

TEXT OF REMARKS: CORPORATE ALIEN TORT LIABILITY AND
THE LEGACY OF NUREMBERG

*Richard Herz**

Thank you. I am very grateful to Amnesty International and the University of Washington School of Law for affording me the opportunity to speak at what has been a terrific conference. I am going to talk today about the Alien Tort Statute, and specifically about ATS litigation against corporations. The cases I will discuss involve multinational oil and mining companies. My co-panelist Susan Burke will address government contractor cases. In my presentation, I will make three broad points.

First, these cases are a direct legacy of the Nuremberg Tribunals. For all intents and purposes, the standards of liability that we are trying to apply to corporations complicit in human rights abuses were recognized at Nuremberg, and they have not changed significantly since.

Second, the Bush Administration has vigorously opposed the use of complicity liability in Alien Tort Statute litigation. Actually, they vigorously opposed any use of the Alien Tort Statute whatsoever. They lost that issue before the Supreme Court two years ago in *Sosa v. Alvarez – Machain*. Now, they are attempting to do retail what they were unable to do wholesale, by attacking various aspects of the Alien Tort Statute, one of which is complicity liability.

Returning to a theme of many of the previous speakers, I want to talk a little bit about how this particular aspect of Bush Administration policy is a betrayal of the Nuremberg legacy. That is true in two senses. Doctrinally, the Administration rejects the idea of complicity liability that was established at Nuremberg even while they embrace those exact same standards in the war on terrorism. More broadly—and this echoes Ambassador Shattuck’s argument and that of many panelists today—the Administration fundamentally rejects the vision of the role of legal judgment in preventing atrocity that underlies the entire project of the Nuremberg Tribunals.

* The author is Litigation Director at EarthRights International and has served as co-counsel for the plaintiffs in a number of Alien Tort Statute suits against multinational corporations, including *Doe v. Unocal* and *Bowoto v. Chevron Texaco* discussed herein.

The third point I will make is that the Bush Administration's position is incoherent even on its own terms. The Administration claims corporate complicity liability undermines its ability to utilize a "constructive engagement" approach to promoting human rights. In fact, however, adjudication of corporate cases under the Alien Tort Statute actually promotes, rather than hinders constructive engagement.

Let me address each of these points in turn. The Alien Tort Statute allows suits by aliens for torts committed in violation of the laws of nations. It had not been used very much until 1980, when the Second Circuit decided *Filartiga v. Pena-Irala*, which held that an alien could sue a former foreign government official for torture. The law thereafter was used in a number of other cases against former officials responsible for egregious human rights violations. Then, in the late 1990's, victims of atrocity began to use the ATS against corporations that were complicit in the abuses they suffered, particularly after the District Court's opinion in *Doe v. Unocal* in 1997. There, Judge Paez refused to dismiss a lawsuit against Unocal for its complicity in forced labor, rape, and murder committed by the Burmese military on behalf of Unocal's Yadana Pipeline Project in Burma. Since that time, additional similar suits have been filed. Just to give you the flavor of these suits, I note by way of example *Bowoto v. Chevron Texaco*. To break up a peaceful protest at one of its off-shore platforms in Nigeria, Chevron flew in members of the Nigerian military in its employ, who shot and killed two protestors. Six months later, Chevron-paid Nigerian military, in Chevron boats and Chevron helicopters, attacked two villages killing a number of people.

One of the main theories of liability in *Unocal* and *Chevron*, and indeed in most of the corporate cases under the Alien Tort Statute, is aiding and abetting liability. By that, I mean knowingly providing substantial assistance to the perpetrator of the crime. In international human rights law, this standard comes directly from Nuremberg. In *U.S. v. Goering*, for example, the Tribunal held that "[w]hen [businessmen], with knowledge of [Hitler's] aims gave him their cooperation, they made themselves parties to the plan he had initiated. They are not to be deemed innocent . . . if they knew what they were doing."¹ Then, at the subsequent trials at Nuremberg, a number of industrialists were convicted on an aiding and abetting theory. For example, Steinbrinck, in the *Flick* Trial, was convicted for giving money to the S.S., even though he actually had no interest in seeing the S.S. commit atrocities. Likewise, other industrialists were convicted for selling poison gas to the Nazis, knowing it would be used for mass extermination. The standard applied was not whether they wanted it to be so used, but

1. The Nuremberg Tribunal, 6 F.R.D. 69, 112 (1947).

whether they knew that what they were doing would assist in the commission of the crime.

These principles of aiding and abetting liability were directly incorporated into the jurisprudence of the International Criminal Tribunals for Rwanda and for the former Yugoslavia. Courts applying the ATS have overwhelmingly held that aiding and abetting liability is actionable, although a small minority has held that it is not. The cases finding such liability have often looked directly to the jurisprudence of Nuremberg and the ICTY and ICTR.

The Bush Administration vigorously opposes aiding and abetting liability under the ATS, and has challenged the application of such liability in submissions before a number of courts and in oral argument. They make two main arguments that are pertinent here. The first is that the aiding and abetting standard that I have laid out is not defined with sufficient specificity in international law. That, of course, is a denial of the Nuremberg precedent, which assumed these principles to be certain enough to hold businessmen criminally responsible, and even sentence a defendant to death, based on the same knowingly providing substantial assistance standard. It is also fundamentally hypocritical, because the aiding and abetting standard that we seek to apply in these cases is the same one that the Government has argued ought to be the standard for holding people who assist terrorism liable in civil suits. Moreover, it is even narrower than the aiding and abetting standard that is specifically incorporated as a feature of international law in the instructions for the military commissions that Rick Wilson talked about just a few moments ago.

The second argument against aiding and abetting that the Bush Administration makes is that the very existence of such liability will create uncertainty for U.S. corporations that will discourage these corporations from doing business in countries with repressive regimes. This in turn, they argue, will undermine constructive engagement, which is, with respect to at least some countries, their chosen policy for increasing respect for human rights. In other words, the Bush Administration sees human rights litigation not just as irrelevant to, but actually fundamentally at odds with the promotion of human rights. Contrast that with the Nuremberg approach. As Ben Ferencz explained in the movie we saw over lunch, the prosecution saw the Nuremberg trials as critical to deterring mass atrocity from happening again. A quote from the Amherst jurisprudence professor, Lawrence Douglas, I think, gives us a little more of a sense of the view of the architects of the Nuremberg Tribunals on this point. The idea was that the trials were “an act staged not simply to punish extreme crimes but to demonstrate visibly the power of the law to submit the most horrific outrages to its sober ministrations. In this regard, the trial was to serve as a spectacle of legality, making visible both the crimes of the Germans and the

sweeping neutral authority of the rule of law.”² In the Bush Administration’s view, however, the rule of law actually undermines the promotion of human rights.

The sad irony of the Government’s attack on aiding and abetting liability under the ATS is that there is no conflict between a policy of promoting human rights through constructive engagement and the Nuremberg vision of law as an engine of human rights reform. Indeed, in my view, the latter is indispensable to the former. I do not take a position here as to whether constructive engagement is a good idea or a bad idea. I hope, however, I can convince you that if you look at constructive engagement through the eyes of those who promote it, the logic of constructive engagement argues strenuously in favor of a vigorous tort regime here at home.

To see why that is the case, one has to look at the mechanisms through which the proponents of constructive engagement claim that engagement advances human rights. The primary mechanism through which proponents argue that engagement works is by instilling Western values in government officials and individuals in foreign countries through interactions with Western business leaders. So how does Alien Tort litigation fit into that model? First the engagement of companies that are actually complicit in human rights abuses cannot by any standard be considered to be constructive. Thus, complicity liability actually polices the boundaries of constructive engagement policy. That was a point recognized by the District Court in *Doe v. Unocal*. Unocal argued that although Congress had enacted a sanctions regime against Burma, that regime had a grandfather clause that exempted companies like Unocal that were already doing business there. According to Unocal, Congress had concluded that their presence was a positive force that would promote human rights. The District Court properly rejected that argument, concluding that, assuming the grandfather clause reflected an engagement policy, knowingly benefiting from human rights abuses does not support that policy.³

Second, businesses that partner with repressive militaries and that know that they might be sued under a tort regime for their own complicity are not going to sit on their hands. They will tell their government partners they cannot tolerate abuses on their project and cannot be complicit in the kind of abuses that such militaries undertake as a matter of course. Moreover, the corporation will have to explain their position. They will inform these regimes that if their company is complicit in abuses, or if the members of the military commit these abuses on the company’s behalf, the company may get sued at home. The most politically marginalized

2. LAWRENCE DOUGLAS, THE MEMORY OF JUDGMENT: MAKING LAW AND HISTORY IN THE TRIALS OF THE HOLOCAUST 41 (2001).

3. 963 F. Supp. 880, 895 n. 17 (C.D. Cal. 1997).

Burmese peasant or Nigerian fisherman will have his day in court before a neutral judge, and that neutral judge is going to be able to hold the corporation accountable. This is so, the company will explain, even though it is a huge, multinational corporation, and even though the Bush Administration, our Executive Branch, does not like it. In other words, corporations will have to go to their government partners and explain to them how the rule of law functions in a free society. That is exactly what the constructive engagement model tells us is necessary if constructive engagement is to work. Without a liability regime, the idea that a corporation will stand up and say to their government partner that they do not like what the military is doing is a little difficult to believe, particularly since when pushed, corporations will often say they do not get involved in politics.

Accordingly, I think the Nuremberg vision of adjudication as an engine of human rights promotion is extraordinarily powerful. If I am right about the interrelationship between Alien Tort litigation and constructive engagement, the value of the Nuremberg legacy ought to be a point of agreement even among people who disagree about as fundamental a human rights issue as whether sanctions or constructive engagement is the more effective approach for encouraging reform. Unfortunately, that legacy is under sustained attack by the Bush Administration, both in the narrow context of the Alien Tort Statute, and more broadly in any number of other contexts that we have all been discussing here today. I believe, however, that legacy is worth fighting for, and I am particularly honored to be speaking to you today, because there is nobody out there fighting for the Nuremberg legacy with more passion and more effectiveness than Amnesty International. Thank you.