

# Ninth Circuit Grants En Banc Rehearing in *Doe v. Unocal*

On September 18, 2002, a three-judge panel of the Ninth Circuit reversed a grant of summary judgment for the defendant in *Doe v. Unocal*.<sup>1</sup> The court held that Unocal could be subject to liability under the Alien Tort Claims Act (ATCA)<sup>2</sup> for human rights abuses committed in connection with the Yadana natural gas pipeline project in Burma (also known as Myanmar).<sup>3</sup> The Ninth Circuit granted Unocal's motion for an en banc rehearing on February 14, 2003,<sup>4</sup> and heard oral arguments on June 17, 2003. To date, the Ninth Circuit has not issued an opinion.<sup>5</sup> While the decision will not directly address environmental issues, it will affect the litigation strategy of nonprofit groups seeking to redress interrelated problems of environmental degradation and human rights violations.

The three-judge panel's split decision, as well as the en banc panel's questions at oral argument, focused on the proper standard of liability under the ATCA for determining whether Unocal's complicity with the Myanmar military is actionable. The ATCA is one of the few means of holding multinational corporations accountable for human rights

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1. *Doe v. Unocal Corp.*, Nos. 00-56603, 00-57197, 00-56628, 00-57195, 2002 U.S. App. LEXIS 19263 (9th Cir. Sept. 18, 2002) (hereinafter *Unocal Appeal Decision*), vacated and reh'g en banc granted by, 2003 U.S. App. LEXIS 2716 (9th Cir. Feb. 14, 2003).

2. 28 U.S.C. § 1330 (2000).

3. *Unocal Appeal Decision*, 2002 U.S. App. LEXIS 19263, at \*36, \*55.

4. *Doe v. Unocal Corp.*, Nos. 00-56603, 00-57197, 00-56628, 00-57195, 2003 U.S. App. LEXIS 2716 (9th Cir. Feb. 14, 2003).

5. The Ninth Circuit ordered that the case be withdrawn from submission pending issuance of the Supreme Court decision in *Sosa v. Alvarez-Machain*. *Doe v. Unocal*, Nos. 00-56603, 00-57197, 00-56628, 00-57195 December 9, 2003 (Order on file with Ecology Law Quarterly). The U.S. Supreme Court issued its opinion in *Sosa v. Alvarez-Machain* on June 29, 2004. 124 S. Ct. 2739 (2004). The Court held that, although the ATCA was jurisdictional in nature, Congress nevertheless intended to allow the courts to hear such claims. *Id.* at 2755. However, the Supreme Court found that there was a specificity requirement that such claims fit within the paradigm of eighteenth century human rights definitions. *Id.* at 2761. Thus, Defendant-Appellant in *Unocal* has submitted a new round of briefing with the Ninth Circuit, filed August 17, 2004. Nos. 00-56603, 00-57197, 00-56628, 00-57195 (Corrected Supplemental Brief of Defendant-Appellees on file with clerk of the court).

violations that are committed abroad, and can be used as a proxy for environmental degradation claims.<sup>6</sup> Despite the expansion in ATCA litigation in the last twenty years,<sup>7</sup> the Supreme Court has not set forth substantive standards of liability to be applied in these actions, resulting in an incoherent body of jurisprudence.<sup>8</sup> In order to adjudicate ATCA cases such as *Unocal* consistently, courts should adopt a standard safely embedded in federal common law, rather than an international standard that has not yet achieved the status of customary international law.<sup>9</sup>

### I. BACKGROUND ON THE ALIEN TORTS CLAIM ACT

The ATCA is a brief provision of the Judiciary Act of 1789 that does not explicitly address the complexities of modern international human rights litigation. It simply provides that: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."<sup>10</sup> Thus, the statute grants federal district courts jurisdiction over civil suits brought by aliens claiming a tort where the law of nations has been violated. According to the Ninth Circuit, there are three threshold questions in evaluating a cause of action under the ATCA: (1) whether the alleged tort is a violation of the law of nations, (2) whether the alleged tort requires state action to create liability under the ATCA, and (3) what standard of liability applies to the tort.

The term "law of nations" and its descendent, "customary international law," refer generally to "established norms of contemporary international law that are 'ascertained...by consulting the works of

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6. See Natalie Bridgeman, *Human Rights Litigation Under the ATCA as a Proxy for Environmental Claims*, 6 YALE H.R. & DEV. L. J. 1 (2003).

7. In the first 190 years of the Act's existence, it was invoked only 21 times, mostly in the context of commercial suits. See Bridgeman, *supra* note 6, at 4 (citing Kenneth Randall, *Federal Jurisdiction over International Law Claims: Inquiries into the ATCA*, 18 N.Y.U. J. INT'L L. & POL. 1, 4-5 n.15 (1985)). It was first used in the human rights context in 1980 in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir 1980), and has since been used for this purpose and in challenges to globalization issues 62 times. *Id.* at 5.

8. Justin Prociv, *Incorporating Specific International Standards into ATCA Jurisprudence: Why the Ninth Circuit Should Affirm Unocal*, 34 U. MIAMI INTER-AM. L. REV. 515, 530 (2003) (noting that "ATCA, as presently interpreted, has resulted in ad hoc jurisprudence that retains questionable legal solidarity. As ATCA has slowly expanded to deal with the incredibly unbounded area of international human rights violations, the resulting body of law remains 'largely a hodgepodge of lower court opinions.'") (quoting Andrew Ridenour, *Doe v. Unocal Corp., Apples and Oranges: Why Courts Should Use International Standards to Determine Liability for Violation of the Law of Nations Under the Alien Tort Claims Act*, 9 TUL. J. INT'L & COMP. L. 581, 584 (2001)).

9. *Unocal Appeal Decision*, 2002 U.S. App. LEXIS 19263, at \*104 (Reinhardt, J., concurring) (noting that "international law principles may, under appropriate circumstances, become a part of the federal common law. Specifically, when an international legal principle achieves sufficient international acceptance that it constitutes customary international law, it also becomes part of the federal common law.") (citing *Filartiga*, 630 F.2d at 881).

10. 28 U.S.C. § 1350 (2000).

jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law."<sup>11</sup> Courts have additionally held that the international norm must be "specific, universal and obligatory."<sup>12</sup> This latter limitation currently precludes most environmental claims under the ATCA, because courts have found that environmental claims have not yet achieved specific, universal, and obligatory status within international law.<sup>13</sup>

Customary international law governs the relations of states, and thus state action is an inherent requirement of ATCA claims.<sup>14</sup> This is true with the exception of a handful of crimes, such as genocide and slave trading, which are so egregious as to elicit individual liability.<sup>15</sup> Corporate accountability cases adjudicated under the ATCA involve non-state actors acting on behalf of or jointly with state actors. In these cases, the courts must determine whether the crimes are so egregious as to fall within the individual liability exception, or alternatively if the corporation was acting on behalf of the state so as to be vicariously liable as the state's partner.

If there is individual liability, the courts must also determine what standard of liability to apply. Different courts have applied international law, the law of the state where the events took place, or the law of the

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11. See *Alvarez-Machain v. United States*, 331 F.3d 604, 613 (9th Cir. 2003) (quoting *United States v. Smith*, 18 U.S. 153, 160-61 (1820)).

12. *Unocal Appeal Decision*, 2002 U.S. App. LEXIS 19263, at \*29 (quoting *Papa v. United States*, 281 F.3d 1004, 1013 (9th Cir. 2002) (quoting *In re Estate of Ferdinand E. Marcos*, 25 F.3d 1467, 1475 (9th Cir. 1994))).

13. The history of environmental claims under the ATCA includes: *Flores v. S. Peru Copper Corp.*, 343 F.3d 140 (2d Cir. 2003) (dismissing for failure to allege a violation of a universal, definable and obligatory norm); *Beanal v. Freeport-McMoRan, Inc.*, 969 F. Supp. 362 (E.D. La. 1997) (same); *Amlon Metals, Inc. v. FMC Corp.*, 775 F. Supp. 668 (S.D.N.Y. 1991) (dismissing for failure to allege a violation of the law of nations, but not foreclosing the possibility that environmental claims could evolve into customary internal norms); *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534 (S.D.N.Y. 2001) (dismissing on the procedural ground of *forum non conveniens*); *Bano v. Union Carbide Corp.*, 273 F.3d 120 (2d Cir. 2001) (dismissing on grounds of comity as claims already had been settled in India); *Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d 1116 (C.D. Cal. 2002) (dismissing as a non-justiciable political question); see also *Bridgeman*, *supra* note 6, at 2, 35 (stating that *Sarei* has been "the only case to articulate a viable-yet politically untenable- environmental ATCA claim").

14. *Prociv*, *supra* note 8, at 530-31 (stating "[t]he inherent state action requirement of the ATCA has led most courts to refuse jurisdiction in cases absent such action, even where a clear violation of the law of nations has been alleged...Consequently, this requirement has greatly limited the feasibility of the ATCA against private individuals.") (citing Douglas Morrin, *People Before Profits: Pursuing Corporate Accountability for Labor Rights Violations Abroad Through the Alien Tort Claims Act*, 20 B.C. THIRD WORLD L.J. 427, 433-34 (2000)). See also *Alvarez-Machain*, 331 F.3d at 613 (finding that the law of nations is a term of art which governs state actors).

15. *Kadic v. Karadzic*, 70 F.3d 232, 239-40 (2d Cir. 1995) (holding that private actors may be held liable for "some international law violations" in the absence of state action); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 795 (D.C. Cir. 1984).

forum state. The question of whether to apply international law standards played a central role in the *Unocal* en banc hearing.<sup>16</sup>

## II. THE UNOCAL LITIGATION

The plaintiffs in *Unocal* are Mynamar villagers and farmers from the region through which the Yadana natural gas pipeline project ran.<sup>17</sup> The Project began in 1988 when the Myanmar Military (hereinafter “the Military”) took control of Burma, renaming the country Myanmar.<sup>18</sup> The Military then established a state-owned company to control Mynamar’s natural gas resources, and sold twenty-eight percent of the pipeline project to Unocal in 1992.<sup>19</sup> The Military provided security for the pipeline project pursuant to a contract with Unocal; this work was extraneous to their state military role.<sup>20</sup>

Evidence based on reports from its own risk-assessment consulting company suggests that Unocal knew of the Military’s record of human rights abuses prior to investing in the pipeline project.<sup>21</sup> Plaintiffs allege that the increased Military presence in the region, provided for the benefit of Unocal’s financial interests in the pipeline project, had the effect of subjecting them to numerous human rights abuses.<sup>22</sup> The plaintiffs allege that the following human rights abuses constitute torts in violation of the law of nations meriting recovery under the ATCA: forced

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16. *Unocal Appeal Decision*, 2002 U.S. App. LEXIS 19263, at \*39-41 (holding that international criminal law standard for aiding and abetting is the proper standard of liability to be applied to the substantive claims).

17. *Id.* at 2-3.

18. *Id.* at 3. The Myanmar Military was then known as the “State Law and Order Restoration Council,” or “SLORC.”

19. *Id.* at 4.

20. See *id.* at 6 (“It is undisputed that the Myanmar Military provided security and other services for the Project, and that Unocal knew about this. . . . The Myanmar Military increased its presence in the pipeline region.”); *id.* at 6 n.4 (stating “[a]lthough anti-government rebels were active elsewhere in Myanmar, the record indicates that there was little to no rebel activity in the region where the pipeline construction occurred.”). See also *id.* at 118-19. Evidence such as Unocal memorandums and contracts suggest that Unocal had “hired” the Myanmar Military for its services of providing security, helipads and road in connection with the pipeline. *Id.* at 7. A May 10, 1995 Unocal “briefing document” states that “[a]ccording to our contract, the government of Myanmar is responsible for protecting the pipeline.” *Id.* Similarly, in May 1995, a cable from the U.S. Embassy in Rangoon, Myanmar, reported that Unocal On-Site Representative Joel Robinson “stated forthrightly that the companies have hired the Burmese military to provide security for the project.” *Id.* Unocal claims that these documents refer to knowledge of the Military’s support for offshore operations that are not the subject of this litigation. *Id.* at 7-8.

21. *Id.* at 13-14. Unocal President Imle acknowledged the use of forced labor in 1995 when he met with human rights organizations at Unocal’s headquarters in Los Angeles. He said that “if [people] threaten the pipeline there’s going to be more military,” and that “if forced labor goes hand and glove with the military yes there will be more forced labor.” He added “[f]or every threat to the pipeline there will be a reaction.” *Id.* at 15-16; see also *id.* at 11-23.

22. *Id.* at 12.

relocation, forced labor, rape, and summary execution for those who attempted to flee.<sup>23</sup>

#### A. District Court Opinion

In 1997, Unocal filed a motion to dismiss, claiming that: (1) the Foreign Sovereign Immunities Act (FSIA)<sup>24</sup> shielded the Military from liability, and (2) a suit in the Military's absence would be inappropriate under Federal Rule of Civil Procedure 19, which addresses failure to state an indispensable party.<sup>25</sup> District Court Judge Paez found that while the Military was immune, claims against Unocal as a joint tortfeasor were appropriate, and that, if plaintiffs were to prevail, the court could apportion liability between Unocal and the Military, with the plaintiffs only recovering their share from Unocal.<sup>26</sup>

In 2000, the District Court granted Unocal's motion for summary judgment against all of plaintiffs' claims.<sup>27</sup> Judge Lew<sup>28</sup> used liability standards under 42 U.S.C. § 1983 as a "referential guide."<sup>29</sup> Section 1983 jurisprudence provides a joint action test for whether non-state actors can be held liable for the constitutional torts committed by state actors.<sup>30</sup> Judge Lew found that proximate causation and proof of control of the state actor are necessary elements to hold Unocal liable under § 1983.<sup>31</sup> Judge Lew held that Unocal's participation in the Project was insufficient to establish liability under § 1983 because no material facts indicated that Unocal either "controlled" the Military or participated in state action.<sup>32</sup>

#### B. Ninth Circuit Three-Judge Panel Opinion

A three-judge panel of the Ninth Circuit reversed Judge Lew's decision in 2002, holding that Unocal could be found liable under the

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23. *Id.* Plaintiffs' testimonies describe rapes at knife-point of female workers on the Project; retaliation by soldiers for those who sought to flee, including throwing one woman into a fire, which killed her child whom she was holding at the time; and the use of forced labor as porters and construction workers. *Id.*

24. Pub. L. No. 94-583, 90 Stat. 2891 (1976) (codified at 28 U.S.C. §§ 1330-31, 1602-1611 (2000)).

25. *Doe v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997).

26. *Id.* at 884, 886-89.

27. *Doe v. Unocal Corp.*, 110 F. Supp. 2d 1294 (C.D. Cal. 2000) (hereinafter *Unocal*).

28. Judge Lew then presided over the case because Judge Paez was elevated to the Ninth Circuit in 2000.

29. See *Unocal*, 110 F. Supp. 2d at 1305 (citing *Kadic*, 70 F.3d at 245).

30. See *Dennis v. Parks*, 449 U.S. 24, 27-28 (1980); see also *Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442, 1453 (10th Cir. 1995).

31. *Unocal*, 110 F. Supp. 2d 1305, 1307 (citing *King v. Masserweh*, 782 F.2d 825, 829 (9th Cir. 1986)).

32. *Id.* at 1306-07, 1310.

ATCA.<sup>33</sup> The panel nevertheless split on the issue of which standard of liability should govern the tort claims both in *Unocal* and in ATCA cases generally.

Writing for the majority, Judge Pregerson (joined by Judge Tashima) applied an international standard of aiding and abetting to plaintiffs' tort claims.<sup>34</sup> The aiding and abetting standard was promulgated at the War Crimes Tribunal for the Former Yugoslavia (hereinafter "Yugoslavia Tribunal") and has since been implemented in the international sphere.<sup>35</sup> Liability for aiding and abetting requires two elements: (1) an *actus reus* that entails "practical assistance, encouragement or moral support which has a substantial effect on the perpetration of the crime;"<sup>36</sup> and (2) *mens rea* of knowledge that the accomplice's actions will assist the perpetrator in the commission of the crime.<sup>37</sup> The accomplice need not share the perpetrator's *mens rea* of positive intention to commit the crime.<sup>38</sup>

The benefit of the aiding and abetting standard is that it is applied within the international law context, and is thus appropriate for international human rights litigation.<sup>39</sup> Arguably, this test provides the flexibility needed for application in a vast array of ATCA claims.<sup>40</sup> What's more, even though the aiding and abetting standard is used within the criminal context internationally, the tests to determine its elements were derived from American Restatement of Torts, section 876, and thus American courts presumably would be familiar with applying it within a civil context.<sup>41</sup>

The majority acknowledged that its adoption of the aiding and abetting standard was based only "on the record in this case."<sup>42</sup> Accordingly, they suggested that another standard might be appropriate for other cases.<sup>43</sup> This concession provided the basis of Judge Reinhardt's concurrence, in which he disagreed with the majority's adoption of the international aiding and abetting standard.<sup>44</sup>

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33. *Unocal Appeal Decision*, 2002 U.S. App. LEXIS 19263, at \*37-38.

34. *Id.* at 45.

35. *Id.* at 44.

36. *Id.* at 45-46.

37. *Id.* at 47.

38. *Id.* at 48.

39. See Prociv, *supra* note 8, at 531 n.125.

40. See e.g., *supra* note 13 (environmental claims in ATCA litigation); see also *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (this was the first ATCA case to be brought in the human rights context and is thus the exemplary means of using the ATCA against a rogue official for individual torture claims); see also *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2001) (like *Unocal*, *Wiwa* used the ATCA as a means to hold corporations liable for human rights abuses committed by corporations).

41. *Unocal Appeal Decision*, 2002 U.S. App. LEXIS 19263, at 42-44.

42. *Id.* at 43, n.25.

43. *Id.* at 43.

44. *Id.* at 84-85. There is a further distinction between the opinions as to whether the violation alleged must amount to a *jus cogens* violation, for which a private actor may be held

Judge Reinhardt recognized that the majority sought a standard flexible enough to address the diverse fact patterns and claims brought under the ATCA. He contended, however, that the aiding and abetting standard set by the Yugoslavia Tribunal is too nascent to be reliable.<sup>45</sup> He distinguished international law that is so widely-accepted as to become an international norm incorporated into federal common law from the law of tribunals that has yet to achieve the status of a “norm” and is therefore extrinsic to domestic law.<sup>46</sup>

Judge Reinhardt noted that federal tort law, with its various tests for liability such as reckless disregard and agency liability, would be well suited for application to ATCA claims.<sup>47</sup> Judge Reinhardt interpreted the *Erie Doctrine*<sup>48</sup> to suggest that cases dealing with international law require national uniformity and are therefore precisely the kinds of cases in which federal common law should apply.<sup>49</sup> In addition, Judge Reinhardt argued that federal tort law would be more “palatable” to the courts because they could rely on an abundance of federal precedent.<sup>50</sup>

### C. Ninth Circuit En Banc Hearing

After the three-judge panel issued its decision, Unocal submitted a petition to the Ninth Circuit for reversal.<sup>51</sup> On February 14, 2003, Chief Judge Schroeder issued an order for rehearing of the case en banc to settle the standard of liability issue.<sup>52</sup> On June 17, 2003, an en banc panel heard oral arguments.<sup>53</sup>

Unocal attacked both the international standard and the federal standard of liability articulated by the Ninth Circuit. Unocal argued that: (1) the international aiding and abetting standard is an unprecedented

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liable absent state action, or whether this question is unnecessary, as Judge Reinhardt holds, because state action is presumed and any liability is derivative. *Id.*

45. *See id.* at 90.

46. *Id.* at 96 (“It is important to recognize that there is a distinction between *substituting* international law for federal common law and making proper use of international law as part of federal common law.”); *see also id.* at 50, n.28 (the majority declares that they do no more than declare that “the decisions by these tribunals are *one* of the sources of international law, rather than *the source* of international law.”).

47. *Id.* at 85.

48. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

49. *Unocal Appeal Decision*, 2002 U.S. App. LEXIS 19263, at 92-95 (finding that unique federal interests support the creation of a uniform body of federal common law to facilitate implementation of substantive claims).

50. *Id.* at 105 n.9.

51. Petition for Panel Rehearing and for Rehearing En Banc, *John Doe v. Unocal*, 2002 WL 31063976 (9th Cir. 2002) (Nos. CV-96-6959 and CV-96-6112) (hereinafter *Petition*).

52. *Doe v. Unocal*, Nos. 00-56603, 00-57197, Nos. 00-56628, 00-57195, 2003 U.S. App. LEXIS 2716 (9th Cir. 2003).

53. Docket # 00-56603, 00-56628, 00-57195, 00-57197 (hereinafter *Transcript*.) Before: Schroeder, Reinhardt, Kozinski, Rymer, TG Nelson, Tashima, Graber, McKeown, W. Fletcher, Fisher, Rawlinson, CJJ.

and unwarranted expansion of liability under the ATCA,<sup>54</sup> (2) the aiding and abetting standard's requirement of constructive rather than actual knowledge further contradicts co-tortfeasor liability theories,<sup>55</sup> and (3) the three-judge panel erred by failing to apply a traditional §1983 analysis.<sup>56</sup>

Counsel for the plaintiffs refuted Unocal's claim that the aiding and abetting standard was wholly unprecedented by highlighting the use of the standard in the context of forced labor issues in the Nuremberg Trials.<sup>57</sup> The panel, however, aptly distinguished this subset of cases on the grounds that the Holocaust gave rise to the necessity defense for employers who were later tried in the Nuremberg Trials.<sup>58</sup> Furthermore, counsel for the plaintiffs alluded in his opening statement to the possibility that the international standard of aiding and abetting may be a part of federal common law. He stated that "international norms should be used wherever they exist as part of federal common law. We believe the panel majority correctly identified aiding and abetting as being part of international law and therefore should be applied as part of the federal common law analysis."<sup>59</sup> The court's acknowledgment that a standard is part of international law does not necessarily mean that such law is of the status to be incorporated as federal common law. At least half of the panelists at the en banc hearing expressed discomfort in applying the international aiding and abetting standard until federal common law status is achieved.<sup>60</sup> It is unlikely that a majority will hold that the aiding and abetting standard is the most appropriate standard to apply in an ATCA suit.

The court seemed more comfortable with Judge Reinhardt's federal tort law theory. Counsel for Unocal admitted that if the court were to find that a viable claim against Unocal exists, then application of domestic law, which he asserted retains elements of control, are "commendable."<sup>61</sup> In addition, counsel for plaintiffs conceded that the outcome of the case is not contingent upon the standard applied.<sup>62</sup>

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54. *Id.* at 4.

55. *Id.* at 6.

56. *Id.* at 12.

57. *Id.* at 2, 6, 7.

58. *Unocal Appeal Decision*, 2002 U.S. App. LEXIS 19263, at \*37.

59. *Id.* at 1.

60. See *Transcript, supra* note 53, at 1-10. The following judges asked questions which implied discomfort: Reinhardt, Kozinski, Graber, Fletcher, Schroeder, McKeown, JJ. See e.g., comments of Judge W. Fletcher, at 6 ("I'm a little uncomfortable with the aiding and abetting standard as you're arguing it as perhaps a little far beyond where the established international law consensus has gotten us.").

61. *Transcript, supra* note 53, at 10 (statement of Oppenheimer, Counsel for Unocal).

62. *Id.* at 2.

Arguably, the facts are such that plaintiffs could prevail under either the international aiding and abetting standard or federal tort law standards.

As for the § 1983 tests, the parties agreed that the tests could be applicable, yet none argued that the tests are sufficiently robust to handle a variety of ATCA cases. While Judge McKeown expressed an interest in achieving a uniform standard of liability to be applied across ATCA cases, § 1983 may not be the best means to achieve the desired predictability.<sup>63</sup> Judge McKeown was critical of Unocal's suggested use of § 1983, which she perceived to endorse an unacceptable blind-eye approach to joint action cases under the ATCA.<sup>64</sup> Similarly, Judge Reinhardt argued that the § 1983 analysis is inappropriate in the international context because it assumes the presence of a democratic government. For many of the host countries involved in ATCA suits, this assumption proves false.<sup>65</sup>

#### CONCLUSION

The international aiding and abetting standard is the preferred approach for human rights groups,<sup>66</sup> particularly those that wish to expand the subset of cognizable customary international law violations to include environmental issues. The transcript of the *Unocal* en banc rehearing, however, indicates that the Ninth Circuit is wary of applying international standards that have yet to achieve the status of federal common law and that might therefore generate inconsistent results. Because neither party articulated clear international standards that have reached this status, the court would be most prudent to abandon application of the aiding and abetting test. Therefore, a domestic standard of liability should be applied. Judge Reinhardt's proposed federal tort standard appears to be the least controversial test, achieving both the goals of uniformity and the flexibility necessary to adjudicate diverse ATCA claims.

*Jill Meyers*

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63. *Id.* at 3.

64. *Id.* at 15.

65. *Id.* at 10.

66. See Prociv, *supra* note 8, at 516.

