05-2141
05-2326

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Sakwe Balintulo Khulumani, as personal representative of Saba Balintulo, Fanekaya Dabula, as personal representative of Lungile Dabula, Nokitsikaye Violet Dakuse, as personal representative of Tozi Skweyiya, Berlina Duda, as personal representative of Donald Duda, Mark Fransch, as personal representative of Anton Fransch, Sherif Mzwandile Gekiso, as personal representative of Ntombizodwa Annestina Nyongwana, Elsi Guga, as personal representative of James Guga, Joyce Hlophe, as personal representative of Jeffrey Hlophe,

(See inside cover for complete list of parties)

BRIEF OF *AMICI CURIAE* CONCERNING THE STATUS OF APARTHEID AS A VIOLATION OF INTERNATIONAL LAW IN SUPPORT OF PLAINTIFFS-APPELLANTS

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Siphaho, Johannes Titus, Mpolontsi Tyotes, Mthuzimele Melford Yamile, Ntunani William Zenani, Thandiwe Shezi, Elias B. Boneng, Dennis Vincent Frederick Brutus, Moraloki A. Kgobe, Reuben Mphela, Lulamile Ralrala,

Plaintiffs-Appellants,

-----v.----

Barclay National Bank Ltd., British Petroleum, PLC., Chevrontexaco Corporation, Chevrontexaco Global Energy, Inc., Citigroup, Inc., Commerzbank, Credit Suisse Group, DaimlerChrysler AG, Deutsche Bank AG, Dresdner Bank AG, ExxonMobil Corporation, Ford Motor Company, Fujitsu, Ltd., General Motors Corporations, International Business Machines Corp., J.P. Morgan Chase, Shell Oil Company and UBS AG,

Defendants-Appellees,

AEG Daimler-Benz Industrie, Fluor Corporation, Rheinmetall Group AG, Rio Tinto Group, Total-Fina-Elf and Doe Corporations,

Defendants.

Lungisile Ntzebesa, Hermina Digwamaje, Andile Mfingwana, F.J. Dlevu, Lwazi Pumelela Kubukeli, Frank Brown, Sylvia Brown, Nyameka Goniwe, Sigqibo Mpendulo, Doroty Molefi, Themba Mequbela, Lobisa Irene Digwamaje, Kaelo Digwamaje, Lindiwe Petunia Leinana, Matshidiso Sylvia Leinana, Kelebogile Prudence Leinana, David Motsumi, Sarah Nkadimeng, Moeketsi Thejane, Moshoeshoe Thejane, Pascalinah Bookie Phoofolo, Khobotle Phoofolo, Gladys Mokgoro, Jongani Hutchingson, Sefuba Sidzumo, Gobusamang Laurence Lebotso, Edward Thapelo Tshimako, Rahaba Mokgothu, Jonathan Makhudu Lediga, Anna Lebese, Sipho Stanley Lebese, William Nbobeni, John Lucas Ngobeni, Clement Hlongwane and Masegale Monnapula,

Plaintiffs-Appellants,

Sakwe Balintulo Khulumani, P.J. Olayi, Wellington Baninzi Gamagu, Violations of Pass Laws, unlawful detention 1981-1983, torture subjected to discriminatory

labor practices 1981 and William H. Durham,

Plaintiffs,

-----v.-----

Daimler Chrysler Corporation, National Westminster Bank PLC, Colgate Palmolive, Barclays Bank PLC, UBS AG, Citigroup Inc., Deutsche Bank AG, Dresdner Bank AG, Commerzbank AG, Ford Motor Company, Holcim, Inc., Exxon Mobil Corporation, Shell Oil Company, J.P. Morgan, Mennesota Mining and Manufacturing Co. (3M Co.), General Electric Company, Bristol-Meyers Squibb Co., E.I.Dupont de Nemours, Xerox Corporation, IBM, General Motors, Honeywell International, Inc., Bank of America, N.A., The Dow Chemical Company, Coca-Cola Co., Credit Agricole S.A., Hewlett-Packard Company, EMS-Chemie (North America) Inc., Chevron Texaco Corporation, American Isuzu Motors, Inc. and Nestle USA, Inc.,

Defendants-Appellees,

Sulzer AG, Schindler Holding AG, Anglo-American Corporation, Debeers Corporation, Novartis AG, Banque Indo Suez, Credit Lyonnais, and Unknown officers and directors of Danu International, Standard Chartered, P.L.C., Corporate Does, Credit Suisse Group, Citigroup AG, Securities Inc., as successor to Morgan Guaranty, Manufacturers Hannover, Chemical Bank & Chase Manhattan Bank, Unisys Corporation, Sperry Corporation, Burroughs Corporation, ICL, Ltd., Amdahl Corp., Computer Companies, John Doe Corporation, Holcin, Ltd., Henry Blodget, Justin Baldauf, Kristen Campbell, Virginia Syer Genereux, Sofia Ghachem, Thomas Mazzucco, Edward McCabe, Deepak Raj, John 1-10 Doe, Oerlikon Contraves AG, Oerlikon Buhrle AG, Corporate Does 1-100,Royal Dutch Petroleum Co., Shell Transport &Trading Company PLC and Shell Petroleum, Inc., Merrill Lynch & Co. Inc., Kenneth Seymour

Defendants.

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

Pursuant to Fed. R. App. P. 26.1, the *Amici* make the following disclosure:

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

NO.

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

NO.

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

NO.

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American Convention on Human Rights (1969) 2

Apartheid as a Crime Against Humanity, A Submission to the South African Truth and Reconciliation Commission, 20 Mich. J. Int'l L. 267 (Winter 1999) 14

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INTEREST OF AMICI CURIAE

Amici are public interest organizations, religious groups, and individuals devoted to the enhancement of human rights through litigation, public education, and lobbying. Many have spent decades advocating against the practice of systematic racial segregation and discrimination, or apartheid, in South Africa. Detailed descriptions about individual amici are provided in Appendix A. Amici submit this brief to address the failure of the District Court to find that apartheid constitutes a violation of customary international law justiciable in U.S. courts. *In re: South African Apartheid Litigation*, 346 F.Supp.2d 538 (S.D.N.Y. 2004). The District Court's failure to recognize apartheid as a violation of customary law is also of general interest to the human rights community, which has sought, through various means, to further recognition of those international legal norms that are binding upon all nations and peoples. The failure of the court below to recognize this form of systematic racial discrimination, which constitutes a crime against humanity, would, if left undisturbed, hinder efforts to hold accountable those who commit human rights violations that are well-recognized under international law, and widely condemned by the international community.

ARGUMENT

Plaintiffs state claims for apartheid, a human rights violation that also constitutes a crime against humanity. The District Court erroneously concluded that even a state actor who directly supported apartheid would escape civil liability. The court focused narrowly on the Apartheid Convention and the failure of the major powers to ratify it and ignored or erroneously rejected sources of customary international law which support plaintiffs' claim. This Court should clarify that

apartheid is a violation of the law of nations and a crime against humanity, and that plaintiffs may proceed with their claims against corporate defendants for aiding and abetting the acts of apartheid against plaintiffs.[1]

I. APARTHEID IS A VIOLATION OF INTERNATIONAL LAW JUSTICIABLE IN U.S. COURTS

The Supreme Court in *Sosa v. Alvarez-Machain*, 124 S. Ct 2739, 2766 (2004), endorsed prior rulings that held that federal courts could hear claims for violations of customary international law which are "specific, universal, and obligatory." Apartheid clearly constitutes such a violation.

Apartheid has been universally regarded as the prototypical form of systematic racial discrimination. The decision of the court below is at odds with international instruments and tribunals which have denounced apartheid as a violation of the law of nations. U.S. courts have recognized that systematic racial discrimination is a justiciable violation of customary international law, and Congress and the U.S. Executive Branch have also condemned apartheid as illegal.

A. Apartheid as a Form of Systematic Racial Discrimination Has Been Universally Recognized as a Violation of Customary International Law

Discrimination on account of race is prohibited by all of the comprehensive international human rights instruments.[2] *See also* IAN BROWNLIE, PRINCIPLES OF

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1 All parties have consented to the filing of this brief, consistent with Fed. R. App. P. 29(a).

2 Universal Declaration of Human Rights, Dec. 10, 1948, G.A. Res. 217A(III), U.N. Doc. A/810 (1948), art. 2 and 16; U.N. CHARTER, June 26, 1945, 59 Stat. 1031, T.S. No. 993, art. 55 and 56 (promoting universal respect for the guarantee of human rights and fundamental freedoms disregarding race); International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, art. 2(2), 993

PUBLIC INTERNATIONAL LAW 546 (Oxford University Press 2003) (1966). For over 40 years, apartheid was repeatedly condemned by the International Court of Justice, the U.N. Security Council, the U.N. General Assembly, and most countries of the world. Customary international law norms are those that are the "customs and usages of civilized nations" *Sosa*, at 2766 (citing *The Paquete Habana*, 175 U.S. 677, 700 (1900)). The prohibition of apartheid clearly meets this standard and thus constitutes a violation of customary international law.

In 1971, the International Court of Justice ("ICJ") condemned apartheid as a form of systematic racial discrimination. In response to a request by the Security Council, the ICJ issued an advisory opinion on the legal consequences of the continued presence of South Africa in Namibia. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, 1971 I.C.J. 16 (1971). In addition to declaring that presence illegal, the ICJ declared South Africa's apartheid policies were a "flagrant violation of the purposes and principles of the [U.N.]

U.N.T.S. 3, 4 (entered into force Jan. 3, 1976); International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 2(1), 999 U.N.T.S. 171, 172 (entered into force Mar. 23, 1976) (136 parties as of Jan. 1, 1997); Convention on the Rights of the Child, Nov. 20, 1989, pmbl., art. 2(1), 28 I.L.M. 1448, 1450 (entered into force Sept. 2, 1990); International Convention on the Elimination of All Forms of Racial Discrimination, Jan. 7, 1966, *passim*, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969); African Charter on Human and Peoples' Rights, June 26, 1981, pmbl., art. 2 and 12, O.A.U. Doc. CAB/LEG/67/3 Rev. 5 (1981), 21 I.L.M. 59 (entered into force Oct. 21, 1986); American Convention on Human Rights, Nov. 22, 1969, art. 1(1), 1144 U.N.T.S. 123, 144 (entered into force July 18, 1978); European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 14, 213 U.N.T.S. 221, 232 (entered into force Sept. 3, 1953), amended by Protocols Nos. 3, 5, and 8 (entered into force on Sept. 21, 1970, Dec. 20, 1971 and Jan. 1, 1990, respectively).

Charter" and "the most essential principles of humanity, principles protected by the sanction of international law." *Id.* at 29. The opinion stated that the practice of enforcing "distinctions, exclusions, restrictions and limitations exclusively based on grounds of race...constitute[s] a denial of fundamental human rights" and characterized apartheid as the negation of equality. *Id.* at 29. The Court observed that many of the laws of the South African apartheid regime encroached on basic principles of equality and personal liberty; limited freedoms of movement of residence; infringed upon the right to own property, the rights of the family, political rights, and the right to work; and reintroduced forced labor. These laws violated Articles 1, 13, 16, 17, 21, and 23 of the Universal Declaration of Human Rights. Furthermore, the Court asserted that the "condemnation of apartheid has passed the stage of declarations and entered the phase of binding conventions," such as the International Convention on the Elimination of All Forms of Racial Discrimination. *Id.* at 46. The opinions of the International Court of Justice should be accorded "great weight" in determining the content of international law. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS OF THE UNITED STATES ("RESTATEMENT (THIRD)") § 702) § 103, cmt. b. (1987).

From 1960 to the mid 1980s, the Security Council repeatedly condemned the South African practice of apartheid as a form of racial discrimination which violated the U.N. Charter,[3] and other sources of international law,[4] and was

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3 *See* Appendix B*; see, e.g.,* U.N. Doc S/RES/134 (1960); U.N. Doc. S/RES/181 (1963); U.N. Doc S/RES/311 (1972).

4 S.C. Res. 190, U.N. Doc S/RES/190 (1964) (condemning "the Government of the Republic of South Africa for its failure to comply with the repeated resolutions of the General Assembly and of the Security Council").

"abhorrent to the conscience of mankind."[5] As early as 1963, the Security Council created and enforced an arms embargo on South Africa and created a special committee on apartheid. This Court has given particular weight to such Security Council resolutions in determining the legal responsibilities of international actors. *See, e.g., Flores v. Southern Peru Copper*, 343 F.3d 140, 167 (2d Cir. 2003) (stating multiple times that the Security Council can issue "legally binding" resolutions and make decisions that are binding on member states).

This Court has also held that U.N. General Assembly documents should be considered evidence of customary international law when they reflect the actual customs and practices of member-States. *Id.* From 1950 through 1993, the U.N. General Assembly passed resolutions condemning apartheid as an illegal policy of racial discrimination. *See* Appendix B. In 1953, for example, a specially-created United Nations Commission on the Racial Situation in the Union of South Africa declared that the "doctrine of racial differentiation and superiority on which the apartheid policy" is contrary to "the dignity and worth of the human person" and Articles 55, 56, the preamble, and the general purpose of the UN Charter. UN Doc. A/2505 and Add.1, 1953, *available at* http://www.anc.org.za/un/undocs1a.html#9; Appendix B. In 1962, the General Assembly, requested that member states break off diplomatic and economic ties with South Africa because of the "continued and total disregard by the Government of South Africa of its obligations under the Charter of the United Nations." UN Doc. A/RES/1761 (XVII), 6 November 1962, *available at* http://www.anc.org.za/un/undocs1a.html#20; Appendix B. Numerous

5 S.C. Res. 182, U.N. Doc S/RES/182 (1963).

subsidiary agencies and other international organizations condemned apartheid between 1960 and 1992. *See* Appendix B.

In addition, countries around the world repeatedly condemned apartheid as a violation of international law. Indeed, defendants' declarations to the District Court included numerous statements that apartheid was a violation of international law in Western Europe.[6] These declarations outlined policies prohibiting certain business transactions which were seen to directly aid the apartheid regime. Switzerland imposed mandatory arms embargoes, imposed annual ceilings on certain capital flows, restricted export of computer systems and nuclear fuel (Krafft Dec. ¶ 7), and monitored economic relations with South Africa to ascertain whether Switzerland was being used to circumvent measures adopted by other countries.

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6 For example, the Declaration of Matthias-Charles Krafft ("Krafft Dec.") ¶ 4 noted Swiss participation in the 1964 ILO Declaration which found the "South African Government's policy of apartheid as incompatible with the Universal Declaration of Human Rights."

The Declaration of Rudolph Dolzer ("Dolzer Dec.") ¶ 24 noted that in 1977, German condemned apartheid as a violation of the U.N. Charter. The Dolzer Declaration also stated that in September 1985, the Foreign Ministers of the member states of the European Community issued the Joint Declaration of Luxembourg restricting exchanges in the military, security and cultural and scientific spheres and the cessation of oil exports to South Africa. Dolzer Dec. ¶ 16.

The Declaration of the Rt. Hon. Lord Robin Renwick of Clifton KCMG ("Renwick Dec.") explains how the United Kingdom implemented sanctions imposed by the UN Security Council (UN Security Council Resolution No. 418 (1977)). Renwick Dec. ¶ 15. Lord Renwick's Declaration also discussed restrictions pursuant to Commonwealth Policies adopted in 1985 (banning new loans, embargo on all military cooperation, ban on new contracts for the sale and export of nuclear goods, material and technology to South Africa).

Germany restricted arms sales starting in 1963, and in 1985 began restricting imports of iron, steel, gold coins and oil. (Dolzer Dec. ¶ 3). Significantly, none of defendants' declarations cited by the District Court argue that corporations that aided and abetted apartheid should be exempt from liability in a court; they merely outlined prohibitions on corporate behavior and conditions for investment.

Countries outside of Europe also condemned the practice of apartheid. India requested action from the United Nations on behalf of Indians living in South Africa. 12 July 1948 Letter to Secretary General, *see* Appendix B. In 1960, the Second Conference of Independent African States appealed to various world bodies, including the Arab States, the British Commonwealth, and the United Nations, to "persevere in the effort to put an end to the terrible situation caused by apartheid and racial discrimination." Appendix B. Members of the Organization of the Petroleum Exporting Countries ("OPEC") placed an oil embargo on South Africa in 1973. *See* EMBARGO, APARTHEID'S OIL SECRET REVEALED 21 (Richard Hengeveld & Japp Rodenburg, eds., Amsterdam University Press 1995). *See* Appendix B, for additional statements by foreign officials.

B. Systematic Racial Discrimination is Justiciable under the Alien Tort Statute

This court has acknowledged that systematic racial discrimination is a violation of the law of nations. *Kadic v. Karadzic*, 70 F.3d 232, 240 n. 3 (2d Cir. 1995) ("A state violates international law if, as a matter of state policy, it practices, encourages, or condones . . . systematic racial discrimination.") (quoting RESTATEMENT (THIRD) § 702); *see also Bigio v. Coca-Cola Co.*, 239 F.3d 440, 448 (2d Cir. 2000) (also citing to RESTATEMENT (THIRD) § 702, which defines it as a violation of customary international law).

Two other circuits have also recognized that systematic racial discrimination is a violation of customary international law. *Siderman de Blake*, 965 F.2d 699, 717 (9th Cir. 1992) (noting that the Restatement identifies *jus cogens* norms prohibiting systematic racial discrimination); *Committee of U.S. Citizens in Nicaragua v. Reagan*, 859 F.2d 929, 941 (D.C. Cir. 1988) ("[f]undamental human rights law...prohibits... racial discrimination"); *Tel-Oren v. Libyan Arab Republic*, 726 F. 2d 774, 781 (D.C. Cir. 1984) (citing RESTATEMENT (THIRD) § 702).

District courts have also ruled that systematic racial discrimination is a violation of customary international law. *See Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 305 (S.D.N.Y. 2003) ("states practicing, encouraging, or condoning ...systematic racial discrimination violate international law."); *Tachiona v. Mugabe*, 234 F. Supp. 2d 401, 439 (S.D.N.Y. 2002); *Hirsh v. State of Israel*, 962 F. Supp. 377, 381 (S.D.N.Y. 1997) (racial discrimination by a foreign state is a *jus cogens* violation); *see also Kane v. Winn*, 319 F. Supp. 2d 162, 196 (D. Mass. 2004) (racial discrimination is violation of customary international law and has reached the status of a jus cogens norm); *Sarei v. Rio Tinto Plc*, 221 F. Supp. 2d 1116, 1152-1153 (D. Cal. 2002) (*jus cogens* norms include racial discrimination); *Taveras-Lopez v. Reno*, 127 F. Supp. 2d 598, 609 (D. Pa. 2000) (citing RESTATEMENT (THIRD)); *Doe v. Unocal*, 963 F. Supp. 880, 890 (C.D. Cal. 1997); *Beanal v. Freeport-McMoran*, Inc., 969 F. Supp. 362, 371 (E.D. La. 1997) (recognizing that systematic racial discrimination is "actionable as violative of the law of nations"); *Denegri v. Republic of Chile*, 1992 U.S. Dist. LEXIS 4233, 11 n.7 (D.D.C. Apr. 6, 1992) (recognizing that racial discrimination is a violation of a *jus cogens* norm of international law); *Guinto v. Marcos*, 654 F. Supp. 276, 280 (S.D. Cal. 1982) (citing *Tel-Oren*, 726 F. 2d 774)

(recognizing systematic racial discrimination as a representative violation of international law).

The courts' repeated citations to the RESTATEMENT (THIRD) are telling. The comments to the specific section cited, 702, lists apartheid in South Africa as an example: "[r]acial discrimination is a violation of customary law when it is practiced systematically as a matter of state policy, *e.g., apartheid* in the Republic of South Africa." RESTATEMENT (THIRD) § 702, cmt. i. Further, the Reporters' Notes to the Restatement use the terms "systematic racial discrimination" and "apartheid" interchangeably and suggest that customary international law accepts the definition contained in the International Convention on the Suppression and Punishment of the Crime of Apartheid. *Id.* at note 7. That Convention prohibits acts such as murder, expropriation of property, and the exclusion of racial minorities from political, social, economic and cultural life "committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them." *Id.* at art. 2.

C. The District Court's Failure to Recognize Apartheid as a Violation of International Law is at Odds with the Position Taken by Congress and the U.S. Executive

1. The United States is a Party to the International Convention on the Elimination of All Forms of Racial Discrimination

On September 28, 1966, President Lyndon Johnson signed the International Convention on the Elimination of All Forms of Racial Discrimination ("CERD"), 660 U.N.T.S. 195 (entered into force Jan. 4, 1969). Once a state signs a treaty it is "obliged to refrain from acts which would defeat the object and purpose of [that]

treaty."[7] Notably, the CERD Preamble highlights international concern about the "manifestations of racial discrimination still in evidence in some areas of the world and by governmental policies based on racial superiority or hatred, such as policies of apartheid, segregation or separation." *Id.* at pmbl. The United States ratified CERD in 1994; the treaty entered into force for the United States on November 20, 1994.

2. Congress Recognizes Apartheid as a Violation of International Law

The U.S. Senate declared in 1978: "What sets South Africa apart from other countries which have equally oppressive, and, in some cases, quantitatively worse records of human rights violations is that 1) South Africa's policies are based on race as the sole criterion of discrimination, 2) its human rights violations have been made 'legal' through legislative and regulatory actions that have institutionalized racism into the fabric of society, and 3) its policies are justified in the name of defending the Free World of which South Africa claims to be a member." Committee on Foreign Relations, Subcommittee on African Affairs, "U.S. Corporate Interests in Africa," Washington, DC, U.S. Government Printing Office, 1978, 12-13. The Senate concluded that "the net effect of American investment has been to strengthen the economic and military self-sufficiency of South Africa's apartheid regime." *Id.* In light of these assumptions, Congress passed the Comprehensive Anti-Apartheid Act of 1986, P.L. 99-440 (prohibiting various economic relations with South Africa), and the United States Export-Import Bank

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7 Vienna Convention on the Law of Treaties, May 23. 1969, art. 18, U.N. Doc A/CONF. 39/27 (entered into force on January 27, 1980). Both the United States Department of State and U.S. courts regard the Vienna Convention as customary international law. *See, e.g., Sale v. Haitian Centers Council, Inc.,* 509 U.S. 155, 191 (1993).

Act of 1985, §. 2(b)(8), 12 U.S.C. § 635(b)(9) (prohibiting banks from extending credit in support of "any export which would contribute to enabling the Government of the Republic of South Africa to maintain or enforce apartheid").

3. The Executive Branch Has Condemned Apartheid as Systematic Racial Discrimination

U.S. officials have publicly condemned apartheid as a form of systematic racial discrimination since at least the early 1960s. For example, in 1963, Adlai Stevenson, the U.S. representative to the U.N. Security Council, announced that the U.S. would stop sales of arms to South Africa because of its failure to "discharge its obligations under Articles 55 and 56 of the Charter." *See* Appendix B. In a 1976 speech, Secretary of State Henry Kissinger stated: "The world community's concern with South Africa is not merely that racial discrimination exists there. What is unique is the extent to which racial discrimination has been institutionalized, enshrined in law, and made all pervasive." *See* Appendix B. In 1985, President Reagan signed Executive Order No. 12532, *Prohibiting Trade and Certain Other Transactions Involving South Africa*, which stated: "the policy and practice of apartheid are repugnant to the moral and political values of democratic and free societies and run counter to United States policies to promote democratic governments throughout the world and respect for human rights..." 50 FR 36861, 3 CFR, 1985 Comp., p. 387. *See* Appendix B for additional statements and actions by U.S. officials.

II. DEFENDANTS MAY BE HELD LIABLE FOR CRIMES AGAINST HUMANITY

Apartheid is itself a violation of fundamental international norms and it is also cognizable as a crime against humanity. The norm against systematic racial

discrimination as a crime against humanity was recognized as early as the Nuremberg Tribunals and apartheid has been specifically condemned as such since 1966.

A. The Prohibition of Crimes Against Humanity Was Well-Established Prior to Defendants' Actions in South Africa

Customary international law has condemned crimes against humanity for at least the last half century.[8] National courts have also prosecuted crimes against humanity.[9] Crimes against humanity are also deemed to be part of *jus cogens* – those legal norms so fundamental that they are non-derogable. In 1945, the Allied Powers drafted the Nuremberg Charter for the International Military Tribunal,[10] and enacted Control Council Law No. 10,[11] which condemned crimes against humanity and set forth basic definitional requirements. These doctrines were

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8 Cherif Bassiouni, *Crimes Against Humanity*, *in* CRIMES OF WAR: WHAT THE PUBLIC SHOULD KNOW, (Roy Gutman & David Rieff, eds., W.W. Norton 1999), *available at* http://www.crimesofwar.org/thebook/crimes-against-humanity. S*ee also In re Agent Orange Prod. Liab. Litig.*, 373 F. Supp. 2d 7, 134-137) (E.D.N.Y. 2005).

9 Bassiouni *supra* note 8 (discussing national prosecutions in, for example, France and Canada.).

10 Charter of the International Military Tribunal, Aug. 8, 1945, art. 6(c), 59 Stat. 1544, 1547, 82 U.N.T.S. 279, 288 (1945) ("Nuremberg Charter"), *available at* http://www.yale.edu/lawweb/avalon/imt/proc/imtconst.htm#art6.

11 Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, December 20, 1945, 3 Official Gazette Control Council for Germany 50-55 (1946) ("Control Council Law No. 10").

reaffirmed in the Nuremberg Principles, drafted in 1950 by the International Law Commission at the request of the UN General Assembly.[12]

Since World War II, other international declarations have condemned crimes against humanity. The U.N. issued repeated statements confirming the international community's position on the subject. General Assembly Resolution 3 makes specific reference to the concept of crimes against humanity as stated in the Nuremberg Charter.[13] General Assembly Resolution 2391, issued in 1968, also explicitly reaffirmed the Nuremberg Charter and the Nuremberg Principles and proclaimed that "war crimes and crimes against humanity are among the gravest crimes in international law."14

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12 Report of the International Law Commission to the General Assembly, U.N. GAOR, 5th Sess., Supp. No. 12, at 1, U.N. Doc. A/1316 (1950), reprinted in [1950] 2 Y.B. Int'l L. Comm'n 364, 374-378.–The report, which also contains commentaries on the principles, appears in *Yearbook of the International Law Commission, 1950*, vol. II, available on line at: www.un.org/law/ilc/texts/nurnberg.htm (last visited Jan. 16, 2005).

13 G.A. Res. 3, UN GAOR, 1st Sess., at 10, U.N. Doc. A/ (1946). G.A. Res. 3 (I) U.N. Doc. A/OR/1-1/R (Feb. 13 1946), *available at* http://dac cessdds.un.org /doc/RESOLUTION/G EN/NR0/032 /54/IM G/NR003254.pdf?OpenElement.

14 G.A. Res 2391 (XIII) pmbl. U.N. Doc. A/7218 (Nov. 26, 1968) *available at* http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/243/51/IMG/NR024351. pdf?OpenElement.

The Nuremberg Tribunals established that crimes against humanity encompass: "atrocities and offenses, including...persecutions on racial grounds." Control Council Law No. 10, art. II(1)(c), *quoted in United States v. Flick*, 6 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, 1191 (1949).[15] As the Tribunal noted, Control Council Law No. 10 is a "statement of international law which previously was at least partly uncodified." *Flick*, 6 Trials at 1189. Time and again, the international community has defined crimes against humanity in virtually identical terms to those used in Control Council Law No. 10.[16]

Since 1966, apartheid has been specifically condemned as a crime against humanity,[17] and this characterization was repeated in many subsequent resolutions

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15 The "civilian population" requirement necessitates "either a finding of widespreadness, which refers to the number of victims, or systematicity, indicating that a pattern or methodical plan is evident." *Prosecutor v. Tadic*, IT-94-1, Trial Chamber 648 (May 7, 1997), *available at* www.icty.org. The notion of widespread abuses includes the cumulative effect of a series of inhumane acts." *Id.* January 8, 2005.

16 *See e.g.,* Nuremberg Charter, art. 6(c), *available at* http://www.yale.edu/lawweb/a valon/imt/pro c/imtcon st.ht m#art6 (last visited Aug. 29, 2005); Statute of the International Tribunal for Rwanda, annexed to S.C. Res. 955 (1994), art. 3, U.N. SCOR, 49th Sess., *available at* http://www.un.org/ictr/english/Resolutions/955e.htm (last visited Aug. 29, 2005); Statute of the International Tribunal For the Former Yugoslavia, annexed to Report of the Secretary-General pursuant to paragraph 2 of U.N. Security Council Res. 808 (1993), art. 5, U.N. Doc. S/25704, U.N. SCOR, 48th Year, Supp. for April-June 1993, at 117 (1995); Rome Statute of the International Criminal Court, July 17, 1998, art. 7, U.N. Doc. A/Conf.183/9 (2002), *available at* http://www.un.org/law/icc/statute/romefra.htm (last visited Aug. 29, 2005).

17 Ron Slye, *Apartheid as a Crime Against Humanity, A Submission to the South*

both by the General Assembly[18] and the Security Council,[19] as well as by the International Court of Justice. The category of persecution on political, racial or religious grounds is found in all definitions of crimes against humanity. The Nuremberg Tribunal defined the following as constituting "persecution": deprivation of the rights to citizenship, to teach, to practice professions, to obtain education and to marry freely, arrest and confinement, beatings, mutilation and torture, confiscation of property, deportation to ghettos, and slave labor.[20]

African Truth and Reconciliation Commission, 20 Mich. J. Int'l L. 267 (Winter 1999).

18 G.A. Res. 2396 (XXII), ¶ 1, U.N. Doc. A/7348 (Dec. 2, 1968); G.A. Res. 2775 E (XXVI), U.N. Doc. A/8429, (November 29, 1971) ("crimes against humanity are committed when enslavement, deportation and other inhuman acts are enforced against any civilian population on political, racial or religious grounds"); Programme of Action against Apartheid, G.A. Res. 38/39, adopted by the General Assembly, on December 5, 1983 in A/RES/38/39 B. ("[r]eaffirming that apartheid is a crime against humanity ").

19 *See, e.g.,* S.C. Res. 556 U.N. Doc S/Res/556 (1984) (reiterating its condemnation of the *apartheid* policy of the South African regime and stating that *apartheid* is a "crime against humanity"). *See also* S.C. Res. 392, U.N. Doc S/RES/392 (1976) ("*apartheid* is a crime against the conscience and dignity of mankind and seriously disturbs international peace and security"); S.C. Res. 473, U.N. Doc S/RES/473 (1980) ("*apartheid* is a crime against the conscious and dignity of mankind and is incompatible with the rights and dignity of man, the Charter of the United Nations, and the Universal Declaration of Human Rights"); Appendix B. The following resolutions refer to either or both of Resolutions 392 & 473, and were also passed unanimously: S.C. Res. 417, U.N. Doc. S/RES/417 (1977); S.C. Res. 418, U.N. Doc. S/RES/418 (1977); S.C. Res. 591, U.N. Doc. S/RES/591 (1986).

20 *See United States v. von Weizsaecker* ("The Ministries Case"), in 14 Trials of War Criminals before Nuremberg Military Tribunals under Control Council Law No. 10471.

U.S. courts have repeatedly recognized that crimes against humanity are actionable under the Alien Tort Statute ("ATS").[21]

B. Corporations May Be Held Liable for Aiding and Abetting a Crime Against Humanity

That private actors can commit crimes against humanity has been clear since Nuremberg.[22] The Nuremberg Charter directly addressed accomplice liability in Article 6, which stated:

> "Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan."[23]

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21 *See Kadic*, 70 F.3d 232, 236 (2d Cir. 1995); *Flores*, 343 F.3d at 150 ("Customary international law proscribing crimes against humanity have been enforced against individuals since World War II"); *Agent Orange*, 373 F. Supp. 2d 7; *Wiwa v. Royal Dutch Petroleum Co.*, 2 U.S. Dist. LEXIS 3293, 36 (S.D.N.Y. 2002); *Doe v. Saravia*, 348 F. Supp. 2d 1112, 1144 (E.D.Cal. 2004); *Aldana v. Fresh Del Monte Produce, Inc.*, 305 F. Supp. 2d 1285 (S.D.Fla. 2003); *Sarei v. Rio Tinto*, 221 F. Supp. 2d 1116, 1150 (C.D.Cal. 2002); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1352-53 (N.D.Ga. 2002); *Estate of Cabello v. Fernandez-Larios*, 157 F. Supp. 2d 1345, 1360-61 (S.D. Fla. 2001); *See also Sosa*, 124 S. Ct. at 2783 (Breyer, J., concurring) (noting that crimes against humanity are among the offenses which are both "universally condemned" and for which there is "agreement that universal jurisdiction exists to prosecute").

22 *See* SUBSTANTIVE AND PROCEDURAL ASPECTS OF INTERNATIONAL LAW, VOL. I 17 (Gabrielle Kirk McDonald & Olivia Swaak-Goldman, eds, 2000)(recognizing that under international law, acts constituting crimes against humanity need not be state policy).

23 Nuremberg Charter, art. 6(c).

Control Council Law No. 10 also addressed this concern:

> Any person without regard to nationality or the capacity in which he acted, is deemed to have committed a crime as defined in paragraph 1 of this Article, if he . . . (b) was an accessory to the commission of any such crime or ordered or abetted the same or (c) took a consenting part therein or (d) was connected with plans or enterprises involving its commission . . . or (f) with reference to paragraph 1 (a) if he . . . held high position in the financial, industrial or economic life of any such country.[24]

Similarly, the Nuremberg Principles incorporate liability for accessories to international crimes. Principle VII states that "complicity in the commission of a crime against peace, a war crime, or a crime against humanity...is a crime under international law."[25] Accordingly, the Nuremberg Tribunals convicted a number of purely private actors for crimes against humanity. For example, in *Flick*, the Tribunal explicitly rejected the contention that "individuals holding no public offices and not representing the State" could not be held responsible, holding that "[a]cts adjudged criminal when done by an officer of the government are criminal also when done by a private individual." 6 Trials at 1192. *Id.* Although defendants "were not officially connected with the Nazi government," they were nonetheless

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24 Control Council Law No. 10, art. 2 ¶2. The same was true in the post-World War II Tokyo Tribunal. Charter of the International Military Tribunal for the Far East, Aug. 8, 1945 art. 5, TIAS No. 1589 (stating that tribunal may punish those who as individuals or as members of organizations" committed crimes against humanity.)

25 Report of the International Law Commission to the General Assembly, U.N. GAOR, 5th Sess., Supp. No. 12, at 1, U.N. Doc. A/1316 (1950), reprinted in [1950] 2 Y.B. Int'l L. Comm'n 364, 377. Commentary to the formulation of the Nuremberg Principles refers to the underlying norm: "[I]nternational law may impose duties on the individual, without any interpretation of domestic law directly." *Id.* at 192.

convicted of crimes against humanity. *Id.* at 1191, 1202. Other industrialists were likewise convicted of crimes against humanity. *See, e.g., U.S. v. Krauch* (I.G. Farben Trial), 8 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, 1190-92 (1949). Thus, under international law, defendants can be held liable for their participation in crimes against humanity.

C. Courts Have Also Recognized Corporate Liability in the Context of the Post-WWII Tribunals and U.S. Criminal Law

The Nuremberg Charter permitted the prosecution of "a group or organization" and allowed the tribunal to declare that entity a "criminal organization." Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal, 1945, arts. 9, 10, 82 U.N.T.S. 279. The tribunals "consistently spoke in terms of corporate liability." *Talisman*, 244 F. Supp. 2d at 315-16. U.S. corporations and individuals are already subject to criminal prosecution for aiding and abetting torture, genocide, and war crimes even when committed abroad, as well as for aiding and abetting other crimes. *See*, 18 U.S.C. §§ 2, 1091, 2340A, 2441, and 1589.[26]

III. THE COURT BELOW ERRED IN ITS ANALYSIS OF THE SOURCES OF CUSTOMARY INTERNATIONAL LAW

The District Court made several critical errors in its analysis of what constitutes proper evidence of customary international law. First, the District Court erroneously rejected the tribunal rulings and documents which deal with criminal matters (including the Nuremberg Tribunals, the International Criminal Tribunals

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26 *See also United States v. Beech-Nut Nutrition Corp.*, 871 F.2d 1181 (2d. Cir.1989) (prosecution of corporate defendants).

created by the UN Security Council, and the Apartheid Convention) as evidence of customary international law. *Apartheid Litigation*, at 549-554. Second, the court below erred in rejecting as evidence of customary international law the U.N. Charter, decisions of the International Court of Justice, the, UN declarations, and the RESTATEMENT (THIRD). Specifically, the District Court: 1) failed to consider precedent of the Supreme Court, this Circuit, and courts across the country, and 2) failed to consider that international documents were to be analyzed individually and cumulatively for evidence of an international consensus against apartheid. The lower court's analysis of these issues contradicts a broad judicial consensus as well as universal standards of what constitutes international law.

First, the Court erroneously rejected the rulings of international criminal tribunals and documents as evidence of customary international law. The District Court failed to recognize that international criminal law can form the basis of civil liability. The civil liability of private actors, as aiders and abettors, for criminal violations of international law was understood at the time the ATS was enacted. A 1795 opinion issued by Attorney General Bradford specifically states that individuals would be liable under the ATS for "committing, aiding, or abetting" violations of the laws of war.[27] *Breach of Neutrality*, 1 Op. Att'y Gen. 57, 59 (1795). In that opinion, the Attorney General considered an incident involving private actors, acting in concert with, but not controlling the French naval vessels.

27 The Bradford opinion was cited as authority in the recent opinion in *Sosa* for the proposition that the ATS was intended "to provide jurisdiction over what must have amounted to common law causes of action." *Sosa*, 124 S. Ct. at 2759. In *Kadic*, the Court specifically relied of the Bradford Opinion in reaching the conclusion that the private actors could be held liable under the ATS. *Kadic*, 70 F.3d at 239.

See id. Six years after the passage of the ATS, the Supreme Court in *Talbot v. Janson*, 3 U.S. (3 Dall.) 133 (1795), found that a French citizen who assisted a U.S. citizen in unlawfully capturing a Dutch ship had acted in contravention of the law of nations and was liable for the value of the captured assets. *See also id.* at 167-68 (Iredell, J., concurring) ("It is impossible that Ballard can be guilty of a crime, and Talbot, who associated with him, in the willful commission of it, can be wholly innocent of it.").

Furthermore, the recognition that international criminal law can be a basis for civil liability underlies the Supreme Court's entire decision in *Sosa*. The Court in *Sosa* held the law against piracy, which is criminal in nature, to be an appropriate basis for an ATS action – thus clearly suggesting that private actors may be held liable for criminal violations of international law. *Sosa*, 124 S.Ct at 2760-61. Also, as this Court made clear in *Kadic*, while international law is often enforced through criminal prosecutions, international law also permits states to establish appropriate civil remedies. *Kadic*, 70 F.3d at 240 (citing RESTATEMENT (THIRD) § 404 cmt. b). *Kadic* found that the ATS is just such a tort remedy, authorized by international law as a means to enforce international law norms. *Id.*

Furthermore, the Nuremberg Trials, which the court rejected as evidence of customary international law, have been cited in courts throughout the country as valid sources of customary international law.[28] Similarly, the international

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28 *See, e.g., Hamdi v. Rumsfeld*, 124 S.Ct. 2633, 2640 (2004) (citing Ex. Parte Quirin, 63 S. Ct. 2 (1942) (quoting decision of Nuremberg Military Tribunal)); *Kadic*, 70 F.3d at 243 (stating "liability of private individuals for committing war crimes has been recognized since World War I and was confirmed at Nuremberg after World War II").

tribunals on the former Yugoslavia and Rwanda have also been carefully analyzed as valid sources of international law. *See, e.g., Presbyterian Church of the Sudan v. Talisman Energy, Inc.*, 374 F.Supp.2d 331 (S.D.N.Y. 2005).

Second, in addition to rejecting the Apartheid Convention as irrelevant because it was meant for criminal prosecutions, the lower court erred in holding that it was "not binding international law" because it "was not ratified by a number of major world powers." *Apartheid Litigation*, 346 F.Supp.2d at 550. However, the court failed to analyze the proper question of whether the Apartheid Convention is one of many sources, which indicates the status of apartheid as a violation of international law.[29]

Third, the District Court's opinion that ICJ authority does not constitute customary international law stands opposed to decisions by the Supreme Court and this court. *See Sosa*, 124 S.Ct. at 2768 (citing the ICJ in discussion of whether arbitrary detention violates customary international law); *U.S. v. Yousef*, 327 F.3d 56, 96, 101 (2d Cir. 2003) (citing an ICJ opinion in relation to conflict of laws issue and analyzing the statute of the ICJ to determine what are "true 'sources' of international law"); *Chubb & Son, Inc. v. Asiana Airlines*, 214 F.3d 301, 308 (2d Cir. 2000) (highlighting that a heavily relied-upon law review article cites the ICJ in discussion of customary international law).

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29 *See* 1 Roger S. Clark, *Apartheid in* INTERNATIONAL CRIMINAL LAW, 655 (Cherif Bassiouni ed., Transnational Publishers, Inc. 2d ed 1999). *See also Slye, supra* at note 16 (explaining drafting history of Apartheid Convention and that failure to ratify did not signify disagreement with the condemnation of apartheid, but rather indicated hesitation to agree to the perceived expansion of criminal jurisdiction and enforcement).

Fourth, the UN Charter, the Universal Declaration of Human Rights, the ICCPR, and UN declarations are recognized evidence of customary international legal norms. In *Filartiga*, 630 F.2d at 881-82 , this Court analyzed each of those sources as constituting evidence of the "international consensus surrounding torture." *Id.* In *Kadic*, 70 F.3d at 241, this Court cited General Assembly resolutions and the RESTATEMENT (THIRD) as evidence of the international prohibition against genocide and war crimes. In *Flores*, 343 F.3d at 157, this Court found that the certain treaties may be of evidentiary value to the extent that they set fourth recognized rules and practices and that the UDHR constitutes evidence of customary international law only insofar as States have universally abided by its principles out of a sense of legal obligation and mutual concern."[30]

Finally, the court erroneously declared that the plaintiff's "reliance on the Restatement (Third) …is misplaced." *Apartheid Litigation* at 552. The Supreme

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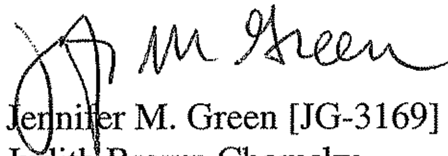
30 *See also Kessler v. Grand Cent. Dist. Management Ass'n, Inc.*, 158 F.3d 92, 118 (2d. Cir. 1998) (citing UDHR Art. 21 in reference to the right to vote); *Talisman,* 244 F. Supp 2d at 317 (stating that the UDHR "enumerates a series of rights, the most basic of which have become part of customary international law"); *Nicholson v. Williams*, 203 F.Supp.2d 153, 234 (E.D.N.Y. 2002) (stating that the right to family integrity is an internationally recognized right under the UDHR and stating that the UDHR "was promulgated in large part at the United States' insistence, and has been used extensively by United States courts in determining the scope of internationally guaranteed rights"); *Wiwa,* 2002 WL 319887, at 6 (S.D.N.Y. 2002) (holding that it is "well established that torture, summary execution, and arbitrary detention constitute fully recognized violations of international law," because they are inconsistent with the "inherent dignity and the equal and inalienable rights of all members of the human family" as stated in the UDHR) (internal citations omitted); *Sanchez v. Dankert*, 2002 WL 529503, at 11 (S.D.N.Y. 2002) (stating that the UDHR "may provide insight into the 'law of nations.').

Court has given great weight to the RESTATEMENT (THIRD) as a guide to international legal jurisprudence. *See Medellin v. Dretke*, 125 S.Ct. 2088, 2094 (2005) (law of judgments); *Pasquantino v. U.S.*, 125 S.Ct. 1766, 1775 (2005) (enforcement of foreign tax judgments); *Republic of Austria v. Altmann*, 541 U.S. 677, 713 (2004) (exhaustion of remedies); *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004) (prescriptive judgments); *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 699 (1999) (foreign state sovereign immunity). *See also, United States v. Stuart*, 489 U.S. 353, 368 (1989). Moreover, both the Supreme Court and this Court have cited the RESTATEMENT (THIRD) extensively for purposes of demonstrating what constitutes international consensus and customary international law. *See Sosa*, 124 S.Ct. at 2768 (rejecting respondent's claim as "exceeding any binding customary rule" and stating that Court's position is "underscored" by the RESTATEMENT'S discussion of customary international law); *F. Hoffman-La Roche Ltd.*, 124 S.Ct. at 2366 (citing the RESTATEMENT (THIRD) to show that a particular rule of construction "reflects principles of customary international law"); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993) (citing it to show that it was "well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States"); *Motorola Credit Corp. v. Uzan*, 388 F.3d 39, 60 (2d Cir. 2004) (stating that a rule from the RESTATEMENT is "a fundamental principle of international comity"); *Kadic*, 70 F.3d at 245 (2d Cir. 1995) (citing the RESTATEMENT as authority for the proposition that "the customary international law of human rights, such as the proscription of official torture, applies to states without distinction between recognized and unrecognized states"); *Bigio*, 239 F.3d at 448-49 (citing the RESTATEMENT to indicate that international law prohibits systematic racial discrimination committed by a state actor).

CONCLUSION

Amici have provided evidence of over forty years of international condemnation of apartheid as systematic racial discrimination which constituted a crime against humanity. The nations of the world repeatedly have condemned apartheid as one of the most egregious violations of international law, both in their domestic legal systems and through multinational organizations such as the United Nations. The international condemnation of apartheid clearly meets the *Sosa* test for a violation actionable under the ATS. For the reasons set forth above, this court should find that apartheid is one of the violations justiciable under the Alien Tort Statute and that plaintiffs' claims against defendants for aiding and abetting apartheid should proceed.

August 30, 2005 Respectfully submitted,



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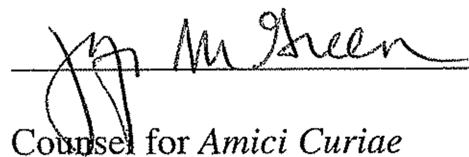

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