CASE NOTE

The "Unocal Case": Potential Liability of Multinational Companies for Investment Activities in Foreign Countries

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Introduction

This case note will discuss the findings and the implications of the completed first phase of the ongoing so-called "Unocal case".[1] In the first part the facts of the case and the major legal findings of the court will be examined. In the second part the implications of the findings will be commented on.

The lawsuit comprises a procedure involving three phases of litigation. As at August 2000, only the first phase, a hearing of the oral arguments of both parties before the judge, has been finalised. On 25 March 1997, in a 38-page order, Judge Paez accepted the plaintiffs' complaint, allowing entry into the second phase. The second phase, the civil discovery, is at the time of writing still in progress.# It will be completed by a summary judgment hearing, which will decide on whether to dismiss the lawsuit or permit it to proceed into the trial phase. It was initially rescheduled for 22 May 2000 but was then postponed again *sine die*. Since Judge Paez has been promoted to the United States Court of Appeals for the Ninth Circuit[2], the case was assigned to a new judge, Richard Lew.[3] This judge needs more time to familiarise himself with the matter, and this was the reason for the delay.

In this second phase the judge must consider the evidence and look at it in the most favourable light to the plaintiffs, and then

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[1] *John Doe I v. Unocal Incorporation, (1997) 963 F. Supp. 880.*

This phase of the proceedings has now been completed, and will be referred to in the postscript.

[2] For more details on this nomination see T. L. Jipping and J. LaRue in the *Washington Times*, 22 July 1999, 'Say No to Judge Paez', p.8; this article is also available through the website of FRC (Family Research Council), <http://www.frc.org/articles/ar99j5le.html>

[3] See <http://www.theburmanetnews.org>, *'The Burma Net News'*, online edition, 11 July 2000

determine whether a reasonable "trier of fact" (a juror) could prima facie make a finding at trial that the plaintiffs would win their claims. If the judge rules in this summary judgment hearing that there is such a possibility, then the case will move forward to trial, the third and final phase.[4]

Brief Facts of the Case

Unocal is one of four companies developing the Yadana Natural Gas Field in the Andaman Sea, forty miles offshore from Burma (Myanmar). The Yadana pipeline project was undertaken to obtain natural gas and oil from the Andaman Sea and transport it to Thailand via the pipeline through the Tenasserim region of Burma. Unocal Corporation, an El Segundo/California based U.S. corporation, and Total S.A., a French corporation, entered into a production-sharing contract with the Myanmar Oil and Gas Enterprise (MOGE) to develop and commercialise the Yadana field. MOGE is a company which is wholly owned by the State Law and Order Restoration Council (SLORC), now renamed the State Peace and Development Council (SPDC), which is the current military regime of Burma.

The Petroleum Authority of Thailand (PAT) is the fourth company involved. Unocal joined the venture in 1993 and invested 28.26 % to finance the pipeline project.[5]

It is alleged that under the joint venture agreement SLORC's function was to clear and level the ground and provide labour, materials, supplies and security for the project. In providing such services, SLORC allegedly enslaved farmers living in the area by forcibly recruiting them as labourers. SLORC was also alleged to have used violence and intimidation to relocate villages and settlements, confiscated farmers' property for the benefit of the project, and in doing so committed murder, assault, rape and other forms of torture.[6] According to the plaintiffs' pleadings there are strong grounds to believe that the private parties to the joint venture might not only have known

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[4] See information service of ERI (Earth Rights International), <http://www.earthrights.org.>, the plaintiffs are among others represented by a team of lawyers from ERI.

[5] See Unocal Corporation World News Release, *Unocal Announces New Myanmar Gas Discovery* (March 5th, 1996) <http://www.unocal.com/uclnews/96htm/030596b.htm>

[6] See plaintiffs' allegations in *John Doe I v. Unocal Incorporation,(1997) 963 F. Supp. 880, at 883*

about or condoned this but perhaps even worked in concert with SLORC.[7]

On 3rd October 1996 a group of 15 Burmese villagers and farmers from the Tenasserim region brought a class action suit under the pseudonym "John Doe" as plaintiff in the Federal Court of Los Angeles, California.[8] The defendants named in the lawsuit were Unocal Corporation, Total S.A., MOGE and SLORC. On 25th March 1997, the court under Judge Paez accepted the complaint.[9]

The complaint itself did not assert that Unocal directly took part in any of the above actions. However, it did maintain that Unocal subsidised SLORC's actions, were aware of the use of forced labour, and benefited from it.[10] In fact, it maintained that Unocal continues to do so and therefore Unocal should be held liable for the actions committed by SLORC.[11] The plaintiffs sought monetary damages in more than seventeen claims, as well as declaratory relief. Since the plaintiffs alleged that the situation continues to worsen they also sought injunctive relief.[12]

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[7] See plaintiffs' allegations in *John Doe I v. Unocal Incorporation,(1997) 963 F. Supp. 880, at 885*

[8] See *John Doe I v. Unocal Incorporation,(1997) 963 F. Supp. 880, at 883-884;* See also Becker DI, 'A Call for the Codification of the Unocal Doctrine' (1998) 32 *Cornell International Law Journal* 184, 186

[9] See information service of 'Earth Rights International (ERI)', <http://www.earthrights.org.>

[10] see *John Doe I v. Unocal Incorporation,(1997) 963 F. Supp. 880, at 885*; see also David I. Becker in 'A Call for the Codification of the Unocal Doctrine' (1998) 32 *Cornell International Law Journal* 184, 186

[11] Judge Paez has meanwhile ruled that the plaintiffs failed to show that Total's subsidiaries with Californian contacts should be treated as Total's agents for jurisdictional purposes, see Peters JL ' The Unocal Litigation' (1998 Year Book), *Colorado Journal of International Environmental Law and Policy* 199, 212

[12] *John Doe I v Unocal Incorporation (1997) 963 F. Supp. 880, at 883,884:* Plaintiffs sought damages by asserting two federal causes of action: 1.) violation of the RICO (Racketeer Influenced and Corrupt Organisations) Act; 2.) violation of Alien Torts Claim Act, (ATCA) by conduct such as forced labour, crimes against humanity, torture, violence against women, arbitrary arrest and detention, cruel, inhuman and degrading treatment, 3.) violation of Californian state law such as wrongful death, battery, false imprisonment, assault and 4.) violation of the California Business & Professions Code, paragraph 17200

Some Legal Issues of the Case

A) The *Alien Torts Claim Act* 1789 (ATCA) [13]:

In making this complaint in a Californian court the Burmese plaintiffs invoked federal American jurisdiction via the ATCA. The ATCA grants original jurisdiction to any civil action claimed by an alien for a tort committed in violation of the laws of nations[14] or a treaty ratified by the United States. The most widely accepted international law norms are also referred to as "jus cogens"[15], and include genocide, torture, systematic racial discrimination and slavery.

The ATCA was initially enacted to let United States courts hear piracy cases and remained as a little known law for many decades. United States courts apparently were reluctant to embark on what constitutes a violation of the "law of nations".[16]

In 1980 the ATCA 'came to life' through the case of *Filartiga v Pena-Irala*[17]. In this case the plaintiff Filartiga alleged that the defendant Pena-Irala had violated *'jus cogens'* norms.[18] For the first time a court elaborated on the 'law of nations' as stipulated in the ATCA. Even more, the court came to the unprecedented conclusion that the ATCA not only confers federal jurisdiction but also a substantive cause of action.[19] This case paved the way for a fair number of subsequent legal actions in American courts regarding human rights abuses against foreign perpetrators.[20]

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[13] United States, *Alien Torts Claim Act 1789*. Currently the *Alien Tort Statute* is embodied in 28 U.S.C. Paragraph 1350 (1994), which originated from a clause in the First Judiciary Act of 1789.

[14] Law of nations, the verbatim translation of "jus gentium" refers to international law as it exists today, see Shaw M, *International Law*, (4th edition, 1997, Cambridge University Press), p 480 at footnote 143

[15] Some human rights are 'jus cogens', as was accepted by the International Court of Justice in the *'Barcelona Traction Case'*, ICJ Report 1970,p. 3; 46 ILR, p. 178. A 'jus cogens' norm has been defined as a norm accepted and recognised by the international community of states as a norm from which no derogation is permitted, see articles 53 & 64 *Vienna Convention On the Law of Treaties* 1969. As such these customary human rights are binding even on States, which have not ratified treaties to protect those rights.

[16] See Becker, note 10, p 189

[17] (1980), 630 F 2d 876

[18] (1980), 630 F 2d 876, at 878

[19] (1980), 630 F 2d 876, at 889

[20] See for example *Trajano v Marcos* 878 F2d 1439 (9th Circuit): *Re Estate of Ferdinand Marcos Litigation* (1992) 978 F2d 493 (9th Circuit)

In the writer's opinion, the 'message' of *Filartiga v Pena Irala* can be thus be generally stated as follows: when human rights abuses violate either a treaty to which the United States is a party, or customary international law like rape, torture, genocide, gross racial discrimination and slavery, then such violations may be adjudicated in federal United States courts.

B) Unocal's defences:

Unocal's first argument in defence was a motion for dismissal on the grounds that the absence of a necessary/indispensable party constitutes a procedural bar to continue the case.

It argued that since the co-defendants SLORC and MOGE were immune from ATCA jurisdiction, according to the *Foreign Sovereign Immunities Act* 1976 (FSIA)[21], and at the same time they were necessary and indispensable parties, the suit could not be proceeded with due to the non-presence of SLORC and MOGE.

Under the FSIA, not only foreign states but also state-related entities are generally immune from any civil litigation in U.S. courts.[22] Generally speaking, the FSIA constitutes the definite 'boundary' of the ATCA. However, the immunity clause does not apply if the relevant action falls within one of six exceptions as stipulated under 28 U.S.C., paragraphs 1601 to 1611.[23] The most popular and most often applicable exception to deny immunity is the so-called 'commercial activity' exception. The court rejected the plaintiffs' contention that SLORC and MOGE should not be granted immunity since they had engaged in commercial activity in the same matter as a private citizen or a private entity. The court argued that, according to the complaint, SLORC and MOGE had engaged in the violation of human rights, which can never fall under the ambit of commercial activity. It was held that in fact the activities of SLORC and MOGE constituted exercise of their policy or power over the Burmese citizenry and as such were sovereign in nature. SLORC and MOGE were therefore entitled to sovereign immunity under the FSIA. This writer would argue that, by its decision the court, in a sense, rewarded SLORC and MOGE for

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[21] see 28 U.S.C. paragraphs 1330, 1601-1611 (1976)

[22] See 28 U.S.C. paragraphs 1330,1601-1611 (1976)

[23] For an enumeration of these exceptions see Rice E, 'Doe v. Unocal Corporation: Corporate Liability for International Human Rights Violations' (1998) 33 *University of San Franciso Law Review*, 157/158

its human rights violations by holding that they are entitled to immunity.

The court did not consider whether Unocal should be treated as a state-related entity, also thus entitling it to sovereign immunity.[24] The court also refused to imply that SLORC's and MOGE's sovereign immunity extended to Unocal.

Unocal's contention that in the absence of SLORC and MOGE no relief could be accorded among the remaining parties was rejected.[25] In determining whether a claim should be dismissed for failure to join a necessary/indispensable party it must first be verified whether the absent party is really necessary and also whether or not can be joined. Based on these determinations, the court must then consider in good conscience the case should be dismissed. The court held that Unocal as co-defendant was alleged in the plaintiffs' complaint of being a joint tortfeasor. As a result, Judge Paez ruled that the case should not be dismissed since a joint tortfeasor is not a necessary party.[26] In addition, the court held that SLORC and MOGE were not indispensable parties because complete relief could be obtained from Unocal without burdening Unocal any more than it would be burdened if SLORC and MOGE were in fact indispensable parties.

Unocal's second defence was to dispute the court's subject matter jurisdiction, arguing that State action was an assumed requirement for ATCA jurisdiction, because violation of the law of nations or a treaty can only be committed by States.

The court found that this argument, although previously correct[27], had now been overruled. Since the 1995 decision in *Kadic v Karadzic*[28], the interpretation of the ATCA has expanded subject-matter jurisdiction under the ATCA to include violations committed by a non-state actor who acts together with state-officials or with significant state aid. Under these circumstances, the non-state actor will then be deemed to be a state actor. Unocal's contention was therefore rejected by the court, thereby reiterating and confirming the modern

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[24] *John Doe I v. Unocal Incorporation,(1997) 963 F. Supp. 880, at 889*
[25] *John Doe I v. Unocal Incorporation,(1997) 963 F. Supp. 880,* at 889
[26] Judge Paez referred to the findings in *Forti v. Suarez-Mason (1987) 672 F. Supp. 1531, at 1552*
[27] As upheld in *Tel-Oren v. Libyan Arab Republic, (1984) 726 F. 2nd 774*
[28] 70 F 3d 232 (2nd Cir. 1995); also found in (1995) 34 ILM p. 1592

"post Kadic" interpretation[29] that it had subject-matter over the remaining defendant Unocal according to the ATCA.

Unocal also moved to dismiss the case under the Act of State doctrine, arguing that, even if Unocal could be considered a state actor, the claims should be barred because adjudication would interfere with the foreign policy efforts of Congress and the President. Therefore the court would lack the right to hear the case.

The Act of State doctrine precludes a court from considering a plaintiff's claim when either the claims or the defences asserted would require the court to determine that a foreign sovereign's official acts executed within the boundaries of its territory were invalid.[30]

Judge Paez rejected that contention by stating that the invocation of the Act of State doctrine is only applicable when it is apparent that the relevant adjudication of the matter will bring the nation into hostile confrontation with the foreign state.

Judge Paez ruled that under customary international law, states are prohibited from torturing or enslaving their citizens. Therefore adjudication of such internationally denounced human rights violations would hardly be capable of interfering with the political activities protected by the doctrine. The judge further noted that even if the doctrine were to apply by its terms, there are possible exceptions leading to its non-application.[31] One exception is the so called 'treaty exception'.[32] When there is a relevant treaty provision between parties or a multilateral agreement the Act of State doctrine might not be applicable given that controlling legal principles are stipulated in the agreement.

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[29] For case law expanding the application of ATCA liability see *Beanal v. Freeport-Mc Moran Incorporation (1997) 969 F. Supp. 362; Mushikiwabo v. Barayagwiza No 94 Civ. 3627, 1996 WL 164496*

[30] The Act of State Doctrine was established in United States case law by the U.S. Supreme Court in *Banco Nacional de Cuba v. Sabbatino, (1964),376 U.S. 398; 35 ILR ,2*

[31] *John Doe I v. Unocal Incorporation,(1997) 963 F. Supp.* 880, at 894-95

[32] Malcolm N. Shaw, *International Law* (1997 Cambridge University Press) p. 133 referring to *Kalamazoo Spice Extraction Co. v. Provisional Military Government of Socialist Ethiopia* (1984) 729 F2nd 422 and Justice Harlan in the *Sabbatino case*, (1964) 376 US 398, at 428

Judge Paez argued therefore that since Burma is a signatory to the *International Labour Organisation Convention No. 29*,[33] which prohibits the use of forced labour, the treaty exception to the Act of State Doctrine applies.[34]

As a final motion to avoid adjudication, Unocal contended that the plaintiffs had failed to state a claim for which relief could be granted, by arguing that the Burmese farmers had not alleged any facts that could establish Unocal's liability for SLORC's actions.

C) Findings of the Court

The court agreed that if Unocal was merely a business partner of SLORC a dismissal according to the ATCA could have been granted. This argument however was rejected, on the grounds that the plaintiffs could prove facts in support of their allegations that Unocal and SLORC have either conspired or acted as joint participants to deprive the plaintiffs of international human rights in furthering their financial interests in and from the project.

The court admitted that case law in this field was not "a model of consistency".[35] However it held that there might be a possibility of holding Unocal liable if the plaintiffs' allegations could be proven that Unocal was aware of and has benefited from the use of forced labour and slavery, the prohibition of which are "*jus cogens*" norms in the "modern" law of nations. The court also found the plaintiffs' allegations regarding Unocal were sufficient to proceed to the next stage of the case, for it knew or should have known about SLORC's human rights violations when it entered into the joint venture. This is

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[33] Shaw MN, *"International Law"* (1997, Cambridge University Press, 1997) p. 249, footnote 331: the International Labour Organisation was created in 1919. In 1946 it became a specialised agency under article 63 of the UN Charter.
See also ILO Commissions Report, 2nd July 1998, Geneva, *'Forced Labour in Burma'*, Official Bulletin, Vol. 81, 1998, p. 140-142, para. 528-538

[34] For a detailed discussion, see Peters JL, ' The Unocal Litigation' (1998) *Colorado Journal of International Environmental Law and Policy*, 199, at 209 and footnote 98

[35] *John Doe I v. Unocal Incorporation,(1997) 963 F. Supp. 880, at 890.* The reason for a certain degree of inconsistency is that there are a number of different approaches to the state-action question. Judge Paez applied the 'joint action test'. There are however other tests available such as the public function test and the state compulsion test, see Lucien J. Dhooge, 'A Close Shave in Burma: Unocal Corporation and Private Enterprise Liability for International Human Rights Violations', (1998) 24(1) *North Carolina Journal of International Law and Commercial Regulation* 1, 34 ,footnote 244

because Unocal allegedly allowed SLORC to organise and oversee the pipeline project. Using the "joint action approach" Judge Paez concluded that Unocal was acting as a wilful participant "in joint action" with SLORC and thus its action shall be deemed as a state-action under the ATCA.

This is the truly novel aspect of the Unocal case. Before the dismissal of Unocal's final motion, no court had held that a corporation could be liable under the ATCA by acting in concert with a foreign government in the violation of universally recognised human rights standards.

The ruling of Judge Paez goes well beyond the already liberal and extensive interpretation of the ATCA in *Kadic v Karadzic*[36] regarding state-action.

In *Kadic v Karadzic*[37] it was held that subject matter jurisdiction under the ATCA can be extended to include violations of the law of nations by non-state actors. Although the Bosnian-Serb military faction, run and engineered by Karadzic, was not a state actor while violating international law, it certainly acted together with Serb state-aid and state officials.

Judge Paez extended that line of reasoning even further, by stating that not only violations of the law of nations, but also the mere acting of a private defendant '*in concert*' with a state actor who commits violations is sufficient.[38] In that regard it makes no difference if Unocal, unlike Karadzic who allegedly masterminded the atrocities, actively did not take part in SLORC's actions, as long as it knew and condoned the violations of international law as executed by SLORC.

Utilising the 'joint action approach' this 'threshold' devised by Judge Paez for holding liable a non-state actor as a state actor is certainly the lowest possible. Under Judge Paez's interpretation of the ATCA all that is required for a court to find joint action is simply a certain substantial degree of cooperative action between the private actor and the state-actor in effecting the deprivation of human rights. The court concluded that the

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[36] 70 F 3d 232 (2nd Cir. 1995); 34 ILM, 1995, p. 1592

[37] 70 F 3d 232 (2nd Cir. 1995); 34 ILM, 1995, p. 1592

[38] As a matter of fact this view was not expressed for the first time by Judge Paez, but was also commented upon in *Kadic v Karadzic*, see 70 F 3d 232 (2nd Cir. 1995), 245

joint venture relationship between Unocal and MOGE is sufficient to be considered as joint action.

Apparently anticipating objection to the application of the 'joint action approach' Judge Paez noted *obiter dicta* that even if there had not been state action on the part of Unocal sufficient to meet the ATCA's requirements, Unocal might still be subject to individual liability. The court held that for a handful of private acts, including slave trading, a private individual may be held liable under the ACTA for violations of international law, even in the absence of state action.[39] The court deemed that participation in the slave trade and utilisation of forced labour as alleged in the plaintiffs' complaint to be committed by Unocal is still actionable even in the absence of state action.[40]

Finally, the court also raised the issue of the statutes of limitation applicable to plaintiffs' claims. It was found that the earliest claim specifically accrued was on 12th May1992. With respect to the plaintiffs' state law tort claims, the court held that California's one-year statute of limitations for personal injury tort was applicable. The majority of plaintiffs' claims had become statute-barred. However, the court found that the plaintiffs could override the statute of limitation by invoking extraordinary circumstances beyond their control, thus making it impossible to file the suit within the limitation period.

The plaintiffs convincingly alleged that there was no possibility of obtaining relief in Burma due to the virtual non-existence of an independent judiciary. In addition, though acknowledging that the plaintiffs failed to bring their claims in the United States on a timely basis, it was held that this was no reason to deny equitably tolling the statute of limitations, since attempts to access American courts could attract reprisals by SLORC against those plaintiffs remaining in Burma. As a result, the court concluded that the plaintiffs were entitled to resort to equitably tolling the statute of limitation for as long as SLORC remains in power, since the plaintiffs would be unable to obtain judicial remedies inside Burma.

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[39] *John Doe I v Unocal Incorporation,(1997) 963 F. Supp. 880, at 891*,see also Dhooge LJ, 'A Close Shave in Burma: Unocal Corporation and Private Enterprise Liability for International Human Rights Violations', (1998) 24(1) *North Carolina Journal of International Law and Commercial Regulation*, 1, 57-58

[40] *John Doe I v. Unocal Incorporation,(1997) 963 F. Supp. 880, at 891*

Comments on the Findings of the Court

1. Interaction of ATCA and FSIA:

The court asserted subject-matter jurisdiction over Unocal as a state actor under the ATCA, arguing that Unocal acted jointly with state officials. At the same time Unocal was denied foreign sovereign immunity as provided under the FSIA through the argument that Unocal should not be treated as an agent of the state of Burma.

Under United States law, State related entities such as MOGE are considered to be immune under the doctrine of sovereign immunity as stated in the FSIA. On the one hand Unocal is considered as a state-actor generating liability under the ATCA, but on the other it is not regarded as a state-related entity, so that foreign immunity under the FSIA does not apply. This holding, it is submitted, is inconsistent.

Some courts have raised the issue of whether sovereign immunity under the FSIA should be granted to individuals acting as agents for a sovereign state.[41] The dilemma in this sound suggestion, however, is that ATCA jurisdiction would then virtually vanish, since only state actors are subject to the ATCA.[42] The ATCA provides for jurisdiction over human rights violations but its effectiveness cannot encroach on the doctrine of state sovereign immunity, which, in the United States, is embodied in the FSIA. In order to overcome this intricate hurdle, courts have resorted to considering abuses to be state action for the purpose of violating international law, but not state action for the purposes of the FSIA. This may be a questionable compromise. However, it has now become an established practice.[43] Companies therefore have to be prepared not only to be liable for international human rights violations under the ATCA, but also to be liable as the sole party, since the state or a state-related entity they operated with will likely be accorded immunity under the FSIA. Ironically, in order to escape liability, a foreign company might be well advised to become a fully State-owned entity in the host country, so as to fall under the protection of the FSIA.

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[41] *Herbage v. Meese* in 747 F. Supp 60, 66-67

[42] see Fitzpatrick J, 'The Future of the Alien Tort Claims Act of 1789: Lessons from *In re Marcos*, Human Rights Litigation' (1993) 67 *St. John's Law Review*, 491, 497

[43] see Osofsky HM, 'Environmental Human Rights under the Alien Tort Statute: Redress for Indigenous Victims of Multinational Corporations', in (1997) 20 *Suffolk Transnational Law Review*, 335, 393, n. 219

2. Indispensability of Parties:

The fact that private defendants, such as that of Unocal, will be on their own in defending themselves in human rights litigation is further supported by the court's finding that SLORC and MOGE are not necessary/indispensable parties to the suit. The court accepted the plaintiffs' allegations that SLORC, MOGE and Unocal were joint tortfeasors. The plaintiffs' allegations are however contradictory, since the complaint swarms with references of a conspiracy between SLORC, MOGE and Unocal, while at the same time denying that they are indispensable parties. The complaint also contains allegations that SLORC and MOGE engaged, directed and encouraged the commission of human rights violations. The allegations indicate that there is a rather wide-ranging cooperation of collaboration between the three defendants. It is quite difficult to understand why despite this close relationship as alleged in the complaint the defendants were not regarded as necessary/indispensable parties to litigation but nevertheless as joint tortfeasors.

3. Liability under the ATCA:

The court held against Unocal in accepting the Burmese plaintiffs' claim that Unocal knew or should have known about SLORC's practices of forced labour and relocation of villages when agreeing to invest in the project.[44]

The court also held that Unocal was aware of and benefited from the use of forced labour and that Unocal either conspired or acted as a joint participant with SLORC to deprive the plaintiffs from enjoying their most basic human rights for the sake of advancing its commercial interest in the project.[45] Judge Paez's ruling in this regard is absolutely novel. It is also bound to have major ramifications. A private company may now be held liable for violations of international human rights committed by an entity other than itself.

Judge Paez resorted predominantly to the findings of *Kadic v Karadzcic*[46], where a private defendant was held liable under the ATCA for war crimes, genocide and torture. Since the private defendant acted in concert with the former Yugoslav government, it was held that the defendant itself falls under the state action criteria of the ATCA. Through this comparison

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[44] see *John Doe I v. Unocal Incorporation,(1997) 963 F. Supp. 880, at 896*
[45] see *John Doe I v. Unocal Incorporation,(1997) 963 F. Supp. 880, at 896*
[46] 70 F 3d 232 (2nd Cir. 1995); 34 ILM, 1995, p. 1592

with the *Kadic* case, the court found that Unocal's acts were sufficiently linked to the human rights violations committed by SLORC, since actions were taken under 'colour of law' for purposes of ATCA jurisdiction. Unocal acted 'in concert' with SLORC by having SLORC provide for security and recruit forced labour for Unocal. According to Judge Paez's interpretation of the joint action test 'in concert,' a state action can be said to be present, if there is a substantial degree of cooperative action between the state and private actors in effecting the deprivation of human rights.

The facts of the case may support the presumption that Unocal acted with state officials or at least with significant state aid, and also that Unocal seems to have been a wilful participant in the violations of international human rights. There is however a very important difference from the *Kadic* case and other ATCA cases.

Unocal is being sued for actions not performed by itself like in the *Kadic* case, where Karadzic was sued for actions allegedly performed, masterminded and planned by himself. Unocal is being sued in fact for actions committed by its business partner SLORC. In holding Unocal liable the court extended liability under ATCA beyond the direct perpetrators of the violence.

The question is how viable is the standard of 'knew or should have known' as stated by the court with regard to Unocal's alleged awareness of SLORC's human rights violations. Or, in other words, to what extent must a multinational corporation be involved in an activity (with its host State 'partner') potentially affecting the human rights of the local populace before it becomes liable for human rights violations committed by its partner? Is simply being a joint venture partner sufficient to generate liability?

It is quite evident that Unocal had extensive knowledge of human rights abuses in Burma, or at least of human rights problems of its domestic business-partner. Hardly anybody doing business with or in Burma can claim in good faith not to have heard of human rights violations by the Burmese regime. A problem with that standard could arise when corporate investment is made in countries where human rights abuses and violations have not been as public and well known as in the case of Burma.

As a result, it is important for American corporations investing in foreign countries to be aware that a court may consider that

their acts in cooperation with the 'host' government could constitute state action. Any forecast in this regard seems to be however rather unpredictable at the current stage.

If the case proceeds to trial and the trial judge should confirm the findings made so far, then the extent of this holding could have significant implications. It might very well open the floodgates for litigation. Any company involved in foreign investment might become subject to liability for human rights violations, not committed by itself but by its business partner.

As a matter of fact, some U.S. lawyers have already commenced signing up clients in other countries to sue US-based companies over events that took place in those other countries. In the past American judges tended to reject suits like this, but now 'litigation-hoppers' lawyers are beginning to seize on the ATCA to charge corporations with a variety of misdeeds such as polluting the earth or running sweatshops.[47]

4. The Act of State Doctrine:

The court held that this doctrine is not applicable because adjudication of the case would not bring the U.S. into hostile confrontation with SLORC. This raises several questions about the future of the doctrine in human rights litigation. The hostile confrontation standard was applied first in the *Marcos*-case.[48]

In that case it was suggested in *obiter dicta* that since Marcos was no longer in power, there was no reason to believe that a hostile confrontation between the United States and the Philippines would arise. So the Act of State doctrine was dismissed. It remains doubtful, however, if a mere *obiter dicta* suggestion should be applied to the Unocal case or any other case as the governing rule of law with precedent-making effect.

Moreover, neither the court in the Marcos case, nor Judge Paez went on to define 'hostile confrontation'. It remains unclear whether 'hostile confrontation' refers to an armed conflict or to a break of diplomatic relations or even maybe only to a tense diplomatic relationship.

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[47] McMenamin B, 'Bring me your tired, your poor, your litigious', 164 (12) *Forbes*, 180. (New York, Nov. 15, 1999)

[48] *Republic of the Philippines v. Marcos* (1988) 862 F. 2d 1355 at 1360

In the first case, the Act of State Doctrine would hardly ever be applicable at all, since a break-out of an armed conflict over human rights issues is most unlikely.

In the second case, if 'hostile confrontation' refers to something less than a looming armed conflict, the question arises whether the possibility of economic sanctions, for instance, is sufficient to apply the doctrine.

In the Unocal case, the court decided to put itself into U.S.-Burmese relations by denying the possibility of 'hostile confrontation' through adjudication. By doing so, the court embarked on foreign relations, an area where under the separation of powers concept, belongs exclusively to the executive and legislative branches.

5. Tolling the statute of limitations:

The court held that the unavailability of legal relief in Burma due to lack of a functional and independent judiciary warranted the grant of equitable tolling relief on grounds of extraordinary circumstances. As such, the court held that the plaintiff's claims were subject to tolling for at least as long as SLORC maintained power in Burma.

Since it seems unlikely that SLORC or its successor SPDC will be overthrown or removed from power in the near future, the limitations period applicable to the plaintiff's claims could be tolled for several years. Such 'open-end extensions' may be justified by looking at the plaintiffs' situation. However, for the private companies who are defendants they impose a substantial burden, since they may be subjected to long delays between the alleged wrongful action and the initiation of litigation.

Private parties may be held liable for acts that took place decades ago and without any misconduct on their part. Instead they might be held liable merely due to an investment agreement with a foreign state or a foreign state entity. The Cuban regime for instance has been in power for over 40 years. The writer submits that under Judge Paez's reasoning there is a possibility that if and when the regime of Fidel Castro is removed, private companies could face liability suits for participation in business investments made during Castro's rule.

Conclusion

The court's decision to grant jurisdiction over Unocal has set a groundbreaking precedent as it allows victims to sue multinational companies for violations of international human rights law committed by their sovereign partners in the host country. This is a 'pioneering' decision and hence a new era might be dawning for American companies transacting business overseas.

However, as discussed earlier, some findings of Judge Paez can be questioned. The interpretation of the ATCA goes beyond the holdings of previous case law, even much beyond the findings of the *Kadic*-case.

The court has given an open-ended ruling as regards a multinational corporation's involvement and the extent of acting 'in concert' with a State partner vis-à-vis human rights violations. The knowledge standard a private company must have to be classified as State-actor under the ATCA is also not satisfactorily elaborated in Judge Paez's ruling.

The interaction between FSIA and ATCA leads to the anomalous result that private companies acting in concert with foreign sovereigns will be held liable as state actors under the ATCA while they do are not accorded immunity under the FSIA. At the same time the actual culprits, the States and State-related entities enjoy full protection from liability as they are covered by the FSIA. The defendants SLORC and MOGE could have been deemed necessary/indispensable parties with much better arguments than merely considering them as joint tortfeasors only.

The court's rejection of the Act of State Doctrine does not seem to be on safe legal grounds. The rejection is solely based on the vague and undefined term of 'hostile confrontation'. The equitable tolling for the plaintiff, seems from a defendant's point of view, rather inequitable since it could create a material detriment for the latter.

These criticisms are by no means meant to raise sympathy for Unocal. The ruling itself does not however unequivocally determine Unocal's liability beyond doubt.

The ruling's implications on the other hand would be so sweeping for countless other companies in the global economy that appeal-courts might feel compelled to narrow its scope.

This is so especially since many decisions in the recent past made by Judge Paez have attracted criticisms.[49]

Whatever the decision of the newly appointed judge in the summary judgement hearing of the second phase might be, as far as human rights are concerned the case can already be considered as a 'victory' to those who are eager to control and check the activities of multinational corporations. If the Unocal case does nothing else but encourage investing multinational corporations to thoroughly investigate the human rights situation in the host country before jumping to invest and possibly attracting human rights liability, then the decision has achieved a purpose for the cause of human rights.

In this writer's opinion, the effect of the Unocal litigation at this stage seems to be that foreign investment companies should be more cautious about entering into investment agreements with governments of host-states that have a poor human rights record, and that they not turn a blind eye to human rights abuses in developing countries.

While this paper was being written an important development took place. Unocal is already 'celebrating' a U.S. Supreme Court decision which in a sense can be considered relevant to the *John Doe I v Unocal Incorporation* case under discussion. On 19th June, 2000 the U.S. Supreme Court unanimously struck down the 'Massachusetts Burma Law', adopted in early 1996.[50] This State Law effectively prohibited Massachusetts from purchasing goods or services from corporations which have made investments in Burma. It was modelled after similar measures to discourage investors from doing business in South Africa. The law had an impressive array of supporters, among them 78 Members of the Congress, the student-led Free Burma Coalition, Aung San Suu Kyi and also religious leaders. Over 20 municipalities and counties around the US followed with selective purchasing laws of their own. In 1998 the National Foreign Trade Council (NFTC), a business group challenged the constitutionality of the Massachusetts Burma law on a number

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[49] See for example Jipping TL & LaRue J in the *Washington Times*, July 22nd 1999, 'Say No to Judge Paez', p.8; this article is also available through the website of FRC (Family Research Council), <http://www.frc.org/articles/ar99j5le.html>.

[50] See *Crosby v National Foreign Trade Council* 530 US 2000; see also Linda Greenhouse, 'Justices Overturn a State Law on Myanmar', *The New York Times*, 20th June 2000, p. 23. The case can be found at the web site <http://laws.findlaw.com/us/000/99-474.html> (accessed as at 28/2/2001).

of grounds. Unocal is one of NFTC's 550 members and one of the main forces behind the offensive.[51]

The recent Supreme Court ruling is based on the finding that states have no power according to the Constitution to take positions with foreign policy implications, since US foreign policy has to be single and coherent. The Supreme Court held that crucial differences between the state law and existing federal sanctions against Burma compromise the very capacity of the President to speak for the nation with one voice in dealing with other governments.[52]

How that Supreme Court decision regarding the 'Massachusetts Burma Law' will affect the approaching summary judgement hearing of the second phase of the Unocal case under newly appointed Judge Ronald Lew is, at the time of writing, a matter of speculation.

Postscript

After submitting this article to the editor a decision in the summary judgement hearing was made[53]. On the 31st of August 2000 Judge Lew dismissed the plaintiffs' claim. He held that despite the overwhelming evidence of human rights abuses committed for Unocal's pipeline project and with Unocal's knowledge, Unocal cannot be held liable.

The decision was made on the grounds that Unocal did not directly participate in forcing villagers to work on the project and did not encourage or influence the Burmese security forces to use slave labour. As a result Judge Lew argued that although the plaintiffs had presented evidence:

a) demonstrating that the Unocal pipeline project hired the military to provide for security, and

b) showing that the military forced villagers to work and had entire villages relocated for the benefit of the project and while doing so had committed numerous acts of violence

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[51] See Risen J, 'Trade Ruling is Victory for Oil Giant', *The New York Times, 20th June 2000*, p. 23

[52] See information service of ERI (Earth Rights International), <http://www.earthrights.org.>

[53] United States District Court, Central District of California, Case No.: CV 96-6112 RSWL (BQRx), John Doe et al. versus Unocal Corporation, Union Oil of California, John Imle and Roger Beach. The 41 pages of the decision can be downloaded through the website of ERI (Earth Rights International), <http://www.earthrights.org/090100PressRel.html>

amounting to human rights crimes, of which Unocal was aware

... it had failed to show that Unocal in fact was able to exercise control over the military's particular decisions concerning the violations[54]. According to Judge Lew there was also no evidence to assume that Unocal engaged in a conspiracy to commit the crimes.[55] Judge Lew apparently concluded that Unocal is free to hire as a security force anyone, even one of the most brutal violators of human rights, without being held accountable by a United States court.

Ostensibly, litigation in this case is not yet over. Given that even Judge Lew found that Unocal knew about and benefited from abuses, counsel for the plaintiffs are by no means discouraged from appealing the decision of Judge Lew. Plaintiffs' lawyers appear confident in their view that Judge Lew's ruling is merely a temporary obstacle in their efforts to ultimately hold Unocal responsible. They have already announced an appeal to Judge Lew's decision in the Ninth Circuit Court of Appeals.[56]

[54] see pages 37,38 of the decision
[55] see page 38 of the decision
[56] see <http://www.earthrights.org/091100PressRel.html>