THE ALIEN TORT CLAIMS ACT OF 1789: AN 18TH CENTURY LAW BECOMES A 21ST CENTURY TOOL IN COMBATING HUMAN RIGHTS VIOLATIONS – AN ETHICAL EXAMINATION

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> [Multinational corporations] should respect the human rights of its employees . . . whether or not local companies respect those rights. This injunction will preclude gross exploitation of workers, set minimum standards for pay, and prescribe minimum standards for health and safety measures.[1]

Global corporations, operating in foreign host countries with dissimilar cultures and laws, political institutions and ideologies, commercial practices and customs, and levels of economic development, are confronted with different ethical standards with which they gauge their conduct and ascertain their moral responsibilities.[2] It is tempting in such circumstances to adopt the theory of ethical relativism - under which something can be judged to be morally good if, in one particular society, it complies with the prevailing moral standards, but wrong if it does not - and to declare that the proposed practice or activity is morally acceptable, because is conforms with the moral standards or practices of the particular society.[3] It may be equally tempting to insulate or disassociate the company from questionable conduct of its host country partner, so that repercussions are muted or avoided.

A recent decision of the Ninth Circuit Court of Appeals vitiates both tactics, and exposes U.S. multinational corporations to liability for human rights violations committed by foreign governments in the course of undertaking economic development projects. In *Doe I v. Unocal Corp*.,[4] residents of Myanmar, alleging human rights violations - forced labor, murder, rape and torture - perpetrated by the Myanmar military in developing a gas pipeline, were permitted to proceed with their action against Unocal Corporation, the Myanmar government's commercial partner in the pipeline development project, under the Alien Tort Claims Act.[5] While this decision was suspended by the Ninth Circuit pending rehearing by the en banc court and therefore cannot be cited as precedent except to the extend adopted by the en banc court,[6] the authors of this paper seek to demonstrate that the panel decision is consistent with ethical theory.

Further, the *Unocal* decision has "set off alarms among business groups, which worry that the likes of IBM, Citibank, and Coca-Cola may be socked with huge jury awards for the misdeeds of Third World governments,"[7] and must be examined closely by multinational corporations that undertake economic development projects for repressive foreign governments in third-world countries and do not want "to face torture survivors in court - a publicity nightmare."[8]

(1) Unocal's role in the pipeline project.

In 1988, the military took control of the government of Burma, renamed the country Myanmar, instituted the State Law and Order Restoration Council as the new military government of Myanmar ("Myanmar Military"), and established a state owned company, Myanmar Oil and Gas Enterprise ("Myanmar Oil"), to develop and sell the country's oil and natural gas.[9] In 1992, Myanmar Oil entered an agreement with Total S.A., the French Oil company, to develop and sell natural gas located off the coast of Myanmar.[10] Total S.A. created a subsidiary, Total Myanmar Exploration and Production ("Total Myanmar"), to undertake two principal operations, gas extraction and gas transportation.[11] The latter operation involved the construction and operation of a gas pipeline through which the natural gas could be transported from the coast, through Myanmar, and into Thailand.[12]

Unocal Corporation acquired a 28% interest in Total Myanmar's gas extraction and gas transportation operations, and housed those interests in two subsidiaries, Unocal Myanmar Offshore Company, which was established to extract the

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natural gas deposits from their offshore field, and Unocal International Pipeline Corporation, which was established to undertake the construction and operation of the gas pipeline.[13]

(2) Unocal's involvement with the Myanmar Military in the pipeline project.

Evidence in the record demonstrated the involvement of the Myanmar Military in the gas pipeline project and Unocal's awareness of that involvement.[14] The Myanmar Military's role, confirmed by internal Unocal memoranda summarizing Unocal's meetings with Total Myanmar, was essentially to provide security for Unocal's survey teams and the pipeline's corridor, to clear roads along the proposed pipeline route, and to construct helipads.[15] Information (aerial photos, surveys, and topographical maps) provided by both Unocal and Total Myanmar guided that work, and daily briefings and meetings, involving Total Myanmar, Unocal, and Myanmar Military personnel, were conducted to coordinate the next day's activities.[16] Likewise, an internal briefing document prepared for Unocal executives acknowledged the Myanmar Military's contractual obligation to provide security for the pipeline,[17] and a document prepared by Total Myanmar confirmed that Unocal had hired the Myanmar Military to provide security for the project, that each working group had a security officer to control the army positions, and that daily security coordination was a working procedure.[18]

Evidence in the record also demonstrated that Unocal was apprised the Myanmar Military engaged in conduct violative of human rights. The Court noted that "the successive military governments of first Burma and now Myanmar have a long and well-known history of imposing forced labor on their citizens,"[19] and that, before it invested in the venture, Unocal was warned by its consultants[20] and partners[21] that the Myanmar Military might employ forced labor and commit human rights violations in carrying our the project."[22] Likewise, even after it invested in the venture, Unocal was warned by human rights organizations[23] and by its own consultants,[24] employees,[25] executives,[26] and partners[27] that the Myanmar Military "was actually committing such violations in connection with the Project."[28]

(3) Plaintiffs' allegations of human rights violations.

In both their complaint and their deposition testimony, plaintiffs, who are villagers from the rural area through which the pipeline was constructed, claim that the Myanmar Military used threats of violence to force them to work on and serve as porters for the pipeline construction project.[29] This work consisted of constructing helipads and roads, hauling construction materials, and cleaning the army camps for the soldiers guarding the pipeline.[30] In addition, plaintiffs allege "the Myanmar Military subjected them to acts of murder, rape and torture."[31] One plaintiff testified that her husband was shot by soldiers because he attempted to escape, and that she and her baby were thrown into a fire in retaliation for the attempted escape.[32] As a result, the woman was injured and her child killed.[33] Other witnesses claimed that villagers who refused to participate in the forced labor program were executed by the Myanmar Military.[34] Several plaintiffs testified that they were raped at knifepoint by Myanmar soldiers who supervised the pipeline construction work.[35]

(4) Unocal's liability under the Alien Tort Claims Act.

Under the Alien Tort Claims Act (ATLA), aliens are permitted to pursue a cause of action in tort in federal district court for violations of "specific, universal and obligatory international norms."[36] In order to succeed in an ATLA claim against a private party, such as Unocal, two preliminary issues must be resolved: (1) whether the tortious conduct complained of is a violation of the laws of nations,[37] and (2) whether the alleged tortious conduct requires the private party to engage in state action for liability to attach, and if so, whether the private party so engaged in state action.[38]

With respect to the first issue, the Court noted "that torture, murder and slavery are *jus cogens* violations,[39] and thus violations of the law of nations.[40] Because rape can be a form of torture,[41] the plaintiff's allegations of rapes by the Myanmar Military were sufficient to plead violation of the law of nations.[42] Likewise, because forced labor is widely perceived as a *jus cogens* violation,[43] the plaintiff's allegations that they were forced to work on construction of the pipeline and helipads were sufficient to state a violation of the law of nations.[44]

With respect to the second issue, the Court noted that the law of nations assigns individual liability to particularly egregious conduct (such as slave trading, genocide, or war crimes) without requiring state action,[45] and that crimes like rape, torture, and summary execution, when committed in furtherance of such especially egregious crimes, do not require state action for ATCA liability to attach.[46] The Court further determined that forced labor is a modern variant of slave labor,[47] which in turn is among the handful of egregious crimes for which state action is not required in making out a ATCA cause of action.[48] Hence the plaintiffs allegations that the Myanmar military committed rapes, torture and summary executions in conjunction with the forced labor on the pipeline project were sufficient to state a cause of action for individual liability under ATCA without requiring state action.[49]

Having concluded the plaintiffs' allegations of forced labor, rape, murder and torture by the Myanmar Military were sufficient to state a cause of action in tort under ATCA, the Court proceeded to determine whether Unocal aided and abetted the Myanmar Military in those ATCA violations.[50] The first step in this process was deciding what law - the law prevailing in the state in which the underlying events occurred, the law of the forum state, the Federal common law, or international law

- should be applied.[51] Because plaintiffs alleged only *jus cogens* violations ("i.e., violations of norms of international law that are binding on nations even if they do not agree to them"),[52] the Court determined that it was preferable to apply international law rather than the law of the state where the underlying events occurred or the forum state.[53] Quite simply, the Court reasoned, "the law of any particular state is either identical to the *jus cogens* norms of international law, or it is invalid."[54] Likewise, applying the factors listed in Restatement (Second) of Conflict of Laws § 6(2),[55] the Court buttressed its conclusion that the application of international law was appropriate, and should be favored over the law of Myanmar, California, or federal common law.[56]

Having determined that the application of international law was appropriate, the Court then examined international human rights law developed in criminal prosecutions to ascertain what was required to establish the *actus reus* and the *mens rea* elements of aiding and abetting human rights law violations.[57] Utilizing precedent established by the International Tribunal for the former Yogoslavia[58] and the International Criminal Tribunal for Rwanda,[59] the Court concluded, with respect to the crime of forced labor, that (1) the *actus reus* element consisted of providing practical assistance or encouragement that has a substantial effect on the perpetration of the crime, namely forced labor,[60] and (2) the *mens rea* element consisted of knowing or having reason to know the principal perpetrator of the crime had the intent to commit such an offense.[61]

Having defined the *actus reus* and *mens rea* elements of aiding and abetting human rights law violations, the Court applied those definitions to the plaintiffs' claims of forced labor. With respect to the *actus reus* element, the Court determine there was substantial evidence in the record that (1) created material issues of fact as to whether forced labor was used in the construction of the pipeline[62] and (2) supported the conclusion Unocal supplied practical assistance to the Myanmar Military in subjecting the plaintiffs to forced labor.[63] Unocal provided practical assistance by furnishing food and money to the Myanmar Military in exchange for its security and pipeline infrastructure construction, by supplying photos, surveys and maps that guided the construction activity, and by participating in daily meetings to determine where the security was needed and the construction would take place.[64] Moreover, this assistance likely had a substantial effect on the perpetration of the crime of forced labor, the Court reasoned, because the forced labor would probably not have occurred in the same manner if Unocal had not hired the Myanmar Military to provide security and/or had not showed the Myanmar Military where the pipeline construction should take place.[65]

With respect to the *mens rea* element of the forced labor claim, the Court determined that Unocal either knew or reasonably should have known that its conduct - providing financial resources to the Myanmar Military and instructing the Myanmar Military where to provide security and where the pipeline was to be build - "would assist or encourage the Myanmar Military to subject the plaintiffs to forced labor."[66]

Accordingly, having concluded genuine issues of material fact existed with respect to Unocal's conduct and with respect to whether that conduct fulfilled the *actus reus* and *mens rea* elements of aiding and abetting forced labor, and thereby constituted a valid claim under the ATCA, the Court reversed the District Court's decision to grant summary judgment in favor of Unocal with respect to the crime of forced labor.[67]

The Court then addressed the application of the *actus reus* and *mens rea* elements to the plaintiffs' claims of murder, rape and torture. In doing so, the Court reiterated its earlier conclusion that acts of murder, rape, and torture, undertaken in furtherance of forced labor, do not need state action to give rise to ATCA liability.[68] The Court then determined that the evidence in the record created a genuine issue of material fact as to whether the Myanmar Military engaged in acts of murder and rape involving the plaintiffs,[69] but was insufficient to demonstrate the existence of genuine issues of fact to establish a claim of torture (other than rape) involving the Plaintiffs.[70] The *actus reus* element of aiding and abetting (i.e., providing practical assistance or encouragement that has a substantial effect on the perpetration of the crimes of murder and rape)[71] was fulfilled by evidence showing that the Myanmar Military subjected the plaintiffs to murder and rape in guarding and constructing the pipeline, and that Unocal provided practical assistance by providing money and food to the Myanmar Military in exchange for its security and construction services, by supplying photos, surveys and maps to guide construction, and by participating in daily meetings conducted to monitor the progress of construction.[72] This assistance could likely have a substantial effect on the commission of murder and rape by the Myanmar Military, because they were hired to provide security for the project and were informed where to do so.[73] Likewise, the failure to Unocal officials to object to the Myanmar Military's conduct during the course of their daily meetings, despite the likelihood Unocal officials knew of such conduct, could be viewed by the Myanmar Military as an act of encouragement to use murder, rape and torture in performing its security and construction obligations.[74]

The *mens rea* element of aiding and abetting the commission of murder and rape by the Myanmar Military - i.e., actual or reasonable knowledge that the actions of Unocal will assist the Myanmar Military in the commission of murder and rape - was fulfilled by evidence Unocal knew or should have known its conduct (making payments of food and money and directing where security was to be provided and the pipeline constructed) would assist or encourage the Myanmar Military to subject the plaintiffs to acts of violence.[75] Notably, Unocal officials need not have been aware that the Myanmar Military intended to commit the precise crimes of murder or rape.[76] Rather it was sufficient that Unocal officials knew or should have known the Myanmar Military might commit "one of a number of crimes."[77] Because Unocal knew acts of violence would likely be committed by the Myanmar Military, Unocal could be found liable as an aider and abettor when the crimes of murder and rape were actually took place.[78]

Having concluded that the record demonstrated the existence of genuine issues of material fact regarding the *actus reus* and *mens rea* elements of Unocal's aiding and abetting the Myanmar Military in the commission of the crimes of forced labor, murder and rape, the Court reversed the District Court's granting of Unocal's motion for summary judgment on the plaintiffs' claims of murder and rape under the ATCA.[79]

The immediate result of this decision is to permit the plaintiffs to proceed against Unocal with their ATCA action for forced labor, murder and rape perpetrated by the Myanmar Military in constructing the gas pipeline and thereby to create enormous potential liability and a huge public relations nightmare for Unocal.

The second and perhaps more far reaching result of this decisions is to expose global corporations that partner in economic development ventures with third world countries that have a history of violating human rights to liability for human rights violations committed by those governments in the performance of those ventures. In order to succeed in their ATCA claims against private individuals, the victims of such human rights violations need demonstrate only: (1) that a *jus cogens* violation of international law has occurred, (2) that a human rights violations took place either in connection with forced labor, genocide or war crimes or while engaging in state action, (3) that the private individual aided and abetted the human rights violation by providing practical assistance (e.g., financial resources) or encouragement (e.g., routine discussion of the progress of the endeavor) that has a substantial effect on the perpetration of the human rights violation, and (4) that the private individual knew or ought to have known the principal perpetrator of the human rights violation had the intent to commit such an offense.

(5) Immunity of Myanmar Military and Myanmar Oil from liability under ATCA.

Significantly, the Court also determined that both the Myanmar Military and Myanmar Oil were immune from liability for the plaintiffs' ATCA claims under the Foreign Sovereign Immunities Act (FSIA).[80] Under FSIA, a district court has jurisdiction over a civil claim against a foreign state and/or its political subdivisions and agencies only if one of several exceptions to foreign sovereign immunity applies.[81] More particularly,

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . (2) in which the action is based [1] upon a commercial activity carried on in the United States by the foreign state; or [2] upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or [3] upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.[82]

The Court determined that none of the three exceptions to sovereign immunity applied, and that therefore the Myanmar Military and Myanmar Oil were entitled to immunity from the plaintiffs' ATCA claims. The first exception did not apply, because the commercial activity giving rise to the *jus cogens* violation occurred in Myanmar, not the United States.[83] The second exception did not apply, because the plaintiffs' claims were based exclusively upon acts (forced labor, murder, rape and torture) allegedly performed by the Myanmar Military and Myanmar Oil entirely in Myanmar, and the plaintiffs did not allege that either the Myanmar Military or Myanmar Oil committed any acts in the United States.[84] The third exception did not apply, because the alleged acts of murder, torture, rape and forced labor on the part of the Myanmar Military and Myanmar Oil did not have the requisite direct effect in the United States required by the third exception.[85] More particularly, the injuries directly resulting from the Myanmar Military and Myanmar Oil's wrongful conduct were murder, rape, torture and forced labor,[86] and the locus of those injuries was Myanmar.[87] Any other effect from the Myanmar Military and Myanmar Oil's activities (e.g., earning profits) cannot be deemed to be a "direct effect," and the third exception cannot be bootstrapped by such indirect results.[88]

That FSIA provides immunity to the Myanmar Military and Myanmar Oil is particularly damaging to Unocal, because it deprives Unocal of its right to contribution from Myanmar Military and Myanmar Oil as joint tortfeasors should Unocal ultimately be found liable to the plaintiffs for their ATCA claims.[89] This result strongly underscores a very stern lesson to global companies undertaking economic development projects with third world countries that have a history of violating human rights: the global company may be forced to go it alone when it comes to compensating victims of *jus cogens* violations of international law perpetrated by foreign government partners brought under the ATCA.

(6) Plaintiffs' ATCA claims were not barred by the Act of State Doctrine.

Unocal also argued that the plaintiffs' claims against it were barred by the "act of state" doctrine.[90] The act of state doctrine is based on the precept that the courts of one country will not judge the acts of another government performed in its own territory.[91] Because the Court was required to judge the conduct of the Myanmar Military and Myanmar Oil (i.e., forced labor, murder, rape and torture) in resolving the plaintiffs' claim, the Court was also required to evaluate the applicability of the act of state doctrine.[92]

The Court identified four factors that must be considered in reviewing the applicability of the act of state doctrine: (1) the degree of codification or consensus regarding a particular area of international law, i.e., the greater the degree of consensus, the more appropriate it is for the court to judge the conduct of another government; (2) the impact of the court's review of another government's conduct on foreign relations, i.e., the lesser the implications on foreign relations, the more likely the court may review the conduct of another government; (3) whether the foreign government whose conduct is to be reviewed is still in existence, i.e., if not, the court should be less reluctant to review the conduct of another government; and (4) whether the foreign government was acting in the public interest.[93]

Applying the first factor, the Court reiterated that murder, rape, torture and forced labor are *jus cogens* violations, i.e., violations of norms that are binding on nations even if they do not agree to them, and therefore great consensus exists that such conduct should be denounced. Hence the first factor indicated that the act of state doctrine should not be applied.[94] Applying the second factor, the Court observed that "the State Department advised the District Court that 'at this time adjudication of the claims based on allegations of torture and slavery would not prejudice or impede the conduct of U.S. foreign relations with the current government of Burma.'"[95] While the Court acknowledged that this statement, given early in the litigation, is not necessarily binding at a later stage in the litigation, the statement supported the conclusion that judicial consideration of the conduct of the Myanmar Military will not substantially exacerbate relations with the Myanmar Military.[96] Hence the second factor indicated the act of state doctrine should not be applied.[97] Applying the third factor, the Court observed that the Myanmar Military remained the government of Myanmar and might be offended by the court's condemnation of its *jus cogens* violations. This factor, however, did not outweigh the others and thereby preclude the Court from evaluating the Myanmar Military's conduct.[98] Applying the fourth factor, the Court concluded that "it would be difficult to contend that Myanmar Military and Myanmar Oil alleged violations of international human rights were 'in the public interest.'"[99] Hence, the fourth factor indicated that the act of state doctrine should not be applied.[100]

Having decided that the more substantial factors weighed against the application of the act of state doctrine,[101] the Court concluded that the plaintiffs' ATCA claims against Unocal were not barred by the doctrine.[102] Indeed, recalling that *jus cogens* violations of international law are by definition valid ATCA claims, that international consensus exists with respect to *jus cogens* violations, and that *jus cogens* violations will almost necessarily be viewed as contrary to the public interest, it is doubtful that the act of state defense will be of any value to any private individual in defending ATCA claims.

(7) Ethical Analysis

The analysis of the legal case in which Unocal now finds itself embroiled invites analysis beyond issues of law, although these legal issues retain great importance. The analysis which follows will include some observations, some general comments about the end of business, and some more specific ethical comments about global human rights issues for corporations that desire to consider themselves American corporations.

When American corporations enter into business ventures in underdeveloped countries, it is understandable that they do so for economic reasons. However, in this era of globalization and heightened ethical sensitivity, American corporations must be aware of the enormous influence they carry with them when they enter into these third world countries. That influence includes economic influence as well as cultural influence. American companies are, whether they are aware of it or not and whether they like it or not, carriers of American values. If American companies fail to carry American principles, then they should not be surprised if they become objects of loathing by the citizens of the country in which they embed their commercial enterprise. And we should not be surprised if the USA becomes an object of scorn by citizens of countries which know us only through the activities of our corporations.

Post September 11, 2001 some distinguished American Scholars asked why this nation was the target of such a heinous set of acts. Among their conclusions was the observation that we as a nation have failed to live up to our ideals. They list five fundamental truths that we as a Nation defend as universal principles. Of the five, two are especially important here. The first is: “All human beings are born free and equal in dignity and rights.” The second is: “The basic subject of society is the human person, and the legitimate role of government is to protect and help to foster the conditions for human flourishing”[103] Unocal and the Myanmar Military as the apparent government of Myanmar in their exploitation of the people of Myanmar violate the first principle and the Myanmar Military formally and materially violates the second principle, while Unocal materially, although not formally, violates the second principle.

Because business is about business, the economic matters will be considered first. If the correct understanding of the end of business as an economic enterprise is the optimization of profits rather than the maximization of profits, then its goal is broader and deeper than its bottom line inasmuch as that bottom line serves the narrow interests of management and shareholders. In the business world, corporations are embedded in a variety of real relationships, relationships to management and shareholders, to workers, and to the community within which they are located. Corporations must benefit each of those. If the corporation is to remain viable then the corporation must provide economic returns for shareholders. If the corporation is to be a just corporation, then the corporation must pay the worker a just wage. A just wage is a means to allow the worker is to retain human dignity. A just wage is one which allows the worker to provide for the necessities of human life including leisure, not just the bare necessities of life. If the corporation is to be sustained, then the corporation is required to be a contributing member of the community within which it exists. The major contribution of the corporation to

the community is an economic contribution. The corporation may not be a despoiler of the community; it may not alienate workers, it may not plunder the resources of the community for the sole good of management and the shareholders. At a minimum when American companies enter into business dealings in third world countries, the third world country and its workers should be economically better off than they would be if the American company had not come at all. It is not very difficult to see that the work of Unocal in Myanmar served the narrow interest of oil for Unocal and financial gain for the military government.

In its focus the ethical analysis will: (1) make some claims about human beings and examine the consequences of that claim, (2) examine some historically significant sites for the affirmation and protections of those claims, and (3) offer some guidelines for American companies operating abroad.

There are three claims about human beings and their rights that are important here. The first two are political claims: (a) the equality claim and (b) the inalienability claim. The third is an epistemological claim: (c) the self-evidence claim. The first political claim is that the assumption of the basic equality of human lives is a democratic contention that every person might embrace. This assumption which has its philosophical foundation in Roman Stoicism, and although limited historically in its founding, has, in the tradition of Western Enlightenment, progressively extended its reach to include those not recognized in the founding. It is a principle affirmed in the founding documents of our Nation: the Declaration of Independence and the Constitution. Among those not recognized in the establishment of the principle and in the founding documents were indigenous people, slaves, and women. It is a mark of progress that the basic equality of these groups has been recognized. The second political claim is that simultaneous with the affirmation of the basic equality of human beings is the affirmation that all human beings have certain rights in their persons … the inalienable rights of the Declaration of Independence and the rights to life, liberty, and property set forth in the 9th and 14th Amendments of the Constitution. As inalienable these rights cannot be separated from a person without due process of law. These rights, although not always expressed as "rights talk" are not American inventions; they have an ancient pedigree from Locke to Hooker to Thomas Aquinas to Cicero. In addition to these rights being inalienable, it is claimed that they are self-evident, that is they are transparent to human reason – a reason which is not biased by a distorted culture or by distorted human desires.

If claims (a), (b), and (c) are correct, certain conclusions ought to follow. All human beings have the same basic rights. The people of Myanmar have the same basic rights as Unocal, the Myanmar military, and citizens of the U.S.A. Activities which are direct assaults on these basic rights, assaults on life, liberty, and property, are wrong. Certain activities such as forced labor and the use of murder, rape and torture as instruments to guarantee participation in forced labor are understood by human reason, even human reason informed by only modest ethical sensitivities, as egregious violations of life, liberty, and property. Hence, one ought to know that these activities are wrong, One ought not to murder, rape and torture, and enslave, and one ought not to cooperate with those who do these activities. In 1946 at the conclusion of the Nuremberg Trials that Court wrote in its condemnation of atrocities committed by and directed by scientists and physicians that these activities, these "human experiments under such conditions are contrary to 'the principles of the law of nations as they result from the usages established among civilized peoples, from the laws of humanity, and from the dictates of public conscience.'"[104] The laws of civilized peoples, the laws of humanity, and the dictates of conscience ought to operate wherever human beings engage in commerce, whether Myanmar or the U.S.A.

Now it may be the case that Myanmar Military may not be tried by courts in the U.S.A. for it violations of human rights that it materially (it did as a matter of historical fact engage in these activities) and formally (it did intend to engage in these acts to accomplish its ends), nonetheless it should not be beyond the scope of American courts to cite these egregious violations as a matter of court record. Now Unocal might argue that it did not directly engage in forced labor, murder, rape and torture and it might argue that it did not directly order the members of the Myanmar army to engage in those activities, hence it should not be held guilty, that is legally guilty. And the law might, to its shame, fail to hold Unocal culpable. However, that claim on the part of Unocal to separate itself from the actions of the military will not hold up to ethical scrutiny. Unocal is an immediate implicit material cooperator in the action of the Myanmar Military. Unocal and the Myanmar military both had the same object as goal, Unocal was aware of the activity of the military in support of that shared goal and Unocal supplied the military with the material means to secure the shared objective. In its failure to explicitly disclaim the activities of the military, Unocal's cooperation is implicit. Immediate material cooperation in egregious human rights violations, even if not explicit cooperation, is always ethically wrong.

(8) Avoiding ATCA liability: proposed norms for international business decisions.

If, as noted at the beginning of this article, neither the theory of ethical relativism nor the disassociation tactic are effective in avoiding ATCA liability of domestic corporations for the human rights violations of foreign, host country partners, it may be in the best interest of global business organizations to infuse their strategic visions with the following ethical norms in resolving international business decisions:

(a) maintain a firm commitment to a moral minimum below which the organization will not go, i.e., to do no intentional, direct harm to the host country or its citizens and residents;

(b) engage in activities that benefit the host country, judged solely by weighing the benefits and detriments to the host country and its people, rather than benefits generated globally;

(c) respect the human rights of the workers and consumers of the host country (e.g., paying a living wage, providing adequate and safe working conditions, providing safe products and adequate warnings about product dangers);

(d) promote the development of institutions in the host country through appropriate means; and

(e) respect the laws of the host country, its culture and local values, provide they do not violate human rights or recognized human values.[105]

Had Unocal followed these precepts, it likely could have avoided its entanglement with the Myanmar Military, and its liability for the human rights violations committed by the Myanmar government in the course of its economic development projects.

FOOTNOTES

[1] Richard T. De George, *Ethical Dilemmas for Multinational Enterprise: A Philosophical Overview*, *in* MORAL ISSUES IN BUSINESS 236, 237 (William H. Shaw and Vincent Barry, 1998).
[2] MANUEL G. VELASQUEZ, BUSINESS ETHICS: CONCEPTS AND CASES 139-40 (4th ed. 1998).
[3] *Id.* at 140-41.
[4] Doe I v. Unocal, 2002 WL 31063976.
[5] 28 U.S.C. § 1350. The Federal District Court via dismissal and summary judgment resolved all of the Plaintiffs' federal claims in favor of Unocal Corporation. Doe I v. Unocal, 2002 WL 31063976 at 4. *See* Nat'l Coalition Gov't of the Union of Burma v. Unocal, Inc., 176 F.R.D. 329, 334 (C.D. Cal. 1997), and Doe I v. Unocal, 963 F.Supp. 880, 883 (C.D. Cal. 1997). *See also* Laura Bowersett, *Doe v. Unocal: Tortious Decision for Multinationals Doing Business in Politically Unstable Environments*, 11 TRNATLAW 361 (1998). The Ninth Circuit reversed the District Court's granting of summary judgment on the plaintiffs' claims under the Alien Tort Claims Act, because it determined evidence in the record demonstrated issues of material fact existed with respect to their claims for forced labor, murder, and rape. Doe I v. Unocal, Doe I v. Unocal, 2002 WL 31063976 at 21.
[6] *See* 2003 WL 359787 (9th Cir.) at 1.
[7] Paul Magnusson, *Making a Federal Case Out of Overseas Abuses*, BUSINESS WEEK, November 25, 2002, p. 78.
[8] *Id*.
[9] Doe I v. Unocal, Doe I v. Unocal, 2002 WL 31063976 at 5.
[10] *Id.*.
[11] *Id*.
[12] *Id*.
[13] *Id*.
[14] *Id*.
[15] *Id*. Unocal memoranda and a Unocal briefing document, made part of the record, confirmed Unocal's understanding and awareness of the role of the Myanmar Military. Unocal's memorandum summarizing its March 1 and 2, 1995, meeting with Total Myanmar, acknowledges that "[f]our battalions of 600 men each will protect the [pipeline] corridor" and [f]ifty soldiers will be assigned to guard each survey team." In their deposition testimony, however, Unocal's President and CEO denied any awareness of that role. *Id*. This buttressed the Ninth Circuit's conclusion that issues of material fact existed and that the District Court's decision granting of summary judgment in favor of Unocal on the Alien Tort Claims Act claims should be reversed. *Id*. at 15.
[16] Doe I v. Unocal, 2002 WL 31063976 at 5, quoting from a May 1995 cable from the U.S. Embassy in Rangoon summarizing the comments of Unocal representative Robinson.
[17] *Id.* at 6. The briefing book indicates that numbers of villagers were hired by Myanmar Military battalions to work as local helpers.
[18] *Id.* quoting from a Total Myanmar document dated November 8, 1995.
[19] *Id.* at 7. The Court cited a report entitled "Forced labour in Myanmar (Burma): Report of the Commission of Inquiry appointed under article 26 of the Constitution of the International Labour Organization to examine the observance by Myanmar of the Forced Labour Convention" (1998), which notes that several inquiries conducted between 1960 and 1992 demonstrate "the pervasive use of forced labour imposed on the civilian population throughout Myanmar by the . . . military."
[20] Doe I v. Unocal, 2002 WL 31063976 at 7. Before purchasing its interest in the project, Unocal hired Control Risk Group to assess the risks of its investment. Control Risk Group in May 1992 warned Unocal that the Burma government "habitually makes use of forced labour to construct roads." *Id*.
[21] Doe I v. Unocal, 2002 WL 31063976 at 7. Unocal's Vice President of International Affairs acknowledged in his deposition that Unocal and its partners were aware that engaging the Myanmar Military to provide protection for the pipeline construction created the risk that the Myanmar Military "might proceed in a manner that would be out of our control and might "[go] to excess." *Id.*
[22] *Id.*.
[23] *Id*. at 8. Amnesty International warned Unocal in June 1995 about the possibility the Myanmar Military might use forced labor in completing the project.

[24] *Id*. On December 11, 1995, Unocal's consultant, John Hasemen, reported to Unocal that "the Myanmar Military was, in fact, using forced labor and committing other human rights violations in connection with the Project." Hasemen also noted:

> Based on my three years of service in Burma, my continuous contacts in the region since them, and my knowledge of the situation there, my conclusion is that egregious human rights violations have occurred, and are occurring now, in southern Burma. The most common are forced relocation without compensation of families from land near/along the pipeline routs; forced labor to work on infrastructure projects supporting the pipeline . . .; and imprisonment and/or execution by the army of those opposing such actions . . . . Unocal, by seeming to have accepted [the Myanmar Military]'s version of events, appears at best naive and at worst a willing partner in the situation. *Id.*

[25] Doe I v. Unocal, 2002 WL 31063976 at 7. Unocal's site representative Robinson warned Unocal's President that he received information confirming the Myanmar Military's increased encroachment activities into villages in the pipeline area and that Unocal's contrary assertion "may not withstand much scrutiny." *Id*. at 7-8.

[26] *Id.* at 7. During his meeting with human rights organizations, Unocal's President acknowledged that the Myanmar Military might use forced labor in connection with the Project, that "forced labor goes hand and glove with the military," and that "there will be more forced labor." *Id*. at 7.

[27] *Id.* at 8. On September 17, 1996, executives of Total Myanmar advised Unocal officials that forced labor was in fact being used in the pipeline construction project. *Id*.

[28] *Id.*

[29] *Id*. at 6. One villager testified that he was forced to build a helipad near the pipeline site in 1994. The helipad was used by Unocal and Total officials who visited the site during the planning stages of the project. Two other villagers described the construction of helipads near the pipeline site that were used to ferry Total/Unocal executives and materials to the construction site, and claimed they and other villagers were forced to build the helipads. Four other villagers testified they were forced to build roads leading to the pipeline construction area. Two other villagers testified that they were forced to haul materials to the building sites and to clean the army camps housing the soldiers guarding the pipeline construction. *Id*.

[30] *Id. See* supra note 29.

[31] *Id*. at 7.

[32] *Id.*

[33] *Id.*

[34] *Id*.

[35] *Id*.

[36] *Id.* at 10, citing Papa v. United States, 281 F.3 1004, 1013 (9th Cir. 2002) (ATCA provides a cause of action for violations of international norms), and In re Estate of Ferdinand E. Marcos, Human Rights Litig., 25 F.3d 1467, 1475 (9th Cir. 1994) (violations of the international law of nations can form the basis of ATCA claims).

[37] Doe I v. Unocal, 2002 WL 31063976 at 10.

[38] *Id.*

[39] *Id*. "*Jus cogens* norms are norms of international law that are binding on nations even if they do not agree to them." *Id.* at 32 n. 14, citing Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 714-15 (9th Cir. 1992) ("a jus cogens norm . . . is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character"). *See also* United States v. Matta-Bellesteros, 71 F.3d 754, 764 at n. 5 (9th Cir. 1995) (torture, murder and slavery are *jus cogens* violations and therefore violations of the law of nations).

[40] Doe I v. Unocal, 2002 WL 31063976 at 10. The Court emphasized:

> We stress that although a *jus cogens* violation is, by definition, "a violation of 'specific, universal, and obligatory' international norms" that is actionable under ATCA, *any* "violation of 'specific, universal, and obligatory' international norms" - *jus cogens* or not - is actionable under the ATCA." (emphasis in original) (cit. omitted). Thus, a *jus cogens* violation is sufficient, but not necessary, to state a claim under the ATCA. *See* Doe I v. Unocal, 2002 WL 31063976 at 33 n. 15.

[41] Doe I v. Unocal, 2002 WL 31063976 at 10. *See* Farmer v. Brennan, 511 U.S. 825, 852, 853 (1994) (brutal prison rape is "nothing less than torture"). *See also* Evelyn Mary Aswad, *Torture by Means of Rape*, 84 GEO. L.J. 1913 (1996).

[42] Doe I v. Unocal, 2002 WL 31063976 at 10.

[43] *Id*., citing the Universal Declaration of Human Rights, G.S. Res. 217(A)III (1948) (banning forced labor), and the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and the Charter of the International Military Tribunal, Aug. 8, 1945, art. 6, 82 U.N.T.S. 280 (making forced labor a war crime).

[44] Doe I v. Unocal, 2002 WL 31063976 at 10.

[45] *Id.* at 11. *See* Kadic v. Karadzic, 70 F.3d 232, 242, 243-44 (2d Cir. 1995) (Rape, torture, and summary execution are proscribed by international law when committed by state officials or under color of law, and hence normally require a showing of state action when committed in isolation by a private party. When such conduct is committed in furtherance of slave trading, genocide or war crimes, however, no demonstration of state action is required for ATCA liability to attach to a private party.)

[46] Doe I v. Unocal, 2002 WL 31063976 at 11.
[47] *Id*. *See* Pollock v. Williams, 322 U.S. 4, 17 (1944) (the aim of the Thirteenth Amendment was not only to end slavery but to maintain a system of free and voluntary labor throughout the United States), and Weidenfeller v. Kidulis, 380 F.Supp. 445, 450 (E.D. Wis. 1974) (forced labor amounts to involuntary servitude and violates the Thirteenth Amendment).
[48] Doe I v. Unocal, 2002 WL 31063976 at 11.
[49] *Id*.
[50] *Id*. at 12.
[51] *Id*.
[52] *Id*.
[53] *Id*.
[54] *Id.*
[55] *See* Restatement (Second) Conflict of Laws §6(2) (1971): "[T]he factors relevant to the choice of the applicable rule of law include (a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied."
[56] Doe I v. Unocal, 2002 WL 31063976 at 12.
[57] *Id.* at 13. The Court noted that this exercise was helpful, because the standard for aiding and abetting in international criminal law is similar to the standard for aiding and abetting in domestic tort law, thereby making the distinction between criminal and tort law less crucial. *Id.* The Court also observed that district courts are increasingly turning to decisions of international criminal tribunals to develop instructions describing the standards of international human rights law under the ATCA. *Id. See* Cabello Barrueto v. Gernandez Larios, 205 F.Supp.2d 1325, 1333 (S.D. Fla. 2002) (using the decision of the International Criminal Tribunal for the Former Yugoslavia to support liability under ATCA for aiding and abetting actions by foreign military officials), and Mehinovic v. Vuckovic, 198 F.Supp.2d 1322 (N.D. Ga. 2002) (using the statutes of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda in establishing the norms of international law as they pertain to ATCA).
[58] Doe I v. Unocal, 2002 WL 31063976 at 13, citing Prosecutor v. Furundzija, IT-95-17/1 T (Dec. 10, 1998), reprinted in 38 I.L.M. 317 (1999).
[59] Doe I v. Unocal, 2002 WL 31063976 at 13, citing Prosecutor v. Musema, ICTR-96-13-T (Jan. 27, 2000), http://www.ictr.org/.
[60] Doe I v. Unocal, 2002 WL 31063976 at 13.
[61] *Id*.
[62] *Id*. at 14.
[63] *Id*.
[64] *Id*.
[65] *Id.* at 15.
[66] *Id*.
[67] *Id*.
[68] *Id*.
[69] *Id*.
[70] *Id*. at 16. The deposition testimony of the villagers in *Doe I* supported the charges of murder and rape, but not torture (other than rape). Evidence of torture was found in deposition testimony of plaintiffs in the companion case, who described acts of extreme physical abuse that might constitute torture. *Doe I* not being a class action, however, the allegations in the companion case by victims other than the plaintiffs in *Doe I*, were insufficient to establish the *Doe I* claims of torture. *Id.*
[71] *Id.*
[72] *Id*.
[73] *Id*. The Court supported this conclusion with the admission of Unocal Representative Robinson that Unocal's assertion the Myanmar Military has not expanded "its usual methods around the pipeline on our behalf may not withstand much scrutiny." *Id*. *See supra* note 24.
[74] Doe I v. Unocal, 2002 WL 31063976 at 16. The Court supported this conclusion with the warning of Unocal Consultant John Haseman to Unocal that the most common human rights violations committed by the Myanmar Military in the pipeline construction project were forced relocations without compensation, forced labor, and execution of those opposing the Myanmar Military. *Id. See supra* note 24.
[75] Doe I v. Unocal, Doe I v. Unocal, 2002 WL 31063976 at 16.
[76] *Id*.
[77] *Id*.
[78] *Id*.
[79] *Id* at 17.

[80] 28 U.S.C. §§ 1330, 1602 *et. seq.*
[81] *See* 28 U.S.C. §§ 1330(a), 1603(a), & 1605-1607.
[82] 28 U.S.C. § 1605(a).
[83] Doe I v. Unocal, 2002 WL 31063976 at 17.
[84] *Id.* In reaching this conclusion, the Ninth Circuit rejected the District Court's determination that certain investment-related activity and money transfers occurred in the United States, because those activities were not elements of the plaintiffs' claims against the Myanmar Military and Myanmar Total. *Id.*
[85] *Id.*
[86] *Id.* at 18. In reaching this conclusion, the Court relied on the definition of "direct effect" provided in Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 710 n. 11 (9th Cir. 1992) ("a direct effect occurs at the locus of the injury directly resulting from the sovereign defendant's wrongful acts.")
[87] Doe I v. Unocal, 2002 WL 31063976 at 18.
[88] *Id.*
[89] *See* U.S. v. Gilman, 347 U.S. 507, 695-96 (1954) (The United States has waived sovereign immunity with respect to, and therefore can be found liable for, the negligent acts of its employees. The United States has not, however, waived sovereign immunity with respect to its employees. Hence, there can be no right of contribution against the negligent employee, and judgment against the United States is a complete bar to any action by the claimant against the employee.) *See also* Beneficial Consumer Discount Co. v. Poltonowicz, 47 F.3d 91, 95-96 (3d Cir. 1995) (United States not having waived its sovereign immunity against the cause of action, the financial institution is not entitled to joint tortfeasor contribution); Hillier v. Southern Towing Co., 714 F.2d 714, 719 (7th Cir. 1983) ("[I]ndemnity shifts the whole of the damage liability from one joint tortfeasor to another, just as contributory negligence shifts the whole of the burden f the accident from the injurer to the victim . . . ."); Horton v. U.S., 622 F.2d 80, 82 (4th Cir. 1980) (United States is not entitled to contribution from a joint tortfeasor immune from liability by virtue of sovereign immunity.); Highway Const. Co. v. Moses, 483 F.2d 812, 815 (8th Cir. 1973) ("There can be no right to contribution unless the injured party has a possible remedy against both tortfeasors," and "an employer who is immune from tort action brought by an injured employee under workmen's compensation statutes could not therefore be compelled to contribute."); and Hill v. U.S., 453 F.2d 839, 842 (6th Cir. 1972) ("[W]here a joint tort-feasor is the beneficiary of an immunity which would preclude liability to the injured party, there is no right of contribution against the immune tort-feasor."). *See generally* Timothy M. Hall, Annotation, *Right of One Governmental Subdivision to Sue Another Such Subdivision for Damages,* 11 A.L.R.5TH 630 (1993).
[90] Doe I v. Unocal, 2002 WL 31063976 at 18.
[91] *Id. See* Underhill v. Hernandez, 168 U.S. 250, 252 (1897) ("[T]he courts of one country will not sit in judgment of the acts of the government of another , done within its own territory.") *See also* W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp, Int'l, 493 U.S. 400, 406 (1990) (the act of state doctrine arises when a court must decide the effect of official action by a foreign sovereign).
[92] Doe I v. Unocal, 2002 WL 31063976 at 18. *See* Liu v. Republic of China, 892 F.2d 1419, 1432-33 (9th Cir. 1989) ("Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its territory.").
[93] Doe I v. Unocal, 2002 WL 31063976 at 19. The first three factors were derived from Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964). The fourth factor was derived from Liu v. Republic of China, 892 F.2d 1419, 1432 (9th Cir. 1989).
[94] Doe I v. Unocal, 2002 WL 31063976 at 19.
[95] *Id.*
[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] *Id.*
[101] *Id.*
[102] *Id.*
[103] Jennifer K. Ruark, *Celebrated Scholars Release a Letter Supporting War on Terrorism*, THE CHRONICLE OF HIGHER EDUCATION, February 22, 2002, p. A17.
[104] *United States v. Karl Brandt, et al.*, Trials of War Criminals Before Nuremberg Military Tribunals Under Control Council Law No. 10, October, 1946 - April, 1949.
[105] De George, s*upra.* note 1, at 237.