Docket Nos. 00-56603, 00-56628
Argument: June 17, 2003
En Banc Rehearing

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN DOE I *et al.*,

Plaintiffs-Appellants,

v.

UNOCAL CORPORATION *et al.*,

Defendants-Appellees.

JOHN ROE III *et al.*,

Plaintiffs-Appellants,

v.

UNOCAL CORPORATION *et al.*,

Defendants-Appellees.

Appeal From the United States District Court for the Central District of California

BRIEF OF THE WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

DANIEL J. POPEO
PAUL D. KAMENAR
WASHINGTON LEGAL FOUNDATION
2009 MASSACHUSETTS AVENUE, N.W.
WASHINGTON, DC 20036
(202) 588-0302

DONALD B. AYER
CHRISTIAN G. VERGONIS
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001-2113
(202) 879-3939

Attorneys for *Amicus Curiae* Washington Legal Foundation

CORPORATE DISCLOSURE STATEMENT

The Washington Legal Foundation is a nonprofit corporation organized under the laws of the District of Columbia. It has no parent company and has issued no stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONS AND STATUTES

EXECUTIVE AND LEGISLATIVE MATERIALS

MISCELLANEOUS

INTEREST OF *AMICUS CURIAE*

The Washington Legal Foundation ("WLF") is a non-profit public interest law and policy center based in Washington, D.C., with supporters nationwide. WLF regularly appears before federal and state courts to promote economic liberty, free enterprise principles and a limited and accountable government. WFL's Legal Studies Division also publishes monographs and other publications on these topics.

In particular, WLF has devoted substantial resources over the years through litigation and publishing to promote civil justice reform, including opposing the expansion of federal-court jurisdiction beyond appropriate statutory and constitutional limits. WLF appeared as *amicus curiae* in *Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003), to discuss the meaning and scope of 28 U.S.C. § 1350, the statutory provision at issue here. In addition, WLF has published articles regarding the propriety of litigating foreign claims in U.S. courts. *See, e.g.*, Peter J. Nickles *et al.*, *Court Properly Limits Scope of Alien Tort Claims Act*, 18 Wash. Legal Found., Legal Backgrounder 2 (Jan. 17, 2003); Layne E. Kruse, *Alien Attack: Foreign Environmental Claims Invade American Courts*, 12 Wash. Legal Found., Legal Backgrounder 30 (July 25, 1997).

WLF believes that it can bring a broader perspective to the issues presented in this case, which will assist the Court in deciding this case in such a way as to

give clearer guidance to courts hearing claims by aliens for alleged human rights abuses occurring abroad.

SUMMARY OF ARGUMENT

This case concerns the appropriate standards to be applied to a claim that a private corporation is secondarily liable for human rights abuses committed abroad by foreign governmental officials. The parties have briefed this case on the assumption that the causes of action asserted by plaintiffs-appellants ("Plaintiffs") for forced labor, murder, rape and torture are federal-law tort claims arising under 28 U.S.C. § 1350. Bound by circuit precedent, the panel decided this case on the same assumption. *See Doe v. Unocal*, No. 00-56603, 2002 WL 31063976, at *8 (9th Cir. Sept. 18, 2002) (stating that "[w]e have held that [28 U.S.C. § 1350] also provides a cause of action" and citing *Papa v. United States*, 281 F.3d 1004, 1013 (9th Cir. 2002), and *In re Estate of Ferdinand E. Marcos Human Rights Litig.*, 25 F.3d 1467, 1474-75 (9th Cir. 1994)); *see also id.* at *27 (Reinhardt, J., concurring) ("There is another reason why the application of federal common law is appropriate here: we are required to resolve issues ancillary to a cause of action created by Congress.).

As Judge Reinhardt recognized, determining the legal rules applicable to ancillary issues such as secondary liability requires a proper understanding of the nature of the underlying causes of action. It is true, moreover, that most courts to

address the matter have concluded that a federal cause of action exists for violations of established norms of customary international human rights law (such as the claims of forced labor, murder, rape and torture alleged by Plaintiffs in this case).[1] That conclusion, however, is incorrect.

The ostensible legal basis for such a cause of action is 28 U.S.C. § 1350 (variously referred to as the Alien Tort Statute, the Alien Tort Act and the Alien Tort Claims Act). Enacted as part of the Judiciary Act of 1789, the Alien Tort Statute now states in full:

> The 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.

---

[1] "Customary international law" refers to an unwritten body of norms that "results from a general and consistent practice of states followed by them from a sense of legal obligation." *Restatement (Third) Foreign Relations Law of the United States* § 102(2) (1987). Traditionally viewed as a tool for the resolution of disputes between nations, *see infra* pp. 14-17, international law came to be seen in the wake of the Holocaust as including mandatory norms designed to protect individual human rights, *i.e.*, the "freedoms, immunities, and benefits which, according to widely accepted contemporary values, every human being should enjoy in the society in which he or she lives." *Id.* § 701, cmt. a. These norms are generally enforced via transnational institutions such as the International Court of Justice and the International Criminal Court. Such norms may also obtain the status of domestic law through "legal internalization," *i.e.*, the process by which "international norm[s] [are] incorporated into the domestic legal system through executive action, legislative action, judicial interpretation, or some combination of the three." *See* Harold H. Koh, *How Is International Human Rights Law Enforced?*, 74 Ind. L.J. 1397, 1414 (1998).

Essentially moribund for nearly two-hundred years, *see Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 812-13 & n.21 (D.C. Cir. 1984) (Bork, J., concurring), the Alien Tort Statute was given life by the Second Circuit in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), a case involving claims filed in federal court by citizens of Paraguay against a Paraguayan police official for his alleged torture of their relative. Despite concluding that the Alien Tort Statute is a jurisdictional statute that did not create any substantive federal rights, the Second Circuit nevertheless held that, at least where the Alien Tort Statute is invoked as the statutory basis for subject-matter jurisdiction, a tort claim for the violation of an established norm of customary international law (including international human rights law) arises under federal law. *Filartiga*, 630 F.2d at 887. This is so, according to the Second Circuit, because customary international law is part of "the common law of the United States." 630 F.2d at 885-87.

Following the decision in *Filartiga*, several courts have agreed that alleged violations of international human rights law state claims for relief under federal law. *See, e.g.*, *Marcos*, 25 F.3d at 1475-76; *Abebe-Jira v. Negewo*, 72 F.3d 844, 847-48 (11th Cir. 1996). *But see Tel-Oren*, 726 F.2d 774, 775 (per curiam) (holding, without a majority rationale, that *Filartiga*-style claims are not justiciable in federal court); *Odah v. United States*, 321 F.3d at 1145-1149 (Randolph, J., concurring) (rejecting the rationale of *Filartiga* and its progeny). However,

whereas *Filartiga* viewed such claims as arising, without congressional authorization, from "the common law of the United States," *see Filartiga*, 630 F.2d at 887 (noting that the Alien Tort Statute does "not . . . grant[] new rights to aliens" but provides jurisdiction over "rights already recognized" by a federal common law of international law), most other courts, including the Ninth Circuit, concluded that the Alien Tort Statute creates a congressionally authorized statutory right of action, the contours of which are to be determined by the courts on a case-by-case basis. *See, e.g.*, *Marcos*, 25 F.3d at 1474-75; *Abebe-Jira*, 72 F.3d at 848. Under these rulings, the Alien Tort Statute is treated as resembling other statutes that create a general right of action but leave to the courts the task of filling in the details in common-lawmaking fashion. *Cf., e.g.*, *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 688 (1978) (noting that Congress "expected the courts to give shape to the [Sherman Antitrust Act's] broad mandate by drawing on common-law tradition"); *Kernan v. Am. Dredging Co.*, 355 U.S. 426, 432 (1958) (noting that with the Federal Employers' Liability Act, "Congress saw fit to enact a statute of the most general terms, thus leaving in large measure to the courts the duty of fashioning remedies . . . in a manner analogous to the development of tort remedies at common law.").

The differing rationales in *Marcos* and the *Filartiga* have led to the same result, *i.e.*, to the development by the courts of a body of federal international

human rights tort law, enforceable by private plaintiffs in suits for money damages against both government officials and private actors.[2] Both rationales, however, are fundamentally flawed and cannot withstand scrutiny.

First, contrary to the holding of this Court that the Alien Tort Statute "creates a cause of action," *Marcos*, 25 F.3d at 1475, the Alien Tort Statute is merely a jurisdictional statute that does not create any substantive federal rights. This is evident both from that statute's plain text and historical context and from the Supreme Court's recent jurisprudence on implied private rights of action. While Congress *could have* enacted legislation creating a general cause of action for violations of international law,[3] the Alien Tort Statute is assuredly not such legislation.

Second, contrary to the holding of *Filartiga*, there is not a self-executing "common law of the United States," pursuant to which the federal courts may

---

[2] The sources from which applicable rules are to be derived include the works of domestic and foreign jurists and commentators, international conventions, judicial decisions and the practice of nations. *See Filartiga*, 630 F.2d at 880-81.

[3] The Constitution grants Congress the power to "define and punish . . . Offences against the Law of Nations." U.S. Const., art. I, § 8, cl. 10. Congress may exercise this power to "internalize" a norm of international law, *see supra* note 1, as it did in the Torture Victim Protection Act of 1991 ("TVPA"), Pub. L. No. 102-256, 106 Stat. 73 (1992), *reprinted in* 28 U.S.C. § 1350 note (1994). Plaintiffs do not assert claims under the TVPA, presumably because the statute, by its terms, does not apply to corporations. *See* TVPA § 2(a) (prohibiting the conduct of "individual[s]"); *Beanal v. Freeport-McMoRan, Inc.*, 969 F. Supp. 362, 382 (E.D. La. 1997), *aff'd on other grounds*, 197 F.3d 161 (5th Cir. 1999).

create and enforce private rights of action for torts alleged to violate the norms of customary international human rights law. The Second Circuit's holding in *Filartiga* was premised on that court's misreading of several nineteenth-century cases that applied "general federal common law" to transitory common-law claims in a manner that was repudiated by the Supreme Court in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

Because claims such as Plaintiffs' are not federal rights of action, it follows that those claims are transitory common-law torts. As such, a federal court adjudicating such claims, to the extent it has diversity or supplemental jurisdiction over them, must apply the choice-of-law rules of the forum state to determine which jurisdiction's law provides the substantive standards of liability, including secondary liability. In most cases, including this one, that will be the law of the jurisdiction in which the relevant events occurred.

ARGUMENT

Three preliminary determinations should inform this Court's decision as to the appropriate legal standards governing Plaintiffs' claims for forced labor, murder, rape and torture. *First*, those claims do not arise under federal law. This is so because (1) the Alien Tort Statute is a jurisdictional statute that does not create any substantive rights, let alone a private right of action, *see infra* Part I.A, and (2) a private right of action does not exist, independent of congressional

authorization, by virtue of "the common law of the United States," *see infra* Part I.B. *Second*, compelling reasons outweighing any *stare decisis* concerns exist for the Court to overturn its prior holdings to the contrary. *See infra* Part II. *Third*, pursuant to well-settled choice-of-law principles governing the adjudication of non-federal claims in federal court, Myanmar law provides the substantive standards of liability here. *See infra* Part III.

I. THERE IS NO FEDERAL CAUSE OF ACTION FOR VIOLATIONS OF INTERNATIONAL HUMAN RIGHTS LAW.

Neither of the two rationales adopted by courts to sustain federal claims for international human rights violations is correct.

A. The Alien Tort Statute Does Not Create a Cause of Action.

Several considerations lead inescapably to the conclusion that the Alien Tort Statute does not create a private right of action for violations of modern norms of customary international human rights law. *First*, its text and context demonstrate conclusively that the Alien Tort Statute is a pure jurisdictional statute that does not create any substantive federal law. *Second*, a congressional intent to provide a private right of action cannot be implied. *Third*, even if the Alien Tort Statute did create a private right of action for torts committed in violation of the "law of nations," that right of action would not extend to human rights abuses of the sort alleged in this case.

1. The Alien Tort Statute is a pure jurisdictional statute.

The text and historical context of the Alien Tort Statute demonstrate conclusively that it is a jurisdictional statute that does not create any substantive federal law. The Alien Tort Statute, which is codified as part of title 28 of the United States Code ("Judiciary and Judicial Procedure"), does not by its terms create any rights, let alone a right of action. Rather, it merely grants the district courts "jurisdiction" over a class of civil lawsuits (those "by an alien for a tort only, committed in violation of the law of nations"). 28 U.S.C. § 1350. This limitation is not surprising, given that the Alien Tort Statute was enacted as part of that section of the Judiciary Act of 1789 setting forth the various jurisdictional heads of the newly created federal district courts. *See* An Act to establish the Judicial Courts of the United States, ch. 20, § 9, 1 Stat. 73, 76-77 (1789). The Alien Tort Statute was originally phrased in terms of "cognizance," *see id.* § 9(b), 1 Stat. 73, 77, which means "jurisdiction," *see FDIC v. Meyer*, 510 U.S. 471, 476 (1994).[4]

"[J]urisdictional statutes speak to the power of the court rather than to the rights or obligations of the parties." *Landgraf v. USI Film Products*, 511 U.S. 244, 274 (1994) (internal quotation marks omitted). Therefore, "pure jurisdictional

[4] The Alien Tort Statute's plain language is consistent with the congressional purpose of steering into federal court a category of common-law actions thought to implicate the national interests of the United States. *See infra* pp. 16-17 & note 7.

statutes," such as the Alien Tort Statute, "which seek to do nothing more than grant jurisdiction over a particular class of cases cannot support Art. III 'arising under' jurisdiction" because they do not create substantive federal law. *Mesa v. California*, 489 U.S. 121, 136 (1989) (internal quotation marks omitted). Indeed, as the Supreme Court has observed, "it would be inconsistent with the plain and ordinary meaning of words, to call a law defining the jurisdiction of certain courts of the United States" an exercise of Congress's Article I powers to create substantive rights and liabilities. *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443, 452 (1851).

The Supreme Court thus consistently has refused to find substantive federal law lurking in the confines of similarly phrased jurisdictional statutes. For example, in rejecting a claim that an admiralty jurisdiction statute, Act of Feb. 26, 1845, ch. 20, 5 Stat. 726, *codified as amended at* 28 U.S.C. § 1873 (2000), represented the congressional creation of substantive federal law pursuant to the Commerce Clause, the Supreme Court explained:

> The law . . . contains no regulations of commerce . . . . It merely confers a new jurisdiction on the district courts; and this is its only object and purpose. . . . It is evident . . . that Congress, in passing [the law], did not intend to exercise their power to regulate commerce. . . . [T]he jurisdiction to administer the existing laws upon these subjects is certainly not a regulation within the meaning of the Constitution.

The Propeller Genesee Chief, 53 U.S. (12 How.) at 451-52.

Similarly, the Supreme Court has rejected the argument that substantive federal law is created by § 27 of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa, which provides (in language paralleling that of the Alien Tort Statute) that "[t]he district courts of the United States . . . shall have exclusive jurisdiction of violations of" the federal securities laws. The Court stated:

> Section 27 grants jurisdiction to the federal courts and provides for venue and service of process. It creates no cause of action of its own force and effect; it imposes no liabilities. The source of plaintiffs' rights must be found, if at all, in the substantive provisions of the [law] which they seek to enforce, not in the jurisdictional provision.

Touche Ross & Co. v. Redington, 442 U.S. 560, 577 (1979).

And the Supreme Court has held that the similarly worded Tucker Act, 28 U.S.C. § 1491(a)(1), which gives the Court of Federal Claims "jurisdiction to render judgment upon any claim against the United States" is "only a jurisdictional statute; it does not create any substantive right enforceable against the United States for money damages." *United States v. Testan*, 424 U.S. 392, 398 (1976). Rather, the Tucker Act merely "confers jurisdiction upon [the Court of Claims] whenever the substantive right exists." *Id.*

So, too, the Alien Tort Statute grants jurisdiction, but does not create substantive federal law.[5] Plaintiffs therefore have no causes of action under the Alien Tort Statute for forced labor, murder, rape, torture or any other tort.

2. The Alien Tort Statute does not imply a private right of action.

The Supreme Court's recent jurisprudence on implied rights of action further supports the conclusion that the Alien Tort Statute does not create federal causes of action for forced labor, murder, rape and torture. "Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress." *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001); *Touche Ross*, 442 U.S. at 578 (remedies available are those "that Congress enacted into law"). "The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but a private remedy." *Alexander*, 532 U.S. at 286; *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15 (1979). Without such statutory intent, "a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter."

---

[5] The Alien Tort Statute is therefore completely *unlike* the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1330, a statute in which Congress exercised its power to create substantive federal law via express reference to its Article I powers to regulate, *inter alia*, foreign commerce. *See* H.R. Rep. No. 94-1487, at 12 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6611; *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 495-96 & n.22 (1983) (FSIA created substantive federal law because "the jurisdictional provisions of the Act are simply one part of [a] comprehensive scheme" that "codifies the standards governing foreign sovereign immunity as an aspect of substantive federal law").

Alexander, 532 U.S. at 286-87; *see also Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 145, 148 (1985); *Transamerica Mortgage Advisors*, 444 U.S. at 23; *Touche Ross*, 442 U.S. at 575-576. "Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals." *Alexander*, 532 U.S. at 287 (internal quotation marks omitted).

The Alien Tort Statute is completely devoid of the sort of "rights-creating" language critical to finding a congressional intent to create an implied private right of action. *Alexander* is instructive. In that case, the statutory provision at issue, § 602 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d-1, stated that certain federal agencies are "authorized and directed to effectuate the provisions of [Title VI] . . . by issuing rules, regulations, or orders of general applicability." The Supreme Court emphasized the absence of prohibitive language (such as "[n]o person . . . shall . . . be subjected to discrimination"), and concluded that "[f]ar from displaying congressional intent to create new rights, § 602 limits agencies to 'effectuat[ing] rights already created." *Alexander*, 532 U.S. at 289. The Alien Tort Statute similarly lacks prohibitive language and, like § 602, is instead "phrased as a directive" to government entities (*i.e.*, the federal district courts). *Id.* (internal quotation marks omitted); *see also Touche Ross*, 442 U.S. at 577

(jurisdictional grant does not imply a private right of action). No private right of action, therefore, can be implied from its terms.[6]

3. The Alien Tort Statute does not in any event apply to the modern concept of international human rights law.

Even if the Alien Tort Statute somehow did create substantive federal law relating to "the law of nations," such federal law would not extend to the international human rights norms invoked by Plaintiffs here. Determining the scope of the statutory phrase "in violation of the law of nations" requires an understanding of the meaning of the phrase "law of nations" when the statute was enacted in 1789. However, unlike the modern conception of international law, which extends to the relationships between private individuals and their own governments, *see supra* note 1, the body of law referred to as "the law of nations" in the late-eighteenth century applied solely to interstate relations. As explained by Emmerich de Vattel, a natural law theorist with significant influence on the

[6] Indeed, even if the Alien Tort Statute did create a right of action for foreign officials' violation of Plaintiffs' human rights, the Court would need to conduct a separate inquiry to determine whether Congress intended to allow a cause of action for secondary liability of the sort alleged against Defendants-Appellees here. *See Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 182 (1994) ("[W]hen Congress enacts a statute under which a person may sue and recover damages from a private defendant for the defendant's violation of some statutory norm, there is no general presumption that the plaintiff may also sue aiders and abettors."). Aiding and abetting is "an ancient *criminal* law doctrine," *id.* at 181 (emphasis added), that will generally not be a basis for *civil* liability under federal law absent an express congressional directive, *id.* at 182-83. There is no such directive here, and hence no federal right of action for secondary liability.

Founding generation, *see U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 462 n.12 (1978), "[t]he Law of Nations is the science which teaches the rights subsisting between nations or states and the obligations correspondent to those rights." Emmerich de Vattel, *The Law of Nations* § 3 (Joseph Chitty ed. & trans., Phila., T. & J.W. Johnson & Co. new ed. 1852) (1758); *see also* 1 James Kent, *Commentaries* *1 (defining the law of nations as "that code of public instruction which defines the rights and prescribes the duties of nations in their intercourse with each other"); Justice James Iredell, Charge to the Grand Jury for the District of South Carolina (May 12, 1794), *reprinted in Gazette of the United States* (Philadelphia), June 12, 1794 (describing the law of nations as the means "by which alone all controversies between nation and nation can be determined"), *quoted in* Douglas J. Sylvester, *International Law As Sword or Shield? Early American Foreign Policy and the Law of Nations*, 32 N.Y.U. J. Int'l L. & Pol. 1, 58 (1999).

This is not to say that individuals could not have rights and obligations under the law of nations. Eighteenth-century courts applied the law of nations (as general common law, *see infra* pp. 18-20) to matters where the conduct of private citizens touched upon relations between nations, such as where one nation's citizens or residents injured or affronted the dignity of another nation or its officers or citizens. *See Tel-Oren*, 726 F.2d at 813-14 (Bork, J., concurring); Anne-Marie

Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 Am. J. Int'l L. 461, 475-80 (1989); John M. Rogers, *The Alien Tort Statute and How Individuals 'Violate' International Law*, 21 Vand. J. Transnat'l L. 47, 49-50 (1988). Blackstone provided examples of such matters, noting that "[t]he principal offence against the law of nations . . . are of three kinds; 1. Violation of safe-conducts; 2. Infringement of the rights of embassadors; and, 3. Piracy." 4 William Blackstone, *Commentaries* *68. Another area in which the law of nations regulated the conduct of private individuals was the field of prize, whereby warring nations (and their citizens) captured enemy merchant vessels. *See* Joseph M. Sweeney, *A Tort Only in Violation of the Law of Nations*, 18 Hastings Int'l & Comp. L. Rev. 445, 451-67 (1995). Significantly, however, because the rights and duties of individuals stemmed from obligations between nations, violations of the law of nations could not arise out wrongs committed against an individual by his own government within his own country.

The United States' treatment of these issues prior to and just after the adoption of the Constitution is consistent with this understanding of the law of nations. In 1781, for example, the Continental Congress, itself lacking the necessary regulatory authority, passed a resolution recommending that the States punish "infractions of the laws of nations." 21 *Journals of the Continental Congress 1774—1789*, at 1136 (Library of Congress 1912). The resolution singled

out, as the "most obvious" subjects of such legislation, violations of safe-conducts and passports granted by Congress to foreign subjects in times of war, acts of hostility against those in amity with the United States, infractions of the immunities of ambassadors and other public ministers, and treaty violations. *Id.* at 1136-37. The resolution also recommended that the States create civil remedies for "injur[ies] done to a foreign power by a citizen." *Id.* at 1137. A decade later, the newly empowered First Congress was able to rely on the Define and Punish Clause, *see supra* note 3, to criminalize violations of safe-conducts and passports and affronts to and assaults on ambassadors and other public ministers. *See* An Act for the Punishment of certain Crimes against the United States, ch. IX, §§ 25-28, 1 Stat. 112, 117-18 (1790).[7]

It is clear, therefore, that when Congress enacted the Alien Tort Statute in 1789, the statutory phrase "tort only, committed in violation of the law of nations" was understood to extend only to torts touching upon the United States' relations

[7] Historians have pointed to the Marbois Affair of 1784, in which Counsel General Marbois, a French diplomat, was assaulted in Philadelphia, as illustrative of the concerns underlying the decision to vest the federal courts with jurisdiction over civil actions involving violations of the law of nations. *See* Aric K. Short, *Is the Alien Tort Statute Sacrosanct? Retaining Forum Non Conveniens in Human Rights Litigation*, 33 N.Y.U. J. Int'l L. & Politics 1001, 1008-09 & n.29 (2001). The inability of the national government directly to address the Marbois incident, and others like it, prompted the enactment of both the Constitution's grant of federal-court jurisdiction over "Cases affecting Ambassadors [and] other public Ministers and Consuls," U.S. Const. art. III, § 2, and its statutory complement, the Alien Tort Statute. *See* Short, *supra*, at 1009.

with other nations (such as a violation of a safe-conduct or an assault, by a U.S. citizen or occurring in the United States, on a foreign diplomat). It did *not*, however, apply to wrongs committed against individuals by their own governments within their own nations, such as the acts of violence committed by the Myanmar military in this case. Even if it were more than a pure jurisdictional statute, therefore, the Alien Tort Statute would not reach the conduct alleged here.

B. Federal Common Law Does Not by Its Own Force Give Rise to a Cause of Action.

The Ninth Circuit should not rely on the reasoning of the Second Circuit in *Filartiga* to find a federal right of action for human-rights torts outside of the terms of the Alien Tort Statute. As explained above, *see supra* p. 4, *Filartiga* held that international law is part of "the common law of the United States" and therefore "aris[es] under . . . the Laws of the United States." 630 F.2d at 885-87. But this conclusion conflicts with long-standing and repeated assertions by the Supreme Court and the Executive Branch that international law that has not been codified in a statute or a treaty does not present a federal question or arise under federal law. *See, e.g.*, *N.Y. Life Ins. Co. v. Hendren*, 92 U.S. 286, 286-87 (1875) (holding that the Supreme Court lacks jurisdiction to review "the law of nations applicable to this case" because that law does not involve "the constitution, laws, treaties, or executive proclamations, of the United States" and therefore does not present "any Federal question"); *Ker v. Illinois*, 119 U.S. 436, 444 (1886) (holding that claim of

international law violation raises no federal question and that "the decision of that question is . . . within the province of the State court, as a question of common law"); *Huntington v. Attrill*, 146 U.S. 657, 683 (1892) (noting that if a "question of international law" is decided in state court, "the Constitution and laws of the United States have not authorized" Supreme Court review of the decision); *Oliver Am. Trading Co. v. Mexico*, 264 U.S. 440, 442-43 (1924); 5 Op. Att'y Gen. 691, 692 (1802) ("doubt[ing] the competency of the federal courts" to hear "an aggravated violation of the law of nations" in the absence of a congressional "statute recognizing the offence"). Indeed, it is particularly instructive to compare the reasoning of *Filartiga* with that of Justice Bradley, the sole dissenting Justice in *New York Life*, who argued that a claim under "unwritten international law" arose under the "laws of the United States." 92 U.S. at 287-88 (Bradley, J., dissenting). The Second Circuit in *Filartiga* essentially adopted the reasoning of a single dissenting Justice and made it the law of the land.

In concluding that uncodified international law has the status of federal law, *Filartiga* failed to reconcile, or even cite, these cases. Instead, the Second Circuit made the crucial analytical mistake of taking out of context statements by the Supreme Court that international law is "part of our law" and "part of the law of the land." 630 F.2d at 887 (quoting *The Nereide*, 13 U.S. (9 Cranch) 388, 422 (1815), and *The Paquete Habana*, 175 U.S. 677, 700 (1900)). Each of those

statements, however, was made prior to the Supreme Court's seminal decision in *Erie Railroad Co. v. Tompkins*, which famously held that "[t]here is no federal general common law." 304 U.S. at 78. The cases cited above make clear that before *Erie*, international law (like the law of torts and contracts) had been a part of this federal general common law, which, though not itself raising a federal question, provided the rules of decision for federal courts that otherwise had jurisdiction over a case. *See Huntington*, 146 U.S. at 683 (explaining that although international law is not federal law, if a "question of international law" arises in federal court, "it is one of those questions of general jurisprudence which the court must decide for itself"). Pronouncements about the law of nations, "our law" and "the law of the land" in the pre-*Erie* cases on which the Second Circuit relied in *Filartiga* involved such an application of general common law, *see, e.g.*, *The Paquete Habana*, 175 U.S. at 700, and simply had no bearing on the actual question presented in *Filartiga*, *i.e.*, whether claims for torts in violation of uncodified customary international law arise under federal law.[8]

[8] *Filartiga*'s conceptual misstep is criticized in depth in Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 Harv. L. Rev. 815 (1997). *See also Odah*, 321 F.3d 1147-48 (Randolph, J., concurring); Curtis A. Bradley & Jack L. Goldsmith, *Federal Courts and the Incorporation of International Law*, 111 Harv. L. Rev. 2260 (1998); Arthur M. Weisburd, *The Executive Branch and International Law*, 41 Vand. L. Rev. 1205 (1988).

Indeed, *Erie* expressly disavowed the two major premises on which nineteenth-century jurisprudence was – and *Filartiga* is – based. *First*, the Supreme Court rejected the idea that the federal courts can apply law not derived from a sovereign source, noting that "law in the sense in which courts speak of it today does not exist without some definite authority behind it." *Erie*, 304 U.S. at 79 (internal quotation marks omitted). *Second*, the Supreme Court rejected the legal fiction that courts "discover" common law rules, explaining that the common law "is often little less than what the judge advancing the doctrine thinks at the time should be the general law on a particular subject" and noting that under the Constitution, the federal courts lack this general common-lawmaking power. *Id.* at 78 (internal quotation marks omitted); *see also Alexander*, 532 U.S. at 287 ("Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals." (internal quotation marks omitted)). *Filartiga* rests precisely on both these premises; it refers to a source of law (the norms of customary international law) that has no sovereign authority behind it, and grants the federal courts common-lawmaking authority to fashion general rules relating to that "law."

In contrast to the "federal general common law" that was repudiated in *Erie*, there is a modern, limited form of federal common law. But this modern federal common law does not govern here. To the contrary, consistent with *Erie*'s

pronouncement that federal courts are powerless to apply law not derived from a sovereign source, modern federal common law applies only where necessary to further "a genuinely identifiable (as opposed to judicially constructed) federal policy." *O'Melveny & Meyers v. FDIC*, 512 U.S. 79, 89 (1994); *cf. D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 472 (1942) (Jackson, J., concurring) (observing that "[f]ederal common law implements the federal Constitution and statutes, and is conditioned by them"). Thus, the Supreme Court has held that federal common law will displace non-federal law only where there is both an identifiable "uniquely federal interest" and a "significant conflict" between that interest and the operation of the non-federal law. *Boyle v. United Techs. Corp.*, 487 U.S. 500, 507 (1988).

There exists no identifiable uniquely federal interest in tort disputes arising out of the mistreatment of foreign citizens by their own governments within their own countries. Even if there were such an interest, moreover, it is difficult to see how it would significantly conflict with, so as to preempt completely, the application of local law to such disputes. *See id.* at 508 (explaining that federal common law applies only to those particular elements of a claim that are in conflict with the federal interest). Indeed, to the extent there is any identifiable policy with respect to individual rights under international law, it counsels *against* the creation

of a private right of action enforceable in federal court, as demonstrated by the holding in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

In *Sabbatino*, the Supreme Court held that federal common law required the application of the act-of-state doctrine as a federal law *defense* against claims (like the ones in this case) challenging the conduct of foreign governments under international law. *Id.* at 421. In doing so, the Supreme Court made clear that the act-of-state doctrine had "constitutional underpinnings," and originated not in international law but in constitutional separation of powers principles that counseled against judicial intervention in foreign affairs. *Id.* at 422-24. Indeed, in holding that the act-of-state doctrine prevented a plaintiff from bringing claims for torts alleged to violate international human rights law, the Court in *Sabbatino* "declared the ascertainment and application of international law beyond the competence of the courts of the United States," *id.* at 439 (White, J., dissenting), and "did not consider international law to be part of the law of the United States in the sense that United States courts must find and apply it as they would have to do if international legal rules had the same status as other forms of United States law," Harold G. Maier, *The Authoritative Sources of Customary International Law in the United States*, 10 Mich. J. Int'l L. 450, 463 (1989).

For these reasons, the Ninth Circuit should not follow *Filartiga* in recognizing a federal common-law cause of action for violations of international human rights law.

II. COMPELLING POLICY REASONS SUPPORT THE OVERRULING OF THIS COURT'S ALIEN TORT STATUTE PRECEDENTS.

As explained above, contrary to the holdings of this Court, the Alien Tort Statute does not create a federal cause of action for violations of international human rights law. In addition to the foregoing analysis, consideration of the consequences of the Court's current doctrine calls for the Court to reject the application of *stare decisis* and correct the erroneous interpretation of the Alien Tort Statute that prevailed in *Marcos* and *Papa*.

First, federal-court adjudication of cases involving sensitive allegations against foreign governments risks alienating the nations against whom the allegations are made and interferes with the political branches' conduct of foreign affairs. Indeed, in one recent case brought against a private corporation under the Alien Tort Statute for alleged complicity in human rights violations by the government of Indonesia, the U.S. State Department warned the district court that

> the Indonesian response to such perceived U.S. 'interference' in its internal affairs could impair cooperation with the U.S. across the full spectrum of diplomatic initiatives, including counterterrorism, military and police reform, and economic and judicial reform.

Letter from William H. Taft, IV, Legal Advisor, U.S. Dep't of State, to Judge Louis F. Oberdorfer of 7/29/02, at 3, *Doe v. Exxon Mobil Corp.*, No. 01-Civ-1357 (D.D.C. filed June 20, 2001); *see also Tel-Oren*, 726 F.2d at 826 n.5 (Robb, J., concurring) (arguing that *Filartiga* is "fundamentally at odds with the reality of the international structure and with the role of United States courts within that structure.").

Second, allowing federal claims to be brought against corporations that do business in foreign countries, based on the alleged misconduct of the host governments, "appears likely to further discourage foreign investment, particularly in extractive industries in remote or unstable areas that require security protection." Letter from Taft to Oberdorfer, *supra*, at 4. In addition to negatively effecting the world economy generally and U.S. businesses in particular, such decreases in foreign investment are likely to worsen economic conditions and "breed instability" in the affected countries. *Id.* at 4-5.

Third, because there is no authoritative arbiter of international law, nor an objective method for determining the norms incorporated therein, international law is necessarily highly indeterminate, creating a grave risk that judges will be guided by their own sense of fairness, rather than by clear legal standards. Moreover, because international law "evolves" on the basis of the views of entities, such as domestic and foreign scholars and foreign and transnational courts, *see supra* note

2, it is neither representative of the American political community nor responsive to it. As Judge Randolph noted, "[t]o have federal courts discover [international law] among the writings of those considered experts in international law and in treaties the Senate may or may not have ratified is anti-democratic and at odds with principles of separation of powers." *Odah*, 321 F.3d at 1148 (Randolph, J., concurring); *see also Tel-Oren*, 726 F.2d at 827 (Robb, J., concurring) (arguing that courts "ought not to serve as debating clubs for professors willing to argue over what is or what is not an accepted violation of the law of nations").

For these reasons, it is especially important that the *en banc* Court take this opportunity to correct its misreading of the Alien Tort Statute as an authorization and mechanism for the federal-court creation of a body of federal international human rights law.

III. MYANMAR LAW PROVIDES THE LIABILITY STANDARDS FOR PLAINTIFFS' CLAIMS.

For the reasons set forth above, the Court should reverse *Marcos* and its progeny and conclude that Plaintiffs' causes of action for forced labor, murder, rape and torture in Myanmar are not governed by federal law. It follows, therefore, that the Court – if it chooses to assert either diversity or supplemental jurisdiction over those claims – should apply California choice-of-law principles to determine the applicable substantive law. *See Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941).

California applies the "governmental interest" test as its choice-of-law test for tortious conduct. See *Ins. Co. of N. Am. v. Fed. Express Corp.*, 189 F.3d 914, 921 (9th Cir. 1999). Here, because *all* of the relevant events occurred in Myanmar, Myanmar has the greater interest and Myanmar law thus provides the substantive liability standards governing Plaintiffs' claims. *See Arno v. Club Med Inc.*, 22 F.3d 1464, 1467-68 (9th Cir. 1994) (applying foreign law where "virtually all of the relevant conduct occurred outside California").

WLF expresses no view on the substantive content of the tort law of Myanmar.

CONCLUSION

For the foregoing reasons, the Court should apply the law of Myanmar to determine whether Unocal Corporation may be held secondarily liable for the alleged injuries suffered by Plaintiffs, natives of Myanmar, at the hands of the Myanmar military.

Respectfully submitted,

DONALD B. AYER
CHRISTIAN G. VERGONIS
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001-2113
(202) 879-3939

DANIEL J. POPEO
PAUL D. KAMENAR
WASHINGTON LEGAL FOUNDATION
2009 MASSACHUSETTS AVENUE, N.W.
WASHINGTON, DC 20036
(202) 588-0302

Counsel for *Amicus Curiae*
Washington Legal Foundation

Dated: April 11, 2003

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(d) and 9th Circuit Rule 32-1, the attached amicus brief is proportionally spaced, has a typeface of 14 points or more and contains 6,857 words.

Dated: April 11, 2003

_____

Donald B. Ayer

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of April, 2003, two bound copies of the foregoing Brief of the Washington Legal Foundation as *Amicus Curiae* in Support of Neither Party were sent by Federal Express to:

Paul L. Hoffman, Esq.
Schonbrun, Desimome, Seplow, Harris & Hoffman LLP
723 Ocean Front Walk
Venice, CA 90291

Attorney for Plaintiffs-Appellants Doe

Terrence P. Collingsworth, Esq.
International Labor Rights Fund
733 15th Street, N.W. #920
Washington, DC 20005

Attorney for Plaintiffs-Appellants Roe

Jerrold J. Ganzfried, Esq.
Howrey, Simon, Arnold & White LLP
1299 Pennsylvania Avenue
Washington, DC 20004

John Niblock, Esq.
O'Melveny & Meyers LLP
555 13th Street, N.W.
Suite 500 West
Washington, DC 20004-1109

Attorney for Defendants-Appellees

I also hereby certify that on this 11th day of April, 2003, the original and thirty-five bound copies of the foregoing Brief of the Washington Legal Foundation as *Amicus Curiae* in Support of Neither Party were filed, via Federal Express, in the Office of the Clerk, United States Court of Appeals for the Ninth Circuit.

_____

Christian G. Vergonis