05-1953-cv

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

VIETNAM ASSOCIATION FOR VICTIMS OF AGENT ORANGE, PHAN THI PHI PHI, NGUYEN VAN QUY, individually and as parent and natural guardian of NGUYEN QUANG TRUNG, THUY NGUYEN THI NGA, his children, DUONG QUYNH HOA, individually and as administatrix of the estate of her deceased child, HUYNH TRUNG SON, on behalf of themselves and others similarly situated, NGUYEN THANG LOI, TONG THI TU, NGUYEN LONG VAN, NGUYEN THI THOI, NGUYEN MINH CHAU, NGUYEN THI NHAM, LE THI VINH, NGUYEN THI HOA, individually and as parent

(*Caption continued on inside cover*)

On Appeal from the United States District Court
for the Eastern District of New York

Brief for the Chamber of Commerce of the United States of America As *Amicus Curiae* in Support of Appellees

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and natural guardian of VO THANH TUAN ANH, her child, VO THANH HAI, NGUYEN THI THU, individually and as parent and natural guardian of NGUYEN SON LINH and NGUYEN SON TRA, her children, DANG THI HONG NHUT, NGUYEN DINH THANH, NGUYEN MUOI, HO THI LE, individually and as administratrix of the estate of her deceased husband HO XUAN BAT, HO KAN HAI, individually and as parent and natural guardian of NGUYEN VAN HOANG, her child, and VU THI LOAN,

Plaintiffs-Appellants,

v.

DOW CHEMICAL COMPANY, MONSANTO COMPANY, MONSANTO CHEMICAL CO., HERCULES INC., OCCIDENTAL CHEMICAL CORPORATION, THOMPSON HAYWARD OYAL CHEMICAL CO INC, UNIROYAL, INC., UNIROYAL CHEMICAL HOLDING COMCHEMICAL CO., HARCROS CHEMICALS, INC, UNIRPANY, UNIROYAL CHEMICAL ACQUISITION CORPORATION, C.D.U. HOLDING INC., DIAMOND SHAMROCK AGRICULTURAL CHEMICALS, INC., DIAMOND SHAMROCK CHEMICAL COMPANY, also known as Diamond Shamrock Refining & Marketing Co., also known as Occidental Electro Chemical Corp., also known as Maxus Energy Corp, also known as Occidental Chemical Corp., also known as Diamond Shamrock, DIAMOND SHAMROCK CHEMICAL, also known as Diamond Shamrock Refining & Marketing Co., also known as Occidental Electro Chemical Corp., also known as Maxus Energy Corp., also known as Occidental Chemical Corp., also known as Diamond Shamrock, DIAMOND SHAMROCK REFINING AND MARKETING COMPANY, OCCIDENTAL ELECTROCHEMICALS CORPORATION, HOOKER CHEMICAL CORPORATION, HOOKER CHEMICAL FAR EAST CORPORATION, HOOKER CHEMICALS & PLASTICS CORP., CHEMICAL LAND HOLDINGS, INC., T-H AGRICULTURE & NUTRITION CO., THOMPSON CHEMICAL CORPORATION, also known as Thompson Chemical Corp, and RIVERDALE CHEMICAL COMPANY,

Defendants-Appellees,

PHARMACIA CORP., formerly known as Monsanto Co., ULTRAMAR DIAMOND SHAMROCK CORPORATION, MAXUS ENERGY CORP., DIAMOND ALKALI COMPANY, ANSUL INCORPORATED, AMERICAN HOME PRODUCTS CORPORATION, formerly known as American Home Products, WYETH, INC., HOFFMAN-TAFF CHEMICALS, INC., ELEMENTIS CHEMICALS, INC., UNITED STATES RUBBER COMPANY, INC., SYNTEX AGRIBUSINESS, INC., ABC CHEMICAL COMPANIES 1-50, SYNTEX LABORATORIES, INC, VALERO ENERGY CORPORATION, doing business as Valero Marketing and Supply Company,

Defendants.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, *amicus* Chamber of Commerce of the United States of America makes the following disclosure.

The Chamber of Commerce of the United States of America ("the Chamber") is a membership organization, not a publicly held corporation. No publicly held corporation owns 10 percent or more of any stock in the Chamber.

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INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation, representing a membership of more than three million businesses and organizations that transact business in countries around the world. Chamber members have a direct and substantial interest in the issues raised by this appeal because they have been and may in the future be defendants in suits under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350. Many of these lawsuits are brought by large numbers of plaintiffs or as class actions against multiple corporate defendants.[1]

Before dismissing this case on the ground that use of the defoliant Agent Orange during the Vietnam war did not violate international law, the district court took the unnecessary step of delving into and opining or ruling on a number of other significant issues that arise in ATS suits in general. In doing so, the district court took the extraordinary step of adopting wholesale large sections of an *amicus* brief that presented a one-sided and incorrect summary of the relevant law. As a result, the district court misstated the law concerning those significant ancillary issues and decided them incorrectly. Unless repudiated by the Court, the lower court's erroneous rulings could seriously harm the interests of Chamber members that have been or are likely to be subjected to ATS lawsuits. In particular,

[1] See, *e.g.*, cases cited at p. 13–15 *infra*.

Chamber members would be harmed if this Court approves or accepts without qualification the district court's erroneous rulings (1) that aiding and abetting can be the basis of an ATS lawsuit for damages; (2) that corporations are liable for violations of international law and therefore may be sued under the ATS; and (3) that customary international law precludes the application of domestic statutes of limitations to ATS suits. 373 F. Supp. 2d 7, 52–64 (S.D.N.Y. 2005) (SPA1, 42–52).

Chamber members operating abroad are already subject to the laws of the foreign countries in which they operate and, in many cases, remain subject to certain provisions of U.S. law. They also recognize the benefits of doing business in the United States and other countries that have incorporated into their domestic law many principles of human rights. But the threat of liability for foreign operations under other, vaguely-stated principles of alleged customary international law imposes risks that are both unpredictable and unreasonable.

The parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

Defendants have convincingly demonstrated that this case should be affirmed on the basis of the ruling below that the use of the defoliant Agent Orange did not violate any norm of international law and therefore could not possibly

provide a basis for jurisdiction under the ATS. The Chamber does not address that issue here.

The Supreme Court has instructed federal courts to proceed cautiously in developing a federal common law of liability under the ATS for violations of international law. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). The district court failed to apply that instruction in addressing—and incorrectly deciding—three ancillary issues that are critical to the interests of U.S. corporations operating abroad.

First, whatever the current status of aiding and abetting under international *criminal* law, it is indisputable that no norm of international law prohibits *civil* aiding and abetting. Because plaintiffs in ATS cases premised on aiding and abetting a norm of international criminal law cannot find their cause of action in international law or federal statutory law, they are asking courts to create a federal-common-law cause of action for damages for such aiding and abetting. But *Sosa*'s extensive cautions, the teaching of *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164 (1994), and the lack of legislative guidance prohibit judicial recognition of such a cause of action.

Second, international law applies to states and, in some instances to individuals, but does not extend liability to corporations. Accordingly, under *Sosa's* requirements that a purported norm of international law must be universally

accepted and definite, corporations cannot be held liable in ATS suits. The district court's contrary conclusion, based upon its own policy preferences, must be rejected.

Third, the district court's conclusion that there is no statute of limitations for war crimes and other violations of international law for purposes of ATS liability misreads international law and improperly disregards long-standing U.S. and state law imposing statutes of limitations for all civil liability. This Court should make clear that statutes of limitations apply in ATS actions.

ARGUMENT

I. Aiding And Abetting the Misconduct of Third Parties Is Not Actionable Under The ATS.

The Supreme Court's decision in *Sosa* establishes that a purported norm of international law should not be enforced under the ATS unless it is both "accepted by the civilized world" and "defined with a specificity" comparable to the features of three 18th century paradigms—"violation of safe conducts, infringement of the rights of ambassadors, and piracy." 542 U.S. at 724–25. Appellee corporations have demonstrated convincingly that they violated no universal and specific norm of international law when they provided Agent Orange to the U.S. government. Under these circumstances, as the district court recognized, no ATS jurisdiction existed, and the case had to be dismissed. Obviously, where there is no violation of an underlying international norm, there can be no valid related claim for aiding

and abetting, which is all the district court needed to say on that subject. But instead, the district court erroneously recognized a norm of international law prohibiting aiding and abetting international law violations in general and suggested that federal courts can use their limited federal-common-law powers to provide a right of action to those injured by such aiding and abetting. In this Part, *amicus* demonstrates the fallacy in that position.

For purposes of argument, we assume that in at least some circumstances not presented in this case (for example, cases of genocide or torture), international criminal law would forbid the aiding and abetting of certain international criminal law prohibitions and that such a separate criminal prohibition against aiding and abetting would meet the *Sosa* tests.[2] Even then, however, plaintiffs would still not have a *civil* cause of action for damages. *Sosa* rejected the effort to base civil liability on the ATS itself in holding that the ATS does not establish a cause of action for damages. In ATS litigation involving claims of aiding and abetting, plaintiffs have generally made no attempt to derive a civil cause of action for damages from a self-executing treaty ratified by the United States, from foreign

[2] The district court's ruling that "[i]nternational law clearly and specifically defines aiding and abetting," 373 F. Supp. 2d at 54 (adopting the statement in a lengthy passage from the *amicus* brief by three human rights organizations), is questionable because it relied primarily on the decisions of the Nuremberg tribunals, the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, all ad hoc tribunals given specific directions with respect to specified crimes in specific contexts.

law, or from a federal statute (excepting the Torture Victim Protection Act ("TVPA")[3], which is not applicable here). That leaves only two possible bases for a private cause of action: either international law itself or federal common law, relying on the limited authority of federal courts after *Sosa* to create federal-common-law causes of action for damages in ATS suits.[4] As we show in Part I.A below, plaintiffs have no cause of action under international law because international law does not impose civil liability for violations of international criminal law. And we show in Part I.B that federal courts may not create a federal-common-law cause of action for aiding and abetting because that would be contrary to the cautionary instructions of *Sosa* and the teaching of *Central Bank*.

A. Civil Aiding and Abetting Liability Is Not Recognized Under International Law.

As Professor Anderson stated in his declaration (A1314, ¶ 93), "Although international law in narrow circumstances does provide for individual criminal liability, it does not generally provide for civil liability—not even for *individuals, let alone for corporations*." And as he elaborated in his reply declaration:

> "[T]he existence of a body of narrow criminal law involving individuals does not alter the fact that what they seek is something that does not exist at present, let alone during the Vietnam War—viz., the concept of international tort law.

[3] Pub. L. 102-256, 106 Stat. 73 (1992), *reprinted in* 28 U.S.C. § 1350 note.

[4] This brief does not discuss plaintiffs' state law claims, which the district court dismissed on the basis of the government contractor defense.

> Perhaps the world would be a better place if such international law existed, and perhaps it will come into being. But if so great a change does come about, it will happen the way in which international law is principally made, through state practice." A2106, ¶ 55.

Under these circumstances, no purported norm of international civil liability for aiding and abetting could possibly meet the test of *Sosa*. The task of defining the content of civil aiding and abetting liability with sufficient specificity to meet the *Sosa* test would require the international community to resolve many open issues that do not arise in the context of criminal aiding and abetting liability, including what standard of causation should apply; how to apportion liability among multiple tortfeasors; whether proceedings could be instituted by private parties (as in common law countries); and what types of damages are recoverable. This task has barely begun in the international community, much less reached a status of customary international law that could be applied after *Sosa* under the ATS.

B. Under *Sosa* and *Central Bank*, Whether To Impose Civil Aiding and Abetting Liability for Alleged Violations of International Norms Under the ATS Is a Decision for Congress.

For a federal court to create a federal-common-law cause of action for aiding and abetting violations under the ATS would transgress *Sosa*'s cautions against judicial legislation and would also clash with the dictates of *Central Bank*.

1. *Sosa*'s Cautionary Instructions

The Supreme Court took pains in *Sosa* to highlight why a court must act with "a restrained conception of [its] discretion * * * in considering a new cause of action" for purported violations of international law. 542 U.S. at 725. In particular, the Court instructed that courts should use "great caution in adapting the law of nations to private rights." 542 U.S. at 728.

In rejecting the claim for damages for alleged illegal detention, the Supreme Court noted that "a series of reasons argue for judicial caution when considering the kinds of individual claims that might implement the jurisdiction conferred by the [ATS]." *Id.* at 725. Many of these reasons for caution strongly counsel against recognizing a cause of action for civil aiding and abetting. For example, the Court noted that "the general practice has been to look for legislative guidance before exercising innovative authority over substantive law" even in the limited areas where federal courts retain the power to create federal common law rules after *Erie Railroad v. Tomkins*, 304 U.S. 64 (1938). *Id.* at 726. As the Court stressed, "a decision to create a private right of action is one better left to legislative judgment in the great majority of cases." *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. Accordingly, even when Congress has made it clear by statute that a rule applies to purely domestic conduct, we are

> reluctant to infer intent to provide a private cause of action where the statute does not supply one expressly." *Id.*

Moreover, the Court made clear that there should be a "high bar" to recognizing new private causes of action for violations of international law because of the danger of "impinging on the discretion of the Legislative and Executive branches in managing foreign affairs." *Id.*

Even brief reflection points to many important practical foreign policy considerations that should alert a court after *Sosa* to pull in its horns.

First, many developing countries have questionable or poor human rights records. Those countries include some in which U.S. foreign policy encourages investment, so as to contribute to development efforts and promote human rights. The prospect that such companies might later find themselves facing massive discovery and jury trials in U.S. courts under nebulous theories of "aiding and abetting" liability might deter their investment in those economies, thus defeating U.S. policy. The determination of whether and to what extent to pursue a constructive engagement policy is precisely the type of foreign affairs decision that is constitutionally vested in the other branches of government and with which courts should not interfere. See, *e.g.*, *American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414–15 (2003).

Second, recognizing a cause of action for aiding and abetting would encourage a wide range of ATS suits in which plaintiffs would indirectly challenge

the conduct of foreign nations that is protected from direct challenge under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602–1611. Such suits typically generate serious diplomatic friction for the United States.[5]

Third, adoption of accessorial liability for ATS claims could also deter investments within the United States by foreign companies because of their concern that such contacts would provide a basis for ATS jurisdiction and expose their investments to attachment to satisfy adverse judgments.

Fourth, recognizing accessorial liability in cases in which the foreign sovereign or its officers or employees are the primary wrongdoers would unfairly place the financial burden of compensating victims of international law violations on the aider and abetter.

2. *Central Bank*'s Teaching

To *Sosa's* specific admonitions must be added the Supreme Court's more general teaching about the inappropriateness of federal courts creating or implying federal causes of action for aiding and abetting even in a purely domestic context. Although aiding and abetting liability is a long-established norm of federal criminal law, 18 U.S.C. § 2(a), *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164 (1994), teaches that a federal court can recognize a federal

[5] See Brief for the United States as *Amicus Curiae* in *Khulumani v. Barclay National Bank Ltd.*, Nos. 05-2141 & 05-2326 (2d Cir. filed Oct. 14, 2005), at 17.

cause of action for damages for aiding and abetting only where the legislature has expressly or implicitly authorized such liability.

Because the underlying norm is one of international law rather than one created directly by Congress, there is even less justification in this case than in *Central Bank* for recognizing civil aiding and abetting liability. Recognizing a cause of action for civil aiding and abetting in this case would involve creating federal-common-law civil liability for aiding and abetting without any relevant congressional direction in the civil arena whatsoever.

In *Central Bank*, the Court declined to permit a plaintiff to maintain an aiding and abetting suit for money damages under Section 10(b) of the Securities and Exchange Act of 1934. Although that Act expressly provides a cause of action for direct liability, it does not expressly provide a remedy for secondary liability, and it had not previously been construed to imply such a remedy. The Court found it significant that "Congress has not enacted a general civil aiding and abetting statute—either for suits by the Government (when the Government sues for civil penalties or injunctive relief) or for suits by private parties." *Id.* at 182. As a result, "when Congress enacts a statute under which a person may sue and recover damages from a private defendant for the defendant's violation of some statutory norm, there is no general presumption that the plaintiff may also sue aiders and abettors." *Id.*

Rejecting policy arguments urged in favor of aiding and abetting liability, the Court noted that "the rules for determining aiding and abetting liability are unclear, in 'an area in that demands certainty and predictability,'" *id.* at 188,[6] and that allowing secondary liability would increase the "danger of vexatiousness" in litigation. *Id.* at 189. Accordingly, the Court declined to endorse the "vast expansion of federal law" that adopting civil aiding and abetting liability would entail, *id.* at 183, "with no expression of congressional direction to do so." *Id.*[7]

The reasoning of *Central Bank* applies here and prohibits a federal court from creating a cause of action for civil aiding and abetting of purported international law violations.

C. Existing Case Law Does Not Support the Recognition of Civil Liability for Aiding and Abetting Under the ATS.

This Court, which has been at the forefront of the development of ATS jurisprudence, has not recognized civil liability for aiding and abetting violations

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[6] The Court observed that the Restatement (Second) of Torts (1979) addressed the issue (at § 876) "under a concert of action principle" that "has been at best uncertain in application" and that some States appeared to reject the principle. *Id.* at 181–82.

[7] *Boim v. Quranic Literacy Institute*, 291 F.3d 1000 (7th Cir. 2002), permitted the imposition of accessorial liability under a 1992 federal criminal statute creating a specific norm of conduct and providing a civil cause of action for damages, 18 U.S.C. § 2333, because it found clear evidence of congressional intent sufficient to overcome the presumption against an implied civil remedy for aiding and abetting. *Id.* at 1010–11, 1019–21. That kind of evidence is absent from the ATS, which neither proscribes any conduct nor creates a cause of action for any violation of international law.

of international law in claims brought under the ATS. In *Kadic v. Karadzic*, 70 F.3d 232, 245 (2d Cir. 1995), this Court ruled that the "color of law" jurisprudence of Rev. Stat. § 1979, as amended, 42 U.S.C. § 1983, "is a relevant guide to whether a defendant has engaged in official action for purposes of jurisdiction under the [ATS]." That ruling is subject to reconsideration now that *Sosa* has established that the ATS is not a cause of action statute like § 1983 and the TVPA (both of which expressly mention "color of law"), but is instead a jurisdictional statute conveying limited common law authority to federal courts. In any event, "color of law" analysis determines when alleged misconduct is properly treated as official action, not when assistance to otherwise unlawful conduct provides a basis for secondary civil liability.

Case law from other circuits is sparse. Although the Ninth Circuit in *Doe I v. Unocal Corp.* issued an opinion recognizing civil aiding and abetting liability under the ATS, 395 F.3d 932 (9th Cir. 2002), the court first withdrew it as a precedential decision pending rehearing en banc, 395 F.3d 978 (9th Cir. 2003), and then dismissed the appeal on stipulated motion. 403 F.3d 708 (9th Cir. 2005).

In *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1157 (11th Cir. 2005), the court stated that the ATS reached "accomplice liability." But the statement is dictum because the case involved a suit against a military official of the Pinochet government for having himself fatally stabbed a member of the Allende

government, and its holding was limited to that official's direct liability for the killing. Moreover, that dictum incorrectly relied on the two circuit cases that do not in fact recognize aiding and abetting liability.[8] Finally, *Cabello* did not even cite *Sosa*, much less discuss the impact of that decision.[9]

With respect to the non-controlling district court cases that have recognized civil aiding and abetting liability, nearly all were not about accessorial liability but were instead about active participation in violations of international law. In any event, this Court should not follow those lower court opinions, nearly all of which predate *Sosa* and were based in part on the faulty assumption, corrected by *Sosa*, that they were applying or construing a federal statutory cause of action.

Two post-*Sosa* decisions correctly apply *Sosa* in declining to find that aiding and abetting is actionable under the ATS. In *In re South African Apartheid*

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[8] In *Hilao v. Estate of Marcos*, 103 F.3d 767, 776–77 (9th Cir. 1996), the Ninth Circuit considered only the application of "command responsibility"—a doctrine of international law unique to war crimes prosecutions —not accessorial liability. *Carmichael v. United Tech. Corp.*, 835 F.2d 109 (5th Cir. 1988), "only assume[d], because it [was] unnecessary to decide," that the ATS reached private parties who aided or abetted violations of international law. *Id.* at 113–14.

[9] An Eleventh Circuit panel that discussed *Sosa* stated, relying on *Cabello*, that a claim for state-sponsored torture under the ATS "may be based on indirect liability as well as direct liability." *Villeda Aldana v. Del Monte Fresh Produce, Inc.*, 416 F.3d 1242, 1248 (11th Cir. 2005) (*per curiam*), but a petition for rehearing *en banc* is pending. No. 04-10234 (filed July 29, 2005). Whether or not that general statement survives rehearing, it should not persuade this Court on the issue of aiding and abetting.

Litigation, 346 F. Supp. 2d 538, 549 (S.D.N.Y. 2004),[10] the court found "little that would lead this Court to conclude that aiding and abetting international law violations is itself an international law violation that is universally accepted as a legal obligation." Still more recently in *Doe v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20, 24 (D.D.C. 2005),[11] the court came to the same correct conclusion and cited the *South Africa* decision with approval."

II. Customary International Law Does Not Subject Corporations to Liability for Violations of International Law.

The district court's ruling (at 55) that corporations can be liable under international law is inconsistent with the teaching of *Sosa*.

The district court acknowledged that there is "substantial support" for the position that corporations *cannot* be liable under international law. The materials it cited as providing that support include:

- Statements by six scholars in the field, including the declaration of Professor Kenneth Howard Anderson in this case (A1269, 1312);[12]

[10] *Appeals docketed sub nom. Khulumani v. Barclay Nat'l Bank*, No. 05-2141-cv (2d Cir. May 2, 2005), and *Ntsebeza v. Sulzer AG*, No. 05-2326-cv (2d Cir. May 11, 2005) (argued together Jan. 24, 2006).

[11] *Appeal docketed*, No. 05-7162 (D.C. Cir. Nov. 17, 2005).

[12] See also Anderson Reply Declaration. A2101–06, ¶¶ 39–55.

- The fact that corporate defendants cannot violate the TVPA, even though that statute codifies two norms of international law (official torture and unlawful extrajudicial killing);
- The fact that the international criminal tribunals beginning with Nuremberg have never provided for corporate criminal liability;
- The express rejection by the treaty drafters for the newly created International Criminal Court of "attempts to include corporate liability";
- The fact that the three international instruments upon which plaintiffs rely that address weapons used in war "follow the general rule of international law by imposing obligations only on states."

373 F. Supp. 2d at 54–56.

Nevertheless, the district court ruled that plaintiffs "would have overcome" the conceptual burden of the cited authorities "had international law prohibited the use of herbicides in Vietnam at the time they were used by the United States." *Id.* at 57. It noted that, in many of the Nuremberg trials, "it was the corporations through which the individuals acted" (*id.*), although that fact merely drives home the significance of the failure to include corporations as defendants in the Nuremberg trials. It observed that "[l]imiting 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" (*id.* at 58),

even though that passage shows that the district court was substituting its own sense of sound policy for that reflected in existing international law.

The court also relied on a passage from Professor Paust's opinion that fails to conclude that corporations are in fact liable under international law and mistakenly treats the issue as one of "immunity." But corporations have never claimed that international law grants them "immunity" from civil liability. They have claimed only that international law does not extend liability to corporate entities. Regulation of corporations has thus far been left by the international community to the laws of individual states.

Finally, the district court adopted (at 58–59) wholesale an extended passage from an advocacy *amicus* brief from three human rights organizations. That adopted passage has many flawed positions that were accepted uncritically and relied upon by the district court.

The passage miscites footnote 20 in *Sosa* for the proposition that the Court "acknowledged that corporations can be sued under the ATS." To the contrary, footnote 20 merely states that a private person or entity can be sued for violating a purported norm of international law only if the norm in question "extends the scope of liability" to such persons or entities.[13] By indicating that not only the

[13] "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. * * *" 542 U.S. at

existence of a norm but also the *application* of the norm to "a private actor or corporation" must meet the *Sosa* standards of universal acceptance and specificity, the Court suggested that whether corporations can be liable for violations of international norms is an unsettled issue and that plaintiffs' efforts to recover damages from corporations under the ATS must therefore fail under *Sosa*.

The passage cites several decisions of this Court which it conceded did not address the liability of corporations under the ATS. It then concludes, implausibly, that "the disposition of these cases is inconsistent with the assertion that no claim under the ATS can be brought against corporations."

The passage relies on decisions in two pre-*Sosa* cases, *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 311–19 (S.D.N.Y. 2003), and *Bowoto v. Chevron Texaco Corp.*, 312 F. Supp. 2d 1229, 1247 (N.D. Cal. 2004). Neither decision correctly anticipated the teaching of *Sosa*. In *Talisman*, the court held that corporations could be liable under international law in reliance on five international conventions, *none* of which had been ratified by the United States,[14] and one of which had never gone into effect in any country.[15] Such

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732 n.20.

[14] Convention Concerning the Application of the Principles of the Right To Organise and To Bargain Collectively (ILO No. C98), *opened for signature* July 1, 1949; Convention on Third Party Liability in the Field of Nuclear Energy (Org. for Econ. Co-operation & Dev.), *opened for signature* July 29, 1960, as amended, 956 U.N.T.S. 251; International Convention on Civil Liability for Oil Pollution Damage (Inter-Governmental Maritime Consultative Org.), *opened for signature*

conventions do not demonstrate the widespread acceptance required by *Sosa*.[16] And *Bowoto* in fact never discussed corporate liability as a matter of international law.

The passage asserts (at 59) that there is "no policy reason why corporations should be uniquely exempt from tort liability under the ATS." Leaving aside that corporate exemption from ATS liability would not make corporations "unique" in this respect,[17] there are in fact a number of sound policy reasons for omitting liability for corporations:

Nov. 29, 1969, 973 U.N.T.S. 3 (erroneously cited by the court to 26 U.S.T. 765, the citation for a different treaty ratified by the U.S.); Vienna Convention on Civil Liability for Nuclear Damage (Int'l Atomic Energy Agency), *opened for signature* May 21, 1963, 1063 U.N.T.S. 265; Convention Relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material (Inter-Governmental Maritime Consultative Org.), *opened for signature* Dec. 17, 1971, 974 U.N.T.S. 255.

[15] Convention on Civil Liability for Oil Pollution Damage Resulting from Exploration for and Exploitation of Seabed Mineral Resources, *opened for signature* Dec. 17, 1976, 16 I.L.M. 1450 (insufficient signatures for entry into force, see http://sedac.ciesin.org/entri/register/reg-092.rrr.html).

[16] A post-*Sosa* decision by Judge Cote in *Talisman*, 374 F. Supp. 2d 331 (S.D.N.Y. 2005) reaffirmed the prior decision (at 335) but showed no awareness of the 2003 decision's cavalier treatment of international treaties and relied in part (at 337) on Canada's failure to object to corporate liability on behalf of its corporation (a consideration not applicable here).

[17] The ATS does not waive the sovereign immunity of the United States. *E.g.*, *Goldstar (Panama) S.A. v. United States*, 967 F.2d 965, 968 (4th Cir. 1992). And any entity, corporate or not, that is treated as a sovereign for purposes of the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602–1611, is immune from tort liability under the ATS unless a specified exception applies. Any government employee sued for a violation of the ATS for conduct within the scope of his authority is exempted from liability, with the United States substituted in as the

- Most international law obligations are aimed at states, explaining why international law has been slow to move towards corporate liability. *E.g.*, Anderson Decl. ¶ 88, A1312.
- The first focus of international criminal law was on individual responsibility and the rejection of such excuses as "following orders," in contexts in which it was accepted that the state entities themselves were immune from prosecution.[18] With that initial emphasis, norms arising from international criminal law understandably have not been applied to corporations.
- The imposition of direct obligations on private corporations, backed by effective international enforcement of those obligations, would significantly disempower sovereign states. Accordingly, states are likely to resist such a fundamental change.
- Congress is presumed to have had sound policy reasons for not extending liability under the TVPA beyond individuals.

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defendant. See *Elmaghraby v. Ashcroft*, No. 04 CV 1409, 2005 WL 2375202 (E.D.N.Y. Sept. 27, 2005) (construing 28 U.S.C. § 2679), *appeal docketed*, No. 05-5768-cv (2d Cir. Oct. 25, 2005); *Bancoult v. McNamara*, 370 F. Supp. 2d 1, 7–10 (D.D.C. 2004), *appeal docketed*, No. 05-5049 (D.C. Cir. Feb. 22, 2005).

[18] "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 Nürnberg Trial*, 6 F.R.D. 69, 110 (Int'l Military Tribunal at Nürnberg 1946).

- The one time that the Supreme Court has considered extending to private corporations the federal-common-law cause of action for damages created in *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), for certain violations of constitutional law, the Court declined to do so. *Correctional Services Corp. v. Malesko*, 534 U.S. 61 (2001). The Court explained that the purpose of *Bivens* is "to deter individual federal officers from committing constitutional violations"; that "the threat of litigation and liability will adequately deter federal officers for *Bivens* purposes"; that "the threat of suit against an individual's employer was not the kind of deterrence contemplated by *Bivens*" and that, with such suits, "'[t]he deterrent effects of the *Bivens* remedy would be lost.'" 534 U.S. at 70–71(citation omitted). Similar policy decisions may continue to cause international law to stop short of corporate liability.

In any event, whether to extend international norms to corporations is for the international community to decide, not for United States courts acting unilaterally.

Finally, the *amicus* passage states (at 59) that it is immaterial that international law does not recognize corporations as defendants, because "it is a bedrock tenet of American law that corporations can be held liable for their torts." But the federal-common-law claim permitted in limited circumstances under *Sosa*

is a cause of action for a violation of international law, not domestic law.[19] If corporations are not recognized as defendants in international law, they are not subject to ATS actions under *Sosa*. It is immaterial to that analysis that American law recognizes corporate liability for torts, unless that law and similar law in other countries grew up in response to perceived obligations under international law. Plaintiffs do not and could not make that showing.

In sum, the district court's opinion on corporate liability under international law refutes itself. The substantial authority against such liability is not remotely outweighed by the scant authority on the other side or by the district court's policy conclusion that differs from the conclusion of the international community.

III. Domestic Statutes of Limitations Apply to ATS Suits.

The district court ruled (at 62) that the statute of limitation issues required "further factual development should the case go forward" on order of this Court. Nevertheless, the court discussed these issues at length (at 59–64) and concluded (at 63), "subject to reconsideration," that there are no statutes of limitations for violations of international law. That ruling (however tentative) is so profoundly troubling that this Court should take the occasion to repudiate it.

[19] The plain words of the ATS require that the allegedly tortuous conduct in question be "committed in violation of the law of nations or a treaty of the United States."

Statutes of limitations are not mere technicalities; they promote the fair administration of justice. They "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Order of R.R. Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348–49 (1944). See also *Wilson v. Garcia*, 471 U.S. 261, 271 (1985) (that a cause of action for damages would have no limitation period would be "utterly repugnant to the genius of our laws") (internal quotation marks and citation omitted).

Like the international community, New York (on the law of which plaintiffs' claims are partly based), and the United States provide no statute of limitations for certain very serious criminal offenses.[20] Nevertheless, New York has a statute of limitations setting a specific period of years for every tort claim, even for the most serious torts such as battery causing serious bodily injury.[21]

[20] *E.g.*, N.Y. Crim. Proc. Law § 30.10(2)(a) (no statute of limitations for prosecution of Class A felonies). Federal law provides no limitations period for prosecuting "any offense punishable by death," 18 U.S.C. § 3281; one of the six categories of genocide offenses (killing members of a national, ethnic, racial, or religious group), *id.* §1091(e); and certain other terrorism offenses, *id.* § 3286(b).

[21] Claims for assault or battery and for other intentional torts must be brought within one year, N.Y. C.P.L.R. 215(3); claims for wrongful death, within two years after the decedent's death, N.Y. Est. Powers & Trusts Law § 5-4.1; claims not otherwise specified, within six years. N.Y. C.P.L.R. 213(1). Equitable tolling and rules about the date of discovery will extend these periods in some circumstances.

Federal law also provides statutes of limitations for every civil cause of action (alleviated, as in state law, by such doctrines as equitable tolling). Where federal statutes creating causes of action do not specify their own specific statutes of limitation, the federal practice for many years was to apply the most analogous state statute of limitations, as federal courts still do for many statutes, such as suits under the civil rights cause of action in Rev. Stat. § 1979, as amended, 42 U.S.C. § 1983. See *Wilson v. Garcia*, *supra*.[22] Or, in certain circumstances, courts adopt the most closely analogous federal statute of limitations. *E.g.*, *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143, 150–51 (1987) (adopting for RICO claims the Clayton Act's four-year limitation). For federal causes of action arising under Acts of Congress enacted after December 1, 1990, 28 U.S.C. § 1658 prescribes a four-year statute of limitation, absent other specific provision.

Defendants here have argued that the 10-year TVPA statute of limitations is applicable to ATS claims. Appellees' Br. at 77–80. But now that *Sosa* has ruled that the ATS is jurisdictional only and does not, by itself, create a cause of action, the issue of the appropriate statute of limitations for ATS actions is an open question. Not every permissible ATS claim will necessarily allege conduct analogous to torture or extrajudicial killing. Moreover, as we have shown, for tort

[22] Courts have similarly applied the analogous state statute of limitations to the federal-common-law cause of action created in *Bivens*, *supra*. See 2 Joseph G. Cook & John L. Sobieski, Jr., Civil Rights Actions ¶ 4.01[B], at 4-26 & n.105 (2005).

actions for money damages, both state and federal law have long prescribed limitations periods in the range of several years, even for the most serious torts.

Given this long-standing approach to limitations statutes in both state and federal law, only unusually convincing authority could support the district court's conclusion that no statute of limitations is appropriate for ATS actions. Instead, the district court appeared to rely principally on a small part of one professor's opinion prepared for this case: "Under international law, there are no statutes of limitation with respect to war crimes and other violations of international law." Paust Op. at 12 (A1539). In supporting this statement, Professor Paust cited exactly two authorities: the Restatement (Third) of the Foreign Relations Law of the United States § 404 cmt. a (1987) and the first edition of his own casebook.[23] The Restatement makes essentially the same general statement as Professor Paust's opinion ("A universal offense is generally not subject to limitations of time"), but offers no support for that proposition in civil suits. And while Professor Paust's casebook (at 273) states that "[t]here are no statutes of limitation under international law * * *," the only case discussed, *Forti v. Suarez-Mason*, 672 F. Supp. 1531 (N.D. Cal. 1987), held to the contrary, applying the statutes of limitations applicable to the "closest analogies" in state and ordinary federal law. And the casebook does not discuss, much less question, the validity of the eight-

[23] Jordan J. Paust *et al.*, International Law and Litigation in the U.S. (2000).

year statute applicable to certain terrorism offenses, 18 U.S.C. § 3286(a), or the general five-year federal statute of limitations, *id.* § 3282(a), which is applicable to prosecutions for five of the six genocide offenses, *id.* § 1091(a)(2)–(6), see *id.* § 1091(e); to criminal torture, defined at *id.* § 2340–2340A; and to non-lethal war crimes, see *id.* § 2441. Furthermore, the casebook cites two international instruments that, after *Sosa*, lack the force of law in the United States.[24]

The district court also cited the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, *opened for signature* Nov. 26, 1968, art. 1, 754 U.N.T.S. 73, 75 ("No statutory limitation shall apply" to the specified offenses), and the Rome Statute of the International Criminal Court , *adopted* July 17, 1998, 2187 U.N.T.S. 90, art. 29 ("The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations."). The district court's reliance on these two conventions is suspect in light of *Sosa*'s requirement that enforceable norms of international law must have widespread international acceptance and the failure of the United States to ratify either convention. Only forty-five countries ratified the 1968 convention,

[24] Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 (Dec. 10, 1948) ("not a treaty * * * imposing international obligations"); International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, S. Exec. Doc. E, 95-2 (1978), 999 U.N.T.S. 171 (entered into force for the U.S. Sept. 8, 1992) (not self-executing, therefore not creating "obligations enforceable in the federal courts"). 542 U.S. at 734–35.

excluding not only the United States but virtually all Western European countries, thus precluding any plausible claim to widespread acceptance.

Moreover, the statute of limitations for the Rome Statute applies only to "crimes," not to civil actions such as ATS tort actions, and applies, like the rest of the Statute, only to conduct after the date of entry into force (July 1, 2002). Art. 24(1). Neither the district court nor plaintiffs tried to show, nor could they, that most countries have repealed their statutes of limitations for criminal conduct covered by the Rome Statute or to civil actions addressing such conduct.

In short, while the cited authorities may have "suggest[ed]" to the district court a "need to recognize a rule under customary international law that no statue of limitations should be applied to war crimes and crimes against humanity," 373 F. Supp. 2d at 63, those authorities simply do not support the existence of such a rule of international law applicable to domestic causes of action for damages for violations of international law. This Court would do a service by clarifying the point.

CONCLUSION

The Court should reject the district court's rulings that *Sosa* permits aiding and abetting liability and corporate liability in ATS suits and that no statute of limitations bars ATS claims.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This *amicus* brief complies with the type-volume limitation of Fed. R. App. P. 29(d), because the brief contains **6810** words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and that number is "no more than one-half the maximum length authorized by these rules for a party's principal brief." *Id.* 29(d). The maximum length authorized for a party's principal brief is 14,000 words. *Id.* 32(a)(7)(B)(i).

2. This brief complies with 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 Version 2002 in 14-point font and Times New Roman style.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 15th day of February 2006 I caused ten bound copies and, pursuant to new Local Rule 25, one unbound copy of the foregoing *amicus* brief of the Chamber of Commerce of the United States of America to be mailed pursuant to Fed. R. App. P. 25(a)(2)(B)(i) by first-class mail, postage prepaid, addressed to the Clerk of the Court, United States Court of Appeals for the Second Circuit, Thurgood Marshall Courthouse, 40 Foley Square, Room 1803, New York, NY, 10007. In addition, I e-mailed an electronic copy of the brief in PDF format to the Court pursuant to Local Rule 32 to briefs@ca2.uscourts.gov.

I further certify that, on this 15th day of February 2006, I caused two copies of the foregoing *amicus* brief of the Chamber of Commerce of the United States of America to be served upon each party separately represented by first-class mail addressed to counsel for the parties at the addresses shown below and caused an electronic copy of the brief in PDF format to be served by e-mail upon the parties by e-mailing such a copy to principal counsel for the parties (with their consent) at the e-mail addresses shown below:

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