No. 10-56739

In the United States Court of Appeals for the Ninth Circuit

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

Plaintiffs-Appellants,

vs.

NESTLE USA, INC.; ARCHER DANIELS MIDLAND CO.; CARGILL INCORPORATED CO.; CARGILL COCOA,

Defendants-Appellees.

On Appeal From the United States District Court
For the Central District of California
The Honorable Stephen V. Wilson
District Court No. 2:05-CV-11695-SVW-JTL

BRIEF OF *AMICUS CURIAE* EARTHRIGHTS INTERNATIONAL IN SUPPORT OF PLAINTIFFS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Amicus curiae EarthRights International (ERI) is a nonprofit corporation, which has no parent corporation nor stock held by any publicly held corporation.

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STATEMENTS PURSUANT TO RULE 29

All parties to this appeal have consented to the filing of this brief. No party or counsel thereof authored this brief; no person other than *amicus* contributed money intended to fund preparing or submitting this brief.

STATEMENT OF IDENTITY AND INTEREST OF *AMICUS CURIAE*

EarthRights International (ERI) is a human rights organization based in Washington, D.C., which litigates and advocates on behalf of victims of human rights abuses worldwide. ERI has represented plaintiffs in several lawsuits against corporations under the Alien Tort Statute (ATS), 28 U.S.C. § 1350, alleging liability for, *inter alia*, aiding and abetting security forces in carrying out torture and extrajudicial killings in foreign countries. *E.g.*, *Doe v. Unocal Corp.*, No. 00-56603 (9th Cir.); *Bowoto v. Chevron Corp.*, No. 09-15641 (9th Cir.); *Wiwa v. Royal Dutch Petroleum Corp.*, No. 96 Civ. 8386 (S.D.N.Y. Feb. 28, 2002).

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

STATEMENT OF THE ISSUE ADDRESSED BY *AMICUS CURIAE*

The appropriate body of law to apply to accessorial and corporate liability under the ATS is federal common law. Under that body of law, the standard for aiding and abetting liability is that the defendant *knowingly* provide substantial

assistance to a person committing a tort, and corporations are subject to suit.

SUMMARY OF ARGUMENT

The district court erred by declining to apply uniform federal common-law rules to determine who may be held liable under the Alien Tort Statute (ATS), 28 U.S.C. § 1350. Instead, the court mistakenly concluded that *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), requires courts to look to international law rather than federal common law for liability standards.

Sosa held that ATS claims are primarily federal common law claims. Thus, while the ATS requires a violation of a right guaranteed by international law, other questions in an ATS action, including the scope of the remedy, are determined according to background common law principles. This approach is compelled not only by *Sosa*, but also by the text of the statute, the ordinary role of federal common law in giving effect to federal claims, the original understanding of the ATS, and the structure of international law — which typically leaves liability issues to domestic resolution. Therefore, liability rules in ATS actions are determined by uniform federal common law. The questions of whether a defendant has sufficiently participated in a violation and whether corporations can be sued are ancillary to the question of whether there has been a violation of an international norm. Accordingly, they must be determined by federal common law.

Although international law may contain gaps that make it inappropriate as the primary source of liability rules, if international law accords with established federal law, there can be little argument against its application in ATS cases.

The standard for civil aiding and abetting liability under federal common law is that the abettor must knowingly provide substantial assistance to the primary tortfeasor. International tribunals have applied the same standard under international law. Where a party knowingly assists in the commission of universally recognized human rights violations, such as genocide or the forced labor at issue here, it cannot absolve itself by claiming it did not affirmatively wish the abuse to occur.

Similarly, corporate liability has been a feature of the common law since the Founding. International law also recognizes that corporations can be sued, in part because international law incorporates general principles of law drawn from the world's major legal systems. The ATS provides no exception to the rule that corporations are civilly liable to the same extent as natural persons. Blanket corporate immunity is anathema even in the context of garden-variety torts; it makes no sense in the context of a law that provides redress for the most egregious human rights abuses.

ARGUMENT

I. Federal common law governs remedies in Alien Tort Statute cases, including secondary liability rules and determinations of whether corporations may be held liable.

The district court should have determined that uniform federal common law rules apply to determine liability in ATS cases. The court's conclusion that aiding-and-abetting liability standards and corporate liability must be determined under international law misunderstands the interplay between international law and federal common law as applied to ATS claims. International law provides the source of the norm whose violation gives rise to an ATS claim; it determines whether a plaintiff has suffered a violation of a right guaranteed by the law of nations. But *Sosa*, the original understanding of the ATS and international law itself all suggest that a uniform body of federal common law should be used to determine liability rules.

The Courts of Appeals are currently divided on the question of what body of law controls. The Eleventh Circuit has adopted common-law rules of liability, *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1158 (11th Cir. 2005); the Second Circuit has looked to international law. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 126–27(2d Cir. 2010); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 259 (2d Cir. 2009). *Amicus* submits that the Eleventh

Circuit's approach is correct.[1]

A. The text of the ATS points to federal common law.

The ATS grants district courts "jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations." 28 U.S.C. § 1350. As this Court has noted, "section 1350 does not require that the action 'arise under' the law of nations, but only mandates a 'violation of the law of nations.'" *In re Estate of Marcos Human Rights Litig.*, 25 F.3d 1467, 1475 (9th Cir. 1994) (quoting *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 779 (D.C. Cir. 1984) (Edwards, J., concurring)). Thus, the text does not require that remedies and theories of liability for violations must be found in international law, nor that international law must define who can be a proper defendant. Indeed, the use of the word "tort" itself precludes the notion that all aspects of what defines the claim must be found in international law, since "tort" is a domestic law concept.

The district court's requirement that international law must supply all liability rules conflicts with the text of the ATS.

B. *Sosa* directs the Court to apply federal common law.

As the appellants argue, the Supreme Court in *Sosa* confirmed that the common law provides the cause of action in ATS cases. *See* Appellants' Br. at 13–

[1] Judge Hall's concurring opinion in *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 286–91 (2d Cir. 2007), also sets forth the proper analysis.

14. While there must be a "violation[] of [an] international law norm" in order for there to be an ATS claim, such claims are "common law causes of action." *Sosa*, 542 U.S. at 721, 732.[2]

Accordingly, once the threshold test for determining whether there has been a violation that gives rise to federal common law claim has been met, federal common law governs the scope of that claim. The *right* violated comes from international law, the *remedy* from federal common law. International law determines whether the infringement of the right at issue is prohibited, but whether to extend a remedy, either to a particular class of defendants, or at all, *see Sosa*, 542 U.S. at 732–33, is a question of federal law.[3] This Court reached essentially

[2] Under *Sosa*'s threshold test, in order for the violation of an international norm to give rise to an ATS cause of action, that norm must have "[no] less definite content and acceptance" among nations than the "historical paradigms familiar when § 1350 was enacted." *Id.* at 732. This standard is "generally consistent with" prior cases requiring that a norm be specific (or definable), universal, and obligatory. *Id.* (citing *Tel-Oren*, 726 F.2d at 781 (Edwards, J., concurring)); *Marcos*, 25 F.3d at 1475.

[3] As Appellants note, footnote 20 of *Sosa* suggests that the question of whether the perpetrator must be a state actor is one of international law. *See* Appellants' Br. at 14–15; 542 U.S. at 732 n.20. This is fully consistent with the right/remedy distinction, because where the involvement of a State is required, it is an element of the offense and thus is part of what defines whether any international right has been violated at all. Liability rules and the recognition of corporate personality are a matter of the remedy an individual state may provide, not elements of the international law right violated. Nothing in footnote 20 suggests that, where a violation of international law has been committed, international criminal liability rules should be used to determine who can be held liable for that

the same conclusion prior to *Sosa*, noting that "[n]othing more than a *violation* of the law of nations is required to invoke section 1350." *Marcos*, 25 F.3d at 1475 (quoting *Tel-Oren*, 726 F.2d at 778 (Edwards, J., concurring)).

The federal common law that defines ATS actions incorporates international law to a certain extent. The norm itself — the prohibited conduct that violates the victim's rights — is a question of international law. *Kiobel*, 621 F.3d at 152–53 (Leval, J., concurring). Equally certain is that international law does not define all aspects of an ATS action; otherwise, *Sosa*'s holding that the ATS allows federal courts to recognize causes of action *at federal common law* would be meaningless. 542 U.S. at 724.

The district court erroneously suggested that all "substantive" rules in ATS cases must be recognized in international law, *Doe v. Nestle, S.A.*, 748 F. Supp. 2d 1057, 1071–72 (C.D. Cal. 2010), and thus declined to apply federal common law in determining the standard for aiding and abetting liability and in holding that corporations may not be held liable at all. *Id.* at 1079, 1124–25. The court's conclusion that no liability rule can be applied unless international law itself expressly provides punishment conflicts with the common-sense understanding of *Sosa*'s holding that the cause of action is provided by federal common law. The

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violation.

question is not whether particular liability rules meet the *Sosa* threshold standard for determining whether violation of a particular right gives rise to any cause of action at all. Rather, the question is which liability rules best effectuate Congress' goals in cases in which the primary conduct meets the *Sosa* threshold test.

C. Courts generally look to federal liability rules to effectuate federal causes of action.

The judiciary's ordinary approach to federal claims requires courts to apply federal common law to the issues at bar. Federal courts nearly always apply preexisting, general tort rules of liability to give effect to federal causes of action. *See United States v. Kimbell Foods,* 440 U.S. 715, 727 (1979); *see also Burlington Indus., Inc., v. Ellerth*, 542 U.S. 742, 754–55 (1998) (fashioning a "uniform and predictable standard" of vicarious liability in Title VII actions "as a matter of federal law").

Indeed, "Congress is understood to legislate against a background of common-law adjudicatory principles," and "courts may take it as given that Congress has legislated with an expectation that [such principles] will apply except when a statutory purpose to the contrary is evident." *Astoria Fed. Sav. & Loan Ass'n v. Solimino,* 501 U.S. 104, 108 (1991) (internal quotations omitted). "The canon of construction that statutes should be interpreted consistently with the

common law helps us interpret a statute that clearly covers a field formerly governed by the common law." *Samantar v. Yousuf*, 130 S. Ct. 2278, 2289 (2010). This applies with even more force here, because the ATS did not replace a common law cause of action; it created jurisdiction to hear one.

D. The Framers' understanding of international law points to federal common law.

Sosa's conclusion that federal law provides the cause of action flows expressly from the 18th-Century understanding of international law, relying heavily on Blackstone. *See* 542 U.S. at 714–24. *Sosa* recognized that private parties were capable of violating certain norms and thereby "threatening serious consequences in international affairs," and that these violations were "admitting of a judicial remedy" — *i.e.*, subject to domestic enforcement. *Id*. at 715.

Blackstone confirms that violations of international law by private parties have always been addressed through domestic processes: "[W]hen committed by private subjects," violations of the law of nations "are then the objects of the municipal law." William Blackstone, *An Analysis of the Laws of England* 125 (6th ed. 1771).[4] Kent's *Commentaries*, also cited by *Sosa*, note that although States

[4] The observation that these offenses are committed by "private subjects" shows that Blackstone recognized, contrary to *Kiobel*, 631 F.3d at 126, 148, that even those who were not generally "subjects" of international law could nonetheless violate its norms and be subject to domestic punishment.

wage war to enforce rules among themselves, "[t]he law of nations is likewise enforced by the sanctions of municipal law." 1 James Kent, *Commentaries on American Law* *181–82. Thus, *Sosa* speaks of recognizing claims "under federal common law for violations of [an] international law norm." 542 U.S. at 732.

E. Modern international law also requires the conclusion that federal common law applies.

The Framers' understanding that international law is enforced through domestic law remains true today. Modern international law itself suggests that federal common law is the proper source for liability rules.

As this Court previously recognized, although international law governs the question of whether there has been a violation, the decision of "how the United States wishe[s] to react to such violations [is a] domestic question[.]" *Marcos*, 25 F.3d at 1475 (quoting *Tel-Oren*, 726 F.2d at 778 (Edwards, J., concurring)). Likewise, the Second Circuit noted that international law "generally does not create private causes of action to remedy its violations, but leaves to each nation the task of defining the remedies that are available for international law violations." *Kadic v. Karadzic*, 70 F.3d 232, 246 (2d Cir. 1995);[5] *see also*

[5] *Kadic* equated "creat[ing] private causes of action" with "defining the remedies," 70 F.3d at 246, consistent with the understanding that *Sosa*'s holding that ATS causes of action arise under federal common law necessarily means that the remedy is governed by common law.

Khulumani, 504 F.3d at 286 (Hall, J., concurring) ("It is a 'hornbook principle that international law does not specify the means of its domestic enforcement.'"). The principle, adopted by this Court in *Marcos*, that international law itself need not provide a right to sue, 25 F.3d at 1475, was approved by *Sosa*, 542 U.S. at 724, 731; Judge Bork's contrary view was expressly rejected. *Id.* at 731.

Moreover, international law is particularly ill-suited to the rules of civil liability in ATS cases because there is no general body of international law civil liability rules. "[T]he law of nations never has been perceived to create or define the civil actions to be made available by each member of the community of nations." *Tel-Oren*, 726 F.2d at 778 (Edwards, J., concurring). Criminal and civil remedies have very different purposes, and international law leaves the question of private civil liability to domestic enforcement. *Kiobel*, 621 F.3d at 170–74 (Leval, J., concurring). Indeed, international law leaves most questions of enforcement — including criminal enforcement of complicity standards — to States. *See e.g.*, U.N. Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, art. 4(1), Dec. 10, 1984, 1465 U.N.T.S. 85 (requiring states to criminalize "complicity" in torture, but not defining a complicity standard).

Under international law, the liability rules applicable to defendants complicit in international torts is a matter for the United States to decide in creating the

remedy, not an issue governed by international norms that define the right. Accordingly, international law itself directs the Court to domestic law as the proper source for remedies and thus for secondary and corporate liability standards.

F. Congress' original understanding of the Alien Tort Statute mandates application of general common law rules of liability.

1. Because the law of nations was incorporated into the common law, general common law rules of liability apply.

Congress' original understanding of the relationship between the law of nations and the common law further suggests that common law tort principles apply in ATS cases. When Congress enacted the ATS, it would not have recognized any clear distinction between the two bodies of law; the common law was considered to have encompassed the law of nations in its entirety. It is thus mistaken to think that Congress would have looked to international law for rules of tort liability — which, of course, it did not and still does not provide. Instead, Congress treated torts under the law of nations like any other common law torts and applied rules of liability drawn from the "general body" of common law. Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 Va. J. Int'l L. 587, 595 (2002).

In our Republic's early years, courts routinely applied the law of nations in both civil and criminal cases, as a matter of general common law. *See* Brief of

Professors of Federal Jurisdiction and Legal History as Amici Curiae in Support of Respondents in *Sosa v. Alvarez-Machain* ["Legal Historians' Brief"], 2003 U.S. Briefs 339, *reprinted in* 28 Hastings Int'l & Comp. L. Rev. 99, 108–109 (2004).[6] Thus, they understood that a tort in violation of the law of nations would be "cognizable at common law just as any other tort would be." William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists,"* 19 Hastings Int'l & Comp. L. Rev. 221, 234 (1996). Attribution of liability was, therefore, governed by the common law, which included the law of nations. *See, e.g.*, *Talbot v. Janson*, 3 U.S. 133, 156 (1795) (applying general principles of aiding and abetting and conspiracy to hold defendant liable for violation of international law of neutrality); *United States v. Benner*, 24 F. Cas. 1084, 1087 (C.C.E.D. Pa. 1830) (recognizing that common-law rule of self defense would exonerate defendant alleged to have infringed on foreign minister's international law right of inviolability of person).

Civil aiding and abetting liability was well established at common law, and would have been familiar to the founders. As early as 1348, the courts of England ruled that one who came in aid of a trespasser, without himself doing another wrong, could be held liable as a trespasser. *See Roger de A.*, Y.B. 22 Edw. 3, fol.

[6] This brief's argument that ATS claims were part of the common law and required no further legislation was adopted by *Sosa*. 542 U.S. at 714.

14b, Mich., Lib. Ass. 43 (1348);[7] *see also Thomlinson v. Arriskin*, (1719) 92 Eng. Rep. 1096 (K.B.) (holding defendant liable for aiding trespass); *Yarborough v. Governor & Company of the Bank of England*, (1812) 104 Eng. Rep. 991 (K.B.) (assuming corporation can be liable for aiding trespass); *Petrie v. Lamont*, (1842) 174 Eng. Rep. 424 (Assizes) ("All persons in trespass who aid or counsel, direct, or join, are joint trespassers"). Thus, the First Congress would have intended that such common law principles apply in ATS cases.

2. The original intent of the ATS suggests application of general common law rules of liability.

As *Sosa* recognized, the First Congress enacted the ATS partly out of concern "over the inadequate vindication of the law of nations" and that the United States was failing to provide a uniform forum for redress of a series of crimes against ambassadors and violations of the law of neutrality, as well as eagerness to prove its credibility as a new nation. 542 U.S. at 715–19; *see also* Dodge, *supra*, at 229–30. Due to concerns about fairness and uniformity in state courts, *see* Dodge, *supra*, at 235–36, the First Congress desired to make federal courts *more accessible* to foreigners' tort claims that, when unaddressed, gave rise to diplomatic friction. *See* Kenneth C. Randall, *Federal Jurisdiction over*

[7] English paraphrase at http://www.bu.edu/phpbin/lawyearbooks/display.php?id=11792.

International Law Claims: Inquiries into the Alien Tort Statute, 18 N.Y.U. J. Int'l L. & Pol. 1, 21 (1985).

Given these aims, the First Congress would not have wanted tort principles in ATS cases to diverge substantially from those available under state common law. Rather, they expected federal courts, like state courts, to apply the familiar body of general common law that, after all, already incorporated relevant aspects of the law of nations.

The incongruousness of applying international law standards of liability is underlined by the fact that, in many modern ATS cases, the plaintiffs also plead domestic common law tort claims for the same conduct implicated in the ATS claims, which are decided under ordinary civil liability standards. The First Congress would not have wanted a foreign diplomat, for example, who would litigate under the general corporate liability and aiding and abetting standards if he or she sues a corporation in California court for abetting an ordinary assault, to face a *higher* burden in federal court on a theory of aiding and abetting a breach of diplomatic inviolability (or indeed to be barred altogether). Such a rule would disadvantage aliens' claims arising under the law of nations vis-à-vis their state law claims — thus "treat[ing] torts in violation of the law of nations less favorably than other torts," Legal Historians' Brief at 110 — and frustrating the aims of the First

Congress.

G. Courts commonly apply federal common law in ATS cases.

As noted above, since *Sosa* the federal courts have split on whether to apply federal common law doctrines.[8] As the appellants note, the general trend in cases both before and after *Sosa* has been to apply principles drawn from federal common law to issues beyond the right violated. *See* Appellants' Br. at 29–30; *see also Eastman Kodak Co. v. Kavlin*, 978 F. Supp. 1078, 1094 (S.D. Fla. 1997) (finding liability under the ATS where "under ordinary principles of tort law [the defendant] would be liable for the foreseeable effects of her actions").[9]

Indeed, the district court's substantive/procedural distinction, under which

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[8] As noted by the appellants, judges of this Court in both the *Sarei v. Rio Tinto* and *Doe v. Unocal* cases embraced federal common law liability rules for ATS claims, before those cases were taken en banc. Appellants' Br. at 30 n.22. In fact, in *Unocal*, while Judge Reinhardt expressly preferred federal common law rules, the majority also acknowledged that such rules might be appropriate, but found it unnecessary to decide the question because the international law and common law aiding and abetting standards were similar. *See Doe v. Unocal Corp.*, 395 F.3d 966, 949 n.25 (9th Cir. 2002), *and id.* at 966 (Reinhardt, J., concurring), *vacated by grant of reh'g en banc*, 395 F.3d 978 (2003).

[9] As noted above, the Second Circuit is an exception. *Kiobel*, 621 F.3d at 117–18 (finding that international law determines ATS jurisdiction to consider claims against corporations); *Presbyterian Church of Sudan*, 582 F.3d at 259 (borrowing what it considered to be international criminal law aiding and abetting rules rather than federal common law civil aiding and abetting rules). *But see Khulumani*, 504 F.3d at 286 (Hall, J., concurring) (endorsing the federal common law approach).

all substantive issues must be decided under international law, arguably would preclude the application of any number of established federal common law doctrines that are routinely applied in ATS cases. Courts, however, have not questioned that these doctrines apply regardless of whether they reflect international law.

For example, in a recent ATS case, the Supreme Court held that federal common law governed the question of whether a foreign official was immune from suit. *Samantar*, 130 S. Ct. at 2284. Similarly, in *Saleh v. Titan Corp.*, 580 F.3d 1, 5 (D.C. Cir. 2009), *cert. denied*, 2011 U.S. LEXIS 4854 (U.S. June 27, 2011), the court determined that the federal common law doctrine of government contractor immunity applied in an ATS case. Such a doctrine is alien to international law, and *Saleh* never suggested that it should be found in international law. Indeed, international law does not recognize personal immunities for offenses such as war crimes, *see* Rome Statute of the International Criminal Court, art. 27, July 17, 1998, 2187 U.N.T.S. 3. Doctrines such as head-of-state immunity, and even the sovereign immunity of the United States, are also federal common-law doctrines.. *See, e.g.*, *Tachiona v. United States*, 386 F.3d 205, 220 (2d Cir. 2004) (head-of-state immunity); *Gray v. Bell*, 712 F.2d 490, 506 (D.C. Cir. 1983) (sovereign immunity).

No court has suggested that international law should displace these federal common law doctrines. Were courts to apply international law to these "substantive" issues, all of which bear on a defendant's liability, these doctrines would fall away. The same reasoning holds true for other liability principles. A consistent body of federal common law principles applies to ancillary issues in ATS cases.

H. The district court's stated reasons for applying international law are in error.

The district court cited *Sosa*'s discussion of *Erie* as support for its substantive/procedural distinction, 748 F. Supp. 2d at 1070, but the discussion actually precludes this distinction. *Sosa* noted that the "post-*Erie* understanding has identified limited enclaves in which federal courts may derive some *substantive* law in a *common law way*." 542 U.S. at 729 (emphasis added). And while "the domestic law of the United States recognizes the law of nations," *id.*, *Sosa*'s holding that the existence of a *claim* comes from federal common law, not international law, refutes the district court's assumption that federal common law in the ATS context *only* encompasses the law of nations.

The district court, 748 F. Supp. 2d at 1070, also cited the plurality decision in *Sarei v. Rio Tinto PLC*, 550 F.3d 822, 828 (9th Cir. 2008) (en banc), but that

section of the opinion is not precedential because it is not a common analyses formed on the narrowest grounds, shared by a majority of the judges. *See Marks v. United States*, 430 U.S. 188, 193 (1977); *Hayes v. Ayers*, 632 F.3d 500, 519-20 (9th Cir. 2011). Regardless, *Sarei declined* to apply international law to the issue of whether the ATS contains an exhaustion requirement, even though it acknowledged that exhaustion might be a substantive international norm. 550 F.3d at 828. Thus, *Sarei* did not suggest that all substantive issues must be determined by customary international law; indeed, the district court noted that *Sarei*'s "language suggests that *Sosa* did not establish a clear substance-procedure distinction, and that general federal common law can be incorporated into an Alien Tort Statute analysis." 748 F. Supp. 2d at 1070, n.14. The district court also stated that *Sarei* applied federal common law because *Sosa* explicitly left exhaustion open as an area not governed by international law. *Id.*; *see also* 550 F.3d at 828. But if that is true, then to the extent, if any, *Sarei* purports to say anything about when under *Sosa* international law must be applied to any issue other than exhaustion, it is clearly *dicta*.

With respect to aiding and abetting, the district court held that international law applies "[b]ecause the act of aiding and abetting a human rights violation constitutes an independent violation of international law." 748 F. Supp. 2d at 1079.

This is incorrect. While international law clearly bars aiding and abetting, it is a theory of liability for a substantive offense, not an independent crime. *Hamdan v. Rumsfeld*, 548 U.S. 2749, 2785 n. 40 (2006) (Stevens, J., plurality). The scope of a liability theory is a question of federal common law, whereas whether the underlying offense has been committed is a question of international law.

In holding that international law governs the question of whether corporations can be held liable, the district court focused on *Sosa*'s cautionary language. 748 F. Supp. 2d at 1124–26. But this language explained why the Court applied a strict threshold test in order to limit the type of *violation* that would give rise to a cause of action. *Sosa*, 542 U.S. at 728–33. *Sosa* did not seek to bar an ordinary tort remedy for violations that meet the *Sosa* threshold test. The district court's opinion cannot be reconciled with *Sosa*'s recognition that the ATS was passed to adequately vindicate the laws of nations. *Id.* at 717.

II. The applicable liability rules incorporate established federal doctrines, informed by traditional common law rules and international law.

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

international law.

The ATS is "highly remedial," *Forti v Suarez-Mason*, 672 F. Supp. 1531, 1548 (N.D. Cal. 1987), and liability rules adopted under it must reflect the universal condemnation of the underlying violations. *Filartiga v. Peña-Irala*, 577 F. Supp. 860, 863 (S.D.N.Y. 1984); *Abebe-Jira v. Negewo*, 72 F.3d 844, 848 (11th Cir. 1996). Numerous cases have, however, already discussed federal law theories of liability that adequately give effect to the remedial purpose of the ATS, and there is therefore no general need to create a new body of liability law for ATS cases.

With respect to issues that are not well-settled in federal law, federal courts typically look to "general" common law. *See, e.g.*, *Burlington Indus.*, 524 U.S. at 754 (relying "'on the general common law of agency'" to establish uniform federal standards). That too is appropriate under the ATS.

Moreover, due to the unique nature of ATS claims as federal common law claims vindicating international law rights, it may also be appropriate to consider international legal principles. Certainly, the fact that a liability rule is found in international law as well as established federal law and general principles of liability supports its application in ATS cases, because international law is part of federal law. *Sosa*, 542 U.S. at 729. But the touchstone remains federal common

law. This means not only that a liability rule need not meet *Sosa*'s threshold standard for determining whether there has been a violation that supports a cause of action; it also means, conversely, that an international principle that does not meet *Sosa*'s strict standard may still inform the common law analysis.

III. Under ordinary common law principles, aiding and abetting liability requires knowing, substantial assistance.

The district court erred in finding that aiding and abetting liability requires "purpose." 748 F. Supp. 2d at 1082. The appellants correctly argue that the common-law rule requires only that one *knowingly* provide substantial assistance to a person committing a tort. Appellants' Br. at 33-34; *accord Cabello*, 402 F.3d at 1158–59; *Khulumani*, 504 F.3d at 287–89 (Hall, J., concurring). Indeed, this Court has held that the general common law standard for aiding and abetting, which courts have found is incorporated in federal common law, requires "(1) an independent primary wrong; (2) actual knowledge by the alleged aider and abettor of the wrong and of his or her role in furthering it; and (3) substantial assistance in the wrong." *Hauser v. Farrell*, 14 F.3d 1338, 1343 (9th Cir. 1994), *rev'd on other grounds, Central Bank of Denver, N.A., v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994); *accord Halberstam v. Welch*, 705 F.2d 472, 477 (D.C. Cir. 1983).

This knowledge standard has long been recognized. Indeed, some early cases suggest that liability for aiding and abetting torts was appropriate even in the absence of actual knowledge. *See, e.g.*, *Purviance v. Angus*, 1 U.S. (1 Dall.) 180, 185 (Pa. 1786) (shipmaster liable for aiding commission of tort when he had constructive knowledge that the action was trespass); *Richardson v. Saltar*, 4 N.C. 505 (1817) (co-defendants liable for aiding trespass despite lack of evidence that they knew principal perpetrator was acting without legal authority); *State v. McDonald*, 14 N.C. 468 (1832) (defendants guilty of abetting wrongful arrest if they had constructive knowledge that warrant was invalid).

The same standards are found in English common law: "[T]here is cogent support both in principle and ancient authority for the suggestion that . . . [k]nowingly assisting . . . would suffice" for liability. John G. Fleming, The Law of Torts 257 (Sydney: 8th ed. 1992).

Furthermore, Congress understood that this knowledge standard applied to international offenses. When the same Congress that enacted the ATS passed a criminal statute outlawing piracy, it included penalties for any person "who shall . . . *knowingly aid and assist*, command, counsel or advise any person" to commit piracy. Act of Apr. 30, 1790, ch. 9, §§ 9–10, 1 Stat. 112, 114 (emphasis added). In passing that law, Congress believed that it was merely codifying the law of nations,

as it had been incorporated into the general common law. *See Sosa*, 524 U.S. at 719; Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 Am. J. Int'l L. 461, 477 & n.75 (1989) (noting that the Act codified crimes that had been identified as violations of the law of nations by the Continental Congress in 1781).[10] Thus, the First Congress understood that knowingly aiding an international offense was prohibited, and would have expected that the common law would apply this prohibition to torts in violation of the law of nations under the ATS.

Liability rules drawn from common law principles may be reinforced by rules found in international law. As the appellants note, since Nuremburg, international criminal law has provided the same standard as the common law: knowing, practical assistance or encouragement that has a substantial effect on the perpetration of the offense. *See* Appellants' Br. at 35, 50-51, 52 n.34; *see also Mauthausen Concentration Camp Case* (Gen. Mil. Gov't Ct. of the U.S. Zone, Dachau, Germany Mar. 29–May 13, 1946), *quoted in Dachau Concentration Camp Trial*, IX *Law Reports of Trials of War Criminals* 15 (U.N. War Crimes Commission, 1949) (convicting defendants of complicity because the facts made it

[10] Indeed, in subsequent revision to the piracy statutes, Congress explicitly defined the crime by reference to the law of nations. Act of Mar. 3, 1819, ch. 77, § 5, 3 Stat. 510, 513–14 (1819).

"impossible" for them to have been present without knowing of the abuses).

In holding that aiding and abetting under international law requires purpose, 748 F. Supp. 2d at 1082–88, the district court misconstrued the international standard. Regardless, as the district court conceded, a "knowledge" standard has often been applied in international law. *Id.* at 1082. It is irrelevant whether that standard meets *Sosa*'s threshold test; an aiding and abetting standard that accords with federal common law has regularly been applied under international law.

In short, there is no basis to conclude that the "knowledge" standard that controls ordinary torts is somehow too strict when applied to genocide, torture or forced labor. If anything, those assisting such crimes should be held to a stricter standard. The knowledge standard best implements Congress' goal of providing redress for international law violations.

IV. Under federal common law, corporations are subject to the same liability rules as natural persons.

Corporations can be held liable even if international law generally applies. *See Kiobel*, 621 F.3d at 175 (Leval, J., concurring); *see alsoKiobel v. Royal Dutch Petroleum Co.*, No. 06-4800-CV, 2011 WL 338151, at *1 (2d Cir. Feb. 4, 2011) (Lynch, J., dissenting from denial of rehearing en banc) (four judges opining that,"for the reasons stated by Judge Leval," the *Kiobel* decision is "very likely

incorrect").[11] But because federal common law controls, the relevant question is whether, when an abuse that meets *Sosa*'s threshold test is at issue, corporate liability or corporate immunity better effectuates Congressional aims. There is no basis to conclude that corporations should be immune from suit for participating in violations of universally recognized human rights.

That corporations are subject to the same civil liability as natural persons is inherent in the whole notion of corporate personality, and has been part of the common law for centuries.[12] As the appellants argue, footnote 20 of *Sosa*, 542 U.S. at 732 n.20, supports this conclusion. *See* Appellants' Br. at 14.[13]

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[11] Corporate liability is determined according to domestic law even if accomplice liability is not. *Kiobel*, 621 F.3d at 187–89 (Leval, J., concurring); *Khulumani*, 504 F.3d at 282 (Katzmann, J., concurring). The argument for an international-law aiding-and-abetting rule is that this is a "conduct regulating norm." William R. Casto, *The New Federal Common Law of Tort Remedies for Violations of International Law*, 37 Rutgers L.J. 635, 650 (2006); *accord* Chimène I. Keitner, *Conceptualizing Complicity in Alien Tort Cases*, 60 Hastings L.J. 61, 72–74 (2008). But the type of entity against which a claim can be asserted is not conduct-regulating, and so is determined under domestic law. Keitner, *supra*, at 72.

[12] *E.g.*, *Trustees of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 667 (1819) (noting that a "corporation at common law . . . possesses the capacity . . . of suing and being sued") (op. of Story, J.); *Cook County v. United States ex rel. Chandler*, 538 U.S. 119, 125 (2003) (citing sources dating back to 1793 confirming "the common understanding . . . that corporations were 'persons' in the general enjoyment of the capacity to sue and be sued").

[13] As noted above, *see supra* note 3, footnote 20 is likewise consistent with the distinction between the right (defined by international law) and the remedy (provided by domestic law). The question of corporate liability is a matter of the

Federal Rule of Civil Procedure 17(b)(2) further directs that a corporation's capacity to be sued is determined "under [the law by] which it was organized." Since corporations are creatures of state law, Rule 17(b) prevails. *Cmty. Elec. Serv. of Los Angeles, Inc. v. Nat'l Elec. Contractors Ass'n, Inc.*, 869 F.2d 1235, 1239 (9th Cir. 1989). While application of Rule 17 would point to the law of the place of incorporation rather than federal common law, it confirms that international law does not control.

Regardless, here too, international law supports federal common law. In Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain), 1970 I.C.J. 3 (Feb. 5), the International Court of Justice noted that international law recognized corporations as institutions "created by States" within their domestic jurisdiction, and that the Court therefore needed to look to general principles of law — a species of international law derived from municipal law — to answer questions about corporate separateness. *Id.* at 33–34, 37. The Supreme Court, citing Barcelona Traction, upheld a counterclaim "aris[ing] under international law" against a Cuban government corporation for the illegal expropriation of property,

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remedy a state chooses to provide where the injurious act violates international law. *See Bowoto v. Chevron Corp.*, No. C 99-02506, 2006 U.S. Dist. LEXIS 63209, *37 (N.D. Cal. Aug. 22, 2006) ("The dividing line for international law has traditionally fallen between States and private actors"; thus "there is very little reason to differentiate between corporations and individuals.")

under principles "common to both international law and federal common law." *First Nat'l City Bank v. Banco Para El Comercio Exterior De Cuba*, 462 U.S. 611, 623 (1983). General principles provide rules applicable in ATS cases. *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 251 (2d Cir. 2003). There can be no dispute that all legal systems recognize that corporations can be sued; this rule is a general principle of law.

Refusing to recognize corporate liability would lead to absurd results. The ability to sue the corporation is inherent in the notion of limited liability; plaintiffs may sue the corporation *because* limited liability ordinarily prevents suits against the shareholders. If corporations were not legal persons that could be sued, they could not be considered legal persons separate from their shareholders. And if a corporation is not a separate person, it is simply an aggregation of agents (the corporation's directors, officers and employees) acting on behalf of the shareholders. Thus, if corporations cannot be sued, the *individual owners* would be liable on an agency theory for everything that employees of the company do, without need to pierce any veil. In the absence of corporate personality, liability would be greatly expanded — not limited.

In order to find that neither corporations nor their shareholders could be sued, the Court would have to find an affirmative rule of corporate *immunity* —

that shareholders may create a corporation to hold their assets and carry on their business, interpose that corporation as a shield against their own liability, and yet not subject the corporation to liability. But neither federal common law nor international law creates any such immunity. Corporate personality for the purposes of limiting shareholders' liability and corporate personality for the purposes of being sued are two sides of the same coin, and both derive from general principles of domestic law common to all legal systems.

Despite the long line of authority noting that there is no logical basis to exclude corporations from liability, which is "persuasive as a matter of abstract reasoning," the district court found that *Sosa* compelled the finding that corporations not be held liable. 748 F. Supp. 2d at 1130–31. But *Sosa* requires no such thing, and the fact that the district court's interpretation of *Sosa* would lead to an illogical rule is further evidence that the district court misread *Sosa.*

CONCLUSION

For the foregoing reasons, *amicus* urges this Court to find that corporate liability and aiding and abetting liability are determined by federal common law,

under which corporations are subject to the same tort liability as natural persons and knowing substantial assistance is the standard for accessorial liability.

DATED: July 1, 2011

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(a)(7)(C) AND CIRCUIT RULE 32-1

Case Nos. 02-56256, 02-56390, & 09-56381

I certify that, pursuant to Fed. R. App. P. 29(d) and 9th Cir. R. 32-1, the attached amicus brief is proportionally spaced, has a typeface of 14 points or more and contains 7000 words or less.

DATED: July 1, 2011

Respectfully submitted,

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