05-2141
05-2326

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

IN RE SOUTH AFRICAN APARTHEID LITIGATION

Sakwe Balintulo Khulumani, as personal representative of Saba Balintulo, Fanekaya Dabula, as personal representative of Lungile Dabula, Nokitsikaye Violet Dakuse, as personal representative of Tozi Skweyiya,

(CAPTION CONTINUED)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
The Honorable John E. Sprizzo

BRIEF OF *AMICI CURIAE*
CAREER FOREIGN SERVICE DIPLOMATS
IN SUPPORT OF NEITHER PARTY

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(CAPTION CONTINUED)

Wellinton Mtyukato Nkosiphendule, Vuyani Nongcama, Sindiswa Mirriam Nunu, Thulani Nunu, Boniwe Phalaza, Pathiswa Pringane, as personal representative of Mthozama Theophilus Pringane, Mthutuzeli Sikani, Noluthando Siletile, Thembeka Victoria Siphaho, Johannes Titus, Mpolontsi Tyotes, Mthuzimele Melford Yamile, Ntunani William Zenani, Thandiwe Shezi, Elias B. Boneng, Dennis Vincent Frederick Brutus, Moraloki A. Kgobe, Reuben Mphela, Lulamile Ralrala,

Plaintiffs-Appellants,

-----v.----

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

Defendants-Appellees,

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

Defendants.

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

Plaintiffs-Appellants,

(CAPTION CONTINUED)

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

Plaintiffs,

-----v.----

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

Defendants-Appellees,

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

Defendants.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Executive Orders, Legislative History, U.S. Government Statements and Submissions

International Authorities

Scholarly Authorities

Other Authorities

QUALIFICATIONS OF *AMICI CURIAE*

Harry C. Blaney III served in the Foreign Service for 25 years, including as a Member of the Secretary of State's Policy Planning Staff and as Director of the Office of Asian Refugee Assistance at the Department of State. He also was a Visiting Fellow at the Council on Foreign Relations and at the Royal Institute of International Affairs and the Woodrow Wilson International Center for Scholars. He served abroad at the U.S. Mission to the European Communities and at the U.S. Mission to NATO.

Goodwin Cooke served for 25 years in the Foreign Service, 1956-81, in embassies in Pakistan, Yugoslavia, Italy, Belgium, Canada, Ivory Coast, and the Central African Republic, where he served as Ambassador. He is now a professor teaching International Relations in the Maxwell School at Syracuse University.

Charles T. Cross held eleven posts abroad and several in Washington during his 32 years in the Foreign Service (1949-81). These included service as Civilian Deputy for Pacification, with assimilated rank of major general, to Commanding General III Marine Amphibious Force, Danang (1967-69); Ambassador to Singapore (1969-72); Policy Planning Staff (1973-74); Consul General in Hong Kong (1974-77); Senior Foreign Service Inspector (1978-79); and first Director of the American Institute in Taiwan (1979-81). Amb. Cross has taught at the Jackson School of International Studies, the University of Washington, Carleton College, and the Semester-at-Sea Program of the University of Pittsburgh, and he served as Diplomat-in-Residence at the University of Michigan.

John Gunther Dean served as Ambassador to Cambodia (1974), Denmark (1975-1978), Lebanon (1978); Thailand (1981), and India (1985-1988). He was also Deputy for Civil Operations for Rural Development Support in Military Region 1 in Vietnam with the assimilated rank of Major General, and presented credentials as Charge d'Affaires in Mali when Africa acceded to independence in 1960. He is currently a member of academic and corporate boards in the United States, Europe and Asia.

Ralph H. Graner served as a Foreign Service Officer from 1955 to 1987, including as Deputy Chief of Mission in Mali and Chad; Consul General in Bremen, Germany; Director of Multilateral Affairs in what was then the Bureau of

Human Rights at the Department of State; and Deputy Director of what was then Inter-African Affairs in the Bureau of African Affairs at the Department of State. He also served in New Delhi, Rangoon, Hong Kong, Algiers, and Accra.

F. Allen "Tex" Harris worked for nine years on ending apartheid in South Africa during his 35 years as a career Foreign Service Officer. He held a variety of postings including Political Officer in Caracas, Venezuela and Buenos Aires, Argentina, Special Assistant to the Legal Advisor, Deputy Director of Southern Africa, Director of the SALT Working Group, Director of Public Programs, Director of Emergency Operations, Director of African Regional Affairs, Consul General in Durban, South Africa and Melbourne, Australia, Associate Administrator of the EPA for International Activities, and twice President of the American Foreign Service Association. He is also the recipient of the Department's Distinguished Honor Award for reporting on human rights violations in Argentina during the "dirty war" period. He retired in 1999, resides in Virginia and is currently a lecturer on foreign affairs and the Secretary of the American Foreign Service Association.

Brady Kiesling served as a Foreign Service Officer for 20 years, including in Israel, Morocco, Greece, and Armenia. His last position was as Political Counselor at the U.S. Embassy in Athens, where he had also served previously as human rights officer.

Edward L. Peck, a Foreign Service Officer for 32 years, was Chief of Mission in Iraq and Mauritania, and also served in Sweden, Morocco, Algeria, Tunisia and Egypt. He was Deputy Director of the Reagan White House Task Force on Terrorism, served two tours of active duty with the paratroops, and is a Fellow of the Institute for Higher Defense Studies, National Defense University.

James E. Thyden served for 26 years in the Foreign Service, 1964-1990, culminating in service as the Director of the Office of Human Rights in the Bureau of Human Rights and Humanitarian Affairs under Assistant Secretary Elliott Abrams; and as Counselor for Political Affairs at the embassy in Oslo, Norway.

STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

The purpose of this brief is to bring to this Court's attention the views and experience of *amici curiae*, United States career foreign service diplomats, relevant to the impact on U.S. foreign policy of aiding and abetting liability under the Alien Tort Statute. 28 U.S.C. § 1350 ("ATS"). Each of the *amici* has served in the U.S. Foreign Service for more than 20 years. Several have served as ambassadors.

STATEMENT OF THE ISSUE ADDRESSED BY *AMICI*

Amici herein submit that continued recognition of liability for aiding and abetting serious violations of universally recognized human rights norms is consistent with, and indeed advances, U.S. foreign policy interests. In so doing, *amici* take no position as to whether the plaintiffs in this action can demonstrate that any of the defendants are liable under the appropriate aiding and abetting standard. Nor do *amici* take any position as to whether this particular case would have any effect, positive or negative, on current U.S. foreign policy toward South Africa. For these reasons, *amici* file this brief in support of neither party.

INTRODUCTION

Plaintiffs allege that the defendant corporations aided and abetted egregious violations of well-established human rights norms in apartheid South Africa.

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[1]All parties have consented to the filing of this brief. Accordingly *amici* file this brief pursuant to F.R.A.P. 29(a).

Despite the unanimous holding of other courts that aiding and abetting is actionable under the Alien Tort Statute, the district court below held that it is not, and dismissed the complaints on that (and other) grounds.

In the course of refusing to recognize aiding and abetting liability, the district court stated: "This Court is also mindful of the collateral consequences and possible foreign relations repercussions that would result from allowing courts in this country to hear civil suits for the aiding and abetting of violations of international norms across the globe." *In re South African Apartheid Litigation*, 346 F. Supp. 2d 538, 551 (S.D.N.Y. 2004). The district court did not specify what it believed the "possible foreign relations repercussions" might be. *Id.*

Amici believe that the ATS properly should and in fact does encompass liability for aiding and abetting violations of universally recognized human rights norms. Because such liability is well established in both international and domestic law, it is necessarily actionable under the ATS. This is a legal question, not a policy question. Thus, the district court's above quoted statement is irrelevant. Nonetheless, because the district court apparently assumed otherwise, *amici* demonstrate that aiding and abetting liability supports U.S. foreign policy.

Amici respectfully submit that the district court's decision regarding aiding and abetting liability should be reversed.

SUMMARY OF ARGUMENT

Holding those who aid and abet egregious violations of universal human rights norms liable under the ATS furthers U.S. foreign policy. Eliminating, or drastically curtailing, such liability would undermine U.S. foreign policy objectives, and is not justified by concerns over any negative impacts that such liability might have on foreign relations.

The United States has long been regarded as a world leader in its commitment to universal human rights standards and respect for the rule of law. This is one of our greatest assets in our diplomatic relations. Our commitment to the rule of law and to the punishment of those who commit or abet gross violations of human rights standards has been a hallmark of our foreign policy. The credibility of that commitment will be undermined if we eliminate ATS lawsuits for aiding and abetting, which are a highly visible tool to hold accountable those complicit in heinous acts such as genocide, crimes against humanity, war crimes, rape and torture.

Our government has spoken clearly about the need to ensure that U.S. corporate entities comply with international human rights obligations. With respect to some countries with poor human rights records, U.S. foreign policy presumes that trade and investment will improve political conditions, an approach

sometimes referred to as "constructive engagement." Complicity liability supports and complements the effectiveness of that approach, since constructive engagement is predicated on the notion that U.S. companies will promote respect for human rights. The potential for liability for those companies that directly aid and abet abuses creates incentives for companies to actively promote liberalization, whereas without such liability, companies might continue to be complicit in the very abuses constructive engagement is designed to prevent.

Similarly, in our war against terrorism, our policy is to maintain our commitment to human rights norms and the rule of law. The U.S. Government has repeatedly emphasized that those who abet terrorism are as responsible as those who commit terrorist acts. Accordingly, we are justifiably asking the countries of the world to ensure that they do not serve, unwittingly or not, as safe havens for those who have committed, or will commit such acts. Indeed, the war against the pariah Taliban regime in Afghanistan was predicated on its creation of a safe haven for Al-Qaeda. To make credible our request that other nations not serve as safe havens, and to lead by example, the United States cannot do otherwise within its own borders with respect to other egregious violations of international law.

U.S. foreign policy has many facets. One is to unflinchingly criticize other governments, including allies, that commit human rights abuses. However, even

where we criticize another government for its human rights practices, or where an ATS claim is brought against one of its citizens or against a corporation allegedly complicit in abuses in that country, rarely do such actions have a significant adverse impact on our foreign relations. All of us have diplomatic experience in countries where we have engaged in such criticism, or concerning which ATS claims have been brought. Yet bilateral diplomatic relations have continued, U.S. companies have continued to invest, and those countries have continued to cooperate on matters of mutual interest such as the war against terrorism.

There may, of course, be particular cases where an aiding and abetting claim under the ATS may be counterproductive to overall U.S. foreign policy goals. In *Sosa v. Alvarez-Machain*, the U.S. Supreme Court suggested that courts should, on a "case-specific" basis, consider such effects. 124 S.Ct. 2739, 2766, n.21 (2004). We have confidence in the capacity of the courts to weigh these considerations case-by-case, and to dismiss cases where warranted. The district court's implicit suggestion, however, that *all* aiding and abetting claims can be precluded based on alleged foreign policy effects conflicts with the "case-specific" inquiry the Supreme Court discussed.

ARGUMENT

I. EVERY COURT THAT HAS CONSIDERED THE ISSUE HAS RECOGNIZED THAT THE ATS PROVIDES FOR AIDING AND ABETTING LIABILITY, EXCEPT THE DISTRICT COURT BELOW.

Courts have repeatedly found aiding and abetting liability is available, in a variety of different circumstances. *E.g. Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1157-1158 (11th Cir. 2005)(upholding verdict against Chilean soldier who aided and abetted extra-judicial killing); *Hilao v. Estate of Marcos*,103 F.3d 767, 776 (9th Cir. 1996)(affirming jury instruction allowing former Phillipine leader to be held liable upon finding that he "directed, ordered, conspired with, or aided the military in torture, summary execution, and 'disappearance.'"); *Burnett v. Al Baraka Investment*, 274 F. Supp. 2d 86, 100 (D.D.C. 2003)(allegations by victims of the September 11 attacks that various entities aided and abetted the perpetrators stated a claim); *Presbyterian Church of the Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 320-24 (S.D.N.Y. 2003)(allegations that a Canadian oil company aided and abetted gross human rights violations in Sudan actionable); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1355-1356 (N.D.Ga 2002) (former Serb soldier liable for aiding and abetting human rights violations in Bosnia-Herzegovina). In concluding otherwise, the district court stands alone.

Courts applying aiding and abetting liability under the ATS have held that a plaintiff must prove the defendant provided practical assistance that has a substantial effect on the perpetration of the crime, with knowledge that these acts assist the commission of the offence. *Cabello*, 402 F.3d at 1158; *Mehinovic*, 198 F. Supp. 2d at 1356; *Presbyterian Church*, 244 F. Supp. at 323-24. These cases set a modest and reasonable standard for U.S. businesses to meet.

II. AIDING AND ABETTING LIABILITY FURTHERS THE U.S. FOREIGN POLICY PRIORITY OF PROMOTING RESPECT FOR HUMAN RIGHTS.

Under U.S. law, "a principal goal of the foreign policy of the United States shall be to promote the increased observance of internationally recognized human rights by all countries." 22 U.S.C. § 2304(a)(1) (1994). The present Administration has described the central tenet of American foreign policy as a "distinctly American internationalism that reflects the union of our values and our national interests. . . In pursuit of our goals, our first imperative is to clarify what we stand for: the United States must defend liberty and justice because these principles are right and true for all people everywhere.... We will speak out honestly about violations of the nonnegotiable demands of human dignity."[2]

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[2] National Security Strategy of the United States of America (September 2002) *available at* http://www.whitehouse.gov/nsc/nss.html.

The commitment to these "nonnegotiable demands of human dignity" is reflected in many aspects of U.S. policy. Congress has directed the State Department to comprehensively review and report annually on the status of internationally recognized human rights in virtually every nation in the world, 22 U.S.C.A. §§ 2151n(d); 19 U.S.C.A. § 2464. Accordingly, for nearly 30 years, the State Department has issued "Country Reports" on human rights practices. These reports are a widely cited authority on human rights practices around the world.

Numerous U.S. laws condition foreign development, security and investment assistance and trade benefits on compliance with internationally recognized human rights.[3] In particular, the United States government sanctions or withholds aid from various organizations and individuals that aid and abet human rights violations. For example, Executive Order No. 13,348 blocks assets of individuals who "materially assisted, sponsored, or provided financial, materials, or technical support for, or goods or services in support of" illegal actions of the former Charles Taylor regime in Liberia. Exec. Order No. 13,348, *Blocking Property of Certain Persons and Prohibiting the Importation of Certain Goods From Liberia*, 69 Fed. Reg. 44,885 (July 22, 2004). Additionally, the U.S. conditions certain funding to

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[3]*See, e.g.*, 22 U.S.C. §§ 2151n(a) (development assistance); 22 U.S.C. § 2304(a)(2) (security assistance); 7 U.S.C. § 1733(j)(1) (provision of agricultural commodities).

the Colombian and Indonesian militaries on their suspending and prosecuting military members who aid or abet militia groups. Pub. L. No. 108-7 §§ 564(a)(2), 569 (2003). The U.S. also withholds funds to any government if it "has aided or abetted...in the illegal distribution, transportation, or sale of diamonds mined in" Sierra Leone. *Id.* at § 570(a). Under 22 U.S.C. § 2798, the President may impose sanctions against foreign persons who "knowingly" assist the illegal acquisition of chemical or biological weapons. Similarly, U.S. law condemns the role of the Government of Sudan in abetting and tolerating slave trading. Sudan Peace Act, Pub. L. No. 107-245, § 4(1)(C), 50 U.S.C. § 1701 note (2002).

In 1992, Congress passed the Torture Victim Protection Act ("TVPA"), 28 U.S.C. § 1350 note, which expanded the possibility for suits in U.S. courts for violations of international human rights law. In signing the TVPA, President George Bush explained:

> In this new era, in which countries throughout the world are turning to democratic institutions and the rule of law, we must maintain and strengthen our commitment to ensuring that human rights are respected everywhere.[4]

The drafters of the TVPA explicitly confirmed that it contemplated liability for those "who ordered, abetted, or assisted in the torture." S. Rep. No. 1, 249, 102nd

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[4] Statement on Signing the Torture Victim Protection Act of 1991, 28 Weekly Comp. Pres. Doc. 465 (March 12, 1992).

Cong., 1st Sess. (1991); *accord Cabello*, 402 F.3d at 1157-58 (TVPA includes abetting liability).

The ATS is one of the tools in the United States' overall efforts to promote compliance by government officials and private actors with fundamental human rights standards. U.S. courts have allowed cases to proceed only for the most serious of human rights violations involving gross physical abuse, such as torture, summary execution, genocide, war crimes, and disappearances.[5] These abuses have been widely condemned internationally and by U.S. foreign policy for decades. Particular ATS cases can serve to reinforce other aspects of U.S. foreign policy.[6]

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[5] *See e.g., Kadic v. Karadzic,* 70 F.3d 232 (2d Cir. 1995) (genocide and war crimes); *In re Estate of Marco;, Human Rights Litigation,* 25 F.3d 1467 (9th Cir. 1993) (torture, execution, and disappearance); *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996) (torture).

[6] Even critics of the ATS state that these cases have helped bring about important resolutions for human rights victims in cases involving corporate complicity. For example, victims' lawsuits helped make possible the historic agreement the United States forged in 2000 with the German government and companies to compensate Holocaust-era slave laborers. After negotiating that agreement, then Deputy Secretary of the Treasury Stuart Eizenstat said: "It was the American lawyers, through the lawsuits they brought in U.S. courts, who placed the long-forgotten wrongs by German companies during the Nazi era on the international agenda.... Without question, we would not be here without them." Remarks of Deputy Secretary of the Treasury Stuart E. Eizenstat at the 12th and Concluding Plenary on the German Foundation, LS-774 (July 17, 2000) *available at* http://www.ustreas.gov/press/releases/ls774.htm. Similarly, *Business Week* noted that a settlement in *Doe v. Unocal* was "A Milestone For Human Rights."

Indeed, the ATS was designed to respond to "[t]he Framers' overarching concern that control over international affairs be vested in the new national government to safeguard the standing of the United States among the nations of the world." *Filartiga v. Pena Irala*, 630 F.2d 876, 885 (2d Cir. 1980). The Framers enacted the ATS to discharge the new nation's legal and moral duty to comply with international law. Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 Am. J. Int'l. L. 461 (1989). This duty included ensuring that "[i]ndividuals who flouted international law would find no quarter in the United States." *Id.* at 487. From the beginning, the ATS has been understood to include aiding and abetting liability. *Breach of Neutrality,* 1 Op. Att'y Gen. 57, 59 (1795). The concerns animating passage of the ATS remain as important to U.S. foreign policy today as they were then.

Our experience as diplomats leads us to concur in the support for prudent application of ATS expressed by the State and Justice Departments in a joint *amicus* brief in *Filartiga*. There, the Government emphasized that to fail to recognize a claim involving violations of well-defined, universally recognized

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Paul Magnusson, "A Milestone For Human Rights," *Business Week* at 63 (January 24, 2005). The plaintiffs had alleged Unocal was complicit in abuses committed by the Burmese military on behalf of Unocal's pipeline project, and the settlement compensated the plaintiffs and provided money for a fund to improve living conditions, health care and education in the pipeline region. *Id.*

norms "might seriously damage the credibility of our nation's commitment to the protection of human rights." Memorandum for the United States as Amicus Curiae, *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), *reprinted in* 19 I.L.M. 585, 604 (1980) (citations omitted). The same is true of aiding and abetting liability. Drastic curtailment of ATS liability to exclude holding accountable those who aid and abet serious human rights abuses could undermine American foreign policy by causing other nations to question the strength of our commitment to human rights.

III. HOLDING ACCOUNTABLE CORPORATIONS COMPLICIT IN THE COMMISSION OF HUMAN RIGHTS VIOLATIONS FURTHERS U.S. FOREIGN POLICY.

A. The United States has a core interest in ensuring that U.S. corporate entities comply with international human rights obligations in their conduct abroad.

When U.S. companies operate overseas, their actions reflect upon the United States as a whole. Our standing as a world leader and our commitment to human rights are diminished if we allow our citizens, including our corporate citizens, to commit or assist in the commission of human rights violations with impunity.

As Lorne W. Craner, then Assistant Secretary for Democracy, Human Rights and Labor, noted in 2002, the State Department "support[s] corporate responsibility . . . This means promoting legal and ethical behavior as well as

respect for human rights and labor rights. U.S. corporations abroad are among our best ambassadors. They play an important role in changing global perceptions about the U.S."[7]

Not long ago the United States State Department, together with the United Kingdom, established the *Voluntary Principles on Security and Human Rights,* which provide guidelines for companies in the extractive industries for "maintaining the safety and security of their operations within an operating framework that ensures respect for human rights and fundamental freedoms."[8] In announcing those principles, the Secretary of State noted that they "demonstrat[e] that the best-run [oil and mining] companies realize that they must pay attention not only to the particular needs of their communities, but also to universal standards of human rights, and that in addressing these needs and standards there is no necessary conflict between profit and principle."[9]

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[7]Remarks at the 2002 Surrey Memorial Lecture, National Policy Association, Washington, DC June 18, 2002, http://www.state.gov/g/drl/rls/rm/11405.htm

[8] Voluntary Principles on Security and Human Rights, United States Department of State (Dec. 19, 2000) at 1.

[9] Remarks of Secretary of State Madeleine K. Albright, Press Briefing, (December 20, 2000), Washington, D.C., available at http://secretary.state.gov/www/statements/2000/001220. html.

The Assistant Secretary for Economic and Business Affairs (who continues to serve in that position) elaborated:

> U.S. companies are models overseas for the kind of business practices we encourage others to adopt. Therefore, it is good not only for American business, but also for the global investment climate that American firms be the best corporate citizens possible.. . . More comprehensive risk assessments, guidance on interactions between companies and host government security, and best security practices are central to any investment climate.[10]

Some business groups have argued that complicity liability might deter investment by U.S. businesses. While such speculation could prove to be accurate in particular cases, our experience has not shown ATS litigation over the past 20 years to have had this effect. The U.S. courts have not allowed "abusive" litigation, the number of lawsuits to date has been small and businesses have continued to invest overseas. As noted above, our understanding is that a corporation may be held liable only if it provided direct and substantial assistance in the commission of violations of universally recognized human rights norms. *See* Section I *supra*.[11] This aiding and abetting liability is needed to ensure that U.S.

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[10] E. Anthony Wayne, Assistant Secretary of State for Economic and Business Affairs, Announcement of "Voluntary Principles on Security and Human Rights," U.S. Department of State (December 20, 2000) available at http://www.state.gov/www/policy_remarks/2000/001220_wayne_principles.html (emphasis added).

[11] Accordingly, the concern expressed by the Government to the district court that potential ATS liability "*for operating in a country* whose government

multinational corporations will not sully our nation's reputation through complicity in such violations, and that if they do, our reputation will not suffer the further damage that would result if our legal system afforded impunity.

Nor is there any merit to the argument that ATS liability will put U.S. corporations at a competitive disadvantage. It is dubious, at best, to suggest that a U.S. corporation is less likely to win foreign contracts because the ATS allows liability for aiding in gross human rights abuses that foreign competitors would only face if they are subject to personal jurisdiction in the U.S. Even if this were the case, however, the same argument was advanced against the Foreign Corrupt Practices Act of 1977 (FCPA), which prohibits U.S. companies from winning foreign contracts by engaging in bribery or corruption. 15 U.S.C. § 78a *et seq*. Just as the FCPA was a reflection of the values of the rule of law and transparency that American foreign policy strives to promote, ATS liability reflects the value of respect for human rights that is also a cornerstone of U.S. diplomacy. Both our policies and our values suffer if we permit U.S. corporations to emulate the worst practices of foreign companies.

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implements oppressive policies will discourage U.S. (and other foreign) corporations from investing in many areas of the developing world" is inapposite to the issue at bar. Statement of Interest of the United States, Exhibit B, October 27, 2003 Letter from William Taft IV, Legal Adviser U.S. Department of State to Shannen Coffin, Esq., U.S. Department of Justice at 3 (emphasis added).

B. Aiding and abetting liability furthers constructive engagement.

With respect to some repressive regimes, the United States has adopted a policy of "constructive engagement," which presumes that responsible investment by U.S. companies will promote democracy and respect for human rights.[12] Alien Tort liability for companies complicit in abuses supports constructive engagement by enhancing the mechanisms through which such engagement is presumed to work. Thus, complicity liability facilitates U.S. foreign policy in those countries in which the government has chosen to use a "constructive engagement" approach. Conversely, constructive engagement is unlikely to work well if legal institutions in the United States allow U.S. multinationals to abet abuses. Tort liability, particularly liability for complicity under the ATS, serves this function.

To understand how aiding and abetting liability increases the effectiveness of economic engagement as a tool to promote human rights and democracy, one must consider the mechanisms by which investment is said to accomplish this

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[12]In others, such as Burma, U.S. foreign policy presumes that vigorous economic sanctions best promote democracy. *See* Exec. Order No. 13047, 62 Fed. Reg. 28301 (May 22, 1997)(banning all new investment in Burma), *extended by* Notice of Continuation of the National Emergency with Respect to Burma, May 17, 2005, *available at* http://www.whitehouse.gov/news/releases/2005/05/20050517-8.html. *Amici* take no position on whether either approach is effective or which approach works best in general or with respect to any particular nation.

result. According to advocates of constructive engagement, U.S. investment in countries with repressive regimes promotes human rights in a number of ways.

First, the argument posits that U.S. corporations will impart democratic values to government officials and private citizens, and that contact with Western business promotes greater integration of repressive regimes into the world community and thus further increases the regime's exposure to Western values.[13] Second, proponents argue that regimes with economic ties to Western governments will seek to maintain those ties and thus will act to promote their reputation through political liberalization.[14] Third, investors purportedly will demand respect for the rule of law so that disputes will be resolved fairly.[15]

To the extent these mechanisms work, ATS complicity liability increases their effectiveness. As a threshold matter, such liability ensures that engagement

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[13]Craig Forcese, *Globalizing Decency: Responsible Engagement in an Era of Economic Intergration*, 5 Yale Hum. Rts & Dev. L.J. 1, 5-6 (2002); USA*Engage, "Economic Engagement Promotes Freedom," *available at* www.usaengage.org/archives/studies/engagement.html; Mark B. Baker, *Flying Over the Judicial Hump: A Human Rights Drama Featuring Burma, The Commonwealth of Massachusetts, the WTO and the Federal Courts*, 32 Law & Pol'y Int'l Bus. 51, 81 (Fall 2000); Unocal Corporation, *Business and Human Rights*, *available at* http://www.unocal.com/responsibility/humanrights/hr4.htm (arguing corporations can promote respect for human rights by privately raising human rights issues in business meetings with government officials).

[14]Baker at 80-81; 85.

[15]USA*Engage, "Economic Engagement Promotes Freedom."

truly is "constructive." Engagement that involves complicity in abuses cannot be considered "constructive," because it supports the very abuses that a constructive engagement policy seeks to end. A corporation that abets human rights abuses will not impart democratic values; even if it attempts to do so, its complicity in abuses will demonstrate that it is not serious about any statements it might make concerning democracy or human rights. Furthermore, corporations complicit in abuses will generally have little incentive to take any action that might actually encourage reform, since such corporations have strong self-interested reasons to prefer the stability of governance by their autocratic partners over the uncertainty of democratization.[16]

A finding by an American court that a U.S. corporation has aided and abetted abuses, therefore, is akin to a conclusion that that corporation's engagement is not constructive. Thus, where Congress and/or the Executive have determined that constructive engagement is the most effective policy for encouraging respect for human rights in a given nation, ATS complicity liability

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[16]A company in a business partnership with a regime or that has been complicit in its abuses has an enormous stake in maintaining the *status quo*. Democratization might bring to power not only opponents of the regime, but opponents of the company. A democratic opposition would not be likely to look kindly on the company's involvement with the past regime's abuses, and might seek to hold the company to account for its actions. Complicit corporations are not likely to press for respect for the rule of law, which might serve to end their own impunity.

serves a vital role in supporting that policy, by ensuring through fact-specific adjudication that corporations that subvert our efforts by aiding and abetting rights abuses can be held accountable. This kind of fact-specific inquiry is a role uniquely suited to the Judiciary.

The district court in *Doe v. Unocal Corp.* recognized precisely this point. 963 F. Supp. 880, 892, 895 n.17 (C.D. Cal. 1997). There, an oil company allegedly complicit in abuses committed by the Burmese military asserted that adjudication of plaintiffs' claims would interfere with U.S. foreign policy, because Congress had recently permitted the President to prohibit new investment in Burma. *Id.* According to Unocal, Congress, in not banning existing investment, demonstrated an official U.S. policy of refraining from taking steps "that might serve only to isolate the Burmese Government [i.e. SLORC] and actually hinder efforts toward reform." *Id., quoting* Unocal Memorandum of Points and Authorities in Support of Motion to Dismiss at 1.

The district court, however, properly rejected that argument. It held:

> Even accepting the Congressional and Executive decisions as Unocal frames them, the coordinate branches of government have simply indicated an intention to encourage reform by allowing companies from the United States to assert positive pressure on SLORC through their investments in Burma. . . . Plaintiffs essentially contend that Unocal, rather than encouraging reform through investment, is knowingly taking advantage of and profiting from SLORC's practice of using forced labor and forced relocation, in concert with other

> human rights violations . . .to further the interests of the Yadana gas pipeline project. Whatever the Court's final decision in this action may be, it will not reflect on, undermine or limit the policy determinations made by the coordinate branches with respect to human rights violations in Burma.

Id. at 895, n.17. Companies that aid and abet abuses cannot be said to promote democracy or human rights and therefore inhibit constructive engagement.

Perhaps the most famous attempt to differentiate between "constructive" and harmful engagement, the "Sullivan Principles," illustrates the wide gulf between complicity in human rights abuses and truly "constructive" engagement. Created as a voluntary code of conduct for corporations in apartheid South Africa, the Sullivan Principles required companies not only to "eliminate all vestiges of racial discrimination" in their employment, but also to"[s]upport the ending of all apartheid laws." *Id.* at 1496-99, Principle I, II, III, VI. "The (Sullivan) Statement of Principles" Fourth Amplification, November 8, 1984; *reproduced in* Sullivan Principles For U.S. Corporations Operating in South Africa, 24 I.L.M. 1464, 1496 (1985). Thus, the Principles recognized that a constructively engaged corporation not only does not abet serious human rights abuses such as apartheid, it actively opposes them. Many corporations might fall in between—neither engaging in conduct that promotes constructive change nor assisting abuses that might lead to

ATS liability.[17] A corporation that is complicit in human rights abuses, however, is not a constructive presence.

Alien Tort Statute cases against corporations typically involve companies that allegedly abet abuses committed on their behalf by repressive government security forces. *E.g. Presbyterian Church of the Sudan*, 244 F. Supp. 2d 289; *Unocal Corp.*, 963 F. Supp. 880; *Bowoto v. ChevronTexaco*, 312 F.Supp.2d 1229 (N.D.Cal. 2004). The possibility of aiding and abetting liability forces companies to engage their government partners in exactly the kind of dialogue the constructive engagement model contemplates.

A corporation that knows it can be held liable for aiding and abetting will have every incentive to tell its government partner that it will not tolerate human rights violations on its project and to adopt safeguards to limit the opportunity for government officials to commit such abuses. Indeed, companies will explain to government officials that the U.S. legal system (and international law) forbid complicity in human rights violations; that victims are entitled to present evidence in court before a neutral decision-maker who will decide their case in accord with the rule of law rather than the will of the government; and that if those victims can prove their allegations they will be entitled redress. Thus, ATS aiding and abetting

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[17] *Amici* do not to suggest that merely failing to oppose repressive policies is actionable under the ATS.

liability ensures corporations will not only explain democratic values and institutions to officials of repressive governments, but will also demonstrate through their actions in attempting to limit the possibility that abuses will occur that those values and institutions are not merely aspirations, but actually govern the conduct of members of democratic societies, including corporations.

Companies will also convey to government officials that if government security forces engage in abuses on behalf of the company, those abuses will be paraded across a high profile stage in the United States. In this sense, potential liability strongly supports the constructive engagement rationale that posits that nations will seek to improve their reputations.

No court has held and appellants do not argue that merely investing in a country that has an authoritarian regime is sufficient for liability. Companies willing to tell their government partners that they will not be complicit in abuses will rarely be deterred from investing. That dialogue is exactly what "constructive" engagement requires.

IV. AIDING AND ABETTING LIABILITY UNDER THE ATS SUPPORTS THE U.S. APPROACH TO THE WAR AGAINST TERRORISM.

The United States has made clear that those who aid and abet terrorism must be held to account. Likewise, the U.S. government has always maintained that an

effective war against terrorism depends in part on building international respect for human rights standards and the rule of law. We cannot effectively demonstrate our commitment to these principles if we deny that aiding and abetting is an established principle of liability for human rights violations or if we afford those complicit in genocide, torture or murder more favorable treatment than those who assist acts of terrorism. If we expect others to cooperate with us, the United States must demonstrate its own commitment to holding accountable those complicit in the violation of universally recognized human rights.

President George W. Bush said in his 2002 State of the Union address: "[W]e have a great opportunity during this time of war [against terrorism] to lead the world toward the values that will bring lasting peace ... America will always stand firm for the non-negotiable demands of human dignity: [including] the rule of law [and] limits on the power of the state . . . "[18]

In a speech to the Heritage Foundation on October 31, 2001, Assistant Secretary Craner stated that "maintaining the focus on human rights and democracy worldwide is an integral part of our response to the attack and is even more essential today than before September 11. They remain in our interest in

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[18] http://www.whitehouse.gov/news/releases/2002/01/print/20020129-11.html.

promoting a stable and democratic world."[19] Similarly, then Secretary of State Colin L. Powell recently noted that we "[m]ust see the pursuit of democracy as central to the fight against terrorism. Healthy democratic societies are the best bulwark against terrorism . . ."[20]

In addition to affirming that the promotion of human rights and democracy is part of the war against terrorism, the U.S. government, and the international community, have repeatedly reaffirmed international aiding-and-abetting standards in the wake of the events of September 11, 2001. For example, U.N. Security Council Resolution 1373, which the U.S. supported, asserts that all states shall criminalize "the wilful provision or collection . . . of funds . . . *in the knowledge that they are to be used*, in order to carry out terrorist attacks." (emphasis added)(Sept. 28, 2001); *see also* U.N. Security Council: Resolution 1368 (On Threats to International Peace and Security Caused by Terrorist Acts) (Sept. 12, 2001) (stressing that those responsible for aiding, supporting or harboring perpetrators of September 11 attacks "will be held accountable.")

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[19] Remarks of Lorne W. Craner, Assistant Secretary for Democracy, Human Rights, and Labor to the Heritage Foundation (Oct. 31, 2001) *available at* http://www.state.gov/g/drl/rls/rm/2001/6378.htm

[20]Colin L. Powell, Remarks at the German Marshall Fund's Transatlantic Center, December 8, 2004, *available at* http://www.state.gov/secretary/former/powell/remarks/39588.htm

Likewise, President Bush stated before a special joint session of Congress with respect to Afghanistan's assistance to Al Qaeda: "By aiding-and-abetting murder, the Taliban regime is committing murder. . . They will hand over the terrorists, or they will share in their fate."[21] Subsequently, Congress' authorization of force against the Taliban approved military action against those who "aided the terrorist attacks" or "harbored" the perpetrators. Public Law 107-40, Sec. 2(a), September 18, 2001. Thus, aiding-and-abetting was the United States' *causus bellum* against Afghanistan.

Indeed, a central tenet of U.S. foreign policy is that "[w]e make no distinction between terrorists and those who *knowingly* harbor or provide aid to them." The National Security Strategy of the United States of America. *Available at* http://www.whitehouse.gov/nsc/nss.html. (emphasis added).

All of these statements show a consistency in the definition of aiding and abetting—knowingly providing aid to the perpetrators of abuses—and demonstrate the centrality of this principle in international law and U.S. foreign policy. The position that aiding and abetting crimes such as torture does not violate international law is at odds with the United States' position that aiding and abetting terrorism does violate international law (and, indeed, can provide grounds for war).

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[21] http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html (Sept. 20, 2001).

Likewise, there is no general, negative relationship between ATS cases and the war against terrorism. Our collective experience has not indicated that countries are less likely to participate in an important collective goal because of claims pursued by individual litigants in U.S. courts. Eliminating accomplice liability under the Alien Tort Statute, however, would undercut U.S. credibility in our critical war against terrorism.

V. POTENTIAL CONFLICTS WITH OTHER ASPECTS OF U.S. FOREIGN POLICY DO NOT JUSTIFY DRASTICALLY CURTAILING ATS LIABILITY.

Cases brought in the United States by private parties do not limit the ability of the Executive Branch to engage with foreign governments. Other governments generally understand that private lawsuits are not U.S. government actions.

Other governments do on occasion object to aspects of our legal system. As diplomats, it was our role to explain U.S. policy to the world, including how our government functions and our constitutional separation of powers. It fell to us to explain what may sometimes seem to other countries to be incomprehensible requirements of the U.S. legal system. National legal systems differ and at times conflict. Our task was to promote resolution of such disputes, which often arise from mutual misunderstanding. Mere differences in enforcement systems cannot by themselves justify eliminating a valuable means of human rights enforcement.

In any event, the ATS has not caused any greater conflict than other laws to which some foreign nations may object. Courts regularly apply U.S. law despite objections from foreign nations. *E.g. Barclay's Bank, PLC v. Franchise Tax Board of Cal.*, 512 U.S. 298, 303, 324 n. 22 (1994); *Laker Airways Ltd. v. Sabena*, 731 F.2d 909, 935-36 (D.C.Cir. 1984)(where statute grants foreign plaintiffs right to sue, U.S. interests override whatever foreign interests may be infringed when foreigner sues in U.S. courts against wishes of foreign state.)

There are times when a case brought under the Alien Tort Statute could conceivably damage U.S. foreign policy interests. The Supreme Court addressed that issue in *Sosa*, suggesting in *dicta* that courts applying the ATS should be careful on a case-by case basis not to interfere with U.S. foreign policy. 124 S.Ct. at 2766, n.21 (2004). We understand that there are a number of doctrines that federal courts have at their disposal, and which they have used to dispose of specific ATS cases deemed harmful to U.S. foreign policy.[22] Even prior to *Sosa*, this Court held that the "preferable approach" to analyzing justiciability under the ATS "is to weigh carefully the relevant considerations on a case-by-case basis.

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[22] Among other doctrinal tools, the "act of state doctrine" precludes courts "from inquiring into the validity of the public acts of a recognized foreign sovereign power committed within its own territory" in the "absence of a treaty or other unambiguous agreement regarding controlling legal principles." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401, 428 (1964). Other tools include sovereign immunity under the Foreign Sovereign Immunities Act.

This will permit the judiciary to act where appropriate in light of the express legislative mandate of the Congress in Section 1350, without compromising the primacy of the political branches in foreign affairs." *Kadic,* 70 F.3d at 249. Indeed, each of these doctrines can only be applied on a case-by-case basis.[23]

Wholesale repeal of complicity liability would conflict with this case-by-case approach. More generally, it would upset the proper distribution of functions between the Judiciary and the political branches in cases that potentially implicate U.S. foreign policy.[24]

Such repeal is also unnecessary to prevent the possibility of unwarranted effects on foreign policy in individual cases. Courts have already applied the numerous means at their disposal on a case-by-case basis, allowing ATS suits to proceed where warranted, while dismissing cases thought to intrude into the

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[23]For example, the act of state doctrine requires as a threshold matter that the *defendant* prove "the conduct in question was the public act of those with authority to exercise sovereign powers." *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 691, 694 (1976).

[24]Courts ordinarily have the obligation to decide a properly presented case, even where the controversy may potentially implicate foreign affairs. *W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics, Corp.*, 493 U.S. 400, 409-410 (1990). Courts cannot "shirk this responsibility merely because [a] decision may have significant political overtones" *Japan Whaling Assn. v. American Cetacean Soc.*, 478 U.S. 221, 230 (1985), or because it may embarrass foreign governments. *W.S. Kirkpatrick,* 493 U.S. at 409-410. Thus, it is "error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." *Baker v. Carr*, 369 U.S. 186, 211 (1962).

political branches' management of foreign relations.[25] There can be no dispute that precluding complicity liability would bar at least some ATS claims that do not even potentially interfere with U.S. foreign policy. *See NCGUB v. Unocal Corp.*, 176 F.R.D. 329, 362 (C.D.Cal. 1997) (State Department opining that "at this time" adjudication of ATS case involving allegations that a California oil company was complicit in forced labor and other abuses on its pipeline project in Burma, would not interfere with U.S foreign relations.)

CONCLUSION

Our experience as diplomats for the United States leads us to conclude that aiding and abetting liability under the Alien Tort Statute supports U.S. foreign policy. If a conflict were to arise between claims brought in a particular ATS case and other U.S. foreign policy goals, the U.S. courts have shown that they can effectively address that conflict. Accordingly, *amici* respectfully urge this Court to

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[25] For example, in *Sarei v. Rio Tinto* the court dismissed human rights claims after the U.S. government opined that adjudication would interfere with an ongoing peace process in Bougainville. 221 F.Supp.2d 1116, 1178-1200 (C.D.Cal. 2002). In *Saltany v. Reagan*, the court dismissed claims against the United Kingdom alleging that nation was complicit in a purportedly illegal United States attack on Libya. 702 F.Supp.319 (D.D.C. 1988). *Amici* take no position as to whether these cases were correctly decided, but simply note that courts that conclude particular cases would interfere with foreign policy have an array of tools to address that problem.

reject the district court's holding that aiding and abetting is not actionable under the ATS.

Respectfully submitted,

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August 30, 2005

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

Pursuant to FRAP 26.1, the *Amici* make the following disclosure:

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

NO.

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

NO.

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

NO.