Appeal Nos. 02-56256, 02-56390 & 09-56381

UNITED STATES COURT OF APPEALS
FOR THE
NINTH CIRCUIT

ALEXIS HOLYWEEK SAREI, PAUL E. NERAU, THOMAS TAMUASI, PHILLIP MIRIORI, GREGORY KOPA, METHODIUS NESIKO, ALOYSIUS MOSES, RAPHAEL NINIKU, GABRIEL TAREASI, LINUS TAKINU, LEO WUIS, MICHAEL AKOPE, BENEDICT PISI, THOMAS KOBUKO, JOHN TAMUASI, NORMAN MOUVO, JOHN OSANI, BEN KORUS, NAMIRA KAWONA, JOANNE BOSCO, JOHN PIGOLO and MAGDALENE PIGOLO, individually and on behalf of themselves and all others similarly situated,
Plaintiffs - Appellants/Cross-Appellees,

v.

RIO TINTO plc and RIO TINTO LIMITED,
Defendants - Appellees/Cross-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA—WESTERN DIVISION
CASE NO. 00-CV-11695-MMM-MAN
HON. MARGARET M. MORROW, UNITED STATES DISTRICT JUDGE

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF DEFENDANTS-APPELLEES/CROSS-APPELLANTS, SUPPORTING AFFIRMANCE OF THE ORDER OF DISMISSAL

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The Chamber of Commerce of the United States of America respectfully submits this brief as amicus curiae supporting Defendants-Appellees/Cross-Appellants. Pursuant to Fed. R. App. P. 29(a), all parties have consented to the filing of this brief.

INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly an underlying membership of more than three million companies and professional organizations of every size, in every industry sector, and from every geographic region of the country. Many Chamber members have been named as defendants in litigation under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350. ATS claims against businesses such as the claims at issue in this case have no basis in international law, impose unjustified—and very substantial—litigation costs, and threaten to deter cross-border business activity that is beneficial both to Americans and to the citizens of other nations. One of the Chamber's principal missions is to represent the interests of its members in court on issues of national importance to American businesses. It is those interests that the Chamber seeks to advance through the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Supreme Court in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), emphasized the need for "vigilant doorkeeping" before opening U.S. courts to ATS lawsuits, and set a "high bar to new private causes of action for violating international law." *Id.* at 729, 727. Pointing to "the potential implications for the foreign relations of the United States of recognizing such causes," *Sosa* cautioned that courts should be "particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs." *Id.* at 727. Absent a "congressional mandate to seek out and define new and debatable violations of the law of nations," courts must exercise "great caution in adapting the law of nations to private rights." *Id.* at 728.

Notwithstanding *Sosa*'s clear cautionary directive, plaintiffs continue to file ATS actions grounded in aggressive legal theories, particularly claims targeting private corporations—in contrast to the government officials sued in *Filartiga*, *Tel-Oren*, *Sosa*, and other early ATS lawsuits. More than half the companies included in the Dow Jones Industrial Average have now been named as defendants in ATS actions and accused of being complicit in some fashion in human rights abuses abroad. *See* Brief for the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Petitioners, *Pfizer, Inc. v. Abdullahi*, No. 09-34, at

19-20 (filed Aug. 10, 2009).[1] Multinational corporations—particularly those with a U.S. presence—are attractive to plaintiffs because, unlike foreign officials, they

[1] ATS lawsuits have been filed against private companies in virtually every business sector. *See, e.g.*, *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163 (2d Cir. 2009) (pharmaceuticals); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009) (energy); *Mohamed v. Jeppesen Dataplan, Inc.*, 579 F.3d 943 (9th Cir. 2009), *rehearing en banc ordered by* No. 08-15693, 2009 WL 3526219 (9th Cir. 2009) (national security and defense); *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252 (11th Cir. 2009) (consumer products); *Abagninin v. Amvac Chemical Corp.*, 545 F.3d 733 (9th Cir. 2008) (chemicals); *Romero v. Drummond Co. Inc.*, 552 F.3d 1303 (11th Cir. 2008) (mining); *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007), *aff'd for lack of quorum sub nom. Am. Isuzu Motors, Inc. v. Ntsebeza*, 128 S. Ct. 2424 (2008) (numerous industries); *Aldana v. Del Monte Fresh Produce, N.A.*,416 F.3d 1242 (11th Cir. 2005) (agricultural); *Deutsch v. Turner Corp.*, 317 F.3d 1005 (9th Cir. 2003) (construction); *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002) (oil); *Bano v. Union Carbide Corp.*, 361 F.3d 696 (2d Cir. 2001) (chemicals); *Bigio v. Coca-Cola Co.*, 239 F.3d 440 (2d Cir. 2000) (consumer products); *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000) (oil); *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161 (5th Cir. 1999) (mining); *Bowoto v. Chevron Corp.*, No. C 99-02506 SI, 2009 WL 593872 (N.D. Cal. Mar. 4, 2009) (oil); *In re Agent Orange Product Liability Litig.*, 373 F. Supp. 2d 7 (E.D.N.Y. 2005), *aff'd sub nom. Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co.*, 517 F.3d 104 (2d Cir. 2008), *cert. denied*, 129 S. Ct. 2524 (2009) (defense and chemical); *Chowdhury v. Worldtel Bangladesh Holding, Inc.*, 588 F. Supp. 2d 375 (E.D.N.Y. 2008) (telecommunications); *Mustafa v. Australian Wheat Bd. Ltd.*, No. 07-CV-7955, 2008 WL 4378443 (S.D.N.Y. Sept. 25, 2008) (food supply); *In re Chiquita Brands International, Inc., Alien Tort Statute & Shareholders Derivative Litig.*, No. 0:08-MD-01916 (S.D. Fla. filed Feb. 20, 2008) (agriculture); *Almog v. Arab Bank, PLC*, 471 F. Supp. 2d 257 (E.D.N.Y. 2007) (financial); *Xiaoning v. Yahoo!, Inc.*, No. 4:07-CV-02151 (N.D. Cal. settled Nov. 28, 2007) (technology); *Kiobel v. Royal Dutch Petroleum Co.*, 456 F.Supp.2d 457 (S.D.N.Y. 2006) (oil); *Corrie v. Caterpillar, Inc.*, 403 F. Supp. 2d 1019 (W.D. Wash. 2005), *aff'd*, 503 F.3d 974 (9th Cir. 2007) (manufacturing); *Doe I v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20 (D.D.C. 2005) (oil); *Doe I v. The Gap, Inc.*, No. Cv-01-0031, 2001 WL 1842389

typically have deep pockets, assets located in the United States, and a continuous and systematic presence inside the United States that permits the assertion of general personal jurisdiction. *See* Julian Ku, *The Third Wave: The Alien Tort Statute and the War on Terrorism*, 19 Emory Int'l L. Rev. 105, 109 (2005); Joel Paul, *Holding Multinational Corporations Responsible Under International Law*, 24 Hastings Int'l & Comp. L. Rev. 285, 291-92 (2001).

Of course, the vast majority of international law principles apply to state actors, not to private parties. *See, e.g.*, *Sosa*, 542 U.S. at 720; *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 488-89 (1983). And responsible corporations almost never can even be alleged to have engaged in the sort of reprehensible conduct that is prohibited by well-established international norms—slavery, genocide, or torture. ATS claims against corporations therefore generally rest on an aiding and abetting theory: that the corporation is liable on the ground that it somehow aided and abetted a state actor's, or other party's, violation of international law. In addition, the plaintiffs argue that ATS liability extends beyond natural persons to encompass legal entities such as corporations.

(D.N. Mar. I. Nov. 26, 2001) (textiles and clothing); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424 (D.N.J. 1999) (automotive).

Because "the rules for determining aiding and abetting liability are unclear" (*Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 188 (1994)), the alleged "substantial assistance" on which the plaintiffs in these cases rest their claims of aiding and abetting most frequently is the corporation's ordinary business activity, conducted in a developing country where human rights abuses take place. This business activity often is a direct result of the foreign policy of the corporation's home nation, which seeks to employ businesses as agents of change by encouraging such "constructive commercial engagement" as a means of improving economic and social conditions in the developing country. *See, e.g.*, Brief for the United States of America as Amicus Curiae in Support of Petitioners, *Isuzu Motors, Inc. v. Ntsebeza*, 128 S. Ct. 2424 (2008) (No. 07-919), 2008 WL 408389, at 21.

In *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009), for example, the plaintiffs sued a Canadian oil company for allegedly aiding and abetting and conspiring with the Sudanese government to commit genocide and crimes against humanity. The plaintiffs' argument was essentially that "Talisman understood that the Government had cleared and would continue to clear the land of the local population if oil companies were willing to come to the Sudan and explore for oil, and that[,] understanding that to be so, Talisman should not have come." *Id.* at 261 (alteration in original) (citation omitted). They asserted

that "that Talisman's knowledge of the Government's record of human rights violations, and its understanding of how the Government would abuse the presence of Talisman, [wa]s a sufficient basis from which to infer Talisman's illicit intent when it designated areas for exploration, up-graded airstrips or paid royalties." *Id.*

Eight years after the lawsuit was filed, the Second Circuit affirmed its dismissal, highlighting the far-reaching implications of plaintiffs' aiding-and-abetting theory: "The activities which the plaintiffs identify as assisting the Government in committing crimes against humanity and war crimes generally accompany any natural resource development business or the creation of any industry." *Id.* at 260-61 (citation omitted); *see also id.* at 261 (characterizing plaintiffs' arguments as "proxies for their contention that Talisman should not have made any investment in the Sudan") (citation omitted).

Similarly, in a case currently pending in the Central District of California, the plaintiffs have sued Nestlé, Cargill, and Archer-Daniels-Midland for allegedly aiding and abetting forced child labor on cocoa farms in Côte d'Ivoire. First Am. Compl., *John Doe I v. Nestle, SA*, No. 2:05-CV-05133 (C.D. Cal. filed July 22, 2009). The corporate defendants are not alleged to have participated in any way in the alleged imprisonment or abuse, which allegedly occurred at the hands of Ivoirian cocoa farmers. Rather, the plaintiffs' theory is that the corporations aided and abetted the farmers' wrongdoing by purchasing Ivorian cocoa beans and

providing various forms of "logistical support" to farming activities—such as agreeing to purchase their entire production, providing fertilizer and other farming supplies, and training in beneficial farming techniques and humane labor practices—allegedly with the knowledge that the use of child labor in that sector of the Ivoirian economy is "well-documented." *Id.* ¶ 47. The plaintiffs also argue that the defendants' failure to stop the farmers from using child labor itself constituted "substantial assistance."

These cases are just a few of the many ATS lawsuits based on little more than allegations of doing business in or having commercial relationships with people in countries with blemished human rights records.[2] Until such expansive

[2] *See, e.g.*, *Jane Doe I v. Wal-Mart Stores, Inc.*, No. CV-057307, 2007 WL 5975664 (C.D. Cal. Mar. 30, 2007), *aff'd*, 572 F.3d 677 (9th Cir. 2009) (workers at foreign factories supplying goods to U.S. retailer sued retailer for labor abuses at factories, alleging that retailer failed to monitor and prevent abuses); *Sinaltrainal*, 578 F.3d 1252 (plaintiffs sought to hold company liable for abuses suffered at the hands of paramilitary forces in Colombia); *Abagninin*, 545 F.3d 733 (plaintiff alleged human rights violations against manufacturer of pesticide and agricultural company that purchased food produced with pesticide in the Ivory Coast); *Khulumani*, 504 F.3d 254 (plaintiffs sued numerous consumer, manufacturing, financial, mining and service companies for doing business in apartheid-era South Africa on grounds that their business activities facilitated violations of international law by prolonging apartheid); *In re Agent Orange Product Liability Litig.*, 373 F. Supp. 2d 7 (plaintiffs sued manufacturer of defoliation agent used by American military in Vietnam); *Mustafa*, 2008 WL 4378443 (plaintiffs sued suppliers of foodstuffs to Iraq alleging that suppliers' business activities facilitated Saddam Hussein regime's human rights abuses); *Xiaoning*, No. 4:07-CV-02151 (plaintiffs sued technology company for complying with legal requirements of Chinese government); *Corrie*, 403 F. Supp. 2d 1019 (plaintiffs sued manufacturer

applications of the ATS are foreclosed, "all companies whose supply chains or distribution markets reach into developing countries are suspect." Elliott J. Schrage, *Judging Corporate Accountability in the Global Economy*, 42 Colum. J. Transnat'l L. 153, 159 (2003).

Indeed, the U.S. Government has warned that aiding-and-abetting liability would "have a deterrent effect on the free flow of trade and investment, because it would create uncertainty for those operating in countries where abuses might occur." U.S. *Ntsebeza* Amicus Br., 2008 WL 408389, at *20; *see also Corrie v. Caterpillar, Inc.*, 403 F. Supp. 2d 1019, 1025 (W.D. Wash. 2005) (civil aiding and abetting under the ATS "could have significant, if not disastrous effects on international commerce" (citation omitted)), *aff'd on other grounds*, 503 F.3d 974 (9th Cir. 2007).

These lawsuits exact a significant financial and reputational toll. Because the claims typically relate to conduct occurring in distant corners of the globe, the discovery process is unusually expensive and burdensome. *See* Gary Hufbauer & Nicholas Mitrokostas, *International Implications of the Alien Tort Statute*, 7 J. Int'l Econ. L. 245, 252-53 (2004) (describing "massive costs" associated with ATS

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of bulldozers allegedly used by Israel Defense Force to destroy homes in Palestine); *Doe I*, 2001 WL 1842389 (plaintiffs sued American clothing retailer that purchased garments from foreign factories where alleged labor abuses occurred).

lawsuits). Pretrial and trial proceedings are generally protracted. *See, e.g.*, *Bowoto v. Chevron Corp.*, No. C 99-02506, 2009 WL 593872 (N.D. Cal. Mar. 4, 2009) (jury verdict in corporate defendants' favor after 10 years of litigation). The prospect of lengthy and costly litigation, combined with the stigma associated with allegations of human rights violations, make ATS suits particularly effective vehicles to extract settlements from corporate "deep pockets" even in meritless actions. *See* Cheryl Holzmeyer, *Human Rights in an Era of Neoliberal Globalization: The Alien Tort Claims Act and Grassroots Mobilization in* Doe v. Unocal, 43 Law & Soc'y Rev. 271, 290-91 (2009); *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 295 (2d Cir. 2007), *aff'd for lack of quorum sub nom. Am. Isuzu Motors, Inc. v. Ntsebeza*, 128 S. Ct. 2424 (2008) (Korman, J., dissenting) (characterizing South Africa Apartheid litigation as "a vehicle to coerce a settlement").

Notwithstanding the significant number of these cases pending in the federal courts, courts of appeals have thus far have had little opportunity to address—under the method of analysis prescribed in *Sosa*—the key legal issues on which these claims rest. Some courts have simply adhered to pre-*Sosa* rulings with no substantive analysis. Others simply have not addressed the questions. Given the high costs associated with these claims, and the lower courts' need for guidance regarding the legal standards applicable in these cases—a number of which are

pending in this Circuit—there is an urgent need for resolution by this Court of the important questions raised by Defendants-Appellees regarding the liability of private corporations and the existence of aiding and abetting claims under the ATS. This Court should address these issues and hold that under the "demanding" standard prescribed by the Supreme Court in *Sosa*, private corporations are not subject to ATS liability and aiding-and-abetting claims may not be asserted under the statute.

ARGUMENT

The *Sosa* Court established two prerequisites for the recognition of any federal common law cause of action under the ATS. First, the international law norm on which the claim is based must have the same "definite content and acceptance among civilized nations" as the three "historical paradigms familiar when § 1350 was enacted" in 1789—*i.e.*, "violations of safe conducts, infringements of the rights of ambassadors, and piracy." 542 U.S. at 732, 737; *see also Abagninin v. Amvac Chem. Corp.*, 545 F.3d 733, 737 (9th Cir. 2008). Second, the court must determine whether violations of the norm should be actionable in private civil actions. As the Court put it, "the determination whether a norm is sufficiently definite to support a cause of action should (and, indeed, inevitably 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; *see also Abagninin*, 545 F.3d at 737.

Under *Sosa*'s mandate of restraint, it is clear that corporations are not subject to liability under the ATS, and that the ATS does not permit the imposition of liability on a theory of aiding and abetting.

A. The Court Should Resolve the Threshold Question of Corporate Liability Under *Sosa*.

Prior to the Supreme Court's decision in *Sosa*, district courts and courts of appeals routinely permitted ATS claims against private corporations, typically on the theory that such liability was well-recognized under domestic common law. *See, e.g., Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424 (D.N.J. 1999).

Sosa makes clear, however, that its "demanding standard of definition" (542 U.S. at 738 n.30) requires ATS plaintiffs to show that "international law extends the scope of liability for a violation of [the] 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). Although the Supreme Court defined this element as a necessary part of the *Sosa* inquiry, no Court of Appeals in the five years since *Sosa* was decided has

considered whether international law extends liability to private corporations. *See* *Talisman*, 582 F.3d at 261 n.12 (reserving question).[3]

The existence of corporate liability under the ATS is a threshold question with implications for dozens of pending lawsuits against American corporations. As such, it merits this Court's immediate attention.

1. There Is A Clear International Consensus Against Imposing Liability on Corporations.

The question of corporate liability must be answered by reference to sources of international law. That much is clear from *Sosa* itself. *See* 542 U.S. at 732 n.20 (requiring a showing that "*international law* extends the scope of liability … to the perpetrator being sued") (emphasis added). And the text of the ATS reinforces that principle: it requires that the "tort" for which suit is brought is one "committed in violation of the law of nations." 28 U.S.C. § 1350. *See also* Order, *Balintulo v. Daimler*, Nos. 09-cv-2778, 2780, 2787, 3037, 2785, 2801, 2779, 2781, 2783, and

[3] The courts that have touched on this issue have simply relied on pre-*Sosa* decisions without conducting the analysis required by *Sosa*. *See, e.g.*, *Abdullahi*, 562 F.3d at 173, 188 (citing *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995), and *Flores v. S. Peru Copper Corp.*, 414 F.3d 233 (2d Cir. 2003)); *Khulumani*, 504 F.3d at 269-70 (same). Other cases, too, have assumed the existence of corporate liability under the ATS when that issue was not disputed. *See, e.g.*, *Bigio*, 239 F.3d 440; *Flores*, 414 F.3d 233. It is well-settled, however, 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 (1925) (internal citations omitted).

2792 (2d Cir. Dec. 4, 2009) (citing *Talisman*, 582 F.3d at 260, for the principle that "we look to international law to determine the scope of liability under the ATS" and inviting supplemental briefing on "what . . . sources of international law evince with respect to whether customary international law recognizes corporate criminal liability").

The relevant international legal materials reveal that there is no norm of corporate liability under international law—much less one with the "definite content and acceptance among civilized nations" necessary to satisfy *Sosa*. 542 U.S. at 732. The Nuremberg Principles and the Rome Statute for the International Criminal Court both foreclose the existence of corporate liability for violations of the law of nations. *See The Nuremberg Trial*, 6 F.R.D. 69, 110 (1946) ("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."); Rome Statute of the Int'l Criminal Court ("Rome Statute"), art. 25(1), 37 I.L.M. 1002, 1016 (1998) (limiting jurisdiction to "natural persons"). The drafters of the Rome Statute considered corporate liability, but rejected it at the behest of the United States. *See* U.N. Diplomatic Conf. of

Plenipotentiaries on the Establishment of an Int'l Criminal Court, at 134-35 ¶ 54, U.N. Doc. A/Conf. 183/13 (Vol. II) (1998).[4]

The statutes governing other international criminal tribunals similarly restrict jurisdiction to natural persons. *See* Statute of the Int'l Criminal Tribunal for the Former Yugoslavia, art. 6, 32 I.L.M. 1192, 1194 (1993); Statute of the Int'l Criminal Tribunal for Rwanda, art. 5, 33 I.L.M. 1602, 1604 (1994).

Not surprisingly in light of the clear weight of the international authorities, the only judge sitting on a court of appeals to address the merits of the issue under *Sosa* found that the relevant international materials "plainly do not recognize" secondary liability for an artificial entity "used as a vehicle for the commission" of an offense against the law of nations. *Khulumani*, 504 F.3d at 321-26 (Korman, J., concurring and dissenting).[5]

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[4] *See* Draft Statute for the Int'l Criminal Court, art. 23, at 5-6 & n.3, U.N. Doc. A/Conf. 183/2/Add.1 (1998) (noting proposal), *available at* http://www.un.org/law/n9810105.pdf; U.N. Diplomatic Conf. of Plenipotentiaries on the Establishment of an Int'l Criminal Court, at 133-36 ¶¶ 32-66, U.N. Doc. A/Conf. 183/13 (Vol. II) (1998) (recording debate), *available at* http://untreaty.un.org/cod/icc/rome/proceedings/E/Rome%20Proceedings_v2_e.pdf; *id.* at 275, ¶ 10 (deletion of corporate liability).

[5] The fact that many, or even most, nations generally recognize civil corporate liability as a matter of their own domestic law does not provide evidence of an international law norm actionable under *Sosa*. *See Cisneros v. Aragon*, 485 F.3d 1226, 1231 (10th Cir. 2007). Customary international law "addresses only matters of mutual concern among States," rather than matters of "several concern" in which "nations are separately and independently interested." *Flores*, 414 F.3d at 249 & n.23.

2. Imposing Corporate Liability Would Disregard Congressional Policy Choices.

Even if a norm of corporate liability were universally recognized as a matter of international law, the second element of *Sosa*'s test—which requires courts to consider "the practical consequences" of making such a norm privately actionable in U.S. courts (542 U.S. at 732-33)—would preclude claims against corporations.

Sosa instructed that courts considering whether to recognize a federal common law cause of action to enforce a particular international norm must "look for legislative guidance before exercising [such] innovative authority over substantive law." *Id.* at 726-27. This caution is consistent with the general rule that it would be "anomalous" for a judicially created cause of action to sweep "beyond the bounds [Congress] delineated for comparable express causes of action." *Cent. Bank*, 511 U.S. at 180.

As a plurality of the en banc Court recognized earlier in this litigation, the Torture Victims Protection Act (TVPA), 28 U.S.C. § 1350 note, is the most closely analogous statutory cause of action to the ATS, and therefore "provides a useful, congressionally-crafted template to guide" the courts' exercise of federal common law authority under the ATS. *Sarei v. Rio Tinto, plc*, 550 F.3d 822, 832 (9th Cir. 2008) (en banc) (plurality opinion); *see also Papa v. United States*, 281 F.3d 1004, 1011-12 (9th Cir. 2002) (TVPA is the "appropriate vehicle for interstitial

lawmaking" for the ATS (internal quotations and citation omitted)); *Enahoro v. Abubakar*, 408 F.3d 877, 885-86 (7th Cir. 2005) (same).

Congress expressly limited liability under the TVPA to "individuals"—excluding corporations. 28 U.S.C. § 1350 note, § 2(a) (imposing liability on any "individual who, under actual or apparent authority, or color of law, of any foreign nation … subjects an individual to torture"); *see also, e.g.*, *Bowoto v. Chevron Corp.*, No. C 99-02506, 2006 WL 2604591, at *2 (N.D. Cal. Aug. 22, 2006) ("Congress intended only that the TVPA reach natural persons, not corporations."); *Corrie*, 403 F. Supp. 2d at 1026 (concluding that "the statutory language of the TVPA precludes a corporation from being a victim or a perpetrator" (citation omitted)); *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1176 (C.D. Cal. 2005) (same).

In exercising federal common law authority under the ATS, the courts must respect the congressional policy judgments reflected in the TVPA, including the decision rejecting corporate liability. *Cf. Abagninin*, 545 F.3d at 740 (no ATS claim for genocide because the domestic criminal genocide statute showed that "the United States' government has clearly expressed" a different understanding of the elements of the offense).

B. *Sosa* Precludes Recognition Of Aiding-And-Abetting Claims Under The ATS.

A second critical question on which this Court's guidance is urgently needed is whether liability for primary violations of the law of nations by other actors can be extended to corporations based on a cause of action for aiding and abetting. "Recognition of secondary liability is no less significant a decision than whether to recognize a whole new tort in the first place." *Talisman*, 582 F.3d at 259. And the permissibility of such claims turns upon *Sosa*'s two-step analysis: first, whether there is an international law norm equivalent to the eighteenth century's prohibitions against piracy and interference with ambassadors; and, second, an assessment of the practical consequences of recognizing civil liability based upon an aiding-and-abetting theory. Aiding-and-abetting claims fail both of these steps.

1. There Is No International Law Norm Prohibiting Aiding and Abetting That Satisfies the *Sosa* Test.

Courts have disagreed as to whether international criminal law norms of aiding and abetting are sufficiently well-defined and accepted to satisfy *Sosa*'s first step. *Compare Khulumani*, 504 F.3d at 264-84 (Katzmann, J., concurring), *with id.* at 319-23, 330-33 (Korman, J., concurring and dissenting). The lack of an international consensus reflected in the debate in these opinions is reason enough for the Court to reject aiding-and-abetting liability under the ATS. *Cf. Abagninin*, 545 F.3d at 738-40 (finding lack of "a sufficient consensus" to support plaintiffs'

proposed "knowledge-based norm" for genocide, which was consistent with Rome Statute, in light of divergence from "specific intent" standard reflected in other international legal materials).

But even if there were a sufficiently well-defined international *criminal* law norm, that alone would not be enough to satisfy *Sosa*'s threshold requirement. The Supreme Court's standard demands in addition that international law itself require nations to provide a means of compensation for persons injured by violations of particular international criminal law norm.

Sosa explains that the purpose of the ATS is to provide a cause of action in U.S. courts for violations of international law *where international law requires redress*. *See* 542 U.S. at 715 (explaining need for "adequate[] redress[]" for certain offenses against the law of nations); *id.* at 723-24 (explaining link between "criminal sanction" and "the requirement that the state, 'at the expense of the delinquent, give full satisfaction to the sovereign who has been offended in the person of his minister'") (quoting E. de Vattel, Law of Nations, Preliminaries § 3, pp. 463-64 (J. Chitty et al. transl. and ed. 1883). For example, "[a]n assault against an ambassador"—one of the three offenses within the original contemplation of the ATS—"impinged on the sovereignty of the foreign nation and if not adequately redressed could give rise to an issue of war." *Id.* at 715. The ATS was enacted to fulfill the our nation's obligations under international law because "a private

remedy was thought necessary for diplomatic offenses under the law of nations." *Id.* at 724.

The *Sosa* Court concluded from this history that the ATS "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*"—*i.e.*, those with the same international law requirement of redress that applied to diplomatic offenses. *Id.* (emphasis added). Accordingly, the inquiry at *Sosa*'s first step regarding the existence of an actionable norm considers not only whether international law universally condemns a practice, but also whether international law requires civil redress.[6]

The Second Circuit applied this approach in *Mora v. New York*, 524 F.3d 183 (2d Cir. 2008), refusing to recognize an ATS claim for official detention of a foreign suspect in violation of the Vienna Convention. Although Article 36 of the Convention guaranteed the right to consular notification and access, the court found dispositive the fact that nations had not recognized a violation of Article 36 *as an actionable tort* in their domestic law. *See* 524 F.2d at 208-09; *see also id*. at

[6] The United States has argued forcefully that the absence of any universal mandate of civil redress for aiding-and-abetting violations of international law precludes such a claim from qualifying under the first step of *Sosa*. *See* Brief of the United States as Amicus Curiae, *Mujica v. Occidental Petroleum Corp.*, Nos. 05-56175, 56178, 56056, 2006 WL 6223020 (9th Cir. Mar. 20, 2006), at 21-28; *see also* C. Bradley *et al.*, Sosa, *Customary International Law, and the Continuing Relevance of* Erie, 120 Harv. L. Rev. 869, 925-929 (2007).

188 n.5. Absent such universal recognition, the court found, "it cannot be said that the tort proposed has 'attained the status of a binding customary norm.'" *Id*. at 209 (quoting *Sosa*, 542 U.S. at 737). This result followed from the rule that customary international law consists "only of those rules that States universally abide by, or accede to, out of a sense of legal obligation and mutual concern." *Id*. (citation and internal quotations omitted).

Although this Court has not directly addressed the relevance under *Sosa* of the extent to which international law calls for a civil remedy, the prior *en banc* plurality in this case held that the existence of universal *criminal* jurisdiction does not imply the existence of universal *civil* jurisdiction, because the basis for civil jurisdiction is "not as well-settled" as the basis for criminal jurisdiction. *Sarei*, 550 F.3d at 831. The plurality's analysis comports with the general point above—that a reliance on criminal law standards alone is insufficient, and examination of relevant international civil law principles is encompassed within the *Sosa* inquiry.

Under this framework, there is no international consensus sufficient to meet *Sosa*'s threshold requirement. As explained above, the relevant international law materials show a lack of consensus even with respect to criminal norms of aiding and abetting. And even if there were such a consensus, there is no international law requirement that nations provide redress to persons injured by aiding and

abetting. For those reasons, there is no international law norm with the "definite content and acceptance" required by *Sosa*. 542 U.S. at 732.

2. The Practical Consequences of Civil Aiding-and-Abetting Liability Preclude Recognition of Such Claims Under the ATS

Even if the first step of the *Sosa* inquiry were satisfied, aiding-and-abetting claims fail *Sosa*'s second step, which requires courts to consider the "practical consequences" of declaring a norm privately actionable. *Id*.; *see also id.* at 727 ("The creation of a private right of action raises issues beyond the mere consideration whether underlying primary conduct should be allowed or not, entailing, for example, a decision to permit enforcement without the check imposed by prosecutorial discretion.").[7]

[7] The Second Circuit recognized aiding-and-abetting liability without ever conducting this second step of the *Sosa* inquiry. Neither of the concurring judges on the *Khulumani* panel discussed the practical consequences. The *Talisman* panel considered itself bound by *Khulumani* to accept aiding and abetting and also did not undertake the step two analysis required by *Sosa*. *See Talisman*, 582 F.3d at 257-58. No other court of appeals has addressed the issue under *Sosa.*

Moreover, the Supreme Court's affirmance in *Khulamani* for lack of quorum has no precedential value. *See* 28 U.S.C. § 2109 ("In any other case . . . , which cannot be heard and determined because of the absence of a quorum . . . the court shall enter its order affirming the judgment . . . with the same effect as upon affirmance by an equally divided court."); *Rutledge v. United States*, 517 U.S. 292, 304 (1996) ("affirmance by an equally divided court [is] a judgment not entitled to precedential weight").

In *Central Bank*, the Supreme Court assessed those very considerations in holding that the doctrine of civil aiding and abetting could not be applied to a judicially crafted private right of action without legislative authorization. 511 U.S. at 188-90; *see also Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761, 768-69 (2008). Each of the adverse practical consequences that the Court relied on in refusing to recognize aiding-and-abetting claims in securities actions applies with equal force to mandate the conclusion that aiding-and-abetting claims should not be recognized in the ATS context.

The Supreme Court first observed that the doctrine of civil aiding and abetting is not well-established, "with the common-law precedents largely confined to isolated acts of adolescents in rural society." 511 U.S. at 181 (citation and internal quotation marks omitted). "The rules for determining aiding and abetting liability are unclear, in 'an area that demands certainty and predictability.' That leads to the undesirable result of decisions 'made on an ad hoc basis, offering little predictive value' to those who provide services to participants in the securities business.'" *Id.* at 188 (citations omitted). Precisely the same conclusion applies with respect to ATS claims: the vagueness of aiding-and-abetting standards means that judicial decisions will provide no real guidance for businesses engaged in, or contemplating, cross-border commerce. Entering into such relationships is a costly undertaking and demands at least the same level of

"certainty and predictability" as decisions by professional services providers to enter into relationships with public companies.

Next, the Court stated that "[b]ecause of the uncertainty of the governing rules, entities subject to secondary liability as aiders and abettors may find it prudent and necessary, as a business judgment, to abandon substantial defenses and to pay settlements in order to avoid the expense and risk of going to trial." *Id*. at 189. ATS claims create the very same dynamic, especially given the unusually high monetary costs of defending such claims—due to discovery outside the United States in developing countries that lack experience with the often-complex procedures specified by U.S. law and in which safety is often a significant concern—as well as the very substantial reputational damage associated with the pendency of such a claim. *See* pages 8-9, *supra*.

The Court also observed that "'litigation under Rule 10b–5 presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general.' Litigation under 10b–5 thus requires secondary actors to expend large sums even for pretrial defense and the negotiation of settlements." *Cent. Bank*, 511 U.S. at 189. As we have discussed, the international character of ATS litigation means that discovery and other pretrial costs will far exceed those of conventional litigation. And many ATS actions are brought as class actions, multiplying the stakes, and therefore the litigation burdens.

Finally, the Court found, "[t]his uncertainty and excessive litigation can have ripple effects" in terms of increased burdens on the very investors that the securities laws are intended to protect. *Id.* In the ATS context, the ripple effects relate to investment in developing countries, with the risk of litigation discouraging the very commercial interaction—expressly encouraged by U.S. foreign policy—that can lead to improved conditions for citizens of those nations. The reasoning of *Central Bank* thus precludes aiding-and-abetting claims here.[8]

Indeed, the adverse practical consequences of recognizing civil aiding-and-abetting liability under the ATS would be even more substantial than those identified in *Central Bank*. Traditionally, ATS suits have been curtailed by sovereign immunity and the principle that only nations are bound by most international law norms. But that is not so for aiding-and-abetting claims. They enable plaintiffs to sue any of a universe of private parties who may bear some tenuous connection to the alleged wrong. In addition, as discussed in depth in

[8] In *Khulumani*, Judges Katzmann and Hall both sought to confine *Central Bank*'s holding to the specific securities-law context in which it arose. 504 F.3d at 282 (Katzmann, J., concurring); *id.* at 288 n.5 (Hall, J., concurring). This ignores the substantial body of case law that applies *Central Bank* in a wide range of contexts. *See In re Currency Conversion Fee Antitrust Litig.*, 265 F. Supp. 2d 385, 431-32 (S.D.N.Y. 2003) (Truth in Lending Act); *Hayden v. Paul, Weiss, Rifkind, Wharton & Garrison*, 955 F. Supp. 248, 256 (S.D.N.Y. 1997) (RICO); *MCI Telecomms. Corp v. Graphnet, Inc.*, 881 F. Supp. 126, 129 (D.N.J. 1995) (Sherman Act); *Flanigan v. Gen. Elec. Co.*, 93 F. Supp. 2d 236, 254 (D. Conn. 2000) (ERISA), *aff'd*, 242 F.3d 78 (2d Cir. 2001).

Defendants-Appellees' brief (at 28-31), civil aiding-and-abetting lawsuits under the ATS pose a grave threat to the political branches' ability to conduct foreign affairs. Because the "collateral consequences" of permitting an ATS claim "without the check imposed by prosecutorial discretion" always warrants "judicial caution" (*id.* at 727), and those consequences are especially severe with respect to aiding-and-abetting claims, this Court should refuse to recognize such an expansive cause of action.

3. If the Court Disagrees and Concludes That *Sosa* Permits Aiding-and-Abetting Claims, It Should Adopt the Liability Standard Set Forth in *Talisman*.

If the Court nonetheless concludes that some form of aiding-and-abetting liability exists under the ATS, it should clearly define both the *actus reus* and the *mens rea* requirements of the offense, in order to provide needed guidance for potential litigants as well as the lower courts. The standard of liability adopted by the Second Circuit in *Talisman* provides an appropriate test

In identifying the appropriate liability standard, several considerations are important. *First*, given the existence of conflicting international law standards for criminal aiding and abetting, the only way to give effect to *Sosa*'s injunction that an actionable standard must embody a universally recognized liability principle would be to require that any such liability be limited to those circumstances in which each of the relevant, but conflicting, international law standards would be

violated. *See Khulumani*, 504 F.3d at 276-77 (Katzmann, J.); *id.* at 333 (Korman, J.). *Second*, because aiding-and-abetting liability often is imposed for conduct that is not itself independently wrongful, courts should draw the governing standard carefully to avoid imposing liability for ordinary commercial behavior.

a. *Actus Reus*

All of the relevant authorities make clear that an aider and abettor must be shown to have provided substantial assistance to the principal's commission of the wrong. Thus, Article 25(3)(c) of the Rome Statute requires the alleged aider and abettor to have actually "aid[ed], abet[ed], or otherwise assist[ed] in [the] commission" of the "crime." Rome Statute, art. 25(3)(c), 37 I.L.M. 999, 1016. The Appeals Chamber of the ICTY likewise defines the *actus reus* of aiding and abetting as conduct "*specifically directed* to assist[] … the perpetration of a *certain specific crime*[]" and which "has a substantial effect upon the perpetration of the crime." *Prosecutor v. Vasiljevic*, No. IT-98-32-A ¶ 102(i) (Feb. 25, 2004), *available at* 2004 WL 2781932 (emphasis added); *see also Prosecutor v. Kvocka*, IT-98-30/1-A, ¶ 89(i) (Feb. 28, 2005) (same). A defendant who has not "carried out acts specifically directed to assisting … the perpetrat[or] of the offence" is not an aider and abettor. *Prosecutor v. Kupreskic*, IT-95-16-A, ¶ 254 (Oct. 23, 2001), *available at* 2001 WL 34712260.

The Second Circuit in *Talisman*, following Judge Katzmann's approach in *Khulumani*, "adopted the standard set forth in the Rome Statute," requiring that the defendant "'provides practical assistance to the principal which has a substantial effect on the perpetration of the crime.'" *Talisman*, 582 F.3d at 259 (quoting *Khulumani*, 504 F.3d at 277 (Katzmann, J., concurring)).

b. *Mens Rea*

In addition to adopting the Rome Statute's *actus reus* requirement, *Talisman* adopted its *mens rea* standard, which imposes liability only when the defendant acts "with the purpose of facilitating the commission of" the principal's offense. *Id.* (quoting *Khulumani*, 504 F.3d at 277 (Katzmann, J., concurring)); *see* Rome Statute, art. 25(3)(c), 27 I.L.M. at 1016. The Rome Statute's purpose standard is the only *mens rea* standard that conceivably could be applied to an aiding-and-abetting claim under the ATS. The purpose requirement requires a higher level of subjective culpability than the standard employed by the ICTY and ICTR, which requires only *knowledge* that "the acts performed … assist the commission of the specific crime of the principal." *Vasiljevic*, ICTY-98-32-A, ¶ 102. Thus, it is the only *mens rea* standard that would result in liability in all of the international tribunals. *See Talisman*, 582 F.3d at 259 ("Even if there is a sufficient international consensus for imposing liability on individuals who *purposefully* aid and abet a violation of international law, no such consensus exists for imposing

liability on individuals who *knowingly* (but not purposefully) aid and abet a violation of international law.") (citations omitted); *Khulumani*, 504 F.3d at 276 n.12 (Katzmann, J., concurring).

If this Court recognizes an aiding-and-abetting norm, it should adopt the Second Circuit's view "that the *mens rea* standard for aiding and abetting liability in ATS actions is purpose rather than knowledge alone." *Talisman*, 582 F.3d at 259.

* * * *

These limiting principles are critical to prevent the ATS from becoming a vehicle for imposing legal liability on American companies merely for doing business in countries with problematic human rights records. Without them, plaintiffs can effectively extort settlements from—or subject to prolonged and costly litigation—any company operating in the vicinity of human rights abuses, based on nothing more than nonspecific allegations that the company "supported" and had "knowledge" of the offenses. This result is inconsistent not only with *Sosa*'s clear cautionary instructions, but also with well-settled domestic law principles of civil aiding-and-abetting liability, and with the foreign policy prerogatives of the political branches.

CONCLUSION

For the foregoing reasons, the Court should decline to recognize corporate aiding-and-abetting liability under the ATS and affirm the district court's initial decision dismissing the complaint with prejudice.

Dated: December 16, 2009

Respectfully submitted,

/s/ Andrew J. Pincus
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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations set forth in Fed. R. App. P. 29(d) because this brief contains 6,844 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in Times New Roman 14-point font.

Dated: December 16, 2009

/s/ Rhett P. Martin

CERTIFICATE OF SERVICE

I hereby certify that on December 16, 2009, I electronically filed the foregoing with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

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