Doe v. Unocal Corp., Apples and Oranges: Why Courts Should Use International Standards to Determine Liability for Violation of the Law of Nations Under the Alien Tort Claims Act

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I. INTRODUCTION

In 1992, the military government of Myanmar (formerly Burma) negotiated a contract with the French oil company Total, S.A. (Total) to exploit the natural gas deposits in the Yadana field, which is in the Andaman Sea off the coast of Myanmar.[1] The Myanmar Oil and Gas Enterprise (MOGE), a state-owned company, and Total's newly formed subsidiary Total Myanmar Exploration and Production (TMEP) entered into a joint venture agreement.[2] In December of 1992, Total and Unocal Corporation (Unocal), a California oil corporation, agreed that Unocal's subsidiary Unocal Myanmar Offshore Company (UMOC) would purchase a portion of Total's share in the MOGE/TMEP joint venture.[3] The joint venture involved, in part, the construction of a pipeline to transport extracted gas to the border with Thailand.[4] This pipeline would pass through the Tenasserim region of southern Myanmar, home to a rebel group opposed to the State Law and Order Restoration Council (SLORC), the military junta.[5] Both Total and Unocal expressed their concerns with MOGE about the safety of the pipeline project and the potential threat that the rebels posed to the successful completion of the project.[6] To allay its partners' fears, MOGE agreed to ensure the safety of the project and to expedite the construction in Myanmar.[7] This in effect made SLORC, as owners of MOGE, the security detail for the

1. *See* Doe v. Unocal Corp., 110 F. Supp. 2d 1294, 1296-97 (C.D. Cal. 2000).
2. *See id.* at 1297.
3. *See id.* at 1298.
4. *See id.* at 1297.
5. *See id.*
6. *See id.*
7. *See id.* (quoting the Production Sharing Contract and the Memorandum of Understanding between the parties).

pipeline project. Foreign governments, international organizations, and human rights groups have continually criticized SLORC's horrendous human rights record since the military junta came to power in 1958.[8] Unocal was fully cognizant of the junta's human rights abuses, especially in light of a report prepared by their consulting firm that highlighted the regime's continual use of slave labor in the construction of roads and its attacks on civilians in the Tenasserim region.[9] The report also warned that Unocal and Total would have little room to maneuver in such circumstances.[10] Moreover, once the pipeline project was under way, Total and Unocal both became aware of various violations of international human rights law by the Burmese military in connection with the project. While both partners conducted evaluations of the project first-hand and insisted on "western style construction practices"[11] in response to reports of forced labor related to the project, a Unocal consultant in 1995 wrote a letter outlining the various human rights violations by SLORC. The letter warned that Unocal, by accepting SLORC's declaration that no human rights violations were occurring, appeared to be complicit in the violations.[12] Several Burmese villagers from the Tenasserim region filed a claim in the Central District of California under the Alien Tort Claims Act (ATCA)[13] against SLORC, Total, and Unocal.[14] These allegations included, inter alia, violations of international law arising from the use of forced labor to construct roads, military barracks, and helipads along the route where the pipeline would pass.[15] In addition, the plaintiffs alleged other violations including torture, rape, and murder along with RICO and California state law tort claims.[16] The district court dismissed SLORC as a defendant on the grounds that it was immune from suit under the Foreign Sovereign Immunities Act[17] and that these allegations did not bring its actions within the commercial activities exception of the Act.[18] The district court then dismissed Total for lack of personal jurisdiction under the California

8. *See id.* at 1296.
9. *See id.* at 1296-97.
10. *See id.* at 1297.
11. *Id.* at 1299.
12. *See id.* at 1299-1300.
13. 28 U.S.C. § 1350 (1993).
14. *See Unocal*, 110 F. Supp. 2d at 1295.
15. *See id.* at 1297-98.
16. *See id.* at 1298.
17. 28 U.S.C. §§ 1602-1611 (1994).
18. *See* Doe v. Unocal Corp., 963 F. Supp. 880, 888, 897-98 (C.D. Cal. 1997) (SLORC Dismissal Order).

long-arm statute.[19] The court then, four years after the filing of the case, granted summary judgment in favor of the remaining defendants, Unocal and two of its corporate officers.[20] *Doe v. Unocal Corp.*, 110 F. Supp. 2d 1294 (C.D. Cal. 2000).

II. BACKGROUND

The First Congress of the United States enacted the original alien tort claims statute in 1789 as part of the First Judiciary Act.[21] The legislative intent of the statute remains unclear, however.[22] The current Alien Tort Claims Act (ATCA) states that "district courts shall have original jurisdiction of any civil action by an alien in tort only, committed in violation of the law of nations or treaty of the United States."[23] The modern interpretation of this statute[24] began with the 1980 decision in *Filartiga v. Peña-Irala*.[25] The Second Circuit reversed the district court's dismissal for lack of subject matter jurisdiction in a suit by Paraguayan nationals under ATCA against another Paraguayan national alleging torture and extrajudicial killings in Paraguay,[26] a case which otherwise would have fallen outside the scope of the court's jurisdiction.[27] Since *Filartiga*, ATCA has spawned extensive litigation covering various charges, particularly for violations of international human rights laws,[28] and has played a "small but important step in the fulfillment of the

19. *See* Doe v. Unocal Corp., 27 F. Supp. 2d 1174, 1190 (C.D. Cal. 1998) (Total Dismissal Order).

20. *See Unocal*, 110 F. Supp. 2d at 1296.

21. *See* William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists,"* 19 HASTINGS INT'L & COMP. L. REV. 221, 222 (1996).

22. *See* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 789 (D.C. Cir. 1984) (Edwards, J., concurring) ("[C]onceding that the legislative history [of the alien tort statute] offers no hint of congressional intent in passing the statute.").

23. 28 U.S.C. § 1350 (1993).

24. Although plaintiffs had invoked the alien tort statute in numerous suits before 1980, only two suits had been successful under the statute. One plaintiff used the forging of a passport as a violation of international law to give rise to federal subject matter jurisdiction in what was in essence a child custody case. *See* Adra v. Clift, 195 F. Supp. 857, 865-66 (D. Md. 1961). Another plaintiff invoked the statute as an alternate basis of subject matter jurisdiction in a suit over title to slaves aboard an enemy ship on the high seas. *See* Bolchos v. Darrel, 3 F. Cas. 810, 810 (D.S.C. 1795) (No. 1,607). Given the present interpretation of the statute as a right of action reserved for violations of peremptory norms of international law, these uses of ATCA as merely a jurisdictional basis to get other causes of action into federal court are most likely no longer good law.

25. 630 F.2d 876, 880 (2d Cir. 1980).

26. *See id.* at 889.

27. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402 (1986) (limiting state jurisdiction to cases involving activities taking place or having effect in the territory of the prescribing state, activities of its nationals, and certain activities directed against a limited class of state interests).

28. *See, e.g.*, Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 799 (D.C. Cir. 1984); Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995).

ageless dream to free all people from brutal violence."[29] The resulting body of jurisprudence has slowly expanded over the past twenty years to deal with an otherwise open area of law: civil remedies for certain violations of international law. Despite calls by several lower courts for Supreme Court guidance on the act,[30] the only high Court decision on ATCA did not resolve many of the issues arising in ATCA cases in lower courts, including standards of liability.[31] Thus, ATCA jurisprudence remains largely a hodgepodge of lower court decisions.

Courts have generally followed the interpretation set out in *Filartiga*,[32] holding that in light of what congressional intent can be inferred from the legislative history of ATCA, the statute provides both jurisdiction for district courts and a cause of action for violations of the law of nations.[33] While the language of the section unambiguously gives original jurisdiction to district courts, courts have debated whether the statute provides a cause of action against a party which has violated international law. One decision supporting the grant of a cause of action by ATCA noted:

> [T]he law of nations never has been perceived to create or define the civil actions to be made available by each member of the community of nations; by consensus, the states leave that determination to their respective municipal laws. . . . In consequence, to require international accord on a right to sue, when in fact the law of nations relegates decisions on such questions to the states themselves, would be to effectively nullify the "law of nations" portion of section 1350.[34]

Under this interpretation, Congress intended ATCA, and its predecessor in the Judiciary Act of 1789, to grant a cause of action to a foreign national to remedy a violation of the law of nations by another party. Any other interpretation would render ATCA valueless in regards to violations of international law because, as Judge Edwards explained, the

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29. *Filartiga*, 630 F.2d at 890.

30. *See Tel-Oren*, 726 F.2d at 776 (Edwards, J., concurring) ("Absent direction from the Supreme Court on the proper scope of the obscure section 1350, I am therefore not prepared to extend *Filartiga*'s construction of section 1350 to encompass this case."); Eastman-Kodak v. Kavlin, 978 F. Supp. 1078, 1090 (S.D. Fla. 1997) ("The Supreme Court has yet to favor us with an interpretation of the ATCA.").

31. *See* Argentina v. Amerada Hess Shipping Corp., 488 U.S. 428 (1989) (holding that Argentina enjoyed immunity under the Foreign Sovereign Immunities Act notwithstanding its clear violations of international law in bombing a ship under a neutral state's flag during the Falkland Islands War).

32. 630 F.2d at 887 (holding that ATCA opens federal courts to aliens for adjudication of rights established under international law).

33. *See Tel-Oren*, 726 F.2d at 778 (Edwards, J., concurring). *But see id.* at 801 (Bork, J., concurring) ("[I]t is essential that there be an explicit grant of a cause of action before a private plaintiff be allowed to enforce principles of international law in a federal tribunal.").

34. *Id*. at 778.

law of nations itself does not provide rights of action. This conclusion would be inconsistent with the canon of construction that acts of Congress should not be construed as "inoperative or superfluous, void or insignificant."[35]

Judge Edwards was concerned that by construing ATCA as granting a cause of action for a violation of international law, the statute would "plac[e] an awesome duty on federal district courts to derive from an amorphous entity—i.e., the 'law of nations'—standards of liability applicable in concrete situations."[36] In an effort to alleviate some of the burden that such an interpretation would entail, he formulated an alternative approach whereby ATCA

> may be read to enable an alien to bring a common law tort action in federal court without worrying about jurisdictional amount or diversity, as long as a violation of international law is also alleged. Unlike the first approach . . . , the substantive right on which this action is based must be found in the domestic tort law of the United States.[37]

Under this approach, a claim of torture in violation of international law would be treated as an equivalent municipal tort, such as battery, by a federal court. Judge Edwards conceded that this approach "also raises a host of complex problems of its own."[38] These include problems in determining what constitutes a violation of the "law of nations," a threshold jurisdictional issue that would use a lower standard than *Filartiga*'s right of action approach.[39] Such an alternative formulation could also raise problems in establishing a sufficient nexus between the international tort alleged and the domestic tort to be adjudicated.[40] If the jurisdictional question did not require a strong connection between the two, plaintiffs could establish federal jurisdiction over a case based on a violation that has little or no relation to the true cause of action.[41] In the end, the alternative formulation of ATCA "might produce radically different results" from the *Filartiga* approach when applied to a case.[42]

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35. *Id.* (citing 2A C. SANDS, STATUTES AND STATUTORY CONSTRUCTION § 46.06 (4th ed. 1973)).

36. *Id.* at 781.

37. *Id.* at 782. This interpretation, as Judge Edwards noted, is consistent with the earlier case of *Adra v. Clift*, 195 F. Supp. 857 (D. Md. 1961).

38. *Tel-Oren*, 726 F.2d at 782.

39. *Id.* at 788.

40. *Id.*

41. Judge Edwards illustrated this problem in *Tel-Oren* by noting that, under this approach, the plaintiffs could have established federal jurisdiction for torture in Israel because the PLO terrorists illegally landed their ship in Israel and thus broke Israeli immigration law. *Id.* This is analogous to the situation in *Adra*, where the plaintiff established federal jurisdiction over a custody suit because the defendant had forged a passport. *Adra*, 195 F. Supp. at 857.

42. *Tel-Oren*, 726 F.2d at 788.

The Ninth Circuit adopted the alternative interpretation of ATCA in *Marcos Estate I*.[43] However, two years later in *Marcos Estate II*, the Ninth Circuit recanted when it explicitly adopted the *Filartiga* court's approach that ATCA "creates a cause of action for violations of specific, universal and obligatory international human rights standards[.]"[44] Other courts addressing the issue have consistently held that ATCA provides a cause of action in addition to the jurisdictional basis.[45] The court in *Xuncax v. Gramajo* gave several reasons for its adoption of the *Filartiga* approach over Judge Edwards' alternative formulation. *Xuncax* underscores the differences between the two interpretations of the statute.[46] *Filartiga*'s approach comports more readily with the plain wording of the statute and with contemporary congressional intent.[47] In addition, while interpreting international legal standards may be a "daunting task . . . , it is hardly out of scale with similar challenges federal courts have successfully addressed in the past."[48] The *Filartiga* approach also holds the advantage that

> by not tethering § 1350 to causes of action and remedies previously developed under roughly analogous municipal law, the federal courts will be better able to develop a uniform federal common law response to international law violations, a result consistent with the statute's intent in conferring federal court jurisdiction over such actions in the first place.[49]

This would also allow federal courts to "incorporate the full range of diverse elements that should be drawn upon to resolve international legal issues . . . ."[50] Moreover, the *Xuncax* court reasoned that treating an international law violation as a "garden-variety municipal tort"[51] improperly characterizes the gravity of the issues being adjudicated.

As the *Xuncax* court noted, the passage of the Torture Victim Protection Act of 1991 (TVPA)[52] has bolstered the interpretation that

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43. Trajano v. Marcos, 978 F.2d 493, 503 (9th Cir. 1992) [hereinafter *Marcos Estate I*] (affirming the district court's use of the alternative approach, whereby defendants were found liable for the torture and extrajudicial killing of an alien).

44. Hilao v. Estate of Marcos, 25 F.3d 1467, 1475 (9th Cir. 1994) [hereinafter *Marcos Estate II*].

45. *See, e.g.*, Forti v. Suarez-Mason, 672 F.2d 1531, 1539 (N.D. Cal. 1987) ("There appears to be a growing consensus that § 1350 provides a cause of action for certain 'international common law torts.'"); Xuncax v. Gramajo, 886 F. Supp. 162, 179 (D. Mass. 1995); Beanal v. Freeport-McMoRan, 969 F. Supp. 362, 366 (E.D. La. 1997); Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424, 441 (D.N.J. 1999).

46. *See Xuncax*, 886 F. Supp. at 182-83.

47. *Id.*

48. *Id.* at 182.

49. *Id.*

50. *Id.*

51. *Id.* at 183.

52. Pub. L. No. 102-256, 106 Stat. 73 (1992).

ATCA provides a cause of action for violations of international law. The statute states that

> [a]n individual who, under actual or apparent authority, or color of law, of any foreign nation, subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or subjects an individual to extra judicial 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.[53]

Courts have held that, regardless of the original intent in adopting the alien tort statute, TVPA demonstrates a current legislative intent that ATCA does create a private cause of action for violations of international law.[54] In its consideration of the proposed TVPA, the House of Representatives stated that

> TVPA would establish an unambiguous and modern basis for a cause of action that has been successfully maintained under an existing law, section 1350 of the Judiciary Act of 1789 (the Alien Tort Claims Act), which permits Federal district courts to hear claims by aliens for torts committed "in violation of the law of nations". . . Judge Bork questioned the existence of a private right of action under the Alien Tort Claims Act, reasoning that separation of powers principles required an explicit-and preferably contemporary-grant by Congress of a private right of action before U.S. courts could consider cases likely to impact on U.S. foreign relations. . . . The TVPA would provide such a grant. . . .[55]

Congress intended for TVPA to augment ATCA by codifying the *Filartiga* approach and extending it to U.S. citizens.[56]

For a violation to give rise to liability under ATCA, it must be of a norm that is universal, specific, and obligatory,[57] in effect limiting actionable violations to those of *jus cogens* as opposed to mere customary international law.[58] Courts have consulted scholarly writings

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53. *Id.* § 2(a)(1)-(2).

54. *See, e.g.*, *Xuncax*, 886 F. Supp. at 181.

55. H.R. REP. NO. 102-367, pt.1, at 3-4 (1991).

56. *See* Kadic v. Karadzic, 70 F.3d 232, 241 (2d Cir. 1995).

57. *See, e.g.*, Filartiga v. Peña-Irala, 630 F.2d 876, 881 (2d Cir. 1980); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 781 (D.C. Cir. 1984) (Edwards, J., concurring); *Marcos Estate II*, 25 F.3d 1467, 1475 (9th Cir. 1994).

58. Some courts have applied the term "customary international law" as the equivalent to "law of nations" under ATCA. *See, e.g.*, *Tel-Oren*, 726 F.2d at 807-08 (Bork, J., concurring); *Kadic*, 70 F.3d at 239 ("The liability of private persons for certain violations of customary international law and the availability of the Alien Tort Act to remedy such violations. . . ."). Other courts conducting inquiries into the definition of "law of nations" under ATCA have held the statute to apply only to violations of *jus cogens*. *See, e.g.*, *Xuncax*, 886 F. Supp. at 183-84. The higher *jus cogens* standard seems more appropriate in light of *Filartiga*'s requirement that courts not impose the "idiosyncratic legal rules" of the forum state on other states. *Filartiga*, 630 F.2d at 881. Otherwise, ATCA might be used to hold a state to a rule of customary international law to

and the general practice of nations in addition to judicial decisions regarding international law to determine what constitutes *jus cogens*.[59] The resulting conclusion is that "[i]t is only where the nations of the world have demonstrated that the wrong is of mutual, and not merely several, concern, by means of express international accords, that a wrong generally recognized becomes an international law violation within the meaning of the [alien tort claims] statute."[60] The *Filartiga* court noted that the reasoning for this "stringent" requirement is to prevent a state from imposing its "idiosyncratic legal rules upon others, in the name of applying international law."[61] This interpretation envisions a generally uniform application of universal rules of international law, if properly followed by all states in similar circumstances. In addition to its application only to *jus cogens*, ATCA decisions have generally held the statute to govern violations of norms of international law that existed at the time of the violation, not at the time the original alien tort statute was adopted.[62] This is particularly significant because international human rights law is a relatively modern creation and would not fit into an interpretation of ATCA that only concerns itself with violations of international law as envisioned in 1789. Crimes such as genocide, slavery, summary executions, and torture have been universally held by courts as violations of contemporary *jus cogens*, and thus subject to liability under ATCA.[63]

While foreign states are generally immune from suit, this immunity has not been extended to cover all actions of a state's agents. This has provided ATCA claimants with prospective individual defendants who could be held liable for international law violations where the states on

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which it has made a reservation. The requirements for a norm of international law to become *jus cogens* and thus enforceable under ATCA were outlined by the court in *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1539-40 (N.D. Cal. 1987). The distinction drawn between customary international law and *jus cogens* is that the latter norms are "non-derogable and therefore binding at all times upon all actors." *Xuncax*, 886 F. Supp. at 184 (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §§ 701-702 (1986)). This also comports better with the concept of universality jurisdiction, which allows any state, even absent another basis of jurisdiction, to exercise jurisdiction over violations of a discreet number of international norms, including piracy, slave trade, genocide, war crimes, hijacking, and possibly certain types of terrorist activities. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 404 (1986).

59. *See Kadic*, 70 F.3d at 241.

60. *Filartiga*, 630 F.2d at 888.

61. *Id.* at 881.

62. *See id.*; *see also Kadic*, 70 F.3d at 238. *But see Tel-Oren*, 726 F.2d at 813 (Bork, J., concurring) ("A different question might be presented if section 1350 had been adopted by a modern Congress that made clear its desire that federal courts police the behavior of foreign individuals and governments. But section 1350 does not embody a legislative judgment that is either current or clear and the statute must be read with that in mind.").

63. *See, e.g.*, Siderman de Blake v. Argentina, 965 F.2d 699, 715 (9th Cir. 1992).

whose behalf they act enjoy immunity.[64] Courts have interpreted the Foreign Sovereign Immunities Act of 1976 (FSIA)[65] as applicable only to a state's agents or instrumentalities acting within the scope of their authority.[66] Where an act is outside the statutory power of an agent, be he a police inspector as in *Filartiga* or president of a sovereign state as in *Marcos Estate II*, it is a private and not a public act.[67] Thus, suits would not "implicate any of the foreign diplomatic concerns involved in bringing suit against another government in United States courts"[68] that the FSIA was intended to avoid.[69] Acts which would constitute violations of *jus cogens*, such as genocide, torture, and slavery, usually also violate the municipal laws of foreign states. Therefore, neither the sovereign immunity nor act of state doctrines have shielded foreign government officers and agents from liability under ATCA.[70] While these violations are criminal in nature, international law allows states to fashion remedies under universal jurisdiction, which the United States has done in a civil form through ATCA.[71]

More recent ATCA jurisprudence has focused on extending ATCA liability for violation of the law of nations to the activities of nonstate actors. While initial ATCA cases held that certain acts which could constitute violations of international law require state action,[72] it has been noted that some crimes of universal jurisdiction such as piracy and slave trade do not require state action to become the concern of international law.[73] In addition to piracy and slave trade, the Second Circuit noted that certain norms of international law established in the twentieth century apply to individuals even when not being carried out under color of state authority. These include genocide and war crimes, crimes which are codified by binding international instruments that specifically extend beyond the scope of state action.[74] The *Kadic* court went on to hold that

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64. The ability of claimants to bring an ATCA suit necessarily relies on the agents being subject to personal jurisdiction of U.S. courts. Thus, only when individual defendants enter the United States have plaintiffs had opportunity to seek redress under ATCA for violations.

65. 28 U.S.C. §§ 1602-1611 (1994).

66. *See Marcos Estate II*, 25 F.3d 1467, 1470 (9th Cir. 1994).

67. *See id.*

68. *Id.* at 1472.

69. As a more anecdotal example of a foreign state's reaction to an ATCA suit, the Republic of the Philippines filed an *amicus curiae* brief in the *Marcos Estate* cases urging the circuit court to reverse the district court's original dismissal on act of state grounds. *See id*.

70. *See* Filartiga v. Peña-Irala, 630 F.2d 876, 889 (2d Cir. 1980).

71. *See* Kadic v. Karadzic, 70 F.3d 232, 240 (2d Cir. 1995).

72. *See* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 776 (D.C. Cir. 1984) (Edwards, J., concurring) (reasoning that PLO's actions could not be considered violations of international law against torture because the PLO was not a state under international law).

73. *See id.* at 781 (Edwards, J., concurring).

74. *See Kadic*, 70 F.3d at 241-42.

other international legal norms, notably prohibitions on extrajudicial killings and torture[75] outside the context of war crimes and genocide, are not applicable to individuals absent state action.[76]

ATCA jurisprudence has also expanded on the issue of whether corporations can be held liable for violations of international law committed through collaboration with a sovereign government. While one court has held that corporations are not "individuals" who may be held liable under TVPA,[77] no court has held corporations immune per se from liability for violations of international human rights law. Still, no court has found a corporation liable for a violation of *jus cogens* under ATCA,[78] although some of the recent flurry of lawsuits arising on the issue are still pending.[79]

The central issue in many cases involving corporate defendants, most notably *Beanal*, is establishing a sufficient connection between the acts of a defendant corporation and those of a government giving rise to liability of the corporation.[80] The Restatement (Third) of Foreign Relations Law offers some guidance for establishing state action under international law, stating, "A state is responsible for any violation of its obligations under international law resulting from action or inaction by . . . (c) any organ, agency, official, employee, or other agent of a government or of any political subdivision, acting within the scope of

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75. *See* Torture Victim Protection Act, Pub. L. No. 102-256, § 2(a), 106 Stat. 73 (1991) ("Liability.—An individual who, *under actual or apparent authority, or color of law*, of any foreign nation. . . .") (emphasis added).

76. *See Kadic*, 70 F.3d at 243.

77. *See* Beanal v. Freeport-McMoRan, 969 F. Supp. 362, 382 (E.D. La. 1997) (holding that legislative intent points to TVPA applying only to actions of individuals as differentiated from foreign states; court infers the choice of "individual" to apply strictly to real and not juridical persons).

78. One district court denied a private corporation's motion to dismiss a suit against it under ATCA for alleged violations of international law in connection with its operation of a penal facility under contract from the Immigration and Naturalization Service, although no further opinions regarding the case were published as of the date of this Note. *See* Jama v. INS, 22 F. Supp. 2d 353, 372 (D.N.J. 1998).

79. *See, e.g.*, *Beanal*, 969 F. Supp. at 382 (dismissing without prejudice due to insufficient pleadings by plaintiff, an action brought pursuant to the ATCA for alleged cultural genocide, torture, and other violations of international law by an Indonesian national against a U.S. mining corporation); Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88 (2d Cir. 2000) (reversing dismissal on *forum non conveniens* grounds of an ATCA action in which Nigerian plaintiffs alleged violations of international law by Dutch and British corporations).

80. The issue of state action should not be necessary to establish violations of those international laws that do not require such state involvement, such as genocide, piracy, and slavery. The *Beanal* court noted this distinction in its treatment of the plaintiff's various claims, although the plaintiff did not plead the claim clearly enough for the court, which allowed the plaintiff to file a more definite statement pursuant to FED. R. CIV. P. 12(e). *See Beanal*, 969 F. Supp. at 373-74.

authority of under color of such authority."[81] This definition, however, is limited to attributing actions of an individual to the state and not vice versa. It suffers the added disadvantage of being too general to allow for application to specific facts of a case,[82] leaving courts to look to other sources for standards to apply to ATCA cases.

Some courts dealing with the issue of corporate and individual liability alleged to have violated international law,[83] have adopted the "color of law" jurisprudence used in suits brought for alleged civil rights violations[84] under 42 U.S.C. § 1983.[85] The more comprehensive § 1983 jurisprudence, which has formulated four distinct tests for vicarious liability for civil rights violations, has the advantage of being applicable both to situations of private acts implicating state activity[86] and to state actions resulting in liability of private parties.[87] Under the "nexus test," a state may be liable for private action if "there is a sufficiently close nexus between the government and the challenged conduct such that the conduct may be fairly treated as that of the State itself."[88] State liability arises "only when [the state] has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State."[89]

Under the "symbiotic relationship" test, the requisite state action can be established "if the state has so far insinuated itself into a position of interdependence with a private party that it must be recognized as a joint participant in the challenged activity."[90] The Supreme Court has narrowly applied this test since the *Burton* decision in 1961. With no bright-line rules for determining what degree of involvement creates a symbiotic relationship, it is limited in application.[91]

The "joint action" test is similar to the symbiotic relationship test in that it examines whether a private party is a "willful participant in joint

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81. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 207 (1986).

82. *See Beanal*, 969 F. Supp. at 375 (determining that the RESTATEMENT (THIRD) test is inconclusive under the facts of the case).

83. *See, e.g.*, Kadic v. Karadzic, 70 F.3d 232, 245 (2d Cir. 1995) ("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 under the Alien Tort Act.").

84. *See Beanal*, 969 F. Supp. at 375.

85. 42 U.S.C. § 1983 (1994).

86. *See, e.g.*, Gallagher v. Neil Young Freedom Concert, 49 F.3d 1442 (10th Cir. 1995).

87. *See, e.g.*, Adickes v. S.H. Kress & Co., 398 U.S. 144, 152 (1970).

88. *Gallagher*, 49 F.3d at 1448 (quoting Jackson v. Metro. Edison Co., 419 U.S. 345, 351 (1974)) (internal quotations omitted).

89. *Id.* (quoting Blum v. Yaretsky, 457 U.S. 991, 1004 (1982)).

90. *Id.* at 1451 (quoting Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961)) (internal quotations omitted).

91. *Id.* at 1452.

action with the State or its agents[.]"[92] The test looks not to any long-term relationship, but to "whether state officials and private parties have acted in concert in effecting a particular deprivation of constitutional rights."[93] Courts utilizing the joint action test have adopted the additional requirement for conspiracy under § 1983 that "both public and private actors share a common, unconstitutional goal."[94] Where the unconstitutional actions are performed by the state itself and a plaintiff seeks to attribute liability to a private party, the complaint "must allege that specified conduct by a party was a proximate cause of the § 1983 injury."[95] To establish proximate cause, a plaintiff must prove that the private party exercised sufficient control over the public official's decision-making to attribute the violation to the private party.[96]

The final test under § 1983 jurisprudence is the "public function" test, whereby actions by private parties may constitute state action "[i]f the state delegates to a private party a function 'traditionally exclusively reserved to the State.'"[97] Domestically, this test has been limited to a very small number of instances.[98] Similar situations have arisen in at least one ATCA claim based on actions of a corporation in a foreign state, although the issue was improperly raised and dismissed by the court.[99]

International sources also provide a body of law relating to liability of private individuals for violations of international law which takes a significantly broader approach to vicarious liability than U.S.C. § 1983 jurisprudence. After the well-known Goering trials of high-ranking Nazi political and military leaders following World War II, several prominent

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92. Dennis v. Sparks, 449 U.S. 24, 27 (1980).

93. *Gallagher*, 49 F.3d at 1453 (citing Collins v. Womancare, 878 F.2d 1145, 1154 (9th Cir. 1989); Sims v. Jefferson Downs Racing Ass'n, 778 F.2d 1068, 1076 (5th Cir. 1985)).

94. *Id.* at 1454 (quoting Cunningham v. Southlake Ctr. for Mental Health, Inc., 924 F.2d 106, 107 (9th Cir. 1991)).

95. Brower v. Inyo County, 817 F.2d 540, 547 (9th Cir. 1987).

96. *See* King v. Massarweh, 782 F.2d 825, 829 (9th Cir. 1986).

97. *Gallagher*, 49 F.3d at 1456 (citing Jackson v. Metro. Edison Co., 419 U.S. 345, 352 (1974)).

98. *See id.* (citing Terry v. Adams, 345 U.S. 461, 468-70 (1953) (administering elections of public officials); Marsh v. Alabama, 326 U.S. 501, 505-09 (1946) (operating a company-owned town); Evans v. Newton, 382 U.S. 296, 301-02 (1966) (managing a city park)).

99. The *Beanal* plaintiff asserted that defendant Freeport-McMoRan operated in some capacity as a security force within the large areas encompassed by its mining operations. The court declined to hold that Freeport-McMoRan exercised a state function in the area because plaintiff's allegations presented insufficient evidence of such a function, dismissing the claims without prejudice. The court also declined the holding because the allegations were improperly raised in a memorandum in opposition to dismissal. Beanal v. Freeport-McMoRan, 969 F. Supp. 362, 379-80 (E.D. La. 1997).

German industrialists were tried by international war crimes tribunals.[100] Many of the defendants were indicted on charges related to the Nazi forced labor programs, which supplied privately owned factories in Germany with laborers from across occupied Europe.[101] The tribunals found most of the factory managers and corporate officers not guilty on the slavery counts because, while aware of the programs, they were not involved in creating the forced labor program nor did they have "actual control of the administration of such programs even where it affected their own plants."[102] The tribunals noted that to resist the government-initiated programs would be dangerous, with the potential for imprisonment or death.[103]

The tribunals applied laws promulgated by the Control Council of the four Allied powers occupying Germany after the war. The tribunals charged the *Krauch* and *Flick* defendants for crimes against humanity under Control Council Law No. 10, which defined such crimes as

> [a]trocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.[104]

The liability section of Control Council Law No. 10 stated that

> [a]ny person without regard to the nationality or the capacity in which he acted, is deemed to have committed a crime . . . if he was (a) a principal or (b) an accessory to the commission of any such crime or ordered or abetted the same or (c) took a consenting part therein or (d) connected with plans or enterprises involving its commission[.][105]

The tribunals noted that all of the defendants were both aware of and involved in some manner with the commission of crimes against

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100. These tribunals were considered international courts despite the fact that they were staffed by U.S. jurists appointed by the U.S. military commander of the American Zone of Allied-occupied Germany, and its rules and procedures were established by the commander. Their authority came from the Control Council for Germany, the body comprised of the four main Allied powers. Their mandate was to implement international, not domestic, U.S. law. *See* Flick v. Johnson, 174 F.2d 983 (D.C. Cir. 1949) (holding that the tribunals were not U.S. courts and thus the Supreme Court could not hear the German defendant's writ of habeas corpus).

101. *See, e.g.*, United States v. Flick, 6 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS 1187, 1194 (1947) [hereinafter *Flick*]; United States v. Krauch, 8 NUERNBERG TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS 1081, 1167 (1948) [hereinafter *Krauch*].

102. *Flick*, *supra* note 101, at 1196.

103. *Id.* at 1197.

104. *Id.* at 1191 (quoting Control Council Law No. 10, art II(1)(c) (1945)). The Control Council, the body administering Germany after World War II, was composed of the United States, France, the United Kingdom, and the Soviet Union.

105. *Id.* at 1200 (quoting Control Council Law No. 10, art II(2) (1945)).

humanity during the Nazi regime[106] and were thus all within the scope of criminal liability under Control Council Law No. 10. However, because circumstances beyond their control made it impossible to resist complicity in the crimes, the tribunals acquitted many of the defendants.[107]

Those defendants whom the tribunal found guilty on the charges of forced labor were subject to the same compulsion by the Nazi regime to comply with the forced labor programs. These defendants, however, actively sought to expand their production quotas on industrial items during the war.[108] Such increases, in light of the shortage of German laborers at the time, would necessarily entail an increase in the number of foreign forced laborers that the central Nazi planners would allocate to the defendants' factories, which the factories would be obliged to accept.[109] The tribunal found that these actions precluded the necessity defense because the defendants made a conscious decision to participate in the resulting violations of international law.[110] The convicted defendants "were not moved by a lack of moral choice, but, on the contrary, embraced the opportunity to take full advantage of the slave-labor program. Indeed, it might be said that they were, to a very substantial degree, responsible for broadening the scope of that reprehensible system."[111] Thus, making a conscious decision to participate in a violation of international law results in criminal liability notwithstanding other circumstances which might relieve a defendant of liability, such as necessity or compulsion.

The scope of liability under the Nürnberg tribunal system was much broader than that applied to ATCA and § 1983 jurisprudence in terms of attaching liability for the actions of others. The "aiding and abetting" standard is a much lower threshold than establishing one of the relationships between states and private parties under U.S. municipal civil rights law. The Nüremberg liability standard[112] has become the accepted standard for criminal liability in many of the institutions formed and instruments adopted to deal with criminal violations of international law by individuals. The 1948 Genocide Convention includes

106. *See Flick*, *supra* note 101, at 1197.
107. *See id.*
108. *See id.* at 1198; *Krauch*, *supra* note 101, at 1179.
109. *See Flick*, *supra* note 101, at 1197.
110. *See Krauch*, *supra* note 101, at 1176.
111. *Id*. at 1179.
112. The principles of the Nürnberg tribunals were reaffirmed by the U.N. General Assembly in 1946. *See Affirmation of the Principles of International Law recognized by the Charter of the Nürnberg Tribunal*, G.A. Res. 95(I), U.N. GAOR, 1st Sess., pt. II, at 188, U.N. Doc. A/64/Add.1 (1946).

"complicity in genocide" as a punishable crime.[113] More recently, article 7 of the Statute of the Yugoslav Tribunal stated that "[a] person who planned, instigated, ordered, committed or otherwise *aided and abetted* in the planning, preparation or execution of a crime [within the subject matter jurisdiction of the Tribunal], shall be individually responsible for the crime."[114] The scope of individual criminal responsibility adopted for the newly formed International Criminal Court under the Treaty of Rome of 1998 contains language incorporating the "aiding and abetting" standard in the commission of a crime under ICC jurisdiction.[115] The "aiding and abetting" standard for individual liability has become entrenched in many of the major instruments defining international criminal law.

III. NOTED CASE

Following the ATCA jurisprudence using § 1983 standards of vicarious liability for state actions, the Central District Court of California granted summary judgment for the defendant Unocal.[116] The *Unocal* court outlined its approach to the ATCA claims as a three-step test:

> To state a claim under the ATCA, a plaintiff must allege (1) a claim by an alien, (2) alleging a tort, and (3) a violation of the law of nations (international law). The parties do not dispute that the first two elements are satisfied. The issue is whether the conduct of the Myanmar military violated international law, and if so, whether Unocal is liable for these violations.[117]

In the court's opinion, the Burmese plaintiffs had not presented sufficient evidence to establish liability on the part of Unocal for SLORC's actions, and thus, as a matter of law, Unocal was entitled to summary judgment.

The court acknowledged that Unocal was aware that the Burmese military violated international law by using forced labor in conjunction with the pipeline project. The court also noted that Unocal and Total, as

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113. Convention for the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, art. 3, 78 U.N.T.S. 277.

114. Statute of the International Criminal Tribunal for Former Yugoslavia, 32 I.L.M. 1203 (1993) (adopted by the U.N. Security Council, S.C. Res. 827, U.N. S/RES/827 (1993)) (emphasis added).

115. *See* Rome Statute of the International Criminal Court, July 17, 1998, art. 25(3) (not yet published in U.N.T.S.), *at* http://untreaty.un.org/English/notpubl/rome-en.htm [hereinafter Rome Statute] ("In accordance with this Statute, a person shall be criminally responsible and liable . . . if that person: (c) For the purpose of facilitating the commission of such a crime, *aids, abets or otherwise assists in its commission* or its attempted commission, including providing the means for its commission.") (emphasis added).

116. *See* Doe v. Unocal Corp., 110 F. Supp. 2d 1294, 1296 (C.D. Cal. 2000).

117. *Id.* at 1303.

members of the joint venture with the government-controlled entity MOGE, benefited from the forced labor practices of the military.[118] However, plaintiffs failed to present any facts to suggest that Unocal sought to employ forced labor. Instead, the court found ample evidence that Unocal and Total attempted to minimize the practice.[119] The court held that "[t]o prevail on their ATCA claim against Unocal, Plaintiffs must establish that Unocal is legally responsible for the Myanmar military's forced labor practices."[120] The evidence presented by plaintiffs was insufficient, in the court's opinion, to establish Unocal's liability under international law for SLORC's forced labor of Burmese peasants in the Tenasserim region.[121] The court then went on to dismiss the remainder of the Burmese plaintiffs' claims under RICO and state law.[122]

The court analyzed the issue of vicarious liability in light of U.S. civil rights jurisprudence as "a relevant guide to whether a defendant has engaged in official action for purposes of jurisdiction under the Alien Tort Claims Act."[123] Plaintiffs sought to establish liability under the "joint action" test, the various applications of which were discussed in *Gallagher*.[124] They claimed Unocal willingly entered into a joint venture with SLORC knowing that violations of international law would be committed by the Burmese military.[125] The district court held that under *Gallagher*, even though the two parties were engaged in a joint venture with a shared goal, there was no evidence that Unocal participated in the violations nor conspired with the government to commit them.[126] Additionally, the court found that because Unocal did not control the Burmese military's decision to perpetrate violations of international law, plaintiffs failed to establish Unocal as the proximate cause of the violations.[127] Thus, as a matter of law, the court held that plaintiffs failed to bring Unocal's actions within the "color of law" requirement for liability under § 1983.

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118. *See id.* at 1310.

119. *See id.* at 1302 (citing statements by Total officials that they compensated workers when they learned of forced labor being used; in addition, Total attempted to keep records of the laborers used by the military, giving them medical exams).

120. *Id*. at 1308-09.

121. *See id.* at 1310.

122. *See id.* at 1311-12.

123. *Id*. at 1305 (quoting Kadic v. Karadzic, 70 F.3d 232, 245 (2d Cir. 1995)).

124. *See id.* (quoting Gallagher v. Neil Young Freedom Concert, 49 F.3d 1442, 1453 (10th Cir. 1995)).

125. *See id.*

126. *See id.* at 1306-07.

127. *See id*. at 1307 (applying standard for proximate cause as established in *Brower v. Inyo County*, 817 F.2d 540, 547 (9th Cir. 1987), and *King v. Massarweh*, 782 F.2d 825, 829 (9th Cir. 1986)).

The court attempted to use international standards of vicarious liability to evaluate plaintiffs' claims against Unocal, citing, inter alia, the *Flick* and *Farben* cases from the Nüremberg War Crimes Tribunals.[128] From the Nüremberg cases, the court extracted a requirement under international law that a defendant must actively participate in unlawful conduct to be held liable for violations.[129] As Unocal did not itself actively seek the use of forced labor in the construction of the pipeline, the court held that it could not be held liable under these standards for the violations committed by SLORC.[130]

IV. ANALYSIS

The *Unocal* court's analysis of ATCA is problematic for several reasons. First, the court implicitly adopted Judge Edwards' alternative interpretation of ATCA whereby the statute provides only a basis for federal jurisdiction and not a cause of action. This contradicts both the majority of ATCA case law following the *Tel-Oren* opinion and Congress' intent in passing the Torture Victim Protection Act of 1991. Secondly, the *Unocal* court improperly applied domestic legal norms found in civil rights jurisprudence. The use of such norms is erroneous on multiple grounds. Forced labor is not a violation of international law that requires a state action nexus. Furthermore, § 1983 jurisprudence addresses domestic issues and is inapposite to situations arising through violations of international law. Domestic norms are only applicable as gap-fillers when interpreting international law and should not be used where international norms already exist. Additionally, the use of domestic norms in adjudicating violations of international law in this case leads to a finding that is inconsistent with international legal standards, a result which courts have sought to avoid when dealing with ATCA claims. Finally, when the *Unocal* court did use international standards for determining liability for violations of *jus cogens*, it incorrectly interpreted those standards. Had the court not made these errors, the outcome of the case would likely have been very different in terms of Unocal's liability for the Burmese government's use of forced labor.

The *Unocal* court initially held that ATCA provides both a jurisdictional basis and a cause of action in accordance with the majority of case law.[131] However, when the court began its analysis of Unocal's

128. *See id.* at 1309.
129. *See id.* at 1310.
130. *See id.*
131. *See id.* at 1303.

liability under ATCA for forced labor, it in effect treated the claim as a domestic tort. The court bifurcated the case, first determining whether an actionable violation of international law occurred and then determining how to assign liability. The court looked to whether forced labor constitutes a violation of international law, correctly finding that it does .[132] At this point, however, it began to treat the claim as a civil rights action under § 1983 by analyzing the state action nexus and liability for private parties. While the use of § 1983 jurisprudence does find support both in prior ATCA cases[133] and in the legislative history of the TVPA,[134] the court took an overly narrow view of liability. While the court took some note of international legal sources in determining Unocal's liability,[135] it bound itself almost entirely to the principles set out in civil rights cases. In the end, the court adopted the "relatively definite and concrete standards of liability as set out in the municipal tort law"[136] when faced with the more amorphous and less codified standards of international law. This resulted in the court treating the allegations by the Burmese plaintiffs of forced labor as a "garden-variety municipal tort"[137] and not as a violation of international law. By limiting its analysis of liability to norms of domestic law rather than addressing the claims in an international legal context, the *Unocal* court in effect adopted Judge Edwards' alternative approach to ATCA claims.

The *Unocal* court's implicit adoption of Judge Edwards' alternative approach from *Tel-Oren* runs counter to both the majority of ATCA case law[138] and the *Unocal* court's own interpretation of the statute.[139] While § 1983 jurisprudence can be a helpful tool in determining liability under color of state authority, the legislative history of TVPA demonstrates an intent that liability be read more broadly in cases of violations of international law.[140] If liability under § 1983 is not as broad as liability under another standard derived from agency theories, then the latter

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132. *See id.* at 1304.

133. *See, e.g.*, Kadic v. Karadzic, 70 F.3d 232, 245 (2d Cir. 1995) ("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 under the Alien Tort Act.").

134. *See* S. REP. NO. 102-249, at 8 (1991) ("Courts should look to principles of liability under U.S. civil rights laws, in particular section 1983 of title 42 of the United States Code, in construing 'under color of law' as well as interpretations of 'actual or apparent authority' derived from agency theory in order to give the fullest coverage possible.").

135. *See* Doe v. Unocal Corp., 110 F. Supp. 2d 1294, 1308-10 (C.D. Cal. 2000).

136. Xuncax v. Gramajo, 886 F. Supp. 162, 182 (D. Mass. 1995).

137. *Id.* at 183.

138. *See* cases cited *supra* note 45.

139. *See Unocal*, 110 F. Supp. 2d at 1303.

140. *See* S. REP. NO. 102-249, at 8 (1991).

should be used to allow for the "fullest coverage possible."[141] The *Unocal* court contradicted itself, going against a consistent line of case law on the subject and defying congressional intent in its narrow reading of standards of liability for ATCA violations.

The application of § 1983 jurisprudence to the facts in the *Unocal* case is also incorrect because the international law violation alleged in the case does not require state action. Forced labor, as a form of slavery, is one of the oldest universally recognized violations of *jus cogens*.[142] Unlike such violations as official torture, extrajudicial killing, and prolonged arbitrary detention,[143] slavery falls within the smaller category of actions, including piracy and certain war crimes, that can rise to the level of *jus cogens* violations when committed by private individuals.[144] Section 1983 jurisprudence deals solely with state action and whether a defendant acted under color of state authority. Any relevance to an ATCA claim would only exist where the alleged violation required state action, such as torture or extrajudicial killing,[145] not to those cases such as *Unocal* where no state action nexus is needed.

In ATCA cases in general, domestic legal norms should not supplant existing international norms because "municipal law is ill-tailored for cases grounded on violations of the law of nations."[146] Domestic laws are based on the legislative choices and policy determinations of a legislature and in the interpretations of that state's courts. International law is based on the policy determinations of the community of nations relating to completely different needs. Using municipal legal principles to determine liability for an international crime disregards these fundamental differences.[147] The types of violations being adjudicated under ATCA, from forced labor to torture and genocide, should warrant a different approach to liability than is used in § 1983 cases.[148] The policy goal of ATCA, as expressed by Congress'

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141. *Id.*

142. *See, e.g.*, Karen Parker & Lyn Beth Neylon, *Jus Cogens: Compelling the Law of Human Rights*, 12 HASTINGS INT'L & COMP. L. REV. 411, 429 (1989) ("The oldest recognized *jus cogens* norms are the prohibition of piracy, and slavery.") (footnotes omitted).

143. *See, e.g.*, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702 (1986).

144. *See* Kadic v. Karadzic, 70 F.3d 232, 239 (2d Cir. 1995) (citing M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 193 (1992); Jordan J. Paust, *The Other Side of Right: Private Duties Under Human Rights Law*, 5 HARV. HUM. RTS. J. 51, 56-58 (1992)).

145. *See Kadic*, 70 F.3d at 239.

146. Xuncax v. Gramajo, 886 F. Supp. 162, 192 (D. Mass. 1995) (deciding to use ATCA and TVPA in place of Massachusetts tort laws).

147. *See id.* at 183.

148. For example, one of the *Xuncax* plaintiffs watched while his father was beaten and kicked, made to walk on broken glass, branded with hot irons, stuck with needles under his finger and toe nails, mutilated alive, shot in the legs then forced to stand, and finally thrown alive into a

passage of TVPA, to provide a forum for adjudication of what are heinous violations of internationally accepted norms of human rights. To judge these violations in the same light as violations of U.S. constitutional rights is to belie the enormous differences between the two. International law violations should be adjudicated in the context of the principles established under international law, not municipal law.

The use of domestic legal principals such as § 1983 jurisprudence in ATCA cases is an easier, but in the end inapposite, method of determining liability for violations of international law. When deemed appropriate in interpreting international law, a court may consider "general principles common to the major legal systems, even if not incorporated or reflected in customary law or international agreement."[149] This may be most appropriate as a gap-filler, where other sources of international law, such as customary international law or international agreements, are silent on a matter.[150] However, not all universally proscribed activities under domestic law are violations of international law per se, but only so where applicable given the nature of international law.[151] Likewise, not all domestic legal principles can be adapted to the international context.[152] Given the facts of the *Unocal* case, there is no need for a gap-filler because there exists jurisprudence from international courts in addition to the various international instruments illustrating norms accepted in contemporary international law.[153] In some areas, including vicarious liability, international jurisprudence is largely incompatible with domestic civil rights jurisprudence.[154] For a domestic court to adjudicate alleged violations of international law but to apply incompatible and inapplicable domestic jurisprudence in interpreting that law would seem counterintuitive. It could also lead to an interpretation of that law in conflict with interpretations in other states and the international legal system, which judicial interpretation of ATCA has sought to avoid.

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pit filled with burning mattresses and cardboard. *See Xuncax*, 886 F. Supp. at 170. By contrast, the oft-cited *Gallagher* was brought by a group of concert-goers who were subjected to an allegedly "unreasonable pat-down search" on their way to a Neil Young concert. *See* Gallagher v. Neil Young Freedom Concert, 49 F.3d 1442, 1144 (10th Cir. 1995).

149. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102(4) (1986).

150. *See* OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 50-55 (1991).

151. *See id.* at 52.

152. *See, e.g.*, Case Concerning Right of Passage Over Indian Territory (Port. v. India), 1960 I.C.J. 6 (1957) (International Court of Justice declining to import domestic principles of easements into international dispute over rights of passage through foreign territory).

153. *See, e.g.*, *Flick*, *supra* note 101; *Krauch*, *supra* note 101; Rome Statute, *supra* note 115, art. 25(3).

154. *See, e.g.*, Gallagher v. Neil Young Freedom Concert, 49 F.3d 1442, 1447 (10th Cir. 1995).

The *Filartiga* court specifically sought to avoid such idiosyncratic application when it limited ATCA to covering only those violations of international laws that are binding on all nations.[155] Subsequent courts have taken this requirement farther in limiting ATCA to violations of universal norms or *jus cogens*,[156] rules from which no derogation is acceptable.[157] All ATCA cases after *Filartiga* have found liability only for violations of what is considered *jus cogens*, regardless of whether that court used the *jus cogens* or customary international law formulation.[158] As the *Forti* court noted, "The requirement of international consensus is of paramount importance, for it is that consensus which evinces the willingness of nations to be bound by the particular legal principle, and so can justify the court's exercise of jurisdiction over the international tort claim."[159] Limiting actionable claims under ATCA to violations of *jus cogens* allows a domestic court to exercise universality jurisdiction over a defendant, even if the act was legal or condoned by the state in which it occurred.[160] Any broader interpretation of the "law of nations" in the statute could result in a party being held liable under a norm of international law that was not legally binding in the state where the act occurred.

Although the *Unocal* court relied heavily on § 1983 jurisprudence in granting defendants' motion for summary judgment, it did take notice of cases illustrating the international standards for liability.[161] However, its analysis of these cases, which resembled the *Unocal* fact pattern in many important ways, clearly misinterpreted those standards. The *Krauch* and *Flick* cases both point to culpability for violations of international law for anyone aiding or abetting in violations of international law such as forced labor. The defendants acquitted on the slavery counts were exonerated under the necessity defense despite their involvement in the forced labor programs.[162] They were unable to make

155. Filartiga v. Peña-Irala, 630 F.2d 876, 881 (2d Cir. 1980).

156. *See, e.g.*, Xuncax v. Gramajo, 886 F. Supp. 162, 183-84 (D. Mass. 1995); Forti v. Suarez-Mason, 672 F. Supp. 1531, 1539-40 (N.D. Cal. 1987).

157. *See Xuncax*, 886 F. Supp. at 184.

158. *Filartiga*, *Tel-Oren*, *Sideman de Blake*, and *Marcos Estate I* all involved torture. *Forti* included allegations of torture, arbitrary detention, and summary execution. *Forti*, 672 F. Supp. at 1541-42. *Marcos Estate II* included torture along with summary execution and disappearances. *Marcos Estate II*, 25 F.3d 1467, 1475 (9th Cir. 1994). These same violations were the basis of the *Xuncax* claims. *Xuncax*, 886 F. Supp. at 169-71. *Kadic* held private defendants could be liable for genocide and war crimes. Kadic v. Karadzic, 70 F.3d 232, 239 (2d Cir. 1995). *Beanal*'s allegations included torture and genocide. Beanal v. Freeport-McMoRan, 969 F. Supp. 362, 365-66 (E.D. La. 1997).

159. *Forti*, 672 F. Supp. at 1540.

160. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 404 (1986).

161. *See* Doe v. Unocal Corp., 110 F. Supp. 2d 1294, 1308-10 (C.D. Cal. 2000).

162. *See Flick*, *supra* note 101, at 1201.

a moral choice in whether to engage in the violation[163] and were forced into complicity. In contrast, those defendants found guilty on the forced labor counts in both cases were found liable because of the active steps that they took in procuring more forced laborers[164] and were thus accessories to the commission of the violations of international law that arose from those actions.[165] Unlike the acquitted defendants, the convicted defendants could not invoke the defense of necessity because they had made a moral choice to participate in the use of forced labor when they sought to increase their share of laborers and thus aided and abetted the subsequent violations.[166] All of the defendants violated international law by their involvement with the forced labor program, but those who did not make a moral choice to engage in these violations were exonerated. This reasoning has extended into contemporary international law, as illustrated by the language of the various international legal instruments dealing with human rights violations.[167]

The reasoning of the *Flick* and *Krauch* tribunals can be directly applied to the *Unocal* case. However, the *Unocal* court incorrectly applied these international standards of liability by requiring active participation in a violation.[168] This directly contradicts the Nürnberg tribunals, which held that a defendant would be liable for a violation if he had made a moral choice to participate in an activity that would necessarily result in a violation of international law.[169] The court concedes that the evidence strongly suggests that Unocal knew of the violations of international law being perpetrated by the Burmese military.[170] Unocal's consultants had warned before the joint venture was launched that SLORC uses forced labor in Myanmar.[171] Unocal benefited from the use of forced labor through the joint venture which, although not enough to produce vicarious liability under § 1983 jurisprudence,[172] was analogous to the benefit that German corporations received from the Nazi slave labor programs. The more recent international human rights instruments, such as the newly adopted statute for the International Criminal Court, seem to have adopted the same

163. *See Krauch*, *supra* note 101, at 1176.
164. *Id*. at 1179.
165. *See Flick*, *supra* note 101, at 1200.
166. *See id*. at 1202 ("The active steps taken by Weiss with the knowledge and approval of Flick . . . deprive the defendants Flick and Weiss of the complete defense of necessity.").
167. *See* sources cited *supra* notes 112-115.
168. *See* Doe v. Unocal Corp., 110 F. Supp. 2d 1294, 1310 (C.D. Cal. 2000).
169. *See Flick*, *supra* note 101, at 1200.
170. *See Unocal*, 110 F. Supp. 2d at 1310.
171. *See id.* at 1297.
172. *See* Gallagher v. Neil Young Freedom Concert, 49 F.3d 1442, 1455 (10th Cir. 1995).

standards of liability as the Nürnberg tribunals. The continuation of the "aiding and abetting" standard of liability, under which Unocal should have been found liable, militates strongly against the *Unocal* court's granting of summary judgment.

V. CONCLUSION

In light of existing international standards of vicarious liability for violations of international law, summary judgment for Unocal was inappropriate. Regardless of whether Unocal would be found liable for the Burmese government's actions under the correct standards of liability, the use of domestic legal standards, such as those of 42 U.S.C. § 1983 civil rights jurisprudence, is an inadequate surrogate for international legal standards in ATCA cases. Additionally, the use of domestic standards runs counter to the reasoning behind the majority of ATCA jurisprudence and legislative intent as expressed by the adoption of the Torture Victim Protection Act of 1991. Moreover, even if § 1983 jurisprudence might be relevant in cases involving certain types of international law violations, it is completely inapposite to the violations alleged by the Burmese plaintiffs. The *Unocal* court's holding, if adopted by future ATCA courts, could result in inconsistent application of international law by U.S. courts in comparison to courts of other states, creating a situation that previous ATCA courts had sought to avoid.

In adopting domestic standards of liability as its primary focus, the *Unocal* court rejected previously established and widely accepted international standards. While the court did look to some international cases, it misinterpreted the reasoning of those cases. If the *Unocal* court had correctly used international standards of liability as its primary guide instead of domestic jurisprudence, the outcome of the case could have been markedly different. The analysis of the *Unocal* court in determining liability for violations of international law runs counter to the standards set out by international law itself.

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