No. 10-56739

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN DOE I; JOHN DOE II; JOHN DOE III, individually and on behalf of proposed class members; GLOBAL EXCHANGE,

Plaintiffs-Appellants,

v.

NESTLE USA INC.; ARCHER DANIELS MIDLAND COMPANY; CARGILL INCORPORATED COMPANY; CARGILL COCOA

Defendants and Appellees,

Appeal from United States District Court
for the Central District of California,
No. 2:05-cv-05133-SVW-JTL
The Honorable Stephen V. Wilson, United States District Judge

---

BRIEF OF DAVID J. SCHEFFER AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS AND REVERSAL

David J. Scheffer, Esq.
Center for International Human Rights
Northwestern University School of Law
375 East Chicago Ave.
Chicago, IL 60611-3069
312-503-2224
d-scheffer@law.northwestern.edu
Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTE

TREATY

OTHER AUTHORITIES

INTEREST OF THE AMICUS CURIAE[1]

David J. Scheffer is the Mayer Brown/Robert A. Helman Professor of Law and Director of the Center for International Human Rights at Northwestern University School of Law, where he teaches international criminal law, corporate social responsibility, and international human rights law. He served as U.S. Ambassador-at-Large for War Crimes Issues (1997-2001) and senior adviser and counsel to the U.S. Permanent Representative to the United Nations (1993-1997). He was deeply engaged in the policy formulation, negotiations, and drafting of the constitutional documents governing the International Criminal Court. He led the U.S. delegation that negotiated the Rome Statute (Rome Statute of the International Criminal Court, adopted July 17, 1998, 2187 U.N.T.S. 90 (1998)), and its supplemental documents from 1997 to 2001. He was deputy head of the delegation from 1995 to 1997. On behalf of the U.S. Government, he negotiated the statutes of and coordinated support for the International Criminal Tribunals for

[1] Counsel of record for all parties received notice at least 10 days prior to the due date of my intention to file this amicus brief; all counsel have consented to the filing of this brief pursuant to Rule 29(a); and the consent emails have been filed with the Clerk of the Court with this brief. No counsel for any party authored this brief in whole or in part, and no person or entity, other than the amicus curiae, made a monetary contribution to the preparation or submission of this brief.

the Former Yugoslavia and Rwanda, Special Court for Sierra Leone, and Extraordinary Chambers in the Courts of Cambodia. He has written extensively about the tribunals, including the International Criminal Court, and the negotiations leading to their creation.

Ambassador Scheffer submits this brief out of concern that the United States District Court for the Central District of California erred in its analysis of the Rome Statute in two ways: first, with regard to the mens rea provision for aiding and abetting liability, most particularly in the District Court's conclusions that this provision of the Rome Statute reflects customary international law and that the accessorial liability of aiding and abetting arises only when there is essentially a shared intent with the perpetrator of the underlying crime; and second, with regard to the District Court's misunderstanding of the exclusion of corporations, or juridical persons, from the personal jurisdiction of the International Criminal Court. Ambassador Scheffer believes this brief is necessary to clarify both the meaning of the Rome Statute's aiding and abetting liability provision and the exclusion of corporate liability from its personal jurisdiction.

SUMMARY OF ARGUMENT

The District Court errs in drawing upon Article 25(3)(c) of the Rome Statute of the International Criminal Court as a demonstration of customary international

law for aiding and abetting atrocity crimes under the International Criminal Court's subject matter jurisdiction. Article 25(3)(c) reads:

> 3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
>
> ....
>
> (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission....

This provision was a negotiated compromise among mostly common law and civil law governments after years of discussion and was not finalized to express a rule of customary law.

The Rome Statute was never intended, in its entirety, to reflect customary international law. Some of the document's provisions—particularly those pertaining to the subject matter jurisdiction of the International Criminal Court—were negotiated for the purpose of codifying customary international law. However, crucial to the passage of the Rome Statute, many other provisions were negotiated instead as compromises unique to the treaty and to the operation of the International Criminal Court. Indeed, aiding and abetting liability is of the latter type of provision and remained an unresolved issue until very late in the negotiations.

In addition, the District Court mistakenly concludes that the reference to "purpose" in Article 25(3)(c) of the Rome Statute essentially establishes the requirement of a shared intent between the perpetrator of the crime and the aider or abettor. The negotiating history of Article 25(3)(c) demonstrates that there was no definitive agreement pointing to either an intention standard or a knowledge standard with respect to aiding and abetting liability. The compromise "purpose" language chosen for Article 25(3)(c) reflects the obvious point that an aider or abettor purposely acts in a manner that has the consequence of facilitating the commission of a crime. The aider or abettor's intention in so acting, however, cannot be established without reference to the mens rea principles set forth in Article 30 of the Rome Statute.[2] Since the judges of the International Criminal Court have had no occasion yet to interpret Article 25(3)(c), particularly in conjunction with Article 30(2) (the intent standard), there is no judicial precedent

---

[2] Article 30 of the Rome Statute reads in its entirety:

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
2. For the purposes of this article, a person has intent where:
   (a) In relation to conduct, that person means to engage in the conduct;
   (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
3. For the purposes of this article, 'knowledge' means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. 'Know' and 'knowingly' shall be construed accordingly.

of the International Criminal Court to elucidate aiding and abetting liability under the Rome Statute.

But there are international precedents repeatedly confirmed by other international criminal tribunals and federal courts over the last sixteen years that are widely viewed as reflecting customary international law. The Rome Statute would be consistent with these precedents were a determination of the mens rea for aiding and abetting to rest upon the treaty's Article 30(2)(b) standard that attaches to the consequence of a crime: that the "person means to cause that consequence *or is aware that it will occur in the ordinary course of events*." (emphasis added)

The District Court also errs in its understanding of why the Rome Statute excludes corporations from the International Criminal Court's personal jurisdiction. The negotiators' decision in Rome to exclude corporations had nothing to do with customary international law and everything to do with a highly diverse application of *criminal* (as opposed to civil) liability for corporate conduct in domestic legal systems around the globe. Given that diversity, it was neither possible to negotiate a new standard of criminal liability with universal application in the time frame permitted for concluding the Rome Statute, nor plausible to implement the complementarity principle of the treaty when confronted with such differences in criminal liability for juridical persons. The decision in Rome had nothing to do with *civil* liability for tort actions by multinational corporations, a

type of liability falling outside of the reach of the International Criminal Court. However, civil liability for corporations, particularly in relation to the most egregious torts, arises in domestic systems worldwide (including the United States) and is firmly embedded as a general principle of law.

ARGUMENT

I. ARTICLE 25(3)(C) OF THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT DOES NOT REFLECT CUSTOMARY INTERNATIONAL LAW

The District Court held that the mens rea standard for aiding and abetting liability under the Alien Tort Statute must reflect "*Sosa's* instruction that norms are only actionable if they are universally recognized and defined with specificity." *Doe 1 v. Nestle, S.A.*, 748 F. Supp. 2d 1057, 1080 (C.D. Cal. 2010). The District Court examines the Rome Statute of the International Criminal Court and erroneously concludes that Article 25(3)(c) of the treaty must represent customary international law. *Id.* at 1085. Appellants correctly point out that customary international law has long established a knowledge standard for aiding and abetting liability and that federal common law, which is informed by customary international law, also embodies the knowledge standard and should guide the courts in determining accessorial liability under the Alien Tort Statute. Brief of Appellant at 34-46, *Doe I v. Nestle, S.A.*, 748 F. Supp. 2d 1057 (C.D. Cal. 2010).

While fully embracing Appellant's reasoning, this amicus brief explicates two narrow but essential points not fully addressed elsewhere. The first objective is to explain, in this Part I, why Article 25(3)(c) of the Rome Statute, which the District Court relies upon for its finding of a purpose standard, should not be interpreted as customary international law. Nonetheless, even if the provision as so interpreted were to be firmly settled as customary international law in the view of the federal judiciary, the second objective of this amicus brief is to explain, in Part II, how the Second Circuit's interpretation of the wording of Article 25(3)(c) betrays both what transpired in the negotiations leading to the Rome Statute and how the mens rea standard for aiding and abetting is established under the treaty.

The Rome Statute is a negotiated treaty of considerable complexity designed to govern only the International Criminal Court. It was never intended, in its entirety, to reflect customary international law. Article 25(3)(c) was a negotiated compromise among primarily common law and civil law governments after years of talks leading to the Rome Statute and was not finalized to express a rule of customary law. Nonetheless, the District Court joins the Second Circuit in leaping to the erroneous conclusion that Article 25(3)(c) embodies customary international law. *See Presbyterian Church of Sudan v Talisman Energy, Inc.,* 582 F.3d 244, 258-59 (2d Cir. 2009).

A. The substantive crimes within the jurisdiction of the International Criminal Court were drafted to reflect customary international law

The substantive crime provisions of the Rome Statute were negotiated with the understanding that they would record customary international law. These provisions of the Rome Statute are the atrocity crimes defined in Articles 6 (genocide), 7 (crimes against humanity), and 8 (war crimes)—the very provisions federal courts should be looking to for guidance about the *primary* violations of international law at stake in Alien Tort Statute litigation. *See* WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 92 (4th ed. 2011).

For years the drafters, including myself and a team of State, Defense, and Justice Department lawyers and their foreign counterparts, examined and debated the development of international humanitarian law and international criminal law to arrive at a general agreement as to what constituted customary international law for the substantive crimes that would be prosecuted before the International Criminal Court. Thus, if one applies the stringent universality requirements of *Sosa v. Alvarez-Machain,* 542 U.S. 692, 725 (2004) to the Rome Statute, one can confidently identify the atrocity crimes defined therein as representing the causes of action that have universal character and are of such a magnitude that they fall within the jurisdictional scope of the Alien Tort Statute.

B. The general principles of law and other key provisions of the Rome Statute were not all drafted to reflect customary international law

The sharp focus on customary international law for the subject matter jurisdiction of the International Criminal Court never was the explicit aim of the negotiations regarding other provisions of the Rome Statute, including the negotiations on accessorial liability. While some other articles of the Rome Statute ended up reflecting customary international law, Article 25(3)(c) is *not* one of them.

The general principles of criminal law set forth in Articles 22-33 of the Rome Statute were intensively negotiated, often leading to compromises between common law and civil (Romano-Germanic) law countries. Delegations schooled in *Sharia* law or other major legal systems also actively intervened. In some instances, the end product of this process of negotiation was a provision that mirrors customary international law. For example, the provisions of the Rome Statute that doubtless fall within this category include Articles 22 (*nullum crimen sine lege*), 23 (*nulla poena sine lege*), 24 (*non-retroactivity ratione personae*), 25(3)(e) (incitement to commit genocide), 32 (mistake of fact or mistake of law), and 67 (rights of the accused).

However, following the deals struck and compromises arrived at during years of talks, it would be erroneous to claim that each and every general principle of law and rule of evidence and procedure, penalties, and sentencing were

reflections of customary international law. As explained above, negotiators labored very hard to create a subject matter jurisdiction of only crimes of customary international law, but the Rome Statute never would have come to pass if that standard of universal acceptance had been required for other provisions, including each general principle of law crafted to apply to the narrowly structured jurisdiction of the International Criminal Court.

For example, Article 33, a general principle of law on superior orders and prescription of law, was heavily negotiated, resulting in compromise language that does not mirror comparable provisions in the charters of the Nuremberg and Tokyo International Military Tribunals or the statutes of the other international or hybrid criminal tribunals of recent years. Indeed, the end result in Rome reflected more what was narrowly acceptable to NATO military commanders than what was desired by many governments. The former President of the International Criminal Tribunal for the Former Yugoslavia, Professor Antonio Cassese, writes, "[Article 33] is at odds with customary international law, for it does not include *war crimes* in the category of offences with regard to which superior order [sic] enjoining their commission are always manifestly unlawful." ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 279 (2d ed. 2008).

Beyond the general principles of law, another example of negotiated compromise language arises with Article 77, which establishes a maximum

sentence of life imprisonment "when justified by the extreme gravity of the crime and the individual circumstances of the convicted person." Arab and Caribbean delegations strongly objected to the absence of the death penalty in the Rome Statute and would never concede that Article 77 reflects the maximum degree of punishment permitted under customary international law. WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 335 n. 17 (4th ed. 2011). Indeed, the U.S. Government would not concede that point either.

C. Article 25(3)(c) of the Rome Statute was not drafted to reflect customary international law

Similarly, Article 25(3)(c) of the Rome Statute was negotiated not to codify customary international law but to accommodate the numerous views of common law and civil law experts about how, precisely, to define the aider or abettor. Per Saland, the Swedish Chairman of the Working Group on the General Principles of Criminal Law for years prior to and throughout the Rome Conference, writes that Article 25

> posed great difficulties to negotiate in a number of ways. One problem was that experts from different legal systems took strongly held positions, based on their national laws, as to the exact content of the various concepts involved. They seemed to find it hard to understand that another legal system might approach the issue in another way: e.g., have a different concept, or give the same name to a concept but with a slightly different content....The text was also burdened with references to the mental element (e.g., intent and knowledge) because agreement had not yet been reached as to the text of a separate article dealing with the mental element in general terms.

Per Saland, *International Criminal Law Principles*, *in* THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE 189, 198 (Roy Lee ed., 1999).

As the lead U.S. negotiator, I would recall vividly any representation or even speculation that the text of what laboriously became Article 25(3)(c) was being universally settled as a matter of customary international law, and no such view was expressed. It was a very contentious provision. Some delegations sought explicit reference to intention, notwithstanding the important complication that the word "intention" has different meanings in different legal systems. Other delegations were wedded to the term "knowledge," believing that it better reflected the standard that was employed in their national practice and that had been endorsed in the jurisprudence of the key sources for customary international law: the Nuremberg and Tokyo International Military Tribunals and the International Criminal Tribunals for the Former Yugoslavia and Rwanda.

Negotiators struggled to find compromise wording and ultimately settled on using neither "intent" nor "knowledge" but "purpose." Reaching this compromise was made easier, in the end, with prior resolution of the final language of Article 30, an article which deals expressly with the mental element of crimes. Finalizing the language of Article 30 helped enormously, as it enabled negotiators to look to Article 30 for intent and knowledge standards without having either standard

explicitly written into Article 25(3)(c). This being the history of Article 25(3)(c) negotiations, if anyone at the time had claimed we were recording customary international law on aiding and abetting liability, they would have been laughed out of the room.

Thus, the wording of Article 25(3)(c) was uniquely crafted for the International Criminal Court, and when read in conjunction with the mens rea standards set forth in Article 30 of the Rome Statute, leaves to the judges of the International Criminal Court the task of determining precisely the proper criteria for accessorial liability—for the International Criminal Court alone. But since Article 25(3)(c) was never negotiated as and is not today a statement of customary international law, and because the International Criminal Court has yet to interpret the provision's meaning and application with respect to accessorial liability for aiding and abetting, national courts can only speculate as to the provision's scope, meaning, and relevance to their own jurisprudence. One pillar of certainty in the negotiating history, though, is that an intent-only mens rea standard for Article 25(3)(c) has no standing as customary international law.

II. THE MENS REA REQUIREMENT FOR AIDING AND ABETTING UNDER THE ROME STATUTE IS AMBIGUOUS AND MOST REASONABLY INTERPRETED AS A KNOWLEDGE STANDARD

The District Court claims the Rome Statute "specifically and clearly" sets out a purpose standard for aiding and abetting when the meaning of the word

"purpose" is actually ambiguous. *Nestle*, 748 F.Supp. 2d at 1085. In the years following the Rome Statute negotiations, scholars have debated what Article 25(3)(c) of the Rome Statute achieves—whether the provision creates a shared purpose requirement for aiding and abetting or whether, when joined with the mental element provision of Article 30, it builds upon longstanding and growing precedents from international and hybrid criminal tribunals that sustain the knowledge standard for aiding and abetting. *See* ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 74, 214-29 (2d ed. 2008); Roger S. Clark, *The Mental Element in International Criminal Law: The Rome Statute of the International Criminal Court and the Elements of Offences*, 2 CRIM. L.F. 291, 301-03 (2001); Donald K. Piragoff & Darryl Robinson, *Article 30: Mental Element*, *in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 849, 854-55 (Otto Trifftrer ed., 2d ed. 2008); Kai Ambos, *Article 25: Individual Criminal Responsibility*, *in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 743, 759-60 (Otto Trifftrer ed., 2d ed. 2008); WILLIAM A. SCHABAS, THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 435-46 (2010); Albin Eser, *Individual Criminal Responsibility*, *in* 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 767, 798-801, 900-02 (Antonio Cassese, et al. eds., 2002). This debate demonstrates that there are multiple reasonable interpretations, one of them

being application of the knowledge standard. But until the judges of the International Criminal Court rule on the mens rea requirement for aiding and abetting under the Rome Statute, no national court can dictate that one standard (such as purpose or shared intention) negates a second standard (such as knowledge) in the International Criminal Court's constitutional framework or in its practice, and certainly not within the realm of customary international law.

A. The "purpose" requirement was not added to Article 25(3)(c) during the Rome negotiations to require a shared intention by the aider or abettor and the perpetrator of the crime

Equating the "purpose to facilitate" requirement in Article 25(3)(c) with the perpetrator's intent to commit the crime, thus marrying the perpetrator's intent with that of the aider or abettor as a virtual co-perpetrator, is a mistaken reading of the provision.

Professor William Schabas writes, "The purpose requirement was added during the Rome Conference, but nothing in the official records provides any clarification for the purposes of interpretation." WILLIAM SCHABAS, THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 435 (2010). The District Court succumbs to the notion that insertion of the word "purpose" in Article 25(3)(c) must really mean a purpose or shared intent standard for aiding and abetting, when in reality the phrase "purpose to facilitate" was a compromise usage of those words to avoid having to agree on precisely the issue of shared

intent. In Rome there was no agreement to so limit aiding and abetting to such a narrow range of liability requiring the finding of a shared intent to commit the underlying crime.

The District Court mistakenly conflates the mens rea standard for aiding abetting in the Rome Statute with the "specific intent" mens rea standard long established for direct participation in the crime of genocide and thus seeks to exclude entirely aiding and abetting as an action associated with a crime that a person is "aware…will occur in the ordinary course of events." Rome Statute, art. 30(2)(b). The specific intent mens rea standard for genocide is of a different and more rigorous character from the intent standard for crimes against humanity and war crimes in the jurisprudence of the international criminal tribunals and in the matter of accessorial liability for aiding and abetting; a distinction that the District Court fundamentally overlooks.

The District Court creates a needlessly confusing picture of the use of the word "purpose" in Article 25(3)(c) and its relationship to a mens rea standard for aiding and abetting liability when the Court analyzes the specific intent mens rea standard in *Abagninin v. AMVAC Chemical Corp.*, 545 F.3d 733 (9th Cir. 2008). *Nestle*, 748 F.Supp.2d at 1097-98. The crime of genocide is one of two atrocity crimes (the other being the crime against humanity of persecution) that require a mens rea standard of specific intent by the perpetrator. Significantly, the specific

intent mens rea standard has not been adjudicated as a standard associated with aiding and abetting liability. One can debate whether an aider and abettor requires a mens rea standard of intent or "purpose," as opposed to a "knowledge" standard, but it has never been the case, including in *Abagninin*, where the highest standard of intent—specific intent—that is only associated with two atrocity crimes (genocide and the crime against humanity of persecution) is required before establishing aiding and abetting liability, even for aiding and abetting the commission of either of these two underlying crimes. The furthest the tribunals have gone in associating specific intent with aiding and abetting liability for either of these crimes is to require that the aider and abettor be *aware* of the perpetrator's specific intent, namely, have knowledge about the perpetrator's specific intent. But the tribunals have not established that the aider and abettor must share the perpetrator's specific intent in providing assistance or encouragement.

The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia addressed this point in *Prosecutor v. Krstić*:

> 140. This, however, raises the question of whether, for liability of aiding and abetting to attach, the individual charged need only possess knowledge of the principal perpetrator's specific genocidal intent, or whether he must share that intent. The Appeals Chamber has previously explained, on several occasions, that an individual who aids and abets a specific intent offense may be held responsible if he assists the commission of the crime knowing the intent behind the crime. This principle applies to the Statute's prohibition of genocide, which is also an offence requiring a showing of specific intent. The

> conviction for aiding and abetting genocide upon proof that the defendant knew about the principal perpetrator's genocidal intent is permitted by the Statute and case-law of the Tribunal.
>
> 141. Many domestic jurisdictions, both common and civil law, take the same approach with respect to the mens rea for aiding and abetting, and often expressly apply it to the prohibition of genocide. Under French law, for example, an aider and abettor need only be aware that he is aiding the principal perpetrator by his contribution, and this general requirement is applied to the specific prohibition of the crime of genocide. German law similarly requires that, in offences mandating a showing of a specific intent (*dolus specialis*), an aider and abettor need not possess the same degree of mens rea as the principal perpetrator, but only to be aware of the perpetrator's intent. This general principle is applied to the prohibition of genocide in Section 6 of the German Code of Crimes Against International Law. The criminal law of Switzerland takes the same position, holding that knowledge of another's specific intent is sufficient to convict a defendant for having aided a crime. Among the common law jurisdictions, the criminal law of England follows the same approach, specifying that an aider and abettor need only have knowledge of the principal perpetrator's intent. This general principle again applies to the prohibition of genocide under the domestic English law. The English approach to the mens rea requirement in cases of aiding and abetting has been followed in Canada and Australia, and in some jurisdictions in the United States.

Prosecutor v. Krstić, Case No. IT-98-33-A, Appeals Judgment, ¶ 140-41 (Int'l Crim. Trib. For the Former Yugoslavia Apr. 19, 2004)

Professors Ronald C. Slye and Beth Van Schaack draw upon international criminal tribunal jurisprudence to summarize:

> The most significant difference between crimes against humanity [other than persecution] and genocide is the *mens rea* element of specific intent (*dolus specialis*) required for genocide. The notion of specific intent indicates that the perpetrator acted with the

> intent to bring about a certain consequence. In the case of genocide, this consequence is the complete or partial destruction of a protected group....This mental state transforms what would otherwise be a municipal law crime (such as murder) or a crime against humanity (such as extermination) into genocide....
>
> The ad hoc tribunals have also lessened the difficulties associated with proving specific intent by removing it as a requirement in cases involving accomplice liability to genocide. The Genocide Convention at Article III prohibits "complicity in genocide" along with genocide, conspiracy to commit genocide, and direct and public incitement to commit genocide. The same types of liability are recognized by the ad hoc tribunals and the ICC. With respect to cases against individuals accused of being accomplices to genocide, the ad hoc tribunals have held that the accomplice need only act "knowingly" with respect to the primary perpetrator, thus paving the way for genocide convictions without genocidal intent. In other words, under this approach, if a defendant charged with complicity knew that the principal actor was acting with the specific intent to commit genocide, the accomplice could be liable for genocide as well, even though the accomplice did not himself or herself possess genocidal intent.

RONALD C. SLYE & BETH VAN SCHAACK, ESSENTIALS INTERNATIONAL CRIMINAL LAW 217, 221 (2009).

Additionally, the District Court's assumption that the Model Penal Code's "purpose" standard was the source for the text of Article 25(3)(c) as well as the basis for interpreting that provision remains the view of only one negotiator from Germany. *Nestle*, 748 F.Supp.2d at 1086. Even if that view were accepted, it has nothing to do with customary international law, but only demonstrates even more strongly that compromise language was discovered to overcome deep divisions of opinion among negotiators.

B. Article 25(3)(c) must be interpreted together with the general principle of law on mental element set forth in Article 30(2)(b) of the Rome Statute

The purpose language of Article 25(3)(c) was intended to require that an aider and abettor purposely acts in a manner that facilitates the commission of a crime. One must look, however, to Article 30 for guidance on the mental element required for aiding and abetting liability.

Prior to the Rome Conference, there remained a lingering and significant problem among largely common law and civil law delegations about precisely how the mens rea for aiding and abetting should be worded. The Preparatory Committee draft in spring 1998, which was the initial working draft in Rome, reflected this continued indecision over the content of Article 25(3)(c): "[With [intent][knowledge] to facilitate the commission of such a crime,] aids, abets or otherwise assists…" *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome 15 June – 17 July 1998, Official Records, Volume III*, U.N. Doc. A/CONF.183/13 (Vol. III) (2002), at 31. It was only after negotiators reached a consensus on Article 30 in Rome during the summer of 1998 that they could finally agree on the compromise language of "for the purpose of facilitating" in Article 25(3)(c).

Article 30 of the Rome Statute is the agreed formula for how both intent and knowledge would be described and applied as the mental element for criminal acts,

"[u]nless otherwise provided." Rome Statute, art. 30(1). The latter proviso relates to explicit formulations of intent and knowledge for some of the atrocity crimes defined in Articles 6, 7, and 8, for command responsibility under Article 28, and for participants in a "common purpose" under Article 25(3)(d)(ii). WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 236-37 (4th ed. 2011). The District Court failed to recognize that the drafters explicitly confirmed the mens rea standards of these provisions as exceptions to Article 30, whereas they simply did not do so with "purpose" in Article 25(3)(c).

As mentioned above, Article 25(3)(c)'s opening phrase, "For the purpose of facilitating the commission of such a crime," was agreed to in Rome during the final negotiations as an acceptable compromise phrase to resolve the inconclusive talks over whether to use the word "intent" or the word "knowledge" for this particular mode of participation. The "purpose" language stated the de minimus and obvious point, namely, that an aider or abettor purposely acts in a manner that facilitates the commission of a crime, but one must look to Article 30(2)(b) for guidance on how to frame the intent of the aider or abettor with respect to the consequential crime.

The final text of Article 30(2)(b) easily captures the mens rea requirement for aiding and abetting, namely, "[i]n relation to a consequence, that person means to cause that consequence *or is aware that it will occur in the ordinary course of*

events." (emphasis added). At Rome, negotiators did not relegate aiding and abetting to the first prong of this formulation—"means to cause that consequence"—which would have injected a shared intention standard into aiding and abetting. As noted below, that construction would collapse 25(3)(c) into other provisions of Article 25(3). Rather, the intent of the aider or abettor is logically discovered within the awareness of the "consequence," namely that he or she who aids or abets is someone who "is aware that [the consequence] will occur in the ordinary course of events." Rome Statute, art. 30(2)(b).

Donald Piragoff, lead Canadian Government negotiator on general principles of law throughout the years of negotiations culminating in Rome, writes about the relationship between aiding and abetting liability under Article 25(3)(c) and mental element requirements of Article 30(2):

> It is submitted that …aiding and abetting by an accused requires both knowledge of the crime being committed by the principal and some intentional conduct by the accused that constitutes the participation….Article 30 para. 2(b) makes it clear that "intent" may be satisfied by an awareness that a consequence will occur in the ordinary course of events. This same type of awareness can also satisfy the mental element of "knowledge," as defined in article 30, para. 3. Therefore, if both "intent" and "knowledge" are required on the part of an accomplice, these mental elements can be satisfied by such awareness.

Donald K. Piragoff & Darryl Robinson, *Article 30: Mental Element*, *in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 849, 855 (Otto Trifftrer ed., 2d ed. 2008).

There has been no ruling by the judges of the International Criminal Court on whether the use of "purpose" in Article 25(3)(c) expresses the requirement of essentially shared intent or is used to describe what the aiding and abetting liability relates to—the commission of a crime. However, the second prong of Article 30(2)(b) ("that person…is aware that it will occur in the ordinary course of events") provides a logical and common sense standard by which to judge mens rea for aiding and abetting. There has been no jurisprudence to deny the applicability of the second prong of Article 30(2)(b) with regard to aiding and abetting liability.

C. Article 25(3)(c) is reasonably read with a knowledge standard because doing so maintains the distinction between aider or abettor and co-perpetrator and is consistent with international jurisprudence

Finding an intent standard for aiding and abetting obliterates the distinction between aiders and abettors, on the one hand, and perpetrators of atrocity crimes on the other hand, thus obviating the need for article 25(3)(c) altogether. Courts should give "full effect to each provision of a statute" and should not "make surplusage of any provision." *Zimmerman v. Oregon Dept. of Justice*, 170 F.3d 1169, 1177 (9th Cir. 1999). If the aider and abettor is required to intend for the primary crime to be committed, that person can and should be prosecuted under other provisions of Article 25(3). However, the very existence of Article 25(3)(c) compels the conclusion that the drafters of the Rome Statute meant to avoid co-

perpetrator liability for aiding and abetting. Professor William Schabas explains, "Some judgments [of the war crimes tribunals] have attempted to explain the distinction [between aiding and abetting and perpetration] in another way, stating that when the accomplice 'shares' the intent of the principal perpetrator, he or she becomes a 'co-perpetrator.'" WILLIAM A. SCHABAS, THE U.N. INTERNATIONAL CRIMINAL TRIBUNALS: THE FORMER YUGOSLAVIA, RWANDA AND SIERRA LEONE 307-08 (2006). Had we, the drafters of the Rome Statute, meant to require an intent standard for aiding and abetting, we would have agreed to recast aiding and abetting more coherently as a co-perpetrator mode of liability. We did not. Consequently, a national court would be mistaken to identify the Rome Statute as somehow confirming a shared intention standard and denying the knowledge standard.

Moreover, as explained in the Appellant's brief, the great weight of international precedent has identified aiding and abetting with a knowledge standard. *See, e.g., Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Judgment, ¶¶ 234-35, 245 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998); *Callixte Kalimanzira v. The Prosecutor*, Case No. ICTR-05-88-A, Appeals Judgment, ¶ 86 (October 20, 2010); *Prosecutor v. Brima, Kamara, and Kanu*, SCSL-04-16-T, Judgment, ¶ 776 (June 20, 2007); *Kaing Guek Eav alias Duch,* Case No. 001/18-07-2007/ECCC/TC, Judgment, ¶ 535 (July 26, 2010). A knowledge standard for

aiding and abetting liability under the Rome Statute would be consistent with these precedents, with a fair reading of Articles 25(3)(c) and 30(2)(b), and with the definition of "knowledge" set forth in Article 30(3).

The final wording of Article 25(3)(c), which awaits initial interpretation by the judges of the International Criminal Court, was neither surplusage nor a negation of a large body of precedent for aiding and abetting liability.

III. CORPORATE LIABILITY UNDER THE ALIEN TORT STATUTE

The District Court draws from its misinterpretation of footnote 20 of *Sosa*, 542 U.S. at 732 n.20, the further requirement "of identifying well-defined, universally acknowledged international norms of corporate liability" in order to hold Nestle or any other corporation liable under the Alien Tort Statute. *Nestle*, 748 F. Supp. 2d at 1139. In so doing, the District Court requires that the character of the tortfeasor must be firmly established as a matter of international law. The District Court then goes on to misinterpret the drafting history of the Rome Statute as revealing "that the global community of nation-states in fact lacks a consensus regarding corporate liability for human rights violations." *Id.* This reading of the negotiating history is seriously flawed. *See* David Scheffer and Caroline Kaeb, *The Five Levels of CSR Compliance: The Resiliency of Corporate Liability under The Alien Tort Statute and the Case for a Counterattack Strategy in Compliance Theory,* 29 BERKELEY J. INT'L LAW 334,364-365, 368 (2011).

The disagreement before and during the Rome negotiations was not whether corporations could be held liable for *civil* damages for the commission of atrocity crimes or other torts, particularly by national courts. The debate centered on whether the International Criminal Court should have the authority to prosecute corporations for violations of international *criminal* law and then impose *criminal* penalties on such juridical persons. Practice varies considerably in national systems around the globe on the *criminal* liability of corporations and the penalties associated therewith, whereas it is universally accepted that corporations are subject to civil liability under domestic law, and by logic the most egregious torts that would constitute atrocity crimes. *See* International Commission of Jurists, *Report of the Expert Legal Panel on Corporate Complicity in International Crimes,* BUSINESS & HUMAN RESOURCE CENTRE (2008), *available at* http://www.business-humanrights.org/Updates/Archive/ICJPaneloncomplicity. That presented a substantial problem for the negotiators, for the unique complementarity structure of the Rome Statute favors similarity on the most fundamental elements of criminal liability in states parties' criminal law systems in order to lift much of the burden of prosecution from the International Criminal Court and devolve it to national courts.

Also, for years the negotiations had progressed with a singular focus on individual criminal liability. When corporate liability was introduced late in the

process, delegations did not have enough time to digest it or understand all of its ramifications. It was no surprise that negotiators at Rome could not find common ground quickly enough to include corporations in the personal jurisdiction of the International Criminal Court.

Thus, no conclusion should be drawn regarding the exclusion of corporations from the jurisdiction of the Rome Statute other than that no political consensus could be reached to use the particular treaty-based court governed by the Rome Statute to prosecute corporations under international criminal law for atrocity crimes. The Rome Statute left other avenues for holding corporations accountable for criminal conduct, and certainly for tortious conduct leading to civil damages, wide open.

The District Court's interpretation of the Rome Statute's negotiating history errs in assuming that footnote 20 of *Sosa* must be read to require that corporate liability had to be viewed by the negotiators as a norm "based on clearly defined and universally recognized international law." *Nestle*, 748 F. Supp. 2d at 1140. The negotiators never concluded that the treaty purposely meant to express a principle of law precluding national courts of law—either civil or criminal—from proceeding against corporations for the commission of atrocity crimes or egregious torts in foreign countries. The omission of juridical persons from the Rome Statute does not mean that corporations enjoy virtual immunity under international law

from either civil or criminal liability; it simply means that the International Criminal Court was established without corporations being chosen to fall under its heavily negotiated jurisdiction.

CONCLUSION

The Rome Statute neither confirms an intent standard as a rule of customary international law for aiding and abetting liability nor any rule on corporate liability, civil or criminal. The District Court commits two material errors in its judgment. First, the District Court misinterprets the mens rea standard for aiding and abetting liability as set forth in the consolidated reading of Articles 25(3)(c) and 30(2)(b) of the Rome Statute. Article 25(3)(c) establishes aiding and abetting liability as a form of individual criminal liability that confirms the purpose of acting so as to facilitate the commission of the principal crime. Article 30(2)(b) describes the mens rea requirement for aiding and abetting liability as one requiring the individual to be "aware that [the consequence] will occur in the ordinary course of events." That wording points to a knowledge standard for aiders and abettors, though the judges of the International Criminal Court have yet to rule on the issue. Until they do, no national court, including the District Court, can conclusively derive an intent-only mens rea standard for aiding and abetting liability under the Rome Statute. Article 25(3)(c) was never negotiated as a confirmation of customary international law.

Second, the District Court errs in fundamentally misunderstanding why the Rome Statute does not address corporate liability. The personal jurisdiction of the Rome Statute is limited to natural persons only because no consensus was reached among delegations as to the *criminal* liability of juridical persons in national legal systems throughout the world. The omission of corporate liability under the Rome Statute simply reflected the diverse views of delegations about criminal liability for corporations under their national legal systems and was not a judgment about the status of corporate *civil* liability as a matter of either customary international law or national or federal common law.

The District Court builds a fragile pyramid of misinterpretations and misunderstandings of the Rome Statute to erroneously discover, as a matter of customary international law, an intent standard for aiding and abetting liability and a prohibition of corporate civil liability for the commission of atrocity crimes and other egregious torts. This extreme distortion of prevailing law and practice crumbles under the weight both of the negotiating record of the Rome Statute and of customary international law long reaffirmed by international criminal tribunals and federal common law.

For the foregoing reasons, this Court should reverse the District Court's dismissal and remand the case for further proceedings on the merits.

Respectfully submitted,

/s/ DAVID J. SCHEFFER
Center for International Human Rights
Northwestern University School of Law
375 East Chicago Avenue
Chicago, Illinois 60611-3069
(312) 503-2224
d-scheffer@law.northwestern.edu
July 1, 2011

CERTIFICATE OF COMPLIANCE

This amicus curiae brief complies with the type-volume limitations set forth in Fed. R. App. P. 29(d) because it contains 6,991 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced 14 point Times New Roman typeface using Microsoft Word 2007.

Dated: July 1, 2011

/s/ David J. Scheffer
David J. Scheffer
Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that I filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by paper due to a technical CM/ECF registration error.

I further certify that I have mailed the foregoing documents in booklet form to the following parties below by First-Class Mail, postage prepaid.

Dated: July 1, 2011

/s/ David J. Scheffer
David J. Scheffer
Amicus Curiae

Andrew John Pincus
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
apincus@mayerbrown.com

Brad D. Brian
Munger, Tolles & Olson LLP
355 South Grand Avenue
35th Floor
Los Angeles, CA 90071-1560
Brad.Brian@MTO.com

Christopher Todd Handman
Hogan Lovells US LLP
555 Thirteenth Street, NW
Washington, DC 20004
chris.handman@hoganlovells.com

Craig A. Hoover
Hogan Lovells US LLP
555 Thirteenth Street, NW
Washington, DC 20004
craig.hoover@hoganlovells.com

Daniel Paul Collins
Munger, Tolles & Olson LLP
355 South Grand Avenue
35th Floor
Los Angeles, CA 90071-1560
Daniel.Collins@mto.com

Jonathan H. Blavin
Munger Tolles & Olson, LLP
560 Mission Street
San Francisco, CA 94105
jonathan.blavin@mto.com

Julie A. Shepard
HOGAN LOVELLS US LLP
1400
1999 Avenue of the Stars
Los Angeles, CA 90067
jashepard@hhlaw.com

Kristin Linsley Myles
Munger Tolles & Olson, LLP
27th. Fl.
560 Mission Street
San Francisco, CA 94105
Kristin.Myles@mto.com

Lee H. Rubin
MAYER BROWN, LLP
Suite 300
3000 El Camino Real
Two Palo Alto Square
Palo Alto, CA 94306-2112

Paul Hoffman
Schonbrun DeSimone Seplow Harris & Hoffman, LLP
Suite 100
723 Ocean Front Walk
Venice, CA 90291
hoffpaul@aol.com

Terrence Patrick Collingsworth
Conrad & Scherer, LLP
Suite 502
1156 15th Street NW
Washington, DC 20005
tcollingsworth@conradscherer.com