Doe v. Unocal: Forced Labor and Corporate Liability
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Synopsis

Widespread allegations of forced labor made Burma’s military regime an international pariah in the 1990s. Human rights advocates campaigned for sanctions at the United Nations, the International Labor Organization, the European Union, the U.S. Congress, and in state and local governments. Two major oil companies from France and the U.S. nevertheless joined Burma’s government in a pipeline consortium project that they maintained would benefit the impoverished and contribute to democratic reform. Burmese villagers brought a class action lawsuit in U.S. District Court charging the consortium with profiting from forced labor. “Doe v. Unocal: Forced Labor and Corporate Liability” presents a legal issue: whether Unocal is liable for the human rights violations of its government joint venture partner. Two other THRO exercises address related issues. “Sanctions or Engagement? SLORC in Myanmar:” shares a common introduction with this exercise, but then addresses a public policy question: Should the international and U.S. efforts to isolate the military regime be continued? “Unocal and Myanmar: An Ethical Joint Venture?” presents the problem as a business ethics case using evidence uncovered in the Doe v. Unocal litigation.

Case Outline

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**Doe v. Unocal: Forced Labor and Corporate Liability**

I. An Appeal from Summary Judgment

In February 2001, Ka Hsaw Wa, a Karen refugee from Burma, appealed for justice to the U.S. 9th Circuit Court of Appeal after a district court dismissed claims by victims of the brutal State Law and Order Council (SLORC) and its corporate partner.

When he was eighteen years old, Ka Hsaw Wa was tortured by SLORC officers. He watched a close friend die as the two fled Rangoon in the wake of student protests in 1988. He found mutilated bodies on the side of the road and heard many mothers describe the deaths of their children. Because of these experiences, Ka Hsaw Wa began to memorize the narratives people told him—those who were mourning loved ones and abandoning the smoking remains of their homes.[2]

Fearing government reprisal, the activist adopted the name Ka Hsaw Wa which means “white elephant,” sacred to the people of Burma.[3] Two University of Virginia law school graduates joined him in creating EarthRights International (ERI) with financial support from Soros and other foundations.

Wa spent years collecting evidence from villagers who became plaintiffs in Doe v. Unocal, a lawsuit against the corporation, its two top officers and their government partners. ERI and the Southeast Asian Information Network (SAIN) published his findings in “Total Denial,” an 80 page indictment of the defendants’ Yadana oil pipeline project. The joint venture built a 416 mile, 36 inch diameter natural gas pipeline from the Yadana field 215 miles underwater, then on land across 39 miles of Burma’s Tenasserim region and finally 161 miles to a new power plant in Thailand.

In August 1995, SAIN spoke with an escaped laborer who had been forced to work on infrastructure projects for the oil companies and build military barracks. . . . In February 1996, ERI interviewed a porter who was seized . . . and brought to work on the pipeline route clearing trees and leveling the earth. He is one of over seventy people who were taken from their villages and forced to clear the way for the pipeline. ERI also took the testimony of both a fifteen-year-old girl who was conscripted to clear vegetation and level the ground for the pipeline and a porter who was forced to carry supplies for soldiers along the route.[4]

Total S.A. of France initiated the consortium with the state owned Myanma Oil and Gas Enterprise (MOGE). Unocal CEO Roger Beach and President John Imle acquired a 28% share in the project, despite a consultant’s report detailing the human rights situation.[5] Thailand’s National oil company PTT joined with a 25% share. MOGE retained rights to about 15% of the gas for a fertilizer and energy plant, and the government would receive dividends and taxes of up to $400 million per year. Total with a 31% share had the primary responsibility for dealing with local contractors and workers during the $1.2 billion pipeline construction.

See accompanying maps of Asia, Burma and the pipeline route; glossary and timeline

**Summary Judgment in the District Court**

Fifteen villagers interviewed by Ka Hsaw Wa became numbered John and Jane Doe plaintiffs in the main class action lawsuit brought on behalf of all affected residents in the pipeline region. The National Coalition Government of Burma (NCGUB) and the Federation of Trade Unions of Burma (FTUB) filed a second lawsuit. The Doe complaint alleged forced labor and eighteen additional violations of international, U.S. and state law. Plaintiffs sought damages for the victims and asked the court to stop further pipeline construction and payments to SLORC. The original defendants included SLORC, MOGE, Total, Unocal, Roger Beach, and John Imle.
By random assignment the case went to U.S. District Court Judge Richard Paez, a Mexican-American Clinton appointee. When President Clinton nominated Judge Paez to the 9th Circuit Court of Appeals, Republican Senators viewed him as too liberal and blocked a vote. In the four years he awaited confirmation, Judge Paez made a significant initial decision for the plaintiffs and then four rulings that favored the defendants. After he was confirmed for the appeals court in March 2000, Doe v Unocal was reassigned to a Republican appointed by President Reagan, Judge Ronald Lew, the son of Chinese immigrants. Judge Lew reviewed numerous documents obtained during years of discovery, held oral argument, and granted summary judgment for Unocal, Beach and Imle in August 2000 without a jury trial.

The plaintiffs celebrated Judge Paez 1997 ruling that denied Unocal's first motion for summary dismissal of their claims and allowed discovery of company documents. The court found the allegations if proven would implicate Unocal in slavery. Defendants welcomed Judge Paez other decisions granting sovereign immunity to SLORC and MOGE,

Legal Issues: In addition to contesting the trial court’s ruling on sovereign immunity, ERI’s appeal to the 9th Circuit raised major questions about the U.S. corporate defendant:

1. Was Unocal vicariously liable for the forced labor conscripted by the military regime?
2. Was Unocal a private actor, or did the corporation engage in sufficient joint action with the government so that rules on state misconduct apply?

II. From Burma to Myanmar

Located on the Andaman Sea between Bangladesh and Thailand, Burma shares inland borders with India, China, and Laos. See Map Prior to British colonial rule in 1865, Burma was governed by an 11th Century Buddhist Monarchy, then as part of the Mongol Empire, and after the 14th Century as a satellite of China. Indigenous kings and British imperialists had both required unpaid community service. Buddhist rulers conscripted workers for economic, military and religious projects.

Current tourist guidebooks note that ancient Burmese kings also frequently relocated villages. The British colonial Villages Act of 1908 and Towns Act of 1907 formally obligated headmen to provide porters and individuals to perform uncompensated public duties.

Following Burma's independence in 1948, Constitutional government lasted until a 1962 coup by General Ne Win. On a “Burmese Road to Socialism” the military nationalized all property, including foreign businesses. The regime deliberately isolated the country by expelling all international correspondents and limiting tourist visas to twenty-four hours. Mountainous border areas populated by ethnic minorities and communist insurgents contributed to the closed society: Burma’s “shape is roughly that of a diamond, with a long tail running south along the Malay Peninsula. . . . Much of the greater part of the territory . . . forms a compact unit surrounded on three sides by a great horseshoe of mountains.” The Burman ethnic group constitutes 68% of the current population of 47 million in a country the size of Texas. Karen and Mon minority groups began fighting in 1948 for self rule in the narrow, mountainous coastal tail adjoining Thailand. Most of the Burmese people lived in poverty; in the early 1990s, per capita income was between $200 and $300 a year.

A 1974 Constitution granted Ne Win plenary executive, legislative and judicial power in a one party system. The regime detained opposition politicians without trial and shut down the universities for years at a time after student protests. For three straight years the gross national product declined by over 6%, and the U.N. reclassified Burma as one of the "least developed countries." Thousands of villagers worked on roads and dams, but economic conditions only worsened. The literacy rate declined, and infant mortality increased. In the “golden triangle” region massive heroin production generated foreign exchange. Inadequate energy resources produced regular blackouts. Violent rioting sparked by economic hardships in 1988 triggered Ne Win’s resignation and military repression that reportedly took 3,000 lives. The State Law and Order Restoration Council imposed a new military regime. SLORC adopted the name “Myanmar,” but local opposition groups and the U.S. continued to call the state Burma.

In 1990 SLORC held a multiparty election for a Peoples Assembly to draft a new constitution. During the campaign they placed the main opposition leader Aung San Suu Kyi under house arrest for association with "anti-government" elements. In 1990 her National League for Democracy (NLD) still won 60% of the votes and 82% of the Assembly seats. The military refused to concede power and constituted SLORC as a provisional government
until approval of a new constitution. The generals arrested the NLD Chair and Vice Chairman along with 65 party candidates who had won seats. Aung San Suu Kyi won the 1991 Nobel Peace prize. Other members elected to the Assembly formed the National Coalition Government of the Union of Burma (NCGUB) in league with armed minority groups on the Thai border and sought international support as the legitimate government. In an extraordinary role reversal, SLORC opened Burma to foreign investment, and opposition groups campaigned for economic isolation.

Burma's National Oil Co found off shore gas in the Yadana region of the Andaman Sea in 1982 and chose Total over Unocal in the first competitive bidding. In order to secure and develop the minority dominated region between Thailand and the sea, between 1988 and 1992 SLORC increased the military by fifty percent, acquired weapons from China, and fought Karen rebels in border districts. Light Infantry Battalions conscripted labor for constructing roads and the Ye-Tavoy railway.

The number of people who “contribute” their labor in Burma is so large that the value of their work in rural development projects has been reported in GOB [Government of Burma] budget figures. The government-controlled press regularly reported on projects that were built with “people’s contributions of labor” until mid-1996. From these reports, more than eighty major infrastructure projects have been identified which were reported to have been built with contributions of “voluntary labor.”

**III. Preliminary Rulings in U.S. District Court**

Veteran public interest lawyers from Los Angles, Washington, Philadelphia and New York joined to represent the plaintiffs—attorneys from EarthRights International, the Center for Constitutional Rights (CCR), the National Labor Rights Fund, and the National Center for Immigration Rights, Paul Hoffman of Los Angeles served as lead counsel. A former President of Amnesty International USA, Hoffman served as ACLU counsel of Southern California before launching a private practice with considerable pro bono human rights work. Since a noted CCR victory in 1980, human rights organizations had successfully used the The Alien Tort Claims Act (ATCA) to bring international law claims against foreign government officials on behalf of victims from the Philippines, Argentina, Chile, Guatemala, Bosnia and Ethiopia. The Unocal case offered a vehicle to extend the jurisdiction of U.S. courts to private multinational corporations involved with foreign dictators.

**A. Sovereign Immunity and Crimes Against Humanity**

At the outset, Judge Paez invited the State Department to advise him on whether a trial of the Doe claims would interfere with U.S. relations with Burma. The judiciary has frequently deferred to the executive when foreign policy issues arise, so that the nation speaks to the world with one voice. Once Congress and the Executive had imposed economic sanctions on Burma, the State Department had no difficulty in submitting a declaration of interest indicating that the Doe litigation would not affect U.S. interests. Out of respect for executive power, Judge Paez still dismissed the National Coalition Government of the Union of Burma as a plaintiff. Although a target of sanctions, SLORC was the only government of Burma officially recognized by the U.S. President. The court would not recognize NCGUB as a de facto government in exile. Judge Paez also applied the Act of State doctrine to dismiss a claim that Burma’s government had illegally nationalized property and a plaintiff who had served in Burma’s military.

Congress has severely limited the federal courts’ jurisdiction to hear claims against other governments with The Foreign Sovereign Immunity Act (FSIA). There is a commercial exception so that foreign government corporations which engage in business ventures are not immune from suit.

Human rights advocates insist that no one should be above the law—whether king or commoner. CCR and other counsel in Doe had won cases in U.S. courts against ex-President Ferdinand Marcos after he fled the Philippines to Hawaii. A Spanish prosecutor convinced the U.K. House of Lords that former Chilean President General Pinochet was subject to universal jurisdiction for crimes of torture. While individual officials may increasingly be held personally liable, governments proper still enjoy broad immunity.

The Doe plaintiffs attempted to persuade Judge Paez that SLORC and MOGE fell within the commercial exception to the Foreign Sovereign Immunity Act (FSIA). Alternately they argued that Congress never intended to immunize governments responsible for crimes against humanity and gross violations of human rights. The government defendants were undeniably doing business, but Judge Paez felt bound by a U.S. Supreme Court decision that granted immunity to Saudi Arabia. An American employee of King Faisal Hospital alleged that he was
imprisoned and tortured after reporting conditions that he believed endangered patients. Although the Supreme Court recognized the Saudi hospital as a commercial venture, the majority reasoned that criminal interrogation and custodial detention were traditional state police functions outside the FSIA commercial exception. By analogy, Judge Paez found that pipeline security provided by SLORC was not a commercial activity. The commercial exception to the FSIA also requires the activity to have an effect in the U.S., and defendants successfully argued that the pipeline in Asia did not affect this country. Judge Paez granted complete immunity to the state defendants, SLORC and MOGE and dismissed them from the case.

B. Minimum Contacts, Forum non Conveniens, and Multinationals

As more than 37,000 multinational corporations expanded into countries with undeveloped legal systems, worker’s rights advocates have urged U.S. courts to grant foreign employees of multinational companies protection under U.S. law. After poison gas from a Union Carbide factory devastated Bhopal India, a U.S. judge applied the doctrine of forum non conveniens in declining to hear the case. In order to gain access to essential witnesses and evidence, plaintiffs should present their claims in the country where alleged negligence occurred.

Despite defendants objection to the inconvenience, state courts in Texas and New York decided to proceed with trials alleging U.S. corporate mistreatment of workers in Costa Rica and Korea. Costa Rican banana workers charged that Standard Fruit and Dow Chemical caused the irreversible sterilization they suffered from handling a toxic pesticide. The Texas court recognized the inconvenience of proceeding at great distance from the alleged misconduct, but a majority saw no injustice in proceeding to trial in the corporate defendant’s home court. The Costa Rican workers accepted a pre-trial cash settlement, and the Texas legislature subsequently moved to restrict state court jurisdiction over future claims by foreign plaintiffs. Korean women who successfully negotiated their first collective bargaining agreement charged that a New York firm shut down a factory to destroy their union. After rejecting a settlement offer, the Korean women lost at trial.

Judge Paez denied certification of the claims as a class action on behalf of all villagers in the pipeline area, thus limiting the suit to the fourteen Doe plaintiffs. He also dismissed the French corporation Total as a defendant, on the basis of forum non conveniens and minimum contacts. He found by that California’s long arm statute did not reach the parent corporation in Paris. Local subsidiaries could not be regarded as Total’s alter ego, and the firm had insignificant contacts with California. Only when a company derived economic benefits from minimal contacts in a state could a court fairly exercise jurisdiction.

The following sections are limited to the legal issues on appeal involving Unocal—whether the corporation was responsible for violating international law against forced labor and whether the corporation was sufficiently linked to Burma’s government to apply other human rights norms that only bind state actors.

IV. Evidence of Forced Labor

Well-established international law on piracy and slave trading applies to private actors as well as to government agents. When the defendants first moved to dismiss all charges without a trial, Judge Paez was legally required to assume that plaintiffs would be able to prove their entire case. He refused to dismiss the case against Unocal after concluding: “The allegations of forced labor in this case are sufficient to constitute an allegation of participation in slave trading.” Any compensation defendants may have paid to individual workers failed to cure a form of slave trading—payments to the military for delivering involuntary recruits.

A law review critique of Judge Paez ruling argued that individuals forced into service for a limited period were not "slaves" under international law.

According to the court, then, Unocal and SLORC effectively are involved in forced labor trading. However, this does not constitute an “acquisition or disposal of a person with intent to reduce him to slavery,” because SLORC has not manifested its intent to exercise ownership over the forced laborers as the definition of slavery in the Slavery Convention requires. Based on the plain language of the Slavery Convention, SLORC’s alleged practice of forced labor does not constitute slave trading, and does not, therefore, give rise to jurisdiction under the ATCA.

Judge Paez allowed discovery so plaintiffs could depose company witnesses and obtain documents. In a two year period, Unocal produced over 70,000 pages of documents, and the parties took 58 depositions from the plaintiffs, defendants and third party witnesses that would be called at trial. The evidence painted a grim picture.
In 1992, the Burmese military began to build up its presence in the pipeline area, increasing the number of light infantry battalions (of 400-800 troops each) from 5 to 14, according to one observer’s estimate. A villager told EarthRights International:

Before 1991, we saw Burmese soldiers very seldomly, only Karen soldiers. But after 1991, light infantry battalions 408, 409, and 410 led by Major Han Htin started to base their outpost in our area...In 1992, we saw [government] soldiers almost every day. [26]

Over the next four years, these Burmese infantry battalions asserted military control in the region. They also organized the construction of support facilities along the pipeline corridor. These facilities included a fortified base camp for Total’s use, with 60 buildings and two underground bunkers surrounded by three rings of barbed-wire fences; a nearby landing strip; a second, smaller base camp near the mid-point of the proposed route; and a dozen helicopter landing pads. The army also supervised the construction of service roads and the clearing of right of way for the pipeline.

To recruit labor for these construction projects and to serve the battalions themselves, the army forcibly conscripted local Karen villagers as described by a Tenasserim resident:

When the government needs porter[s], well, the soldier will inform the police, and the police will inform the head of the village. And the head of the village will tell the villagers to go for forced labor. And those who can give money and those who are rich, they can give money and stay at home, because they are afraid that they would be killed. And those who were very poor, as they cannot afford to pay money, they have to go by themselves. [27]

Often, families sent the young and elderly to fulfill their forced labor obligations, because the more able-bodied members of the family, particularly young men, were needed to maintain their farms. Conditions in the conscripted labor gangs were horrendous. Workers who could not keep up were summarily executed.

V. Evidence of Unocal’s Complicity

When it was initially involved in negotiating for gas rights, Unocal contracted with a consulting firm, the Control Risk Group, to assess the political situation. The CRG reported:

Throughout Burma the government habitually makes use of forced labour to construct roads. In [the] Karen and Mon states the army is forcing villagers to move to more secure sites (similar to the ‘strategic hamlets’ employed by the US Army in Vietnam) in the hope of cutting off their links with the guerillas. There are credible reports of military attacks on civilians in the regions. In such circumstances UNOCAL and its partners will have little freedom of maneuver. The local community is already terrorized: it will regard outsiders apparently backed by the army with extreme suspicion. [28]

Unocal’s vice president of international affairs noted:

In our discussions between Unocal and Total, we said that the option of having the military provide protection for the pipeline construction and operation of it would be they might proceed in the manner that would be out of our control and not be in the manner that we would like to see them proceed, I mean, going to the excess. So that was the hazard we were talking about. It was out of our control if that kind of full relinquishment of security was given to the government. [29]

In 1992 Unocal nevertheless decided to proceed with Total as “operator.” Each company would pay expenses according to its share and could vote on joint venture operations through an operating committee. The firm closely monitored its investment. A Singapore-based executive, Joel Robinson, was assigned to oversee Unocal’s interest in the Yadana joint venture. At least half a dozen times prior to January 1996, Robinson and his associates visited the pipeline area to evaluate the situation. He reported his findings in a series of reports and letters. [30] Robinson also communicated with Total officials and with the U.S. Embassy in Thailand. In March 1994, Robinson wrote Total officials about the threat to the pipeline posed by Karen rebels:

The Myanmar Army claims that, despite these people [Karen rebels], they have an area secured only along the proposed pipeline route and within +/-10 kilometers of the proposed pipeline route… The Burmese Army claims to have many battalions in the area, based in Kaleinaung, with up to 200 troops in the mountain jungle area near the border along the pipeline route.
A month later Robinson reported on precautions to prevent the use of conscripted workers:

Total and Unocal will insist upon western style construction practices including fair labor rates and the use of an internationally recognized contractor. I specifically asked if Total would ever agree to allow Myanmar to build a road or some other facilities as a partial contribution to the partnership knowing that they might use impressed labor. Mr. Madeo [from Total] assured us that would be unacceptable to Total.

As Robinson learned more about Myanmar Army activities, he expressed concern in 1995:

[I have received] more of the publications of the ‘Karen press’ which depicted in more detail than I have ever seen before the increased encroachment of SLORC activities into the villages of the pipeline area. Our assertion that the SLORC has not expanded and amplified its usual methods around the pipeline on our behalf may not withstand much scrutiny.

His report two months later, however, was more positive:

Unocal’s observer in Myanmar spent four days in early May [1995] visiting 11 villages along the pipeline route, meeting with over 160 villagers… It is clear that there is strong local support for the project. Local people welcome the jobs, the training, and the benefits to the local economy.

That same month, Robinson met with embassy officials in Thailand. A confidential U.S. embassy cable that plaintiffs characterized as a “smoking gun” summarized their conversation.[31]

On the general issue of the close working relationship between Total/Unocal and the Burmese military, Robinson had no apologies to make. He stated forthrightly that the companies have hired the Burmese to provide security for the project and pay for this through the Myanmar Oil and Gas Enterprise (MOGE). He said that three truckloads of soldiers accompany project officials as they conduct survey work and visit villages. He said Total’s security officials meet with military counterparts to inform them of the next day’s activities so that soldiers can ensure the area is secure and guard the work perimeter while the survey team goes about its business.[32]

Imle defended military security for the pipeline as the type of protection a local sheriff would routinely provide to any private business. “. . . if you threaten the pipeline there’s going to be more military. If forced labor goes hand in hand with the military, yes, there will be more forced labor. For every threat to the pipeline, there will be a reaction.”[33]

In late 1995, Unocal commissioned another consultant’s report, apparently in an effort to learn more about the army’s activities. In a document that was hardly reassuring, the consultant, a former military attaché to the U.S. Embassy in Burma, wrote:

My conclusion is that egregious human rights violations have occurred, and are occurring now, in southern Burma. The most common are forced relocations without compensation to families from land near/along the pipeline route; forced labor to work on infrastructure projects supporting the pipeline (the SLORC calls this government service in lieu of payment of taxes); and imprisonment and/or execution by the army of those opposing these actions. Unocal, by seeming to have accepted SLORC’s version of events, appears at best naïve and at worst a willing partner in the situation.

Ultimately Robinson appears to have abandoned the idea that the oil companies could prevent the military from conscripting labor. His comments to Total focused, rather, on keeping these practices clearly at arm’s length from the pipeline project:

[F]rom Unocal’s standpoint, probably the most sensitive issue is ‘what is forced labor’ and ‘how can you identify it.’ I am sure that you will be thinking about the demarcation between work done by the Project and work done ‘on behalf of’ the Project. Where the responsibility of the Project ends is very important.

As Total and Unocal continued to discuss and how to draw a line between the military’s actions and those of the operator, construction manager, Herve Chagnoux, wrote Robinson:
By stating that I could not guarantee that the army is not using forced labour, I certainly imply that they might (and they might), but I am saying that we do not have to monitor army’s behavior: We have our responsibilities; they have their responsibilities; and we refuse to be pushed into assuming more than what we can really guarantee. About forced labour used by the troops assigned to provide security on our pipeline project, let us admit between Unocal and Total that we might be in a grey zone.

By September 1996, Total had apparently decided that the best course of action would be to pay conscripted workers directly, in situations where they were arguably providing services to the pipeline project. Chagnoux wrote Robinson, “when we had knowledge of such occurrences [forced labor supporting pipeline operations], the workers have been compensated.” Total also began to provide food rations for both the army and “project helpers” “hired” by the army. Clearly, both oil companies felt uncomfortable in the “grey zone,” and Total made a point to pay wages and provide rations for local workers provided by the army to assure they were properly compensated.

V. Human Rights Norms Binding on States and their Agents

International laws binding on governments may also apply to private actors who have a sufficiently close working relationship.

The army was alleged to have forcibly relocated civilians whose villages lay in the path of the proposed pipeline. NGOs reported that the army had escalated forcible relocation after 1988. The U.S. Department of Labor estimated that from 100,000 to 1.5 million Burmese were compelled. Critics of the Yadana project charged that several villages that stood in the path of the proposed pipeline were forcibly relocated in the early 1990s. Unocal vigorously denied that any village relocations had occurred in the area after 1992, when the Agreement was signed. However, the company did pay local villagers about $1 million to reimburse them for 525 acres of land used by the project.

In 1995, the Thai government ran an advertisement in the Bangkok Post stating that “Myanmar has recently cleared the way by relocating 11 Karen villages that would otherwise obstruct the passage of the gas resource development project.” The company charged that this report was in error.

Although outmanned and outgunned by the army, the KNA and the Karen National Liberation Army, its military wing, carried out a series of attacks against the pipeline project. In March 1995, Karen rebels fired on a convoy of three trucks carrying Total employees and armed SLORC soldiers. Reportedly, several Burmese employees of Total were killed. In December 1995, rebels attempted an attack on Total’s fortified base camp, which failed. In February 1996, a second attack on the base camp occurred; this time, six employees were wounded. EarthRights International reported:

The retaliation from SLORC for these attacks was swift…[Several infantry battalions] marched into Shin Byn village… The troops seized Saw Kyi Lwin, the village headman. He was accused of collaborating with the KNLA, interrogated and tortured. He was later executed by the SLORC soldiers.

Rapes and assaults were used to intimidate and terrorize civilians. In one such incident, a 54-year old Karen woman had been travelling on foot with her granddaughter in December 1993, when they encountered a light infantry battalion patrolling the area immediately south of the pipeline route.

[The commander] said, ‘Old woman, tell me the truth. How old is your granddaughter? I responded, ‘Seventeen years old.’ Then he said, ‘go and tell your granddaughter to come here.’ I took my granddaughter to him. As soon as he saw me, he yelled at me: ‘Why did you come with her? I’ll kill you with a hoe.’ …He also took out his knife and threatened me… I heard my granddaughter screaming ‘Grandma! Grandma!’ But I dared not go. I was so scared. After fifteen minutes they freed my granddaughter. My granddaughter said he told her to sleep with him. She refused. Finally, he raped her…Before they released us, they told us not to tell anyone about what happened. And the commander said, ‘Old woman, if you tell anyone about that, I’ll kill you and your relatives.’

A villager reported having to pay what he called a “pipeline tax.”
About the pipeline construction, none of us know exactly about that, except that we have to pay money for building it. The soldiers came to our village and informed the village and asked for the donation. For our house, we have to pay 500 kyat. The villagers are getting poorer and poorer. Some are selling their own things like cattle to pay the forced labor fees, porter fees, and other forced donations, like donations for all the buildings and so many things. So many villagers are easily getting sick, like diarrhea and oh, I can’t think of it all. A lot of them are suffering. So many villagers are trying to leave and come to the border…

If I mention all of the atrocities of SLORC, I’ll not be finished in two days.

Thousands of villagers fled the area and sought sanctuary as refugees along the Thai border.

In 1996, the International Federation of Human Rights Leagues (FIDH), in a review of evidence collected by its member organizations, reported that the Yadana pipeline had given “occasion to large-scale, repeated and documented violations of human rights… [W]ithout the pipeline, all, or at least some, of these violations would not have occurred.”[57]

**VI. Summary Judgment for Unocal**

After hearing oral argument and reviewing the evidence, Judge Lew summarily dismissed all the claims against Unocal, Beach, and Imle without holding a jury trial. Although he found that Unocal knew of the human rights violations, he reasoned that the corporation was not legally responsible.

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 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. . . . Unocal and SLORC shared the goal of a profitable project. However, . . . this shared goal does not establish joint action. Plaintiffs present no evidence that Unocal "participated in or influenced" the military's unlawful conduct; nor do Plaintiffs present evidence that Unocal "conspired" with the military to commit the challenged conduct.[58]

Citing several precedents involving private defendants who acted “under color of law” Judge Lew found that the villagers had not proven Unocal instigated the government misconduct.

In this case, the government committed the challenged acts. In order for a private individual to be liable . . . when the state actor commits the challenged conduct, the plaintiff must establish that the private individual was the proximate cause of the violation. . . . In order to establish proximate cause, a plaintiff must prove that the private individuals exercised control over the government official's decision to commit the section 1983 violation.[59]

Judge Lew also distinguished Nuremberg precedents that held German industrialists vicariously liable for Nazi slave labor policies.

In this case, 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.

**VII. Conclusion**

The consortium finished the Yadana gas pipeline on schedule and Unocal began receiving payments from the Thai government for gas 1998: $10 million, 1999: $65 million, and 2000: $72 million. In 1999, at age 58, John Imle resigned as president and vice-chairman of Unocal and took a position as co-chair of a nonprofit organization based in Geneva called the Business Humanitarian Forum. The purpose of the organization was to facilitate communication and cooperation between the business and humanitarian communities. Reebock presented its annual Reebok Human Rights Award to Ka Hsaw Wa and he received the Goldman Environmental Prize on Earth Day 1999.
The litigation tested Unocal’s decade long economic, political, and legal strategy against a compelling appeal by Burma’s abused villagers. Paul Hoffman’s brief to the U.S. 9th Circuit Court of Appeals charged that Unocal had made a Faustian bargain, a “deal with the devil for its own financial gain. . . . A corporation in the U.S. cannot knowingly hire a criminal with a record of violent crime as a security officer, and then absolve itself from liability by claiming that it did not ‘intend’ for the inevitable victim to be injured.” Unocal’s answering brief denied that the corporation could be held vicariously liable for the military’s torts and urged the court to affirm the summary judgment for defendants.
Timeline

1982 Oil discovery in Andaman Sea; Total invests $15 million

1990 SLORC imposes harsh military rule, negates elections, increases presence in oil region

December 1992 Unocal purchases 49% of Total’s share in the Yadana project.

1993-1996 Test wells establish commercial viability, pipeline route cleared, base camp set up
Complaints of forced labor and relocation made to ILO, Unocal, U.S. State Department
Karen rebels attack base camp and construction workers

February 2, 1995 MOGE and PTT, on behalf of the Burmese and Thai governments sign thirty-year contract. Thailand agrees to pay Bt10 billion annually for the purchase of gas from the Yadana field.

October 1996 Construction begins, onshore pipeline laid in dry seasons, and offshore platforms installed to begin first deliveries on July 1, 1998.

October 1996 Two US lawsuits filed against Unocal, Beach, Imle, Total, SLORC and MOGE

January 1997 U.S. Congress adopts economic sanctions against Burma, bars future investment
Massachusetts and other states adopt local sanctions
Protesters introduce resolutions at Unocal shareholder meetings
US court dismisses all defendants except Unocal, Beach and Imle

March-December 1997 Unocal sells off U.S. assets, launches Project Energy Renaissance


August 2000 Judge Lew grants summary judgment in favor of Unocal

Glossary

Aung San Suu Kyi National League for Democracy Party leader, Nobel laureate
Andaman Sea  West of Burma’s Southern Tenasserim region, site of Yadana oil field
ASEAN  Association of Southeast Asian Nations
ATCA  Alien Tort Claims Act, allows lawsuits in U.S. court
Beach, Roger  Chairman, CEO Unocal
CCR  Center for Constitutional Rights, N.Y.
CRG  Control Risk Group
FSIA  Foreign Sovereign Immunity Act
FTUB  Federation of Trade Unions of Burma
Hoffman, Paul  Lead counsel for Doe plaintiffs, former AIUSA President, ACLU counsel
ILO  International Labor Organization, Geneva
Imle, John F.  Unocal President
EarthRights International  Nongovernmental Organization opposed to pipeline
Ka Hsaw Wa  Karen refugee, co-founder EarthRights International
Karen  ethnic minority group in pipeline region
KNU  Karen National Union
Lew, Ronald  U.S. District Court Judge, Southern California
MGTC  Moattama Gas Transportation Company
MOGE  Myanma Oil and Gas Exploration (state owned), 15% share
Myanmar  Burma Country name change made by SLORC in 1988
NCGUB  National Coalition Government of Burma
Ne Win  General who ruled Burma from 1962-
NGO  Nongovernmental Organization
NLD  National League for Democracy, party won the 1988 elections
Paez, Richard  U.S. District Court Judge, Southern California
PTTEP  Petroleum Authority of Thailand, 26% share
SLORC  State Law and Order Restoration Council, military government after 1990
SCPD  State Committee for Peace and Development (successor to SLORC)
Tenasserim  panhandle region of Southern Burma on the Andaman Sea
Total, S.A.  French corporation, world’s eighth largest energy company, 31% share
Unocal  U.S. oil multinational, offices in El Segundo California, 28% share
Yadana  Natural Gas pipeline project linking Andaman Sea field to Thailand
Yangon  Capital city, formerly Rangoon
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**International Labor Organization**


**United Nations**


**United States**


**U.S. Cases**

*John Doe I v. Unocal*, 27 F. Supp. 2d 1174; (C.D. Cal. 1998)

*Dow Chemical Co. et al. V. Castro Alfaro et al.*, 786 S.W. 2d 674 (Tex. 1990).

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

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Kadic v. Karadzic, 70 F.3d 232, 238 (2d Cir. 1995)

Labor Union of Pico Korea, Ltd. V. Pico Products, Inc., 968 F.2d 191(2d. Cir. 1992)


In re Union Carbide Corp. Gas Plant Disaster at Bhopal in December, 1984; 809 F.2d 195; (2d Cir. 1987.

Wiwa v. Royal Dutch Petroleum

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Appellants' Opening Brief, Doe v. Unocal No. 00-56603 in the U.S. Court of Appeals for the Ninth Circuit, February 26, 2001.

Brief of Amici Curiae in support of Plaintiffs-Appellants Urging Reversal , Doe v. Unocal No. 00-56603 and Roe v. Unocal, No. 00-56628 in the U.S. Court of Appeals for the Ninth Circuit (submitted by Center for International Environmental Law, Global Exchange, Rainforest Action Network, Sierra Club).

Defendants/Appellees' Consolidated Answering Brief, Doe v. Unocal No. 00-56603 and Roe v. Unocal, No. 00-56628 in the U.S. Court of Appeals for the Ninth Circuit, May 7, 2001.

Videotapes


Endnotes

1 Revised draft of September 4, 2001, following presentation at Case Teaching and Writing Workshop, Electronic Hallway, University of Washington, June 11-17, 2000 and based on three anonymous reviews by members of the North American Case Research Association. Copyright © by the authors.
16 CCR had two similar cases pending. Palestinian victims of tear gas sold to Israel sued the U.S. manufacturer Gurab v. Federal Laboratories, Inc. and TransTechnology Corp. 975 F. Supp. 774; (U.S. W.D.Pa. 1994) A Nigerian family sued Royal Dutch Shell Petroleum for supporting the military regime which summarily executed a political dissident. Wiwa v. Royal Dutch Petroleum. 2d Cir.
17 Letter from Michael Matheson, Acting Legal Adviser, Department of State, to Frank Hunger, Assistant Attorney General, Department of Justice, at 2 (July 8, 1997).
19 In re Union Carbide Corp. Gas Plant Disaster at Bhopal in December, 1984 809 F.2d 195; (2d Cir. 1987)
20 Dow Chemical Co. et al. V. Castro Alfaro et al., 786 S.W. 2d 674 (Tex. 1990).
23 Unocal insisted that the state actors were indispensable parties whose absence would unfairly prejudice judgment of a lone corporate defendant. That reasoning persuaded Judge Paez that the lawsuit could not proceed as a class defined as “all residents of the Tenasserim region of Burma (bounded on the north by latitudinal line of 15 degrees 15 minutes North; on the south by the latitudinal line of 13 degrees, 30 minutes North; on the west by the coastline and offshore islands; and on the east by the Thai/Burmese border) who have been, are, or will be subject to the following acts in furtherance of the Yadana gas pipeline project in which defendants are joint venturers: forced relocation, forced labor, torture, violence against women, arbitrary arrest and detention, cruel, inhuman or degrading treatment, crimes against humanity, the death of family members, battery, false imprisonment, assault, negligent hiring, or negligent supervision.” Even if the court ultimately enjoined Unocal from further involvement in the Yadana project, the consortium would still continue the enterprise. Thus if plaintiffs prevailed against Unocal, the injustice suffered by thousands of class members in Burma would continue unabated. Under its contract, Total would share pipeline income with SLORC no matter what the court decided about Unocal.
24 The International Convention to Suppress the Slave Trade and Slavery, which includes Burma and the United States among the 88 states, defines slave trading as “all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery.” n67 Slavery is defined as “the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.” n68 The Restatement identifies slavery and slave trading as a violation of customary international law and a violation of jus cogens. n69 The practice of slavery also violates the U.S. Constitution n70 and state constitutions. n71 Treaty law, the practice of nations, jus cogens, and U.S. law indicate that slavery and the slave trade are violations of the law of nations sufficient to warrant the exercise of subject matter jurisdiction under the ATCA. Leslie Wells, “A Wolf in Sheep’s Clothing: Why Unocal Should be Liable Under U.S. Law for Human Rights Abuses in Burma,” 32 Colum. J.L. & Soc. Probs. Fall, 1998 35 Slavery and forced labor have also been issues in recent efforts to obtain recovery for Jewish workers coerced by Nazis to


26 The quotations in this section are taken from Total Denial, unless otherwise noted.

27 Deposition of John Doe IX.


30 All quotations in this section and the following two sections are drawn from the deposition of Joel Robinson, and quoted by Judge Ronald S.W. Lew in his decision of August 30, 2000, unless otherwise noted.


32 Quoted in appeals brief provided by Paul Hoffman, p. 8. This cable was produced through a Freedom of Information Act request by plaintiffs’ attorneys.


34 A U.S. appeals court had allowed another CCR case against a Serbian private citizen to proceed because of his collaboration in Bosnia with Yugoslavia’s government. (Doe) Kadic v. Karadzic, 70 F.3d 232, 238 (2d Cir. 1995).


36 April 17, 1995, Bangkok Post.


39 a section 1983 violation. King, 782 F.2d at 829. Brower v. Inyo County, 817 F.2d 540, 547 (9th Cir. 1987). [**41] See King v. Massarweh, 782 F.2d 825, 829 (9th Cir. 1986); Arnold, 637 F.2d 1350 at 1356.

40 Appellants’ Opening Brief, Doe v. Unocal No. 00-56603 in the U.S. Court of Appeals for the Ninth Circuit, February 26, 2001.

41 Defendants/Appellees’ Consolidated Answering Brief, Doe v. Unocal No. 00-56603 and Roe v. Unocal, No. 00-56628 in the U.S. Court of Appeals for the Ninth Circuit, May 7, 2001.