C.A. No. 10-56739

In the United States Court of Appeals for the Ninth Circuit

JOHN DOE I, JOHN DOE II, AND JOHN DOE III, INDIVIDUALLY AND ON BEHALF OF PROPOSED CLASS MEMBERS; AND GLOBAL EXCHANGE,
Plaintiffs-Appellants,

v.

NESTLÉ U.S.A., INC.; ARCHER DANIELS MIDLAND COMPANY; AND CARGILL, INCORPORATED,
Defendants-Appellees,

On Appeal from the United States District Court for the Central District of California, Case No. C-05-5133-SVW
The Honorable Stephen V. Wilson, United States District Judge

ANSWERING BRIEF OF DEFENDANTS-APPELLEES NESTLÉ U.S.A., INC.; ARCHER-DANIELS-MIDLAND COMPANY; AND CARGILL, INCORPORATED

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CORPORATE DISCLOSURE STATEMENT

Defendant-Appellee Archer-Daniels-Midland Company is a publicly traded domestic corporation. No publicly-traded company owns 10% or more of its common stock.

Defendant-Appellee Nestlé U.S.A., Inc. is a wholly-owned subsidiary of Nestlé Holdings, Inc., which is a wholly-owned subsidiary of Nestlé S.A., which is a publicly-traded Swiss corporation, the shares of which are traded in the U.S. in the form of American Depositary Receipts.

Defendant-Appellee Cargill, Incorporated is a domestic corporation, the shares of which are not publicly traded. No publicly-traded company owns 10% or more of its common stock.

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INTRODUCTION

Plaintiffs-Appellants are three citizens of Mali ("Plaintiffs") who seek to hold Archer-Daniels-Midland, Cargill Incorporated, and Nestlé U.S.A., Inc. ("Defendants") liable, under the Alien Tort Statute, 28 U.S.C. § 1350 ("ATS"), for allegedly aiding and abetting forced labor and child labor violations by unidentified farmers in Côte d'Ivoire.[1] Plaintiffs' sole theory of liability is that Defendants, who purchase cocoa beans from Côte d'Ivoire farms and provide farming-related assistance to their suppliers, thereby "aid and abet" labor violations by suppliers in the region. Such a theory of "aiding and abetting" is unprecedented, and was properly dismissed by the district court. (ER15.)[2]

Under *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), a federal common law claim may not be recognized under the ATS unless, at a minimum, the international-law norm that it seeks to enforce is universally agreed upon and clearly defined. *Sosa* held that it is for Congress, not the courts, to recognize claims resting on new or unsettled international-law principles—a standard that reflects the foreign-policy and separation-of-powers concerns that attend any effort to create common law claims based on novel or expansive views of international law. *Id*. at 725-29.

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[1] The opening brief does not challenge the dismissal of a fourth plaintiff, Global Exchange.

[2] "ER" refers to Appellants' Excerpts of Record; "AOB" is Appellants' Opening Brief.

The district court, after exhaustively canvassing international-law sources, concluded that there is "absolutely no legal authority—let alone well-defined and universally accepted legal authority"—for Plaintiffs' aiding-and-abetting claim. (ER105.) Its judgment of dismissal should be affirmed for four reasons. *First*, to the extent that aiding and abetting is a permissible ground of liability, it requires proof that a defendant acted with the purpose of facilitating the underlying wrong and engaged in acts that substantially assisted the commission of that wrong. Plaintiffs have not come close to alleging such facts. *Second*, there is no clear and definite international-law consensus extending liability for human rights norms to artificial entities such as corporations. *Third*, there is no clear and definite international-law norm of aiding and abetting labor violations. *Fourth*, Plaintiffs' claim would require the extraterritorial application of the ATS, in contravention of the presumption against extraterritoriality repeatedly reaffirmed by the Supreme Court.

ISSUES PRESENTED

1. Whether Plaintiffs' factual allegations fail to state a claim of aiding-and-abetting liability under any plausible international-law standard.

2. Whether liability under the ATS extends to corporations.

3. Whether there is an international-law consensus supporting the creation of an ATS cause of action for aiding and abetting forced-labor violations.

4. Whether Plaintiffs' claims rest upon an impermissible extraterritorial application of U.S. law.

STATEMENT OF FACTS

I. Plaintiffs' Allegations

A. Plaintiffs' Alleged Forced Labor

Plaintiffs allege that, beginning when they were 14 or younger and ending in 2000, they were forced to work at three cocoa plantations in Côte d'Ivoire. (ER258-60.) Plaintiffs allege that they were not paid for their labor; that John Does I and II received minimal nourishment; and that each Plaintiff was guarded, kept at night in a locked room, and beaten. (*Id*.)

Plaintiffs do *not* allege that the Defendants themselves engaged in any acts of trafficking, forced labor, or violence. Rather, these acts allegedly were committed by unidentified "guards" and "overseer[s]" on "farm[s] and/or farmer cooperative[s]," none of whom is either a party here or employed by a party. (ER244, 251, 258-60.) In this Court, Plaintiffs have abandoned all but one of the ten claims asserted in their original complaint and rely *only* on a federal common law claim under the ATS for aiding and abetting forced labor in violation of international law. (AOB3 n.2.)

B. Plaintiffs' Allegations of Aiding and Abetting

Plaintiffs' aiding-and-abetting theory rests on three sets of factual allegations.

First, Plaintiffs allege that Defendants purchased cocoa beans that they "knew or should have known" were harvested using forced labor and provided "ongoing financial support, including advance payments and personal spending money" to farmers or cooperatives with whom they had "exclusive supplier/buyer relationships." (ER251, 255.) Plaintiffs do not allege that any of the Defendants had such a relationship with the particular farms or cooperatives where Plaintiffs allegedly were abused. (ER250-59.)

Second, Plaintiffs allege that Defendants provided "logistical" support to farms in Côte d'Ivoire—although not necessarily farms where Plaintiffs worked—by providing Ivoirian farmers with (1) "farming supplies, including fertilizers, tools and equipment"; (2) training in "growing and fermentation techniques"; and (3) "training" on "appropriate labor practices." (ER251, 257.) Plaintiffs allege that these practices required "frequent and ongoing visits to the farms" either by Defendants or their agents. (*Id.*)

Third, Plaintiffs allege that Defendants failed to use their "economic leverage"—allegedly gained through "exclusive supplier/buyer agreements"—to "control and/or limit the use of forced child labor" by their suppliers. (ER255.) Plaintiffs quote from Defendants' public statements and policies condemning unlawful child labor and forced labor, and assert that Defendants should have used their leverage to enforce these policies more effectively. (ER251-57.)

Plaintiffs do not allege any facts linking any alleged "exclusive" relationship between Defendants and particular farmers, or any assistance allegedly provided to farmers, with mistreatment allegedly suffered by *these Plaintiffs*. They name a handful of specific "supplier/buyer relationships" (two for Nestlé, one for ADM, and six for Cargill), but nowhere allege that these suppliers were among those who allegedly forced Plaintiffs to work. (ER251-54.) Indeed, with one exception,[3] they do not even allege that forced labor occurred at the listed farms or cooperatives, much less with any Defendant's knowledge. They merely assert that Defendants knew of the "widespread use of *child* labor," and that non-governmental organizations have concluded that "many, if not most, of the children working on Ivorian cocoa plantations are being forced to work." (ER254-55, emphasis added.)

II. The District Court's Ruling

The district court issued a 161-page order dismissing the action. Applying *Sosa*, the court held that the existence of and scope of any ATS claim for aiding and abetting violations of international-law norms is governed by international law, which requires a plaintiff to plead and prove that (1) the defendant "carrie[d] out acts that have a substantial effect on the perpetration of a specific crime" under international law—the "*actus reus*" requirement—and (2) the defendant "act[ed]

[3] Plaintiffs allege that one farm had an exclusive relationship with Cargill and used forced child labor (ER254), but they do not allege that Cargill knew of that alleged fact or that any Plaintiff worked there.

with the specific intent (*i.e.*, for the purpose) of substantially assisting the commission of that crime"—the "*mens rea*" requirement. (ER63.)

As to *actus reus*, the court held that Plaintiffs' allegations established no more than "purchasing cocoa and assisting the production of cocoa" and that such "ordinary commercial transactions do not lead to aiding and abetting liability." (ER106, emphasis omitted.) To "'nudg[e] their claims across the line from conceivable to plausible,'" Plaintiffs would have to identify acts by the Defendants "that had a material and direct effect on the Ivorian farmers' specific wrongful acts." (*Id.*, quoting *Bell Atl. Co. v. Twombly*, 550 U.S. 544, 570 (2007).) As to *mens rea*, the court held that Plaintiffs' "allegations fail to raise a plausible inference that Defendants knew or should have known that the general provision of money, training, tools, and tacit encouragement … helped to further the specific wrongful acts committed by the Ivorian farmers." (ER108-09, emphasis omitted.)

The court also found "no support in the relevant sources of international law for the proposition that corporations are legally responsible for international law violations." (ER172.) On the contrary, "*all* of the available international law materials apply *only* to states or natural persons." (*Id.*) Because "there is no well-defined international consensus regarding corporate liability for violating international human rights norms," permitting such liability would violate *Sosa*'s

rule that only universal, well-defined international norms may give rise to claims under the ATS. (ER134, 144.)

STANDARD OF REVIEW

This Court reviews *de novo* a dismissal for failure to state a claim. *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005). To withstand dismissal, Plaintiffs must plead "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570.

SUMMARY OF ARGUMENT

Plaintiffs' claim, at its core, is that a company buying goods in a country where human-rights violations are known to occur may be held liable for aiding and abetting those violations, based solely on acts that are ordinary incidents of legitimate business transactions. The only way to avoid liability would be to stop doing business in any market in which there are even allegations of human-rights violations—a category that encompasses dozens of countries throughout the world, including some of America's major trading partners.

This exorbitant theory of liability is flawed on multiple grounds. Most obviously, as the district court held, to the extent aiding and abetting is a permissible ground of ATS liability, it requires proof that a defendant acted with the purpose of facilitating the underlying wrong and engaged in acts that substantially assisted in the commission of the wrong. The district court correctly

concluded that the allegations here fall far short of those standards.

Moreover, as the district court also held, corporate entities are not subject to liability under the ATS. Permitting such liability would violate *Sosa*'s principle that federal courts may not recognize new or debatable forms of liability not universally adhered to by nations out of a sense of mutual obligation.

The Court also may affirm the judgment on the alternative ground that there is no international-law consensus supporting an ATS claim for aiding and abetting violations of forced labor norms. International conventions prohibiting labor abuse impose international law obligations *only on member nations*—which undertake to enact and enforce adequate domestic labor laws. They do not bind private employers or individuals, much less persons or entities that purchase goods or provide purchase-related assistance to such employers or individuals.

Finally, Plaintiffs' claims rest upon an improper extraterritorial application of the ATS. Extending the statute to regulate acts within foreign territory contravenes the presumption against extraterritorial application of U.S. law.

ARGUMENT

I. ATS Liability Is Permissible Only If A Plaintiff Alleges A Violation Of A Clearly Established International-Law Norm And Practical Consequences Do Not Preclude Recognition Of A Private Claim

In *Sosa*, the Supreme Court explained that the ATS, which "create[s] no new causes of action," was enacted to confer jurisdiction for claims based on "a narrow

set" of violations of the law of nations. 542 U.S. at 715, 721, 724.[4] The Court specified two prerequisites for recognizing such a claim.

First, the international-law norm invoked must have as "definite content and acceptance among civilized nations" as the three "historical paradigms familiar when § 1350 was enacted" in 1789 (*Sosa*, 542 U.S. at 732)—*i.e.*, "Blackstone's three common law offenses" against the law of nations: "violation of safe conducts, infringement of the rights of ambassadors, and piracy." *Id.* at 724, 737; *Abagninin v. AMVAC Chem. Corp.*, 545 F.3d 733, 737 (9th Cir. 2008) (same). *Sosa* limits ATS claims to norms that are "'specific, universal, and obligatory.'" 542 U.S. at 732. It thus prevents courts from "seek[ing] out and defin[ing] new and debatable violations of the law of nations," a practice that would "imping[e] on the discretion of the Legislative and Executive Branches in managing foreign affairs." *Id.* at 728. Moreover, norms drawn so broadly that a consensus exists at only a "high level of generality" are insufficient. *Id.* at 736-37 & n.27.

The *Sosa* requirements of definite content and universal acceptance—what the Court termed "clear definition," *id*. at 733 n.21—thus closely resemble the standard federal courts apply in determining whether a government official has violated a "clearly established" constitutional right and therefore is subject to

[4] The statute provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350.

monetary liability under 42 U.S.C. § 1983 or a *Bivens* action. *Cf. Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2080 (2011); *Sosa*, 542 U.S. at 743 (Scalia, J., concurring in part and in judgment) ("*Bivens* provides perhaps the closest analogy."). In that context, a constitutional right is clearly established only if "existing precedent" has placed the "question beyond debate." *al-Kidd*, 131 S. Ct. at 2083; *id*. at 2084 ("a robust 'consensus of cases'") (citation omitted); *Brosseau v. Haugen*, 543 U.S. 194, 198-99 (2004) ("inquiry 'must be undertaken in light of the specific context of the case, not as a broad general proposition'").

Plaintiffs suggest they can establish the universally recognized international norm that *Sosa* requires by cobbling together the most favorable language (often *dicta*) from various international-law decisions. But just as a court may not cherry-pick from different rulings on a constitutional question and declare the resulting rule "clearly established," it may not impose ATS liability by reconciling divergent international-law sources to identify a "correct" international-law rule. *Sosa* limits courts to "prevailing norms of international law," and courts cannot "extend and redefine" them. *Abagninin*, 545 F.3d at 737-38.

Second, even if an international norm meets the "demanding standard of definition" required by *Sosa*, 542 U.S. at 738 n.30, the court still must determine whether, as a matter of domestic law, violations of the norm should be actionable. "[T]he determination whether a norm is sufficiently definite to support a cause of

action should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts." *Id.* at 732-33; *Abagninin*, 545 F.3d at 737. In "making international rules privately actionable," courts should "look for legislative guidance before exercising innovative authority over substantive law" in this area, which has "such obvious potential to affect foreign relations." *Sosa*, 542 U.S. at 726-27, 731.

II. The Complaint Fails To State A Claim Under Any Potential Standard For Aiding-And-Abetting Liability

The district court correctly identified the only aiding-and-abetting standard that plausibly could apply under *Sosa*: that the defendant's actions must be specifically directed to, and have a substantial effect on, the commission of an international-law tort (*actus reus*) and that the defendant must act purposefully to facilitate that underlying wrong (*mens rea*). The court also correctly found "absolutely no legal authority" for concluding that what Plaintiffs allege—essentially, purchases of cocoa beans and farming-related support, allegedly with knowledge of labor violations within the farming industry—constitutes aiding and abetting. (ER105.)

Plaintiffs' attempt to piece together snippets from outlier decisions to construct new, watered-down *actus reus* and *mens rea* standards cannot meet *Sosa*'s "demanding standard of definition" and universal acceptance. 542 U.S. at 738 n.30. Even if it could, the practical consequences of holding companies liable

merely for conducting ordinary commercial activity in any country where labor abuses do—or could—occur would require rejection of such a radical new claim.

A. The District Court Correctly Looked To International Law To Provide The Standard For The Aiding-and-Abetting Claim

The district court correctly held that international law, not federal common law, determines both the existence and scope of a claim for aiding and abetting under the ATS. (ER45-46.) Plaintiffs' insistence that aiding-and-abetting liability is an "ancillary" rule of decision that can be "left to the forum country" and that it need not "meet the threshold [*Sosa*] test for substantive law of nations violations" (AOB31)—is contrary to *Sosa*, as the Second, Fourth, and D.C. Circuits have held. *See Aziz v. Alcolac, Inc.*, ___ F.3d ___, 2011 WL 4349356, at *8 (4th Cir. 2011); *Doe v. Exxon Mobil Corp.*, ___ F.3d ___, 2011 WL 2652384, at *11-12 (D.C. Cir. 2011); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 259 (2d Cir. 2009). No court of appeals has held otherwise.[5]

Under *Sosa*, the scope of liability for ATS violations must be "derived from international law"; "domestic law … cannot render conduct actionable under the ATS." *Talisman*, 582 F.3d at 259. Because aiding-and-abetting rules create

[5] Plaintiffs are incorrect that the Eleventh Circuit "applies federal common law." (AOB30.) *Cabello v. Fernandez-Larios*, 402 F.3d 1148 (11th Cir. 2005) contains no choice-of-law analysis and predates *Sosa*. *See In re Chiquita Brands Int'l, Inc. ATS & Shareholder Derivative Litig.*, ___ F. Supp. 2d ___, 2011 WL 2163973, at *35 n.64 (S.D. Fla. 2011) (looking to international law after concluding that *Cabello* did not resolve the choice-of-law issue). The other Eleventh Circuit cases referenced by Plaintiffs merely cite *Cabello*.

liability for conduct not otherwise actionable, any aiding-and-abetting standard likewise must be governed by international law. A contrary rule would "violate *Sosa*'s command that [courts] limit liability to 'violations of ... international law ... with ... definite content and acceptance among civilized nations [equivalent to] the historical paradigms familiar when § 1350 was enacted.'" *Talisman*, 582 F.3d at 259; *accord Aziz*, 2011 WL 4349356, at *8; *Exxon*, 2011 WL 2652384 at *12, *16.

Plaintiffs' reliance on *Sarei v. Rio Tinto, PLC*, 550 F.3d 822, 828 (9th Cir. 2008), is misplaced. There, this Court considered whether international-law rules requiring exhaustion of remedies apply in ATS cases. *Id.* at 828. The Court reasoned that it could "freely draw from both federal common law and international law without violating the spirit of *Sosa*'s instructions or committing [itself] to a particular method regarding [exhaustion of remedies and] other *nonsubstantive aspects* of ATS jurisprudence left open after *Sosa*." *Id*. (emphasis added). But the Court took pains to emphasize that as to "*substantive* norm[s] of international law," *Sosa*'s "'requirement of clear definition' applies." *Id.* (emphasis added).

Aiding and abetting is surely a *substantive* norm because it delimits a category of conduct that gives rise to liability. Thus, "[r]ecognition of secondary liability is no less significant a decision than whether to recognize a whole new tort in the first place." *Talisman*, 582 F.3d at 259; *see also U.S. v. Perlaza*, 439 F.3d

1149, 1168 (9th Cir. 2006) ("substantive area of criminal law"); *Fassett v. Delta Kappa Epsilon*, 807 F.2d 1150, 1157, 1162-63 (3d Cir. 1986) ("substantive questio[n]" for *Erie* purposes). The district court correctly held that, under *Sosa*, international law governs accessorial liability.

B. Plaintiffs' Allegations Do Not Satisfy The Only Plausible International-Law Standard

1. The *Actus Reus* Element Requires Conduct That Is "Specifically Directed" To, And Has A "Substantial Effect" On, The Commission Of The Underlying Crime

The district court correctly concluded that the only international-law *actus reus* standard that possibly could satisfy *Sosa* requires that the defendant commit acts "*specifically directed*" to the perpetration of a "*certain specific crime*, which have a substantial effect on the perpetration of the crime." (ER48, quoting *Prosecutor v. Blagojevic*, No. IT-02-60-A, ¶ 127 (ICTY May 9, 2007), *available at* <http://www.icty.org/x/cases/blagojevic_jokic/acjug/en/blajok-jud070509.pdf>.) An aider and abettor must have provided assistance not just to the *wrongdoer*, but to the *commission of the underlying crime*. (ER49-51.) *Accord Talisman*, 582 F.3d at 259.

This *actus reus* standard appears in Article 25(3)(c) of the Rome Statute of the International Criminal Court, 37 I.L.M. 1002, 1016 (1998), which is recognized as an authoritative expression of the views of "a great number of states." *Aziz*, 2011 WL 4349356, at *7, *10 & n.12. And it is applied by the International

Tribunals for the former Yugoslavia ("ICTY") and for Rwanda ("ICTR"). *E.g.*, *Prosecutor v. Ntagerura*, 2006 WL 4724776, ¶ 370 (ICTR July 7, 2006); *Blagojevic*, No. IT-02-60-A, ¶ 127; Eser, *Individual Criminal Responsibility*, *in* THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 800 & n.138 (2002).

Plaintiffs advocate a much lower standard that would eliminate the requirement that the act be directed to the underlying wrong—alleged *forced labor*—and make assistance to the *suppliers* or their *farming activities* sufficient. (AOB11.) But this alternative has no support in international precedent.

Plaintiffs cite language from *Prosecutor v. Furundzija*, 1998 WL 34310018, ¶ 235 (ICTY Dec. 10, 1998), referencing "practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime." (AOB34.) But even *Furundzija*—which has been discounted as a poorly-reasoned, outlier trial decision, *Khulumani v. Barclay Nat'l Bank*, 504 F.3d 254, 334 (2d. Cir. 2007) (Korman, J., concurring)—recognized that "assistance," however described, must be *to the wrongdoing itself*. *Furundzija*, 1998 WL 34310018, ¶¶ 202 ("facilitat[ing] the commission of the crime"), 204, 226.

Plaintiffs assert that *Blagojevic* renounced the "specifically directed" standard. (AOB35.) But that decision actually confirmed its longstanding provenance. IT-02-60-A, ¶¶ 127 & n.342, 184-89. The tribunal merely noted that

a finding of "specific direction" will often "implicit[ly]" be a finding of "practical assistance," as when the aider and abettor "co-ordinat[ed]" deployments to "mass execution sites." *Id.* ¶¶ 180, 189, 191. Nothing in *Blagojevic* suggests that it would be enough to "assist" the wrongdoer in some general sense. (ER49 n.27.)

Finally, even if these few decisions meant what Plaintiffs say and did not post-date the alleged events,[6] *Sosa* forbids disregarding the numerous international-law sources applying a stricter standard. When there is disagreement, ATS liability must be limited to those circumstances in which *all* of the international-law standards would be violated. *Talisman*, 582 F.3d at 259; *Abagninin*, 545 F.3d at 738. Less stringent formulations are "not *uniformly* accepted" and therefore not actionable. (ER49 n.27.) The only uniformly accepted *actus reus* standard—the only test that produces liability under all of the relevant international authorities—is conduct specifically directed to providing substantial assistance to the principal's commission of the crime.

2. Plaintiffs' Allegations Do Not Meet The *Actus Reus* Standard

According to Plaintiffs, Defendants' "substantial assistance" took the form of payment for cocoa and nonmonetary farming assistance, which they characterize

[6] The Plaintiffs allege that they were all freed in 2000 (ER258-59 ¶¶ 57-59), whereas *Blagojevic* was decided in 2007. A norm must have been "universally accepted at the time of the events giving rise" to the claim. *Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co.*, 517 F.3d 104, 123 (2d Cir. 2008).

as "logistical support." (ER251-54.) Plaintiffs also allege that Defendants had "economic leverage" over their suppliers. (ER251.)

Nowhere do Plaintiffs claim Defendants assisted in the commission of *forced labor*. They contend only that Defendants provided "substantial assistance *to the farming activities* of the Ivorian farmers." (AOB48, emphasis added.) As the district court recognized, "[t]here is absolutely no legal authority—let alone *well-defined* and *universally accepted* legal authority—to support the proposition that an economic actor's long-term exclusive business relationship constitutes aiding and abetting" of forced labor. (ER105.)

a. Financial assistance

The district court correctly held that a purchaser who pays a supplier in connection with a commercial relationship does not aid and abet the supplier's international-law violations. (ER92.) Although Plaintiffs characterize some payments as "advance payments" (AOB8), that does not alter the fact that they are funds for cocoa; "Plaintiffs' own Complaint identifies the commercial *quid pro quo*." (ER87.)

The district court invoked a leading Nuremberg-era decision, *U.S. v. von Weizsacker* ("*The Ministries Case*"), in 14 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 ("T.W.C."). There, the tribunal acquitted a banker who had arranged for loans of

"very large sums of money" to "various SS enterprises that used slave labor," reasoning that although "[l]oans or sale of commodities to be used in an unlawful enterprise may well be condemned from a moral standpoint," the "transaction can hardly be said to be a crime." *Id.* at 622. Plaintiffs assert that *The Ministries Case* is distinguishable because it involved a "single bank making a loan," implying that these were one-off transactions. (AOB51.) That is false. 14 T.W.C. at 622, 784 (noting "number and amount" of loans). Even doing repeat business with international-law violators does not create liability unless the defendant's actions were directed toward assisting in the *wrongful activities*.

United States v. Flick, 6 T.W.C. at 1198, 1220, does not hold otherwise. (AOB50-51 & n.33.) As the district court explained, Flick and Steinbrinck were not convicted for doing business with suppliers that used forced labor.[7] (ER52-53.) Rather, as members of Himmler's Circle of Friends, they contributed money to Himmler, knowing that the funds would be used for "special purposes." 6 T.W.C. at 1198, 1219-21. Thus, they provided Himmler with a "'blank check'" that "maintained" the SS "criminal organization"—nothing like this case. (ER52.)

Courts applying the ATS have recognized that "financial assistance" in the context of a commercial transaction does not constitute aiding and abetting. For

[7] Flick's distinct conviction for "participation in the slave-labor program of the Third Reich," was based on the *primary offense* of directly employing forced labor. 6 T.W.C. at 1190, 1198, 1201; (ER69-71); Nuremberg Br. 26 n.51.

example, the district court in *In re South African Apartheid Litig.* dismissed claims based on "simply doing business" with the apartheid regime, reasoning that the law of nations "does not impose liability for declining to boycott a pariah state." 617 F. Supp. 2d 228, 257 (S.D.N.Y. 2009); *Mastafa v. Australian Wheat Bd. Ltd.*, 2008 WL 4378443, at *3-4 & n.6 (S.D.N.Y. 2008).

Plaintiffs try to distinguish *Apartheid* by noting that the defendants were banks making loans. (AOB51.) But the point is that "[a] bank sells money or credit in the same manner as the merchandiser of any other commodity." *The Ministries Case*, 14 T.W.C. at 622. Providing a wrongdoer with a fungible resource such as money through a commercial transaction, whether as a bank or as a purchaser, is not "substantial assistance" because the act lacks a sufficiently "close[] causal connection to the principal crime." *Apartheid*, 617 F. Supp. 2d at 258-59, 269-70.[8]

b. Farming supplies, technical assistance, and training

The same analysis applies to Plaintiffs' allegations of nonmonetary assistance, such as farming supplies and training in farming techniques. (ER74-

[8] *Linde v. Arab Bank, PLC*, 384 F. Supp. 2d 571, 577, 584 (E.D.N.Y. 2005) involved a bank's "death and dismemberment plan" through which terrorist organizations rewarded suicide bombers' families. That it is possible to aid and abet a crime by actively funding it—as a bank does when it pays bounties to "sustai[n] a suicide bombing campaign," *Liu Bo Shan v. China Const. Bank Corp.*, 421 F. App'x 89, 95 (2d Cir. 2011)—is irrelevant where there is no such direct funding.

78.) Even as framed in Plaintiffs' brief, these allegations relate only to alleged "assistance to … farming activities," not assistance to forced labor. (AOB48.) Supplying a farmer with fertilizer might make him better off, but that "is not the same thing as aiding and abetting [his or her] alleged human rights abuses." *Apartheid*, 617 F. Supp. 2d at 257; *Mastafa*, 2008 WL 4378443, at *4 n.6.

Plaintiffs question the district court's analysis of the case law. (AOB49-50 & n.50.) But the court properly relied on precedents holding, for example, that while providing Nazis with poison gas and training the SS in using it to "kil[l] human beings" facilitates genocide (*Zyklon B*),[9] and providing "specialized military equipment" to apartheid security forces facilitates killings (*Apartheid*, 617 F. Supp. 2d at 264), merely selling ordinary computers or cars does not (*id.* at 267-68). Likewise here, by providing farming assistance, Defendants at most "assisted the Ivorian farmers in the act of growing crops and managing their business." They did not provide the farmers with the means of committing the underlying wrong—forced labor. (ER78.)

Plaintiffs attempt to distinguish *Prosecutor v. Delalic*, 2001 WL 34712258 (ICTY Feb. 20, 2001), which held that providing "logistical support" to military forces did not constitute "participat[ion]" in the mistreatment of military detainees

[9] *Trial of Bruno Tesch ("Zyklon B")*, *in* 1 LAW REPORTS OF TRIALS OF WAR CRIMINALS 93, 95.

"as an aider and abettor." *Id.* ¶¶ 355, 360; *Prosecutor v. Delalic*, 1998 WL 34310017, ¶ 664 (ICTY Nov. 16, 1998). Plaintiffs' assertion that the defendant was merely a low-level "electrician and maintenance provider" (AOB50 n.32) is, as the district court noted, "plainly contradicted by the facts." (ER91 n.47.) Among other things, the defendant arranged for "supplies of material, equipment, food, communications equipment, railroad access, transportation of refugees and the linking up of electricity grids." *Delalic*, 1998 WL 34310017, ¶¶ 659, 662, 664-68. Even *that* extensive support did not constitute aiding and abetting.

c. Failure to exercise "economic leverage"

Plaintiffs acknowledge that they seek to impose liability on anyone who is in a "position to influence" the use of forced labor, but who fails to pursue "a different course of conduct … that would have mitigated" it. (ER234-35.) They allege that, because Defendants' "economic dominance" allowed them to "dictate the terms" of cocoa production (AOB7), Defendants supposedly approved the "system" of forced labor by continuing to purchase cocoa.

The district court correctly concluded that the few international-law precedents that even refer to aiding and abetting by "moral support," "tacit approval," or omission are too scattered and unclear to support a norm actionable under *Sosa*. (ER94, 103-05.) Indeed, Plaintiffs' "economic leverage" claim goes far beyond what *any* international-law source has recognized, even in *dicta*.

(ER105.) This Court, like the district court, should "refrain[] from extending the existing case law … to recognize such an unprecedented form of liability." *Id.*

i. Plaintiffs cite cases relying on "command responsibility" (AOB36, 52-54), but that theory is irrelevant because it imposes a *primary* duty, and therefore is conceptually distinct from aiding and abetting. Command responsibility imposes "personal responsibility" on a military officer for failing to prevent war crimes committed by his subordinates. *In re Yamashita*, 327 U.S. 1, 15 (1946). It is plainly inapplicable: Defendants are not "military commanders," *Hamdan v. Rumsfeld*, 548 U.S. 557, 604 n.36 (2006), and their suppliers are not their troops.[10]

ii. Aiding and abetting by moral support or by omission is, as the district court determined, "far too uncertain and inchoate" to be actionable under *Sosa*. (ER92-94, citation omitted.) The uncertainty is widely acknowledged. Boas, *Omission Liability at the International Criminal Tribunals—A Case for Reform*, *in* JUDICIAL CREATIVITY AT THE INTERNATIONAL CRIMINAL TRIBUNALS 204, 205 (2010) ("liability for omissions beyond [command responsibility] has no

[10] *United States v. Ohlendorf* ("*The Einsatzgruppen Case*"), involved officers in Einsatzgruppen, which were SS units whose mission "was to carry out a large scale program of murder." 4 T.W.C. 373. It involved command responsibility, not aiding and abetting. *Id.* at 52; *compare id.* at 568-69 (Klingelhoefer, convicted: "command[ed] part of Vorkommando Moscow"); *id.* at 570-72 (Fendler, convicted: "second highest ranking officer"), *with id.* at 579-80 (Ruehl, acquitted: *not* in the "leadership of a Kommando").

articulated basis in international criminal law"). Because "it was not possible to reach consensus," Ambos, *Article 25: Individual Criminal Responsibility*, *in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 743, 770 (2d ed. 2008) ("COMMENTARY ON THE ROME STATUTE"), "there is no criminal liability established in the [Rome] Statute for mere failure to act"—other than the inapposite theory of command responsibility, *see* Schabas, *General Principles of Criminal Law in the ICC Statute*, 6 EUR. J. CRIME, CRIM. L., CRIM. JUST. 400, 412 (1998).

This lack of a consensus is dispositive under *Sosa*. As the district court found, aiding and abetting by moral support or by omission is a "non-existent breed" for purposes of the ATS (ER97), because these nebulous heads of liability remain "too unclear to satisfy *Sosa*'s requirements." (ER94.)

iii. Even assuming *arguendo* that some form of such liability were available, Plaintiffs' allegations do not come close to satisfying the standard applied even in the outlier cases upholding such liability.

As the district court explained (ER51), aiding and abetting by moral support requires "[1] a position of authority and [2] physical presence." *Oric*, IT-03-68-A ¶ 42 & n.97.[11] Moreover, the authority figure's encouragement must be "relat[ed]

[11] Plaintiffs assert that *Oric* did not expressly say that presence and authority are necessary. (AOB36.) But it is *Plaintiffs'* burden under *Sosa* to "marshal support for [their] proposed rule," 542 U.S. at 737, and thus to show that international-law

specifically to the crime." *Prosecutor v. Brdjanin*, 2007 WL 1826003, ¶¶ 281, 283 (ICTY Apr. 3, 2007). Plaintiffs' allegations of control are just as conclusory as those rejected in *Doe I v. Wal-Mart Stores, Inc.*, 572 F.3d 677 (9th Cir. 2009): "[C]ommon buyer-seller contract terms" do not give rise to inference of "control over … day-to-day employment" *Id.* at 683. And they do not allege that Defendants stood by approvingly while farmers harmed them.

The district court also correctly determined that there is no basis for aiding and abetting by omission. (ER92-105.) Plaintiffs have not alleged, as required by the few cases addressing substantial assistance through inaction, that Defendants had both the (1) independent "legal duty to act" and (2) "ability" to prevent the third party from carrying out the wrongful acts.[12] *Brdjanin*, 2007 WL 1826003, ¶¶ 274-75 & n.557; *Ntagerura*, 2006 WL 4724776, ¶ 333.

Finally, the precedents relied upon by Plaintiffs are readily distinguishable. Sending poison gas to Auschwitz and training Nazis in using it to kill (*Zyklon B*) is nothing like failing to exercise "economic leverage" to improve labor practices. (ER67-69; AOB54.) The conviction in the *Synagogue* case, which arose under the

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precedent has *affirmatively and uniformly recognized* liability absent these elements.

[12] Plaintiffs seize upon outlier decisions that have not recited the "duty to intervene" requirement. (AOB43.) This argument misapprehends *Sosa*, which rules out Plaintiffs' gambit of cherry-picking the most expansive liability rules from divergent international law precedents. *See Talisman*, 582 F.3d at 259; *Abagninin*, 545 F.3d at 738.

German penal code and not international law, was premised on the defendant's "presence on the crime-scene, combined with his status as an 'alter Kämpfer' (long-time militant of the Nazi party)"; it simply applied the authority-plus-presence test set forth in *Oric*. (ER99-102.) *Government Commn'r v. Roechling* imposed liability on a similar basis. 14 T.W.C. Appendix B, at 1087, 1091-92, 1136 (on-site factory manager was "specially competent" to represent factory in dealings with the Gestapo regarding workers and the labor police).

d. Even taking all of the allegations together, Plaintiffs have failed to allege substantial assistance

Even considering the allegations "collectively," as the district court did (ER106), Plaintiffs have not stated a claim. *Sosa* does not permit an ATS plaintiff to cobble together multiple categories of legitimate conduct and then claim that they are actionable as components of a cocoa production "system." (AOB47, 54-55.) The district court properly distinguished Plaintiffs' Nuremberg-era cases on the grounds that they involved conduct that specifically enabled the underlying wrong (*Zyklon B* and *Flick*) or were not about aiding and abetting at all, but rather command responsibility (*Einsatzgruppen*) or primary liability, *United States v. Krauch*, 8 T.W.C. at 1180, 1187-89 ("*The Farben Case*") (defendant "distribut[ed] and allocat[ed]" forced labor), *United States v. Krupp*, 9 T.W.C. at 1435, 1400-49 (defendants operated camps using forced labor). There are no remotely comparable allegations here.

3. The *Mens Rea* Standard Requires That The Aider and Abettor Act With The "Purpose" Of Facilitating The Underlying Wrong.

The district court correctly defined the *mens rea* standard to require that the defendant act with the *purpose* of facilitating the underlying wrong, rather than mere "knowledge" that the wrong might occur. (ER49.) This is the only standard that has been applied with any consistency by international tribunals, and the Second and Fourth Circuits both have held that "only a purpose standard … has the requisite 'acceptance among civilized nations' for application in an action under the ATS." *Talisman*, 582 F.3d at 259 (quoting *Sosa*, 542 U.S. at 732); *see Aziz*, 2011 WL 4349356, at *11.

a. The Rome Statute

The district court properly afforded great weight to the Rome Statute. (ER62 & n.36.)[13] It requires that the accused act with "the *purpose* of facilitating the commission of" the wrong. Rome Statute art. 25(3)(c) (emphasis added). This plain text and the overwhelming weight of scholarly commentary make clear that the *mens rea* under the Rome Statute is purpose, not knowledge. *See, e.g.*, Ambos,

[13] *Sosa* confirms that treaties are among the primary international-law materials that courts must consider. 542 U.S. at 734. As the Fourth Circuit explained, "the Rome Statute constitutes a source of the law of nations, and, at that, a source whose mens rea articulation of aiding and abetting liability is more authoritative than that of the ICTY and ICTR tribunals." *Aziz*, 2011 WL 4349356, at *10; *see also Prosecutor v. Krnojelac*, 2003 WL 23920818, ¶ 221 n.358 (ICTY Sept. 17, 2003).

Article 25, *in* COMMENTARY ON THE ROME STATUTE, at 757 ("[I]t is clear that purpose generally implies a specific subjective requirement stricter than mere knowledge."); *accord* Schabas, THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE 435 (2010); Olasolo, *International Criminal Court and International Tribunals: Substantive and Procedural Aspects*, *in* THE LEGAL PRACTICE IN INTERNATIONAL LAW AND EUROPEAN COMMUNITY LAW 186 (2006); van Sliedregt, THE CRIMINAL RESPONSIBILITY OF INDIVIDUALS FOR VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW 93 (2003); Eser, *Individual Criminal Responsibility*, *in* THE ROME STATUTE 801.[14] This purpose standard quite properly "allows the citizen to carry on with normal … business relationships without the risk of being held responsible for crimes committed autonomously by others." Sereni, *Individual Criminal Responsibility*, *in* 2 ESSAYS ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 111 (2004).

Pointing to Article 30, Plaintiffs assert that the Rome Statute requires only knowledge, a reading endorsed by a divided D.C. Circuit panel in *Exxon*. (AOB43-45.) But Article 30 merely defines "knowledge" and "intent" and

[14] Only one of the scholars cited by Plaintiffs' *amicus*—Antonio Cassese—concludes that the Rome Statute imposes a "knowledge" standard, and he has been criticized as displaying a "significant pro-prosecution bias" and "simply mistaken" in his interpretation of the Rome Statute. Heller, *Book Review: The Oxford Companion to International Criminal Justice*, 104 AM. J. INT'L L. 154, 154, 160 (2010).

specifies a default *mens rea* standard "unless otherwise provided."[15] Article 25(3)(c) *does* provide a different *mens rea* standard—"purpose"—and aiding and abetting therefore is not "governed by the ordinary requirements … [of] Article 30." Eser, *Individual Criminal Responsibility*, *in* THE ROME STATUTE 801; Piragoff & Robinson, *Article 30: Mental Element*, *in* COMMENTARY ON THE ROME STATUTE, at 857-58 ("purpose" equivalent to requiring "specific intent"); *accord* Werle, PRINCIPLES OF INTERNATIONAL CRIMINAL LAW 161-62 (2d ed. 2009); Ambos, *Article 25*, *in* COMMENTARY ON THE ROME STATUTE, at 757.

Plaintiffs also cite an inapplicable provision of the Rome Statute, Article 25(3)(d), which they say adopts a "knowledge" standard. (AOB44.) Article 25(3)(d) does not address aiding and abetting at all, *see Aziz*, 2011 WL 4349356, at *11 n.13, but rather defines a variant of the "joint criminal enterprise [*i.e.*, JCE]" or "common purpose" liability. *Prosecutor v. Lubanga Dyilo*, ICC-01/04-01/06, ¶¶ 334-35 (ICC Jan. 29, 2007), *available at* <http://www.icc-cpi.int/iccdocs/doc/doc266175.PDF>; Weigend, *Perpetration Through an Organization*, 9 J. INT'L CRIM. JUST. 91, 108-09 (2011).[16] It is doubtful that this unsettled form of liability

[15] Plaintiffs' reliance on Article 10 is, as the district court explained, similarly premised on a "misreading of the Rome Statute." (ER61-62.)

[16] *Accord* Schabas, THE INTERNATIONAL CRIMINAL COURT, at 436-37; Boas, et al., FORMS OF RESPONSIBILITY IN INTERNATIONAL CRIMINAL LAW 126 (2008); Werle, PRINCIPLES 184.

is sufficiently definite and accepted to qualify as a norm actionable under the ATS.[17] But at minimum, such liability (like common law conspiracy) requires a group of persons acting with a "common purpose" to commit a crime. Article 25(3)(d). Thus, even "under a theory of relief based on a joint criminal enterprise," Plaintiffs' claims would "require the same proof of *mens rea* as their claims for aiding-and-abetting"—purpose, which they cannot satisfy. *Talisman*, 582 F.3d at 260.[18]

Furthermore, Plaintiffs never have pled conspiracy or a joint criminal enterprise. Nor can they, because the Supreme Court has foreclosed this form of liability and held that the only cognizable "'conspiracy' crimes" are "conspiracy to commit genocide and common plan to wage aggressive war." *Hamdan*, 548 U.S. at 610; *Talisman*, 582 F.3d at 260. "*Sosa* requires that this Court recognize only" universally accepted forms of liability, and other forms of "[c]onspiracy do[] not meet this standard." *Apartheid*, 617 F. Supp. 2d at 263.

Finally, Plaintiffs' *amicus* points to the "very contentious" negotiating history of Article 25(3)(c). Scheffer Br. 11. But that debate fatally *undermines*

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[17] *E.g.*, Powles, *Joint Criminal Enterprise: Criminal Liability by Prosecutorial Ingenuity and Judicial Creativity?*, 2 J. INT'L CRIM. JUST. 606, 617 (2004); Werle, PRINCIPLES 175 & n.215; van Sliedregt, THE CRIMINAL RESPONSIBILITY OF INDIVIDUALS 187.

[18] *Accord Lubanga Dyilo*, ICC-01/04-01/06, ¶ 329; *Prosecutor v. Tadic*, 1999 WL 33918295, ¶ 206 (ICTY July 15, 1999); Werle, PRINCIPLES 175 & n.213.

any contention that there is a consensus around a "knowledge" standard. That the Rome Statute's negotiators could not straightforwardly settle on a "knowledge" *mens rea* is proof positive that there is no international consensus regarding that standard, as *Sosa* requires. 542 U.S. at 725.[19]

b. Nuremberg-era decisions

The "purpose" requirement also was applied at Nuremberg. In *Hechingen*, the trial court, applying a knowledge standard, convicted certain defendants of aiding and abetting the Gestapo to deport Jews. *The Hechingen and Haigerloch Case*, 7 J. INT'L CRIM. JUST. 131, 145 (2009). The appellate court reversed, holding that the proper *mens rea* standard is purpose.[20] As the court explained, the "accessory must have acted … from an inhumane mindset." *Id.* at 150. Because the defendants behaved "leniently and sympathetically"—*i.e.*, without the purpose of facilitating the underlying offense—they were acquitted. *Id.* at 151.

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[19] The Rome Statute's "purpose" standard also is applied by the East Timor human rights tribunals. (ER61.) Although Plaintiffs assert that the tribunals' regulations reflect Indonesian domestic law (AOB39 n.27), they are in fact "widely recognized as being indicative of customary international law." Burchill, *From East Timor to Timor-Leste: A Demonstration of the Limits of International Law in the Pursuit of Justice*, *in* THE LEGAL REGIME OF THE INTERNATIONAL CRIMINAL COURT 280 (2009).

[20] Plaintiffs' *amici* misstate the trial court's holding, 7 J. INT'L CRIM. JUST. at 145-46, as that of the appellate court, *id.* at 150-51. They also assert that the tribunal was applying German municipal law, but in fact Law No. 10, which was enacted "according to the generally recognized rules of international law," was the "sole and exclusive legal basis for the punishment" of the defendants, including "as regards aiding and abetting." *Id.* at 134-35, 149-50.

Roechling, discussed at Nuremberg Br. 30-31, also applied a "purpose" standard. Roechling was charged with contributing to the Nazi war of aggression. 14 T.W.C. at 1072. The decisive question on this count was "whether his activity constitutes a sufficient and, in particular, an intentional collaboration with Hitler or with Goering in the preparation and the waging of the war." *Id.* Roechling took a "considerable part in the rearmament," but because there was no evidence that his "participation … was carried out with the *intention and aim* to permit an invasion of other countries," he was acquitted. *Id.* at 1108 (emphasis added).[21] Likewise, in *The Ministries Case*, the tribunal declined to impose liability on a bank officer who made a loan with the knowledge that the borrower would use the funds to commit a crime. (ER665.)

Plaintiffs insist that a handful of Nuremberg-era cases applied a knowledge standard. But even their lead authority, the *Zyklon B* case, is equivocal. (AOB42.) The defendants there "not only supplied prussic acid to the S.S. but undertook to train its members how it could be used to kill human beings." *Khulumani*, 504 F.3d at 276 n.11 (Katzmann, J., concurring). That evidence would surely suffice to establish that those defendants had the requisite intent.

[21] Roechling's convictions on the war crimes and forced labor counts were based on primary liability, not on aiding and abetting, so the tribunal's statements about his "knowledge" of those matters is irrelevant. *Cf.* Nuremberg Br. 31. For example, Roechling submitted "his views and suggestions as to how to improve this criminal [forced labor] program" and make better "utilization" of prisoners of war. 14 T.W.C. at 1132, 1139; *see id.* at 1070, 1083-86, 1095, 1111-14, 1130-31.

c. *Ad hoc* international tribunals

Finally, the district court properly discounted the stray decisions of the ICTY and ICTR suggesting a knowledge standard on the ground that they do not reflect an international consensus. (ER55 n.29.) Indeed, other decisions of these tribunals use a purpose standard and require that the "aider and abettor must have *intended* to assist" in the crime. Boas, *Omission Liability*, at 208 & n.20 (emphasis added; collecting cases); Meloni, *Command Responsibility*, 5 J. INT'L CRIM. JUST. 619, 635 n.99 (2007); *Prosecutor v. Nyiramasuhuko*, 2004 WL 3154919, ¶ 129 (ICTR Dec. 16, 2004). Given this inconsistency, the tribunals cannot be cited for any reliable *mens rea* standard.

4. Plaintiffs' Allegations Are Insufficient Under Either A Purpose Standard Or A Knowledge Standard

Plaintiffs concede that they cannot plead facts showing that Defendants acted with the *purpose* of supporting forced labor. (AOB48.) That is fatal to their aiding-and-abetting claim.

Even if mere knowledge were enough, the claim would fail. The scattered international-law decisions adopting a "knowledge" standard require that the defendant know "that the acts performed assist the commission of the *specific crime* of the principal perpetrator." (ER53, citing *Blagojevic*, IT-02-60-A, ¶ 127, emphasis added.); *Ntagerura*, 2006 WL 4724776, ¶ 370; *Prosecutor v. Vasiljevic*, 2004 WL 2781932, ¶ 102 (ICTY Feb. 25, 2004). Plaintiffs allege nothing of the

sort. As the district court noted, they allege only that Defendants "knew about the general problem of child labor" and then "engaged in general commercial transactions." That does not amount to actual knowledge of specific wrongful acts. (ER109.)

Plaintiffs assert that Defendants knew of the allegedly "widespread" and "pervasive use of forced child labor in the entire cocoa sector" of Côte d'Ivoire. (AOB47; ER254-55 ¶¶ 44-45, 47.) But an allegation that Defendants knew of the *risk* that a farm might use forced labor (because forced labor is present or even prevalent in a region) does not equate to knowledge that *particular* farms employ forced labor, much less that Defendants knew of *specific* acts of mistreatment allegedly visited upon the individual Plaintiffs by the farmers to whom Defendants allegedly provided assistance.[22] Thus, Plaintiffs are unable to allege that Defendants knew that their "acts … assist[ed] the commission of the *specific crime* of the principal perpetrator" (ER53), as required even by the courts that have entertained a "knowledge" standard. Accordingly, Plaintiffs' *mens rea* allegations are deficient under any conceivably applicable standard.

[22] Plaintiffs cite for the proposition that constructive knowledge is enough, but the passage actually deals with the *mens rea* for crimes against humanity. (AOB47-48, citing *Prosecutor v. Kayishema,* 1999 WL 33288417, ¶¶ 133-34 (ICTR May 21, 1999).) Moreover, the Appeals Chamber decision confirms that even if knowledge were the applicable *mens rea* standard, it still would require actual knowledge of the specific offense. *Kayishema,* No. ICTR-95-1-A, ¶ 201 (ICTR June 1, 2011), *available at* <http://www.unictr.org/Portals/0/Case/English/kayishema/judgement/010601.pdf>.

C. Plaintiffs Cannot Meet Any Domestic Standard For Aiding And Abetting

Even if domestic law supplied the standard for aiding and abetting—as Plaintiffs assert—their allegations are not actionable.

Plaintiffs' failure to allege that Defendants assisted the farmers' forced labor practices precludes aiding-and-abetting liability under domestic law just as it does under international law. The domestic authorities that Plaintiffs invoke specify that the aider and abettor must have "substantially assist[ed] *the principal violation*." *Halberstam v. Welch*, 705 F.2d 472, 488 (D.C. Cir. 1983) (applying D.C. law) (emphasis added); RESTATEMENT (SECOND) OF TORTS § 876(b) (1979) ("substantial assistance or encouragement" to the principal "so to conduct himself"). In other words, the "substantial assistance [must] advance the [tort's] commission." *Lerner v. Fleet Bank, N.A.*, 459 F.3d 273, 292 (2d Cir. 2006); *Ponce v. SEC*, 345 F.3d 722, 737 (9th Cir. 2003).

This Court already has rejected under domestic law Plaintiffs' theory that purchases from a wrongdoer constitute aiding and abetting. The idea that "the simple act of purchasing would make a buyer an aider or abettor" is "simply incorrect," because "the purchaser is doing no more than making a purchase that it desires to make for its own business reasons." *United States v. Approximately 64,695 Pounds of Shark Fins*, 520 F.3d 976, 981 (9th Cir. 2008); *United States v.*

Moore, 212 F.3d 441, 447 (8th Cir. 2000) ("purchasing drugs" is not "demonstrative of the buyer's aiding or abetting the seller").

Nor does domestic law impose aiding-and-abetting liability on a purchaser for failing to stop a supplier's alleged wrongs. *See* RESTATEMENT (SECOND) OF TORTS § 314 & cmt. b (1979); *e.g.*, *Doe I v. The Gap, Inc.*, 2001 WL 1842389, at *13 (D.N. Mar. I. Nov. 26, 2001) (failure to act is not "[substantial] assistance in [a supplier's] alleged peonage, involuntary servitude, or labor violations"); *see also Wynn v. Nat'l Broad. Co.*, 234 F. Supp. 2d 1067, 1115 (C.D. Cal. 2002) ("mere inaction" of another party does not constitute "substantial assistance"); *Fiol v. Doellstedt*, 50 Cal. App. 4th 1318, 1326 (1996).

D. Plaintiffs' Aiding-and-Abetting Standard Would Disrupt International Commerce

Plaintiffs ignore the practical consequences of their unprecedented theory, which would impose liability for engaging in ordinary commercial activities with suppliers when the defendant knows that labor violations have occurred in that sector of the country's economy. On Plaintiffs' view, a business could avoid liability only by exercising its "economic leverage" to overhaul every suppliers' labor practices, or by withdrawing from the market. (AOB9, 52.) Given the practical impossibility of the former, the latter would be the only realistic choice. Significantly, attempts to *improve* suppliers' labor practices (as alleged here) would not safeguard a business from liability; rather, they would supply a basis for

liability by supporting a finding of failure to exercise economic leverage and knowledge of wrongdoing.

Sosa cautioned that recognition of a cause of action under the ATS "must[] involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts." 542 U.S. at 732-33. This Court should reject Plaintiffs' invitation to "open the floodgates," *Taveras v. Taveraz*, 477 F.3d 767, 782 (6th Cir. 2007), to a torrent of litigation that would render the federal courts the global arbiters of proper labor practices.

The activities that Plaintiffs identify as "substantial assistance" routinely "accompany any natural resource development business or the creation of any industry." *Talisman*, 582 F.3d at 260-61 (internal quotation marks and citation omitted). They are not "inherently criminal or wrongful" and "serve essentially as proxies for [Plaintiffs'] contention that [Defendants] should not have" done business in Côte d'Ivoire because it knew that country's cocoa farming industry lacked an unblemished record for enforcement of labor standards. *See id.* As the *Talisman* court observed, "if ATS liability could be established by knowledge of … abuses coupled only with such commercial activities … , the statute would act as a vehicle for private parties to impose embargos or international sanctions through civil actions in U.S. courts. Such measures are not the province of private parties but are, instead, properly reserved to governments and multinational

organizations." *Id.* at 264. The dramatic consequences of Plaintiffs' aiding-and-abetting standard preclude its recognition under *Sosa*.

Plaintiffs' theory is precluded for a second, independent reason: it conflicts with Congress's decision to allow the importation of cocoa grown through forced labor, and therefore violates *Sosa*'s directive that courts should defer to "congressional guidance in exercising jurisdiction with such obvious potential to affect foreign relations." 542 U.S. at 731. Section 307 of the Tariff Act authorizes the importation of "goods … produced … in any foreign country by … forced labor" when the goods "are not … produced … in such quantities in the United States as to meet the consumptive demands of the United States." 19 U.S.C. § 1307. It reflects a deliberate choice to "subordinate[] human rights concerns to the availability of the goods at issue." *Int'l Labor Rights Fund v. United States*, 391 F. Supp. 2d 1370, 1376 (Ct. Int'l Tr. 2005). Relying on Section 307, the Court of International Trade held that federal law allows the importation of Ivoirian cocoa despite the "continued existence of forced child labor in the Ivoirian cocoa industry" because "no domestic cocoa production industry exists in the United States sufficient to meet domestic consumptive demand." *Id.* at 1372-73, 1375.

Allowing Plaintiffs to assert ATS claims based on the same conduct—*i.e.*, Defendants' alleged purchases of cocoa from alleged wrongdoers and other ordinary purchaser-supplier activities—effectively would preclude importation of

this cocoa, thus overriding Congress's judgment. *Sosa* bars that result. *Abagninin*, 545 F.3d at 739-40 (enactment of a stricter standard of genocide could not be overridden by invoking the ATS); *see American Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2536-37 (2011) (when Congress has "addresse[d] a question," that "legislation excludes the declaration of federal common law").

III. The District Court Correctly Held That There Is No Corporate Liability Under The ATS

The decision below can also be affirmed because, as the district court correctly held, there is no corporate liability under the ATS. Under international law, culpability for human-rights norms extends only to nations, individuals acting under color of state authority, and, in some limited instances, natural persons. Whether to extend that liability to corporations long has been, and remains, a contested issue in the international community. Nothing approaching a consensus has emerged, much less a consensus that meets the exacting standards—"specific, universal, and obligatory"—required by *Sosa*. If anything, there is a consensus *against* extending international-law obligations to corporations. That resolves the issue.

Practical considerations likewise counsel against recognizing corporate liability. The extraordinary theory Plaintiffs advance—that corporations can incur liability for human-rights violations simply because they bought goods from

overseas suppliers—has such sweeping ramifications that it should be adopted, if at all, only by Congress.

A. The Corporate Liability Issue Is Governed by International Law

Plaintiffs again raise a threshold choice-of-law question, arguing that the question of corporate liability is a mere "loss-allocation" or "remedies" issue that may be governed by domestic law. (AOB 13-15.) The district court correctly recognized that corporate liability, like aiding and abetting, is a substantive issue that must satisfy *Sosa*.

The circuits are divided on this issue. The Second Circuit, like the court below, held that international law controls, *see Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 125-31 (2d Cir. 2010), while the D.C. Circuit applied domestic law, *see Exxon*, 2011 WL 2652384 at *21-23.[23] For several reasons, the approach used by the Second Circuit and district court is the only one that complies with *Sosa*.

First, the choice-of-law issue was *not* left open in *Sosa*, nor did the Court refer the matter to federal common law. Instead, the Court directed courts to consider "whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual." 542 U.S. at 732 n.20; *see also id.* at 760 (Breyer, J.,

[23] The Seventh Circuit has stated in *dictum* that domestic law controls. *Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013, 1019-20 (7th Cir. 2011).

concurring). In plain terms, the Court stated that international law defines not only the conduct that will trigger a norm, but also the class of potential actors to whom that norm applies. *Id*. Plaintiffs insist this statement does nothing more than distinguish between state actors and non-state actors. But that is no distinction at all. As the Second Circuit recognized, the question whether a particular norm extends only to state actors or includes non-state actors is indistinguishable for choice-of-law purposes from whether the norm extends only to natural persons or includes artificial entities; there simply "is no principled basis for treating the two questions differently." *Kiobel*, 621 F.3d at 130-31. *Accord Exxon*, 2011 WL 2652384 at *58 (Kavanaugh, J., dissenting). In both cases, the scope of liability is governed by international law.

Second, applying *Sosa* to determine *who* may be sued under the ATS honors the Court's requirement of caution when considering new international norms. *Sosa* described a narrow class of norms that may be recognized through a judicially created cause of action without Congressional guidance—but only if those norms enjoy universal acceptance among civilized nations. 542 U.S. at 732. Absent agreement not only on the "what" of an international norm, but also on the "who," there is not the requisite degree of international consensus on what (or whose) conduct is covered to authorize a judicially created common law remedy under the ATS. *See Kiobel*, 621 F.3d at 128-29.

Third, international law long has regarded who may be sued as no less integral to a given norm than what conduct is prohibited; the "who" never has been left to the domestic law of individual States. *See* 1 OPPENHEIM'S INTERNATIONAL LAW § 33, at 119-29 (9th ed. 1996); RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE US, pt. II, Introductory Note at 70-71. At Nuremberg, for example, some individuals charged with violating international human-rights norms argued that only nations were subject to international law obligations. The Tribunal disagreed, making explicit for the first time that "international law imposes duties and liabilities upon individuals as well as upon states," and that "individuals can be punished for violations of international law." *The Nurnberg Trial*, 6 F.R.D. 69, 110 (Int'l Military Trib. 1946). Significantly, the issue of individual liability was addressed and resolved as a matter of international law.

Finally, it is wrong to refer to the scope of liability as either a "remedy" or "loss allocation mechanism" (AOB15), or, as the D.C. Circuit phrased it, a mere "technical accoutermen[t]." *Exxon*, 2011 WL 2652384 at *30. The scope of liability is—always—a substantive issue not to be confused with questions of remedy or technical pleading standards: "'The substantive questions whether the plaintiff has any right or the defendant has any duty, and if so what it is, are very different questions from the remedial question whether this remedy or that is preferred, and what the measure of the remedy is.'" *City of Sherrill v. Oneida*

Indian Nation, 544 U.S. 197, 213 (2005) (quoting Dobbs, THE LAW OF REMEDIES § 1.2, p.3 (1973)). Remedial questions would include the relief a successful plaintiff may receive, such as money damages. *Kiobel*, 621 F.3d at 147 n.50. And although international law sometimes leaves such remedial questions to individual States, "the liability of corporations … is not a question of remedy." *Id.* at 147. Instead, whether a class of defendants can be held liable in the first place relates to the "scope of liability"—an issue that *Sosa* confirms is controlled by international law. *Id*.

B. There Is No International Law Consensus For Extending Liability For International Norm Violations To Corporations

With choice of law resolved, the remaining question is whether there is a "specific, universal" international-law norm imposing liability on corporations. The answer is no. Under *Sosa*, the issue is not—as plaintiffs suggest—whether any single nation or tribunal has thought it appropriate to extend to corporations the obligations associated with the alleged norm against forced labor. The issue instead is whether the nations of the world have uniformly adopted the view that international law imposes such obligations on corporations. *Sosa*, 542 U.S. at 732.

They have not. As the Second Circuit found, there remains an "absence of any generally recognized principle or consensus among States concerning corporate liability for violations of customary international law." *Kiobel*, 621 F.3d

at 137. Indeed, there is not even a consensus on what the human rights role of corporations *should be*, as a matter of policy.

And for good reason: As one international law scholar explained, it is widely perceived that artificial entities cannot form the requisite intent to commit the types of moral crimes to which individual liability has extended. Bassiouni, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW, 378-81 (2d ed. 1999). Likewise, the circumstances under which corporate liability might be thought appropriate vary widely depending on the nature of the underlying human rights norm at issue. *See id*; *Khulumani*, 504 F.3d at 325 (Korman, J., concurring).

The lack of uniformity is not surprising given the evolution of international law. Historically, the law of nations applied primarily between nations, not between or among individual citizens of particular nations. *See* St. Korowicz, *The Problem of the International Personality of Individuals*, 50 AM. J. INT'L L. 533, 534 (1956). Over time, certain norms were deemed applicable to individuals exercising state power, and, in some narrow instances, to non-state individuals. *See* Bassiouni, CRIMES AGAINST HUMANITY, at 369-70. These developing principles of individual liability later were incorporated into the statutes of the ICTY, arts. 7(1) & 23(1), 32 I.L.M. 1192, 1194, 1199 (1993, updated 2004), and ICTR, arts. 6(1) & 22(1), 33 I.L.M. 1602, 1604, 1610 (1994), as well as the Rome Statute. But despite these shifts, a consensus never emerged to expand that

liability to artificial entities such as corporations. *See Developments in the Law, Corporate Liability for Violations of International Human Rights Law*, 114 HARV. L. REV. 2025, 2030 (2001).

Thus, despite occasional proposals to recognize corporate responsibility in international law, there never has been any consensus for doing so. That is why a group of leading international-law scholars concluded that "no international tribunal ever has found a corporation liable for violating customary international law." Br. of Amicus Curiae Int'l Law Professors at 9, *Sarei v. Rio Tinto, PLC*, Nos. 02-56256 *et seq.* (Dec. 24, 2009).

In this case, the district court surveyed relevant international law—including treaties, conventions, international judicial tribunals, and scholarship (ER145-69)—and concluded that "there is no well-defined international consensus regarding corporate liability for violating human rights norms." (ER144.) The Second Circuit conducted a similarly exhaustive survey in *Kiobel* and reached the same conclusion. *See* 621 F.3d at 132-148. Although word limits prevent Defendants from retracing these comprehensive surveys, a few critical points confirm the absence of anything approaching a clear international-law consensus favoring corporate liability.

International Criminal Court. During the Rome Statute negotiations, France proposed that a provision be included for corporate liability, but the

proposal was specifically rejected "when it became clear that there was there was no possibility that a text could be adopted by consensus." Clapham, *The Question of Jurisdiction Under International Criminal Law Over Legal Persons*, *in* LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW 139, 157 (2000). *See* ER164; *Kiobel*, 621 F.3d at 119. No fewer than 13 nations firmly opposed the inclusion of corporate liability, and 12 more, including the United States, considered the disparity in practice among states cause for concern. (ER164-65.) Accordingly, the statute creates jurisdiction over only "natural persons." Rome Statute art. 25(1). As *Kiobel* observed: "The history of the Rome Statute … confirms the absence of any generally recognized principle or consensus among States concerning corporate liability for violations of customary international law." 621 F.3d at 137.

Plaintiffs argue that the rejection of corporate liability in the Rome Statute "had nothing to do with corporate liability in international law generally." (AOB 27.) Plaintiffs' *amicus* David Scheffer and the majority in *Exxon* similarly discount the Rome Statute as "more properly viewed in the nature of a treaty and not as customary international law." *Exxon*, 2011 WL 2652384, at *18. But treaties are among the primary sources of international law, *Sosa*, 542 U.S. at 734, particularly in the case of the Rome Statute, which "has been signed by 139 countries and ratified by 105, including most of the mature democracies of the

world," and thus may be taken "'by and large … as constituting an authoritative expression of the legal views of a great number of States.'" *Khulumani*, 504 F.3d at 276 (Katzmann, J., concurring) (quoting *Furundzija*, 1998 WL 34310018, ¶ 227). That is why Scheffer's position was rejected by the Second Circuit in *Khulumani* and, more recently, by the Fourth Circuit in *Aziz*. *See* 2011 WL 4349356, at *10 & n.12 ("parting company" with the D.C. Circuit and finding the Rome Statute to be an "authoritative barometer of international expression").

ICTY & ICTR. The Rome Statute's limitations are mirrored in the charters of the ICTY and the ICTR, both of which address only natural persons. *See* ICTY Statute, art. 6(1); ICTR Statute, art. 5. The ICTY statute is especially significant because it was "intended to codify existing norms of customary international law." *Khulumani*, 504 F.3d at 274 (Katzmann, J.).

Earlier Conventions. Earlier international conventions against torture and genocide were to the same effect. The Convention on the Prevention of the Crime of Genocide, art. 4, Jan. 12, 1951, 78 U.N.T.S. 277, provides for punishment only of "constitutionally responsible rulers, public officials, or private individuals." Likewise, the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, SEN. TREATY DOC. NO. 100-20 (1988), extends only to individual persons.

U.N. Studies. A more recent illustration is the work of U.N. Special Representative of the Secretary-General John G. Ruggie. Ruggie was appointed to study the issue of applying international human-rights law to multinational corporations. He concluded that there is no international consensus recognizing corporate liability because "states have been unwilling to adopt binding international human rights standards for corporations." Ruggie, *Implementation of G.A. Resolution 60/251 of 15 March 2006*, U.N. Doc. A/HRC/4/35, ¶ 44 (Feb. 19, 2007); *see also* Ruggie, *Interim Report of the Special Representative*, U.N. Doc. E/CN.4/2006/97, ¶ 59 (Feb. 22, 2006). Although he acknowledged efforts to extend such duties to corporations and lauded corporations' *voluntary* efforts in the area, he concluded that established sources of positive law do not "currently impose direct liabilities on corporations. Ruggie, *Implementation of G.A. Resolution 60/251*, ¶ 44.

Nuremberg. Finally, much attention has been given to the criminal trials at Nuremberg following World War II. But like the ICTY, ICTR, and ICC tribunals that followed, the Nuremberg tribunals did not authorize or involve criminal charges against corporations.

Article 6 of the "London Charter" of the International Military Tribunal, which authorized the punishment of Axis war criminals, granted the tribunal jurisdiction only to "try and punish persons … whether as individuals or as

members of organizations." *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis*, art. 6, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 280. The "members of organizations" provision resulted in the designation of certain organizations—such as the SS and the Gestapo—as "criminal," but this served only "to facilitate prosecution of individuals who were members of the organization." *Kiobel*, 621 F.3d at 134. In neither the initial Nuremberg trials, nor the later U.S. military trials under authority of the "Control Council"—a committee of military leaders from the U.S., the U.K., the Soviet Union, and France—was any corporate entity put to trial. *Id*. As one leading Nuremberg scholar noted, "the [Nuremberg] court sharply dismissed the notion of imposing liability on 'abstract entities' instead of individual perpetrators," and "[o]ccasional suggestions to the contrary by human rights scholars are mistaken." J. Bush, *The Prehistory of Corporations & Conspiracy in Int'l Criminal Law: What Nuremberg Really Said*, 109 COLUM. L. REV. 1094, 1098, 1162 (2009).

Plaintiffs and their *amici* offer several counter-arguments premised on misstatements of the historical record. Plaintiffs point to references to "Farben" in one decision as suggesting that corporate liability was imposed on the German chemical company I.G. Farben. (AOB26-27, citing *The Farben Case*, 8 T.W.C. at 1173-74.) But they omit the critical statement, a few pages earlier, that "Farben"

was a collective reference to the *individual* defendants. *The Farben Case*, 8 T.W.C. at 1153.

Plaintiffs also argue that corporations *were* punished "under international law" at Nuremberg because corporate assets were seized and the Control Council liquidated certain German companies and reorganized several industries. (AOB 25-27; Nuremberg Br. 16-17.) But that is revisionist history. The Control Council was not exercising judicial authority under international law, but rather was acting in an executive capacity as the *government of Germany*, pursuant to Germany's unconditional surrender. *See Declaration Regarding the Defeat of Germany and the Assumption of Supreme Authority by Allied Powers* (June 5, 1945) (Allied powers "assume[d] supreme authority with respect to Germany, including all the powers possessed by the German Government"); *Agreement on Control Machinery in Germany*, art. 3(a) (Nov. 14, 1944). The Council's actions in an executive capacity did not constitute legal precedents regarding the treatment of corporations under international law.

Nuremberg thus provides no precedent for creating corporate liability for human-rights norms. Like the history of the ICTY, ICTR, and ICC tribunals, the history of Nuremberg "demonstrate[s] that imposing liability on corporations for violations of customary international law has not attained a discernible, much less

universal, acceptance among nations of the world in their relations *inter se*." *Kiobel*, 621 F.3d at 145. Plaintiffs' claims were properly dismissed on this ground.

C. Plaintiffs' Contrary Arguments Are Meritless

Plaintiffs insist that, even with no international consensus, this Court should recognize corporate liability under the ATS because many nations' legal systems do so *domestically*. Plaintiffs are wrong for several reasons.

First, *Sosa* confirmed that courts evaluating an international norm under the ATS must distinguish between rules of truly "international character," 542 U.S. at 725, and those that are merely accepted by the domestic systems of many nations. "It is only where the nations of the world have demonstrated that the wrong is of mutual, and not merely several, concern … that a wrong generally recognized becomes an international law violation within the meaning of the [ATS]." *Filártiga v. Peña-Irala*, 630 F.2d 876, 888 (2d Cir. 1980). As Judge Friendly explained, "[t]he mere fact that every nation's municipal law may prohibit theft does not incorporate the Eighth Commandment, 'Thou Shalt not steal' … into the law of nations.'' *ITT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975).

Nuremberg itself illustrates the point: The concept of individual liability was known to all nations, but the tribunal viewed individual liability *under the law of nations* as a separate matter. *See* 6 F.R.D. 69, 110. Thus whatever role "general principles" of municipal law may play in implementing international law in a

quasi-legislative context—such as where nations need to round out an international code with general provisions, *cf.* Scheffer Br. at 10—courts applying the ATS may not use such rules to expand the scope of international norms.

Second, the separation-of-powers principles that animated *Sosa* compel the same result. No one doubts that Congress could enact legislation governing activities of U.S. corporations with respect to international human rights. Indeed, when international law leaves matters to be decided by each nation, this generally is how it is handled: the new law is created, if at all, by each nation's lawmaking body. Given this allocation—and the fact that Congress has provided "no congressional mandate to seek out and define new and debatable violations of the law of nations," *Sosa*, 542 U.S. at 727-28—the federal courts must exercise any common law power "if at all, with great caution," by incorporating into U.S. law only international norms that are already well-settled and universally agreed upon by nations. *Id.*

Finally, Plaintiffs advance a hodgepodge of arguments about the text and history of the ATS—including that "the text places no limits on who can be a defendant" and that "[t]he drafters of the ATS were quite familiar with common law tort liability for corporations." (AOB16-22.) But Plaintiffs ignore the most important text: the language of the ATS itself. It provides that the "tort" committed by the defendant must be "in violation of the law of nations," 28 U.S.C.

§ 1350, which cannot occur if international law imposes no obligations on the defendant sued. Moreover, *Sosa* directs courts construing the ATS to look to "international law," not 18th-century common law or any other source, to decide whether "the scope of liability for a violation of a given norm" extends to a given defendant. 542 U.S. at 732 n.20. And it is beside the point that "[t]ort liability against juridical entities … was well known at the time the ATS was enacted" (AOB17), because such liability is not well-established in the *law of nations*.

Nor do Plaintiffs fare any better by recasting the question presented as one of "[c]orporate [i]mmunity." (AOB13); *see also Exxon*, 2011 WL 2652384 at *21-23. That formulation "improperly assumes that there is a norm imposing liability in the first place." *Kiobel*, 621 F.3d at 120. The idea of assuming a norm with universal scope and then asking whether corporations are "immune" stands on its head the teaching of *Sosa*: courts must ask whether international law "extends" the scope of liability for a norm to a particular class of defendant. 542 U.S. at 732 n.20.

D. Practical Considerations Militate Against Recognizing Corporate Liability

Even if there were a "specific, universal" international-law consensus extending liability to corporations, *Sosa*, 542 U.S. at 732, plaintiffs' claim would fail because *Sosa* requires a second step: courts must consider the "practical consequences" of such an extension. *Id.* at 732-33. There are two fundamental

reasons why those practical consequences militate against recognizing a federal common law cause of action here.

First, Congress chose not to recognize corporate liability in the most analogous area in which it has legislated: the TVPA, which is an extension of the ATS and thus "provides a useful, congressionally-crafted template to guide" the Court's common law ATS powers. *Sarei*, 550 F.3d at 832. The TVPA extends only to "individuals," not corporations. 28 U.S.C. § 1350, *note*, § 2(a); *Bowoto v. Chevron Corp.*, 621 F.3d 1116, 1126 (9th Cir. 2010).

That is important because *Sosa* directs courts to "look for legislative guidance before exercising innovative authority." *Sosa*, 542 U.S. at 726. Indeed, it would be "anomalous" for a judicially-crafted cause of action to sweep "beyond the bounds [Congress] delineated for comparable express causes of action." *Central Bank, N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164, 180 (1994). The same prudential limits that Congress imposed in the TVPA certainly should apply in any judge-made action under the ATS.

Second, this Court must consider the "practical consequences" of creating private claims in U.S. courts to govern worldwide labor practices. Plaintiffs' proposal threatens to transform labor violations "anywhere in the world" into federal common law actions in U.S. courts against downstream purchasers. *Sosa*,

542 U.S. at 736. The implications of this expansion of U.S. law would be "breathtaking" and should not be undertaken without Congressional action. *Id.*

IV. This Court May Affirm on the Alternative Ground That an Aiding and Abetting Cause of Action Under the ATS is Contrary to *Sosa*

This Court may affirm on the alternative ground that the ATS does not authorize claims for the theory of liability alleged here—aiding and abetting forced labor. That norm satisfies neither of *Sosa*'s prerequisites for recognition of a new federal common law claim.

A. There is No International Law Consensus Supporting Plaintiffs' Aiding-and-Abetting Theory

Plaintiffs cannot show that that the basis of liability they advocate—aiding and abetting forced labor (AOB3 n.2)—has achieved the same degree of "definite content and acceptance among civilized nations" as the paradigms identified in *Sosa*. 542 U.S. at 732. The ILO conventions that Plaintiffs cite do not create such a norm because they extend obligations only to ratifying nations, not private parties. For example, ILO Convention 182, addressing the Worst Forms of Child Labor, does not purport to bind non-state parties and thus provides no support for a "norm" applicable to individual employers—much less to third parties that do business with them. Plaintiffs have not cited a single case in which liability was imposed under international law for "aiding and abetting" such a labor violation.

The aiding-and-abetting provisions in the Rome, ICTY, and ICTR Statutes do not help Plaintiffs. By their terms, these statutes apply only to a small handful of enumerated international-law offenses—*i.e.*, war crimes, genocide, and crimes against humanity.[24] There is no international-law support for the notion that aiding and abetting is a *freestanding* norm that all nations condemn as a matter of universal and mutual concern. Rather, the statutes define aiding and abetting *only in connection* with a narrow group of especially grave, core international crimes. Thus, they do not support the existence of an international norm against aiding and abetting forced labor.[25]

Nor is it proper to identify a substantive norm—such as forced labor—and then graft onto it a separate "norm" of aiding and abetting. The scope of liability "for a given norm"—*i.e.*, the nature of conduct that is proscribed—must be defined by reference to international law. *Sosa*, 542 U.S. at 732 n.20. Because the advisability of, and standards for, aiding and abetting may vary depending on the nature of the underlying offense, courts must evaluate aiding and abetting *with respect to the particular norm at issue*—here, forced labor. *Khulumani*, 504 F.3d

[24] Rome Statute, art. 25(3)(c) (aiding and abetting "a crime within the jurisdiction of this Court"); ICTY Statute art. 7(1) (aiding and abetting "a crime referred to in articles 2 to 5 of the present Statute"); ICTR Statute art. 6(1).

[25] No treaty ratified by the United States authorizes aiding-and-abetting liability at all, much less for labor violations. *See Khulumani*, 504 F.3d at 319-26, 330-33 (Korman, J.). And the Nuremberg Trials yield no instance in which liability was imposed for aiding and abetting (as opposed to directly employing) forced labor.

at 326-27 (Korman, J.); *see also Ali Shafi v. Palestinian Auth.*, 642 F.3d 1088, 1096 (D.C. Cir. 2011) (scope of liability must be shown "on a norm-specific basis"). A pieced-together claim such as that proposed by Plaintiffs cannot constitute a settled international norm under *Sosa*, because a court cannot "extend and redefine … norms" to create a consensus that does not exist. *Abagninin*, 545 F.3d at 737-38.

B. "Practical Consequences" Weigh Against Any Federal Common-Law Claim for Aiding and Abetting Here

Plaintiffs' aiding-and-abetting theory also fails the "practical consequences" step of *Sosa*. 542 U.S. at 732-33.

Civil aiding and abetting is such an "uncertain" concept that even when Congress enacts a law allowing recovery for "violation of some statutory norm, there is no general presumption that the plaintiff may also sue aiders and abettors." *Central Bank*, 511 U.S. at 175, 182. Moreover, authorization for civil aiding and abetting cannot be inferred "from a criminal prohibition." *Id*. at 188, 190.[26]

The insight underlying *Central Bank*—that creation of aiding-and-abetting liability must be approached with caution because it transforms previously

[26] *See also Sosa*, 542 U.S. at 715-16, 722 n.15, 723-724 (ATS intended to provide forum for international-law violations as to which international law required redress); *Mora v. New York*, 524 F.3d 183, 208-09 (2d Cir. 2008) (rejecting proposed norm absent international-law consensus on need for a tort remedy); *cf. Filártiga*, 630 F.2d at 883 (relying on universal accord both that official torture is prohibited, and that nations must afford "redress and compensation" to the victim).

permissible conduct into wrongdoing—applies with even greater force to the ATS, because of the "obvious potential to affect foreign relations." *Id*. at 731. As the United States has explained, "[t]he absence of a prosecutorial check has special salience as a reason to reject civil aiding and abetting liability in the ATS context." Br. for the U.S., *Am. Isuzu Motors, Inc. v. Ntsebeza*, No. 07-919 (U.S. S. Ct.), 2008 WL 408389, at *11 (citing *Sosa*, 542 U.S. at 727). It "would be remarkable to take a *more* aggressive role in exercising [ATS] jurisdiction" than the federal courts take in other contexts. *Sosa*, 542 U.S. at 726.

V. Plaintiffs' Claims Fail Because The ATS Lacks Extraterritorial Reach

This Court also can affirm on a ground already adopted by two of its judges: the ATS has no extraterritorial reach. *See Sarei v. Rio Tinto, PLC*, 625 F.3d 561, 562-64 (9th Cir. 2010) (Kleinfeld, J., dissenting from *en banc* referral to mediation); *Sarei*, 550 F.3d at 838-40 (Ikuta, J., dissenting).

1. Unless an "affirmative intention of the Congress clearly expressed" states otherwise, federal courts presume that statutes do not apply extraterritorially. *Morrison v. Nat'l Australia Bank Ltd.*, 130 S. Ct. 2869, 2877 (2010). That presumption "protect[s] against unintended clashes between our laws and those of other nations which could result in international discord." *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991). "When a statute gives no clear indication of an extraterritorial application, it has none." *Morrison*, 130 S. Ct. at 2878.

As Judges Kleinfeld and Ikuta have concluded, the ATS says nothing about extraterritorial application. To be sure, it refers to conduct committed in "violation of the law of nations or a treaty of the United States," and such conduct can occur worldwide. But "as the Supreme Court has explained, the mere fact that statutory language could plausibly apply to extraterritorial conduct does not suffice to overcome the presumption against extraterritoriality. Otherwise, most statutes, including most federal criminal laws, would apply extraterritorially and cover conduct occurring anywhere in the world." *Exxon*, 2011 WL 2652384 at *50 (Kavanaugh, J., dissenting). Nor does the reference to "an alien" change this conclusion. That just means that aliens can sue for injuries suffered *within* the United States. *See id.* at *47.

The history of the ATS confirms that that is precisely what Congress intended. As Judge Kavanaugh explained in *Exxon*, the United States lacked authority under the Articles of Confederation to remedy violations of the law of nations. *See* 2011 WL 2652384, at *50. That posed grave diplomatic problems because diplomats suffered invasions of their customary rights on U.S. soil and Congress could not ensure redress. *Id.* The First Congress responded by enacting the ATS. *See id.* Thus Congress "was concerned about aliens who were injured *in the United States* in violation of customary international law"—not those injured

abroad by foreign actors. *Id.* (emphasis added); *accord Sarei*, 550 F.3d at 839 (Ikuta, J., dissenting).

2. The lack of extraterritorial reach in the ATS is dispositive here because Plaintiffs seek to apply the statute to conduct with no domestic nexus. Their claims seek to redress injuries inflicted in West Africa by West Africans against other West Africans. That the complaint alleges that U.S. companies' purchases of cocoa make them vicariously liable for actions taken overseas does not give the underlying torts any meaningful U.S. connection.

Indeed, applying the ATS to this case—or any case premised on foreign conduct—would threaten the very foreign-relations difficulties that the ATS and the presumption against extraterritoriality are designed to avoid. The presumption assumes that expansive application of U.S. law can cause "unintended clashes between our laws and those of other nations which could result in international discord." *EEOC*, 499 U.S. at 248. The ATS, likewise, was designed to keep the United States out of foreign disputes. *See Sosa*, 542 U.S. at 715-18. But ATS litigation involving events like those alleged here would deputize U.S. courts as worldwide labor-dispute referees, often to the alarm of foreign nations. Indeed, foreign nations—including the U.K., Switzerland, and Germany—have complained that the ATS violates their rights to regulate conduct in their own

territory. *See Developments in the Law, Extraterritoriality*, 124 HARV. L. REV. 1226, 1283 (2011).

Here, Plaintiffs have alleged that their mistreatment occurred with the sanction of the Ivoirian government (ER262-64). This action accordingly would transform the ATS, a statute designed to ease tension with foreign nations, into a device for exacerbating it.

3. Among the federal circuits, only the D.C. and Seventh Circuits have decided whether the ATS applies extraterritorially. *See Exxon*, 2011 WL 2652384, *5-11; *Flomo*, 643 F.3d at 1025. Although both concluded that it does, the question is open in this circuit, where two judges have already reached the opposite conclusion. The Second Circuit likewise has suggested that the ATS lacks extraterritorial reach, *see Kiobel*, 621 F.3d at 142 n.44, and Judge Kavanaugh's dissent in *Exxon* shows in detail why that conclusion is correct. If this Court reaches the question, it should follow these opinions in ruling that the ATS lacks extraterritorial reach.

CONCLUSION

The judgment of the district court should be affirmed.

DATE: September 30, 2011

Respectfully submitted,

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STATEMENT OF RELATED CASES

The Defendants-Appellees are aware of the following related cases that are currently pending in this Court and that may raise related issues:

Sarei v. Rio Tinto, plc, C.A. Nos. 02-56256, 02-56390, 09-56381

Galvis Mujica v. AirScan Inc., C.A. Nos. 10-55515, 10-55516, & 10-55587

CERTIFICATE OF COMPLIANCE

I certify pursuant to Federal Rules of Appellate Procedure 32(a)(7)(C) that the attached brief is proportionately spaced, has a typeface of 14 points, and contains 13,920 words.

Dated: September 30, 2011

/s/ Kristin L. Myles
Kristin L. Myles

CERTIFICATE OF SERVICE

I hereby certify that on September 30, 2011, I electronically filed the foregoing "Answering Brief for Defendants-Appellees Nestlé U.S.A., Inc.; Archer-Daniels-Midland Company; and Cargill, Incorporated" with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: September 30, 2011

By: */s/ Kristin L. Myles*
Kristin L. Myles