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

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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

CORRECTED SUPPLEMENTAL BRIEF OF DEFENDANTS-APPELLEES

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INTRODUCTION

Sosa v. Alvarez-Machain, 124 S. Ct. 2739 (2004), has profound impact on this case. It effects a sea change in this Court's Alien Tort Statute ("ATS") jurisprudence, which for the last several years was listing ever towards allowing a flood of novel ATS claims based upon non-binding, inchoate, *ad hoc* sources of supposed international law. The ship righted, *Sosa*'s holdings and reasoning mandate that this Court affirm the district court's order granting summary judgment in favor of defendants-appellees Unocal Corporation, Union Oil Company of California, John Imle, and Roger Beach (collectively, "Unocal").

In *Sosa*'s wake, this case is not a close call. The record does not support the conclusion that forced labor was used on the Yadana pipeline project, in which two of Unocal's subsidiaries had a minority investment. However, even assuming such acts occurred, plaintiffs' claims for "forced labor" and "aiding and abetting forced labor" come nowhere close to satisfying the rigorous standards set forth in *Sosa* that must be met before any federal court may recognize a new cause of action under international law. Indeed, in *Sosa* itself—where plaintiff had a stronger argument than here that a specifically defined and universally agreed upon international norm had been violated—the Supreme Court *unanimously* reversed an *en banc* panel opinion of this Court that had recognized a new cause of action for arbitrary arrest and detention.

Sosa impacts this case in the following ways:

First, *Sosa* held that the ATS is purely "jurisdictional," and does not create a statutory cause of action. 124 S. Ct. at 2754. Courts may only create common law actions for violations of a "norm of international character accepted by the civilized world and defined with a specificity comparable to" the international law violations that existed at common law in 1789. *Id.* at 2761-62, 2769.

Second, under *Sosa*, forced labor claims are simply not actionable. Current regulations on the use of forced labor are of "less definite content and acceptance among civilized nations than the historical paradigms," such as piracy, that were familiar in 1789. *Id.* at 2765. Indeed, the Supreme Court of the Netherlands (a very progressive nation) reached this same conclusion recently in rejecting a claim that forced labor was universally proscribed under international law.

Third, even if forced labor were actionable under the ATS, the "state action" requirement would bar plaintiffs' claims. Forced labor is not among the very few international law violations, such as genocide or slave trading, that give rise to claims for *individual* liability. Temporary forced labor, no matter how deplorable, is not the same as owning, buying, and selling human beings, as the relevant international law sources on the two subjects make clear.

Fourth, the state action requirement may not be circumvented by an "aiding and abetting" theory of liability. Aiding and abetting norms are not specifically

defined or so universally accepted as to be binding international law. The best examples of differing views on this subject are the *trial court* opinion of a war crimes tribunal that the three-judge panel here relied upon, and an *appellate* opinion from the same tribunal imposing a different, higher standard of liability.

Fifth, Congress, through the Burma Sanctions Act, preempted the common law claims plaintiffs invite this Court to create. If there were any doubt about the impropriety of this Court's treading in this area, the Executive Branch, in its *amicus* brief filed in this case, makes clear that it is the province of the political branches, not the courts, to respond to the human rights situation in Myanmar.

I. THE ATS ONLY PROVIDES JURISDICTION OVER A NARROW SET OF SPECIFICALLY DEFINED INTERNATIONAL LAW VIOLATIONS.

Sosa flatly rejected the argument long advanced by plaintiffs, and previously accepted by this and other courts, that the ATS creates a statutory cause of action. A unanimous Supreme Court called this argument "simply frivolous." *Sosa*, 124 S. Ct. at 2755. The ATS is "only jurisdictional." *Id.* at 2754. Any cause of action brought under jurisdictional grant of the ATS must be created by an independent source, such as a statute or treaty, or must exist among the "narrow set of common law actions derived from the law of nations." *Id.* at 2759.

In 1789, the law of nations recognized only three common law actions "in which all the learned of every nation agree": piracy, violations of safe conducts,

and infringement of the rights of ambassadors. 4 W. Blackstone, *Commentaries on the Laws of England* 67-68 (1769). *Sosa* severely limits "any residual common law discretion" federal courts have to expand this "narrow set" of actionable offenses under the ATS. 124 S. Ct. at 2756, 2769. While "no development in the two centuries from the enactment of [the ATS]" has "categorically precluded" federal courts from recognizing additional claims under the law of nations, "there are good reasons for a restrained conception of the discretion a federal court should exercise in considering a new cause of action of this kind." *Id.* at 2761.

In discussing the restraint federal courts must exercise, *Sosa* gave a nod to this Court's observation that only "specific, universal, and obligatory" norms are actionable. *Id.* at 2765-66. But the Supreme Court unanimously rejected the permissive way in which this Court had *applied* that standard in *Sosa* and other cases. *See id.* Specifically, *Sosa* rejected this Court's attempt to derive a universal norm against "arbitrary arrest and detention" from non-binding, non-self-executing international agreements (which are of "little utility"); national constitutions reflecting a consensus at "a high level of generality"; irrelevant case law from the International Court of Justice; and federal ATS cases reflecting an excessively "assertive view of federal judicial discretion." *Id.* at 2767-68 & n.27.

To prevent future overreaching by federal courts, the Supreme Court established a firm rule for determining whether conduct is actionable under the

ATS: courts are prohibited from "recogniz[ing] private claims under federal common law for violations of any international norm with *less definite content* and *acceptance* among civilized nations than the historical paradigms familiar when [the ATS] was enacted." *Id.* at 2765 (emphasis added). As an example of the "specificity with which the law of nations" must be defined before courts may create a new cause of action, the *Sosa* Court pointed to its early definition of the law of piracy in *United States v. Smith*, 5 Wheat. 153, 163-83 & n.4 (1820).

In *Smith*, Justice Story engaged in a comprehensive survey of international law authorities and concluded: "There is scarcely a writer on the law of nations who does not allude to piracy as a crime of *settled and determinate* nature; and whatever may be the diversity of definitions, in other respects, *all* writers concur in holding that robbery, or forcible depredations upon sea, *animo furandi*, is piracy." *Id.* at 161 (emphasis added). To support its "settled and determinate" definition of piracy, the Court relied upon several pages of citations, dating back centuries, from "writers on the civil law, the law of nations, the maritime law, and the common law." *Id.* at 163-83 & n.4. All of these authorities *universally* treated piracy as a violation of the law of nations and defined it in the same way. The Court noted:

> [T]he general practice of *all* nations in punishing *all persons,* whether natives or foreigners, who have committed this offense against *any persons whatsoever*, with whom they are in amity, is a *conclusive proof* that the offense is supposed to depend, not upon the particular provisions of any municipal code, but upon the law of nations, both for its definition and its punishment. *Id.* at 162 (emphasis added).

The panel that reversed summary judgment here failed to engage in the searching analysis of international law that *Sosa* and *Smith* require. (Neither, for that matter, did the district court, though it ultimately came to the correct result.) Because it is beyond dispute that plaintiffs' claims rest upon norms of less definite content and acceptance than the 1789 paradigms, they must be dismissed.

II. THE PROHIBITION AGAINST FORCED LABOR IS NOT SPECIFICALLY DEFINED OR UNIVERSALLY ACCEPTED.

These lawsuits rest on plaintiffs' claims that some plaintiffs performed forced labor on the Yadana pipeline—claims Unocal vigorously disputes.[1] The central question posed by this case is whether this Court should recognize, for the first time, a cause of action for "forced labor" under international law.[2]

This Court can take the drastic step of creating a new cause of action only if it establishes that forced labor violates a "norm of international character accepted

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[1] The panel erroneously concluded that "both Jane Does II and III testified that *while conscripted to work on pipeline-related construction projects*, they were raped at knife-point by Myanmar soldiers who were members of a battalion that was supervising the work." *Doe v. Unocal*, 2002 WL 31063976 at *16 (9th Cir. Sept. 18, 2002) (emphasis added). To the contrary, Jane Does II and III never alleged, much less testified, that they were conscripted to perform forced labor or that their alleged rapes were in any way connected to the conscription of labor. As they explained in their complaint and swore to when deposed, they were allegedly raped while traveling back on a trip to buy two Christmas pigs. *See* Appellants' Consol. Excerpts of Rec., Vol. I, at 132-33 ¶¶91-96; Defs.'/Appellees' Supp. Excerpts of Rec., Vol. 5, at 7242-46; Vol. 12, at 8861-8936; Vol. 13 at 9072-9101.

[2] Unocal agrees with the district court and the panel that plaintiffs' claims for "rape," "murder," and "torture" are not independently actionable under the ATS. Unocal also agrees that plaintiffs presented no evidence that they themselves were tortured. *See Doe*, 2002 WL 31063976 at *15-17.

by the civilized world and defined with a specificity comparable to" the three international law violations that were actionable in 1789. *Sosa*, 124 S. Ct. at 2762. It is not sufficient that the conduct alleged might be illegal in the U.S., be condemned by many in the international community, or is contrary to a norm Westerners wish existed or could be imposed on the developing world. To satisfy *Sosa*, the norms prohibiting forced labor must be *specifically defined* under international law and *universally accepted* and *legally binding* on the international community. Even then, the Court may not let these cases proceed if it finds they are preempted by Congressional action, interfere with the conduct of foreign policy by the political branches, or if other sound policy reasons so counsel. *See id.* at 2764-66. The cursory analyses of forced labor under international law engaged in by the district court and the panel fall well short of *Sosa*'s requirements.

A. Forced Labor Is Not A "Specifically Defined" Violation of International Law.

There is no "settled and determinate" definition of forced labor on which "all writers concur," as *Smith* requires. 5 Wheat. at 161. The district court relied primarily on the definition found in the 1930 Forced Labor Convention of the International Labor Organization ("ILO").[3] Known as "Convention No. 29," it includes a vague and expansive definition of forced or compulsory labor: "all work or service which is extracted from any person under the menace of penalty and for

[3] Convention Concerning Forced or Compulsory Labor (ILO No. 29), ILO, June 28, 1930, 39 U.N.T.S. 55.

which said person has not offered himself voluntarily." *Id.* art. 2. This broad definition, however, is riddled with so many exceptions that one reasonably cannot tell, with any specificity, what labor is actually forbidden by the rule.[4]

At least one nation's Supreme Court has held that Convention No. 29 is *not* specific enough to create binding legal obligations. Affirming dismissal of a forced labor claim brought under Convention No. 29 and customary international law, the Supreme Court of the Netherlands has held that that the definition of "forced and compulsory labour" in Convention No. 29 does not "contain[] norms that are so precisely defined as to be eligible by virtue of their content for direct application and hence to be capable of being binding on all persons."[5]

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[4] *See, e.g., id.* art. 2. (allowing for compulsory military service; compulsory labor attendant to "normal civic obligations"; compulsory labor in cases of emergency, including war; and minor communal services). The Convention acknowledges that forced labor is a reality in many developing countries by, among other things: permitting local "chiefs" to "have recourse to forced or compulsory labor," *id.* art. 7; permitting forced labor "exacted as a tax," *id.* art. 10; and permitting forced or compulsory labor "for the transport of persons or goods, such as the labor of porters or boatmen," *id.* art. 18. The Convention provides that "the maximum period for which any person may be taken for forced or compulsory labour of all kinds in any one period of twelve months shall not exceed sixty days." *Id.* art. 12.

[5] *E.O. v. Openbaar Ministerie*, HR 18 Apr. 1995, NJ 1995, 619, *reproduced in* 28 NETH. Y.B. INT'L L. 336-38 (1997) (attached hereto as Appendix A). Plaintiff in the case argued that he was subjected to forced labor in violation of Convention No. 29. In the alternative, he argued that even if the Convention was nonbinding, after "sixty years" the "*principles* underlying the Convention" should be applied as binding law. *Id.* at 337. Assuming that the violation plaintiff alleged would constitute "forced or compulsory labor" according to the terms of the Convention, the Dutch Supreme Court nonetheless rejected plaintiffs' arguments. *Id.* at 338.

Significantly, the United States has refused to ratify Convention No. 29. Instead, in 1991 the United States ratified the ILO's narrower 1957 Forced Labour Convention, which does not define forced labor, or impose a *per se* ban on its use, but rather commits signatory nations to "undertake[] to suppress and not make use of any form of forced or compulsory labor" for certain specified purposes.[6]

Unlike the district court, the panel majority did not rely on Convention No. 29 to define forced labor. Indeed, the panel did not look to international law standards on this issue at all. Rather, it relied exclusively on domestic law dealing with slavery and involuntary servitude. *See Doe*, 2002 WL 31063976 at *9-10. The panel's analysis was in error for at least two reasons. First, *Sosa* is clear that any new common law cause of action within the jurisdiction of the ATS must derive from "the current state of international law"—not domestic U.S. law. *Sosa*, 124 U.S. at 2766.[7] Second, as discussed below in Part III.A, international law

[6] Abolition of Forced Labor Convention (ILO No. 105), ILO, *opened for signature* June 28, 1957, 320 U.N.T.S. 291 ("Convention No. 105"), art. 1.

[7] Two of the federal cases the panel relied on considered international law norms, but using flawed, cursory, pre-*Sosa* analysis. Moreover, *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 440 (D.N.J. 1999), involved allegations of wartime slave labor; plaintiff alleged she was "literally purchased" by defendant. Moreover, because the plaintiff in *Iwanowa* alleged that the defendant corporation was a state actor, the court did not need to resolve whether a private entity could be liable even for slave labor under the law of nations. *See id.* at 445-46. *In re World War II Era Japanese Forced Labor Litig.*, 164 F. Supp. 2d 1160, 1179 (N.D. Cal. 2001), which also involved war crimes, uncritically adopted the *Iwanowa* analysis.

distinguishes slave trading and slavery (which are specifically defined and universally prohibited) from forced labor (which is not).[8]

Put simply, nothing in international law provides a "settled and determinate" definition of forced labor. *Smith*, 5 Wheat. at 161. For this reason alone, the jurisdictional scope of the ATS does not extend to plaintiffs' forced labor claims.

B. The Prohibition Against Forced Labor Is Not "Universally Accepted" And "Binding."

To be actionable under the ATS, an alleged tort *cannot* involve the violation of any norm with "less . . . acceptance among civilized nations than the historical paradigms" familiar when the ATS was enacted. *Sosa*, 124 S. Ct. at 2765. Blackstone noted that the international law violations that were actionable in 1789 were those "in which *all* the learned of *every* nation agree." Blackstone, *supra*, at

[8] In his concurring opinion, Judge Reinhardt stated that forced labor violates customary international law, though he never offered a specific definition of forced labor. *See Doe*, 2002 WL 31063976 at *25. The authorities Judge Reinhardt relied on as evidence of his customary international norm were either non-binding instruments that *Sosa* rejected as of "little utility," 124 S. Ct. at 2767, or irrelevant domestic case law. As the *Sosa* Court noted, the Universal Declaration of Human Rights, G.A. Res. 217(A)(III), does not impose obligations under international law. *See Sosa*, 124 S. Ct. at 2767. The International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 171, is not self-executing and does not "create obligations enforceable in federal courts." *Sosa*, 124 S. Ct. at 2767. The International Covenant for Economic, Social and Cultural Rights, Jan. 3, 1976, 993 U.N.T.S. 3, does not mention forced labor, and has not been ratified by either the United States or Myanmar. The Charter of the Nuremberg Tribunal referred only to wartime "slave labor" as a "war crime" and "enslavement" as a "crime[] against humanity." 6 F.R.D. 69, 77 (1946).

67 (emphasis added). Similarly, the Supreme Court noted in *Smith* that the definition of the crime of piracy was "universally" agreed upon. 5 Wheat. at 162.

The ILO Conventions certainly do not reflect a universal consensus on the prohibition of forced labor. As noted above, the United States has not ratified Convention No. 29. Nor have China, the Philippines, South Korea, or 13 other nations. Even fewer countries had ratified the Convention prior to the early 1990s, when the claims of the plaintiffs in these actions allegedly arose.[9]

The same holds true for Convention No. 105. Though the U.S. ratified the Convention in 1991, Myanmar has not. Nor have China, Japan, South Korea, or Vietnam. Singapore denounced the Convention in 1979, as did Malaysia in 1990. Other nations, including India, Indonesia, Chile, and Bulgaria only ratified the Convention after 1996—*i.e.*, after the last alleged tort in this case occurred.[10]

The lack of a universal norm prohibiting forced labor under international law is underscored by the complete absence of forced labor among the list of

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[9] *See* "Ratifications Of The Fundamental Human Rights Conventions By Country," http://www.ilo.org/ilolex/english/docs/declworld.htm (last visited July 28, 2004); *see id.* (*e.g.*, Turkey ratified in 1998; Gambia in 2000; Nepal in 2002).

[10] *See id.* The ILO conventions are not "self-executing" and do not in themselves "create obligations enforceable in the federal courts." *Sosa*, 124 S. Ct. at 2767. By their own terms, the agreements are "binding only upon those Members whose ratifications have been registered." Convention No. 29, art. 28; Convention No. 105, art. 4. Moreover, Convention No. 29, unratified by the United States, does not ban forced labor. It simply commits signatories to the *goal* of "undertak[ing] to suppress the use of forced or compulsory labor in all its forms within the shortest possible period," while permitting recourse to various forms of forced or compulsory labor during the "transition period." Convention No. 29, art. 1.

international law violations in the *Restatement (Third) of Foreign Relations Law of the United States* (1987). In *Sosa*, the Supreme Court looked to Section 702 of the *Restatement* for guidance to determine whether the arbitrary arrest at issue in that case was actionable under the ATS. Prolonged arbitrary detention is included among the violations listed in Section 702. Nonetheless, because Section 702 referred only to *prolonged* arbitrary detention as a violation of customary international law, the Court found that plaintiff's relatively short detention did not rise to the level of an actionable offense. *See* 124 S. Ct. at 2768-69.

This case is much clearer than *Sosa*. Section 702 contains absolutely no mention of forced labor—whether prolonged or temporary.[11] If a prohibition on forced labor had achieved the level of specificity and universal consent necessary to be an actionable offense under international law, the *Restatement*'s drafters were remarkably negligent in omitting it. And "the *Restatement*'s limits are only the beginning of the enquiry," because even if forced labor did violate a universal norm, "it may be harder to say which policies cross that line with the certainty afforded by Blackstone's three common law offenses." *Sosa*, 124 S. Ct. at 2769.

[11] "Slavery or slave trade" are listed among the commonly accepted international law violations by states, but, as discussed in Part III.A below, international law by no means equates "forced labor" with "slavery," much less the "slave trade."

The absence of *any* discussion of forced labor in the *Restatement* argues forcefully against the conclusion that the practice is universally prohibited.[12]

The widespread use of forced labor around the globe is regrettable in Western eyes, yet its prevalence is also a strong indication of the lack of any binding, universal norm prohibiting the practice. *See Smith*, 5 Wheat. at 160-61 (one source of customary international law is "the general usage and practice of nations"). The U.S. State Department found that, as of 1993—the year a Unocal subsidiary first obtained an interest in Yadana, and the year these claims first arose—forced and compulsory labor were being practiced in more than 40 nations, including Brazil, China, India, Peru, Pakistan, Nepal, Bulgaria, Cuba, and Haiti.[13]

As *Sosa* noted, that a rule of international law "as stated is . . . far from full realization . . . is evidence against its status as binding law; *and an even clearer point against the creation by judges of a private cause of action to enforce the aspiration behind the rule claimed*." 124 S. Ct. at 2769 n.29 (emphasis added).

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[12] *See also Khup v. Ashcroft*, -- F.3d --, No. 02-74059, 2004 WL 1588112 at *3 (9th Cir. July 16, 2004) ("reasonable minds could differ" whether forced labor practices in Myanmar constituted "persecution"). The threshold for establishing that an act constitutes "persecution" is lower than that for establishing an actionable violation of the law of nations. *See, e.g., Xuncax v. Gramajo*, 886 F. Supp. 162, 189 n.38 (D. Mass. 1995) (a "well founded fear of persecution" need not rise to the level of a "peremptory norm of international law").

[13] *See* 1993 Country Reports on Human Rights Practices, Bureau of Democracy, Human Rights, and Labor, U.S. Department of State (Jan. 31, 1994), *available at* http://dosfan.lib.uic.edu/ERC/democracy/1993_hrp_report/93hrp_report_toc.html, attached hereto as Appendix C. Unocal respectfully requests that the Court take judicial notice of the fact that the State Department reported such conditions.

Like in *Sosa*, plaintiffs' claims in these cases "express an aspiration that exceeds any binding customary rule having the specificity" required. *Id.* at 2769. Given the aspirational nature of the international agreements plaintiffs cite, it is hardly surprising that the *Restatement* does not list a prohibition against forced labor as a binding norm of customary international law. Nor is it surprising that the Supreme Court of the Netherlands held that the restrictions on forced labor in Convention No. 29 were *not* binding sources of customary international law.

Because current policies against forced labor "exceed[] any binding customary rule," *id.* at 2769, plaintiffs may not pursue their forced labor claims under the ATS, and summary judgment for Unocal should be affirmed.

III. EVEN IF BINDING INTERNATIONAL LAW PROHIBITED FORCED LABOR, UNOCAL CANNOT BE HELD LIABLE BECAUSE IT IS NOT A STATE ACTOR.

Even if this Court ignores *Sosa*'s admonitions and makes new international law that forced labor violates a binding, universal, and specifically defined norm, summary judgment for Unocal must still be affirmed. "[I]f the defendant is a private actor such as a corporation or individual," *Sosa* requires a court to determine "whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued." 124 S. Ct. at 2766 n.20.

Forced labor is not among the handful of violations that give rise to private

actor liability.[14] Because there is no consensus under international law that forced labor should give rise to *individual* liability, plaintiffs may not pursue a claim against Unocal, and summary judgment must be affirmed.

To avoid this outcome, plaintiffs argue that "forced labor" is a modern variant of "slave trading" and thus one of the few international law violations giving rise to individual liability. Alternatively, they argue that Unocal qualifies as a state actor. Both arguments flounder in *Sosa*'s wake.

A. International Law Does Not Equate Forced Labor With Slavery or Slave Trading.

Relying exclusively on federal cases and statutes, the panel concluded that "forced labor, like traditional variants of slave trading, is among the 'handful of crimes . . . to which the law of nations attributes *individual liability.*'" *Doe*, 2002 WL 31063976 at *9 (citation omitted). Nothing in customary international law justifies equating temporary forced labor with slave trading. To the contrary, international law consistently and carefully distinguishes between the two.

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[14] *See, e.g.*, *Kadic v. Karadzic*, 70 F.3d 232, 240 (2d Cir. 1995) (identifying only piracy, war crimes, and genocide as international law violations of such "universal concern" that they are capable of being committed by non-state actors); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 (Edwards, J., concurring) (D.C. Cir. 1984) (piracy and slave trading). *Kadic*, 70 F.3d at 240 & n.4, relied, in part, on the *Restatement* Section 404, which identifies the following crimes as offenses of universal concern: piracy, slave trading, attacks on or hijacking of aircraft, genocide, war crimes, and "perhaps certain acts of terrorism." *Restatement* Section 404 *does not* include forced labor as an offense of universal concern.

Two international conventions deal specifically with slavery. Both conventions make clear that "ownership" is an essential feature of slavery.[15] Plaintiffs in these cases do not allege that they were ever "owned," "purchased," or "sold." Rather, they allege they were forced by Burmese soldiers to work as porters or builders of roads for limited periods (hours, days, or weeks). Even accepting plaintiffs' claims as factually accurate, they were not subjected to slavery, much less slave trading.

Moreover, if forced labor were, in fact, the modern equivalent of slave trading, there would be no need for separate international conventions dealing with forced labor. Nor would the ILO's forced labor conventions, or indeed U.S. or California law—which allow for certain forms of forced labor—be consistent with

[15] The Slavery Convention of 1926, Sept. 25, 1926, art. 1(1), 46 Stat. 2183, 60 L.N.T.S. 253 ("1926 Convention"), defines slavery as "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised." The 1926 Convention separately defines slave trading as the "capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves." *Id.* art. 1(2). The 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Sept. 7, 1956, art. 1(2), 18 U.S.T. 3201 ("1956 Convention") adopts these definitions. The 1926 Convention notes there is a danger forced labor can "develop[] into conditions analogous to slavery," but provides for the use of forced labor in certain circumstances, specifically "for public purposes." 1926 Convention, art. 5(1). The 1956 Convention identifies a number of "practices similar to slavery": debt bondage, serfdom, marriage in consideration for payment, and transfer of children for labor. 1956 Convention, art 1. Forced labor is *not* on that list.

the outright ban on slave trading in the 1926 and 1956 Slavery Conventions.[16] Given this, even plaintiffs concede that, unlike slave trading, there exist "certain legitimate reasons for the conscription of labor (such as the valid military draft)." Response to Petition for Panel Rh'g and for Rh'g En Banc 13.

Under international law, forced labor is not equivalent to—and, indeed, is clearly distinct from—slave trading. Accordingly, international law would not hold a *private actor* such as Unocal liable for forced labor, even if there were a norm against forced labor sufficiently definite to support a cause of action a *state*.

B. Unocal Is Not A State Actor Under International law.

Plaintiffs' argument that Unocal can be held liable as a state actor also fails under *Sosa*. The parties have spilled considerable ink discussing the district

[16] In equating forced labor with slave trading, the panel relied on U.S. cases that have little or no bearing on the status of forced labor in international law, and that do not even hold that forced labor is synonymous with slave trading. For example, *Pollock v. Williams*, 322 U.S. 4, 17-18 (1944), a case considering whether forced labor for debt repayment constituted "involuntary servitude," states that the "aim of the Thirteenth Amendment . . . was not merely to end slavery but to maintain a system of completely free and voluntary labor throughout the United States." Significantly, the very next two sentences note: "Forced labor in some special circumstances may be consistent with the general basic system of free labor. For example, forced labor has been sustained as a means of punishing crime, and there are duties such as work on highways which society may compel." *Id.*; *see also Butler v. Perry*, 240 U.S. 328 (1916) (holding that civilian forced labor on roads and bridges under threat of fine or imprisonment is constitutional); CAL. GOV'T. CODE § 204 ("The State may require services of persons, with or without compensation: In military duty; in jury duty; as witnesses; as town officers; in highway labor; in maintaining the public peace; in enforcing the service of process; in protecting life and property from fire, pestilence, wreck, and flood; and in other cases provided by statute.").

court's state action analysis, which was guided by federal "color of law" jurisprudence under 42 U.S.C. § 1983. In light of *Sosa*, however, if this Court even reaches the state action question, it must look to "international law" for an answer. *Sosa*, 124 S. Ct. at 2766 n.20.

One statement on this subject comes from the International Criminal Tribunal for the Former Yugoslavia, an *ad hoc* war crimes tribunal on which the panel relied. In *Prosecutor v. Tadic*, IT-94-1-A (July 15, 1999) ("*Tadic II*"), the Appeals Chamber was faced with the question whether individual liability could be imposed on an alleged *de facto* state actor. The Appeals Chamber held that the focus of this "*de facto* State actor" inquiry should be on the control exercised by the State over the private actor's conduct. *See id.* ¶¶ 98-144. According to the Appeals Chamber, international courts "do not consider[] an overall general level of control to be sufficient." *Id.* ¶ 132. Rather, the State must "specifically direct" or "publicly endorse or approve" the private actor's misconduct. *Id.* ¶ 137.[17]

Another standard was articulated by the International Court of Justice in *Nicaragua v. United States*, 1986 I.C.J. 14 (June 27, 1986). In that case, the ICJ held that state action required a showing that the government "had effective

[17] *Tadic II* discussed an alternative test, not relevant here, whereby individuals may be held liable for their own conduct by way of "the assimilation of individuals to State organs" through "their actual behavior within the Structure of a State," for example, by killing Polish Jews on behalf of the German special forces or administrating a Nazi death camp. *Id.* ¶¶ 141-44.

control" over the alleged state actor, "in the course of which the alleged violations were committed." *Id.* ¶ 115. Applying this standard, the ICJ concluded that even evidence of "preponderant or decisive" participation of the government "in the financing, organizing, training, supplying and equipping of [the private party], the selection of its military or paramilitary targets, and the planning of the whole of its operation" would still be "insufficient" for a finding of state action. *Id.*

Unocal cannot possibly be regarded as a state actor under these standards. To begin with, *all* the alleged violations in this case were committed by Burmese soldiers, not Unocal's subsidiaries (much less Unocal). Moreover, there is absolutely no evidence that the Myanmar government issued "specific instructions" to Unocal or its subsidiaries to commit "particular acts" of misconduct—or vice versa. Nor is there any evidence that the Myanmar government publicly endorsed or approved any alleged international law violations by Unocal or its subsidiaries—or vice versa. Unocal is not a state actor.[18]

[18] In granting summary judgment in Unocal's favor in August 2000, the district court declined to address plaintiffs' California state law claims or their contention that Unocal and its subsidiaries were "alter egos." Over the past four years, while this appeal has been pending, the parties have litigated plaintiffs' state law claims as well as their alter-ego arguments in California state court. In December 2003 and January 2004, the state court held a four-week Phase I alter-ego trial. Defendants prevailed in this trial, and the state court ruled that each of the Unocal subsidiaries connected to the Yadana project was *not* an alter-ego company. The court ruled that each subsidiary was adequately capitalized, observed formalities, controlled its own day-to-day affairs, did not have a unity of interest with Unocal, and that no injustice would arise from recognizing the subsidiaries' separate

IV. UNOCAL CANNOT BE LIABLE UNDER INTERNATIONAL LAW ON AN AIDING AND ABETTING THEORY OF LIABILITY.

Plaintiffs' attempt to sidestep the state action requirement by arguing that Unocal can be held individually liable for "aiding and abetting" the alleged use of forced labor by Burmese soldiers. *Sosa* forecloses this argument.

First, as Judge Reinhardt rightly noted, the panel majority relied on "undeveloped principle[s] of international law promulgated by a recently-constituted *ad hoc* international tribunal," which itself based its opinion on a hodgepodge of non-binding international instruments. *Doe*, 2002 WL 31063976 at *27.[19] Such "[n]ovel standard[s]," first articulated *two or three years after the*

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corporate existence. *See* Appendix B attached hereto (state court ruling).

[19] The panel relied on decisions in *Prosecutor v. Tadic*, ICTY-94-1 (May 7, 1997), and *Prosecutor v. Furundzija,* IT-95-17/1 T (Dec. 10, 1998). The sources upon which these Yugoslav tribunals relied in developing their various aiding and abetting standards do not articulate universally accepted norms. *See, e.g.*, *Furundzija* ¶ 227 (relying on the "nonbinding" 1996 Draft Code of Crimes Against the Peace and Security of Mankind, promulgated by the United Nations International Law Commission ("ILC")). The ILC is charged not only with codification of existing customary international law but also with "the *progressive development* of international law." Statute of the International Law Commission, Art. I (1), *available at* http://www.un.org/law/ilc/texts/statueng.htm (emphasis added); G.A. Res. 36/107, U.N. GAOR, 36th sess., Supp. No. 21, U.N. Doc. A/RES/36/107 (1981). The *Furundzija* tribunal recognized the limited value of ILC's aspirational pronouncements, noting that the Draft Code:

> *may* (i) constitute evidence of customary law, or (ii) shed light on customary rules which are of *uncertain contents or are in the process of formation*, or, at the very least, (iii) be *indicative* of the legal views of eminently qualified publicists representing the major legal systems of the world.

Furundzija ¶ 227 (emphasis added). These hollow affirmations are "pretty flabby language." *Atkins v. Virginia*, 536 U.S. 304, 352 (2002) (Scalia, J., dissenting).

conduct at issue in this case occurred, "do[] not constitute customary international law," *Doe*, 2002 WL 31063976, at *29, especially in light of *Sosa*.

Second, the aiding and abetting cases upon which the panel relied are not even the law within the Yugoslav tribunal. The panel relied on *trial* chamber decisions in *Tadic* and *Furundzija* to fashion its aiding and abetting standard, which does *not* require "that the aider and abettor *know[] the precise crime* that the principal intends to commit." *Id.* at *13 (emphasis added). However, a later decision by the Yugoslav *Appellate* Chamber applied a different and far more stringent test. *See Tadic II*, ICTY-91-1-A ¶ 229. Directly refuting the aiding and abetting standard announced by the trial chambers, and adopted by the panel here, the Appellate Chamber held: "The aider and abettor [must] carr[y] out acts *specifically directed* to assist, encourage or lend moral support to the perpetration of *a certain specific crime*." *Id.* (emphasis added). Moreover, to establish the "requisite mental element," one must prove "*knowledge* that the acts performed by the aider and abettor assist the commission of a *specific crime* by the principal." *Id.* (emphases added). Plaintiffs cannot possibly meet this exacting test.[20]

Third, the inchoate standards of aiding and abetting liability are not sufficiently definite or universally accepted to justify the creation of a cause of action under international law. In the absence of a definitive standard, this Court

[20] *See Doe v. Unocal Corp.*, 110 F. Supp. 1294, 1310 (C.D. Cal. 2000) ("there are no facts suggesting that Unocal sought to employ forced or slave labor").

may not import criminal aiding and abetting standards into this civil context. *See Central Bank of Denver v. First Interstate Bank*, 511 U.S. 164, 181-82 (1994).[21]

V. THE BURMA SANCTIONS ACT PREEMPTS THE COMMON LAW CLAIMS PLAINTIFFS ASSERT.

From day one, these two lawsuits—which were originally filed by the self-styled government-in-exile of Burma, and which sought to enjoin any Unocal involvement in Yadana—have been premised on the theory that Unocal's mere investment in Myanmar—a country with a poor human rights record—gave rise to a cause of action under the ATS and international law. *Sosa* erects "a high bar to new private causes of action for violating international law," especially where, as here, recognizing such suits "imping[es] on the discretion of the Legislative and Executive Branches in managing foreign affairs." 124 S. Ct. at 2763. Where Congress has acted, "explicitly, or implicitly, by treaties or statutes that occupy the field," it has "shut the door" to judicially created ATS claims. *Id.* at 2765. These lawsuits, which are purely political at base, improperly try to reopen that door.

Forced labor in Myanmar has been the subject of political debate for several years. Certain lobbies have pushed for sweeping sanctions that would ban all U.S.-related investment in the country. In the mid-1990s, and mere months before these lawsuits were filed, Congress decided instead to take a "sticks and carrots"

[21] Nor can the state action requirement be avoided by applying domestic law principles of vicarious liability to hold private parties liable for international law violations by foreign states. *See Sosa*, 124 S. Ct. at 2766 n.20.

approach and prohibit only *new* investment in the country. Beneficial existing projects, such as Yadana, were exempted from the Act's reach.[22]

Certain states viewed the legislation that Congress passed as too timid. While the Congressional debates were pending, Massachusetts enacted far more aggressive sanctions legislation. However, soon after the Burma Sanctions Act was passed, the Massachusetts law was challenged, and the Supreme Court held that it was preempted by federal law. *See Crosby*, 530 U.S. at 373-76.

Federal law similarly preempts the common law remedies plaintiffs seek. Common law is displaced when a "field has been made the subject of comprehensive legislation or authorized administrative standards." *City of Milwaukee v. Illinois*, 451 U.S. 304, 314 (1981). In contrast to state law preemption, which is concerned with encroaching on state power, federal common law preemption is easier to prove and "start[s] with the assumption that it is for the

[22] *See* Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 101(b), 110 Stat. 3009-121 (1996) (the "Burma Sanctions Act"); *see also Crosby v. Nat'l Trade Council*, 530 U.S. 363, 377-78 (2000); 142 Cong. Rec. S8809 (daily ed. July 25, 1996) (Sen. Feinstein) ("They will build schools, they will build hospitals, they will put to the community an opportunity for economic upward mobility. Let us say the unilateral sanction passes, and let us say Unocal cannot go ahead, do you know who will take Unocal's share in this? Mitsui, a Japanese company, or South Korea."); *id.* at S8748-49 (statement of Sen. Johnston) ("I can tell you . . . that the President of Unocal—an American—it is better to have him in there than to have only the French because the French and the Europeans have never really helped on human rights matters."). Congress recently reassessed its Burma sanctions policy and again exempted prior investments, such as Yadana. *See, e.g.*, The Burmese Freedom and Democracy Act of 2003, Pub. L. No. 108-61.

Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law." *Id.* at 317. "The establishment of such a self-consciously comprehensive program by Congress . . . strongly suggests that there is no room for courts to attempt to improve on that program with federal common law." *Id.* at 319.

Imposing liability on Unocal in this case for an investment consciously permitted and implicitly encouraged by Congress is "at odds with achievement of the federal decision about the right degree of pressure to employ" in Burma. *Crosby*, 530 U.S. at 380. *Sosa* counsels courts to show "case-specific deference to the political branches" before creating a new cause of action for international law violations. 124 S. Ct. at 2766 n.21. Here, both Congress and the Executive branch have clearly spoken and have "shut the door" to these claims. *Id.* at 2765.[23]

[23] *See* Br. for the United States of America as *Amicus Curiae* at 4 (filed May 9, 2003) ("While the United States unequivocally deplores and strongly condemns the anti-democratic policies and blatant human rights abuses of the Burmese (Myanmar) military government, it is the function of the political Branches, not the courts, to respond (as the U.S. Government actively is) to bring about change in such situations."). Lest there be any doubt, the Supreme Court recently noted that "claims against even nominally private entities have become issues in international diplomacy." *American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 416 (2003).

CONCLUSION

For the reasons stated herein and in Unocal's prior briefing, this Court should affirm the district court's grant of summary judgment in Unocal's favor.

Respectfully submitted,

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By: _____
Attorneys for Defendants/Appellees

August 6, 2004

CERTIFICATE OF COMPLIANCE PURSUANT TO

CIRCUIT RULE 32-3

I CERTIFY THAT the attached Corrected Supplemental Brief of Defendants-Appellees complies with the type-volume requirements of Ninth Circuit Rule 32-3 because it is:

[__] Monospaced, and does not exceed the designated number of pages (___) ordered by the Court;

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DATED: August 6, 2004

O'MELVENY & MYERS LLP

By: _____
Attorneys for Defendants/Appellees

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Washington, D.C. 20005

I declare under penalty of perjury under the laws of the United States that the above is true and correct.

Executed on August 6, 2004, at Los Angeles, California.

/ Nori Zeliff

Nori Zeliff

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I am over the age of eighteen years and not a party to the within action. I am a resident of or employed in the county of Los Angeles at the office of a member of the bar of this Court at whose direction this service was made. My business address is O'Melveny & Myers, 1999 Avenue of the Stars, Suite 700, Los Angeles, California 90067. On August 6, 2004, I personally served the following documents:

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