No. 07-0016

In the United States Court of Appeals for the Second Circuit

THE PRESBYTERIAN CHURCH OF SUDAN, REV. MATTHEW MATHIANG DEANG, REV. JAMES KOUNG NINREW, NUER COMMUNITY DEVELOPMENT SERVICES IN U.S.A., FATUMA NYAWANG GARBANG, NYOT TOT RIETH, individually and on behalf of the Estate of her husband JOSEPH THIET MAKUAC, STEPHEN HOTH, STEPHEN KUINA, TUNGUAR KUEIGWONG RAT, LUKA AYUOL YOL, THOMAS MALUAL KAP, PUOK BOL MUT, CHIEF PATAI TUT, CHIEF PETER RING PATAI, CHIEF GATLUAK CHIEK JANG, YIEN NYINAR RIEK, and MORIS BOL MAJOK, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

vs.

TALISMAN ENERGY, INC.,

Defendants-Appellees.

On Appeal From the Judgment of the United States District Court
For the Southern District of New York
The Honorable Denise L. Cote
District Court No. 01 Civ. 9882 (DLC)

BRIEF OF AMICUS CURIAE EARTHRIGHTS INTERNATIONAL IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL SUBMITTED WITH THE CONSENT OF ALL PARTIES

MARCO B.SIMONS
RICHARD L. HERZ
EARTHRIGHTS INTERNATIONAL
1612 K Street NW, Suite 401
Washington, DC 20006
Tel: 202-466-5188
Counsel for amicus curiae

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All parties have consented to the filing of this brief pursuant to Federal Rule of Appellate Procedure 29(a).

STATEMENT OF IDENTITY AND INTEREST OF AMICUS CURIAE

EarthRights International (ERI) is a human rights organization based in Washington, D.C., which litigates and advocates on behalf of victims of human rights abuses worldwide. ERI is or has been counsel in several lawsuits under the Alien Tort Statute (ATS) involving issues of corporate liability. In *Doe v. Unocal Corp.*, No. 00-56603 (9th Cir.), which was settled in March 2005, ERI represented plaintiffs alleging that a corporation was liable under the ATS for complicity in forced labor, rape, and murder carried out for the benefit of a gas pipeline project operated by the defendant and its joint-venture partners. In *Bowoto v. ChevronTexaco Corp.*, No. 99-CV-2506 (N.D. Cal.), and *Wiwa v. Royal Dutch Petroleum Corp.*, No. 96 Civ. 8386 (S.D.N.Y.), ERI represents plaintiffs alleging that corporations are liable under the ATS for complicity in murder and other abuses carried out by Nigerian security forces, including an allegation that the defendants' Nigerian subsidiaries, which are joint-venture partners of the Nigerian government, are agents or alter egos of their parent companies.

Amicus therefore has an interest in ensuring that the courts apply the correct body of law to decide corporate and agency liability questions under the ATS.

STATEMENT OF THE ISSUE ADDRESSED BY AMICUS CURIAE

Amicus addresses the question of the appropriate body of law to apply for vicarious or corporate liability under the ATS, and the substantive rules of law for piercing the corporate veil, joint venture liability, and agency liability.

SUMMARY OF ARGUMENT

The district court erred by failing to apply uniform federal law to issues of vicarious and corporate responsibility under the ATS. Because the ATS is a federal statute providing liability for violations of international law as incorporated into federal law, uniform federal law should determine the appropriate rules of liability, including the federal common law test for piercing the corporate veil and the traditional rules of agency and joint venture. This federal law is consistent with international law, providing an additional basis for its application in ATS cases.

These federal standards differ from the rules applied by the district court. Under federal and international law, the corporate form should be disregarded where it is used to defeat the enforcement of fundamental human rights norms. The basic principles of agency are firmly rooted in both federal law and international law, common to the world's major legal systems. Under those principles, a principal may be held liable for the actions of its agent, even where

the principal and agent are corporations. Finally, under traditional principles of joint venture liability, joint venturers are liable for the torts of their co-venturers committed within the scope of the enterprise, and the existence of a joint venture may be proved without a formal written agreement.

ARGUMENT

I. Uniform Federal Law Governs Corporate Liability, Agency, and Joint Venture Liability in Alien Tort Statute Cases.

The district court erred by declining to apply uniform federal common law rules to questions of vicarious and corporate responsibility to claims under the Alien Tort Statute (ATS), 28 U.S.C. § 1350. *See Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 453 F. Supp. 2d 633, 681–89 (S.D.N.Y. 2006). The district court failed even to consider the possibility that federal law provides the rules of decision, *id.* at 681–83, and then further used New York choice-of-law rules to settle upon, for different issues, the law of Mauritius, New York, the Netherlands, Sudan or Canada, and England, *id.* at 683–689.

Both the Supreme Court's decision in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), and the standard approach to federal claims suggest that a uniform body of federal common law should be used to decide these questions.

A. Following *Sosa*, federal common law provides the rules of liability in Alien Tort Statute cases.

In *Sosa*, the Supreme Court settled the question of the source of law to be applied in ATS cases. The Court ruled that the ATS grants jurisdiction over causes of action present in federal common law, which incorporates international law. *Sosa*, 542 U.S. at 724 (noting that under the ATS "the common law" provides "a cause of action for the modest number of international law violations with a potential for personal liability"). The Court described the process of determining whether a claim is actionable under the ATS as whether a court should "recognize private claims under federal common law for violations of [an] international law norm." *Id.* at 732.

More recently, the Ninth Circuit affirmed that federal common law provides the rules of liability, including vicarious liability, to be applied in ATS cases: "Courts applying the [ATS] draw on federal common law, and there are well-settled theories of vicarious liability under federal common law." *Sarei v. Rio Tinto PLC*, 456 F.3d 1069, 1078 (9th Cir. 2006). Prior to *Sosa*, several other courts suggested that "liability standards applicable to international law violations" should be developed "through the generation of federal common law," an approach that is "consistent with the statute's intent in conferring federal court jurisdiction over such actions in the first place." *Xuncax v. Gramajo*, 886 F. Supp.

162, 182–83 (D. Mass. 1995); *see also Abebe-Jira v. Negewo*, 72 F.3d 844, 848 (11th Cir. 1996) (holding that courts may "fashion domestic common law remedies to give effect to violations of customary international law"); *Doe v. Islamic Salvation Front*, 257 F. Supp. 2d 115, 120 n.12 (D.D.C. 2003) (considering the possibility that "[t]ort principles from federal common law" are appropriately applied to determine liability in ATS cases); *Doe v. Unocal Corp.*, 395 F.3d 932, 966 (9th Cir. 2002), *vacated by grant of en banc review*, 395 F.3d 978 (2003) (Reinhardt, J., concurring) (arguing that federal common law applies in ATS cases "in order to fashion a remedy with respect to the direct or indirect involvement of third parties in the commission of the underlying tort"); *Eastman Kodak Co. v. Kavlin*, 978 F. Supp. 1078, 1094 (S.D. Fla. 1997) (finding liability under the ATS where, "under ordinary principles of tort law [the defendant] would be liable for the foreseeable effects of her actions").

B. Under the standard test, uniform federal law provides the rules of decision in Alien Tort Statute cases.

Even if *Sosa* had not settled the issue, the standard choice-of-law analysis points to the need for uniform federal rules of liability given that ATS claims are federal claims addressing violations of universally recognized norms of international law (which is itself incorporated into federal law). The district court erred by applying New York's choice-of-law test, rather than the federal test, and

by failing even to consider the possibility that federal common law is the appropriate body of law for the rules of liability in ATS cases.

State choice-of-law rules are not applicable in ATS cases. Such rules may apply to some questions in federal cases, such as "'questions which arise in federal court but whose determination is not a matter of federal law.'" *In re Gaston & Snow*, 243 F.3d 599, 607 (2d Cir. 2001) (quoting *In re Merritt Dredging Co.*, 839 F.2d 203, 206 (4th Cir. 1988)). But, in determining whether to apply uniform federal rules of liability to a federal cause of action, this Circuit applies a federal test that looks to"(1) whether the federal program, by its very nature, requires uniformity; (2) whether application of state law would frustrate specific objectives of the federal program; and (3) whether application of a uniform federal rule would disrupt existing commercial relationships based on state law." *New York v. Nat'l Serv. Indus., Inc.*, 460 F.3d 201, 208 (2d Cir. 2006) (citing *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728–29 (1979)).[1] These factors weigh heavily in favor of uniform federal rules of liability in ATS cases.

Uniformity is desirable in ATS cases. "[T]here is presumably an interest in

[1] *New York* may have been an erroneous application of the *Kimbell Foods* test. *Kimbell Foods* considered the need for uniform federal law in the context of the priority of security interests held by a federal agency, *see* 440 U.S. at 719–20, but the Supreme Court has not applied the same test in determining the rules of liability for federal claims. *See, e.g.*, *Burlington Indus., Inc., v. Ellerth*, 524 U.S. 742, 754–55 (1998).

uniform application" of federal causes of action, *New York*, 460 F.3d at 208, and this presumption is particularly appropriate in the ATS context. As noted in *Sosa*, the application of federal law in ATS cases is "consistent with the division of responsibilities between federal and state courts after *Erie*." 542 U.S. at 731 n.19. This is because customary international law is part of federal common law. *Id.* at 729. It makes little sense to allow claims for violations of universally-recognized international law norms and then not apply uniform standards to the determination of those claims. The application of a panoply of state and foreign law rules "would eventually lead in other cases to divergent measures of recovery for essentially identical claims against . . . defendants guilty of" violations of international law. *Wagner v. Islamic Republic of Iran*, 172 F. Supp. 2d 128, 135 (D.D.C. 2001).

In addition to the need for uniformity, the application of state law rules of liability would frustrate the purpose of the ATS. Reflecting on the history of the statute, including "a program to assure the world that the new Republic would observe the law of nations," *id.* at 722 n.15, the Supreme Court held that "Congress intended the ATS to furnish jurisdiction for a relatively modest set of actions alleging violations of the law of nations." *Sosa*, 542 U.S. at 720. The ATS therefore reflects a federal policy of providing remedies for such international law violations. With respect to issues of corporate and vicarious

liability, even though corporations are created by local law, "no State may endow its corporate creatures with the power to place themselves above the Congress of the United States and defeat . . . federal policy." *Anderson v. Abbott*, 321 U.S. 349, 365 (1944). The same conclusion holds true for foreign jurisdictions as well: no foreign jurisdiction can endow its corporations with the power to place themselves above international law. The Supreme Court came to a similar conclusion in *First National City Bank (FNCB) v. Banco Para El Comercio Exterior De Cuba,* 462 U.S. 611 (1983), noting that "[t]o give conclusive effect to the law of the chartering state in determining whether the separate juridical status of its instrumentality should be respected would permit the state to violate with impunity the rights of third parties under international law while effectively insulating itself from liability in foreign courts." *Id.* at 621–22.

Indeed, federal courts nearly always apply federal rules of corporate and vicarious liability to give effect to federal causes of action, because "when Congress creates a tort action, it legislates against a legal background of ordinary tort-related vicarious liability rules and consequently intends its legislation to incorporate those rules." *Meyer v. Holley*, 537 U.S. 280, 285 (2003); *see, e.g.*, *Burlington Indus., Inc., v. Ellerth*, 524 U.S. 742, 754–55 (1998) (fashioning "a uniform and predictable standard" of vicarious liability in Title VII actions "as a matter of federal law"); *Thomas v. Peacock*, 39 F.3d 493, 503 (4th Cir. 1994)

(holding that "the determination of whether to pierce the corporate veil in an ERISA action is made under federal law"), *rev'd on other grounds*, 516 U.S. 349, 353–54 (1996); *Davidson v. Enstar Corp.*, 848 F.2d 574, 577 (5th Cir. 1988) (applying federal joint venture test, distinct from Louisiana's idiosyncratic joint venture rules, to federal statutory claims).[2]

Finally, uniform federal rules of liability would not disrupt commercial relationships, because the relationship between ATS plaintiffs and defendants is far from a commercial relationship; ordinary commercial disputes are not recognized as ATS claims. *See, e.g.*, *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975); *Hamid v. Price Waterhouse*, 51 F.3d 1411, 1418 (9th Cir. 1994). Furthermore, applying uniform rules of liability to the tort claims of third parties does not affect the rights of the commercial partners between and among themselves—which may still be determined by local law. And, even if a particular business relationship were based on the expectation that the parties would be insulated from liability for the worst violations of international law, that expectation would not be reasonable, nor should it outweigh the victims'

[2] *See also Intergen N.V. v. Grina*, 344 F.3d 134, 143–44 (1st Cir. 2003); *Moriarty v. Glueckert Funeral Home*, 155 F.3d 859, 865 n.15 (7th Cir. 1998); *Taylor v. Peoples Natural Gas Co.*, 49 F.3d 982, 988 (3d Cir. 1995); *Am. Bell, Inc. v. Fed'n of Tel. Workers*, 736 F.2d 879, 886 (3d. Cir. 1984); *Mayes v. Moore*, 419 F. Supp. 2d 775, 780 n.5 (M.D.N.C. 2006); *Idylwoods Assocs. v. Mader Capital, Inc.*, 915 F. Supp. 1290, 1305 (W.D.N.Y. 1996).

expectations that they should not be subject to such abuses.

Thus, ATS claims require uniform rules of federal liability, rather than a choice among various state or foreign law rules.

C. In Alien Tort Statute cases, the applicable liability rules incorporate established federal doctrines, informed by traditional common law rules and international law.

Concluding that federal law provides uniform rules of decision does not end the inquiry: This Court must also consider what sources to consult in developing such rules. The primary source is preexisting, well-established federal principles, as informed by traditional common law rules where necessary as well as international law.

As the Ninth Circuit observed in *Sarei*, federal common law already recognizes "well-settled theories of vicarious liability." 456 F.3d at 1078. The ATS is "highly remedial," *Forti v Suarez-Mason*, 672 F. Supp. 1531, 1548 (N.D. Cal. 1987), and liability rules adopted under it must reflect the universal condemnation of the underlying violations. *Filartiga v. Peña-Irala*, 577 F. Supp. 860, 863 (S.D.N.Y. 1984); *Abebe-Jira*, 72 F.3d at 848. Numerous cases have, however, already discussed federal law theories of liability that adequately give effect to the remedial purpose of the ATS, and there is therefore no general need to create a new body of liability law for ATS cases.

With respect to issues that are not already well-settled in federal law, federal

courts typically look to "general" common law. *See, e.g.*, *Burlington Indus.*, 524 U.S. at 754 (relying "'on the general common law of agency'" to establish uniform federal standards). And, due to the unique nature of ATS claims as federal common law claims incorporating international law, it may also be appropriate to consider the application of international law principles. Certainly, the fact that a rule of liability is found in international law as well as established federal law and general principles of liability supports its application in ATS cases, because international law is part of federal law. *Sosa*, 542 U.S. at 729. The relevant sources of international law include treaties, "international custom," "general principles of law recognized by civilized nations," and "judicial decisions." *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 251 (2d Cir. 2003). Although international law may contain gaps that make it inappropriate as the primary source of rules of liability, if international law accords with established federal law, there can be little argument against its application in ATS cases. *See Sarei*, 456 F.3d at 1078 & n.5 (after concluding that federal doctrines of vicarious liability are applicable, noting "that violations of the law of nations have always encompassed vicarious liability").

II. The Uniform Federal Standard for Piercing the Corporate Veil, Which Is Consistent With International Law, Applies in Alien Tort Statute Cases.

In determining the issue of piercing the veil of the corporations involved,

the district court erred in looking to the law of the jurisdictions of incorporation, including Mauritius, the Netherlands, and England. *See* 453 F. Supp. 2d at 683–84, 686–87, 689. The district court should have applied the uniform federal standard for veil-piercing, *see Anderson*, 321 U.S. at 365, which is consistent with international law.[3]

Federal law is "not bound by the strict standards of the common law alter ego doctrine." *Bhd. of Locomotive Eng'rs v. Springfield Terminal Ry.*, 210 F.3d 18, 26 (1st Cir. 2000). "Nor is there any litmus test." *Id*. Instead, "a corporate entity may be disregarded in the interests of public convenience, fairness and equity." *Id.* In *FNCB*, the Supreme Court held that federal law recognizes a "broad[] equitable principle that the doctrine of corporate entity, recognized generally and for most purposes, will not be regarded when to do so would work fraud or injustice.'" 462 U.S. at 629 (internal quotation marks omitted). "In particular, the Court has consistently refused to give effect to the corporate form where it is interposed to defeat legislative policies." *Id.* at 629–30. The Court also found the same principles in international law, noting that they have been

[3] The question of what veil-piercing law applies in ATS cases would be academic if the rules of the various jurisdictions mirrored federal law. The correctness of the district court's description of the foreign law standards is beyond the scope of this brief, but it is significant that the court phrased each test differently, not only from the federal standard (as explained herein) but also from each other. *See* 453 F. Supp. 2d at 683–84, 686–87, 689.

adopted by "courts in the United States and abroad," *id.* at 628 (footnote omitted), and citing to a decision of the International Court of Justice holding that the notion of """lifting the corporate veil""" is appropriate "'to prevent the misuse of the privileges of legal personality . . . to protect third persons . . . or to prevent the evasion of legal requirements or of obligations.'" *Id.* at 628 n.20 (quoting *The Barcelona Traction, Light & Power Co. (Belg. v. Spain)*, 1970 I.C.J. 3, 38–39 (Judgment of Feb. 5, 1970)).

Because of the nature and history of the ATS, rigid deference to the corporate form in ATS cases would be inconsistent with the statute's purposes. As the Supreme Court held in *Sosa*, the ATS "was enacted on the congressional understanding that courts would exercise jurisdiction by entertaining some common law claims derived from the law of nations," 542 U.S. at 731 n.19, and, as Justice Breyer noted, those claims include "torture, genocide, crimes against humanity, and war crimes." *Id.* at 762 (Breyer, J., concurring). Under the federal veil-piercing test, courts refuse to give effect to the corporate form where it will defeat legislative purposes, *FNCB*, 462 U.S. at 629–30, irrespective of whether defeating a legislative policy was the reason for incorporation. *Anderson*, 321 U.S. at 363. Thus, under federal law, the corporate veil may be lifted in ATS cases where it presents a barrier to the enforcement of international law. This conclusion makes particular sense both in light of the fact that the ATS was

originally passed in 1789, long before the acceptance of the legal fiction of separate corporate personhood, and given the remedial nature of the ATS and the gravity of the violations it addresses.

The district court's conclusion, therefore, that (under foreign law) the corporate veil can only be lifted if a subsidiary is established for the purpose of evading existing obligations to other parties, 453 F. Supp. 2d at 683, 689, was error. In ATS cases, federal courts should disregard corporate separateness where it would result in injustice or defeat the policy of enforcing key norms of international law, including the fundamental human rights at issue in this case.

III. General Principles of Agency Applicable in Alien Tort Statute Cases Allow Principals, Including Corporations, to Be Held Liable for the Acts of Their Agents.

The district court erred by failing to recognize that general principles of agency liability, applicable in ATS cases as part of federal law, allow corporations to be held vicariously liable for the acts of their agents. In *Sarei*, the Ninth Circuit specifically noted that "federal common law agency liability principles" apply in ATS cases. 456 F.3d at 1078. Such principles, which may be drawn from sources such as the Restatement on Agency, *see id.*, provide that corporations may be held liable for the acts of their agents.

Moreover, the federal common law standards applicable here are also reflected in international law; concepts of vicarious liability are general principles

of law common to virtually every legal system. There can be no question that the agency principles described below are actionable under the ATS.

A. Uniform federal rules of agency allow a principal to be held liable for the acts of its agent, regardless of corporate structure.

The district court's analysis of agency liability is difficult to parse. Ultimately, the district court did not engage in any substantive agency analysis; it decided that either Canadian or Sudanese law must apply but then ruled that because the plaintiffs did not provide evidence of the law of these jurisdictions, their agency claims failed. *See* 453 F. Supp. 2d at 687–88. While this would not be an appropriate choice-of-law analysis under any circumstances,[4] it was clearly erroneous in this case because the rule of decision should be provided by uniform federal law.

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[4] Although the district court purported to apply New York's choice-of-law rules, New York law requires "a party wishing to apply the law of a foreign state [to] show how that law differs from the forum state's law. Failure to do so results in the application of New York law." *Haywin Textile Prods., Inc., v. Int'l Fin. Inv. & Commerce Bank Ltd.*, 152 F. Supp. 2d 409, 413 (S.D.N.Y. 2001); *see also Loebig v. Larucci*, 572 F.2d 81, 85 (2d Cir. 1978) (noting that where "no evidence has been presented as to foreign law, New York courts have decided the cases in accordance with New York law," and citing cases); *Park Place Entm't Corp. v. Transcon. Ins. Co.*, 225 F. Supp. 2d 406, 408 (S.D.N.Y. 2002). Thus, the absence of proof of the content of Canadian or Sudanese law should have led the district court to apply New York law, not to disregard plaintiffs' legal theories. The district court's approach would require a party to prove the viability of its legal theories under foreign law even though that party is not advocating the application of foreign law. Such an approach would be particularly destructive to ATS cases, in which the torts often arise in countries with poorly developed legal systems.

"It is well established that traditional vicarious liability rules ordinarily make principals or employers vicariously liable for acts of their agents or employees in the scope of their authority or employment." *Meyer*, 537 U.S. at 285; *see also* Restatement (Second) of Agency [hereinafter "Restatement"] § 219. The principal may be liable for the agent's torts even though the agent's conduct is unauthorized, as long as it is within the scope of the relationship. Restatement § 216; *see id.* §§ 228–236; *see, e.g.*, *Cantrell v. Forest City Publ'g Co.*, 419 U.S. 245, 253 (1974). A number of factors may be considered in determining whether one actor is the servant of another, *see* Restatement § 220, but the primary question is whether the principal has "'the right to control'" the agent. *Clackamas Gastroenterology Assocs., P.C., v. Wells*, 538 U.S. 440, 448 (2003) (quoting Restatement §§ 2, 220).

Liability for an agency relationship is not precluded by the fact that the principal and agent may be related corporations, or a parent and a subsidiary. *See* Restatement § 14M reporters note (distinguishing "situations in which liability is imposed on a parent because of the existence of the agency relation, in our common-law understanding of that relation, from cases in which the corporate veil of the subsidiary is pierced"). In the ATS case *Bowoto v. Chevron Corp.*, 312 F. Supp. 2d 1229 (N.D. Cal. 2004), the district court properly concluded that, independently of whether the corporate veil may be pierced, "[a] parent

corporation can be held vicariously liable for the acts of a subsidiary corporation if an agency relationship exists between the parent and the subsidiary." *Id.* at 1238; *see also Phoenix Can. Oil Co. v. Texaco, Inc.*, 842 F.2d 1466, 1477 (3d Cir. 1988); *Ronald A. Katz Tech. Licensing, L.P. v. Verizon Communications, Inc.*, 2002 U.S. Dist. LEXIS 19691, *9–10 (E.D. Pa. 2002); *C.R. Bard Inc. v. Guidant Corp.*, 997 F. Supp. 556, 560 (D. Del. 1998); *Joiner v. Ryder Sys. Inc.*, 966 F. Supp. 1478, 1487 n.19 (C.D. Ill. 1996). Here, the district court erred by expressly refusing to consider this possibility. *See* 453 F. Supp. 2d at 688.

Under "[c]ommon law agency principles," a principal is also "liable if it ratifie[s] the illegal acts" of the agent. *Phelan v. Local 305, United Ass'n of Journeymen*, 973 F.2d 1050, 1062 (2d Cir. 1992); *see also Bowoto*, 312 F. Supp. 2d at 1247–48. A principal may be responsible for an unauthorized act of another that was done or purportedly done on the principal's behalf, where the subsequent conduct of the principal establishes an agency relationship as if it had been authorized from the start. *Daynard v. Ness, Motley, Loadholt, Richardson & Poole, P.A.*, 290 F.3d 42, 59 (1st Cir. 2002) (citing Restatement § 82). "Ratification occurs when the principal, having knowledge of the material facts involved in a transaction, evidences an intention to ratify it." *Phelan*, 973 F.2d at 1062 (internal punctuation omitted). An intent to ratify a transaction may be inferred, for example, from "a failure to repudiate" an "unauthorized transaction,"

Restatement § 94, or from "acceptance by the principal of benefits of an agent's acts, with full knowledge of the facts." *Monarch Ins. Co. v. Ins. Corp. of Ir., Ltd.*, 835 F.2d 32, 36 (2d Cir. 1987). In the same vein, a principal who defends or covers up the misconduct of an alleged agent embraces that conduct as his own and, thus, ratifies the misconduct. *Seymour v. Summa Vista Cinema, Inc*., 809 F.2d 1385, 1388 (9th Cir. 1987); *Bowoto*, 312 F. Supp. 2d at 1247–48.

B. Principles of agency liability are well-established in international law.

Agency principles are firmly established in the world's legal systems, and have become part of international law as "general principles of law recognized by civilized nations" as well as "judicial decisions." *Flores*, 414 F.3d at 251.

Courts in common law (and pluralistic or mixed) jurisdictions regularly acknowledge the principle that an employer may be held liable for the acts of its agent, including intentional torts. *See, e.g., Lister v. Hesley Hall, Ltd.*, [2002] 1 A.C. 215 (H.L.) (holding school liable for sexual abuse by warden); *B.C. Ferry Corp. v. Invicta Sec. Serv. Corp.*, No. CA023277, 84 A.C.W.S. (3d) 195 (B.C. Ct. App. Nov. 11, 1998) (holding employer liable for arson committed by its security personnel); *Chairman, Ry. Bd. v. Das*, [2000] 2 L.R.I. 273 (India) (holding railway liable for rape by railway employees).[5]

[5] *See also Johnson & Johnson (Ir.) Ltd. v. CP Sec. Ltd.*, [1986] I.R. 362 (H.Ct.) (Ir.); *NK v. Minister of Safety & Sec.*, 2005 (9) B.C.L.R. 835 (CC) (S.

In some jurisdictions—including, notably, Sudan—agency principles are also enshrined in statute. *See, e.g.*, The Agency Act, LSDRSG no. 1163 (1974), *quoted and translated in Laws of the Sudan*, vol. 7 (5th ed. 1981) ("The principal is jointly and separately liable with the agent for any tortious act committed by the agent[.]").[6] This is especially the case in civil law countries. *See, e.g.*, C. Civ. (Civil Code) art. 1384 (1994) (Fr.) (establishing liability for damages "caused by the act of persons for whom [one] is responsible"); § 831BGB (Civil Code) (1975) (F.R.G.) ("A person who employs another to do any work is bound to compensate for damage which the other unlawfully causes to third party in the performance of his work."); Minpō (Civil Code) art. 715 (1997) (Japan) (same).[7]

Afr.); *Carrington v. Attorney Gen.*, [1972] N.Z.L.R. 1106 (Auk. S. Ct.); *On v. Attorney Gen.*, [1987] H.K.L.R. 331 (C.A.) (H.K); *Bohjaraj A/L Kasinathan v. Nagarajan A/L Verappan & Annor,* [2001] 6 M.L.J. 497 (H.Ct. Temerloh) (Malay.).

[6] *See also* Hamilton, Harrison & Matthews Advocates, *Kenya*, *in* 2 *Int'l Agency & Distribution Law* [hereinafter *IADL*] § 9[2], KEN 21 (Dennis Campbell ed., 2001); Samuel Hong, *Malaysia*, *in* 2 *IADL*, *supra*, Part I (citing Contracts Act, 1950 (Act 136) § 179); Philip Sifrid A. Fortun, Mylene Marcia-Creencia, et al., *Philippines*, *in* 2 *IADL*, *supra*, Part I.

[7] *See also* C.C. (Civil Code) § 2049 (1991) (Italy) ("Masters and employers are liable for the damage cause by an unlawful act of their servants and employees in the exercise of functions to which they are assigned."); Codigo Civil (Civil Code) art. 800 (1981) (Port.) ("In the case of negligence or default of the agent, the principal is jointly and severally responsible for damages caused to third parties."); Juan Francisco Torres Landa & R. Barrera, *Mexico*, *in* 2 *IADL*, *supra*, § 2(6)(2), MEX 16 ("Where [an] act is in the name of the agent but within his scope of authority, the principal is ultimately liable . . . ."); Leopoldo Olavarria Campagna, *Venezuela*, *in* 2 *IADL*, *supra*, § 9[2], VEN 39; Konstantin Obolensky

In addition to the basic principles of agency, the concept of ratification is also found in international law. For example, the International Court of Justice in *Nicaragua v. United States* applied recognized principles of ratification in ruling that the U.S. was responsible for certain activities undertaken by Central American operatives on its behalf, considering evidence that the U.S. government had made false denials of involvement in the activities and had arranged for a Nicaraguan organization to issue false statements claiming responsibility for them. *Military & Paramilitary Activities In & Against Nicaragua (Nicaragua v. United States)*, 1986 I.C.J. 14 ¶¶ 77–78 (Judgment of June 27, 1986). Furthermore, liability by ratification is expressly established by statute in Sudan. *See* The Agency Act, LSDRSG no. 1163 (1974) *quoted and translated in Laws of the Sudan*, vol. 7 (5th ed. 1981) (providing that an "agency relationship" may be created "by the subsequent ratification by the principal of an act done on his behalf and without his authority by any person," and for liability "for any tortious act committed by the agent . . . which the principal has ratified").

IV. General Principles of Joint Venture Liability Applicable to Federal Claims Apply in Alien Tort Statute Cases.

As with questions of agency and veil-piercing, the district court erred by applying divergent rules of joint venture law from Mauritius and New York to

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& Akhmed Glashev, *Russia*, *in* 2 *IADL*, *supra*, Part I § 1[1] RUSS-4 (citing Civil Code Chapter 52); William E. Butler, *Russian Law* 389–91 (2d. ed. 2003).

determine whether the defendants in this case could be held liable under the ATS. *See* 453 F. Supp. 2d at 684. Because the standards applied by the district court are distinct from the general rules of joint venture, and therefore could lead to different results depending on the place of origin of the business venture at issue, they should be rejected in favor of the uniform standards of federal law.

A. The existence of a joint venture does not require a written agreement, and joint venturers may be held jointly liable.

There is general agreement in most U.S. jurisdictions about the basic test for determining the existence of a joint venture. *See, e.g.*, *United States v. USX Corp.*, 68 F.3d 811, 826 n.30 (3d Cir. 1995). This traditional common law test considers four general factors: "(1) whether the parties intended to form a partnership or joint venture; (2) whether the parties share a common interest in the subject matter of the venture; (3) whether the parties share profits and losses from the venture; and (4) whether the parties have joint control or the joint right of control over the venture." *Davidson*, 848 F.2d at 577; *see also* 46 Am. Jur. 2d Joint Ventures § 8 ("A joint venture exists where there is a joint interest in property, an express or implied agreement to share profits and losses of the venture, and there are actions or conduct showing joint cooperation in the venture."); *Sasportes v. M/V Sol de Copacabana*, 581 F.2d 1204, 1208 (5th Cir. 1978).

The district court erred by departing from the traditional joint venture test in

several significant ways. In applying the law of Mauritius, the district court concluded that a Mauritian *societe de fait* was most similar to the notion of a joint venture. *See* 453 F. Supp. 2d at 684. The *societe de fait*, however, apparently requires "ownership in equal shares," *id.*, which is not a requirement of a joint venture. The district court did not explain how Mauritian law would characterize a joint business enterprise in which the venturers did not hold equal shares, or whether the venturers would be jointly liable for its torts. As with piercing the corporate veil, a foreign jurisdiction should not be able to assist its business entities in evading liability for violations of fundamental norms of international law by the adoption of idiosyncratic rules of joint venture liability.

The district court also departed from traditional joint venture rules in its application of New York law. The district court held that a joint venture could not be proved without an executed written agreement, even where the "Consortium Members may have viewed their relationship as a joint venture or described it informally as such," *id.* at 686, and held that, under New York law, a joint venture could not exist if the purported co-venturers also formed a corporation. *See id.* at 685 ("Since GNPOC is organized as a corporation, New York law requires its corporate form to be respected and prevents suit by third parties under a joint venture theory."). The district court erred in both respects.

The district court's conclusion that a joint venture can only be formed by

formal written agreement is contrary to both the general law of joint venture and New York law. "A formal agreement is not necessary to establish a joint venture," 46 Am. Jur. 2d Joint Ventures § 9, and a joint venture may even be created by an "implied contract," *id.* New York law reflects this rule; although a joint venture "implies an agreement . . . that agreement may not only be shown by parol; it may be implied in whole or in part from the conduct of the parties. The form of agreement is immaterial." *In re Taub*, 4 F.2d 993, 994 (2d Cir. 1924) (citations omitted) (applying New York law).

As for the impact of incorporation on joint venture liability, the general rule, as expressed by a California court, is that "a corporation may be but an instrumentality to carry out a joint adventure, and hence the mere fact that a corporation is interposed as an operating agent between two parties who hold its shares does not prevent them from being joint adventurers." *Enos v. Picacho Gold Mining Co.*, 56 Cal. App. 2d 765, 772 (1943); *see also Colonial Refrigerated Transp., Inc. v. Mitchell*, 403 F.2d 541, 547 (5th Cir. 1968) (holding that the fact that joint venturers "decide[d] to employ a corporation as a medium for their investment . . . does not negate the existence of the joint venture at the moment the alleged tort was committed"); *Tate v. Ballard*, 68 N.W.2d 261, 265 (Minn. 1954); *Donahue v. Davis*, 68 So. 2d 163, 171 (Fla. 1953) ("The fact that joint adventurers may determine to carry out the purpose of the agreement through the medium of a

corporation does not change the essential nature of the relationship.");
Mendelsohn v. Leather Mfg. Corp., 93 N.E.2d 537, 541 (Mass. 1950).

Although New York cases have held that the joint venture relationship ceases once the parties incorporate, *see Weisman v. Awnair Corp.*, 3 N.Y.2d 444, 449 (1957), that principle has been qualified. In *Macklem v. Marine Park Homes, Inc.*, 191 N.Y.S.2d 374 (Sup. Ct. 1955), *aff'd*, 191 N.Y.S.2d 545 (App. Div. 1959), *aff'd*, 170 N.E.2d 455 (N.Y. 1960), the court held that a joint venture that creates a corporation to hold its property may continue in existence, if the partners intended to carry on their business as a joint venture rather than "as stockholder in a corporation." 191 N.Y.S.2d at 376; *see Arditi v. Dubitzky*, 354 F.2d 483, 486 (2d Cir. 1965) (noting that the courts of New York have permitted "suit upon joint venture obligations if it is apparent that the intention of the parties was that the corporation should be only a means of carrying out the joint venture"). "[A] complete merger of a joint venture into corporate form, which legally supplants the venture, does not occur . . . when the corporation is a mere 'adjunct of a joint venture.'" *Sagamore Corp. v. Diamond W. Energy Corp.*, 806 F.2d 373, 379 (2d Cir. 1986). In such a case, the joint venture agreement "'runs along side of the path of the corporation' without being merged into it." *Id*.

While the district court relied on *Itel Containers International Corp. v. Atlanttrafik Express Service, Ltd.*, 909 F.2d 698 (2d Cir. 1990), *Itel* simply stated

that the corporation at issue "*itself* was not a joint venture because it was a corporation." *Id.* at 702 (emphasis added). Although *Itel* also determined that the parties had not intended to engage in a joint venture, *see id.* at 701, the decision certainly does not rule out the possibility of a joint venture existing along with a corporation—such that, for example, the corporation acts as the agent of the joint venture or, if its ownership is identical, even its alter ego. *See, e.g.*, *Doe v. Unocal Corp.*, 395 F.3d at 972 (Reinhardt, J., concurring) (suggesting in the ATS context that similar corporation created by consortium was "the alter ego of the joint venture"). And, regardless of the precise contours of the New York rule, this Court has already noted that the rule "has come under heavy attack and has been rejected by many jurisdictions." *Arditi*, 354 F.2d at 486.

Finally, although the district court did not directly address the liability of joint venturers, the traditional common law treats joint venturers as mutual agents, equivalent to partners, liable for the torts of their co-venturers committed within the scope of the venture. *See, e.g.*, 46 Am. Jur. 2d Joint Ventures § 35; *Pine Prods. Corp. v. United States*, 945 F.2d 1555, 1560 (Fed. Cir. 1991) (concluding, under "general principles of law applicable to joint ventures," including "general principles of partnership law," joint venturers are "jointly and severally liable for obligations and debts of the" venture).

B. Joint venture law, including the elements of a joint venture and joint liability, is reflected in international law.

As with agency principles, the general features of joint venture law are also general principles of international law, common to numerous legal systems. *See, e.g.*, *Aronovitch & Leipsic Ltd. v. Berney*, 141 A.C.W.S. (3d) 412, 2005 A.C.W.S.J. 11438 ¶¶ 19–28 (Man. Q.B. 2005) (noting that a joint venture can be formed without written contract and can be carried out through"joint venture corporation"); *Talbot Underwriting Ltd. v. Murray*, [2005] E.W.H.C. 2359 (Comm.) (Q.B.) (setting out definition of joint venture without requiring written contract); *Schipp v. Cameron*, 1998 NSW LEXIS 1862, *143–44 (N.S.W. Sup. Ct., Equity Div., 1998) (noting that, regardless of written agreement, a joint venture is form by association for a common end and results in a relationship of mutual agency); William E. Butler, *Russian Law* 389, 461–52 (2d ed. 2003) (noting that joint ventures are formed by the contribution of resources toward common business objective, and that joint venturers are liable for the acts of any venturer on behalf of the venture); Chibli Mallat, *From Islamic to Middle Eastern Law*, 51 Am. J. Comp. L. 699, 706–07 (2003) (noting that "joint adventures" may be formed under Islamic law).

In *Doe v. Unocal Corp.*, Judge Reinhardt's concurring opinion specifically recognizes that joint venture liability is reflected in international law:

> The principle that a member of a joint venture is liable for the torts of its co-venturer is well-established in international law and in other national legal systems. International legal materials frequently refer to the principle of joint liability for co-venturers. *See, e.g.*, United Nations Convention On the Law of the Sea, Art. 139, Oct. 21, 1982, 21 I.L.M. 1245, 1293 (establishing principle of joint liability in international maritime law for parties acting jointly in maritime ventures); Convention on International Liability for Damage Caused by Space Objects, Mar. 29, 1972, 961 U.N.T.S. 187 (establishing joint liability principles to harms caused by parties launching objects into space); see also John E. Noyes & Brian D. Smith, State Responsibility and the Principle of Joint and Several Liability, 13 YALE J. INT'L. LAW 225, 249 (1988) (describing joint and several liability for co-venturers' actions as a general principle of international law). The status of joint liability as a general principle of law is supported not only by international law sources but also by the fact that it is fundamental to "major legal systems." *See, e.g.*, N.Y. PARTNERSHIP LAW § 24 (McKinney 2002); *Buckley v. Chadwick*, 45 Cal. 2d 183, 190, 288 P.2d 12, 289 P.2d 242 (1955); *Caron v. Lynn Sand & Stone Co.*, 270 Mass. 340, 346, 170 N.E. 77 (1930); 2 LAWS AND REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA 71 (1984) (Chinese joint venture statute); *AIB Group (UK) Plc. v. Martin*, 2001 U.K.H.L. 63 (United Kingdom joint venture law).

395 F.3d at 971 (Reinhardt, J., concurring). Thus, like general principles of agency and uniform rules of piercing the corporate veil, the principles of joint venturer liability are general principles that should be applied to ATS claims, and are consistent with international law.

CONCLUSION

For the foregoing reasons, *amicus* urges this Court to reverse the grant of summary judgment and hold that uniform federal law provides the rules of liability

under the Alien Tort Statute.

DATED: March 7, 2007

Respectfully submitted,

Marco Simons
Richard Herz
EARTHRIGHTS INTERNATIONAL
Counsel for Amicus Curiae*

* Counsel would like to acknowledge the assistance of Sara Fargnoli, Marguerite Gardiner, and Tracey Lesetar of the George Washington University Law School International Human Rights Clinic.

CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(a)(7)(C)

The Presbyterian Church of Sudan, *et al.*, v. Talisman Energy, Inc., *et al.*

Case No. 07-0016

I certify that, pursuant to Federal Rules of Appellate Procedure 32(a)(7) and 29(d), the attached amicus brief is proportionally spaced, has a typeface of 14 points or more and contains 7000 words or less, according to WordPerfect 11, the word-processing program used to prepare the brief.

DATED: March 7, 2007

Marco Simons
EARTHRIGHTS INTERNATIONAL
Counsel for Amicus Curiae

CERTIFICATE OF ANTI-VIRUS SCANNING PURSUANT TO LOCAL R. 32(a)(1)(E)

The Presbyterian Church of Sudan, *et al.*, v. Talisman Energy, Inc., *et al.*

Case No. 07-0016

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Marco Simons
EARTHRIGHTS INTERNATIONAL
Counsel for Amicus Curiae

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Paul L. Hoffman
Adrienne J. Quarry
Schonbrun DeSimone Seplow Harris & Hoffman
723 Ocean Front Walk
Venice, CA 90291

Lawrence Kill
John O'Connor
Stanley Bowker
Anderson Kill & Olick, P.C.
1251 Avenue of the Americas
New York, NY 10020

Carey D'Avino
Stephen Whinston
Keino Robinson
Berger & Montague, P.C.
1622 Locust Street
Philadelphia, PA 19103

Scott Reynolds
Lovells
590 Madison Avenue
New York, NY 10022

Richard Heinmann
Elizabeth Cabraser
Daniel E. Seltz
Steven E. Fineman
Rachel Geman
Lieff, Cabraser, Heinmann & Bernstein, LLP
780 Third Avenue, 48th Floor
New York, NY 10017

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