No.

# In the Supreme Court of the United States

NESTLÉ U.S.A., INC.; ARCHER-DANIELS-MIDLAND COMPANY; AND CARGILL, INCORPORATED,
*Petitioners*,

v.

JOHN DOE I; JOHN DOE II; JOHN DOE III,
INDIVIDUALLY AND ON BEHALF OF PROPOSED CLASS MEMBERS,
*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTIONS PRESENTED

Petitioners are companies that purchase cocoa beans grown in Côte d'Ivoire. Respondents, citizens of Mali, claim that Ivorian cocoa farmers subjected them to forced labor and other abuses when they were under the age of 14. They also contend that the use of forced child labor on Ivorian cocoa farms is "widespread" and well known. Respondents filed this class action under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, claiming that petitioners are liable as aiders and abettors of the farmers' labor abuses based on petitioners' purchases of cocoa and provision of crop-related assistance to cocoa farmers.

The questions presented, each of which is the subject of a circuit conflict, are:

1. Whether a defendant is subject to suit under the ATS for aiding and abetting another person's alleged violation of the law of nations based on allegations that the defendant intended to pursue a legitimate business objective while knowing (but not intending) that the objective could be advanced by the other person's violation of international law.

2. Whether the "focus" test of *Morrison* v. *National Australian Bank, Ltd.*, 561 U.S. 247, 248 (2010), governs whether a proposed application of the ATS would be impermissibly extraterritorial under *Kiobel* v. *Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013).

3. Whether there is a well-defined international-law consensus that corporations are subject to liability for violations of the law of nations.

## PARTIES TO THE PROCEEDING BELOW

The petitioners, and defendants-appellees below, are Nestlé U.S.A., Inc.; Archer-Daniels-Midland Company, and Cargill, Incorporated.

The respondents, and plaintiffs-appellants below, are Malian citizens suing pseudonymously as John Doe I, John Doe II, and John Doe III.

Global Exchange, a San Francisco-based human-rights organization, was a plaintiff in district court, but did not appeal the dismissal of its claims.

## RULE 29.6 STATEMENT

Petitioner Archer-Daniels-Midland Company is a publicly traded domestic corporation. No publicly traded company owns 10% or more of its common stock.

Petitioner Nestlé U.S.A., Inc. is a wholly owned subsidiary of Nestlé Holdings, Inc., which is a wholly owned subsidiary of NIMCO US, Inc., which is a wholly owned subsidiary of Nestlé S.A., a publicly traded Swiss corporation, the shares of which are traded in the U.S. in the form of American Depositary Receipts.

Petitioner Cargill, Incorporated is a domestic corporation, the shares of which are not publicly traded. No publicly traded company owns 10% or more of its common stock.

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## PETITION FOR A WRIT OF CERTIORARI

## OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-42a) is reported at 766 F.3d 1013. The court of appeals' order denying rehearing, as amended (App., *infra*, 232a-253a), is reported at 788 F.3d 946. The court of appeals' initial opinion (App., *infra*, 43a-48a) is reported at 738 F.3d 1048. The district court's opinion granting the motion to dismiss (App., *infra*, 54a-231a) is reported at 748 F. Supp. 2d 1057. The district court's order dismissing the action (App., *infra*, 49a-53a) is unreported.

## JURISDICTION

The judgment of the court of appeals was entered on September 4, 2014 (App., *infra*, 1a), and a timely petition for rehearing was denied on May 6, 2015 (App., *infra*, 232a). Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including September 18, 2015. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

## STATUTORY PROVISION INVOLVED

The Alien Tort Statute, 28 U.S.C. § 1350, provides:

> 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.

## STATEMENT

### A. District Court Proceedings.

This putative class action under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, was filed in 2005

in the United States District Court for the Central District of California.

Respondents allege that, when they were 14 or younger, they were forced to work without pay at three cocoa plantations in Côte d'Ivoire, and that they were guarded, kept at night in a locked room, and beaten, among other similar abuses—all at the hands of the plantation owners or operators. App., *infra*, 3a. They seek to bring a class action on behalf of all similarly-situated individuals who suffered such abuse in Côte d'Ivoire. *Id.* at 5a.

Petitioners Nestlé U.S.A., Inc.; Archer-Daniels-Midland Company; and Cargill, Incorporated are the named defendants. App., *infra,* 2a. Respondents do not allege that petitioners committed any of the alleged labor abuses or other wrongs. Nor do they allege that any petitioner had an economic relationship with any farm on which respondents allegedly were subject to abuse. C.A. ER 251-254.

Rather, respondents allege that petitioners aided and abetted the abuses by purchasing cocoa beans from farmers and farming cooperatives in Côte d'Ivoire and by providing those farmers and farming cooperatives with crop-related assistance (*e.g.*, seed money and training on farming techniques), all allegedly with knowledge of the "widespread use of child labor" by cocoa farmers in Côte d'Ivoire. App., *infra,* 60a-61a.

Respondents also allege that petitioners had "exclusive supplier/buyer relationships," and allegedly failed to use their "economic leverage" to prevent the use of forced child labor. App., *infra*, 4a.

In particular, respondents assert that petitioners' contractual relationships with the

farmers and cooperatives from which they purchased cocoa beans enabled them to "control" Ivoirian cocoa production "with the unilateral goal of finding the cheapest sources of cocoa." App., *infra*, 4a.

Following extensive briefing, and multiple opportunities for respondents to amend their allegations, the district court dismissed the action in a 161-page opinion. App., *infra*, 54a-231a.

The court held that a plaintiff asserting an aiding-and-abetting claim under the ATS must plead that the defendant "act[ed] with the specific intent (*i.e.*, for the purpose) of substantially assisting the commission of that crime." App., *infra,* 108a. The court observed that respondents "do not—and, as they conceded at oral argument * * *, cannot—allege that [petitioners] acted with the purpose and intent that their conduct would perpetuate child slavery on Ivorian farms." *Id.* at 157a. The court concluded that respondents' allegations "fail to raise a plausible inference that [petitioners] knew or should have known that the general provision of money, training, tools, and tacit encouragement * * * helped to further the specific wrongful acts committed by the Ivorian farmers." *Id.* at 158a-159a.

With respect to the *actus reus* element of aiding-and-abetting liability, the court held that respondents were required to identify acts by petitioners "that had a material and direct effect on the Ivorian farmers' specific wrongful acts." App., *infra,* 156a. Respondents' allegations of "purchasing cocoa and assisting the production of cocoa" constituted "ordinary commercial transactions [that] do not lead to aiding and abetting liability." *Ibid.*

The court also found "no support in the relevant sources of international law for the proposition that corporations are legally responsible for international law violations" and, therefore, "no well-defined international consensus regarding corporate liability for violating international human rights norms," as required by *Sosa* v. *Alvarez Machain*, 542 U.S. 692 (2004). App., *infra,* 198a.

The district court offered respondents an opportunity to amend their complaint to attempt to allege facts satisfying the aiding-and-abetting standard the court had adopted. App., *infra,* 231a. Respondents declined, and the district court dismissed the action. *Id.* at 5a; 49a-53a.

**B. Ninth Circuit Proceedings.**

1. *The initial panel ruling*. The court of appeals panel first issued a *per curiam* order vacating the district court's dismissal order. App., *infra*, 43a-48a.

The majority stated that "the district court erred in requiring [respondents] to allege specific intent in order to satisfy the applicable purpose *mens rea* standard." App., *infra*, 44a. The court granted leave to amend the complaint "in light of recent authority regarding the extraterritorial reach of the Alien Tort Statute and the *actus reus* standard for aiding and abetting," citing this Court's decision in *Kiobel* [v. *Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013)] and two rulings by international criminal tribunals. *Ibid*. The panel also held that corporations are subject to ATS liability. *Ibid*.

Judge Rawlinson dissented in part, stating that a plaintiff asserting an aiding-and-abetting claim "must plead that the Defendants acted with specific

intent to violate the norms of international law." App., *infra*, 45a.

2. *The panel's revised opinion.* Following a petition for rehearing and rehearing *en banc,* the panel withdrew its order and issued a new opinion, again vacating the district court's judgment. App., *infra*, 1a-42a.

The panel recognized that "[c]ustomary international law—not domestic law—provides the standard for aiding and abetting." App., *infra*, 15a. With regard to the *mens rea* element of aiding-and-abetting liability, the majority declined to "decide whether a purpose or knowledge standard applies" because it "conclude[d] that [respondents'] allegations satisfy the more stringent purpose standard." *Id.* at 18a. The majority reasoned:

> Driven by the goal to reduce costs in any way possible, the defendants allegedly supported the use of child slavery, the cheapest form of labor available. These allegations explain how the use of child slavery benefitted the defendants and furthered their operational goals in the Ivory Coast, and therefore, the allegations support the inference that the defendants acted with the purpose to facilitate child slavery.

*Ibid.*

The majority observed that "[a]ccording to the complaint, [petitioners] had enough control over the Ivorian cocoa market that they could have stopped or limited the use of child slave labor by their suppliers." App., *infra,* 19a. Because petitioners allegedly "did not use their control to stop the use of child slavery, * * * but instead offered support that

facilitated it," their "failure to stop or limit child slavery supports the inference that they intended to keep that system in place." *Id.* at 19a-20a.

The majority found additional support for its specific-intent determination in petitioners' "lobbying efforts designed to defeat federal legislation that would have required chocolate importers and manufacturers to certify and label their chocolate as 'slave free,'" stating that the "lobbying efforts also corroborate the inference of purpose." App., *infra,* 20a.[1]

The majority also rejected petitioners' separate argument that this Court's decision in *Kiobel* required dismissal on extraterritoriality grounds. The majority described *Kiobel* as "articulat[ing] a new 'touch and concern' test for determining when" a claim is impermissibly extraterritorial, but stated that this Court did not "explain the nature of this test." App., *infra*, 25a. The majority held that this issue is not governed by "the 'focus' test set out in" *Morrison*, stating that *Morrison* "may be informative precedent for discerning the content of the touch and concern test, but * * * [*Kiobel*] did not incorporate *Morrison*'s focus test." *Id.* at 26a.

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[1] With respect to the *actus reus* element of aiding-and-abetting liability, the panel recognized that the alleged assistance to the principal wrongdoer must be "substantial," but declined to decide "whether international law imposes the additional requirement that the assistance must be specifically directed towards the commission of the crime." App., *infra,* 22a. The panel remanded to allow respondents to amend the complaint in light of two recent decisions by international criminal tribunals. *Id.* at 22a-23a.

After holding *Morrison* inapplicable, the majority declined to "attempt to apply" or explicate what it termed *Kiobel*'s "amorphous touch and concern test." Rather, it remanded to allow respondents to amend the complaint to allege facts satisfying that test. App., *infra,* 27a-28a.

The panel also held that corporations can be subject to liability under the ATS. App., *infra,* 10a-15a. It "reaffirm[ed]" the analysis in *Sarei* v. *Rio Tinto, PLC*, 671 F.3d 736, 765 (9th Cir. 2011), vacated and remanded, 133 S. Ct. 1995 (2013), holding that "corporate liability under an ATS claim does not depend on the existence of international precedent enforcing legal norms against corporations" and "norms that are 'universal and absolute,' or applicable to 'all actors,' can provide the basis for an ATS claim against a corporation." App., *infra,* 13a. The panel concluded that "the prohibition against slavery is universal and may be asserted against the corporate defendants in this case." *Id.* at 14a.

Judge Rawlinson again dissented in part. She began by pointing out that "[w]e all agree that the practice of engaging in child slave labor is reprehensible, indefensible, and morally abhorrent. Indeed, if that were the issue we were called upon to decide, this would be an easy case. Instead, we must decide who bears legal responsibility for the atrocities inflicted upon" respondents. App., *infra,* 28a-29a.

With respect to *mens rea*, Judge Rawlinson stated that she "would definitely and unequivocally decide that the purpose standard applies." App., *infra,* 29a. That standard, she explained, requires a plaintiff to plead specific facts showing that the

defendant acted with the purpose—which she equated with specific intent—"of causing the injuries suffered by" the plaintiff." *Id.* at 29a-30a. Judge Rawlinson noted that this standard had been applied by the Second and Fourth Circuits in *Presbyterian Church of Sudan* v. *Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009), and *Aziz* v. *Alcolac, Inc.*, 658 F.3d 388 (4th Cir. 2011).

Judge Rawlinson "strongly disagree[d]" with the majority's conclusion that respondents' allegations "satisfy" the "proper *mens rea* standard of purpose, or specific intent," applied by the Second and Fourth Circuits. App., *infra,* 33a. And she emphasized that the majority's "contrary conclusion" was "particularly curious" given respondents' "concession of their inability to meet the standard." *Ibid*.

Judge Rawlinson explained that "[i]t may well be true that child slave labor is the cheapest form of labor for harvesting cocoa. But that unvarnished statement in no way supports the inferential leap that because child slave labor is the cheapest form of labor, [petitioners] aided and abetted the cocoa farmers who allegedly operated the child slave labor system." App., *infra,* 35a.

With respect to extraterritoriality, Judge Rawlinson disagreed with the majority's holding that *Kiobel* did not incorporate the focus test from *Morrison*: "Why else would the Supreme Court direct us to *Morrison* precisely when it was discussing claims that allegedly 'touch and concern' the United States? *Kiobel*, 133 S. Ct. at 1669." App., *infra*, 41a. Judge Rawlinson also observed that "the Supreme Court has made clear that not any old domestic contact will do," but rather "that the burden of

showing sufficient domestic contact is substantial." *Ibid.*

Judge Rawlinson concluded by stating that she would have affirmed the district court's holding that the complaint failed to state a claim and remanded to "allow [respondents] to further amend their Complaint in an effort to state a claim under the ATS." App., *infra,* 42a. She "dissent[ed] from any holding that they have adequately done so." *Ibid.*

3. *The dissents from denial of rehearing*. The Ninth Circuit denied rehearing and rehearing *en banc*. App., *infra*, 232a. Judge Rawlinson noted that she would grant both requests for rehearing (*id*. at 233a), and eight other judges joined a lengthy dissent from the denial of rehearing *en banc*. *Id.* at 233a-253a (Bea, J., joined by O'Scannlain, Gould, Tallman, Bybee, Callahan, M. Smith, and N.R. Smith, JJ.).

The dissenters concluded that "the panel majority here has substituted sympathy for legal analysis." App., *infra,* 233a. Agreeing that respondents are "deserving of sympathy," the dissenters observed that respondents, however, "do not bring this action against the slavers who kidnapped them, nor against the plantation owners who mistreated them." *Id.* at 233a-234a.

Turning to the *mens rea* issue, the dissenters stated that

> the panel majority concludes that [petitioners], who engaged in the Ivory Coast cocoa trade, did so with the *purpose* that plaintiffs be enslaved, hence aiding and abetting the slavers and plantation owners.

> By this metric, buyers of Soviet gold had the purpose of facilitating gulag prison slavery.

App., *infra*, 234a.

The dissenters stated that the majority's construction of the "purpose" standard is erroneous and in "open conflict" with this Court's decision in *Sosa*. App., *infra,* 234a. In addition, "regardless what the majority contends, it was most certainly *not* following" the Second and Fourth Circuit decisions applying the purpose standard. *Id.* at 238a-241a.

With respect to the Fourth Circuit's ruling in *Aziz*, for example, which rejected an ATS action against a company that sold chemicals used to produce mustard gas, the dissenters explained: "If selling chemicals with the knowledge that the chemicals will be used to create lethal chemical weapons does not constitute purpose that people be killed, how can purchasing cocoa with the knowledge that slave labor may have lowered its sale price constitute purpose that people be enslaved?" App., *infra,* 239a. That is particularly true because here "[e]ven the plaintiffs admit defendants intended only to maximize profits." *Id.* at 234a.

The dissenting judges concluded that "the panel majority's claim to have adopted the Second and Fourth Circuit's analysis is simply incorrect. It has not done so, and has thus created a circuit split on the proper mens rea element for aiding and abetting liability under customary international law"—and put the Ninth Circuit "on the wrong side of the circuit split[.]" App., *infra,* 242a-243a.

The dissenters next addressed the extraterritoriality issue, observing that it is "an important [issue] in this case, since all the acts of

enslavement and maintenance of slavery are alleged to have occurred outside United States borders." App., *infra,* 243a. They stated that the majority was "quite wrong" in holding that *Kiobel* did not incorporate *Morrison*'s focus test—pointing out that this Court's "explanation of [*Kiobel*'s] 'touch and concern' language is encompassed in one citation to *Morrison*." *Id.* at 245a.

The dissenters explained that "[t]he meaning is clear: the Supreme Court stated that the *Morrison* presumption against extraterritorial application of American statues is to be applied to ATS cases. And, since the presumptions are the same, it follows that the very same evidence is needed to rebut either presumption." App., *infra,* 245a-246a.

Because "the two circuits to consider this issue agree that *Kiobel* simply directs application of the *Morrison* test," the dissenters concluded that the panel majority's holding "creates another circuit split." App., *infra,* 247a (citing *Baloco* v. *Drummond Co.*, 767 F.3d 1229 (11th Cir. 2014), and *Mastafa* v. *Chevron Corp.*, 770 F.3d 170 (2d Cir. 2014)). "[Y]et again, the majority has taken the minority, incorrect side." App., *infra*, 249a.

Finally, the dissenters noted that "this case squarely presents the question whether ATS liability should extend to corporations"—the subject of a third unresolved "circuit split." App., *infra,* 249a & n.19. The dissenters explained that the panel's holding on this issue "violates the Supreme Court's commands" regarding the limited scope of ATS liability and "opens our doors to an expansive vision of corporate liability." *Id.* at 252a.

## REASONS FOR GRANTING THE PETITION

### I. The Ninth Circuit's Ruling Creates A Conflict Regarding The *Mens Rea* Standard For Aiding-And-Abetting Liability.

The decision below creates a clean and clear split regarding the proper *mens rea* standard for aiding-and-abetting liability under the ATS—as the panel dissent and the *eight* other judges dissenting from denial of rehearing *en banc* recognized. In the Second and Fourth Circuits, aiding-and-abetting liability attaches only when a defendant acts with the purpose of aiding the violation of international law. *Aziz*, 658 F.3d at 398-401; *Talisman*, 582 F.3d at 257-264.

The Ninth Circuit, while nominally genuflecting towards the purpose standard, in fact gutted it. The panel majority held that the purpose standard is satisfied whenever a defendant acts with the purpose of maximizing profit—here, seeking to purchase inexpensive cocoa—coupled with the knowledge that third parties may be engaged in human-rights violations that might contribute to achieving the profit-maximizing goal. App., *infra*, 18a.

That novel standard does not just conflict with the Second and Fourth Circuit rule. It also expands aiding-and-abetting liability far beyond any principle universally accepted by international law, in direct violation of this Court's decisions in *Kiobel* and *Sosa*. And it threatens to chill foreign investment in developing nations by allowing private plaintiffs to usurp the role of the federal government and impose their own economic sanctions on countries with mixed human-rights records. This Court's intervention is urgently needed.

### A. The Decision Below Squarely Conflicts With Rulings By The Second And Fourth Circuits.

The Second and Fourth Circuits hold that a defendant has the requisite *mens rea* for aiding-and-abetting liability under the ATS only when the defendant acts with the purpose of aiding a violation of international law—a standard these courts equate with the specific intent to further the violation of international-law norms. *Talisman*, 582 F.3d at 257-264; *Aziz*, 658 F.3d at 398-401.

Thus, in *Talisman*, the Second Circuit required proof that the defendant acted with a "purpose to advance violations of international humanitarian law." 582 F.2d at 264. And the Fourth Circuit in *Aziz* adopted the Second Circuit's "*Talisman* analysis" as "the law of this Circuit," announcing a "specific intent *mens rea* standard" for aiding-and-abetting liability under the ATS. 658 F.3d at 398, 400.

Both courts explicitly rejected liability for defendants who "*knowingly* (but not purposefully) aid and abet" such violations. *Talisman*, 582 F.3d at 259; see also *Aziz*, 658 F.3d at 397.

In its initial opinion, the Ninth Circuit panel majority held that the district court "erred in requiring [respondents] to allege specific intent in order to satisfy the applicable purpose *mens rea* standard"—expressly disagreeing with the standard embraced by the Second and Fourth Circuits. App., *infra*, 44a. Judge Rawlinson dissented, stating that "the district court utilized the same analysis as that used in [*Talisman*]"; she agreed with the Second Circuit "that the Plaintiff must plead that the

Defendants acted with specific intent to violate the norms of international law." *Id.* at 47a.

The panel subsequently withdrew this ruling and issued a new opinion—in response to a petition for rehearing and rehearing *en banc* pointing out the square conflict between the panel majority's ruling and the decisions of the Second and Fourth Circuits. The panel majority replaced its express rejection of the specific-intent standard with the determination that "we need not decide whether a purpose or knowledge standard applies" because respondents' allegations "support the inference that [petitioners] acted with the purpose to facilitate child slavery." App., *infra*, 18a, 19a.

The panel majority's revamped holding confirms, rather than eliminates, the square conflict with the Second and Fourth Circuit standards, as Judge Rawlinson and the eight dissenters explained in detail. App., *infra*, 28a-38a (Rawlinson opinion), 238a-242a (*en banc* dissent).

The panel majority concluded that the "purpose" *mens rea* requirement was satisfied because the complaint could be interpreted to allege that petitioners "act[ed] with the purpose of obtaining the cheapest cocoa possible," and any use by Ivorian farmers of child labor could "further[]" this goal. App., *infra*, 21a, 18a; see also *id.* at 238a (*en banc* dissent) (recognizing that, under the panel majority's logic, evidence that "[petitioners] specifically intended * * * to buy cocoa cheap" permits an inference that petitioners also "promote[d] slavery as a means of buying cheap").

But the Second and Fourth Circuits expressly held that the purpose/specific-intent standard *cannot*

be satisfied by allegations that a defendant pursued legitimate business goals with the knowledge that those goals might be aided by a third party's human-rights violations. They require facts showing that the defendant acted for the purpose of achieving those violations.

Thus, in *Talisman*, the Second Circuit rejected the assertion that an oil company could be liable for aiding and abetting the human-rights abuses of the Sudanese government based on allegations that the company pursued the development of oil in the Sudan, with the knowledge that the Sudanese government was engaged in human-rights violations that allegedly had the effect of "facilitat[ing]" the oil production. 582 F.3d at 264. The Second Circuit found that such allegations simply could not establish that the company "acted with the purpose to support the Government's offenses." *Id.* at 263.

The *Talisman* plaintiffs alleged that the defendant oil company "supported the creation of a buffer zone around its [Sudanese] oil fields," 582 F.3d at 263—a lawful business objective. The plaintiffs provided evidence that the Sudanese government sought to achieve that legitimate goal by "violat[ing] customary international law," but—dispositively—they provided no evidence that the defendant *intended* for the government to use those improper means. *Ibid.* Absent such evidence, the *mens rea* requirement was not established. *Ibid.*; accord *Balintulo* v. *Ford Motor Co.*, 796 F.3d 160, 170 (2d Cir. 2015) (rejecting assertion that IBM had aided and abetted the South African Apartheid government's abuses in the absence of plausible allegations that IBM's "purpose was to denationalize black South Africans and further the aims of a brutal

regime"), reh'g denied (Sept. 14, 2015); *Mastafa*, 770 F.3d at 194 (noting the implausibility of "a large international corporation intending * * * the Saddam Hussein regime's torture and abuse of Iraqi persons").

Similarly, the plaintiffs in the Fourth Circuit's *Aziz* case alleged that the defendant chemical company placed quantities of certain chemicals "into the stream of international commerce" with "actual or constructive knowledge that such quantities would ultimately be used by Iraq in the manufacture of mustard gas to attack [Iraqi] Kurds." *Aziz*, 658 F.3d at 394, 401. Although Iraq's purchases of such chemicals allegedly improved defendant's sales, defendant's profit motive was insufficient to transform its knowledge of potential later misuse into a purpose to accomplish genocide. "[T]he allegations that [the company] knew how the chemicals would be used did not amount to an allegation that [the company] harbored specific intent (*i.e.*, purpose) that the Kurds be gassed and thereby accomplish a form of genocide." App., *infra*, 239a (*en banc* dissent); see also 658 F.3d. at 400, 401.

The Ninth Circuit panel majority pointed to *no* allegation here of an unlawful purpose on petitioners' part. That is not surprising, given respondents' repeated concessions that they could not meet the specific-intent standard articulated by the Second and Fourth Circuits.[2]

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[2] Respondents acknowledged in the district court that they "would not be able to allege" that petitioners "wanted child slave labor to go on," App., *infra*, 157a & n.52, or that petitioners "acted with a shared purpose with their suppliers to

Instead, the panel majority attempted to disguise the circuit split by asserting that the defendants in *Talisman* and *Aziz* had "nothing to gain from the violations of international law" they were accused of abetting. App., *infra*, 19a. But that claim is, in Judge Bea's words, "[d]emonstrably not so." *Id.* at 239a. The *Talisman* court specifically noted that the Sudanese government's attacks on civilians "facilitated the [defendants'] oil enterprise." 582 F.3d at 264. And, as the *en banc* dissenters observed with respect to *Aziz*, "the more Saddam Hussein used chemical weapons to kill his opponents, the more of [the defendant's] chemicals he would need and thus the higher the sales of [the defendant's] products; the higher their sales, of course, the higher their profit." App., *infra*, 239a-240a.

In each case, the principal's alleged wrongdoing could be said to further the defendants' business objectives. Necessary, but absent, were allegations showing that the defendant acted with the purpose to assist in a violation of international law, as distinguished from a purpose to accomplish those commercial objectives. App., *infra*, 241a (*en banc* dissent) (recognizing that the allegations against the *Talisman* and *Aziz* defendants "did not make it

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continue to utilize child labor." C.A. ER 11. Petitioners were even more direct on appeal, acknowledging that they lacked "facts sufficient" to demonstrate that petitioners "specifically intended the human rights violation at issue." Resp. C.A. Br. 48; see also App., *infra*, 238a n.6 (*en banc* dissent) ("[O]ne would assume that a panel, having concluded that the plaintiff must show purpose, would find that a plaintiff who concedes that the defendant lacks that purpose has briefed himself out of his case. The panel majority's contrary decision is unexplained and, I submit, inexplicable.").

plausible that [they] specifically intended Kurd or Southern Sudanese killings").

Here, respondents' allegations are even further removed from the specific intent required by the Fourth and Second Circuits. The panel majority found specific intent to aid and abet human-rights violations by fusing petitioners' claimed "profit motive" with their alleged knowledge of child labor abuses by farmers within the West Africa cocoa industry. This faulty conclusion runs headlong into the Second and Fourth Circuits' rulings, which make clear, based on much more problematic factual allegations, that participating in commercial transactions with knowledge of potential wrongdoing by other parties "does not equate to * * * specific intent." App., *infra*, 35a (Rawlinson opinion).

The other allegations on which the panel majority relied demonstrate just how far afield it ventured from the purpose standard embraced by the Second and Fourth Circuits. The majority pointed to only two other allegations—that petitioners purportedly failed to use their power in the cocoa market to stop child slavery, and that petitioners advocated to Congress a "voluntary mechanism through which the chocolate industry would police" child labor, rather than a legislative mandate. App., *infra*, 20a.

Even the panel acknowledged that the former allegation would not support an inference of purpose. App., *infra*, 21a. And where lobbying Congress is concerned, as Judge Rawlinson explained, "exercising their right to petition the government does not reasonably support an inference that [petitioners] acted with the purpose to aid and abet child slavery. It is equally likely that [petitioners]

sought to avoid additional government regulation," and under the Second Circuit's standard "if there is a benign explanation for the corporation's action, no plausible inference of purpose may be drawn." *Id.* at 37a-38a (citing *Talisman*, 582 F.3d at 262).[3] See also *id.* at 242a n.11 (*en banc* dissent).[4]

* * *

As the *en banc* dissenters put it, "the panel majority's claim to have adopted the Second and Fourth Circuit's analysis is simply incorrect. It has not done so, and has thus created a circuit split on the proper *mens rea* element for aiding and abetting liability under customary international law." App.,

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[3] The Ninth Circuit's reliance on these lobbying activities was particularly dubious because petitioners' efforts to petition their representatives are privileged under settled First Amendment principles. See, *e.g.*, *United States* v. *Wallace*, 531 F.3d 504, 506 (7th Cir. 2008) (Easterbrook, J.) ("[T]he first amendment protects self-interested campaigning."); *Sosa* v. *DIRECTV, Inc.*, 437 F.3d 923, 931 (9th Cir. 2006) (*Noerr-Pennington* doctrine requires courts to "construe federal statutes so as to avoid burdening conduct that implicates the protections afforded by the Petition Clause unless the statute clearly provides otherwise").

[4] The Ninth Circuit's error on the issue of "purpose" was exacerbated by its failure to address whether respondents' *actus reus* allegations—commercial acts such as the provision of seed money, training in farming practices, and similar innocuous commercial activities unrelated to any human-rights abuses—could state an ATS claim. The panel ignored respondents' allegation that the alleged training addressed *prevention* of improper labor practices. As the *en banc* dissenters noted, "the panel majority cannot be inferring *pro-slavery* purpose from *anti-slavery* activity." App., *infra*, 242a n.11.

*infra*, 242a; accord *id.* at 37a (Rawlinson opinion) ("[t]he majority seeks to distinguish *Aziz* and *Talisman*, but no principled distinction can be made"). The panel majority's strained attempts to disguise that split are only a further signal that this Court's review is warranted.

### B. The Panel Majority's Aiding-and-Abetting Analysis Conflicts With This Court's Precedents.

In splitting from the Second and Fourth Circuits, the Ninth Circuit also broke from this Court's precedent. The Court has emphasized—most recently in *Kiobel*—that the authority of federal courts under the ATS is "limited * * * to recognizing causes of action only for alleged violations of international-law norms that are 'specific, universal, and obligatory.'" 133 S. Ct. at 1665 (quoting *Sosa*, 542 U.S. at 732).

The Ninth Circuit violated that fundamental rule by recognizing a form of aiding-and-abetting liability for which there is nothing close to the universal acceptance that *Sosa* and *Kiobel* require.

This Court has not itself addressed whether a private action for aiding and abetting may be recognized under the ATS. See *Sosa*, 542 U.S. at 732 & n.20 (requiring consideration of "whether international law extends the scope of liability for a violation of a given norm *to the perpetrator being sued*" and "the practical consequences of making [a] cause [of action] available") (emphasis added).

But any such cause of action necessarily is limited to those principles that enjoy "universal" acceptance as a norm of international law. The Second and Fourth Circuits applied that rule,

concluding that only a strict purpose requirement was supported by "sufficient international consensus." *Talisman*, 582 F.3d at 259; *Aziz*, 658 F.3d at 401 ("a purpose standard alone has gained the requisite acceptance among civilized nations") (internal quotation marks omitted).

The Ninth Circuit, by contrast, adopted an understanding of "purpose" that has no precedent in international law. Indeed, the notion that a desire to control costs and earn profits can somehow convert knowledge into purpose is analytically unsound: Knowledge of someone else's bad act, plus a general desire to control costs, is still just knowledge. As Judge Rawlinson explained, "[i]t may well be true that child slave labor is the cheapest form of labor for harvesting cocoa," but that allegation "in no way raises a plausible inference that the Defendants acted with the purpose to aid and abet child slave labor." App., *infra*, 35a.

The panel majority did not cite even a single authority in support of its holding that the purpose/specific-intent standard can be satisfied by allegations such as those relied on here, much less try to demonstrate an international consensus on that point—because it could not do so. The panel majority's ruling, as the *en banc* dissenters put it, amounts to the "effective acceptance" of a knowledge standard, because a company may be held liable whenever it *knows* human-rights violations may be occurring in an industry in which it is doing business. App., *infra*, 243a. But the Second and Fourth Circuits explicitly held that there is no international consensus for such a knowledge standard. As the *Talisman* court observed, the "purpose standard has been largely upheld in the

modern era, with only sporadic forays in the direction of a knowledge standard." 582 F.3d at 259; see also *Aziz*, 658 F.3d at 401.[5]

In order to conform with this Court's dictates in *Sosa* and *Kiobel*, the Ninth Circuit should have similarly rejected a knowledge standard because of its lack of anything close to the "universal" acceptance necessary under the ATS. Instead the panel majority flouted the precedents of this Court and its sister circuits, recognizing a novel form of aiding-and-abetting liability and expanding the reach of the ATS far beyond the "limited" parameters this Court has approved.

### C. The Ninth Circuit's Ruling Will Have Significant Adverse Consequences.

The consequences of leaving the Ninth Circuit's ruling in place are severe.

By vastly expanding the scope of ATS liability, the decision below means that any company doing business in (or with) a country with a blemished human-rights record is subject to an ATS aiding-and-abetting suit. It will almost always be possible for a plaintiff to articulate some plausible connection between the benefits a company realizes from commercial activities in a developing country and abuses carried out by local actors on their own initiative.

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[5] The *Talisman* court relied largely on Judge Katzmann's adoption of the purpose standard in his separate opinion in *Khulumani* v. *Barclay National Bank PLC Ltd.*, 504 F.3d 254, 275-277 (2d Cir. 2007), aff'd under 28 U.S.C. § 2109 *sub nom. Am. Isuzu Motors* v. *Ntsebeza*, 553 U.S. 1028 (2008).

Under the Ninth Circuit panel's rule, that company's "profit motive," combined with an awareness that human-rights abuses might be occurring in the relevant industry, is sufficient to establish *mens rea*. As Judge Rawlinson noted, such a sweeping rule would capture a wide range of legitimate profit-making activity:

> [P]rofit-seeking is the reason most corporations exist. To equate a profit-making motive with the [required] *mens rea* * * * would completely negate the constrained concept of ATS liability contemplated by the Supreme Court in *Sosa*.

App., *infra*, 38a. The purpose standard, by contrast, ensures that companies that attempt constructive engagement—via commerce—with countries with mixed human-rights records will not be held liable based on indirect connections to abuses that they did not want to occur and even endeavored to prevent.

The Ninth Circuit's ruling means a company must either refrain from doing business in emerging economies or risk the liability and stigma of being labeled complicit in whatever local abuses may exist. As the *Talisman* court recognized, that result impermissibly converts the ATS into "a vehicle for private parties to impose embargos or international sanctions." 582 F.3d at 264. And this Court has repeatedly cautioned against the use of the ATS for such "unwarranted judicial interference in the conduct of foreign policy." *Kiobel*, 133 S. Ct. at 1664.[6]

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[6] The panel majority exacerbated the negative repercussions of its holding by suggesting that the mere existence of some

Moreover, the Ninth Circuit's decision threatens to harm the very populations that respondents here allege were victimized. Many developing countries are working to remedy human-rights abuses. Foreign investments and business partnerships can be critical in providing the funding for such improvement efforts. But companies will now be loath to engage in such dealings for fear of being hauled into court in the Ninth Circuit.

The denial of *en banc* review in this case means that there is no chance the nation's largest circuit—which has become a magnet for ATS litigation—will correct its own error. Only this Court can resolve the circuit split, bring the Ninth Circuit in line with the dictates of *Kiobel* and *Sosa*, and avoid the severe consequences that inevitably will result from the panel majority's opinion.

## II. The Extraterritoriality Ruling Contravenes *Kiobel* And Creates A Circuit Conflict.

This Court in *Kiobel* expressly adopted the standard set forth in *Morrison* for determining when

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"causal link" between the defendant's conduct and an international-law violation might satisfy the *actus reus* of aiding-and-abetting liability. App., *infra*, 23a. That lenient standard could encompass virtually all business activity in countries with developing human-rights regimes. Respondents here have pointed to nothing more than routine commercial conduct. See page 2, *supra*. Certainly international law offers nothing close to universal consensus for the "causal link" standard that would be required by *Sosa* and *Kiobel*. See, *e.g.*, App., *infra*, 92a-96a (district court opinion); *Prosecutor* v. *Perisic,* Case No. IT-04-81-T Judgment ¶28 n.70 (Feb. 28, 2013) (act must be "specifically directed to assist the * * * the perpetration of a certain specific crime").

a particular application of a statute is impermissibly extraterritorial. See *Kiobel*, 133 S. Ct. at 1669 (citing *Morrison*, 561 U.S. at 266-273). Under *Morrison*, the application of a statute in a given case is improperly extraterritorial if the conduct that was the "'focus' of congressional concern" under the statute occurred overseas. 561 U.S. at 266. Application of the "focus" test here would require dismissal of this case, because the alleged "violation[s] of the law of nations" that are the focus of the ATS all occurred outside the U.S.

The Ninth Circuit majority did not dispute that this action would be precluded under *Morrison*'s "focus" test, and instead simply declared that test inapplicable. App., *infra*, 26a. Dismissing as merely "informative" this Court's express citation and incorporation of *Morrison*, the panel held that *Morrison* "cannot sensibly be applied to ATS claims." App., *infra*, 27a.

That ruling, as the *en banc* dissenters observed, directly conflicts with *Kiobel* and with decisions of the Second and Eleventh Circuits recognizing that *Kiobel* adopted *Morrison*'s focus test. App., *infra*, 247a-248a.

### A. *Kiobel* Adopted *Morrison*'s "Focus" Test.

1. *Kiobel* held that "the presumption against extraterritoriality applies to claims under the ATS." 133 S. Ct. at 1669. The Court acknowledged that the presumption typically is invoked "to discern whether an Act of Congress regulating conduct applies abroad" and that the "ATS, on the other hand, is [a] 'strictly jurisdictional'" statute. *Id.* at 1664. Despite these differences, "the principles underlying the canon of interpretation similarly constrain courts

considering causes of action that may be brought under the ATS." *Id*. at 1665.

This Court found that "nothing in the text of " the ATS or the "historical background against which the ATS was enacted" suggested that Congress intended ATS actions "to have extraterritorial reach." 133 S. Ct. at 1665-1666. To the contrary, the Court found that the ATS's purpose—"avoiding diplomatic strife"—militates in favor of a strong presumption against extraterritorial application of the ATS, which helps "guard[] against our courts triggering serious foreign policy consequences." *Id.* at 1669. Finding no "clear indication of extraterritoriality" in the ATS, the Court held that the presumption governs. *Ibid*.

The ATS claim in *Kiobel* was "barred," the Court concluded, because the plaintiffs sought "relief for violations of the law of nations occurring outside the United States," with "all the relevant conduct" taking "place outside the United States." *Ibid*.

*Kiobel* recognized that, in some ATS cases, conduct may have occurred within the United States. 133 S. Ct. at 1669. But "even where the claims touch and concern the territory of the United States," the Court—citing *Morrison*—cautioned, "they must do so with sufficient force to displace the presumption against extraterritorial application." *Ibid.* (citing *Morrison*, 561 U.S. at 266-273).

The cited portion of *Morrison* (Part IV of the Court's opinion) parallels *Kiobel* in recognizing that the presumption against extraterritoriality is easily applied to a case that, like *Kiobel*, "lacks *all* contact with the territory of the United States." 561 U.S. at 266; compare *Kiobel*, 133 S. Ct. 1669. And just as

*Kiobel* acknowledged that other cases would involve some conduct that "touch[es] and concern[s] the territory of the United States" and would therefore require further analysis to determine whether the conduct has done so with "sufficient force to displace the presumption," 133 S. Ct. at 1669, *Morrison* held that where "*some* domestic activity is involved in the case," further analysis is required. 561 U.S. at 266.

*Morrison* then explained the proper analysis in the latter situation: courts should first identify the particular conduct that was the "'*focus*' of congressional concern" in enacting the statute. 561 U.S. at 266 (emphasis added). If that conduct occurred within the United States the claim may proceed because there is no impermissible extraterritorial application. *Ibid*.

Assessing the statute at issue in *Morrison*—Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b)—the Court held that Congress's focus was "upon purchases and sales of securities in the United States." 561 U.S. at 266. Because the claims in *Morrison* did not involve a purchase or sale within the United States, the claims were barred—even though the defendants were U.S. entities and the claimed fraud allegedly involved "significant conduct" in the U.S. *Id*. at 270, 273.

In explaining that only some ATS claims that involve U.S. conduct will overcome the presumption against extraterritoriality, the *Kiobel* Court pointed to this analysis in *Morrison*—and nothing else. See 133 S. Ct. at 1669 (citing *Morrison*, 561 U.S. at 266-273). *Morrison*'s focus test therefore governs the determination whether an application of the ATS is impermissibly extraterritorial.

2. As Judge Rawlinson and the eight *en banc* dissenters recognized, the panel majority erred in reaching a contrary conclusion. App., *infra*, 39a-42a (Rawlinson dissent); 243a-249a (*en banc* dissent).

The Ninth Circuit rejected *Morrison*'s focus test because, the majority reasoned, the *Kiobel* Court "chose to use the phrase 'touch and concern' rather than the term 'focus' when articulating the legal standard it did adopt." App., *infra*, 26a.

But *Kiobel* did not announce a new "touch and concern" test. The words appear only in a single phrase at the beginning of a sentence—followed by a citation to *Morrison*: "And even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application. See *Morrison*, 561 U.S. —, 130 S. Ct., at 2883-2888." *Kiobel*, 133 S. Ct. at 1669. That plainly is a direction to apply *Morrison*'s test for determining whether a claim with some U.S. connection is nonetheless impermissibly extraterritorial. As Judge Rawlinson stated in dissent: "Why else would [*Kiobel*] direct us to *Morrison* precisely when it was discussing claims that allegedly 'touch and concern' the United States?" App., *infra*, 41a; accord *id.* at 244a-247a (*en banc* dissent).

The panel majority also claimed that *Morrison*'s test "cannot sensibly be applied to ATS claims." App., *infra*, 27a. It stated that *Morrison*'s "focus" test is a "tool of *statutory* interpretation" that "turns on discerning Congress's intent," but ATS claims "are *common law* claims." *Ibid* (emphasis added). But the presumption against extraterritoriality is *itself* a "canon of statutory interpretation," 133 S. Ct. at 1664, and yet *Kiobel* squarely held that the

"principles" underlying that presumption "constrain courts considering [common-law] causes of action that may be brought under the ATS," *ibid*. The panel's criticism of *Morrison* thus rests on the very proposition that *Kiobel* explicitly *rejected*—that the settled standards governing the presumption against extraterritoriality apply only to "an Act of Congress regulating conduct" (as in *Morrison*) and not to a "'strictly jurisdictional'" statute allowing recognition of common-law causes of action (such as the ATS). *Ibid*.

The panel's assertion that this Court, in one sentence, adopted a "new" and "amorphous" test for determining when conduct is sufficiently domestic, App., *infra*, 25a, 27a, also is entirely at odds with *Morrison*'s effort to bring order to lower courts' extraterritoriality analysis. *Morrison* criticized and abrogated various tests that lower courts had used in the Section 10(b) context as "unpredictable," "inconsistent," and "not easy to administer," 561 U.S. at 260, 258, in favor of "apply[ing] the presumption in all cases" to "preserv[e] a stable background against which Congress can legislate with predictable effects," *id.* at 261. The decision below thwarts *Kiobel*'s effort to set the ATS on a similar path toward predictability.

3. Under the governing "focus" test, this is an easy case. The focus of congressional concern in the ATS was articulated in *Sosa*: "Congress intended the ATS to furnish jurisdiction for a relatively modest set of actions alleging *violations of the law of nations*." 542 U.S. at 720 (emphasis added). Here, the only alleged violations of the law of nations occurred outside the U.S.—both the alleged forced labor and

the alleged acts of aiding and abetting took place in Africa. C.A. ER 251.

Even if some aspects of the alleged aiding and abetting were planned, approved, or even overseen from within the U.S.—facts that respondents never have alleged, nor claimed that they could allege—that would not transform respondents' theory into a domestic application of the ATS. Even "significant conduct" in the U.S. that advances a violation the "focus" of which is elsewhere cannot displace the presumption. *Morrison*, 561 U.S. at 266-270.

Indeed, respondents have never contended that they could satisfy *Morrison*'s focus test, and the Ninth Circuit did not suggest that they could. That is for good reason: respondents had two opportunities to identify any relevant conduct within the United States, and failed to do so. In their supplemental brief below regarding *Kiobel*, and in opposing petitioners' rehearing petition below, respondents identified only their allegations of "logistical support, equipment, and financial assistance provided to the farmers," Resp. Opp. to C.A. Pet. Reh'g 10, and petitioners' alleged "involve[ment] in [the farmers'] supply chains," Resp. Supp. C.A. Br. 4. But the alleged supply chain is in Côte d'Ivoire, and the alleged training and assistance was "provided" in Côte d'Ivoire. Neither statement alleges that the violation of international law occurred in the United States.

Further elaboration in an amended complaint would not alter the analysis. And that is particularly true given the lack of any guidance from the panel majority regarding the standard that it believed applicable.

This Court should intervene now to prevent this case—and all other Ninth Circuit ATS litigation that centers on obviously extraterritorial conduct—from being dragged out in the lower courts in direct violation of this Court's holding in *Kiobel*.

### B. The Clear Conflict On This Frequently Recurring Question Should Be Resolved By This Court.

This Court's review is imperative because, as the en banc dissenters emphasized, the panel decision breaks with "the two circuits to consider [the extraterritoriality] issue [that] agree that *Kiobel* simply directs application of the *Morrison* test." App., *infra*, 247a.

Thus, to undertake "the extraterritoriality analysis" under *Kiobel* for ATS claims "where plaintiffs allege some 'connections' to the United States," the Second Circuit "look[s] to th[is] Court's opinion in *Morrison*" to evaluate which "'territorial event[s]' or 'relationship[s]'" are "the 'focus' of the ATS." *Mastafa*, 770 F.3d at 183. And that "'focus,'" the Second Circuit explained, "is on * * * the location of [the] conduct" that is "either a direct violation of the law of nations" or that "constitutes aiding and abetting another's violation of the law of nations." *Id.* at 185; see also *Balintulo* v. *Ford*, 796 F.3d at 166-67 (same); *Balintulo* v. *Daimler AG*, 727 F.3d 174, 189 (2d Cir. 2013).

The Eleventh Circuit similarly hews to *Morrison*, considering "whether 'the claim' and 'relevant conduct' are sufficiently 'focused' in the United States to warrant displacement [of the presumption] and permit jurisdiction." *Doe* v. *Drummond Co.*, 782 F.3d 576, 590 (11th Cir. 2015) (citing *Baloco*, 767

F.3d at 1238-1239). Even if "some of the relevant conduct transpired in the United States," if the alleged international-law violations nonetheless occurred abroad, then the "claims are not focused within the United States," and must be dismissed. *Baloco*, 767 F.3d at 1236, 1238.

Confirming the conflict, the plaintiffs in these Second and Eleventh Circuit cases alleged far more U.S. conduct than has been or could be alleged here. For example, the *Baloco* plaintiffs "contend[ed] that at least some of the relevant conduct transpired in the United States"—the defendant agreed in the United States to support the Colombian paramilitary forces that allegedly committed the international-law violations. 767 F.3d at 1236. The Eleventh Circuit nonetheless affirmed dismissal because "Plaintiffs' claims are not focused within the United States." *Id.* at 1238.

Likewise, in *Cardona* v. *Chiquita Brands International, Inc.*, 760 F.3d 1185, 1189-91 (11th Cir. 2014), the plaintiffs alleged that the defendant's "corporate officers reviewed, approved, and concealed payments and weapons transfers to Colombian terrorist organizations from their offices in the United States." *Id.* at 1194 (Martin, J., dissenting). Nonetheless, the court held the claims were extraterritorial because there was no allegation that any "act constituting a tort in terms of the ATS touched or concerned the territory of the United States with any force." *Id*. at 1191.

And in *Balintulo* v. *Daimler*, the plaintiffs alleged that the defendants "took affirmative steps in this country," such as deciding to continue to supply the South African government. 727 F.3d at 192. Those allegations were insufficient to render the

claim domestic because there was no allegation that the defendants "commit[ted] any relevant conduct within the United States giving rise to a violation of customary international law." *Ibid.*

Adding to the division among the lower courts, the Fourth Circuit considered the question of extraterritoriality in *Al Shimari* v. *CACI Premier Technology, Inc.*, 758 F.3d 516 (4th Cir. 2014). The Fourth Circuit did not mention the "focus" test or *Kiobel*'s direct reference to *Morrison*, but instead concluded that because this Court in *Kiobel* did "not state a precise formula for our analysis" it would consider "all the facts that give rise to ATS claims, including the parties' identities and their relationship to the causes of action." *Id.* at 527, 529. The Fourth Circuit's interpretive approach is mistaken for the same reasons as is the Ninth Circuit's holding here.[7]

The question of the extraterritorial application of the ATS is of critical importance. Almost all ATS cases involve allegations of overseas conduct, and the *Morrison* test adopted by this Court in *Kiobel* gives courts and litigants essential guidance on whether

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[7] Moreover, the circumstances in *Al Shimari* differ markedly from most post-*Kiobel* cases that have addressed extraterritoriality. The underlying violations in *Al Shimari* were allegedly committed by U.S. citizens at a U.S.-operated military facility who were paid under a U.S. government contract executed in the United States. 758 F.3d at 528-529. And the norm at issue—torture—requires alleged action under color of law, which was met by the U.S. government contract. The *Al Shimari* court found that "these ties to the territory of the United States are far greater than those considered recently by the Second Circuit in *Balintulo*." *Id.* at 529.

particular cases should proceed past the pleading stage. The Ninth Circuit jettisoned that guidance and instead adopted an "amorphous" test—without providing any guidance regarding the relevant facts or how they should be assessed—that threatens greatly to expand the opportunities for extraterritorial application of the ATS.

This Court should grant review to resolve the division in the circuits and reiterate what *Kiobel* already establishes: *Morrison*'s "focus" test guides the extraterritoriality inquiry in cases brought under the ATS.

## III. The Court Should Resolve The Recognized Conflict As To Whether There Is A Well-Defined International-Law Consensus That Corporations Are Subject To Liability For Violations Of The Law Of Nations.

Review is also warranted to resolve the persistent conflict among the courts of appeals regarding corporate liability under the ATS. The Court granted review on this very question in *Kiobel*, but did not address the question because it resolved the case on extraterritoriality grounds. See 133 S. Ct. at 1663-1664.

The panel below held that corporations may be sued under the ATS—and several other courts of appeals have reached, or assumed, that result. App., *infra*, 13a; *Flomo* v. *Firestone Nat'l Rubber Co.*, 643 F.3d 1013, 1021 (7th Cir. 2011) ("corporate liability is possible under the Alien Tort Statute"); *Romero* v. *Drummond Co.*, 552 F.3d 1303, 1315 (11th Cir. 2008) (same).

The Second Circuit, by contrast, has frequently reaffirmed its holding in *Kiobel* that corporations are

not subject to ATS liability. *Balintulo* v. *Ford*, 796 F.3d at 166 n.28; *Chowdhury* v. *Worldtel Bangladesh Holding, Ltd.*, 746 F.3d 42, 49 n.6 (2d Cir. 2014); *Balintulo* v. *Daimler*, 727 F.3d at 191 n.26; see also *Kiobel* v. *Royal Dutch Petroleum Co.*, 621 F.3d 111, 148-149 (2d Cir. 2011), aff'd on other grounds, 133 S. Ct. 1659 (2013).

Both the panel and the eight judges dissenting from the denial of rehearing expressly recognized this conflict among the courts of appeals. App., *infra*, 11a, 249a n.19.

The dissenting judges disagreed with the panel's determination, stating that the panel erred in "resuscitat[ing]" the endorsement of corporate liability in the subsequently-vacated ruling in *Sarei* v. *Rio Tinto PLC*. App., *infra*, 251a. "Our court was wrong enough in *Sarei* to join those circuits that erroneously conclude that corporate liability could exist under the ATS," the dissenters stated. *Ibid.* "[T]he majority's error violates the Supreme Court's commands and opens our doors to an expansive vision of corporate liability." *Id.* at 252a.

Subjecting corporations to ATS liability conflicts with this Court's decision in *Sosa*, which directed courts to consider "whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual." 542 U.S. at 732 n.20; see also *id.* at 760 (Breyer, J., concurring).

There is no international consensus that liability for human-rights violations extends to juridical entities such as corporations. To the contrary, what exists is an "absence of any generally recognized

principle or consensus among States concerning corporate liability for violations of customary international law." *Kiobel*, 621 F.3d at 137; see also BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 378-381 (2d ed. 1999) (noting controversy over whether artificial entities can form the requisite intent to commit crimes).

Indeed, proposals that corporations be subjected to liability for violations of international law under the Rome Statute were specifically rejected because of the controversy over the issue—with 13 nations opposing corporate liability, and 12 others (including the United States) voicing concerns over the disparity in practice among nations regarding corporate liability. App, *infra*, 220a-221a. As the Second Circuit concluded, "[t]he history of the Rome Statute * * * confirms the absence of any generally recognized principle or consensus among States concerning corporate liability for violations of customary international law." *Kiobel*, 621 F.3d at 137.

The Court should grant review to resolve the clear conflict regarding this important and frequently recurring issue.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 2015

# APPENDICES

**APPENDIX A**

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

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No. 10-56739

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John Doe I; John Doe II; John Doe III, individually and on behalf of proposed class members; Global Exchange,

Plaintiffs-Appellants,

v.

Nestle USA, Inc.; Archer Daniels Midland Company; Cargill Incorporated Company; Cargill Cocoa

Defendants-Appellees.

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Appeal from the United States District Court
for the Central District of California
Stephen V. Wilson, District Judge
(2:05-CV-05133-SVW-JTL)

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Submitted: December 2, 2013
Filed: September 4, 2014

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Before: Dorothy W. Nelson, Kim McLane Wardlaw, and Johnnie B. Rawlinson, Circuit Judges.

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## ORDER

The order filed December 19, 2013, and appearing at 738 F.3d 1048, is withdrawn, *Carver v. Lehman*, 558 F.3d 869, 878–79 (9th Cir. 2009), and is replaced by the opinion filed concurrently with this order. Our prior order may not be cited as precedent to any court. Moreover, with the original order withdrawn, we deem the petition for rehearing and rehearing en banc moot. The parties may file a petition for rehearing and rehearing en banc with respect to the opinion filed together with this order.

**IT IS SO ORDERED.**

## OPINION

D.W. NELSON, Senior Circuit Judge:

The plaintiffs in this case are former child slaves who were forced to harvest cocoa in the Ivory Coast. They filed claims under the Alien Tort Statute (ATS) against defendants Nestle USA, Inc., Archer Daniels Midland Company, Cargill Incorporated Company, and Cargill Cocoa, alleging that the defendants aided and abetted child slavery by providing assistance to Ivorian farmers.

The district court dismissed their complaint, finding that the plaintiffs failed to state a claim upon which relief can be granted. We reverse, vacate, and remand for further proceedings.

## I. Background[1]

The use of child slave labor in the Ivory Coast is a humanitarian tragedy. Studies by International Labour Organization, UNICEF, the Department of State, and numerous other organizations have confirmed that thousands of children are forced to work without pay in the Ivorian economy. Besides the obvious moral implications, this widespread use of child slavery contributes to poverty in the Ivory Coast, degrades its victims by treating them as commodities, and causes long-term mental and physical trauma.

The plaintiffs in this case are three victims of child slavery. They were forced to work on Ivorian cocoa plantations for up to fourteen hours per day six days a week, given only scraps of food to eat, and whipped and beaten by overseers. They were locked in small rooms at night and not permitted to leave the plantations, knowing that children who tried to escape would be beaten or tortured. Plaintiff John Doe II witnessed guards cut open the feet of children who attempted to escape, and John Doe III knew that the guards forced failed escapees to drink urine.

Though tarnished by these atrocities, the Ivory Coast remains a critical part of the international chocolate industry, producing seventy percent of the world's supply of cocoa. The defendants in this case dominate the Ivorian cocoa market. Although the defendants do not own cocoa farms themselves, they

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[1] The facts set forth in our background section are drawn from the allegations in the plaintiffs' First Amended Complaint, which we must accept as true for purposes of evaluating a motion to dismiss. *Seven Arts Filmed Entm't Ltd. v. Content Media Corp. PLC*, 733 F.3d 1251, 1254 (9th Cir. 2013).

maintain and protect a steady supply of cocoa by forming exclusive buyer/seller relationships with Ivorian farms. The defendants are largely in charge of the work of buying and selling cocoa, and import most of the Ivory Coast's cocoa harvest into the United States. The defendants' involvement in the cocoa market gives them economic leverage, and along with other large multinational companies, the defendants effectively control the production of Ivorian cocoa.

To maintain their relationships with Ivorian farms, the defendants offer both financial assistance and technical farming assistance designed to support cocoa agriculture. The financial assistance includes advanced payment for cocoa and spending money for the farmers' personal use. The technical support includes equipment and training in growing techniques, fermentation techniques, farm maintenance, and appropriate labor practices. The technical support is meant to expand the farms' capacity and act as a quality control mechanism, and either the defendants or their agents visit farms several times per year as part of the defendants' training and quality control efforts.

The defendants are well aware of the child slavery problem in the Ivory Coast. They acquired this knowledge firsthand through their numerous visits to Ivorian farms. Additionally, the defendants knew of the child slave labor problems in the Ivorian cocoa sector due to the many reports issued by domestic and international organizations.

Despite their knowledge of child slavery and their control over the cocoa market, the defendants operate in the Ivory Coast "with the unilateral goal of finding the cheapest sources of cocoa." The defend-

ants continue to supply money, equipment, and training to Ivorian farmers, knowing that these provisions will facilitate the use of forced child labor. The defendants have also lobbied against congressional efforts to curb the use of child slave labor. In 2001, the House of Representatives passed a bill that would have required United States importers and manufacturers to certify and label their products "slave free." The defendants and others in the chocolate industry rallied against the bill, urging instead the adoption of a private, voluntary enforcement mechanism. A voluntary enforcement system was eventually adopted, a result that, according to the plaintiffs, "in effect guarantee[d] the continued use of the cheapest labor available to produce [cocoa]—that of child slaves."

The plaintiffs filed a proposed class action in the United States District Court for the Central District of California, alleging that the defendants were liable under the ATS for aiding and abetting child slavery in the Ivory Coast. The district court granted the defendants' motion to dismiss in a detailed opinion, which concluded that corporations cannot be sued under the ATS, and that even if they could, the plaintiffs failed to allege the elements of a claim for aiding and abetting slave labor. The plaintiffs declined to amend their complaint, and appeal the district court's order.

## II. Standard of Review

"A dismissal for failure to state a claim is reviewed de novo. All factual allegations in the complaint are accepted as true, and the pleadings construed in the light most favorable to the nonmoving party." *Abagnin v. AMVAC Chemical Corp.*, 545 F.3d 733, 737 (9th Cir. 2008) (internal citations omitted).

## III. Discussion

The ATS, quoted in full, reads:

> 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. For nearly two hundred years, the ATS was almost never invoked. In *Filartiga v. Pena-Irala*, however, the Second Circuit breathed life into the statute by construing it to allow two Paraguayan citizens to bring a civil action against a Paraguayan police officer who had tortured and killed their son. 630 F.2d 876, 878 (2d Cir. 1980); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724–25 (2004) (describing *Filartiga* as "the birth of the modern line of [ATS] cases."). The Second Circuit in *Filartiga* reasoned that the ATS was designed to "open[] the federal courts for adjudication of the rights already recognized by international law," and thus permitted the plaintiffs to pursue their tort claim because torture is prohibited by international law. *Filartiga*, 630 F.2d at 885, 887–88. *Filartiga* concluded by observing that modern history had led the nations of the world to recognize the collective interest in protecting fundamental human rights, and commented that its holding was "a small but important step in the fulfillment of the ageless dream to free all people from brutal violence." *Id.* at 890.

The Supreme Court reached a consonant result in *Sosa v. Alvarez-Machain*, its first opinion addressing the ATS. The Court first held that the text of the ATS is focused solely on jurisdiction, and that the statute itself does not create a tort cause of action arising out of violations of international law. *Sosa*, 542 U.S. at 724. After reviewing the ATS's history,

however, the Court also observed that "the statute was intended to have practical effect the moment it became law," and thus held that "[t]he jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time." *Id.* Thus, under *Sosa*, the federal courts are available to hear tort claims based on violations of international law. Specifically, *Sosa* held that federal common law creates tort liability for violations of international legal norms, and the ATS in turn provides federal courts with jurisdiction to hear these hybrid common law–international law tort claims. *Id.*; *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 265 (2d. Cir. 2007) (Katzmann, J., concurring) ("*Sosa* makes clear that all [ATS] litigation is in fact based on federal common law. . . .").

At the time of its passage, the ATS was intended to grant jurisdiction over tort claims seeking relief only for three violations of international law: piracy, violation of safe conducts, and infringement of the rights of ambassadors. *Sosa*, 542 U.S. at 724. The Court in *Sosa* held, however, that contemporary ATS claims can invoke the rights created by the "present-day law of nations," and thus are not limited to these "historical paradigms." *Id.* at 725, 732. Under contemporary international law, federal courts have permitted plaintiffs to pursue ATS claims based on a broad range of misconduct, including genocide, war crimes, torture, and supporting terrorism.

While *Sosa* therefore permits the application of contemporary international law in an ATS claim, federal courts must exercise restraint when doing so. *Sosa* described this restraint through a historically

focused standard for determining when an ATS claim may be based on contemporary international law. Under this test, "federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted." *Id.* at 732. This standard "is suggestive rather than precise," and is perhaps "best understood as the statement of a mood—and the mood is one of caution." *Flomo v. Firestone Natural Rubber Co., LLC*, 643 F.3d 1013, 1016 (7th Cir. 2011). Applying this standard, courts focus on whether a contemporary international legal norm underlying a proposed ATS claim is "specific, universal, and obligatory." *In re Estate of Marcos Human Rights Litig.*, 25 F.3d 1467, 1475 (9th Cir. 1994); *Sosa*, 542 U.S. at 732 (citing this definition with approval).

Additionally, *Sosa* held that the decision to recognize a new cause of action must "involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts." *Sosa*, 542 U.S. at 732–33. This inquiry focuses on "the consequences that might result from making the cause of action generally available to all potential plaintiffs," and permits courts "to consider other prudential concerns consistent with *Sosa*'s approach." *Khulumani*, 504 F.3d at 268 (Katzmann, J., concurring).

The body of international law that supplies the norms underlying an ATS claim is often referred to as "customary international law," which consists of "rules that States universally abide by, or accede to, out of a sense of legal obligation and mutual concern." *Id.* at 267 (Katzmann, J., concurring) (quoting

*Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 248 (2d Cir. 2003)); *see also The Paquete Habana*, 175 U.S. 677, 707–08 (1900); *Abagninin*, 545 F.3d at 738. To determine the content of customary international law, courts "look to the sources of law identified by the Statute of the International Court of Justice." *Khulumani*, 504 F.3d at 267 (Katzmann, J., concurring). These sources include international conventions, international customs, "the general principles of law recognized by civilized nations," "judicial decisions," and the works of scholars. *Id.*; *see also* Restatement (Third) of Foreign Relations Law § 102 (1987) (identifying similar sources). Courts also consult authorities that provide an authoritative expression of the views of the international community even if, strictly speaking, the authority is not meant to reflect customary international law. *Khulumani*, 504 F.3d at 267 (Katzmann, J., concurring) (relying on the Rome Statute of the International Criminal Court).

Here, the parties look primarily to three sources of customary international law. The first are decisions of the post–World War II International Military Tribunal at Nuremberg, which are widely recognized as a critical part of customary international law and regularly invoked in ATS litigation. *See*, e.g., *Khulumani*, 504 F.3d at 271 (Katzmann, J., concurring). The second are decisions issued by the International Criminal Tribunals for Rwanda and the former Yugoslavia (ICTR and ICTY, respectively), which were convened to prosecute violations of international humanitarian law committed in Rwanda during 1994 and war crimes that took place in the Balkans during the 1990s. These decisions are also recognized as authoritative sources of customary international law. *Id.* at 278–79; *Abagninin*, 545 F.3d

at 739. The third is a recent decision issued by the Special Court for Sierra Leone (SCSL), which was convened to address violations of international humanitarian law in Sierra Leone since November 30, 1996. *Prosecutor v. Taylor*, Case No. SCSL-03-01-A (SCSL Sept. 26, 2013). We consider this decision to be a proper source of international law for ATS claims. The parties also cite the Rome Statute of the International Criminal Court in their briefing, but, as discussed in more detail below, dispute its relevance in this case.

The specific norms underlying the plaintiffs' ATS claim are the norms against aiding and abetting slave labor, which the defendants allegedly violated by providing financial and non-financial assistance to cocoa farmers in the Ivory Coast. The defendants argue that this claim should be dismissed, for three reasons. First, the defendants argue that there is no specific, universal, and obligatory norm preventing corporations—as opposed to individuals—from aiding and abetting slave labor. Second, the defendants argue that the plaintiffs' complaint fails to allege the *actus reus* and *mens rea* elements of an aiding and abetting claim. Finally, the defendants argue that the plaintiffs' complaint improperly seeks extraterritorial application of federal law contrary to the Supreme Court's recent decision in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) ("*Kiobel II*"). We consider each argument in turn.

**A. Corporate Liability under the ATS**

The primary focus of international law, although not its exclusive focus, is the conduct of states. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 165 (2d. Cir. 2010) (Leval, J., concurring) ("*Kiobel I*"). Many of its prohibitions therefore only apply to state action,

and an important issue in ATS litigation can be determining whether the norm asserted by the plaintiff is applicable to both state actors and private actors. This issue is illustrated by the contrasting decisions of the D.C. Circuit in *Tel-Oren v. Libyan Arab Republic* and the Second Circuit in *Kadic v. Karadzic*. In *Tel-Oren*, Judge Edwards concluded that the plaintiffs' ATS claim was barred because there was no consensus that international law applied to torture carried out by non-state actors. 726 F.2d 774, 791–95 (D.C. Cir. 1984). In *Kadic*, by contrast, the Second Circuit held that international law's prohibition on genocide applies regardless of whether the perpetrator is acting on behalf of a state. 70 F.3d 232, 241–42 (2d. Cir. 1995).

The Supreme Court's only allusion to corporate liability occurred in a footnote that referenced these discussions in *Tel-Oren* and *Kadic*. *Sosa*, 542 U.S. at 732 n.20. In the footnote, the Court directed federal courts contemplating the recognition of new ATS claims to consider "whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a *private actor such as a corporation or individual*." *Id.* (emphasis added).

The issue of corporate liability has been more thoroughly examined in the circuit courts, which have disagreed about whether and under what circumstances corporations can face liability for ATS claims. *Kiobel I*, 621 F.3d at 145; *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 57 (D.C. Cir. 2011), *vacated on other grounds by* 527 F. App'x. 7 (D.C. Cir. 2013); *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 747 (9th Cir. 2011) *vacated on other grounds by* 133 S. Ct. 1995 (2013); *Flomo*, 643 F.3d at 1020–21. Here, we reaf-

firm the corporate liability analysis reached by the en banc panel of our circuit in *Sarei v. Rio Tinto*.

In *Sarei*, the plaintiffs sought to hold corporate defendants liable for aiding and abetting genocide and war crimes. We first rejected the defendants' argument that corporations can never be sued under the ATS. Rather than adopting a blanket rule of immunity or liability, the *Sarei* court held that for each ATS claim asserted by the plaintiffs, a court should look to international law and determine whether corporations are subject to the norms underlying that claim. *Id.* at 748 ("*Sosa* expressly frames the relevant international-law inquiry to be the scope of liability of private actors for a violation of the 'given norm,' i.e. an international-law inquiry specific to each cause of action asserted."). Thus, we adopted a norm-by-norm analysis of corporate liability.

The *Sarei* court then conducted corporate liability analyses for the two norms underlying the plaintiffs' claims, the norm against genocide and the norm against war crimes. *Id.* at 759–61, 764–65. The en banc panel observed that both norms apply to states, individuals, and groups, and that the applicability of the norms turns on the "specific identity of the *victims* rather than the identity of the *perpetrators*." *Id.* at 760, 764–65 (emphasis added). Thus, we concluded that the norms were "universal" or applicable to "all actors," and, consequently, applicable to corporations. *Id.* at 760, 765. We reasoned that allowing an actor to "avoid liability merely by incorporating" would be inconsistent with the universal quality of these norms. *See id.* at 760 (discussing genocide).

In *Sarei* we also explained that a norm could form the basis for an ATS claim against a corporation even in the absence of a decision from an inter-

national tribunal enforcing that norm against a corporation. *Id.* at 761 ("We cannot be bound to find liability only where international fora have imposed liability."); *contra Kiobel I*, 621 F.3d at 131–45. We explained that the absence of decisions finding corporations liable does not imply that corporate liability is a legal impossibility under international law, and also noted that the lack of decisions holding corporations liable could be explained by strategic considerations. *Sarei*, 671 F.3d at 761 (citing Jonathan A. Bush, *The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said*, 109 Colum. L. Rev. 1094, 1149–68 (2009)). Rejecting an analysis that focuses on past enforcement, *Sarei* reaffirmed that corporate liability ultimately turns on an analysis of the norm underlying the ATS claim. *Id.* at 760–61 ("We . . . believe the proper inquiry is not whether there is a specific precedent so holding, but whether international law extends its prohibitions to the perpetrators in question.").

We thus established three principles about corporate ATS liability in *Sarei*, that we now reaffirm. First, the analysis proceeds norm-by-norm; there is no categorical rule of corporate immunity or liability. *Id.* at 747–48. Second, corporate liability under an ATS claim does not depend on the existence of international precedent enforcing legal norms against corporations. *Id.* at 760–61. Third, norms that are "universal and absolute," or applicable to "all actors," can provide the basis for an ATS claim against a corporation. *Id.* at 760. To determine whether a norm is universal, we consider, among other things, whether it is "limited to states" and whether its application depends on the identity of the perpetrator. *Id.* at 764–65.

We conclude that the prohibition against slavery is universal and may be asserted against the corporate defendants in this case. Private, non-state actors were held liable at Nuremberg for slavery offenses. *The Flick Case*, 6 Trials of War Criminals (T.W.C.) 1194, 1202. Moreover, the statutes of the International Criminal Tribunals for Rwanda and the former Yugoslavia are broadly phrased to condemn "persons responsible" for enslavement of civilian populations. ICTY Statute Art. 5(c), U.N. S/RES/827 (May 25, 1993); ICTR Statute Art. 3(c), U.N. S/RES/955 (Nov. 8, 1994). The prohibition against slavery applies to state actors and non-state actors alike, and there are no rules exempting acts of enslavement carried out on behalf of a corporation. Indeed, it would be contrary to both the categorical nature of the prohibition on slavery and the moral imperative underlying that prohibition to conclude that incorporation leads to legal absolution for acts of enslavement. *Kiobel I*, 621 F.3d at 155 (Leval, J., concurring) ("The majority's interpretation of international law, which accords to corporations a free pass to act in contravention of international law's norms, conflicts with the humanitarian objectives of that body of law.").

A final point of clarification is in order about the role of domestic and international law. Although international law controls the threshold question of whether an international legal norm provides the basis for an ATS claim against a corporation, there remain several issues about corporate liability which must be governed by domestic law. This division of labor is dictated by international legal principles, because international law defines norms and determines their scope, but delegates to domestic law the task of determining the civil consequences of any

given violation of these norms. *Id.* at 172 (Leval, J., concurring); *Exxon*, 654 F.3d at 42–43; *Flomo*, 643 F.3d at 1020. Thus, when questions endemic to tort litigation or civil liability arise in ATS litigation—such as damages computation, joint and several liability, and proximate causation—these issues must be governed by domestic law. Many questions that surround corporate liability fall into this category, including, most importantly, the issue of when the actions of an individual can be attributed to a corporation for purposes of tort liability. Determining when a corporation can be held liable therefore requires a court to apply customary international law to determine the nature and scope of the norm underlying the plaintiffs' claim, and domestic tort law to determine whether recovery from the corporation is permissible.

Our holding that the norm against slavery is universal and thus may be asserted against the defendants addresses only the international legal issues related to corporate liability in this case. We do not address other domestic law questions related to corporate liability, and leave them to be addressed by the district court in the first instance.

**B. Aiding and Abetting Liability**

We next consider whether the plaintiffs' complaint alleges the elements of a claim for aiding and abetting slavery. Customary international law—not domestic law—provides the legal standard for aiding and abetting ATS claims. *Sarei*, 671 F.3d at 765–66. When choosing between competing legal standards, we consider which one best reflects a consensus of the well-developed democracies of the world. *See Sosa*, 542 U.S. at 732 (directing federal courts to apply legal norms in ATS litigation that are accepted by

"civilized nations"); *Khulumani*, 504 F.3d at 276 (Katzmann, J., concurring) (consulting the Rome Statute's aiding and abetting legal standard in part due to its wide acceptance among "most of the mature democracies of the world").

1. *Mens Rea*

The plaintiffs argue that the required *mens rea* for aiding and abetting is knowledge, specifically, knowledge that the aider and abetter's acts would facilitate the commission of the underlying offense. This knowledge standard dates back to the Nuremberg tribunals, and is well illustrated by the *Zyklon B Case*, 1 LAW REPORTS OF TRIALS OF WAR CRIMINALS 93 (1946). There, the defendants supplied poison gas to the Nazis knowing that it would be used to murder innocent people, and were convicted of aiding and abetting war crimes. *Id.* at 101. An analogous knowledge standard is applied in *The Flick Case*, where a defendant was convicted of aiding and abetting war crimes for donating money to the leader of the SS, knowing that it would be used to support a criminal organization. 6 T.W.C. 1216–17, 1220–21; *see also The Ministries Case*, 14 T.W.C. 622 (concluding that the defendant's knowledge regarding the intended use of a loan was sufficient to satisfy the *mens rea* requirement, but declining to find that the defendant satisfied the *actus reus* requirement).

As plaintiffs contend, this knowledge standard has also been embraced by contemporary international criminal tribunals. The International Criminal Tribunals for Rwanda and the former Yugoslavia consistently apply a knowledge standard. In *Prosecutor v. Blagojevic*, for instance, the tribunal stated that "[t]he requisite mental element of aiding and abetting is knowledge that the acts performed assist

the commission of the specific crime of the principal perpetrator." No. IT-02-60-A, ¶ 127 (ICTY, May 9, 2007) ("*Blagojevic*"); *see also Prosecutor v. Kayishema*, No. ICTR-95-1-T, ¶ 205 (ICTR, May 21, 1999); *Khulumani*, 504 F.3d at 277–79 (Katzmann, J., concurring) (observing that the ICTY and ICTR decisions apply a knowledge standard); *Exxon*, 654 F.3d at 33–34 (same). Additionally, after conducting an extensive review of customary international law, the Appeals Chamber of the Special Court for Sierra Leone recently affirmed this knowledge standard, concluding that "an accused's knowledge of the consequence of his acts or conduct—that is, an accused's 'knowing participation' in the crimes—is a culpable *mens rea* standard for individual criminal liability." *Taylor*, ¶ 483.

However, two of our sister circuits have concluded that knowledge is insufficient and that an aiding and abetting ATS defendant must act with the *purpose* of facilitating the criminal act, relying on the Rome Statute of the International Criminal Court, 37 I.L.M. 999 (1998) ("Rome Statute")[FN callout]. *See Aziz v. Alcolac, Inc.*, 658 F.3d 388, 399–400 (4th Cir. 2011); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 259 (2d Cir. 2009). These circuits have interpreted the Rome Statute to bar the use of a knowledge standard because it uses the term "purpose" to define aiding and abetting liability:

> [A] person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person . . . [f]or the *purpose* of facilitating the commission of such a crime, aids, abets, or otherwise assists in its commission . . . .

Rome Statute, art. 25(3)(c) (emphasis added). Taking this text at face value, as the Second and Fourth Circuits did, it appears that the Rome Statute rejects a knowledge standard and requires the heightened *mens rea* of purpose, suggesting that knowledge standard lacks the universal acceptance that *Sosa* demands.

Here, we need not decide whether a purpose or knowledge standard applies to aiding and abetting ATS claims. We conclude that the plaintiffs' allegations satisfy the more stringent purpose standard, and therefore state a claim for aiding and abetting slavery. All international authorities agree that "*at least* purposive action . . . constitutes aiding and abetting[.]" *Sarei*, 671 F.3d at 765–66 (declining to determine whether the *mens rea* required for an aiding and abetting claim is knowledge or purpose).

Reading the allegations in the light most favorable to the plaintiffs, one is led to the inference that the defendants placed increased revenues before basic human welfare, and intended to pursue all options available to reduce their cost for purchasing cocoa. Driven by the goal to reduce costs in any way possible, the defendants allegedly supported the use of child slavery, the cheapest form of labor available. These allegations explain how the use of child slavery benefitted the defendants and furthered their operational goals in the Ivory Coast, and therefore, the allegations support the inference that the defendants acted with the purpose to facilitate child slavery.

The defendants' alleged plan to benefit from the use of child slave labor starkly distinguishes this case from other ATS decisions where the purpose standard was not met. *See Talisman*, 582 F.3d at 262–64; *Aziz*, 658 F.3d at 390–91, 401. According to

the allegations here, the defendants have not merely profited by doing business with known human rights violators. Instead, they have allegedly sought to accomplish their own goals by supporting violations of international law. In *Talisman*, by contrast, the defendant did not in any way benefit from the underlying human rights atrocities carried out by the Sudanese military, and in fact, those atrocities ran contrary to the defendant's goals in the area, and even forced the defendant to abandon its operations. *Talisman*, 582 F.3d at 262. Similarly, in *Aziz*, the plaintiffs alleged that the defendants sold chemicals knowing they would be used to murder Kurds in northern Iraq, but failed to allege that the defendants had anything to gain from the use of chemical weapons. *Aziz*, 658 F.3d at 394, 401. Thus, in *Talisman* and *Aziz*, the purpose standard was not satisfied because the defendants had nothing to gain from the violations of international law, and in *Talisman*, the violations actually ran counter to the defendants' interest. Here, however, the complaint alleges that the defendants obtained a direct benefit from the commission of the violation of international law, which bolsters the allegation that the defendants acted with the purpose to support child slavery.

The defendants' control over the Ivory Coast cocoa market further supports the allegation that the defendants acted with the purpose to facilitate slavery. According to the complaint, the defendants had enough control over the Ivorian cocoa market that they could have stopped or limited the use of child slave labor by their suppliers. The defendants did not use their control to stop the use of child slavery, however, but instead offered support that facilitated it. Viewed alongside the allegation that the defendants benefitted from the use of child slavery, the de-

fendants' failure to stop or limit child slavery supports the inference that they intended to keep that system in place. The defendants had the means to stop or limit the use of child slavery, and had they wanted the slave labor to end, they could have used their leverage in the cocoa market to stop it. Their alleged failure to do so, coupled with the cost-cutting benefit they allegedly receive from the use of child slaves, strongly supports the inference that the defendants acted with purpose.

The defendants' alleged lobbying efforts also corroborate the inference of purpose. According to the complaint, the defendants participated in lobbying efforts designed to defeat federal legislation that would have required chocolate importers and manufacturers to certify and label their chocolate as "slave free." As an alternative to the proposed legislation, the defendants, along with others from the chocolate industry, supported a voluntary mechanism through which the chocolate industry would police itself. The complaint also alleges that when the voluntary enforcement system was eventually put into practice instead of legislation, it "in effect guaranteed the continued use of the cheapest labor available to produce [cocoa]—that of child slaves."

Despite these detailed allegations, the dissent contends that the complaint should be dismissed as implausible under *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). The allegation of purpose is not, however, a bare and conclusory assertion that is untethered from the facts underlying the plaintiffs' claims. Instead, the complaint specifically ties the defendants' alleged purpose to the defendants' economic goals in the Ivory Coast, their control over the cocoa market, and their lobbying efforts. The factual allegations

concerning the defendants' goals and business operations give rise to a reasonable inference that the defendants acted with purpose, and that is enough to satisfy *Iqbal*. *Id.* at 678–79; *Moss v. U.S. Secret Service*, 572 F.3d 962, 969 (9th Cir. 2009) ("In sum, for a complaint to survive a motion to dismiss, the nonconclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief.").

We also disagree with the dissent's assertion that the plaintiffs have conceded that their allegations fail to satisfy the purpose standard. The plaintiffs have maintained throughout this appeal that the purpose standard has been satisfied. They only conceded that the defendants did not have the subjective motive to harm children. Indeed, the complaint is clear that the defendants' motive was finding cheap sources of cocoa; there is no allegation that the defendants supported child slavery due to an interest in harming children in West Africa.

This is not to say that the purpose standard is satisfied merely because the defendants intended to profit by doing business in the Ivory Coast. Doing business with child slave owners, however morally reprehensible that may be, does not by itself demonstrate a purpose to support child slavery. Here, however, the defendants allegedly intended to support the use of child slavery as a means of reducing their production costs. In doing so, the defendants sought a legitimate goal, profit, through illegitimate means, purposefully supporting child slavery.

Thus, the allegations suggest that a myopic focus on profit over human welfare drove the defendants to act with the purpose of obtaining the cheapest cocoa possible, even if it meant facilitating child slavery.

These allegations are sufficient to satisfy the *mens rea* required of an aiding and abetting claim under either a knowledge or purpose standard.

2. *Actus Reus*

We next consider whether the plaintiffs have alleged the *actus reus* elements of an aiding and abetting claim. The *actus reus* of aiding and abetting is providing assistance or other forms of support to the commission of a crime. *Blagojevic*, ¶ 127; *Taylor*, ¶ 362; Rome Statute art. 25(3)(c). As both parties agree, international law further requires that the assistance offered must be substantial. *Blagojevic*, ¶ 127; *Taylor*, ¶ 362. The parties dispute, however, whether international law imposes the additional requirement that the assistance must be specifically directed towards the commission of the crime.

The "specific direction" requirement appears to have originated in decisions issued by the International Criminal Tribunal for the former Yugoslavia. *See Prosecutor v. Tadic*, Case No. IT-94-1-A (ICTY July 15, 1999); *Prosecutor v. Perisic*, Case No. IT-04-81-A, (ICTY Feb. 28, 2013) ("*Perisic*"). In *Tadic*, the Appeals Chamber used the phrase "specifically directed" to distinguish joint criminal enterprise liability from aiding and abetting liability. *Tadic*, ¶¶ 227–29. While joint criminal enterprise liability only requires an individual to engage in conduct that "in some way" assisted the commission of a crime, the Appeals Chamber stated that aiding and abetting liability requires an individual to engage in conduct that is "specifically directed" towards the commission of a crime. *Id.* ¶ 229(ii). In *Perisic*, a later panel of the Appeals Chamber clarified that the specific direction requirement relates to the "link" between the assistance provided and the principal offense, and

requires that "assistance must be 'specifically'—rather than 'in some way'—directed towards the relevant crimes." *Perisic* ¶ 27, 37 (quoting *Tadic*, ¶ 229).

Some Appeals Chamber panels and other international tribunals have explicitly rejected the specific direction requirement. *Prosecutor v. Mrksic*, Case No. IT-95-13/1-A, ¶ 159 (ICTY May 5, 2009) ("[T]he Appeals Chamber has confirmed that 'specific direction' is not an essential ingredient of the *actus reus* of aiding and abetting."); *Blagojevic*, ¶ 189 ("[S]pecific direction has not always been included as an element of the *actus reus* of aiding and abetting."); *Taylor*, ¶ 481. Beneath this controversy, however, there is widespread substantive agreement about the *actus reus* of aiding and abetting. As the Special Court for Sierra Leone Appeals Chambers recently affirmed, "[t]he actus reus of aiding and abetting liability is established by assistance that has a substantial effect on the crimes, not the particular manner in which such assistance is provided." *Taylor*, ¶ 475. What appears to have emerged is that there is less focus on specific direction and more of an emphasis on the existence of a causal link between the defendants and the commission of the crime. However, we decline to adopt an *actus reus* standard for aiding and abetting liability under the ATS. Instead, we remand to the district court with instructions to allow plaintiffs to amend their complaint in light of *Perisic* and *Taylor*, both of which were decided after the complaint in this case was dismissed and this appeal had been filed.

### C. Extraterritorial ATS Claims

The defendants' final argument contends that the plaintiffs' ATS claim seeks an extraterritorial application of federal law that is barred by the Su-

preme Court's recent decision in *Kiobel II*, 133 S. Ct. at 1669. We decline to resolve the extraterritoriality issue, and instead remand to allow the plaintiffs to amend their complaint in light of *Kiobel II*.

The Supreme Court's decision in *Kiobel II* is concerned with the application of the presumption against extraterritoriality to ATS claims. The presumption against extraterritoriality is a canon of statutory construction, and embodies the default assumption that legislation of Congress is only meant to apply within the territory of the United States. *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2877 (2010). Under this canon of construction, a statute should be construed to reach only conduct within the United States unless Congress affirmatively states that the statute applies to conduct abroad. *Id.* (quoting *EEOC v. Arabian Am. Oil Co.* (*Aramco*), 499 U.S. 244, 248 (1991)). The presumption is meant to provide "a stable background against which Congress can legislate with predictable effects," *Morrison*, 130 S. Ct. at 2881, and also "protect against unintended clashes between our laws and those of other nations which could result in international discord," *Aramco*, 499 U.S. at 248.

Since the presumption against extraterritoriality is a canon of statutory construction, it has no direct application to ATS claims, which, as discussed above, are claims created by federal common law, not statutory claims created by the ATS itself. *Kiobel II*, 133 S. Ct. at 1664. In *Kiobel II*, however, the Supreme Court explained that the prudential concerns about judicial interference in foreign policy are particularly strong in ATS litigation, and concluded that "the principles underlying the presumption against extraterritoriality thus constrain courts exercising their

power under the ATS." *Id.* The Court also concluded that nothing in the text, history, and purpose of the ATS rebutted the presumption of extraterritoriality. *Id.* at 1669.

Turning to the specific claims asserted by the *Kiobel II* plaintiffs, the Court observed that "all the relevant conduct took place outside the United States," and that the defendants were foreign corporations whose only connection to the United States lay in their presence in this country. *Id.* The Court held that these claims were therefore barred, reasoning that they sought relief for violations of international law occurring outside the United States, and did not "touch and concern the territory of the United States . . . with sufficient force to displace the presumption against extraterritorial application." *Id.*

*Kiobel II's* holding makes clear that the general principles underlying the presumption against extraterritoriality apply to ATS claims, but it leaves important questions about extraterritorial ATS claims unresolved. *See id.* (Kennedy, J., concurring) ("The opinion for the Court is careful to leave open a number of significant questions regarding the reach and interpretation of the Alien Tort Statute."). In particular, *Kiobel II* articulates a new "touch and concern" test for determining when it is permissible for an ATS claim to seek the extraterritorial application of federal law. *Id.* But the opinion does not explain the nature of this test, except to say that it is not met when an ATS plaintiff asserts a cause of action against a foreign corporation based solely on foreign conduct. *Id.* (Alito, J., concurring) (observing that the Court's formulation of the touch and concern test "obviously leaves much unanswered"); *see also Tymoshenko v. Firtash*, 2013 WL 4564646, at *4 (S.D.N.Y.

Aug. 28, 2013) ("[T]he Court failed to provide guidance regarding what is necessary to satisfy the 'touch and concern' standard.").

The defendants argue that the touch and concern test is substantially the same as the "focus" test set out in *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. at 2884. *Morrison*'s focus test is a tool of statutory interpretation. It is used to determine when statutes without extraterritorial application can be applied to a course of conduct that occurred both domestically and abroad. *Id.* Under this test, courts first determine the "focus of congressional concern" for a statute, and allow the statute to be applied to a course of conduct if the events coming within the statute's focus occurred domestically. *Id.* (internal quotation marks omitted). In *Morrison*, for example, the Court reasoned that the focus of the Exchange Act is the purchase and sale of securities, and therefore held that it applies only to "transactions in securities listed on domestic exchanges, and domestic transactions in other securities." *Id.* The Court then held that the anti-fraud provisions of the Exchange Act did not apply to a foreign sale of securities that were listed on an Australian exchange. *Id.* at 2888.

*Morrison* may be informative precedent for discerning the content of the touch and concern standard, but the opinion in *Kiobel II* did not incorporate *Morrison*'s focus test. *Kiobel II* did not explicitly adopt *Morrison*'s focus test, and chose to use the phrase "touch and concern" rather than the term "focus" when articulating the legal standard it did adopt. Moreover, the assertion that *Kiobel II* meant to direct lower courts to apply the familiar *Morrison* focus test is belied by the concurring opinions, which note that the standard in *Kiobel II* leaves "much un-

answered." *Kiobel II*, 133 S. Ct. at 1669 (Alito, J., concurring); *see also id.* (Kennedy, J., concurring). Additionally, since the focus test turns on discerning Congress's intent when passing a statute, it cannot sensibly be applied to ATS claims, which are common law claims based on international legal norms.

Rather than attempt to apply the amorphous touch and concern test on the record currently before us, we conclude that the plaintiffs should have the opportunity to amend their complaint in light of *Kiobel II*. It is common practice to allow plaintiffs to amend their pleadings to accommodate changes in the law, unless it is clear that amendment would be futile. *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 972 (9th Cir. 2009) ("Having initiated the present lawsuit without the benefit of the Court's latest pronouncements on pleadings, Plaintiffs deserve a chance to supplement their complaint . . ."). Here, the plaintiffs seek to amend their complaint to allege that some of the activity underlying their ATS claim took place in the United States. On the record before us, we are unable to conclude that amendment would be futile, because unlike the claims at issue in *Kiobel II*, the plaintiffs contend that part of the conduct underlying their claims occurred within the United States. *See Kiobel II*, 133 S. Ct. at 1669. Moreover, it would be imprudent to attempt to apply and refine the touch and concern test where the pleadings before us make no attempt to explain what portion of the conduct underlying the plaintiffs claims took place within the United States.

We therefore decline to determine, at present, whether the plaintiffs' ATS claim is barred by the Supreme Court's holding in *Kiobel II*, and remand

this case to allow the plaintiffs to amend their complaint.

## IV. Conclusion

The district court's order is **REVERSED**, and we **VACATE** for further proceedings consistent with this opinion.[2]

**IT IS SO ORDERED.**

RAWLINSON, Circuit Judge, concurring in part and dissenting in part:

I do not object to remanding this case to afford the Plaintiffs an opportunity to further amend their Complaint in an attempt to state a cause of action under the Alien Tort Statute (ATS), as recently interpreted by the United States Supreme Court in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013). I doubt that their effort will be successful in view of their prior candid acknowledgment in their Opening Brief on appeal that "they do not currently possess facts sufficient to support the district court's standard that Defendants specifically intended the human rights violations at issue in this case. . . ." Nevertheless, because I cannot say with certitude that any attempt to further amend the Complaint would be futile, I voice no objection to a remand on that basis.

We all agree that the practice of engaging in child slave labor is reprehensible, indefensible, and morally abhorrent. Indeed, if that were the issue we

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[2] We need not reach the parties' remaining arguments in light of our decision to remand with instructions that the district court allow leave to amend.

were called upon to decide, this would be an easy case. Instead, we must decide who bears legal responsibility for the atrocities inflicted upon these Plaintiffs, forced into slave labor as children. More precisely, we must determine if the named Defendants in this case may be held legally responsible for the injuries alleged by the Plaintiffs.

I also agree that corporations are not *per se* excluded from liability under the ATS. *See Majority Opinion*, pp. 16–18 (adopting the reasoning of our en banc decision in *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 747 (9th Cir. 2011), *vacated for further consideration in light of Kiobel*, 133 S. Ct. 1995 (2013); *see also Romero v. Drummond Co. Inc.*, 552 F.3d 1303, 1315 (11th Cir. 2008) ("The text of the Alien Tort Statute provides no express exception for corporations . . .") (citation omitted).

## I.

### *Mens Rea Requirement of the ATS*

Unlike the majority, I would definitely and unequivocally decide that the purpose standard applies to the pleading of aiding and abetting liability under the ATS. In other words, Plaintiffs seeking to assert a claim against Defendants on an aiding and abetting theory of liability must allege sufficient facts to state a plausible claim for relief, *i.e.*, that the defendants acted with the purpose[3] of causing the inju-

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[3] I use the term "purpose" interchangeably with the phrase "specific intent" because there is no material difference between the two. *See United States v. Gracidas-Ulibarry*, 231 F.3d 1188, 1196 (9th Cir. 2000) ("In general, 'purpose' corresponds to the concept of specific intent . . .") (citations omitted); *see also United States v. Meredith*, 685 F.3d 814, 826 (9th Cir. 2012) ("Jury Instruction 52 defines willfully as an act done voluntarily and intentionally and with the specific intent to do something the

ries suffered by the Plaintiffs. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009) (delineating the pleading standard under Rule 8 of the Federal Rules of Civil Procedure).

I am persuaded to this view in part by the rationale set forth by our sister circuits in the cases of *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 259 (2d Cir. 2009) and *Aziz v. Alcolac, Inc.*, 658 F.3d 388, 400–01 (4th Cir. 2011).

In *Talisman*, the Second Circuit considered the claims of Sudanese citizens against the government of Sudan and Talisman, a corporation that allegedly aided and abetted the government of Sudan in its commission of human rights abuses against the Plaintiffs. The Second Circuit expressly relied upon the principles for "imposing accessorial liability under the ATS" previously articulated by the United States Supreme Court in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), the first Supreme Court case interpreting the ATS. *See Talisman*, 582 F.3d at 248, 255. The Second Circuit referenced the language in *Sosa* clarifying that the ATS was enacted with an understanding that the number of actionable international law violations would be "modest." *Id.* at 255 (quoting *Sosa*, 542 U.S. at 724). The Second Circuit also recounted the reasons articulated by the Supreme Court in *Sosa* for exercising "great caution" before recognizing violations of international law that are not based on international norms recognized in 1789. *Id.*

In *Sosa*, the Supreme Court first focused on the need for exercising caution when considering the

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law forbids; that is to say with a purpose either to disobey or disregard the law. . . .") (internal quotation marks omitted).

availability of claims under the ATS, due to the marked difference between the conception of the common law in 1789 when the ATS was enacted, and the conception of the common law in more modern times. *See Sosa*, 542 U.S. at 725–26. Prior to the Supreme Court's decision in *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), the common law was conceived of as a non-preemptive body of general (non-federal) common law. *See* Curtis Bradley, *International Law in the U.S. Legal System*, 211 (Oxford University Press, 2013). Today, judicially recognized claims under the ATS would be considered preemptive federal common law, thereby extending the reach of federal law. *See id*.

Relatedly, the Supreme Court cautioned federal courts to tread lightly when considering whether to further expand the federal law in a manner "of particular importance to foreign relations." *Sosa*, 542 U.S. at 726. Rather than assuming an "aggressive role" in recognizing claims under the ATS, a statute "that remained largely in shadow for much of the prior two centuries," the Supreme Court suggested looking to guidance from the legislative branch before embarking on "innovative" substantive expansion of the ATS. *Id*.

Next, the Supreme Court expressed reluctance to create a private right of action in the absence of an express legislative provision addressing private rights of action, particularly when the effect is to render international rules subject to private action, thereby implicating the management of foreign affairs that are generally best left to "the discretion of the Legislative and Executive Branches." *Id*. at 727. The Supreme Court noted that international law "very much" concerns itself with defining permissible

limits on the power of sovereign governments over their own citizens, a notion that inherently merits the utmost trepidation. *Id*. at 727–28.

Finally, the Supreme Court recognized that it is "particularly important" that the federal courts lack a legislative "mandate to seek out and define new and debatable violations of the law of nations." *Id*. at 728. For these reasons, the Supreme Court urged "great caution in adapting the law of nations to private rights." *Id*. Indeed, the Supreme Court, in recognition of the potential negative implications of construing the ATS too broadly, construed the ATS as legislation "meant to underwrite litigation of a *narrow set* of common law actions derived from the law of nations . . ." *Id*. at 721 (emphasis added). The Supreme Court instructed that judicial power should be exercised to recognize causes of action under the ATS sparingly, "subject to vigilant doorkeeping" by the federal courts. *Id*. at 729.

In *Talisman*, the Second Circuit absorbed the Supreme Court's repeated emphasis on the "modest" and "narrow" nature of the claims that should be recognized under the ATS, and rejected the Plaintiffs' argument for a "broad and elastic" principle of aiding and abetting liability under the ATS. 582 F.3d at 255, 259. Rather, in keeping with the "modest" and "narrow" approach described with approval in *Sosa*, the Second Circuit adopted the purpose standard as the applicable *mens rea* test for aiding and abetting liability under the ATS. *See id*. at 259. As the Second Circuit noted, there is no international consensus supporting the imposition of liability on individuals who act with knowledge of the violation of international law, but who harbor no intent or purpose to aid and abet the violation. *See id*.

In a similar vein, the Fourth Circuit cited "the Supreme Court's admonitions in *Sosa* that we should exercise great caution, before recognizing causes of action for violations of international law" and agreed with the Second Circuit that aiding and abetting liability under the ATS must be predicated on a showing of purposeful facilitation of the violation of international law. *Aziz*, 658 F.3d at 401 (internal quotation marks omitted).

I agree with the Second and Fourth Circuits that the principles set forth in *Sosa* militate in favor of the application of a *mens rea* of purpose or specific intent to impose aiding and abetting liability under the ATA, and I would so hold.

Applying the proper *mens rea* standard of purpose, or specific intent, I strongly disagree that the allegations in Plaintiffs' Amended Complaint satisfy that standard. The contrary conclusion reached by the majority is particularly curious in light of the Plaintiffs' concession of their inability to meet the standard. Nevertheless, the majority generally relies upon allegations in the Amended Complaint as sufficient to establish that Defendants acted with the purpose to aid and abet child slavery. The majority focuses on inferences rather than on any particular allegations in the Amended Complaint that reflect the purpose *mens rea.* The only allegation from the Amended Complaint that is specifically referenced is the allegation that "[d]riven by the goal to reduce costs in any way possible, the defendants allegedly supported the use of child labor, the cheapest form of labor available . . . ." *Majority Opinion*, p. 22. The majority concludes that "[r]eading the allegations in the light most favorable to the plaintiffs, one is led to the inference that the defendants placed increased

revenues before basic human welfare, and intended to pursue all options available to reduce their cost for purchasing cocoa." *Id*. at 22 Piling inference upon inference, the majority contends that the allegations that the defendants placed increased revenues before human welfare and acted with the intent to reduce the cost of purchasing cocoa, "support the inference that the defendants acted with the purpose to facilitate child slavery." *Id*. at 22. But is that inference plausible, as required by *Iqbal*? I think not, because these allegations are remarkably similar to those rejected by the Supreme Court in *Iqbal*.

The Plaintiff in *Iqbal* filed a *Bivens*[2] action against the Attorney General of the United States and the Director of the Federal Bureau of Investigations, asserting that the defendants violated his constitutional rights by subjecting him to inhumane conditions of confinement due to his race, national origin or religion. *See Iqbal*, 556 U.S. at 668–69. Iqbal alleged that the Defendants "knew of, condoned, and willfully and maliciously agreed to subject [Iqbal] to harsh conditions of confinement as a matter of policy, solely on account of [Iqbal's] religion, race, and/or national origin . . ." *Id*. at 680 (internal quotation marks omitted). The Supreme Court rejected this allegation as a "bare assertion [ ], amount[ing] to nothing more than a formulaic recitation of the elements of a constitutional discrimination claim . . ." *Id*. at 681 (citation and internal quotation marks omitted). The Supreme Court added that the allegation was "conclusory" and "disentitle[d] . . . to the presumption of truth." *Id*.

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[2] *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

The same can be easily said of the one specific allegation relied on by the majority in this case. The allegation that Defendants acted with the intent "to reduce costs in any way possible" is at best a feeble attempt to set forth the required *mens rea* of purpose, or specific intent. However, as the Supreme Court noted in *Iqbal*, a conclusory statement of the elements of a claim falls far short of stating a plausible claim. *See id*.

The statement that child slavery is the cheapest form of labor available does not even implicate the Defendants. This allegation in no way raises a plausible inference that the Defendants acted with the purpose to aid and abet child slave labor. It may well be true that child slave labor is the cheapest form of labor for harvesting cocoa. But that unvarnished statement in no way supports the inferential leap that because child slave labor is the cheapest form of labor, Defendants aided and abetted the cocoa farmers who allegedly operated the child slave labor system.

To bolster the inferences discussed, the majority explains that Defendants' "use of child slavery benefitted the defendants and furthered their operational goals in the Ivory Coast . . ." *Majority Opinion*, pp. 22–23. However, taking advantage of a favorable existing market, while perhaps morally repugnant, does not equate to the specific intent to aid and abet child slave labor. In *Aziz*, 658 F.3d at 390–91, the corporate defendant sold restricted chemicals that ultimately reached Iraq and were used to manufacture mustard gas. The mustard gas in turn was used to attack Kurds. Thousand of Kurds were killed, maimed, or left with "physical and psychological trauma." *Id*. at 391. Plaintiffs, individuals of Kurdish

descent, were victims of mustard gas attacks themselves, or family members of deceased victims.

They brought claims under the ATS, alleging that the corporate defendant "aided and abetted the Iraqi regime's use of mustard gas to attack the Kurds. . . ." *Id.* at 395. Plaintiffs specifically alleged that the corporate defendant "placed [the restricted chemical] into the stream of international commerce with the purpose of facilitating the use of said chemicals in the manufacture of chemical weapons to be used, among other things, against the Kurdish population in northern Iraq." *Id.* at 401 (citation omitted). Citing *Iqbal*, the Fourth Circuit characterized the allegations as "cursory" and "untethered to any supporting facts." *Id.* Unfortunately, that same characterization accurately describes the allegations made by Plaintiffs in this case.

The aiding and abetting claims asserted under the ATS in *Talisman* met a similar fate in the Second Circuit. Plaintiffs alleged that Talisman, a corporation, provided "substantial assistance" to the government of Sudan, which assistance aided the government in "committing crimes against humanity and war crimes . . ." 582 F.3d at 261. The assistance provided by Talisman to the government included: 1) upgrading airstrips; 2) designating areas for oil exploration; 3) paying royalties to the government; and "giving general logistical support to the Sudanese military . . . ." *Id.* (citation and footnote reference omitted). The Second Circuit observed that there was nothing inherently nefarious about these activities. Rather, such activities "generally accompany any natural resource development business or the creation of any industry. . . ." *Id.* (citation omitted). In essence, Plaintiffs argued that Talisman should have

made no financial investment in Sudan at all, lest the financial wherewithal enable the government to abuse its citizenry. However, as in *Aziz*, the allegations were insufficient to support a plausible inference that Talisman acted with the required *mens rea* of purpose or specific intent. *See id*. at 263; *see also Aziz*, 658 F.3d at 401.

The majority seeks to distinguish *Aziz* and *Talisman*, but no principled distinction can be made. The majority points to the fact that Defendants in this case had sufficient control over the cocoa market "that they could have stopped or limited the use of child slave labor by their suppliers." *Majority Opinion*, p. 23. Rather than doing so, the majority concludes, Defendants "instead offered support that facilitated" child slavery. *Id*. at 24. This reasoning mirrors the argument rejected by the Second Circuit that Talisman should never have made a financial investment in Sudan, thereby enabling that country to oppress its people. *See Talisman*, 582 F.3d at 262–63. Rejection of this argument is particularly appropriate in the absence of evidence that Defendants intended that the financial support be used for child slavery. *See id*. at 262.

The majority also points to Defendants' lobbying efforts to "corroborate the inference of purpose." *Majority Opinion*, p. 24. "[T]he defendants participated in lobbying efforts designed to defeat federal legislation that would have required chocolate importers and manufacturers to certify and label their chocolate as slave free." *Id*. at p. 24 (internal quotation marks omitted). In the alternative, Defendants and others with interest in the chocolate industry advocated for the implementation of a voluntary compliance mechanism. *See id*. at p. 24. However, exercis-

ing their right to petition the government does not reasonably support an inference that Defendants acted with the purpose to aid and abet child slavery. It is equally likely that Defendants sought to avoid additional government regulation. As recognized by the Second Circuit, if there is a benign explanation for the corporation's action, no plausible inference of purpose may be drawn. *See Talisman*, 582 F.3d at 262.

Plaintiffs and the majority concede that any and all actions taken by Defendants were motivated by the desire for profits rather than an intent to enslave children. *See Majority Opinion*, pp. 22–24. This concession is fatal to the Amended Complaint as presently couched. There is absolutely no allegation that Defendants have violated any governing law or regulation in their quest for profits. And profit-seeking is the reason most corporations exist. To equate a profit-making motive with the *mens rea* required for ATS aiding and abetting liability would completely negate the constrained concept of ATS liability contemplated by the Supreme Court in *Sosa*. *See* 542 U.S. at 721, 724, 729 (construing the ATS as encompassing a "modest" and "narrow" set of claims "subject to vigilant doorkeeping by the federal courts") (internal quotation marks omitted).

One would hope that corporations would operate their businesses in a humanitarian and morally responsible manner. It is indeed unfortunate that many neglect to do so. However regrettable that circumstance may be, we cannot substitute the lack of humanitarianism for the pleading requirements that govern the ATS. Following the reasoning of *Sosa*, *Aziz* and *Talisman*, I would *not* conclude that the Plaintiffs have stated a claim under the ATS.

II.

*Extraterritorial Reach of the ATS*

As stated earlier, I do not object to a remand to allow Plaintiffs to seek to further amend their Complaint in light of the Supreme Court's recent *Kiobel* decision. However, in my view, Plaintiffs face a substantial hurdle in their effort to assert a viable claim that the ATS applies to the admittedly extraterritorial child slave labor that is the basis of this case. As noted by the majority, Justice Kennedy observed that the *Kiobel* opinion left open "a number of significant questions regarding the reach and interpretation of the Alien Tort Statute. . . ." *Kiobel*, 133 S. Ct. at 1669 (Kennedy, J. concurring). But a question not left open regarding the reach of the ATS was the presumption against extraterritorial application of the statute. *See id*. at 1664–67.

In *Kiobel*, Plaintiffs sued corporate defendants who participated in oil exploration and production in Nigeria. In their Complaint, Plaintiffs alleged that after they protested against the environmental effects of the corporation's practices, "Nigerian military and police forces attacked . . . villages, beating, raping, killing, and arresting residents and destroying or looting property." *Id*. at 1662. According to Plaintiffs, the corporate defendants aided and abetted their tormentors "by, among other things, providing the Nigerian forces with food, transportation and compensation, as well as by allowing the Nigerian military to use respondents' property as a staging ground for attacks." *Id*. at 1662–63.

The Supreme Court explained that the presumption against extraterritorial application of federal statutes avoids "unintended clashes between our

laws and those of other nations which could result in international discord." *Id*. at 1664 (citation omitted). The Supreme Court noted that the concern underlying the presumption is heightened in cases brought under the ATS because those cases seek relief based on court-created causes of action rather than for claims expressly provided for by Congress. *See id*. Referring back to *Sosa*, the Supreme Court reiterated its emphasis on "the need for judicial caution in considering which claims could be brought under the ATS . . ." *Id*. Indeed, the foreign policy implications of recognizing a claim under the ATS "are all the more pressing when the question is whether a cause of action under the ATS reaches conduct within the territory of another sovereign." *Id*. at 1665.

The Supreme Court observed that "nothing in the text of the [ATS] suggests that Congress intended causes of action recognized under it to have extraterritorial reach. . . ." *Id*. Similarly, nothing in the historical backdrop of the statute overcomes the presumption against extraterritorial application of the ATS. *See id*. at 1666. Finally, the Supreme Court emphasized that there was no indication that Congress intended to make this country the forum "for the enforcement of international norms. . . ." *Id*. at 1668.

Having articulated these underlying precepts, the Supreme Court concluded that the ATS was subject to the presumption against extraterritorial application and that Plaintiffs' "case seeking relief for violations of the law of nations occurring outside the United States [was] barred . . ." *Id*. at 1669. On the facts as alleged by Plaintiffs, "all the *relevant conduct* took place outside the United States." *Id*. (emphasis added). The Supreme Court further explained

that even in a case where the claims did "touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application. . . ." *Id*. (citing *Morrison v. Nat'l Australia Bank Ltd*., 561 U.S. 247, 264–73 (2010)).

In *Morrison*, the Supreme Court held, in no uncertain terms, that when an allegation of domestic relationship is raised to defeat the presumption against extraterritoriality, that domestic relationship must coincide with "the focus of congressional concern . . ." *Id*. at 266 (citation omitted). I do not agree with the majority that the Supreme Court "did not incorporate *Morrison's* focus test." *Majority Opinion*, p. 30. Why else would the Supreme Court direct us to *Morrison* precisely when it was discussing claims that allegedly "touch and concern" the United States? *Kiobel*, 133 S. Ct. at 1669. In any event, at a minimum, the Supreme Court has made clear that not any old domestic contact will do. Rather, the Supreme Court has colorfully informed us that the burden of showing sufficient domestic contact is substantial. *See Morrison*, 561 U.S. at 266 ("[T]he presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case . . . .") (emphasis in the original).

In sum, I would affirm the district court's ruling that the Amended Complaint failed to state a claim under the ATS. In reviewing the next amended Complaint, the district court should hew closely to the guidance that the Supreme Court laid out in *Morrison*, *Sosa* and *Kiobel* that cautions federal court judges to tread lightly both when determining whether a claim has been stated under the ATS and

whether the presumption against extraterritorial application of a domestic statute has been rebutted. These cases militate toward contraction rather than expansion. Therefore, I concur in a remand to allow Plaintiffs to further amend their Complaint in an effort to state a claim under the ATS. I dissent from any holding that they have adequately done so.

## APPENDIX B

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

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No. 10-56739

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John Doe I; John Doe II; John Doe III, individually and on behalf of proposed class members; Global Exchange,

Plaintiffs-Appellants,

v.

Nestle USA, Inc.; Archer Daniels Midland Company; Cargill Incorporated Company; Cargill Cocoa,

Defendants-Appellees.

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

Stephen V. Wilson, District Judge

(2:05-CV-05133-SVW-JTL)

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Argued: December 2, 2013
Filed December 19, 2013

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Before: Dorothy W. Nelson, Kim McLane Wardlaw, and Johnnie B. Rawlinson, Circuit Judges.

**ORDER**

Plaintiff-appellants appeal the district court's order dismissing their First Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). In light of intervening developments in the law, we conclude that corporations can face liability for claims brought under the Alien Tort Statute, 28 U.S.C. § 1350. *Kiobel v. Royal Dutch Petroleum*, 133 S. Ct. 1659, 1669 (2013) (suggesting in dicta that corporations may be liable under ATS so long as presumption against extraterritorial application is overcome); *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 761 (9th Cir. 2011) (en banc) (holding that corporations may be liable under ATS), *vacated on other grounds*, 133 S. Ct. 1995 (2013); *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 41 (D.C. Cir. 2011) (same), *vacated on other grounds*, 527 F. App'x 7 (D.C. Cir. 2013); *Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013, 1020-21 (7th Cir. 2011) (same). Additionally, the district court erred in requiring plaintiff-appellants to allege specific intent in order to satisfy the applicable purpose *mens rea* standard. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 259 (2d. Cir. 2009).

Furthermore, we grant plaintiff-appellants leave to amend their complaint in light of recent authority regarding the extraterritorial reach of the Alien Tort Statute and the *actus reus* standard for aiding and abetting. *Kiobel*, 133 S. Ct. at 1669; *Prosecutor v. Charles Ghankay Taylor*, Case No. SCSL-03-01-A Judgment, at ¶ 475 (SCSL Sept. 26, 2013) ("[T]he *actus reus* of aiding and abetting liability is established by assistance that has a substantial effect on the crimes, not the particular manner in which such assistance is provided."); *Prosecutor v. Perisic*, Case No. IT-04-81-A Judgment, at ¶ 36 & n.97 (ICTY Feb. 28,

2013) (holding that "specific direction remains an element of the *actus reus* of aiding and abetting," but noting that "specific direction may be addressed implicitly in the context of analysing substantial contribution").

Accordingly, the order of the district court is hereby **VACATED**, and this case is **REMANDED** for further proceedings consistent with this order. This panel retains jurisdiction over any other appeals in this case.

**IT IS SO ORDERED.**

RAWLINSON, Circuit Judge, concurring in part and dissenting in part:

I concur in the Order with the exception of the discussion of the pleading requirements for aiding and abetting liability under international law. I am of the view that the Plaintiff must plead that the Defendants acted with specific intent to violate the norms of international law. *See Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 258 (2d Cir. 2009) (holding that "a defendant may be held liable under international law for aiding and abetting the violation of that law by another when the defendant (1) provides practical assistance to the principal which has a substantial effect on the perpetration of the crime, and (2) does so with the purpose of facilitating the commission of that crime"); *see also Aziz v. Alcolac, Inc.*, 658 F.3d 388, 400-01 (4th Cir. 2011) ("We conclude that adopting the specific intent mens rea standard for accessorial liability explicitly embodied in the Rome Statute hews as closely as possible to the *Sosa* [*v. Alvarez-Machain*, 542 U.S. 692 (2004)] limits of requiring any claim based on the present-day law of nations to rest on a norm of

international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms the Supreme Court has recognized.") (citation and footnote reference omitted).

The district court "conclude[d] that the 'purpose' *mens rea* standard is the proper standard to use in Alien Tort Statute litigation. The less stringent 'knowledge' standard that was originally synthesized by the International Criminal Tribunal for the former Yugoslavia in Furundzija rests on a number of premises that, while perhaps acceptable under that Tribunal's enacting authority, fail to satisfy the requirements set forth by the Supreme Court in *Sosa*." *Doe I v. Nestle*, 748 F. Supp. 2d 1057, 1083 (C.D. Cal. 2010). The district court explained that it was "apply[ing] the dominant approach taken in the recent international appellate tribunal decisions . . . requir[ing] that the aider and abettor must know or have reason to know of the relationship between his conduct and the wrongful acts." *Id*. (citation omitted). The district court held:

> In sum, the Court concludes that the core definition of aiding and abetting under international law requires the following. A person is legally responsible for aiding and abetting a principal's wrongful act when the aider and abettor (1) carries out acts that have a substantial effect on the perpetration of a specific crime, and (2) acts with the specific intent (i.e., for the purpose) of substantially assisting the commission of that crime.

*Id.* at 1087-88 (citations omitted). Thus, it appears that the district court was equating "specific intent"

with "purpose" for pleading an aiding and abetting claim under international law.[1]

The district court utilized the same analysis as that used in *Presbyterian Church*, in which the Second Circuit observed that "[t]here is no allegation that [the defendant] (or its employees) personally engaged in human rights abuses; the allegation is that [the defendant] was complicit in Government abuses." 582 F.3d at 257. The Second Circuit incorporated the standard proposed by Judge Katzmann in his concurring opinion in a prior case. *See id*. at 258. The Second Circuit presented its *mens rea* standard by holding that "a defendant may be held liable under international law for aiding and abetting the violation of that law by another when the defendant (1) provides practical assistance to the principal which has a substantial effect on the perpetration of the crime, and (2) does so with the purpose of facilitating the commission of that crime." *Id*. (citation omitted).

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[1] It is not uncommon for the terms "purpose" and "specific intent" to be utilized by courts as synonymous. *See United States v. Gracidas-Ulibarry*, 231 F.3d 1188, 1196 (9th Cir. 2000) (observing that "[i]n general, 'purpose' corresponds to the concept of specific intent, while 'knowledge' corresponds to general intent. A person who causes a result prohibited by common law or statute is said to have acted purposely if he or she consciously desired that result, whatever the likelihood of that result ensuing from his or her actions.") (citations omitted); *see also United States v. Meredith*, 685 F.3d 814, 826 (9th Cir. 2012) ("Jury Instruction 52 defines willfully as an act 'done voluntarily and intentionally and with the specific intent to do something the law forbids; that is to say with a purpose either to disobey or disregard the law. . . .'").

The district court relied upon *Presbyterian Church* to determine that the appropriate *mens rea* standard was "specific intent (i.e., for the purpose) of substantially assisting the commission of that crime." *Doe*, 748 F. Supp. 2d at 1087-88 (citations omitted). In my opinion, the district court's reliance was consistent with recent indications from the Supreme Court urging restraint in applying the Alien Tort Statute. *See Sosa*, 542 U.S. at 724-25.

Although I agree that the case should be remanded to give the Plaintiff the opportunity to amend his Complaint in view of intervening authority, that authority requires Plaintiff to meet the specific intent *mens rea* pleading standard.

**APPENDIX C**

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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CV 05-5133 SVW (JTLx)

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John Doe I, Individually and on behalf of Proposed Class Members; John Doe II, Individually and on behalf of Proposed Class Members; John Doe III, Individually and on behalf of Proposed Class Members; Global Exchange,
Plaintiffs,

v.

Nestle, S.A.; Nestle U.S.A.; Nestle Ivory Coast; Archer Daniels Midland Co.; Cargill, Inc.; Cargill Cocoa; Cargill West Africa, S.A.; and Corporate Does 1-10,
Defendants.

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Order Dismissing Claims With Prejudice And Dismissing Plaintiff Global Exchange's California Business And State Law Claim For Lack Of Jurisdiction

October 13, 2010

Stephen V. Wilson, District Judge.

## I. Introduction

On September 8, 2010, the Court issued a detailed Order granting Defendants' Motion to Dismiss Plaintiff's First Amended Complaint. Doc. No. 138 ("Order"). In view of the Ninth Circuit's strong policy permitting amendment of complaints, the Court granted Plaintiffs leave to amend. Order at 160.

The Court observed that based upon oral representations of Plaintiffs' counsel and a prior failed attempt to amend the complaint to include additional material facts, Plaintiffs would be well-advised to consider an appeal rather than an amendment. Order at 160.

On September 30, 2010, Plaintiffs responded to the Court's Order. Plaintiffs once again stated their disagreement with the Court's legal conclusions. Plaintiffs' Response 1. Plaintiffs also sought discovery to both show Defendants' shared purpose with their suppliers and to name specific individual defendants. Plaintiffs' Response 1-2. Plaintiffs admit that without discovery, they are unable to amend their complaint to make the necessary allegations. Plaintiffs' Response 2.

**II. Discussion**

In *Iqbal*, the Supreme Court found that courts should not "unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Ashcroft v. Iqbal*, 556 U.S. _____, 129 S.Ct. 1937, 1950 (2009). After finding that the respondent's complaint was deficient under Rule 8, the Court specifically disallowed limited discovery. *Iqbal*, 129 S. Ct. at 1954 ("Because respondent's complaint is deficient under Rule 8, he is not entitled to discovery, cabined or otherwise.").

Plaintiffs claim that under Ninth Circuit authority after *Iqbal*, the Court must permit Plaintiffs to engage in limited discovery. Plaintiffs' Response 2 (citing *Skaff v. Meridien N. Am. Beverly Hills, LLC*, 506 F.3d 832, 841-42 (9th Cir. 2007) and *Twentieth Century Fox International Corp., v. Scriba*, 2010 WL

2545790 (9th Cir. 2010)). However, neither case cited by Plaintiffs stands for this proposition.

In *Skaff*, a case decided two years before *Iqbal*, the Ninth Circuit found that the district court erred in dismissing a complaint for lack of standing under the Americans with Disabilities Act. *Skaff*, 506 F.3d 842-43. In that case, the defendant argued that the plaintiff "pled no constitutional injury because he did not allege the existence of specific accessibility barriers with sufficient detail." *Id.* at 841. In dismissing this argument, the court reasoned that "the purpose of a complaint under Rule 8 [is] to give the defendant fair notice of the factual basis of the claim and of the basis for the court's jurisdiction." *Id.* The court found that the plaintiff had alleged sufficient facts and that the defendant had an array of discovery devices available to seek additional specificity regarding the plaintiff's standing. *Id.* at 841-42. The reasoning in *Skaff*, even if consistent with *Iqbal*, does not support Plaintiffs, who argue they should be allowed further discovery against defendants despite a dismissal of their complaint under Fed. R. Civ. Pro. 12(b)(6). First, the *Skaff* court found sufficient facts were alleged in the plaintiff's claim to meet Article III standing requirements. Second, the *Skaff* court did not address the issue of whether plaintiffs could seek additional discovery to state facts giving rise to a plausible claim for relief.

In *Scriba*, the Ninth Circuit overturned the dismissal of a complaint because the district court improperly denied a plaintiff discovery when dismissing a case for lack of personal jurisdiction. *Scriba*, 2010 WL 2525790 at *2. In that case, the plaintiff alleged that the district court had personal jurisdiction over a foreign corporation because the foreign corporation

was an alter ego of another corporation over which the court could exercise personal jurisdiction. *Id.* at *1. The plaintiff sought discovery on the alter ego issue to support its allegation of personal jurisdiction at the motion to dismiss stage. *Id.* The district court denied this request and dismissed the complaint for lack of jurisdiction. *Id.* The Ninth Circuit held that the plaintiff had met its burden of showing that it faced actual and substantial prejudice without discovery on the issue of personal jurisdiction. *Id.* at 2. The Ninth Circuit reasoned that "Discovery 'may be appropriately granted where pertinent facts **bearing on the question of jurisdiction** are controverted or where a more satisfactory showing of the facts is necessary.'" *Id.* at 2 (quoting *Boschetto v. Hansing*, 539 F.3d 1011, 1020 (9th Cir. 2008)) (emphasis added). However, *Scriba* does not control in this case. The *Scriba* court specifically restricted its analysis to discovery needed to show that the court had jurisdiction over the defendants. The court did not address whether discovery could be granted despite a plaintiff's failure to state facts giving rise to a plausible claim for relief. Here, the Court dismissed Plaintiffs' complaint under Fed. R. Civ. Pro. 12(b)(6), finding substantively that Plaintiffs failed to allege sufficient facts to state a claim to relief that is plausible on its face.

Plaintiffs can cite to no law requiring the Court to allow discovery at this stage. Moreover, granting discovery to Plaintiffs, who have failed to plead a proper complaint under Rule 8, would squarely conflict with the Supreme Court's decision in *Iqbal*.

**III. Conclusion**

In view of Plaintiffs' Response and the Court's September 8, 2010 Order, the Court holds that Plain-

tiffs' complaint is DISMISSED WITH PREJUDICE. The claim of Plaintiff Global Exchange for the alleged violation of California Business and Professions Code section 17200 is dismissed for lack of jurisdiction.

IT IS SO ORDERED.

**APPENDIX D**
**UNITED STATES DISTRICT COURT,**
**C.D. CALIFORNIA.**

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**No. CV 05–5133 SVW (JTLx).**

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John Doe I, Individually and on behalf of Proposed Class Members; John Doe II, Individually and on behalf of Proposed Class Members; John Doe III, Individually and on behalf of Proposed Class Members; Global Exchange, Plaintiffs,

v.

Nestle, S.A.; Nestle U.S.A.; Nestle Ivory Coast; Archer Daniels Midland Co.; Cargill, Inc.; Cargill Cocoa; Cargill West Africa, S.A.;
And Corporate Does 1–10, Defendants.

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No. CV 05–5133 SVW (Jtlx)
Sept. 8, 2010

Order Granting Defendants Archer–Daniels–Midland Co., Nestle U.S.A., And Cargill Inc.'S Motion To Dismiss Plaintiffs' First Amended Complaint Pursuant To Fed. R. Civ. P. 12(B)(6) For Failure To State A Claim

STEPHEN V. WILSON, District Judge.

## I. INTRODUCTION

On July 14, 2005, Plaintiffs John Doe I, John Doe II, John Doe III, and Global Exchange (collectively

"Plaintiffs")[1] filed this class action for damages and injunctive relief. On July 10, 2009, Plaintiffs filed a first amended complaint. The amended complaint asserts causes of action under the Alien Tort Statute, 28 U.S.C. § 1350; the Torture Victim Protection Act, Pub. L. 102–256, 106 Stat. 73 (1992); state-law unjust enrichment; and Cal. Bus. & Prof. Code §§ 17200 *et seq*.[2]

Defendants are Nestle, S.A. (based in Switzerland), Nestle, U.S.A., and Nestle Cote d'Ivoire, S.A. (collectively "Nestle"); Cargill, Incorporated ("Cargill, Inc."), Cargill Cocoa (based in the United States), and Cargill West Africa, S.A. (collectively "Cargill"); and Archer Daniels Midland Company ("Archer Daniels Midland") (collectively "Defendants").[3]

Defendants Nestle U.S.A., Cargill Inc., and Archer Daniels Midland have filed a Motion to Dismiss the First Amended Complaint for failure to state a claim upon which relief can be granted.

## II. LEGAL STANDARD

In order to survive a Rule 12(b)(6) Motion to Dismiss, a plaintiff's complaint "must contain suffi-

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[1] Global Exchange brings only a single cause of action (Cal. Bus. & Prof. Code § 17200). The Court's use of the term "Plaintiffs" generally refers only to the "Doe" plaintiffs.

[2] In their Opposition, Plaintiffs have conceded their fourth and fifth causes of action for breach of contract and negligence/recklessness under California state law.

[3] Plaintiffs allege that the subsidiary defendants were acting as agents of the parent defendants, and that the parent defendants controlled and ratified the actions of their subsidiaries. Plaintiffs also allege that the subsidiary defendants were alter egos of the parents. Plaintiffs also sue ten unnamed "Corporate Does."

cient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal*, 556 U.S. —, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. "Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all of the complaint's allegations are true." *Twombly*, 550 U.S. at 555, 127 S.Ct. 1955. A complaint that offers mere "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." *Iqbal*, 129 S.Ct. at 1951; *see also Moss v. U.S. Secret Service*, 572 F.3d 962, 969 (9th Cir.2009) (citing Iqbal, 129 S.Ct. at 1951). Courts should not "unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Iqbal*, 129 S.Ct. at 1950.

**III. FACTS**

The individual Plaintiffs are Malians who allege that they were forced to labor on cocoa fields in Cote d'Ivoire. Plaintiffs seek class status on behalf of similarly situated Malians who were forced to labor in Cote d'Ivoire. The remaining Plaintiff, Global Exchange, is a San Francisco-based human rights organization that promotes social justice.

Plaintiffs allege that they have filed suit in the United States because: (1) there is no law in Mali allowing civil damages for their injuries caused by non-Malian cocoa exporters (as all Defendants are American, European, or Ivorian corporations); (2) no suit can be brought in Cote d'Ivoire because "the judicial

system is notoriously corrupt and would likely be unresponsive to the claims of foreign children against major cocoa corporations operating in and bringing significant revenue to Cote d'Ivoire" (FAC ¶ 2); (3) Plaintiffs and their attorneys would be subjected to possible harm in Cote d'Ivoire on account of general civil unrest and "the general hostility by cocoa producers in the region"; and (4) the United States has provided an appropriate forum for these claims through the Alien Tort Statute and the Torture Victim Protection Act, 28 U.S.C. § 1350.

Plaintiffs claim that Defendants have aided and abetted violations of international law norms that prohibit slavery; forced labor; child labor; torture; and cruel, inhuman, or degrading treatment. Plaintiffs also seek relief under state-law unjust enrichment. All Plaintiffs (including Global Exchange) allege violations of Cal. Bus. & Prof. Code § 17200.

Plaintiffs allege that Defendants obtain an "ongoing, cheap supply of cocoa by maintaining exclusive supplier/buyer relationships with local farms and/or farmer cooperatives in Cote d'Ivoire." (FAC ¶ 33.)[4]

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[4] Plaintiffs identify certain of Defendant Nestle's exclusive relationships with suppliers Keita Ganda and Keita Baba from plantations in Daloa, and supplier Lassine Kone from plantations in Sitafa. (FAC ¶ 35.) Plaintiffs identify certain of Defendant Archer Daniels Midland's exclusive relationships with suppliers including a farmer cooperative called "SIFCA." (FAC ¶ 39.) Plaintiffs identify certain of Defendant Cargill's exclusive relationships with Dote Colibaly, Soro Fonipoho, Sarl Seki, Lenikpo Yeo ("from which 19 Malian child slaves were rescued," FAC ¶ 42), Keita Ganda, and Keita Hippie. (FAC ¶ 42.) The Court notes that among the allegedly "exclusive" suppliers identified by Plaintiffs, one—Keita Ganda—is alleged to be an "exclusive" supplier of both Nestle and Cargill. (FAC ¶¶ 35, 42.)

These exclusive contractual arrangements allow Defendants "to dictate the terms by which such farms produce and supply cocoa to them, including specifically the labor conditions under which the beans are produced." (*Id*.) Defendants control the farms' labor conditions "by providing local farmers and/or farmer cooperatives *inter alia* ongoing financial support, including advance payments and personal spending money to maintain the farmers' and/or the cooperatives' loyalty as exclusive suppliers; farming supplies, including fertilizers, tools and equipment; training and capacity[-]building in particular growing and fermentation techniques and general farm maintenance, including appropriate labor practices, to grow the quality and quantity of cocoa beans they desire." (FAC ¶ 34.) This oversight requires Defendants to engage in "training and quality control visits [that] occur several times per year and require frequent and ongoing visits to the farms either by Defendants directly or via their contracted agents." (*Id*.)

Plaintiffs identify certain of Nestle's representations in which Nestle states that it "'provides assistance in crop production'" and performs "'tracking inside our company supply chain, i.e. from the reception of raw and packaging materials, production of finished products to delivery to customers.'" (FAC ¶ 36 (quoting Nestle "Principles of Purchasing," 2006).) Nestle also states that "'[i]n dealing with suppliers, Purchasing must insist on knowing the origin of incoming materials and require suppliers to communicate the origin of their materials,'" and that it "'actively participate[s] as the first link in an integrated supply chain,' 'develop[s] supplier relationships,' and 'continually monitor[s] the performance, reliability and viability of suppliers.'" (*Id*.) Nestle also states that its "'Quality System covers all steps in the food

supply chain, from the farm to the consumer of the final products ..., includ[ing] working together with producers and suppliers of raw ... materials.'" (FAC ¶ 37.) Finally, Nestle has stated that "'[w]hile we do not own any farmland, we use our influence to help suppliers meet better standards in agriculture.... Working directly in our supply chain we provide technical assistance to farmers.'" (FAC ¶ 38.) This assistance "'ranges from technical assistance on income generation to new strategies to deal with crop infestation, to specific interventions designed to address issues of child labour,'" including "'[s]pecific programmes directed at farmers in West Africa [such as] field schools to help farmers with supply chain issues, as well as a grassroots 'training of trainers' programme to help eliminate the worst forms of child labour.'" (*Id*.)

Plaintiffs identify certain of Archer Daniels Midland's representations in which the company states that its relationship[5] with the SIFCA cooperative "'gives ADM Cocoa an unprecedented degree of control over its raw material supply, quality and handling.'" (FAC ¶ 39 (quoting ADM statements contained in 2001 article in *Biscuit World* ).) An Archer Daniels Midland executive has been quoted as saying "'ADM Cocoa can deliver consistent top quality products by control of its raw materials,' and that 'ADM is focused on having direct contact with farmers in order to advise and support them to produce higher

[5] In a conclusory manner, Plaintiffs identify Archer Daniels Midland's exclusive supplier relationship with SIFCA as involving an "acquisition," without explaining whether this "acquisition" involves an exclusive contract or a formal integration of SIFCA into Archer Daniels Midland's corporate structure. (*See* FAC ¶ 39.)

quality beans for which they will receive a premium.'" (*Id*.) Archer Daniels Midland has represented that it has a " 'strong presence in [cocoa] origin regions,' " and that " 'ADM is working hard to help provide certain farmer organizations with the knowledge, tools, and support they need to grow quality cocoa responsibly and in a sustainable manner.... ADM is providing much needed assistance to organizations representing thousands of farmers and farming communities. These efforts are making an impact at the farm level.' " (FAC ¶ 40.) It has also stated that it " 'is actively involved in long term efforts to ensure that cocoa is grown responsibly and sustainably. Such efforts include research into environmentally sound crop management practices, plant breeding work to develop disease-resistant varieties, and farmer field schools to transfer the latest know-how into the hands of millions of cocoa farmers around the world. Starting from the cocoa growers through to the world's top food and beverage manufacturers, ADM Cocoa is committed to delivering the best in product quality and service at every stage.' " (FAC ¶ 41 (quoting ADM Cocoa Brochure).)

Plaintiffs allege that Cargill opened cocoa buying stations in Daloa and Gognoa, and that Cargill's Micao cocoa processing plant has obtained ISO 9002 certification. Plaintiffs allege that the ISO 9002 certification "is a system of quality standards for food processing from sourcing through processing that inherently requires detailed visits and monitoring of farms." (FAC ¶ 43.)

With respect to all Defendants, Plaintiffs allege generally that "Defendants' ongoing and continued presence on the cocoa farms" provided "Defendants" with "first hand knowledge of the widespread use of

child labor on said farms." (FAC ¶ 44.) Plaintiffs also allege that various governmental and non-governmental actors have provided "numerous, well-documented reports of child labor." (*Id*.) Plaintiffs allege that "Defendants not only purchased cocoa from farms and/or farmer cooperatives which they knew or should have known relied on forced child labor in the cultivating and harvesting of cocoa beans, but Defendants provided such farms with money, supplies, and training to do so with little or no restrictions from the government of Cote d'Ivoire." (FAC ¶ 47.) Plaintiffs allege that Defendants provided this "money, supplies, and training ... knowing that their assistance would necessarily facilitate child labor." (FAC ¶ 52.)

Plaintiffs also allege that some of the cocoa farms are linked to the Ivorian government: "Upon information and belief, several of the cocoa farms in Cote d'Ivoire from which Defendants source are owned by government officials, whether directly or indirectly, or are otherwise protected by government officials either through the provision of direct security services or through payments made to such officials that allow farms and/or farmer cooperatives to continue the use of child labor." (FAC ¶ 47.)

Plaintiffs allege that "Defendants, because of their economic leverage in the region and exclusive supplier/buyer agreements, each had the ability to control and/or limit the use of forced child labor by the supplier farms and/or farmer cooperatives from which they purchased their cocoa beans, and indeed maintained specific policies against the use of such forced labor practices." (FAC ¶ 48.) Plaintiffs identify various representations in which Defendants asserted that they abide by international standards, do not

use child labor, and take efforts to prevent their business partners from using child labor. (FAC ¶¶ 49–51.)

Plaintiffs also allege that Defendants lobbied against a 2001 United States Congressional proposal to require chocolate manufacturers and importers to certify and label their products as "slave free." (FAC ¶¶ 53–54.) As a result of Defendants' lobbying efforts, the mandatory law was replaced by a voluntary arrangement known as the Harkin-Engel protocol, in which the chocolate industry agreed upon certain standards by which it would self-regulate its labor practices. (FAC ¶ 55.) Plaintiffs allege that "but for" this lobbying effort, Defendants' cocoa plantations would not have been able to use child labor.[6]

Plaintiff Global Exchange asserts a cause of action under Cal. Bus. & Prof. Code § 17200. Plaintiffs allege that Global Exchange's members are American chocolate consumers who "have expressed a clear desire to purchase products that are not made under exploitative conditions but are incapable of determining whether products contain slave labor produced cocoa or non-slave labor produced cocoa." (FAC ¶ 61.) Their "interests are being harmed by having to purchase products containing illegally imported, slave labor produced cocoa against their clearly expressed wishes," (FAC ¶ 61), thus causing them to "suffer[ ] specific and concrete injuries." (FAC ¶ 60.) Additionally, Plaintiffs allege that Global Exchange "has fair trade stores" that sell "fair trade chocolate," and as a result of Defendants' actions, Global Exchange's

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[6] The Court notes that the Congressional effort took place in 2001, but the named Plaintiffs ceased working on the cocoa plantations in 2000. (FAC ¶¶ 57–59.)

stores "have been forced to pay a premium for this chocolate due to the unfair competition of slave produced chocolate." (FAC ¶ 60.) Plaintiffs also allege that Global Exchange "has ... been forced to spend significant resources in providing fairly traded chocolate, educating members of the public, and monitoring Defendants' corporate obligation not to use child labor." (FAC ¶ 62.)

## IV. *SOSA V. ALVAREZ–MACHAIN* AND INTERNATIONAL LAW

### A. CAUSES OF ACTION FOR VIOLATIONS OF INTERNATIONAL LAW

#### *1.* SOSA v. ALVAREZ–MACHAIN

In *Sosa v. Alvarez–Machain*, 542 U.S. 692, 124 S.Ct. 2739, 159 L.Ed.2d 718 (2004), the Supreme Court established the requirements for bringing an action under the Alien Tort Statute, 28 U.S.C. § 1350.[7] The Court held that § 1350 is solely a jurisdictional statute and does not create any causes of action. Instead, a limited number of international-law based causes of action are provided by the common law. Thus, although the Alien Tort Statute provides broad federal court **jurisdiction** for any tort committed in violation of customary international law, *Sosa* sharply circumscribed the availability of

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[7] Courts refer to 28 U.S.C. § 1350 as the Alien Tort Statute, Alien Tort Claims Act, or the Alien Tort Act. This Court adopts the Supreme Court's preferred version, the Alien Tort Statute.

In its entirety, the Alien Tort Statute provides: "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.

**private causes of action** that are cognizable in federal courts under § 1350.

Not all international law norms provide a common law cause of action under § 1350—to be actionable, it must be a well-defined and universally recognized norm of international law. As explained by the Court, "the ATS was meant to underwrite litigation of a narrow set of common law actions derived from the law of nations." *Sosa*, 542 U.S. at 721, 124 S.Ct. 2739. In determining the scope of this "narrow set" of actions, courts must engage in a two-part analysis: "courts should require any claim based on the present-day law of nations to rest on [1] a norm of international character accepted by the civilized world and [2] defined with a specificity comparable to the features of the 18th-century paradigms we have recognized"—that is, the three common law international law wrongs identified by Blackstone, "violation of safe conducts, infringement of the rights of ambassadors, and piracy." *Id*. at 725–26, 124 S.Ct. 2739.[8]

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[8] Commentators have suggested that only one of these three violations is the true inspiration for the Alien Tort Statute. *See Sosa*, 542 U.S. at 716–17, 124 S.Ct. 2739 (discussing 1784 Marbois affair, which involved private citizen's infringement of rights of French diplomatic representative); Thomas H. Lee, *The Safe–Conduct Theory of the Alien Tort Statute*, 106 Colum. L. Rev. 830 (2006) (discussing safe conduct as inspiration of Alien Tort Statute); Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation*, 45 Harv. Int'l L.J. 183 (2004) (discussing piracy as proper basis of Alien Tort Statute); see also Joseph Modeste Sweeney, *A Tort Only in Violation of the Law of Nations*, 18 Hastings Int'l & Comp. L. Rev. 445 (1995) (asserting that Alien Tort Statute applies only to the law of prize; that is, capture of enemy merchant vessels on high seas).

The Court added that federal courts "have no congressional mandate to seek out and define new and debatable violations of the law of nations," *id*. at 728, 124 S.Ct. 2739, and firmly cautioned that "federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted." *Id*. at 732, 124 S.Ct. 2739. In a footnote, the Court noted that "[a] related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual." *Id*. at 732 n. 20, 124 S.Ct. 2739.

*2. SOURCES OF INTERNATIONAL LAW*

With these basic rules in mind, it is important to have a clear understanding of the sources of international law upon which courts must rely in determining whether a particular norm is universally accepted and defined with the requisite specificity. As explained in *The Paquete Habana*, 175 U.S. 677, 700, 20 S.Ct. 290, 44 L.Ed. 320 (1900) (cited in *Sosa*, 542 U.S. at 734, 124 S.Ct. 2739), "international law is part of our law," and courts should look to the following sources for guidance:

> where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and

In other words, "it is fair to say that a consensus understanding of what Congress intended has proven elusive." *Sosa*, 542 U.S. at 718–19, 124 S.Ct. 2739. This Court agrees with the Supreme Court's observation that "we would welcome any congressional guidance" in this area of law. *Id*. at 731, 124 S.Ct. 2739.

> usages of civilized nations, and, as evidence of these, to the works of jurists and commentators who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.

*The Paquete Habana*, 175 U.S. at 700, 20 S.Ct. 290 (citing *Hilton v. Guyot*, 159 U.S. 113, 163, 164, 214, 215, 16 S.Ct. 139, 40 L.Ed. 95 (1895)). The Court also stated that international law norms must be agreed upon "by the general consent of the civilized nations of the world," *id*. at 708, 20 S.Ct. 290, or, as phrased in international law, *opinio juris*.

The approach set out in *The Paquete Habana* is consistent with the modern view of customary international law. As stated in the Statute of the International Court of Justice (the authoritative institution in adjudicating international law), the sources of international law are:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b. international custom, as evidence of a general practice accepted as law;

c. the general principles of law recognized by civilized nations;

d. subject to the provisions of Article 59,[9] judicial decisions an [sic] the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

ICJ Statute, June 26, 1945, art. 38(1), 59 Stat. 1055, 1060, U.S.T.S. 993.[10]

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[9] Article 59 provides that "[t]he decision of the Court has no binding force except between the parties and in respect of that particular case." ICJ Statute, art. 59.

[10] The *Restatement (Third) of Foreign Relations* outlines a similar set of guidelines:

> (1) A rule of international law is one that has been accepted as such by the international community of states
>
> (a) in the form of customary law;
>
> (b) by international agreement; or
>
> (c) by derivation from general principles common to the major legal systems of the world.
>
> (2) Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.
>
> (3) International agreements create law for the states parties thereto and may lead to the creation of customary international law when such agreements are intended for adherence by states generally and are in fact widely accepted.
>
> (4) General principles common to the major legal systems, even if not incorporated or reflected in customary law or international agreement, may be invoked as supplementary rules of international law where appropriate.

*Restatement*, § 102. And as further explained in Section 103(2):

> In determining whether a rule has become international law, substantial weight is accorded to
>
> (a) judgments and opinions of international judicial and arbitral tribunals;
>
> (b) judgments and opinions of national judicial tribunals;

In practice, this requires an exhaustive examination of treaties, court decisions, and leading treatises.[11] As a model example, the Supreme Court in *Sosa*, 542 U.S. at 732, 124 S.Ct. 2739, referred to the lengthy, polyglot footnote in *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 5 L.Ed. 57 (1820). The *Smith* Court examined over a dozen treatises in English, Latin, French, and Spanish, as well as English caselaw, and determined that these various sources all agreed upon the same basic definition of piracy under international law. *Smith*, 18 U.S. at 163–80 n. h.

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(c) the writings of scholars;

(d) pronouncements by states that undertake to state a rule of international law, when such pronouncements are not seriously challenged by other states.

*Id*. at § 103(2); *see also id*. at § 112 (noting that United States courts follow the approach contained in § 103, but that the Supreme Court's interpretations are binding upon lower courts).

[11] The Restatement, § 103 n. 1, helpfully explains the role of scholarly sources as evidence of customary international law:

> Such writings include treatises and other writings of authors of standing; resolutions of scholarly bodies such as the Institute of International Law (Institut de droit international) and the International Law Association; draft texts and reports of the International Law Commission, and systematic scholarly presentations of international law such as this Restatement. Which publicists are "the most highly qualified" is, of course, not susceptible of conclusive proof, and the authority of writings as evidence of international law differs greatly. The views of the International Law Commission have sometimes been considered especially authoritative.

In other words, it is important to exercise care when citing secondary sources as authorities on the meaning of international law. Accordingly, the Court has endeavored to rely on primary sources as much as possible.

### *3. INTERNATIONAL LAW CAUSES OF ACTION AFTER SOSA*

Ultimately, *Sosa* provides that international law norms are only actionable if they are specifically defined and universally adhered to out of a sense of mutual obligation. Other courts, quoted in *Sosa*, 542 U.S. at 732, 124 S.Ct. 2739, have explained that this requires a showing that the violation is one of a "handful of heinous actions," *Tel–Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 (D.C.Cir.1984) (Edwards, J., concurring), involving a norm that is "specific, universal, and obligatory," *In re Estate of Marcos Human Rights Litigation*, 25 F.3d 1467, 1475 (9th Cir.1994), resulting in a finding that the actor is "*hostis humani generis*, an enemy of all mankind." *Filartiga v. Pena–Irala*, 630 F.2d 876, 890 (2d Cir.1980).

In defining the relevant norms of international law, domestic courts should carefully distinguish the substance of international law from the procedures of international law. *See Sosa*, 542 U.S. at 729–30 & n. 18, 124 S.Ct. 2739 (referring to *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), and discussing Alien Tort Statute as incorporating "substantive rules" of international law[12]). For ex-

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[12] The relevance of *Erie* appears to animate the majority opinion in *Sosa*—but the Court certainly could have made this analogy more apparent. *See*, *e.g.*, Craig Green, *Repressing Erie's Myth*, 96 Cal. L. Rev. 595, 598 (2008) ("In *Sosa v. Alvarez–Machain*, *Erie* was a touchstone of the Court's ATS analysis, and not one Justice questioned *Erie' s* relevance."); William R. Castro, *The New Federal Common Law of Tort Remedies for Violations of International Law*, 37 Rutgers L.J. 635, 842–43 (2006) ("The federal courts' administration of state law under the *Erie* doctrine presents a useful model for thinking about in-

ample, the Ninth Circuit's lead *en banc* opinion in *Sarei v. Rio Tinto*, addressing the issue of exhaustion of remedies, noted that *Sosa* requires an inquiry into "whether exhaustion is a substantive norm of international law, to which the 'requirement of clear definition' applies; or if it is nonsubstantive, what source of law—federal common law or international law—illuminates its content." *Sarei v. Rio Tinto*, *PLC*, 550 F.3d 822, 828 (9th Cir.2008) (en banc) (internal footnote and citations omitted).[13] In other words, courts applying the Alien Tort Statute must determine whether the rule at issue is substantive or nonsubstantive (i.e., procedural), and then must determine whether that substantive international law is

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ternational law as federal common law.... In ATS litigation, the most obvious divide between international and pure United States domestic law is the separation of substance from procedure.... [In examining international law's] substance, the norm for which a remedy is provided in ATS litigation is clearly governed by international law. All questions as to whether the defendant has acted unlawfully must be answered by recourse to rules of decision found in international law.").

[13] The *Sarei* majority ultimately held that Alien Tort Statute claims include an exhaustion requirement; this majority was split, however, over whether exhaustion was substantive or procedural in nature. Three judges held that exhaustion was a "prudential" requirement of domestic law, 550 F.3d at 828, 830–31, two held that it was a substantive element of the international law claim, *id*. at 834–36, and one concurred in the result for other reasons, *id*. at 840–41. A dissenting opinion asserted that neither domestic nor international law requires exhaustion of remedies prior to filing an Alien Tort Statute action. *Id*. at 843–45.

The Court notes that Defendants' Motion does not raise the exhaustion issues discussed in *Sarei*.

sufficiently definite and universal to satisfy the requirements of *Sosa*.[14]

In distinguishing between the substance and procedure of international law, it is helpful to consider the guidelines set out by a leading expert on international criminal law. According to M. Cherif Bassiouni, who is among the most prolific and prominent authorities on international criminal law, "the penal aspects of international [criminal] law include: international crimes, elements of international criminal responsibility, the procedural aspects of the 'direct enforcement system' of international criminal law, and certain aspects of the enforcement modalities of the 'indirect enforcement system' of the International Criminal Court." M. Cherif Bassiouni, 1 *International Criminal Law* 5 (2008). Customary international law defines the **substantive** elements of the crimes and the elements of criminal responsibility, whereas the **procedural** enforcement mechanisms are established largely on a case-by-case basis in response to particular atrocities (though today, the

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[14] The Ninth Circuit's lead opinion in *Sarei* somewhat enigmatically held "that we may freely draw from both federal common law and international law without violating the spirit of *Sosa's* instructions or committing ourselves to a particular method regarding other nonsubstantive aspects of ATS jurisprudence left open after *Sosa*." *Sarei*, 550 F.3d at 828. On its face, this language suggests that *Sosa* did not establish a clear substance-procedure distinction, and that general federal common law can be incorporated into an Alien Tort Statute analysis.

Notably, however, the *Sarei* opinion specifically addressed **exhaustion of remedies**, which was explicitly left open by the Supreme Court as an area of law that is not necessarily governed by the Court's discussion of the proper method of **substantive** international law analysis. *Sosa*, 542 U.S. at 733 n. 21, 124 S.Ct. 2739.

International Criminal Court is meant to provide a permanent forum for enforcement actions). *Id.* at 7–8. The Supreme Court in *Sosa* instructed federal courts to look to the **substantive** aspects of international law, not the **procedural** details of particular international law enforcement mechanisms. Because the Alien Tort Statute itself provides an independent domestic enforcement mechanism, federal courts should not be distracted by the procedural quirks of foreign and international legal systems. Federal courts must be careful to apply only **substantive** international law—that is, the elements of the criminal acts and the nature of criminal responsibility—rather than the procedural elements of international law. *See* Bassiouni, 1 *International Criminal Law* at 5–8.

It is important for courts to apply international law with a careful eye on its substantive provisions, as *Sosa* repeatedly insisted that only clearly defined, universally recognized norms are actionable under the Alien Tort Statute. Though courts must look to various sources to determine the scope of international law, courts should not just "pick and choose from this seemingly limitless menu of sources" and create a hybrid form of domestic common law that merely draws on customary international law when convenient. *See Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 194 (2d Cir.2009) (Wesley, J., dissenting), *cert. denied*, —— U.S. ——, 130 S.Ct. 3541, 177 L.Ed.2d 1121 (2010). The Alien Tort Statute, as interpreted in *Sosa*, does not permit federal courts to codify a new form of what International Court of Justice Judge Philip Jessup termed "transnational law," which, as he explained, "includes both civil and criminal aspects, [ ] includes what we know as public and private international law, and [ ] includes national

law both public and private." Philip Jessup, *Transnational Law* 106 (1956). Jessup justified his proposed legal mélange on the ground that "[t]here is no inherent reason why a judicial tribunal, whether national or international, should not be authorized to choose from all these bodies of law the rule considered to be most in conformity with reason and justice for the solution of any particular controversy." *Id*. But, as made abundantly clear in *Sosa*, such an idealized and ungrounded form of international law is not a permissible source of authority for Alien Tort Statute cases. *Sosa* requires that federal courts cannot look to general principles of "reason and justice" drawn *ad hoc* from international and domestic rules; rather, courts must look carefully to the substantive norms of international law that are **clearly defined** and **universally agreed-upon**. To do otherwise is to misapply *Sosa* and "open the door" far too wide for Alien Tort Statute litigation. *Sosa*, 542 U.S. at 729, 124 S.Ct. 2739 ("[T]he judicial power should be exercised on the understanding that the door is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today.").

### B. THE DISTINCTION BETWEEN CIVIL AND CRIMINAL INTERNATIONAL LAW NORMS

In its June 9, 2009 Order for further briefing, the Court requested that the parties address the question of whether the standards for liability under international law distinguish between civil and criminal causes of action. In particular, the Court was concerned with whether *Sosa* requires international law to establish well-defined norms of **civil** liability in order for an Alien Tort Statute action to lie. In

light of this briefing, the Court has reached the following conclusions.

There is no meaningful distinction in Alien Tort State [sic] litigation between criminal and civil norms of international law. *See*, *e.g.*, *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 257 n. 7 (2d Cir.2009) (citations omitted), *pet'n for cert. filed*, Apr. 15, 2010, May 20, 2010; *Khulumani v. Barclay Nat. Bank Ltd.*, 504 F.3d 254, 270 n. 5 (2d Cir.2007) (Katzmann, J., concurring) (citations omitted). This is supported by the *Sosa* opinion, by the historical materials relevant to the *Sosa* Court's construction of the Alien Tort Statute, and by Justice Breyer's concurrence in *Sosa*.

The majority opinion in *Sosa* pointedly quoted the proposition from international scholar Beth Stephens that a "mixed approach to international law violations, encompassing both criminal prosecution ... and compensation to those injured through a civil suit, would have been familiar to the founding generation." *Sosa*, 542 U.S. at 724, 124 S.Ct. 2739 (quoting Beth Stephens, *Individuals Enforcing International Law: The Comparative and Historical Context*, 52 DePaul L. Rev. 433, 444 (2002)). In other words, the Court suggested that international **criminal** law at the time of the founding also contained a **civil** component.

This conclusion is supported by an examination of Blackstone, upon whom the *Sosa* Court relied heavily. Notably, Blackstone discussed the three "common law" international law violations (piracy, offenses on the high seas, and offenses against ambassadors) as being **criminal** offenses rather than **civil** offenses. Blackstone did not suggest that these offenses could be redressed through common-law civ-

il actions. *See* Blackstone, 4 *Commentaries*, Ch. 5; *see also Sosa*, 542 U.S. at 723, 124 S.Ct. 2739 ("It is true that Blackstone [ ] refer[red] to what he deemed the three principal offenses against the law of nations in the course of discussing **criminal sanctions**.") (emphasis added). However, Blackstone **did** explain that violations of an ambassador's safe-conduct were subject to **statutory** restitution. *See* Blackstone, 4 *Commentaries*, Ch. 5 ("if any of the king's subjects attempt or offend, upon the sea, or in port within the king's obeisance, against any stranger in amity, league, or under safe-conduct; and especially by attaching his person, or spoiling him, or robbing him of his goods; the lord chancellor, with any of the justices of either the king's bench or common pleas, **may cause full restitution and amends to be made to the injured**.") (emphasis added) (citing Statute of 31 Hen. VI., ch. 4).

As the Supreme Court recognized in *Sosa*, the Alien Tort Statute requires that federal courts provide civil redress for these criminal offenses. *Sosa*, 542 U.S. at 724, 124 S.Ct. 2739 ("We think it is correct ... to assume that the First Congress understood that the district courts would recognize private causes of action for ... torts corresponding to Blackstone's three primary offenses."). If we are to use Blackstone's treatise as the lodestar of Alien Tort Statute analysis (as the Supreme Court did in *Sosa* ), then we must necessarily conclude that the Alien Tort Statute exists precisely for the purpose of providing civil redress to victims of violations of international criminal law. *See generally* Jaykumar A. Menon, *The Alien Tort Statute: Blackstone and Criminal/Tort Law Hybridities*, 4 J. Int'l Crim. Just. 372 (2006) (discussing implications of Alien Tort Statute's status as a hybrid of criminal law and tort law).

Justice Breyer went further than the *Sosa* majority in discussing the relationship between international criminal law and civil causes of action. He noted that criminal punishment contains an element of restitution in many legal systems.[15] *Sosa*, 542 U.S. at 762–63, 124 S.Ct. 2739 (Breyer, J., concurring). Notably, the International Criminal Court provides for reparations and restitution as part of its jurisdiction over international criminal law. *See* Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90, at arts. 75(2) ("The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation."), 77(2)(b) ("In addition to imprisonment, the Court may order ... [a] forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties.").

In short, even in the absence of a universally recognized civil cause of action that exists under **international law**, the Alien Tort Statute provides a **domestic** civil cause of action which incorporates the universally recognized norms of international law, regardless of whether they are criminal or civil. To hold otherwise would render *Sosa'* s references to Blackstone superfluous and, indeed, would cause the entire foundation of the Alien Tort Statute to crumble, given that there is no universally recognized

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[15] For example, an Italian court recently held American CIA operatives criminally liable (in absentia) for the abduction and extraordinary rendition of an Egyptian while he was in Italy. *See Italy Rules in Rendition Case*, *Wall St. J.*, Nov. 5, 2009, at A12. In the verdict, the court also imposed a collective restitution obligation on the defendants in the amount of 1.5 million euros.

norm of private civil liability for international law violations. *See generally* Christine Gray, *Judicial Remedies in International Law* (1987) (noting, inter alia, that international law traditionally provides only for reparations between states, not private civil remedies).

Accordingly, the Court concludes that the Alien Tort Statute provides a civil cause of action for international law violations even if international law itself does not clearly recognize a civil cause of action for violations of that norm.

## V. THE ALLEGED PRIMARY VIOLATIONS OF INTERNATIONAL LAW

Plaintiffs allege that Cote d'Ivoire farmers are responsible for the following violations of Plaintiffs' rights under international law. Plaintiffs further allege that Defendants have aided and abetted these violations.

Defendants' Motion to Dismiss is aimed at the adequacy of Plaintiffs' allegations of aiding and abetting. Because the Motion is not directed at the underlying primary violations of international law (i.e., the conduct of the Ivorian farmers), the Court assumes for purposes of this Order that Plaintiffs have adequately alleged primary violations of the following norms. The Court summarizes the applicable facts and legal standards in order to provide context for the discussion of Defendants' contribution (or lack thereof) to those violations. It is helpful to thoroughly examine the details of the alleged primary violation prior to addressing the parties' arguments regarding secondary liability.

### A. FORCED LABOR

It is widely acknowledged that the use of forced labor violates international law. *See Adhikari v. Daoud & Partners*, 697 F.Supp.2d 674, 687 (S.D.Tex.2009) ("trafficking and forced labor ... qualify as universal international norms under *Sosa* "); *John Roe I v. Bridgestone Corp*., 492 F.Supp.2d 988, 1014 (S.D.Ind.2007) ("some forms of forced labor violate the law of nations"); *Jane Doe I v. Reddy*, No. C 02–05570 WHA, 2003 WL 23893010, at *9 (N.D.Cal. Aug. 4, 2003) ("forced labor ... is prohibited under the law of nations); *Iwanowa v. Ford Motor Co.*, 67 F.Supp.2d 424, 441 (D.N.J.1999) ( "[T]he case law and statements of the Nuremberg Tribunals unequivocally establish that forced labor violates customary international law."); *see also In re World War II Era Japanese Forced Labor Litig*., 164 F.Supp.2d 1160, 1179 (N.D.Cal.2001) ("this court is inclined to agree with the *Iwanowa* court's conclusion that forced labor violates the law of nations").

For present purposes, the Court adopts the definition of "forced labor" supplied by the International Labour Organization Forced Labor Convention of 1930: "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily." International Labour Organization Convention No. 29 Concerning Forced or Compulsory Labor, art. 2., 39 U.N.T.S. 55, *entered into force*, May 1, 1932. More thorough definitions may be found in the treaties and conventions identified in the Complaint (FAC ¶ 63), in the expert declaration of Lee Swep-

ston [docket no. 93], and in the Victims of Trafficking and Violence Protection Act of 2000.[16]

There are various examples of forced labor cases being brought under the Alien Tort Statute (many of which, it should be noted, predate *Sosa* ). In one case, the district court held that the plaintiffs' allegations were insufficient to state a claim under international law where:

> Plaintiffs allege that they have nothing left after they spend their wages at [the defendant's] company stores and other company facilities (such as schools), but they do not allege induced indebtedness. Plaintiffs allege that they are physically isolated at the Plantation, but they do not allege that [the defendant] keeps them physically confined there. To the extent plaintiffs allege psycho-

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[16] The Act provides that a person has engaged in forced labor if he:

> knowingly provides or obtains the labor or services of a person by any one of, or by any combination of, the following means—
>
> (1) by means of force, threats of force, physical restraint, or threats of physical restraint to that person or another person;
>
> (2) by means of serious harm or threats of serious harm to that person or another person;
>
> (3) by means of the abuse or threatened abuse of law or legal process; or
>
> (4) by means of any scheme, plan, or pattern intended to cause the person to believe that, if that person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint.

18 U.S.C. § 1589(a).

> logical compulsion, they are clearly alleging what the [International Labor Organization] report calls "pure economic necessity, as when a worker feels unable to leave a job because of the real or perceived absence of employment alternatives," which is not forced labor under international law.

*John Roe I v. Bridgestone Corp.*, 492 F.Supp.2d 988, 1014 (S.D.Ind.2007).

In another case, the allegations were sufficient where the plaintiffs alleged that they "were brought to the United States and forced to work involuntarily [,] and [that] defendants reinforced their coercive conduct through threats, physical beatings, sexual battery, fraud and unlawful substandard working conditions." *Jane Doe I v. Reddy*, 2003 WL 23893010, at *9. Similarly, in *Licea v. Curacao Drydock Co., Inc.*, 584 F.Supp.2d 1355 (S.D.Fla.2008), the plaintiffs established that they were forced to work on oil platforms after having been trafficked from Cuba to Curacao under threats of physical and emotional harm.

In the present case, Plaintiffs allege that they were forced to labor on cocoa fields. (FAC ¶¶ 57–59.) At least one Plaintiff (John Doe I) alleges that he was trafficked from Mali to Cote d'Ivoire. (FAC ¶ 57.) All three Plaintiffs were locked on their respective farms and plantations and monitored at night by guards armed with guns and whips. (FAC ¶¶ 57–59.) They were subjected to physical violence and related psychological abuse that had the effect of forcing them to work and remain on the farms. (FAC ¶¶ 57–59.) They were threatened with severe beatings from whips and tree branches, being forced to drink urine, and having their feet cut open. (*Id.*) They were not

paid for their work, were given inadequate amounts of food, and were forced to sleep in groups in locked rooms, and at least one plaintiff was forced to sleep on the floor. (*Id*.)

Because Defendants have not disputed that [sic] adequacy of these allegations, the Court concludes for present purposes that these allegations are sufficient constitute [sic] forced labor under international law.

**B. CHILD LABOR**

It is clear that in some instances "child labor" constitutes a violation of an international law norm that is specific, universal, and well-defined. "Yet whatever one's initial reaction is to the broad phrase 'child labor,' reflection shows that national and international norms accommodate a host of different situations and balance competing values and policies.... It is not always easy to state just which practices under the label 'child labor' are the subjects of an international consensus." *John Roe I v. Bridgestone*, 492 F.Supp.2d at 1020.

Plaintiffs submit an expert declaration from a former member of the International Labour Organization, Lee Swepston. [Docket no. 93.] Swepston's declaration reveals that the definitional concerns identified by the *John Roe I v. Bridgestone* court apply with equal force in the present case.[17] Neverthe-

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[17] For example, a number of countries allow children of the age of 14 or 15 to engage in most or all types of labor. (*See* Swepston Decl. Ex. B (Australia, Ethiopia, Fiji, Finland, India, Pakistan, Sri Lanka, Trinidad & Tobago).) A number of states in the U.S. are similar. (*See id*. (Illinois, Indiana, Nevada, Pennsylvania).)

In addition, although most countries have adopted regulations prohibiting children of varying ages from engaging in

less, for present purposes, the Court assumes that the allegations in the First Amended Complaint are analogous to the allegations at issue in *John Roe I v. Bridgestone*, a case involving allegations of forced labor and child labor on a Liberian rubber plantation:

> [T]he Complaint states that defendants are actively encouraging—even tacitly requiring—the employment of six, seven, and ten year old children. Giving plaintiffs the benefit of their factual allegations, the defendants are actively encouraging that these very young children perform back-breaking work that exposes them to dangerous chemicals and tools. The work, plaintiffs allege, also keeps those children out of the [company-provided] schools. The court understands that defendants deny the allegations, but defendants have chosen to file a motion that requires the court to accept those allegations as true, at least for now. [¶] The circumstances alleged here include at least some practices that could therefore fall within the "worst forms of child labor" addressed in ILO Convention 182. The conditions of work alleged by plaintiffs (and reported by the UN investigators) are likely to harm the health and safety of at least the very youngest of the child plaintiffs in this case.

*John Roe I v. Bridgestone Corp.*, 492 F.Supp.2d at 1021.[18]

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"hazardous" work activities, the precise definition of "hazardous" remains unclear. (*See id.*)

[18] It should be noted that *John Roe I v. Bridgestone* involved claims for the defendants' **direct** violations of international law, not for the defendant's aiding and abetting third parties'

The plaintiffs in the present case allege that they were forced to work "cutting, gathering, and drying" cocoa beans for twelve to fourteen hours a day, six days a week. (FAC ¶¶ 57–59.) The plaintiffs were between twelve and fourteen years old at the time they first began working at the farms. (*Id*.)

Because Defendants have not disputed the adequacy of these allegations, the Court assumes for present purposes that Plaintiffs' allegations establish violations of universal, well-defined international law norms prohibiting child labor.[19]

**C. TORTURE**

Torture is a well-established norm of international law that is actionable under the Alien Tort Statute. *See In re Marcos Human Rights Litig*., 25 F.3d 1467, 1475 (9th Cir.1994) (collecting authorities); *Filartiga v. Pena–Irala*, 630 F.2d 876, 880–84 (2d Cir.1980); *see also Sosa*, 542 U.S. at 732, 124 S.Ct. 2739 (citing those cases with approval).

A helpful working definition of "torture" can be found in the Torture Victim Protection Act:

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violations. The plaintiffs in that case had alleged that the defendants "own and control the plantation." 492 F.Supp.2d at 990.

[19] The Court notes, however, that Plaintiffs' allegations are readily distinguishable from the allegations at issue in *John Roe I v. Bridgestone*, which involved the employment of significantly younger children (six to ten years old, as opposed to twelve to fourteen in the present case) and contained specific factual allegations that they were not allowed to attend school and were forced to perform "back-breaking work that expose[d] them to dangerous chemicals and tools." *See John Roe I v. Bridgestone*, 492 F.Supp.2d at 1021.

> the term 'torture' means any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind[.]

Torture Victim Protection Act, Pub. L. 102–256, 106 Stat. 73 (1992), § 3(b)(1), *reprinted in* 28 U.S.C.A. § 1350 note. In addition, the Torture Victim Protection Act contains a state-action requirement, such that liability only exists if the act of torture is done "under actual or apparent authority, or color of law, of any foreign nation." *Id*. at § 2(a)(1).[20]

Plaintiffs allege that they were severely beaten and/or threatened with severe beatings in order to prevent them from leaving the cocoa plantations. Plaintiffs also allege that they were given inadequate food, were forced to sleep in tightly-packed locked

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[20] This definition of torture is nearly identical, word-for-word, as the leading international law definition found in the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1(1), S. Treaty Doc. No. 100–20 (1988), 1465 U.N.T.S. 113, *reprinted in* 23 I.L.M. 1027 (1984), *modified in* 24 I.L.M. 535 (1985).

rooms, and were threatened with being forced to drink urine. (FAC ¶¶ 57–59.)

The Court will assume for purposes of this motion that these allegations are sufficient to state the basic elements of torture: "severe pain or suffering" was "intentionally inflicted on" Plaintiffs for the "purposes" of "punishing" Plaintiffs for acts that Plaintiffs committed, and/or for the "purposes" of "intimidating or coercing" Plaintiffs. Allegations of severe beatings, extended confinements, and deprivation of food—causing both physical and mental injury—generally constitute torture. *See*, *e.g.*, *Doe v. Qi*, 349 F.Supp.2d 1258, 1267–70, 1314–18 (N.D.Cal.2004) (collecting cases).[21]

To the extent that the international law definition of torture contains additional requirements (most importantly, the state-action requirement), the Court discusses these issues at greater length *infra*.

### D. CRUEL, INHUMAN, AND DEGRADING TREATMENT

"Cruel, inhuman, or degrading treatment or punishment is defined as acts which inflict mental or physical suffering, anguish, humiliation, fear and debasement, which fall short of torture." *Sarei v. Rio Tinto PLC*, 650 F.Supp.2d 1004, 1029 (C.D.Cal.2009) (quoting *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 452 F.3d 1284, 1285 n. 1 (11th Cir.2006) (Barkett, J., dissenting)), *appeal pending*, Nos. 02–56256, 02–56390, 09–56381 (9th Cir.). "The principal difference between torture and [cruel, inhuman, or de-

[21] That said, in light of *Twombly* and *Iqbal*, the Court has serious concerns about the adequacy of the factual details contained in Plaintiffs' First Amended Complaint.

grading treatment] is 'the intensity of the suffering inflicted.' " *Id*. (quoting *Restatement (Third) of Foreign Relations*, § 702 n. 5).

The prevailing view in the caselaw is that "cruel, inhuman, and degrading treatment" generally constitutes an actionable international law norm under *Sosa*. *See*, *e.g.*, *Sarei*, 650 F.Supp.2d at 1028–29 (collecting cases). However, as with child labor, there is a general consensus that only some types of activities constitute cruel, inhuman, and degrading treatment; and the central question is whether the "specific conduct at issue" fits within that core norm. *Id*. at 1029–30 ("Because multiple elements of plaintiffs' CIDT claim do not involve conduct that has been universally condemned as cruel, inhuman, or degrading, the court concludes that the specific CIDT claim plaintiffs assert does not exclusively involve matters of universal concern."); *Bowoto*, 557 F.Supp.2d at 1093–94; *John Roe I v. Bridgestone*, 492 F.Supp.2d at 1023–24 (recognizing cruel, inhuman, and degrading treatment as actionable norm under customary international law, but holding that "exploitative labor practices" do not violate those norms); *Doe v. Qi*, 349 F.Supp.2d at 1321–25.

As with the allegations of torture, the Court assumes for purposes of this Order that Plaintiffs have adequately alleged cruel, inhuman, or degrading treatment with respect to Defendants' alleged severe beatings, extended confinements, and deprivation of food.

## VI. LEGAL STANDARD REGARDING LIABILITY FOR AIDING AND ABETTING VIOLATIONS OF INTERNATIONAL LAW

### A. INTRODUCTION

There is an extensive body of precedent supporting aiding and abetting-liability for violations of international law. Aiding and abetting liability is prominent in the Nuremberg Tribunals, the International Criminal Tribunals for the Former Yugoslavia and Rwanda (hereinafter "ICTY" and "ICTR"), and the Rome Statute of the International Criminal Court. *See Khulumani v. Barclay Nat. Bank Ltd.*, 504 F.3d 254, 270 (2d Cir.2007) (Katzmann, J., concurring) ("the individual responsibility of a defendant who aids and abets a violation of international law ... has been frequently invoked in international law instruments as an accepted mode of liability [and] has been repeatedly recognized in numerous international treaties."). International conventions such as the Supplementary Convention on the Abolition of Slavery require the punishment of aiders and abetters. *See* Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Sept. 7, 1956, 18 U.S.T. 3201, 226 U.N.T.S. 3.[22] Similarly, domestic criminal law provides for aiding and abetting liability, *see* 18 U.S.C. § 2, and has done so for centuries with respect to aiding and abetting particular violations of inter-

[22] The Convention requires member states to prohibit "being accessory" to and "being a party to a conspiracy to accomplish" acts including "enslaving another person" and separating a child from his parents "with a view to the exploitation of the child['s] ... labour." 18 U.S.T. 3201, arts. 1(d), 6(1)-(2).

national law such as piracy.[23] There is little doubt, then, that certain Alien Tort Statute defendants may potentially be held liable under an aiding and abetting theory of liability.

### B. WHICH SOURCE OF LAW TO APPLY?

The key question is whether to examine domestic law or international law to derive the proper legal standard for determining aiding and abetting liability. Plaintiffs assert that the proper source of aiding and abetting liability is domestic law. Defendants assert that international law is the proper source.

Ultimately, the Court agrees with and adopts the Second Circuit's resolution of this question: interna-

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[23] In light of *Sosa' s* emphasis on Blackstone and the law of piracy, it is interesting to note the centuries-old domestic statutory provisions in England and the United States that criminalized aiding and abetting piracy. *See United States v. Palmer*, 16 U.S. 610, 629, 3 Wheat. 610, 4 L.Ed. 471 (1818) (discussing Apr. 30, 1790 Act providing for punishment by death for those who "knowingly and wittingly aid and assist, procure, command, counsel, or advise, any person or persons, to do or commit any murder, robbery, or other piracy," or who after the fact "furnish aid to those by whom the crime has been perpetrated") (citing 1 Stat. 112, 113–14, §§ 10–11); Blackstone, 4 *Commentaries*, Ch. 5 (discussing statute of 2 Hen. V. St. 1, ch. 6, by which the "breaking of truce and safe-conduct, or abetting and receiving the truce breakers, was (in affirmance and support of the law of nations) declared to be high treason against the crown and dignity of the king," and statutes of 11 & 12 Wm. III., ch. 7 and 8 Geo. I., ch. 24, which established criminal liability for "conspiring" to commit piracy and for "trading with known pirates, or furnishing them with stores or ammunition, or fitting out any vessel for that purpose, or in any wise consulting, combining, confederating, or corresponding with them," and further establishing that "all accessories to piracy, are declared to be principal pirates, and felons without benefit of clergy").

tional law provides the appropriate definition of aiding and abetting liability. *See Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 258–59 (2d Cir.2009) (discussing *Khulumani v. Barclay Nat. Bank Ltd.*, 504 F.3d 254 (2d Cir.2007)). The central principles are as follows.

The Supreme Court in *Sosa* repeatedly insisted that United States courts must follow international law in defining the nature of violative acts and the scope of liability. *See*, *e.g.*, *Sosa*, 542 U.S. at 732, 124 S.Ct. 2739 ("federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted."). Though Plaintiffs argue that federal law should be used to fill the gaps where international law is silent, it is clear that international law provides sufficiently well-established norms of secondary liability to satisfy *Sosa'* s requirement of norms containing "definite content [that are] accept[ed] among civilized nations." *See id*. There is simply no reason to alter the well-defined scope of international law by introducing domestic law into the Alien Tort Statute.

It is clear from the authorities identified by the parties and discussed at greater length *infra* that international law recognizes **aiding and abetting** liability. Because the act of aiding and abetting a human rights violation constitutes an independent violation of international law, the Court concludes that international law is the appropriate source of law under *Sosa*.

### C. WHAT IS THE SCOPE OF AIDING AND ABETTING LIABILITY UNDER INTERNATIONAL LAW?

There is little doubt that aiding and abetting liability is a part of international law. Aiding and abetting liability is prominent in the Nuremberg Tribunals,[24] the International Criminal Tribunals for the Former Yugoslavia and Rwanda,[25] and the Statute of the International Criminal Court. *See generally Khulumani*, 504 F.3d at 270 (Katzmann, J., concurring).

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[24] The London Charter that created the Nuremberg Tribunals provided for secondary as well as primary liability for the atrocities committed by the Axis Powers during the Second World War. Article Six provided that "Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes [crimes against peace, war crimes, and crimes against humanity] are responsible for all acts performed by any persons in execution of such plan." Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal, Aug. 8, 1945, art. 6, 82 U.N.T.S. 279 (hereinafter "London Charter").

[25] ICTY and ICTR allow for aiding and abetting liability by virtue of their enabling statutes, which create liability for those who have "planned, instigated, ordered, committed, or otherwise aided and abetted in the planning, preparation or execution of a crime." Statute of the International Tribunal for the Former Yugoslavia, art. 7, *adopted* May 25, 1993, S.C. Res. 827, U.N. Doc. S/RES/827 (hereinafter "ICTY Statute"); Statute of the International Criminal Tribunal for Rwanda, art. 6, *adopted* Nov. 8, 1994, S.C. Res. 955, U.N. Doc. S/RES/955 (hereinafter "ICTR Statute"). The ICTY and ICTR Statutes were drafted and approved by the Security Council of the United Nations. *See Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 374 F.Supp.2d 331, 338 (S.D.N.Y.2005).

Although there are various formulations of the proper standard of aiding and abetting liability in international law, it is important to remember *Sosa' s* instruction that norms are only actionable if they are universally recognized and defined with specificity. For example, as noted by Justice Story in *United States v. Smith*, 18 U.S. 153, 161, 5 Wheat. 153, 5 L.Ed. 57 (1820), "whatever may be the diversity of definitions, ... all writers concur, in holding, that robbery or forcible depredations upon the sea, *animo furandi* [with the intention to steal] is piracy."[26] In other words, where there are a variety of formulations, the court should look to the formulation that is agreed upon by all—a lowest common denominator or a common "core definition" of the norm. *See Khulumani*, 504 F.3d at 277 n. 12 (Katzmann, J., concurring). This approach has been adopted by the Ninth Circuit in *Abagninin v. AMVAC Chem. Corp*., 545 F.3d 733, 738–40 (9th Cir.2008), which concluded that customary international law imposes a specific intent standard for genocide, despite an alternative "knowledge" standard established by one particular treaty. In addition, this lowest common denominator approach has been adopted by other federal courts dealing with the question of aiding and abetting liability. *See Presbyterian Church of Sudan*, 582 F.3d at 259 (concluding that the relevant "standard has been largely upheld in the modern era, with only sporadic forays in the direction of a [different] standard.").

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[26] The *Smith* Court's analysis of piracy was cited with approval in *Sosa*, 542 U.S. at 732, 124 S.Ct. 2739.

*1.* ACTUS REUS

With respect to the *actus reus* element of the violation, the Court, having examined the applicable authorities, believes that the International Criminal Tribunal for the former Yugoslavia has accurately and concisely restated the governing international law rule:

> an aider and abettor carries out acts **specifically directed** to assist, encourage, or lend moral support to the perpetration of a **certain specific crime**, which have a substantial effect on the perpetration of the crime. The *actus reus* need not serve as condition precedent for the crime and may occur before, during, or after the principal crime has been perpetrated.

*Prosecutor v. Blagojevic*, No. IT–02–60–A, at ¶ 127 (ICTY Appeals Chamber, May 9, 2007) (collecting cases) (citations and footnotes omitted, emphasis added), *available at* http://www.icty.org/x/cases/blagojevic_jokic/acjug/en/blajok-jud070509.pdf.[27] This

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[27] Plaintiffs argue that the *actus reus* element does not require that the acts are "specifically directed" to a "certain specific crime." But as Plaintiffs concede (see 8/6/09 Opp. at 12), the *Blagojevic* tribunal carefully explained that international law has **always** required that the acts be "specifically directed" to assist in a "certain specific crime"; however, the tribunal also noted that some courts have **implicitly** concluded that this standard was satisfied when the facts showed that the actor's conduct was undertaken knowingly and had a "substantial effect on the perpetration of the crime." *Blagojevic*, at ¶¶ 189, 193. The Court agrees with the *Blagojevic* tribunal's summary of the international caselaw, which unanimously supports the conclusion that the *actus reus* of aiding and abetting in international law requires that the assistance is "specifically directed" to a "certain specific crime." As explained in *Blagojevic*, alterna-

formulation requires that the defendant must do something more than "[a]iding a criminal" generally—the defendant must aid the commission of a specific **crime**. As other District Courts have aptly explained, "[a]iding a **criminal** 'is not the same thing as aiding and abetting his or her alleged **human rights abuses**.' " *In re South African Apartheid Litig.*, 617 F.Supp.2d 228, 257 (S.D.N.Y.2009) (emphasis added) (quoting *Mastafa v. Australian Wheat Bd. Ltd.*, No. 07 Civ. 7955(GEL), 2008 WL 4378443, at *3 (S.D.N.Y. Sept. 25, 2008)). In other words, the aider and abettor's assistance must bear a **causative** relationship to the **specific wrongful conduct** committed by the principal. *Id*. The assistance need not necessarily constitute a "but-for" cause or *conditio sine qua non*, but it must have an actual effect on the principal's criminal act. *Id*.

This definition of the *actus reus* standard is consistent with the caselaw summarized *infra* and, notably, retains a meaningful and clear distinction between aiding and abetting liability and conspiracy/joint criminal enterprise liability. As explained by the International Criminal Tribunal for the Former Yugoslavia, the distinctions between aiding and abetting and joint criminal enterprise are as follows:

> Participation in a joint criminal enterprise is a form of "commission" [of a crime] under Ar-

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tive formulations of this standard generally constitute *dictum* that is not uniformly accepted. The alternative formulations therefore fail to satisfy Sosa' s requirement that the international law norm must be **universally** accepted. *See Presbyterian Church of Sudan*, 582 F.3d at 259 (adopting approach of looking to common core definition to determine appropriate choice among competing articulations of a standard); *Abagninin*, 545 F.3d at 738–40 (same).

ticle 7(1) of the [ICTY] Statute. The participant therein is liable as a co-perpetrator of the crime(s). Aiding and abetting the commission of a crime is usually considered to incur a lesser degree of individual criminal responsibility than committing a crime. In the context of a crime committed by several co-perpetrators in a joint criminal enterprise, the aider and abettor is always an accessory to these co-perpetrators, although the co-perpetrators may not even know of the aider and abettor's contribution. Differences exist in relation to the *actus reus* as well as to the *mens rea* requirements between both forms of individual criminal responsibility:

(i) The aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime (murder, extermination, rape, torture, wanton destruction of civilian property, etc.), and this support has a substantial effect upon the perpetration of the crime. By contrast, it is sufficient for a participant in a joint criminal enterprise to perform acts that in some way are directed to the furtherance of the common design.

(ii) In the case of aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of the specific crime of the principal. By contrast, in the case of participation in a joint criminal enterprise, i.e. as a co-perpetrator, the requisite *mens rea* is intent to pursue a common purpose.

*Vasiljevic*, 2004 WL 2781932, at ¶ 102. In other words, the aider and abettor must do something more than commit acts that "in some way" tenuously "further[ ] ... the common design" of a criminal organization; that *actus reus* standard applies only to co-conspirators who knowingly and actively join in the criminal conspiracy and share its criminal purpose. To establish aiding and abetting liability, generalized assistance is not enough: the assistance must be "specifically directed"—i.e., bear a direct causative relationship—to a specific wrongful act, and the assistance must have a substantial effect on that wrongful act. *Blagojevic*, at ¶ 127.

This aiding and abetting *actus reus* standard necessarily "requires a fact-based inquiry" that is context-specific. *See id*. at ¶ 134. However, one important issue must be noted at the outset of the discussion. There is a great deal of uncertainty about the *actus reus* of "tacit approval and encouragement" —a theory of liability that, according to Plaintiffs, dates back to Nuremberg-era precedents such as *The Synagogue Case* and *United States v. Ohlendorf ("The Einsatzgruppen Case"), in 4 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10* ("T.W.C."), at 570–72 (William S. Hein & Co., Inc. 1997). To the extent this form of liability even exists, the modern caselaw supports liability only where the defendant has "a combination of a position of authority and physical presence at the crime scene[, which] allows the inference that non-interference by the accused actually amounted to tacit approval and encouragement." *Prosecutor v. Oric*, No. IT–03–68–A, at ¶ 42 (ICTY Appeals Chamber, July 3, 2008), *available at* 2008 WL 6930198. As with all aiding and abetting, it must be shown that the encouragement was "sub-

stantial"—which necessarily requires that the "principal perpetrators [were] aware of it," because otherwise, the support and encouragement would not have had any effect (let alone a substantial one) on the principal offense. *Prosecutor v. Brdjanin*, No. IT–99–36–A, at ¶ 277 (ICTY Appeals Chamber, April 3 2007), *available at* 2007 WL 1826003. The specific situations in which courts have imposed such liability are identified *infra*.

*2. MENS REA*

The Court is aware that there is an ongoing debate among courts, litigants, and commentators regarding the proper definition of aiding and abetting liability. *See*, *e.g.*, *Pet'n for Writ of Cert., Presbyterian Church of Sudan v. Talisman Energy, Inc.*, No. 09–1262, 2010 WL 1602093, at *27–33 (Apr. 15, 2010) (collecting cases). The Court concurs with the five judges on the Second Circuit who have concluded that the appropriate *mens rea* for aiding and abetting violations of international law requires that the defendant act with "the purpose of facilitating the commission of that crime." *Khulumani*, 504 F.3d at 277 (Katzmann, J., concurring); see also *Presbyterian Church of Sudan*, 582 F.3d at 259 (adopting Judge Katzmann's formulation); *Khulumani*, 504 F.3d at 332–33 (Korman, J., concurring in relevant part). As the Second Circuit explained in its recent *Presbyterian Church of Sudan* decision, a plaintiff must show that the defendant acted with "purpose rather than knowledge alone" because only a "purpose" standard "has the requisite 'acceptance among civilized nations' " to satisfy *Sosa'* s stringent requirements. *Presbyterian Church of Sudan*, 582 F.3d at 259 (quoting *Sosa*, 542 U.S. at 732, 124 S.Ct. 2739). The less-stringent "knowledge" standard, although it has

often been invoked, has not obtained **universal** recognition and acceptance. *See generally Prosecutor v. Furundzija*, IT–95–17/1–T, at ¶¶ 190–249 (ICTY Trial Chamber, Dec. 10, 1998) (surveying international caselaw and adopting "knowledge" *mens rea* standard), *reprinted in* 38 I.L.M. 317 (1999), *aff'd*, No. IT–95–17/1–A (ICTY Appeals Chamber, July 21, 2000), *available at* 2000 WL 34467822. As such, the "knowledge" standard is an improper basis for bringing an Alien Tort Statute action.

However, to the extent that a "knowledge" *mens rea* standard applies (a conclusion that the Court rejects), the Court believes that the proper articulation of the aiding and abetting standard would be the formulation adopted by the Appeals Chambers of the International Criminal Tribunals for the former Yugoslavia and Rwanda: "the requisite mental element of aiding and abetting is **knowledge** that the acts performed assist the commission of **the specific crime** of the principal perpetrator." *Blagojevic*, at ¶ 127 (collecting cases) (citations and footnotes omitted, emphasis added); *see also Prosecutor v. Ntagerura*, No. ICTR–99–46–A, at ¶ 370 (ICTR Appeals Chamber, July 2006) (same), *available at* 2006 WL 4724776; *1083 *Prosecutor v. Blaskic*, No. IT–95–14–A, at ¶ 45 (ICTY Appeals Chamber, July 2004) (same), *available at* 2004 WL 2781930; *Prosecutor v. Vasiljevic*, No. IT–98–32–A, at ¶ 102 (ICTY Appeals Chamber, Feb. 25, 2004) (same), available at 2004 WL 2781932. To the extent that the International Criminal Tribunals for the former Yugoslavia and Rwanda have occasionally adopted a less stringent standard, *see*, *e.g.*, *Mrksic*, at ¶ 159; *Furundzija*, 38 I.L.M. 317 at ¶ 249, the Court believes that the standard articulated in *Blagojevic*, *Ntagerura*,

*Blaskic*, and *Vasiljevic* best reflects the relevant caselaw discussed *infra*.[28]

Accordingly, to the extent that the "purpose" specific intent *mens rea* standard does not apply and a "knowledge" general intent *mens rea* standard does apply, the Court would apply the dominant approach taken in the recent international appellate tribunal decisions. This approach requires that the aider and abettor must know or have reason to know of **the relationship between his conduct and the wrongful acts**. *See Oric*, 2008 WL 6930198, at ¶ 45. It is not enough, as explained by the *Oric* appeals tribunal, that the aider and abetter knew or had reason to know that crimes were being committed—the aider and abetter must know or have reason to know that his own acts or omissions "assisted in the crimes." *Id.* at ¶¶ 43, 45 & n. 104.

That said, the Court concludes that the "purpose" *mens rea* standard is the proper standard to use in Alien Tort Statute litigation. The less-stringent "knowledge" standard that was originally synthesized by the International Criminal Tribunal for the

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[28] The Court also notes that, in the present context, the specific articulation of the *mens rea* standard is not necessarily determinative. At the pleading stage, the "purpose" standard is similar to the *Blagojevic* tribunal's "knowledge that the acts assist a specific crime" standard. A defendant's purposeful intent might potentially be inferred from factual allegations that establish that a defendant knew his action would substantially assist a certain **specific** crime (consistent with the *actus reus* principles articulated *supra* and developed further *infra* ). In light of this consideration, the Court believes that the best resolution of the present case can be obtained by way of analogy to the **facts** of existing international-law precedents. The relevant cases are discussed at length *infra*.

former Yugoslavia in *Furundzija* rests on a number of premises that, while perhaps acceptable under that Tribunal's enacting authority, fail to satisfy the requirements set forth by the Supreme Court in *Sosa*.

The appropriateness of the "purpose" standard is supported by the following authorities. As an initial matter, it is particularly notable that the International Court of Justice—the central expositor of international law, *see Restatement (Third) of Foreign Relations*, § 103 cmt. (b) ("The judgments and opinions of the International Court of Justice are accorded great weight")—recently declined to decide whether the crime of aiding and abetting genocide requires that the aider and abettor **share** the perpetrator's criminal intent or merely **know** of the perpetrator's criminal intent. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, 2007 I.C.J. No. 91, at ¶ 421 ("the question arises whether complicity presupposes that the accomplice shares the specific intent (*dolus specialis*) of the principal perpetrator"), *available at* http://www.icj-cij.org/docket/files/91/13685.pdf. The fact that the International Court of Justice refrained from addressing this question supports the conclusion that the appropriate definition remains subject to reasonable debate.[29] In light of *Sosa*, any doubts

[29] It is true that the International Court of Justice was only addressing allegations regarding aiding and abetting the crime of genocide, which is not at issue in the present case. *See Khulumani*, 504 F.3d at 332 (Korman, J., concurring) (noting that *Sosa* "requires an analysis of the **particular norm** the defendant is accused of violating to determine whether a private party may be held responsible as an aider and abettor") (emphasis

about the standard should be resolved in favor of the most stringent version. *See*, *e.g.*, *Presbyterian Church of Sudan*, 582 F.3d at 259 (adopting approach of looking to common core definition to determine appropriate choice among competing articulations of a standard); *Abagninin*, 545 F.3d at 738–40 (same).

The Court notes that a Nuremberg-era precedent supports the view that the aider and abetter must act with the **purpose** of aiding the principal offender. In the *Hechingen* case, a number of German citizens were accused of aiding and abetting the deportation of the Jewish population of two German towns. *See The Hechingen and Haigerloch Case, translated in Modes of Participation in Crimes Against Humanity*, 7 J. Int'l Crim. Just. 131, 132 (2009). The Gestapo had issued orders for the towns' Jewish populations to be deported and for their persons and luggage to be searched. *Id*. Two of the defendants, "Ho." and "K.," had participated in the searches and had collected the victims' jewelry to give to the town's mayor. *Id*. at 144–45. The trial court held that on account of these acts the defend-

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added). However, the Court believes that the International Court of Justice's refusal to address the question undermines the analysis and conclusions reached by the *ad hoc* International Criminal Tribunals both with respect to genocide cases specifically, *see*, *e.g.*, *Prosecutor v. Ntakirutimana*, ICTR–96–10–A, ICTR–96–17–A, at ¶¶ 500–01 & nn. 855–56 (ICTR Appeals Chamber Dec. 13, 2004) (collecting cases), *available at* 2004 WL 2981767, and all cases discussing the aiding and abetting *mens rea* more generally. The International Court of Justice's refusal to adopt the *ad hoc* tribunals' conclusions provides compelling evidence of the tribunals' inadequacies as precedents for Alien Tort Statute litigation, an issue that is thoroughly and persuasively addressed in the concurring opinions in *Khulumani*. *See Khulumani*, 504 F.3d at 278–79 (Katzmann, J., concurring); *id*. at 336–37 (Korman, J., concurring).

ants were guilty as accessories of participating "in a persecution on racial grounds and thus in a crime against humanity." *Id*. at 145. The trial court's conclusion was based on its view that the "knowledge" *mens rea* standard applied: "Intent as an accessory requires, first, that the accused knew what act he was furthering by his participation; he must have been aware that the actions ordered from him by the Gestapo served persecution on racial grounds.... [And] second, that the accused knew that through his participation he was furthering the principal act." *Id*. at 139.

This conclusion was reversed on appeal. The appellate court explained that the underlying offense, "[p]ersecution on political, racial and religious grounds," may only be committed if the defendant "acted out of an inhumane mindset, derived from a politically, racially or religiously determined ideology." *Id*. at 150. The court explained that the aider and abettor must share this criminal intent—i.e., must act with the intention of bringing about the underlying crime: "[t]he accessory [ ] to a crime against humanity is 'regarded as guilty of a crime against humanity, without regard to the capacity in which he acted.' From this complete equation with the perpetrator it follows that the accessory must have acted from the same mindset as the perpetrator himself, that is, from an inhumane mindset and in persecutions under politically, racially or religiously determined ideologies." *Id*. at 150. The court then concluded that "[t]he accused Ho. and K. were, according to the [trial court's] findings, involved only in a subordinate manner in the deportations. In doing so they behaved particularly leniently and sympathetically, i.e. humanely [toward the victims]. Their attitudes were not anti- Jewish. Moreover, as the

[trial court] judgment also explicitly finds, they did not have an awareness of the illegality of what they were doing." *Id.* at 151. Accordingly, the court of appeal reversed their convictions. *Id.*

In light of the *Hechingen* case—which has received surprisingly little attention from courts and litigants under the Alien Tort Statute, *cf.* Brief of Amici Curiae International Law Scholars William Aceves, et al., in support of Pet'n for Writ of Cert., *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, No. 09–1262, 2010 WL 1787371, at *7 & n. 4 (Apr. 30, 2010) (arguing that "a single deviation from a long line of precedent does not modify customary international law")—the Court is compelled to conclude that the "purpose" *mens rea* standard is the correct standard for Alien Tort Statute purposes and the *Furundzija* "knowledge" standard is not. The *Hechingen* precedent was simply brushed aside by the ICTY Trial Chamber in *Furundzija*, *see* 38 I.L.M. 317, at ¶ 248 ("the high standard proposed by [*Hechingen* ] is not reflected in the other cases"). But in light of *Sosa*, this Court is not in a position to ignore international precedent so easily.[30]

Notably, this conclusion is further supported by the Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90, which "has been signed by 139 countries and ratified by 105, including most of the mature democracies of the

[30] It might be argued that the *Hechingen* court's opinion was directed toward "joint criminal enterprise" (i.e., conspiracy) liability rather than aiding and abetting liability. But this argument is belied by the fact that the *Hechingen* court stated that the defendants were accused of being an "**accessory** [ ] to a crime against humanity." *The Hechingen and Haigerloch Case*, 7 J. Int'l Crim. Just. at 150 (emphasis added).

world," *Khulumani*, 504 F.3d at 333 (Korman, J., concurring), and which "by and large may be taken as constituting an authoritative expression of the legal views of a great number of States." *Furundzija*, 38 I.L.M. 317, at ¶ 227. Importantly, the Rome Statute, unlike many other international law sources, specifically and clearly "articulates the mens rea required for aiding and abetting liability" and harmonizes all of the relevant caselaw from international tribunals. *Khulumani*, 504 F.3d at 275 (Katzmann, J., concurring); *cf. Abagninin*, 545 F.3d at 738–40 (rejecting plaintiffs' reliance on Rome Statute with respect to genocide because Rome Statute's definition of genocide conflicted with definition that was uniformly adopted by other authorities).

The Rome Statute provides that "a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court[31] if that person[,] ... [f]or the **purpose** of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission." Article 25(3)(c) (emphasis added). The "purpose" *mens rea* standard should be contrasted with the treaty's general "intent and knowledge" standard, art. 30(1),[32] the criminal negligence standard

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[31] The Rome Statute establishes jurisdiction for "the most serious crimes of concern to the international community as a whole," art. 5(1), namely, genocide, crimes against humanity, war crimes, and aggression. "Crimes against humanity" include many of the claims at issue in this case, including enslavement, severe deprivation of physical liberty, and torture. Art. 7(1)(c),(e),(f).

[32] Article 30 provides:

applicable to military commanders' liability for subordinates' actions, art. 28(a),[33] the criminal recklessness standard applicable to other superiors for their subordinates' actions, art. 28(b),[34] and the intent and

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1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.

2. For the purposes of this article, a person has intent where:

(a) In relation to conduct, that person means to engage in the conduct;

(b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

3. For the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly.

[33] Article 28(a) provides:

A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

(i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

(ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

[34] Article 28(b) provides:

knowledge standard applicable to conspirators (that is, members of "groups acting with a common purpose").[35] It is also noteworthy that the "purpose" standard "was borrowed from the Model Penal Code of the American Law Institute and generally implies a specific subjective requirement stricter than knowledge." *See* International Commission of Jurists, Expert Legal Panel on Corporate Complicity in International Crimes, 2 *Corporate Complicity & Le-*

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With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

(i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;

(ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and

(iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

[35] Article 25(3)(d) provides:

[A] person shall be criminally responsible and liable for punishment for a crime with the jurisdiction of the Court if that person ... [i]n any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

(i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or

(ii) Be made in the knowledge of the intention of the group to commit the crime.

*gal Accountability* 22 (2008) (citing Kai Ambos, "Article 25: Individual Criminal Responsibility," in Otto Triffterer, ed., *Commentary on the Rome Statute* (1999)).

Much like the Nuremberg-era *Hechingen* case, the Rome Statute's "purpose" standard, was largely ignored by the *Furundzija* tribunal. The *Furundzija* tribunal cited Article 30 of the Rome Statute for the proposition that "knowledge" is the default *mens rea* for violations of human rights law, and wholly failed to mention the more specific "purpose" standard set forth for aiding and abetting liability under Article 25 of the Rome Statute. *See Furundzija*, 38 I.L.M. 317, at ¶ 244 & n. 266; Rome Statute, at art. 25(3)(c) (establishing aiding and abetting liability where defendant acts "[f]or the **purpose** of facilitating the commission of" the principal offense) (emphasis added). Yet as the *Furundzija* court recognized, "[i]n many areas the [Rome] Statute may be regarded as indicative of the legal views, i.e. *opinio juris* of a great number of States." *Furundzija*, 38 I.L.M. 317, at ¶ 227; *see also Prosecutor v. Tadic*, No. IT–94–1–A, at ¶ 223 & n. 282 (ICTY Appeals Chamber, July 15, 1999) (same), *available at* 1999 WL 33918295. The Rome Statute's "purpose" standard must be given great weight. It should be noted as well that the Rome Statute's standard is not a lone outlier: the same articulation appears in the United Nations's regulations governing human rights tribunals in East Timor. *See* United Nations Transitional Administration in East Timor, "On the Establishment of Panels with Exclusive Jurisdiction Over Serious Criminal Offenses," § 14.3(c), UNTAET Reg. NO.2000/15 (June 6, 2000), *available at* http://www.un. org/en/peacekeeping /missions/past/ etimor/untaetR/Reg0015E.pdf.

Some (including Plaintiffs) have argued that the Rome Statute does not abrogate prior customary international law. (*See* 2/23/09 Opp. at 13 n. 16.) However, this argument rests in part on a misreading of the Rome Statute itself. This argument rests on Article 10 of the Statute, which provides that "[n]othing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute." Based on this provision, Plaintiffs argue that the Rome Statute does not override international caselaw to the contrary. But Article 10 only establishes that nothing "**in this Part**" affects existing customary international law. Rome Statute, art. 10 (emphasis added). Article 10 appears in **Part II**, which governs "Jurisdiction, admissibility and applicable law." On the other hand, Article 25, which establishes the rules regarding individual criminal responsibility (including aiding and abetting liability), appears in **Part III** of the Treaty, under the heading "General principles of criminal law." *See* Rome Statute, arts. 22–33 ("Part III"); *see also Tadic*, 1999 WL 33918295, at ¶ 223 n. 282 (making same observation). As such, Article 10 does not apply to the present analysis, and it is therefore appropriate that the Rome Statute's articulation of the relevant *mens rea* standard—which has been approved by the majority of nations in the world—should prevail over conflicting international caselaw.[36]

Accordingly, in light of *Sosa'* s requirement that international law norms must be "accepted by the

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[36] In any event, as discussed throughout this Order, the Court concludes that, even if the Rome Statute is not determinative, only the "purpose" standard has achieved the requisite universal consensus to satisfy *Sosa*.

civilized world" and "defined with a specificity comparable to" the eighteenth-century norms recognized by Blackstone, *Sosa*, 542 U.S. at 725, 124 S.Ct. 2739, the Court concludes that it is appropriate to adopt the "purpose" *mens rea* standard rather than the "knowledge" standard. *See Presbyterian Church of Sudan*, 582 F.3d at 259; *Khulumani*, 504 F.3d at 277 (Katzmann, J., concurring), 332–33 (Korman, J., concurring in relevant part).

*3. SUMMARY OF AIDING AND ABETTING STANDARD*

In sum, the Court concludes that the "core" definition of aiding and abetting under international law requires the following. A person is legally responsible for aiding and abetting a principal's wrongful act when the aider and abettor (1) carries out acts that have a substantial effect on the perpetration of a specific crime, and (2) acts with the specific intent (i.e., for the purpose) of substantially assisting the commission of that crime. *See Presbyterian Church of Sudan*, 582 F.3d at 259 (articulating *mens rea* standard); *Blagojevic*, at ¶ 127 (articulating *actus reus standard* ). The Court concludes that the relevant international caselaw, as construed in accordance with *Sosa*, supports this articulation of the aiding and abetting standard.

## D. NUREMBERG–ERA ILLUSTRATIONS OF AIDING AND ABETTING UNDER INTERNATIONAL LAW

The seminal cases discussing aiding and abetting liability were issued following the Second World War by military tribunals operating under the rules of the

London Charter of the International Military Tribunal at Nuremberg.[37]

The most important illustration of aiding and abetting liability involves the prosecution of a bank officer named Karl Rasche in *United States v. von Weizsaecker et al.* ("*The Ministries Case*" ), 14 T.W.C. at 308, 621–22.[38] The three-judge military tribunal declined to impose criminal liability with respect to the bank's loans of "very large sums of money" to various SS enterprises that used slave labor and engaged in the forced migration of non-German populations. *Id.* at 621. The court held that it was insufficient that the defendant knew that the loan would be

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[37] These cases were decided by British and American military tribunals and by British, German, and French courts operating under the standards set forth in the London Charter (which was incorporated by reference into Control Council Law Number 10, which established and governed the tribunals). *See Flick v. Johnson*, 174 F.2d 983, 984–86 (D.C.Cir.1949) (dismissing a petition for habeas corpus and holding that the Control Council military tribunals were international rather than national judicial bodies); *United States v. Flick* ("*The Flick Case*"), 6 T.W.C. at 1198 ("The Tribunal ... is an international tribunal established by the International Control Council, the high legislative branch of the four Allied Powers now controlling Germany (Control Council Law No. 10, 20 Dec. 1945).... The Tribunal administers international law. It is not bound by the general statutes of the United States.").

[38] It is unclear whether this case addresses the *mens rea* element of aiding and abetting, *see Presbyterian Church of Sudan*, 582 F.3d at 259; *Khulumani*, 504 F.3d at 276 (Katzmann, J., concurring), 292–93 (Korman, J., concurring); or the *actus reus* element, *see In re South African Apartheid Litig.*, 617 F.Supp.2d 228, 258, 260 (S.D.N.Y.2009). Regardless of how the case is categorized, its holding is plainly relevant with respect to the **facts** of the present case, particularly when taken in conjunction with similar Nuremberg-era precedents.

used for criminal purposes by the SS enterprises. In full, the court held:

> The defendant is a banker and businessman of long experience and is possessed of a keen and active mind. Bankers do not approve or make loans in the number and amount made by the Dresdner Bank without ascertaining, having, or obtaining information or knowledge as to the purpose for which the loan is sought, and how it is to be used. It is inconceivable to us that the defendant did not possess that knowledge, and we find that he did.[39]
>
> The real question is, is it a crime to make a loan, knowing or having good reason to believe that the borrower will use the funds in financing enterprises which are employed in using labor in violation of either national or international law? Does he stand in any different position than one who sells supplies or raw materials to a builder building a house, knowing that the structure will be used for an unlawful purpose? A bank sells money or credit in the same manner as the merchandiser of any other commodity. It does not become a partner in enterprise, and the interest charged is merely the gross profit which

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[39] In a separate part of the opinion which held Rasche liable as a member of the SS, the tribunal concluded that Rasche "knew of the Germanization and resettlement program, knew that it was accomplished by forcible evacuation of the native populations and the settlement of ethnic Germans on the farms and homes confiscated from their former owners, and knew it was one of the SS programs and projects." *Ministries Case*, 14 T.W.C. at 863.

> the bank realizes from the transaction, out of which it must deduct its business costs, and from which it hopes to realize a net profit. Loans or sale of commodities to be used in an unlawful enterprise may well be condemned from a moral standpoint and reflect no credit on the part of the lender or seller in either case, but the transaction can hardly be said to be a crime. Our duty is to try and punish those guilty of violating international law, and we are not prepared to state that such loans constitute a violation of that law, nor has our attention been drawn to any ruling to the contrary.

*Ministries Case*, 14 T.W.C. at 622. The court accordingly acquitted Rasche on the charge of aiding and abetting the SS's use of slave labor and forced migration. *Id*. The court applied an identical analysis in acquitting Rasche on an additional count of aiding and abetting spoliation (plundering) activities by financing the German government's "spoliation agencies." *Id*. at 784.

Rasche's case must be contrasted with the *The Flick Case*, 6 T.W.C. at 1187. The defendants Flick and Steinbrinck were charged with being "members of the Keppler Circle or Friends of Himmler, [and] with knowledge of its criminal activities, contributed large sums to the financing of" the SS. *Id*. at 1190. Both Flick and Steinbrinck gratuitously donated 100,000 Reichsmarks annually to a "cultural" fund headed by Himmler (the head of the SS). *Id*. at 1219–20. The amount was "a substantial contribution"—"even [for] a wealthy man"—and plainly could have not have been used by Himmler solely for cultural purposes. *Id*. at 1220. The court explained that al-

though Flick and Steinbrinck might have plausibly argued that they were initially ignorant of the true purposes of their donations, they continued making donations well after "the criminal character of the SS ... must have been known" to them. *Id.* at 1220. The court held that Flick and Steinbrinck had effectively given Himmler "a blank check," by which "[h]is criminal organization was maintained." *Id.* at 1221. When a donor provides extensive sums of money to a criminal organization without asking for anything in return, it is "immaterial whether [the money] was spent on salaries or for lethal gas." *Id.* The donor becomes guilty of aiding and abetting the organization's criminal acts: "One who knowingly by his influence and money contributes to the support [of a criminal organization] must, under settled legal principles, be deemed to be, if not a principal, certainly an accessory to such crimes." *Id.* at 1217. Yet, at the same time, the tribunal also found that Flick and Steinbrinck had not joined in the Nazi Party's ideologies: "Defendants did not approve nor do they now condone the atrocities of the SS." *Id.* at 1222. The defendants "were not pronouncedly anti-Jewish," and in fact "[e]ach of them helped a number of Jewish friends to obtain funds with which to emigrate." *Id.* The tribunal found it "unthinkable that Steinbrinck, a V-boat commander who risked his life and those of his crew to save survivors of a ship which he had sunk, would willingly be a party to the slaughter of thousands of defenseless persons." *Id.* Similarly Flick "knew in advance of the plot on Hitler's life in July 1944, and sheltered one of the conspirators." *Id.* It thus cannot reasonably be argued that the defendants made their contributions for the **purpose** of assisting the SS's acts.

The distinctions between Flick and Steinbrinck in *The Flick Case* and Rasche in *The Ministries Case* are narrow, but important. Neither Flick nor Steinbrinck acted with the **purpose** of furthering the Nazi cause; indeed, the tribunal explicitly concluded that neither defendant shared the German government's genocidal intent. However, by gratuitously donating money to the Nazi party with full knowledge of the fact that the money would be used to further the German government's atrocities, they were found guilty as accessories to those atrocities. In *The Ministries Case*, the banker Rasche also acted with full knowledge that his loans would be used to benefit enterprises that used slave-labor and engaged in forced migrations. 14 T.W.C. at 622, 863. But Rasche was acquitted. Regardless of whether the holdings are categorized as turning on the defendant's *actus reus* or the *mens rea*,[40] the ultimate conclusion is clear: ordinary commercial transaction [sic], without more, do not violate international law. In one case, the defendant provided payments without asking for anything in return; in the other case, the defendant engaged in commercial transactions by lending money. One is guilty of violating international law, and the other is not.

A similar distinction can be found by contrasting another pair of Nuremberg-era precedents, the *Zyklon B Case*, *in* 1 *Law Reports of Trials of War Criminals* 93 (1947), and *The I.G. Farben Case*, 8

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[40] As noted in footnote 38 *supra*, the Second Circuit in *Khulumani* and *Presbyterian Church of Sudan* has characterized these cases as reflecting a "purpose" *mens rea* standard, whereas the District Court in *In re South African Apartheid* has characterized them as reflecting the "substantial effect" *actus reus* standard.

T.W.C. 1081. In the *Zyklon B Case*, defendant Bruno Tesch and a colleague were engaged in the business of providing gasses and equipment for use in exterminating lice. *See* 1 *Law Reports of Trials of War Criminals* at 94. Tesch and his colleague provided the German government with "expert technicians to carry out ... gassing operations" as well as training to the German government on using the gasses. *Id*. They did not physically supply the gas itself, but were exclusive sales agents for the gas in the relevant region of Germany. *Id*. The evidence showed not only that Tesch provided the gas, the training, and the tools for using the gas to carry out genocide; the evidence also showed that Tesch had suggested to the German government that the Germans use the gas in the first place. *Id*. at 95. Following the close of evidence, the prosecutor argued that "[t]he essential question was whether the accused knew of the purpose to which their gas was being put," because "by supplying gas, knowing that it was to be used for murder, the [ ] accused had made themselves accessories before the fact to that murder." *Id*. at 100–01. Both Tesch and his colleague (who was personally responsible for operating the business for approximately 200 days a year while Tesch was traveling) were convicted of being accessories to murder. *Id*. at 102.

In contrast, in *The I.G. Farben Case*, various executives and directors of I.G. Farben were charged with supplying Zyklon B gas to the Germans for use in the concentration camps. 8 T.W.C. at 1168. The defendants were directors of a company called "Degesch," which was 45% owned by I.G. Farben and which was one of two companies that manufactured and sold the Zyklon B gas. *Id*. at 1168–69. The tribunal explained that the evidence showed that the di-

rectors were not closely involved in the management of the company, and also that the German government's use of the Zyklon B gas in the concentration camps was kept top secret. *Id*. The court summarized the relevant considerations:

> The proof is quite convincing that large quantities of Cyclon–B were supplied to the SS by Degesch and that it was used in the mass extermination of inmates of concentration camps, including Auschwitz. But neither the volume of production nor the fact that large shipments were destined to concentration camps would alone be sufficient to lead us to conclude that those who knew of such facts must also have had knowledge of the criminal purposes to which this substance was being put. Any such conclusion is refuted by the well-known need for insecticides wherever large numbers of displaced persons, brought in from widely scattered regions, are confined in congested quarters lacking adequate sanitary facilities.

*Id*. at 1169.

Accordingly, the *I.G. Farben* court held that the defendants, unlike Bruno Tesch in the *Zyklon B Case*, were not guilty as accessories to the gassing of the victims in the concentration camps. *Id*. In one case, the defendants had provided the tools and the training on using those tools for illegal purposes; in the other case, the defendants provided only the tools and were unaware of the illegal acts being done.

Having set forth these basic contours of aiding and abetting liability, it is useful to turn to the cases that Plaintiffs argue are most factually analogous,

given that they involve businesspeople who directly benefitted from the use of forced labor.

In *The Flick Case*, defendant Flick, in addition to being convicted for contributing to Himmler and the SS, was also convicted of "participation in the slave-labor program of the Third Reich" because he acted with "knowledge and approval" of his co-defendant Weiss's decision to order additional freight-car production from a facility that utilized slave-labor. 6 T.W.C. at 1190, 1198. Plaintiffs argue that this conviction resulted from aiding and abetting or accessorial liability. However, Plaintiffs fail to note that Flick was the **controlling owner** of an industrial empire that included coal and iron mining companies, steel-production companies, and finished-goods companies that made machinery out of the raw steel produced by the other companies. *Id*. at 1192. The indictment charged that Flick and his co-defendants "sought and utilized ... slave labor program [by using] tens of thousands of slave laborers, including concentration camp inmates and prisoners of war, in the industrial enterprises and establishments owned, controlled, or influenced by them." *Id*. at 1194 (addition in original). The indictment further charged that Flick "participated in the formulation and execution of such slave-labor program." *Id*.

The tribunal held that Flick and the co-defendants were not guilty of most of the charged offenses because "the slave-labor program had its origin in Reich governmental circles and was a governmental program, and ... the defendants had no part in creating or launching this program." *Id*. at 1196. The German government had required the companies to employ "voluntary and involuntary foreign civilian workers, prisoners of war and concen-

tration camp inmates," and "the defendants had no actual control of the administration of such program." *Id*. The government allocated the involuntary labor and set production quotas for the mines and factories. *Id*. at 1197. Accordingly, the tribunal acquitted the defendants on the basis of necessity and duress because they had acted under government compulsion. *Id*. at 1201–02.

There was, however, a single exception to the acquittal: defendant Weiss had actively solicited an "increased freight car production quota" and "took an active and leading part in securing an allocation of Russian prisoners of war for use in the work of manufacturing such increased quotas." *Id*. at 1198. This decision was "initiated not in governmental circles but in the plant management ... for the purpose of keeping the plant as near capacity production as possible." *Id*. at 1202. The necessary effect of the increased production quota was to lead directly to "the procurement of a large number of Russian prisoners of war" to carry out the production. *Id*. The tribunal accordingly found Weiss guilty of participation in the unlawful employment of slave labor.

The tribunal also found Flick guilty for the same acts because "[t]he active steps taken by Weiss [were made] with the knowledge and approval of Flick." *Id*. at 1202; *see also id*. at 1198 (noting "the active participation of defendant Weiss, with the knowledge and approval of defendant Flick, in the solicitation of increased freight car production quota"). It must be emphasized that Flick was the controlling owner of the entire industrial enterprise, and Weiss was Flick's nephew and chief assistant. *Id*. at 1192–93. Given the close relationship between Flick and the direct perpetrator Weiss, and given Flick's central

role in the industrial enterprise that directly employed the slave labor, the case is better viewed as imposing direct liability on Flick as a personal participant in the employment of slave labor. *See*, *e.g.*, *In re Agent Orange Product Liability Litig*., 373 F.Supp.2d 7, 98 (E.D.N.Y.2005) ("Flick was found guilty of charges reflecting his commercial activities and those of his corporations."). Alternatively, Flick's liability could viewed as an example of the operation of *respondeat superior* liability under agency principles, or command responsibility, or, perhaps, aiding and abetting liability of the type described in *The Einsatzgruppen Case*, where a top-level commanding authority fails to prevent a known violation. *See Einsatzgruppen Case*, 4 T.W.C. at 572; *see also Delalic*, 1998 WL 34310017, at ¶ 360 ("Noting th[e] absence of explicit reasoning [in *Flick* ], the United Nations War Crimes Commission has commented that it 'seems clear' that the tribunal's finding of guilt was based on an application of the responsibility of a superior for the acts of his inferiors which he has a duty to prevent.") (citing *Trial of Friedrich Flick et al., in 9 Law Reports of Trials of War Criminals* 54 (1949)); *accord Hilao v. Estate of Marcos*, 103 F.3d 767, 777–78 (9th Cir.1996) (discussing principles of command responsibility).

The same conclusion may be drawn from the *I.G. Farben Case'* s discussion of slave labor (which is also relied upon by Plaintiffs). The I.G. Farben company had undertaken a construction project in Auschwitz to build a rubber factory. *I.G. Farben Case*, 8 T.W.C. 1081, 1180–84. Defendant Krauch was the Plenipotentiary General for Special Questions of Chemical Production, and was responsible for "pass[ing] upon the applications for workers made by the individual plants of the chemical industry." *Id*. at 1187. The tri-

bunal held that, although Krauch was not responsible for certain wrongful acts in which he was not personally involved,

> he did, and we think knowingly, participate in the allocation of forced labor to Auschwitz and other places where such labor was utilized within the chemical field.... In view of what he clearly must have known about the procurement of forced labor and the part he voluntarily played in its distribution and allocation, his activities were such that they impel us to hold that he was a willing participant in the crime of enslavement.

*Id*. at 1189. Plaintiffs argue that Krauch's case illustrates the scope of aiding and abetting liability under international law, and that the tribunal's discussion reflects a "knowledge" *mens rea* standard. However, the tribunal's decision plainly rests on the fact that Krauch "knowingly [ ] **participate[d]** in the allocation of forced labor to Auschwitz," and "was a willing **participant** in the crime of enslavement." *Id*. at 1189 (emphasis added). The case is plainly not an example of aiding and abetting liability.

These same observations regarding direct personal involvement apply equally to the third major Nuremberg-era case involving German industrialists. In *United States v. Krupp* ("*The Krupp Case*"), the tribunal convicted various directors and officers of the Krupp corporation for using forced labor in their factories. The tribunal cited evidence such as a letter from the Board of Directors to the German Army High Command stating that "we are ... very anxious to employ Russian prisoners of war in the very near future, [and] we should be grateful if you would give us your opinion on this matter as soon as

possible." *Krupp*, 9 T.W.C. at 1439. In this and other instances, "the Krupp firm had manifested not only its willingness but its ardent desire to employ forced labor." *Id*. at 1440. All but three of the defendants had "participated in the establishment and maintenance" of a particularly brutal forced labor camp at Dechenschule. *Id*. at 1400–02. Of the three who were not involved with Dechenschule, one (Pfirsch) was acquitted of forced labor charges because he was not involved in any of the company's forced labor activities. *See generally id*. at 1402–49 (court's factual summary and legal analysis is silent as to Pfirsch). One of the other three (Loeser) was found guilty because he had participated directly in the creation of a forced-labor factory at Auschwitz. *Id*. at 1414, 1449. The third (Korschan) was found guilty because he had directly supervised a large contingent of Russian laborers and had signed a letter proposing the use of concentration-camp labor to increase the production of armaments toward the end of the war. *Id*. at 1405, 1418–19, 1449. The court accordingly rejected the Krupp employees' necessity defense and found all but one of them (Pfirsch) guilty of employing forced labor in their business. *Id*. at 1441–49.

Thus, like the *Krauch* case, *Krupp* does not provide any discussion of secondary liability for the underlying violations. Contrary to Plaintiffs' characterization, the defendants in these two cases were direct participants in the illegal acts, and these cases are inapposite to the present case.

## E. ILLUSTRATIONS UNDER THE ALIEN TORT STATUTE[41]

These foundational principles of aiding and abetting liability are illustrated in the Second Circuit's recent decision in *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir.2009). The *Presbyterian Church of Sudan* court held on summary judgment that a Canadian energy firm had not purposefully aided and abetted the Sudanese government in committing crimes against humanity. The court examined the evidence and determined that there was no reasonable inference that the defendants acted with the **purpose** of furthering the Sudanese government's policies of clearing out the disfavored ethnic groups. Specifically, the defendants' actions included the following: "(1) upgrading the Heglig and Unity airstrips; (2) designating areas 'south of the river' in Block 4 for oil exploration; (3) providing financial assistance to the Government through the payment of royalties; and (4) giving general logistical support to the Sudanese military." *Id.* at 261 (quoting *Presbyterian Church of Sudan*, 453 F.Supp.2d at 671–72) (alterations omitted).

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[41] The Court notes that the present Order largely avoids discussing international-law precedents from the International Criminal Tribunals for the Former Yugoslavia and Rwanda. The Court has examined these cases and finds that they are factually inapposite because they discuss aiding and abetting liability in the context of civil war and military control of the population. None of the International Criminal Tribunal cases offer analogous discussions of aiding and abetting liability with respect to business transactions.

For a thorough discussion of the limitations of the International Criminal Tribunal cases, *see Khulumani*, 504 F.3d at 334–37 (Korman, J., concurring).

The first issue involved the assistance with building roads and airstrips despite knowing that this infrastructure might be used by the government to conduct attacks on civilians. The court recognized that the defendants "had a legitimate need to rely on the [Sudanese] military for defense" because of the unrest in the region; given this legitimate need, the evidence that the defendant was "coordinating with the military supports no inference of a purpose to aid atrocities." *Id*. at 262. As for the second sets of acts—designating certain areas for oil exploration—there was no evidence that the oil exploration even occurred or that any international law violations took place. *Id*. With respect to royalty payments to the government, the court explained that "[t]he royalties paid by [defendant] may have assisted the Government in its abuses, as it may have assisted any other activity the Government wanted to pursue. But there is no evidence that [defendants] acted with the purpose that the royalty payments be used for human rights abuses." *Id*. Finally, the act of providing fuel to the military was not criminal because "there is no showing that Talisman was involved in such routine day-to-day [defendant] operations as refueling aircraft. Second, there is no evidence that [defendant's] workers provided fuel for the purpose of facilitating attacks on civilians; to the contrary, an e-mail from a Talisman employee to his supervisor, which plaintiffs use to show that the military refueled at a [defendant] airstrip, expresses anger and frustration at the military using the fuel." *Id*. at 262–63. In short, none of the purported acts of aiding and abetting were supported by the necessary "purpose" *mens rea*.

Notably, the court stated that **something more** than mere knowledge and assistance are required to

hold commercial actors liable for third parties' violations of international law. The court explained:

> There is evidence that southern Sudanese were subjected to attacks by the Government, that those attacks facilitated the oil enterprise, and that the Government's stream of oil revenue enhanced the military capabilities used to persecute its enemies. But if ATS liability could be established by knowledge of those abuses coupled only with such commercial activities as resource development, the statute would act as a vehicle for private parties to impose embargos or international sanctions through civil actions in United States courts. Such measures are not the province of private parties but are, instead, properly reserved to governments and multinational organizations.

*Id*. at 264.

The *Presbyterian Church of Sudan* court's ultimate conclusion is in full accord with the trend identified *supra* with respect to the Nuremberg-era cases involving German industrialists. When a business engages in a commercial *quid pro quo*—for example, by making a loan to a third party—it is insufficient to show merely that the business person knows that the transaction will somehow facilitate the third party's wrongful acts. *See The Ministries Case*, 14 T.W.C. at 621–22. Rather, the business person must participate more fully in the wrongful acts—most obviously, in the cases involving the primary liability of the industrialists who personally participated in planning and using of slave labor. *See*, *e.g.*, *Krupp*, 9 T.W.C. at 1439–49; *The I.G. Farben Case*, 8 T.W.C. at 1189; *The Flick Case*, 6 T.W.C. at 1190–93. Or, al-

ternatively, the business person must be acting in a non-commercial, non-mutually-beneficial manner, as with the banker in *The Flick Case* who gratuitously funded the SS's criminal activities, 6 T.W.C. at 1219–20, or the chemical-company employees in the *Zyklon B Case* who provided the gas, tools, and specific training that facilitated the Germans' genocidal acts. *Zyklon B Case*, *in* 1 *Law Reports of Trials of War Criminals*, at 95, 100–01.

This conclusion is supported by the domestic caselaw applying the Alien Tort Statute. In *Corrie v. Caterpillar, Inc.*, 403 F.Supp.2d 1019 (W.D.Wash.2005), *aff'd on other grounds*, 503 F.3d 974, 977 (9th Cir.2007) (holding that case presented nonjusticiable political question), the district court held that a bulldozer manufacturer could not be held liable for aiding and abetting the Israeli military in demolishing residences and causing deaths and injuries to the residents. The court explained that even if the defendant "knew or should have known" (as the plaintiff conclusorily alleged in the pre-*Twombly* era, *see id.* at 1023) that the bulldozers would be used to commit those illegal acts, "[o]ne who merely sells goods to a buyer is not an aider and abettor of crimes that the buyer might commit, even if the seller knows that the buyer is likely to use the goods unlawfully, because the seller does not share the specific intent to further the buyer's venture." *Id.* at 1027 (citing *United States v. Blankenship*, 970 F.2d 283, 285–87 (7th Cir.1992) ("a supplier joins a venture only if his fortunes rise or fall with the venture's, so that he gains by its success")).

A relevant contrast to *Presbyterian Church of Sudan* and *Corrie* may be found in the allegations against automakers Daimler, Ford, and General Mo-

tors in *In re South African Apartheid Litig.*, 617 F.Supp.2d 228 (S.D.N.Y.2009), *on remand from Khulumani*, 504 F.3d 254. The plaintiffs in that case alleged that the automakers "aided and abetted extrajudicial killing through the production and sale of specialized military equipment." *Id.* at 264; *see also id.* at 266–67. The defendants were not selling ordinary vehicles to the South African government; they were selling "heavy trucks, armored personnel carriers, and other specialized vehicles," including "military vehicles." *Id.* at 264, 266. "These vehicles were the means by which security forces carried out attacks on protesting civilians and other antiapartheid activists." *Id.* at 264. The plaintiffs also alleged that the automakers both knew of and affirmatively expressed their support for the South African government's illegal activities. *Id.* Accordingly, the court held that the automakers could be held liable for selling these military-type products to the South African government, thereby aiding and abetting the government's atrocities. On the other hand, the court held that the automakers could not be liable for selling "passenger vehicles" and mass-market light trucks to the government, because the "[t]he sale of cars and trucks without military customization or similar features that link them to an illegal use does not meet the *actus reus* requirement of aiding and abetting a violation of the law of nations." *Id.* at 267.

The *South African Apartheid* plaintiffs introduced similar allegations with respect to computer manufacturer IBM. The plaintiffs alleged that IBM provided computers to the South African regime and that the computers were used to further the regime's policies of apartheid because the computers allowed the regime to create a registry of individuals in order to relocate them and change their citizenship. *Id.* at

265. Importantly, the plaintiffs alleged that "IBM employees also assisted in developing computer software and computer support specifically designed to produce identity documents and effectuate denationalization." *Id*. at 265; *see also id*. at 268. These "customized computerized systems were indispensable to the organization and implementation of a system of geographic segregation and racial discrimination in a nation of millions." *Id*. at 265.[42]

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[42] The plaintiffs brought additional claims against the automakers and also brought claims against an arms manufacturer whose weapons were used by the South African government.

The plaintiffs alleged that the automakers "provided information about anti-apartheid activists to the South African Security Forces, facilitated arrests, provided information to be used by interrogators, and even participated in interrogations." *In re South African Apartheid*, 617 F.Supp.2d at 264. These allegations were clearly analogous to defendant Ohlendorf's case in *The Einsatzgruppen Case*, 4 T.W.C. at 569, in which the tribunal found the "defendant guilty of aiding and abetting Nazi war crimes by turning over a list of individuals who he knew 'would be executed when found.' " I*n re South African Apartheid*, 617 F.Supp.2d at 264 n. 192 (quoting *The Einsatzgruppen Case*, 4 T.W.C. at 569).

In *obiter dicta*, the district court addressed those allegations against the arms manufacturer despite the fact that the arms manufacturer had not brought a motion to dismiss. *Id*. at 269–70 & n. 231. The court suggested that the allegations sufficiently stated aiding and abetting claims with respect to the arms manufacturer's provision of equipment used to commit extrajudicial killings and enforcing apartheid. *Id*. at 270. The court suggested that the allegations were insufficient with respect to acts of torture, unlawful detention, and cruel, inhuman, and degrading treatment, apparently because the complaint did not allege that the weapons were used to perpetrate those crimes. *See id*.

The distinction between *Corrie* and *In re South African Apartheid* is instructive. In one case (*Corrie* ), a manufacturer sold its ordinary goods to a foreign government and the foreign government, with the manufacturer's knowledge, used the goods to commit alleged atrocities. In the other case (*In re South African Apartheid* ), manufacturers sold custom-made goods to a foreign government with the knowledge that those goods were an essential element of the foreign government's wrongful conduct. The manufacturers in *South African Apartheid* affirmatively evidenced their support for the government's conduct, either implicitly by intentionally creating custom equipment or explicitly by expressing their support for the government. As reflected in this comparison, a plaintiff must allege something more than ordinary commercial transactions in order to state a claim for aiding and abetting human rights violations. Indeed, consistent with the generally aiding and abetting standard articulated *supra*, a plaintiff must allege that the defendant's conduct had a substantial effect on the principal's **criminal acts**. Mere assistance to the principal is insufficient.[43]

Another example can be found in *Almog v. Arab Bank, PLC*, 471 F.Supp.2d 257 (E.D.N.Y.2007). There, the plaintiffs sued the defendant bank for aiding and abetting various terrorist activities by Hamas and other radical groups in violation of international law. The plaintiffs alleged that the defendant

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[43] The Court does not intend to suggest that the *South African Apartheid* decision was correctly decided. It is unclear to this Court whether (to take one example) an auto-manufacturer's act of selling military vehicles constitutes aiding and abetting human rights violations under established and well-defined international law.

bank knew of Hamas's terrorist activities, knew that the bank accounts were being used to fund the terrorist activities directly, and even "solicited and collected funds for" organizations that were known to be fronts for Hamas. *Id*. at 290. The plaintiffs also alleged that the bank was directly involved with Hamas's creation of bank accounts to provide for the families of suicide bombers. *Id*. at 291. The bank allegedly knew about the nature of the accounts, which "facilitated and provided an incentive for the suicide bombings and other murderous attacks," and the bank both maintained the accounts and "consulted with" a Hamas-related organization "to finalize the lists of beneficiaries" of the funds. *Id*. at 291–92. In light of these allegations, the court held that the defendant bank did not "merely provide [ ] routine banking services" that benefitted the terrorist organization. *Id*. at 291. Rather, the bank "active[ly] participat[ed]" in the terrorist organization's activities. *Id*. at 292; *see also Lev v. Arab Bank, PLC*, No. 08 CV 3251(NG)(VVP), 2010 WL 623636, at *2 (E.D.N.Y. Jan. 29, 2010) (holding that *Presbyterian Church of Sudan'* s "purpose" *mens rea* standard was satisfied by the allegations in *Almog* because "Plaintiffs' plausible factual allegations here permit the reasonable inference that Arab Bank was not merely the indifferent provider of 'routine banking services' to terrorist organizations, but instead purposefully aided their violations of international law").

A useful factual contrast to the *Almog* case can be found in part of the *South African Apartheid* case. In *South African Apartheid*, the plaintiffs alleged that a pair of banks had provided loans to the South African government and purchased "South African defense forces bonds." 617 F.Supp.2d at 269. The court, relying heavily on the Nuremberg-era *Minis-*

*tries Case* in which the tribunal acquitted the banker Karl Rasche, held that "supplying a violator of the law of nations with funds—even funds that could not have been obtained but for those loans—is not sufficiently connected to the primary violation to fulfill the actus reus requirement of aiding and abetting a violation of the law of nations." *Id*.

As a final pertinent example under the Alien Tort Statute, the Ninth Circuit has analyzed a specific intent *mens rea* standard in *Abagninin v. AMVAC Chemical Corp*., 545 F.3d 733 (9th Cir.2008).[44] The plaintiffs' allegations in Abagninin related to the defendants' alleged genocide through their use of agricultural pesticides that caused male sterility in villages in the Ivory Coast. *Id*. at 735–36. As defined in international law, genocide requires a showing of "specific intent" (which appears analogous to the "purpose" *mens rea* in the aiding and abetting context) to **achieve the particular wrongful result**—namely, to destroy a particular national or ethnic group as such. *Id*. at 739–40. The court specifically rejected a "knowledge" or general intent standard, which would have required a showing of the defendant's "awareness that a consequence will occur in the ordinary course of events." *Id*. at 738. Instead, the court required plaintiff to allege that defendants intended to cause the particular (genocidal) harm. Even though plaintiff alleged that the defendant knew of the likelihood that the chemicals caused this

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[44] The *Abagninin* case involved allegations that the defendant **directly** participated in the crime of genocide. The case is relevant because of the court's discussion of the specific intent standard under the law of genocide, which is generally analogous to the "purpose" or "specific intent" *mens rea* standard under the law of aiding and abetting.

particular harm, the court found significant the fact that the plaintiff "fail[ed] to allege that [the defendant] intended to harm him through the use of chemicals." *Id*. at 740. The court refused to infer from the plaintiff's allegations of **knowledge**, and rejected the plaintiff's conclusory statements that the defendant "acted with intent." *Id*. Finally, although one of the defendant's employees allegedly stated "[f]rom what I hear, they could use a little birth control down there," the court refused to attribute this statement to the corporate employer and also determined that the statement was not directed at the Ivory Coast (as is required to show genocidal intent with respect to Ivorians). *Id*.

## VII. DISCUSSION REGARDING AIDING AND ABETTING ALLEGATIONS

### A. BACKGROUND

Plaintiffs describe their allegations as encompassing three types of activities: financial assistance; provision of farming supplies, technical assistance, and training; and failure to exercise economic leverage.

Defendants break down the alleged conduct into five groups: financial assistance; providing farming supplies and technical farming assistance; providing training in labor practices; failing to exercise economic leverage; and lobbying the United States government to avoid a mandatory labeling scheme.

Because Plaintiffs bear the burden of pleading sufficient "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged," the Court will adopt Plaintiffs' preferred approach. *See Ashcroft v. Iqbal*, 556 U.S. ___, 129 S.Ct. 1937, 1949, 173

L.Ed.2d 868 (2009). As will be shown, the First Amended Complaint fails to allege that Defendants' conduct was "specifically directed to assist [or] encourage ... the perpetration of a certain specific crime," and "ha[d] a substantial effect of the perpetration of the crime." *See Blagojevic* (ICTY Appeals Chamber), at ¶ 127. Additionally, the First Amended Complaint fails to allege that Defendants acted with the "purpose" of facilitating the Ivorian farm owners' wrongful acts. *See Presbyterian Church of Sudan*, 582 F.3d at 259.[45]

### B. DISCUSSION OF ACTUS REUS

Plaintiffs assert that Defendants' conduct was "not only substantial, it was essential" to the existence of child slavery in Ivorian cocoa farming. (8/6/09 Opp. at 2.) Plaintiffs' fundamental premise is that Defendants were not engaged in ordinary commercial transactions; rather, Plaintiffs emphasize that Defendants "maintain[ ] exclusive supplier/buyer relationships with local farms and/or farmer cooperatives in Cote d'Ivoire," and that these exclusive relationships allow Defendants "to dictate the terms by which such farms produce and supply cocoa to them, including specifically the labor conditions under which the beans are produced." (FAC ¶ 33.) Plaintiffs further contend that "Defendants, because of their economic leverage in the region and exclusive supplier/buyer agreements[,] each had the ability to control and/or limit the use of forced child labor by the supplier farms and/or farmer cooperatives from which they purchased their cocoa beans." (FAC ¶ 48.)

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[45] And even if the Court were to apply the "knowledge" *mens rea* standard, Plaintiffs' allegations fail to satisfy the applicable standard as set forth *infra*.

In support of their claims, Plaintiffs detail three types of conduct: financial assistance; provision of farming supplies, technical assistance, and training; and failure to exercise economic leverage. The Court addresses each form of assistance in turn.

*1. FINANCIAL ASSISTANCE*

Plaintiffs allege that Defendants "provide ongoing financial support, including advance payments and personal spending money to maintain the farmers' and/or the cooperatives' loyalty as exclusive suppliers." (FAC ¶ 34.) Plaintiffs argue that Defendants' financial support "provide[d] the financial means ... to commit international human rights violations" and provided the "incentive for these farmers to employ slave-labor." (8/6/09 Opp. at 14–15.)

As is repeatedly illustrated in the caselaw discussed *supra*, merely "supplying a violator of the law of nations with funds" as part of a commercial transaction, without more, cannot constitute aiding and abetting a violation of international law. *In re South African Apartheid*, 617 F.Supp.2d at 269. The central example of this principle is provided in the discussion of banker Karl Rasche in *The Ministries Case*, 14 T.W.C. at 621–22. Rasche provided a loan of "very large sums of money" to enterprises that used slave labor, but was acquitted of aiding and abetting the enterprises' wrongdoing. *Id*. at 621. Likewise, the banks in *South African Apartheid* provided loans to the South African government and purchased government bonds. 617 F.Supp.2d at 269. The act of providing financing, without more, does not satisfy the *actus reus* requirement of aiding and abetting under international law.

On the other hand, if defendant engages in additional assistance beyond financing, or engages in financing that is gratuitous or unrelated to any commercial purpose, the *actus reus* element has been satisfied. So, for example, the bank in *Almog v. Arab Bank* did not just hold and transfer funds on behalf of the terrorist organization Hamas; rather, the bank took the extra step of "solicit[ing] and collect[ing]" those funds for Hamas. *Almog*, 471 F.Supp.2d at 290. As another example, the industrials Flick and Steinbrinck in *The Flick Case* did not provide hundreds of thousands of Reichsmarks to Himmler and the SS as part of a mutually beneficial commercial transaction; rather, the funds were donated gratuitously, and served as "a blank check" that ensured the "maintain[ence]" of the criminal organization. *The Flick Case*, 6 T.W.C. at 1220–21.

These observations are summarized in the District Court opinion in *In re South African Apartheid*:

> It is (or should be) undisputed that simply doing business with a state or individual who violates the law of nations is insufficient to create liability under customary international law. International law does not impose liability for declining to boycott a pariah state or to shun a war criminal....
>
> Money [as in *The Ministries Case* ] is a fungible resource, as are building materials [which were also mentioned in *The Ministries Case* ]. However, poison gas [as in the *Zyklon B Case* ] is a killing agent, the means by which a violation of the law of nations was committed. The provision of goods specifically designed to kill, to inflict pain, or to cause other injuries resulting from violations of custom-

> ary international law bear a closer causal connection to the principal crime than the sale of raw materials or the provision of loans. Training in a precise criminal use only further supports the importance of this link. Therefore, in the context of commercial services, provision of the means by which a violation of the law is carried out is sufficient to meet the *actus reus* requirement of aiding and abetting liability under customary international law.

*In re South African Apartheid*, 617 F.Supp.2d at 257–59 (citing *The Ministries Case*, 14 T.W.C. at 621–22; *The Zyklon B Case*, *in* 1 *Law Reports of Trials of War Criminals*, at 100–01). In contrast, "supplying a violator of the law of nations with funds—even funds that could not have been obtained but for those loans—is not sufficiently connected to the primary violation to fulfill the actus reus requirement of aiding and abetting a violation of the law of nations." *Id*. at 269.

Here, it is clear from Plaintiffs' allegations that Defendants were engaged in commercial transactions. Plaintiffs do not allege that Defendants gratuitously gave large sums of money to the Ivorian farmers in the manner that Flick and Steinbrinck gave money to the SS in *The Flick Case*. Rather, Plaintiffs' allegations specifically state that Defendants provided money to the farmers in order to obtain cocoa and to ensure a future cocoa supply. (FAC ¶ 34.) Even if the payments are described as "advance payments" (FAC ¶ 34), this is another way of stating that Defendants were paying for cocoa. *See Black's Law Dictionary* 1243 (9th ed. 2009) (defining "advance payment" as a "payment made in anticipation of a con-

tingent or fixed future liability or obligation"). And to the extent that Plaintiffs allege that Defendants provided "personal spending money" to the farmers, Plaintiffs themselves assert that these payments were made "to maintain the farmers' and/or the cooperatives' loyalty as exclusive suppliers." (FAC ¶ 34.) Again, Plaintiffs' own Complaint identifies the commercial *quid pro quo* in which Defendants were engaged.

In short, Plaintiffs fail to allege any facts showing that Defendants' transfers of money were "specifically directed to assist ... a certain specific crime" and had a "substantial effect on the perpetration of that crime." *See Blagojevic* (Appeals Chamber), at ¶ 127. Defendants' "financial assistance" does not constitute a sufficient *actus reus* under international law.

*2. PROVISION OF FARMING SUPPLIES, TECHNICAL ASSISTANCE, AND TRAINING*

Plaintiffs assert that Defendants provided "farming supplies, including fertilizers, tools and equipment; training and capacity[-]building in particular growing and fermentation techniques and general farm maintenance, including appropriate labor practices, to grow the quality and quantity of cocoa beans they desire." (FAC ¶ 34.) "The training and quality control visits occur several times per year." (*Id*.) Plaintiffs cite to Nestle's representation that it "provides assistance in crop production," and "provide[s] technical assistance to farmers." (FAC ¶¶ 36, 38.) This assistance "ranges from technical assistance on income generation to new strategies to deal with crop infestation." (FAC ¶ 38.) Similarly, Plaintiffs cite to Archer Daniels Midland's representation that "ADM

is working hard to help provide certain farmer organizations with the knowledge, tools, and support they need to grow quality cocoa responsibly and in a sustainable manner." (FAC ¶ 40.) Archer Daniels Midland provides "research into environmentally sound crop management practices, plant breeding work to develop disease-resistant varieties and farmer field schools to transfer the latest know-how into the hands of millions of cocoa farmers around the world." (FAC ¶ 41.)

Plaintiffs argue that these allegations show that "Defendant were providing the [Ivorian] farmers the necessary means by which to carry out slave labor." (Pls. Opp. (8/6/09), at 17.) Plaintiffs describe Defendants' actions as providing "logistical support and supplies essential to continuing the forced labor and torture." (*Id*. at 18.)

This line of argument is unavailing. Plaintiffs contend that Defendants' logistical support and other assistance generally furthered the Ivorian farmers' ability to continue using forced labor. However, Plaintiffs do not allege that Defendants provided supplies, assistance, and training that was "specifically directed" to assist or encourage "the perpetration of a certain specific crime," or that Defendants' conduct had a "substantial effect" on the specific crimes of forced labor, child labor, torture, and cruel, inhuman, and degrading treatment. Plaintiffs simply **do not** allege that Defendants' conduct was specifically related to those primary violations. Plaintiffs do not allege, for example, that Defendants provided the guns and whips that were used to threaten and intimidate the Plaintiffs, or that Defendants provided the locks that were used to prevent Plaintiffs from leaving their respective farms, or that Defendants

provided training to the Ivorian farmers about how to use guns and whips, or how to compress a group of children into a small windowless room without beds, or how to deprive children of food or water, or how to psychologically abuse and threaten them.[46] **That** is the type of conduct that gives rise to aiding and abetting liability under international law—conduct that has a **substantial effect** on a **particular criminal act**. *See*, *e.g.*, *Vasiljevic*, 2004 WL 2781932, at ¶¶ 41, 133–34 (affirming defendant's guilt for aiding and abetting murder where defendant, armed with a gun, escorted victims to murder site and pointed his gun at victims to prevent them from fleeing).

Plaintiffs' allegations do not identify any specific criminal acts that were substantially furthered by Defendants' general farming assistance. It is useful to compare Plaintiffs' allegations to the relevant caselaw. The defendants in the *Zyklon B Case* provided the gas that was used to commit murder and the training on how to use that gas; the automakers in *In re South African Apartheid* provided the specialized military vehicles that were used to further extrajudicial killings, 617 F.Supp.2d at 264, 266; and the computer company in that case provided customized software and technical support designed to facilitate a centralized identity database that supported the government's segregation, denationalization, and racial discrimination activities, *id*. at 265, 268. In contrast to those examples, the heavy-equipment manufacturer in *Corrie* sold its ordinary product to an alleged human-rights abuser, 403 F.Supp.2d at

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[46] This list of illustrations is not meant to be exhaustive, nor is it meant to suggest that Plaintiffs' Complaint would adequately state a claim for relief if it included such allegations.

1027, and the automakers in *South African Apartheid* were not liable for their sales of ordinary passenger vehicles to the apartheid regime, 617 F.Supp.2d at 267.

Another salient example is *Prosecutor v. Delalic*, in which the ICTY acquitted the defendant on aiding and abetting charges based on his "logistical support" to a prison that engaged in the unlawful confinement of civilians. *Delalic*, No. IT–96–21–T, at ¶ 1144 (Trial Chamber Nov. 16, 1998), *available at* 1998 WL 34310017, *aff'd*, No. IT–96–21–A, at ¶ 360 (Appeals Chamber Fed. 20, 2001), *available at* 2001 WL 34712258. The trial court concluded that the defendant had no authority over the prison camp, 1998 WL 34310017, at ¶ 669, and the appeals court agreed that "he was not in a position to affect the continued detention of the civilians at the [prison] camp." *Delalic*, 2001 WL 34712258, at ¶ 355. The appeals court explained that "the primary responsibility of Delalic in his position as co-ordinator was to provide logistical support for the various formations of the armed forces; that these consisted of, *inter alia*, supplies of material, equipment, food, communications equipment, railroad access, transportation of refugees and the linking up of electricity grids." *Id.* at ¶ 355 (citing Trial Chamber Judgment, at ¶ 664). The courts concluded that Delalic's involvement in the camp—although essential to its functioning—was unrelated to the specific offense of unlawful confinement of civilians. *Delalic*, 1998 WL 34310017, at ¶ 669, 2001 WL 34712258, at ¶ 355. Accordingly, he

was acquitted of aiding and abetting the crimes of unlawful confinement.[47]

Here, Plaintiffs allege that Defendants engaged in general assistance to the Ivorian farmers' farming activities-mainly, assisting crop production and providing training in labor practices. Plaintiffs do not allege that Defendant provided any specific assistance to the farmers' specific acts of slavery, forced labor, torture, and the like. In light of the international caselaw described *supra*, Plaintiffs' allegations do not give rise to a plausible inference that Defendants' conduct had a substantial effect on the Ivorian farmers' specific human rights abuses. As Defendants rightly point out, "providing a farmer with ...

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[47] Plaintiffs unpersuasively argue that Delalic occupied "a role equivalent to the prison camp's electrician and maintenance provider." (8/6/09 Opp. at 18.) This description of *Delalic* is plainly contradicted by the facts of the case. The Trial Chamber noted that some of "his duties were to operate as an effective mediator between the War Presidency, which is a civilian body, and the Joint Command of the Armed Forces. His regular intervention was designed to facilitate the work of the War Presidency with the different formations constituting the defence forces in Konjic.... Mr. Delalic was accountable to, and would report orally or in writing to, the body within the War Presidency which gave him the task." *Delalic*, 1998 WL 34310017, at ¶ 662. Delalic also helped prepare for military operations by "provid[ing] supplies to [a military] unit, including communications equipment, quartermaster supplies, uniforms and cigarettes," and "ma[king] arrangements for the relevant needs for first aid equipment, transport conveyance and such supplies and facilities as could be provided by the civilian authorities." *Id*. at ¶¶ 666, 668.

It should go without saying that these are odd responsibilities to give to a mere "electrician and maintenance provider." The Court is unpersuaded by Plaintiffs' attempt to downplay Delalic's responsibilities.

fertilizer does not substantially assist forced child labor on his farm." (Defs. Reply (8/24/09, at 13.)[48] Plaintiffs' allegations establish, at most, that Defendants generally assisted the Ivorian farmers in the act of growing crops and managing their business—**not** that Defendants substantially assisted the farmers in the acts of committing human rights abuses.

*3. FAILURE TO EXERCISE ECONOMIC LEVERAGE*

Plaintiffs' final set of allegations focus on Defendants' implicit moral encouragement and failures to act to prevent the Ivorian farmers' abuses. Plaintiffs assert that "Defendants, because of their economic leverage in the region and exclusive supplier/buyer agreements each had the ability to control and/or limit the use of forced child labor by the supplier farms and/or farmer cooperatives from which they purchased their cocoa beans." (FAC ¶ 48.) Plaintiffs argue that the international law *actus reus* standard is satisfied if "a different course of conduct could have been pursued that would have mitigated or prevented the [primary] offense." (Pls. Opp. (8/6/09), at 20.)

a. *LEGAL AUTHORITY*

The precise nature of aiding and abetting liability for omissions, moral support, and tacit approval and encouragement is uncertain. As noted by the

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[48] Indeed, the most reasonable conclusion is that Defendants' conduct **reduced** the extent of labor abuses on the Ivorian farms. Defendants' training in crop production techniques would have **increased** the efficiency of the Ivorian cocoa farms, thereby **reducing** the need for forced labor and child labor.

District Court in *Presbyterian Church of Sudan v. Talisman Energy*, omissions, moral support, and tacit approval and encouragement fall outside the "core" definition of aiding and abetting liability under international law. That court proceeded as this Court is proceeding—it applied the "core" notion of aiding and abetting but refrained from reaching into the outer fringes of international law to identify a novel and debatable aiding and abetting standard. As the court explained:

> Talisman [the defendant] also attempts to demonstrate that the *actus reus* standard for liability based on aiding and abetting is a source of disagreement in international law. Talisman points to a 1998 ICTY Trial Chamber decision that extended aiding and abetting liability in "certain circumstances" to "moral support or encouragement of the principals in their commission of the crime." *Prosecutor v. Furundzija*, No. IT–95–17/1–T, 1998 WL 34310018, para. 199 (Trial Chamber, Int'l Crim. Trib. for the Former Yugoslavia, Dec. 10, 1998). Discussing this standard, a Ninth Circuit panel decided to leave "the question whether such liability should also be imposed for moral support which has the required substantial effect to another day." *Doe I [v. Unocal Corp*.], 395 F.3d [932,] 951 [ (9th Cir.2002), *vacated on grant of rehearing en banc*, 395 F.3d 978, 979 (9th Cir.2003) ]. Talisman draws liberally from a concurring opinion in *Doe I* which noted that the inclusion of moral support is "far too uncertain and inchoate a rule for us to adopt without further elaboration as to its scope by international jurists," *id*. at 969–70 [Reinhardt, J.,

> concurring], and that "it is a novel standard that has been applied by just two ad hoc international tribunals." *Id*. at 969.
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> The question of whether the "novel" moral support standard should be included in the definition of aider and abettor liability, however, did not prevent the Ninth Circuit from imposing liability for aiding and abetting another's violation of international law under a settled, core notion of aider and abettor liability in international law "for knowing practical assistance or encouragement which has a substantial effect on the perpetration of the crime." *Id*. at 951 [maj. op.]. Therein lies the flaw in Talisman's argument. The ubiquity of disagreement among courts and commentators regarding the fringes of customary international legal norms is unsurprising. The existence of such peripheral disagreement does not, however, impugn the core principles that form the foundation of customary international legal norms—principles about which there is no disagreement.

*Presbyterian Church of Sudan*, 374 F.Supp.2d 331, 340–41 (S.D.N.Y.2005) (order denying defendants' motion for judgment on the pleadings).

The international tribunals themselves have recognized the uncertainty in this area of law. As explained by the prominent ICTY decision in *Prosecutor v. Tadic*:

> "mere presence [at the crime scene] seems not enough to constitute criminally culpable conduct, "[b]ut what further conduct would constitute aiding and abetting the commis-

> sion of war crimes or some accessory responsibility is not known with sufficient exactitude for 'line-drawing' purposes."

*Tadic*, No. IT–94–1–T, at ¶ (Trial Judgment May 7, 1997) (internal footnote omitted) (quoting Jordan Paust, *My Lai and Vietnam*, 57 Mil. L. Rev. 99, 168 (1972)), *available at* 1997 WL 33774656. The tribunal then summarized Nuremberg-era cases and emphasized that the cases "fail[ed] to establish specific criteria" governing this form of liability. *Id*.

The state of the law has not cleared up in the years following that decision. The International Tribunals for the Former Yugoslavia and Rwanda have engaged in a great deal of discussion of omissions, moral support, and tacit approval and encouragement, but have reached only a few concrete conclusions. The law in this area is simply too unclear to satisfy *Sosa' s* requirements of definiteness and universality. The Court therefore refrains from applying this "uncertain and inchoate" rule. *See Presbyterian Church of Sudan*, 374 F.Supp.2d at 340–41 (quotations omitted). In support of this conclusion, the Court notes four additional observations regarding this body of law.

First, one must attempt to distinguish omissions, moral support, and tacit approval and encouragement from the concept of "command responsibility," which "holds a superior responsible for the actions of subordinates." *Hilao v. Estate of Marcos*, 103 F.3d 767, 777 (9th Cir.1996). Under command responsibility, "a higher official need not have personally performed or ordered the abuses in order to be held liable. Under international law, responsibility for [*jus cogens* violations] extends beyond the person or persons who actually committed those acts—anyone

with higher authority who authorized, tolerated or knowingly ignored those acts is liable for them." *Id.* (quoting S.Rep. No. 249, 102d Cong., 1st Sess. at 9 (1991)).

For example, in a case relied upon by Plaintiffs, *United States v. Ohlendorf* ("*The Einsatzgruppen Case*"), the defendant Fendler, the second in command in his unit, was convicted of aiding and abetting war crimes and crimes against humanity because he was aware of the large number of executions and murders being committed by the subordinates in his unit. Despite his knowledge of his subordinates' wrongful acts, "there [wa]s no evidence that he ever did anything about it." *Einsatzgruppen Case*, 4 T.W.C. at 572. The court emphasized that "[a]s the second highest ranking officer in the Kommando [unit], his views could have been heard in complaint or protest against what he now says was a too summary [execution] procedure, but he chose to let the injustice go uncorrected." *Id.* Had Fendler not been in such a high-level "position of authority," *see Oric*, 2008 WL 6930198, at ¶ 42, his inaction would not have been sufficient to establish his guilt.

Second, an "omission" or "failure to act" only gives rise to aiding and abetting liability if "there is a **legal duty** to act." *Prosecutor v. Mrksic*, No. IT–95–13/1–A, at ¶ 134 & n. 481 (ICTY Appeals Chamber, May 5, 2009) (collecting cases) (quoting *Oric*, at ¶ 43) (emphasis added), *available at* http://www.icty.org/x/cases/mrksic/acjug/en/090505.pdf. The most obvious "duty to act" is the commander's "affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and [ ] civilian population[s]." *In re Yamashita*, 327 U.S. 1, 16, 66

S.Ct. 340, 90 L.Ed. 499 (1946). In this regard, "command responsibility" can be viewed as a form of aiding and abetting liability in which a commander fails to satisfy his legal duty of exercising his power to control his subordinates. *See generally Prosecutor v. Aleksovski*, No. IT–95–14/1–T, at ¶ 72 (ICTY Trial Chamber, June 25, 1999) ("Superior responsibility derives directly from the failure of the person against whom the complaint is directed to honour an obligation."), *available at* 1999 WL 33918298, *aff'd in relevant part and rev'd in part*, No. IT–95–14/1–A, at ¶ 76 (ICTY Appeals Chamber, Mar. 24, 2000) ("command responsibility ... becomes applicable only where a superior with the required mental element failed to exercise his powers to prevent subordinates from committing offences or to punish them afterwards."), *available at* 2000 WL 34467821; *see also Prosecutor v. Kayishema*, ICTR–95–1–T, at ¶ 202 (Trial Chamber May, 1999) (comparing aiding and abetting through tacit approval and encouragement with command responsibility), *available at* 1999 WL 33288417, *aff'd*, No. ICTR–95–1–A (ICTR Appeals Chamber July 2, 2001), *available at* http://www.unictr.org/Portals/0/Case/English/Kayishema_F/decisions/index.pdf.[49]

In cases involving "omissions" by actors other than commanders, "the question remains open as to

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[49] The central readily identifiable distinction between command responsibility and aiding and abetting liability is that command responsibility requires a finding of formal or actual control; that is, an agency (or similar) relationship between the primary wrongdoer and the defendant. *See generally Blagojevic* (Appeals Chamber), at ¶¶ 300–03; *see also Doe v. Qi*, 349 F.Supp.2d 1258, 1329–33 (N.D.Cal.2004) (summarizing doctrinal elements of command responsibility).

whether the duty to act must be based on criminal law, or may be based on a general duty" under other bodies of law. *Mrksic*, at ¶ 149 (quoting prosecutor's brief); *see also id*. at ¶ 151 (refraining from answering question posed in prosecutor's brief); *see also Oric*, 2008 WL 6930198, at ¶ 43 ("The Appeals Chamber has never set out the requirements for a conviction for omission in detail."). The only courts to reach definitive conclusions on this question have held that the duty to act may arise under either criminal law or the "laws and customs of war." *See Mrksic*, at ¶ 151 & n. 537 (citing *Blaskic* appeal judgment, at ¶ 663 n. 1384). However, there are no cases holding that omissions of other duties (such as non-criminal duties existing under statute or common law) will give rise to aiding and abetting liability. In light of this uncertainty, the Court will assume that the requisite "universal consensus of civilized nations" for purposes of the Alien Tort Statute only recognizes liability in cases where the duty to act arises from an obligation imposed by criminal laws or the laws and customs of war. *See Presbyterian Church of Sudan*, 582 F.3d at 259 (adopting approach of looking to common core definition to determine appropriate choice among competing articulations of a standard); *Abagninin*, 545 F.3d at 738–40 (same).

Third, it must be emphasized that aiding and abetting by way of "moral support" and "tacit approval and encouragement" is a rare breed (and, in fact, a non-existent breed for purposes of the Alien Tort Statute). To the extent this type of liability even exists, **all** of the international tribunal cases reviewed by the Court involve defendants who held a position of formal authority. In many ways, the discussions in these cases tend to overlap with discus-

sions of command responsibility and/or joint criminal enterprise. *See generally Khulumani*, 504 F.3d at 334–37 (Korman, J., concurring) (discussing inadequacies of International Tribunal decisions). To the extent that these cases purport to identify an independent international law norm regarding "moral support" and "tacit approval and encouragement," there simply is not a sufficiently well-defined, universally recognized norm to satisfy *Sosa' s* requirements.

As an initial matter, it is important to note that all of the "moral support" cases involve a defendant who held formal military, political, or administrative authority. As summarized by the recent Appeals Chamber decision in *Oric*, in the cases that have "applied the theory of aiding and abetting by tacit approval and encouragement, ... the combination of a position of authority and physical presence at the crime scene allowed the inference that non-interference by the accused actually amounted to tacit approval and encouragement." *Oric*, 2008 WL 6930198, at ¶ 42 & n. 97 (citing *Brdjanin*, ¶ 273 nn. 553, 555). It is important to remember that "authority" requires a high degree of control, either *de jure* or *de facto*, over the perpetrators. *See generally Kayishema*, 1999 WL 33288417, at ¶¶ 479–507 (discussing concepts of *de jure* and *de facto* control in context of command responsibility); *see also Black's Law Dictionary* 152 (9th ed. 2009) (defining "authority," in pertinent part, as "[g]overment power or jurisdiction").[50] In this vein, all of the cases cited by the re-

[50] It is appropriate to cite *Black's Law Dictionary* when interpreting the decisions of the international tribunals. *See*, *e.g.*, *Prosecutor v. Naletilic*, No. IT–98–34–A, at ¶ 24 & nn. 1400–01 (ICTY Appeals Chamber May 3, 2006) (citing *Black's* to define

cent Appeals Chamber decisions in *Oric* and *Brdjanin* support the conclusion that only a **formal authority figure's** presence and inaction may constitute tacit approval and encouragement. *See Aleksovski*, 2000 WL 34467821, at ¶¶ 76, 170–72 (defendant was prison warden); *Kayishema*, 1999 WL 33288417, at ¶¶ 479–81 (defendant was prefect—i.e., top regional executive); *Prosecutor v. Akayesu*, No. ICTR–96–4–T, at ¶ 77 (ICTR Trial Chamber Sept. 2, 1998), (defendant was bourgmestre—i.e., town mayor with control over police), *available at* 1998 WL 1782077, *aff'd*, No. ICTR–96–4 (ICTR Appeals Chamber June 1, 2001), *available at* 2001 WL 34377585; *Furundzija*, 38 I.L.M. 317, at ¶¶ 122, 130 (defendant was police commander); *see also Tadic*, 1997 WL 33774656, at ¶ 686 (discussing Nuremberg-era case in which the mayor and members of German guard failed to intervene when civilians beat and killed American pilots parading in Germany) (citing *United States v. Kurt Goebell* ("*Borkum Island case*"), *in Report, Survey of the Trials of War Crimes Held at Dachau*, *Germany*, Case. no. 12–489, at 2–3 (Sept. 15, 1948)). In other words, "tacit approval or encouragement" requires that the defendant must hold a position of formal or *de facto* military, political, or administrative authority. The rationale for this rule is that "it can hardly be doubted that the presence of an individual with authority will frequently be perceived by the perpetrators of the criminal act as a sign of encouragement likely to have a significant or

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crime of "deportation"); ¶¶ 674–75 & nn. 1332–34 (ICTY Trial Chamber July 31, 2003) (same); *Prosecutor v. Semanza*, No. ICTR–97–20–T, at ¶¶ 380, 384 & nn. 629, 637–38 (ICTR Trial Chamber May 15, 2003) (citing, inter alia, *Black's* for definitions of "plan" and "aid and abet"), *available at* 2003 WL 23305800.

even decisive effect on promoting its commission." *Aleksovski*, 1999 WL 33918298, at ¶ 65.

Plaintiffs rely heavily on a Nuremberg-era case that lies at the outer fringe of this line of cases, *The Synagogue Case*. As an initial matter, the Court notes that *The Synagogue Case* is not an appropriate authority for purposes of the Alien Tort Statute. The Court agrees with Defendants that *The Synagogue Case* "does not reflect customary international law." (8/24/09 Reply at 15 n. 9.) The ICTY in *Furundzija* explained that The Synagogue Case was decided "under the provision on co-perpetration of a crime (*'Mittäterschaft'* ) of the then German penal code (Art. 47 Strafgesetzbuch )." *Furundzija*, 38 I.L.M. 317, at ¶ 206. In other words, *The Synagogue Case* reflects German domestic law and is therefore an inappropriate source of authority for purposes of the Alien Tort Statute under *Sosa*.

However, even if the Court were to consider *The Synagogue Case* as a valid international law authority, the case stands for the general proposition that defendants are only responsible for "moral support" if they occupy a position of formal military, political, or administrative authority vis-a-vis the perpetrators. Specifically, in *The Synagogue Case*, the defendant was found guilty of aiding and abetting the destruction of a Jewish synagogue. Although "he had not physically taken part in" the acts of destruction, "[h]is intermittent presence on the crime-scene, combined with his status as an '*alter Kämpfer*,' " was a sufficient *actus reus* to establish his guilt. *Furundzija*, 38 I.L.M. 317, at ¶ 205. Notably, an " '*alter Kämpfer*' " is a "long-time militant of the Nazi party," a fact that places this case in line with the cases from the ICTY and ICTR. *See id*. Secondary authori-

ties reveal that "*alter Kämpfer*" were not mere party members; rather, they were the core members of the Nazi security and intelligence apparatus.[51] As explained by an expert on German history, the *alter Kämpfer* were "men who without exception had willingly joined the SS and who most clearly personified its philosophy." David Clay Large, *Reckoning without the Past: The HIAG of the Waffen–SS and the Politics of Rehabilitation in the Bonn Republic, 1950–1961*, 59 Journal of Modern History 79, 90 (1987). It should be recalled that "[t]he SS was the elite guard of the Nazi party" and was responsible for policing, intelligence, and security operations in Nazi Germany. *United States v. Geiser*, 527 F.3d 288, 290 (3d Cir.2008); *see also United States v. Negele*, 222 F.3d 443, 445 (8th Cir.2000) ("The SS, an organ of the Nazi party, acted as the federal police force in Germany."); *United States v. Kwoczak*, 210 F.Supp.2d 638, 641 (E.D.Pa.2002) (describing testimony of history expert, who described the SS as "Hitler['s] own elite guard," which he used "to consolidate police power in Germany" in the 1930s and which "controlled networks of concentration camps"); *United States v. Hajda*, 963 F.Supp. 1452, 1462 (N.D.Ill.1997) ("The SS was the elite guard and intelligence unit of the Nazi Party of Germany."); *see generally The Nuremberg Trial*, 6 F.R.D. 69, 140–43 (1946) (summarizing the history of the SS and its criminal activities). The *alter Kämpfer* therefore were not civilians—they

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[51] The Court notes that *The Synagogue Case* does not appear to be widely available in English translation, and courts have been forced to rely on the second-hand discussion contained in *Furundzija*. Because of the unavailability of the original text of *The Synagogue Case*, the Court has resorted to secondary authorities to uncover the factual context of the decision.

were members of the state security and police forces (the SS) and were, in fact, the most prominent members of those organizations. In other words—and this is a point that Plaintiffs have apparently overlooked (*see* 8/6/09 Opp. at 19)—the defendant in *The Synagogue Case* possessed formal political and administrative authority. Indeed, the *Furundzija* court emphasized that the defendant's status as an authority figure was a necessary element of his guilt. *Furundzija*, 38 I.L.M. 317 at ¶ 209 ("The supporter must be of a certain status for [moral support] to be sufficient for criminal responsibility."). Plaintiffs' own expert declaration concurs. (*See* Collingsworth Decl. (2/23/09), Ex. A, Brief *Amicus Curiae* of International Law Scholars Philip Alston, et al., *Khulumani v. Barclay National Bank*, Nos. 05–2141, 05–2326 (2d Cir.) (" '[S]ilent approval' or mere presence is not a convictable offense, at least among civilians, though a spectator may aid and abet illegal conduct if he occupies some position of authority.").) In short, a defendant is only guilty of "tacit approval and encouragement" if the defendant occupies a position of formal authority.

As a fourth and final observation about "moral support" and "tacit approval and encouragement," it is important to distinguish aiding and abetting through omissions, moral support, and tacit approval and encouragement from other forms of secondary liability such as joint criminal enterprises and conspiracies. As discussed *supra*, the relevant distinctions are that:

> (i) The aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime (murder, extermination, rape,

> torture, wanton destruction of civilian property, etc.), and this support has a substantial effect upon the perpetration of the crime. By contrast, it is sufficient for a participant in a joint criminal enterprise to perform acts that in some way are directed to the furtherance of the common design.
>
> (ii) In the case of aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of the specific crime of the principal. By contrast, in the case of participation in a joint criminal enterprise, i.e. as a co-perpetrator, the requisite *mens rea* is intent to pursue a common purpose.

*Vasiljevic*, 2004 WL 2781932, at ¶ 102.

To summarize, to the extent that "moral support" and "tacit approval and encouragement" are even actionable under the Alien Tort Statute (and the Court concludes that they are not adequately well-defined and widely adopted to satisfy *Sosa* ), there are four important points to keep in mind. First, some cases, such as the *Einsatzgruppen Case* relied upon by Plaintiffs, tend to blur the distinction between "command responsibility" and aiding and abetting. Second, a person is liable for an "omission" or "failure to act" only if that person owes an affirmative duty under criminal law or the laws and customs of war. Third, the concept of "moral support" has only been applied in cases involving persons possessing administrative, political, or military authority and who are personally present at the crime scene while the overt criminal acts are taking place. Fourth, and finally, it is important to distinguish between the aiding and abetting *actus reus* and the conspiracy/joint-criminal-

enterprise *actus reus*. Unlike conspiracy cases, aiding and abetting requires that the assistance must bear a direct causative relationship to the underlying crime.

This discussion of "moral support" and "tacit encouragement and approval" ought to demonstrate that this area of law lacks the "specificity" and "definite content and acceptance among civilized nations" to support a cause of action under *Sosa*, 542 U.S. at 732, 738, 124 S.Ct. 2739. The Court therefore agrees with the Southern District of New York's observations quoted *supra*: "the inclusion of moral support is far too uncertain and inchoate a rule for us to adopt without further elaboration as to its scope by international jurists, and ... it is a novel standard that has been applied by just two ad hoc international tribunals. The question of whether the 'novel' moral support standard should be included in the definition of aider and abettor liability ... does not, however, impugn the core principles that form the foundation of customary international legal norms—principles about which there is no disagreement." *Presbyterian Church of Sudan*, 374 F.Supp.2d at 340–41 (internal citations and quotations omitted).

It is telling that no Alien Tort Statute case has permitted a plaintiff to proceed on the theory of aiding and abetting through "moral support" or "tacit encouragement and approval." Those words are often quoted as part of the general aiding and abetting legal standard, but there are simply no **holdings** that apply that portion of the standard. *See*, *e.g.*, *In re South African Apartheid*, 617 F.Supp.2d at 257 (quoting standard without applying it); *Almog*, 471 F.Supp.2d at 286–87 (same); *Presbyterian Church of Sudan v. Talisman Energy*, 453 F.Supp.2d 633, 666–

67 (S.D.N.Y.2006) (order granting summary judgment) (same); *Bowoto*, 2006 WL 2455752, at *4 (same); *In re Agent Orange*, 373 F.Supp.2d at 54 (same); *Presbyterian Church of Sudan v. Talisman Energy*, 244 F.Supp.2d 289, 324–25 (S.D.N.Y.2003) (order denying motion to dismiss) (same). *The Presbyterian Church of Sudan* came the closest to reaching such a holding, as it concluded on a motion to dismiss that the defendants had "encouraged *Sudan*" to "carry out acts of 'ethnic cleaning.' " *Presbyterian Church of Sudan*, 244 F.Supp.2d at 324. However, that case does not support the proposition that "moral support" or "tacit encouragement and approval" are actionable under the Alien Tort Statute. The allegations in the *Presbyterian Church of Sudan* complaint showed that the defendants were not mere bystanders—in addition to "encourag [ing]" Sudan's actions, the defendants had also "worked with Sudan" and "provided material support to Sudan" in committing genocide. *Id*. at 324. Specifically, the complaint alleged that the defendants had worked in concert with Sudanese government to engage in ethnic cleansing, held "regular meetings" with Sudanese government, developed a "joint ... strategy ... to execute, enslave or displace" civilians, and issued "directives" and "request[s]" to the Sudanese government. *Id*. at 300–01. Such conduct constitutes overt acts of assistance, not moral support or tacit encouragement.

The Court accordingly concludes that the *actus reus* of "moral support" and "tacit encouragement and approval" is not sufficiently well-defined and universally accepted to constitute an actionable international law norm under *Sosa*.

b. *FURTHER DISCUSSION*

If, however, "moral support" and "tacit encouragement and approval" **were** actionable under the Alien Tort Statute (and the Court firmly disagrees with such a proposition), Plaintiffs' allegations would fail to meet the standard articulated in the international caselaw discussed *supra*. There is absolutely no legal authority—let alone **well-defined** and **universally accepted** legal authority—to support the proposition that an economic actor's long-term exclusive business relationship constitutes aiding and abetting, either as tacit "moral support" or as overt acts of assistance. Although Plaintiffs argue that Defendants are liable on account of their "failure to exercise economic leverage" (8/6/09 Opp. at 19–21), there is absolutely no international law authority to support such a legal standard-let alone the type of authority that is well-defined and universally agreed-upon to satisfy *Sosa*. The Court refrains from extending the existing caselaw (much of which consists of *dicta* rather than holdings) to recognize such an unprecedented form of liability.

Plaintiffs have not, therefore, alleged a sufficient *actus reus* in the form of tacit encouragement or moral support on account of Defendants' failure to exercise their economic leverage over Ivorian farmers who committed human rights abuses.

*4. SUMMARY OF ACTUS REUS*

Plaintiffs insist that it is inappropriate to undertake a "divide-and-conquer" analysis of the Complaint. They assert that Defendants' conduct must be viewed as a whole, and that even if each individual element of Defendants' conduct does not rise to the level of an actionable international law violation, De-

fendants' conduct as a whole does reach that level. However, even viewing Plaintiffs' allegations collectively rather than separately, the overwhelming conclusion is that Defendants were **purchasing** cocoa and assisting the **production** of cocoa. It is clear from the caselaw that ordinary commercial transactions do not lead to aiding and abetting liability. Even if Defendants were not merely engaged in commercial conduct, something more is required in order to find a violation of international law—the defendants' conduct must have a substantial effect on the perpetration of the specific crime. Plaintiffs in this case have not identified any of Defendants' conduct, taken separately or holistically, that had a material and direct effect on the Ivorian farmers' specific wrongful acts. In short, Plaintiffs "have not nudged their claims across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570, 127 S.Ct. 1955. The *actus reus* allegations are insufficient as a matter of law.

### C. DISCUSSION OF MENS REA

In addition to the *actus reus* element of aiding and abetting, Defendants also challenge the adequacy of Plaintiffs' allegations regarding the *mens rea* standard.

Plaintiffs' Complaint adequately alleges that Defendants knew or should have known of the labor violations on the Ivorian farms. Defendants engaged in a long-term relationship with these farmers and had occasional ground-level contact with the farms. (FAC ¶ 34.) Defendants undertook a number of activities that reflected an awareness of the labor problems. Defendants represented to the public that Defendants were concerned about the farmers' labor practices and that Defendants were taking affirma-

tive steps to reduce the amount of child labor/forced labor used on Ivorian farms. (FAC ¶¶ 38, 49–51.) Defendants even took efforts to prevent Congress from enacting a stringent importation regime that would have required imported chocolate to be certified as "slave free." (FAC ¶¶ 54–55.) In light of these allegations, as well as allegations about the existence of various reports from public organizations documenting labor abuses in Cote d'Ivoire (FAC ¶¶ 45–46, 51), Plaintiffs have plausibly alleged that Defendants knew or reasonably should have known about the child-labor abuses on the Ivorian farms.

However, these allegations are insufficient to establish that Defendants acted with the *mens rea* required by international law.

Applying the "purpose" standard adopted in *Presbyterian Church of Sudan*, 582 F.3d at 259—which is, as noted, supported by the Rome Statute, art. 25(3)(c), the *Hechingen Case*, *in* 7 J. Int'l Crim. Just. at 150, and the International Court of Justice's recent agnosticism in *Bosnia and Herzegovina v. Serbia and Montenegro*, 2007 I.C.J. No. 91, at ¶ 421—Plaintiffs' allegations are inadequate to establish the requisite *mens rea*. Plaintiffs do not—and, as they conceded at oral argument on November 10, 2009, **cannot**—allege that Defendants acted with the purpose and intent that their conduct would perpetuate child slavery on Ivorian farms.[52]

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[52] Specifically, Plaintiffs' counsel stated: "Now, if what was required was a state of mind that the defendants wanted child slave labor to go on, you know, positively desired it, which is what I think you're saying ... [t]hen we would not be able to allege that."

The Ninth Circuit's analysis of the genocide allegations in *Abagninin*, 545 F.3d at 740, provides a relevant analogy regarding pleading standards. The plaintiff in *Abagninin* had alleged that the defendant knew that its chemicals could cause reproductive harms; however, the Ninth Circuit held that the plaintiff "fail[ed] to allege that [the defendant] **intended** to harm him through the use of [those] chemicals." *Id*. (emphasis added). Where a specific intent *mens rea* is required (as in *Abagninin* ), it is insufficient to allege the defendant's knowledge of likely consequences. **Purpose** or **specific** intent must be shown, and Plaintiffs' allegations fail to meet this standard. Plaintiffs' allegations do not support the conclusion that Defendants **intended** and **desired** to substantially assist the Ivorian farmers' acts of violence, intimidation, and deprivation.

Even if the Court were to apply the "knowledge" *mens rea* standard articulated in certain international caselaw (an approach which the Court has rejected, *see supra* ), Plaintiffs' allegations would fail to move "across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570, 127 S.Ct. 1955. As noted *supra*, the leading international law "knowledge" standard requires that the defendant "*know[s]* that the acts performed **assist the commission of the specific crime** of the principal perpetrator." *Blagojevic*, at ¶ 127 (emphasis added).

Plaintiffs' allegations fail to raise a plausible inference that Defendants knew or should have known that the **general** provision of money, training, tools, and tacit encouragement (assuming, that is, that such acts even satisfied the *actus reus* standard discussed *supra* ) helped to further the **specific** wrong-

ful acts committed by the Ivorian farmers. Again, it must be recalled that the specific alleged wrongs include the Ivorian farmers' acts of whipping, beating, threatening, confining, and depriving Plaintiffs. (*See* FAC ¶¶ 57–59.) There are no allegations that Defendants **knew** that their conduct substantially assisted those wrongful acts. Instead, the allegations, and the plausible inferences drawn from them, show that Defendants knew about the general problem of child labor on certain Ivorian farms and engaged in general commercial transactions with those farmers. Such allegations do not constitute aiding and abetting under international law. Plaintiffs have not alleged that Defendant possessed "knowledge that the[ir] acts ... assist[ed] the commission of the specific crime of the principal perpetrator." *Blagojevic*, at ¶ 127. Thus, even if the "knowledge" *mens rea* standard applies, Plaintiffs' Complaint fails to state a claim upon which relief may be granted.

### D. SUMMARY OF AIDING AND ABETTING LIABILITY

Plaintiffs' First Amended Complaint fails to state a viable cause of action with respect to Defendants' alleged aiding and abetting human rights violations by cocoa farmers in Cote d'Ivoire. Plaintiffs have not alleged facts from which one may plausibly conclude that Defendants' conduct violated a universally accepted and well-defined international law norm. *See Sosa*, 542 U.S. at 732, 124 S.Ct. 2739. Plaintiffs' allegations fail to satisfy either the *actus reus* or *mens rea* standards illustrated in the leading international and domestic caselaw that discuss aiding and abetting under international law. Accordingly, Defendants' Motion to Dismiss Plaintiffs' cause of action al-

leging violations of customary international law is GRANTED.

### E. AGENCY THEORIES

As an alternative to the aiding and abetting theories of liability, Plaintiffs also attempt to hold Defendants directly liable as the principals of the Ivorian farmers who allegedly violated Plaintiffs' human rights.

As an initial matter, the Court disagrees with Plaintiffs' reliance on domestic-law agency principles. *See generally infra* Part X (holding that international law, not domestic law, must provide substantive rules of agency attribution). However, the Court also concludes that Plaintiffs' allegations are insufficient even under the domestic agency law cited by Plaintiffs. Plaintiffs cite to cases involving an employer-employee relationship, *Quick v. Peoples Bank of Cullman County*, 993 F.2d 793, 797 (11th Cir.1993), an alleged parent-subsidiary corporate relationship, *Bowoto v. Chevron Texaco Corp*., 312 F.Supp.2d 1229, 1241–46 (N.D.Cal.2004), and a case that offered no substantive discussion whatsoever regarding agency, *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242 (11th Cir.2005). (*See* 2/23/09 Opp. at 19.)

Plaintiffs insist that Defendants can be liable as principals because "[u]nder general agency rules, a principal is liable for the actions of its agents when the acts are: (1) related to and committed within the course of the agency relationship; (2) committed in furtherance of the business of the principal; and (3) authorized or subsequently acquiesced in by the principal." (2/23/09 Opp. at 19.) Plaintiffs assert that their Complaint adequately "allege[s] that Defend-

ants had a long term relationship with their farmers, and provided direction and support. This would allow an inference that the farmers were Defendants' agents. Further, that the Defendants continued to work with and support their farmers even though they had specific knowledge of the farmers' use of forced child labor, would constitute acquiescence or subsequent ratification." (*Id.*)

The Court disagrees with Plaintiffs' analysis. First, the Court concludes that, under *Sosa*, international law rather than domestic law must provide the relevant body of agency rules. Plaintiffs have failed to identify any international law in cases, treaties, or any other authority that recognizes an agency relationship between a purchaser of goods and a supplier of goods. Furthermore, the Court disagrees with Plaintiffs' assertion that a "long-term" and "exclusive" buyer-supplier relationship transforms an arms-length commercial relationship into an agency relationship in which the buyer is liable for the suppliers' actions.[53] Such a conclusion would be contrary

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[53] The Court finds persuasive the illustrations provided in the *Restatement (Third) of Agency* regarding the basic rules of commercial relationships:

> 10. P Corporation designs and sells athletic footwear using a registered trade name and a registered trademark prominently displayed on each item. P Corporation licenses A Corporation to manufacture and sell footwear bearing P Corporation's trade name and trademark, in exchange for A Corporation's promise to pay royalties. Under the license agreement, P Corporation reserves the right to control the quality of the footwear manufactured under the license. A Corporation enters into a contract with T to purchase rubber. As to the contract with T, A Corporation is not acting as P Corporation's agent, nor is P Corporation the agent of A Corporation by virtue of any obligation it may have to defend

to general principles of agency law and would eviscerate the well-established international law rules discussed *supra* that limit secondary liability to certain specific situations.

Finally, the Court disagrees with Plaintiffs' assertions regarding agency liability because Plaintiffs misstate both the relevant law and the operative allegations of the Complaint. The appropriate standard

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> and protect its trade name and trademark. P Corporation's right to control the quality of footwear manufactured by A Corporation does not make A Corporation the agent of P Corporation as to the contract with T.
>
> 11. Same facts as Illustration 10, except that P Corporation and A Corporation agree that A Corporation will negotiate and enter into contracts between P Corporation and retail stores for the sale of footwear manufactured by P Corporation. A Corporation is acting as P Corporation's agent in connection with the contracts....
>
> 13. P owns a shopping mall. A rents a retail store in the mall under a lease in which A promises to pay P a percentage of A's monthly gross sales revenue as rent. The lease gives P the right to approve or disapprove A's operational plans for the store. A is not P's agent in operating the store.
>
> 14. Same facts as Illustration 13, except that A additionally agrees to collect the rent from the mall's other tenants and remit it to P in exchange for a monthly service fee. A is P's agent in collecting and remitting the other tenants' rental payments. A is not P's agent in operating A's store in the mall.

*Restatement (Third) of Agency*, § 1.01 cmt. g, ill. 10–14.

In light of these illustrations, it is noteworthy that Plaintiffs' Complaint fails to include any facts suggesting that Defendants and the Ivorian farmers agreed that the farmers would act as Defendants' agents with respect to Defendants' procurement and maintenance of its labor force (or for any other matters).

under federal common law[54] is that an agency relationship is created "when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act." *Restatement (Third) of Agency* § 1.01 (2006); *see also id.* at § 3.01 ("[a]ctual authority ... is created by a principal's manifestation [through either words or conduct, *see* § 1.03] to an agent that, as reasonably understood by the agent, expresses the principal's assent that the agent take action on the principal's behalf."). Plaintiffs have not even attempted to argue that an agency relationship has been created according to these rules. (*See* 2/23/09 Opp. at 19.) Contrary to Plaintiffs' conclusory assertions in their Opposition, Plaintiffs have not alleged any facts from which it may be plausibly inferred that Defendants manifested an intent to the Ivorian farmers that the farmers would act on Defendants' behalf. Nor have Plaintiffs alleged any facts from which it may be plausibly inferred that the Ivorian farmers manifested their assent to Defendants' control of the farmers' conduct. Absent such allegations, there is no agency relationship between Defendants and the Ivorian farmers. *Accord Bowoto*, 312 F.Supp.2d at 1241 ("To establish actual agency a party must demonstrate the following elements: (1) there must be a manifestation by the principal that the agent shall act for

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[54] *See United States v. Bonds*, 608 F.3d 495, 504–05 (9th Cir.2010) (suggesting that the Third Restatement is the appropriate source of federal agency law); *see also Schmidt v. Burlington Northern and Santa Fe Ry. Co.*, 605 F.3d 686, 690 n. 3 (9th Cir.2010) (noting that the Third Restatement has "superceded" the Second Restatement).

him; (2) the agent must accept the undertaking; and (3) there must be an understanding between the parties that the principal is to be in control of the undertaking. There is no agency relationship where the alleged principal has no right of control over the alleged agent.") (quotations and citation omitted).

Similarly, Plaintiffs' allegations fail to show that the Ivorian farmers are Defendants' agents under rules of ratification and acquiescence. "Although a principal is liable when it ratifies an originally unauthorized tort, the principal-agent relationship is still a requisite, and ratification can have no meaning without it." *Batzel v. Smith*, 333 F.3d 1018, 1036 (9th Cir.2003) (footnote omitted); *see also Restatement (Third of Agency)* § 4.03 ("A person may ratify an act if [and **only** if, *see* § 4.01(3)(a),] the actor acted or purported to act as an agent on the person's behalf."). In other words, absent a preexisting principal-agent relationship, the concept of "ratification" cannot operate independently to create such a principal-agent relationship.

Accordingly, the Court rejects Plaintiffs' arguments that the Defendants are liable for the Ivorian farmers' actions under an agency theory.

## VIII. TORTURE VICTIM PROTECTION ACT

Plaintiffs' third cause of action alleges that Defendants aided and abetted acts of torture. This cause of action is brought under both the Alien Tort Statute and the Torture Victim Protection Act, Pub. L. 102–256, 106 Stat. 73 (1992), *reprinted in* 28 U.S.C.A. § 1350 note. The Torture Victim Protection Act provides:

**Section 1. Short Title.**

This Act may be cited as the 'Torture Victim Protection Act of 1991'

**Sec. 2. Establishment of civil action.**

**(a) Liability.**—An individual who, under actual or apparent authority, or color of law, of any foreign nation—

**(1)** subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or

**(2)** subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

**(b) Exhaustion of remedies.**—A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred.

**(c) Statute of limitations.**—No action shall be maintained under this section unless it is commenced within 10 years after the cause of action arose.

**Sec. 3. Definitions.**

"**(a) Extrajudicial killing.**—For the purposes of this Act, the term 'extrajudicial killing' means a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. Such term, however, does not include any such

killing that, under international law, is lawfully carried out under the authority of a foreign nation.

"**(b) Torture.**—For the purposes of this Act—

"**(1)** the term 'torture' means any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind; and

"**(2)** mental pain or suffering refers to prolonged mental harm caused by or resulting from—

"**(A)** the intentional infliction or threatened infliction of severe physical pain or suffering;

"**(B)** the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

"**(C)** the threat of imminent death; or

"**(D)** the threat that another individual will imminently be subjected to death, severe

> physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality."

28 U.S.C.A. § 1350 note.

Defendants argue that the Torture Victim Protection Act supercedes the Alien Tort Statute with respect to torture and related offenses. This is the approach taken by the divided panel in *Enahoro v. Abubakar*, 408 F.3d 877, 884–85 (7th Cir.2005), a much-criticized case[55] which concluded that the Torture Victim Protection Act's statutory exhaustion requirement would be rendered meaningless if plaintiffs could simply plead torture-related violations under customary international law.

The Court disagrees with Defendants' assertion. While it is true that the Torture Victim Protection Act "was intended to codify judicial decisions recognizing such a cause of action under the Alien Tort

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[55] *See*, *e.g.*, Philip Mariani, Comment, *Assessing the Proper Relationship Between the Alien Tort Statute and the Torture Victim Protection Act*, 156 U. Pa. L.Rev. 1383, 1386 (2008) ("the Seventh Circuit's preclusive interpretation ... produces an inappropriate result for courts to follow); Ved P. Nanda & David K. Pansius, 2 *Litigation of International Disputes in U.S. Courts*, § 9:9, at n. 366 and accompanying text (2010 supp.) ("The text projects that in the long run Judge Cudahy's [dissenting] argument [from *Enahoro* ] will prevail in most circuits. Congress did not repeal the AT[S]. *Sosa* did not reject the proposition that torture was an actionable norm under the AT[S]. Sosa also indicated no disagreement with the case law that had consistently treated the AT[S] and TVPA as mutually coexisting."); *see also Adhikari v. Daoud & Partners*, 697 F.Supp.2d 674, 687–88 (S.D.Tex.2009) (pointedly refusing to adopt holding of *Enahoro* ).

[Statute]," *Hilao v. Estate of Marcos*, 103 F.3d 767, 778 (9th Cir.1996), there is no clear congressional intent that the Alien Tort Statute cannot also provide a cause of action for torture and related acts. Notably, the Ninth Circuit affirmed a judgment which contained causes of action for torture brought under both the Alien Tort Statute and the Torture Victim Protection Act. *See Hilao v. Estate of Marcos*, 103 F.3d at 777–78.

The Court agrees with and adopts the discussion of this question in *Bowoto v. Chevron Corp.*, 557 F.Supp.2d 1080, 1084–86 (N.D.Cal.2008), and *Mujica v. Occidental Petroleum Corp.*, 381 F.Supp.2d 1164, 1179 n. 13 (C.D.Cal.2005) (explaining that Torture Victim Protection Act was intended to enhance, not limit, remedies available to torture victims, and that "repeals by implication are not favored") (collecting authorities), *remanded on other grounds by* 564 F.3d 1190, 1192 (9th Cir.2009) (ordering district court to consider applicability of prudential exhaustion requirement articulated in *Sarei v. Rio Tinto*, 550 F.3d 822 (9th Cir.2008) (en banc)); *see generally* Philip Mariani, Comment, *Assessing the Proper Relationship Between the Alien Tort Statute and the Torture Victim Protection Act*, 156 U. Pa. L. Rev. 1383 (2008) (closely examining the question and rejecting Seventh Circuit's contrary conclusion).

In any event, even if the Court were to follow the reasoning of the Seventh Circuit in *Enahoro*, the concerns motivating the Seventh Circuit (namely, the interaction between the Torture Victim Protection Act and the Alien Tort Statute regarding exhaustion of remedies) are not present in the instant case. Defendants have not argued that the Torture Victim Protection Act's statutory exhaustion re-

quirement would be eviscerated if the Court applied the Alien Tort Statute in this case. Accordingly, *Enahoro'* s reasoning is inapposite.

### A. PLAINTIFFS' ALLEGATIONS FAIL TO STATE A VIABLE CAUSE OF ACTION FOR AIDING AND ABETTING TORTURE

The Court assumes for purposes of this Order that the Torture Victim Protection Act creates a cause of action relating to a defendant's act of aiding and abetting torture. Because the Act creates a **statutory** cause of action, this question is distinct from the common law-based Alien Tort Statute analysis discussed *supra*. Whereas Alien Tort Statute claims are derived from international law, a Torture Victim Protection Act claim derives from federal statute. The existence of aiding and abetting liability is therefore a matter of statutory interpretation. The Court refrains from engaging in this exercise at the present juncture. *See generally* Ved P. Nanda & David K. Pansius, 2 *Litigation of International Disputes in U.S. Courts*, § 9:9, at nn. 257–29 and accompanying text (2010 supp.) ("In a TVPA case complicity liability would derive from the terms of that statute to the extent that a court may consider the issue addressed in the statute or its legislative history.... Under the ATS the cause of action must arise from a norm of international law.").

However, even assuming that the Torture Victim Protection Act recognizes aiding and abetting liability, the Court grants Defendants' Motion to Dismiss the Torture Victim Protection Act cause of action for the same reasons that it grants the motion on the common-law international law causes of action brought under the Alien Tort Statute. As discussed

*supra*, Plaintiffs have not alleged sufficient facts to establish a plausible inference that Defendants aided and abetted third parties' torture of Plaintiffs.

### B. CORPORATE LIABILITY UNDER THE TORTURE VICTIM PROTECTION ACT

In addition, the Court grants Defendants' Motion to Dismiss the Torture Victim Protection Act cause of action because Congress only extended liability to natural persons, not corporations.

The overwhelming majority of courts have concluded that only natural persons, not corporations, may be held liable under the Torture Victim Protection Act. *See Ali Shafi v. Palestinian Authority*, 686 F.Supp.2d 23, 28 (D.D.C.2010) ("Defendants correctly assert that Ali may not plead a cause of action against non-natural persons under the TVPA."); *Bowoto v. Chevron Corp.*, No. C 99–02506–SI, 2006 WL 2604591, at *1–2 (N.D.Cal. Aug. 22, 2006); *Corrie v. Caterpillar, Inc.*, 403 F.Supp.2d 1019, 1026 (W.D.Wash.2005), *aff'd on other grounds*, 503 F.3d 974 (9th Cir.2007); *Doe v. Exxon Mobil Corp.*, 393 F.Supp.2d 20, 28 (D.D.C.2005); *In re Terrorist Attacks on September 11, 2001*, 392 F.Supp.2d 539, 565 (S.D.N.Y.2005); *Mujica v. Occidental Petrol. Corp.*, 381 F.Supp.2d 1164, 1175 (C.D.Cal.2005); *In re Agent Orange Prod. Liability Litig.*, 373 F.Supp.2d 7, 55–56 (E.D.N.Y.2005); *Arndt v. UBS AG*, 342 F.Supp.2d 132, 141 (E.D.N.Y.2004); *Friedman v. Bayer Corp.*, No. 99–CV–3675, 1999 WL 33457825, at *2 (E.D.N.Y. Dec. 15, 1999); *Beanal v. Freeport–McMoRan, Inc.*, 969 F.Supp. 362, 381–82 (E.D.La.1997), *aff'd on other grounds*, 197 F.3d 161, 169 (5th Cir.1999) (holding that complaint failed to allege facts sufficient to show that torture occurred); *but see Sinaltrainal v. Coca–Cola Co.*, 256 F.Supp.2d

1345, 1358–59 (S.D.Fla.2003) (reaching contrary conclusion); *Estate of Rodriquez v. Drummond Co., Inc.*, 256 F.Supp.2d 1250, 1266–67 (N.D.Ala.2003) (same)

The central animating logic behind these decisions is that the Act prohibits **individuals** from inflicting torture on other **individuals**. *See* 28 U.S.C.A. § 1350 note § 2(a)(1) ("An **individual** who ... subjects an **individual** to torture shall, in a civil action, be liable for damages to that individual.") (emphasis added). Because a corporation cannot be tortured, it appears that the Act's use of word "individual" refers only to natural persons, not corporations. As noted in *Mujica*, corporations are quite obviously incapable of being "tortured":

> The Court does not believe it would be possible for corporations to be tortured or killed. The Court also does not believe it would be possible for corporations to feel pain and suffering. *See Leocal* [*v. Ashcroft*, 543 U.S. 1,] 125 S.Ct. [377,] 382 [160 L.Ed.2d 271 (2004) ] ("When interpreting a statute, we must give words their 'ordinary or natural' meaning."). Thus, the only manner in which the statute does not reach an 'absurd result,' is by excluding corporations from the scope of the statute's liability.

*Mujica*, 381 F.Supp.2d at 1176.

Another strand of reasoning involves reference to the default rules of linguistic interpretation set forth by Congress itself. Congress's Dictionary Act defines "person" as including both "corporation" and "individuals." *See* 1 U.S.C. § 1 ("In determining the meaning of any Act of Congress, unless the context indi-

cates otherwise—... the words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals"). "[T]he Dictionary Act's definition of 'person' implies that the words 'corporations' and 'individuals' refer to different things," and that implied meaning should govern as long as the context does not indicate otherwise. *United States v. Middleton*, 231 F.3d 1207, 1211 (9th Cir.2000). Here, context supports the implied meaning given in the Dictionary Act—that is, that "individual" refers to "natural persons"—and there is no reason to hold otherwise. *Bowoto*, 2006 WL 2604591, at *1–2.

As persuasive authority in favor of holding corporations liable under the Torture Victim Protection Act, Plaintiffs point to the statement of Sen. Specter, the bill's sponsor, who said that the bill would allow suits against "persons" who were involved in committing torture. (*See* 2/23/09 Opp. at 22.) This single statement is an insufficient basis for reaching a conclusion that is contrary to basic principles of statutory construction. *See generally United States v. Tabacca*, 924 F.2d 906, 910–911 (9th Cir.1991) ("The remarks of a legislator, even those of the sponsoring legislator, will not override the plain meaning of a statute."); *see also Weinberger v. Rossi*, 456 U.S. 25, 35 n. 15, 102 S.Ct. 1510, 71 L.Ed.2d 715 (1982) ("The contemporaneous remarks of a sponsor of legislation are not controlling in analyzing legislative history."); *Bath Iron Works Corp. v. Director, Office of Workers' Compensation*, 506 U.S. 153, 166, 113 S.Ct. 692, 121 L.Ed.2d 619 (1993) (where the language of the statute was unambiguous on the issue, the Court gave "no weight" to a single senator's reference during a floor debate in the Senate). Furthermore, no court has relied on Sen. Specter's statement as dispositive;

to the extent that courts have relied on the legislative history to show that corporations may be sued, they have concluded that this history "does not reveal an intent to **exempt** private corporations from liability." *Sinaltrainal v. Coca–Cola Co.*, 256 F.Supp.2d 1345, 1358–59 (S.D.Fla.2003) (emphasis added); *see also Estate of Rodriquez v. Drummond Co., Inc.*, 256 F.Supp.2d 1250, 1266–67 (N.D.Ala.2003) (following *Sinaltrainal*).[56] But in light of the plain statutory language of the Act, the Court concludes that the majority of courts are correct that the Act does not extend liability to corporations. Congress simply has not provided for corporate liability.

### C. STATE ACTION

As a final matter, the Court grants Defendants' Motion to Dismiss the Torture Victim Protection Act cause of action because Plaintiffs have not adequately alleged "state action" for purposes of the Act. The Act establishes liability where "[a]n individual who, **under actual or apparent authority, or color of law, of any foreign nation**—subjects an individual

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[56] The Eleventh Circuit has affirmed both of these decisions and extended liability to corporations, but has never explicitly stated its reasoning for permitting a corporation to be sued under the Act. In *Romero v. Drummond Co., Inc.*, 552 F.3d 1303, 1315 (11th Cir.2008), the court stated that "we are bound by th[e] precedent" of *Aldana v. Del Monte Fresh Produce, Inc.*, 416 F.3d 1242 (11th Cir.2005), that a plaintiff may "state[ ] a claim against a corporate defendant" under the Torture Victim Protection Act. However, the *Aldana* court did not expressly address the issue. *See generally Aldana*, 416 F.3d at 1244–53. Later, in *Sinaltrainal v. Coca–Cola Co.*, 578 F.3d 1252, 1263 (11th Cir.2009), the court suggested that *Romero*, not *Aldana*, was the operative precedent regarding corporate liability under the Torture Victim Protection Act.

to torture." 28 U.S.C.A. § 1350 note § 2(a)(1) (emphasis added). This statutory provision requires that the principal offender committing torture—here, the Ivorian farmers—was acting under color of law.

Unlike the Alien Tort Statute, the Torture Victim Protection Act contains an explicit reference to domestic law to define the state-action requirement of the Torture Victim Protection Act. As explained in a recent *en banc* decision issued by the Second Circuit's decision, "[i]n construing the term 'color of law,' courts are instructed to look to jurisprudence under 42 U.S.C. § 1983." *Arar v. Ashcroft*, 585 F.3d 559, 568 (2d Cir.2009) (en banc) (citing H.R.Rep. No. 367, 102d Cong., 2d Sess., at 5 (1991) *reprinted in* 1992 U.S.C.C.A.N. 84, 87) (alterations omitted), *cert. denied*, — U.S. —, 130 S.Ct. 3409, 177 L.Ed.2d 349 (2010). Accordingly, the Court will consider precedents construing both the Torture Victim Protection Act and 42 U.S.C. § 1983.

The essence of Plaintiffs' state-action argument is that some farms were owned by government officials, or were protected by government-based security services, or were insulated from government attention through payments to government officials. (FAC ¶¶ 47, 67, 73, 77.) Specifically, Plaintiffs allege that "several of the cocoa farms in Cote d'Ivoire from which Defendants source [cocoa] are owned by government officials, whether directly or indirectly, or are otherwise protected by government officials either through the provision of direct security services or through payments made to such officials that allow farms and/or farmer cooperatives to continue the use child labor." (*Id.* at ¶ 47.) Plaintiffs also assert that the farmers' wrongful actions were done with the "implicit sanction of the state" or through "the in-

tentional omission of responsible state officials ... to act in preventing and/or limiting the trafficking" of child slaves into Cote d'Ivoire. (*Id*. at ¶ 77.)

Plaintiffs assert that these allegations establish a form of "joint action" between the state actors and the private defendants. (2/23/09 Opp. at 23.) Plaintiffs cite to *Dennis v. Sparks*, 449 U.S. 24, 27–28, 101 S.Ct. 183, 66 L.Ed.2d 185 (1980), which explained that "[p]rivate persons, jointly engaged with state officials in the challenged action, are acting 'under color' of law for purposes of § 1983 actions." *Dennis* involved allegations that a private party had entered into a "corrupt conspiracy involving bribery of [a] judge." The Court explained that "the private parties conspiring with the judge were acting under color of state law." *Id*. at 28, 101 S.Ct. 183.

The "joint-action" principle is further illustrated in a number of Torture Victim Protection Act cases. In *Mujica v. Occidental Petroleum*, the plaintiffs alleged that the Colombian Air Force, while providing paid-for security services at one of the defendant's oil production facilities and oil pipelines, committed torture by dropping cluster bombs on groups of civilians in a residential area. *Mujica*, 381 F.Supp.2d at 1168. The court held that these allegations were sufficient to satisfy the Torture Victim Protection Act's requirement that the wrongful conduct be done under color of law.

Similarly, in *Wiwa v. Royal Dutch Petrol. Co.*, No. 96 CIV. 8386(KMW), 2002 WL 319887 (S.D.N.Y. Feb. 28, 2002), the court held that the allegations were sufficient to satisfy the state action requirement where the plaintiff alleged that the defendants "jointly collaborated" with a foreign government "in committing several of the claimed violations of inter-

national law." *Id*. at *14. The court explained that "individuals engaged in a conspiracy with government actors to deprive others of their constitutional rights act 'under color of law' to commit those violations." *Id*.

In *Aldana v. Del Monte Fresh Produce*, the plaintiffs alleged that they had been taken hostage and were threatened with death during labor negotiations in Guatemala. *Aldana*, 416 F.3d at 1245. The Eleventh Circuit reversed the district court's dismissal of the Torture Victim Protection Act claims to the extent that the plaintiffs alleged that the local mayor had personally acted as an "one of the armed aggressors" who personally participated in taking the plaintiffs hostage and threatening them with death. *Id*. at 1249. (The court noted that the private-party defendants were secondarily liable for the mayor's conduct because the mayor was acting "at the urging of [the] Defendants." *Id*.) Because the mayor was personally involved in the underlying wrongdoing, the plaintiffs had adequately alleged state action. *Id*.

In contrast to the allegations involving the mayor, the *Aldana* court held that there was no state action where the government provided "registration and toleration" of the organizations responsible for the wrongful acts. *Id*. at 1248. The court cited the Supreme Court's decision in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 175–78, 92 S.Ct. 1965, 32 L.Ed.2d 627 (1972), in which the Court held that a "state's alcohol licensing and regulatory scheme did not transform a private club with a liquor license into a state actor." *Aldana*, 416 F.3d at 1248.

In *Sinaltrainal v. Coca–Cola*, the plaintiffs alleged that private "paramilitary forces" engaged in torture. The Eleventh Circuit explained that "[m]ere

toleration of the paramilitary forces does not transform such forces' acts into state acts." *Sinaltrainal*, 578 F.3d at 1270. Relying on the pleading rules as construed in *Iqbal*, the court rejected the plaintiffs' conclusory allegations that "the paramilitary are 'permitted to exist' and are 'assisted' by the Colombian government." *Id*. at 1266. The court explained that the plaintiffs offered only the "naked allegation the paramilitaries were in a symbiotic relationship with the Colombian government and thus were state actors," and "absent any factual allegations to support this legal conclusion," the motion to dismiss was properly granted. *Id*.

The present case, in contrast to *Dennis*, *Mujica*, *Wiwa*, and the portion of *Aldana* addressing the mayor's conduct, does not involve any allegations that Ivorian government officials jointly conspired or participated with the farmers who were directly engaged in wrongdoing. Rather, Plaintiffs allege in a wholly conclusory fashion that the Ivorian government somehow "protected" the farmers and otherwise allowed them "to continue to use child labor." (FAC ¶ 47.) Like the complaint in *Sinaltrainal*, Plaintiffs' Complaint lacks any factual allegations showing that the Ivorian government jointly participated in the underlying human rights abuses, as was the case with the mayor in *Aldana* and the corrupt judge in *Dennis*. *See also Romero*, 552 F.3d at 1317 (granting summary judgment to defendant because "proof of a general relationship [between the Colombian government and alleged wrongdoer] is not enough. The relationship must involve the subject of the complaint.... [T]he [evidence] do[es] not even suggest that the Colombian military was involved in those crimes."); *Alomang v. Freeport–McMoran Inc.*, Civ. A. No. 96–2139, 1996 WL 601431 (E.D.La. Oct.

17, 1996) (plaintiff's complaint failed to satisfy state action requirement because it "does not explicitly link the alleged human rights violations to the alleged presence of Indonesian troops at the Grasberg Mine site").

To the extent that Plaintiffs allege that Ivorian government officials **owned** the farms on which the violations took place, it is well established that government officials' private conduct does not satisfy the state action requirement. *See*, *e.g.*, *Screws v. United States*, 325 U.S. 91, 111, 65 S.Ct. 1031, 89 L.Ed. 1495 (1945) ("acts of officers in the ambit of their personal pursuits are plainly excluded ... [from] the words 'under color of any law' "); *see also Gritchen v. Collier*, 254 F.3d 807, 812 n. 6 (9th Cir.2001) (collecting cases). Plaintiffs fail to allege any facts establishing that the Ivorian farms were operated by or for the benefit of the government.

Finally, the Court rejects Plaintiffs' argument that these state action issues should be left to the summary judgment stage of litigation rather than the motion to dismiss stage. Plaintiffs' authority predates the Supreme Court's clear authority in *Twombly* and *Iqbal*, requiring plaintiffs to allege facts supporting their claim for relief. The cases cited by Plaintiffs apply a different legal standard. *See National Coalition Government of Union of Burma v. Unocal, Inc.*, 176 F.R.D. 329, 346 (C.D.Cal.1997) ("[T]he Court considers Unocal's argument that plaintiffs **cannot possibly prevail** on a joint action theory based on the allegations of the complaint.") (emphasis added). Admittedly, it is somewhat difficult for the Court to analyze the sufficiency of Plaintiffs' legal theory at the present stage of litigation—but that is only because the Complaint contains con-

clusory assertions rather than factual allegations. On that basis alone, the Motion to Dismiss must be granted.

### D. SUMMARY OF TORTURE VICTIM PROTECTION ACT

Accordingly, the Court concludes that: Plaintiffs' Complaint fails to allege sufficient facts from which it may be reasonably inferred that Defendants aided and abetted torture; corporations cannot be held liable under the Torture Victim Protection Act because the statute precludes such a result; and Plaintiffs' Complaint fails to allege sufficient facts from which it may be reasonably inferred that the Ivorian farmers acted under "color of law."

## IX. STATE–LAW CAUSES OF ACTION

Plaintiffs' Complaint alleges four causes of action under California law: breach of contract, negligence, unjust enrichment, and unfair business practices. Plaintiffs concede that the Ninth Circuit's decision in *Doe I v. Wal–Mart Stores, Inc.*, 572 F.3d 677 (9th Cir.2009), forecloses the contract and negligence claims. (*See* 8/6/09 Opp. at 2.)[57]

### A. UNJUST ENRICHMENT

With respect to the unjust enrichment cause of action, Plaintiffs allege that:

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[57] *Doe I v. Wal–Mart Stores* addressed causes of action arising out of Wal–Mart's public relations statements about its human rights standards (it had issued a "code of conduct" regarding its labor practices). The court rejected the plaintiffs' contract and negligence claims arising out of the code of conduct because Wal–Mart was an indirect purchaser of the goods manufactured by the laborer-plaintiffs. As Plaintiff concede, the same type of analysis applies in the present case.

> As a result of the forced labor practices utilized by farms and/or farmer cooperatives from which Defendants sourced cocoa beans, Defendants received benefits by being able to purchase cocoa beans from such farms at significantly lower prices as the farms' total labor costs were greatly diminished by reliance on forced child labor. Defendants' conduct thereby constitutes unjust enrichment and Defendants are under a duty of restitution to the Former Child Slave Plaintiffs for the benefits received therefrom.

(FAC ¶¶ 90–91.)

A thorough and relevant discussion of California's law of unjust enrichment appears in *Doe I v. Wal–Mart Stores*:

> We turn finally to Plaintiffs' claim of unjust enrichment. Plaintiffs allege that Wal–Mart was unjustly enriched at Plaintiffs' expense by profiting from relationships with suppliers that Wal–Mart knew were engaged in substandard labor practices. Unjust enrichment is commonly understood as a theory upon which the remedy of restitution may be granted. *See* 1 GEORGE E. PALMER, LAW OF RESTITUTION § 1.1 (1st ed. 1978 & Supp. 2009); Restatement of Restitution § 1 (1937) ("A person who has been unjustly enriched at the expense of another is required to make restitution to the other."). California's approach to unjust enrichment is consistent with this general understanding: "The fact that one person benefits another is not, by itself, sufficient to require restitution. The person receiving the benefit is required to make

> restitution only if the circumstances are such that, as between the two individuals, it is *unjust* for the person to retain it." *First Nationwide Sav. v. Perry*, 11 Cal.App.4th 1657, 15 Cal.Rptr.2d 173, 176 (1992) (emphasis in original).
>
> The lack of any prior relationship between Plaintiffs and Wal–Mart precludes the application of an unjust enrichment theory here. *See Smith v. Pac. Props. & Dev. Corp.*, 358 F.3d 1097, 1106 (9th Cir.2004) (noting that a party generally may not seek to disgorge another's profits unless "a prior relationship between the parties subject to and benefitting from disgorgement originally resulted in unjust enrichment"). Plaintiffs essentially seek to disgorge profits allegedly earned by Wal–Mart at Plaintiffs' expense; however, we have already determined that Wal–Mart is not Plaintiffs' employer, and we see no other plausible basis upon which the employee of a manufacturer, without more, may obtain restitution from one who purchases goods from that manufacturer. That is, the connection between Plaintiffs and Wal–Mart here is simply too attenuated to support an unjust enrichment claim. *See*, *e.g.*, *Sperry v. Crompton Corp.*, 8 N.Y.3d 204, 831 N.Y.S.2d 760, 863 N.E.2d 1012, 1018 (2007) (holding that "the connection between the purchaser of tires and the producers of chemicals used in the rubbermaking process is simply too attenuated to support" the purchaser's claim of unjust enrichment).

*Doe I v. Wal–Mart Stores*, 572 F.3d at 684–85.

The Ninth Circuit's observations about the "attenuated" nature of the relationship between the plaintiffs and the defendant applies with equal force in the present case. Plaintiffs assert that *Doe v. Wal–Mart* is not controlling because the present case involves a "long term exclusive relationship" between Defendants and the "specific farmers that enslaved Plaintiffs and other children." (8/6/09 Opp. at 2.) However, Plaintiffs fail to identify any legal authority for their conclusion that Defendants' long-term exclusive relationship with the **Ivorian farmers** constitutes a "prior relationship" between **Plaintiffs** and Defendants. In *Doe v. Wal–Mart*, the Ninth Circuit affirmed the dismissal of an unjust enrichment claim where there was no "prior relationship" between the plaintiffs and defendant, and Plaintiffs have failed to identify any such relationship between Plaintiffs and Defendants in this case. The Motion to Dismiss the unjust enrichment cause of action is therefore granted.

**B. UNFAIR BUSINESS PRACTICES**

All Plaintiffs—both the Malian child-laborer Plaintiffs and the Global Exchange Plaintiffs—allege unfair competition violations under Cal. Bus. & Prof. Code §§ 17200 *et seq*. The basic allegations are that Defendants engaged in fraudulent and deceptive business practices by making materially false misrepresentations and omissions that:

> den[ied] the use of child slaves and/or [ ] create[d] the false impression that the problem of child slaves is being adequately addressed, either directly by Defendants and/or through their various trade associations, including that an independent, credible system of mon-

> itoring, certification, and verification would be in place by July 1, 2005.

(FAC ¶ 95.) Defendants also allegedly engaged in unfair business practices by "us[ing] ... unfair, illegal, and forced child labor" to gain an unfair business advantage over competitors. (FAC ¶ 96.)

*1. ALLEGATIONS BY FORMER CHILD LABORERS*

The child-laborer Plaintiffs fail to allege any facts showing that they suffered harm on account of Defendants' conduct in California.

Plaintiffs correctly recognize that the Unfair Competition Law allows claims by "non-California plaintiffs when the alleged **misconduct** or **injuries** occurred **in California**." (2/23/09 Opp. at 36 (collecting cases) (emphasis added).) California courts have consistently held that out-of-state plaintiffs may not bring Unfair Competition Law claims for out-of-state misconduct or injuries. *See*, *e.g.*, *Churchill Village, L.L.C. v. General Elec. Co.*, 169 F.Supp.2d 1119, 1126 (N.D.Cal.2000) ("section 17200 does not support claims by non-California residents where none of the alleged misconduct or injuries occurred in California") (citing *Norwest Mortgage, Inc. v. Superior Court*, 72 Cal.App.4th 214, 85 Cal.Rptr.2d 18 (1999)), *aff'd*, 361 F.3d 566 (9th Cir.2004).

Plaintiffs fail to articulate any theory through which the child-laborer Plaintiffs were harmed by Defendants' California-based conduct. Plaintiffs assert that "Plaintiffs allege that Defendants have been making false and misleading statements in California" (2/23/09 Opp. at 36), but Plaintiffs fail to explain how the child-laborer **Plaintiffs** were **harmed** by those false and misleading statements.

Absent allegations that the child-laborer Plaintiffs suffered injuries based on Defendants' conduct in California, the Unfair Competition Law claims of the child-laborer Plaintiffs are dismissed. *See Jane Doe I v. Wal–Mart Stores, Inc.*, No. CV 05–7307 AG (MANx), 2007 WL 5975664, at *6 (C.D.Cal. Mar. 30, 2007) (holding that no "case supports finding an injury in fact in a consumer deception case when the plaintiff is not a consumer. Plaintiffs have not shown any legal authority for such an extension of a consumer protection law.").[58]

*2. ALLEGATIONS BY GLOBAL EXCHANGE*

The Court declines to exercise supplemental jurisdiction over Global Exchange's Unfair Competition Law claims against Defendants. Global Exchange's claims relate to Defendants' marketing and sales conduct, not Defendants' alleged aiding and abetting human rights abuses. (*See* FAC ¶¶ 90–91.) The Court concludes that Global Exchange's Unfair Competition Law claims are not "so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a). "Nonfederal claims are part of the same 'case' as federal claims when they 'derive from a common nucleus of operative fact' and are such that a plaintiff 'would ordinarily be expected to try them in one judicial proceeding.' " *Trustees of Construction Industry and Laborers Health and Welfare Trust v. Desert Valley Landscape & Maintenance, Inc.*, 333 F.3d 923, 925 (9th Cir.2003) (quoting *Finley*

[58] The *Doe v. Wal–Mart* plaintiffs did not appeal this portion of the district court's holding.

*v. United States*, 490 U.S. 545, 549, 109 S.Ct. 2003, 104 L.Ed.2d 593 (1989)). Here, Global Exchange's claims do not "derive from a common nucleus of operative fact" as the child-laborers' claims. *See id*. at 925.

The Court also concludes that even if supplemental jurisdiction were appropriate under 28 U.S.C. § 1367(a), the Court would decline to exercise supplemental jurisdiction because "the claim raises a novel or complex issue of State law." 28 U.S.C. § 1367(c)(1); *see also Medrano v. City of Los Angeles*, 973 F.2d 1499, 1506 (9th Cir.1992) (affirming dismissal of claims involving "complicated state law issues"). California's Unfair Competition Law is in a state of flux and the Court concludes that the state courts, not federal courts, should resolve the statute's uncertainties. *See generally Clayworth v. Pfizer, Inc.*, 49 Cal.4th 758, 111 Cal.Rptr.3d 666, 233 P.3d 1066 (2010); *In re Tobacco II Cases*, 46 Cal.4th 298, 93 Cal.Rptr.3d 559, 207 P.3d 20 (2009); *see also Janda v. T–Mobile USA, Inc.*, 378 Fed.Appx. 705, 708 (9th Cir.2010) ("In the context of a UCL consumer claim it is unclear whether a plaintiff must (1) show that the harm to the consumer of a particular practice outweighs its utility to defendant, or (2) allege unfairness that is tethered to some legislatively declared policy.") (citations and quotations omitted) (citable pursuant to Fed. R.App. P. 32.1(a); 9th Cir. R. 36–3(b)).[59]

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[59] The Court further notes that the precise basis of Plaintiffs' Unfair Competition Law claim is unclear given the paucity of the factual allegations. It is unclear whether Plaintiffs' claims are governed by cases discussing injuries to **competitors** or by cases discussing injuries to **consumers**.

In addition, the Court would also decline to exercise supplemental jurisdiction under 28 U.S.C. § 1367(c)(3). *See*, *e.g.*, *Construction Industry and Laborers Health and Welfare Trust*, 333 F.3d at 926 ("we [have] held that it was appropriate for the district court to decline jurisdiction over the supplemental state claims because the federal claim had proven to be unfounded.").

Although Defendants did not argue for the dismissal of Global Exchange's claims on jurisdictional grounds, "[c]ourts have an independent obligation to determine whether subject-matter jurisdiction exists." *Hertz Corp. v. Friend*, 559 U.S. —, 130 S.Ct. 1181, 1193, 175 L.Ed.2d 1029 (2010) (citing *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006)). Here, the Court concludes that subject matter jurisdiction does not exist because Global Exchange's claims are not part of the same "case or controversy." Furthermore, even if subject matter jurisdiction would be permissible under 28 U.S.C. § 1367, the Court exercises its discretion to decline to exercise supplemental jurisdiction. *See Estate of Amergi v. The Palestinian Authority*, 611 F.3d 1350, 1365–67 (11th Cir.2010) (affirming district court's dismissal of supplemental wrongful-death claim where federal claims were premised on Alien Tort Statute).

Plaintiffs have not pled any alternative bases other than 28 U.S.C. § 1367 that would support subject matter jurisdiction. Although they assert that jurisdiction is proper under 28 U.S.C. § 1332 (*see* FAC ¶ 6), they have failed to allege the citizenship of the individual members of Global Exchange. *See*, *e.g.*, *Stark v. Abex Corp.*, 407 F.Supp.2d 930, 934 (N.D.Ill.2005) (plaintiff bears burden of showing

complete diversity between plaintiff and individual members of defendant trade association); *see generally* Walter W. Jones, Annotation, *Determination of citizenship of unincorporated associations, for federal diversity of citizenship purposes, in actions by or against such associations*, 14 A.L.R. Fed. 849 (1973, 2010 supp.). Plaintiffs bear the burden of alleging diversity, and they have failed to meet this burden. *See Bautista v. Pan American World Airlines, Inc.*, 828 F.2d 546, 552 (9th Cir.1987). Plaintiffs may amend their Complaint to remedy this deficiency. *See Snell v. Cleveland, Inc.*, 316 F.3d 822, 828 n. 6 (9th Cir.2002). However, it appears that Plaintiffs are likely fail on this ground because by their own admission Plaintiff Global Exchange is based in California and Defendant Nestle USA is headquartered in California. (FAC ¶¶ 17–19.)

## X. CORPORATE LIABILITY UNDER THE ALIEN TORT STATUTE

Although the foregoing discussion resolves Plaintiffs' international law claims in Defendants' favor, the Court wishes to address an issue that was fully briefed for the Court and will require further attention if Plaintiffs elect to file an amended complaint.

Defendants argue that international law does not extend liability to corporations. (2/9/09 Mot. at 5–6.) With a single exception, this argument has been uniformly rejected or ignored by other courts. This Court, however, agrees with Defendants. For the following reasons, the Court concludes that international law does not recognize corporate liability for violations of international law. Accordingly, the Court concludes that the Alien Tort Statute, as interpreted in *Sosa*, does not recognize an internation-

al law cause of action for corporate violations of international law.

### A. *SOSA'* S REQUIREMENTS AND INTERNATIONAL LAW

First and foremost, the Court is guided by the choice-of-law principles enunciated in *Sosa*: federal common law (actionable under this Court's jurisdiction conferred by the Alien Tort Statute) only recognizes causes of action derived from (1) universal and (2) well-defined norms of (3) international law. *Sosa*, 542 U.S. at 725, 124 S.Ct. 2739 ("[C]ourts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized."). Thus, this Court must rely on **international** rather than **domestic** law; and must rely on norms that are **universally** accepted by a consensus of civilized nations, rather than norms that are accepted by a select group of nations; and, finally, the Court must rely on **definite** legal standards, not **disputed** or **uncertain** ones. *See Sosa*, 542 U.S. at 738 n. 30, 124 S.Ct. 2739 (noting "our demanding standard of definition").

In undertaking an analysis of whether *Sosa* permits suits to be brought against corporate defendants, other federal courts appear to be pushed and pulled by two opposing concerns. First is the *Sosa* Court's observation that "the First Congress did not pass the ATS as a jurisdictional convenience to be placed on the shelf for use by a future Congress or state legislature that might, someday, authorize the creation of causes of action or itself decide to make some element of the law of nations actionable for the benefit of foreigners." *Sosa*, 542 U.S. at 719, 124

S.Ct. 2739. In order to prevent the Alien Tort Statute from "lying fallow indefinitely," *see id.*, lower courts occasionally appear eager to entertain Alien Tort Statute claims. Perhaps these courts are guided by Chief Justice Marshall's declaration that every "individual who considers himself injured, has a right to resort to the laws ... for a remedy." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 166, 2 L.Ed. 60 (1803). To these courts, it would be inequitable, and perhaps even a bit unseemly, to bar the courthouse doors simply because a particular international law norm is not quite definite enough, or is not recognized by a sufficient number of civilized nations as applying to corporations.

In seeking to open the courthouse doors to Alien Tort Statute litigants, courts have run up against the second major concern raised by *Sosa*: courts are prohibited from being "aggressive" or "creativ[e]" in interpreting international law, because "Congress intended the ATS to furnish jurisdiction for a relatively **modest set** of actions alleging violations of the law of nations." *Sosa*, 542 U.S. at 720, 726, 728, 124 S.Ct. 2739 (emphasis added). The emphasis must be placed on the word **modest**. According to the Supreme Court, Congress has implicitly commanded to the courts that there must be a "restrained conception of the discretion a federal court should exercise in considering a new cause of action" under international law. *Id.* at 725, 124 S.Ct. 2739. As the Court explained, lower courts must exercise "**caution**" when identifying actionable legal theories.[60] The

[60] The *Sosa* majority uses the word "caution" (occasionally modified to read "**great** caution") five separate times. *Id.* at 725, 727, 728, 124 S.Ct. 2739.

Court further stated that it was imposing a "high bar to new private causes of action for violating international law," and that courts must exercise "vigilant doorkeeping" in allowing a "narrow class" of appropriate cases. *Id*. at 727, 729, 124 S.Ct. 2739.

*Sosa' s* repeated use of words like "caution" and "modest[y]" is particularly telling in light of the Court's discussion of the evolution in judicial thinking toward the common law. In the past, the common law was "found or discovered" by courts; but today we acknowledge that the common law is "made or created" by judges through their exercise of "a substantial element of discretionary judgment in the decision." *Id*. at 725–26, 124 S.Ct. 2739. In order to restrain this judicial discretion, "the general practice has been to look for legislative guidance before exercising innovative authority over substantive law." *Id*. at 726, 124 S.Ct. 2739. As the Court explained, "we now tend to understand common law not as a discoverable reflection of universal reason but, in a positivistic way, as a product of human choice." *Id*. at 729, 124 S.Ct. 2739.

Here, the "product of human choice" to which the Court must defer is the Alien Tort Statute, 28 U.S.C. § 1350. And as explained by *Sosa*, this statute requires courts to look abroad to "f[ind] or discover[ ]" only those international legal principles that are **universal** and **well-defined**. Domestic federal courts are simply not authorized to create new international law, nor are they authorized to push the boundaries of existing international law beyond those that have been defined by other authorities. Notably, this narrowly defined, positivistic view is in accord with the modern conception of international law as being a product of affirmative human choices

rather than a form of "natural law" that exists somewhere in the ether. *See*, *e.g.*, *The Case of the S.S. "Lotus"*, P.C.I.J., Ser. A., No. 10, 1927, at 18 ("The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims.").

Accordingly, the Supreme Court concluded that the appropriate source of law under the Alien Tort Statute is well-defined, universally-accepted international law. In order to determine the details of this source of law, it is necessary to apply the three-tiered approach articulated by the Supreme Court in *The Paquete Habana*, 175 U.S. at 700, 20 S.Ct. 290, codified by American academics in the *Restatement (Third) of Foreign Relations*, § 102, and adopted as the substantive foundation for the primary contemporary authority on international law, the International Court of Justice, *see* ICJ Statute, art. 38. The central sources of law are treaties and customary international law; by way of analogy, these two bodies of law may be viewed respectively as something like the statutes and common law in our domestic system. The secondary body of law is the gap-filling "general principles of law common to the major legal systems." *Restatement (Third) of Foreign Relations*, § 102(4) & n. 7; *see also* ICJ Statute, art. 38(1)(c) ("the general principles of law recognized by civilized nations").[61]

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[61] Secondary authorities are recognized as "as subsidiary means for the determination of rules of law." ICJ Statute, art. 38(1)(d).

With those three sources of international law in mind, it is important to refocus on *Sosa' s* directive that lower courts may only apply international law that is universally accepted and well-defined. Notably, in addition to this general description of the Alien Tort Statute, the Supreme Court in *Sosa* also stated that lower courts must specifically examine "whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual." *Sosa*, 542 U.S. at 732 n. 20, 124 S.Ct. 2739. Thus, in order to address Defendants' argument that corporations are not liable under the Alien Tort Statute for violations of international law, the Court concludes that the correct approach under *Sosa* is to determine whether universal, well-defined international law "extends the scope of liability for a violation of a given norm to ... corporation[s]." *See Sosa*, 542 U.S. at 732 n. 20, 124 S.Ct. 2739.

After *Sosa*, it is appropriate to look to international law rather than domestic law to provide standards governing corporate liability, agency attribution, joint venture theories, piercing the corporate veil, and the like. Some might argue that corporate liability can be provided by operation of "federal common law." *See*, *e.g.*, *In re Agent Orange*, 373 F.Supp.2d at 59 ("In any event, even if it were not true that international law recognizes corporations as defendants, they still could be sued under the ATS.... [T]he Supreme Court made clear that an ATS claim is a federal common law claim and it is a bedrock tenet of American law that corporations can be

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Secondary authorities are not themselves a source of international law. *See id*.

held liable for their torts.") (quotation omitted). However, such an approach improperly superimposes American legal rules on top of international law norms, which directly contravenes *Sosa's* insistence that courts must determine "whether **international law** extends the scope of liability for a violation of a given norm to the perpetrator being sued." *Sosa*, 542 U.S. at 732 n. 20, 124 S.Ct. 2739.

The following example will illustrate the logic animating the Court's conclusion that international law, not domestic common law, must provide for corporate liability. At the time the Alien Tort Statute was enacted, the common law included a rule known as "coverture," which treated husbands and wives as a single legal entity. *See generally* Samantha Ricci, Note, *Rethinking Women and the Constitution: An Historical Argument for Recognizing Constitutional Flexibility with Regards to Women in the New Republic*, 16 Wm. & Mary J. Women & L. 205, 212–21 (2009). As explained by Blackstone: "By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs every thing; and is therefore called in our law-french a *feme-covert*; is said to be covert-baron, or under the protection and influence of her husband, her baron, or lord; and her condition during her marriage is called her coverture." Blackstone, 1 *Commentaries*, Ch. 15. Under this doctrine of coverture, according to one study of criminal records in Pennsylvania, "[i]n a fifty-year span between 1750 and 1800, 276 wives were prosecuted alongside their husbands, and 266 other wives were charged independently with the same crime their spouse had committed."

Ricci, *Rethinking Women and the Constitution,* 16 Wm. & Mary J. Women & L. at 214 (citing G.S. Rowe, *Femes Covert and Criminal Prosecution in Eighteenth–Century Pennsylvania*, 32 Am. J. L. Hist. 138, 142 (1988)). In other words, women could be—and, based on the historical record, apparently **were**—held legally responsible for acts committed by their husbands.

In contrast to the common law rules, Blackstone noted, coverture did not exist in civil law countries. Blackstone, 1 *Commentaries*, Ch. 15. In those countries, "the husband and wife are considered as two distinct persons; and may have separate estates, contracts, debts, and injuries: and therefore, in our ecclesiastical courts, a woman may sue and be sued without her husband." *Id*.

In light of these clear distinctions between the common law tradition and the civil law tradition, it would be quite inappropriate for a United States court to apply principles of coverture under the Alien Tort Statute. No one could reasonably argue that United States courts should impose American views of marital relations on all international wrongdoers. There is no authority in international law allowing for the wife of a *hostis humanis generis* to be held equally liable for her husband's wrongdoing, and it would be judicial imperialism at its worst for American courts to inject coverture into the Alien Tort Statute absent some clear authorization to do so from either Congress or international law.

Of course, coverture no longer exists in domestic law, so there is little risk that courts will engage in such absurdity. But the purpose of this discussion is to illustrate the nature of agency attribution in a circumstance that is much less familiar than corporate

liability, joint venture liability, and general principal-agent liability. *See generally* Blackstone 1 *Commentaries* Chs. 14–17 (discussing four types of agency relationships: master-servant, husband-wife, parent-child, and guardian-ward). Although no Alien Tort Statute court would think it appropriate to hold a wife liable for her husband's wrongdoing based on idiosyncratic domestic rules such as coverture, Alien Tort Statute courts **routinely** apply domestic conceptions of agency liability with respect to corporations, joint venturers, and others who have entered into commercial principal-agent relationships. Such an approach is, in this Court's view, improper. Under *Sosa*, corporate liability and other types of agency liability must be created by international law. And as the following discussion demonstrates, there is not a well-defined consensus regarding corporate liability in international law.

### B. OTHER COURTS' CONCLUSIONS

Despite the stringent standards set forth in *Sosa*, domestic courts have almost uniformly concluded that corporations may be held liable for violations of international law. *See Romero v. Drummond Co., Inc.*, 552 F.3d 1303, 1315 (11th Cir.2008) ("The text of the Alien Tort Statute provides no express exception for corporations, and the law of this Circuit is that this statute grants jurisdiction from complaints of torture against corporate defendants.") (citations omitted); *Khulumani v. Barclay Nat. Bank Ltd.*, 504 F.3d 254, 282 (2d Cir.2007) (Katzmann, J., concurring) ("the issue of whether corporations may be held liable under the Alien Tort Statute is indistinguishable from the question of whether private individuals may be"); *Al–Quraishi v. Nakhla*, 728 F.Supp.2d 702, 753–55, 2010 WL 3001986, at *39–41 (D.Md.2010);

*In re XE Services Alien Tort Litigation*, 665 F.Supp.2d 569, 588 (E.D.Va.2009) ("Nothing in the ATS or *Sosa* may plausibly be read to distinguish between private individuals and corporations."); *In re South African Apartheid*, 617 F.Supp.2d at 254–55 ("On at least nine separate occasions, the Second Circuit has addressed ATCA cases against corporations without ever hinting—much less holding—that such cases are barred.... [T]his Court is bound by the decisions of the Second Circuit."); *Arias v. Dyncorp*, 517 F.Supp.2d 221, 227 (D.D.C.2007) ("It is clear that the ATCA may be used against corporations acting under 'color of state law,' or for a handful of private acts, such as piracy and slave trading.") (alterations omitted); *Bowoto v. Chevron Corp.*, No. C 99–02506 SI, 2006 WL 2455752, at *9 (N.D.Cal. Aug. 22, 2006) ("The dividing line for international law has traditionally fallen between states and private actors. Once this line has been crossed and an international norm has become sufficiently well established to reach private actors, there is very little reason to differentiate between corporations and individuals."); *Presbyterian Church of Sudan v. Talisman Energy Inc.*, 374 F.Supp.2d 331, 335–37 (S.D.N.Y.2005); *In re Agent Orange Prod. Liab. Litig.*, 373 F.Supp.2d 7, 58–59 (E.D.N.Y.2005) ("Limiting civil liability to individuals while exonerating the corporation directing the individual's action through its complex operations and changing personnel makes little sense in today's world."). Other courts have held corporations liable without specifically addressing the issue. *See Abdullahi v. Pfizer, Inc.*, 562 F.3d 163 (2d Cir.2009); *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242 (11th Cir.2005); *John Roe I v. Bridgestone Corp.*, 492 F.Supp.2d 988 (S.D.Ind.2007); *Mujica v.*

*Occidental Petroleum Corp.*, 381 F.Supp.2d 1164 (C.D.Cal.2005).

The two most thorough opinions on this question were issued by a pair of district courts in the Second Circuit. In *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F.Supp.2d 289 (S.D.N.Y.2003), and *In re Agent Orange Product Liability Litig.*, 373 F.Supp.2d 7 (E.D.N.Y.2005), Judge Schwartz and Judge Weinstein respectively discussed corporate liability in detail and concluded that corporations may be held liable for violating international law.[62] Many other courts have relied almost exclusively on the reasoning employed by these two decisions. *See*, *e.g.*, *In re XE Services*, 665 F.Supp.2d at 588; *In re South African Apartheid*, 617 F.Supp.2d at 255 ("[I]n *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, Judge Denise Cote [sic] of the Southern District of New York wrote two lengthy and persuasive explanations of the basis for corporate liability in ATCA cases. This Court need not repeat her analysis.") (footnote omitted); *Bowoto*, 2006 WL 2455752, at *9. Accordingly, this Court's analysis focuses heavily on the authorities and reasoning contained in *Presbyterian Church of Sudan* and *In re Agent Orange*.

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[62] Shortly before passing away, Judge Schwartz wrote the initial *Presbyterian Church of Sudan* opinion addressing corporate liability. The case was transferred to Judge Cote. Following *Sosa*, Judge Cote reaffirmed the validity of Judge Schwartz's reasoning and added a few additional observations. *See Presbyterian Church of Sudan*, 374 F.Supp.2d at 335 ("The 2003 Opinion meticulously demonstrated that corporations may be held liable under international law for violations of *jus cogens* norms, citing Second Circuit and other federal precedent, as well as a wide array of international law sources."). The Court refers to Judge Schwartz's opinion as *Presbyterian Church of Sudan I* and Judge Cote's opinion as *Presbyterian Church of Sudan II*.

Having examined the reasoning of those two cases and related authorities, the Court concludes there is no well-defined international consensus regarding corporate liability for violating international human rights norms. Despite the weight of domestic authority supporting that conclusion, this issue remains open to reasonable debate. Notably, the Second Circuit recently ordered further briefing on this issue, which reveals that the question is not settled in that Circuit. *See In re South African Apartheid*, 617 F.Supp.2d at 255 n. 127; *see also* Docket no. 133 (Plaintiffs' Filing of Supplemental Briefing in *Presbyterian Church of Sudan* ). After receiving (and presumably reviewing) that briefing, the Second Circuit simply noted that *Sosa* specifically requires an inquiry into " 'whether international law extends the scope of liability' to corporations," and assumed **without deciding** that "corporations such as Talisman may be held liable for the violations of customary international law that plaintiffs allege." *Presbyterian Church of Sudan*, 582 F.3d at 261 n. 12 (quoting *Sosa*, 542 U.S. at 732 n. 20, 124 S.Ct. 2739). In addition, the Second Circuit again requested briefing on this issue in a recent appeal of the South African *Apartheid* decision. *See Balintulo v. Daimler AG*, Case No. 09–2778–cv(L) (Dec. 4, 2009 order requesting further briefing). This Court therefore believes that, contrary to Plaintiffs' assertions that this issue is well-settled, corporate liability remains open to scrutiny.

Accordingly, the Court wishes to undertake a critical examination of the legal arguments *pro* and *con* regarding corporate liability under the Alien Tort Statute. As noted *supra*, this discussion draws heavily on the two key cases resolving the question in favor of corporate liability (the *Presbyterian Church of*

*Sudan* and *In re Agent Orange* district court opinions). These cases' reasoning is contrasted with the only judicial decision to the contrary, Judge Korman's dissent in *Khulumani v. Barclay Nat. Bank Ltd.*, 504 F.3d 254, 321–26 (2d Cir.2007). Having examined these and related authorities, the Court concludes that the existing cases have not adequately identified any international law norms governing corporations. Accordingly, the Court concludes that corporations cannot be held directly liable under the Alien Tort Statute for violating international law.

### C. THE VARIOUS LINES OF REASONING

Simply put, the existing caselaw fails to provide persuasive analysis of the question of corporate liability under international law. The courts have mainly relied on the following lines of argument. The Court examines the inadequacies of each argument, and concludes that the existing cases fail to identify a universal, well-defined norm of corporate liability under international law.

#### *1. PRINCIPLE- AND LOGIC–BASED ARGUMENTS*

One of the most prominent approaches to corporate liability rests on general principles of fairness and logic. Courts have repeatedly justified corporate liability on the ground that there is **no** reason why corporations should **not** be liable for violating international law. *See*, *e.g.*, *Romero v. Drummond Co., Inc.*, 552 F.3d 1303, 1315 (11th Cir.2008) ("The text of the Alien Tort Statute provides no express exception for corporations."); *Khulumani v. Barclay Nat. Bank Ltd.*, 504 F.3d 254, 282 (2d Cir.2007) (Katzmann, J., concurring) ("the issue of whether corporations may be held liable under the Alien Tort

Statute is indistinguishable from the question of whether private individuals may be"); *In re XE Services*, 665 F.Supp.2d at 588 ("Nothing in the ATS or *Sosa* may plausibly be read to distinguish between private individuals and corporations.... [T]here is no **identifiable principle** of civil liability which would distinguish between individual and corporate defendants in these circumstances.") (emphasis added); *Bowoto v. Chevron*, 2006 WL 2455752, at *9 ("The dividing line for international law has traditionally fallen between states and private actors. Once this line has been crossed and an international norm has become sufficiently well established to reach private actors, there is **very little reason** to differentiate between corporations and individuals.") (emphasis added); *Presbyterian Church of Sudan II*, 374 F.Supp.2d at 336 n. 10 ("there is **no principled basis** for contending that acts such as genocide are of mutual and not merely several concern to states when the acts are performed by some private actors, like individuals, but not by other private actors, like corporations") (emphasis added); *In re Agent Orange*, 373 F.Supp.2d at 58–59 ("Limiting civil liability to individuals while exonerating the corporation directing the individual's action through its complex operations and changing personnel **makes little sense** in today's world.") (emphasis added); *Presbyterian Church of Sudan I*, 244 F.Supp.2d at 318 ("[T]here is **no logical reason** why corporations should not be held liable, at least in cases of *jus cogens* violations.") (emphasis added).

The most thorough elaboration of this argument appears in *In re Agent Orange*. Judge Weinstein explained:

> Limiting civil liability to individuals while exonerating the corporation directing the individual's action through its complex operations and changing personnel makes little sense in today's world. Our vital private activities are conducted primarily under corporate auspices, only corporations have the wherewithal to respond to massive toxic tort suits, and changing personnel means that those individuals who acted on behalf of the corporation and for its profit are often gone or deceased before they or the corporation can be brought to justice.... Defendants present no policy reason why corporations should be uniquely exempt from tort liability under the ATS, and no court has presented one either.... Such a result should hardly be surprising. A private corporation is a juridical person and has no per se immunity under U.S. domestic or international law. Given that private individuals are liable for violations of international law in certain circumstances, there is no logical reason why corporations should not be held liable, at least in cases of *jus cogens* violations.... Indeed, while [the defendant] disputes the fact that corporations are capable of violating the law of nations, it provides no logical argument supporting its claim.

*In re Agent Orange*, 373 F.Supp.2d at 58–59 (citations and quotations omitted).

This approach may be persuasive as a matter of abstract reasoning, but it fails to comport with the Supreme Court's directives in *Sosa*. Federal courts addressing claims under the Alien Tort Statute may

only recognize claims that "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized [that is, piracy, safe-conduct violations, and infringements of the rights of ambassadors]." *Sosa*, 542 U.S. at 725, 124 S.Ct. 2739. As the *Sosa* Court noted, "we now adhere to a conception of limited judicial power ... that federal courts have no authority to derive 'general' common law." *Id*. at 729, 124 S.Ct. 2739. The Court emphasized that Alien Tort Statute claims are not drawn from the ether but rather are "derived from the law of nations." *Id*. at 731 n. 19, 124 S.Ct. 2739. Thus, under *Sosa*, federal judges may not rely on their own ideas of what is right, fair, or logical. To paraphrase Justice Scalia's concurrence, although "we"—i.e., federal judges—"know ourselves to be eminently reasonable, self-awareness of eminent reasonableness is not really a substitute for" universal and well-defined norms of international law. *Id*. at 750, 124 S.Ct. 2739 (Scalia, J., concurring). Whatever the logical force of the domestic courts' conclusions, Sosa simply prohibits that method of analysis. This Court therefore concurs with Judge Korman's observation that "the issue here is not whether policy considerations favor (or disfavor) corporate responsibility for violations of international law." *Khulumani*, 504 F.3d at 325 (Korman, J., dissenting).[63]

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[63] It should be emphasized that Sosa requires the international law norm to be well-defined and widely recognized. International law may, as a general matter, allow jurists to apply basic principles of logic and reason. *See*, *e.g.*, *In re Piracy Jure Gentium*, [1934] A.C. 586, 595 (P.C.) (rejecting argument that actual robbery is a *sine qua non* of piracy, and noting with respect to

Furthermore, the Court is not fully convinced that reason and logic clearly compel the conclusion that corporations should be liable under the Alien Tort Statute. As noted by Judge Korman:

> There is a significant basis for distinguishing between personal and corporate liability. Where the private actor is an individual, he is held liable for acts which he has committed and for which he bears moral responsibility. On the other hand, "legal entities, as legal abstractions can neither think nor act as human beings, and what is legally ascribed to them is the resulting harm produced by individual conduct performed in the name or for the benefit of those participating in them or sharing in their benefits."

*Khulumani*, 504 F.3d at 325 (Korman, J., dissenting) (quoting M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* 378 (2d ed. 1999)). Ultimately, **individuals**, not **legal entities**, perform the actions that violate international law. Therefore, it stands to reason that the individuals should be held responsible.

One of the central animating forces behind domestic courts' conclusions is an aspirational view of what the law **should** contain, not what the law **actually** contains. However, *Sosa* prohibits courts from substituting abstract aspirations—or even pragmatic

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this argument that "their Lordships are almost tempted to say that a little common sense is a valuable quality in the interpretation of international law"). However, *Sosa* appears to bar domestic courts from engaging in that mode of analysis. Under Sosa, applicable rules of international law must be derived from universally recognized, well-defined international-law sources, not federal judges' particular notions of "common sense."

concerns—in place of specific international rules. *See Sosa*, 542 U.S. at 738, 124 S.Ct. 2739 (rejecting plaintiff's argument because it "expresses an aspiration that exceeds any binding customary rule having the specificity we require."). The real question is whether international law actually provides for corporate liability.

*2.* STARE DECISIS–*BASED ARGUMENTS*

The second most prominent line of argument relies on the fact that domestic courts have consistently upheld corporate liability under the Alien Tort Statute. For example, in *Abdullahi v. Pfizer*, the court cited the *per curiam* decision in *Khulumani* for the proposition that "we held that the ATS conferred jurisdiction over multinational corporations that purportedly" violated international law. *Abdullahi v. Pfizer*, 562 F.3d 163, 174 (2d Cir.2009), *cert. denied*, —— U.S. ——, 130 S.Ct. 3541, 177 L.Ed.2d 1121 (2010). The *Abdullahi v. Pfizer* court accordingly treated the question as settled.[64] District courts in the Second Circuit have reached the same conclusion. *In re South African Apartheid*, 617 F.Supp.2d at 254–55; *Presbyterian Church of Sudan II*, 374 F.Supp.2d at 335 (noting that, after *Presbyterian Church of Sudan I*, "the Second Circuit twice confronted ATS cases with corporate defendants, and neither time did it hold that corporations cannot be liable under customary international law"); *In re Agent Orange*, 373 F.Supp.2d at 58 ("The Second Circuit has considered numerous cases where plaintiffs sued a corporation under the ATCA for alleged

[64] As noted *supra*, this question is decidedly **not** settled in the Second Circuit. *See Presbyterian Church of Sudan*, 582 F.3d at 261 n. 12.

breaches of international law.") (quotation omitted) (collecting cases); *Presbyterian Church of Sudan I*, 244 F.Supp.2d at 311–13 ("While the Second Circuit has not explicitly held that corporations are potentially liable for violations of the law of nations, it has considered numerous cases ... where a plaintiff sued a corporation under the ATCA for alleged breaches of international law.... In each of these cases, the Second Circuit acknowledged that corporations are potentially liable for violations of the law of nations that ordinarily entail individual responsibility, including *jus cogens* violations.") (collecting cases). Courts in other circuits have adopted the same line of analysis. *See Romero v. Drummond Co.*, 552 F.3d 1303, 1315 (11th Cir.2008) ("[T]he law of this Circuit is that this statute grants jurisdiction from complaints of torture against corporate defendants."); *In re XE Services*, 665 F.Supp.2d 569, 588 (E.D.Va.2009) ("all courts to have considered the question have concluded that" corporations may be held liable under international law); *In re South African Apartheid*, 617 F.Supp.2d at 254–55 ("On at least nine separate occasions, the Second Circuit has addressed ATCA cases against corporations without ever hinting—much less holding—that such cases are barred.... [T]his Court is bound by the decisions of the Second Circuit."); *Bowoto v. Chevron*, 2006 WL 2455752, at *9 (N.D.Cal. Aug. 22, 2006) ("Both before and after *Sosa*, courts have concluded that corporations may be held liable under the ATS.").

None of these cases identifies a universal and well-defined standard of international law. In fact, none of these cases quotes or cites an earlier case that identifies a universal and well-defined standard of international law. Most of these cases refer to earlier cases that did not even **mention** corporate liabil-

ity. *Compare Romero v. Drummond Co.*, 552 F.3d at 1315 (citing *Aldana v. Del Monte Fresh Produce, Inc.*, 416 F.3d 1242 (11th Cir.2005), as binding circuit "precedent") *with Aldana v. Del Monte Fresh Produce, Inc.*, 416 F.3d at 1244–53 (opinion is silent regarding corporate liability). This approach ignores the fundamental principle that "[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster v. Fall*, 266 U.S. 507, 511, 45 S.Ct. 148, 69 L.Ed. 411 (1925); *see also E. & J. Gallo Winery v. EnCana Corp.*, 503 F.3d 1027, 1046 n. 14 (9th Cir.2007) (same).

Accordingly, the Court affords little weight to the fact that various domestic courts have contemplated corporate liability (either explicitly or implicitly). Under *Sosa*, domestic precedents are only relevant to the extent that they identify a well-defined international law consensus.

*3. EARLY HISTORICAL PRECEDENTS*

As *Sosa* noted, piracy is one of the oldest and most well-defined examples of international law. There is some authority for the proposition that piracy can only be committed by individuals, not legal entities. As explained in Samuel Rutherford's seventeenth century treatise *Lex*, *Rex*, which is quoted among the extensive citations in *United States v. Smith*, 18 U.S. 153, 5 Wheat. 153, 5 L.Ed. 57 (1820):

> A band of robbers or a company of pirates may in fact be united to one another by compact, & c. But they are still, by the law of nature, only a number of unconnected individuals; and consequently, **in the view of the**

> **law of nations they are not considered as a collective body or public person**. For the compact by which they unite themselves is void, because the matter of it is unlawful, & c. & c. The common benefit which a band of robbers or a company of pirates propose to themselves consists in doing harm to the rest of mankind.

*Smith*, 18 U.S. at 168–69 n. h quoting Rutherford, 2 *Lex*, *Rex*, ch. 9 (1644) (emphasis added). In other words, a legal entity used for an illegal purpose is traditionally void in international law.

This same view is stated by Blackstone regarding corporate crimes more generally. As Blackstone wrote, "[a] corporation cannot commit treason, or felony, or other crime, in its corporate capacity: though its members may, in their distinct individual capacities. Neither is it capable of suffering a traitor's, or felon's punishment, for it is not liable to corporeal penalties, nor to attainder, forfeiture, or corruption of blood." Blackstone, 1 *Commentaries*, Ch. 18.

On the other hand, the early authorities do not uniformly prohibit corporate liability. Notably, in the early twentieth century the Attorney General of the United States recommended that the Alien Tort Statute could be used to remedy harms caused by a corporation's violation of a water-rights treaty between the United States and Mexico. Charles J. Bonaparte, *Mexican Boundary—Diversion of the Rio Grande*, 26 Op. Atty. Gen. 250 (1907). The attorney general stated that the Alien Tort Statute provides both "a right of action and a forum" for Mexican citizens to bring an action against the corporation for the harm they may have suffered from the diversion of the Rio Grande. *Id.* at 252–53. The attorney gen-

eral hedged a bit by noting that he could not "undertake to say whether or not a suit under ... the foregoing statute[ ] would be successful," as such questions "could only be determined by judicial decision." *Id*. This opinion, although somewhat ambiguous and certainly not binding on this Court, provides at least some historical support for the view that corporations may potentially be held liable for violating international law.

*4. NUREMBERG–BASED PRECEDENTS*

Another set of historical precedents is contained in the decisions of the Nuremberg Tribunals, which are generally viewed as the seminal authorities in modern international criminal law.

The London Charter (the agreement through which the Nuremberg Tribunals were formed and governed) explicitly recognized the existence of "criminal organizations." The Charter specifically provided that the Tribunal was empowered to declare certain organizations to be "criminal organization[s]." London Charter, Art. 9. The effect of this declaration was not to impose liability upon the organization itself; rather, the declaration, if unrebutted before the Tribunal, imposed automatic liability on the organization's **individual members**. See Art. 9–10.[65] (Notably, Karl Rasche-the banker in "*The*

[65] In full, Article 9 reads:

> At the trial of any individual member of any group or organization the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organization of which the individual was a member was a criminal organization.
>
> After the receipt of the Indictment the Tribunal shall give such notice as it thinks fit that the prosecution intends to

*Ministries Case*"—was found guilty of being a member of the SS, which had been deemed a "criminal organization" pursuant to this provision. *United States v. Von Weizsaecker*, 14 T.W.C. at 863.)

Some courts have viewed this "criminal organization" provision as an example of corporate liability. *See Presbyterian Church of Sudan I*, 244 F.Supp.2d at 315. The better view—expressed by the Nuremberg Tribunal itself—is that the "criminal organization" provision was a mechanism for holding individual members of the organization liable for other members' acts in the same manner that joint criminal enterprise or conspiracy provides for such individual liability. *See The Nuremberg Trial*, 6 F.R.D. 69, 132 (1946) ("A criminal organization is analogous to a criminal conspiracy in that the essence of both is cooperation for criminal purposes. There must be a group bound together and organized for a common purpose. The group must be formed or used in connection with the commission of crimes denounced by the Charter."); *see generally Prosecutor v. Vasiljevic*,

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> ask the Tribunal to make such declaration and any member of the organization will be entitled to apply to the Tribunal for leave to be heard by the Tribunal upon the question of the criminal character of the organization. The Tribunal shall have power to allow or reject the application. If the application is allowed, the Tribunal may direct in what manner the applicants shall be represented and heard.

Article 10 reads:

> In cases where a group or organization is declared criminal by the Tribunal, the competent national authority of any Signatory shall have the right to bring individual to trial for membership therein before national, military or occupation courts. In any such case the criminal nature of the group or organization is considered proved and shall not be questioned.

2004 WL 2781932, at ¶ 102 (describing differences between aiding and abetting liability and joint criminal enterprise liability). The London Charter did not provide for entity responsibility as such; rather, it only authorized the Tribunals to convict those person [sic] who "as **individuals** or as **members of organizations**, committed" certain crimes. London Charter, art. 6 (emphasis added). In other words, the Charter recognized that some individuals were acting "as members of organizations," but determined that the individual members, rather than the organizations themselves, were the proper defendants. In short, the Tribunal was only authorized to establish "individual responsibility," art. 6, and simply could not punish organizations. *See United States v. Krauch*, 8 T.W.C. at 1153 ("It is appropriate here to mention that the corporate defendant, Farben, is not before the bar of this Tribunal and cannot be subjected to criminal penalties in these proceedings."); *see generally Khulumani*, 504 F.3d at 322 & n. 10 (Korman, J., dissenting).

That said, the Tribunals occasionally suggested that corporations and organizations could be held separately responsible. Domestic courts have relied heavily on these statements from the Tribunals. *See In re Agent Orange*, 373 F.Supp.2d at 57; *Presbyterian Church of Sudan I*, 244 F.Supp.2d at 315–16. The Tribunals' clearest discussion of corporations appears in the *United States v. Krauch* decision, in which the panel explicitly suggested that corporations may be liable for certain war crimes relating to wartime plunder (or "spoliation," in the terms used by the tribunal):

> Where private individuals, **including juristic persons**, proceed to exploit the military

> occupancy by acquiring private property against the will and consent of the former owner, such action, not being expressly justified by any applicable provision of the Hague Regulations, is in violation of international law. The payment of a price or other adequate consideration does not, under such circumstances, relieve the act of its unlawful character. Similarly where a private individual or a **juristic person** becomes a party to unlawful confiscation of public or private property by planning and executing a well-defined design to acquire such property permanently, acquisition under such circumstances subsequent to the confiscation constitutes conduct in violation of the Hague Regulations.

*Krauch*, 8 T.W.C. at 1132–33 (emphasis added).

The tribunal went on to explain, however, that the corporation could not be held responsible for violating international law: "corporations act **through individuals** and, under the conception of personal individual guilt ..., the prosecution, to discharge the burden imposed upon it in this case, must establish by competent proof ... that **an individual defendant** was either a participant in the illegal act or that, being aware thereof, he authorized or approved it." *Krauch*, 8 T.W.C. at 1153 (emphasis added).[66] The

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[66] In an oft-quoted statement, one of the post-Nuremberg tribunals expressed in strong, clear terms that only **individuals** were capable of being punished for violating international law: "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced." *The Nuremberg Trial*, 6 F.R.D. 69, 110 (1946). The

tribunal explained that its discussion of "corporations" and "juristic persons" was mere *obiter dictum* that was "descriptive of the instrumentality of cohesion in the name of which the enumerated acts of spoliation were committed." *See id*. In other words, the tribunal's references to the company were placeholders meant as shorthand for the individual members of the company. The tribunal's references to the company were not substantive discussions regarding legal responsibility. *Accord In re Agent Orange*, 373 F.Supp.2d at 57 ("In fact, in the Nuremberg trials, this point of lack of corporate liability appeared to have been explicitly stated.").

An illustration of the tribunals' "shorthand" approach can be found in *United States v. Krupp*. The tribunal concluded "that the confiscation of the Austin plant [a French tractor plant owned by the Rothschilds] ... and its subsequent detention **by the Krupp firm** constitute a violation of Article 43 of the Hague Regulations which requires that the laws in force in an occupied country be respected; that it was also a violation of Article 46 of the Hague Regulations which provides that private property must be respected; [and] that **the Krupp firm, through defendants Krupp, Loeser, Houdremont, Mueller, Janssen, and Eberhardt,** voluntarily and without duress participated in these violations by purchasing and removing the machinery and leasing the property of the Austin plant and in leasing the Paris property." *Krupp*, 9 T.W.C. at 1352–53 (emphasis added).

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context of that discussion, however, reveals that the tribunal was rejecting the argument that international law applies only to **sovereign states**. *See id*.; *see also Krauch*, 8 T.W.C. at 1125. The tribunal was not referring specifically to questions of corporate liability.

In light of this factual conclusion, the tribunal held the individual defendants—not the corporation itself—responsible for the wrongful acts. *Id.* at 1448–49; *see also Khulumani*, 504 F.3d at 322 (Korman, J., dissenting) (noting similar discussion in *United States v. Krauch*, 7 T.W.C. at 11–14, 39, 50, 59).

Based on these cases, the fundamental conclusion is that the Nuremberg-era tribunals did not impose any form of liability on corporations or organizations as such. Rather, these tribunals were imposing liability solely on the individuals members of the corporations and organizations. The tribunals repeatedly noted this fact, and their stray references to the contrary constitute nothing more than *dicta*. The courts that have relied on this *dicta* have failed to identify a sufficiently universal and well-defined international law norm of corporate liability that satisfies *Sosa*. *See Khulumani*, 504 F.3d at 321–22 (Korman, J., dissenting).

*5. TREATY- AND CONVENTION–BASED PRECEDENTS*

With few exceptions, international treaties bind sovereign states rather than private parties. *See generally Presbyterian Church of Sudan I*, 244 F.Supp.2d at 317 ("Treaties, by definition, are concluded between states."); *see also Edye v. Robertson (Head Money Cases)*, 112 U.S. 580, 598, 5 S.Ct. 247, 28 L.Ed. 798 (1884) ("A treaty is primarily a compact between independent nations."). In fact, the "major conventions protecting basic human rights, such as the Genocide Convention and common article 3 of the Geneva Convention, do not explicitly reach corporations." *Presbyterian Church of Sudan*, 244 F.Supp.2d at 317. Instead, human rights conventions and treaties bind states or, on occasion, natural persons. For

example, treaties bind nations by requiring them to enact domestic legislation outlawing slavery or the slave trade, *see* 1926 Geneva Slavery Convention, arts. 2(b), 6; requiring nations to outlaw forced labor and other wrongful labor practices, *see*, *e.g.*, Convention Concerning Forced or Compulsory Labor, ILO no. 29, arts. 25–26, 39 U.N.T.S. 55, *entered into force* May 1, 1932; or requiring nations to outlaw illegal shipments of hazardous wastes, *see*, *e.g.*, Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Arts. 4(2), 4(4), 4(7), 9(5), 1673 U.N.T.S. 57. Of course, domestic laws that implement these treaties might be enforceable against corporations; but this results from the operation of the domestic implementing law, not international treaty law. The treaties themselves are silent regarding corporate liability.

Despite these general principles of treaty law, the district court in *Presbyterian Church of Sudan* identified a handful of treaties that explicitly contemplate corporate liability. *See generally Presbyterian Church of Sudan*, 244 F.Supp.2d at 317. An oil pollution treaty provides that a ship "owner" (defined as any "person" registered as the owner) is liable for oil pollution damage caused by the ship's discharge. *Id*. at 317 (citing International Convention on Civil Liability for Oil Pollution Damage, Nov. 29, 1969, art. 3(1), 26 U.S.T. 765, 973 U.N.T.S. 3). Similarly, a nuclear treaty provides that "[t]he operator of a nuclear installation" is liable for damage caused by the installation; notably, the treaty specifically defines "operator" as "any private or public body whether corporate or not." *Id*. (citing Vienna Convention on Civil Liability for Nuclear Damage, May 21, 1963, art. 2(1), 1063 U.N.T.S. 265). The 1976 Convention on Civil Liability for Oil Pollution Damage Resulting

from Exploration for and Exploitation of Seabed Mineral Resources contains an identical extension of liability to any person "whether corporate or not." Dec. 17, 1976, art. 5, *reprinted at* 16 I.L.M. 1450 (cited in *Presbyterian Church of Sudan I*, 244 F.Supp.2d at 317).

These treaties provide marginal authority at best with respect to the relevant inquiry under *Sosa* of identifying a universal and well-defined international consensus regarding corporate liability for human rights violations. These treaties involve transnational environmental torts such as oil spills and nuclear accidents. *See* Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 Yale L.J. 443, 479–81 (2001). The international community has a direct interest in regulating these forms of private behavior, as the harms that flow from these torts extend beyond the national borders of the *situs* of the act. *See id*. In fact, many scholars view these treaties as constituting rules of private law rather than public international law. *Id*. at 481 & nn. 152–54. In any event, regardless of how these treaties are characterized, they fail to identify a universal and well-defined international law standard for holding corporations responsible for human rights abuses.

In addition to the specific environmental tort treaties, domestic courts have also pointed to other international conventions and international rulemaking as indirect evidence of corporate liability. *See Presbyterian Church of Sudan I*, 244 F.Supp.2d at 318. The *Presbyterian Church of Sudan* court relied on the declaration of Professor Ralph G. Steinhardt for the proposition that the major human rights treaties "do not distinguish between natural and juridical

individuals, and it is implausible that international law would protect a corporation" that violated fundamental norms of international law. *Id*. *The Presbyterian Church of Sudan I* court also looked to labor treaties—none of which actually state that they apply to corporations—which, in the court's words, "clearly 'presuppose[ ] ... a duty on the corporation not to interfere with the ability of employees to form unions.'" *Id*. at 317 (quoting Ratner, *Corporations and Human Rights*, 111 Yale L.J. at 478–79). In light of *Sosa*, it should be clear that *Sosa's* requirements are not satisfied by the **possibility** of corporate liability, *id*. at 316 ("corporations **may** be liable under codified international law") (emphasis added), or by one professor's suggestion as to what is or is not **plausible**, *id*. ("it is **implausible** that international law would protect a corporation") (emphasis added), or by yet another professor's conclusion that labor treaties implicitly **presuppose** corporate liability, *id*. at 317 ("a major International Labour Organization convention clearly '**presupposes** ... a duty on the corporation' ") (emphasis added).

*The Presbyterian Church of Sudan I* court also relied on the Universal Declaration of Human Rights, which the court asserted was "binding on states as well as corporations." *Id*. at 318. The Universal Declaration provides that "every individual and every organ of society" shall "strive ... to promote respect" for the fundamental human rights described in the Convention. Notably, the *Sosa* Court expressly **rejected** the plaintiff's reliance on the Universal Declaration of Human Rights because "the Declaration does not of its own force impose obligations as a matter of international law," but rather is "'a statement of principles'" that are non-binding in nature. *Sosa*, 542 U.S. at 734–35, 124 S.Ct. 2739 (quoting

Eleanor Roosevelt, cited in Humphrey, *The UN Charter and the Universal Declaration of Human Rights* 39, 50 (E. Luard ed. 1967)). In any event, even if the Universal Declaration were a binding statement of international law, it is unclear that it actually applies to corporations. The *Presbyterian Church of Sudan I* court relied on a short essay written by the prominent international law professor Louis Henkin, which explains that "every individual and every organ of society" as used in the Universal Declaration "includes juridical persons. Every individual and every organ of society excludes no one, no company, no market, no cyberspace. The Universal Declaration applies to them all." Louis Henkin, *The Universal Declaration at 50 and the Challenge of Global Markets*, 25 Brook. J. Int'l L. 17, 25 (1999) (quoted in *Presbyterian Church of Sudan I*, 244 F.Supp.2d at 318). But notably absent from the *Presbyterian Church of Sudan I's* discussion is the opening sentence of that paragraph of Henkin's essay: "At this juncture the Universal Declaration **may** also address multinational companies." Henkin, *The Universal Declaration at 50*, 25 Brook. J. Int'l L. at 25 (emphasis added). Needless to say, the mere **possibility** of corporate liability is different from a well-defined international consensus on the issue. *See Khulumani*, 504 F.3d at 324 (Korman, J., dissenting) (citing Carlos M. Vázquez, *Direct v. Indirect Obligations of Corporations Under International Law*, 43 Colum. J. Transnat'l L. 927, 942 (2005)). The Universal Declaration of Human Rights therefore stands among the other aspirational international attempts at identifying and defining corporate liability for human rights violations.[67] As the Supreme Court wrote in *Sosa*,

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[67] For example, the United Nations Code of Conduct on Trans-

"that a rule as stated is as far from full realization as the one [plaintiff] urges is evidence **against** its status as binding law." *Sosa*, 542 U.S. at 738 n. 29, 124 S.Ct. 2739 (emphasis added).

As a final source of international law, the *Presbyterian Church of Sudan I* court also relied on the United Nations' practice of imposing economic sanctions, which although "formally directed at states, they also entail certain duties for corporations." *Presbyterian Church of Sudan I*, 244 F.Supp.2d at 318. None of the sanctions were directly applied to corporations, though; if a corporate act violated the sanctions, the state of the corporation's citizenship would be held responsible for violating the sanctions. *Id*. The court also pointed to United Nations General Assembly Resolutions, which by their very nature are non-binding. *See Flores v. Southern Peru Copper Corp*., 414 F.3d 233, 259–62 (2d Cir.2003). In addi-

national Corporations has been through a pair of drafts (one in 1983 and another in 1990), but has never been formally adopted by any nation. Similar efforts have likewise resulted in purely aspirational, theoretical documents that are non-binding and in no way reflective of international law. *See* Development and International Economic Cooperation: Transnational Corporations, U.N. ESCOR, 2d Sess., U.N. Doc. E/1990/94 (1990); Draft United Nations Code of Conduct on Transnational Corporations, U.N. ESCOR, Spec. Sess., Supp. No. 7, Annex II, U.N. Doc. E/1983/17/Rev. 1 (1983); *see also* U.N. Econ. & Soc. Council (ECOSOC), Sub-Comm'n on Promotion & Prot. of Human Rights, Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/L.8 (Aug. 7, 2003); *cf*. Report of the Special Representative of the Secretary–General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts, UN Doc. A/HRC/4/35, ¶ 20 (Feb. 19, 2007).

tion, the court relied on the practice of the European Union, which, under the 1957 Treaty of Rome (which established the Union) and subsequent treaties, has implemented regulations directly against corporations in areas such as antitrust and socioeconomic discrimination. *Presbyterian Church of Sudan I*, 244 F.Supp.2d at 318.

In short, courts have identified various treaties, conventions, and international proclamations as support for the view that international law recognizes corporate liability. However, none of these international law sources provides a well-defined universal consensus regarding corporate liability. These authorities, without more, fail to satisfy *Sosa's* requirements.

On the contrary, treaty-based international law provides a rather compelling (although not definitive) argument **against** treating corporate liability as an actionable rule of international law. The drafting history of the 1998 Rome Statute of the International Criminal Court reveals that the global community of nation-states in fact **lacks** a consensus regarding corporate liability for human rights violations. *See Khulumani*, 504 F.3d at 322–23 (Korman, J., dissenting). Thus, not only have the **supporters** of corporate liability failed to meet their affirmative burden of identifying well-defined, universally acknowledged international norms of corporate liability, but the **opponents** of corporate liability have affirmatively shown that such a well-defined global consensus **does not** exist. "Since as a practical matter it is never easy to prove a negative," *Bartnicki v. Vopper*, 532 U.S. 514, 552, 121 S.Ct. 1753, 1775, 149 L.Ed.2d 787 (2001) (quoting *Elkins v. United States*, 364 U.S. 206, 218, 80 S.Ct. 1437, 1445, 4 L.Ed.2d

1669 (1960)), the Rome Statute negotiating history provides particularly compelling evidence that there is not a global consensus of corporate responsibility for human rights violations under international law.

The negotiating history of Rome Statute shows that the global community has been unable to reach a consensus regarding corporate responsibility for international human rights violations. Although the initial drafts of the Statute provided for corporate liability, this provision was specifically **deleted** from the final version. *See* 2 *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June—17 July 1998*, at 135 (2002). There were a number of reasons for deleting the provision,[68] and the most prominent reason was the absence of international uniformity regarding "acceptable definitions" of corporate liability. Delegates from China, Lebanon, Sweden, Mexico, Thailand, Syria, Greece, Egypt, Poland, Slovenia, El Salvador, Yemen, and Iran firmly opposed the inclusion of corporate liability. Delegates from Australia, Ukraine, Cuba, Argentina, Singapore, Venezuela, Algeria, the United States, Denmark, Finland, Portugal, and Korea expressed hesitation on account of the disparity in practice among states. *Id*. at ¶¶ 35–39, 43–48, 51, 53–65. One of the

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[68] In full, the chairman summarized negotiations as centering on these questions: "Many delegations had difficulty in accepting any reference to 'legal persons' or 'criminal organizations', the reasons given being the problem of implementation in domestic law, the difficulty of finding acceptable definitions, the implications for the complementarity principle, the possible creation of new obligations for States, and the challenge to what was considered the exclusive focus of the Statute, namely individual criminal responsibility." *Id*. at 135.

central points of concern involved the lack of a clear definition among states (and indeed, the absence of corporate criminal liability in many states). *See id.*[69] As a result, the Rome Statute only applies to "natural persons." Rome Statute, art. 25(1).

The Rome Statute's negotiating history therefore reveals that corporate liability fails to satisfy either of *Sosa's* two key requirements—that the norm must be based on clearly defined and universally recognized international law. As noted in *Sosa*, "we now tend to understand common law not as a discoverable reflection of universal reason but, in a positivistic way, as a product of human choice." *Sosa*, 542 U.S. at 729, 124 S.Ct. 2739. The positivistic approach leads to a clear conclusion: there has not been a clear "hu-

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[69] The negotiating history of the Rome Statute is further supported by specific evidence of legal practice among foreign nations. There is a wide variety of forms of corporate liability within domestic legal systems. Some countries do not even recognize corporations as being capable of committing crimes. *See, e.g.*, Hans de Doelder & Klaus Tiedemann, eds., *Criminal Liability of Corporations* 343 (1996) (Russia only recognizes natural persons as capable of committing crimes). Even the countries that recognize corporate criminal liability are divided on the appropriate rules of attributing conduct and culpability to the corporate entity. *See id.* at 104–05, 186–87, 131, 372, 398 (standards include attribution through the acts of control persons [Australia, United Kingdom], the acts of any agent [United States, Finland], or other formulations of liability [Canada, Netherlands]). This divergence in opinion is not merely a disagreement on the procedural aspects of criminal punishment. It reflects a fundamental disagreement on the legal capacity of corporations to commit particular acts and the substantive rules of attributing an agent's conduct to the principal. Given this widespread disagreement, it seems clear that the relevant norms are not sufficiently well-defined among foreign nations to satisfy the requirements of *Sosa*.

man choice" to impose liability on corporations for violating international norms. Indeed, to the extent that there has been a choice, the governments drafting the Rome Statute chose **not** to extend liability to corporations.

Of course, the Court does not intend to suggest that the Rome Statute is the sole authority for construing international law norms under *Sosa*. *See*, *e.g.*, *Abagninin*, 545 F.3d at 738–40 (rejecting plaintiffs' reliance on Rome Statute with respect to genocide because Rome Statute's definition of genocide conflicted with definition that was uniformly adopted by other authorities). Nor does the negotiating history of the Rome Statute provide a definitive international rejection of corporate liability in international law. A fair amount of the delegates' opposition to corporate liability arose from the eleventh-hour nature of the proposal to include corporate liability. *See generally* 2 *United Nations Diplomatic Conference on the Establishment of an International Criminal Court, Rome, 15 June—17 July 1998*, at 133–36. In addition, others were concerned with the idea of imposing corporate **criminal** responsibility, but were silent regarding the possibility of corporate civil responsibility. *Id*. As international-crimes expert Professor Bassiouni has emphasized, it is important to distinguish the **substantive** elements of international law from the sometimes-idiosyncratic procedural systems that are used to enforce those substantive rules. M. Cherif Bassiouni, 1 *International Criminal Law* 5, 7–8 (2008). It is important not to place too much weight on the Rome Statute, which defined certain crimes and created certain enforcement mechanisms, but was not intended to serve as an encyclopedic restatement of the full body of international law. The negotiating history must therefore

be viewed as persuasive rather than conclusive authority for purposes of the Alien Tort Statute.

In the end, though, international treaties and conventions reveal an absence of international human rights norms governing corporate conduct. As noted by the United Nations Special Representative of the Secretary–General, "states have been unwilling to adopt binding international human rights standards for corporations." Representative of the Secretary–General, *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, at ¶ 44 (2007). Instead, the only pertinent authorities are "soft law standards and initiatives." *Id*. Such non-binding, aspirational norms are insufficient under *Sosa*.

*6. INTERNATIONAL PRACTICE*

Another line of reasoning was set forth in Judge Cote's decision in *Presbyterian Church of Sudan II*, which re-affirmed Judge Schwartz's prior decision and, in light of the intervening Supreme Court decision in *Sosa*, supplemented Judge Schwartz's reasoning.

In re-assessing the applicability of Alien Tort Statute to corporations in light of *Sosa*, the *Presbyterian Church of Sudan II* court relied heavily on the fact that no country had ever objected to domestic courts' exercise of jurisdiction over corporations under the Alien Tort Statute. The court stated that "[o]ne of the clearest means for determining the content of a rule of customary international law is to examine situations where a governmental institution asserts a claim purportedly based on the customary rule, and to consider, as part of state practice, whether States with competing interests object."

*Presbyterian Church of Sudan II*, 374 F.Supp.2d at 336. This proposition is drawn from the general rule that there is "only [one] way that customary international law can change—by one state's violating the old norm and other states' acquiescing in the violation." Phillip R. Trimble, *The Supreme Court and International Law*, 89 Am. J. Int'l L. 53, 55 (1995). However, this general rule presupposes that a customary international law norm exists in the first instance—i.e., that there is an "old norm" governing state behavior. Objections become relevant only **after** that "old norm" exists; once the rule is established, the rule may be altered when other states deviate and no objections are lodged. This is the approach stated in the *Restatement*, which explains that state practice is evidence of customary international law only "where there is **broad acceptance** and no or little objection" by other states. *Restatement (Third) of Foreign Relations Law*, § 102 n. 2 (emphasis added). In other words, objections are only relevant if states have already accepted a particular norm as constituting binding international law.

*The Presbyterian Church of Sudan II* court concluded that it was highly relevant that foreign governments acquiesced in the domestic courts' exercise of Alien Tort Statute jurisdiction over those governments' corporations. *Presbyterian Church of Sudan II*, 374 F.Supp.2d at 337. The court explained that those governments presumably would have objected if domestic courts were incorrectly applying international law against corporate defendants. *Id*. As the court explained: "Talisman has not cited a single case where any government objected to the exercise of jurisdiction over one of its national corporations based on the principle that it is not a violation of international law for corporations to commit or aid in

the commission of genocide or other similar atrocities. If this issue was a genuine source of disagreement in the international community, it would be expected that the assertion of such a rule as customary would provoke objections from States whose interests were implicated by the assertion of the rule in those cases against their nationals." *Id*.

The Court recognizes that the *Presbyterian Church of Sudan II* court's analysis would be correct **if** in fact there was, as that court suggested, "compelling evidence of state practice" holding corporations responsible for international human rights violations. *Id*. However, the Court disagrees with the premise that there is "compelling evidence" of an international consensus regarding corporate liability. *See generally supra*. Absent any "old norm" of corporate liability, *see Trimble*, 89 Am. J. Int'l L. at 55, that has achieved "broad acceptance" among the international community, *see Restatement*, § 102 n. 2, the Court disagrees with the *Presbyterian Church of Sudan II* court's reliance on the absence of objections from foreign governments. Mere silence and acquiescence does not provide probative evidence of a well-defined universal norm of international law.

*7. SUMMARY OF DOMESTIC COURTS' REASONING*

Above all, domestic courts have been guided by a single erroneous assumption: that the burden is on **corporations** to show that international law **does not** recognize corporate liability. *See*, *e.g.*, *In re Agent Orange*, 373 F.Supp.2d at 59 ("Defendants present no policy reason why corporations should be uniquely exempt from tort liability under the ATS, and no court has presented one either.") (quotations omitted); *Presbyterian Church of Sudan I*, 244

F.Supp.2d at 319 ("while Talisman disputes the fact that corporations are capable of violating the law of nations, it provides no logical argument supporting its claim."). Instead, this Court believes that *Sosa* requires courts to undertake the opposite analysis: the **plaintiffs** must bear the burden to show that international law **does** recognize corporate liability. As the Supreme Court emphasized, "federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted." *Sosa*, 542 U.S. at 732, 124 S.Ct. 2739. Plaintiffs seeking to identify a cause of action under international law bear the burden of persuading the Court that international law contains a norm with sufficiently "definite content and acceptance among civilized nations." *Id*. If the Court is not persuaded that international law satisfies this standard, then the plaintiff's claim must fail. This burden-shifting approach is consistent with the general rule that plaintiffs bear the burden of proving the elements of their claims. *See generally Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 56–57, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005) (collecting cases). Furthermore, this is the burden-shifting approach applied by Sosa itself: because the plaintiff Alvarez–Machain had not shown that he suffered an injury in violation of international law, his claims failed. *See Sosa*, 542 U.S. at 736, 124 S.Ct. 2739 ("Alvarez cites little authority that a rule so broad has the status of a binding customary norm today"), 737 ("Alvarez's failure to marshal support for his proposed rule is underscored by the *Restatement (Third) of Foreign Relations Law of the United States*" ), 738 ("Whatever may be said for the broad

principle Alvarez advances, in the present, imperfect world, it expresses an aspiration that exceeds any binding customary rule having the specificity we require.").

In other words, international law must contain rules establishing corporate **liability**. This Court therefore disagrees with the other courts that have inverted this legal standard and examined whether international law contains rules establishing corporate **immunity**. *See Romero v. Drummond Co., Inc.*, 552 F.3d at 1315 ("The text of the Alien Tort Statute provides **no express exception** for corporations.") (emphasis added); *In re Agent Orange*, 373 F.Supp.2d at 59 ("Defendants present no policy reason why corporations should be **uniquely exempt** from tort liability under the ATS, and no court has presented one either."); *Presbyterian Church of Sudan I*, 244 F.Supp.2d at 319 ("A private corporation ... has no ***per se*** **immunity** under U.S. domestic or international law.") (emphasis added); *see also In re South African Apartheid*, 617 F.Supp.2d at 255 n. 127 (noting that Second Circuit could potentially "determine that corporations are **immune from liability** under customary international law") (emphasis added). These courts start from the erroneous premise that international law norms **do** apply to corporations, and then search for significant international precedents that **reject** corporate liability. However, as demonstrated *supra*, no court has yet identified a sufficiently well-defined and universally recognized international law norm establishing corporate liability in the first place. In this Court's view, the Supreme Court's guidance in *Sosa* requires that, at present, corporations may not be held liable under international law in an Alien Tort Statute action.

### *8. THIS COURT'S CONCLUSION*

Having examined the legal arguments *pro* and *con* regarding corporate liability for international human rights violations, the Court concludes that corporations as such may not presently be sued under Sosa and the Alien Tort Statute. There is no support in the relevant sources of international law for the proposition that corporations are legally responsible for international law violations. International law is silent on this question: no relevant treaties, international practice, or international caselaw provide for corporate liability. Instead, **all** of the available international law materials apply **only** to states or natural persons. *Sosa' s* minimum standards of definiteness and consensus have not been satisfied. It is impossible for a rule of international law to be universal and well-defined if it does not appear in anything other than a handful of law review articles. Judicial *diktat* cannot change the basic fact that international law does not recognize corporate liability.

To the extent that corporations should be liable for violating international law, that is a matter best left for Congress to decide. *See Sosa*, 542 U.S. at 728, 124 S.Ct. 2739 ("We have no congressional mandate to seek out and define new and debatable violations of the law of nations, and modern indications of congressional understanding of the judicial role in the field have not affirmatively encouraged greater judicial creativity."). However, to the extent that Congress has ever addressed the question of corporate liability for violating international law, it has explicitly **refrained** from extending liability beyond natural persons under the Torture Victim Protection Act. *See supra* Part VIII.B. Accordingly, the Court concludes

that corporations as such may not be sued under the Alien Tort Statute. Corporate agents—i.e., natural persons—are subject to civil actions, but corporations themselves are not. Based on the authorities identified by the parties and by other courts, the Court concludes that corporations may not be sued under the Alien Tort Statute.[70]

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[70] The Court is aware of potential arguments premised on the existence of generally recognized principles of corporate liability and/or principal-agent liability under domestic bodies of law. *See*, *e.g.*, Supp. Brief of Plaintiffs–Appellants/Cross–Appellees, *Sarei v. Rio Tinto, PLC*, 2010 WL 804413, at *53 (9th Cir. Jan. 22, 2010); Brief of Amicus Curiae Earthrights International in Support of Plaintiffs–Appellants, *Presbyterian Church of Sudan*, No. 07–0016, 2007 WL 7073749, at *18–19 & nn. 5–7 (2d Cir. Mar. 9, 2007). The Court notes that international law sometimes looks to "general principles common to the major legal systems of the world" that operate "interstitially" to fill gaps in international law "when there has not been practice by states sufficient to give the particular principle status as customary law and the principle has not been legislated by general international agreement." *Restatement (Third) of Foreign Relations*, § 102(1)(c) & cmt. l. However, the Court also notes that international law does not address "[m]atters of 'several' concern among States"—that is, "matters in which States are **separately** and **independently** interested." *Flores*, 414 F.3d at 249 (emphasis added). Accordingly, while theft and murder (for example) are prohibited around the world, these rules do not constitute customary international law because the "nations of the world have not demonstrated that this wrong is of mutual, and not merely several, concern." *Id*. (quotations omitted).

> Furthermore, even if litigants attempted to identify general international norms that might form the building blocks of corporate liability, the Court disagrees with the premise that *Sosa* allows federal courts to build a new rule of international law by combining separate and distinct rules. So even if a court were to conclude that the "general principles" of law recognize corporations as legal persons, *see*, *e.g.*, *Case Concerning The Barcelona Traction, Light & Power*

### D. SUMMARY OF CORPORATE LIABILITY

Having thoroughly considered the question of corporate liability under the Alien Tort Statute, the Court concludes that the existing authorities fail to show that corporate liability is sufficiently well-defined and universal to satisfy Sosa.

## XI. CONCLUSION

In light of the foregoing analysis, the Court GRANTS Defendants' Motion to Dismiss. To the extent that the Court has not addressed any the parties' remaining arguments, the Court's analysis has rendered those issues moot.

Given Plaintiffs' representations in its briefing and at oral argument, it appears that further amendment of the Complaint would be futile. Plaintiffs have already amended the Complaint in order to

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*Co.*, 1970 I.C.J. 3, and were further to conclude that the "general principles" of law incorporate general principles of agency responsibility, *see*, *e.g.*, Blackstone, 1 *Commentaries*, ch. 14; Vienna Convention on the Law of Treaties, art. 7, May 23, 1969, 1155 U.N.T.S. 331; International Law Commission, Draft Articles of State Responsibility, arts. 4, 5, 7, 8, 11; *but see* Convention on the Law Applicable to Agency, Mar. 14, 1978 (only four countries have adopted international treaty regarding agency law), the Court would be inclined to conclude that *Sosa* requires plaintiffs to identify well-defined rules of law that have already achieved clear recognition by a wide consensus of states in the exact form in which they are being applied under the Alien Tort Statute. Under *Sosa*, proponents of corporate liability are faced with the steep hurdle of showing that not only that general principles of agency liability **exist**, but that these principles are **well-defined** and **well-established** in the **corporate** context. Absent such a showing, domestic courts simply cannot conclude that rules of corporate agency attribution are clearly defined and universally agreed-upon.

provide additional factual details, and they have not suggested to the Court that they left out any material facts. It appears to the Court that Plaintiffs hold a very different view of the legal principles discussed in this Order. If that is the case, Plaintiffs would be well-advised to consider filing an appeal rather than filing an amended complaint. However, because the Ninth Circuit has articulated a strong policy in favor of permitting complaints to be amended, *e.g.*, *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051–52 (9th Cir.2003), the Court will provide Plaintiffs another opportunity to amend their Complaint.

Accordingly, Defendants' Motion to Dismiss is **GRANTED** with leave to amend. If Plaintiffs elect to file an amended complaint, they shall do so no later than **September 20, 2010**. If Plaintiffs fail to file an amended complaint at that time, Defendants shall submit a proposed final judgment no later than **September 22, 2010**.

IT IS SO ORDERED.

**APPENDIX E**

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

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No. 10-56739

(2:05-CV-05133-SVW-JTL)

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John Doe I; John Doe II; John Doe III, individually and on behalf of proposed class members; Global Exchange,

Plaintiffs-Appellants,

v.

Nestle USA, Inc.; Archer Daniels Midland Company; Cargill Incorporated Company; Cargill Cocoa,

Defendants-Appellees.

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Filed: May 6, 2015
Amended: June 10, 2015

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**ORDER**

The order denying the petition for rehearing/rehearing en banc, filed on May 6, 2015, is hereby amended at Page 2, Line 3, to add the sentence:

> Judges Graber, Ikuta, Watford, Owens, and Friedland did not participate in the deliberations or vote in this case.

**SO ORDERED.**

## AMENDED ORDER

Judge Rawlinson voted to grant the petition for rehearing and petition for rehearing en banc.

Judge Nelson and Judge Wardlaw voted to deny the petition for panel rehearing. Judge Wardlaw voted to deny the petition for rehearing en banc and Judge Nelson so recommended.

The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35.

Judges Graber, Ikuta, Watford, Owens, and Friedland did not participate in the deliberations or vote in this case.

The petition for panel rehearing and the petition for rehearing en banc are **DENIED**.

Judge Bea's dissent from the denial of rehearing en banc is filed concurrently with this order.

BEA, Circuit Judge, with whom O'SCANNLAIN, GOULD, TALLMAN, BYBEE, CALLAHAN, M. SMITH, AND N.R. SMITH, Circuit Judges, join, dissenting from the denial of rehearing en banc:

Unfortunately, the panel majority here has substituted sympathy for legal analysis. I quite agree plaintiffs are deserving of sympathy. They are alleged former child slaves of Malian descent, dragooned from their homes and forced to work as slaves on cocoa plantations in the Ivory Coast. But they do not bring this action against the slavers who kidnapped them, nor against the plantation owners who

mistreated them. Instead the panel majority concludes that defendant corporations, who engaged in the Ivory Coast cocoa trade, did so with the *purpose* that plaintiffs be enslaved, hence aiding and abetting the slavers and plantation owners. By this metric, buyers of Soviet gold had the purpose of facilitating gulag prison slavery.

How was the cocoa buyers' purpose shown? By their purchase of cocoa and their conduct of "commercial activities [such] as resource development," conduct one of our sister circuits has explained does not establish that a defendant acted with the required purpose.[1] The panel majority's conclusion is wrong. Even the plaintiffs admit defendants intended only to maximize profits, not harm children through slavery.[2] It also creates a circuit split with the Second and Fourth Circuits.

But the consequences of the majority's decision do not end there—the majority leads us into open conflict with Supreme Court doctrine interpreting the Alien Tort Statute ("ATS"). The Court unequivocally requires that federal judges who are fashioning federal common law torts for violations of customary international law under the ATS operate under a "restrained conception" of the extent of such liability. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725–26 (2004). The panel majority flouts that requirement by permitting a broad expansion of liability under the ATS. The panel majority allows a single plaintiff's civil action to effect an embargo of trade with

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[1] *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 264 (2d. Cir. 2009).

[2] *Doe I v. Nestle USA, Inc.*, 766 F.3d 1013, 1025 (9th Cir. 2014).

foreign nations, forcing the judiciary to trench upon the authority of Congress and the President. And in the process, the majority creates a second circuit split by misinterpreting the Supreme Court's decision in *Kiobel v. Royal Dutch Petroleum*, 133 S. Ct. 1659 (2013), as creating a new test for when the presumption against extraterritorial application of United States law is rebutted, rather than incorporating the settled doctrine of *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010).

For these reasons, our court should have corrected the panel's mistake by granting a hearing en banc, and I respectfully dissent from the order denying rehearing.

I begin by bringing to mind the basic principles of ATS litigation. The text of the ATS gives the federal district courts "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. The Supreme Court has held that the ATS does not create a substantive tort action; instead, the statute is purely a grant of jurisdiction. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724 (2004). ATS actions thus sound in federal common law. *Id.* But because there are "good reasons for a restrained conception of the discretion a federal court should exercise in considering a new cause of action of this kind," an ATS claim must "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized." *Id.* at 725–26.[3] Those "good reasons" include

[3] Those paradigms are "violation of safe conducts, infringement of the rights of ambassadors, and piracy." *Sosa*, 542 U.S. at 724.

the general presumption against judge-made law, the paucity of early cases utilizing the ATS's jurisdictional grant, the disfavoring of court-created private rights of action, the risk that ATS litigation poses to the foreign relations of the United States, and the absence of an affirmative congressional mandate to engage in "judicial creativity" by crafting new norms. *Id.* at 726–28. Indeed, *Sosa* repeatedly emphasizes the need for restraint in extending liability to a defendant who is "a private actor such as a corporation or individual." *Id.* at 732 n.20.

As the majority opinion in this case recognizes, the Supreme Court's list of requirements for an ATS action is not exhaustive; instead, the *Sosa* opinion's standard "is suggestive rather than precise, and is perhaps best understood as the statement of a mood—and the mood is one of caution." *Doe*, 766 F.3d at 1019 (quoting *Flomo v. Firestone Natural Rubber Co., LLC*, 643 F.3d 1013, 1016 (7th Cir. 2011)). In light of its recognition of these principles, the majority's errors are all the more curious.

I turn now to the particulars of this case. Plaintiffs, alleged former child slaves who worked on cocoa plantations in the Ivory Coast, have sued the defendant chocolate companies on the theory that by purchasing the chocolate produced by Ivorian plantations, providing technical assistance[4] to the plantations, and lobbying Congress for a voluntary alternative to the mandatory "slave-free" licensing scheme Congress was considering, the defendants aided and abetted a violation of customary international law: child slavery.

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[4] The technical assistance is not alleged to have included whips, chains, or other implements of slavery.

I agree with the majority and the plaintiffs that child slavery is a violation of customary international law. And I further agree that aiding and abetting a crime is itself a crime, with its own *actus reus* and *mens rea* elements. The parties in this case dispute what is the correct *mens rea* standard for ATS aiding and abetting liability. Defendants claim that a showing that they acted purposefully to bring about (or maintain) the use of slavery to produce cocoa is required to confer liability. Plaintiffs claim that knowledge that slavery was so employed, together with acts of defendants which circumstantially benefit the slaver, is enough; specific intent (purpose) that slavery be facilitated need not be alleged. Plaintiffs candidly admit they cannot in good faith allege defendants acted with the specific intent to promote slavery and thus harm children.

The panel majority did not accept plaintiffs' assertion that knowledge that cocoa growers employed slavery makes out the *mens rea* element of aiding and abetting liability. Rather, they recognized that "two of our sister circuits have concluded that knowledge is insufficient and that an aiding and abetting ATS defendant must act with the *purpose* of facilitating the criminal act . . . ." *Id.* at 1023 (citing *Aziz v. Alcolac, Inc.*, 658 F.3d 388, 399–400 (4th Cir. 2011); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 259 (2d Cir. 2009)). However, the majority decided that it need not reach the question whether knowledge was a sufficient *mens rea*, because plaintiffs' allegations met the purpose standard. In particular, though plaintiffs "conceded that the defendants did not have the subjective motive to harm children," and alleged only that "the defendants' motive was finding cheap sources of cocoa," the majority found that plaintiffs sufficiently alleged defendants

had the *purpose* of aiding child slavery because of defendants' "myopic focus on profit over human welfare."[5] *Doe*, 766 F.3d at 1025–26. Thus, pursuit of profit over human welfare, in the majority's eyes, allows a jury to find the defendants specifically intended not merely to buy cocoa cheap, but to promote slavery as a means of buying cheap.[6]

In so reasoning, regardless what the majority contends, it was most certainly *not* following *Aziz*.

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[5] Plaintiffs allege four types of conduct that, taken together, are meant to show the defendants acted with the purpose of aiding and abetting slavery. First, the defendants bought the slavers' cocoa. Second, the defendants supplied the plantation owners with money, equipment and training for the cultivation of cocoa, while defendants knew the continued and expanded profitability of those farmers would facilitate the use of child slave labor; defendants continue to establish and honor those agreements today. Third, the defendants lobbied against Congressional efforts to curb the use of child slaves by, for example, opposing a bill that would require United States importers to certify and label their products "slave free." The companies instead urged and secured the adoption of a private, voluntary enforcement mechanism for "slave free" certification, similar to the regime for "fair trade" coffee imports into the U.S. Fourth, though the corporations have enough market power effectively to control Ivory Coast's cocoa markets, and could use that power to stop or limit the use of child slave labor if they so chose; they have taken no such action.

[6] The panel majority does not explain how this pleading could make plausible a finding of purpose to promote slavery in light of the concession from the plaintiffs that the defendants did not have the purpose of promoting slavery. *See Doe*, 766 F.3d at 1025. After all, one would assume that a panel, having concluded that the plaintiff must show purpose, would find that a plaintiff who concedes the defendant lacks that purpose has briefed himself out of his case. The panel majority's contrary decision is unexplained and, I submit, inexplicable.

There, the Fourth Circuit noted that defendant Alcolac had sold chemicals that could be used to produce lethal mustard gas with full knowledge of that possible use, despite having been told that the chemical in question was subject to U.S. export restrictions. The chemical was sold to a company defendant Alcolac knew was a shell company designed to evade those export restrictions.

Through the shell company, the chemicals eventually reached Saddam Hussein's regime in Iraq, which used the chemicals to create mustard gas it then used to killed thousands of Kurds. *Aziz*, 658 F.3d at 390–91. Plaintiffs alleged, in sum, that Alcolac sold its chemicals "with actual or constructive knowledge that such quantities [of the chemicals] would ultimately be used by Iraq in the manufacture of mustard gas to attack the Kurds." *Id.* at 394. Nonetheless, the Fourth Circuit held plaintiffs had not adequately alleged purposeful violation of customary international law by Alcolac. *Id.* at 401. That is, the allegations that Alcolac knew how the chemicals would be used did not amount to an allegation that Alcolac harbored specific intent (i.e. purpose) that the Kurds be gassed, and thereby accomplish a form of genocide.

The contradiction with the majority's holding is obvious. If selling chemicals with the knowledge that the chemicals will be used to create lethal chemical weapons does not constitute purpose that people be killed, how can purchasing cocoa with the knowledge that slave labor may have lowered its sale price constitute purpose that people be enslaved? The majority replies that "the defendants [in *Aziz*] had nothing to gain from the violations of international law." *Doe*, 766 F.3d at 1024. Demonstrably not so—the more Saddam Hussein used chemical weapons to kill his opponents,

the more of Alcolac's chemicals he would need and thus the higher the sales of Alcolac's products; the higher their sales, of course, the higher their profit.[7]

The majority fares no better with its characterization of the Second Circuit's decision in *Talisman*, which should come as no surprise since the Fourth Circuit's *Aziz* opinion explicitly relied on *Talisman*. *Aziz*, 658 F.3d at 398. Talisman Energy ("Talisman"), a Canadian oil corporation, was part of a conglomerate that had a business arrangement with the Sudanese government whereby Talisman extracted oil in several regions of Sudan. Talisman and its conglomerate worked closely with the Sudanese government: Talisman upgraded airstrips for the Sudanese government, who used the airstrips were used [sic] to conduct bombing raids on the ethnic South Sudanese; Talisman considered expanding its oil-exploration area into South Sudan despite knowing the government would kill the local inhabitants to give Talisman the land; Talisman paid royalties to the Sudanese government, knowing the money would go to the continuation of the ethnic genocide[8] perpetrated by the government against the South Sudanese people; and, the conglomerate provided fuel to Sudanese government military aircraft taking off on bombing missions in pursuit of its genocidal aims. *Talis-*

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[7] The plaintiffs in *Aziz* alleged that Alcolac had sold one million pounds of its chemicals to the shell corporation, on the understanding that the shell corporation "intended to place further orders in the three to six million pound range annually." *Aziz*, 658 F.3d at 391. It belies economic reality to suggest that an order of that size provides no benefit to the seller of goods.

[8] Genocide is a recognized violation of customary international law. *Abagninin v. AMVAC Chemical Corp.*, 545 F.3d 733, 739 (9th Cir. 2008).

*man*, 582 F.3d at 262. Nevertheless, the Second Circuit held that plaintiffs (Southern Sudanese victims of the government's attacks) had not shown Talisman had aided and abetted the Sudanese government's genocidal acts, because "[p]laintiffs d[id] not suggest in their briefs that Talisman was a partisan in regional, religious, or ethnic hostilities, or that Talisman acted with the purpose to assist persecution." *Id.* at 263. In distinguishing this case, the majority makes a point—Talisman was harmed by the government's genocidal conduct to the extent that it ultimately had to abandon its Sudanese venture, while Nestle continued its cocoa business.[9] *Doe*, 766 F.3d at 1024. But the Second Circuit also noted that "if ATS liability could be established by knowledge of those abuses coupled only with such commercial activities as resource development, the statute would act as a vehicle for private parties to impose embargos or international sanctions through civil actions in United States courts." *Talisman*, 582 F.3d at 294.[10]

By contrast, defendants here are alleged to have been aware that slavery was occurring on the cocoa plantations, but not to have done anything to assist directly in the enslavement of plaintiffs. Indeed, the

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[9] Of course, Talisman also benefitted from its relationship with the military; like any oil company doing business in a region prone to violence, it had to "rely on the military for defense." *Talisman*, 582 F.3d at 262.

[10] An embargo by chocolate manufacturers on Ivory Coast chocolate farmers is precisely the predictable economic effect plaintiffs' successful action would have. Indeed, failure to effect an embargo by refusing to deal with the plantation owners is precisely the misuse of economic power which the majority finds sufficient to make plausible the conclusion that defendants acted with the purpose to promote slavery. *Doe*, 766 F.3d at 1025.

plaintiffs in this case do not even allege that defendants could not have procured similar prices from the Ivorian plantations absent their use of slave labor—by technological innovations or the exercise of monopsony power, for instance.[11] By contrast, Talisman was required to acquiesce in the Sudanese government's misdeeds if it wanted to make a profit. It bears emphasis that Alcolac and Talisman undoubtedly knew that their actions were contributing to great evils: the use of poison gas in Alcolac's case, and genocide in Talisman's. Nonetheless, the Second and Fourth Circuit's decisions absolved these companies of ATS aiding and abetting liability, because plaintiffs' allegations did not make it plausible that defendants specifically intended Kurd or Southern Sudanese killings.

Thus, the panel majority's claim to have adopted the Second and Fourth Circuit's analysis is simply incorrect. It has not done so, and has thus created a circuit split on the proper *mens rea* element for aiding and abetting liability under customary international law.

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[11] Nor can the panel majority rely for its answer on the plaintiffs' allegations that the corporations trained farmers and lobbied Congress. As to farmer training, the complaint alleges that two of the named defendants are attempting to *change* farming and labor practices in the Ivory Coast in an effort to reduce the use of child labor; the complaint contains no allegation that the third defendant has engaged in any farmer training at all. The panel majority cannot be inferring *pro-slavery* purpose from *antislavery* activity. As for the lobbying, plaintiffs themselves allege that the corporations' lobbying efforts had the *intent* of ensuring child labor free chocolate; the plaintiffs then allege that the defendants' lobbying had the *effect* of allowing child slavery to continue. That the corporations' lobbying is alleged to have backfired does not mean that the backfire was intended.

Moreover, the majority is on the wrong side of the circuit split it creates. *Sosa* requires that the federal courts accept as proper bases of a claim for relief only those violations of customary international law that have "definite content and acceptance among civilized nations." Thus, if there is conflict as to the proper scope of ATS liability, the narrower reading should be chosen, as no consensus can be said to exist on the broader one. *Sosa*, 542 U.S. at 732. As the majority opinion recognizes, "the Rome Statute rejects a knowledge standard and requires the heightened *mens rea* of purpose, suggesting that a knowledge standard lacks the universal acceptance that *Sosa* demands."[12] *Doe*, 766 F.3d at 1024. The conflict between the Rome Statute's rejection of knowledge and the panel majority's effective acceptance of knowledge is sufficient to eliminate the required consensus. In its assessment of our sister circuits and its reading of Supreme Court precedent, therefore, the panel majority is well off the mark.

I turn next to the question of extraterritoriality—an important one in this case, since all the acts of enslavement and maintenance of slavery are alleged to have occurred outside United States borders. While this case was pending before the panel, the Supreme Court announced its decision in *Kiobel v.*

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[12] The Rome Statute, 37 I.L.M. 999 (1998), is the treaty that establishes the International Criminal Court. The United States has signed but not ratified the treaty. In 2002, Under Secretary of State John Bolton sent a letter to then-UN Secretary General Kofi Annan which stated that the United States did not intend to become a party to the treaty and suspended the United States's signature. *See* Press Statement of Richard Boucher, United States Department of State, May 6, 2002, *available at* http://2001-2009.state.gov/r/pa/prs/ps/2002/9968.htm.

*Royal Dutch Petroleum*, 133 S. Ct. 1659 (2013). The Supreme Court held in *Kiobel* that the presumption against extraterritoriality applies to claims brought under the ATS; as usual, that presumption is rebuttable.[13] *Id.* at 1669. To be viable, ATS claims must "touch and concern the territory of the United States" with "sufficient force to displace the presumption against extraterritorial application." *Id.* (citing *Morrison v. National Australia Bank*, 561 U.S. 247, 264–273 (2010)).

The plaintiffs claim *Kiobel*'s "touch and concern" language announces a new test to determine when the presumption against extraterritoriality is rebutted, while defendants argue *Kiobel* simply adopts the test announced in *Morrison*. *Morrison*'s text adopted a "focus" test, whereby courts must ask whether the defendants engaged in the conduct that is the focus of the statute at issue. *Morrison*, 561 U.S. at 266–67.[14] The panel majority adopted plaintiffs' view and

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[13] This is the presumption that "when a statute gives no clear indication of an extraterritorial application, it has none." *Kiobel*, 133 S. Ct. at 1664 (brackets omitted) (quoting *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247, 255 (2010)). That is, American statutes—the 1934 Securities Exchange Act or the 1797 Alien Tort Statute—do not apply to actions taken beyond our shores unless Congress tells us to the contrary.

[14] In *Morrison*, an Australian bank had purchased a Florida mortgage-servicing company, and listed the mortgage-servicing company's assets on its annual reports. It proudly touted the success of the mortgage-servicing company's business and gave it a high valuation. A few years later, however, the bank wrote down the value of the mortgage-servicing company's assets, causing the bank's share price to drop. *Id.* at 251–53. The plaintiffs, Australian shareholders in the bank, brought suit for violation of SEC Rule 10b-5, which states that it is unlawful "to use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered,

held that "*Morrison* may be informative precedent for discerning the content of the touch and concern standard, but the opinion in *Kiobel II* did not incorporate *Morrison*'s focus test." *Doe*, 766 F.3d at 1028. Respectfully, the majority is quite wrong.

First, the Supreme Court's opinion in *Kiobel* counsels against the majority's analysis. As the Supreme Court's majority opinion states, though *Morrison* dealt with acts of Congress, "the principles underlying the [*Morrison*] canon of interpretation [which counsel against the Exchange Act's extraterritorial application] similarly constrain courts considering causes of action that may be brought under the ATS." *Kiobel*, 133 S. Ct. at 1664. Moreover, the Court's explanation of the "touch and concern" language is encompassed in one citation to *Morrison*. *Id.* at 1669.[15] The meaning is clear: the Supreme Court

. . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [Securities and Exchange] Commission may prescribe." *Id.* at 262 (ellipses and brackets in original). The district court dismissed for lack of jurisdiction because the conduct occurred abroad, and the Second Circuit affirmed. The Supreme Court reclassified the issue as merits-based rather than jurisdictional, and affirmed. In light of the presumption against the extraterritorial applicability of federal law, the Court held that "the focus of the Exchange Act is not upon the place where the deception originated, but upon purchases and sales of securities in the United States." *Id.* at 266–67. Because the statute intended only to regulate domestic transactions and protect prospective parties to domestic transactions alone, the plaintiffs' claims, which arose out of deception occurring in Australia, between Australian buyers and sellers of Australian bank shares, were dismissed for failure to state a claim for relief.

[15] *Kiobel* cites to pages 2883–88 of *Morrison*. In those pages, the Supreme Court explained why the Australian share fraud claims in *Morrison* did not have sufficient "contact with the territory of the United States." *Morrison*, 561 U.S. at 2884. The Court first noted that the principal purpose of the 1934 Securi-

stated that the *Morrison* presumption against extraterritorial application of American statutes is to be applied to ATS cases. And, since the presumptions are the same, it follows that the very same evidence is needed to rebut either presumption. Moreover, the *Kiobel* opinion cannot have imparted any additional meaning to the "touch and concern" test; the *Kiobel*

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ties and Exchange Act was to protect transactions on domestic exchanges, as Congress could not regulate foreign exchanges. Second, as to securities traded on foreign exchanges, the Securities Exchange Act was exclusively focused on domestic purchases and sales; here, the transaction had not occurred in the United States. *Id.* Furthermore, there was no contemporary statutory context suggesting that Congress's "comprehensive regulation of securities trading" was meant to encompass foreign transactions on securities not registered in the United States. *Id.* at 2885. Indeed, the strong risk of incompatibility with foreign law counseled against application of the Securities and Exchange Act to such transactions. *Id.* The Court further noted, in rejecting the test proposed by the Solicitor General ("SG"), the fact that the SG's test (which asked if "significant and material conduct" had happened in the United States) would open the floodgates of class action litigation for lawyers representing victims of foreign securities fraud. *Id.* at 2886. Finally, the Court explained that the consistency of the SG's proposed test with international law meant only that adoption of the SG's test would not violate international law, not that it was *required* by international law, and that the SEC's interpretation was not entitled to deference because it was based on cases which the Supreme Court had disapproved.

Thus, a court applying the *Morrison* test in the ATS context should focus on the location of the alleged violation of customary international law, statutory indicia that Congress intended U.S. courts to regulate the particular conduct at issue, the risk of an increase in future litigation, and the existence of a well-founded interpretation of applicable law to which the court should defer. All of these considerations point to the conclusion that plaintiffs' claims here lack sufficient contact with the territory of the United States.

majority did not apply the test or provide any further guideposts as to its possible meaning. Against this evidence, the panel majority points to the mere use of different language, as well as some language in the concurrences of Justices Kennedy and Alito in *Kiobel*, to claim a new but undefined test was created by the Court. *Doe*, 766 F.3d at 1028. This is too thin a reed on which to support such an expansive argument.

Second, the two circuits to consider this issue agree that *Kiobel* simply directs application of the *Morrison* test; the panel majority's contrary conclusion thus creates another circuit split. In *Baloco v. Drummond Co., Inc.*, 767 F.3d 1229 (11th Cir. 2014), the Eleventh Circuit noted that "[t]he Court in *Kiobel* looked to *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010), for a discussion of when claims that 'touch and concern the territory of the United States' do so 'with sufficient force to displace the presumption against extraterritorial application.'"[16] *Id.* at 1236–37 (quoting *Kiobel*, 133 S. Ct. at

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[16] Baloco was a Colombian national and the child of a union leader who worked for Drummond Ltd. at Drummond's coal mining operation in Colombia. Drummond is a closely-held corporation with its principal place of business in Alabama. The union leader was murdered, Baloco alleged, by paramilitary members of the AUC, an organization affiliated with Colombia's military which provided security for Drummond's coal mining operation and was engaged in a guerrilla war with FARC. Baloco brought suit under the ATS, Trafficking Victims Protection Act, and Colombia's wrongful death statute. The district court granted Drummond's motion to dismiss Baloco's ATS claims for lack of subject matter jurisdiction under 12(b)(1). The Eleventh Circuit affirmed. The court adopted the presumption that the ATS statute did not touch murders occurring outside the United States, and applied the *Kiobel* "touch and concern the territory of the United States" standard to see if the presumption was rebutted. The court explained that "[t]he [Supreme] Court in *Ki-*

1669). Similarly, in *Mastafa v. Chevron Corp.*, 770 F.3d 170, 182–86 (2d Cir. 2014), the Second Circuit applied the *Morrison* "focus" test in a post-*Kiobel* ATS case to determine if the presumption against extraterritoriality had been rebutted.[17]

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*obel* looked to *Morrison* for a discussion of when claims that 'touch and concern the territory of the United States' do so 'with sufficient force to displace the presumption against extraterritorial application." *Baloco*, 767 F.3d at 1236–37 (quoting *Kiobel*, 133 S. Ct. at 1669). Examining the allegations of Baloco's complaint, Baloco's "claims are not focused within the United States" because the killings occurred in Colombia in the context of a guerrilla war in Colombia. *Baloco*, 767 F.3d at 1237–38.

[17] Mastafa was an Iraqi woman who was the victim of torture by agents of Saddam Hussein's regime in Iraq. She brought suit against Chevron, alleging that it paid kickbacks and other unlawful payments to the regime which enabled the regime to survive and torture her. The district court granted Chevron's 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, and the Second Circuit affirmed. The court explained that the Supreme Court's decision in *Kiobel* "significantly clarified the jurisdictional grant of the ATS with respect to extraterritoriality." *Mastafa*, 770 F.3d at 181–82. The court noted that in *Kiobel*, the Supreme Court had not explained how this presumption could be displaced; "[t]o determine how to undertake the extraterritoriality analysis where plaintiffs allege some 'connections' to the United States, we first look to the Court's opinion in *Morrison*." *Id.* at 183. The circuit interpreted the *Morrison* methodology as requiring that the conduct which touched and concerned the territory of the United States *be* the conduct which gave rise to ATS liability. The circuit then concluded that the only conduct alleged in the complaint which touched and concerned the United States (maintenance of escrow accounts and arrangement of payments in New York bank accounts) did not constitute a violation of customary international law. Thus, the district court correctly concluded that it lacked subject matter jurisdiction. Applied here, the only conduct of defendants which touched and concerned the U.S. were (1) sales of cocoa products in the US and (2) lobbying efforts in the Congress.

The panel majority's analysis thus puts our court on one side of yet another circuit split; yet again, the majority has taken the minority, incorrect side.[18]

Finally, I note that this case squarely presents the question whether ATS liability should extend to corporations.[19] Our court's earlier affirmative answer to this question in the panel was vacated by the Supreme Court, making this a question of first impression in this circuit. *Sarei v. Rio Tinto PLC*, 671 F.3d 736, 748 (9th Cir. 2011) (en banc), *vacated by* 133 S.

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Neither sales nor lobbying are even colorable violations of customary international law.

[18] There is one other court to have opined on this issue: the Fourth Circuit, in *Al Shimari v. CACI Premier Technology, Inc.*, 758 F.3d 516 (4th Cir. 2014). The paragraphs in which the Fourth Circuit decided that the *Morrison* presumption against extraterritorial application was rebutted do not cite the "focus" test; of course, those paragraphs *also* do not cite the "touch and concern" test. *Id.* at 528–29. However one interprets the Fourth Circuit opinion, it does not affirmatively hold that "the opinion in *Kiobel II* did not incorporate *Morrison*'s focus test." *Doe*, 766 F.3d at 1028. The majority opinion in this case is the first to come to that conclusion. And the panel majority is the first to hold that *Kiobel* necessitates remand of the case to decide whether the presumption against extraterritoriality has been vacated, a conclusion the Fourth Circuit did *not* reach.

[19] A circuit split exists on whether the ATS's grant of jurisdiction extends to claims against corporations. *Compare, e.g.*, *Flomo v. Firestone Natural Rubber Co., LLC*, 643 F.3d 1013, 1021 (7th Cir. 2011) ("[C]orporate liability is possible under the Alien Tort Statute . . . .") *with Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 148–49 (2d. Cir. 2011) ("[C]orporate liability has not attained a discernable, much less universal, acceptance among nations of the world in their relations *inter se*, and it cannot, as a result, form the basis of a suit under the ATS.").

Ct. 1995 (2013).[20] The panel majority chose to "reaffirm the corporate liability analysis" of *Sarei*. *Doe*, 766 F.3d at 1021. Here again, the majority has erred.

The *Sarei* analysis, as the majority adopts it today, comes in three parts. First, the analysis of customary international law is norm-by-norm, as "there is no categorical rule of corporate immunity or liability" in ATS cases. *Id.* Second, corporate liability can be imposed in the absence of "international precedent enforcing legal norms against corporations."[21] *Id.* Third, norms that are "'universal and absolute,'

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[20] *Sarei* was vacated in light of the Supreme Court's decision in *Kiobel* and the opinion was not reinstated on remand. *Sarei v. Rio Tinto*, 722 F.3d 1109 (9th Cir. 2013) (en banc). Instead, "a majority of the en banc court" voted to affirm the district court's judgment of dismissal with prejudice without any further explanation. Thus, the original *Sarei* en banc opinion has no precedential effect.

[21] In the *Sarei* en banc court's words, "[t]hat an international tribunal has not yet held a corporation criminally liable does not mean that an international tribunal could not or would not hold a corporation criminally liable under customary international law." *Sarei*, 671 F.3d at 761. Of course, as the *Sarei* opinion did not state, that an international tribunal has not yet held a corporation criminally liable does not mean that an international tribunal *would* hold a corporation criminally liable, either. And as the Second Circuit noted in *Kiobel*, the *Sarei* panel's factual premise was incorrect: the refusal to extend liability to corporations like IG Farben, which aided and abetted Nazi war crimes, was "not a matter of happenstance or oversight," but a careful decision reflecting the central moral principle of holding men, not "abstract entities," accountable for evil actions. *Kiobel*, 621 F.3d at 134–35.

Moreover, as I discuss below, *Sarei*'s willingness to rush ahead of international tribunals' declarations of law is inconsistent with the Supreme Court's cautious mood in *Sosa*.

or applicable to 'all actors,' can provide the basis for an ATS claim against a corporation." *Id.*

There are many problems with this approach. Our court was wrong enough in *Sarei* to join those circuits which held that corporate liability could exist under the ATS. But even amongst those circuits that erroneously conclude that corporate liability can exist under the ATS, the *Sarei* approach resuscitated by the panel majority distinguishes itself as particularly erroneous, in two ways.

First, the Court has explained that a norm cannot give rise to ATS liability unless it is "specific, universal, and obligatory." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 (2004) (quoting *In re Estate of Marcos Human Rights Litigation*, 25 F.3d 1467, 1475 (9th Cir. 1994)). Well and good. In this case, the panel majority finds that the norm against slavery is sufficiently specific, universal, and obligatory to give rise to ATS liability. *Doe*, 766 F.3d at 1022. I agree. The majority then says that *because* of the "categorical nature of the prohibition on slavery and the moral imperative underlying that prohibition," corporations must be liable for aiding and abetting slavery. *Doe*, 766 F.3d at 1022. But this is circular reasoning: by the panel's reasoning, any norm "categorical" enough to give rise to an ATS claim based on customary international law necessarily gives rise to corporate liability for violation of that norm. And worse yet, the majority's reasoning contradicts the Supreme Court's teaching in *Sosa* that there must be a meaningful inquiry—not a mere labeling of norms as 'categorical'—as to whether the particular international norm at issue, which is assumed to confer liability under the ATS generally, would allow for corporate liability in particular. *Sosa*, 542 U.S. at 732 n.20.

Second, the *Sarei* opinion rested its analysis on common sense inference about "congressional intent when the ATS was enacted." *Sarei*, 671 F.3d at 761. Because Congress could not have anticipated the "array of international institutions that impose liability on states and non-state actors alike in modern times," the *Sarei* panel refused to be bound "to find liability only where international fora have imposed liability." *Id.* But this approach is forestalled by *Sosa*'s reminder that federal courts have "no congressional mandate to seek out and define new and debatable violations of the law of nations." *Sosa*, 542 U.S. at 728. In light of the cautious mood expressed by *Sosa*, therefore, a desire to "get ahead" of international law cannot be followed.

In sum, the majority's error violates the Supreme Court's commands and opens our doors to an expansive vision of corporate liability.[22]

We do the law a disservice when we allow our sympathies, no matter how well-founded, to run our decisions afoul of the Supreme Court's unequivocal commands. Because this court has done such a dis-

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[22] More expansive, even, than the *Sarei* decision that the Court vacated. In the *Sarei* en banc opinion, we first noted that there was an international norm against war crimes, then noted international law cases which recognized aiding and abetting liability *for war crimes*. *Sarei*, 671 F.3d at 763–66. By contrast, the panel majority here finds an international norm against slavery and a general international law principle of aiding and abetting liability—without finding such liability applied to *slavery*—and finds those two sufficient to give rise to liability. Thus, the panel imposes liability for aiding and abetting slavery without citing a single case in which an international tribunal recognized the applicability of this form of liability for this particular norm.

service by refusing to take this case en banc, I respectfully dissent.