

**No. 0056603**

**IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

**John DOE I, et al.,**

**Plaintiffs-Appellants,**

**vs.**

**UNOCAL CORP., Union Oil Company of California,  
John Imle; and Roger Beach,**

**Defendants-Appellees,**

**On Appeal From the United States District Court  
for the Central District of California  
The Honorable Ronald Lew**

**BRIEF OF AMICI CURIAE  
INTERNATIONAL HUMAN RIGHTS ORGANIZATIONS  
AND INTERNATIONAL LAW AND HUMAN RIGHTS LAW SCHOLARS  
IN SUPPORT OF PLAINTIFFS-APPELLANTS**

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**DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER ENTITIES  
WITH A DIRECT FINANCIAL INTEREST IN LITIGATION**

Pursuant to FRAP 26.1, the *Amici* make the following disclosure:

1. Is the party a publicly held corporation or other publicly held entity?

NO.

2. Is the party a parent, subsidiary, or affiliate of, or a trade association representing, a publicly held corporation, or other publicly held entity?

NO.

3. Is there any other publicly held corporation, or other publicly held entity, that has a direct financial interest in the outcome of the litigation?

NO.

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### **INTEREST OF THE AMICI**

This *Amici Curiae* brief is respectfully submitted jointly by two groups: (1) international human rights organizations; and (2) international law and human rights

law scholars.<sup>1</sup> Each of the organizational signatories is dedicated to the protection and promotion of human rights through law. Each of the law professor signatories has studied or written extensively on international law or human rights law.

*Amici* believe that efforts to restrict the nature and scope of the Alien Tort Claims Act (hereinafter “ATCA”) conflict with the text of the statute and well-established case law. Since the seminal ruling of Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980), federal courts have applied the ATCA to impose civil liability for violations of international law. Indeed, the Filartiga approach has been upheld by federal courts in the First Circuit, Second Circuit, Third Circuit, Fifth Circuit, Ninth Circuit, Eleventh Circuit, and the D.C. Circuit. As evidenced by its decisions in the Marcos litigation as well as other cases, the Ninth Circuit has applied the ATCA to affirm and apply fundamental principles of international law, thereby upholding the mandate of Congress. *Amici* support this balanced interpretation and application of the ATCA.

## **ARGUMENT**

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<sup>1</sup> Additional information about their background and qualifications is provided in the motion for leave to file.

The Alien Tort Claims Act expressly authorizes civil actions by aliens for torts committed in violation of the law of nations or a treaty of the United States. The plain wording of the ATCA, as well as case law interpreting the statute, indicates that it provides jurisdiction for actions alleging violations of international law. The District Court erred by restricting the application of the ATCA to *jus cogens* norms, thereby contradicting the express terms of a clear federal statute that Congress adopted over 200 years ago.<sup>2</sup>

In addition, international law, like its domestic counterpart, does not require “active participation” to establish civil liability for violations of international human rights law. Various types of conduct may give rise to liability, including planning, instigating, ordering, committing or otherwise aiding or abetting in the planning, preparation, or execution of an illegal act. Accordingly, the District Court erred by finding that international law requires “active participation” — in the narrow sense of direct execution or authorization — to establish civil liability.

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<sup>2</sup> *Amici* do not seek to minimize the importance of *jus cogens* norms. Rather, they argue that the category of claims actionable under the ATCA is not limited to violations of *jus cogens* principles of international law.

## I.

### **THE CATEGORY OF CLAIMS ACTIONABLE UNDER THE ATCA IS NOT LIMITED TO VIOLATIONS OF JUS COGENS LAW**

In Doe v. Unocal, 110 F.Supp. 2d 1294, 1304 (C.D. Cal. 2000), the District Court suggests that only violations of *jus cogens* principles are actionable under the ATCA. To restrict the claims actionable under the ATCA to only violations of *jus cogens* principles of international law, however, is wholly inconsistent with the clear language of the ATCA, the historical record, and case law. See, e.g., Hilao v. Marcos, 25 F.3d 1467, 1475 (9th Cir. 1994) (“Nothing more than a violation of the law of nations is required to invoke section 1350.”). See also Kadic v. Karadzic, 70 F.3d 232, 236 (2d Cir. 1995); Abebe-Jira v. Negewo, 72 F.3d 844 (11th Cir. 1996); Filartiga v. Pena-Irala, 577 F. Supp. 860 (E.D.N.Y. 1984). There is simply no principled basis — either in international law or in U.S. law — to distinguish between customary international law and *jus cogens* principles for purposes of ATCA litigation. The District Court’s interpretation is an attempt to rewrite the statute by adding words or limitations that Congress never chose.<sup>3</sup> Indeed, the District Court

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<sup>3</sup> When Congress adopted the Torture Victim Protection Act in 1991, it evinced its continued support for the ATCA and its accompanying jurisprudence. See Kadic v. Karadzic, 70 F.3d at 241. See also H.R. Rep. No. 367, 102d Cong., 2d Sess., at 4

itself recognized the novelty of its holding when it noted that “the Ninth Circuit has not expressly held that only jus cogen norms are actionable . . . .” Doe v. Unocal, 110 F. Supp. 2d at 1304.

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(1991), reprinted in 1992 U.S.C.C.A.N. 84 (The ATCA “should remain intact to permit suits based on other norms (in addition to torture and summary execution) that already exist or may ripen in the future into rules of customary international law.”).

Enacted in 1789 as part of the First Judiciary Act, the Alien Tort Claims Act provides: “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” 28 U.S.C. § 1350. The term “law of nations” was used until the early 20th century in reference to the customary rules and obligations that regulated interaction between states and certain aspects of state interaction with individuals.<sup>4</sup> It has now been supplanted by the term “customary international law.” Restatement (Third) of the Foreign Relations Law of the United States § 111 Introductory Note (1987) (hereinafter “Restatement (Third)”). Like the law of nations, international law can be established by several sources, including customary international law and treaty law. Id. at § 102. Customary international law is defined as generally consistent state practice recognized out of a sense of legal obligation (*opinio juris*). Customary international law, therefore, contains two elements: the objective element (consistent state practice) and the subjective element (*opinio juris*). Jordan Paust, International Law as Law of the United States 1 (1996). In the absence of either element, customary international law does not exist. These principles of international

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<sup>4</sup> The term “law of nations” has been defined as “those standards, rules or customs (a) affecting the relationship between states or between an individual and a foreign state, and (b) used by those states for their common good and/or dealings inter se . . . .” Lopes v. Reederei Richard Schroders, 225 F. Supp. 292, 297 (E.D. Pa. 1963).

law are well-recognized in the United States. See, e.g., Restatement (Third) § 102(2).

See also The Paquete Habana, 175 U.S. 677 (1900); United States v. Smith, 18 U.S. (5 Wheat.) 153 (1820); The Nereide, 13 U.S. (9 Cranch) 388, 423 (1815).

In contrast to the long-standing nature of customary international law, the concept of *jus cogens* is of more recent origin. Restatement (Third) § 102 rpt. note 6 (“The concept of *jus cogens* is of relatively recent origin.”); Louis Henkin, et al., International Law 92 (3d ed. 1993). Based on principles of natural law, it was not formally incorporated into international law until the 20th century. See Lauri Hannikainen, Peremptory Norms (Jus Cogens) in International Law 17-19 (1988); Christos L. Rozakis, The Concept of Jus Cogens in the Law of Treaties 1-5 (1976). Indeed, the concept of *jus cogens* was not even codified until the 1969 Vienna Convention on the Law of Treaties, U.N. Doc. A/CONF. 39/27 (1969) (hereinafter “Vienna Convention”). Article 53 of the Vienna Convention defines *jus cogens* in the following manner:

A peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

See also Restatement (Third) § 102, cmt. (k). Owing to its peremptory character, the concept of *jus cogens* identifies a category of international norms that cannot be set aside by treaty or acquiescence.

Given the relatively recent development of the principle of *jus cogens*, it would be anomalous to restrict the law of nations to a concept that did not even exist when

the First Judiciary Act (containing the ATCA) was adopted in 1789.<sup>5</sup> Indeed, early references to the ATCA by the Executive branch found it applicable to violations of the law of nations that would not be considered *jus cogens* violations.<sup>6</sup> See 26 Op. Att’y Gen. 250, 253 (1907) (applicability of the ATCA for damages caused by the diversion of a river in violation of the law of nations); 1 Op. Att’y Gen. 57, 59 (1795) (applicability of the ATCA for damages caused by the plundering of a British colony). See generally William S. Dodge, “The Historical Origins of the Alien Tort Statute: A Response to the “Originalists,” 19 Hastings International and Comparative Law Review 221, 229-30 (1996). Judicial decisions have made similar determinations. See **Doe v. Islamic Salvation Front, 993 F. Supp. 3, 5, 7-8 (D.D.C. 1998)**; Nguyen

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<sup>5</sup> Article I, section 8, clause 10 of the U.S. Constitution, which was drafted only two years before the ATCA, authorizes Congress to “define and punish . . . offenses against the law of nations.” See generally Louis Henkin, Foreign Affairs and the U.S. Constitution 69 (2d ed. 1996); Beth Stephens, “Federalism and Foreign Affairs: Congress’s Power to ‘Define and Punish . . . Offenses Against the Law of Nations’,” 42 William and Mary Law Review 447 (2000). There is no indication that the authority of Congress to adopt legislation to define and punish offenses against the law of nations is limited to only *jus cogens* norms.

<sup>6</sup> In describing the ATCA to the Commission on Human Rights, the United States Government indicated that the “statute was originally enacted to provide a remedy to individuals who suffered a ‘tort’ at the hands of privateers seeking prize money under the law of admiralty. More recently, it has been applied to cases of human rights violations.” Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, U.N. Doc. E/CN.4/1996/29/Add.2 (1996). See also Memorandum for the United States as Amicus Curiae, Filartiga v. Pena-Irala, No. 79-6090 (2d Cir. May 29, 1980).

da Yen v. Kissinger, 528 F.2d 1194, 1201-02 (9th Cir. 1975); Adra v. Clift, 195 F. Supp. 857 (D. Md. 1961); Bolchos v. Darrel, 3 F. Cas. 810 (D.S.C. 1795). While international law must be interpreted as it has evolved, the Supreme Court has never indicated that the law of nations has evolved to apply exclusively to *jus cogens* principles. The U.S. Supreme Court has recognized a variety of international norms as constituting the law of nations that are not *jus cogens* norms.<sup>7</sup>

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<sup>7</sup> See, e.g., The Paquete Habana, 175 U.S. 677 (1900) (during time of war, fishing vessels are protected from capture by the law of nations); Ex parte Quirin, 317 U.S. 1 (1942) (enemy aliens engaged in sabotage are liable for violations of the laws of war); United States v. Arjona, 120 U.S. 479 (1887) (counterfeiting foreign government securities violates the law of nations).

In Doe v. Unocal, 110 F.Supp. 2d at 1304, the District Court suggests that only *jus cogens* norms are actionable under the ATCA and relies on Hilao v. Marcos, 25 F.3d at 1475 and Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 715 (9th Cir. 1992) for this proposition. Neither of these cases, however, limit the application of the ATCA to only *jus cogens* norms. There is no language in these cases to suggest such a restrictive interpretation. Rather, these cases merely state the obvious – norms that are nominal or hortatory do not create binding international obligations.<sup>8</sup> In contrast, the Ninth Circuit noted in Hilao v. Estate of Marcos, 103 F.3d 789 (9th Cir. 1996), a more recent decision, that customary international law may also be classified as specific, universal, and obligatory. Specifically, the Court indicated that torture is “prohibited not only by a specific, universal, and obligatory norm but by one that reaches the level of *jus cogens*.” Id. at 795. Hence, the Court recognized that *jus cogens* norms are not the only international law violations that are specific, universal, and obligatory. In addition to torture, the Court also found that arbitrary detention was actionable under the ATCA. Id. In its analysis, the Court did

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<sup>8</sup> Siderman de Blake v. Republic of Argentina, 965 F.2d 699 (9th Cir. 1992) is also distinguishable because it did not address the status of international law for purposes of the Alien Tort Claims Act but rather in the context of the Foreign Sovereign Immunities Act. Specifically, the Ninth Circuit rejected the argument that the Foreign Sovereign Immunities Act contained an implicit exception to sovereign immunity for violations of *jus cogens* principles.

not indicate whether the prohibition against arbitrary detention had attained the status of a *jus cogens* norm. For purposes of the Alien Tort Claims Act, it simply did not matter.

By definition, customary international law is neither nominal nor hortatory. It must contain explicit obligations that are recognized as binding by states in order to constitute customary international law. In the absence of either the objective element (consistent state practice) or the subjective element (*opinio juris*), customary international law does not exist.<sup>9</sup> Hence, both customary international law and *jus cogens* norms may be defined as specific, universal, and obligatory.

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<sup>9</sup> As a result, several courts have dismissed claims under the ATCA that were based on norms that were deemed as insufficiently obligatory, universal, or definable. See, e.g., Kruman v. Christie's International PLC, 2001 U.S. Dist. LEXIS 712 (S.D.N.Y. 2001); Guinto v. Marcos, 654 F. Supp. 276, 280 (S.D. Cal. 1986); Abiodun v. Martin Oil Service, Inc., 475 F.2d 142, 145 (7th Cir. 1973); Valanga v. Metropolitan Life Ins., 259 F. Supp. 324 (E.D. Pa. 1966).

Moreover, the character of customary international law does not mean that every nation must assent to its development.<sup>10</sup> As noted in the Restatement (Third) § 102(2), “[c]ustomary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.” See also Restatement (Third) § 102 cmt. b (“A practice can be general even if it is not universally followed . . .”). In Forti v. Suarez-Mason, 694 F. Supp. 707, 709 (N.D. Cal. 1988), the district court indicated that every nation need not agree that a particular tort violates international law. “To meet this burden, plaintiffs need not establish unanimity among nations. Rather, they must show a general recognition among states that a specific practice is prohibited.”

For these reasons, the category of claims actionable under the ATCA should not be limited to violations of *jus cogens* principles of international law. Rather, it applies to the broader realm of customary international law. This is consistent with the text of the ATCA, the historical record, and case law.

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<sup>10</sup> See Military and Paramilitary Activities (Nicar. v. U.S.) 1986 I.C.J. 14, 98 (June 27) (“The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolute rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule.”).

## II.

### **INTERNATIONAL LAW DOES NOT REQUIRE ACTIVE PARTICIPATION TO ESTABLISH CIVIL LIABILITY**

U.S. courts have long recognized that individuals may be held civilly liable for tortious violations of customary international law even if they did not direct or actively participate in such acts. In **The Amiable Nancy**, 1 F. Cas. 765 (Cir. Ct., D. N.Y., 1817), for example, the Circuit Court considered whether victims of piracy could sue the owners of the ship whose crew had preyed upon them. According to the Circuit Court, “[i]t has long been regarded as a general principle of maritime law, and not resulting from any special contract, that owners of a privateer are liable for torts committed by captains whom they may employ; and whatever doubt may have once existed as to the extent of this responsibility, it is now well settled, that it is not limited by the value of the privateer, which would often prove a very inadequate compensation, but that they are personally accountable for the whole of the injury committed.” **Id.** at 768. This position was affirmed by the U.S. Supreme Court, which held that the owners were liable, notwithstanding the fact that they were “innocent of the demerit of this transaction, having neither directed it, nor countenanced it, nor participated in it

in the slightest degree.”<sup>11</sup> The Amiable Nancy, 16 U.S. 546, 559 (1818). See also Harmony v. United States, 43 U.S. 210, 234-235 (1844).

Recent cases have emphasized the notion of individual liability for violations of international law in more emphatic terms. In Eastman Kodak Co. v. Kavlin, 978 F. Supp. 1078 (S.D. Fla. 1997), for example, the district court noted that customary international law prohibits conspiring to commit violations of international human rights law, even when such conspiracy occurs between private individuals and foreign governments.

**As a matter of initial impression, the Court believes that it would be a strange tort system that imposed liability on state actors but not on those who conspired with them to perpetrate illegal acts through the coercive use of state power. Although the negative prohibitions of our own Constitution generally extend only to state action, those**

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<sup>11</sup> **The finding of liability in these cases is supported by several federal statutes, including 18 U.S.C. § 1657, which establishes criminal liability for “[w]hoever consults, combines, confederates, or corresponds with any pirate or robber upon the seas, knowing him to be guilty of any piracy or robbery . . . ,” and 18 U.S.C. § 1654, which establishes criminal liability for “whoever purchases any interest in any” private vessel of war or privateer “with a view to share in the profits thereof . . . .” See also United States v. Howard, 26 F. Cas. 390 (C.C. Pa. 1818).**

**who conspire with state actors to invade the constitutional rights of others may be held liable along with the state actors.**

**Id. at 1091. Indeed, the District Court in Eastman Kodak Co. cited Hilao v. Estate of Marcos, 103 F.3d at 776 to support the proposition that “the ATCA reaches conspiracies so long as some state actor is involved.” Eastman Kodak Co. v. Kavlin, 978 F. Supp. at 1091. See also Bodner v. Banque Paribas, 114 F. Supp.2d 117, 128 (E.D.N.Y. 2000) (allegations that defendant banks aided and abetted the Vichy and Nazi regimes to plunder plaintiffs’ private property, and facilitated Nazi genocide and other violations of international law are actionable under the ATCA); Carmichael v. United Technologies Corp., 835 F.2d 109, 113 (5th Cir. 1988) (assuming, but not deciding, that “the Alien Tort Statute does confer subject matter jurisdiction over private parties who conspire in, or aid and abet, official acts of torture by one nation against the citizens of another nation.”)**

The notion of individual liability, even in the absence of active participation, is also recognized in international criminal law, where individual responsibility may be established for various kinds of conduct, including planning, instigating, ordering, committing or otherwise aiding or abetting in the planning, preparation, or execution of an illegal act. The degree of participation in a particular act, from passive conduct

to active participation, is generally expressed in the range of punishment accorded to such acts. From the Nuremberg tribunals to the recent case law of the International Criminal Tribunals for the Former Yugoslavia and Rwanda, the notion of individual responsibility for violations of international law and the various kinds of conduct that can give rise to such responsibility are well-established.

In Doe v. Unocal, 110 F. Supp. 2d at 1310, the District Court suggests that international law requires active participation in illegal conduct in order to establish liability. To support its interpretation, the District Court discusses three decisions issued by the United States Military Tribunals established pursuant to Control Council Law No. 10 at the end of the Second World War: United States v. Flick, 6 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10 (1952); United States v. Krauch, 8 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10 (1952); and United States v. Krupp, 9 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10 (1950). According to the District Court, these cases hold that “liability requires participation or cooperation in the forced labor practices.” Doe v. Unocal, 110 F. Supp.2d at 1310. In fact, however, a careful reading of these cases supports the position that liability under international law is not

limited exclusively to individuals who actively participate in violations of international law.<sup>12</sup> Moreover, the Military Tribunal decisions were influenced by

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<sup>12</sup> It should be noted that Article II(2) of Control Council Law No. 10, which authorized the prosecution of persons guilty of war crimes, crimes against peace, and crimes against humanity, identified several forms of individual acts that could give rise to liability.

Any person without regard to nationality or the capacity in which he acted, is deemed to have committed a crime as defined in paragraph 2 of this Article, if he was (a) a principal or (b) was an accessory to the commission of any such crime or ordered or abetted the same or (c) took a consenting part herein or (d) was connected with plans or

evidentiary limitations and historical context and are, therefore, distinguishable.

For example, the Military Tribunal in United States v. Flick held that the actions of several German industrialists, including Friedrich Flick and Bernhard Weiss, in procuring slave labor gave rise to criminal liability. United States v. Flick, at 1202. In contrast, the Tribunal held that four other German industrialists were entitled to the affirmative defense of necessity and were not subject to criminal liability. According to the Tribunal, an individual was entitled to the affirmative

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enterprises involving its commission or (e) was a member of any organization or group connected with the commission of any such crime or (f) with reference to paragraph 1(a), if he held a high political, civil or military (including General Staff) position in Germany or in one of its Allies, co-belligerents or satellites or held high position in the financial, industrial or economic life of any such country.

Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, Dec. 20, 1945.

defense of necessity if he could establish that his actions were coerced or taken under duress. Id. at 1201. The District Court in Doe v. Unocal, 110 F. Supp.2d at 1309 indicates that this case stands for the proposition that only active participation may give rise to criminal liability. There are several factual elements, however, which mitigate this reading of the Flick case. The Military Tribunal noted the limited participation of the four defendants in the development and operation of the slave labor program. “[I]t is clear that the slave-labor program had its origin in Reich governmental circles and was a governmental program, and that the defendants had no part in creating or launching this program.” United States v. Flick, at 1196. Indeed, “the defendants had no actual control of the administration of such program even where it affected their own plants.” Id. Notwithstanding these limitations, the Tribunal emphasized that the four defendants who were found not guilty were only acquitted of their crimes due to the necessity defense. Id. at 1199-1202.

In United States v. Krauch, the Military Tribunal indicated that personal criminal liability for war crimes is not limited exclusively to active participation. Rather, it may be established if a defendant “knowingly participated in an act of plunder or spoliation because he was either (a) a principal, or (b) an accessory to the commission of any such crime, or ordered, or abetted the same, or (c) took a consenting part therein, or (d) was connected with plans or enterprises involving its

commission, or (e) was a member of an organization or group connected with the commission of any such crime.” United States v. Krauch, at 1137. The Krauch decision is significant because it emphasized that the corporate structure cannot be used as a mechanism for avoiding liability. “[O]ne may not utilize the corporate structure to achieve an immunity from criminal responsibility for illegal acts which he directs, counsels, aids, orders, or abets.” Id. at 1153. In addition, the Military Tribunal reiterated the holding in Flick, which differentiated between defendants that were compelled to act in violation of international law due to coercion and defendants that were under no such compulsion. “It is plain, therefore, that Hermann Roechling, von Gemmingen, and Rodenhauser, like Weiss and Flick, were not moved by a lack of moral choice, but, on the contrary, embraced the opportunity to take full advantage of the slave-labor program. Indeed, it might be said that they were, to a very substantial degree, responsible for broadening the scope of that reprehensible system.” Id. at 1179. While the Military Tribunal indicated that several defendants did not exercise initiative in obtaining forced labor, a point emphasized by the District Court in Doe v. Unocal, 110 F. Supp.2d at 1310, the Military Tribunal also noted that there was insufficient evidence that these defendants knew of the initiative being taken by other members of the I.G. Farben corporation in acquiring forced labor. The Military Tribunal also emphasized that the defense of necessity shielded them from any

liability. United States v. Krauch, at 1193.

While the decisions of the U.S. Military Tribunals in the Flick and Krauch cases reveal a broader interpretation of liability under international law than that suggested by the District Court, it must also be emphasized that these cases involved a unique scenario. First, the Military Tribunal cases involved determinations of criminal liability. By contrast, the Unocal litigation involves determinations of civil liability, which require different standards than criminal liability. Second, the Military Tribunal cases applied the necessity defense as an affirmative defense for several defendants. By contrast, the necessity defense is inapplicable to the facts of the Unocal litigation.

A review of decisions issued by military and civilian tribunals affirms that international law does not require active participation to establish liability, even in the criminal context. Rather, several activities may give rise to liability under international law, including planning, instigating, ordering, committing or otherwise aiding or abetting in the planning, preparation, or execution of a crime. See, e.g., The Zyklon B Case (Trial of Bruno Tesch and Two Others), I Law Reports of Trials of War Criminals 93 (Brit. Mil. Ct. 1946) (imposing liability on German industrialists for supplying Zyklon B poison gas to Nazi concentration camps); The Dachau Concentration Camp Trial, XI Law Reports of Trials of War Criminals 5, 13 (U.S.

Mil. Ct. 1945) (imposing liability on the staff of the Dachau Concentration Camp for aiding, abetting, and participating in the mistreatment of prisoners; to establish liability against each of the accused, the prosecution had to show that: “(1) that there was in force at Dachau a system to ill-treat the prisoners and commit the crimes listed in the charges, (2) that each accused was aware of the system, and (3) that each accused, by his conduct ‘encouraged, aided and abetted or participated’ in enforcing this system.”). See generally Jordan Paust, et al., International Criminal Law 39-43 (2d ed. 2000).

More recently, the Statutes for the International Criminal Tribunals for the former Yugoslavia and Rwanda recognize a variety of conduct that may give rise to individual criminal liability, including planning, instigating, ordering, committing or otherwise aiding or abetting in the planning, preparation, or execution of a crime.<sup>13</sup> See Statute for the International Criminal Tribunal for the former Yugoslavia, art.

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<sup>13</sup> International criminal law also recognizes command responsibility, where an individual may be held liable for the actions of persons under his or her effective authority or control. See, e.g., Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/9. (1998). See also Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995), cert. denied, 518 U.S. 1005 (1996).

7(1), U.N. Doc. S/25704, annex (1993), reprinted in 32 I.L.M. 1192 (1993); Statute of the International Criminal Tribunal for Rwanda, art. 6(1), reprinted in 33 I.L.M. 1602 (1994).

Several cases decided by the International Criminal Tribunals for the former Yugoslavia and Rwanda have elaborated on the various forms of conduct that give rise to individual criminal liability. In Prosecutor v. Furundzija, IT-95-17/1-PT (Dec. 10, 1998), reprinted in 38 I.L.M. 317 (1999), for example, the Trial Chamber for the International Criminal Tribunal for the former Yugoslavia indicated that “not only the commission of rape or serious sexual assault, but also the planning, ordering or instigating of such acts, as well as aiding and abetting in the perpetration, are prohibited.” Id. at para. 187. Seeking to clarify these various forms of participation, the Trial Chamber conducted a detailed analysis of the *actus reus* and *mens rea* requirements for aiding and abetting. With regard to the *actus reus*, the Trial Chamber considered whether the assistance given by the aider and abettor need be tangible in nature or may consist only of encouragement or moral support. Id. at 192.

After reviewing several cases, including the Dachau Concentration Camp and Zyklon B cases, the Trial Chamber indicated that assistance in criminal activity need not be tangible and can consist of moral support. Indeed, mere presence at the scene of a crime suffices to establish liability if it has “a significant legitimizing or encouraging

effect on the principals.” Id. at para. 232. With regard to the *mens rea*, the Trial Chamber considered whether mere knowledge that actions assist the perpetrator in the commission of the crime are sufficient to establish liability as an aider or abettor. Id. at para. 236. According to the Trial Chamber, “the clear requirement in the vast majority of the cases is for the accomplice to have knowledge that his actions will assist the perpetrator in the commission of the crime. . . . Moreover, it is not necessary that the aider and abettor should know the precise crime that was intended and which in the event was committed. If he is aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed, he has intended to facilitate the commission of that crime, and is guilty as an aider and abettor.” Id. at para. 246.

In sum, the Trial Chamber holds the legal ingredients of aiding and abetting in international criminal law to be the following: the actus reus consists of practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime. The mens rea required is the knowledge that these acts assist the commission of the offence.<sup>14</sup>

Id. at para. 249. As the Trial Chamber emphasized, *quis per alium facit per se ipsum*

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<sup>14</sup> In Prosecutor v. Furundzija, at para. 224, the Trial Chamber cited the Hechingen Deportation case, where the court “pointed out that the culpability of an aider and abettor is not negated by the fact that his assistance could easily have been obtained from another.”

*facere videtur* – he who acts through others is regarded as acting himself. Id. at para. 256.

In Prosecutor v. Akayesu, ICTR-96-4-T (Sept. 2, 1998), reprinted in 37 I.L.M. 1399 (1998), the Trial Chamber for the International Criminal Tribunal for Rwanda affirmed that an individual “can be held responsible for the criminal acts of others where he plans with them, instigates them, orders them or aids and abets them to commit those acts.” Id. at para. 472. As in Furundzija, the Trial Chamber in Akayesu elaborated on the concept of aiding and abetting.

Article 6 (1) declares criminally responsible a person who "(...) or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 4 (...)". **Aiding** and **abetting**, which may appear to be synonymous, are indeed different. Aiding means giving assistance to someone. Abetting, on the other hand, would involve facilitating the commission of an act by being sympathetic thereto. The issue here is to whether the individual criminal responsibility provided for in Article 6(1) is incurred only where there was aiding and abetting at the same time. The Chamber is of the opinion that either aiding or abetting alone is sufficient to render the perpetrator criminally liable. In both instances, it is not necessary for the person aiding or abetting another to commit the offence to be present during the commission of the crime.

Id. at para. 484 (emphasis in original). The Trial Chamber also elaborated upon complicity, which “is viewed as a form of criminal participation by all criminal law

systems, notably, under the Anglo-Saxon system (or Common Law) and the Roman-Continental system (or Civil Law).”<sup>15</sup> Id. at para. 527.

[C]omplicity is borrowed criminality (criminalité d’emprunt). In other words, the accomplice borrows the criminality of the principal perpetrator. By borrowed criminality, it should be understood that the physical act which constitutes the act of complicity does not have its own inherent criminality, but rather it borrows the criminality of the act committed by the principal perpetrator of the criminal enterprise. Thus, the conduct of the accomplice emerges as a crime when the crime has been consummated by the principal perpetrator. The accomplice has not committed an autonomous crime, but has merely facilitated the criminal enterprise committed by another.

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<sup>15</sup> International law recognizes complicity in several ways. See, e.g., Draft Articles on State Responsibility, article 16, U.N. GAOR, 51st Sess., Supp. No. 10, at 125-151, U.N. Doc. A/51/10 and Corr. 1 (1998), reprinted in 37 I.L.M. 440 (1998) (“A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) That State does so with the knowledge of the circumstances of the internationally wrongful act; and (b) The act would be internationally wrongful if committed by that State.”). See also Jordan Paust et al., International Law and Litigation in the United States 516-517, 565-566 (2000).

Id. at para. 528. The Trial Chamber emphasized that the accomplice need not even wish that the principal offence be committed. “[A]nyone who knowing of another’s criminal purpose, voluntarily aids him or her in it, can be convicted of complicity even though he regretted the outcome of the offence.” Id. at para. 539.

The Rome Statute of the International Criminal Court contains similar provisions that establish individual criminal liability for various forms of participation. Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/9. (1998). Article 25, for example, provides that a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

- (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
- (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
- (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
- (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either: (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or (ii) Be made in the knowledge of the intention of the group to commit the crime . . . .”

Thus, the Rome Statute distinguishes between “aiding and abetting” and “common purpose,” either of which may give rise to criminal liability. In Prosecutor v. Furundzija, the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia referenced the Rome Statute in recognizing a distinction between: (1) aiding and abetting; and (2) participating in a common criminal plan.

Article 25 of the Rome Statute distinguishes between, on the one hand, a person who “contributes to the commission or attempted commission of a crime by a group of persons acting with a common purpose” where the contribution is intentional and done with the purpose of furthering the criminal activity or criminal purpose of the group or in the knowledge of the intention of the group to commit the crime, from, on the other hand, a person who, “for the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission.” Thus, two separate categories of liability for criminal participation appear to have crystallized in international law – co-perpetrators who participate in a joint criminal enterprise, on the one hand, and aiders and abettors, on the other.

Prosecutor v. Furundzija, at para. 216.

The Draft Code of Crimes against Peace and Security of Mankind provide similar distinctions between the various forms of conduct which may establish individual criminal liability under international law. U.N. GAOR, 51st Sess., Supp.

No. 10, at 9, U.N. Doc. A/51/10 (1996), reprinted in 2 Yearbook of the International Law Commission pt. 2 (1996). Article 2(3) provides that an individual shall be responsible for such acts as genocide, war crimes, and crimes against humanity if that individual:

- (a) intentionally commits such a crime;
- (b) orders the commission of such a crime which in fact occurs or is attempted;
- (c) fails to prevent or repress the commission of such a crime in the circumstances set out in article 6;
- (d) knowingly aids, abets or otherwise assists, directly and substantially, in the commission of such a crime, including providing the means for its commission;
- (e) directly participates in planning or conspiring to commit such a crime which in fact occurs;
- (f) directly and publicly incites another individual to commit such a crime which in fact occurs;
- (g) attempts to commit such a crime by taking action commencing the execution of a crime which does not in fact occur because of circumstances independent of his intentions.

In the accompanying commentary to the Draft Code, the International Law Commission indicated that each subparagraph of Article II(3) describes a distinct act which may give rise to individual criminal activity.

In sum, international law establishes liability for various forms of activity, involving varying degrees of individual participation, from passive conduct to active

participation.<sup>16</sup> The degree of participation in a particular act is generally expressed in

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<sup>16</sup> See also Criminal Law Convention on Corruption, Jan. 27, 1999, art. 18(3), E.T.S. No. 173 (establishes criminal liability for persons who are perpetrators, instigators, or accessories); Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, art. 1(2), reprinted in 37 I.L.M. 1 (1998) (promotes the establishment of criminal liability for complicity in, including incitement, aiding and abetting, or authorization of an act of bribery of a foreign public official); Inter-American Convention against Corruption, March 29, 1996, art. VI(1), reprinted in 35 I.L.M. 724 (1996) (establishes liability for participation as a principal, coprincipal, instigator, accomplice or accessory after the fact, or in any other manner, in the commission or attempted commission of, or in any collaboration or conspiracy to commit any of the prohibited acts); Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, art. 6, Sept. 7, 1956, 266 U.N.T.S. 3 (establishes liability for enslaving another person or inducing another person, or attempting these acts, or being accessory thereto, or being a party to a conspiracy to accomplish any such acts); Convention on the Prevention and Punishment of the Crime of Genocide, Jan. 12,

the range of punishment accorded to such acts.

## CONCLUSION

Throughout the past twenty years, the Alien Tort Claims Act has played a critical role in upholding fundamental principles of international law. From the seminal Filartiga decision to the Marcos litigation, the ATCA has provided victims of human rights violations with the ability to seek redress in U.S. courts for these violations of international law. To restrict the claims actionable under the ATCA to only violations of *jus cogens* principles of international law is wholly inconsistent with the express terms of the ATCA, the historical record, and case law. It would rewrite a clear federal statute that Congress adopted over 200 years ago and that has been affirmed in numerous judicial decisions. In addition, international law recognizes various kinds of conduct which may give rise to liability. Accordingly, efforts to limit responsibility for violations of international law through the use of corporate structure or other mechanisms are contrary to established precedent.

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1951, art. III, 78 U.N.T.S. 277 (establishes criminal liability for a variety of activities, including genocide, attempt to commit genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, and complicity in genocide).

For these reasons, *Amici* respectfully submit this brief and urge the Court to reverse the District Court's rulings on these issues.

Dated: February 28, 2001

Respectfully Submitted,

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February 28, 2001

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