

Note

ATCA's Achilles Heel: Corporate Complicity, International Law and the Alien Tort Claims Act

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I. INTRODUCTION

In August 2000, the District Court for the Central District of California issued summary judgment against Burmese plaintiffs suing U.S. multinational Unocal for its pipeline project in Burma. Alleging egregious human rights violations by Burmese soldiers tasked with providing security for the project, the fifteen plaintiffs argued that Unocal was both aware of and benefited from these abuses and thus should be held liable pursuant to the Alien Tort Claim Act ("ATCA"). While not questioning the plaintiffs' allegations, the court

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concluded in *Doe v. Unocal Corp.*¹ that Unocal's connection to human rights abuses was insufficient to establish liability under the "law of nations," the litmus test for an ATCA claim.

While the plaintiffs have indicated they will appeal,² the District Court's reasoning underscores the Achilles heel of claims presently before U.S. courts of corporate complicity with serious human rights abuses by foreign regimes. A venerable statute enjoying a modern resuscitation, the Alien Tort Claims Act provides that "[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."³ While the precise meaning of these words has sparked controversy, the predominant view at present is that the ATCA converts a violation of the "law of nations" into a domestic tort actionable by alien plaintiffs in federal courts.⁴ This interpretation leads naturally to expansive federal court subject matter jurisdiction over violations of international law connected only incidentally to the United States. However, the "law of nations" is, at times, a remarkably amorphous body of substantive law from which to derive principles of law applicable in civil litigation. In most instances in which U.S. companies have been implicated in human rights abuses, these violations were committed not by the company or its agents but rather by states. Accordingly, the ATCA seems to oblige plaintiffs to find in the fuzzy confines of international law a principle of complicity, negligence or joint and several liability compatible with the company's limited participation. As international law is almost exclusively directed at state action, it includes few of the constructs of indirect, private-party responsibility extant in municipal law. Accordingly, the District Court's

1. 110 F. Supp. 2d 1294 (C.D. Cal. 2000).

2. Evelyn Iritani, *Judge Rejects Suit Accusing Unocal of Conspiring with Myanmar*, L.A. TIMES, Sept. 7, 2000, at C1.

3. 28 U.S.C. § 1350 (2000).

4. Notably, the language of "tort" committed in "violation of the laws of nations" raises a clear question of how a "tort" is to be measured. Are "torts" only actionable under the ATCA where they exist at international law? Conversely, is the term "tort" intended to convert non-self-executing violations of international law into domestic civil wrongs cognizable in U.S. courts? In *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), cert. denied, 470 U.S. 1003 (1985), the D.C. Court of Appeals split on this question. Judge Bork, concurring, required the plaintiffs to demonstrate the existence of "a private right of action to bring this lawsuit either by a specific international legal right or impliedly by the whole or parts of international law." *Id.* at 1090. For his part, Judge Edwards, concurring, did not require "a specific right to sue under the law of nations in order to establish jurisdiction under section 1350." *Id.* at 777. More recent decisions follow Judge Edwards's view that there is no need to identify in international law a procedural right to bring a private action. In *Abebe-Jira v. Negewo*, the Eleventh Circuit put it this way: "Congress . . . has recognized that the Alien Tort Claims Act confers both a forum and a private right of action to aliens alleging a violation of international law. . . . Accordingly, we conclude that the Alien Tort Claims Act establishes a federal forum where courts may fashion domestic common law remedies to give effect to violations of customary international law." 72 F.3d 844, 847 (11th Cir. 1996); see also *In re Estate of Ferdinand Marcos, Human Rights Litig.*, 25 F.3d 1467, 1474-75 (9th Cir. 1994) ("It is unnecessary that international law provide a *specific* right to sue."); *Xuncax v. Gramajo*, 886 F. Supp. 162, 179 (D.Mass. 1995) ("I find that § 1350 yields both a jurisdictional grant and a private right to sue for tortious violations of international law (or a treaty of the United States), without recourse to other law as a source of the cause of action."); *Paul v. Avril*, 812 F. Supp. 207, 212 (S.D. Fla. 1993) ("The plain language of the [ATCA] and the use of the words 'committed in violation' strongly implies [sic] that a well pled tort[,] if committed in violation of the law of nations, would be sufficient [to give rise to a cause of action]."); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 443 (D.N.J. 1993) ("[T]his Court finds that the ATCA provides both subject matter jurisdiction and a private right of action for violations of the law of nations.").

August 2000 holding in *Unocal* likely represents the sort of stumbling block other corporate complicity ATCA claims will encounter as they wend their way to trial.

The Note that follows explores this contention. First, the Note examines several case studies involving allegations of complicity by U.S. companies with foreign states' grave human rights abuses. It then reviews the ATCA jurisprudence and explores how subject-matter jurisdiction for "complicity" might be available under the Act. The Note applies lessons drawn from this analysis to the *Unocal* case, suggesting a number of weaknesses in the court's reasoning. It concludes by asserting that, the *Unocal* decision notwithstanding, the ATCA remains a potentially serviceable means for calling to account businesses complicit in human rights abuses.

II. MULTINATIONAL COMPANIES, MILITARIZED COMMERCE, AND THE ATCA

U.N. Secretary-General Kofi Annan has insisted that "[t]ransnational companies have been the first to benefit from globalization. They must take their share of responsibility for coping with its effects."⁵ Yet, despite Mr. Annan's admonishment, there are now a number of cases in which multinational companies operating in repressive countries have been implicated in serious human rights abuses. Most notable are instances in which companies practice a form of "militarized commerce." For the purposes of this Note, "militarized commerce" involves reliance by companies on state military or paramilitary forces for security.⁶ Where these units commit violations of human rights, companies risk being accused of complicity with their security providers. The section that follows offers several case studies of "militarized commerce" and points to the potential legal risks companies run when they engage in such practices.

A. U.S. Oil Companies in Nigeria

Oil companies operating in Nigeria—particularly Royal Dutch Shell and Chevron—have been subjected to a barrage of criticism over their proximity to human rights abuses in that country. In a 1999 report of investigations undertaken in 1997, Human Rights Watch noted "repeated incidents in which people [were] brutalized for attempting to raise grievances with the companies." In particular, in some cases security forces "threaten[ed], beat, and jail[ed] members of community delegations even before they present[ed] their cases." Such abuses often occurred on or adjacent to company property, "or in the immediate aftermath of meetings between company officials and

5. Kofi A. Annan, *Help the Third World Help Itself*, WALL ST. J., Nov. 29, 1999, at A28.

6. For a more extensive account of these practices, see Craig Forcese, *Detering "Militarized Commerce": The Prospect of Corporate Liability for "Privatized" Human Rights Abuses*, 31 OTTAWA L. REV. 171 (1999-2000).

individual claimants or community representatives.”⁷ Further, Human Rights Watch has documented several instances in which oil companies have called upon the assistance of Nigerian security forces in quelling protests. Some of these units are infamous for their human rights abuses; in several instances people were killed by Nigerian troops called to the scene. Companies are said to have done little or nothing to protest human rights abuses committed by security forces responding to company requests for assistance.⁸ For instance, in February 1999, Human Rights Watch reported that in “one particularly serious incident on January 4, soldiers using a Chevron helicopter and Chevron boats attacked villagers in two small communities in Delta State, Opia and Ikenyan, killing at least four people and burning most of the villages to the ground.”⁹

In the wake of these and other instances, both Royal Dutch Shell¹⁰ and Chevron¹¹ are now being sued in federal court under the ATCA for their activities in Nigeria. Both cases have survived motions challenging court jurisdiction over the companies.

The complaint in the lawsuit brought against Chevron alleges that egregious human rights violations stemming from the events described above and related occurrences were “inflicted by Nigerian military and police personnel, who were acting at the behest of, and with the support, cooperation and financial assistance of . . . Chevron.”¹² Chevron claims it participated in the events cited by the plaintiffs only when forced to do so “at gunpoint.”¹³

The plaintiffs in the case against Shell aver that they “and their next of kin . . . were imprisoned, tortured, and killed by the Nigerian government in violation of the law of nations at the instigation of the [defendant Shell companies], in reprisal for their political opposition to the defendants’ oil exploration activities.” Further, the Royal Dutch Shell Group “allegedly provided money, weapons, and logistical support to the Nigerian military, including the vehicles and ammunition used in the raids on the villages, procured at least some of these attacks, participated in the fabrication of murder charges against [some of the plaintiffs’ next of kin], and bribed witnesses to give false testimony against them.”¹⁴ Shell denies involvement in the wrongs detailed in the complaint.¹⁵

7. Human Rights Watch, *The Price of Oil: Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities* (Feb. 23, 1999), at <http://www.hrw.org/hrw/reports/1999/nigeria/index.htm>.

8. *Id.*

9. Press Release, Human Rights Watch, Oil Companies Complicit in Nigerian Abuses (Feb. 23, 1999), at <http://www.hrw.org/press/1999/feb/nig0223.htm>.

10. *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000).

11. Pl.’s Compl., *Bowoto v. Chevron*, No. C99-2506 CAL (N.D. Cal. 1999) (on file with the Yale Journal of International Law); Jason Hoppin, *Human Rights Suit Against Chevron to Proceed*, LEGAL INTELLIGENCER, May 18, 2000, at 4; *Request to Transfer Suit Against Chevron Denied*, S.F. CHRON., Apr. 8, 2000, at A23.

12. Pl.’s Compl., *Bowoto v. Chevron*, No. C99-2506 CAL, at 3 (N.D. Cal. 1999).

13. Compl. as described in *Wiwa*, 226 F.3d at 92; Hoppin, *supra* note 11.

14. *Wiwa*, 226 F.3d at 93.

15. Letter from Alan Detheridge, Vice President, External Affairs, Exploration & Production, Shell International, TIMES (London), Nov. 20, 2000, at 19.

B. *Freeport McMoRan in Indonesia*

The U.S. mining firm Freeport McMoRan runs one of the world's largest gold mines in Irian Jaya, Indonesia. Local indigenous groups have opposed the mine since its opening in 1967. Anti-mine protests and violence have increased since 1977, resulting in crackdowns by the Indonesian military.¹⁶ In April 1995, the Australian Council for Overseas Aid (ACFOA) released a report describing significant human rights concerns tied to the mine. In particular, the report alleged that security services retained by Freeport, as well as Indonesian military personnel, "engaged in acts of intimidation, extracted forced confessions, shot 3 civilians, disappeared 5 Dani villagers, and arrested and tortured 13 people"¹⁷ ACFOA later backtracked on its allegations of direct Freeport involvement in killings.¹⁸ Subsequently, an investigation by the Catholic Church reported the murder of over a dozen civilians by the Indonesian military, including at least four persons killed by soldiers in Freeport facilities, and multiple instances of torture.¹⁹ In September 1995, the Indonesian Human Rights Commission determined that human rights abuses in the mine region "are directly related to activities of the armed forces and military operations carried out in connection with efforts to overcome the problem of peace disturbing elements . . . and in the framework of safeguarding mining operations of PT Freeport Indonesia which the government has classified as a vital project."²⁰ In 1996, Amnesty International noted with concern that the Indonesian government had failed to investigate "the role of the mining company, Freeport McMoRan Copper and Gold Corporation, in the human rights violations."²¹ In May 2000, the Indonesian government announced it "will ask a new human rights commission to investigate possible [human rights] violations by Freeport-McMoRan."²²

Freeport has persistently denied any involvement in human rights abuses, though it acknowledges that "a few individuals in the Indonesian military" who have been "tried and punished under Indonesian law" have committed human rights abuses.²³ Nevertheless, the company has faced

16. Australian Council for Overseas Aid, *Eyewitness Accounts of West Papuan Resistance to the Freeport-McMoRan mine in Irian Jaya, Indonesia and Indonesian Military Repression: June 1994 - February 1995*, at <http://www.moles.org/ProjectUnderground/motherlode/freeport/acfoa.html> (last visited Apr. 23, 2001).

17. *Id.*

18. Robert Bryce, *Spinning Gold*, MOTHER JONES, Sept.—Oct. 1996, at http://www.motherjones.com/mother_jones/SO96/bryce.html.

19. Catholic Church of Jayapura, *Violations of Human Rights in the Timika Area of Irian Jaya (1995)*, at <http://www.moles.org/ProjectUnderground/motherlode/freeport/catholic.html> (last visited Apr. 23, 2001).

20. National Human Rights Commission, *Results of Monitoring and Investigation of Five Incidents at Timika and One Incident at Hoesa, Irian Jaya, During October 1994 - June 1995 (1995)*, at <http://www.moles.org/ProjectUnderground/motherlode/freeport/ighr.html> (last visited Apr. 23, 2001).

21. Amnesty International, *Indonesia: Full Justice? Military Trials in Irian Jaya (1996)*, at <http://www.web.amnesty.org/ai.nsf/index/ASA210171996> (last visited Apr. 23, 2001).

22. *Freeport Faces Human Rights Probe; N.O.-Based Company Studied by Indonesia*, N. ORLEANS TIMES-PICAYUNE, May 26, 2000, at C1.

23. Freeport McMoRan, *Issues & Answers: Human Rights Allegations*, at <http://www.fcx.com/mr/issues&answers/ia-hra.html> (last visited Apr. 23, 2001).

lawsuits in both state²⁴ and federal²⁵ courts. The federal ATCA claim alleged the Freeport companies "have systematically engaged in a corporate policy both directly and indirectly through third parties which have [sic] resulted in human rights violations against the Amungme Tribe and other Indigenous tribal people. Said actions include extra-judicial killing, torture, surveillance and threats of death, severe physical pain and suffering by and through its security personnel employed in connection with its operation of the Grasberg mine."²⁶ The Fifth Circuit dismissed the federal ATCA action in 1999 on the ground that the Indonesian plaintiff had failed to plead sufficient facts concerning abuses to make out a cause of action.²⁷

The claim in state court²⁸ alleged, *inter alia*, personal injury claims based on the same assertions made in the federal claim. It was dismissed in March 2000, again apparently because it failed to allege sufficient facts to make out a cause of action²⁹ and because Freeport could not be held liable for the actions of its Indonesian subsidiary.³⁰ The plaintiff reportedly intends to appeal to the Louisiana Court of Appeals.³¹

C. *Oil and Gas Companies in Burma*

Burma is ruled by a brutal military dictatorship that continues to ignore the results of a democratic election held in 1990 and has committed persistent and egregious human rights abuses against its population. Yet, while Burma has become an international pariah, it continues to benefit from foreign direct investment.

The most important example of this investment is the Yadana pipeline initiative, undertaken jointly by oil companies Total and Unocal with the Burmese and Thai oil parastatals. The pipeline, once in full operation, is expected to provide Burma's dictatorship "with up to U.S. \$400 million per year, making it the junta's single largest source of liquid funds."³² Further, as the pipeline lies in a region of civil unrest and armed opposition to the dictatorship by ethnic groups, the pipeline's presence has fuelled a notable increase in the presence of security forces providing protection to the

24. Pl.'s Compl., *Alomang v. Freeport-McMoRan* (June 19, 1996), available at <http://www.cs.utexas.edu/users/boyer/fp/alomang-filing.html>.

25. Pl.'s Compl., *Beanal v. Freeport-McMoRan*, 1998 U.S. Dist. LEXIS 2522 (E.D. La. 1998) (No. 96-1474), available at <http://www.cs.utexas.edu/users/boyer/fp/filing.html>.

26. *Id.*

27. *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161 (5th Cir. 1999).

28. *Alomang v. Freeport-McMoran, Inc.*, 97-1349 (La. App. 4 Cir. 4/15/98), 718 So. 2d 971 (La. Ct. App. 1998).

29. Press Release, Freeport-McMoRan, State Court Dismisses with Prejudice Complaint Against Freeport-McMoRan Copper & Gold Inc. (Mar. 23, 2000), at <http://www.fcx.com/news/032300.pdf>.

30. Stewart Yerton, *Indonesian Suit Against Freeport Dismissed*, N. ORLEANS TIMES-PICAYUNE, Mar. 24, 2000, at C1.

31. *Id.*

32. EarthRights International & Southeast Asian Information Network, *Total Denial: A Report on the Yadana Pipeline Project in Burma (1996)*, at <http://www.ibiblio.org/freeburma/docs/totaldenial/td.html> (last visited Apr. 23, 2001).

pipeline.³³ In its 1999 *World Report*, Human Rights Watch noted that "the Burmese forces providing security for the project [reportedly] continued to commit violations against villagers along the pipeline route, including killings, torture, rape, displacement of entire villages, and forced labor."³⁴ Meanwhile, the pleadings made in a lawsuit against Unocal brought in the United States allege that "[i]n the course of its actions on behalf of the joint venture, . . . [the regime] carried out a program of violence and intimidation against area villagers On information and belief, plaintiffs allege women and girls in the . . . region have been targets of rape and other sexual abuse by [regime] officials, both when left behind after male family members have been taken away to perform forced labor and when they themselves have been subjected to forced labor."³⁵

Unocal and Total have repeatedly denied that human rights abuses have occurred in relation to the pipeline.³⁶ The lawsuit brought against these companies is discussed in greater detail in Part IV.

D. Discussion

The case studies cited above reflect a considerable literature discussing the role of resource companies in fuelling or contributing to conflict and human rights abuses in various countries.³⁷ These case studies show, first, that militarized commerce in the form of company reliance on state militaries is practiced by resource companies operating in the developing world and, second, that security forces affiliated with companies at some level have been implicated in serious human rights abuses. Put another way, and assuming their veracity, the case studies suggest that "militarized commerce" may involve some level of corporate complicity with state human rights abuses.

Black's Law Dictionary defines "complicity" as an "association or participation in a criminal act."³⁸ Clearly, such acts create victims, many of

33. *Id.*

34. HUMAN RIGHTS WATCH, *WORLD REPORT 1999*, at <http://www.hrw.org/hrw/worldreport99/special/corporations.html> (last visited Apr. 23, 2001).

35. *Doe v. Unocal Corp.*, 963 F. Supp. 880, 885 (C.D. Cal. 1997).

36. *See, e.g.*, Unocal, *Human Rights and Economic Engagement*, at <http://www.unocal.com/responsibility/humanrights/hr5.htm> (last visited Apr. 23, 2001).

37. *E.g.*, *Situation of Human Rights in the Sudan*, U.N. Sec. Gen., 54th Sess., Agenda Item 116(c), U.N. Doc. A/54/467 (1999); Peter Verney, *Raising the Stakes: Oil and Conflict in the Sudan* (1999) (report on file with the author); Steven Edwards et al., *Calgary Firm Tied to Sudan 'Atrocities'*, NAT'L POST, Nov. 17, 1999, at A1; News Release, Amnesty International, *Sudan: The Human Price of Oil* (Mar. 5, 2000), at <http://www.web.amnesty.org/ai.nsf/index/AFR540042000>; News Release, Amnesty International, *Colombia: British Petroleum Risks Fuelling Human Rights Crisis Through Military Training* (June 30, 1997), at <http://www.amnesty.it/news/1997/22304497.htm>; John Harker, *Human Security in Sudan: The Report of a Canadian Assessment*, prepared for the Minister of Foreign Affairs (Canada), Jan. 2000, at <http://www.dfait-maeci.gc.ca/foreignp/3110186-e.pdf>; Human Rights Watch, *The Enron Corporation: Corporate Complicity in Human Rights Violations* (1999), at <http://www.hrw.org/hrw/reports/1999/enron>; Human Rights Watch, *Colombia: Human Rights Concerns Raised by the Security Arrangements of Transnational Oil* (1998), at <http://www.hrw.org/advocacy/corporations/colombia/Oilpat.htm>; Scott Pegg, *Corporate Armies for States and State Armies for Corporations: Addressing the Challenges of Globalization and Natural Resource Conflict*, Paper prepared for delivery at the 2000 Annual Meeting of the American Political Science Association, Aug. 31 - Sept. 3, 2000, at <http://pro.harvard.edu/abstracts/019/019010PeggScott0.htm>; Force, *supra* note 6.

38. BLACK'S LAW DICTIONARY 279 (7th ed. 1999).

whom will likely desire redress. Yet, in many instances, the principal actor actually committing human rights abuses will be a sovereign government, able to render itself virtually judgment-proof by creating court systems unwilling or incapable of adjudicating claims for compensation or punishing transgressions of criminal law by powerful actors. In Burma, for example, through 1998, "the Government continued to rule by decree and was not bound by any constitutional provisions providing for fair public trials or any other rights. Although remnants of the British-era legal system were formally in place, the court system and its operation remained seriously flawed, particularly in the handling of political cases."³⁹ In Indonesia, "[t]here were few signs of judicial independence. The court continued to be used to take action against, or deny legal remedy to, political activists and government critics."⁴⁰ In Nigeria, "[s]ome courts are understaffed. Judges frequently fail to show up for trials, often because they are pursuing other means of income. In addition court officials often lack the proper equipment, training, and motivation for the performance of their duties, again due in no small part to inadequate compensation."⁴¹

Accordingly, victims seeking redress are left either to the often-indifferent mercies of the international legal system or are faced with the prospect of seeking compensation via the court systems of another state. The latter approach is fraught with its own difficulties, not the least of which are principles of personal jurisdiction and other jurisdiction-limiting doctrines such as sovereign immunity. Where multinational corporations operating in the United States are potential defendants, however, these jurisdictional hurdles are less pressing. Plainly, corporations are not "subjects" of international law and are generally viewed as falling outside the confines of international human rights instruments.⁴² However, by properly identifying the appropriate venue, foreign plaintiffs are in an excellent position to urge U.S. courts to exercise personal jurisdiction over companies domiciled within their districts. In establishing subject-matter jurisdiction for their international law claims, the most notable tool used by plaintiffs to date has been the Alien Tort Claims Act.

III. THE ATCA AND CORPORATE COMPLICITY WITH HUMAN RIGHTS ABUSES

As noted above, the ATCA provides that "[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."⁴³ The law

39. U.S. DEP'T OF STATE, BURMA COUNTRY REPORT ON HUMAN RIGHTS PRACTICES FOR 1998, 815 (1999).

40. U.S. DEP'T OF STATE, INDONESIA COUNTRY REPORT ON HUMAN RIGHTS PRACTICES FOR 1998, 915 (1999).

41. U.S. DEP'T OF STATE, NIGERIA COUNTRY REPORT ON HUMAN RIGHTS PRACTICES FOR 1998, 322 (1999).

42. See Saman Zia-Zarifi, *Suing Multinational Corporations in the U.S. for Violating International Law*, 4 UCLA J. INT'L L. & FOREIGN AFF. 81 (1999).

43. 28 U.S.C. § 1350 (2000).

dates from 1789,⁴⁴ but its origins are obscure. In *Eastman Kodak Co. v. Kavlin*, the District Court for the Southern District of Florida observed that "[t]his statute presumably is based upon Congress' power under Article I, section 8 to 'define and punish . . . offenses against the Law of Nations.'" ⁴⁵ Yet, "although the constitutional text permits Congress to 'define and punish,' the ATCA punishes, but does not define."⁴⁶ The court noted that this lack of clear definition "raises some interpretative challenges for courts entertaining ATCA suits. 'The law of nations' means many things to many people."⁴⁷ As the section that follows suggests, courts applying the ATCA have struggled with this problem.

A. *International Law and the ATCA*

For most courts, the substantive law to be applied in an ATCA lawsuit is international law.⁴⁸ As Justice Cardozo once observed, "[i]nternational law, or the law that governs between states has at times, like the common law within states, a twilight existence during which it is hardly distinguishable from morality or justice, till at length the imprimatur of a court attests [to] its jural quality."⁴⁹ In grappling with international law's ambiguity and determining when an international norm is deserving of judicial imprimatur, federal courts have established a fairly consistent test. In its venerable decision in *United States v. Smith*,⁵⁰ the Supreme Court concluded 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 recognising and enforcing that law." Similarly, in *Hilton v. Guyot*,⁵¹ the Court concluded that where "there is no written [international] law upon the subject . . . [t]he courts must obtain such aid as they can from judicial decisions, from the works of jurists and commentators, and from the acts and usages of civilized nations."

Cases deciding ATCA matters have relied on this jurisprudence. In both *Filartiga v. Pena-Irala*⁵² and *Kadic v. Karadzic*,⁵³ the Second Circuit held that

44. Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 77 (1789).

45. 978 F. Supp. 1078 (S.D. Fla. 1997).

46. *Id.* at 1090.

47. *Id.*

48. For arguments suggesting that U.S. tort law might form the substantive cause of action for an ATCA claim triggered by international law violations, see *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 782 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985). In *Wiwa v. Royal Dutch Petroleum Co.*, citing *Tel-Oren* and other cases, the Second Circuit implied that the issue of what substantive law a court will apply in an ATCA claim is not completely closed. 226 F.3d 88, 105 n.12 (2d Cir. 2000).

49. *New Jersey v. Delaware*, 291 U.S. 361, 383 (1934).

50. 18 U.S. (5 Wheat.) 153, 160-61 (1820).

51. 159 U.S. 113, 163 (1895); *see also* *The Paquete Habana*, 175 U.S. 677, 700 (1900) ("[W]here there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.").

52. 630 F.2d 876, 880 (2d Cir. 1980) (quoting *Smith*, 18 U.S. (5 Wheat.) at 160-61).

53. 70 F.3d 232, 238 (2d Cir. 1995) (citing *Filartiga*, 630 F.2d at 880), *cert. denied*, 518 U.S.

international law is to be assessed with reference to the writings of jurists, the practice of nations, and previous judicial decisions. Where this inquiry establishes that the defendant's alleged conduct violates "'well-established, universally recognized norms of international law,' . . . as opposed to 'idiosyncratic legal rules,' . . . then federal jurisdiction exists under the Alien Tort Act."⁵⁴ Yet, as the following section suggests, while the test for substantive law under the ATCA is easily stated, its application and inherent limitations where questions of individual—rather than state—liability arise can create real complexities.

B. *Individual Responsibility and the Law of Nations*

Recently, several courts have been asked to determine whether the "law of nations" extends beyond the conduct of states to govern actions by private individuals. Answering this question in the affirmative, courts have found individual liability for international wrongs in two circumstances. First, courts canvassing international law have identified several acts that constitute international crimes for which individual liability exists at international law. In *Kadic*, the Second Circuit wrote: "We do not agree that the law of nations, as understood in the modern era, confines its reach to state action. Instead, we hold that certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals."⁵⁵ For the Second Circuit, determining whether the wrongs alleged were of the sort that created liability for individuals requires the court to "make a particularized examination of these offenses, mindful of the important precept that 'evolving standards of international law govern who is within the [Alien Tort Act's] jurisdictional grant.'"⁵⁶ To date, courts in ATCA cases have either found or discussed individual responsibility with respect to piracy,⁵⁷ the slave trade,⁵⁸ slavery and forced labor,⁵⁹ aircraft hijacking,⁶⁰ genocide,⁶¹ war crimes,⁶² and other "offenses of 'universal concern.'"⁶³

1005 (1996); see also *In re Estate of Ferdinand Marcos, Human Rights Litig.*, 25 F.3d 1467, 1475 (9th Cir. 1994) ("Actionable violations of international law must be of a norm that is specific, universal, and obligatory."), *cert. denied*, 513 U.S. 1126 (1995); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1540 (N.D. Cal. 1987) ("These international torts, violations of current customary international law, are characterized by universal consensus in the international community as to their binding status and their content. That is, they are universal, definable, and obligatory international norms."), *amended in part*, 694 F. Supp. 707 (N.D. Cal. 1989).

54. *Kadic*, 70 F.3d at 239 (citing *Filartiga*, 630 F.2d at 881, 888).

55. *Id.*

56. *Id.* at 241 (citing *Amerada Hess Shipping Corp. v. Argentine Republic*, 830 F.2d 421, 425 (2d Cir. 1987)).

57. *Id.* at 239; *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 794-95 (D.C. Cir. 1984) (Edwards, J., concurring), *cert. denied*, 470 U.S. 1003 (1985).

58. *Kadic*, 70 F.3d at 239; see also *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 444 (D.N.J. 1993) (suggesting, without deciding, that "private entities using slave labor are liable under the law of nations").

59. *Doe v. Unocal Corp.*, 963 F. Supp. 880, 891-92 (C.D. Cal. 1997).

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

61. *Id.* at 242; see also *Beanal v. Freeport-McMoRan, Inc.*, 969 F. Supp. 362, 371 (E.D. La. 1997), *aff'd* 197 F.3d 161 (5th Cir. 1999) (citing *Kadic* and approving of the claim that certain crimes, such as genocide, incur individual responsibility).

Second, courts have concluded that certain forms of indirect participation in state-committed wrongs may render an individual liable, irrespective of whether individual liability is available at international law. In several instances, the courts have suggested that individual liability may arise from conspiracy or conspiracy-like participation with state actors committing violations of the laws of nations.⁶⁴ In *Carmichael v. United Technologies Corp.*, the plaintiff was imprisoned and tortured while on business in Saudi Arabia, in the wake of a contract dispute with some of the defendant companies.⁶⁵ The plaintiff's release had been made conditional on payment of all claims made against him by the defendant firms. Upon obtaining his release, the plaintiff brought suit in the Southern District of Texas, invoking the ATCA and alleging that the defendant companies conspired with the Saudi government to have him jailed. The claims against most defendants named in the suit were dismissed by reason of improper service, and this determination was upheld by the Court of Appeals. While the Court of Appeals was not persuaded that the facts supported plaintiff's allegations against the remaining defendant company, it was prepared to assume—though it found it unnecessary to decide—that “the Alien Tort Statute does confer subject matter jurisdiction over private parties who conspire in, or aid and abet, official acts of torture by one nation against the citizens of another nation.”⁶⁶

Similarly, in *Eastman Kodak*, plaintiffs in a contractual dispute with a Bolivian company alleged a conspiracy on the part of the firm and the Bolivian authorities to imprison the individual plaintiff under horrendous conditions. For the District Court a key question in determining whether the Bolivian corporation could be held liable under the ATCA was “whether the ATCA makes a private actor liable in tort for conspiring with state actors to violate the law of nations,”⁶⁷ in this case arbitrary and inhumane detention. The court observed that “it would be a strange tort system that imposed liability on state actors but not on those who conspired with them to perpetrate illegal acts through the coercive use of state power.”⁶⁸ Analogizing to federal constitutional precedents establishing that “those who conspire with state actors to invade the constitutional rights of others may be held liable along with the state actors,”⁶⁹ the court held that a conspiracy between private individuals and state actors to commit a violation of the law of nations was actionable under the ATCA.⁷⁰

Notably, neither the Fifth Circuit in *Carmichael* nor the District Court in *Eastman Kodak* asked whether the law of nations itself contemplated conspiracy or aiding and abetting as wrongs for which individuals might be

62. *Kadic*, 70 F.3d at 243; see also *Doe v. Islamic Salvation Front*, 993 F. Supp. 3, 8 (D.D.C. 1998) (applying ATCA to non-state entity).

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

64. E.g., *Hilao v. Estate of Marcos*, 103 F.3d 767, 776 (9th Cir. 1996) (stating that a foreign leader can be liable where he “directed, ordered, conspired with, or aided the military in torture, summary execution, and ‘disappearance’”).

65. 835 F.2d 109 (5th Cir. 1988).

66. *Id.* at 113-14.

67. *Eastman Kodak Co. v. Kavlin*, 978 F. Supp. 1078, 1091 (S.D. Fla. 1997).

68. *Id.*

69. *Id.* (citing *Dennis v. Sparks*, 449 U.S. 24, 27-28 (1980)).

70. *Id.* at 1094.

liable. In other words, it was irrelevant whether there was an international crime of "aiding and abetting" or "conspiracy" to "commit arbitrary and inhumane detention." It was equally irrelevant whether such crimes extended international liability to individuals. In both cases, the concept of "conspiracy" or "aiding and abetting" seemed to reflect domestic law concepts. The courts' approach impliedly fuses U.S. concepts of complicitous guilt onto breaches of the law of nations, thereby side-stepping painstaking efforts to determine the scope of this concept in international law and potentially simplifying the ATCA's application.

The *Carmichael* and *Eastman Kodak* courts are not alone in relying on domestic legal doctrine to flesh out ATCA claims. Given the cases it relies upon, *Eastman Kodak* is likely a variant of a now notable line of jurisprudence grafting concepts of state action in federal constitutional doctrine onto the ATCA and thereby circumventing the principle that only states, and not private individuals, are capable of violations of international law. In *Kadic*, the Second Circuit held that "[t]he 'color of law' jurisprudence of 42 U.S.C. § 1983 [civil action for deprivation of rights] is a relevant guide to whether a defendant has engaged in official action for purposes of jurisdiction under the Alien Tort Act."⁷¹ 'Color of law,' for the *Kadic* court, is a construct extending state liability to an individual where that person "acts together with state officials or with significant state aid."⁷² Much of the color of law jurisprudence involves wrongful acts by private parties, determined to be state actors for the purposes of constitutional torts. In the ATCA context, courts are evidently very comfortable reversing this scenario, relying on state action doctrine to link wrongful action by states to private parties somehow connected to the violation.

Color of law or state action approaches⁷³ have now been applied in several cases in which companies have been accused of acting as *de facto* state actors in breaches of international law. In a 1997 proceeding in *Doe v. Unocal Corp.*,⁷⁴ the District Court for the Central District of California reviewed color of law jurisprudence in U.S. constitutional practice, noting that "where there is a 'substantial degree of cooperative action' between the state and private actors in effecting the deprivation of rights, state action is present." On the facts in that case, allegations "that the private plaintiffs were and are jointly engaged with the state officials in the challenged activity, namely forced labor and other human rights violations in furtherance of the pipeline project . . . [were] sufficient to support subject-matter jurisdiction

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

72. *Id.* (citing *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982)).

73. Color of law and state action are used synonymously by the courts. See *United States v. Price*, 383 U.S. 787, 794 n.7 (1966) ("In cases under § 1983, 'under color' of law has consistently been treated as the same thing as the 'state action' required under the Fourteenth Amendment."); see also *Lugar*, 457 U.S. at 929 ("[I]t is clear that in a § 1983 action brought against a state official, the statutory requirement of action 'under color of state law' and the 'state action' requirement of the Fourteenth Amendment are identical."). But see *Collins v. Womancare*, 878 F.2d 1145, 1148 (9th Cir. 1989) (interpreting the Supreme Court as maintaining a distinction between the two concepts), *cert. denied*, 493 U.S. 1056 (1990).

74. 963 F. Supp. 880, 890-91 (C.D. Cal. 1997) (citing *Gallagher v. "Neil Young Freedom Concert"*, 49 F.3d 1442, 1453 (10th Cir. 1995)).

under the ATCA.”⁷⁵ In *Iwanowa v. Ford Motor Co.*, the district court, while not invoking § 1983 by name, concluded that the defendant company:

acted in close cooperation with Nazi officials in compelling civilians to perform forced labor. . . . The allegation that Ford Werke pursued its own economic interests, or that its own employees (as opposed to Nazi officials), mistreated Iwanowa, does not preclude a determination that Ford Werke acted as an agent of, or in concert with, the German Reich Consequently, even if this Court were to find that no liability attaches to private actors for violations of international law, by showing that (1) she is an alien (2) suing for a tort (forced labor/slave trade) (3) committed by a *de facto* state actor (4) in violation of the law of nations, Iwanowa has established subject matter jurisdiction under the ATCA.⁷⁶

The exact level of connection required for a company to become a state actor under the color of law approach to ATCA has not been precisely demarcated. There are clearly some levels of participation that fall below the level of engagement necessary to constitute state action. In *Ge v. Peng*,⁷⁷ the District Court for the District of Columbia declined to find state action where the only relationship between a company and a state factory committing human rights abuses was the company's imprint on the factory's product. Invoking the test established by *Unocal* via analogy to § 1983, the court concluded: “[I]t is clear that plaintiffs here have not alleged the ‘substantial degree of cooperative action’ between the Chinese government defendants and Adidas such that jurisdiction would be proper under a state action theory.”⁷⁸

C. Actionable Complicity Under the ATCA

On the basis of the discussion in the previous section, it is evident that, under present interpretations of the ATCA, complicity with a violation of international law is potentially actionable in two circumstances: 1) where international law itself contains a doctrine rendering individuals liable for complicity with violations of the law of nations,⁷⁹ and 2) where the color of law analysis in domestic constitutional jurisprudence stretches far enough to capture acts of complicity. While the *Carmichael* decision suggests a third approach—one relying on domestic criminal law concepts of conspiracy and aiding and abetting—it does not decide the issue. Accordingly, this Note will confine itself to exploring international law and color of law considerations and their implications for complicity with human rights abuses.

75. *Unocal*, 963 F. Supp. at 891.

76. *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 446 (D.N.J. 1993).

77. Civ. No. 98-1986 (TFH), 2000 U.S. Dist. LEXIS 12711 (D.D.C. Aug. 28, 2000).

78. *Id.* at 16.

79. As is suggested by the discussion above, in practice this approach converts international criminal law into a civil tort. It may be that the conversion of substantive sources of international criminal liability into civil wrongs raises procedural questions; for example, what standard of proof should be used in such an instance? On the other hand, the authorities discussed previously, *supra* note 4, imply that the ATCA imports substantive principles of international as domestic torts, without any regard being paid to the procedural apparatus that may surround those principles in international law. Put another way, ATCA supplies the procedure, international law defines the nature of the wrong.

1. *Complicity for Violations of International Law as an International Wrong*

It is clear from the writings of jurists and the decisions of international war crimes tribunals that a concept of complicitous guilt does exist in international law. In its recent decision in *Prosecutor v. Dusko Tadic*,⁸⁰ the Appeals Chamber of the International Tribunal for the former Yugoslavia (ICTY) had occasion to review these authorities. In this regard, the Chamber noted, "[m]any post-World War II cases concerning war crimes proceed upon the principle that when two or more persons act together to further a common criminal purpose, offences perpetrated by any of them may entail the criminal liability of all the members of the group."⁸¹

For the Chamber, "[c]lose scrutiny of the relevant case law shows that broadly speaking, the notion of common purpose encompasses three distinct categories of collective criminality."⁸² First, there are instances where "all co-defendants, acting pursuant to a common design, possess the same criminal intention."⁸³ The Chamber points to instances where co-perpetrators form a common plan to kill in which each has a different role, but all possess the intent to kill. Here, the key consideration is a shared *mens rea* to commit the crime, coupled with some participation in the completion of the common enterprise.

Second, the Chamber noted the so-called "concentration camp" cases.⁸⁴ In these trials, "[t]he notion of common purpose was applied to instances where the offences charged were alleged to have been committed by members of military or administrative units such as those running concentration camps."⁸⁵ Summarizing the outcome of these cases, the Chamber determined that the *actus reus* in these cases "was the active participation in the enforcement of a system of repression," while the *mens rea* element "comprised: (i) knowledge of the nature of the system and (ii) the intent to further the common concerted design to ill-treat inmates."⁸⁶

80. Judgment of the Appeals Chamber, IT-94-I-A (ICTY, July 15, 1999), at http://www.un.org/icty/tadic/appeal/judgement/index_2.htm.

81. *Id.*, para. 195.

82. *Id.*

83. *Id.*, paras. 196-98. The Chamber cited various post-World War II war crimes trials in the discussion of common criminal purpose. *E.g.*, Trial of Otto Sandrock and three others, British Military Court for the Trial of War Criminals, held at the Court House, Almelo, Holland, on 24-26 Nov., 1945, UNWCC, vol. I, p. 35, *cited in id.*, para. 197 n.233; Hoelzer et al., Canadian Military Court, Aurich, Germany, Record of Proceedings, 25 Mar.-6 Apr. 1946, vol. I, pp. 341, 347, 349 (RCAF Binder 181.009 (D2474), *cited in id.* n.235; Trial of Gustav Alfred Jepsen and others, Proceedings of a War Crimes Trial held at Luneberg, Germany, on 13-23 Aug., 1946, Judgment of 24 Aug. 1946, *cited in id.*, para. 198 n.236.

84. *Tadic*, IT-94-I-A, para. 202 n.248 (citing Trial of Martin Gottfried Weiss and thirty-nine others, General Military Government Court of the United States Zone, Dachau, Germany, 15 Nov.-13 Dec., 1945, UNWCC, vol. XI, p. 5); *id.* n.249 (citing Trial of Josef Kramer and 44 others, British Military Court, Luneberg, 17 Sept.-17 Nov., 1945, UNWCC, vol. II, p. 1).

85. *Id.*, para. 202 n.248 (citing Trial of Martin Gottfried Weiss, p. 5).

86. *Tadic*, IT-94-I-A, para. 203.

Finally, "[t]he third category concerns cases involving a common design to pursue one course of conduct where one of the perpetrators commits an act which, while outside the common design, was nevertheless a natural and foreseeable consequence of the effecting of that common purpose."⁸⁷ The Chamber explored this concept using a hypothetical: If a group of individuals were to embark on a common enterprise of 'ethnically cleansing' a village and, during the course of that activity, victims were shot, "[c]riminal responsibility may be imputed to all participants within the common enterprise where the risk of death occurring was both a predictable consequence of the execution of the common design and the accused was either reckless or indifferent to that risk."⁸⁸ Citing a series of post-World War II cases,⁸⁹ the Chamber determined that *mens rea* in this scenario required: "(i) the intention to take part in a joint criminal enterprise and to further—individually and jointly—the criminal purposes of that enterprise; and (ii) the foreseeability of the possible commission by other members of the group of offences that do not constitute the object of the common criminal purpose."⁹⁰ Foreseeability, in this context, means more than a negligence standard. Instead, "[w]hat is required is a state of mind in which a person, although he did not intend to bring about a certain result, was aware that the actions of the group were most likely to lead to that result but nevertheless willingly took that risk."⁹¹

2. *Color of Law/ State Action*

As noted in Section III.B, U.S. courts have not hesitated to import § 1983 color of law jurisprudence into the ATCA. Notably, neither the influential Second Circuit *Kadic* judgment, nor the *Forti* decision that it cites to justify its position,⁹² provide an analysis of how § 1983 principles might be tempered in their application to ATCA cases. Consequently, as the discussion of *Unocal* in Part IV will illustrate, the courts have often applied § 1983 principles in an *ad hoc* manner. This Section explores how § 1983 might inform ATCA cases. It also suggests, however, that there is a body of international law providing an equally robust body of principles. Given that the ATCA supposedly incorporates as a tort substantive international law, this

87. *Id.*, para. 204.

88. *Id.*

89. E.g., Trial of Erich Heyer and six others (Essen Lynching Case), British Military Court for the Trial of War Criminals, Essen, 18-19 & 21-22 Dec., 1945, UNWCC, vol. I, p. 88, at p.91, *cited in* Tadic, IT-94-I-A, para. 207 n.255; Kurt Goebell et al. (Borkum Island case), Charge Sheet, U.S. National Archives Microfilm Publications I, *cited in* Tadic, IT-94-I-A, para. 210 n.261.

90. Tadic, IT-94-I-A, para. 220.

91. *Id.*

92. *Kadic v. Karadzic*, 70 F.3d 232, 245 (2d Cir. 1995) ("The 'color of law' jurisprudence of 42 U.S.C. § 1983 is a relevant guide to whether a defendant has engaged in official action for purposes of jurisdiction under the Alien Tort Act [citing *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1546 (N.D. Cal. 1987)]."). *Forti* dealt with a lawsuit by Argentine victims of a former Argentine general. On the § 1983 issue, *Forti* merely indicates that "[c]laims for tortious conduct of government officials under 28 U.S.C. § 1350 may be analogized to domestic lawsuits brought under 42 U.S.C. § 1983, where plaintiffs must allege both deprivation of a federally protected right and action 'under color of' state law." 672 F. Supp. at 1546.

international doctrine may provide a more logical source of law in ATCA cases than does § 1983.

a. *Domestic § 1983 Jurisprudence*

Determining when state and private involvement in a wrongful activity are so conflated that each actor is properly considered a state actor under § 1983 is a key concern of both U.S. constitutional law and ATCA jurisprudence. Yet, as the Supreme Court observed in *Lebron v. National R.R. Passenger Corp.*, "our cases deciding when private action might be deemed that of the state have not been a model of consistency."⁹³ Courts have identified several different tests applied by the Supreme Court.⁹⁴ The Supreme Court itself has categorized state action into four classes.⁹⁵ First, state action exists where a private party partakes in a public function⁹⁶ or enjoys "powers traditionally exclusively reserved to the State."⁹⁷ Second, the Court has discerned state action where state compulsion obliges the private party to commit the wrongful act.⁹⁸ Third, in some instances, the nexus between the state and the actions of a private entity is such that the "the action of the latter may be fairly treated as that of the State itself."⁹⁹ Last, the Court has invoked a "joint action" test. In *Lugar v. Edmondson Oil Co.*, the Court implied that this test might be restricted to cases involving "prejudgment attachments."¹⁰⁰ However, as the discussion below suggests, other cases have expanded the joint action test significantly.

The distinctions among these approaches are not always clear. The Supreme Court itself has mused that the different approaches may simply be "different ways of characterizing the necessarily fact-bound inquiry that confronts the Court."¹⁰¹ With that caveat in mind, two of these approaches—the nexus and joint action tests—merit further consideration.

93. 513 U.S. 374, 378 (1995) (citing *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 632 (1991) (O'Connor, J., dissenting)).

94. Compare, for example, the classification offered in *Gallagher v. "Neil Young Freedom Concert,"* 49 F.3d 1442, 1448-51 (10th Cir. 1995), with that set out in *Sandoval v. Bluegrass Regional Mental Health-Mental Retardation Bd.*, No. 99-5018, 2000 U.S. App. LEXIS 17949 (6th Cir., July 11, 2000).

95. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982).

96. *Id.* (citing *Terry v. Adams*, 345 U.S. 461 (1953); *Marsh v. Alabama*, 326 U.S. 501 (1946)).

97. *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352 (1974) (holding no state action existed in a case involving actions by a privately owned and operated utility corporation).

98. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 170 (1970) (holding that state action might exist where discriminatory actions by restaurant reflected state-enforced custom).

99. *Jackson*, 419 U.S. at 351.

100. 457 U.S. at 937 (holding that state action may arise where a corporate creditor acts jointly with state in attaching plaintiff's property without due process).

101. *Id.* at 939. Some courts have sliced up the Supreme Court's state action jurisprudence differently. See, e.g., *Gallagher v. "Neil Young Freedom Concert,"* 49 F.3d 1442, 1447 (10th Cir. 1995) (distinguishing between a "nexus" test and a "symbiotic relationship" test).

(i) *Nexus/Symbiotic Relationship Approach*

In *Rendell-Baker v. Kohn*, Justice Marshall observed that “[t]he decisions of this Court clearly establish that where there is a symbiotic relationship between the State and a privately owned enterprise, so that the State and a privately owned enterprise are participants in a joint venture, the actions of the private enterprise may be attributable to the State.”¹⁰² While Justice Marshall was in dissent, his observation reflects a long, if somewhat more nuanced, line of reasoning that appears in other federal cases. The leading case is *Burton v. Wilmington Parking Authority*.¹⁰³ In *Burton*, a private restaurant refused to serve the plaintiff on racial grounds. The restaurant, while clearly a private business, leased space in a building constructed with public monies for public purposes and owned and operated by a state agency. The unique relationship of the restaurant with the publicly-run parking facility produced a number of mutual benefits. Guests to the restaurant had a convenient place to park while the presence of the restaurant likely increased the demand for public parking. As the Court added, “[n]either [could] it be ignored, especially in view of [the restaurant’s] affirmative allegation that for it to serve Negroes would injure its business, that profits earned by discrimination not only contribute[d] to, but also [we]re indispensable elements in, the financial success of a governmental agency.”¹⁰⁴ For the Court, the public nature of the construction and operation of the facility as a whole, the physical placement of the restaurant in a public facility, and the mutual benefits accruing to the restaurant and the state from this placement together demonstrated a degree of state participation sufficient to constitute state action.¹⁰⁵

Currently, the breadth of the *Burton* nexus or symbiotic relationship doctrine is uncertain. In several instances, the Supreme Court has sought to limit its scope.¹⁰⁶ Simple regulation¹⁰⁷ or public financing¹⁰⁸ are now insufficient to convert a private actor into a state functionary. The Court has also concluded that mere state “approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives.”¹⁰⁹ Finally, in *Jackson v. Metropolitan Edison Co.*, the Court commented on *Burton* and urged that “while ‘a multitude of relationships might appear to some to fall within the [Fourteenth] Amendment’s embrace,’

102. 457 U.S. 830, 847 (1982) (Marshall, J., dissenting).

103. 365 U.S. 715 (1961).

104. *Id.* at 724.

105. *Id.*

106. *See, e.g.,* *Murphy v. New York Racing Ass’n*, 76 F. Supp. 2d 489, 495 (S.D.N.Y. 1999) (citing leading commentator for proposition that “although *Burton* has never been overruled, it has been narrowed to the point of being virtually unworkable as a state action doctrine”); *see also Gallagher*, 49 F.3d at 1451 (noting that later Supreme Court decisions have read *Burton* narrowly).

107. *Blum v. Yaretsky*, 457 U.S. 991, 1011 (1982); *see also American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 57 (1999).

108. *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982).

109. *Blum*, 457 U.S. at 1004-05; *see also San Francisco Arts & Athletics v. U.S. Olympic Comm.*, 483 U.S. 522, 547 (1987).

differences in circumstances beget differences in law, limiting the actual holding to lessees of public property.”¹¹⁰

Some circuit courts have not heeded the Court's seemingly emphatic advice in *Jackson*.¹¹¹ Yet the high threshold established by the Supreme Court through its caveats to *Burton* has generally rendered lower courts reluctant to find a nexus between state and private action, even in public property matters. Some courts, reviewing the nexus case law, have concluded that where the approach is adopted, the most important consideration in the potpourri of connecting variables is evidence that each party benefits from the wrongful act itself, and not just from the parties' broader relationship.¹¹²

(ii) *Joint Action Approach*

According to the Tenth Circuit in *Gallagher v. "Neil Young Freedom Concert,"*¹¹³ in determining whether a private party is a willing participant in joint action with a state, "courts examine whether state officials and private parties have acted in concert in effecting a particular deprivation of constitutional rights."¹¹⁴ While the relevant case law is perplexing in its variability, there appear to be two lines of joint action jurisprudence. First, in some cases, courts have found joint action where the private actor and the state conspire to violate constitutional rights. The Supreme Court has held that "an otherwise private person acts 'under color of' state law when engaged in a conspiracy with state officials to deprive another of federal rights."¹¹⁵ Conspiracy in this context seems to mean a meeting of minds concerning an unlawful objective. As the Seventh Circuit put it in *Cunningham v. Seattle Center for Mental Health, Inc.*, "[a] requirement of the joint action charge therefore is that both public and private actors share a common, unconstitutional goal."¹¹⁶

Second, as *Gallagher* observed, "[o]ther courts applying the joint action test have focused on the manner in which the alleged constitutional deprivation is effected. These decisions hold that, if there is a 'substantial

110. 419 U.S. 345, 358 (1974) (quoting *Burton*, 365 U.S. at 726).

111. *Mark v. Borough of Hatboro*, 51 F.3d 1137, 1143 n.6 (3d Cir. 1995) (urging that the *Burton* test, in spite of *Jackson*, "remains a viable framework for assessing state actor status"), *cert. denied* 516 U.S. 858 (1995). *But see* *Haavistola v. Community Fire Co.*, 6 F.3d 211 (4th Cir. 1993) (relying on *Jackson* to constrict *Burton*).

112. *Murphy v. New York Racing Ass'n*, 76 F. Supp. 2d 489, 495 (S.D.N.Y. 1999) (citing leading commentator for proposition that the lower federal courts "'usually reject state action claims based on the *Burton* symbiotic relationship doctrine . . . generally following the present Supreme Court's reading of *Burton* that the most significant fact that led to the finding of state action was the public authority's profiting from the [private actor's] discrimination'").

113. 49 F.3d 1442 (1995).

114. *Id.* at 1453 (citing *Collins v. Womancare*, 878 F.2d 1145, 1154 (9th Cir. 1989); *Sims v. Jefferson Downs Racing Ass'n*, 778 F.2d 1068, 1076-80 (5th Cir. 1985)).

115. *Tower v. Glover*, 467 U.S. 914, 920 (1984).

116. 924 F.2d 106, 107 (7th Cir. 1991); *see also* *Moore v. Marketplace Rest., Inc.*, 754 F.2d 1336, 1352 (7th Cir. 1985) ("In order to establish a conspiracy, the plaintiff must demonstrate that the state officials and the private party somehow reached an understanding to deny the plaintiffs their constitutional rights."); *Johnson v. B. H. Liquidation Corp.*, No. 93-151412, 1994 U.S. App. LEXIS 2975, at *3 (9th Cir. Feb. 7, 1994) ("In order to prove such a conspiracy under section 1983, however, an agreement to violate constitutional rights must be shown.").

degree of cooperative action' between state and private officials, . . . or if there is 'overt and significant state participation' . . . in carrying out the deprivation of the plaintiff's constitutional rights, state action is present."¹¹⁷

This second approach to which *Gallagher* alludes appears consistent with several Supreme Court cases finding joint action where the harm is caused by state actors responding to a legal procedure commenced by a private party.¹¹⁸

In these cases, "a private party's mere use of the State's dispute resolution machinery" does not constitute state action "without the 'overt, significant assistance of state officials.'"¹¹⁹ As with the nexus test, the courts have also consistently held that "the mere acquiescence of a state official in the actions of a private party is not sufficient."¹²⁰ In *Gallagher*,¹²¹ the defendant promoter leased facilities from a state university for a concert for a substantial fee. In preparing for the concert, the promoter followed university protocol and, partially to fulfill university requirements, it retained the defendant company to provide crowd management during the event. The defendant company had an explicit "pat-down" policy for searching attendees at rock concerts. University officials were present at discussions regarding the reliance on "pat-down" searches. Subsequently, defendant company personnel searched concert patrons, while University police looked on. The Tenth Circuit found no joint action where state university police officers simply observed the pat-down searches completed by the defendant company's personnel and played no role in influencing the searches.

(iii) *Proximate Cause*

Compounding uncertainty concerning the precise scope of state action is the doctrine of "proximate cause" invoked by several circuit courts—particularly in the Ninth Circuit—as a key component of § 1983 proceedings. As the Ninth Circuit put it in *Van Ort v. Estate of Stanewich*, "although state action and causation are separate concepts, . . . elements of the causation analysis have been used in determining state action."¹²² The proximate cause analysis is particularly important where the wrong is committed by state agents but prompted at some level by private parties. The leading case is *Arnold v. IBM*.¹²³ Here, IBM was part of a task force with state officials investigating leaks of trade secrets. As a result of the task force's activities, the plaintiff was arrested and indicted and had his house searched. The case against the plaintiff was later dropped. He then sued IBM for its involvement in the harm he suffered, relying on § 1983. In deciding against the plaintiff,

117. *Gallagher v. "Neil Young Freedom Concert,"* 49 F.3d 1442, 1454 (10th Cir. 1995).

118. *Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478, 486 (1988) (reasoning that "when private parties make use of state procedures with the overt, significant assistance of state officials, state action may be found"); see also *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982).

119. *American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 54 (1999).

120. *Gallagher*, 49 F.3d at 1453 ("This Court . . . has never held that a State's mere acquiescence in a private action converts that action into that of the State.") (citing *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 164 (1978)).

121. *Id.* at 1442.

122. 92 F.3d 831, 836 (9th Cir. 1996), cert. denied 519 U.S. 1111 (1997).

123. 637 F.2d 1350, 1355 (9th Cir. 1981).

the Ninth Circuit held that "liability under section 1983 can be established by showing that the defendant personally participated in a deprivation of the plaintiff's rights, or caused such a deprivation to occur The causation requirement of sections 1983 . . . is not satisfied by a showing of mere causation in fact. Rather, the plaintiff must establish proximate or legal causation."¹²⁴ In describing this concept, the court invoked the requirement of foreseeability. However, in applying the proximate cause test to the facts, the court also examined whether IBM had "some control or power" over the state actors actually inflicting the constitutional harm.¹²⁵

One other circuit court has cited this language of control with approval.¹²⁶ However, *Arnold* has been discussed or distinguished in other cases in a fashion undermining control as the test for proximate cause. In *Tidwell v. Schweiker*, a series of what were presumably mixed state and federal rules determined that the disability benefits of incompetent patients entering Illinois mental health facilities were paid to a "representative payee."¹²⁷ Where family members were unavailable, the superintendent of the patient's institution was appointed as the payee. The process afforded the patient no notice and no opportunity to submit evidence. Plaintiff patients sued the state and federal institutions on constitutional grounds. The District Court found that the appointment of an institutional superintendent as a representative payee was not *per se* unlawful, but that the procedures involved in the appointment were inconsistent with due process standards. Attorney's fees for the case were awarded against Illinois, but not the federal defendants. The State appealed the fee award, relying on *Arnold* to urge that it was federal—and not state—conduct that was the proximate cause of the injury. Specifically, it urged that the illegal procedural aspect of the appointment process was solely within the control of the federal defendants. The Seventh Circuit upheld the lower court and dismissed the *Arnold* argument by holding "it was not necessary for the state defendant to have had control over the illegal procedures when the [Illinois agency] willingly participated in and benefited from the procedures."¹²⁸ It was enough that, under the scheme, the State was responsible for initiating the process that culminated in the appointment of the superintendent as the payee. In doing this, the State agency "set in motion a series of acts when the [agency] knew or should have known that a constitutional injury was the only reasonable outcome."¹²⁹

In arriving at this conclusion, the court relied on the oft-cited Ninth Circuit's decision in *Johnson v. Duffy*.¹³⁰ Here, in a case involving the relative apportionment of fault between public actors in a § 1983 case, the court concluded that "[t]he requisite causal connection can be established not only

124. *Id.*

125. *Id.* at 1356.

126. *Jacob v. Curt*, 898 F.2d 838, 839 (1st Cir. 1990).

127. 677 F.2d 560, 569 (7th Cir. 1982), *cert. denied*, 61 U.S. 905 (1983).

128. *Id.*

129. *Id.* at 569 n.12. For the court, this minimal role in initiating what would amount to a constitutional violation indicated the existence of a conspiracy between the federal and state governments directed at the illegal diversion of Social Security benefits from the plaintiffs to the state defendant.

130. 588 F.2d 740 (9th Cir. 1978).

by some kind of direct personal participation in the deprivation, but also by setting in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury.”¹³¹

More recently, in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe*,¹³² the Ninth Circuit came to a similar conclusion, expressly invoking and applying a test for proximate causation less stringent than control. There, the court held that “[i]t is well-established that foreseeability analysis is an appropriate part of proximate cause determinations in § 1983 actions.”¹³³ Foreseeability, as ultimately applied by the court, obliges a traditional tort law inquiry into whether the harm was reasonably foreseeable.

These reasonable foreseeability cases grapple with proximate causation as a means of apportioning blame between state actors. There is some question as to whether they can be relied upon in cases where a court seeks to determine the state action question, rather than to assess the relative participation of undeniable state actors. Yet, as noted above, there are clear statements in *Van Oort* and an implicit holding in *Arnold* suggesting that, at least in the Ninth Circuit, it is appropriate to rely on proximate causation doctrine developed in other contexts in deciding the state action question. Consequently, it is urged that since other cases have regularly held that proximate cause requires reasonable foreseeability, this is the standard that courts should apply in state action proximate cause analyses.

b. *State Action in International Law*

In *Eastman Kodak*, the District Court observed that “[t]hrough the negative prohibitions of our own Constitution generally extend only to state action, those who conspire with state actors to invade the constitutional rights of others may be held liable along with the state actors Of course, just because our constitutional distinctions are drawn one way does not mean that we have to draw the same distinctions under the ATCA.”¹³⁴ While reliance on constitutional color of law/state action doctrine has clearly become the norm in ATCA claims, there is a similar corpus of international law that is relevant. Notably, some of these international precedents suggest a test for state action that is broader than the nexus or joint action approaches extant in constitutional practice.

In 1988, the Inter-American Court of Human Rights commented in the *Velásquez Rodríguez* case that “under international law a State is responsible for the acts of its agents undertaken in their official capacity and for their

131. *Id.* at 743-44; see also *Conner v. Reinhard*, 847 F.2d 384, 396-97 (7th Cir. 1988) (“For liability under section 1983, direct participation by a defendant is not necessary. Any official who ‘causes’ a citizen to be deprived of her constitutional rights can also be held liable. The requisite causal connection is satisfied if the defendant set in motion a series of events that the defendant knew or should reasonably have known would cause others to deprive the plaintiff of her constitutional rights.”), *cert. denied* 488 U.S. 856 (1988).

132. 216 F.3d 764 (9th Cir. 2000).

133. *Id.* at 784.

134. *Eastman Kodak Co. v. Kavlin*, 978 F. Supp. 1078, 1091 (S.D. Fla. 1997).

omissions, even when those agents act outside the sphere of their authority or violate internal law.”¹³⁵ More recently, in *Prosecutor v. Tadic*, the Appeals Chamber of the ICTY considered the international principles for attributing actions of private actors to state actors.¹³⁶ Critiquing the ICJ decision in *Nicaragua v. United States*,¹³⁷ the Chamber concluded, “[t]he requirement of international law for the attribution to States of acts performed by private individuals is that the State exercises control over the individuals.”¹³⁸ Notably, the degree of control required for state action varies with the factual circumstances of each case. Citing a number of instances where attribution of private action to the state requires substantial state involvement and direction in the unlawful conduct of the private actor, the Chamber identified a circumstance where the involvement of the state need not be as profound:

To these situations another one may be added, which arises when a State entrusts a private individual (or group of individuals) with the specific task of performing lawful actions on its behalf, but then the individuals, in discharging that task, breach an international obligation of the State In this case, by analogy with the rules concerning State responsibility for acts of State officials acting *ultra vires*, it can be held that the State incurs responsibility on account of its specific request to the private individual or individuals to discharge a task on its behalf.¹³⁹

For the Chamber, the test for attribution of private acts to states in these circumstances depends on whether or not the private party is an organized military or paramilitary entity. Where “individuals making up an organised and hierarchically structured group, such as a military unit or, in case of war or civil strife, armed bands of irregulars or rebels” are implicated, and are under the overall control of a state, “it must perforce engage the responsibility of that State for its activities, whether or not each of them was specifically imposed, requested or directed by the State.”¹⁴⁰ In the court’s words,

In order to attribute the acts of a military or paramilitary group to a State, it must be proved that the State wields overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity. Only then can the State be held internationally accountable for any misconduct of the group. However, it is not necessary that, in addition, the State should also issue, either to the head or to members of the group, instructions for the commission of specific acts contrary to international law.¹⁴¹

On the other hand, where 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 impugned state concerning the commission of the wrongful act or ex post facto endorsement of a completed violation.

135. Inter-Am. Ct. H.R. (Ser. C) No. 4 (1988), ¶ 170, *reprinted in* 9 HUM. RTS. L.J. 212 (1988), available at http://www1.umn.edu/humanrts/iachr/b_11_12d.htm.

136. *Prosecutor v. Tadic*, Judgment of the Appeals Chamber, IT-94-1-A (July 15, 1999), at http://www.un.org/icty/tadic/appeal/judgement/index_2.htm.

137. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27).

138. *Tadic*, IT-94-1-A, para. 117.

139. *Id.*, para. 119.

140. *Id.*, paras. 120-23.

141. *Id.*, para. 131.

D. Conclusion

In sum, the ATCA creates an independent cause of action in tort for a violation of the treaties of the United States and the law of nations. Courts unearth the law of nations with reference to various authorities, endorsing as international law those principles that are sufficiently universal and obligatory. Court practice to date establishes that liability for individuals is possible in two circumstances. First, ATCA liability may attach where individual responsibility for breaches of international law is available at international law. While the matter has yet to be decided in a U.S. court, international war crimes tribunals have found individual liability for certain acts of complicity with, at the very least, war crimes and crimes against humanity. The three doctrines of complicitous guilt identified in the recent *Tadic* decision of the ICTY vary in emphasis, but share in common an intended participation in a criminal common enterprise. Taken together, they suggest that, at international law, an accused is guilty not only for the intended outcome of that shared criminal activity, but also for crimes that are the natural and foreseeable consequences of the common enterprise and about which the accused was reckless or indifferent.

Second, courts adjudicating ATCA matters have relied on color of law jurisprudence to evaluate instances where private actors are so proximate to state abuses as to be considered state actors liable for breaches of international law. While state action law is not entirely consistent, in general, two sets of circumstances have been employed by courts dealing with color of law matters analogous to claims of corporate complicity with human rights abuses. First, courts have sometimes found state action where a nexus exists between the state and private parties. Courts teach that the nexus approach requires a very high level of state/private actor interdependence. Unfortunately, no bright line test exists establishing the exact quantum of interrelationship necessary to make out state action. Though insufficient on its own, evidence that both parties benefit from the wrongful act is the most important single variable. Second, courts have discerned state action where the parties act jointly. The joint action test examines whether state officials and private parties have acted in concert in causing a particular deprivation of constitutional rights. Joint action may be expressed via a conspiracy—defined as a meeting of minds to deprive a person of constitutional rights—or through the overt, significant assistance of one party in the rights-depriving conduct of the other. There is also good authority for the proposition that the actions of one transgressing party must be foreseeable to the party who, while causally connected to the violation, does not actually commit the wrong. Foreseeability in this context is probably best measured with reference to standard tort law principles and not with reference to control over the wrongdoer's actions.

Notably, there is also a line of international state responsibility jurisprudence analogous to domestic state action law. While this international doctrine has not yet been applied in an ATCA claim, it represents a supplemental—perhaps even more logical—approach to color of law. As with much domestic color of law jurisprudence, the relevant state responsibility concepts are directed at establishing when wrongful activities by private

parties can be attributed to a state for liability purposes. As distilled in *Tadic*, these international norms envisage the test for attribution of state responsibility as varying according to the nature of the party committing the wrongful actions. Where the wronging party is a military or paramilitary organization, the state is responsible irrespective of whether it commanded or endorsed the wrongful act so long as it has overall control over the group, by equipping and financing the organization and by coordinating or helping in the general planning of its military activity. Clearly, like much of the domestic color of law jurisprudence discussed above, state responsibility at international law is a doctrine linking states to wrongful actions by private parties, rather than private parties to states. Yet liability issues raised in cases like *Unocal* depend on companies being held accountable for wrongful actions by the state. State responsibility, therefore, is a corpus of law whose application depends on courts being prepared to adopt and *invert* the roles of the relevant parties, perhaps in much the same way present ATCA jurisprudence has relied on color of law doctrine to attribute state wrongs to individuals. A court prepared to take these steps might find a company responsible for the wrongful actions of a state military where it had control of the right-violating unit—namely, where it equipped and financed the group and aided in general operational planning. Depending on the facts in specific cases, this standard may prove much simpler to apply and potentially more demanding of companies than the often ambiguous domestic color of law tests described above.

With these standards in mind, the following section evaluates the decision in *Unocal*.

IV. DOE V. UNOCAL CORP.

In *Unocal*, the plaintiffs urged that Unocal was “liable for torts committed against them by the Myanmar military for the benefit of the [Yadana Pipeline] Project.”¹⁴² As noted above, the latter is a pipeline initiative undertaken by a consortium of which Unocal is a member. The project has prompted serious human rights abuses by Burmese forces. Citing federal causes of action under the ATCA, the Racketeer Influenced and Corrupt Organizations Act (RICO),¹⁴³ and the federal question statute,¹⁴⁴ the plaintiffs won a precedent-setting victory in 1997, persuading a District Court judge that the matter should not be dismissed for lack of subject-matter jurisdiction,¹⁴⁵ and instead should proceed to trial. Subsequently, on August 31, 2000, the court allowed the defendant’s motion for summary judgment. The following discussion focuses on the ATCA claim.

142. *Doe v. Unocal Corp.*, 110 F. Supp. 2d 1294, 1303 (C.D. Cal. 2000).

143. 18 U.S.C. § 1961 (2001).

144. 28 U.S.C. § 1331 (1994).

145. *Doe v. Unocal Corp.*, 963 F. Supp. 880, 890 (C.D. Cal. 1997).

A. *Holding on Summary Judgment*

After distilling the facts, the court noted that “[t]o state a claim under the ATCA, a plaintiff must allege (1) a claim by an alien, (2) alleging a tort, and (3) a violation of the law of nations (international law).”¹⁴⁶ The first two assertions were not at issue, prompting the court to focus on the international law question. Concluding that “[a]ctionable violations of international law must be of a norm that is specific, universal, and obligatory,”¹⁴⁷ the court considered the vexing question of whether individuals could be liable for breaches of international law. Citing with approval the view that “certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals,”¹⁴⁸ the court observed that “[w]hile crimes such as torture and summary execution are proscribed by international law only when committed by state officials or under color of law . . . the law of nations has historically been applied to private actors for the crimes of piracy and slave trading, and for certain war crimes.”¹⁴⁹

Apparently agreeing that “forced labor” committed by the Burmese regime amounted to slavery and thus was one of the acts for which international law assigned individual liability, the court considered whether Unocal was responsible for the regime’s conduct. Confronted with the plaintiffs’ claims that principles of vicarious liability existed in international law governing forced labor, the court considered the prosecution of Nazi industrialists for use of forced labor in the Second World War. For the court, these cases teach that “liability requires participation or cooperation in the forced labor practices.”¹⁵⁰ Turning to Unocal’s role, the court held that

there are no facts suggesting that Unocal sought to employ forced or slave labor. In fact, the Joint Venturers expressed concern that the Myanmar government was utilizing forced labor in connection with the Project. In turn, the military made efforts to conceal its use of forced labor. The evidence does suggest that Unocal knew that forced labor was being utilized and that the Joint Venturers benefitted from the practice. However, because such a showing is insufficient to establish liability under international law, Plaintiffs’ claim against Unocal for forced labor under the Alien Tort Claims Act fails as a matter of law.¹⁵¹

Turning to the question of whether Unocal was operating “under color of law,” the court relied on civil rights jurisprudence under 42 U.S.C. § 1983, holding that “an individual acts under ‘color of law’ within the meaning of section 1983 when he acts together with state officials or with significant state aid.” Citing *Collins v. Womancare*¹⁵² and *Gallagher v. “Neil Young Freedom Concert,”*¹⁵³ the court considered the color of law issue by asking whether Unocal was a joint participant in the challenged activity—one who

146. *Unocal*, 110 F. Supp. 2d at 1303.

147. *Id.* at 1304.

148. *Id.* at 1305 (citing *Kadic v. Karadzic*, 70 F.3d 232, 239 (2d Cir. 1995)).

149. *Id.*

150. *Id.* at 1310.

151. *Id.*

152. *Collins v. Womancare*, 878 F.2d 1145 (9th Cir. 1989), *cert. denied*, 493 U.S. 1056 (1990).

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

participated in or influenced the challenged action or who conspired or shared a common objective to commit violations. According to the court, the plaintiffs marshaled evidence

demonstrating that before joining the Project, Unocal knew that the military had a record of committing human rights abuses; that the Project hired the military to provide security for the Project, a military that forced villagers to work and entire villages to relocate for the benefit of the Project; that the military, while forcing villagers to work and relocate, committed numerous acts of violence; and that Unocal knew or should have known that the military did commit, was committing, and would continue to commit these tortious acts.¹⁵⁴

Yet, while Unocal and the Burmese regime “shared the goal of a profitable project,” the plaintiffs presented “no evidence that Unocal ‘participated in or influenced’ the military’s unlawful conduct . . . ‘conspired’ with the military to commit the challenged conduct . . . [or] ‘controlled’ the Myanmar military’s decision to commit the alleged tortious acts.”¹⁵⁵ Therefore, Unocal’s actions were not the proximate cause of the violations within the meaning established by *Arnold*, and the plaintiffs’ “claims that Unocal acted under ‘color of law’ for purposes of the ATCA fail[ed] as a matter of law.”¹⁵⁶

B. Discussion

An analysis of the decision with reference to applicable legal principles set out earlier in this Note casts doubt on the correctness of the court’s decision. Its application of the joint action test for state action is generally consistent with the authorities discussed in Section III.C. No facts are cited by the court suggesting that the company conspired to deprive the plaintiffs of their rights. Nor is there evidence that the company assisted in the actual infliction of human rights abuses. Nevertheless, materials on the record suggested that the company’s contract made the military “responsible for protecting the pipeline.”¹⁵⁷ In fact, the Unocal officials acknowledged that the companies “hired the Burmese military to provide security for the Project and pay for these through the [government-run] Myanmar Oil and Gas Enterprise. . . . [T]hree truckloads of soldiers accompany Project officials as they conduct survey work and visit villages.”¹⁵⁸ Company officials also recognized that their “assertion that SLORC ha[d] not expanded and amplified its usual methods around the pipeline on our behalf m[ight] not withstand much scrutiny.”¹⁵⁹ These facts point to a project formally tying the military to the company and obliging an increased military presence. The enhanced military presence, in turn, exacerbated human rights abuses. Further, the companies provided at least some material assistance to the military security providers,

154. *Unocal*, 110 F. Supp. 2d at 1306.

155. *Id.* at 1306-07.

156. *Id.* at 1307.

157. *Id.* at 1301.

158. *Id.*

159. *Id.* at 1300.

both in terms of paying for the military presence and in terms of providing transportation.

Taken together, these facts suggest two objections to the court's ultimate conclusion on joint action. First, the court is likely wrong in dismissing the plaintiff's claim on proximate cause grounds. Its reliance of the *Arnold* language of control as the test for proximate cause ignores more persuasive and recent authority calling for a tort-like test of reasonable foreseeability. Given Unocal's familiarity with the rights-violating record and activity of the regime, the consequences for the plaintiffs seem eminently foreseeable. Second, the court concludes correctly that one line of joint action jurisprudence requires participation in the impugned conduct. Clearly, the construction of a pipeline is not *per se* an unlawful action. Yet, given the facts cited above, it is arguable that participation by the company in the provision of military security was intimately linked to the army's human rights abuses. The facts alleged suggest that, absent the pipeline project, the abuses would have never occurred. More than providing a motivation for the abuses, the pipeline project provided material and financial support to the security forces. That this support was remote in time and not directed *per se* at the actual abuse does not necessarily mean that it was not part of a joint action of "providing security for the pipeline" that had, as its foreseeable consequences, serious human rights abuses.

The *Unocal* court appears to reduce the requisite unlawful conduct to the moments of the actual human rights abuses. It implicitly confines the actors caught up in the joint action to the parties who are present at the time of the abuse and who physically inflict the harm. Such a narrow view of unlawful conduct seems deeply inconsistent with the very objectives of the proximate cause test upon which the court ultimately relies. After all, if wrongful joint action only arose where the impugned behavior was contemporaneous with, and directed specifically at, the abuse, the question of foreseeability would be significantly less important. In fact, as the cases cited in Section III.C suggest, joint action may arise where the participation of one party is remote in time and content from the other party's ultimately wrongful acts. In *Tidwell* and *Johnson*, the Seventh and Ninth Circuits found participation in unlawful conduct where one party initiated a process of which the foreseeable consequences were constitutional violations by another party.¹⁶⁰ Put another way, a sensible reconciliation of the twin requirements of unlawful conduct and proximate causation would envisage unlawful conduct as activities that contribute in fact to abuses that are reasonably foreseeable. On the authority of *Tidwell* and *Johnson*, joint action should exist if Unocal set in motion a series of acts where it knew or should have known that a human rights violation was the only reasonable outcome.¹⁶¹ Measured against this standard, the facts alleged by the plaintiffs in *Unocal* should have been sufficient to survive summary judgment.

Third, the court's discussion of color of law fails to consider the nexus approach. While the precise requirements for this prong of the state action

160. *Supra* notes 127, 130 and accompanying text.

161. *Id.*

test—and even its continued vitality—are deeply uncertain, Unocal's financial and material involvement in the provision of security by the Burmese military in *Unocal* raises real questions about interdependence. Further, there is a clear prospect that both parties benefitted from the abuses committed by the military. On the one hand, the brutalization of the population assures the company of project security and non-resistance to its activities. On the other hand, the regime is able to attract and retain a substantial and essential foreign presence in a key project.

Fourth, the international state responsibility material set out in *Tadic* presents an alternative or complementary approach to state action that has potential implications for the outcome in *Unocal*. An application of the *Tadic* state responsibility approach test, applied to the Burmese military, might render Unocal culpable where the company had overall control over the relevant units. According to *Tadic*, the question of control considers the role of the firm in equipping and financing the military and in coordinating or helping in the general planning of its military activity. As noted above, the company played some role in financing and equipping units. The facts recited by the court do not describe Unocal as having a planning role. However, its joint venture partner Total reportedly met regularly with the military "to inform them of the next day's activities so that soldiers [could] ensure the area [was] secure" and guard the work area while the survey team conducted its business.¹⁶² If there is evidence of similar briefings by Unocal, the elements of control may well be present.

Finally, the court does not draw on international law principles establishing personal liability for complicity with certain crimes against humanity and war crimes. Certainly, several of the allegations made by the plaintiffs concerned crimes against humanity committed by the Burmese military in relation to the pipeline project. If the facts showed that these violations were the natural and foreseeable consequences of a common enterprise and that the company was reckless or indifferent as to these consequences, the international law standard for complicitous guilt set out in *Tadic* might be met. Critically, however, the enterprise in which the company intends to participate must itself be criminal. While *Tadic* provides no definition of what constitutes a criminal enterprise, the language in that case suggests that a criminal enterprise at international law is one directed at committing an international crime, such as a crime against humanity or a war crime. As the common enterprise in *Unocal* is the provision of security for a pipeline—an endeavor associated with, but not *per se*, an international crime—this element of complicitous guilt is not made out. Here, it is unlikely that the foreseeability inquiry analogous to that employed in the § 1983 joint action approach applies. Even if the company supplied material and financial support to Burmese troops, the *mens rea* requirement of "intent to participate in a criminal enterprise" would likely require a showing that this assistance was provided with the intent of furthering criminal actions by the soldiers, not simply that these criminal acts were foreseeable.

162. *Unocal*, 110 F. Supp. 2d at 1301.

V. CONCLUSION

Of the several cases alleging corporate complicity in human rights abuses,¹⁶³ *Doe v. Unocal* has proceeded furthest. The dismissal of the case on summary judgment has clear implications for other cases. While the decision on its face seems damning to plaintiffs intent on using the ATCA to hold companies accountable for alleged complicity with human rights abuses, a review of relevant principles of U.S. and international law suggest that much remains to be explored in the ATCA context. Specifically, the standards for complicitous guilt in international law, international state responsibility rules, and the U.S. color of law doctrine all suggest a number of different avenues for capturing complicity as an actionable wrong. There is some basis for concluding that the *Unocal* court's holding does not fully exhaust these areas of law, raising questions concerning its sustainability on appeal and its precedential impact on other, similar corporate complicity cases. In sum, while complicity arguments predicated on the ATCA's uncertain substantive law are a clear Achilles heel in ATCA lawsuits, the Act may yet prove a means for plaintiffs to seek compensation from companies practicing an unabashed form of militarized commerce in joint ventures with human rights abusing regimes.

163. See discussion in Part I.

