Docket Nos. 00-56603, 00-56628, 00-57195, 00-57197

Argued: June 17, 2003

Before: Hon. Mary M. Schroeder, Hon. Stephen R. Reinhardt, Hon. Alex Kozinski, Hon. Pamela A. Rymer, Hon. Thomas G. Nelson, Hon. A. Wallace Tashima, Hon. Susan P. Graber, Hon. M. Margaret McKeown, Hon. William A. Fletcher, Hon. Raymond C. Fisher, and Hon. Johnnie B. Rawlinson

---

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN DOE I *et al.*, Plaintiffs-Appellants,

v.

UNOCAL CORPORATION *et al.*, Defendants-Appellees.

JOHN ROE III et al., Plaintiffs-Appellants,

v.

UNOCAL CORPORATION *et al.*, Defendants-Appellees.

On Appeal from the United States District Court
For the Central District of California
Honorable Richard A. Paez and Honorable Ronald S. W. Lew, District Judges
Nos. CV-96-6959 and CV-96-6112

DOE AND ROE PLAINTIFFS' AND APPELLANTS' SUPPLEMENTAL BRIEF

TERRENCE P. COLLINGSWORTH
NATACHA THYS
INTERNATIONAL LABOR RIGHTS FUND
733 15th Street N.W., Suite 920
Washington, D.C. 20003
Tel: (202) 347-4100
Fax: (202) 347-4885
Attorneys for Plaintiffs-Appellants
JOHN ROE III *et al.*

PAUL L. HOFFMAN SBN 071244
SCHONBRUN DESIMONE SEPLOW HARRIS & HOFFMAN LLP
723 Ocean Front Walk
Venice, CA 90291
Tel: (310) 396-0731
Fax: (310) 399-7040
Attorneys for Plaintiffs-Appellants
JOHN DOE I *et al.*

Attorneys for Plaintiffs/Appellants continued on next page

DAN STORMER SBN 101967
ANNE RICHARDSON SBN 151541
CORNELIA DAI SBN 207435
HADSELL & STORMER, INC.
128 N. Fair Oaks Avenue, Suite 204
Pasadena, CA 91103
Tel: (626) 585-9600
Fax: (626) 577-7079

JUDITH BROWN CHOMSKY
P.O. Box 29726
Elkins Park, PA 19027
Tel: (215) 782-8367
Fax: (215) 782-8368

RICHARD L. HERZ
KATHARINE J. REDFORD
TYLER GIANNINI
EARTHRIGHTS INTERNATIONAL
1612 K Street N.W., Suite 401
Washington, D.C. 20006
Tel: (202) 466-5188

JENNIFER M. GREEN
BETH STEPHENS
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, NY 10012
Tel: (212) 614-6464

Attorneys for Plaintiffs-Appellants
JOHN DOE I, *et al.*

JOSEPH C. KOHN
MARTIN J. D'URSO
KOHN, SWIFT & GRAF, P.C.
One South Broad Street, Suite 2100
Philadelphia, PA 19107
Tel: (215) 238-1700

CRISTOBAL BONIFAZ
JOHN C. BONIFAZ
LAW OFFICES OF CRISTOBAL BONIFAZ
48 North Pleasant Street
P.O. Box 2488
Amherst, MA 01004-2488
Tel: (413) 253-5626

CHRISTOPHER E. KRAFCHAK
KENDERTON S. LYNCH III
KRAFCHAK & ASSOCIATES
1888 Century Park East, Suite 1900
Los Angeles, CA 90067
Tel: (310) 772-0034
Fax: (310) 772-0121

Attorneys for Plaintiffs-Appellants
JOHN ROE III, *et al.*

Table of Contents

Table of Authorities

Page(s)

Cases

Statutes and Regulations

Othor Authorities

I. INTRODUCTION.

As Appellees state, this case "is not a close call." Defs.' Br. at 1.[1] There is no question after *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 159 L. Ed. 2d 718 (2004), that plaintiffs' claims are actionable under the Alien Tort Statute (ATS).

In *Alvarez*, the Supreme Court, over Justice Scalia's dissent, pointedly endorsed the approach of dozens of federal courts—including this Court's analysis in *In re Estate of Marcos Human Rights Litigation*, 25 F.3d 1467 (9th Cir 1994), and the seminal Second Circuit case *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980)—that plaintiffs may pursue claims for violations of international norms that are "specific, universal, and obligatory." 124 S. Ct. at 2766. Indeed, the Court repudiated virtually all of the arguments about the scope and meaning of the ATS asserted by Sosa and by the United States (and appellees' counsel) as *amicus curiae*. 124 S. Ct. at 2755. The evidence supporting the existence of a "specific, universal and obligatory" norm prohibiting forced labor is overwhelming and clearly satisfies *Alvarez*.

Appellees' state action argument is meritless. Crimes against humanity, forced labor and abuses committed in connection with a forced labor regime do

---

[1] The reference to "Defs.' Br." is to the Corrected Supplemental Brief of Defendants-Appellees served on August 9, 2004. Appellants in the *Doe* and *Roe* cases file a consolidated response for the convenience of the Court.

not require state action. Moreover, the Burmese soldiers here were obviously state actors, and Unocal is liable for, *inter alia*, aiding and abetting their actions.

Aiding and abetting is an accepted basis for imposing liability for violating norms like the prohibition against forced labor, and has been a feature of international law since the Nuremberg trials. *Alvarez* reaffirmed the ability of the federal courts to fashion appropriate federal common law principles to govern the litigation authorized by Congress under the ATS. Thus, this Court can draw on federal common law to determine aiding and abetting, joint venture, recklessness and agency liability.

Finally, Unocal's argument that the Burma Sanctions Act pre-empts this lawsuit should once again be rejected. Unocal has waived this meritless claim by failing to assert it previously in this appeal.

II. *ALVAREZ* AFFIRMS THIS COURT'S "SPECIFIC, UNIVERSAL, AND OBLIGATORY" STANDARD.

Alvarez, for all its cautionary language, reaffirms the "specific, universal, and obligatory" standard employed by this Court in *Marcos* and other ATS cases and by the panel in this case. *Alvarez*, 124 S. Ct. at 2774-75 (citing *Filartiga*, *Marcos*, and *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 (D.C. Cir. 1984) (Edwards, J., concurring)). Appellants' claims have already been found to have met the *Alvarez* standard. The Supreme Court did not criticize a single case

in which an international human rights norm had been recognized as meeting this standard, other than the arbitrary arrest claim considered in this Court's *en banc* decision in *Alvarez* itself.[2]

The forced labor claims here do not suffer from the same infirmities as Dr. Alvarez's claim. The Supreme Court held that, although a norm against arbitrary arrest may exist, there was no consensus that such a norm prohibited an extraterritorial seizure by private parties based on a grand jury indictment and federal arrest warrant, which took less than 24 hours and did not result in any physical injury: "Any credible invocation of a principle against arbitrary detention that the civilized world accepts as binding customary international law requires a factual basis beyond relatively brief detention in excess of positive authority." 124 S. Ct. at 2769.[3] Thus, the Court rejected Dr. Alvarez's claim because the facts

---

[2] Appellees seek to perpetuate the myth that the federal courts had opened the door to a "flood" of ATS cases. Defs.' Br. at 1. The courts since *Filartiga*, including this Court, have been insistent on adequate proof that the norms asserted by ATS plaintiffs be "specific, universal and obligatory." Claims not supported by such evidence have been uniformly rejected. *See, e.g., Flores v. S. Peru Copper Corp.*, 343 F.3d 140, 161-72 (2d. Cir 2003) (rejecting pollution claims).

[3] Although the Court referred to § 702 of the Restatement (Third) of Foreign Relations Law of the United States ("Restatement"), it did not tie its standard to the Restatement list or to a finding that a norm is a *jus cogens* norm. 124 S. Ct. at 2768-69. Indeed, the Restatement itself notes that the list is not exclusive. § 702 cmt. a. The "law of nations" in 1789 did not even recognize any separate category of *jus cogens* norms, *see* William S. Dodge, *Which Torts in Violation of the Law of Nations?*, 24 Hastings Int'l & Comp. L. Rev. 351, 358 & note 53 (2001); limiting ATS claims to a concept that did not exist at the time the ATS was enacted is

of his claim fell outside the core prohibition of any recognized norm. *See also Martinez v. City of Los Angeles*, 141 F.3d 1373, 1384 (9th Cir. 1998).

By contrast, just as "robbery . . . upon the sea" unquestionably constitutes piracy, *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 161 (1820),[4] the events here unquestionably violate the internationally recognized prohibition of forced labor. Villagers were systematically subjected to a reign of terror, torture, forced relocation and murder and were forcibly taken from their homes to work under harsh conditions against their will on a privately-funded project. This is slavery, not "public service," *see* Defs.' Br. at 17 n.16, and no government claims that such conduct is permissible under international law. Indeed, the prohibition against forcing people to labor on a mass scale under the threat of death has been accepted as binding international law at least since Nuremberg.

III. FORCED LABOR IS ACTIONABLE UNDER *ALVAREZ.*

Every judge to consider the question has found that Appellants' forced labor claims fall under a "specific, universal, and obligatory" international law prohibition. In this case there is a concordance of the many sources from which

---

contrary to the analysis in *Alvarez.*

[4] *Smith* expressly notes the existence of a "diversity of definitions" of piracy, *id.* at 161. The focus in *Smith* and *Alvarez* on the specific conduct at issue demonstrates that all sources need not agree on a single definition as long as they agree that the challenged conduct falls within it.

customary norms may be identified, including treaties, executive, legislative and judicial decisions, the customs and usages of nations, and the works of scholars. As the panel stated, "forced labor is so widely condemned that it has achieved the status of a *jus cogens* violation." Slip op. at 14208. This analysis is fully in accord with *Alvarez*.[5]

The evidence supporting the international norm prohibiting forced labor is comparable in specificity and universal acceptance to the paradigmatic case giving rise to an ATS claim, official torture.[6] Indeed, the evidence relating to forced labor is indistinguishable from the evidence reviewed in *Filartiga* to determine that torture violated the "law of nations."

---

[5] Unocal erroneously claims that the panel "relied exclusively on domestic law." Defs.' Br. at 9. In fact, as Unocal concedes in a footnote, the U.S. decisions relied on by the panel—*Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 440 (D.N.J. 1999), and *In re World War II Era Japanese Forced Labor Litigation*, 1160 F. Supp. 2d 1160, 1179 (N.D. Cal. 2001)—both concluded that forced labor is actionable under the ATS because forced labor violates the "law of nations." Defs.' Br. at 9 n.7. Moreover, the consideration of domestic law is proper under *Alvarez*. Although *Alvarez* directs courts to identify "the current state of international law" in determining if a plaintiff has alleged an actionable violation, 124 S. Ct. at 2766, *Alvarez* itself cites to domestic standards in delineating the appropriate boundaries of an arbitrary arrest claim. *Id.* at 2768.

[6] As the Court in *Filartiga* emphasized, the torturer in the 20th century had become, like the pirate of the 18th century, "*hostis humani generis*, an enemy of all mankind." 630 F.2d at 890. *Alvarez* clearly found that the cases finding actionable norms against torture, extrajudicial executions, and disappearance have applied the correct evidentiary analysis. *See* 124 S. Ct. at 2766 (citing *Filartiga*, 630 F.2d at 890; *Marcos*, 25 F.3d at 1475).

Convention No. 29 of the International Labor Organization (ILO) is the starting point for the inquiry into the specificity and universality of this norm. Effective in 1932, and ratified by 145 countries, including Burma, Convention No. 29 represents a consistent and universally accepted standard in international law. The Convention provides a universally agreed-upon definition of "forced or compulsory labour" as "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily." Convention concerning forced or compulsory labour (No. 29), June 28, 1930, art. 2(1), 39 U.N.T.S. 55. Indeed, Article 4 expressly forbids "the imposition of forced or compulsory labor for the benefit of private individuals, companies or associations."

Unocal suggests that the existence of exceptions to forced labor undermines the specificity of this norm. Defs.' Br. at 8 n.4. In fact, the clarity of these exceptions only reinforces the fundamental nature of the core prohibition and makes this norm amenable to judicial enforcement. There is no plausible argument that any of these exceptions apply here.[7]

---

[7] Unocal resurrects its reprehensible position, explicitly rejected by the District Court, that the brutal forced labor prevalent in Burma is the equivalent of "public service." Defs.' Br. at 17 n.16. Judge Lew held that "Unocal's public service argument is not compelling. There is ample evidence in the record linking the Myanmar government's use of forced labor to human rights abuses." 110 F. Supp. 2d at 1308. Unocal stands alone in denying the brutal forced labor regime for which Burma has been universally condemned.

Moreover, the ILO has demonstrated quite directly how this specific standard can be applied to the facts of forced labor in Burma.[8] After finding that forced labor was widespread and systematic as a factual matter in Burma, the ILO Commission concluded that "*there exists now in international law a peremptory norm prohibiting any recourse to forced labour and that the right not to be compelled to perform forced or compulsory labour is one of the basic human rights.*" ER 962. (emphasis added). The ILO's conclusion is in complete agreement with the only expert testimony in the case.[9] Professor Virginia Leary, a renowned expert on international labor standards, stated:

> Prohibition of forced labor is a rule of customary international law as is evident from applying the standards used by the Court in *Filartiga* and progeny . . . The prohibition of forced labor is included in numerous widely ratified treaties and international agreements, is prohibited in a number of constitutions and has been expressly accepted as a fundamental norm by states at the [ILO]. **To my knowledge, no country has stated that it has the right to use forced labor.**[10]

---

[8] *See* ER 948-1081 (ILO Report, *Forced Labour in Myanmar (Burma)*). The ILO acknowledged in its Report that "[t]here was evidence before the Commission in the form of secondary statements that forced labour was used until May 1995 for ground clearance work to provide access to survey teams for the Yadana gas pipeline project." ER 1033.

[9] *See United States v. Smith*, *supra*, 18 U.S. at 160-61 (the law of nations is determined "by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law").

[10] Even the Government of Burma repeatedly denied using forced labor. *See* ILO Commission of Inquiry, *Forced Labour in Myanmar (Burma)*, ¶ 132 (1998)

ER 158 (emphasis added). Unocal has never introduced any scholarly opinion or other evidence to the contrary, and clings solely to its assertion that the failure of the U.S. government to ratify ILO Convention No. 29 is sufficient to answer the overwhelming evidence that all nations accept the customary norm prohibiting forced labor.[11] Unocal's argument also ignores the fact the United States *has* accepted Convention No. 29's definition of forced labor as binding on the United

---

(government told ILO in 1992 that its laws "prevented the use of forced labour," and that "porters had ceased to be employed by the military"), *available at* http://www.ilo.org/public/english/standards/relm/gb/docs/gb273/myanmar2.htm; *see generally id.* ¶¶ 110-32. Although forced labor may exist in several countries, *see* Defs.' Br. at 13 & n.13, the State Department reports Unocal cites make clear that virtually all of those nations prohibited forced labor in their domestic law. In any event, "'[t]he fact that the prohibition . . . is often honored in the breach does not diminish its binding effect as a norm of international law.'" *Alvarez*, 124 S. Ct. at 2769, note 29 (quoting *Filartiga*, 630 F.2d at 884 n.15). Indeed, numerous governments still reportedly use torture, but this does not detract from the universality or obligatory nature of the norm. *See* Dep't of State, *Country Reports on Human Rights Practices for 2003* (2004).

Similarly, Unocal's argument that the failure of a handful of governments to ratify the ILO conventions undermine the universality of the norm is inconsistent with *Filartiga* and its progeny. When *Filartiga* was decided the Convention Against Torture had not even been drafted. Even today not all governments have ratified the Convention, yet no government claims a right to torture. The same is true of forced labor.

[11] Defs.' Br. at 11. The United States need not ratify any treaty, let alone every treaty containing a norm, in order for the United States to recognize that norm as customary; the United States had ratified none of the multilateral treaties the *Filartiga* court relied on in finding a customary norm prohibiting torture. 630 F.2d at 883-84. Indeed, ratifying treaties creates conventional, not customary, law; it is the drafting of a "pattern of treaties in the same form" that is evidence of international custom. Ian Brownlie, *Principles of Public International Law* 5 (5th ed. 1998).

States by, *inter alia*, agreeing to comply with the ILO's "core labor standards," which include a prohibition on forced labor as defined by Convention No. 29. *See* ER 160-62. Further, United States law in prohibiting forced labor domestically and, as discussed below, in imposing a forced labor ban on its trading partners, is consistent with the Convention.[12] Indeed, the United States has ratified Convention No. 105, a subsequent and stronger ILO Convention, which requires ratifying members, including the U.S., "to take effective measures to secure the immediate and complete abolition of forced or compulsory labour." Convention concerning the abolition of forced labour (No. 105), June 25, 1957, art. 2, 320 U.N.T.S. 291.

---

[12] Unocal mistakenly relies on an excerpted translation of a case from the Netherlands to argue that Convention No. 29's standard is not obligatory. *See* Defs.' Br. at 8 & n.5. In the Dutch case, the court rejected the notion that the convention provided a defense to prosecution for failure to perform public service as an alternative to compulsory military service, essentially because the convention was not self-executing under Dutch law. *See* Defs.' Br. app. A at 337-38. The court did not express any view as to whether the "law of nations" includes a universal, specific, and obligatory norm against forced labor, or whether Convention No. 29's definition was useful to determine the boundaries of such a norm. Indeed, the European Court of Human Rights has used Convention No. 29 to interpret the prohibition on forced labor in the European Convention, which is binding on the Netherlands. *See Van der Mussele v. Belgium*, 70 Eur. Ct. H.R. (ser. A) ¶ 32 (1983), *available at* http://hudoc.echr.coe.int/hudoc; *see also* European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 4(2), 213 U.N.T.S. 211.

The United States has also accepted the prohibition on forced labor by ratifying the International Covenant on Civil and Political Rights (ICCPR).[13] Ratified by 152 states, including the United States,[14] the ICCPR provides a great deal of specificity for the content of this norm and it clearly covers Appellants' claims. ICCPR art. 8(3)(a). The *Alvarez* Court pointed out that when the United States ratified the ICCPR, it expressly did so with the reservation that it was not self-executing. *See* 124 S. Ct. at 2767. While this may preclude the use of specific provisions of the ICCPR as the sole basis for a common law right to sue, it is still useful to show that there is universal consensus on the norm, which is binding and enforceable based on other sources of law.[15]

---

[13] *Opened for signature*, Dec. 16, 1966, S. Exec. Doc. E, 95-2 (1978), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976; ratified Sept. 8, 1992).

[14] *See* Office of the U.N. High Comm'r for Human Rights, *Status of Ratifications of the Principal Int'l Human Rights Treaties* (June 9, 2004), *available at* http://www.unhchr.ch/pdf/report.pdf.

[15] *Alvarez* did not hold that the United States' "non-self-executing" declaration prevented any norm in such a treaty from being actionable under the "law of nations" clause of the ATS. Indeed, after mentioning this declaration, the Court went on to examine whether the customary norm prohibiting arbitrary detention applied to Dr. Alvarez's circumstances. 124 S. Ct. at 2767-69. Unocal's position that a non-self-executing declaration ends the analysis would, for example, preclude claims for torture, *see* ICCPR Art. 7, and indeed would be identical in result to Justice Scalia's position, clearly rejected by the Court, that the ATS is a dead letter. There are many reasons why a government may be reluctant to ratify a treaty or make it self-executing, while still adhering to the customary norms embodied in that treaty. For example, without this declaration every provision of a human rights treaty like the ICCPR would become enforceable in all

Furthermore, United States trade law and foreign policy has long incorporated the prohibition on forced labor, underscoring our government's acceptance of it as binding customary law. In a series of international trade laws, the United States has conditioned receipt of trade benefits by developing countries upon compliance with "internationally recognized worker rights." For example, the Generalized System of Preferences (GSP) program requires compliance with "internationally recognized worker rights," 19 U.S.C. § 2462(a)(2)(G), including "***a prohibition on the use of any form of forced or compulsory labor.***"[16] *Id.* § 2467(4)(C) (emphasis added). These GSP determinations utilize the definition of ILO Convention No. 29.[17] Numerous other U.S. trade laws reference this same

---

federal and state courts under Article VI of the Constitution without the need for the ATS or the need to demonstrate that the norm was accepted as part of customary law. There is no evidence that these declarations were intended to limit the scope of the ATS, and the Supreme Court has repeatedly admonished that "'repeals [of statutes] by implication are not favored.'" *Branch v. Smith*, 538 U.S. 254, 273 (2003).

[16] In 1989, the United States revoked Burma's GSP due to its violations of internationally recognized workers' rights. *See* 54 Fed. Reg. 16190-91 (Apr. 21, 1989).

[17] The State Department also uses the ILO Conventions to serve as its standard: "An international consensus exists, based on several key International Labor Organization (ILO) Conventions, that certain worker rights constitute core labor standards. These include . . . 'freedom from forced and child labor.'" Dep't of State, *Country Reports on Human Rights Practices for 1997*, at xxiv (1998).

definition of "internationally recognized worker rights" from the GSP provision.[18] The prohibition on "forced labor" is also included in numerous bilateral and multilateral treaties.[19] These examples are only a sampling of the overwhelming evidence that the United States, along with the rest of the world, accepts that the prohibition on forced labor is "specific, universal and obligatory."

IV. APPELLEES CONCEDE THAT APPELLANTS' CLAIMS OTHER THAN FORCED LABOR ARE ACTIONABLE.

Appellees' brief addresses only Appellants' forced labor claims. Appellees understandably do not dispute that Appellants' crimes against humanity,[20] torture and extrajudicial execution claims are actionable after *Alvarez*.

---

[18] *See, e.g.*, 19 U.S.C. § 2702(b)(7) (providing that a nation may not be a "beneficiary country" for the Caribbean Basin Initiative "if such country has not or is not taking steps to afford internationally recognized worker rights"); *id.* § 3202(c)(7) (same with respet to Andean Region); *id.* § 3703(a)(1)(F) (same with respect to sub-Saharan Africa). Forced labor is also an "unreasonable" trade practice, such that a U.S. trading partner is subject to sanctions if it "permits any form of forced or compulsory labor." *Id.* § 2411(d)(3)(B)(iii)(III). *See generally* Lance Compa & Jeffrey S. Vogt, *Labor Rights in the Generalized System of Preferences: A 20-Year Review*, 22 Comp. Lab. L. & Pol'y J. 199, 205-06 (2001).

[19] *See, e.g.*, ER 159-60. The labor side agreement to the North American Free Trade Agreement also includes the "prohibition of forced labor." *See* North American Agreement on Labor Cooperation, Sept. 14, 1993, annex 1, 32 I.L.M. 1499 (1993), *available* at http://www.naalc.org/english/agreement9.shtml.

[20] Appellants' crimes against humanity claims were not addressed by the district court's summary judgment decision because of reasoning rejected by the panel. Plaintiffs challenged the court's failure to do so on appeal. *See* Doe Appellants' Opening Br. ("AOB") at 23 n.25.

Crimes against humanity[21] is one of the most well-established violations of international law.[22] Courts have universally concluded that crimes against humanity is actionable under the applicable "specific, universal and obligatory" standard.[23]

Plaintiffs have demonstrated that the Burmese military engaged in a widespread and systematic pattern of forced labor, torture, murder, rape,[24] and

---

[21] Nuremburg established that crimes against humanity encompasses "murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population." Control Council Law No. 10, art. II(1)(c), Dec. 20, 1945, 3 Official Gazette of the Control Council for Germany 50 (1946), *available at* http://www1.umn.edu/humanrts/instree/ccno10.htm.

[22] *See, e.g.*, Statute of the International Criminal Tribunal for Rwanda (ICTR), Art. 3, U.N. Doc. S/RES/955/Ann.1 (1994), art. 3, *reprinted in* 33 I.L.M 1598, 1603, *available at* http://www.ictr.org/ENGLISH/basicdocs/statute.html; Statute of the International Criminal Tribunal For the Former Yugoslavia (ICTY), U.N. Doc. S/RES/827 (1993), art. 5, *reprinted in* 32 I.L.M. 1192, 1194 (1993), *available at* http://www.un.org/icty/legaldoc/statuteindex.htm; Rome Statute of the International Criminal Court, *opened for signature* July 17, 1998, art. 7, 37 I.L.M. 999, 1003 (entered into force July 1, 2002). For a discussion of the Nuremberg standards, see Doe AOB at 26-30; Appellants' Pet. for Reh'g at 2-7; and Roe AOB, at 19-22.

[23] *See, e.g., Alvarez*, 124 S. Ct. at 2783 (Breyer, J., concurring); *Kadic v. Karadzic*, 70 F.3d 232, 236 (2d Cir. 1995); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1352-54 (N.D. Ga. 2002).

[24] Jane Doe II and Jane Doe III have claims that they were raped by soldiers guarding the pipeline. *See* Doe AOB at 16; ER 1592, 5237-50. These claims clearly satisfy the *Alvarez* standard. As the panel here concluded, rape is a form of torture, Slip op. at 14208, *see also Kadic*,70 F.3d at 244, and therefore actionable

forced relocation for the benefit of the pipeline. Unocal aided and abetted this policy, *see, e.g.,* ER 4933-36, 4939, 4943-44, 4954-55, 5544-45, 5797-5800; and may be found liable for crimes against humanity.[25]

V. *ALVAREZ* DOES NOT AFFECT THE STATE ACTION ISSUE BEFORE THIS COURT.

As Judge Reinhardt suggested, "state action" is not an issue here because Burmese soldiers committed the abuses; therefore, any state action requirement is met. Slip op. at 14244-47. Unocal's liability stems from its legal responsibility for acts of the Burmese military.[26] Unocal's state action arguments would fail anyway because forced labor and crimes against humanity do not require state

---

when committed by a state actor or as part of a pattern of crimes against humanity. *See also* Control Council Law No. 10, *supra* note 22, art. II(1)(c). Rape is also actionable when committed in furtherance of a pattern of forced labor. *See* Slip op. at 14224.

[25] Appellants also have murder and additional torture claims. The panel correctly concluded that Unocal can be held liable for the murder of Baby Doe I, Slip op. at 14225-28, but concluded erroneously that only Jane Doe II and Jane Doe III had been subjected to "extreme physical abuse that might give rise to a claim of torture." *Id.* at 14225-26; *see* Appellants' Pet. for Reh'g at 14-15. Record evidence establishes that the beating of Jane Doe I and Baby Doe I that led to the latter's death constituted torture. *See* ER 747, 5193-5208.

[26] Unocal's liability for its own actions in aiding and abetting the Burmese military are discussed in Part VI, *infra.*

action, and because Unocal is a state actor under international law aiding and abetting standards.

Alvarez noted that courts should look to international law to determine whether a given norm requires state action. 124 S. Ct. at 2766 n.20.[27] The Court cited with approval this practice in cases before *Alvarez*.[28] *Alvarez* said absolutely nothing about which customary norms other than genocide are actionable regardless of state action.[29] Unocal offers no basis for reconsideration of the panel's conclusion that "[o]ur case law strongly supports the conclusion that

---

[27] Likewise, international standards apply to any state action determinations. *See Doe* Reply Br. at 5-6. As noted *infra*, international law recognizes aiding and abetting liability, and plaintiffs have presented abundant evidence Unocal abetted the military. No further state action inquiry is necessary, because abetting a state actor provides a sufficient nexus with the state to make a private party a state actor. Thus, for example, the Torture Victim Protection Act, 28 U.S.C. § 1350 note, requires state action, but extends liability to those who "abetted" torture. S. Rep. No. 102-249, at 8 (1991). Similarly, as Unocal concedes, agents of a state are state actors under international law. Defs./Appellees' Consol. Answering Br. at 39. As joint venturers, Unocal and Burma were mutual agents.

[28] *See id.*, citing *Tel-Oren*, 726 F.2d at 791-95 (Edwards, J. concurring) (torture requires state action), and *Kadic*, 70 F.3d at 239-41 (genocide does not require state action).

[29] It should be noted that none of the 18th century paradigms referred to by the Court—piracy, attacks on ambassadors, and violations of safe conducts, *see* 124 S. Ct. at 2761—required state action. In the 18th century individual liability under the "law of nations" without state action was the norm, not the exception. *See, e.g., Breach of Neutrality*, 1 Op. Att'y Gen. 57, 59 (1795).