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Enforcing Internationally Recognized Human Rights Violations under the Alien Tort Claims Act: An Analysis of the Ninth Circuit's Decision in *Doe v. Unocal Corp.*

JOSHUA E. KASTENBERG*

I. INTRODUCTION

On September 18, 2002, the Ninth Circuit Court of Appeals ruled that a United States based corporation can be held civilly liable for “aiding and abetting” the internationally recognized human rights violation of forced labor. This case, *Doe v. Unocal Corp.*¹ (*Doe II*), is significant for its ramifications to human rights litigation in United States courts as well as to future liability for multinational corporations conducting commerce in foreign states. The uniqueness of this case is found in its precedent. No prior federal court has held a corporation liable for human rights violations under the Alien Tort Claims Act.

In 1789, Congress enacted the First Judiciary Act.² This act included a jurisdictional provision for district courts that granted foreign persons or entities the right to sue under tort law for violations committed under the law of nations.³ This jurisdictional law was named the Alien Tort Claims Act (ATCA).⁴ From 1789 until 1984, the ATCA underwent three minor

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1. 2002 U.S. App. LEXIS 19263 (9th Cir. Sept. 18, 2002) (*Doe II*).

2. 1 Stat. 73 (1789).

3. 1 Stat. 73, 77 (1789).

4. This act is also referred to as the Alien Tort Statute.

alterations⁵ culminating in its present form that states: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”⁶

For almost two centuries, little use was made of the ATCA,⁷ and certainly none of it for allegations of human rights violations based on international norms.⁸ However, in 1979 the Second Circuit Court of Appeals, in *Filartiga v. Pena-Irala*,⁹ changed the dormant nature of the ATCA.¹⁰ This case originally involved a New York District Court lawsuit between Paraguayan litigants for human rights violations that occurred in Paraguay.¹¹ The United States had no actual nexus to the violations.¹² Yet, the Second Circuit found that United States courts had jurisdiction to hear cases involving human rights violations, wherever these violations occur.¹³

As a result of *Filartiga*, several lawsuits occurred that cited human rights violations. The majority of these cases involved lawsuits against foreign government and former foreign government officials. Another result of *Filartiga* was legislative, rather than judicial. In 1992, Congress enacted the Torture Victim Protection Act (TVPA) which created a cause of action for two violations of international law: torture and summary execution.¹⁴ The TVPA also bolstered the ATCA by providing the right to

5. Joseph Modeste Sweeny, *A Tort only in Violation of the Law of Nations*, 18 *Hastings Intl. & Comp. L. Rev.* 445, 449-50 (1995) (providing a detailed discussion of the substance of the alterations to the ATCA).

6. 28 U.S.C. § 1350 (1993).

7. *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 104 (2d Cir. 1980) (citing *Filartiga v. Pena-Irala*, 630 F.2d 876, 878, n. 21 (2d Cir. 1980)).

8. See e.g. *Dreyfus v. von Fink*, 534 F.2d 24, 30-31 (2d Cir. 1975). In *von Fink*, the Second Circuit held that the ATCA’s jurisdiction dealt primarily with relationship among nations rather than individuals. Specifically, that court held:

There has been little judicial interpretation of what constitutes the law of nations, and no universally accepted definition of this phrase. . . . There is a general consensus, however, that it deals primarily with the relationship among nations rather than among individuals. “It is termed the Law of Nations—or International Law—because it is relative to States or Political Societies and not necessarily to individuals, although citizens or subjects of the earth are greatly affected by it.”

Id. at 31 (quoting von Redlich, *The Law of Nations* 5 (2d ed. 1937)).

9. 630 F.2d 876 (2d Cir. 1979).

10. See *id.* at 887 (stating that jurisdiction has rarely been based on the ATCA).

11. *Id.* at 890.

12. *Id.* at 878.

13. *Id.*

14. Act of March 12, 1992, Pub. L. 102-256, 106 Stat. 73. The TVPA reads in pertinent part:

(a) LIABILITY.—An individual who, under actual or apparent authority, or color of law, of any foreign nation—

sue United States citizens.¹⁵ Since 1979, ATCA cases have emerged in three general categories. The first of these categories involves suits by alien (foreign) plaintiffs against current foreign heads of state and government.¹⁶ The second category deals with suits by foreign plaintiffs against former foreign heads of state and government officials.¹⁷ The third category of ATCA suits involves civil action by foreign plaintiffs against multinational corporations conducting foreign commercial activity in conjunction with foreign governments.¹⁸ This article concerns the third category, in particular, an analysis of *Doe II*.

This article analyzes *Doe II* under a multi-tiered rubric. The first tier involves analyzing whether the Ninth Circuit was correct in its jurisdictional interpretation. The second tier studies the extent to which the Ninth Circuit's use of international law expanded previously accepted usage by United States courts. For example, after reading *Doe II*, a question arises as to whether the Ninth Circuit created a "complete" universal jurisdiction for torts under the ATCA. The final tier, involves analyzing foreseen legal consequences. That is, does *Doe II* expand causes of action for foreign human rights violations because the decision reduces possible defenses to tort claims under the ATCA?

Within this multi-dimensional rubric, *Doe II* must be understood from its beginnings. Section II discusses the history of *Doe II*, primarily through two prior district court decisions. However, in order to analyze *Doe II*, a meaningful background to the ATCA must be determined. Section III of

(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or

(2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

(b) EXHAUSTION OF REMEDIES.—A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred.

(c) STATUTE OF LIMITATIONS.—No action shall be maintained under this section unless it is commenced within 10 years after the cause of action arose.

Id.

15. *Id.* For a brief but insightful discussion of the TVPA see Steven Ratner & Jason Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, 243 (2d ed., Oxford U. Press 2001).

16. See e.g. *Tachiona v. Mugabe*, 216 F. Supp. 2d 262 (S.D.N.Y. 2002) (suing Zimbabwe's ruling party); *Kadic v. Karadzic*, 70 F.3d 232 (1995) (suing President of Bosnia-Herzegovina).

17. See e.g. *In re Estate of Ferdinand Marcos, Human Rights Litigation*, 25 F.3d 1467 (9th Cir. 1994) [hereinafter *Marcos II*] (suing estate of former Philippine leader Ferdinand Marcos).

18. See e.g. *Estate of Rodriguez v. Drummond Co.*, 2003 U.S. Dist. LEXIS 6657 (N.D. Al. April 14, 2003) (accusing an American corporation of collaboration with Columbian paramilitary); *Presbyterian Church of Sudan v. Talisman Energy*, 244 F. Supp. 2d 289 (S.D.N.Y. 2003) (accusing a Canadian corporation of collaborating with Sudan for ethnic cleansing).

this paper provides this background. Particular attention is paid to the *Filartiga* decision and its progeny because *Doe II* relied, in large-part, on principles established in *Filartiga*. Section IV provides context for the suit, namely, the nature of human rights violations occurring in Myanmar where the plaintiffs allege the violations occurred. Section V analyzes the Ninth Circuit's unique application of International Law. Section VI analyzes foreseeable consequences to defenses against ATCA suits. In particular, defenses under the act of state doctrine, dismissal under the indispensable parties rule, and *forum non conveniens* are addressed. This article concludes with the final assessment that while *Doe II* is rooted in fundamentally correct interpretations of the law, it both expands the parameters of corporate liability and it fundamentally alters the ability to defend against ATCA suits.

II. *DOE V. UNOCAL CORP.*: FACTS AND HISTORY

A. *Note on Unocal*

Union Oil Corporation of California (Unocal) was formed in 1890.¹⁹ It is headquartered in El Segundo, California.²⁰ Unocal currently employs over 6,500 people and conducts expansive operations throughout the world.²¹ These operations are mainly in the area of natural gas extraction and transportation, crude oil extraction, and pipeline construction.²² In 2001, the company enjoyed revenues of 6.8 billion dollars and earnings of 615 million dollars.²³ Unocal first explored the possibility of extraction operations in Myanmar in 1990.²⁴ In 1993, it obtained a 28.26% share²⁵ in a project run by Total Fina Elf S.A., a Europe based petroleum corporation.²⁶ The project was centered on extracting gas from the Yadana natural

19. Unocal Corp., *Unocal, All about Unocal, Unocal at a Glance, Around the World 2003* 1 <<http://www.unocal.com/aboutucl/uclataglance.pdf>> (accessed June 14, 2003) [hereinafter *Around the World*] (also referred to on the web site as *Unocal Fact Sheet*).

20. *Id.* at 2.

21. *Id.* Unocal conducts business in Thailand, Indonesia, the Philippines, Bangladesh, the Netherlands, Azerbaijan, Brazil, Canada, Myanmar, China, and domestically in the Gulf Coast Region, and Alaska. *Id.*

22. *Id.*

23. Unocal Corp., *Unocal, Investor Information, Data Warehouse, 2000-2003 Quarterly Fact Book 2* <<http://www.unocal.com/investor/qfb0003.pdf>> (accessed June 27, 2003).

24. *Id.* For general background see *Doe v. Unocal Corp.*, 963 F. Supp. 880, 883-84 (C.D. Cal. 1997) (*Doe I(a)*); *Doe v. Unocal Corp.*, 27 F. Supp. 2d 1174, 1178-79 (C.D. Cal. 1998).

25. Unocal Corp., *Unocal, All about Unocal, International Energy Operations, Thailand, Thailand Fact Sheet*, 1 <http://www.unocal.com/globalops/fact_thailand.pdf> (accessed June 27, 2003) [hereinafter *Thailand Fact Sheet*].

26. Total Fina Elf became Total S.A. in 1995.

gas field and transporting it, via pipeline, for power generation in Thailand.²⁷

Unocal has a Corporate Responsibility Program (CRP).²⁸ In 2001, the corporation spent six million dollars in worldwide programs to promote “sustainable community development,” advance the well being of children, and provide educational programs.²⁹ Judging from their investor relations web site, it appears some of this money was spent in Myanmar.³⁰ However, none of the published court decisions relating to this case state that Unocal’s CRP was utilized in Myanmar.

B. *Doe I(a)*

In October 1996, fourteen plaintiffs from the Tenasserim region in Burma filed a class action suit against Unocal, based in part on the ATCA, in the United States District Court for the Central District of California.³¹ Other defendants named in this suit were, Total S.A. (Total),³² the Myanma Oil and Gas Enterprise (MOGE),³³ the State Law and Order Restoration Council (SLORC),³⁴ Mr. John Imle (Imle),³⁵ and Mr. Roger C. Beach (Beach).³⁶ For purposes of this article, the defendants will be referred to as “the joint venture,” except where Unocal’s specific role is addressed. Throughout *Doe*, the plaintiffs alleged they were the victims of human rights abuses perpetrated by the military government in Myanmar.³⁷ The

27. *Doe*, 963 F. Supp. at 883 (*Doe I(a)*).

28. Unocal Corp., *Unocal, Corporate Responsibility at Unocal* <<http://www.unocal.com/responsibility/index.htm>> (accessed June 27, 2003).

29. *Around the World*, *supra* n. 19, at 1.

30. Unocal Corp., *Unocal, Corporate Responsibility at Unocal: 2000-2001 Report, Community Involvement and Support, Myanmar* <http://www.unocal.com/responsibility/01cr_report/myanmar.htm> (accessed June 27, 2003).

31. *Doe*, 963 F. Supp. at 883 (*Doe I(a)*). The original fourteen plaintiffs were expected to be joined by thousands of others. The plaintiffs were farmers from the above-noted region. *Id.*

32. Total S.A. is a European petroleum and extraction company. See e.g. *Doe v. Unocal Corp.*, 27 F. Supp. 2d 1174, 1178-79 (C.D. Cal.1998). The district court, in determining it lacked jurisdiction over Total, dismissed the plaintiffs’ suit against it. *Id.* In *Doe v. Unocal Corp.*, 248 F.3d 915, 921 (9th Cir. 2001), the Ninth Circuit affirmed the district court’s dismissal of the suit against Total.

33. *Doe*, 963 F. Supp. at 883 (*Doe I(a)*).

34. *Id.* SLORC is the ruling body in Myanmar, formerly known as Burma. *Id.*

35. *Id.* Mr. Imle was the president of Unocal. *Id.*

36. *Id.* Mr. Beach was the chairman of Unocal from 1994 until 2001 and the chief executive officer (CEO) of Unocal from 1995 until 2001. Unocal Corp., *Unocal, All about Unocal, A History of Unocal*, <www.unocal.com/aboutucl/history/index.htm> (accessed June 27, 2003).

37. *Doe*, 963 F. Supp. at 883 (*Doe I(a)*). Additionally, in September 1996, four villagers from the Tenasserim region, the Federation of Trade Unions of Burma and the National Coalition Government of the Union of Burma filed suit, titled *National Coalition Government of the Union of Burma v. Unocal, Inc.*, 176 F.R.D. 329 (C.D. Cal. 1997), under the ATCA in the United States District Court for the Central District of California. The plaintiffs alleged violations under the law of nations as a basis for the ATCA claim, and violations of state law. *Id.* at 335.

plaintiffs specifically claimed that during a pipeline construction, begun in 1991, they were subjected to, *inter alia*, forced labor, torture, murder of family members, forced displacement, and rape.³⁸ The pipeline construction, known as the Yadana project, was designed to ferry natural gas across Myanmar for eventual power generation in Thailand.³⁹ The particular allegations were raised under the ATCA as violating the law of nations.⁴⁰ The direct perpetrators of these offenses were state actors from SLORC: its military, intelligence agents, and police.⁴¹ However, the plaintiffs alleged that because Unocal, Total, Imle, and Beach were jointly engaged with the Myanmar government in the pipeline construction, the district court possessed jurisdiction over the defendants.⁴² Specifically, the plaintiffs' contended Unocal and Total contracted with the Myanmar government for use of its military to provide security.⁴³ District Court Judge Richard Paez held that the district court possessed jurisdiction over the plaintiffs' ATCA claims.⁴⁴

The district court concluded that it lacked jurisdiction over SLORC and MOGE because of their entitlement to sovereign immunity under the Foreign Sovereign Immunities Act (FSIA).⁴⁵ Relying on the plain language of this act as well as *Saudi Arabia v. Nelson*,⁴⁶ the court determined SLORC and MOGE's activity did not fit into one of the commercial activ-

38. *Doe*, 963 F. Supp. at 883-85 (*Doe I(a)*).

39. *Id.* at 883-85.

40. *Id.* at 892.

41. *Id.* at 883.

42. *Id.* at 883-84. The Plaintiffs also asserted claims under the Racketeer Influenced and Corrupt Organizations Act (RICO), violations of the California Business & Professions Code § 17200, and several generic torts such as intentional infliction of emotional distress, negligent supervision, negligent hiring, and assault. As to the ATCA claim, the court accepted as fact that in 1991 Unocal and Total contracted with the Myanmar government to clear forest, construct road access, and provide security for a natural gas pipeline running from the Andaman Sea through the Tenasserim region of Burma and into Thailand. *Id.*

43. *Id.* at 883.

44. *Id.* at 884. Other tort claims were dismissed under applicable statutes of limitation. *See id.* at 897.

45. *Id.* at 885. Codified at 28 U.S.C. § 1330, "the [FSIA] provides the sole basis for obtaining jurisdiction over a foreign state" in domestic courts. *Id.* at 886 (quoting *Saudi Arabia v. Nelson*, 507 U.S. 349, 355, 113 S. Ct. 1471, 1476, 123 L. Ed. 2d 47, 58 (1993)). Generally under the FSIA, a foreign state is immune from law suits. *Id.* (citations omitted). However, there are three exceptions to the general rule of immunity. *Id.* These exceptions are as follows:

[1] the action is based upon a commercial activity carried on in the United States by the foreign state; or [2] upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or [3] upon an act outside the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect on the United States[.]

28 U.S.C. § 1605(a)(2) (2003).

46. 507 U.S. 349, 113 S. Ct. 1471, 123 L. Ed. 2d 47 (1993).

ity exceptions enabling jurisdiction.⁴⁷ However, despite dismissing SLORC and MOGE from the case, the district court determined that they were not indispensable parties to the suit.⁴⁸

Reviewing principles of jurisdiction under the ATCA, the court first determined that official torture rose to the level of a *jus cogens* norm and therefore jurisdiction attached.⁴⁹ Further, the court held that the plaintiff's allegations constitute state action.⁵⁰ Namely, Unocal, SLORC, and MOGE were "joint venturers, working in concert with one another; and that the defendants have conspired to commit the violations of international law . . . to further the interests of the Yadana gas pipeline project," to constitute state action.⁵¹ In essence, the allegation was sufficient to establish subject-matter jurisdiction under the ATCA.⁵² However, the court recognized that under some circumstances, such as forced labor, private actors may be liable for violations of international law absent state action.⁵³ Thus the court did not conduct a state-action analysis for forced labor as it had for torture.⁵⁴

Unocal also argued for dismissal under the act of state doctrine claiming a grant of jurisdiction would "interfere with the foreign policy efforts of Congress and the President."⁵⁵ The court reaffirmed the act of

47. *Doe*, 963 F. Supp. at 888 (*Doe I(a)*).

48. *Id.* at 884. Indispensable parties are governed by Rule 19 of the Federal Rules of Civil Procedure. In order to determine whether a party is indispensable, courts engage in a two step inquiry. "First, the court must determine whether the absent party is necessary and cannot be joined." *Id.* at 889. If the answer is in the affirmative, "the court must then determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed." *Id.* In this case, Unocal initially argued SLORC and MOGE were entitled to sovereign immunity. *Id.* at 884. In prevailing in this argument, Unocal relied upon *Aquinda v. Texaco Inc.*, 945 F. Supp. 625 (S.D.N.Y. 1996), and then argued for dismissal based on fairness. See *Doe*, 963 F. Supp. at 889 (*Doe I(a)*).

49. *Doe*, 963 F. Supp. at 890 (*Doe I(a)*). A *Jus cogens* norm is a principle of international law that is accepted by the international community of states as a whole as a norm from which no derogation is permitted. See e.g. *Prinz v. Federal Republic of Germany*, 26 F.3d 1166, 1173 (D.C. Cir. 1994).

50. *Doe*, 963 F. Supp. at 890 (*Doe I(a)*).

51. *Id.* at 891. State action is essentially defined as "an act under color of law" by a state instrumentality. See e.g. *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374 (1995). A private individual acts under color of law within the meaning of the ATCA when he acts together with state officials or with significant state aid. *Doe*, 963 F. Supp. at 891 (*Doe I(a)*).

52. *Doe*, 963 F. Supp. at 891 (*Doe I(a)*).

53. *Id.*

54. *Id.* at 892. To establish a claim for some offenses under the ATCA against a private party, the plaintiff must prove the defendant engaged under color of state action. *Id.* at 891. It appears there are two sequential questions. The first question arises as to whether the corporate entity's activities were independently commercial, or did the commercial activity assist the criminal actor—in this case, SLORC—to the degree that the commercial activity "aided and abetted" the criminal actor. If the latter answer is true—as argued in this article—then the second question involves determining whether the "aiding and abetting" extinguishes the act of state doctrine, or if the doctrine remains viable. *Id.* at 892.

55. *Id.* The act of state doctrine is premised on the separation of powers. *Republic of Philippines v. Marcos*, 862 F.2d 1355, 1369 (9th Cir. 1988) (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427-28, 84 S. Ct. 923, 940 (1964)). The Ninth Circuit in *Doe I(a)* held, "the act of state doctrine 'reflects the prudential concern that the courts, if they question the validity of sovereign acts taken by

state doctrine principle that, "Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory."⁵⁶ The district court further held, "[r]edress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves."⁵⁷ This definition was originally supplied by the Supreme Court in *Banco National de Cuba v. Sabbatino*.⁵⁸ After a lengthy analysis of the act of state doctrine's applicability in regard to *jus cogens* violations, the court concluded that "the high degree of international consensus," as to the seriousness of the alleged offenses, "severely undermines [Unocal's] argument that SLORC and MOGE's alleged activities should be treated as acts of state."⁵⁹

Finally, the court analyzed Unocal's remaining fact-based argument for dismissal. Unocal argued that because the plaintiffs did not allege that Unocal directly participated in torture or forced labor, but rather accepted this labor from SLORC, the case warranted dismissal.⁶⁰ Moreover, Unocal argued that the plaintiffs' allegations, even if true, merely established a business relationship between SLORC and Unocal.⁶¹ The court disagreed with this argument and found sufficient facts that "plaintiffs could conceivably prove facts to support . . . 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

foreign states, may be interfering with the conduct of American foreign policy by the Executive and Congress." *Doe*, 963 F. Supp. at 892-93 (*Doe I(a)*) (quoting *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 717 (9th Cir. 1992)).

56. *Doe*, 963 F. Supp. at 892 (*Doe I(a)*) (citing *Banco National de Cuba v. Sabbatino*, 376 U.S. 398, 423, 84 S. Ct. 923, 937-38, 123 L. Ed. 2d 804, 820 (1964) (quoting *Underhill v. Hernandez*, 168 U.S. 250, 252, 18 S. Ct. 83, 84, 42 L. Ed. 456, 457 (1897))).

57. *Doe*, 963 F. Supp. at 892 (*Doe I(a)*).

58. 376 U.S. 398, 84 S.Ct. 923, 11 L. Ed. 2d 804 (1964). In *Sabbatino*, the Court held "maintaining intact the act of state doctrine" serves both the national interest and "progress toward the goal of establishing the rule of law among nations." 376 U.S. at 437.

59. *Doe*, 963 F. Supp. at 894 (*Doe I(a)*). The court further concluded:

[b]ecause nations do not, and cannot under international law, claim a right to torture or enslave their own citizens, a finding that a nation has committed such acts, particularly where, as here, that finding comports with the prior conclusions of the coordinate branches of government, should have no detrimental effect on the policies underlying the act of state doctrine.

Id.

60. *Id.* at 896.

61. *Id.*

pipeline project.”⁶² Thus, the court determined the case merited a hearing before a trier of fact.

C. *Doe I(b)*

On October 31, 2001, District Court Judge Ronald Lew, granted Unocal’s motion for summary judgment based on further jurisdictional arguments.⁶³ The court analyzed the plaintiffs’ claims in light of past ATCA decisions.⁶⁴ The court framed its analysis in a two-step process. First, the court had to determine “whether the conduct of the Myanmar military violated international law.”⁶⁵ Second, if the first question was answered in the affirmative, the court had to assess “whether Unocal [wa]s liable for th[o]se violations.”⁶⁶

Reviewing the first question, the court held that “[a]ctionable violations of international law must be of a norm that is specific, universal, and obligatory.”⁶⁷ In other words, the court applied a *jus cogens* threshold for jurisdiction. Additionally, because Unocal argued that only *jus cogens* violations are actionable under the ATCA, the court distinguished between customary international law and *jus cogens*.⁶⁸ The court defined customary international law as “rest[ing] on the consent of the states.”⁶⁹ In essence, the court held “that those states that do not agree to a norm of customary international law are not bound by it.”⁷⁰ In defining *jus cogens* as “values taken to be fundamental by the international community. . . [that] are binding on all nations,” the court determined that the ATCA conferred jurisdiction over *jus cogens* offenses only.⁷¹ The court held torture, murder, genocide, and slavery as violations of *jus cogens* norms.⁷² The court further recognized that the law of nations regarding piracy and slavery has been

62. *Id.* The court further addressed statutes of limitation, equitable tolling, and remaining claims not related to the ATCA. *Id.* at 896-97.

63. *Doe v. Unocal Corp.*, 110 F. Supp. 2d 1294, 1312 (C.D. Cal. 2000) (*Doe I(b)*).

64. *Id.* at 1303-05. The court specifically analyzed norms regarding forced labor, relying on reports by the International Labor Organization (ILO). *Id.* at 1308. The ILO is the primary agency within the United Nations for workers rights. *Id.* In 1996, it specifically reviewed labor practices in Myanmar. *Id.* Interestingly, Unocal appeared to concede forced labor occurred when it argued before Judge Lew that federal law recognizes the right of states to utilize forced labor “for the public good.” *Id.*

65. *Id.* at 1303.

66. *Id.*

67. *Id.* at 1304 (citations omitted).

68. *Id.*

69. *Id.* (citing *Siderman de Blake*, 965 F.2d at 715).

70. *Id.* (citing *Siderman de Blake*, 965 F.2d at 715).

71. *Id.* (relying on *Estate II*, 25 F.3d at 1475).

72. *Doe*, 110 F. Supp. 2d, at 1304 (*Doe I(b)*) (citations omitted).

historically applied to private actors, but not torture and summary execution (murder).⁷³

However, the court's analysis of state action liability led it to dismiss the plaintiffs' suit as to the murder and torture claims.⁷⁴ The court held that for jurisdiction over Unocal to attach, its participation in the pipeline project had to constitute state action under the joint action test.⁷⁵ In order to satisfy that test, Unocal had to be a "willful participant in joint action with [Myanmar] or its agents."⁷⁶ Because the plaintiffs presented no direct allegation that Unocal conspired, participated in, or influenced SLORC's conduct, the plaintiffs' suit as to summary execution (murder) and torture failed.⁷⁷ Thus, dismissing the plaintiffs' suit, the court considered that Unocal would have to have been an active participant in order for it to find Unocal had aided and abetted the Myanmar military in the asserted international law violations, with the exception of forced labor.⁷⁸

The court assessed Unocal's liability as a private actor for forced labor and held that the plaintiffs had a burden of establishing Unocal's legal responsibility for the Myanmar military's forced labor activities.⁷⁹ The court also analyzed the plaintiffs' argument that "knowledge and approval of acts is sufficient for a finding of liability" by looking at the post-World War II trials of German industrialists.⁸⁰ However, in some of those trials, the tribunals determined knowledge of slave labor usage alone was an insufficient ground for guilt.⁸¹ That is, where those defendants could estab-

73. *Id.* at 1305.

74. *Id.*

75. *Id.* In order to be liable for certain offenses in violation of the law of nations, the perpetrator must be acting under color of state action. For instance Unocal would not be liable under the ATCA for committing an offense such as summary execution. In that case, a plaintiff would have to seek jurisdiction under a different theory of liability. Under the joint action test, state action is present if a private party is a willful participant in joint action with the State or its agents." *Id.* In ATCA cases, the "color of law" jurisprudence of 42 U.S.C. § 1983 is a relevant guide to whether a defendant has engaged in official action for purposes of jurisdiction. *Kadic v. Karadzic*, 70 F.3d 232, 245 (2d Cir. 1996). "A private individual acts under 'color of law' within the meaning of section 1983 when he acts together with state officials or with significant state aid." *Id.*

76. *Doe*, 110 F. Supp. 2d at 1305 (*Doe I(b)*) (quoting *Dennis v. Sparks*, 449 U.S. 24, 27-28, 101 S. Ct. 183, 186, 66 L. Ed. 2d 185, 189 (1980)).

77. *Id.*

78. *Id.*

79. *See id.* at 1309. (looking to the International Military Tribunals (IMT) conducted against German "captains of industry" after World War II).

80. *Id.* at 1309. There were twelve trials conducted. *Id.* In *U.S. v. Flick*, four of the defendants were entitled to a defense of necessity and were therefore not guilty. *Id.* (citing 6 Tr. of War Crim. before the Nuremberg Mil. Trib. under Control Council Law No. 10 1196 (U.S. Govt. Printing Off. 1952)). In *U.S. v. Krauch*, five of the defendants were found guilty, in part, because "they embraced the opportunity to take full advantage of slave labor program." *Id.* at 1310 (citing 8 Tr. of War Crim. before the Nuremberg Mil. Trib. under Control Council Law No. 10 1179 (U.S. Govt. Printing Off. 1952) [hereinafter *I.G. Farben*]).

81. *See Doe*, 110 F. Supp. 2d at 1309-10 (*Doe I(b)*) (requiring knowledge and participation).

lish “necessity,” the burden of proving guilt was considerably higher because the prosecution then encountered a burden of proving the weakness of the necessity defense.⁸² Likewise, the court held that while there was ample evidence that Unocal knew SLORC “employed forced labor,” there was no evidence Unocal specifically sought its use.⁸³ In essence, the district court found no domestic or international principle of law establishing liability for passively participating, or financially benefiting, from slave labor. As a result, no liability attached to Unocal and the court granted Unocal summary judgment.⁸⁴

D. *Doe II*

1. *The Majority Opinion*

a. Pertinent Facts in the Decision

On September 18, 2002, the Ninth Circuit reversed the lower court’s grant of summary judgment to Unocal,⁸⁵ criticizing both its interpretation of international law⁸⁶ and its jurisdictional analysis.⁸⁷ In doing so, the Ninth Circuit published an extensive factual background to the case. The court first noted that all parties to the suit agreed that the “Myanmar Military provided security and other services for the [pipeline construction].”⁸⁸ It found there was sufficient evidence to raise “a genuine issue of material fact whether the [joint venture] hired the Myanmar Military, and whether Unocal knew of this.”⁸⁹ During earlier depositions, in corporate news releases,⁹⁰ and at the district court, Unocal disputed that the joint venture

82. *Id.* at 1310.

83. *Id.* The court specifically held:

there are no facts suggesting that Unocal sought to employ forced or slave labor. . . . The evidence does suggest that Unocal knew forced labor was being utilized and that the Joint Venturers benefited from the practice. However, because such a showing is insufficient to establish liability under international law, Plaintiff’s claim against Unocal for forced labor under the [ATCA] fails as a matter of law.

Id.

84. *Id.* In this decision, the court also dismissed the plaintiffs’ RICO claims. *Id.* at 1311.

85. *Doe*, 2002 U.S. App. LEXIS 19263 at *55 (*Doe II*).

86. *Id.* at *36.

87. *Id.* at *37.

88. *Id.* at *6. The court drew this inference, in part, from a Unocal memorandum documenting that corporation’s meetings with Total where the use of Myanmar security was discussed, as well as a deposition from a former soldier guarding the project. *Id.*

89. *Id.* at *7.

90. Unocal Corp., *Unocal, Corporate Responsibility, Human Rights and Unocal, Human Rights and Economic Engagement* <<http://www.unocal.com/responsibility/humanrights/hr5.htm>> (stating that

hired the Myanmar military, and if it did, that Unocal knew about it.⁹¹ The court, while not ruling on Unocal's knowledge, called into question the veracity of Imle's and Beach's denials.⁹² The court also noted evidence indicating that Unocal had the ability to influence the Myanmar military.⁹³ In short, the court determined that the evidence raised a genuine issue regarding Unocal's relationship to the Myanmar military through their partnership in the joint venture.⁹⁴

The court then analyzed evidence regarding Unocal's knowledge of human rights abuses.⁹⁵ It noted several plaintiffs earlier testified that the Myanmar Military subjected them to rape, murder, and torture.⁹⁶ The court also noted an abundance of international law reports that catalogued human rights abuses, such as forced labor, in Myanmar.⁹⁷ Additionally, it recognized several instances where human rights organizations provided Unocal with information detailing that forced labor occurred at the Yadana project.⁹⁸ The court found it compelling that one of Unocal's own consultants, "a former military attaché at the U.S. Embassy in Rangoon, reported to Unocal that 'the Myanmar Military was, in fact, using forced labor and committing other human rights violations in connection with the Project.'"⁹⁹ Finally, the court noted a series of communications between Unocal and Total "reflect[ing] the companies' shared knowledge that the

pipeline workers were paid at least a market wage).

91. *Id.* at **7-8.

92. *Id.* at *8. The court noted that Total briefed Imle and Beach in 1996 on the issues of pipeline security and labor wages. *Id.*

93. *Id.* at **10-11. The court noted an e-mail from Unocal's Director of Information to a company spokesman which provided evidence of Unocal's influence over the Myanmar military. *Id.* at *10.

94. *Id.* at *9.

95. *Id.* at *11.

96. *Id.* at *12. One compelling instance in the evidence relates to "Jane Doe I." She testified that her husband was shot at by soldiers in an attempt to escape the forced labor program at the construction site. In retaliation for his escape attempt, the soldiers threw her and her baby into a fire, killing the baby. The court also noted other witnesses who testified to observing executions of villagers who refused to work as well as those who were too weak to work. Still other witnesses testified to being raped by soldiers. *Id.*

97. *Id.* at *13.

98. *Id.* For example, in 1995, Amnesty International "alerted Unocal to the possibility that the Myanmar military might used forced labor in connection with the project." *Id.*

99. *Id.* at *18. Mr. John Haseman, a former United States Military Attaché to Rangoon specifically told Unocal that:

Unocal was particularly discredited when a corporate spokesman was quoted as saying that Unocal was satisfied with . . . assurances [by the Myanmar Military] that no human rights abuses were occurring in the area of pipeline construction . . . Unocal, by seeming to have accepted [the Myanmar Military]'s version of events, appears at best naive and at worst a willing partner in the situation.

Id. at **18-19 (brackets in original).

Myanmar Military was using forced labor in connection with the Project.”¹⁰⁰

b. The Court’s Legal Analysis

The Ninth Circuit began its analysis by determining that the plaintiffs’ allegations constituted a violation of the law of nations.¹⁰¹ The court, in relying on past precedent, held that torture, murder, and slavery constituted *jus cogens* offenses.¹⁰² The court also held that rape can constitute torture, and thus embody a *jus cogens* offense.¹⁰³ It determined that since the allegations of murder, rape, and torture were committed in furtherance of forced labor, the doctrine of state action did not preclude the plaintiffs’ claims.¹⁰⁴ The court then held “that forced labor is a modern variant of slavery.”¹⁰⁵ In addition to supporting the view that private actor liability extended to the offense of forced labor, the court noted the same held true for claims arising under the Thirteenth Amendment.¹⁰⁶

Up to this point, the court below and the Ninth Circuit were in agreement. While the Ninth Circuit agreed with the lower court’s decision to apply international law as developed by international criminal tribunals,¹⁰⁷ it disagreed with the lower court’s determination that for Unocal to be li-

100. *Id.* at *19. The court specifically noted that “on September 17, 1996, Total reported to Unocal about a meeting with a European Union civil servant in charge of an investigation of forced labor in Myanmar. . . .” *Id.* at *20. The civil servant concluded that the forced labor was occurring in relation to the project. *Id.* The court also appeared to cast an aspersion on Imle and Unocal’s honesty in depositions. For example, the court found that on March 4, 1997:

Unocal nevertheless submitted a statement to the City Counsel of New York, in response to a proposed New York City select purchasing law imposed on firms that do business in Myanmar, in which Unocal stated that “no [human rights] violations have taken place” in the vicinity of the pipeline route.

Id. at **20-21 (brackets in original).

101. *Id.* at *29.

102. *Id.* at **28-29. In relying, in part, on *U.S. v. Matta-Ballesteros*, 71 F.3d 754, 764 n. 5 (9th Cir. 1995), the court determined that murder, torture, and slavery were peremptory norms from which no derogation is permitted. *Doe*, 2002 U.S. App. LEXIS 19263 at *28 (*Doe II*).

103. *Id.* at *28. The court relied on Justice Blackmun’s concurrence in *Farmer v. Brennan*, 511 U.S. 825, 852, 854, 114 S. Ct 1970, 1987, 128 L. Ed. 2d 811, 835 (1994) where prison rape was described as “the equivalent of” and “nothing less than torture.” *Doe*, 2002 U.S. App. LEXIS 19263 at *28 (*Doe II*).

104. *Id.* at *31.

105. *Id.* at *32. In making this determination, the court relied on the language of the Thirteenth Amendment and *Pollock v. Williams*, 322 U.S. 4, 17, 64 S. Ct. 792, 799, 88 L. Ed. 1095, 1103 (1944). *Id.* The Thirteenth Amendment reads: “[n]either slavery nor involuntary servitude . . . shall exist within the United States. . . .” U.S. Const. amend. XIII, § 1.

106. *Doe*, 2002 U.S. App. LEXIS 19263 at *33 n. 18 (*Doe II*).

107. *Id.* at *39.

able, its conduct would have to rise to the level of “active participation.”¹⁰⁸ Instead, the court applied the recent international law understanding of accomplice liability and defined “aiding and abetting” similar to definitions created by the International Criminal Tribunal for Yugoslavia (ICTY)¹⁰⁹ and the International Criminal Tribunal for Rwanda (ICTR).¹¹⁰ The plaintiffs contended Unocal was also liable under theories of joint venture, agency, negligence, and recklessness.¹¹¹ However, the court declined to address these claims, because neither the district court nor Unocal addressed any of these alternative theories.¹¹² Nonetheless, the court concluded, these alternative theories may also be appropriate to consider.¹¹³

The Ninth Circuit defined the two elements of “aiding and abetting” as “knowing practical assistance or encouragement that has a substantial effect on the perpetration of the crime,”¹¹⁴ and “actual or constructive ‘knowledge . . . that [the accomplice’s] actions will assist the perpetrator in the commission of the crime.’”¹¹⁵ Applying these elements to the facts, the court concluded enough evidence existed to establish a prima facie case

108. *Id.* at *37. The Ninth Circuit held the lower court’s use of the “active participation standard” occurred because that court misapplied the standards in the German industrialist cases. The Ninth Circuit argued the IMT applied the active participation standard only to overcome the defendant’s necessity defenses. *Id.* The Ninth Circuit further held the necessity defense was inapplicable for Unocal. *Id.* The Ninth Circuit also did not limit its sources of international law to tribunals, acknowledging the scholarship of jurists and other general practices of nations. *Id.*

109. See e.g. *United Nations Security Council Resolution 827*, S.C. Res. 827, 48 U.N. SCOR, U.N. Doc. S/RES/827 (1993) (establishing ICTY). For a contextual narrative of the events related to the ICTY, see e.g. *Prosecutor v. Tadic*, ICTY-94-1 ¶ 689 (May 7, 1997) <<http://www.un.org/icty/tadic/trialc2/judgement/tad-ts70507JT2-e.pdf>> (accessed June 27, 2003). On June 25, 1991, Croatia and Slovenia declared independence from Yugoslavia. *Id.* at 27 ¶ 77. The Serbian leader of Yugoslavia, Slobodan Milosevic, ordered the army to invade Slovenia. See *id.* (Slovenia’s independence challenged militarily by JNA.). After European intervention, Milosevic then turned the army toward Croatia. *Id.* at 44 ¶ 123. In January 1992, the United Nations brokered a cease-fire between the two. During this time, ethnically diverse Bosnia-Herzegovina, another Yugoslav province, declared its independence. *Id.* at 27 ¶ 78. Within that province Muslims and Croats found themselves fighting Serbs. See *id.* at 29 ¶ 84. From 1992 until 1995, Serbian military and paramilitary groups engaged in a pattern of human rights abuses that came to be known under the umbrella label, “ethnic cleansing.” *Id.* at ¶84. It is estimated that over 100,000 persons perished during the fighting. The ICTY was established in 1993 to prosecute war crimes such as crimes against humanity and genocide. *Id.* at ¶ 2

110. See e.g. *United Nations Security Council Resolution 955*, S.C. Res. 955, 49 U.N. SCOR, U.N. Doc. S/RES/955 (1994) (establishing the ICTR); see *Prosecutor v. Akayesu*, ICTR-96-4-T, Judm. 484-485, 548 (ICTR Sept. 2, 1998) <<http://www.ictt.org/ENGLISH/cases/Akayesu/judgement/akay001.htm>> (accessed June 27, 2003). Between April to July 1994, between 500,000 and over one million persons belonging mostly to a distinct minority group, the Tutsi, were executed by Rwandan government forces, their intermediaries, and supporters. *Id.* at ¶ 110-111. Individuals considered by the United Nations Security Council (Security Council) to be perpetrators or main participants of crimes related to this event were ultimately indicted, and in an ongoing process, brought to trial before an ad hoc tribunal specifically created to punish those offenders under international law. *Id.* at ¶ 129.

111. *Doe*, 2002 U.S. App. LEXIS 19263, at *36 n. 20 (*Doe II*).

112. *Id.*

113. *Id.*

114. *Id.* at *36.

115. *Id.* at *47.

of forced labor, murder, and rape.¹¹⁶ The court also held that since the plaintiffs' case theory rested on proving the murder, rape, and torture occurred in furtherance of forced labor, state action was not required to give rise to liability under the ATCA.¹¹⁷ However, the court affirmed the dismissal of the plaintiffs' suit for torture because other than rape, the pleadings did not contain adequate proof of torture.¹¹⁸ Finally, the Ninth Circuit upheld the lower court's dismissal of the Myanmar Military and MOGE recognizing that the FSIA precluded jurisdiction¹¹⁹ and dismissed the plaintiffs' RICO claims.¹²⁰ The court concluded that RICO did not extend to ATCA cases.¹²¹

2. Judge Stephen Reinhardt's Concurrence

In his concurrence, Judge Reinhardt agreed with the majority that the ATCA conferred jurisdiction to the district court to adjudicate the plaintiffs' allegations.¹²² He also agreed with the court's presentation of facts relevant to its determination. Additionally, he found that if allegations of forced labor were proven, Unocal would be liable under the ATCA.¹²³ However, Judge Reinhardt disagreed with both the court's application of international law in defining ancillary issues such as accomplice liability, and its analysis of *jus cogens*.¹²⁴

In terms of defining liability, Judge Reinhardt concluded that "federal common law tort principles, such as agency, joint venture, or reckless disregard," were the correct means for determining liability.¹²⁵ In particular, he found the court's application of accomplice liability, defined from the ICTY and ICTR *ad hoc* tribunals, troublesome because their accomplice liability definition permits the "imposition of liability for the lending of moral support."¹²⁶ Judge Reinhardt conceded that Unocal's liability, in terms of choice of law, under the ATCA presented a case of first impression.¹²⁷ However, he argued federal common law served as the correct

116. *See id.* at *63 (Because Unocal knew that acts of violence were about to occur, it was liable as an aider and abettor when those acts occurred.).

117. *See id.* (liable as an aider and abettor if acts occurred).

118. *Id.* at *63.

119. *Id.* at *79.

120. *Id.* at *83.

121. *Id.* at **81-82.

122. *Id.* at *84.

123. *Id.* at *83.

124. *Id.* at **84-85. Judge Reinhardt found the court's analysis of *jus cogens* interesting from a scholarly point of view, but irrelevant to the case. *Id.* at *89 n. 2.

125. *Id.* at *85.

126. *Id.* at *84.

127. *Id.* at *90.

basis for determining Unocal's liability as to ancillary issues such as defining accomplice liability.¹²⁸ He further argued that common law principles are more than adequate for defining accomplice liability because they have been applied to similar domestic cases for years.¹²⁹ Yet, he acknowledged that the TVPA, FSIA, and the substantive component of the ATCA obligated the use of international law.¹³⁰ Judge Reinhardt's chief concern with the application of international law for third-party liability stemmed from the ICTY's and ICTR's "uncertain and inchoate rule,"¹³¹ of liability based on "practical assistance, encouragement, or moral support. . . ."¹³²

Instead, Judge Reinhardt's inquiry as to choice of law relied, in part, on principles set forth by the 1900 case, *The Paquete Habana*¹³³ where the Supreme Court held that in appropriate circumstances federal common law incorporates principles of international law.¹³⁴ To Judge Reinhardt, these factors included: (1) ease in determining the law to be applied; (2) "certainty, predictability and uniformity of result;" and, (3) the application of well-known legal principles over unsettled international principles of recent origin.¹³⁵

As noted above, in applying federal common law to *Doe*, Judge Reinhardt posited three theories of third-party liability. The first of these theories is "joint venture liability."¹³⁶ Under this theory, "a member of a joint venture is liable for the acts of its co-venturers."¹³⁷ Judge Reinhardt argued that the joint venture theory is well established in international law as well as under domestic law.¹³⁸ He also argued that agency liability could be applied.¹³⁹ Under this theory, for example, an employer is responsible for the acts of his or her employees.¹⁴⁰ It is up to the jury to determine the existence of an agency relationship mirroring employment or other fiduciary responsibility.¹⁴¹ As in the case of joint venture liability,

128. *Id.* at *91. Judge Reinhardt acknowledged that federal courts ordinarily apply federal common law in limited circumstances such as when Congress authorizes them to do so. *Id.* However, he argued that international relations is one area where federal common law is "frequently applied." *Id.*

129. *Id.* at *95.

130. *Id.* at *96.

131. *Id.* at *105.

132. *Id.* at *105 (citing *Prosecutor v. Furundzija*, IT-95-17/1-T (Dec. 10, 1998) (reprinted in 38 I.L.M. 317, ¶ 235 (1999))).

133. 175 U.S. 677, 700, 20 S. Ct. 290, 44 L. Ed. 320 (1900).

134. *Doe*, 2002 U.S. App. LEXIS 19263 at *104 (*Doe II*).

135. *Id.* at **98-99.

136. *Id.* at *107.

137. *Id.* at *107 (citing *Davidson v. Enstar Corp.*, 848 F.2d 574, 577-78 (5th Cir. 1988)).

138. *Doe*, 2002 U.S. App. LEXIS 19263 at **108-109 (*Doe II*).

139. *Id.* at *113.

140. *Id.* at *114 (citing *Moriarity v. Gluckert Funeral Home, Ltd.*, 155 F.3d 859, 866 n. 15 (7th Cir. 1998)).

141. *Doe*, 2002 U.S. App. LEXIS 19263 at *114 (*Doe II*).

Judge Reinhardt found that agency principles are well established under both domestic and international law.¹⁴² Finally, Judge Reinhardt found the theory of reckless disregard applicable¹⁴³ and recognized it as a principle in both domestic and international law.¹⁴⁴

III. DOMESTIC APPLICATION OF INTERNATIONAL LAW CONCEPTS AND THE ALIEN TORT CLAIMS ACT PRIOR TO *DOE* v. UNOCAL CORP.: THE MOVE TOWARD CORPORATE LIABILITY

As noted above, from 1789 to 1979, few civil actions were pursued under the ATCA. The first successful civil action involving human rights violations occurred in the 1979 *Filartiga* case.¹⁴⁵ Cases occurring after *Filartiga* expanded principles set forth in that decision and merit review for this paper. As noted in the introduction, review of prior ATCA decisions prior are necessary to any conduct meaningful analysis of *Doe II*.

A. *Filartiga* v. *Pena-Irala*

In 1979, two Paraguayan citizens, Dr. Joel Filartiga and his daughter, Dolly Filartiga, filed suit in New York District Court under the ATCA against another Paraguayan citizen, Americo Norbero Pena-Irala.¹⁴⁶ Pena-Irala had been the Inspector General of Police in the city of Asuncion, Paraguay.¹⁴⁷ The plaintiffs alleged that on March 29, 1976, in Asuncion, Pena-Irala kidnapped and murdered Dr. Filartiga's son Joelito Filartiga.¹⁴⁸ This apparently occurred in response to Dr. Filartiga's political activity against the Paraguayan government.¹⁴⁹ No component of that murder, in-

142. *Id.* at *115. Judge Reinhardt cited to, *inter alia*, *Bazley v. Curry*, 2 S.C.R. 534 (Can. 1999) (Canadian Supreme Court); the Civil Code of France, Art. 1384 (1984); the Civil Code of Germany § 831 (1975); and *Case Concerning the Barcelona Traction Power & Light Co.*, 1970 I.C.J. 3, 215 (Belgium v. Spain). *Id.* at **115-116.

143. *Doe*, 2002 U.S. App. LEXIS 19263 at *119 (*Doe II*).

144. *Id.* at **120-123. Judge Reinhardt drew attention to, *inter alia*, *Farmer v. Brennan*, 511 U.S. 825, 836, 114 S. Ct. 1970, 1978, 128 L. Ed. 2d 811, 826 (1994) and *Youell v. Exxon Corp.*, 48 F.3d 105, 110-11 (2d Cir. 1994).

145. *Filartiga*, 630 F.2d at 878.

146. *Id.*

147. *Id.*

148. *Id.* Later that day, Dolly Filartiga was escorted to the Pena-Irala home by the Paraguayan police where she saw her brother's dead and tortured body. As she fled from the home, Pena-Irala followed her shouting, "Here you have what you have been looking for so long and what you deserve. Now shut up." *Id.*

149. *Id.*

cluding the preparation, had any geographic nexus to the United States.¹⁵⁰ At that time, Paraguay was governed by military dictatorship, and its human rights reputation was almost universally condemned.¹⁵¹ At the time of suit all parties were geographically located in New York.¹⁵²

On May 15, 1979, the district court, in construing that “law of nations” excluded a state’s treatment of its own citizens, dismissed the case for lack of jurisdiction.¹⁵³ On appeal, the Second Circuit Court of Appeals reversed.¹⁵⁴ The court, relying on the Supreme Court case, *U.S. v. Smith*¹⁵⁵ reiterated “the law of nations ‘may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law.’”¹⁵⁶ That the Second Circuit recognized that in interpreting international law, evolving standards and theoretical arguments played a role is significant. This is because international law is often not codified.¹⁵⁷ The Second Circuit, in its reversal of the lower court, refused to be locked into a narrow definitional interpretation of the ATCA’s law of nations element, and gave recognition to the evolving standards of international law. The court specifically held that to determine the standard of international law offenses in violation of the laws of nations a court must look to the law’s current form rather than the form of the law in 1789.¹⁵⁸ Some of the court’s recognition was based on the fact that the United Nations Charter “makes it clear that . . . a state’s treatment of its own citizens is a matter of

150. *See id.* (kidnapped, tortured, and murdered in Paraguay).

151. *Id.* Paraguay was governed under the administration of Alfredo Stroessner who had been in power since 1954. *Id.* at 878.

152. *Id.* Dolly Filartiga entered the United States in 1978. *Id.* Pena-Irala entered the United States in 1978, but by the time he was served with his court summons, he was awaiting deportation for overstaying his visa. *Id.* at 879.

153. *Id.* at 880. The district court, in making this decision, relied on *von Finck*, 534 F.2d 24 (2d Cir. 1975) and *ITT v. Vencap, Ltd.*, 519 F.2d 1001 (2d Cir. 1975). *Id.* Two days after dismissing its case, Pena-Irala returned to Paraguay. *Id.*

154. *Id.* at 878.

155. 18 U.S. 153, 160, 5 L. Ed. 57 (1820).

156. *Filartiga*, 630 F.2d at 880 (quoting *U.S. v. Smith*, 18 U.S. 153, 160-61, 5 L. Ed. 57, 58-59 (1820)).

157. *Id.* *See e.g. The Paquete Habana*, 175 U.S. 677, 20 S.Ct 290, 44 L. Ed. 320 (1900), where the Court held:

where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat . . .

Id. at 880-881.

158. *Filartiga*, 630 F.2d at 880.

international concern.”¹⁵⁹ Additionally, the Second Circuit found support in the Declaration of All Persons from Being Subjected to Torture.¹⁶⁰

Having accepted torture as a violation of the law of nations,¹⁶¹ the Second Circuit then was confronted by an issue of geographic nexus. The torture occurred in Paraguay.¹⁶² However, the court held, “[c]ommon law courts of general jurisdiction regularly adjudicate transitory tort claims between individuals over whom they exercise personal jurisdiction, wherever the tort occurred.”¹⁶³ Thus, the Second Circuit concluded the ATCA opened the federal courts for adjudication of rights already recognized by international law.¹⁶⁴ In doing so, as discussed below, the Second Circuit created a narrow but universal jurisdiction for civil tort actions based on the law of nations. Finally, the Second Circuit provided philosophical guidance for its reasoning:

In the twentieth century the international community has come to recognize the common danger posed by the flagrant disregard of basic human rights and particularly the right to be free of torture In the modern age, humanitarian and practical considerations have combined to lead the nations of the world to recognize that respect for fundamental human rights is in their individual and collective interest Indeed, for purposes of civil liability, the torturer has become like the pirate and slave trader before him hostis humani generis, an enemy of all mankind. Our holding today, giving effect to a jurisdictional provision enacted by our First Congress, is a small but important step in the fulfillment of the ageless dream to free all people from brutal violence.¹⁶⁵

Although *Filartiga* was not granted certiorari by the Supreme Court, principles established in that case appear to have been given credence by the Court. In *Argentine Republic v. Amerada Hess Shipping Corp.*,¹⁶⁶ the Court held that Argentina could not be liable under the ATCA because the Court determined the FSIA was the sole basis for obtaining jurisdiction over sitting foreign governments.¹⁶⁷ *Amerada* involved a suit under the

159. *Id.* at 881.

160. *Id.* at 882 (citing G.A. Res. 3452, U.N. GAOR, 30th Sess., Supp. No. 34, at 91, U.N. Doc. A/1034 (1975)).

161. *Id.* at 884.

162. *See id.* at 878.

163. 630 F.2d at 885. To prove the long-standing acceptance of transitory nature of tort, the Second Circuit relied on *McKenna v. Fisk*, 42 U.S. 241, 11 L. Ed. 117 (1843). *Id.*

164. 630 F.2d at 887.

165. *Id.* at 890.

166. 488 U.S. 428, 109 S. Ct. 683, 102 L. Ed. 2d 818 (1989) [hereinafter *Amerada*].

167. *Amerada*, 488 U.S. at 438-39.

ATCA against Argentina for that country's damaging of a neutral ship during the Falklands War against the United Kingdom.¹⁶⁸ In a sense, while the Court reversed the Second Circuit's decision to attach liability to Argentina, under the ATCA, it never repudiated the jurisdictional and interpretive principles set in *Filartiga*. To date, *Filartiga* remains compelling law, and in all but one case, has its holding been rejected or modified into a narrower jurisdictional interpretation.¹⁶⁹ Additionally, in 1992 Congress appeared to accept the *Filartiga* holding by passing the TVPA.

B. *Marcos I and Kadic v. Karadzic: The Movement toward Corporate Liability under the ATCA.*

Filartiga, as noted above, involved a lawsuit by an individual against a former government actor for human rights abuses violating the law of na-

168. *Amerada*, 488 U.S. at 432. As a result of the damage, the owners scuttled the ship. *Amerada*, 488 U.S. at 432. In April of 1982, Argentine Forces invaded the Falkland Islands Group then belonging to Great Britain. See generally Thomas M. Frank, *Dulce es Decorum est: The Strategic Role of Legal Principles during the Falklands War*, 77 Am. J. Intl. L. 109 (1983). In response, British Prime Minister Margaret Thatcher obtained the support of the United Nations Security Council, the United States Government, and the European Community to launch a military reconquest of the island group. *Id.* This war involved fighting between the maritime, land, and air forces of Great Britain and Argentina. *Id.*

169. The United States Court of Appeals for the District of Columbia, in *Tel-Oren v. Libyan Arab Republic*, dismissed a plaintiff's suit against the Palestinian Liberation Organization and Libya for a terrorist act in Israel. 726 F.2d 774 (D.C. Cir. 1984). Judge Bork, in his concurrence, held the ATCA only extends to torts that would have violated the law of nations in 1789 such as piracy. *Id.* at 814, *cert denied*, 470 U.S. 1003, 105 S. Ct. 1354, 84 L. Ed. 2d 377 (1985). Interestingly, Judge Bork's concurrence appears to run afoul of the Restatement (Third) of Foreign Relations. This reads, in pertinent part:

Universal Jurisdiction to Define and Punish Certain Offenses. A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism

Restatement (Third) of the Foreign Relations Law of the United States § 404 (1987).

In the Restatement's comment section, there is discussion on permitting a state to expand the class of offenses. This section reads:

[I]nternational law permits any state to apply its laws to punish certain offenses although the state has no links of territory with the offense, or of nationality with the offender (or even the victim). Universal jurisdiction over the specified offenses is a result of universal condemnation of those activities and general interest in cooperating to suppress them, as reflected in widely-accepted international agreements and resolutions of international organizations. These offenses are subject to universal jurisdiction as a matter of customary law. Universal jurisdiction for additional offenses is provided by international agreements, but it remains to be determined whether universal jurisdiction over a particular offense has become customary law for states not party to such an agreement.

Restatement (Third) of the Foreign Relations Law of the United States § 404 cmt. a (1987).

tions. After *Filartiga*, jurisdiction over public individuals and foreign governments continued to be a focus of concern. However, later decisions eventually provided parameters that could be used in suits against private corporations.

The first important post-*Filartiga* case establishing eventual parameters for corporate liability was *In re: Estate of Ferdinand E. Marcos Human Rights Litigation*¹⁷⁰ (*Marcos I*). This case involved a plaintiff's suit against the estate of former Philippine dictator, Ferdinand Marcos.¹⁷¹ While much of the Ninth Circuit's decision dealt with suits barred under the FSIA, the court provided expansive jurisdictional parameters for cases under the ATCA. In *Marcos I*, the Ninth Circuit held that the ATCA places no limitations as to the citizenship of the defendant as well as the locus of the injury.¹⁷² Two years after *Marcos I*, the Ninth Circuit in *Marcos II*¹⁷³ revisited jurisdictional principles set in the initial case to address ongoing litigation concerning the Marcos estate. In *Marcos II*, the Ninth Circuit further held extraterritorial application of the ATCA did not violate international law.¹⁷⁴

In the 1995 case, *Kadic v. Karadzic*,¹⁷⁵ the Second Circuit found that international law norms apply to private actors who "act in concert with a state."¹⁷⁶ The court reasoned that certain forms of conduct violate the law of nations whether undertaken by a state or by a private actor.¹⁷⁷ The court further held the example of the prohibition against piracy applies both to states and to private actors.¹⁷⁸ *Kadic* involved a lawsuit under the ATCA against Radovan Karadzic, the head of an unrecognized Bosnian-Serb regime who committed human rights violations against several private vic-

170. 978 F.2d 493 (9th Cir. 1992) [hereinafter *Marcos I*].

171. See 978 F.2d at 495-496. In *Marcos I*, the plaintiff, Agapita Trajano, filed suit against the estate of Ferdinand Marcos and his daughter Imee Marcos-Manotoc. *Id.* at 496. In 1977, Agapita Trajano's son, Archimedes, during an open university forum, asked Imee Marcos-Manotoc questions regarding her appointment as a director of an organization. *Id.* at 495. Shortly after this forum, Archimedes Trajano was abducted, interrogated, and tortured to death by military intelligence personnel. *Id.* at 496. These personnel were under the control of Imee Marcos-Manotoc. *Id.*

In 1986, Ferdinand Marcos, Imee Marcos-Manotoc, and other political officials left the Philippines and resided in Hawaii. In March of that year, Agapita Trajano filed suit under the ATCA against Imee Marcos Manotoc for false imprisonment, kidnapping, wrongful death, and deprivation of rights. Despite appropriate service and knowledge of the proceedings, Imee Marcos-Manotoc failed to appear at court and default judgment was entered against her. The court then awarded Agapita Trajano \$4.16 million in damages and attorneys fees. Imee Marcos-Manotoc then appealed this verdict. *Id.*

172. *Id.* at 500.

173. 25 F.3d 1467 (9th Cir. 1994). *Marcos II* involved challenging a court injunction against the Marcos Estate from moving its assets outside of the United States. *Id.* at 1468.

174. *Id.* at 1475.

175. 70 F.3d 232 (2d Cir. 1995).

176. *Id.* at 245.

177. *Id.* at 239.

178. *Id.*

tims.¹⁷⁹ Yet, Karadzic was a direct—albeit private—actor in human rights abuses.¹⁸⁰ Corporations seldom are direct actors in human rights abuses in ATCA claims.¹⁸¹

C. Concurrent Corporate Liability Cases

As a result of *Kadic, Doe II* involved no radical expansion of the principle under which private, non-state entities, including corporations, can be liable under the ATCA. Indeed, *Doe* was not the first case involving a corporation to go before either a district court or a circuit court.¹⁸² However, for reasons discussed below, the Ninth Circuit was confronted by first impression issues of law and gave greater recognition to the use of international law not reached by other courts addressing the ATCA.

As *Doe* worked its way through the district and the appellate courts, several other ATCA cases involving corporations, mainly engaged in extraction enterprises, were also brought before the district and the circuit courts. However, most of these cases were disposed of without any analysis of issues central to adjudicating claims under the ATCA such as defining accomplice liability, establishing what torts could be construed as violating the law of nations, and establishing what, if any, defenses were available to corporations. For instance, in one of the cases predating *Doe II*, *Aguinda v. Texaco*¹⁸³, allegations of widespread environmental destruction and of health problems stemming from Texaco's activities were dismissed by the District Court for the Southern District of New York under the doctrine of *forum non conveniens*.¹⁸⁴ The Second Circuit upheld this decision.¹⁸⁵ Likewise, in *Jota v. Texaco*,¹⁸⁶ an earlier companion case to *Aguinda*, the Second Circuit decided not to fully determine whether wide-

179. *Id.* at 237. The victims in *Kadic* were Croat Muslims who were, along with family members, subjected to rape, forced prostitution, forced impregnation, torture, and summary execution. These degradations were carried out by Bosnian Serb forces, "as part of a genocidal campaign conducted during the course of the Bosnian civil war." *Id.*

180. *See id.* at 239 (Karadzic asserted contradictory positions that he was a private individual and a head of state.).

181. *See e.g.* Anita Ramasastry, *Corporate Complicity: From Nuremberg to Rangoon - An Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations*, 20 Berkeley J. Intl. L. 91, 101 (2002). In this article, Ramasastry provides three well-defined typologies of corporate complicity. These are "(1) direct complicity, (2) indirect complicity, and, (3) mere presence in a country, coupled with silence or inaction." *Id.* at 100. Ramasastry argues convincingly that Unocal's activities in Myanmar fit into the second category of indirect complicity. *Id.* at 102-03.

182. *See e.g.* Ralph G. Steinhardt, *The Internationalization of Domestic Law*, in *The Alien Tort Claims Act: An Analytical Anthology* 9 (Ralph Steinhardt and Anthony D'Amato, eds., Transnatl. Publishers, 1999).

183. 945 F. Supp. 625 (S.D.N.Y. 1996).

184. 303 F.3d 470, 476 (2002).

185. *Id.* at 480.

186. 157 F.3d 153 (2d Cir. 1998).

spread environmental degradations violated the law of nations¹⁸⁷ and remanded the case under the indispensable parties rule.¹⁸⁸

In the Second Circuit case, *Bano v. Union Carbide Corp.*,¹⁸⁹ plaintiffs sued Union Carbide for violations under the ATCA for claims stemming from the Bhopal, India disaster.¹⁹⁰ However, because the Indian Government previously settled all claims on behalf of the victims, the plaintiffs were precluded from bringing suit in the United States.¹⁹¹ Prior to *Bano*, the Second Circuit addressed corporate liability in *Bigio v. Coca-Cola Co.*¹⁹² In that case, the court determined that a current lease of property from Egypt, which had been previously confiscated by the Egyptian government, based on the original owner's religion, did not violate a universal norm of international law.¹⁹³ In *Beanal v. Freeport-McMoran, Inc.*,¹⁹⁴ the Fifth Circuit held that a private corporation could be held liable for genocide.¹⁹⁵ However, the plaintiffs in that case failed to allege facts that constituted genocide and the case was dismissed.¹⁹⁶

At the district courts, several ATCA cases involving corporate defendants were occurring as well. For example, on September 16, 2002, the United States District Court for the Southern District of New York, in *Abdullahi v. Pfizer, Inc.*,¹⁹⁷ dismissed the case under the doctrine of *forum non conveniens*, finding Nigeria the appropriate jurisdiction.¹⁹⁸ However,

187. *Id.* at 159.

188. *Id.* at 163.

189. 273 F.3d 120 (2d Cir. 2001).

190. *Id.* at 124. On December 2-3, 1984, a Union carbide chemical plant in the city of Bhopal, India leaked poisonous gas into "densely populated neighborhoods." *Id.* at 122. Thousands of people were killed and hundreds of thousands were injured. *Id.*

191. *Id.* at 128-130.

192. 239 F.3d 440 (2d Cir. 2000).

193. *Id.* at 449.

194. 197 F.3d 161 (5th Cir. 1999).

195. *See id.* at 167-68 (observing that plaintiff's complaint could have been amended to allege genocide).

196. *Id.* at 167-68. Beanal's argument was premised on a claim of cultural genocide. *Id.* at 167. Beanal also argued Freeport engaged in widespread environmental degradations. *Id.* at 166. However, the court dismissed this complaint for failing to state a claim under the ATCA. *Id.* at 166-67.

197. 2002 U.S. Dist. LEXIS 17436 (S.D.N.Y. Sept. 16, 2002).

198. *Id.* at *38. In *Abdullahi*, a class of plaintiffs alleged Pfizer, a United States-based pharmaceutical company, administered an experimental antibiotic, Trovan, in Nigeria without their consent. *Id.* at *8. As a result of Pfizer's actions, the plaintiffs claimed they suffered "grave injuries," including child paralysis, blindness, and death. *Id.* at *6. The drug used had not yet gained FDA approval during the period it was administered in Nigeria. *Id.*

According to the district court,

[I]n January 1999, the FDA recommended that Trovan be prescribed only for patients in nursing homes or hospitals suffering from life threatening conditions. That following June, the FDA issued a public health advisory on liver toxicity associated with oral and intravenous Trovan following post-marketing reports of acute liver failure strongly associated with the drug. The FDA announced that it received reports of more than one-hundred cases

the court did find that Pfizer's distribution of experimental drugs that resulted in injury and death could be actionable under the ATCA.¹⁹⁹ Likewise, the same district court on July 16, 2002, in *Flores v. S. Peru Copper Corp.*,²⁰⁰ held that environmental degradations do not constitute violations of universally recognized norms and dismissed the plaintiffs' suit.²⁰¹ Finally, in *Sarei v. Rio Tinto PLC*,²⁰² plaintiffs alleged they were victims of human rights abuses from a British and an Australian mining corporation.²⁰³ The United States District Court for the Central District of California held that while plaintiffs' allegations of torture constituted actionable claims, the case was dismissed on the political question doctrine.²⁰⁴ In *Eastman Kodak v. Kavlin*,²⁰⁵ the United States District Court for the Southern District of Florida held where a corporation conspires with a government to deprive a plaintiff of basic civil rights, such as by false imprisonment, the ATCA confers jurisdiction.²⁰⁶ Although, *Kavlin* did not address choice of law issues, it provided further analysis as to the expanse of the

where Trovan patients exhibited clinically symptomatic liver toxicity and advised physicians to use Trovan only for patients who met certain criteria. In addition, Pfizer agreed to limit distribution of Trovan to hospitals and long-term nursing facilities. Further, the European Union's Committee for Proprietary Medicinal Products suspended all sales of Trovan in part due to results from the [Nigeria] tests.

Id. at *7-8 (citations omitted).

199. *See id.* at *10-*18.

200. 2002 U.S. Dist. LEXIS 13013 (S.D.N.Y. July 16, 2002) (This case was decided on July 16, 2002, and was unlikely to have any impact on *Doe II*).

201. *Id.* at *31. In *Flores*, the court relied, in part, on the Restatement (Third) of Foreign Relations Law. *Id.* The court's specific language bears important note to future ATCA cases alleging environmental degradations.

The Restatement (Third) of Foreign Relations Law (1987) supports the position that environmental pollution, within a nation's borders, that adversely affects human life or health does not violate any binding rules of international law. Section 601 describes a state's responsibilities with respect to the environment as follows:

- (1) A state is obligated to take such measures as may be necessary, to the extent practicable under the circumstances, to ensure that activities within its jurisdiction or control
 - (a) conform to generally accepted international rules and standards for the prevention, reduction, and control of injury to the environment of another state or of areas beyond the limits of national jurisdiction; and
 - (b) are conducted so as not to cause significant injury to the environment of another state or of areas beyond the limits of national jurisdiction

Id. at *31-32.

202. 221 F. Supp. 2d 1116 (C.D. Cal. 2002).

203. *Id.* at 1120-21.

204. *Id.* at 1208-09.

205. 978 F. Supp. 1078 (S.D. Fla. 1997).

206. *Id.* at 1094. The district court in this case created language that applies to corporate liability, holding: "it would be a strange tort system that imposed liability on state actors but not on those who conspired with them to perpetrate illegal acts through the coercive use of state power." *Id.* at 1091.

ATCA's jurisdiction.²⁰⁷ The court, while noting the Supreme Court has yet to provide an interpretation as to the ATCA's use, also provided guidance in recognizing a conspiracy liability of corporations for human rights abuses.²⁰⁸

None of these cases addressed the choice of law to be employed by the court. Thus, in deciding *Doe II*, the Ninth Circuit was forced to review the case, in part, as one of first impression.²⁰⁹

IV. HUMAN RIGHTS RECORD OF MYANMAR PRIOR TO AND DURING UNOCAL'S COMMERCIAL ACTIVITIES

Although Unocal first began negotiating with Myanmar around 1991,²¹⁰ it wasn't until 1993 that Unocal formally entered into the joint venture with Total and MOGE.²¹¹ Even prior to 1993, Myanmar possessed one of the worst human rights records in the world.²¹² From 1990 on, government rule was characterized by summary execution; torture; arbitrary arrest; suppression of freedom of opinion, assembly, and association; and forced labor.²¹³ Myanmar repeatedly denied allegations of human rights abuses to United Nations officials.²¹⁴ However, the wealth of evidence provided by the United Nations and non-governmental organizations (NGO) mutes the government's denials. "In 1989, [both] the [United States] Senate and House [of Representatives] passed concurrent resolutions condemning human rights violations in [Myanmar]."²¹⁵ On July 22, 1991, President George H.W. Bush implemented economic sanctions against SLORC in response to continued human rights abuses.²¹⁶

According to the district court in *Doe I(b)*, Unocal executives were provided with information detailing human rights abuses specific to the

207. *Id.* at 1090-94.

208. *Id.* at 1090.

209. *Doe*, 2002 U.S. App. LEXIS 19263 at *90 (*Doe II*).

210. See, 963 F. Supp. at 884 (*Doe I(a)*) (plaintiffs allege Unocal initiated negotiations during or before 1991.).

211. *Id.* at 885.

212. *Hearings before the Subcommittee on Asia and Pacific Affairs for the House Committee on International Relations*, 102nd Cong. (1995) (prepared testimony of Holly Burkhalter, Washington Director of the Human Rights Watch on Human Rights in Burma) (reprinted in Fed. News Serv., Sept. 7, 1995).

213. E.g. *United Nations Interim Report, Situation of Human Right in Myanmar*, U.N. Commission on Human Rights, Agenda Item 110(c), at ¶ 4(c), U.N. Doc. A/51/466 (1996) [hereinafter *U.N. Interim Report*]; Lawyers Comm. for Human Rights, *Burma* (Lawyers Comm. for Human Rights Feb. 1992) [hereinafter LCHR].

214. *U.N. Interim Report, supra* n. 213, at ¶¶ 130-31.

215. S. Con. Res. 61, 101st Cong., 1st Sess. (1989); H. Con. Res. 185, 101st Cong., 1st Sess. (1989); 135 Cong. Rec. S10, 165 (daily ed. Aug 4, 1989); LCHR, *supra* n. 213, at 37.

216. LCHR, *supra* n. 213 at 43.

Yadana project.²¹⁷ For example, Human Rights Watch representatives met with Unocal officials in 1995 and detailed several human rights problem areas relating to the pipeline.²¹⁸ Equally telling, Unocal employees and consultants expressed concern with human rights abuses occurring in conjunction with the Yadana project.²¹⁹ And on January 4, 1995 during a meeting between concerned NGO groups and Imle, the latter apparently acquiesced his knowledge of forced labor.²²⁰ Finally, Total officials shared information on forced labor with Unocal.²²¹ Clearly, both SLORC's reputation and flow of reports to Unocal provided notice of probable human rights abuses in connection with the Yadana project.

V. ANALYZING THE IMPACT OF THE NINTH CIRCUIT'S APPLICATION OF INTERNATIONAL LAW

Having established that *Doe II* represents a case of first impression, it must first be determined whether the Ninth Circuit correctly applied international law in addressing whether the plaintiffs' allegations stated a claim. If the plaintiffs' properly stated a claim, then, was the Ninth Circuit correct in expanding a concept of universal jurisdiction for torts into federal common law when it chose to apply international law over existing federal common law? If the court was correct and fair in its determination, the final task is to consider what the foreseeable effects are on legal defenses for corporate defendants.

A. *Matching the Alleged Torts to International Law: Universal Prohibitions*

One means for determining whether an act or crime violates international law is to view the act through *jus cogens*. "[A] *jus cogens* norm is a principle of international law that is 'accepted by the international community of States as a whole. . . .'"²²² Moreover, it represents "'a norm from which no derogation is permitted. . . .'"²²³ The D.C. Circuit Court in *Princz v. Federal Republic of Germany*²²⁴ held:

217. *Doe*, 110 F. Supp. 2d at 1299-1300 (*Doe I(b)*).

218. *Id.* at 1299.

219. *Id.* at 1299, 1310.

220. *Id.* at 1300. In response to questioning, Imle replied: "Let's be reasonable about this. What I'm saying is that if you threaten the pipeline there's gonna be more military. If forced labor goes hand and glove with the military yes there will be forced labor." *Id.*

221. *Id.* at 1302.

222. *E.g.* *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1173 (1994) (citations omitted).

223. *Id.* (citations omitted).

224. 26 F.3d 1166.

a state violates *jus cogens*, as currently defined, if it[] “practices, encourages, or condones (a) genocide, (b) slavery or slave trade, (c) the murder or causing the disappearance of individuals, (d) torture or other cruel, inhuman, or degrading treatment or punishment, (e) prolonged arbitrary detention, (f) systematic racial discrimination, or (g) a consistent pattern of gross violations of internationally recognized human rights.”²²⁵

In simpler language, the Ninth Circuit, in *Marcos I*²²⁶ noted, “for a court to determine whether a plaintiff has a claim for a tort committed in violation of international law, it must decide whether there is an applicable norm of international law . . . and whether it was violated in the particular case.”²²⁷

Several treaties and conventions detail and define human rights violations. The *International Covenant on Civil and Political Rights* (ICCPR)²²⁸ is perhaps the best starting point for this determination. This convention guarantees individuals, among other rights, the right to freedom of thought, conscience,²²⁹ and movement.²³⁰ The *International Covenant on Economic and Social Rights* (ICESR)²³¹ also provides guidance because it suggests slave labor is a human rights violation.²³² Although the *Universal Declaration of Human Rights* (UDHR) is not binding law, it too embodies aspirational principles of human rights.²³³ For instance, it proclaims a right for fair wages and reasonable periods of rest.²³⁴ Likewise, the later conventions such as the *Torture Convention*²³⁵ and *Genocide Convention*²³⁶

225. *Id.* (quoting the Restatement (Third) of Foreign Relations Law §702, cmt. n (1987)).

226. 978 F.2d 493 (1992).

227. 978 F.2d at 502.

228. *International Covenant on Civil and Political Rights* (Dec. 16, 1966), 999 U.N.T.S. 171 [hereinafter ICCPR].

229. *Id.* at art. 18.

230. *Id.* at art. 12.

231. *International Covenant on Economic, Social and Cultural Rights* (Dec. 16, 1966), 993 U.N.T.S. 3.

232. *Id.* at art. 7. Article 7 reads, in pertinent part:

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favorable conditions of work, which ensure, in particular:

- (a) Remuneration which provides all workers, as a minimum, with:
 - (i) fair wages and equal remuneration for work of equal value...
 - (b) safe and healthy working conditions[.]

Id.

233. *Universal Declaration of Human Rights*, G.A. Res. 217A, U.N. GAOR, 3d Sess., at 71, U.N. Doc A/810, (1948).

234. *Id.*

235. *The Convention against Torture and other Cruel, Inhuman, Degrading Treatment or Punishment* (1984), G.A. Res. 39/46, U.N. GAOR, Annex, Supp. No. 51, at 197, U.N. Doc. A/39/51.

assist any determination of what constitutes a recognized violation. Additionally, there are three regional agreements capable of providing guidance: The *Inter-American Treaty on Human Rights*,²³⁷ *The European Charter on Human Rights*,²³⁸ and *The African Convention on Human Rights*.²³⁹

Prior ATCA case law also provides some guidance as to what otherwise tortious action does or does not violate recognized international human rights law for civil action purposes. For example, certain tortious interference with commercial activity, such as unregulated or unlawful picketing, does not provide a basis for suit.²⁴⁰ Additionally, tortious conversion of personal property does not provide a basis for suit.²⁴¹ Nor can libel provide a basis for suit.²⁴² Thus the basis for any civil action filed under the ATCA is that the alleged tort must constitute a violation of the law of nations.

The Ninth Circuit, in *Doe II*, reiterated that one threshold question in any ATCA case is whether the alleged tort is a violation of the law of nations.²⁴³ The court further recognized that torture, murder, and slavery are *jus cogens* violations, and thus violations of the law of nations.²⁴⁴ Additionally, the court accepted that rape can be a form of torture.²⁴⁵ This section analyzes whether the Ninth Circuit was correct in its determination as

236. *The Convention on the Prevention and Punishment of the Crime of Genocide* (Dec. 9, 1948), 78 U.N.T.S. 277, 280.

237. (Nov 22, 1967), 9 I.L.M. 673. Article 6 reads, in pertinent part: "1. No one shall be subject to slavery or to involuntary servitude, which are prohibited in all their forms, as are the slave trade and traffic in women . . ." *Id.*

238. See *Charter of Fundamental Rights of the European Union*, (Nov 4, 1950), 312 U.N.T.S. 221 (codified at 2000/C 364/01 <http://www.europarl.eu.int/charter/pdf/text_en.pdf> (accessed June 27, 2003)). Article 5 specifically prohibits slavery, forced or compulsory labor, and human trafficking. Article 31 is also helpful in providing a recognized norm. It reads: "1. Every worker has the right to working conditions which respect his or her health, safety and dignity. 2. Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave." *Id.*

239. *Banjul Charter* of June 27, 1981, (entered into force Oct. 21, 1986), 21 I.L.M. 58. Article 5 reads:

Every individual shall have the right to the respect of dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

Id.

240. *E.g. Khedival Line, S.A.E. v. Seafarers' Intl. Union*, 278 F.2d 49, 52 (2d Cir. 1960).

241. *E.g. Cohen v. Hartman*, 634 F.2d 318, 319 (5th Cir. 1981).

242. *E.g. Akbar v. N. Y. Mag. Co.*, 490 F. Supp. 60, 63 (D.D.C. 1980).

243. 2002 U.S. App. LEXIS 19263 at *28.

244. *Id.*

245. *Id.* (citing *Kadic*, 70 F.3d at 242 (2d Cir. 1995) (describing rape as torture)).

to whether the plaintiffs allegations, if true, established offenses of a *jus cogens* nature.

1. *Forced Labor*

Freedom from slavery is universally recognized as a basic human right.²⁴⁶ The Thirteenth Amendment to the United States Constitution expressly prohibits slavery in all forms but penal.²⁴⁷ Moreover, as noted above, slavery is outlawed in a number of international agreements and conventions. Additionally, several post-World War II tribunals recognized forced labor as a war crime.²⁴⁸ Domestic courts have held forced labor is the modern variant of slavery.²⁴⁹ There are several domestic and international precedents defining the prohibition against slavery, or its modern variant, forced labor. For example, the United States Court of Appeals for the District of Columbia in, *Tel-Oren v. Libyan Arab Republic*,²⁵⁰ held that slave trading constituted a crime in violation of the law of nations.²⁵¹ Indeed, Judge Edwards in a concurring opinion posited that “while most crimes require state action for ATCA liability to attach, there are ‘a handful of crimes’, including slave trading, ‘to which the law of nations attributes *individual liability*,’ such that state action is not required.”²⁵² Thus, the issue of forced labor is so serious as to warrant private liability. For these reasons, the Ninth Circuit in *Doe II* held forced labor rose to a *jus cogens* violation.²⁵³

Forced labor rarely occurs in a vacuum. That is, forced labor is generally part of a larger program of subjugation. In *Doe II*, forced labor allegedly occurred as a result of the Myanmar Military using a campaign of violence to create a labor pool.²⁵⁴ This allegation is similar to the use of

246. See ICCPR, Supra n. 228, at art. 8. This article reads in pertinent part: “1. No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited. 2. No one shall be held in servitude” *Id.*

247. The Thirteenth Amendment reads: “Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.” U.S. Const. amend. XIII. The Court, in *Pollock v. Williams*, held, “the undoubted aim of the Thirteenth Amendment . . . was not merely to end slavery but to maintain a system of completely free and voluntary labor throughout the United States.” 322 U.S. 4, 17, 64 S. Ct. 792, 799, 88 L. Ed. 1095, 1103 (1944).

248. See e.g. *Matthew Lippman, War Crimes Trials of German Industrialists: The “Other Schindlers,”* 9 Temp. Intl. & Comp. L.J. 173, 184, 244 (1995) (Nuremberg Tribunals).

249. See e.g. *In re World War II Era Japanese Forced Lab. Litig.*, 164 F. Supp. 2d 1160, 1179 (N.D. Cal. 2001); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 440 (D.N.J. 1999).

250. 726 F.2d 774, 794-95 (D.C. Cir. 1984).

251. *Id.*

252. 2002 U.S. App. LEXIS 19263 at *30. (citing *Oren*, 726 F.2d at 794-95 (Edwards, J. concurring) (emphasis added)).

253. 2002 U.S. App. LEXIS 19263 at *29.

254. *Id.* at *11.

forced labor in World War II by both Germany and Japan. Indeed, the post World War II tribunals against industrialists specifically addressing forced labor provided the Ninth Circuit with some guidance.²⁵⁵ After World War II, a group of German industrialists was prosecuted by the United States and its allies Britain and France.²⁵⁶ For example, in 1948, a tribunal for the French military occupation government indicted directors of the Roechling Company for crimes against the peace and war crimes.²⁵⁷ Although acquitted of several charges, the chairman of the company, Herman Roechling was convicted of participating in the deportation of over 200,000 persons from occupied territories into iron and munitions factories.²⁵⁸ While Roechling did not personally order the deportation to his plants, the deported individuals worked in his plants with both his knowledge and encouragement.²⁵⁹ Additionally, Roechling executives tolerated the use of a Gestapo disciplinary court and punishment camp.²⁶⁰ That Roechling managers did not conduct any punishment of workers themselves did not negate their responsibility.²⁶¹ Likewise in *I.G. Farben*, Chairman Carl Krauch and four other defendant's were indicted, in part, for slave labor.²⁶² At trial, Krauch and the others attempted to use a defense of ignorance.²⁶³ However, the prosecution successfully argued the I.G. Farben executives had a fiduciary duty to know the working conditions of their plants.²⁶⁴ Generally, the tribunals permitted a defense of necessity in cases where refusal to comply with Nazi slave order directives would result in drastic retaliation.²⁶⁵ However, this defense was not available to defendants who voluntarily sought slave labor.²⁶⁶ Such was the case at I.G. Farben where managers actively sought slave labor.²⁶⁷ Likewise, in the case of *U.S. v.*

255. See *e.g. id.* at *38 n. 22, *42.

256. See *e.g.* Lippman, *supra* n. 248, at 181-86.

257. See *The Roechling Case*, in 14 Tr. of War Crim. before the Nuremberg Mil. Trib. under Control Council Law No. 10 1097 (U.S. Govt. Printing Off. 1950). Five of the Judges on the tribunal were French, one was Dutch, and one Belgian. Lippman, *supra* n. 248, at 182 n. 87.

258. Lippman, *supra* n. 248, at 182-83 (citing *The Roechling Case*, in 14 Tr. of War Crim. before the Nuremberg Mil. Trib. under Control Council Law No. 10 1061 (U.S. Govt. Printing Off. 1950)).

259. Lippman *supra* n. 248, at 182-83.

260. *Id.*

261. *Id.* at 184-85.

262. *Id.* at 206.

263. *Id.* at 220.

264. 2002 U.S. App. LEXIS 19263 at *37 (*Doe II*).

265. *Id.*

266. 9 Tr. of War Crim. before the Nuremberg Mil. Trib. under Control Council Law No. 10 1436 (U.S. Govt. Printing Off. 1950).

267. Lippman, *supra* n. 248, at 216-19 (citing Letter from Def. Krauch to Kehrl, Jan. 13, 1944, in 7 Tr. of War Crim. before the Nuremberg Mil. Trib. under Control Council Law No. 10 1081 (U.S. Govt. Printing Off. 1950)).

Krupp, the Tribunal denied the defendants a necessity defense, because the defendants had “taken the initiative in [procuring slave] labor.”²⁶⁸

Of course, the IMT cases dealt with criminal law jurisdiction where the defendants faced death or lengthy imprisonment. As noted below, suits arising under the ATCA are civil and the damages are pecuniary. Assuming that criminal law defenses, such as necessity, are applicable in ATCA cases, the standard for determining the admissibility of that defense would be exceedingly high from an evidentiary point. Even the potential loss of assets and investments would not provide the basis for a defense of necessity. Certainly, a grant of summary judgment could not be based on corporate necessity.

In *Doe II*, there is no evidence, or even argument, that Unocal was forced into the Yadana Pipeline Project. Likewise, there is ample evidence the Myanmar Military used forced labor to aid in the construction of the pipeline.²⁶⁹ As noted earlier, Unocal owned a 28.26% share²⁷⁰ in the project and sought to financially benefit from its use. These three facts are explain why the Ninth Circuit was correct in its denial to Unocal of the necessity defense. In Section II, this article noted both the district court and the appellate court found some evidence of Unocal’s knowledge of conditions on the project. Under the *Roechling*, *I.G. Farben*, and *Krupp* standards, there is a *prima facie* case of Unocal’s liability in “aiding and abetting” forced labor under the Ninth Circuit’s definition of the accomplice liability elements. Whether or not the “aiding and abetting” standard is correct is addressed below in parts (b) and (c) of Section V. However, because of the universal consensus against forced labor, and the standards set under domestic and international law, there is nothing inherently wrong, or even slightly flawed, in the Ninth Circuit’s forced labor analysis.

2. Rape as a Component of Torture

The argument that torture constitutes a *jus cogens* offense has been accepted by several courts.²⁷¹ But is rape a form of torture? The Supreme Court, in *Farmer v. Brennan*,²⁷² settled the issue of including rape within the ambit of torture in an Eighth Amendment context.²⁷³ In *Farmer*, a

268. *Lippman*, *supra* n. 248, at 248.

269. 2002 U.S. App. LEXIS 19263 at *51 (*Doe II*).

270. *Thailand Fact Sheet*, *supra* n. 25.

271. See e.g. *Cornejo-Barreto v. Siefert*, 218 F.3d 1004, 1016 (9th Cir. 2000); *Filartiga*, 630 F.2d at 887.

272. 511 U.S. 825, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994).

273. 511 U.S. at 854 (Blackmun, J. concurring).

transsexual federal inmate was raped by fellow inmates despite prison officials' alleged knowledge of the danger that the prison's general population posed to the victim.²⁷⁴ The court held that deliberate indifference by prison officials could constitute an Eighth Amendment violation.²⁷⁵ This is the clearest domestic example of including rape within torture.

Rape, in the international community has been considered a component of other crimes such as genocide and torture. For example, the ICTY case, *Prosecutor v. Akayesu*²⁷⁶ addressed the crime of rape in the context of it falling under the aegis of another crime such as genocide. *Akayesu* was the first international tribunal to convict an accused for rape. Some legal scholars note the *Akayesu* decision is historic because it is the first case to link sexual violence to genocide and crimes against humanity.²⁷⁷ This argument may be overblown as *Akayesu* did not object to the inclusion of rape under the charged offenses as a legal matter. Yet, there is some significance in the tribunal's inclusion of rape as part of the genocide and crimes against humanity charges. Specifically, *Akayesu* was accused of knowing that the acts of sexual violence and other crimes were being committed and of being present at times during their commission. He was further accused of having "facilitated the commission of sexual violence, beatings and murders by allowing the sexual violence . . . to occur on or near the Taba bureau communal premises."²⁷⁸ The tribunal held, sexual violence crimes, i.e., rape:

constitute genocide in the same way as any other act, as long as they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such. Indeed, rape and sexual violence certainly constitute . . . one of the worst ways of inflicting [*sic*] harm on the victim as he or she suffers both bodily and mental harm. . . . Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole.²⁷⁹

274. 511 U.S. at 830.

275. *Farmer*, 511 U.S. at 839-40.

276. *Prosecutor v. Akayesu*, ICTR-96-4-T (ICTR Sept. 2, 1998) <<http://www.ictor.org/ENGLISH/cases/Akayesu/judgement/akay001.htm>> (accessed June 27, 2003).

277. Rana Lehr-Lehnardt, *One Small Step for Women: Female-Friendly Provisions in the Rome Statute of the International Criminal Court*, 16 BYU J. Pub. L. 317, 327 (2002) (allowed rape to be prosecuted as genocide); Llezlie L. Green, *Gender Hate Propaganda and Sexual Violence in the Rwandan Genocide: An Argument for Intersectionality in International Law*, 33 Colum. Hum. Rights L. Rev. 733, 763 (rape "may constitute crime against humanity").

278. *Akayesu*, ICTR-96-4-T at ¶ 12b.

279. *Id.* at ¶ 731.

The tribunal also found Akayesu guilty of crimes against humanity for rape.²⁸⁰ The tribunal defined rape and sexual violence as follows: “a physical invasion of a sexual nature, committed on a person under the circumstances which are coercive. Sexual violence, which includes rape, is considered to be any act of a sexual nature which is committed on a person under circumstances which are coercive.”²⁸¹

3. *Murder, in Furtherance of Forced Labor*

In *Kadic*, the Second Circuit held that, under certain circumstances, summary execution by a private individual violated international law.²⁸² Summary execution is a cognizable offense under the law of nations when committed under the color of state action.²⁸³ On the other hand, when a private individual commits murder, absent state action, it is not in violation of the law of nations. Rather, such an action constitutes the local domestic crime of murder and nothing more. In *Doe II*, the Ninth Circuit viewed murder as a component of forced labor, and therefore liability attached to Unocal.²⁸⁴ The correctness of this decision is not a matter of simple semantics. Unocal was alleged to have aided and abetted Myanmar.²⁸⁵ The murder of pipeline workers can be viewed as part and parcel of the forced labor program. As such, the state action doctrine does not serve to prevent Unocal’s liability.²⁸⁶ Yet, even if it did, the court could still apply a Federal Rule of Evidence (FRE) 404(b) analysis.²⁸⁷ This rule permits the admission of other crimes, wrongs, or acts into evidence to prove motive and intent.²⁸⁸ Myanmar apparently utilized summary execution to promote its forced labor program and Unocal benefited from the program.

280. *Id.* at ¶ 696.

281. *Id.* at ¶ 598.

282. 70 F.3d at 243.

283. *Id.*

284. 2002 U.S. App. LEXIS 19263 at *57.

285. *Id.* at *35.

286. *Id.* at *56.

287. FRE 404(b) precludes the admission of evidence of “other crimes, wrong doings or acts,” unless such evidence is admitted for other purposes “such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake. . . .” See e.g. *U.S. v. Duffaut*, 2002 U.S. App. LEXIS 24461 (5th Cir. Dec. 3, 2002).

288. *Duffaut*, 2002 U.S. App. LEXIS 24461 at *209.

B. *Concepts of Universal Jurisdiction under 28 U.S.C. § 1350 and the Developing Nature of International Law: The Ninth Circuit's Expansion in Choice of Law Application.*

The ATCA is silent as to what choice of law, international or domestic, to apply to ancillary issues. The Ninth Circuit, as this paper argues, expanded a concept of universal jurisdiction for torts when it applied non-domestic standards to ancillary issues within the case. The most important of these ancillary issues is accomplice liability. This full incorporation of international legal principles was the basis of Judge Reinhardt's disagreement with the majority opinion.²⁸⁹ Was the majority wrong?

One of the perceived difficulties in reconciling the criminal law basis of universal jurisdiction to tort deals with the choice of law to be employed by the adjudicating body. Arguably, the inclusion of international over federal law was a step toward a universal jurisdiction for tort. However, before analyzing the degree, if any, to which *Doe II* expanded universal jurisdiction to tort law, a brief overview may be helpful in delineating the criminal law basis of universal jurisdiction versus common understanding of tort law.

Universal jurisdiction has been thought of internationally as a matter for criminal law.²⁹⁰ However, torts are thought of as having a transitory nature.²⁹¹ That is, "a tort action which follows a tortfeasor wherever he goes."²⁹² Under domestic law, a person may sue in one state for a tort committed in another state, provided both *in personam* and subject matter jurisdiction exists.²⁹³ In order to obtain jurisdiction, there must be some contact with the trial forum. Thus, even with its transitory nature, tort law has limitations. Additionally, to date, international law places no obligation on a state to provide a tort remedy for violations of human rights.²⁹⁴

289. 2002 U.S. App. LEXIS 19263 at *84-85 (*Doe II*).

290. See e.g. Beth Stephens, *Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 Yale J. Intl. L. 1, 41-43 (2002) [hereinafter *Translating Filartiga*].

291. See e.g. *Young v. Masci*, 289 U.S. 253, 53 S. Ct. 599, 77 L. Ed. 1158 (1933) (holding New Jersey citizen liable for New York auto accident caused by bailee); *In re School Asbestos Litigation*, 921 F.2d 1310, 1319 (3d Cir. 1990) (stating tort is transitory rather than local).

292. *Marcos I*, 978 F.2d at 503.

293. See e.g. *Intl. Shoe Co. v. Wash.*, 326 U.S. 310, 316, 66 S. Ct. 154, 158, 90 L. Ed. 95, 102 (1945) ("certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional [conceptions] of fair play and substantial justice.'" (citations omitted)); *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 446, 72 S. Ct. 413, 418-19, 96 L. Ed. 485, 493 (1952) (If the defendant's activities in the forum are substantial, continuous, and systematic, general jurisdiction is available. In other words, the foreign defendant is subject to suit even on matters unrelated to his or her contacts in the forum).

294. See e.g. Beth Stephens, *Do Tort Remedies Fit the Crime*, 60 Alb. L. Rev. 579, 602 (1997) (stating that a "remedy must be adjudicatory").

As a result, there is no treaty or customary requirement that domestic courts use international law in place of domestic law for primary and ancillary issues.

Some scholars conclude “[u]niversal jurisdiction fills a gap where other, more basic doctrines of jurisdiction provide no basis for national proceedings.”²⁹⁵ These scholars argue that tort claims arising under the ATCA present such a case.²⁹⁶ Under the American system, criminal law has limitations, in that courts which adjudicate criminal law cases do not award, except under limited circumstances, financial penalties to victims.²⁹⁷ However, most crimes, constitute some type of tort. Certainly, the plaintiffs’ allegations in *Doe II* embody both a crime and a tort.

Both the district court in *Doe I* and the circuit court in *Doe II* accepted that tort, as defined by the ATCA—i.e., law of nations—possessed a type of universal jurisdiction. This is perhaps because the actual torts alleged were based on, or at least akin to, “crimes against humanity.”²⁹⁸ These offenses possess universality because humanity itself is seen as a victim.²⁹⁹ Additionally, this is partly why the Ninth Circuit saw the distinction between tort law and criminal law of minimal relevance.³⁰⁰

Under international principles, “domestic jurisdiction rests on reconciling a state’s interest in a particular offense with other states’ interests in the offense.”³⁰¹ That is, there are certain offenses of such gravity that the importance of the geographic location of the offense is minimized. That the allegations against Unocal fall into this category are best understood in light of the last sixty years of developing international law. As World War II ended, allied representatives met in London to finalize a charter detailing the “constitution, jurisdiction and functions of the International Military Tribunal” (IMT), which conducted the Nuremberg trials.³⁰² The concept of

295. E.g. Bruce Broomhall, *Symposium: Universal Jurisdiction: Myths, Realities, and Prospects: Towards the Development of an Effective System of Universal Jurisdiction for Crimes under International Law*, 35 New Eng. L. Rev. 399, 400 (2001).

296. See generally Michael Ramsey, *18th Annual Symposium: Multinational Corporate Liability under the Alien Tort Claims Act: Some Structural Concerns*, 24 Hastings Intl. & Comp. L. Rev. 361 (2001). (Professor Ramsey does not argue for universal jurisdiction under the ATCA. Rather, his informative article highlights perceived problem areas for obtaining jurisdiction.)

297. Stephens, *Translating Filartiga*, *supra* n. 301, at 58.

298. See e.g. Susan Chesterman, *An Altogether Different Order: Defining the Elements of Crimes Against Humanity*, 10 Duke J. Comp. & Intl. L. 307, 309 (2000).

299. E.g. Christopher C. Joyner, *Redressing Impunity for Human Rights Violations: The Universal Declaration and the Search for Accountability*, 26 Denv. J. Intl. L. & Policy 591, 622 (1998).

300. See *Doe*, 2002 U.S. App. LEXIS 19263 at *44 (*Doe II*).

301. Kenneth C. Randall, *Universal Jurisdiction under International Law*, 66 Tex L. Rev. 785, 786 (1988).

302. See *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers and the Charter of the International Military Tribunal*, (Aug 8, 1945) 59 Stat. 1544, 82 U.N.T.S. 279 [hereinafter London Agreement]. Article 2 of the London agreement states that “[t]he constitution, jurisdiction and functions of the International Military Tribunal shall be those set in the

universal jurisdiction for certain offenses gained initial acceptance through the IMT, and the International Military Tribunals for the Far East,³⁰³ as well as the 1968 Israeli trial of Adolph Eichmann.³⁰⁴ Indeed, other foreign courts have accepted universal jurisdiction concepts developed in the Eichmann trial. For example, in the 1989 Ontario High Court of Justice case, *Regina v. Finta*,³⁰⁵ a Canadian court accepted the principle that state courts can exercise criminal law jurisdiction “with respect to acts which occurred outside its territory.”³⁰⁶ In 1999, a Swiss Military Tribunal indicted and convicted a former Rwandan mayor for war crimes stemming from the Rwandan genocide.³⁰⁷ These trials added to the growing acceptance that some offenses, such as genocide, constitute crimes against hu-

Charter annexed to this Agreement, which Charter shall form an integral part of this Agreement.” *Id.* at 1544-45. In the course of World War II, the Allied Governments issued several declarations concerning the punishment of war criminals. On October 7, 1942, it was announced that a United Nations War Crimes Commission would be set up for the investigation of war crimes. However, it was not until October 20, 1943, that the actual establishment of the Commission took place. In the Moscow Declaration of October 30, 1943, the United States, United Kingdom and Soviet Union issued a joint statement that the German war criminals should be judged and punished in the countries in which their crimes were committed, but that, “the major criminals whose offenses have no particular geographic localization,” would be punished “by the joint decision of the Governments of the Allies.” See *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions, and Other Documents*, 881 (Dietrich Schindler et al. eds., 3d ed., Martinus Nijhoff 1988).

303. *Id.* at 912-919. The International Military Tribunal for the Far East was established by a special proclamation of General Douglas MacArthur as the Supreme Commander in the Far East for the Allied Powers. *Id.*

304. *Israel v. Eichmann*, 36 Intl. L. Rep. 5 (Jerusalem D.C. 1961) (Criminal Case no. 46/61). In *Eichmann*, the court recognized universal jurisdiction to prosecute an offense against the Jewish people that occurred prior to the formation of the State of Israel. The court specifically held:

The State of Israel’s ‘right to punish’, the accused derives, in our view, from two cumulative sources: a universal source (pertaining to the whole of mankind), which vests the right to prosecute and punish crimes of this order in every State within the family of nations; and a specific or national source, which gives the victim nation the right to try any who assault its existence.

Id. at ¶ 30

305. 1989 *W.C.B.J. LEXIS 8889* (Ontario High Ct. J. June 26, 1989).

306. *Id.* at (*40).

It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, -and in which it cannot rely on some permissive rule of international law. Such a rule would only be tenable if international law contained a general prohibition to States to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory . . .

Id. at *41 (quoting the Permanent Court of International Justice in the *Steamship Lotus*, Series A, No. 10 (Permanent Ct. Intl. J. 1927)).

307. See *Niyonteze v. Public Prosecutor* (Trib. Militaire de cassation, Apr. 27, 2001); Amnesty International, 2000, *Annual Report on Switzerland* <<http://web.amnesty.org/web/ar2001.nsf/webeurcountries/SWITZERLAND?OpenDocument>> (accessed June 27, 2003).

manity that can be prosecuted at any location by any recognized court complying with basic procedural rights. This acceptance is partly a product of twentieth century history. Following World War II, treaties and agreements codified crimes against humanity. In the 1990's two *ad hoc* tribunals were created by the United Nations Security Council to prosecute individuals responsible for conducting, in part, crimes against humanity. These tribunals dealt with crimes against humanity in the former Yugoslavia (ICTY)³⁰⁸ and Rwanda (ICTR).³⁰⁹ The Ninth Circuit expressly referred to the importance of ICTR and ICTY decisions in furnishing international law legal definitions.³¹⁰

As noted in Section III, several district and appellate court cases involving corporate liability under the ATCA existed prior to *Doe II*. None of these cases precluded civil action against corporations acting in concert with foreign governments, or even engaging in independent activities. That these cases were dismissed on grounds other than jurisdiction, is a matter of semantics in assessing whether the acceptance of corporate liability under the ATCA expands the statute's universal jurisdiction. On the other hand, the choice of international law over federal common law for defining ancillary issues expanded a concept of universal jurisdiction for tort under the ATCA. The Ninth Circuit had limited guidance in that only one prior federal court decision addressed the choice of law issue. In *Xuncax v. Gramajo*,³¹¹ the United States District Court for Massachusetts concluded only international law fulfilled the expectations of the ATCA.³¹² However, *Xuncax* did not involve a corporate defendant, but rather a former Guatemalan government official.³¹³

Other, non ATCA cases, provide some guidance in assessing whether *Doe II's* expansion is justified. As early as 1804, the Supreme Court in *Murray v. The Schooner Charming Betsy* established a principle that "an act of Congress ought never to be construed to violate the law of nations."³¹⁴ Since that time, several courts have held customary international

308. U.N. Doc. S/25704, annex (1993), reprinted in 32 Intl. Leg. Materials 1192 (1993) (statute of ICTY).

309. *United Nations Security Council Resolution 955*, S.C. Res. 955, 49 U.N. SCOR, U.N. Doc. S/RES/955 (1994) (establishing the ICTR).

310. *Doe*, 2002 U.S. App. LEXIS 19263 at *45 (*Doe II*).

311. 886 F. Supp. 162 (D. Mass. 1995); see Tzeutschler, *Corporate Violator: The Alien Tort Liability of Transnational Corporations for Human Rights Abuses Abroad*, 30 Colum. Hum. Rights L. Rev. 359, 403 (1999) (arguing "the language of section 1350 itself suggests that international law is the substantive law to be applied." However, he does not detail further analysis as to why).

312. *Xuncax*, 886 F. Supp. 162, 183 (D. Mass. 1995).

313. *Id.* at 169.

314. 6 U.S. 64, 118, 2 L. Ed. 208, 226 (1804).

law was a part of federal common law.³¹⁵ For example, in *Banco Nacional de Cuba v. Chase Manhattan Bank*,³¹⁶ the Second Circuit held that under customary international law, an obligation existed to provide full compensation for an unlawful taking.³¹⁷ Taking both the *Charming Betsey* principle, and the fact that Congress has never delineated definitions of liability under the ATCA, a valid argument exists for incorporating international law to issues of liability under the ATCA.

Whether the Ninth Circuit was correct in its expansion of universal jurisdiction can be answered by looking to factors generally considered in choice of law inquiries. Pertinent factors are enumerated in the *Restatement (Second) of Conflict of Laws*.³¹⁸ Judge Reinhardt viewed chapter 1, section 6 as helpful, but before reading that section, it is important to understand its context, which is provided in section 1. Section 1 reads:

The world is composed of territorial states having separate and differing systems of law. Events and transactions occur, and issues arise, that may have a significant relationship to more than one state, making necessary a special body of rules and methods for their ordering and resolution.³¹⁹

Section 6 reads as follows:

- (1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
- (2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include:
 - (a) the needs of the interstate and international systems,
 - (b) the relevant policies of the forum,
 - (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
 - (d) the protection of justified expectations,
 - (e) the basic policies underlying the particular field of law,

315. See e.g. Harold H. Koh, *Is International Law Really State Law*, 111 Harv. L. Rev. 1824, 1837-38 (1998) (Professor Koh cites other cases relating to extradition, official immunity, and prisoner treatment that incorporate customary international law into federal common law.).

316. 658 F.2d 875 (2d Cir. 1981).

317. *Id.* at 892-93.

318. *Restatement (Second) of Conflict of Laws* ch. 1 § 1 (1971).

319. *Id.*

- (f) certainty, predictability, and uniformity of result, and
- (g) ease in the determination and application of the law to be applied.³²⁰

Both the majority and concurring opinions in *Doe II* correctly recognized the ATCA is silent as to a statutory directive on choice of law. The majority held that “‘the needs of the international system’ are better served by applying international law than national law.”³²¹ In terms of “‘the protection of justified expectations’”; “‘the ‘certainty, predictability, and uniformity of the result’””; and “‘the ‘ease in the determination and application of the law to be applied,’” the court noted that their decision embodied principles dating back to the Nuremburg Tribunals.³²² The majority’s logic is sensible for two reasons. First, based on the widespread knowledge of human rights conditions in Myanmar, Unocal cannot claim the corporation was surprised by the nature of the plaintiffs’ allegations. Likewise, based on well-known and long established international law principles, highlighted throughout this article, Unocal could not argue a lack of notice of these laws. All Unocal could argue was a lack of notice that the court would apply principles developed in the ICTY and ICTR to ancillary issues in *Doe*. But, even this argument has a fundamental weakness stemming from the nature of the relationship between tort and criminal law. In this case, the torts alleged, if true, violated a universal understanding of international law. In other cases, courts have applied international law to definitional matters.³²³

Finally, some scholars and judges have advanced domestic law principles as the proper means to determine liability.³²⁴ Some of the principles advanced are agency law, 42 U.S.C. § 1983, and reckless disregard.³²⁵ But, these arguments for purely relying on domestic law tend to ignore the issue that the trier of fact must determine whether a tort committed under the law of nations occurred. In *Doe II*, the torts are purely criminal in nature. The allegations are not a matter of simple negligence. As noted above, almost every crime is a tort. However, the inverse is not necessarily true. Of course, the plaintiffs could advance alternative domestic theories of liability as well. But the essential core of this case is a tort determina-

320. *Id.* at § 6.

321. *Doe*, 2002 U.S. App. LEXIS 19263 at *42 (*Doe II*).

322. *Id.*

323. See e.g. *Cabello Barrueto v. Fernandez Larios*, 205 F. Supp. 2d 1325, 1333 (S.D. Fla. 2002); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1345 (N.D. Ga. 2002).

324. See e.g. Courtney Shaw, Student Author, *NOTE: Uncertain Justice: Liability of Multinationals under the Alien Tort Claims Act*, 54 Stan. L. Rev. 1359, 1374-1379 (2002) (arguing for liability under 42 U.S.C. § 1983).

325. See e.g. *id.*

tion of internationally recognized criminal activity. In this limited arena, the Ninth Circuit was correct in applying international definitions to the ancillary issue of accomplice liability.

Having established that the Ninth Circuit correctly expanded a universal jurisdiction to a tort under the ATCA, the fairness inquiry then becomes one of determining how different the international law standards are from the federal common law of accomplice liability. In essence, this is a dual question of both comparative law and examining Unocal's role in aiding and abetting forced labor.

C. *The Ninth Circuit's Definition of Accomplice Liability: Aiding and Abetting under the International Law as opposed to Domestic Law.*

In order to analyze the difference between the international and domestic law understanding of accomplice liability, it is first beneficial to define "aiding and abetting," under federal law. "Aiding and abetting" is essentially a criminal law term. It does not constitute elements of a particular crime because the concept, and corresponding federal statute, 18 U.S.C. § 2, provides a means for convicting a person for an offense caused by a principal.³²⁶ There are usually two components to criminal offenses: *actus reus* and *mens rea*. *Actus reus* consists of an actual physical act while *mens rea* denotes the actor's mental state.³²⁷

In criminal law, the elements of "aiding and abetting" are generally as follows: (1) the principal commits a substantive offense and (2) the defendant charged with the "aiding and abetting" "consciously shared the principal's knowledge of the underlying criminal act, and intended to help the principal."³²⁸ The *actus reus* element of "aiding and abetting" is generally easy to discern because under a theory of accomplice liability, to be guilty, the defendant must commit an act in furtherance of the principal's offense.³²⁹ For example, where a defendant supplied the principal with a weapon later used in a bank robbery, the *actus reus* requirement is satis-

326. See 18 U.S.C. § 2. The statute does not define a separate crime, but rather provides another means of convicting someone of assisting another in committing the underlying offense. *E.g. U.S. v. Sorrells*, 145 F.3d 744, 753 (5th Cir. 1998). In that case, the Fifth Circuit listed three conditions—or elements—of proof to establish guilt. *Id.* In a criminal trial, in order to prove a defendant guilty of aiding and abetting under 18 U.S.C. § 2, three elements must be met. *Id.* First, that the defendant associated with the criminal venture. Second, that the defendant participated in the venture. *Id.* Third, that the defendant sought by action to make the venture at succeed. *Id.* (citation omitted).

327. Black's Law Dictionary defines *actus reus* as the physical aspect of a crime, whereas *mens rea* involves the intent factor. 36 (Henry L. Black et. al eds., 6th ed., West 1990).

328. See *e.g.* 18 U.S.C. § 2(a); *Nye & Nissan Corp. v. U.S.*, 336 U.S. 613, 619, 69 S. Ct. 766, 770, 93 L. Ed. 919, 925 (1949); *U.S. v. Spinney*, 65 F.3d 231, 235 (1st Cir. 1995) (quoting *U.S. v. Taylor*, 54 F.3d 967, 975 (1st Cir. 1995)).

329. *U.S. v. Pipola*, 83 F.3d 556, 562 (2d Cir. 1995).

fied.³³⁰ On the other hand, the defendant's mental state is important for assessing whether the *mens rea* was present to prove guilt. Indeed, the defendant's beforehand knowledge of the principal's offense is central to establishing the applicable *mens rea* for accomplice liability. However, a "classic formulation of aider and abettor liability . . . does not make the knowledge requirement"³³¹ facially clear because some courts have construed this requirement to mean less than full knowledge of an intended act.³³² For example, in *U.S. v. Hill*, a case involving an illegal gambling enterprise, the Sixth Circuit defined knowledge as "'the general scope and nature . . . and awareness of the general facts concerning the venture."³³³ Thus, the knowledge requirement is less than a knowing of intricacies, but rather, knowledge of general purpose. In order to determine *Doe II*'s fairness, the Ninth Circuit's view of "aiding and abetting" must be viewed in the context that it has been used by the ICTY and ICTR as well as older international bodies.³³⁴

As noted in Section II, the Ninth Circuit established the standard for "aiding and abetting" under the ATCA in *Doe II* as "knowing practical assistance or encouragement that has a substantial effect on the perpetration of the crime."³³⁵ In incorporating the ICTY case, *Prosecutor v. Furundzija*,³³⁶ the Ninth Circuit recognized an international law concept establishing the "*actus reus* of aiding and abetting in international criminal law requires practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime."³³⁷ Moreover, the court accepted that "assistance, 'need not constitute an indispensable element, that is, a *conditio sine qua non*, for the acts of the principal."³³⁸ The Ninth Circuit also reviewed the ICTR's interpretation of "aiding and abetting" in the case *Prosecutor v. Musema*.³³⁹ In that case, the ICTR's definition for the *actus reus* element consisted of "'all acts of assistance in the form of either physical or moral support . . . [that] substantially contribute to the commission of the crime."³⁴⁰ In essence, the plaintiffs do not have

330. *See id.*

331. *U.S. v. Hill*, 55 F.3d 1197, 1201 (6th Cir. 1995).

332. *See e.g. id.* (quoting *U.S. v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938)).

333. *Id.*

334. 2002 U.S. App. LEXIS 19263 at *36.

335. *Id.*

336. IT-95-17/1-T (Dec. 10 1998), reprinted in 38 I.L.M. 317 (1999).

337. 2002 U.S. App. LEXIS 19263 at *45-46 (quoting *Furundzija*, IT-95-17/1-T at ¶ 235). Further, the Ninth Circuit found that the evidence "support[ed] the conclusion that Unocal gave 'encouragement' to the Myanmar Military in subjecting Plaintiffs to forced labor." *Id.* at *53.

338. *Id.* at *45 (*Doe II*) (quoting *Furundzija*, IT-95-17/1-T at § 3.3(c) ¶ 209).

339. *Id.* at *47 (*Doe II*) (quoting *Prosecutor v. Musema*, ICTR-96-13-A (ICTR Jan. 27, 2000) <<http://www.ict.org/ENGLISH/cases/Musema/judgement/index.htm>> (accessed June 27, 2003)).

340. *Musema*, ICTR-96-13-A at § 3.1.1 ¶ 126.

to prove that Unocal's assistance made the forced labor possible. Rather, the plaintiffs need only prove the Myanmar Military utilized Unocal's assistance. This is a relatively easy burden because of Unocal's investment in the Yadana Project as well as its technical assistance in the construction.

Additionally, the court further recognized the international law concept for the *mens rea* of "aiding and abetting" as "actual or constructive . . . knowledge [that the accomplice's] actions will assist the perpetrator in the commission of the crime."³⁴¹ This reflected the ICTR's view in *Musema* that defined the *mens rea* element as "[knowledge] of the assistance he was providing in the commission of the actual offense."³⁴² Again, this is a fairly easy burden for the plaintiffs due to the amount of public information on Myanmar's human rights record available to Unocal.³⁴³

Clearly, the Ninth Circuit correctly interpreted the ICTY and ICTR definition of "aiding and abetting." How the court's definition disadvantages Unocal is less clear. It is true that actual knowledge is not required under either domestic or international law, as evidenced in the ICTR and ICTY cases discussed in this article. It is also true that within the ICTY and ICTR definition of "aiding and abetting", moral support can establish the *actus reus*. None of the ICTR and ICTY cases involve funding. However, an analogy can be drawn to other activities of support. For example, in the ICTR case, *Prosecutor v. George Ruggiu*,³⁴⁴ the tribunal found a journalist guilty as a *de facto* aider and abettor for making several broadcasts encouraging Hutu to kill Tutsi.³⁴⁵ In *Doe II*, Unocal is not alleged to have provided moral support in the sense of a radio broadcast. Yet, a compelling analogy can be drawn that Unocal's financial and advisory relationship with the Myanmar Military provided support.

As noted above, the plaintiffs' allegations established a *prima facie* case against Unocal under the court's definition of "aiding and abetting." In viewing the *prima facie* determination, it is necessary to keep in mind that, the standard burden of proof in civil suits is by a "preponderance of the evidence" not beyond a "reasonable doubt."³⁴⁶ There was evidence Unocal knew about general allegations of human rights violations such as forced labor.³⁴⁷ Additionally, Unocal knew Total had contracted with SLORC for the Myanmar Military to provide security for the pipeline con-

341. *Doe*, 2002 U.S. App. LEXIS 19263 at *47 (*Doe II*) (quoting *Musema*, ICTR-96-13-A at § 3.11 ¶ 126) (brackets in original).

342. *Id.* at *48 (quoting *Musema*, ICTR-96-13-A at § 3.22 ¶ 180).

343. *Id.* at *53 n. 29.

344. ICTR-97-32-1 (ICTR June 1, 2000).

345. *Id.* at ¶ 44 (a).

346. For a discussion of standards of proof, see e.g. *U.S. v. Goba*, 220 F. Supp. 2d 182 (W.D.N.Y. 2002).

347. *Doe*, 2002 U.S. App. LEXIS 19263 at *15 (*Doe II*).

struction project.³⁴⁸ Lastly, Unocal's involvement in attending security meetings and overseeing the joint venture³⁴⁹ along with Total and MOGE could be seen as evidence of rendering assistance or encouragement to the Myanmar Military.³⁵⁰ Applying the evidence accepted by the court to a domestic standard of "aiding and abetting," there is a *prima facie* case established as well. The participation in a joint venture with a known offender is one aspect of establishing a *prima facie* case. Unocal's various acts of attending joint venture meetings,³⁵¹ and supplying funds and construction oversight crews³⁵² for the Yadana project clearly go to the *actus reus* element.³⁵³ As for the *mens rea* requirement, the court record appears to contain enough evidence showing knowledge.³⁵⁴ E-mails between company officers,³⁵⁵ advice from consultants,³⁵⁶ notice from a Total representative, and repeated contacts from NGO's³⁵⁷ show a *prima facie* case of knowledge.

VI. EXAMINING THE FORESEEN CONSEQUENCES OF THE NINTH CIRCUIT'S DECISION TO OTHERWISE APPLICABLE DEFENSES: ACT OF STATE, RULE 19, AND *FORUM NON CONVENIENS*

A. *Act of State Doctrine*

The act of state doctrine has evolved since its conception.³⁵⁸ Initially, the doctrine was seen as a principle of comity between sovereign states.³⁵⁹ However, it has transformed into a prudential concern regarding the separation of powers.³⁶⁰ The Court in *Banco Nacional de Cuba v. Sabbatino* recognized the executive's role in foreign policy, including fostering human rights and democracy.³⁶¹ When the executive branch, through the

348. *Id.* at *7.

349. *Id.* at *53.

350. *Id.* at *49.

351. *Id.* at *117.

352. *Id.* at *60.

353. *Id.* at *51.

354. *Id.* at *54.

355. *Id.* at *40.

356. *Id.* at *13.

357. *Id.* at *14.

358. *W.S. Kirkpatrick & Co. v. Envtl. Tectonics*, 493 U.S. 400, 404, 110 S. Ct. 701, 704, 107 L. Ed. 816, 822, (1990).

359. *W.S. Kirkpatrick & Co.*, 493 U.S. at 404 (quoting *Oetjen v. Central Lumber Co.*, 246 U.S. 297, 303-304, 38 S. Ct. 309, 311, 62 L. Ed. 726, 732 (1918)).

360. *W.S. Kirkpatrick & Co.*, 493 U.S. at 404 (citing *Sabbatino*, 376 U.S. at 423).

361. *W.S. Kirkpatrick & Co.*, 493 U.S. at 404. The Court fashioned a three-part test to determine whether the act of state doctrine should apply. This test is as follows:

State Department, files a brief with the court, the executive branch's arguments are given tremendous deference.³⁶² For example, in a recent ATCA case against ExxonMobil and Indonesia, in the United States District Court for the District of Columbia, the State Department filed an *amicus* brief.³⁶³ This filing was done in response to a specific judicial request.³⁶⁴ As of this article's publication date, the court has not decided whether dismissal under this doctrine is appropriate. Thus, a corporation such as Unocal could have the executive branch as a powerful ally in any ATCA court proceeding. Such a legal defense however, becomes almost untenable without the assistance of the executive branch.

In *Doe II*, the Ninth Circuit recognized the Second Circuit's opinion in *Kadic*, that "it would be a rare case in which the act of state doctrine precluded suit under [the [ATCA]]."³⁶⁵ This is, in part, because, *jus cogens* violations tend to diminish the act of state defense's vitality.³⁶⁶ However, the Ninth Circuit declined to establish a blanket rule barring the act of state doctrine in ATCA cases.³⁶⁷ In part, this may have been because the execu-

[1] The greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it . . . [2] The less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches. [3] The balance of relevant considerations may also be shifted if the government which perpetrated the challenged act of state is no longer in existence

Doe, 2002 U.S. App. LEXIS 19263 at * 72 (*Doe II*) (quoting *Sabbatino*, 376 U.S. at 428) (ellipses and brackets from *Doe II*).

The Ninth Circuit added a fourth factor to this test in holding, "we must also consider whether the state was acting in the public interest. *Doe*, 2002 U.S. App. LEXIS 19263 at * 72 (*Doe II*) (quoting *Liu v. Republic of China*, 892 F.2d 1419, 1432 (9th Cir. 1989)).

362. *Sabbatino*, 376 U.S. at 419.

363. See *Amicus Curiae*, United States Statement of Interest, *Doe v. Exxon Mobil Corp.*, Civ. Action No. 01-CV-1357 (D.D.C. July 29, 2002). In this brief, the United States avers:

[T]he Department of State believes that adjudication of this lawsuit at this time would in fact risk a serious adverse impact on significant interests of the United States . . . related directly to the on-going struggle against international terrorism. It may also diminish our ability to work with the Government of Indonesia ("GOI") on a variety of important programs, including efforts to promote human rights in Indonesia.

Id. at 1.

The brief further details economic interests in writing: "This litigation appears likely to further discourage foreign investment, particularly in extractive industries in remote or unstable areas that require security protection. This, in turn, could have decidedly negative consequences for the Indonesian economy." *Id.* at 4.

364. *Id.* at 1.

365. *Doe*, 2002 U.S. App. LEXIS 19263 at *71 (*Doe II*) (quoting *Kadic*, 70 F.3d at 250. Brackets in original).

366. See *id.* at *73.

367. See *id.* at ** 71-73.

tive branch did not file an amicus brief to the court. Lastly, the court's reasoning in *Doe* was not inconsistent with prior case decisions from other circuit courts. For example, in *Bigio v. Coca-Cola*, the Second Circuit held the act of state doctrine was to be determined on a case-by-case basis.³⁶⁸ As such, the common sense of the court may likely compose a significant factor in determining whether permitting adjudication will "likely impact foreign relations," or "embarrass or hinder the executive in the realm of foreign relations."³⁶⁹ Based on its view of common sense, the court determined the act of state doctrine did not apply.³⁷⁰

1. *Federal Rule of Civil Procedure, Rule 19*

Federal Rule of Civil Procedure (FRCP) Rule 19 requires that indispensable parties to a lawsuit must be identified.³⁷¹ As noted earlier, corporate defendants in prior ATCA cases have benefited from this rule. The district court, in denying Unocal's FRCP Rule 19 dismissal, set precedent for cases involving forced labor. So too did the Ninth Circuit in not reviewing this issue. It may be argued that Rule 19 should not apply in any ATCA case. If an act committed "in violation of the law of nations" is truly akin to a crime against humanity, then liability should not give way to dismissal under Rule 19. If future courts accept this logic, then *Doe II* is truly a revolutionary case. If, on the other hand, *Doe II* is merely narrowed to economic expectations and possible financial damage weighing, then it joins a group of persuasive cases.

2. *Remaining Jurisdictional Issues: Does Forum Non Conveniens Apply to ATCA claims?*

Doe II did not squarely address the issue of *forum non conveniens*, but it warrants discussion in this article because all of the litigation elements regarding this doctrine exist in the history of *Doe (I & II)*. The doctrine of *forum non conveniens* involves the dismissal of lawsuits brought by plaintiffs in their favored forum in favor of adjudication in a foreign court.³⁷² It

368. 239 F.3d at 452 (citing *Allied Bank Intl. v. Banco Credito Agricola de Cartago*, 757 F.2d 515, 520 (2d Cir. 1985)).

369. *Id.*

370. *Id.* at 444. The Court noted that the Bigios' property was confiscated by the administration of then President Nasser. *Id.* At the time of the case, Nasser had been dead for thirty years. *Id.*

371. FRCP 19(a) provides that a person is a necessary party if: "(1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action . . ."

372. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 504, 67 S. Ct. 839, 841, 91 L. Ed. 1055, 1060 (1947); *Koster v. Am. Lumbermens Mut. Cas. Co.* 330 U.S. 518, 531-32, 67 S. Ct. 828, 835, 91 L. Ed. 1067, 1077-78 (1947).

“is a discretionary device permitting a court in rare instances to ‘dismiss a claim even if the court is a permissible venue with proper jurisdiction over the claim.’”³⁷³ A two-step process developed to assess whether *forum non conveniens* dismissal is appropriate. The first step involves determining whether an adequate alternative forum exists.³⁷⁴ If the answer is in the affirmative, the second step requires courts to “balance a series of factors involving the private interests of the parties in maintaining the litigation in the competing fora and any public interests at stake.”³⁷⁵ This doctrine’s applicability to claims arising under the ATCA is questionable for a number of reasons. First, human rights abuses violating international rights rarely occur in a state with a defined and respectable legal system. Second, because the ATCA requires state action, or as argued in this article commercial activity rising to the level of state action, it is unlikely the host government will permit a fair hearing.

In *Wiwa v. Royal Dutch Petroleum Company*³⁷⁶ the Second Circuit addressed the doctrine in light of the ATCA. *Wiwa* involved Nigerian plaintiffs alleging that the Nigerian government tortured and killed family members and themselves at the behest of Shell Petroleum Development Company of Oil Nigeria (SON).³⁷⁷ The parent company of SON, Royal Dutch Petroleum, and one of its subsidiaries pertinent to the suit, Shell Transport and Trading Company (STTC), were listed on the New York Stock Exchange and maintained an investor relations office in New York City.³⁷⁸ However, Royal Dutch Petroleum and STCC were incorporated in the Netherlands and Great Britain.³⁷⁹ Additionally, one of Royal Dutch Petroleum’s subsidiaries, Shell Petroleum Inc (SPI), and SPI’s subsidiary, Shell Oil Company performed extensive commerce operations in the United States.³⁸⁰ The district court dismissed the plaintiff’s suit under the *forum non conveniens* doctrine.³⁸¹ This occurred, in part, because the defendant corporation argued the case should be tried in Great Britain.³⁸² As to the second prong, the district court found a balancing of public and pri-

373. *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 100 (quoting *PT United Can Co. v. Crown Cork & Seal Co.*, 138 F.3d 65, 73 (2d Cir. 1998)).

374. *Id.* (citing *Gilbert*, 330 U.S. at 506-07).

375. *Wiwa*, 226 F.3d at 100 (citing *Gilbert*, 330 U.S. at 508-09).

376. 226 F.3d 88 (2d Cir. 2000).

377. *Id.* at 92.

378. *Id.* at 93.

379. *Id.* at 92.

380. *Id.* at 93.

381. *Id.* at 108.

382. *See Wiwa*, 226 F.3d at 100.

vate factors made the British forum preferable.³⁸³ However, the Second Circuit concluded the district court failed to give weight to three significant considerations that favored retaining jurisdiction.³⁸⁴ First, the court held that since one of the plaintiffs was a United States resident, retaining jurisdiction was proper.³⁸⁵ Second, the court held United States interests in furnishing a forum to litigate claims of violations of international standards of the law of human rights were compelling.³⁸⁶ Finally, although the court recognized British courts as “exemplary in their fairness and commitment to the rule of law,” this recognition did not outweigh the interests of either prior reason.³⁸⁷

In *Wiwa* the Second Circuit declined to readdress the original intent behind the ATCA.³⁸⁸ Rather, the court found, that after the TVPA was incorporated into the ATCA, the ATCA expressed “a policy favoring receptivity by our courts to such suits.”³⁸⁹ The court reasoned that permitting a *forum non conveniens* dismissal could represent a setback for human rights litigation.³⁹⁰ However, the court declined to establish an across the board rule that denied *forum non conveniens* to defendants in all ATCA cases.³⁹¹ Instead, the court determined *forum non conveniens* dismissal could not be granted, “unless the defendant has fully met the burden of showing that the *Gilbert* factors ‘tilt[] strongly in favor of trial in the foreign forum.’”³⁹² Should *Doe II* not settle and be upheld, it appears likely from the language of *Doe II*, relying on the *Wiwa* precedent, that *forum non conveniens* is not an option for Unocal.

383. *Id.* at 92. The plaintiffs challenged the adequacy of the British forum “because three doctrines of English law—double actionability, transmissibility, and the act of state doctrine—created a likely bar to a British court” hearing the suit. *Id.* at 100.

384. *Id.* at 101.

385. *Id.*

386. *Id.*

387. *Id.*

388. *Id.* at 105 n. 10. “Whatever the intent of the original legislators (a matter that is forever hidden from our view by the scarcity of relevant evidence), the text of the Act seems to reach claims for international human rights abuses occurring abroad.” *Id.*

389. *Id.* at 105. In determining the effect of the TVPA on the ATCA, the court viewed two changes in the statutory wording. First, there was a shift “from addressing the courts’ ‘jurisdiction’ to addressing substantive rights.” Second, “the change from the ATCA’s description of the claim as one for ‘tort . . . committed in violation of the law of nations . . .’ to the new Act’s assertion of the substantive right to damages under U.S. law.” *Id.*

390. *Id.* at 105.

391. *Id.* at 106. The court states “This is not to suggest that the TVPA has nullified, or even significantly diminished, the doctrine of *forum non conveniens*. The statute has, however, communicated a policy that such suits should not be facilely dismissed on the assumption that the ostensibly foreign controversy is not our business.” *Id.*

392. *Id.* (quoting *R. Maganlal & Co. v. M.G. Chem. Co.*, 942 F.2d 164, 167 (2d Cir. 1991)).

VII. CONCLUSION

When the Ninth Circuit reversed the lower court in *Doe II*, new precedent was set. While there was nothing inherently wrong in the court's legal interpretation, the decision, if upheld, will have dramatic effect on the law. The ATCA will not only provide plaintiffs with a remedy against corporations "aiding and abetting" human rights violators, it may also cause multinational corporations to better monitor their overseas financial activities. Perhaps this deterrent will better promote human rights and democratic development in troubled areas. The reason for this possibility rests in the expansion of a universal jurisdiction for tort. The Ninth Circuit's choice of law analysis is broad, but correct for the limited purpose of adjudicating claims under the statute. The analysis is fair in that the result differs little from domestic civil theories. It is also fair in that the choice of law better reflects the nature of offenses committed in violation of the laws of nations. Finally, the foreseeable circumstances are not so burdensome as to inhibit overseas commerce. Rather, it will provide victims of human rights abuses committed in violation of international law with a forum for redress. Additionally, it may result in forcing multinational corporations from the role of enabler of violator regime to a true reforming influence.