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Corporate Liability for Conduct of a Foreign Government: The Ninth Circuit Adopts a “Reason to Know” Standard for Aiding and Abetting Liability Under the Alien Tort Claims Act

EDWIN V. WOODSOME, JR. & T. JASON WHITE

I. INTRODUCTION

On September 18, 2002, the Ninth Circuit Court of Appeals found triable issues of fact in *Doe I v. Unocal Corporation*, requiring a trial to determine whether Unocal Corporation could be liable under the Alien Tort Claims Act (ATCA) for alleged conduct of the Myanmar Government related to a pipeline built in Myanmar in the mid-1990s.¹ The Ninth Circuit noted that Unocal chose to invest in a natural gas project in Myanmar, whose government had been accused of past human rights violations. Based on this fact, the court concluded that Unocal had reason to know that the Myanmar government would commit similar violations in conjunction with Unocal’s investment in the natural gas project.² Therefore, according to the Ninth Circuit, Unocal may be liable for aiding and abetting the Myanmar military’s illegal policing operations in the pipeline construction area.

In analyzing the international aiding and abetting case law, the Ninth Circuit primarily relied on *Prosecutor v. Furundzija*,³ a case from the International Criminal Tribunal for the Former Yugoslavia. The

1. *Doe I v. Unocal Corp.*, Nos. 00-56603, 00-57197, 00-56628, 00-57195, 2002 WL 31063976 at *15, *17 (9th Cir. Sept. 18, 2002). This decision is currently under review en banc. *Doe I v. Unocal Corp.*, No. 00-56603, 2003 WL 359787 (9th Cir. Feb. 14, 2003). Accordingly, the en banc panel may reject or alter the standard adopted by the *Doe I* court, discussed herein.

2. *Id.* at *17.

3. 38 I.L.M. 317 (Int’l Crim. Tribunal for the Former Yugoslavia 1999), available at <http://www.un.org/icty/furundzija/appeal/judgement/fur-aj000721e.pdf>.

Ninth Circuit held that a private actor may be liable for the conduct of a foreign country's military under an international aiding and abetting theory.⁴ In *Furundzija*, a military commander was accused of assisting his subordinates in wrongful conduct because he was present and in command of the soldiers while they committed criminal acts.⁵ The *Furundzija* decision was based on prior cases of military officials aiding and abetting in committing human rights violations abroad, rather than cases involving private actors accused of aiding and abetting government officials, as in *Doe I v. Unocal*.⁶

In the Ninth Circuit, an ATCA action must be premised on a violation of a "specific, universal and obligatory" international norm.⁷ In applying the *Furundzija* standard to a U.S. company for the conduct of a foreign government, however, the Ninth Circuit has abandoned the "specific, universal and obligatory" standard for determining international law. As Judge Reinhardt recognized in his concurring opinion, the majority's standard is based upon a concept of aiding and abetting that is not part of customary international law, but is merely "an undeveloped principle of international law promulgated by a recently-constituted ad hoc international tribunal."⁸ *Doe I*, therefore, expands the potential liability for U.S. companies with investments in third world countries such as Myanmar. The irony of the Ninth Circuit's decision is that Congress expressly permitted Unocal's investment in its sanctions legislation against Myanmar just a few years earlier. The legislation permitted companies with existing investments in the country, such as Unocal, to maintain those investments.⁹

Additionally, contrary to Congress's determination, the *Doe I* decision permits litigation that challenges foreign investment decisions, even if the U.S. government has previously concluded that U.S. foreign policy provides for such investments. In recent years, plaintiffs have increasingly used the ATCA to assert claims against U.S. companies for alleged human rights violations committed by the governments of

4. See *Doe I v. Unocal*, 2002 WL 31063976, at *17.

5. See *Furundzija*, 38 I.L.M. at 328 (1999).

6. 2002 WL 31063976 at *36 n.26.

7. *In re Estate of Ferdinand Marcos, Human Rights Litig.*, 25 F.3d 1467, 1475-76 (9th Cir. 1994).

8. *Doe I v. Unocal*, 2002 WL 31063976, at *27. Judge Reinhardt refers to the *Doe I* majority aiding and abetting standard as "novel," "uncertain," and "inchoate." *Id.* at *29-30.

9. Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 570, 110 Stat. 3009-166 to 3009-167 (1996); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 368-69 (2000).

foreign states in which they invest.¹⁰ The *Doe I* decision will affect those cases, as well as any untold future litigation involving U.S. corporate foreign investment.

The facts of the *Doe I* decision further illustrate the massive scope of potential future liability of U.S. companies. All responsibility for the construction of the pipeline rested with Total Myanmar Exploration and Production (Total), a French energy company, not Unocal. Indeed, the Ninth Circuit found that the project would have occurred regardless of Unocal's minority investment.¹¹ Remarkably, the only fact that the Ninth Circuit cited for its holding that Unocal aided and abetted the Myanmar military was that Total met with Myanmar military officials shortly after insurgents ambushed and killed five pipeline workers.¹²

This Article summarizes the most relevant ATCA cases leading up to the *Doe I* decision in Part II, and discusses the *Doe I* decision in Part III. In Part IV, this Article discusses the international cases relied upon in *Doe I*. Part V explains why those authorities do not support the majority's expansive theory of international tort liability.

This Article offers an analytical framework that classifies the cases into categories, which reflect the status of the defendant as either a private actor or public official. The analytical framework will identify the degree of culpability between the defendant and the wrongful conduct. The Ninth Circuit previously held that the private actor must "control" the state official to be liable for the official's wrongful conduct.¹³ The assistance that private actors provide to a government official should therefore be significantly greater than that of a government official to be liable as an aider and abettor, because private actors do not control government officials. This Article concludes that the Ninth Circuit should adopt a standard for aiding and abetting under the ATCA that requires a mens rea reflective of the unique relationship between private actors and governmental officials.

10. See *infra* Part II(B).

11. *Doe v. Unocal Corp.*, 248 F.3d 915, 925 (9th Cir. 2001).

12. Total met with the Myanmar officials to ensure that the workers would not be near the fighting between the insurgents and the Myanmar military. Unocal had no employees involved in the construction of the pipeline, never met with or had any contact with Myanmar officials regarding the pipeline, and was not aware of any improper conduct of the Myanmar military during the pipeline construction. See *Doe I v. Unocal*, 2002 WL 31063976, at *2-3.

13. The Ninth Circuit has previously held that the private actor must "control" the state official to be liable for the official's wrongful conduct. *Arnold v. IBM*, 637 F.2d 1350, 1356-57 (9th Cir. 1981). See also *King v. Massarweh*, 782 F.2d 825, 829 (9th Cir. 1986) (requiring control to establish causation).

II. THE HISTORY OF THE ATCA

The ATCA has a limited legislative history. As one judge expressed, "This old but little used section is a kind of legal Lohengrin; although it has been with us since the First Judiciary Act . . . no one seems to know whence it came."¹⁴ The ATCA was enacted as part of the Judiciary Act of 1789, yet the House debates over the Judiciary Act do not mention the ATCA directly or indirectly.¹⁵

The ATCA states that "[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."¹⁶ Although the language of the statute is broad, the ATCA's history suggests that its purpose was probably to ensure that U.S. federal courts would have jurisdiction over claims with international implications, and thereby prevent state courts from mishandling them.¹⁷ Until 1980, no case explicitly held that the ATCA provided a substantive cause of action, and there were only two cases in which courts relied upon as a basis for federal jurisdiction.¹⁸

A. Jurisdiction, a Cause of Action, and the Judicial Standard Under the ATCA

The ATCA first received new life from the Second Circuit in 1980, after over 190 years of dormancy. In *Filartiga v. Pena-Irala*,¹⁹ the father and daughter plaintiffs were citizens of Paraguay. They claimed that in 1976 the defendant, the former Inspector General of Police in Asunción, Paraguay, kidnapped and tortured the plaintiffs' relative to death. The defendant entered the United States in 1978 and was living in Brooklyn, New York when the plaintiffs learned of his presence in the country.²⁰ The court found that:

14. *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975).

15. See 1 ANNALS OF CONG. 782, 782-833 (1789).

16. Alien Tort Claims Act, 28 U.S.C. § 1350 (2001). The ATCA as enacted in 1789 stated that "the district courts . . . shall also have cognizance, concurrent with the courts of the several states, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States." Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 73, 76-77.

17. *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 104 n.10 (2d Cir. 2000).

18. *Bolchos v. Darrell*, 3 F. Cas. 810, 810 (D.S.C. 1795) (No. 1607); see also *Abdul-Rahman Omar Adra v. Clift*, 195 F. Supp. 857, 866 (D. Md. 1961).

19. 630 F.2d 876 (2d Cir. 1980).

20. *Id.* at 878-79.

[I]n light of the universal condemnation of torture in numerous international agreements, and the renunciation of torture as an instrument of official policy by virtually all of the nations of the world (in principle if not in practice) we find that an act of torture committed by a state official against one held in detention violates established norms of the international law of human rights, and hence the law of nations.²¹

In ascertaining the scope of the law of nations, the court stated that one should look to “works of jurists, writing professedly on public law; or [to] the general usage and practice of nations; or [to] judicial decisions recognizing and enforcing that law.”²²

Importantly, the court “updated” the ATCA by stating that “courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today.”²³ After examining various international authorities, the court found that the act of torture by a state official violates the law of nations.²⁴ Accordingly, the court ruled that the ATCA provided federal jurisdiction in that case.²⁵

Subsequently, in 1984, the D.C. Circuit struggled with the broad scope of potential liability created by *Filartiga* in deciding *Tel-Oren v. Libyan Arab Republic*.²⁶ The plaintiffs in *Tel-Oren* were survivors and representatives of persons murdered in a 1978 armed attack on a civilian bus in Israel. Plaintiffs filed suit against various Middle Eastern organizations known to have supported terrorism, alleging various tortious acts in violation of the law of nations, U.S. treaties, and the common law.²⁷

In affirming the district court’s dismissal, the circuit court filed three concurring opinions adopting different reasons for affirming the result. Judge Bork and Judge Robb roundly criticized the *Filartiga* decision that the ATCA provided an independent cause of action. Judge Bork stated that “it is essential that there be an explicit grant of a cause of action before a private plaintiff be allowed to enforce principles of international law in a federal tribunal.”²⁸ Although Judge Edwards

21. *Id.* at 880.

22. *Id.*

23. *Id.* at 881.

24. *Id.* at 884.

25. For a more recent treatment of the ATCA by the Second Circuit, see *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995).

26. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 801 (D.C. Cir. 1984).

27. *Id.* at 775.

28. *Id.* at 801 (Bork, J., concurring).

disagreed with Judge Bork and Judge Robb on their criticism of *Filartiga*, he acknowledged what is even truer today than in 1984:

This case deals with an area of law that cries out for clarification by the Supreme Court. We confront at every turn broad and novel questions about the definition and application of the "law of nations." As is obvious from the laborious efforts of opinion writing, the questions posed defy easy answers.²⁹

After *Filartiga* and *Tel-Oren*, the circuits were split as to whether plaintiffs needed an international statute that provided a right to sue before courts could entertain an ATCA case alleging forced labor violations. In 1994, the Ninth Circuit agreed with *Filartiga* in deciding *In re Estate of Ferdinand Marcos Human Rights Litigation*.³⁰ Plaintiffs were a large number of Philippine citizens who claimed they were arrested and tortured during Ferdinand Marcos's presidency in the Philippines. The *Marcos* court found that the ATCA provides an independent cause of action by concluding that it "is unnecessary that international law provide a specific right to sue....[N]othing more than a violation of the law of nations is required to invoke section 1350."³¹ The *Marcos* court further stated that "[a]ctionable violations of international law must be of a norm that is specific, universal, and obligatory."³² Thus, the Ninth Circuit in *Marcos* found that the plaintiffs successfully alleged a cause of action under the ATCA because torture committed by military intelligence officials is prohibited by the law of nations.³³

The *Marcos* court's decision that the ATCA provides a cause of action for all claims, however, is mere dicta. In 1991 Congress passed the Torture Victims Protection Act (TVPA), which granted a specific cause of action for torture and murder.³⁴ The plaintiffs in *Marcos*, therefore, did not require the ATCA to maintain a cause of action for federal jurisdiction; the jurisdiction was proper under the TVPA. Although the *Marcos* ruling on the ATCA is not binding, it

29. *Id.* at 775.

30. 25 F.3d 1467, 1475 (9th Cir. 1994).

31. *Id.* at 1475.

32. *Id.* (interpreting *Filartiga*, 630 F.2d at 881; and *Tel-Oren*, 726 F.2d at 781).

33. *In re Estate of Ferdinand Marcos, Human Rights Litig.*, 25 F.3d at 1474.

34. The TVPA states, in relevant part:

An individual who, under actual or apparent authority, or color of law, of any foreign nation - (1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative.

Torture Victim Protection Act, Pub. L. No. 102-256, § 2, 106 Stat. 73 (1992).

demonstrates that Judge Bork's concerns expressed in *Tel-Oren* were becoming less compelling to a federal judiciary as it continued to expand the scope of the ATCA.

The *Filartiga* and *Marcos* decisions expanded the scope of the ATCA significantly.³⁵ If the ATCA were merely a jurisdictional statute, as two *Tel-Oren* judges surmised, plaintiffs would need to invoke an international statute or treaty that provides a right to sue. This would eliminate many ATCA claims that do not allege torture or murder because only a limited number of international statutes and treaties provide such a right. Based on *Filartiga* and *Marcos*, however, plaintiffs merely need to show that there has been a violation of an international norm that is specific, universal, and obligatory.³⁶

As noted below, the *Doe I* decision departs from the "specific, universal and obligatory" standard by adopting an aiding and abetting liability standard from a recent ad hoc criminal tribunal, and then arbitrarily modifying that standard to fit the facts of the case.

B. Impact of the ATCA Cases on Foreign Policy

Filartiga and its progeny were watersheds for non-governmental organizations that are averse to U.S. corporate investment in areas of the world with burgeoning free market economies, such as Southeast Asia and Africa. Subsequent litigation under the ATCA has exploded, including lawsuits against Exxon Mobil,³⁷ Texaco,³⁸ Chevron,³⁹ Freeport-McMoran, Inc.,⁴⁰ Ford Motor Company,⁴¹ Coca-Cola,⁴² and various other U.S. corporations conducting business overseas.

The post-*Filartiga* ATCA cases generally involve foreign nationals attempting to hold American companies that invest overseas liable for alleged abuses committed by the host country's government,

35. The Eleventh Circuit has also recognized the ATCA as providing an independent cause of action. See *Abebe-Jira v. Negewo*, 72 F.3d 844, 847-48 (11th Cir. 1996).

36. For recent ATCA decisions, see *In re World War II Era Japanese Forced Labor Litig.*, 164 F. Supp. 2d 1153 (N.D. Cal. 2001); *Joo v. Japan*, 172 F. Supp. 2d 52 (D.D.C. 2001) (commenting on the ATCA in dictum); *Bano v. Union Carbide Corp.*, 273 F.3d 120 (2d Cir. 2001).

37. Complaint, *Doe I v. Exxon Mobil Corp.*, No. 01-CV-1357 (D.D.C. June 20, 2001).

38. *Jota v. Texaco, Inc.*, 157 F.3d 153 (2d Cir. 1998); *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534 (S.D.N.Y. 2001).

39. Fourth Amended Complaint, *Bowoto v. Chevron Corp.*, No. C99-2506 (N.D. Cal. filed Aug. 30, 2002).

40. *Beanal v. Freeport-McMoran, Inc.*, 969 F. Supp. 363 (E.D. La. 1997), *aff'd*, 197 F.3d 161 (5th Cir. 1999).

41. *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424 (D.N.J. 1999).

42. *Bigio v. Coca-Cola Co.*, 239 F.3d 440 (2d Cir. 2001).

military, or police. The cases are increasingly undermining American foreign policy. For example, in *Doe v. Exxon Mobil Corporation*,⁴³ eleven residents of the Aceh region of Indonesia filed suit in federal court in Washington, D.C., claiming that the Indonesian military committed human rights abuses against them in furtherance of Exxon Mobil's operation of a natural gas facility.⁴⁴ The plaintiffs alleged that Exxon Mobil assisted the military by providing financial support to the military and by using the military to protect its operations.⁴⁵

The *Exxon Mobil* court contacted the U.S. State Department for assistance in the Court's assessment of the case's foreign policy implications. The State Department wrote that the case "would in fact risk a potentially serious adverse impact on significant interests of the United States, including interests related directly to the ongoing struggle against international terrorism."⁴⁶ The State Department also stated that the Indonesian government "may respond to the litigation by curtailing cooperation with the United States on issues of substantial importance to the United States."⁴⁷ The State Department also addressed the following issues of importance:

The United States . . . is actively seeking to assist Indonesia in reform efforts aimed at ending the kinds of abuses alleged in this litigation. Through improved training and support of security personnel, as well as judicial reform, these programs are designed to establish a higher degree of professionalism and respect for individual rights. Should the [Indonesian Government] withdraw from these programs in reaction to the litigation, it will impact adversely on our goal of improving Indonesia's treatment of all members of its population, including the people of Aceh.

In our experience, the government and people of Indonesia react most negatively to any perceived intrusion into areas of Indonesian sovereignty. We anticipate that adjudication of this case will be perceived in Indonesia as a U.S. court trying the [Indonesian government] for its conduct of a civil war in Aceh. All of the human rights abuses and injuries alleged in the complaint refer to conduct claimed to have been committed by the military and police forces of the [Indonesian government].

43. Complaint, *Doe v. Exxon Mobil Corp.*, No. 01-CV-1357 (D.D.C. June 20, 2001).

44. *Id.* at 1-7.

45. *Id.*

46. *Id.* at 1.

47. *Id.* at 2.

This litigation appears likely to further discourage foreign investment, particularly in extractive industries in remote or unstable areas that require security protection.

[W]e note that increasing opportunities for U.S. business abroad is an important aspect of U.S. foreign policy. Under the circumstances presented here, the adjudication of these claims could prejudice the Government of Indonesia and Indonesian businesses against U.S. firms bidding on contracts in extractive and other industries.⁴⁸

The State Department expressed similar views in *Sarei v. Rio Tinto PLC*.⁴⁹ The plaintiffs in *Rio Tinto* were residents of the island of Bougainville in Papua New Guinea.⁵⁰ They alleged that the defendant's mining operations on Bougainville destroyed the island's environment, harmed the health of the islanders, and incited a ten-year civil war.⁵¹ They alleged that the defendants were liable under the ATCA for war crimes, crimes against humanity, racial discrimination, and environmental harm in violation of international law.⁵² The *Rio Tinto* court contacted the State Department for its view on the foreign policy impact of adjudicating the *Rio Tinto* case in a U.S. district court. The State Department stated that the lawsuit "would risk a potentially serious adverse impact on the [Bougainville] peace process, and hence on the conduct of [United States] foreign relations."⁵³

The State Department's concerns expressed in *Exxon Mobil* and *Rio Tinto* are common to many other ATCA cases. ATCA cases, such as *Exxon Mobil* and *Rio Tinto*, will discourage foreign investment because U.S. companies will face uncertain litigation and liability for the conduct of governmental entities that they cannot control. These cases also discourage foreign countries from engaging U.S. companies in projects, fearing that a U.S.-based judge without foreign policy experience will subject them to international scrutiny.

Finally, citizens of foreign countries will suffer from the chilling effect caused by the ATCA cases because less foreign investment means fewer jobs and opportunities. As discussed below, the *Doe I*

48. Letter from William H. Taft, IV, The Legal Advisor of the Department of State, to Hon. Louis F. Oberdorfer, District Court Judge for the District of Columbia, on whether adjudication of the *Doe I v. Exxon Mobil* case would negatively impact the interests of the United States (July 29, 2002), available at <http://www.hrw.org/press/2002/08/exxon072902.pdf>.

49. *Sarei v. Rio Tinto P.L.C.*, 221 F. Supp. 2d 1116, 1180-81 (C.D. Cal. 2002).

50. *Id.* at 1120.

51. *Id.*

52. *Id.*

53. *Id.* at 1181.

decision merely exacerbates the State Department's foreign policy concerns expressed in *Exxon Mobil* and *Rio Tinto*.

III. THE *DOE I* DECISION

In 1992, Myanmar awarded to Total the rights to explore for natural gas in an area of the Andaman Sea. Total assigned to a Unocal subsidiary an undivided 28% minority interest in Total's rights under various contracts signed by Total and the Myanmar Government. A separate company was formed to build and operate a pipeline that would transport the gas from the Andaman Sea to the Thailand border.⁵⁴

The plaintiffs are former residents of the Tenasserim region of Myanmar, the region that housed the pipeline construction. They allege that they suffered personal injuries at the hands of the Myanmar military in the area of the pipeline construction. Several of them also allege that they were forced, without pay, to perform tasks for the military, such as carrying supplies and constructing military barracks.⁵⁵

The *Doe I* majority found that, through international aiding and abetting law, Unocal could be liable under the ATCA for the acts of the Myanmar military.⁵⁶ In adopting an international aiding and abetting standard, the Court relied on a Yugoslavian war crimes tribunal case, *Prosecutor v. Furundzija*,⁵⁷ as well as several other recent war crimes tribunal cases. As noted above, the Ninth Circuit has held that only violations of "specific, universal and obligatory" international norms are actionable under the ATCA.⁵⁸ The majority rationalized its reliance on these war criminal tribunal cases by stating that

[T]he standard for aiding and abetting in international criminal law is similar to the standard for aiding and abetting in domestic tort law, making the distinction between criminal and tort law less crucial in this context. Accordingly, District Courts are increasingly turning to the decisions by international *criminal* tribunals for instructions regarding the standards of international human rights law under our *civil* ATCA.⁵⁹

The majority adopted a modified version of the aiding and abetting standard articulated in *Furundzija*. Specifically, the majority found that

54. *Doe I v. Unocal*, 2002 WL 31063976, at *1.

55. *Id.* at *3-4.

56. *Id.* at *14-17.

57. Discussed *infra* Part IV(C)(2).

58. *Doe I v. Unocal*, 2002 WL 31063976, at *8.

59. *Id.* at *12.

under the ATCA a private actor may be liable for the conduct of a state actor if he has “actual or constructive (i.e., ‘reasonabl[e]’) ‘knowledge that [the accomplice’s] actions will assist the perpetrator in the commission of the crime,’”⁶⁰ and provides “practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime.”⁶¹ The majority then determined that the moral support element, part of the aiding and abetting standard adopted in *Furundzija*, was not applicable to the *Doe I* case because, according to the majority, “we are not . . . ‘bound’ by every aspect of [the *Furundzija* standard].”⁶² Based on this truncated *Furundzija* standard, the majority reversed the district court’s summary judgment in favor of Unocal, and remanded the case to determine whether Unocal aided and abetted the Myanmar military.⁶³

Although concurring with the majority on the result, Judge Reinhardt criticized the majority’s adoption of a novel standard for aiding and abetting liability. Specifically, Judge Reinhardt noted that the majority’s standard is derived from a recent ad hoc international tribunal, whose interpretations are subject to change by the “future decisions of some as-yet unformed international tribunal established to deal with other unique regional conflicts.”⁶⁴

As discussed in more detail below, the international authorities relied on by the *Doe I* majority do not support its aiding and abetting standard. An analysis of the international authorities also demonstrates that the majority’s standard, instead of being “specific, universal and obligatory,” is, as Judge Reinhardt stated in his concurrence, “novel,” “uncertain,” and “inchoate.”⁶⁵

IV. INTERNATIONAL AUTHORITIES FOR AIDING AND ABETTING LIABILITY

This Part will examine the aiding and abetting standard applied in other international human rights cases. They suggest that the *Doe I* majority misinterpreted international norms by imposing a reason to know standard, rather than actual knowledge or intent, for aiding and abetting liability.

60. *Id.* at *13.

61. *Id.*

62. *Id.* at *13 n.28.

63. *Id.* at *17.

64. *Doe I v. Unocal*, 2002 WL 31063976, at *28.

65. *See id.* at *29-30.

A. *The Nuremberg Industrialist Cases, Aiding and Abetting Under Control Council Law No. 10, Article II*

After World War II, a number of German industrial leaders stood trial for various charges stemming from their roles in the Nazi atrocities. Many of the defendants were charged under Control Council Law No. 10, Article II. Article II states that “[a]ny person without regard to nationality or capacity in which he acted, is deemed to have committed a crime . . . if he a) was a principal or b) was an accessory to the commission of any such crime or ordered or abetted the same.”⁶⁶

The following Nuremberg cases relying on Article II illustrate that aiding and abetting liability under Article II requires willfulness, as well as active and substantial participation.

1. *The Flick Case*

The *Flick* case⁶⁷ involved Friedrich Flick and five other executives of Flick’s steel companies, which controlled dozens of coal, iron, and steel companies and plants in Germany.⁶⁸ The six defendants were charged with participation in the Third Reich’s slave-labor program by using prisoners of war in armament production between 1939 and 1945.⁶⁹ Under Article II aiding and abetting liability, the prosecutor had to prove that “the acts and conducts of defendants were committed unlawfully, willfully and knowingly.”⁷⁰

The court held that defendants Flick and Weiss were liable for aiding and abetting Germany’s slave labor program because each defendant actively attempted to increase their allotment of forced laborers that they used in their plants, while none of the remaining defendants took active steps in procuring forced laborers.⁷¹ Weiss, with the knowledge and approval of Flick, solicited increased freight car production in order to ship more forced laborers to the Flick factories.⁷² The court stated that it “likewise appears that Weiss took an active and

66. Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, Control Council Law No. 10, v. 31.01.1946 (Official Gazette of the Control Council for Germany S. 51), available at <http://www.yale.edu/lawweb/avalon/imt/imt10.htm>.

67. United States of America v. Flick, 6 Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No. 10 (1952).

68. The Flick plants employed over 120,000 people. *Id.* at 1192.

69. *Id.* at 1190.

70. *Id.*

71. *Id.* at 1198.

72. *Id.*

leading part in securing an allocation of Russian prisoners of war for use in the work of manufacturing such increased quotas.”⁷³ Based on these findings, the court held defendants Weiss and Flick liable as aiders and abettors.⁷⁴

The convictions in *Flick* turned on each defendant’s state of mind. The *Flick* defendants did not dispute that the plants were utilizing forced labor and that each of them knew about the forced labor. According to the *Flick* court, however, knowledge was not enough to sustain a conviction for aiding and abetting.⁷⁵ As demonstrated by the evidence against the two convicted defendants, aiding and abetting liability under Article II of the Control Council required the showing of willful participation.⁷⁶

2. *United States of America v. Carl Krauch*⁷⁷

Similarly, in 1942, reports showed that the Farben Corporation, including high ranking industrialist Krauch,⁷⁸ used Polish prisoners of war to construct a plant at Auschwitz.⁷⁹ The court found that the Farben Corporation sought to employ forced labor.⁸⁰ As to defendant Krauch specifically, the court found that “[i]t seems that Krauch is inextricably involved in the allocation of labor to Auschwitz in a manner that negatives his lack of knowledge of the employment of concentration-camp inmates and forced foreign labor on the Auschwitz construction project.”⁸¹

The evidence showed that Krauch not only knew about the use of forced labor at his plants, but also intended to participate in the use of forced labor. Indeed, several Farben officers were present to discuss the construction of an Auschwitz plant which was to be owned by Farben.

73. *Id.*

74. The remaining defendants successfully invoked the necessity defense by arguing that they were placed in the untenable dilemma to either placidly accept the forced labor program, or suffer personal consequences. *Id.* at 1202.

75. *See id.*

76. *See id.*

77. *United States of America v. Krauch*, 8 Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No. 10 (1952).

78. Krauch worked under Goering, as Chief of the Department for Research and Development in the commission of Hitler’s four year plan. *See generally* TELFORD TAYLOR, *SWORD AND SWASTIKA, GENERALS AND NAZIS IN THE THIRD REICH* 124 (1952) (providing the story of the generals and the Nazis in their rise to power until 1939).

79. *Krauch*, 8 Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No. 10 at 1181-1206.

80. *Id.* at 1186.

81. *Id.* at 1187-88.

The court found that Krauch also corresponded with high-ranking Nazi leaders, showing his support for current labor practices.⁸²

3. The *Krupp* Case

Finally, twelve defendants in *Krupp* came to trial against charges of violating Article II by aiding and abetting in the use of forced labor at steel and armament plants owned by the Krupp concern.⁸³

The *Krupp* defendants were found to have taken active steps throughout the war to procure and maintain the use of forced laborers in the Krupp concern plants. In 1942, one defendant sent a Krupp representative to Holland to request additional Dutch steelworkers from German governmental officials. Based on the Krupp representative's efforts, the Krupp concern increased their allotment of Dutch workers from 33 in 1942 to 1,700 in 1943. A Krupp representative also went to France and Belgium to procure additional forced laborers. In all, 30,000 workers skilled in the iron-producing trade were sent to Germany to work in Krupp concern plants. Krupp officials then cooperated with the German government to secure the return of any laborers that attempted to escape.⁸⁴

Evidence clearly established that the defendants willfully sought to employ forced labor. For instance, in 1942, the German government sent a message to one of the Krupp plants requesting information on whether the Krupp firm could use skilled, foreign, Jewish labor, and whether the plant could erect a concentration camp to house the laborers. The Krupp plant sent a reply to the effect that it could use 1,050 – 1,100 Jewish workers if they were skilled.⁸⁵

Additionally, one Krupp defendant met with Hitler in 1942 to discuss the employment of concentration camp inmates. The meeting was successful and in 1943 the Krupp concern started to employ concentration camp inmates. By 1943, at the request of the Krupp concern, the S.S. provided about 4,000 imprisoned Jews to work for the Krupp plant's forced labor camp. For the Krupp defendants, the

82. *Id.*

83. United States of America v. Alfred Felix Awyn Krupp von Bohln und Halbach, 9 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10 (1950).

84. *See id.* at 1398.

85. *Id.* at 1412-13.

evidence clearly showed that each one intended to and did in fact substantially participate in the use of forced labor.⁸⁶

B. In re Tesch, Aiding and Abetting Under Article 46 of the Hague Regulations

The defendants in *Tesch* were accused of supplying poison gas used for the extermination of prisoners at concentration camps.⁸⁷ The defendants claimed that they were unaware that the S.S. was using Zyklon B gas, which the S.S. had purchased from Tesch, to kill millions of Jews at Auschwitz.⁸⁸ The defendants faced charges of aiding and abetting the German government in violation of Article 46 of the Hague Regulations of 1907. Article 46 states that “[f]amily honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected.”⁸⁹

Evidence at trial showed that Tesch knew that the gas was for killing human beings. Tesch’s former bookkeeper supplied evidence that

Tesch recorded an interview with [Nazi officials], during which he was told that the burial, after shooting, of Jews in increasing numbers was proving more and more unhygienic, and that it was proposed to kill them with prussic acid. Dr. Tesch, when asked for his views, had proposed to use the same method, involving the release of prussic acid gas in an enclosed space, as was used in the extermination of vermin. He undertook to train the S.S. men in this new method of killing human beings.”⁹⁰

Tesch and one of his associates were convicted and sentenced to death. The prosecution’s evidence overwhelmingly proved that Tesch substantially participated in the use of Zyklon B gas at concentration camps and intended its deadly results.

86. *Id.* at 1412, 1416-17.

87. *In Re Tesch*, 13 Ann. Dig. 250, 250-51 (1946).

88. *Id.* at 251.

89. Convention IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, art. 46, 35 Stat. 2277, 2306-07.

90. *The Zylon B Case*, 1 Law Reports of Trials of War Criminals 93, 95 (1946).

C. *The International Criminal Tribunal for the Former Yugoslavia*

1. Statute of the International Criminal Tribunal for the Former Yugoslavia

The International Criminal Tribunal for the Former Yugoslavia (ICTY) has authority to prosecute persons who were responsible for serious violations of international humanitarian law in the former Yugoslavia since 1991.⁹¹ Individual criminal responsibility is imposed on those who “planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution” of crimes enumerated in the ICTY statute.⁹²

2. *Prosecutor v. Furundzija*

As noted above, the *Doe I* majority relied most heavily on *Prosecutor v. Furundzija*.⁹³ In that case, local military police arrested a Bosnian Muslim woman and took her to a house for interrogation. While the defendant, a local military commander, questioned the woman about listed names and her sons’ activities, another soldier assaulted and raped her.⁹⁴ The defendant came before the ICTY on charges of aiding and abetting the assault and rape. The prosecution argued that to establish aiding and abetting liability under the ICTY statute, it need only show that the defendant intended to participate in the organization and that his act contributed to its commission.⁹⁵

After reviewing the international authority, the *Furundzija* tribunal found that

knowledge of the criminal activities of the organisation combined with a role in that organisation was not sufficient for complicity in this case and the defendants’ acts in carrying out their duties had to have a substantial effect on the commission of the offence for

91. Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, art. 1, U.N. Doc. S/25704/Add.1 (1993).

92. *Id.* at art. 7(1).

93. *Furundzija*, 38 I.L.M. at 317.

94. *Id.* at 328.

95. *Id.* at 329. See generally *Prosecutor v. Delalic*, No. IT-96-21-A, ¶ 352-59, Feb. 20, 2001, available at <http://www.un.org/icty/celebici/appeal/judgement/cel-aj010220.pdf> (discussing the standard for aiding and abetting to require more than mere knowledge and participation in an organization, it also requires a requisite level of mens rea and perhaps a form of independent authority).

responsibility to ensue. . . .⁹⁶ [The ICTY concluded that] the relationship between the acts of the accomplice and of the principal must be such that the acts of the accomplice make a significant difference to the commission of the criminal act by the principal. Having a role in the system without influence would not be enough to attract criminal responsibility.⁹⁷

As to the defendant's state of mind, the tribunal stated that the aider and abettor need not know the precise crime that was intended and that was in fact committed.⁹⁸ "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."⁹⁹ It is far from clear, however, that the *Furundzija* tribunal actually intended to establish a "reason to know" standard as opposed to an actual knowledge standard. In discussing the standard necessary for conviction, the tribunal only refers to authorities requiring actual knowledge.¹⁰⁰ Thus, the ICTY statute, as interpreted by the *Furundzija* tribunal, does not support the imposition of ATCA liability as articulated by *Doe I*.

D. The International Criminal Tribunal for Rwanda

1. Statute of the International Criminal Tribunal for Rwanda

The International Criminal Tribunal for Rwanda (ICTR) has authority to prosecute persons who committed genocide between January 1, 1994 and December 31, 1994.¹⁰¹ Article 6 of the ICTR statute establishes individual liability for those that "planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution" of the crime of genocide.¹⁰²

96. *Furundzija*, 38 I.L.M. at 361-62.

97. *Id.* at 364-65. See generally *Delalic*, 346, available at <http://www.un.org/icty/celebici/appeal/judgement/cel-aj010220.pdf>.

98. *Furundzija*, 38 I.L.M. at 366.

99. *Id.*

100. *Id.* at 370.

101. Statute of the International Tribunal for Rwanda, S.C. Res 955, U.N. SCOR, 49th Sess., 3453d mtg., Annex, art. 1, U.N. Doc. S/RES/955 (1994).

102. *Id.* at art. 6(1).

2. *Prosecutor v. Georges Anderson Nderubumwe Rutaganda*

In *Rutaganda*, the defendant was a Rwandan businessman and was second vice president of the youth military of a national organization.¹⁰³ He was charged with aiding and abetting in the commission of the following crimes: (1) distributing guns that were used to kill eight Tutsis at a roadblock, (2) participating in an attack at a school that resulted in the death of a large number of Tutsis, (3) transporting those that survived the attack to a gravel pit where they were killed, and (4) conducting house to house searches of Tutsis and striking and killing a person attempting to flee.¹⁰⁴

The *Rutaganda* tribunal found the defendant guilty of aiding and abetting in the preparation and perpetration of killings of Tutsis and for having caused serious bodily or mental harm to Tutsis. The tribunal further found that the defendant personally distributed weapons and “ordered them to go to work” on the killings.¹⁰⁵

As to the applicable mental state for aiding and abetting liability, the tribunal required a showing of intent to cause the injuries.¹⁰⁶ For example, the tribunal stated that the defendant “aided and abetted in the killings . . . and by his conduct intended to cause the death of a large number of people belonging to the Tutsi ethnic group, because of their ethnicity.”¹⁰⁷ Based on *Rutaganda*, the ICTR statute requires evidence of intent to find a defendant liable for aiding and abetting.

E. International Law Commission Draft Code of Crimes Against The Peace and Security of Mankind

In 1996, the International Law Commission released a draft Code of Crimes Against the Peace and Security of Mankind. The draft states that “[c]rimes against the peace and security of mankind are crimes under international law and punishable as such, whether or not they are punishable under national law.”¹⁰⁸ Under Article 2, an “individual shall be responsible for a crime . . . if that individual knowingly aids, abets or

103. *Prosecutor v. Rutaganda*, No. ICTR-96-3, Dec. 6, 1999, available at <http://www.ictr.org/ENGLISH/cases/Rutaganda/judgement/9/index.htm>.

104. *Id.* ¶¶ 10-19.

105. *Id.* 389-404.

106. *See id.* 404-05, 416-17.

107. *Id.* 416.

108. *Report of the International Law Commission on the Work of its Forty-Eighth Session 6 May – 26 July 1996*, U.N. GAOR, 51st Sess., Supp. No. 10, art. 1(2), at 14, U.N. Doc. A/51/10 (1996).

otherwise assists, directly and substantially, in the commission of such a crime, including providing the means for its commission.”¹⁰⁹ The commentary to aiding and abetting liability states:

This subparagraph provides that an individual who “aids, abets or otherwise assists” in the commission of a crime by another individual incurs responsibility for that crime if certain criteria are met. The accomplice must knowingly provide assistance to the perpetrator of the crime. Thus, an individual who provides some type of assistance to another individual without knowing that this assistance will facilitate the commission of a crime would not be held accountable under the present subparagraph. In addition, the accomplice must provide the kind of assistance which contributes directly and substantially to the commission of the crime, for example by providing the means which enable the perpetrator to commit the crime. Thus, the form of participation of an accomplice must entail assistance which facilitates the commission of a crime in some significant way.¹¹⁰

The draft Code of Crimes Against the Peace and Security of Mankind has not been adopted and the commission continues to revise it. Accordingly, there has yet to be an international case discussing the draft. The commentary suggests that knowledge is sufficient to establish aiding and abetting liability. There is an implication, however, that one who provides the type of significant assistance required by the draft would also intend that assistance to facilitate the commission of a crime. Until an international tribunal adopts and interprets the draft, however, the proper interpretation of the statute remains unclear.

V. ANALYSIS OF *DOE I*

In crafting an aiding and abetting standard under the ATCA, the majority in *Doe I* made a fundamental error in following the international cases involving governmental officials accused of aiding and abetting subordinates as opposed to following the cases involving private actors accused of aiding and abetting government officials.

For purposes of an analytical discussion of *Doe I*, the international authorities discussed above can be classified into two categories. The first category is composed of cases that involve defendants who are private actors assisting government officials in the wrongful conduct (Category One). Category One is typified by the Nuremberg cases. The

109. *Id.* at art. 2(3)(d).

110. *Id.* at art. 2 cmt. 11.

second category of cases involves defendants who are government officials assisting private actors and/or soldiers in the wrongful conduct (Category Two). War crimes tribunals for the former Yugoslavia and Rwanda are representative of Category Two.

The distinction between the actions of private actors as opposed to government officials is important in determining the appropriate standard for aiding and abetting liability. The role of a private entity that invests in a country accused of engaging in human rights violations is far different from the role of a military officer, such as the defendant in *Furundzija*, who encouraged his subordinates to commit unlawful acts.

In determining the appropriate legal standard to apply to Unocal's alleged conduct, the district court correctly looked to Category One cases because those cases involved private actors accused of aiding and abetting the government. The district court ruled that the proper standard for determining whether Unocal was liable for aiding and abetting the Myanmar military was if they actively participated in the alleged wrongful conduct;¹¹¹ that is, if they were complicit in that conduct in a manner equivalent to that of a co-conspirator. The district court stated:

The Court disagrees with Plaintiffs that these cases hold that an industrialist is liable where he or she has knowledge that someone else would commit abuses. Rather, liability requires participation or cooperation in the forced labor practices. In the *Flick* Case, Weiss took "active steps" with the "knowledge and approval" of his superior to procure forced laborers so that the company could increase its production quota. The Tribunal's guilty verdict rested not on the defendants' knowledge and acceptance of benefits of the forced labor, but on their active participation in the unlawful conduct.¹¹²

The *Doe I* majority rejected that argument because it found that the active participation standard applied only as a way to overcome the necessity defense.¹¹³ That argument, however, does not withstand scrutiny. Many corporations in Germany and elsewhere purchased steel from the Flick companies knowing that the Flick plants used forced labor.¹¹⁴ No one would argue that those companies could invoke the

111. *Doe v. Unocal Corp.*, 110 F. Supp. 2d 1294, 1310 (C.D. Cal. 2000).

112. *Id.* at 1310.

113. *Doe I v. Unocal*, 2002 WL 31063976, at *10.

114. See Peter Gumbel & Terence Roth, *Flick Industrial Empire Points Up Waning Role of German Family-run Firms*, WALL ST. J., Dec. 6, 1985, at 35 (Friedrich Flick later became known

necessity defense because each one of those companies could choose where to purchase its steel and, presumably, would not be faced with personal repercussions for choosing not to conduct business with the Flick companies. Yet none of the individuals who ran those companies were brought to trial at Nuremberg. If knowledge and participation were enough to establish aiding and abetting liability under Article II, certainly many German purchasers of Flick steel would have been criminally liable.¹¹⁵

The court's proposition is impractical and the mens rea for aiding and abetting under Article II of the Control Council Law would not support such expansive liability. The necessity defense enabled the Nuremberg court to separate between those defendants who intended for the wrongful conduct to occur, thereby satisfying the mens rea of aiding and abetting liability, and those who did not. Accordingly, the active participation standard adopted by the district court and applied in the Nuremberg cases is equally applicable under the ATCA.

After rejecting the district court's ruling on the "active participation" standard, the *Doe I* majority turned to the ICTY to substantiate a much broader aiding and abetting standard than could be justified under the Nuremberg cases. One court recently noted that aiding and abetting liability may be appropriate in cases involving military officials and subordinates because "[m]ost of the time" war crimes "do not result from the criminal propensity of single individuals but constitute manifestations of collective criminality: the crimes are often carried out by groups of individuals acting in pursuance of a common criminal design."¹¹⁶ The majority, however, failed to discuss how the *Furundzija* standard, adopted in a case where a ranking military commander directed and encouraged his subordinates to commit unlawful acts, could rationally apply to private actors. The holding of *Furundzija* has little to do with whether a private company investing in a foreign country should be liable for the conduct of a sovereign military force with whom it does not conspire and that it does not control. The court cannot reasonably stretch liability to such an extent.

as "Frederick the Great," due to his reputation for building a steel empire, ultimately with annual sales in the billions of dollars. *Id.*

115. Plaintiffs attempting to expand ATCA liability to indirect participants have been unsuccessful. *E.g. Iwanowa*, 67 F. Supp. 2d at 485 (declining to decide forced labor claims that arise out of war under the political question doctrine).

116. *Barrueto v. Larios*, 205 F. Supp. 2d 1325, 1333 (S.D. Fla. 2002) (quoting *Prosecutor v. Tadic*, No. IT-94-I-A, Judgment (1999) at 191).

The *Doe I* majority also failed to follow the Ninth Circuit mandate that actions may be maintained under the ATCA only if it is based upon a “specific, universal and obligatory” international norm.¹¹⁷ The majority noted that “[t]he *Furundzija* standard for aiding and abetting liability under international criminal law can be summarized as knowing practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime.”¹¹⁸ Instead of adopting the *Furundzija* standard, the majority found the “application of a slightly modified *Furundzija* standard appropriate in the present case.”¹¹⁹ Accordingly, the majority’s aiding and abetting standard is merely an ad hoc determination based on the facts of the case, and is not, as previously required under Ninth Circuit law, specific, universal or obligatory.

VI. CONCLUSION

The international aiding and abetting case law discussed in this article shows that a private actor cannot be liable as an aider and abettor for a government’s conduct unless he intends for the wrongful acts to occur. This Article suggests that courts addressing future ATCA cases adopt the analytical framework discussed in this article so that private actors will not be held to the same aiding and abetting standard as government officials. The international authority shows that, to be liable for aiding and abetting, one must actually participate in the wrongful acts with the conscious desire to have them occur. Thus, aiding and abetting liability must be viewed as equivalent to the crime of conspiracy in terms of the mens rea required for the commission of an offense.

In adopting a modified aiding and abetting standard under *Furundzija*, the Ninth Circuit created a new standard of liability for U.S. companies investing in foreign countries. Plaintiff lawyers can be expected to argue that the Ninth Circuit’s *Doe I* decision creates a “foreseeability” standard for aiding and abetting liability under the ATCA. The scope of that standard undoubtedly will be tested in the avalanche of future ATCA cases that are sure to follow *Doe I*.

117. *In re Estate of Ferdinand Marcos, Human Rights Litig.*, 25 F.3d at 1475-76.

118. *Doe I v. Unocal*, 2002 WL 31063976, at *13.

119. *Id.* at *13.