demonstrations throughout Burma on May 3 and 4, 1997. *See id.* The demonstrations were sponsored by the Union Solidarity and Development Association, a group controlled by SLORC. *See id.*

concluded that the Burmese economy would survive the imposition of international sanctions as it had survived twenty-six years of socialist isolationism imposed by Ne Win, and there was "no reason to deviate from its original path to serve the interest of a foreign government."[197]

III. The Procedural History of *John Doe I v. Unocal Corp.*

In the midst of these volatile circumstances, Unocal's investment in the Yadana pipeline project has become a focus of international discussion, primarily as a result of the suit brought against the Joint Venture participants by Burmese farmers and their families.[198] Allegations made by the Plaintiffs are wide-ranging. Plaintiffs charge that Defendants[199] have and continue to relocate villagers against their will, to utilize forced labor, to steal villagers' property, and to engage in other human rights violations in the construction of the Yadana pipeline.[200] Further, they

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[197] Seth Mydan, *Amid U.S. Ban, Burmese Crack Down* (visited May 21, 1997) <http://www.soros.org/burma/unocal.html>; *Burmese Chamber of Commerce Denounces American Sanctions*, ASSOCIATED PRESS, May 12, 1997, *available in* 1997 WL 2524892; *Burmese Leader Shrugs Off U.S. Sanctions*, ASSOCIATED PRESS, Apr. 26, 1997, *available in* 1997 WL 4863700; Peck, *supra* note 168. Conversely, Suu Kyi welcomed the imposition of sanctions by the United States, noting that continuing to permit new investments in Burma was an investment in injustice. *See Suu Kyi Praises Clinton for Sanctions on Burma*, ASSOCIATED PRESS, Apr. 25, 1997, *available in* 1997 WL 4863569.

[198] *See* John Doe I v. Unocal Corp., 963 F. Supp. 880 (D.C. Cal. 1997).

[199] Throughout Plaintiffs' Complaint, the term "Defendants" referred to all such named parties collectively. Plaintiffs did not specifically identify which Defendants undertook the actions set forth in their Complaint. *See* Complaint para. 18, at 7, *John Doe I. v. Unocal Corp.*, 963 F. Supp. 880 (D.C. Cal. 1997) (No. 96-6959). Rather, the Plaintiffs alleged that actions of each Defendant, as agent, employer, and joint venturer of the others, were attributable to all Defendants. *See id.* Additionally, the Complaint alleged Defendants ratified each other's conduct in the operation of the Joint Venture. *See id.* Furthermore, Plaintiffs alleged that the Defendants were the alter egos of one another with regard to the pipeline project and conspired to enter into agreements to commit the acts set forth in Plaintiffs' Complaint. *See id.* para. 19, at 8. Allegedly, Imle and Beach participated in, directed, and authorized the tortious conduct of the Defendants. *See id.* paras. 15-16, at 6-7. The Complaint also alleged Imle and Beach knew of such tortious conduct and failed to undertake appropriate action to prevent its occurrence. *See id.*

[200] *See Unocal*, 963 F. Supp. at 883. Plaintiffs alleged numerous other human rights violations including arbitrary arrest, torture, cruel, inhuman and degrading treatment, battery, false imprisonment, assault, and emotional distress as a result of

maintain that such actions violate state and federal law, international treaties, and customary international law.[201] As a

Defendants' actions. *See* Complaint paras. 204-06, 210-17, at 38-40, 42-46, *Unocal* (No. 96-6959). Additionally, Plaintiffs contended that Defendants failed to exercise reasonable care in selecting SLORC to provide security for the pipeline project. *See id.* paras. 250-53, at 47-48.

[201] *See id.* at 883-84. Plaintiffs alleged that Defendants' conduct violated:

Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (1994) [hereinafter RICO];

Alien Tort Claims Act, 28 U.S.C. § 1350 (1994) [hereinafter ATCA];

Torture Victim Protection Act, 28 U.S.C. § 1350 (1994) [hereinafter TVPA];

U.N. CHARTER, June 26, 1945, 59 Stat. 1031, T.S. 993;

Universal Declaration, *supra* note 13;

International Covenant on Civil and Political Rights, G.A. Res. 2220A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16 at 52, 999 U.N.T.S. 171, U.N. Doc. A/6316 (1966);

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 46, U.N. GAOR, 39th Sess., Supp. No. 51 at 197, U.N. Doc. A/39/51 (1984);

Declaration on the Protection of All Persons From Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 3452 (XXX), U.N. GAOR, 30th Sess., Supp. No. 34, Annex, at 91, U.N. Doc. A/10034 (1975);

Convention to Suppress the Slave Trade and Slavery, Sept. 25, 1926, 46 Stat. 2183, T.S. No. 788, 60 L.N.T.S. 253;

Protocol Amending the Slavery Convention, with Annex, Sept. 25, 1926, 7 U.S.T. 479, T.I.A.S. 3532, 182 U.N.T.S. 51 (1953);

Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, Sept. 7, 1956, 18 U.S.T. 3201, T.I.A.S. 6418, 226 U.N.T.S. 3;

Convention Concerning Forced or Compulsory Labor, *supra* note 37;

Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, U.N. GAOR, 48th Sess., Supp. No. 49, at 217, U.N. Doc. A/48/49 (1993);

Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, at 193, U.N. Doc. A/34/46 (1979);

Common law of the United States;

Statutes and common law of the state of California including wrongful death, theft by coercion, assault and battery, false imprisonment, kidnapping, negligence, recklessness, intentional and negligent infliction of emotional distress, and unfair business practices; and

Laws of Burma.

Complaint, paras. 187 (a)-(u), at 32-34, *Unocal* (No. 96-6959).

result, Plaintiffs are seeking compensatory and punitive damages as well as injunctive relief.[202] They hope any injunction so ordered would enjoin Unocal from making payments to SLORC, or from further participating in the Joint Venture in any manner until such time as SLORC ceases its human rights violations in the Tenasserim region.[203]

In an opinion by Judge Richard A. Paez on March 25, 1997, the court denied in part and granted in part Defendants' Motion to Dismiss.[204] Although the court found that SLORC, MOGE, and Total were not subject to the court's jurisdiction, Plaintiffs were entitled to continue their suit against Unocal.[205] Unocal could be held liable for claims based on violations of international law pursuant to the Alien Tort Claims Act (ATCA), even in the absence of contribution from the participating foreign sovereigns.[206]

The opinion concluded that the Foreign Sovereign Immunity Act (FSIA) entitled SLORC and MOGE to sovereign immunity.[207] After determining SLORC and MOGE were foreign sovereigns and thus entitled to immunity,[208] the court then turned to Plaintiffs' contentions that the human rights violations perpetrated in connection with the Yadana gas pipeline project were sufficient to invoke the commercial activity exception to immunity.[209] The court found Plaintiffs' allegations insufficient to invoke the exception.[210]

Specifically, the court found clause two of the commercial

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202 *See id.* at 52-53.

203 *See id.*

204 *See Unocal*, 963 F. Supp. at 887.

205 *See id.*

206 *See id.*

207 *See id.* at 888.

208 *See id.*

209 *See id.*

210 *See id.* Although the party asserting immunity bears the burden of presenting a prima facie case that it is a sovereign state, a plaintiff claiming the existence of an exception bears the burden of producing evidence that an exception applies. *See* Phaneuf v. Republic of Indonesia, 106 F.3d 302, 307 (9th Cir. 1997); Randolph v. Budget Rent-A-Car, 97 F.3d 319, 324 (9th Cir. 1996).

activity exception inapplicable because it only applies to claims that are based upon acts performed in the United States.[211] Plaintiffs' human rights claims were based upon acts of SLORC and MOGE allegedly committed in Burma.[212] Although commercial activities such as negotiations and decision-making occurred in the United States, such occurrences were not elements of Plaintiffs' claims against SLORC and MOGE.[213] As such, clause two of the commercial activity exception did not apply to Plaintiffs' claims against SLORC and MOGE.

The court also rejected Plaintiffs' contention that the court could exercise jurisdiction pursuant to the third clause of the commercial activity exception.[214] The court held that, although SLORC and MOGE "engaged in commerce in the same manner as a private citizen might do when they allegedly entered into the Yadana gas pipeline project," the alleged violations of Plaintiffs' human rights did not fall within the ambit of the commercial activity exception.[215] Rather, SLORC and MOGE's activities constituted exercises of their police power over the Burmese citizenry.[216] The exercise of such power was "peculiarly sovereign in nature" and could not be exercised by private parties.[217] Such acts therefore were not within the scope of the commercial activity exception to FSIA.[218]

Ultimately, the court concluded that Plaintiffs could not demonstrate that SLORC and MOGE's alleged human rights violations had a direct effect in the United States.[219] The court defined an effect as direct for purposes of the commercial activity

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[211] *See Unocal*, 963 F. Supp. at 887.

[212] *See id.*

[213] *See id.*

[214] *See id.* at 887-88.

[215] *Id.* at 887.

[216] *See id.* at 888.

[217] *Id.*

[218] *See id.* However, it is important to note that the court found that the alleged acts of torture and expropriation of property committed in furtherance of the pipeline project were "substantively connected to the commercial activity" thereby satisfying the "in connection with" requirement of the clause three exception. *Id.*

[219] *See id.*

exception if "it follows as an immediate consequence of the defendant's activity."[220] The financial losses alleged by Plaintiffs to have occurred in the United States as a result of Defendants' human rights violations were in themselves insufficient to constitute a direct effect.[221] Rather, the court determined that the locus of a direct effect is "the place where the legally significant acts giving rise to the claims occurred."[222] In this case, the legally significant acts giving rise to Plaintiffs' claims occurred in Burma.[223] Therefore, SLORC and MOGE were entitled to sovereign immunity.

The court also refused to deem SLORC and MOGE necessary or indispensable parties to the litigation.[224] The court rejected Unocal's contention that complete relief could not be accorded among the remaining parties in SLORC and MOGE's absence.[225] The court deemed as "inexplicable" Unocal's argument that Plaintiffs' Complaint was based solely upon vicarious liability rather than joint tortfeasor liability.[226] Rather, the allegations regarding the creation and operation of the Joint Venture and resultant conspiracy to violate Plaintiffs' human rights were more than sufficient to state claims based upon joint tortfeasor liability.[227] If Plaintiffs were able to successfully prove Defendants were joint tortfeasors, the court concluded that complete compensatory relief could be accorded among the remaining parties.[228]

Additionally, SLORC and MOGE's absence would not impede Plaintiffs from obtaining the injunctive and declaratory relief prayed for in their Complaint.[229] The court distinguished Plaintiffs' claims and requested relief from those set forth by the

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220 *Id.*; Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 618 (1992).

221 *See Unocal*, 963 F. Supp. at 888.

222 *Id.*

223 *See id.*

224 *See id.* at 889.

225 *See id.*

226 *Id.*

227 *See id.*

228 *See id.*

229 *See id.*

plaintiffs in *Aquinda v. Texaco, Inc.* in which the U.S. District Court for the Southern District of New York concluded that Ecuador and its state-owned oil company were indispensable parties.[230] In *Aquinda*, the plaintiffs sought extensive equitable relief including environmental clean-up of polluted lands, alteration of the consortium's Trans-Ecuador pipeline, and lengthy direct monitoring of the project and affected lands.[231] Additionally, Ecuador's state oil company owned one hundred percent of the pipeline and consortium.[232]

By contrast, the equitable relief sought by the Burmese Plaintiffs was far less extensive and intrusive. The equitable relief sought by Plaintiffs consisted of orders directing Defendants to cease payments to SLORC and cease their participation in the Joint Venture until human rights violations in the Tenasserim region ended.[233] Additionally, ownership of the Joint Venture did not entirely reside with a foreign sovereign, thereby mitigating concerns regarding judicial intrusion into matters of national sovereignty and resultant enforceability of the requested remedies. Based upon the limited nature of the requested equitable relief, Plaintiffs could still obtain complete relief from the remaining Defendants if they prevailed.[234] Furthermore, injunctive relief against the remaining Defendants would not "burden them any more than such relief would burden them if SLORC and MOGE were subject to suit."[235] Thus, the court concluded that SLORC and MOGE were not necessary parties, thereby rendering a decision upon their indispensability unnecessary.[236]

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[230] *See* Aquinda v. Texaco, Inc., 945 F. Supp. 625, 627-28 (S.D.N.Y. 1996).

[231] *See id.* at 627.

[232] *See id.*

[233] *See* Complaint at 52-53, *John Doe I v. Unocal Corp.*, 963 F. Supp. 880 (D.C. Cal. 1997) (No. 96-6959).

[234] *See Unocal*, 963 F. Supp. at 889.

[235] *Id.*

[236] *See id.* In addition, the court rejected Defendants' argument that they would be prejudiced as a result of their inability to conduct discovery of SLORC and MOGE in their absence from the litigation. *See id.* at 889 n.6. The court concluded that there was "no evidence that the absence of this court's subpoena power over SLORC and MOGE will have any appreciable effect on Unocal's ability to conduct discovery." *Id.* The court presumably would have accepted Defendants' argument, or at least devoted more

The court also found that it had subject matter jurisdiction over the remaining Defendants pursuant to the ATCA.[237] As Plaintiffs' claims were asserted by aliens and alleged the commission of torts, the only issues for resolution were whether Plaintiffs alleged violations of international law and the necessity of state action.[238] In determining the law of nations, the court turned to "juridical writings on public law, the general practice of nations and judicial decisions recognizing and enforcing international law."[239] A court applying the ATCA must determine "whether there is an applicable norm of international law, whether it is recognized by the United States, what its status is and whether it has been violated."[240] Jus cogens norms of international law, such as Plaintiffs' allegations of torture, met these criteria and, thus, jurisdiction could be premised upon their violation.[241]

The court then addressed the issue of the necessity of state action to a claim for relief asserted pursuant to the ATCA.[242] To the extent that state action is required to assert a claim pursuant to the ATCA, the court analogized to standards developed under 42

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time to it, had Defendants presented substantive evidence of their inability to conduct discovery (such as SLORC and MOGE's status as the sole repository of documents crucial to the defense) and resultant prejudice.

[237] *See id.* at 889-90.

[238] *See id.* at 890-92. Although the law of nations is part of federal common law, *see In re* Estate of Ferdinand Marcos Human Rights Litigation, 978 F.2d 493, 502 (9th Cir. 1992), it is important to note that "section 1350 does not require that the action 'arise under' the laws of the United States, but only mandates 'a violation of the law of nations' in order to create a cause of action." *In re* Estate of Ferdinand Marcos Human Rights Litigation II, 25 F.3d 1467, 1475 (9th Cir. 1994).

[239] *Unocal*, 963 F. Supp. at 890-92 (citing Kadic v. Karadzic, 70 F.3d 232, 238 (2d Cir. 1995)).

[240] *Id.* (quoting *In re* Estate of Ferdinand Marcos Human Rights Litigation, 978 F.2d. at 502).

[241] *See id.* A jus cogens norm of international law is defined as a norm "accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 714 (9th Cir. 1992).

[242] *See Unocal*, 963 F. Supp. at 890-91. A state is defined in international law as "an entity [having] a defined territory and a permanent population under the control of its own government, with the capacity to engage in formal relations with other states." *Kadic*, 70 F.3d at 238.

U.S.C. § 1983.[243] The court recognized that case law in this area was not "a model of consistency."[244] Regardless of whether the standards established by the Supreme Court were treated as separate tests or as factors for consideration, the court chose to make a fact-bound inquiry to resolve the state action issue.[245]

Utilizing the joint action approach, the court held that private persons can become state actors if they are "willful participants in joint action with the State or its agents."[246] This approach requires the court to examine "whether state officials and private parties have acted in concert in effecting a particular deprivation of rights."[247] Such joint action could arise from an agreement between a government and a private party as well as from a conspiracy between the parties to deprive third persons of their rights.[248] Such joint action may also arise in instances where the state maintains a position of interdependence with a private party.[249] In fact, all that is required for a court to find joint action is "a substantial degree of cooperative action between the state and private actors in effecting the deprivation of rights."[250]

In this case, the court held that Plaintiffs' allegations that

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[243] *See Unocal*, 963 F. Supp. at 890. The Second Circuit summarized the state action requirement of § 1983 as requiring that a private individual act "together with state officials or with significant state aid." *Kadic*, 70 F.3d at 245.

[244] *Unocal*, 963 F. Supp. at 890. The Supreme Court has articulated a number of different approaches to the state action question, specifically, the public function test, the presence of state compulsion, the presence of a nexus between private and state action, and the presence of joint action. *See id.* (quoting George v. Pacific-CSC Work Furlough, 91 F.3d 1227, 1230 (9th Cir. 1996)).

[245] *See id.* at 890.

[246] *Id.* (quoting *George*, 91 F.3d at 1231); Dennis v. Sparks, 449 U.S. 24, 27 (1980).

[247] *Unocal*, 963 F. Supp. at 891 (quoting Gallagher v. Neil Young Freedom Concert, 49 F.3d 1442, 1453 (10th Cir. 1995)); Collins v. Womancare, 878 F.2d 1145, 1154 (9th Cir. 1989).

[248] *See Unocal*, 963 F. Supp. at 890-91 (citing *George*, 91 F.3d at 1231); Fonda v. Gray, 707 F.2d 435, 437 (9th Cir. 1983).

[249] *See Unocal*, 963 F. Supp. at 891 (citing Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961)); Carmichael v. United Technologies Corp., 835 F.2d 109, 114-15 (5th Cir. 1988).

[250] *Unocal*, 963 F. Supp. at 891 (quoting *Gallagher*, 49 F.3d at 1453); *Collins*, 878 F.2d at 1154.

SLORC and MOGE were the agents of the private defendants supported a conclusion of joint action.[251] This conclusion was supported by the joint venture relationship that existed between the Defendants.[252] Plaintiffs' allegations that Defendants were jointly engaged with SLORC and MOGE in utilizing forced labor and committing other human rights violations in furtherance of the pipeline project were also sufficient to constitute joint action between the parties.[253] As such, the court found sufficient state action to support subject matter jurisdiction pursuant to the ATCA.[254]

The court also addressed the liability of private actors for violations of international law in the absence of state action. Despite applicable authority to the contrary,[255] the court concluded that liability absent state action remained for a "handful of private acts" including piracy, slave trading, and forced labor.[256] This conclusion was based upon the opinion of the U.S. Court of Appeals for the Second Circuit in *Kadic v. Karadzic* wherein the court noted violations of international law are not confined to state action but rather include "certain forms of conduct . . . whether undertaken by those acting under the auspices of a state or only as private individuals."[257] Although the Second Circuit ultimately concluded that claims of rape, torture, and summary execution were proscribed under international law only when committed by

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[251] *See Unocal*, 963 F. Supp. at 891.

[252] *See id.*

[253] *See id.*

[254] *See id.*

[255] In *In re Estate of Ferdinand E. Marcos Human Rights Litigation*, the Ninth Circuit Court of Appeals held that "only individuals who have acted under official authority or under color of such authority may violate international law." 978 F.2d 493, 501 (9th Cir. 1992). The court apparently chose to ignore this precedent for two reasons. First, the Ninth Circuit ignored its previous statement of law in *Hamid v. Price Waterhouse*, wherein the court refused to "reach the issue of whether the law of nations applies to private as opposed to governmental conduct." 51 F.3d 1411, 1417 (9th Cir. 1995). Additionally, allegations of slave trading were not present in the Ninth Circuit's previous opinions with regard to this issue and thus did not provide guidance to the court in the present case.

[256] *Unocal*, 963 F. Supp. at 890-91 (quoting Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 794 (D.C. Cir. 1984) (Edwards, J., concurring)).

[257] 70 F.3d 232, 239 (2d Cir. 1995).

state officials or under color of law, the court also concluded that participation in the slave trade was actionable regardless of the absence of state action.[258]

The *Unocal* court held that the allegations of forced labor in Plaintiffs' Complaint were sufficient to constitute an allegation of participation in slave trading in violation of international law.[259] Although SLORC's activities did not constitute slave trading in the classic sense of the sale and purchase of human beings for forced servitude, the court found Plaintiffs' allegations with regard to Defendants' conduct to meet the definition of slave trading.[260] The court focused on the allegation that the private Defendants utilized and paid SLORC to provide labor for the pipeline project and accepted benefits flowing from the use of forced labor despite their knowledge of SLORC's present and past practices in this regard.[261] The court thus concluded that these allegations were sufficient to establish subject matter jurisdiction pursuant to the ATCA.[262] As such, the court also concluded that it could exercise jurisdiction over Plaintiffs' supplemental state law claims pursuant to 28 U.S.C. § 1367.[263]

Additionally, the court determined that the act of state doctrine did not preclude consideration of Plaintiffs' claims.[264] The court chose to focus its analysis on separation of powers concerns.[265] It noted that the "continuing vitality" of the doctrine was dependent upon "its capacity to reflect the proper distribution of functions between the judicial and political branches of Government on matters bearing upon foreign relations."[266] As such, courts should apply the doctrine when confronted with cases where judicial

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258 *See id.*

259 *See Unocal*, 963 F. Supp. at 892.

260 *See id.*

261 *See id.*

262 *See id.*

263 *See id.* Given its determination of the existence of jurisdiction pursuant to the ATCA, the court declined to reach the jurisdictional questions raised by Defendants pursuant to 28 U.S.C. § 1331, the TVPA, and RICO. *See id.* at 892 n.11.

264 *See id.* at 893.

265 *See id.* at 892.

266 *Id.*

intervention "may hinder rather than further [the U.S.] pursuit of goals both for itself and for the community of nations as a whole in the international sphere."[267] The doctrine, however, does not bar cases that may embarrass foreign governments.[268] Rather, it simply requires courts to accept as valid the actions of foreign sovereigns taken within their own jurisdictions.[269] In addition, the court acknowledged that there are instances when the policies underlying the doctrine may not justify its application even though the validity of an act of a foreign sovereign within its own territory is at issue.[270]

The court noted that in the context of human rights litigation, the scope of the act of state doctrine is unclear.[271] Nonetheless, the court held the doctrine inapplicable unless it is "apparent that adjudication of the matter will bring the nation into hostile confrontation with the foreign state."[272] In this case, there was little likelihood of a hostile confrontation as the executive and legislative branches had previously censured SLORC for its human rights abuses.[273] The court concluded "it is hard to imagine how judicial consideration of the matter will so substantially exacerbate relations as to cause 'hostile confrontation.'"[274]

The court also deemed relevant an inquiry into the issue of

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[267] *Id.* at 893. This conclusion was based, in part, upon dicta contained in the case of *Republic of the Philippines v. Marcos*, wherein the Ninth Circuit Court of Appeals held that the act of state doctrine may be utilized to "prevent judicial challenge in our courts to many deeds of a dictator in power, at least when it is apparent that sustaining such challenge would bring [the United States] into a hostile confrontation with the dictator." 862 F.2d 1355, 1360 (9th Cir. 1988); *see also* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423 (1964) (noting "[t]he text of the Constitution does not require the act of state doctrine; it does not irrevocably remove from the judiciary the capacity to review the validity of foreign acts of state.").

[268] *See Unocal*, 963 F. Supp. at 893.

[269] *See id.*; W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., 493 U.S. 400, 405 n.13 (1990).

[270] *See Unocal*, 963 F. Supp. at 893 (citing *W.S. Kirkpatrick & Co.*, 493 U.S. at 409).

[271] *See id.*

[272] *Id.*

[273] *See id.*

[274] *Id.*

"whether the foreign state was acting in the public interest."[275] The sovereignty of a foreign state would be affronted by judicial intervention in instances where the state acts in the public interest.[276] Such concerns were not evident in this case, as SLORC and MOGE's alleged human rights violations were not in the interest of the Burmese citizenry, despite the fact that they were "directly connected to decisions regarding allocation and profit from Burma's natural resources."[277] In any event, such concerns were mitigated by the fact that Plaintiffs sought injunctive relief solely against the non-state Defendants.[278]

Moreover, the fact that Plaintiffs alleged jus cogens violations[279] made it unlikely that judicial intervention would undermine the policies behind the act of state doctrine.[280] Specifically, one factor in determining whether to apply the doctrine is "the degree of international consensus regarding [the] activity."[281] To ignore international consensus would "totally emasculate the purpose and effectiveness of [FSIA] by permitting a foreign state to reimpose the so recently supplanted framework of sovereign immunity, as defined prior to the Act, through the back door under the guise of the act of state doctrine."[282] Rather, courts have historically recognized the doctrine only in the absence of "unambiguous agreement regarding controlling legal principles . . . in which world opinion [is] sharply divided."[283] Of particular significance was the court's statement that it "would be a rare case in which the act of state doctrine precluded suit under [the ATCA]."[284]

In this case, the court concluded that there existed a "high

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[275] *Id.* at 893 (quoting Liu v. Republic of China, 892 F.2d 1419, 1432 (9th Cir. 1989)).

[276] *See id.* (citing *Liu*, 892 F.2d at 1432).

[277] *Id.*

[278] *See id.*

[279] *See supra* note 241.

[280] *See Unocal*, 963 F. Supp. at 894.

[281] *Id.* (quoting *Liu*, 892 F.2d at 1433).

[282] *Id.*; *see Liu*, 892 F.2d at 1433.

[283] *Id.* (quoting Kadic v. Karadzic, 70 F.3d 232, 250 (2d Cir. 1995)).

[284] *Id.*

degree of international consensus" which "severely undermine[d]" Defendants' arguments seeking application of the doctrine.[285] Torture and slavery have been universally condemned, and no nation can claim a right to engage in such activities.[286] The court concluded that a judicial finding that a state has committed such acts "should have no detrimental effect on the policies underlying the act of state doctrine," especially where, as here, the coordinate branches of government have reached similar conclusions.[287] In any event, the court vowed to exercise restraint in its determination of the case such that its final decision would not "reflect on, undermine or limit the policy determinations made by the coordinate branches with respect to human rights violations in Burma."[288]

The court also declined to dismiss Plaintiffs' Complaint for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6).[289] The court held that dismissal pursuant to Rule 12(b)(6) is proper "only where there is either a lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory."[290] In determining such a motion, "[a]ll allegations of material facts are to be taken as true and construed in the light

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[285] *Id.* (citing Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 717 (9th Cir. 1992)).

[286] *See id.*

[287] *Id.* The court also rejected Unocal's contention "that adjudication of this case [would] interfere with Congressional and Executive efforts to exert pressure on SLORC to reform its human rights record." *Id.* at 895 n.17. Unocal cited the developing Executive and Congressional consensus on policy towards Burma and the restraint exercised by the Clinton administration to date. *See id.* Unocal characterized Plaintiffs' Complaint as "an unprecedented attempt to enmesh the federal courts in setting American foreign and economic policy toward Burma" which would disrupt the fragile state of American-Burmese relations and interfere with Executive and Congressional initiatives. *Id.* However, the court found that a consensus on policy towards Burma already existed as exemplified by the imposition of unilateral economic sanctions and the encouragement of reform by allowing American companies to "assert positive pressure on SLORC through their investments in Burma." *Id.* (citing 142 CONG. REC. S8755 (daily ed. July 25, 1996) (statement of Sen. McCain)).

[288] *Id.*

[289] *See id.* at 895.

[290] *Id.* at 895 (quoting Balistreri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1990)).

most favorable to the non-moving party."[291] Therefore, a court must not dismiss a complaint 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."[292]

Applying these standards to Plaintiffs' Complaint, the court found that it included "a number of allegations that indicate Plaintiffs may be able to prove facts in support of their claims."[293] Specifically, Plaintiffs alleged that Unocal and its officers knew or should have known about SLORC's practices of forced labor.[294] Despite this knowledge, Plaintiffs alleged that Defendants agreed that SLORC would provide labor and security for the project.[295] Additionally, Plaintiffs alleged that Unocal and its officers "were aware of and benefited from the use of forced labor to support the Yadana gas pipeline project."[296] Finally, Plaintiffs claimed that Unocal "knew that SLORC . . . committed human rights abuses, including forced labor and forced relocation, in connection with the Yadana gas pipeline project."[297] The court rejected Unocal's contention that Plaintiffs' allegations merely established "the presence of a business relationship with SLORC and MOGE and nothing more."[298] Instead, the court concluded that Plaintiffs could conceivably prove facts to support their allegations, specifically, that "Unocal and SLORC have either conspired or acted as joint participants to deprive plaintiffs of international human rights in order to further their financial interests in the Yadana gas pipeline project."[299]

Finally, the court addressed the issue of the statutes of

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[291] *Id.* (quoting Hall v. City of Santa Barbara, 833 F.2d 1270, 1274 n.9 (9th Cir. 1986)).

[292] *Id.* (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)).

[293] *Id.* at 896.

[294] *See id.*

[295] *See id.*

[296] *Id.* (quoting Complaint para. 51, at 14, *John Doe I v. Unocal Corp.*, 963 F. Supp. 880 (D.C. Cal. 1997) (No. 96-6959)).

[297] *Id.* (quoting Complaint para. 52, at 14, *John Doe I v. Unocal Corp.*, 963 F. Supp. 880 (D.C. Cal. 1997) (No. 96-6959)).

[298] *Id.*

[299] *Id.*

limitation applicable to Plaintiffs' claims.[300] Although Plaintiffs alleged the accrual of claims as early as 1991, the court found that the earliest claim specifically accrued on May 12, 1992.[301] Applying the four-year statute of limitations for claims accruing pursuant to RICO and section 17200 of the California Business and Professions Code, the court found claims accruing before October 3, 1992 to be time barred absent equitable tolling or application of the continuing violation doctrine.[302] With respect to Plaintiffs' state law tort claims, the court held that "absent tolling or the effect of the continuing violation doctrine, California's one year statute of limitations for personal injury torts [was applicable]."[303] It thus appeared that the vast majority of Plaintiffs' claims were subject to dismissal.

The court, however, found that Plaintiffs created an issue of fact as to whether there were "extraordinary circumstances outside [their] control that made it impossible for them to timely assert their claims."[304] Specifically, Plaintiffs "sufficiently alleged that they could obtain no relief in Burma" due to the absence of a functioning independent judiciary.[305] As such, the court concluded that Plaintiffs' claims were subject to tolling "as long as SLORC remains in power, and [P]laintiffs are unable to obtain access to domestic judicial review."[306] The issues of fact raised by equitable tolling also caused the court to decline to reach the question of the

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[300] *See id.* at 896-97.

[301] *See id.* at 896.

[302] *See id.*

[303] *Id.*

[304] *Id.* at 897. Under federal law, equitable tolling is available where "defendant's wrongful conduct prevented plaintiff from timely asserting the claim" or where "extraordinary circumstances outside the plaintiff's control made it impossible for the plaintiff to timely assert [the] claim." Forti v. Suarez-Mason, 627 F. Supp. 1531, 1549 (N.D. Cal. 1987).

[305] *Unocal*, 963 F. Supp. at 897.

[306] *Id.* The court acknowledged that Plaintiffs failed to specifically allege that they could not have brought their claims in the United States on a timely basis. *See id.* Nevertheless, the court concluded that this was an insufficient reason to disregard the application of the equitable tolling doctrine, as attempts to access American courts could have resulted in reprisals by SLORC against those Plaintiffs remaining in Burma. *See id.*

application of the continuing violation doctrine.[307]

IV. *John Doe I v. Unocal Corp.*: The Implications for American Companies Transacting Business Overseas

Judge Paez's opinion in *John Doe I v. Unocal Corp.* has significant implications for American companies transacting business overseas. The court's rulings with regard to FSIA, the act of state doctrine, and indispensable parties expose American companies to liability for international human rights violations without the benefit of contribution from participating foreign sovereigns. The court's interpretation of the ATCA identifies international standards to which American companies transacting business overseas must conform their conduct. The court's holding also establishes standards of liability for private companies acting alone and in concert with foreign sovereigns. The court's acceptance of Plaintiffs' conclusory allegations set forth in the Complaint may subject American companies to extensive discovery when such human rights violations are alleged. Finally, the court's determination and application of the appropriate statutes of limitation may create long-term exposure for American companies.

A. The Foreign Sovereign Immunities Act

Initially, the court's holding with regard to the applicability of FSIA exposes American companies to liability for international human rights violations without the benefit of contribution from

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[307] *See id.* Because Plaintiffs raised substantive issues regarding the application of the equitable tolling doctrine, and following the precedent of *Hilao v. Estate of Ferdinand Marcos*, 103 F.3d 767 (9th Cir. 1996), the court refused to determine whether the ten year limitations period set forth in the Torture Victim Protection Act (TVPA) was applicable to claims asserted pursuant to the ATCA. *See id.* at 896. However, the court cited with approval two opinions wherein federal district courts held that the limitations period set forth in the TVPA was applicable to claims brought pursuant to the ATCA. *See id.* at 897 (citing Cabriri v. Assasie-Gyimah, 921 F. Supp. 1189, 1196 (S.D.N.Y. 1996); Xuncax v. Gramajo, 886 F. Supp. 162, 176-78 (D. Mass. 1995)). Further, the court noted that persuasive authority to the contrary was decided prior to the enactment of the TVPA and therefore was of limited relevance. *See id.* (citing *Forti*, 672 F. Supp. at 1548). With regard to Plaintiffs' claim pursuant to California Business and Professions Code section 17200, the court granted the Motion to Dismiss and further granted Plaintiffs leave to amend the claim within ten days of the entry of the order. *See Unocal*, 963 F. Supp. at 896.

foreign sovereigns that initiate or participate in such violations. SLORC and MOGE completely escaped liability despite their alleged primary role in confiscating real and personal property and abusing the Burmese citizenry through forced labor, torture, summary execution, arbitrary arrest, and other misconduct.[308] Furthermore, the court's holding renders the primary exception to such immunity, the commercial activity exception, irrelevant in cases alleging that a foreign state has violated human rights.[309]

In 28 U.S.C. § 1605(a)(2), the FSIA provides an exception to jurisdictional immunity where "the action is based . . . upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere."[310] According to the court, this exception applies only to claims that are based upon acts performed in the United States.[311] Claims are based upon those activities that would entitle a party to relief.[312] In *John Doe I v. Unocal Corp.*, as in most human rights cases involving foreign sovereigns, the conduct from which liability flows is the conduct of the sovereign within its own boundaries.[313] Although commercial negotiations and decision-making may occur outside of national boundaries, such actions are not elements of most human rights claims.[314] Thus, the occurrence of such activities in the United States is insufficient to establish an exception from sovereign immunity pursuant to § 1605(a)(2).[315]

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[308] *See id.* at 885-86.

[309] Discussion of the commercial activity exception to FSIA will be limited to clauses two and three of 28 U.S.C. § 1605(a)(2). Clause one of § 1605(a)(2) provides that a foreign state is not immune from suit in any action "based upon a commercial activity carried on in the United States by the foreign state." 28 U.S.C. § 1605(a)(2). This clause has no application in human rights litigation as it requires that plaintiffs base their claims upon a commercial activity carried out by the foreign sovereign in the United States. *See id.*

[310] *Id.*

[311] *See Unocal*, 963 F. Supp. at 887.

[312] *See* Holden v. Canadian Consulate, 92 F.3d 918, 920 (9th Cir. 1996) (citation omitted).

[313] *See Unocal*, 963 F. Supp. at 887.

[314] *See id.* However, such activities may be sufficient to establish joint activity between the foreign sovereign and private defendants. *See id.*

[315] *See id.*

In 28 U.S.C. § 1605(a)(2), the FSIA also provides an exception to immunity where "the action is based . . . upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States."[316] According to the court, this exception is inapplicable to human rights cases for two reasons. First, the exception does not apply to police powers exercised by foreign sovereigns.[317] Instead, the exception only applies "when a foreign government acts . . . in the manner of a private player."[318] Such action occurs only when the foreign sovereign's acts are of the type "by which a private party engages in 'trade and traffic or commerce.'"[319] In *John Doe I v. Unocal Corp.*, SLORC and MOGE engaged in commerce in the same manner as private citizens in creating the Joint Venture.[320] The actions of SLORC and MOGE that Plaintiffs complained of, however, were not commercial.[321] Rather, these actions were peculiarly sovereign in nature and thus were exercises of SLORC's police powers over its citizenry.[322] Such activities are not within the commercial activity exception to FSIA.[323]

Secondly, the court held that Plaintiffs failed to demonstrate that SLORC's and MOGE's activities have a direct effect in the United States as required by the commercial activity exception.[324] Financial losses or gains occurring in the United States merely

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316 28 U.S.C. § 1605 (a)(2).

317 *See Unocal*, 963 F. Supp. at 888.

318 *Id.* at 887.

319 *Id.*

320 *See id.* However, it may be argued that the exploitation of minerals or other natural resources owned exclusively by the state constitutes an exercise of sovereign power which is beyond the competency of private persons. *See* Mol, Inc. v. People's Republic of Bangladesh, 736 F.2d 1326, 1329 (9th Cir. 1984).

321 *See Unocal*, 963 F. Supp. at 887-88.

322 *See id.*

323 *See id.* at 888. The court also held that it was irrelevant whether the Plaintiffs' Complaint was based upon a commercial activity or based upon an activity in connection with a commercial activity if the action of the state could be characterized as a sovereign exercise of police powers over its citizenry. *See id.*

324 *See id.*

constitute indirect consequences.[325] In order to be direct, the effect must follow as "an 'immediate consequence' of the defendant's activity."[326] The court only looked to direct effects in the location where the actions occurred.[327] In most human rights cases, such actions occur within the boundaries of the foreign sovereign. In *John Doe I v. Unocal Corp.*, the actions of SLORC and MOGE, which constituted elements of the Plaintiffs' Complaint, occurred in Burma.[328] As such, the direct effect of such actions occurred only within Burma, regardless of the effect such activities had within the United States. This lack of direct effect in the United States prevented application of the commercial activity exception to FSIA.[329]

The court's holding renders the FSIA commercial activity exception irrelevant in most human rights cases arising from actions of foreign sovereigns occurring abroad. As a result, sovereign immunity will remain in these cases, thereby leaving the private defendants to fend for themselves. Given the breadth of the court's FSIA holding, there are few options left for private parties seeking to overcome immunity and retain foreign sovereigns as parties to human rights litigation. Potential strategies include obtaining a waiver of immunity from the foreign sovereign through the inclusion of a forum selection clause in a contract providing for the arbitration or litigation of disputes in the United States.[330] The same result may be achieved by utilizing a choice of law clause providing for the application of U.S. law to all disputes.[331] Private parties may also include a clause in agreements with foreign sovereigns whereby the sovereign agrees to indemnify the private party for losses arising from the sovereign's violation of human rights in connection with the commercial activity. Further, private parties may incorporate a

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[325] *See id.*

[326] *Id.* (citations omitted).

[327] *See id.*

[328] *See supra* note 212 and accompanying text.

[329] *See id.*

[330] *See* 28 U.S.C. § 1605(a)(1); Verlinden v. Central Bank of Nigeria, 488 F. Supp. 1284, 1302 (S.D.N.Y. 1980).

[331] *See Verlinden*, 488 F. Supp. at 1302.

code governing the conduct of all parties to the agreement, including the foreign sovereign. The same result may be achieved through reference to international human rights standards in the body of the agreement. Inclusion of such provisions may be sufficient to avoid the police power and direct effect concerns expressed by the court in *Unocal*.[332] However, most, if not all, foreign sovereigns would object to the inclusion of such provisions in their agreements with private parties. Furthermore, judicial interpretation of such provisions remains uncertain. The uncertainty associated with the inclusion of such provisions can nevertheless be no worse than the current status of the commercial activity exception in international human rights litigation.

B. The Act of State Doctrine

The conclusion that private defendants bear sole responsibility for the defense of human rights claims is solidified by the court's rulings on the act of state and indispensable parties issues. The court held the act of state doctrine to be inapplicable because adjudication of the case would not bring the United States into hostile confrontation with SLORC.[333] The court also held the doctrine inapplicable as SLORC's activities did not serve the best interests of the Burmese citizenry.[334] Finally, the court refused to apply the doctrine to SLORC's alleged jus cogens violations, the existence of which made it unlikely that judicial intervention would undermine the policies behind the doctrine.[335] In any event, the court vowed to exercise restraint in its determination of the merits of the case in order not to undermine policies adopted by the coordinate branches of government with regard to Burma.[336]

The court's act of state holding reinforces the conclusion that private defendants will be on their own in the defense of international human rights cases in U.S. courts. The court did grant Unocal standing to raise the act of state doctrine in SLORC's

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[332] *See supra* notes 316-29 and accompanying text.

[333] *See Unocal*, 963 F. Supp. at 893.

[334] *See id.* at 893-94.

[335] *See id.*

[336] *See id.*

absence.[337] However, it firmly rejected any attempt by Unocal to excuse its alleged participation in SLORC's human rights violations under the guise of act of state. Unocal was unable to escape liability by utilizing the sovereign nature of SLORC's actions in the absence of a threatened hostile confrontation between the United States and Burma. The presence of jus cogens violations, which could not be argued to be in the best interests of the Burmese citizenry, also prevented Unocal from successfully applying the doctrine.[338] When combined with the holding on FSIA, two conclusions may be drawn from the court's treatment of the act of state doctrine: (1) private defendants shoulder sole responsibility in defending human rights cases in that foreign sovereigns offer them neither allocation of fault nor contribution; and (2) private defendants will be unable to shield their activities from judicial scrutiny by citing the sovereign and therefore inviolate nature of the actions of the absent foreign state. Rather, private defendants such as Unocal will have to rely upon their own actions and personal defenses in litigating international human rights cases.

The court's refusal to apply the act of state doctrine raises several questions about the future of the doctrine in human rights litigation. The hostile confrontation standard utilized by the court is legally suspect and may render the doctrine moot in future human rights litigation. The hostile confrontation standard first appeared in the Ninth Circuit Court of Appeals' opinion in *Republic of the Philippines v. Marcos.*[339] In this case, the court held that the act of state doctrine did not bar the adjudication of the plaintiff's claims to recover the value of property stolen during the defendant's dictatorial regime.[340] In dicta, the court suggested that there was little likelihood of hostile confrontation between the Republic of the Philippines and the United States since Marcos was no longer in power and his country had turned against him, as evidenced by the filing of the lawsuit at issue.[341] The *Unocal* court

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337 *See id.* at 892-95.

338 *See supra* note 335 and accompanying text.

339 862 F.2d 1355, 1360 (1988).

340 *See id.* at 1360-61.

341 *See id.*

acknowledged the Ninth Circuit's discussion as dicta in its own opinion.[342] Nevertheless, it "extrapolated" from this dicta and reached the conclusion that Unocal's act of state defense was barred by the absence of resulting hostile confrontation.[343] The court's adoption of dicta as the governing rule of law in a case of this magnitude is troubling. A result based upon extrapolation from dicta is even worse.

Furthermore, the court failed to define "hostile confrontation." If "hostile confrontation" means the outbreak of armed conflict between the United States and the foreign sovereign whose actions are at issue, the act of state doctrine has little remaining relevance in international human rights litigation, especially since the eruption of such conflict over human rights issues is unlikely. Furthermore, an armed conflict standard fails to recognize that states may be engaged in "hostile confrontation" where current relations between the countries is strained, as seen between the United States and Iraq, Cuba, North Korea, Iran, and Libya. In fact, given the prohibition recently placed upon new American investments in Burma by the Clinton administration, current relations between the United States and Burma may be deemed hostile.[344]

If the definition of "hostile confrontation" is something other than armed conflict, applying the standard becomes difficult. The court has yet to determine what constitutes "hostile relations" between states. For example, would the definition require the existence of economic sanctions, such as are currently in place against the regimes in Cuba, Iran, North Korea, and Libya? Does the standard require something less than economic sanctions, such as periodic condemnation, or does the definition merely require periodic disputes, which characterize U.S. relations with most of its allies, including Canada, Israel, Japan, and the European Union? Furthermore, if countries had a past relationship characterized by hostility, such as that of the United States and Vietnam, when do such hostilities cease? Particularly troublesome are countries where the United States has pursued dual policies of

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[342] *See Unocal*, 963 F. Supp. at 893.

[343] *See id.*

[344] *See supra* notes 171-84 and accompanying text.

cooperation and condemnation, as it has with the Peoples' Republic of China on the issues of international trade and human rights. The court casts no light on these issues and, as a result, "hostile confrontation" remains an undefined standard.

The "hostile confrontation" standard places federal courts in the unwise position of prognosticators of foreign reaction to judicial intervention in matters of national sovereignty. These determinations impermissibly inject courts into international relations, an arena best left to the political branches. For example, if a court determines that no hostile confrontation presently exists between the United States and the foreign sovereign, the court would be free to ignore the act of state doctrine. However, failure to apply the doctrine may create a confrontation (which may prove to be hostile) where no such confrontation existed before. If the court determines that there is a confrontation existing between the United States and such foreign sovereign, but that such confrontation is not hostile nor likely to become hostile, the court's failure to apply the act of state doctrine may escalate the confrontation to the level of hostility. If hostile confrontation already exists between the United States and the foreign sovereign, the court's disregard of the act of state doctrine may interfere with diplomatic efforts by the coordinate branches of government to defuse the confrontation.

The *Unocal* court found itself in the difficult position of deciding whether hostile relations existed between the United States and Burma at a time when U.S. policy toward Burma was unclear.[345] While it had denounced SLORC's human rights abuses,[346] it remained unclear what response the coordinate branches of the U.S. government would determine to be appropriate in light of the continuation of these abuses. Debate regarding the appropriateness of a ban on investments by American companies in Burma and the scope of such a prohibition was ongoing at the time of the court's decision.[347] In fact, the

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[345] *See Unocal*, 963 F. Supp. at 893.

[346] *See supra* notes 171-85 and accompanying text.

[347] Several senators urged President Clinton to exercise the authority granted to him by Title II of the Foreign Operations, Export Financing and Related Appropriations Act of 1997 and impose economic sanctions upon SLORC. These senators encompassed the

authority to determine whether to impose a prohibition on investments had been specifically delegated to the President by Congress in September 1996.[348] President Clinton chose to prohibit new American investments in Burma effective May 21, 1997.[349] Nonetheless, the *Unocal* court chose to inject itself into American-Burmese relations in March 1997 by granting Plaintiffs the right to pursue judicial remedies in the United States.[350]

More troubling is the potential conflict between the relief that the court may order in *John Doe I v. Unocal Corp.* and the current ban on new investments in Burma ordered by President Clinton. The President's Executive Order of May 20, 1997 prohibits new investments in Burma by "United States persons."[351] The Executive Order exempts existing investments by U.S. persons in Burma.[352] In their Complaint, Plaintiffs seek injunctive relief directing Unocal to terminate payments to SLORC and participation in the Yadana gas pipeline project until such time as SLORC ceases its human rights abuses in the Tenasserim region of Burma.[353] Unocal's current investment in Burma, which Plaintiffs seek to enjoin, is lawful pursuant to the terms of the Executive Order.[354] Plaintiffs and human rights activists

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entire political spectrum and included Republicans Jesse Helms (N.C.) and Alfonse M. D'Amato (N.Y.) and Democrats Daniel Patrick Moynihan (N.Y.) and Edward M. Kennedy (Mass.). However, Senator Diane Feinstein (Democrat, Cal.) argued against an absolute ban upon American investment in Burma, noting that such a ban would alienate regional allies and disrupt efforts to develop a "comprehensive multilateral strategy to bring democracy and to improve human rights and the quality of life in Burma." 142 CONG. REC. S8753 (daily ed. July 25, 1996). Furthermore, Senator John McCain (Republican, Ariz.) noted that an investment ban could result in a loss of American leverage in Burma and an accompanying increase in human rights abuses. *See* CONG. REC. S8755 (daily ed. July 25, 1996).

348 *See supra* note 172 and accompanying text.

349 *See* Executive Order No. 13,047, *supra* note 71, at 28,301.

350 *See Unocal*, 963 F. Supp. at 898.

351 Executive Order No. 13,047, *supra* note 71, at 28,301. This resolution represented a compromise between the Clinton administration and members of Congress memorialized in the Foreign Operations, Export Financing and Related Appropriations Act.

352 *See id.*

353 *See* Complaint at 53, *John Doe I v. Unocal Corp.*, 963 F. Supp. 880 (D.C. Cal. 1997) (No. 96-6959).

354 Executive Order No. 13,047, *supra* note 71, at 28,301.

supporting their efforts apparently seek to obtain judicially that which they could not obtain through the executive and legislative branches, specifically, a prohibition upon current investments in Burma. Such a result intrudes upon executive and legislative authority in the area of foreign relations.

The *Unocal* court also improperly injected itself into domestic Burmese affairs. In its opinion, the court deemed the act of state doctrine inapplicable as SLORC and MOGE's alleged violations of international human rights were not in the public interest of the Burmese citizenry.[355] The court unilaterally crowned itself the arbiter of the "best interests" of the Burmese people. Thus, the court's role in determining the "best interests" of foreign persons not only exceeds the role of federal courts, as designated by the Constitution, but also strains the boundaries of judicial competence. One may obviously conclude that the alleged torture and forced labor in *John Doe I v. Unocal Corp.* are not in the best interests of the Burmese citizenry. However, such determinations may not be so simple when they involve less spectacular human rights violations or conflicts between competing racial, social, and economic classes within a foreign country.[356] These concerns are exacerbated by the complete lack of standards for determining the "public interest" of foreign citizens and the potential lack of judicial knowledge necessary to make such determinations.

The court's opinion may render the act of state doctrine irrelevant in most human rights cases litigated before American

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[355] *See Unocal*, 963 F. Supp. at 893-94. This conclusion ignores the fact that SLORC and MOGE's actions with regard to the pipeline project were directly connected to decisions regarding exploitation of Burma's natural resources, an area traditionally recognized as within the parameters of foreign sovereignty. *See* Liu v. Republic of China, 892 F.2d 1419, 1432 (9th Cir. 1989); Mol, Inc. v. People's Republic of Bangladesh, 736 F.2d 1326, 1329 (9th Cir. 1984).

[356] For example, if a foreign sovereign chooses to confiscate real property within its boundaries in violation of international law from a small number of its citizens in order to construct a public works project that ultimately benefits the majority of its citizenry, has the foreign sovereign acted in the "public interest"? Although it may be argued that the uncompensated confiscation of real property by sovereigns is not in the "public interest," economic benefits flowing to the vast majority of the citizenry militates against such a finding. This argument is not intended to imply that a tyranny of the majority in derogation of international law is a defensible state of affairs. Rather, it is intended to demonstrate the difficulty of the decisions potentially confronting the federal judiciary in making such determinations.

courts. At the very least, the opinion lists exceptions to the doctrine so numerous as to render its application most unlikely in human rights cases.[357] According to the court, the act of state doctrine is inapplicable if coordinate branches of government have denounced the foreign sovereign for the human rights abuses at issue or if the court's conclusion comports with the prior conclusions of such branches.[358] Additionally, the doctrine is inapplicable in instances where the foreign state is not acting in the "public interest."[359] The doctrine will also be ignored in those instances where plaintiffs have alleged the existence of jus cogens violations by the foreign sovereign.[360] Even if the plaintiffs do not allege the existence of jus cogens violations, the act of state doctrine will not be applied if there is a "high degree of international consensus" regarding the identification and application of controlling legal principles.[361] In fact, the court concluded that "it would be a rare case in which the act of state doctrine precluded suit under [section] 1350 [of the ATCA]."[362] The sole instance identified by the court when the act of state doctrine would be applicable is when "world opinion is sharply divided" on an issue.[363] Given the numerous exceptions noted above, the court's assurance that it will exercise caution so as not to "undermine or limit the policy determinations made by the coordinate branches with respect to human rights violations in Burma" provides little comfort.[364]

C. Indispensability of Parties

The court's holding on the issue of the indispensability of SLORC and MOGE to the resolution of Plaintiffs' Complaint further supports the conclusion that private defendants in U.S.

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[357] *See infra* notes 358-60 and accompanying text.

[358] *See Unocal*, 963 F. Supp. at 893.

[359] *See id.*

[360] *See id.* at 894.

[361] *Id.*

[362] *Id.*

[363] *Id.* However, the court did not identify standards to determine world opinion or whether any divisions of such opinion were "sharp." *See id.*

[364] *Id.* at 895 n.17.

courts will be on their own in the defense of international human rights litigation. The court held neither SLORC nor MOGE were necessary or indispensable parties despite their massive involvement and participation in the alleged actions.[365] This holding was not limited to instances where the foreign sovereign participates in the violations to such a degree as to be deemed a joint tortfeasor with the private actors.[366] Rather, the Plaintiffs' Complaint is replete with references to an alleged conspiracy existing between SLORC, MOGE, and the private Defendants to violate Plaintiffs' human rights.[367] Further, Plaintiffs allege SLORC and MOGE ratified, directed, encouraged, and acquiesced in the commission of human rights violations in connection with the pipeline project.[368] SLORC and MOGE also allegedly failed to act to end these violations.[369] Nevertheless, the court deemed this wide-ranging participation insufficient to render SLORC and MOGE necessary or indispensable parties to the litigation.[370]

The court's holding on the issue of indispensability also leaves private defendants on their own in conducting discovery and collecting evidence. The court rejected Unocal's argument that the absence of subpoena power over SLORC and MOGE rendered them necessary or indispensable parties.[371] The court indicated that such an argument may merit closer scrutiny where the absence of this power would have an "appreciable effect" upon Unocal's ability to conduct discovery.[372] The court, however, deemed no such "appreciable effect" to exist despite the complete absence of available discovery devices against SLORC and MOGE.[373]

Numerous methods exist by which discovery may be conducted by private parties engaged in international civil

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365 *See id.* at 889.

366 *See id.*

367 *See* Complaint paras. 15-22, 188-97, at 6-8, 34-36, *John Doe I. v. Unocal Corp.*, 963 F. Supp. 880 (D.C. Cal. 1997) (No. 96-6959).

368 *See id.* paras. 5-22, 188-203, at 6-8, 34-37.

369 *See id.* paras. 15-22, 236-59, at 6-8, 45-50.

370 *See Unocal*, 963 F. Supp. at 889.

371 *See id.* at 889 n.6.

372 *Id.* at 889.

373 *Id.*

litigation. Federal courts may compel production of documents located overseas if the court possesses personal jurisdiction over the party maintaining the documents.[374] Nonparties may be compelled to produce documents located abroad only if they may be lawfully served with a subpoena and are subject to the personal jurisdiction of the court.[375] Personal jurisdiction and subpoena power are also required in order to subject a nonparty located abroad to an extraterritorial deposition.[376] If a party is not subject to the personal jurisdiction of U.S. courts, the party seeking discovery must resort to the Hague Evidence Convention.[377] If the foreign state in which the evidence or deponent is located is not a signatory to the Hague Evidence Convention, parties seeking discovery must utilize letters rogatory.[378]

None of these discovery methods is readily available to the private Defendants in *John Doe I v. Unocal Corp.* The private defendants will be unable to compel production of documents from SLORC and MOGE given the court's lack of personal jurisdiction and subpoena power over both parties. SLORC and MOGE personnel located in Burma are unavailable for depositions for the same reasons. Discovery is equally unavailable pursuant to the Hague Evidence Convention as Burma is not a signatory to the Convention. Although Unocal and the other private Defendants may avail themselves of letters of request, such letters are likely to be disregarded due to the lack of an independent judiciary and the current strained state of relations between the United States and Burma. At the very least, the use of this discovery method will result in delays, increased costs, a narrower scope of discovery, and loss of control of the process, all of which may prove prejudicial to Defendants. Nevertheless, private defendants in

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[374] *See In re* Uranium Antitrust Litigation, 480 F. Supp. 1138, 1144 (N.D. Ill. 1979).

[375] *See* FED. R. CIV. P. 45(b)(2).

[376] *See id.*

[377] *See* Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters, Mar. 18, 1970, 23 U.S.T. 2555; 28 U.S.C. § 1781 (1994).

[378] *See* 28 U.S.C. §§ 1781-1782 (1994); FED. R. CIV. P. 28(b). Letters rogatory are formal requests by the court of one foreign sovereign to the courts of another foreign sovereign for assistance in obtaining evidence located in the recipient state. BLACK'S LAW DICTIONARY 905 (6th ed. 1990).

future international human rights actions should be prepared to encounter such adverse conditions and expect little or no assistance from the federal judiciary.

Despite the harsh nature of its ruling, the court left one avenue open to private defendants seeking to designate foreign sovereigns as necessary and indispensable parties. In its opinion, the court cited the case of *Aquinda v. Texaco, Inc.*, wherein the U.S. District Court for the Southern District of New York concluded that Ecuador and its state-owned oil company, Petroecuador, were indispensable parties.[379] In *Aquinda*, Plaintiffs were residents of the Oriente region of Ecuador who alleged vast environmental damage to the region as a result of thirty-three years of oil exploration by a consortium owned and operated by Texaco and Petroecuador.[380] Petroecuador acquired all interest in the consortium in 1992.[381] Plaintiffs sought equitable relief consisting of complete restoration and environmental monitoring of the affected lands.[382] The court deemed both Ecuador and Petroecuador indispensable parties, supplying the plaintiffs with the only avenue through which the case could proceed.[383] The court based its conclusion on the extensive nature of the equitable relief sought by the plaintiffs as well as the ownership of the consortium.[384] Private parties may structure their transactions to resemble the *Aquinda* transaction in order to ensure that foreign sovereigns are deemed necessary and indispensable parties in any future litigation. However, complete ownership of the project by the foreign sovereign is a less than ideal business structure and may be too high a price to pay to ensure the indispensability of foreign sovereigns which may arise in the future.

D. The Alien Tort Claims Act

The *Unocal* court's ruling with regard to the applicability of the ATCA is of primary importance for several reasons. The court

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379 *See* Aquinda v. Texaco, Inc., 945 F. Supp. 625, 627-28 (S.D.N.Y. 1996).

380 *See id.* at 626.

381 *See id.* at 626-27 n.1.

382 *See id.* at 627.

383 *See id.* at 627-28.

384 *See id.* at 627.

held that the standards of conduct by which American companies transacting business overseas will be measured are established by international norms recognized by the United States.[385] The sources of these international norms include treaties, customs, juridical writings on public law, and judicial decisions recognizing and enforcing international law.[386] International norms that have attained the status of jus cogens, such as the prohibitions upon torture and forced labor, provide particular assistance in establishing standards of conduct for American companies.[387]

The court's opinion leaves open the possibility that international norms that have not attained jus cogens status may also be utilized to establish standards of conduct for American companies, as long as such norms are recognized by the United States.[388] The court, however, failed to define "recognition."[389] The United States has signed many treaties without ratifying them. An open question remains as to whether the norms set forth in the treaties the United States has signed but not ratified are recognized by the United States such that they may establish standards of conduct for American businesses. Equally vague are the recognized standards of customary international law to which American businesses must conform their conduct.

For example, the United Nations General Assembly adopted the International Covenant on Economic, Social and Cultural (ESC) Rights in 1966.[390] The ESC Covenant sets forth a wide variety of basic economic, social, and cultural rights to be enjoyed by every person in the world.[391] Despite its status as a signatory of

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385 *See* John Doe I v. Unocal Corp., 963 F. Supp. 880, 890 (D.C. Cal. 1997).

386 *See id.*

387 *See id.*

388 *See generally Unocal*, 963 F. Supp. at 890 (failing to discuss the relevance of international norms that have not attained jus cogens status).

389 *See generally Unocal*, 963 F. Supp. at 890 ("[A] court applying the ATCA must determine whether there is an applicable norm of international law, whether it is recognized by the United States, what its status is, and whether it has been violated.").

390 *See* G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966) [hereinafter ESC Covenant].

391 *See id.* Included in these rights are the right to work, the right to minimum remuneration, safe working conditions and equal opportunity, the right to form and participate in trade unions, the right to social security, the right of workers to be free

the ESC Covenant and its recognition of several of the rights set forth therein, the United States has never ratified the Covenant. In the event an American company operating overseas violates the rights and privileges of persons as provided in the ESC Covenant, an issue exists as to whether the company has violated an international norm recognized by the United States.[392] This question and similar issues remain unanswered by the court.

The court's opinion requires American companies to conform their conduct to international norms recognized by the United States regardless of whether the companies act in concert with a foreign sovereign or alone.[393] The range of norms and liability for human rights violations increases when private companies act in concert with a foreign sovereign.[394] Thus, it is important for private companies to be cognizant of those actions that courts will deem to constitute "state action." According to the court, the determination of what constitutes "state action" is a factual inquiry to be conducted on a case-by-case basis.[395] Willful participation or engagement with the foreign sovereign may be sufficient to transform a private company's behavior into state action.[396] Additionally, the creation of an agency relationship between the private company and the foreign sovereign may constitute state action.[397] Participating in a conspiracy to deprive persons of human rights may also be deemed state action.[398] Even more broadly, any "substantial degree of cooperative action" between the foreign sovereign and the private company may constitute state action.[399] None of the activities alleged to constitute state action needs to be identified with any degree of specificity in a complaint

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from exploitation, and the right to an adequate standard of living. *See id.* arts. 6-11.

[392] In fact, the allegations of Plaintiffs' Complaint may establish violations of Articles 6, 7 and 11, reflecting the right to freely choose one's occupation, the right to minimum remuneration and safe working conditions, and the right to an adequate standard of living. *See id.* arts. 6, 7, 11.

[393] *See Unocal*, 963 F. Supp. at 890.

[394] *See id.* at 890-91.

[395] *See id.*

[396] *See id.* at 890.

[397] *See id.* at 890-91.

[398] *See id.* at 891.

[399] *Id.*

filed by one alleging a violation of human rights.[400] As a result, a private defendant should expect considerable discovery devoted to the interrelationship between itself and the relevant foreign sovereign.

The court's opinion also imposes liability on American companies for violations of internationally recognized human rights in the absence of joint action with a foreign sovereign.[401] Liability in the absence of state action is limited to a "handful of crimes to which the law of nations attributes individual responsibility."[402] The court did not include rape, torture, and summary execution in this "handful of crimes," but it did deem participation in the slave trade and utilization of forced labor as alleged in Plaintiffs' Complaint to be actionable absent state action.[403] Although limited in scope, the development of private liability absent state action for human rights violations bears attention as greater consensus on applicable norms of international law develops in the future.

The court's holding with regard to the ATCA also sets forth a knowledge standard that must be met prior to the imposition of liability on private companies for human rights violations. Specifically, Plaintiffs must prove that the private Defendants knew of the alleged practices. The court held that if Plaintiffs were to successfully demonstrate that Unocal had knowledge of SLORC's utilization of forced labor on the pipeline project, yet despite this knowledge continued to pay the Burmese government to provide labor for the project, Unocal would be liable for slave trading pursuant to the ATCA.[404] While the court did not address what would sufficiently constitute "knowledge,"[405] knowledge could potentially be implied from SLORC's past practices.[406] If this was in fact accepted as sufficient by the court, American companies transacting business overseas would be well advised to

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400 *See id.* at 896.

401 *See id.* at 891.

402 *Id.*

403 *Id.*

404 *See id.* at 892.

405 *See generally Unocal*, 963 F. Supp. at 892 (failing to define "knowledge").

406 *See generally id.* at 892 (discussing the appropriate standard).

familiarize themselves intimately with the state of respect for human rights in the potential host country prior to undertaking operations. A company should, at the very least, compile a human rights impact report for each potential host country. The research and preparation of such a report would fully inform American companies about the state of human rights in each country in which they transact business. Additionally, such a report might be utilized to demonstrate to potential claimants due diligence and the absence of knowledge of ongoing human rights violations.

The court's opinion with regard to jurisdiction pursuant to the ATCA rendered resolution of the jurisdictional issues relative to RICO and the TVPA unnecessary.[407] Thus, an open question remains as to whether the TVPA applies to corporations and other juridical persons who commit, abet, or assist in summary execution and acts of torture.[408] The extraterritorial reach of RICO and the applicability of its prohibitions to international human rights litigation also remain unresolved.[409] American companies should keep the potential applicability of these statutes in mind when conducting overseas business.

E. Statutes of Limitations

Finally, the *Unocal* court's determination and application of the appropriate statute of limitations creates long term exposure for American companies alleged to have participated in human rights violations while transacting business overseas. Although the court refused to determine whether the ten-year limitations period set forth in the TVPA applied to ATCA claims,[410] the court approvingly cited two opinions where federal district courts held the limitations period set forth in the TVPA to be applicable to all claims brought pursuant to the ATCA.[411]

The court cited the opinion of the U.S. District Court for the

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[407] *See id.* at 892 n.11.

[408] *See* Opposition to Motion to Dismiss, at 16, *John Doe I v. Unocal Corp.*, 963 F. Supp. 880 (D.C. Cal. 1997) (No. 96-6959).

[409] *See id.* at 17-20.

[410] *See Unocal*, 963 F. Supp. at 897.

[411] *See id.* (citing Xuncax v. Gramajo, 886 F. Supp. 162 (D. Mass. 1995); Cabriri v. Assasie-Gyimah, 921 F. Supp. 1189 (S.D.N.Y. 1996)).

District of Massachusetts in *Xuncax v. Gramajo*.[412] In *Xuncax*, nine expatriate citizens of Guatemala brought an action pursuant to the ATCA against the former Guatemalan Minister of Defense for summary execution, disappearances, torture, arbitrary detention, and cruel, inhuman, and degrading treatment allegedly engaged in by members of the Guatemalan military.[413] The plaintiffs' claims were based, in part, upon events which occurred nine years prior to the commencement of the action and prior to the addition of the statute of limitations to the TVPA.[414] The defendant contended that the claims were therefore subject to the most analogous limitations period, specifically, Massachusetts' three-year limitations period for personal injury actions, and as a result, time-barred.[415]

The district court, however, applied the ten-year statute of limitations of the TVPA retroactively to the plaintiffs' claims.[416] The *Xuncax* court acknowledged the U.S. Supreme Court's opinion in *Landgraf v. USI Film Products*,[417] wherein the Court refused certain provisions of the Civil Rights Act of 1991 retroactive effect to a case pending on appeal at the time the statute was enacted.[418] Nevertheless, the *Xuncax* court focused on language within Justice Stevens's majority opinion in *Landgraf*: "Any test of retroactivity . . . is unlikely to classify the enormous variety of legal changes with perfect philosophical clarity . . . . [It] is a matter on which judges tend to have 'sound instinc[ts]', and familiar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance."[419] Applying these considerations to the plaintiffs' claims, the *Xuncax* court held that the defendant could not have reasonably expected his conduct to

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[412] 886 F. Supp. 162 (D. Mass. 1995).

[413] *See id.* at 169-75.

[414] *See id.*

[415] *See id.* at 176-78.

[416] *See id.*

[417] 511 U.S. 244 (1994).

[418] *See Xuncax*, 886 F. Supp. at 176-77 (citing *Landgraf*, 511 U.S. 244).

[419] *Landgraf*, 511 U.S. at 270 (citation omitted), cited in *Xuncax*, 886 F. Supp. at 177.

fall within prevailing legal norms.[420] Furthermore, public interest in making the TVPA available to persons such as the plaintiffs outweighed any of the defendant's expectations with respect to the current state of the law.[421] Finally, the district court held such application to be merely jurisdictional and one that did not unfairly deprive the defendant of substantive rights.[422]

The *Unocal* court also cited *Cabriri v. Assasie-Gyimah*, an opinion of the U.S. District Court for the Southern District of New York.[423] In *Cabriri*, a former Ghanian trade counselor claimed that he had been tortured by a Ghanian security officer in violation of the ATCA.[424] The plaintiff's claims were based on events that occurred seven years prior to the commencement of the action and prior to the addition of a statute of limitations to the TVPA.[425] As in *Xuncax*, the defendant contended that the plaintiff's claims were time-barred under the most analogous limitation periods, specifically, the one to three-year limitation periods established by New York tort law.[426]

Following the lead set in *Xuncax*, the district court applied the ten year statute of limitations of the TVPA retroactively.[427] Again, the district court focused on Justice Stevens's language in *Landgraf*.[428] Applying these considerations to the plaintiff's claim of torture, the district court held that the defendant had fair notice that his actions were not lawful, and any expectation he had as to lack of accountability for his actions was rightly disrupted by retroactive application.[429] The district court also adopted the holding of the *Xuncax* court on the issue of lack of deprivation of defendant's substantive rights.[430]

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420 *See Xuncax*, 886 F. Supp. at 177.

421 *See id.*

422 *See id.* at 177 n.13.

423 921 F. Supp. 1189 (S.D.N.Y. 1996).

424 *See id.* at 1191-92.

425 *See id.* at 1194.

426 *See id.* at 1195.

427 *See id.* at 1196.

428 *See id.* at 1195 (citing Landgraf v. USI Film Prods., 511 U.S. 244, 270 (1994)).

429 *See id.* at 1196.

430 *See id.*

Further, the *Unocal* court discounted the precedential value of its previous opinion with regard to this issue. In *Forti v. Suarez-Mason*,[431] the U.S. District Court for the Northern District of California applied the one-year state law limitations period to the claims of Argentine citizens against a former Argentine general for torture, murder, and arbitrary detention in violation of the ATCA.[432] The court determined that no reason supported the application of any other limitations period since the most analogous federal statute, 42 U.S.C. § 1983, mandated application of state limitations periods.[433] The *Unocal* court discounted the value of this opinion given its determination prior to the adoption of the TVPA and its ten-year limitations period.[434]

The *Unocal* court's citation of these opinions strongly suggests that American companies may be held accountable for their participation in international human rights violations for extended periods of time spanning at least ten years from the date of accrual of the cause of action. The violations which may be the subject matter of future litigation may in fact have occurred substantially farther in the past than ten years if the defendant's alleged human rights violations are deemed to be part of an ongoing conspiracy or continuing pattern of violations. American companies transacting business abroad must monitor potential "hotspots" which may give rise to human rights violations for extended periods of time. Companies must also take added care in preserving documentation and sources of information relating to such violations which may prove to exonerate them in litigation initiated in the distant future. Companies should be aware of the current location of material witnesses to any alleged human rights violations and attempt to obtain and preserve contemporaneous statements of such witnesses for use in future litigation, especially where concerns exist that the witness will be unavailable in the future or will suffer the inevitable fading of recollection inherent in cases involving chronologically distant events. In any event, American companies need to add potential human rights litigation and the preservation

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[431] 672 F. Supp. 1531 (N.D. Cal. 1987).

[432] *See id.* at 1548-49.

[433] *See id.* at 1548.

[434] *See* John Doe I v. Unocal Corp., 963 F. Supp. 880, 897 (D.C. Cal. 1997).

of evidence to their long-range plans relating to foreign investments.

This conclusion is bolstered by the *Unocal* court's discussion of the equitable tolling and continuing violations doctrines. Under federal law, equitable tolling of an applicable limitations period may occur where a defendant's wrongful conduct prevents a plaintiff from asserting his claims.[435] Although the court did not base its findings on this branch of the equitable tolling doctrine,[436] it is important to note that American companies transacting business overseas should exercise caution in responding to claims of human rights violations. Attempts to discourage such claims through intimidation, retaliation, or extortion clearly fall within the definition of "wrongful conduct." Conversely, attempts to discourage the filing of claims through offers to engage in arbitration or settlement negotiations are clearly lawful. Absent such lawful actions, companies would be best advised to refrain from undertaking any action that might be construed as having the express or implicit purpose of wrongfully interfering with the potential plaintiffs' right to assert claims.

Equitable tolling may also occur when "extraordinary circumstances" outside the plaintiff's control make it impossible to timely assert the claim.[437] In *Unocal*, the court held that the unavailability of a remedy in Burma due to the lack of an independent judiciary was an "extraordinary circumstance" sufficient to toll Plaintiffs' claims against the private Defendants.[438] The threat of reprisals by SLORC against Burmese citizens who might have filed claims in the past also constituted an "extraordinary circumstance."[439] As such, the court held that Plaintiffs' claims were subject to tolling for as long as SLORC remained in power.[440]

With the expulsion of SLORC from power unlikely in the

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435 *See Forti*, 672 F. Supp. at 1549.

436 *See Unocal*, 963 F. Supp. at 896-97.

437 *See Forti*, 672 F. Supp. at 1549.

438 *Unocal*, 963 F. Supp. at 897.

439 *Id.*

440 *See id.*

foreseeable future, the limitations period applicable to Plaintiffs' claims against the private Defendants could be tolled for years. This result may hold true in other circumstances where foreign sovereigns engage in actions designed to discourage the assertion of human rights claims. Given the inability of the international community to expel the most intransigent human rights violators from power or, at least, dissuade them from future violations, private defendants to international human rights litigation in the United States may be subjected to lengthy delays in the initiation of such litigation.[441] Adding to the frustration that may result from such delays is the fact that the existence and length of delays are outside of the control of private defendants. Rather, such control resides with the foreign sovereign whose very conduct immunizes it from liability pursuant to FSIA. Additionally, such delays present companies with problems, such as evidence preservation, which may prove prejudicial to their defense. As such, a test consisting of judicial balancing of the "extraordinary circumstances" alleged by the plaintiff and the demonstrable prejudice suffered by the private defendants may be appropriate in international human rights cases where long delays between the actions at issue and the initiation of litigation have occurred.

This conclusion is further supported by the potential use of the continuing violation doctrine in international human rights litigation. Under federal law, equitable tolling of an applicable limitations period may occur if the underlying violation is of a continuing nature.[442] Pursuant to this prong of the equitable tolling doctrine, a systematic violation of rights is actionable even if some or all of the events evidencing its inception occurred prior to the limitations period.[443] When a defendant's conduct is part of a continuing practice, an action is timely as long as the last act falls

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[441] For example, despite 36 years of pressure asserted by the United States, the Castro regime in Cuba remains firmly entrenched in power. Saddam Hussein remains in control of Iraq seven years after the end of the Gulf War. A dictatorial Communist regime remains in power in North Korea, and Islamic fundamentalists retain a firm grip on the reins of power in Iran despite over 46 and 18 years of economic sanctions, respectively.

[442] *See* Williams v. Owens-Illinois, Inc., 665 F.2d 918, 924 (9th Cir. 1982); Fletcher v. Union Pac. R.R. Co., 621 F.2d 902, 907-08 (8th Cir. 1980).

[443] *See* Brenner v. Local 514, 927 F.2d 1283, 1295 (3d Cir. 1991).

within the limitations period.[444] In such an instance, the federal courts have granted relief for the earlier related acts that would otherwise be time barred.[445]

Although the court declined to reach the question of its applicability, the continuing violation doctrine remains relevant for American companies transacting business abroad. It is unclear if the continuing violation doctrine requires joint participation by the foreign sovereign and private parties in the continuing pattern of violations or whether continuation of the pattern by the foreign sovereign acting alone is sufficient. If continuance of the pattern of violations by the foreign sovereign acting alone is sufficient, private companies remain potentially liable for human rights violations that are part of the pattern despite their occurrence in the distant past. Additionally, potential private defendants may suffer prejudice if the foreign sovereign continues to engage in a systematic pattern of human rights violations, thereby extending the period of time in which injured parties may file claims. This prejudice may be exacerbated by the private defendants' inability to prevent the continuing violations and the knowledge that the foreign sovereign may ultimately be shielded from liability by application of FSIA.

However, control is restored to the potential private defendant if the continuing violation doctrine requires joint participation of the foreign sovereign and the private party. In such event, potential private defendants would be best advised to refrain from undertaking any action which may be construed as having the express or implicit purpose of continuing the past pattern of human rights violations. This passive course of action may be complimented by an active policy of denial and denunciation of human rights violations occurring within the host country. An active policy of denial and denunciation, however, risks straining the relationship between the host country and the private company and may be interpreted as an admission of participation in past human rights violations engaged in by the foreign sovereign. These risks are best left to private enterprise to determine on a case-by-case basis.

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[444] *See Fletcher*, 621 F.2d at 907-08.

[445] *See id.* at 908.

V. Conclusion

The *John Doe I v. Unocal Corp.* decision represents the first time in which a federal court has held that American companies may be liable for human rights abuses committed by their sovereign partners in another country.[446] The court determined that the Joint Venture was sufficient foundation upon which to base subject matter jurisdiction, pursuant to the ATCA regarding claims of violation of Plaintiffs' human rights by SLORC and Unocal.[447] The claims based upon allegations of forced labor remained actionable against Unocal even in the absence of joint action with SLORC.[448] Unocal's potential liability may continue for an extended period of time based on the court's holding with regard to the limitations period applicable to Plaintiffs' claims and its extension by the equitable tolling and continuing violations doctrines.[449] The prudential concerns memorialized in the act of state doctrine were inapplicable to claims brought pursuant to the ATCA, given the presence of unambiguous international agreement upon controlling legal principles.[450] These concerns were also inapplicable due to SLORC's failure to act in the best interest of its subjects and because there was no risk that adjudication of the case would lead to confrontation between the United States and Burma.[451] Additionally, no relief was available to Unocal based upon the application of FSIA or Rule 19 of the Federal Rules of Civil Procedure.[452] Even a conservative interpretation of the court's opinion leads to the conclusion that a new era is dawning for American companies transacting business overseas.

This new era, however, is fraught with peril for American businesses. The court's opinion imposes liability upon private

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[446] *See Firms Overseas May Be Liable For Rights Abuses*, S.F. CHRON., Apr. 17, 1997, at A10.

[447] *See* John Doe I v. Unocal Corp., 963 F. Supp. 880, 889-90 (D.C. Cal. 1997).

[448] *See id.* at 889.

[449] *See id.* at 896-97.

[450] *See id.* at 892-95.

[451] *See id.* at 893.

[452] *See id.* at 889.

companies acting in concert with foreign sovereigns, while allowing foreign sovereigns to escape liability by utilizing sovereign immunity. Despite foreign sovereigns' instigation of human rights violations and their exclusive control over important sources of evidence and avenues of discovery, the court refused to hold such foreign sovereigns to be necessary or indispensable parties pursuant to Rule 19 of the Federal Rules of Civil Procedure.[453] Nevertheless, the court deemed itself competent to determine the best interests of foreign citizens in the absence of their governments.[454]

Nor will the act of state doctrine shield private parties from liability.[455] The court's opinion demonstrates a new willingness to inject the federal judiciary into international relations and foreign politics. It christens the federal judiciary as a prognosticator of future hostile confrontations with foreign sovereigns as well as the determinant of the best interests of oppressed persons throughout the world. As a result, the act of state doctrine may be summarily swept aside in cases brought pursuant to the ATCA. The court's concluding promise to exercise discretion in this area provides little comfort to businesses already attempting to conform their behavior to the dictates of the coordinate branches of government traditionally responsible for the conduct of foreign affairs.

This decision renders the participation of foreign sovereigns in human rights violations irrelevant under certain limited circumstances. Private parties remain liable in the absence of state action if they had actual or constructive knowledge of the alleged human rights violations and nonetheless continued to accept the benefits bestowed by the commission of such violations.[456] Such liability may also flow from the private party's actual or constructive knowledge of the foreign sovereign's history of human rights violations and practices.[457] Although this portion of the court's holding is presently limited to slave trading and "a

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[453] *See id.*

[454] *See generally id.* at 893 (stating "courts should consider whether the foreign state acts in the public interest").

[455] *See id.*

[456] *See id.*

[457] *See id.*

handful of other crimes,"[458] future expansion to include other human rights violations is foreseeable if not immediately probable.

The court's opinion also renders impotent chronological limitations upon private liability. Even if the opinion is not read as an implicit endorsement of the application of the ten-year TVPA limitations period to claims brought pursuant to the ATCA, private parties may be liable for acts that took place in the distant past even in the absence of their own misconduct.[459] The limitations period may be tolled by continuing violations even if such violations are solely engaged in by the foreign sovereign without private participation.[460] Private parties may also remain liable for claims regardless of their date of accrual for as long as the repressive regime remains in power.[461] This same result may also occur in the absence of a functioning or independent judiciary in the foreign country.[462]

Criticism of the opinion should not excuse SLORC's conduct with regard to the Yadana gas pipeline project. Rejected by the vast majority of Burmese citizens in the dishonored 1990 elections, SLORC nevertheless maintains an illegitimate hold on political power in Burma through maintenance of an atmosphere of repression, fear, and intimidation. SLORC remains one of the leading human rights violators in the world, terrorizing dissidents through disappearances, torture, arbitrary arrest, and detention.[463] Burmese citizens remain subject to forced relocation and confiscation of their property as well as the possibility of receiving a request to "contribute" their labor to government projects.[464] Freedoms deemed fundamental throughout the world such as speech, assembly, and association remain nonexistent.[465] Communication with the outside world is viewed with suspicion

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458 *Id.*

459 *See generally id.* at 896-97 (discussing the statute of limitations and equitable tolling).

460 *See id.* at 897.

461 *See id.*

462 *See id.*

463 *See supra* notes 13-44 and accompanying text.

464 *See supra* notes 13-44 and accompanying text.

465 *See supra* notes 13-44 and accompanying text.

by SLORC and, in some instances, is a punishable offense.[466] With limited exceptions, SLORC has succeeded in cutting off Burma from a modern world increasingly characterized by economic interdependence and the primacy of democratic governance.[467]

This criticism should not create sympathy for the plight of Unocal and the other private defendants to the litigation. Unocal voluntarily associated itself with SLORC and should expect no better treatment than it has received to date. Unocal's alleged indifference to SLORC's history of human rights abuses and specific practices with regard to the Yadana pipeline project may render it the poster child for the consequences of consorting with repressive regimes in blind pursuit of corporate profits. If such proves to be the case, there should be no sympathy for Unocal. Instead, American companies should carefully scrutinize the history of their sovereign partners, add potential human rights liability to their risk assessment and determine the advisability of proceeding with their investments. If nothing else, Unocal's alliance with the illegitimate regime of SLORC has raised corporate consciousness of the role of human rights in the international marketplace. This is a positive result in a rapidly expanding global economy dominated by gargantuan multinationals seemingly obsessed with profits and rates of return at the expense of respect for individual rights.

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[466] *See supra* notes 13-44 and accompanying text.

[467] Visiting Burma has been characterized as "a bit like entering a time machine and turning the dial back about four decades, to an era with few conveniences or consumer goods, no efficient modes of transportation and communication, no substantial domestic manufacturing industry and no appreciable tourism." Smith, *supra* note 104, at C1.