

7-1-2003

Incorporating Specific International Standards into ATCA Jurisprudence: Why the Ninth Circuit Should Affirm *Unocal*

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Recommended Citation

Justin Proxiv, *Incorporating Specific International Standards into ATCA Jurisprudence: Why the Ninth Circuit Should Affirm Unocal*, 34 U. Miami Inter-Am. L. Rev. 515 (2003)

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COMMENT

INCORPORATING SPECIFIC INTERNATIONAL STANDARDS INTO ATCA JURISPRUDENCE: WHY THE NINTH CIRCUIT SHOULD AFFIRM *UNOCAL*

I. Introduction	515
II. ATCA: A Brief Overview	517
A. Legislative History	517
B. Case Law	518
1. Liability for Private, Non-State Actors	521
2. The Joint Action Test and the State Action Doctrine	522
III. Why Domestic Jurisprudence Does Not Work and Why International Standards Are Ready for Incorporation	530
IV. What the Ninth Circuit Will Hear Next	539
V. Why ATCA Should Incorporate International Standards	542
A. A Transition Away from Domestic Jurisprudence	542
B. The Worthy Substitutes	543
1. Aiding and Abetting	543
2. The <i>Dusko Tadic</i> Approaches	544
3. Does It Really Matter Anyway?	546
VI. Conclusion	547

I. INTRODUCTION

In the international arena, plaintiffs rely on doctrines of international state responsibility to bring tort actions, making private parties responsible for violations committed by states. The analog of such jurisprudence in the United States is the Alien Tort Claims Act, 28 U.S.C. § 1350 (2000) (ATCA).

In the Judiciary Act of 1789, Congress established federal jurisdiction over criminal offenses committed by individuals in violation of the law of nations. ATCA was created as the civil counterpart to those criminal provisions. “Where an alien is

injured by the commission of a tort in a violation of the law of nations or a treaty, ATCA recognizes the legal personality and duty of the tortfeasor to compensate the injured alien."¹

However, recent decisions interpreting ATCA have come under heavy criticism. Three specific areas of ATCA present the most problems. The first is the difficulty in determining whether the specific wrong complained of is actionable, the second is determining when a private party can be sued in the absence of state action, and the third is the difficulty in determining which substantive tests should be applied to the defendants' conduct. This Comment focuses on the last of these problems. Because most violations are so egregious, courts are less hesitant to find condemnation of such acts in the appropriate sources of controlling law. However, when choosing the appropriate tests, it is much harder to implement the logic of 'ends justifying means,' and courts have greatly diverged on whether domestic substantive law or specific international standards are appropriate for determining liability. This Comment focuses on why using domestic jurisprudence is extremely problematic and why courts should universally incorporate specific international standards into ATCA jurisprudence.

Part II presents a brief overview of ATCA as presently interpreted. In that section, *John Doe I v. Unocal Corp.*² is introduced. This case is at the forefront of the issues discussed in this Comment. The *Unocal* decision was the first to hold that liability under ATCA may be appropriately determined according to specific international substantive tests. Focus will be on this case in light of the Ninth Circuit's February 14, 2003 order to rehear the case en banc.³

In Part III, problems and inconsistencies with the statute are acknowledged and discussed, and sources of international law ready for incorporation are identified. Part IV lays out the arguments from both parties' petitions for rehearing of *John Doe I v.*

1. Kenneth C. Randall, *Further Inquiries into the Alien Tort Statute and a Recommendation*, 18 N.Y.U. J. INT'L L. & POL. 473, 498-99 (1986). Congress deemed ATCA particularly necessary because "[t]here is no global international tribunal to resolve [cases of human rights violations against aliens], and [these] victims generally cannot get a fair hearing in their home countries. . . ." RALPH G. STEINHARDT & ANTHONY D'AMATO, *THE ALIEN TORT CLAIMS ACT: AN ANALYTICAL ANTHOLOGY* 45 (2001).

2. *John Doe I v. Unocal Corp.*, 2002 WL 31063976 (9th Cir. 2002) [hereinafter *Unocal* Appeal Decision].

3. *John Doe I v. Unocal Corp.*, 2003 WL 359787 (9th Cir. 2003) [hereinafter *Unocal* Rehearing Order].

*Unocal Corp.*⁴ Part V analyzes why such standards ought be incorporated into ATCA jurisprudence, and the Comment concludes in Part VI. It must be noted that Part V is an adventure into relatively virgin territory, as this analysis has not been explored in the multitude of literature investigating ATCA. Ultimately, this Comment seeks to demonstrate that specific tests for complicity derived from sources of international law will promote clarity and consistency in ATCA jurisprudence and ought to be incorporated into the Act.

II. ATCA: A BRIEF OVERVIEW

A. Legislative History

The Alien Tort Claims Act, reads, “[t]he 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.”⁵

In an attempt to punish violations of the law of nations Congress, in 1789, meant to provide for extraterritorial jurisdiction over the crimes of piracy, slave trading, and kidnapping of ambassadors.⁶ Congress’ enactment of ATCA grew from an accepted condemnation for such acts and those committing them, “viewing these offenders as *hostis humani generis*, or ‘enemies of all mankind’. . . .”⁷ This extraterritorial jurisdiction was an “exception to the normal dictate that international law does not permit . . . jurisdiction for unofficial acts.”⁸

Because the law of nations itself does not provide rights of action, the inference is that Congress sought to grant causes of action to foreign nationals for violations thereof. “Any other interpretation would render ATCA valueless”⁹

4. *Unocal Appeal Decision*, *supra* note 2.

5. Alien Tort Claims Act, 28 U.S.C. § 1350 (1994).

6. Jean-Marie Simon, *The Alien Tort Claims Act: Justice or Show Trials?*, 11 B.U. INT’L L.J. 1, 8 (1993). For more insight into Congress’ intent, see Jeffrey M. Blum & Ralph G. Steinhardt, *Federal Jurisdiction Over International Human Rights Claims: The Alien Tort Claims Act After Filartiga v. Pena-Irala*, 22 HARV. INT’L L.J. 53 (1970).

7. Simon, *supra* note 6, at 9.

8. *Id.*

9. 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).

B. Case Law

"The modern interpretation of [ATCA] began with *Filartiga*¹⁰ *v. Pena-Irala*."¹¹ *Filartiga* states, "[ATCA] provides both jurisdiction for district courts and a cause of action for violations of the law of nations."¹²

The plaintiffs in *Filartiga* were citizens of Paraguay, where Dr. Filartiga was an opponent of Paraguay's ruling party. He sent his daughter, Dolly, to the U.S. in 1978 under a visitor's visa, and Dolly subsequently applied for permanent political asylum.¹³

Dr. Filartiga also had a seventeen-year-old son, Joelito, who was allegedly kidnapped and tortured to death by Americo Norberto Pena-Irala (Pena), the then Inspector General of Police in Paraguay. The Filartigas claim Joelito was tortured and killed because of Dr. Filartiga's political opposition.¹⁴

In 1978, Pena entered the U.S. and began living in Brooklyn, New York.¹⁵ Dolly, who was living in Washington, D.C. learned Pena was in the country, and, using that information, the Immigration and Naturalization service arrested him. He was subsequently ordered deported.¹⁶

Immediately, Dolly served Pena with a summons and civil complaint alleging that Pena wrongfully caused Joelito's death and sought damages of \$10,000,000.¹⁷ The Filartigas claimed jurisdiction under ATCA, arguing that Pena's alleged torture of Joelito violated the law of nations.¹⁸ The District Court for the Eastern District of New York disagreed and, construing the law of nations narrowly, dismissed the suit for lack of subject matter jurisdiction.¹⁹ Pena then returned to Paraguay.²⁰

The Filartigas appealed, arguing that torture is in fact a violation of the law of nations, and the Court of Appeals for the Second Circuit agreed. Addressing the question of whether torture is a violation of the law of nations, the court stated, "In light of the universal condemnation of torture . . . , we find that an act of tor-

10. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

11. Ridenour, *supra* note 9, at 583.

12. *Id.* at 584.

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

14. *Id.*

15. *Id.* at 878-79.

16. *Id.* at 879.

17. *Id.*

18. *Id.*

19. *Id.* at 880.

20. *Id.*

ture committed by a state official . . . violates established norms of the international law of human rights, and hence the law of nations."²¹

Even though the court found that "there are few, if any, issues in international law . . . on which opinion seems to be so united as the limitations on a state's power to torture persons,"²² the court acknowledged that a "requirement that a rule command the 'general assent of civilized nations' to become binding upon them all is a stringent one. Were this not so, the courts of one nation might feel free to impose idiosyncratic legal rules upon others, in the name of applying international law."²³ So, according to *Filartiga*, there is no unanimity requirement for a violation to fall within the law of nations. In fact, "the ultimate scope of those rights [falling within the law of nations is] a subject for continuing refinement and elaboration. . . ."²⁴

However, *Filartiga* did not leave completely open the question of determining which violations are actionable. "The Supreme Court has enumerated the appropriate sources of international law. The law of nations 'may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law.'"²⁵ Left open, however, was the question of whether ATCA applied to private individuals as well as state actors.

In general, though, to state a claim under ATCA, a plaintiff must allege: 1) a claim by an alien, 2) a tort, and 3) a violation of either the law of nations or a treaty of the U.S.²⁶

Most recently, in *John Doe I v. Unocal Corp.*,²⁷ a three-judge panel of the Ninth Circuit Court of Appeals modified the approach to ATCA in the context of reversing a summary judgment granted in favor of the defendants. This decision was the first domestic case to delineate specific international standards appropriate for liability determinations in ATCA cases, and, as will be discussed in section V, proves that such standards are a step in the right

21. *Id.*

22. *Id.* at 881.

23. *Id.*

24. *Id.* at 885. Note this is not the focus of the author's Comment and only merits mentioning at this point as one of *Filartiga*'s key holdings.

25. *Id.* at 880.

26. Ridenour, *supra* note 9, at 595; see also Simon, *supra* note 6, at 8-9.

27. *Unocal* Appeal Decision, *supra*, note 2. Because this Comment discusses three different opinions in the *Unocal* matter, reference to the case name "*Unocal*" as used hereafter refers to the 2002 decision by the three-judge panel.

direction for meaningful changes in ATCA jurisprudence. The Ninth Circuit, however, has just ordered that this case be reheard en banc in June, 2003.²⁸ This Comment was written in the hope that the en banc panel affirms the *Unocal* decision in its entirety and further seeks to explain why such a holding is necessary.

In *Unocal*, a group of fifteen Burmese villagers brought suit against California-based oil companies for international human rights violations. The defendants are collectively referred to as "Unocal."²⁹ Plaintiffs claimed Unocal entered into a joint venture with a French oil company and the government of Myanmar (the Burmese military) to extract natural gas from the coast of Burma.³⁰ Plaintiffs further claimed that Unocal, as a private party, was responsible for human rights violations committed by the Burmese military in furtherance of construction of a gas pipeline.³¹ The plaintiffs alleged that during the construction of the pipeline the military forced the villagers, under threats of violence, to work on the projects and to relocate for the benefit of the project. Plaintiffs also alleged specific acts of violence including, torture, rape, and murder.³²

The parties stipulated that the third prong of the ATCA test, the existence of a violation of either the law of nations or a treaty of the U.S., was satisfied,³³ but disagreed as to whether, under differing tests of substantive law, Unocal could be liable for these violations.

Plaintiffs put forth two arguments for Unocal's liability: (1) liability as a private actor, and (2) liability under a *color of law / joint action* doctrine. Nevertheless, the District Court granted defendant Unocal's motions for summary judgment on all of plaintiffs' ATCA claims.³⁴ The District Court also granted Unocal's motion to recover costs in the amount of \$125,846.07.³⁵ Plaintiffs subsequently appealed the foregoing judgments.

28. *Unocal* Rehearing Order, *supra*, note 3. "Upon the vote of a majority of non-recused regular active judges of this court, it is ordered that this case be reheard by the en banc court pursuant to Circuit Rule 35-3. The three-judge panel opinion shall not be cited as precedent by or to this court or any district court of the Ninth Circuit, except to the extent adopted by the en banc court." *Id.* at *1.

29. *John Doe I v. Unocal Corp.*, 110 F. Supp. 2d 1294, 1295 (C.D. Ca. 2000) [hereinafter *Unocal* District Court Opinion].

30. *Unocal* Appeal Decision, *supra* note 2, at *1.

31. *Id.* at *3.

32. *Id.* at *3-*4.

33. See *supra* text accompanying note 26. Hence, whether the alleged acts violated the law of nations was not at issue.

34. *Unocal* Appeal Decision, *supra* note 2, at *7.

35. *Id.* at *8.

1. Liability for Private, Non-State Actors³⁶

Recently, "in a series of cases involving 'proto-states' and paramilitary groups . . . courts [have come] to interpret [ATCA] in conformity with emerging international standards expanding liability to non-state actors."³⁷ This expansion was motivated by a concern that certain violations of human rights exist in the absence of state action. For example, violations like torture, slave trade, and piracy violate norms of international law in lieu of state participation.

In *Kadic v. Karadzic*,³⁸ plaintiffs were Croat and Muslim citizens of Bosnia-Herzegovina. The defendant, Karadzic, was part of a three-man presidency exercising actual control over the military within large parts of Bosnia.³⁹ Plaintiffs alleged they were victims of crimes including rape, forced prostitution, forced impregnation, torture, and execution, perpetrated by Karadzic, and by military forces under his control.⁴⁰

Karadzic argued he was not a state actor, and hence, not susceptible to the law of nations, which binds persons only when they act under color of state law.⁴¹ The court disagreed. While crimes such as torture and execution are proscribed by international law only when committed by state officials, the law of nations has historically been applied to private actors for the crimes of piracy and slave trading, and for certain war crimes.⁴² "[T]he availability of the Alien Tort Act to remedy such violations was early recognized by the Executive Branch in an opinion of Attorney General Bradford in reference to acts of American Citizens aiding the French fleet to plunder British property"⁴³ Thus, "crimes like rape, torture, and summary execution, which by themselves require state action for ATCA liability to attach, do *not* require state action when committed in furtherance of other crimes . . . which by themselves do not require state action"⁴⁴ The court further

36. As mentioned above, *see supra* text accompanying notes 1-2, this Comment does not focus on whether courts have appropriately held ATCA liability as extending to private parties. The following paragraphs are included as necessary to a factual understanding of the *Unocal* case.

37. Steinhardt, *supra* note 1, at 8. Steinhardt is referring to the *Kadic* decision discussed in the text immediately following this note.

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

39. *Id.* at 237.

40. *Id.*

41. *Id.* at 239.

42. *Id.*

43. *Id.*

44. *Unocal* Appeal Decision, *supra* note 2, at *9 (emphasis in original).

held that *Filartiga* was not in conflict because there the court "had no occasion to consider whether international law violations other than torture [were] actionable against private individuals. . . ." ⁴⁵

In *Unocal*, the court noted that there are two threshold questions in any ATCA case: (1) whether "the alleged tort is a violation of the law of nations," ⁴⁶ and (2) when the action is against a private party, "whether the alleged tort requires the private party to engage in state action for ATCA liability to attach, and if so, whether the private party in fact engaged in state action." ⁴⁷ As to the forced labor claims, the District Court held that even though Unocal knew "forced labor was being used" to benefit the joint venture, plaintiffs' cause of action failed because "Unocal's conduct did not rise to the level of 'active participation'. . . ." ⁴⁸

The Ninth Circuit reversed, holding, "[f]orced labor is a modern variant of slavery to which the law of nations attributes individual liability," and that there was an issue of fact as to whether Unocal may be liable under an "aiding and abetting" standard. ⁴⁹ Generally speaking, the aiding and abetting standard, which is derived from international law, has two requirements: (1) An *actus reus* requirement demanding "practical assistance or encouragement which has a substantial effect on the perpetration of the crime"; and (2) a *mens rea* requirement demanding "actual or constructive . . . knowledge that the accomplice's action will assist the perpetrator in the commission of the crime." ⁵⁰ Because there were issues of fact as to whether Unocal hired the military to provide security "in exchange for money or food," and because "[t]he evidence . . . suggest[s] that Unocal knew that forced labor was being utilized," the District Court's granting of summary judgment was error. ⁵¹

2. The Joint Action Test and the State Action Doctrine

The *Unocal* plaintiffs also argued Unocal's liability was based

45. *Kadic*, 70 F.3d at 240.

46. As mentioned above, the parties stipulated so as to take this out of issue. See *supra* text accompanying note 33.

47. *Unocal* Appeal Decision, *supra* note 2, at *9. The court held all *jus cogens* violations are violations of the law of nations. *Id.* at *8. *Jus cogens* violations are "violations of norms of international law that are binding on nations even if they do not agree to them . . ." *Id.* at *11. *Jus cogens* violations necessarily include torture, murder, and slavery, and may include rape. *Id.* at *8.

48. *Id.* at *10.

49. *Id.* at *9, *10. This specific test will be discussed in more detail *infra*.

50. *Id.* at *14, *15.

51. *Id.* at *14-*15.

on its symbiotic relationship with the military and Myanmar government. The crux of this argument is that a private party has acted in concert with a state in committing, or with knowledge of, violations of the law of nations. This argument is available when the private party itself has not actually committed the violations.

The Supreme Court of the United States has enumerated four tests for complicity in these situations:⁵² 1) When a private party endeavors to take on state responsibility; 2) when a private party is in effect ordered by a state to commit a wrongful act; 3) where the nexus between the private party and the state is such that the action of the latter may be fairly treated as that of the state itself; and 4) a joint action test.

Unfortunately, these are not clear-cut and distinct tests, and may simply be different ways of characterizing similar factual situations.⁵³ "Both the Ninth Circuit and the Supreme Court have recognized that 'cases deciding when private action might be deemed that of the state have not been a model of consistency.'"⁵⁴ Furthermore, it is not at all clear from the case law the situations in which it is appropriate to apply one or more of the above tests. This is further indicative of why courts must abandon these types of domestic substantive approaches.

Some courts have used the 'color of law' jurisprudence of 42 U.S.C. § 1983⁵⁵ as "a relevant guide to whether a defendant has engaged in official action for purposes of jurisdiction under" ATCA.⁵⁶ Hence, the *Unocal* plaintiffs used § 1983 to satisfy the joint action requirement by arguing the defendants were "liable for violations of international law committed through collaboration with a sovereign government."⁵⁷

The Ninth Circuit has held under the joint action test that a "private party [must be] 'a willful participant in joint action with the State or its agents.'"⁵⁸ Courts also find joint action by looking to "whether state officials and private parties have acted in con-

52. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939 (1982).

53. *Id.* at 939. See also Steinhardt, *supra* note 1, at 11 ("The nexus standards to date may well offer insufficient guidance to multinational corporations attempting in good faith to avoid liability under [ATCA].").

54. *Unocal* District Court Opinion, *supra* note 29, at 1305.

55. 42 U.S.C. § 1983 (1994) (Civil action for deprivation of rights).

56. *Kadic v. Karadzic*, 70 F.3d 232, 245 (2d Cir. 1995).

57. Ridenour, *supra* note 9, at 590.

58. *Unocal* District Court Opinion, *supra* note 29, at 1305 (citing *Dennis v. Sparks*, 449 U.S. 24, 27 (1980)).

cert in effecting a particular deprivation of constitutional rights."⁵⁹ Yet another way to prove joint action is to "demonstrate a conspiracy between the private and state actors."⁶⁰ Finally, "[a] private individual [also] acts under 'color of law' . . . when he acts with significant state aid."⁶¹

It is obvious that the domestic approaches can be more than just a little confusing. In their defense, perhaps the easiest way to understand them is to condense the above four tests into the final 'joint action' test and use the first three as factors in the analysis. For further insight, the principal § 1983 cases from which ATCA principles are drawn are discussed below.⁶²

In *Collins v. Womancare*,⁶³ abortion protestors sued Womancare, an abortion clinic, for civil rights violations under § 1983. Womancare had obtained an injunction prohibiting protestors from picketing within a certain distance of its property.⁶⁴ When Womancare attempted to serve plaintiffs with the injunction and move them across the street, plaintiffs refused. After the police arrived, an officer informed a Womancare employee of her right to make a citizen's arrest.⁶⁵ The Womancare employee, upon her attorney's advice, performed a citizen's arrest, and the plaintiffs subsequently sued, arguing the employee had acted under color of law by effecting an arrest in concert with a police officer.⁶⁶

There were no allegations of a conspiracy, and the court looked instead to whether the Womancare employee had "willfully" participated in state action with the police officers.⁶⁷ The

59. *Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442, at 1453 (10th Cir. 1995).

60. *Unocal* District Court Opinion, *supra* note 29, at 1306.

61. *Id.* at 1305.

62. It is necessary to point out that the § 1983 body of law is extremely voluminous, spreading across nearly all the federal circuits in thousands of opinions. The § 1983 cases discussed in this Comment are those specifically relied on by ATCA cases. It would be impossible and disadvantageous to discuss all § 1983 cases because many cases are Circuit specific, and an attempt to discuss and reconcile all of them would necessitate an article within an article. Instead of touching upon every single test articulated within § 1983 jurisprudence, the author leaves this general description of § 1983 to the reader as further evidence that such body of law is ill suited to provide the substantive basis for ATCA. The specific international standards articulated by the *Unocal* and *Dusko Tadic* cases (discussed below) have the advantages of simplicity and cohesiveness that the domestic jurisprudence so sorely lacks.

63. *Collins v. Womancare*, 878 F.2d 1145 (9th Cir. 1989).

64. *Id.* at 1146.

65. *Id.*

66. *Id.* at 1146, 1154.

67. *Id.* at 1154.

court noted that such joint action "requires a substantial degree of cooperati[on]. . . ." ⁶⁸ Because the facts failed to establish that the state had "so far insinuated itself into a position of interdependence with [Womancare employees] that it must be recognized as a joint participant in the challenged activity . . . [Instead], virtually all of the circumstances of this case point to the opposite conclusion." ⁶⁹

The fatal facts included: (1) the "impetus for the arrests came from Womancare employees and not San Diego police officers;" ⁷⁰ (2) the officer refused to make an arrest on his own authority; ⁷¹ (3) the plaintiffs failed to dispute that the officers maintained a position of neutrality; ⁷² and (4) "there is no indication in the record that state agents failed to use independent judgment or in any way coerced or encouraged Womancare employees to effect the citizen's arrest." ⁷³ The court held the state failed to exercise any actual authority and never intended to act for the private benefit of Womancare.

In *Gallagher v. Neil Young Freedom Concert*, ⁷⁴ concertgoers sued a concert promoter under § 1983 after being searched outside of a Neil Young performance at the University of Utah. Two weeks before the concert, university officials met to discuss the implementation of appropriate security procedures before and during the show. ⁷⁵ During this meeting, a promoter directed a security company to perform the challenged searches. ⁷⁶

The court held the joint action test did not apply because the facts failed to show that university officials participated in the searches. ⁷⁷ The court acknowledged the four different tests articulated by the Supreme Court ⁷⁸ and analyzed the facts under each. ⁷⁹

The main issue under the nexus test is to establish the appro-

68. *Id.*

69. *Id.* at 1155.

70. *Id.* (noting the officer actually attempted to discourage the arrest).

71. *Id.*

72. *Id.*

73. *Id.* at 1156.

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

75. *Id.* at 1445.

76. *Id.*

77. *Id.* at 1455.

78. *Id.* at 1456. See *supra* text accompanying notes 52-53.

79. The court defined the fourth test as the 'public function test.' *Gallagher*, 49 F.3d at 1456. This test is the least complicated and looks mainly to see if the state has expressly delegated responsibility to a private party. It suffices to acknowledge the mere existence of the public function test as one of many for determining state action as further indicative of the problems in ATCA jurisprudence.

priate link between the defendant and the alleged state actor.⁸⁰ In *Gallagher*, the court held that under the nexus test, "a state normally can be held responsible for private decision 'only when it has exercised coercive power or has provided such significant encouragement . . . that the choice must in law be deemed to be that of the State.'"⁸¹ Accordingly, the state must be responsible for the "specific conduct" of the defendants.⁸² Mere funding or "acquiescence in the initiatives of a private party [are] not sufficient to justify holding the State responsible"⁸³ Here, there was no direct nexus between University rules or policies and the searches actually performed. Thus, the court found the requisite nexus absent.⁸⁴

In focusing on whether the searches "resulted from" a specific state policy or decision, the court held, "[u]niversity rules and policies, standing alone, [were] . . . too general to supply" the necessary link.⁸⁵ There was no evidence that the university "influenced the formulation or execution of this policy."⁸⁶ Nor did it matter that university police were present during the searches. Because the security company's "employees conducted the pat-down searches pursuant to [their own policies], the observation of these searches by University officers does not supply the required nexus."⁸⁷

The court next addressed the issue of whether the defendants were liable under a 'symbiotic relationship' test.⁸⁸ The court noted the leading case to be *Burton v. Wilmington Parking Authority*.⁸⁹ In *Burton*, a restaurant leasing space in a publicly financed building refused to serve African-Americans. Public parking provided available spaces to guests, and as the popularity of the restaurant increased, so did the demand for such parking. The *Burton* court held that the "profits earned by discrimination . . . were indispensable elements in the financial success of the governmental

80. Ridenour, *supra* note 9, at 590.

81. *Gallagher*, 49 F.3d at 1448 (citing *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982)).

82. *Id.*

83. *Id.*

84. *Id.* at 1450.

85. *Id.*

86. *Id.*

87. *Id.* at 1451.

88. *Id.* While the *Gallagher* court chose this label for the test, it is hard to see how it is functionally different from the 'nexus test' or from findings of complicity under a 'color of law' analysis.

89. *Id.* at 1451 (citing *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961)).

agency.”⁹⁰ According to the Court, the public nature of the construction, the operation of the facility, and the mutual benefits accruing between the two demonstrated a degree of state participation sufficient to constitute state action.

However, the U.S. Supreme Court noted, in determining sufficient symbiotic relationships as in *Burton*, “a multitude of relationships might appear to some to fall within [the definition of such a nexus, and] . . . differences in circumstances beget differences in law, limiting the actual holding to lessees of public property.”⁹¹ Hence, the precise scope of this doctrine is unclear, and seems to have taken on an ad hoc quality.⁹² Not surprisingly, some circuit courts have been reluctant to find the required relationship, while others have broken the inquiry down to a mere finding of benefit from the wrongful action. *Burton*, though, has been read very narrowly.⁹³ “Extensive state regulation, the receipt of substantial state funds, and the performance of important public functions do not necessarily establish the kind of symbiotic relationship . . . required for state action.”⁹⁴

The *Gallagher* plaintiffs argued two factors in favor of a symbiotic relationship: (1) the searches occurred on University property, and (2) the University profited from the concert.⁹⁵ The court quickly dismissed the first factor as “clearly” insufficient.⁹⁶ As to the second factor, neither economic benefits nor non-economic benefits were sufficient to establish the required relationship.⁹⁷

In contrast to *Burton*, the record [failed to] establish that the allegedly unconstitutional conduct generated profits that were indispensable elements in the University’s financial success . . . Payments under government contracts and the receipt of government grants . . . are insufficient to establish a symbiotic relationship between the government and a private entity.⁹⁸

90. *Burton*, 365 U.S. at 724.

91. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 358 (1974).

92. “The applicable decisions clearly establish no bright-line rule for determining whether a symbiotic relationship exists between a government agency and a private entity. Questions as to how far the state has insinuated itself into the operations of a particular private entity and when, if ever, the operations of a private entity become indispensable to the state are matters of degree.” *Gallagher*, 49 F.3d at 1452.

93. *Id.* at 1451.

94. *Id.*

95. *Id.* at 1452.

96. *Id.*

97. *Id.* at 1453.

98. *Id.*

Similarly, the fact that "policies of both [the security company] and the University . . . prohibited many of the same items . . . [did] not mean that the two entities were functionally intertwined under the *Burton* standard."⁹⁹ Even though the searches revealed items prohibited by the university, "this assistance falls far short of the degree of indispensability required by *Burton*."¹⁰⁰

Finally, the *Gallagher* court looked for complicity under a "joint action test."¹⁰¹ Under this test, "courts examine whether state officials and private parties have acted in concert in effecting a particular deprivation of constitutional rights."¹⁰² Of particular importance is action by the private party rising to the level of "willful" participation.¹⁰³ The relevant case law has diverged into two lines. The first line focuses on intent to see whether the parties have sufficiently conspired to deprive third parties of rights, while the second focuses on the manner in which the alleged deprivation is carried out. Under the "conspiracy" approach, "state action may be found if a state actor has participated in or influenced the challenged decision or action."¹⁰⁴ The second approach is satisfied "if there is a 'substantial degree of cooperative action' . . . or if there is 'overt and significant state participation' . . . in carrying out the deprivation of plaintiff's constitutional rights"¹⁰⁵ This second approach is most consistent with Supreme Court cases finding joint action where the harm is caused by state actors responding to a legal procedure commenced by a private party.

Plaintiffs argued two factors supporting a finding of joint action: (1) the University policies gave one individual, Mr. James, broad authority over the security procedures to be implemented; and (2) the University and the security company shared a common goal of producing "a musical concert from which each would benefit financially."¹⁰⁶ The court held neither factor established the necessary "joint action."¹⁰⁷

The university policies were silent as to the exact kind of

99. *Id.*

100. *Id.*

101. *Id.* Note what the *Gallagher* court refers to as the "joint action" test may be quite different from how other courts have described the joint action test. This is exactly the type of confusion that use of domestic jurisprudence brings to ATCA.

102. *Id.*

103. *Id.*

104. *Id.* at 1454.

105. *Id.*

106. *Id.* at 1455.

107. *Id.*

security provided at concerts. "This silence establishes no more than the University's acquiescence in the practices of the parties," which is insufficient to establish state action.¹⁰⁸ Similarly, sharing the common goal of making money "does not establish the necessary degree of concerted action . . . [S]tate and private entities must share a specific goal to violate the plaintiff's [rights]."¹⁰⁹

Relying on the above cases, the District Court in *Unocal* granted defendants' motions for summary judgment on the plaintiffs' remaining theories of liability.¹¹⁰ "As in *Gallagher*, *Unocal* and [the Burmese government] shared the goal of a profitable project. However, . . . this shared goal does not establish joint action. Plaintiffs present no evidence that *Unocal* 'participated in or influenced' the military's unlawful conduct; nor do Plaintiffs present evidence that *Unocal* 'conspired' with the military to commit the challenged conduct."¹¹¹

The District Court also held that when, as in this case, it is the state actor committing the alleged violations, an additional requirement of proximate cause is needed to hold the private party liable under a theory of joint action.¹¹² "In order to establish proximate cause, a plaintiff must prove that the private individuals exercised control over the [state's] decisions to commit the § 1983 violation."¹¹³ Here, "Plaintiffs present[ed] no evidence [that] *Unocal* 'controlled' the Myanmar military's decision to . . . commit the alleged tortuous acts. . . ."¹¹⁴ This requirement of proximate cause is not yet a universal one. The Supreme Court has yet to consider the issue, and the District Court in *Unocal* derives this precedent from Ninth Circuit cases only.

The Ninth Circuit reversed the District Court's grant of summary judgment on the claims of murder and rape, but affirmed the granting of summary judgment on the claims of torture.¹¹⁵ The court reaffirmed that "under *Kadic*, State action [would not be] required for . . . acts [of rape and murder]" to give rise to

108. *Id.*

109. *Id.*

110. Keep in mind that the District Court in *Unocal* did not analyze the plaintiffs' claims in a bullet point approach similar to that of the *Gallagher* court. The District Court did not take into account each test separately, but considered them all in one paragraph. *Unocal* District Court Opinion, *supra* note 29, at 1306-07.

111. *Id.*

112. *Id.* at 1307.

113. *Id.*

114. *Id.*

115. *Unocal* Appeal Decision, *supra* note 2, at *24.

liability.¹¹⁶

For acts of rape and murder committed by the military, the court disregarded the tests articulated in *Collins* and *Gallagher* and held that Unocal may be liable under the aforementioned aiding and abetting test.¹¹⁷ There were issues of fact as to whether the same practical assistance evidence that supported liability for forced labor also supplied the necessary *actus reus* and *mens rea* requirements for rape and murder.¹¹⁸

However, the record did not "contain sufficient evidence to establish a claim of torture Although a number of witnesses described acts of extreme physical abuse that might give rise to a claim of torture, the allegations all involved victims other than Plaintiffs."¹¹⁹

III. WHY DOMESTIC JURISPRUDENCE DOES NOT WORK AND WHY INTERNATIONAL STANDARDS ARE READY FOR INCORPORATION

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 decisions"¹²⁰ "Victims of human rights abuses and their advocates fight an uphill battle, looking for the cracks through which they can slip their claims in an effort to find some means to seek justice, hold those responsible accountable, and help prevent such abuses in the future."¹²¹ As a result, a plaintiff's burden to establish that a defendant has committed a tort and violated the law of nations or a treaty, and thereby injured plaintiff, has been difficult to sustain.¹²²

The 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

116. *Id.* at *15.

117. *Id.*

118. *Id.* at *16.

119. *Id.*

120. Ridenour, *supra* note 9, at 584. See also Simon, *supra* note 6, at 28 (noting decisional law coming after *Filartiga* have produced a miasma of legal interpretations).

121. Beth Stephens, *Taking Pride in International Human Rights Litigation*, 2 CHI. J. INT'L L. 485, 493 (2001).

122. Randall, *supra* note 1, at 503.

has been alleged. . . . Consequently, this requirement has greatly limited the feasibility of the ATCA for claims against private individuals.¹²³

Hence, use of the state action analogy is not only confusing, but also results in plaintiffs rarely being able to survive summary judgment. For those that do, the victories are, at the most, "pyrrhic."¹²⁴ This is exactly why the Ninth Circuit, as an en banc panel, should affirm the *Unocal* decision in its entirety. Fortunately, international law provides tests for liability of private individuals and takes a significantly broader approach to liability than . . . ATCA does.¹²⁵ Further, the *Unocal* court is not alone in recognizing that a change needs to be made.

Following the *Unocal* decision, the court in *Tachiona v. Mugabe*¹²⁶ held domestic jurisprudence inappropriate as the substantive basis for ATCA cases. However, the court did not take its opinion as far as the *Unocal* court because it failed to delineate specific international standards as appropriate substitutes. Instead, the court stopped just short of *Unocal* by holding that, in general, substantive principles should be drawn from international law. The case is significant, though, because it is further recent evidence that there are problems with the way ATCA is currently interpreted.

In *Tachiona*, plaintiffs, citizens of Zimbabwe, sued the county's ruling party, the Zimbabwe African National Union-Patriotic Front ("ZANU-PF"), alleging violations under ATCA.¹²⁷ Plaintiffs alleged ZANU-PF 1) tortured and brutally murdered three people;¹²⁸ 2) unlawfully denied plaintiffs various political freedoms, including denial of the rights of association, assembly, and the right to participate in state's government;¹²⁹ 3) subjected plaintiffs to cruel and inhuman treatment;¹³⁰ and 4) racially discriminated and unlawfully seized plaintiffs' property.¹³¹

123. Douglas S. 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).

124. Simon, *supra* note 6, at 28.

125. Ridenour, *supra* note 9, at 592-93 (discussing the expansive scope of liability under the Nuremberg tribunal system that dealt with the trials of high ranking Nazi leaders and German industrialists after World War II).

126. 234 F.Supp. 2d 401, 413 (S.D.N.Y. 2002).

127. *Id.* at 405.

128. *Id.* at 420.

129. *Id.* at 423.

130. *Id.* at 435.

131. *Id.* at 439.

Because ZANU-PF failed to answer the complaint¹³² or otherwise appear, the District Court entered a default judgment and referred the matter to a Magistrate judge for a determination of damages.¹³³ The court adopted the factual findings in a report issued by the Magistrate judge, but reserved judgment as to the award under ATCA.¹³⁴ Because the court determined that, under *Filartiga*, it was required to perform a choice of law analysis, and because the matter had not been addressed prior to the Magistrate judge's report, the court ordered the parties to brief the issue.¹³⁵ The court found it appropriate to "determine substantive principles to be applied by looking to international law"¹³⁶ and adopted the Magistrate judge's recommendations pertaining to ATCA damages with only one modification.¹³⁷

The court began by noting, "adoption of [international] principles as the product of a choice of law evaluation of an ATCA claim poses a significant quandary."¹³⁸ The problem is one of adopting "one [international] forum's pertinent law in its entirety" versus comparatively identifying "various sources of relevant substantive rights and principles from which the Court may draw in fashioning the ATCA remedy most appropriate under the circumstances of the case."¹³⁹ The court chose the latter, holding "[V]arious international declarations, covenants and resolutions catalogue rights all persons should enjoy; affirm the obligations of nations to ensure those rights by means of implementing legislation; exhort governments to protect and promote widely recognized rights; and pronounce the global community's condemnations and renunciations of wrongful practices."¹⁴⁰ In the alternative, choosing, for example, solely Zimbabwe law would deny plaintiffs recovery and

132. The Court found jurisdiction over the claims against ZANU-PF through process personally served on Zimbabwe President Robert Mugabe, who is also the head of ZANU-PF. *Id.* at 405.

133. *Id.* at 406.

134. *Id.*

135. "With regard to the ATCA claims, the Court determined that under its reading of applicable Second Circuit doctrine, . . . it was required to perform a choice of law analysis to determine the appropriate substantive law governing the adjudication of ATCA disputes alleging human rights abuses." *Id.*

136. *Id.* at 413.

137. The Court denied plaintiffs' general request for punitive damages in connection with the claims asserting unlawful seizure of property. "There [was] no evidence on the record to support a finding that [international sources of law] would authorize the awarding of punitive damages in connection with" such a claim. *Id.* at 441.

138. *Id.* at 407.

139. *Id.*

140. *Id.* at 409.

defeat the entire purpose of ATCA.¹⁴¹

In holding that international law was the appropriate substantive basis, the court first noted,

[T]he challenge [of determining the appropriate standards] has engendered significant conceptual division and divergent practices among the courts that have addressed the question. . . . However, several considerations counsel against . . . [an] unyielding reliance to municipal law . . . to supply the exclusive substantive cause of action and rules of decision governing the adjudication of the merits of international human rights claims invoking the ATCA.¹⁴²

The court cited two main reasons why municipal law is ill suited for the task, and why courts must graft the appropriate substantive tests from an array of international sources.¹⁴³ First, the court reiterated that Congress, intending ATCA be interpreted broadly, "entrusted to the federal courts the task of determining the substantive rights to be applied to ATCA claims by reference to international standards, as well as the 'power to choose and develop federal remedies to effectuate the purposes of the international law incorporated into United States common law.'"¹⁴⁴ Doing such not only furthers "the federal policy embodied in the ATCA", but also effectuates "the clear objectives reflected in the international prohibition against" *jus cogens* violations.¹⁴⁵

Second, in response to the call for adopting strictly the law of the jurisdiction where the violations take place, the court responded, "several conceptual, policy and practical constraints caution against strict adherence to municipal rules of the foreign

141. "[T]he governing law of Zimbabwe, while in general terms recognizing some of the rights Plaintiffs invoke here under ATCA, does not define specific cause of action to vindicate the particular claims asserted, or does not permit recovery of the kinds of damages Plaintiffs seek, or may otherwise bar liability" *Id.* at 408.

142. *Id.* at 411-12.

143. The Court actually cited four reasons, but only two are pertinent to this Comment. The second rationale is a three-paragraph recitation of how other courts have rejected a strict adherence to municipal law, and the results justifying these decisions. *Id.* at 413-14. The fourth rationale states, "A final drawback to a choice of law approach mandating strict adherence to municipal law in redressing international law violations in ATCA cases is the practical and jurisprudential complexities that inhere in discerning, construing and enforcing substantive rules of decision formulated by foreign courts, legislatures or administrative bodies. . . . Though the Federal Rules of Civil Procedure provide guidance for federal courts in applying foreign law, this authority does not mitigate the conceptual and pragmatic obstacles always associated with in [sic] the task." *Id.* at 418.

144. *Id.* at 413 (citing *Filartiga v. Pena-Irala*, 630 F.2d 876, 886 (2d Cir. 1980)).

145. *Tachiona*, 234 F.Supp. 2d at 413. See also *supra* note 47.

state in defining the scope of substantive rights and causes of action¹⁴⁶ For example,

[A]nother limitation inherent in placing undue reliance on municipal law of the foreign state in choice of law analysis is reflected in actions . . . that charge egregious misconduct by the sitting government itself through measures taken by the highest ranking officers of the regime. These are the very officials whose public duties encompass enacting, enforcing and construing domestic laws, and deciding the state's compliance with international norms. It is unlikely to escape the notice of government leaders who defile the powers of their offices by resorting to the barbarism of state-sponsored torture and murder, and to the brutalities characteristic of inhuman treatment of their nation's own people, to equally dishonor the municipal justice system and its laws in order to immunize themselves from accountability and liability for their wrongs.¹⁴⁷

In addition, "because customary international norms are not always fixed in codifications and treaties, not every nation will necessarily reflect clearly in its domestic jurisprudence principles that manifest its unequivocal assent and adherence to universal standards that may override municipal rules."¹⁴⁸ As a consequence:

[T]he magnitude of genocide and murder by torture and extrajudicial killing may have to be adjudged and remedied in accordance with ordinary civil tort standards prescribed in wrongful death statutes. Wholesale degradations and deprivations of all traces of human dignity perpetrated by cruel, inhuman or degrading treatment may be civilly prosecuted under local principles defining assault and battery or infliction of emotional distress. Forced disappearance and prolonged arbitrary detention may be classified as false imprisonment.¹⁴⁹

Hence, the Southern District of New York has agreed to some extent with the *Unocal* court. Adherence to a strict domestic jurisprudence approach, whether the applicable law is extracted from the U.S. or from the foreign jurisdiction at issue, is confusing,

146. *Tachiona*, 234 F.Supp. 2d at 414.

147. *Id.* at 415.

148. *Id.*

149. *Id.* at 416.

complicated, and counterintuitive to the policy of ATCA.¹⁵⁰ However, the *Tachiona* court did not adopt specific international stan-

150. The *Tachiona* Court also relied heavily on *Xuncax v. Gramajo*, 886 F.Supp. 162 (D. Mass. 1995), decided seven years earlier. In *Xuncax*, nine Guatemalan citizens brought suit against Hector Gramajo ("Gramajo"), Guatemala's former Vice Chief of Staff and director of the Army General Staff, commander of the military zone where plaintiffs lived, and Minister of Defense. *Id.* at 169, 171. Plaintiffs alleged "Gramajo bears personal responsibility for the numerous acts of gruesome violence inflicted by military personnel who were under his direct command." *Id.* at 169. Using the military, he "order[ed] and direct[ed] the implementation of the program of persecution and oppression that resulted in the terrors visited upon the plaintiffs and their families." *Id.* at 171. As a result, armed forces "ransacked [plaintiffs'] villages . . . [.] subjected [plaintiffs] to torture and arbitrary detention . . . [.] and forced [plaintiffs] to watch as their family members were tortured to death or summarily executed *Id.* at 169. Plaintiffs served Gramajo while he was in the U.S. (attending a function at Harvard University's Kennedy School of Government), and he filed a *pro se* answer. Gramajo subsequently "declined to participate further in [the] proceedings by refusing to even respond to Court orders requiring him to furnish a current address for service." *Id.* Just as in *Tachiona*, the Court entered a default judgment against the defendant. *Id.*

The Court found subject matter jurisdiction under ATCA, and proceeded with its discussion and analysis of whether "[t]he substantive rule of decision in a case maintained under [ATCA] is . . . provided by the municipal tort law under which plaintiffs bring their claims." *Id.* at 179-181. The Court answered this question in the negative, holding that "simply apply[ing] the relatively definite and concrete standards of liability as set out in . . . municipal tort law . . . [is] neither consistent with the terms of [ATCA] nor with its manifest intent. . . . [T]here appears little warrant to look to municipal law exclusively" given its "seeming inadequacy . . . to address . . . such human rights violations as . . . torture [and] summary execution" *Id.* at 182, 183. Hence, just as the *Tachiona* and *Unocal* Courts held, courts should look to international law for the appropriate substantive tests.

Here, the Court cited three main reasons why international law should provide the appropriate substantive basis for ATCA. First, while the task of fashioning tests from the "'amorphous body' of international law [can be daunting], it is hardly out of scale with similar challenges federal courts have successfully addressed in the past." *Id.* at 182. Second, "by not tethering [ATCA] to causes of action and remedies previously developed under roughly analogous municipal law, the federal courts will be better able to develop a uniform federal common law response to international law violations, a result consistent with the statute's intent in conferring federal court jurisdiction over such actions in the first place." *Id.* Finally, by looking to international law, "courts will be freer to incorporate the full range of diverse elements that should be drawn upon to resolve international legal issues than they would if bound to a straightforward recurrence to extant domestic law." *Id.*

However, the Court acknowledged the downside of "leaving courts free to draw upon diverse sources of law . . ." *Id.* at 183 (emphasis in original). "[N]ovel questions arise when United States Courts are *obliged* to discern, interpret, and then enforce standards of liability framed by foreign courts or legislative bodies, simply because the underlying cause of action may (or may not) be coincident with or analogous to an alleged violation of international law." *Id.* (emphasis in original). For example, the Court here required testimony from "Professor Alejandro M. Garro regarding the provisions and principles of the Guatemalan law that [were] pertinent to this case." *Id.* at 196.

Also, when it is not clear who determines which municipal law is applicable, one of two problems inevitably will arise: 1) Leaving to the Court to determine which law

dards appropriate for incorporation. Perhaps, this was because the Magistrate judge had already done the work of achieving the desired result, or because, with only one party appearing in the case, there was no incentive to push for any specificity. In either case, a court in the Second Circuit has now seen fit to disregard the traditional approach of adjudicating ATCA claims via domestic jurisprudence.¹⁵¹

While the *Tachiona* court deserves credit for taking steps away from ATCA's history of using domestic jurisprudence, it should have followed the *Unocal* court more precisely and adopted specific international standards ready for incorporation. Available standards ready for incorporation are discussed below. Under the Nuremberg tribunal system, the courts utilized an "aiding and abetting" standard that required a much lower threshold for establishing the nexus between states and private parties.¹⁵² This has become the accepted standard for criminal liability in many of the institutions and documents formulated to deal with criminal violations of international law.¹⁵³

The court in *Unocal* was the first domestic court to incorporate the 'aiding and abetting' approach into ATCA jurisprudence. The court affirmed that the Nuremberg Military Tribunals are indeed an appropriate source of guidance for ATCA interpretation because they are "*judicial decisions recognizing and enforcing*" the

is invoked creates a "troublesome conflation of jurisdictional and substantive concerns"; and 2) leaving it to the plaintiff encourages "problems of 'domestic law shopping.'" *Id.*

However, the Court could have avoided such a conundrum by doing exactly what the *Unocal* Court did: adopt *specific* international substantive tests. Doing such obviates both problems discussed above by taking the decision away from both the plaintiffs and the courts. In addition, all parties would, prior to entering the courthouse, be served with some measure of predictability by knowing exactly which principles define the scope of the defendants' liability.

151. However, the reader must remember that the *Tachiona* decision is a district court decision. Since the defendants never once appeared during the trial phase, it is most likely that there will not be an appeal. However, it is entirely possible that, following the Ninth Circuit's en banc decision in the *Unocal* case, the Second Circuit will not hesitate in immediately hearing the next ATCA case brought on appeal.

152. "[A]n individual may be guilty for aiding and abetting an offense that he did not directly commit; and command responsibility, which attributes certain acts of subordinates to the superior." Stephen R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 492 (2001).

153. Ridenour, *supra* note 9, at 594-95 (expanding criminal liability, the Yugoslav Tribunal makes persons individually responsible for any act that aids or abets the execution of a crime). See also *Prosecutor v. Dusko Tadic, Judgment of the Appeals Chamber*, IT-94-1-A (ICTY, July 15, 1999), available at http://www.un.org/icty/tadic/appeal/judgment/index_2.htm (last visited April 20, 2003).

law of nations.¹⁵⁴ Furthermore, the shift is warranted because "District Courts [have been] increasingly turning to the decisions by international *criminal* tribunals for instructions regarding the standards of international human rights law under . . . ATCA."¹⁵⁵

As mentioned in Section II, the aiding and abetting standard contains two elements: an *actus reus*, and a *mens rea*. The practical assistance needed for the *actus reus* to exist "need not constitute an indispensable element, that is, a *conditio sine qua non* for acts of the principle.' . . . Rather, it suffices that 'the acts of the accomplice make a significant difference to the commission of the criminal act by the principle.'"¹⁵⁶ In other words, the *actus reus* is "all acts of assistance . . . that substantially contributed to the commission of the crime."¹⁵⁷ The *mens rea* element requires "actual or constructive . . . 'knowledge that [the accomplice's] actions will assist the perpetrator in the commission of the crime.'"¹⁵⁸ "[I]t is not necessary for the accomplice to [either]share the mens rea [sic] of the perpetrator, in the sense of positive intention to commit the crime. . . [, or know] the precise crime that the principle intends to commit."¹⁵⁹ "Rather, if the accused 'is aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed, he has intended to facilitate the commission of that crime . . .'"¹⁶⁰ In summary, the aiding and abetting standard may be satisfied when there exists "knowing practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime."¹⁶¹

Following *Unocal's* lead, courts can derive two other available tests from the case of *Prosecutor v. Dusko Tadic*.¹⁶² In *Dusko Tadic*, the Appeals Chamber of the International Tribunal for the former Yugoslavia had to "determine whether the Bosnian Serb army was part of the armed forces of Serbia; a positive finding would mean that the war in Bosnia was an interstate war and

154. *Unocal* Appeals Court Decision, *supra* note 2, at *11 (citing *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980)) (emphasis in original).

155. *Id.* at *12 (emphasis in original).

156. *Id.*

157. *Id.* at *13.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Prosecutor v. Dusko Tadic*, *Judgment* of the Appeals Chamber, IT-94-1-A (ICTY, July 15, 1999), at para. 195, available at <http://www.un.org/icty/tadic/appeal/judgment/index.htm> (last visited Apr. 20, 2003).

would thereby trigger protections of civilians . . . and make certain breaches of [the Geneva convention] war crimes.”¹⁶³ The defendant was a military leader within the army who allegedly committed numerous human rights violations. The Tribunal noted three categories of liability for private individuals acting in concert with states to effect violations of human rights:¹⁶⁴ 1) Instances where all defendants acting pursuant to a common design possess the same criminal intent; 2) where there is active participation in the enforcement of repression coupled with knowledge of the nature of the system and intent to further its design; and 3) where the perpetrators commit an act outside of a common design to pursue one course of conduct, but the act is a natural and foreseeable consequence of effecting the common purpose.¹⁶⁵ Thus, at international law an accused is guilty not only for the intended outcome of the criminal activity, but also for crimes that are reasonably expected to flow from the common enterprise.¹⁶⁶

In addition, a distinction concerning the character of the private party gives rise to additional liability of the state. As the *Dusko Tadic* court noted, “when the private party is not a military or paramilitary group, the level of control must be much more substantial and include either specific instructions from the state concerning the commission of the wrongful act, or an endorsement of a completed violation.”¹⁶⁷ Hence, the test varies according to the nature of the party committing the act. Where the party holds a military status, the state is *per se* liable as long as it has overall control of the group by means of equipping, financing, coordinating, or general planning.¹⁶⁸ In other words, “the acts of an armed group are attributable to a state as long as the state ‘has a role in organizing, coordinating or planning the military actions’ of the group”¹⁶⁹ The state does not have to necessarily control “particular operations.”¹⁷⁰

163. Ratner, *supra* note 152, at 499.

164. Prosecutor v. Dusko Tadic, *Judgment of the Appeals Chamber*, IT-94-1-A (ICTY, July 15, 1999), at para. 195, available at <http://www.un.org/icty/tadic/appeal/judgment/index.htm> (last visited Apr. 20, 2003).

165. See Ratner, *supra* note 152, at 490 (discussing other rules for assessing the responsibility of the state or individuals).

166. Craig Forcece, *ATCA's Achilles Heel: Corporate Complicity, International Law and the Alien Tort Claims Act*, 26 YALE L.J. 487, 509 (2001).

167. *Id.* at 508.

168. *Id.* at 510.

169. Ratner, *supra* note 152, at 499.

170. *Id.* at 499 (citing Prosecutor v. Dusko Tadic, *Judgment of the Appeals Chamber*, IT-94-1-A (ICTY, July 15, 1999), available at <http://www.un.org/icty/tadic/appeal/judgment/index.htm> (last visited Apr. 20, 2003)).

IV. WHAT THE NINTH CIRCUIT WILL HEAR NEXT

This section briefly discusses the arguments of both sides' petitions for and against the rehearing en banc in the *Unocal* case. The Ninth Circuit granted Unocal's petition for rehearing and set oral argument for June 2003. The following arguments are what the court can expect to hear and a brief commentary on these arguments. Unocal makes four main arguments in favor of a reversal: 1) The *Unocal* court's "standard for aiding and abetting liability is an unprecedented and unwarranted expansion of liability under [ATCA]"¹⁷¹; 2) because the standard does not require actual knowledge, but only constructive knowledge, such standard contradicts domestic law approaches to co-tortfeasor liability;¹⁷² 3) the court erred by not adhering to the § 1983 jurisprudence traditionally used in ATCA cases;¹⁷³ and, 4) the "application of [the] aiding and abetting standard to the evidence is internally inconsistent"¹⁷⁴

First, Unocal argues the aiding and abetting standard was originally promulgated by an "*ad hoc* international tribunal . . . whose interpretations are subject to change"¹⁷⁵ Hence, such standard "lacks universal acceptance and definition" because it is not part of customary international law.¹⁷⁶ Additionally, Unocal

171. Unocal's Petition for Panel Rehearing and for Rehearing En Banc at 4, John Doe I v. Unocal, 2002 WL 31063976 (9th Cir. 2002)(Nos. CV-96-6959 and CV-96-6112) [hereinafter Unocal Petition for Rehearing].

172. *Id.* at 6.

173. *Id.* at 9.

174. *Id.* at 12. Unocal argues an additional point: "The deleterious impact of the decision is further amplified by the reality . . . that Unocal's investment was permitted by federal statute." *Id.* at 9. The "majority's standard is particularly problematic in a case such as this where the political branches of government have permitted the very investment challenged in court" and concluded that such investments are consistent with United States foreign policy. *Id.* at 8. The author finds troubling the argument that because Congress has authorized a business venture it has implicitly authorized any and all means aimed at completing such venture. While it may be true Congress recognizes the importance of extending this country's reach in gathering natural resources, it hardly seems Congress intended a foreign country's reputation for human rights violations to immunize a private party from liability for violations committed in concert with said foreign country. See *id.* at 9.

175. *Id.* at 5.

176. Further, Unocal argues the standard fails the above requirement because the Court adopted a less restrictive version of the test. The Court left the International Tribunal for the former Yugoslavia's "inclusion of [a] 'moral support'" prong out of its version. *Id.* However, as plaintiffs point out, "[n]ot all rules applied as federal common law in ATCA cases must be universally adopted in the same form in every detail" Plaintiffs' Response To Petition for Panel Rehearing and for Rehearing En Banc at 6, John Doe I v. Unocal, 2002 WL 31063976 (9th Cir. 2002)(Nos. CV-96-

urges that the panel's adoption of aiding and abetting is inappropriate because such standard is historically only concerned with "liability for military or militia members for war crimes committed by . . . military subordinates" ¹⁷⁷

As argued by the plaintiffs, Unocal first contention is seriously flawed.¹⁷⁸ The "specific, universal and obligatory" language refers only to whether plaintiffs alleged a particular violation of the law of nations. It does not relate to whether particular substantive international tests are appropriate for ATCA incorporation. If Unocal were correct, "there [could] be no ATCA liability unless every legal rule employed in an ATCA case has won universal adherence in international law from [the majority] of [all international] court[s], tribunal[s], and state[s]."¹⁷⁹ Such a holding would "utterly thwart the enforcement of the ATCA" ¹⁸⁰ Finally, plaintiffs argue it is unclear whether Unocal's actions were in fact military abuses committed "pursuant to 'a policy of forced labor.'"¹⁸¹

Second, Unocal contends the Court erred because its aiding and abetting standard does not require actual knowledge for liability to attach. Unocal likens the constructive knowledge prong to negligence, which "is not a principle of international law, much less a specific, universal and obligatory international norm."¹⁸² Not only do plaintiffs argue Unocal improperly raises this argument for the first time on appeal,¹⁸³ but distinguish *Central Bank* as a case only dealing with the specific language of the Securities Exchange Act.¹⁸⁴ In contrast, "ATCA plainly authorizes federal courts to adjudicate claims [derived from] international law,"¹⁸⁵ and the aiding and abetting clearly falls within that category.

Third, Unocal argues the court erred because, under § 1983, private actors cannot be liable for conduct of "government officials unless the private actor controlled the conduct of those officials."¹⁸⁶

6959 and CV-96-6112) (citing *Xuncax v. Gramajo*, 886 F.Supp. 162, 187 (D. Mass. 1995) [hereinafter Plaintiffs' Response to Petition]).

177. Unocal Petition for Rehearing, *supra* note 170, at 5.

178. Plaintiffs' Response to Petition, *supra* note 176, at 1-2.

179. *Id.* at 2.

180. *Id.* at 2.

181. *Id.* at 7.

182. Unocal Petition for Rehearing, *supra* note 170, at 8 (citing *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164 (1994) for this proposition).

183. Plaintiffs' Response to Petition, *supra* note 176, at 9-10.

184. *Id.* at 10. See also *Central Bank*, 511 U.S. at 182 (limiting its holding to the securities statute).

185. Plaintiffs' Response to Petition, *supra* note 176, at 10.

186. Unocal Petition for Rehearing, *supra* note 170, at 9-10.

Hence, the District Court properly granted summary judgment in favor of defendants. Rather than taking the position of this Comment, that § 1983 should be completely eliminated from ATCA jurisprudence, plaintiffs argue certain international law claims do not fall within that category of violations governed by the § 1983 "control" test.¹⁸⁷ Plaintiffs rely on the *Kadic* case,¹⁸⁸ which held certain violations so egregious (i.e. slave trading, piracy, genocide, etc.) that the character (private or state) of the tortfeasor was irrelevant for ATCA purposes.¹⁸⁹ Because the violations involved forcing "relocation of villagers at gunpoint to act as unpaid porters" and "rapes and murders . . . as terror tactic[s]" plaintiffs analogize the *Unocal* claims to those "universally condemned" by the *Kadic* case.¹⁹⁰

Finally, *Unocal* argues the three-judge panel erred in holding questions of fact exist under a test requiring "practical assistance" because "[t]here is no evidence that *Unocal* ever requested the Myanmar military" to do anything.¹⁹¹ However, it seems this argument is unavailing. The record reflects evidence that, at the least, raise issues of fact whether *Unocal* actively engaged the Myanmar military. As plaintiffs point out, "a cable from the U.S. Embassy in Rangoon, Myanmar, reported that [a] *Unocal* . . . [r]epresentative . . . 'stated forthrightly that *the companies have hired* the Burmese military to provide security for the project.'"¹⁹² In addition, the same representative "indicated . . . Total/*Unocal* uses [photos, surveys, and maps] to show the [military] where they need helipads built and facilities secured. . . ."¹⁹³

Unocal attempts to dilute such record evidence by arguing most information available to *Unocal* was supplied via a "briefing book" and other documents prepared in their entirety by Total.¹⁹⁴ "[R]eceiving reports in a briefing does not amount to participation; indeed, the fact that *Unocal* needed to be briefed itself contradicts the conclusion that *Unocal* participated in the conduct under dis-

187. Plaintiffs' Response to Petition, *supra* note 176, at 12.

188. See Steinhardt, *supra* note 1.

189. *Kadic v. Karadzic*, 70 F.3d 232, 239 (2d Cir. 1995).

190. Plaintiffs' Response to Petition, *supra* note 176, at 13-14.

191. *Unocal* Petition for Rehearing, *supra* note 170, at 13.

192. *Unocal* Appeal Decision, *supra* note 2, at *2 (emphasis in original); see also Plaintiffs' Response to Petition, *supra* note 176, at 16.

193. *Unocal* Petition for Rehearing, *supra* note 170 at 3. Total was the French oil company that originally established the natural gas project in Burma. *Id.* at 1. *Unocal* acquired its 28% interest in the project from Total. *Id.*

194. *Id.* at 13.

cussion."¹⁹⁵ However, this contention assumes Total did all the work regarding the project, and Unocal seemingly failed to participate following acquisition of its 28% interest. In a project of this magnitude, such contention is probably without merit.

V. WHY ATCA SHOULD FOCUS MORE ON INCORPORATING INTERNATIONAL STANDARDS

A. *A Transition Away from Domestic Jurisprudence*

State responsibility at international law is a body of law the application of which depends on courts being prepared to adopt a somewhat different approach to ATCA than they have done in the past.¹⁹⁶ The courts must adopt and invert the roles of relevant parties, similar to the way in which present ATCA jurisprudence has relied on various other tests to attribute State wrongs to individuals.¹⁹⁷ A court taking it upon itself to do such may find international standards much simpler to apply and more damaging to potential wrongdoers than the often-ambiguous tests mentioned in section II.¹⁹⁸

In support of making this transition, scholars have pointed out that the use of domestic standards are inadequate surrogates for international legal standards in ATCA cases and run counter to the policy and reasoning behind ATCA jurisprudence and legislative intent.¹⁹⁹

"[R]eading [ATCA] as essentially a jurisdictional grant only and then looking to domestic tort law to provide the cause of action mutes the grave *international law* aspect of the tort, reducing it to no more . . . than a garden-variety municipal tort."²⁰⁰ "[T]he needs of the . . . international system are better served by applying international rather than national law" because "the relevant policies of the forum' cannot be ascertained by . . . ignoring . . . decisions which have favored other law, including international law."²⁰¹

However, most commentators have merely acknowledged the usefulness of ATCA jurisprudence and acknowledged the availa-

195. *Id.*

196. Forcese, *supra* note 166, at 510.

197. *Id.*

198. *Id.*

199. *Id.* "[T]hese [domestic] tests set a relatively high standard, as a result of which plaintiffs have lost key cases." *Id.*

200. *Unocal* Appeal Decision, *supra* note 2, at *11 (emphasis in original).

201. *Id.*

bility of alternate international tests. Few commentators have pushed for real change or argued that specific sources of international law are better suited and more workable for these types of cases. Following the lead of the *Unocal* court and universally adopting a shift away from § 1983 jurisprudence will not only give ATCA the air of predictability that it has so sorely lacked, but will also make ATCA a much more useful tool against foreign and domestic defendants who think they can violate human rights with impunity.

B. *The Worthy Substitutes*

1. Aiding and Abetting

When courts decide to make a switch and adopt a more expansive legal standard than the one presently in use, there will be an inevitable problem of inconsistency and/or incoherence of terms. The challenge will be one of actively defining, and refining, a set of definitions that crystallizes the appropriate tests. Fortunately, this is not an improbability. The *Unocal* court has taken the first steps towards making real change by incorporating one international test, the aiding and abetting test, into ATCA jurisprudence.

The court began by acknowledging the similarity between the aiding and abetting standard and the Restatement (Second) of Torts § 876 (1979).²⁰² Although this international test was developed in the context of criminal sanctions, and the Restatement is a source of civil law, this distinction makes no difference in terms of the test's usefulness. In fact, the aforementioned similarity makes the court's "slightly modified" international test especially appropriate.²⁰³ Hence, carving out a workable and cognizable scope of definitions delineating "aiding and abetting" is clearly not an impossible task. As the *Unocal* court noted, doing such will encourage "certainty, predictability . . . uniformity of result . . . ease in the determination and application of the law to be applied," and "the protection of justified expectations[.]"²⁰⁴ The

202. *Id.* at *13. The Restatement reads, "For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he (a) does a tortious act in concert with the other or pursuant to a common design with him, or (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person." Restatement (Second) of Torts § 876 (1979).

203. *Unocal* Appeal Decision, *supra* note 2, at *13.

204. *Id.* at *11.

Tachiona court wholeheartedly agreed,

As a body of federal law develops under [the approach of adopting international standards], so as to give content to an ATCA right of action and thus fill in interstices with federal decisional rules, the federal courts' response acquires the virtues of uniformity and recognition of more diverse sources of substantive standards to draw upon in shaping remedies for adjudication of ATCA claims. . . . [B]y not tethering [the ATCA] to causes of action and remedies previously developed under roughly analogous municipal law, federal courts will be better able to develop a uniform federal common law response to international law violations, a result consistent with the statute's intent in conferring federal court jurisdiction over such actions in the first place.²⁰⁵

As a result, not only will the *Unocal* plaintiffs have their chance for a meaningful day in court, but also, if courts follow the Ninth Circuit's reasoning, future defendants will have guidelines for defining their potential liability.

2. The *Dusko Tadic* Approaches

The first category of criminality discussed by the Appeals Chamber²⁰⁶ in *Dusko Tadic* focuses not only on intent but also on knowledge and active participation. This approach embraces a "zone of danger" test in which defendants are responsible for the natural and foreseeable consequences of their actions in working to affect a common goal or purpose.²⁰⁷

This test is effective because it finds liability in the gray areas created by the domestic jurisprudence. This is most important in situations like those giving rise to the *Unocal* case. For example, before *Unocal* acquired an interest in the joint venture, it hired a consulting company to assess the risks involved. They were subsequently informed that the Burmese government "habitually makes use of forced labor to construct roads."²⁰⁸ This prompted a *Unocal* vice president to admit that in using the Myanmar military for protection, "[P]ipeline construction . . . might proceed in [a] manner that would be out of our control and not . . . in a manner that we would like to see them proceed. . . ."²⁰⁹ Not surpris-

205. *Tachiona v. Mugabe*, 234 F.Supp. 2d 401, 419 (S.D.N.Y. 2002) (citing *Xuncax v. Gramajo*, 886 F.Supp. 162, 182 (D. Mass. 1995)).

206. *Forcese*, *supra* note 166, at 500-01.

207. *Id.*

208. *Unocal* Appeal Decision, *supra* note 2, at *4.

209. *Id.* at *5.

ingly, on four separate occasions between March 1995 and February 1996, Unocal was informed that the military was probably using forced labor and was probably committing human rights violations.²¹⁰

Since the domestic jurisprudence discussed in Part II focuses on willfulness, intent, level of encouragement, and active participation in pursuit of a common goal, defendants like Unocal will most likely avoid liability in situations where, considering ATCA's purpose, complete exoneration seems fundamentally wrong. By extending liability to foreseeable consequences, the first approach of the *Dusko Tadic* tribunal resembles the accepted aiding and abetting standard by punishing defendants who are "aware that . . . a number of crimes will probably be committed" when human rights are indeed violated.²¹¹ At a minimum this will, like the aiding and abetting standard, also further the "basic polic[y] underlying [ATCA]" by providing some meaningful access to "tort remedies for violations of international law."²¹²

Second, adopting the "per se" approach to liability formulated in *Dusko Tadic* is perhaps the simplest way to hold a certain class of defendants liable for violations of the law of nations. This test comprises two simple elements: 1) a military or paramilitary group as a defendant (private or state); and 2) a showing of overall control that can be satisfied by a showing of equipping, financing, coordinating, or general planning.²¹³

As reliance upon this standard develops, plaintiffs will no longer have to worry about the resulting body of law becoming one of ad hoc jurisprudence. Since the first part of the test is relatively simple, it is unlikely that courts will differ a great deal in determining whether the party at issue is a military group. However, there still remains the question of what "role" the state must play in order to exercise "overall control." Obviously, adopting standards of § 1983 jurisprudence requiring willful participation, etc. would defeat the purpose of adopting the new standard. Fortunately, the Tribunal anticipated this by holding that the state does not have to control "particular operations."²¹⁴ The inference is that a level of complicity below actual knowledge or actual par-

210. *Id.* at *5-*6.

211. *Id.* at *13.

212. *Id.* at *12.

213. Forcese, *supra* note 166, at 510.

214. Ratner, *supra* note 152, at 499 (citing Prosecutor v. Dusko Tadic, *Judgment of the Appeals Chamber*, IT-94-1-A (ICTY, July 15, 1999), available at http://www.un.org/icty/tadic/appeal/judgment/index_2.htm (last visited April 20, 2003)).

ticipation will suffice. Standards similar to that of the *actus reus* and *mens rea* requirements of the aiding and abetting test could very easily be incorporated to make this a much better substitute when military or paramilitary groups are involved.

Finally, it must be noted that there is one criticism in adopting this approach. Adopting any per se standard entails developing notions of strict liability. If courts choose to more readily use this standard, this result will have to be carefully considered, as it has been suggested ATCA is no place for strict liability.²¹⁵ This concern has come in the context of states acting in concert with corporate defendants, "[s]uch a standard does not suggest that any ties, or even any significant ties, between the government and the corporation per se create corporate responsibility for the government's acts More would have to be shown . . . [in cases of] loose[r] ties."²¹⁶

3. Does it Really Matter Anyway?

Even though "ATCA is increasingly being used by plaintiffs [and] should become even more helpful"²¹⁷ as "the international norms of the law of nations continue to evolve and expand[,] "²¹⁸ we must question whether any changes will actually make a difference. In fact, no defendant subject to an ATCA judgment has ever been forced to pay. Despite the nature and arguably utopian effectiveness of the international standards discussed above, admittedly, none of them really address the ability to force defendants to actually "ante up."

[E]ven if plaintiffs were able to demonstrate that. . . [defendants] had been responsible for the actions of the security forces they employed, courts could not provide an appropriate remedy. An appropriate remedy is impossible because our federal courts have no authority in the realm of international relations to regulate the military security forces of a sovereign nation and they certainly lack the authority to punish the foreign sovereign actors or remedy the atrocities they have committed. . . .²¹⁹

215. MICHAEL WALZER, *JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL IMPLICATIONS* 320 (1977).

216. Ratner, *supra* note 152, at 502.

217. Morrin, *supra* note 123, at 437.

218. *Id.*

219. Demian Betz, *Holding Multinational Corporations Responsible For Human Rights Abuses Committed By Security Forces In Conflict-Ridden Nations: An Argument Against Exporting Federal Jurisdiction for the Purpose of Regulating Corporate Behavior Abroad*, 14 DEPAUL BUS. L.J. 163, 195 (2001).

Suppose an ATCA suit were to be litigated to the bitter end, resulting in a billion dollar judgment. . . . What result? Payment would be rendered to plaintiffs and their attorneys, but what about the cause of the abuses at the root of the litigation? How would the judgment impact or change the source of the problem? It would do nothing. . . . Thus, [these suits] are not achieving justice for the people who really need it. The victorious plaintiffs are few, while the source of the harm remains unchanged in the outcome of the litigation.²²⁰

From a point of view focusing on individual retribution, it seems fruitless to debate the merits of domestic jurisprudence and international standards if neither is better suited to actually compensate the injured plaintiff. However, if the point is subjecting defendants to ATCA complicity merely because the alternative (implicitly condoning violations of human rights by doing nothing) is morally and politically unacceptable,²²¹ then a change to a more coherent, effective, and cognizable body of law is necessary.²²² As mentioned at the beginning, though, this Comment seeks to remedy the theory of the statute. Its practicality, in the context of actually putting dollars in the plaintiff's pocket, is something left for another day.

VI. CONCLUSION

Hence, the stage is set for the Ninth Circuit, as an *en banc* panel, to affirm in its entirety the three-judge decision in the *Unocal* case. This decision has special importance because the defendant, Unocal, is a California corporation, and, therefor, may be the first ATCA defendant ever to pay a judgment. Should the Ninth Circuit fail, the task will be left to the Supreme Court of the United States. Because standards of international law would be easier to apply, and more damaging to potential wrongdoers, ATCA should move away from the ambiguous and often empty standards of domestic jurisprudence and into a realm of meaning-

220. *Id.* at 202-03.

221. Randall, *supra* note 1, at 476 ("The literature . . . has often viewed the Alien Tort Statute solely as a 'human rights statute,' without regard to the statute's more basic origin, meaning, and usage.").

222. See generally Simon, *supra* note 6. See also Randall, *supra* note 1, at 511-38 (other suggestions on how to amend ATCA to make it more workable). For a further discussion on how adoption of international standards can make a difference, see Ridenour, *supra* note 9, at 603, and Forcese, *supra* note 166, at 510-15 (both sources discussing how the result in *Unocal* would have been different had the Court applied more appropriate standards of law under an ATCA analysis).

ful legal doctrine. Even though adopting specific international standards might prove difficult, and might at first seemingly exacerbate that which it is trying to remedy, the long term benefits of legal solidarity and integrity would be well worth the time invested in making the change. In addition, the original intent of 28 U.S.C. § 1350 would come back as a reality rather than as empty words used as part of legal rhetoric.

But the effectiveness of adopting a new standard will be directly proportional to the amount of effort accorded to developing its workability.²²³ The courts are not the only players involved when it comes to defining a more workable scope of ATCA. Lawyers and legal scholars are in positions to make a serious impact as well.²²⁴ We need to acknowledge ATCA's limitations in whatever form it is interpreted;²²⁵ until we do, new ways of adjudicating international abuses and violations will go untested and unacknowledged, and victims and their families will inevitably be denied the complete justice they deserve.²²⁶ Even by adopting the simplest and least result oriented international standards, the legal community would be taking a step in the right direction.

JUSTIN PROCIV*

223. In *Tel-Oren v. Libyan Arab Republic*, Senior Circuit Judge Robb noted "Given the broad and novel questions raised by cases involving the Alien Tort Statute, courts ought not to appeal for guidance to the Supreme Court, but should instead look to Congress and the President. Should these branches of the Government decide that questions of this sort are proper subjects for judicial inquiry, they can then provide the courts with the guidelines by which such inquiries should proceed." *Tel-Oren v. Libyan Arab Republic*, 726 F. 2d 774, 827 (C.A.D.C. 1984).

224. "[I]n practice, the reliance on human rights scholars as experts has led to the development in the United States of a coherent, measured body of international law norms." Stephens, *supra* note 121, at 488.

225. "The road to building a theory of corporate responsibility that does not simply ignore decades of practice and doctrine about state and individual responsibility is to recognize explicitly where decision makers could apply such principles to corporations and where they could not." Ratner, *supra* note 152, at 496.

226. Simon, *supra* note 6, at 79.

* J.D., University of Miami School of Law, 2003. The author would like to thank Professor Patrick O. Gudridge of the University of Miami School of Law for his counsel and assistance in writing this Comment. The author would also like to especially thank Ted and JoAnn for providing the means, and Holly for 2 years of infinite patience and support.