forced labor is a modern variant of slavery. Accordingly, forced labor, like traditional variants of slave trading, is among the 'handful of crimes . . . to which the law of nations attributes *individual liability*,' such that state action is not required." Slip op. at 14210 (quoting *Tel-Oren*, 726 F.2d at 794-95 (Edwards, J., concurring)).

As Professor Leary testified, "the concept of slavery has evolved to include not only slavery defined as the purchase of human beings but to include slavery-like practices. The definition of slavery and enslavement has evolved, as pointed out by the [International Law Commission], to include forced labor." ER 169; *see also* ER 168-70. Contrary to Unocal's argument, the evolution of the concept of slavery does not contradict the 1926 Slavery Convention's requirement of exercising "any or all of the powers" of "ownership." Defs.' Br. at 16 & n.15. Such powers of ownership do not require "purchasing" or "selling" individuals; they include, *inter alia*, "'control of someone's movement . . . measures taken to prevent or deter escape, force, threat of force or coercion . . . and forced labour.'" *Prosecutor v. Kunarac,* IT-96-23, ¶ 119 (ICTY Appeals Chamber 2002).

In *Kunarac*, the ICTY noted that "various contemporary forms of slavery" now "form[] part of enslavement as a crime against humanity under customary international law," *id.* ¶ 117, and expressly relied on the 1926 Slavery

Convention. *Id.* ¶ 118. The understanding that forced labor equates to slavery dates back at least to the Nuremberg tribunals, *see United States v. Pohl*, 5 Trials of War Criminals Before the Nuremburg Military Tribunals Under Control Council Law No. 10 ("TWC") 958, 970 (1950) (noting that slaves "are still slaves if without lawful process they are deprived of their freedom by forceful restraint," and that "the admitted fact of slavery [is] compulsory uncompensated labour"), and was confirmed by a U.N. body as recently as last month. *Report of the Working Group on Contemporary Forms of Slavery*, U.N. Commission on Human Rights, U.N. Doc. E/CN.4/Sub.2/2004/36, at 9, 12 (2004) (focusing on "the struggle against forced labour and other contemporary forms of slavery," and "[r]ecall[ing] that slavery, in all its forms and practices, is a crime against humanity").

Likewise, as the panel unanimously concluded, because the non-forced labor abuses were committed in furtherance of a program of forced labor, no state action showing is needed for these claims. Slip op. at 14224-24, (citing *Kadic*, 70 F.3d at 243-44); *id.* at 14268-69 (Reinhardt, J., concurring).

Unocal's argument would fail even if forced labor required a showing of state action. Each plaintiff has crimes against humanity claims, because all of the forced labor, torture and murder they suffered was part of a widespread pattern of

pipeline-related abuse. Crimes against humanity does not require state action. *Kadic*, 70 F.3d at 236.

VI. *ALVAREZ* AND THE TEXT AND HISTORY OF THE ATS SUPPORT APPELLANTS' AIDING AND ABETTING THEORY OF LIABILITY.

In *Alvarez*, the Supreme Court specifically concluded that ATS claims are "claims under federal common law." 124 S. Ct. at 2765. Thus, the federal courts must develop principles to govern ATS litigation. Because international law is part of federal common law, *see id.* at 2764; *see also In re Estate of Marcos Human Rights Litigation*, 978 F.2d 493, 502 (9th Cir. 1992); *Kadic*, 70 F.3d at 246; *Filartiga*, 630 F.2d at 886, international law principles of aiding and abetting are applicable to determine liability; aiding and abetting is also recognized generally under federal common law. *See Halberstam v. Welch*, 705 F.2d 472, 478 (D.C. Cir. 1983) ("Aiding-abetting focuses on whether a defendant knowingly gave 'substantial assistance' to someone who performed wrongful conduct, not on whether the defendant agreed to join the wrongful conduct.").[30]

The plain words of the statute compel recognition of aiding and abetting liability. As the Panel concluded, aiding and abetting liability holds a defendant

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[30] *Alvarez* likewise supports the recognition of federal common law liability for agency, joint venture, and recklessness. *See* Slip op. at 1421 n.20; *id.* at 14257-67 (Reinhardt, J., concurring).

accountable for its own acts; it is not vicarious liability. Slip op. at 14222-23 n.30. Because international law prohibits aiding and abetting human rights violations, such complicity is itself a "tort . . . committed in violation of the laws of nations." 28 U.S.C. § 1350.

Indeed, this understanding dates back to the Founders. The influential 1795 opinion issued by Attorney General Bradford, relied on by the *Alvarez* Court, 124 S. Ct. at 2759, specifically states that individuals would be liable under the ATS for "committing, aiding, or abetting" violations of the laws of war. *Breach of Neutrality*, 1 Op. Att'y Gen. 57, 59 (1795).

Significantly, this incident involved private actors, acting in concert with but certainly not controlling French naval vessels. *See id.* In short, the interpretation of the ATS and the Bradford Opinion accepted by the Supreme Court, includes the venerable concept that those who aid and abet violations of international law are responsible for those violations. Nothing has happened since 1789 to alter this concept.

The aiding and abetting standard recognized by the panel has been clearly enshrined in international law since Nuremberg, and has been repeatedly codified and applied in the statutes and jurisprudence of the ICTY, the ICTR, and the

International Criminal Court (ICC).[31] Thus, Unocal's assertion that this standard was adopted for the first time after the conduct at issue is mistaken. Indeed, the panel cited *Furundzija* specifically because it contained "an exhaustive analysis" of international law, including heavy reliance on the jurisprudence of the post-World War II tribunals. Slip op. at 14217-18 n.26 & n.27; *Prosecutor v. Furundzija*, IT-95-17/1 ¶¶ 195-97, 200-25, 236-49 (ICTY Trial Chamber 1998).[32] The more recent ad hoc tribunals and the ICC build on this understanding.

Unocal falsely suggests that the ICTY Appeals Chamber has repudiated aspects of the *Furundzija* Trial Chamber's aiding and abetting standard. Defs.' Br. at 21-22. Indeed, the very language challenged—that the defendant need not "know the precise crime that was intended and which in the event was

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[31] *See generally* William A. Schabas, *Enforcing International Humanitarian Law: Catching the Accomplices*, 83 Int'l Rev. Red Cross 439 (June 2001) (discussing aiding and abetting under ICTY, ICTR, and ICC); *see also* Anita Ramasastry, *Corporate Complicity: From Nuremberg to Rangoon: An Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations*, 20 Berkeley J. Int'l L. 91, 113-18 (2002) (describing prosecutions of WWII industrialists); *Presbyterian Church of Sudan v. Talisman Energy, Inc,* 244 F. Supp. 2d 289, 322 (S.D.N.Y. 2003) (holding that "the concept of complicit liability for . . . aiding and abetting is well-developed in international law"); *Mehinovic,* 198 F. Supp. 2d at 1355-56 (same); *Burnett v. Al Baraka Inv. & Dev. Corp.*, 274 F. Supp. 2d 86, 100 (D.D.C. 2003) (same).

[32] Unocal is therefore disingenuous when it pretends that *Furundzija* was based on a non-binding pronouncement of International Law Commission. Defs.' Br. at 20 n.19.

committed," *Furundzija* ¶ 246—was more recently quoted *verbatim* by the Appeals Chamber, which "concur[red] with this conclusion." *Prosecutor v. Blaskic*, IT-95-14 ¶ 50 (ICTY Appeals Chamber 2004). *Tadic II*, on which Unocal relies,[33] did not alter *Furundzija*. In *Blaskic*, the Appeals Chamber described aiding and abetting in the exact language Unocal quotes from *Tadic II, id.*, ¶ 45, and simultaneously, explicitly reaffirmed the *Furundzija* Trial standard that aiding and abetting required "'practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime,'" with "'the knowledge that these acts assist the commission of the offense.'" *Blaskic*, IT-95-14 ¶ 46; *compare* Slip op. at 14219 (same standard). While Unocal suggests that it cannot be held liable under this test absent a showing that it sought to employ forced labor, Defs.' Br. at 21 & n.20, intent is obviously *not* a requirement under the Appeals Chamber jurisprudence or, more generally, under customary international law. Indeed, *Blaskic* specifically *rejected* the notion that "'the aider and abettor needs to have intended to provide assistance,'" or even "'accepted that such assistance would be a possible and foreseeable consequence of his conduct,'"

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[33] The language quoted by Unocal appears in a discussion of the distinction between aiding-and-abetting and "common purpose or design." *Id.* The Appeals Chamber was not considering the issue of whether the aider and abettor need know the precise nature of the crime comitted.

so long as he knows "that his acts assist in the commission" of a crime. IT-95-14 ¶ 49.

The District Court erred in holding that the Nuremberg cases would exonerate Unocal because the company had not "sought to employ forced or slave labor." 110 F. Supp. 2d at 1310. It was distinctly *not* a requirement for liability that the defendants in *Flick* and *Krauch*.[34] *United States v. Flick*, 6 Trials of War Criminals Before the Nuremburg Military Tribunals Under Control Council Law No. 10 ("TWC"), at 807 (1952); *United States v. Krauch*, 8 TWC No. 10, at 635-**36 (1952).** The Nuremberg cases and generally accepted principles of tort law establish that Unocal's civil liability can be based on knowingly "aiding and abetting" acts that result in forced labor being used. There is absolutely no requirement that Unocal directly participate in the violent acts, or seek or desire that forced labor be used.

Unocal also errs in claiming the military must control Unocal (or vice versa). Defs.' Br. at 19-20. Aiding and abetting does not require control.[35] *See* Slip op. at 14212-22; *see also id.* at 14224 n.32; Doe Reply Br. at 12-16. *Tadic II*

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[35] Even if plaintiffs were required to demonstrate control, plaintiffs have provided ample evidence of control. *See* Doe AOB at 10-12; Doe Reply Br. at 4.

and *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27), are inapposite.[36] The cited portions of those cases considered the circumstances under which a state is responsible for acts committed by a private party. *See Tadic II* (discussing the "general international rules on State responsibility which set out the legal criteria for attributing to a State acts performed by individuals"); *Nicaragua*, 1986 I.C.J. at 65-66 ¶ 115 (considering whether the United States could be held liable for war crimes committed by the *contras*). This case presents the converse question. Individual liability standards, including aiding and abetting, not state responsibility standards, are relevant here.[37]

VII. APPELLEES' PREEMPTION ARGUMENT IS MERITLESS.

Appellees have waived their "preemption" argument. Appellees did not raise preemption before the district court, and did not identify it as an issue

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[36] Unocal also ignores the holding in *Nicaragua* that, without controlling the *contras*, the United States could be liable for "its own conduct," 1986 I.C.J. at 65 ¶ 116, in giving "support and assistance" (including financial support) to paramilitaries seeking to overthrow another government, *id.* at 124-25 ¶¶ 241-42, and for "encourag[ing] persons" to commit war crimes, *id.* at 114-15 ¶ 220; *see also id.* at 129-30 ¶¶ 254-56; and actually found that the United States, "by training, arming, equipping, financing and supplying the *contra* forces or otherwise encouraging, supporting and aiding" the *contras*, had violated customary international law. *Id.* at 146 ¶ 292(3).

[37] Moreover, even if state responsibility standards were relevant, *Tadic* and *Nicaragua* are far removed from this case because they involved actions that occurred *outside* the State purportedly responsible.

presented for review either in their original panel briefing or in their petition for rehearing; they cannot raise it now.[38]

Even if not waived, Appellees' preemption argument fails. Appellants do not seek to hold Unocal liable merely for investing in Burma, but challenge specific tortious behavior, including knowingly aiding and abetting forced labor, crimes against humanity, and other violations of international law. The Burma Sanctions Act (BSA), Pub. L. No. 104-208 § 570, 110 Stat. 3009-166, cannot be transformed into the blanket legislative grant of tort immunity Unocal covets.

Federal common-law preemption applies "when Congress addresses a question previously governed by a decision rested on federal common law," such that the need for the common-law rule "disappears." *City of Milwaukee v. Illinois*, 451 U.S. 304, 314 (1981).[39] Thus, in the portion of *Alvarez* upon which Unocal relies, the Supreme Court noted that Congress could "modify or cancel any judicial decision so far as it rests on recognizing an international norm as such," and that it could preempt the recognition of new causes of action if it were to

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[38] *See Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999); *see also Int'l Olympic Comm. v. San Francisco Arts & Athletics*, 781 F.2d 733, 738 n.2 (9th Cir. 1986).

[39] Appellees misquote *Milwaukee*, attributing language to the Supreme Court that is actually quoted from the Tenth Circuit. Defs.' Br. at 24.

"occupy the field" with comprehensive legislation addressing violations of international law. 124 S. Ct. at 2765. However, Unocal cannot plausibly argue that Congress has occupied the field with respect to violations of international law, or with respect to any of the particular norms at issue here. Instead, Unocal claims that Congress has preempted all tort claims against U.S. companies operating in Burma. The BSA, however, generally aims to promote democratization and human rights in Burma, *see id.* § 570(c); it does not address liability for particular human-rights violations. Nor does its exclusion of preexisting investments insulate Unocal from liability. As then-District Judge Paez observed in his discussion of the act of state doctrine, plaintiffs allege that Unocal "is knowingly taking advantage of and profiting from SLORC's practice of using forced labor and forced relocation," which is not protected by the BSA. *Doe v. Unocal Corp.*, 963 F. Supp. at 894 n.1.[40]

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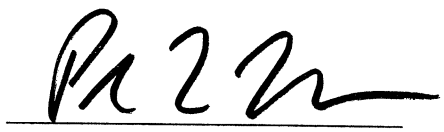
[40] Congress has recently recognized its duty not to abet the "government-sponsored system of forced, compulsory, or slave labor in Burma." Burmese Freedom and Democracy Act of 2003, Pub. L. No. 108-61, § 2(10), 117 Stat. 864, 865 (2003). As the Secretary of State recently noted, until Burma "move[s] in a positive direction with respect to democracy . . . we will continue to put pressure on the regime. We will not have a satisfactory relationship with Burma until this matter is resolved." Roundtable with Japanese Journalists, Secretary Colin L. Powell, Washington, D.C., Aug. 12, 2004, *available at* http://www.state.gov/secretary/rm/35204.htm.

CONCLUSION

The *Alvarez* decision supports the reasoning this Court has employed in many ATS cases. The egregious human rights violations at issue in this case may be traced directly to the Nuremberg legacy and clearly satisfy the *Alvarez* standard.

Dated: August 30, 2004

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I hereby certify that this brief complies with the type-volume limitation in Rule 32(a)(7)(B). The foregoing brief is presented in Times New Roman 14 point font. The word count for the brief (as calculated by Word Perfect 10.0 word-processing program, excluding exempt material) is 6,859, and is under the 7,000 word limitation. The 7,000 word limit is derived from Ninth Circuit Rule 32-3, which expressly permits the conversion of a page limitation set by order into a word-count limit of 280 words per page.

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PROOF OF SERVICE

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I am a resident of the aforesaid county, State of California; I am over the age of 18 years and not a party to the within action; my business address is 723 Ocean Front Walk, Venice, California 90291.

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DOE AND ROE PLAINTIFFS' AND APPELLANTS' SUPPLEMENTAL BRIEF

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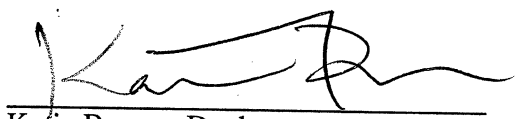

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