Nos. 09-7125 (lead case), 09-7127, 09-7134, 09-7135

ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOHN DOE VIII, ET AL.,
Plaintiffs – Appellants – Cross-Appellees,
v.

EXXON MOBIL CORPORATION, ET AL.,
Defendants – Appellees – Cross-Appellants.

JOHN DOE I, ET AL.,
Plaintiffs – Appellants - Cross-Appellees,
v.

EXXON MOBIL CORPORATION, ET AL.,
Defendants – Appellees – Cross-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF *AMICI CURIAE* INTERNATIONAL LAW SCHOLARS IN SUPPORT OF PLAINTIFFS-APPELLANTS SEEKING REVERSAL

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Pursuant to Circuit Rule 28.1, *Amici* certify the following:

A. Parties Appearing Before the District Court

All parties, intervenors and *amici* appearing before the district court and this Court are listed in the Brief for Plaintiffs-Appellants.

B. Rulings Under Review

The issues that are the subject of this amicus curiae brief are those in the October 14, 2005 ruling of the District Court of the District of Columbia. *Doe v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20 (D.D.C. 2005). All other rulings under review in these consolidated appeals are listed in the Certificate of Parties, Rulings, and Related Cases filed by Plaintiffs-Appellants.

C. Related Cases

Counsel for *Amici* is unaware of any related cases currently pending before this Court or any other court outside of those cases already consolidated in this action.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, counsel makes the following disclosure:

None of the *Amici* is a publicly held entity. None of the *Amici* is a parent, subsidiary, or affiliate of, or a trade association representing, a publicly held corporation, or other publicly held entity. No parent companies or publicly held companies have a 10% or greater ownership in any of the *Amici*.

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GLOSSARY OF ABBREVIATIONS

ATS: Alien Tort Statute

ICC: International Criminal Court

ICTY: International Criminal Tribunal for the Former Yugoslavia

ICTR: International Criminal Tribunal for Rwanda

INTEREST OF *AMICI CURIAE*

This Brief of *Amici Curiae* International Law Scholars is respectfully submitted pursuant to Federal Rule of Appellate Procedure 29 and this Court's Orders of June 8 and July 15, 2010. It is filed in support of Plaintiffs-Appellants and seeks reversal of the district court's decision.

Amici are legal experts in the fields of international law and human rights.[1] While they pursue a wide variety of legal interests, they all share a deep commitment to the rule of law and respect for human rights. *Amici* believe this case raises important issues concerning international law and human rights law. They are also concerned with the district court's analysis of these issues. Accordingly, *Amici* would like to provide this Court with an additional perspective on these issues. They believe this submission will assist the Court in its deliberations. All parties have consented to the participation of *amici curiae* in this case.

SUMMARY OF ARGUMENT

In *Doe v. Exxon Mobil Corp.*, 393 F.Supp.2d 20 (D.D.C. 2005), the Plaintiffs-Appellants have alleged a series of human rights abuses that arose out of the operation of the Defendants-Appellees' natural gas operations in

[1] A list of the *Amici* appear in the Appendix.

Indonesia. These human rights abuses – torture, extrajudicial killing, and prolonged arbitrary detention – are well-established in international law. The prohibitions against such acts are specific, universal, and obligatory, thereby meeting the rigorous standards set forth by the U.S. Supreme Court in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). Under *Sosa*, these claims are actionable under the Alien Tort Statute (ATS).

The Plaintiffs-Appellants have further alleged that the Defendants-Appellees are liable because they aided and abetted in the commission of these acts. Secondary liability, including aiding and abetting, is also equally well-established in international law and also actionable under the ATS. It has been used by numerous tribunals, from the Nuremberg tribunals to the International Criminal Tribunals for the former Yugoslavia and Rwanda. In *Doe v. Exxon Mobil Corp.*, 393 F.Supp.2d at 24, the district court relied on *In re South African Apartheid Litigation*, 346 F.Supp.2d 538 (S.D.N.Y. 2004) to hold that aiding and abetting may not be pursued under the Alien Tort Statute. This opinion was subsequently overruled by the Second Circuit in *Khulumani v. Barclay National Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007), which correctly held that aiding and abetting is, in fact, recognized under international law and may, therefore be actionable under the ATS. Claims involving aiding and abetting require the knowing provision of

substantial assistance to the tortfeasor. They do not require specific intent to further the goals of the tortfeasor. To hold otherwise would obliterate the distinction between direct perpetrators and aiders and abettors.

ARGUMENT

I. TORTURE, EXTRAJUDICIAL KILLING, AND PROLONGED ARBITRARY DETENTION ARE WELL-ESTABLISHED IN INTERNATIONAL LAW AND ACTIONABLE UNDER THE ALIEN TORT STATUTE.

In its modern form, the Alien Tort Statute (ATS) 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. In *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), the Supreme Court established that courts can recognize a cause of action, derived from the common law, for certain violations of international law:

> [A]lthough the ATS is a jurisdictional statute creating no new causes of action, the reasonable inference from the historical materials is that the statute was intended to have practical effect the moment it became law. The jurisdictional grant is best read as having been enacted on the understanding that *the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time*.

Id. at 724 (emphasis added). The Court indicated that only three torts were

recognized under the common law in 1789 as being violations of the law of nations with a potential for personal liability: violation of safe conduct, infringement of the rights of ambassadors, and piracy. The Court added, however, that international law was not static and the development of international law was not frozen in time:

> We assume, too, that no development in the two centuries from the enactment of § 1350 to the birth of the modern line of cases beginning with *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), has categorically precluded federal courts from recognizing a claim under the law of nations as an element of common law; Congress has not in any relevant way amended § 1350 or limited civil common law power by another statute.

Id. at 724.[2] Furthermore, the recognition of a claim under the "present-day law of nations" as an element of common law is limited to "norm[s] of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized." *Id.* at 725.

The essence of *Sosa v. Alvarez-Machain*, therefore, is that the ATS authorizes federal courts to develop a cause of action where the underlying abuse violates international norms that are specific, universal, and

[2] It is now firmly established that "courts ascertaining the content of the law of nations 'must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today.'" *Kadic v. Karadzic*, 70 F.3d 232, 238 (2d Cir. 1994) (quoting *Filartiga v. Pena-Irala*, 630 F.2d 876, 881 (2d Cir. 1980)).

obligatory.[3] This is precisely what the lower courts have done and *Sosa* noted with approval. *See Sosa v. Alvarez-Machain*, 542 U.S. at 732. *See also Filartiga v. Pena-Irala* 630 F.2d 876, 880-885 (2d Cir. 1980); *Hilao v. Estate of Marcos*, 25 F.3d 1467, 1475 (9th Cir. 1994); *Kadic v. Karadzic*, 70 F.3d 232, 236 (2d Cir. 1995). In *Sosa*, the Supreme Court did not question a single case in which this high standard had been found. This is because the lower courts have consistently sustained jurisdiction under the ATS only for certain egregious violations of international law.

Torture, extrajudicial killing, and prolonged arbitrary detention – each of these acts fall within the *Sosa* standard and are, therefore, actionable under the Alien Tort Statute.

Every major human rights instrument prohibits *torture*. *See, e.g.*, Universal Declaration of Human Rights art. 5, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948);

[3] Equally significant, the federal courts have routinely dismissed claims that did not clear this high hurdle. In *Flores v. Southern Peru Copper Corp.*, 343 F.3d 140 (2d Cir. 2003), for example, the Second Circuit affirmed that ATS claimants were required to allege a violation of "specific, universal, and obligatory" norms. *Id*. at 151. Without calling into question its analysis in *Filartiga* or *Karadzic*, the Second Circuit concluded that environmental torts were not currently in violation of international law. *See also Hamid v. Price Waterhouse*, 51 F.3d 1411, 1418 (9th Cir. 1995) (fraud does not violate the law of nations); *Maugein v. Newmont Mining Corp.*, 298 F. Supp. 2d 1124, 1130 (D. Colo. 2004) (defamation does not violate the law of nations); *Guinto v. Marcos*, 654 F. Supp. 276, 281 (S.D. Cal. 1986) (First Amendment has no counterpart in the law of nations).

International Covenant on Civil and Political Rights, art. 7, *adopted* Dec. 16, 1966, 999 U.N.T.S. 171;[4] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 2, *adopted* Dec. 10, 1984, 1465 U.N.T.S. 85. The Convention against Torture prohibits torture under all circumstances and allows no derogation.[5] This prohibition is well-established in U.S. domestic law. *See, e.g.*, 18 U.S.C. § 2340A (establishes criminal liability for acts of torture committed anywhere in the world); 28 U.S.C. § 1350 (note) (establishes a cause of action for torture). The courts have uniformly recognized that the ATS encompasses claims for torture. *See, e.g.*, *Filartiga v. Pena-Irala*, 630 F.2d at 890; *Hilao v. Estate of Marcos*, 25 F.3d at 1475; *Abebe-Jira v. Negewo*, 72 F.3d 844, 846-48 (11th Cir. 1996); *Aldana v. Del Monte Fresh Produce, N.A. Inc.*, 416 F.3d 1242 (11th Cir. 2005).

Virtually every major human rights agreement protects against *extrajudicial killing*. *See, e.g.*, Universal Declaration of Human Rights, *supra*, at art. 3; International Covenant on Civil and Political Rights, *supra*, at art. 6. An execution is considered arbitrary if it is neither "lawful

[4] As of September 13, 2010, there are 166 States Parties to the International Covenant on Civil and Political Rights.

[5] As of September 13, 2010, there are 147 States Parties to the Convention against Torture.

punishment pursuant to conviction in accordance with due process of law" nor "necessary under exigent circumstances." Restatement (Third) of the Foreign Relations Law of the United States, § 702 cmt. f. (1987). Congress recognized extrajudicial killings as a human rights violation by enacting the Torture Victim Protection Act, 28 U.S.C. § 1350 (note), which recognizes a cause of action for summary execution. Thus, claims of summary execution clearly satisfy the requirements of the ATS. *See, e.g.*, *Kadic v. Karadzic*, 70 F.3d at 243-44; *Hilao v. Estate of Marcos*, 25 F.3d at 1475.

Few concepts are more fundamental to the principle of ordered liberty than the right to be free from *prolonged arbitrary detention*. This basic human right has been recognized by almost every multilateral and regional human rights agreement of the twentieth century. *See, e.g.*, Universal Declaration of Human Rights, *supra*, at art. 9, International Covenant on Civil and Political Rights, *supra*, at art. 9. According to the Restatement (Third), arbitrary detention constitutes a violation of customary international law. Restatement (Third), *supra*, at § 702(e). Detention is arbitrary "if it is not pursuant to law; it may be arbitrary also if it is incompatible with the principles of justice or with the dignity of the human person." *Id*. at § 702

cmt. (h). *See, e.g.*, *Martinez v. City of Los Angeles*, 141 F.3d 1373 (9th Cir. 1998); *Hilao v. Estate of Marcos*, 103 F.3d 789, 795 n.9 (9th Cir. 1996).[6]

In sum, torture, extrajudicial killing, and prolonged arbitrary detention are well established in international law and actionable under the Alien Tort Statute.

II. SECONDARY LIABILITY, INCLUDING AIDING AND ABETTING, IS WELL-ESTABLISHED IN INTERNATIONAL LAW AND ACTIONABLE UNDER THE ALIEN TORT STATUTE.

The Plaintiffs-Appellants have asserted that the standards for aiding and abetting liability are the same in both federal common law and customary international law. Accordingly, it is instructive to consider the status of aiding and abetting under international law.

From the Nuremberg tribunals to the recent case law of the International Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR), it is well-established that a wide range of conduct may give rise to liability under international law, including planning, instigating, ordering, committing or otherwise aiding or abetting in the planning,

[6] In *Sosa v. Alvarez-Machain*, 542 U.S. at 737, the Supreme Court held that a detention of less than 24 hours "followed by the transfer of custody to lawful authorities and a prompt arraignment" did not violate customary international law. Significantly, the Court did not question that prolonged arbitrary detention was a violation of international law.

preparation, or execution of a crime. Secondary liability is essential to the enforcement of international law because it ensures that perpetrators who facilitate the commission of a crime are held accountable for their actions:

> Although only some members of the group may physically perpetrate the criminal act (murder, extermination, wanton destruction of cities, towns or village, etc.), the participation and contribution of the other members of the group is often vital in facilitating the commission of the offence in question. It follows that the moral gravity of such participation is often no less – or indeed no different – from that of those actually carrying out the acts in question.

Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment, ¶ 191 (July 15, 1999). This obligation to refrain from knowingly assisting the commission of international wrongs applies to all members of society, including private individuals, government officials, and corporations.[7]

[7] Several decisions issued by the Nuremberg tribunals after World War II addressed the liability of corporate officials for human rights abuses. These cases emphasized that corporate structure could not be used to remove liability for human rights abuses, including the aiding and abetting of such acts. *See, e.g.*, *United States v. Krauch*, 8 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, at 1081 (1952); *United States v. Flick*, 6 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, at 1202 (1952). "Although in all these cases the courts were trying individuals, they nonetheless routinely spoke in terms of corporate responsibilities and obligations." Steven Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 Yale L.J. 443, 477 (2001). In recent years, numerous lawsuits have also raised the issue of corporate responsibility for human rights abuses committed during World War II. *See generally* Michael J. Bazyler, Holocaust Justice: The Battle for Restitution in America's Courts (2003).

Secondary liability, including aiding and abetting liability, has long been recognized under international law. For example, the Charter for the International Military Tribunal at Nuremberg provided that "[l]eaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan." Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal, art. 6, Aug. 8, 1945, 82 U.N.T.S. 279. Similarly, Allied Control Council Law No. 10, which addressed prosecutions of other German war criminals after World War II, recognized criminal liability for principals who committed war crimes and crimes against humanity *and* for those who were accessories or ordered or abetted in such crimes. Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, Dec. 20, 1954, 3 Official Gazette Control Council for Germany 50-55 (1946). This standard was sufficiently definite to allow both convictions and acquittals, and these cases establish that *knowingly providing substantial assistance* in the commission of human rights violations, even without specific intent to further the goals of the tortfeasor, violates international law.

In *United States v. Ohlendorf*, a U.S. military tribunal established under Control Council Law No. 10 concluded that defendant Waldemar Klingelhoefer could be convicted "as an accessory" because in turning over lists of Communists "he was aware that the people listed would be executed when found." *United States v. Ohlendorf*, 4 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, at 569 (1949). The tribunal also recognized that Lothar Fendler could be convicted for failure to protest abuses about which the defendant knew, when failure to do so "in any way contributed" to the abuses. *Id.* at 572-573. In *United States v. Flick*, Otto Steinbrinck was convicted by a U.S. military tribunal under settled legal principles for knowingly contributing money to an organization committing widespread abuses, even though it was "unthinkable" he would "willingly be a party" to atrocities. *United States v. Flick*, 6 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, at 1217, 1222 (1952). Similarly, *In re Tesch* (Zyklon B) involved several industrialists who were sentenced to death by a British military tribunal for selling Zyklon B gas to Nazi Germany for use at Auschwitz "with knowledge" that the gas would be used to kill prisoners. *In re Tesch*, 13 International Law Reports 250 (1947). At no point in this opinion did the court find intent to perpetrate the underlying

abuses to be a relevant factor. In contrast, several industrialists who ran the industrial conglomerate I.G. Farben were acquitted by a U.S. military tribunal because they honestly believed that Zyklon B gas would be used as a delousing agent. *United States v. Krauch*, 8 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, at 1169 (1948).

More recently, the Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY) provides that "[a] person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime."[8] Statute of the International Criminal Tribunal for the Former Yugoslavia art. 7(1), May 25, 1993, U.N. Doc. S/RES/827. Because the ICTY is "only empowered to apply" standards that are "beyond any doubt customary law," its judgments should be accorded substantial weight in determining the content of customary international law.[9] *Prosecutor v. Tadic*, Case No. IT-

[8] According to the ICTY, "[t]he principles of individual criminal responsibility enshrined in Article 7, paragraph 1, of the Statute reflect the basic understanding that individual criminal responsibility for the offences under the jurisdiction of the International Tribunal is not limited to persons who directly commit the crimes in question." *Prosecutor v. Delalic*, Case No. IT-96-21-T, Trial Judgment, ¶ 319 (Nov. 16, 1998).

[9] U.S. courts regularly rely upon the statute and jurisprudence of the ICTY

94-1-T, Trial Judgment, ¶¶ 661-662 (May 7, 1997).

On several occasions, the ICTY has considered aiding and abetting liability and examined its *actus reus* and *mens rea* components. It has consistently indicated that aiding and abetting does not require specific intent to further the goals of the tortfeasor.

In *Prosecutor v. Furundzija*, for example, the Trial Chamber of the ICTY considered "whether it is necessary for the accomplice to share the *mens rea* of the principal or whether mere knowledge that his actions assist the perpetrator in the commission of the crime is sufficient to constitute *mens rea* in aiding and abetting the crime. The case law indicates that the latter will suffice." The Trial Chamber reviewed a number of precedents from World War II, including *In re Tesch*. Each of these cases stood for the proposition that the defendant need not act with the intention of assisting in the commission of the underlying crime. *Id*. at ¶¶ 238-240. Indeed, the defendant charged with aiding and abetting need not meet the *mens rea* requirements for the principal perpetrator. "In particular, it is not necessary that he shares and identifies with the principal's criminal will and purpose, provided that his own conduct was with knowledge. That conduct may in

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as evidence of international law. *See, e.g.*, *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 323-24 (S.D.N.Y. 2003); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1344, 1355-56 (N.D. Ga. 2002); *Hilao v. Estate of Marcos*, 103 F.3d 767, 777 (9th Cir. 1996).

itself be perfectly lawful; it becomes criminal only when combined with the principal's unlawful conduct." *Id*. at ¶ 243. For the foregoing reasons:

> [t]he above analysis leads the Trial Chamber to the conclusion that it is not necessary for the accomplice to share the *mens rea* of the perpetrator, in the sense of positive intention to commit the crime. Instead, the clear requirement in the vast majority of the cases is for the accomplice to have knowledge that his actions will assist the perpetrator in the commission of the crime. This is particularly apparent from all the cases in which persons were convicted for having driven victims and perpetrators to the site of an execution. In those cases the prosecution did not prove that the driver drove for the purpose of assisting in the killing, that is, with an intention to kill. It was the knowledge of the criminal purpose of the executioners that rendered the driver liable as an aider and abettor. Consequently, if it were not proven that a driver would reasonably have known that the purpose of the trip was an unlawful execution, he would be acquitted.
>
> Moreover, it is not necessary that the aider and abettor should know the precise crime that was intended and which in the event was committed. If he is aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed, he has intended to facilitate the commission of that crime, and is guilty as an aider and abettor.

Id. at ¶¶ 245-246.

In *Prosecutor v. Vasiljevic*, the Appeals Chamber of the ICTY affirmed these principles on aiding and abetting liability. *Prosecutor v. Vasiljevic*, Case No. IT-98-32-A, Appeals Judgment (Feb. 25, 2004). In *Vasiljevic*, the Appeals Chamber considered whether Mitar Vasiljevic was guilty of aiding and abetting in crimes against humanity due to his

participation in the murder of seven Muslim men. In its analysis, the Appeals Chamber distinguished liability under a theory of joint criminal enterprises from other forms of liability, including aiding and abetting liability. While certain forms of joint criminal enterprise require specific intent, aiding and abetting did not:

> Participation in a joint criminal enterprise is a form of "commission" under Article 7(1) of the Statute. The participant therein is liable as a co-perpetrator of the crime(s). Aiding and abetting the commission of a crime is usually considered to incur a lesser degree of individual criminal responsibility than committing a crime. In the context of a crime committed by several co-perpetrators in a joint criminal enterprise, the aider and abettor is always an accessory to these co-perpetrators, although the co-perpetrators may not even know of the aider and abettor's contribution. Differences exist in relation to the *actus reus* as well as to the *mens rea* requirements between both forms of individual criminal responsibility:
>
> (i) The aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime (murder, extermination, rape, torture, wanton destruction of civilian property, etc.), and this support has a substantial effect upon the perpetration of the crime. By contrast, it is sufficient for a participant in a joint criminal enterprise to perform acts that in some way are directed to the furtherance of the common design.
> (ii) In the case of aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of the specific crime of the principal. By contrast, in the case of participation in a joint criminal enterprise, i.e. as a co-perpetrator, the requisite *mens rea* is intent to pursue a common purpose.

Id. at ¶ 102. Throughout its analysis, the Appeals Chamber did not indicate

that specific intent was a necessary element for aiding and abetting. Indeed, the Appeals Chamber took great care to distinguish between the distinct forms of liability set forth in Article 7(1) of the ICTY Statute. While some forms of liability required specific intent, aiding and abetting did not. *Id*.

Even perpetrators charged with aiding and abetting in cases of specific intent crimes, such as genocide, are not required to share the intent of the principal perpetrator. In *Prosecutor v. Krstic*, the Appeals Chamber of the ICTY distinguished between different forms of secondary liability and considered Radislav Krstic's responsibility for aiding and abetting genocide. *Prosecutor v. Krstic*, Case No. IT-98-33-A, Appeals Judgment, ¶ 139 (Apr. 19, 2004):

> This, however, raises the question of whether, for liability of aiding and abetting to attach, the individual charged need only possess knowledge of the principal perpetrator's specific genocidal intent, or whether he must share that intent. The Appeals Chamber has previously explained, on several occasions, that an individual who aids and abets a specific intent offense may be held responsible if he assists the commission of the crime knowing the intent behind the crime. This principle applies to the Statute's prohibition of genocide, which is also an offence requiring a showing of specific intent. The conviction for aiding and abetting genocide upon proof that the defendant knew about the principal perpetrator's genocidal intent is permitted by the Statute and case-law of the Tribunal.
>
> Many domestic jurisdictions, both common and civil law, take the same approach with respect to the *mens rea* for aiding and abetting, and often expressly apply it to the prohibition of

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

Id. at ¶¶ 140-141 (citations omitted). Accordingly, the Appeals Chamber considered and rejected the assertion that an aiding and abetting charge in cases of genocide requires that the defendant share the principal perpetrator's specific genocidal intent. While the Appeals Chamber set aside Krstic's conviction as a participant in a joint criminal enterprise to commit genocide, it entered a conviction for aiding and abetting instead. *Id*. at ¶ 143. For the Appeals Chamber, Krstic's intent to commit genocide was not a relevant consideration.

These principles of aiding and abetting liability and the requisite *mens*

rea have been affirmed in numerous ICTY cases.[10] *See, e.g.*, Guenael Mettraux, International Crimes and the *ad hoc* Tribunals 284-287 (2005); John R.W.D. Jones & Steven Powles, International Criminal Practice 420-421 (3d ed. 2003); Claire de Than & Edwin Shorts, International Criminal Law and Human Rights 7-8 (2003). They have also been recognized by the International Criminal Tribunal for Rwanda. *See, e.g.*, *Prosecutor v. Ntakirutimana*, Case No. ICTR-96-10-A, Appeals Judgment, ¶ 501, (Dec. 13, 2004); *Prosecutor v. Musema*, Case No. ICTR-96-13-T, Trial Judgment, ¶¶ 180-182 (Jan. 27, 2000). These cases make it abundantly clear that international law does not require specific intent to establish a claim for aiding and abetting. Rather, international law only requires knowing assistance to the tortfeasor for liability to accrue.

Despite such overwhelming evidence, the Second Circuit recently concluded that the *mens rea* standard for aiding and abetting is purpose

[10] *See also Prosecutor v. Krnojelac*, Case No. IT-97-25-T, Appeals Judgment, ¶ 52, (Sept. 17, 2003) ("[T]he aider and abettor in persecution, an offence with a specific intent, must be aware not only of the crime whose perpetration he is facilitating but also of the discriminatory intent of the perpetrators of that crime. He need not share the intent but he must be aware of the discriminatory context in which the crime is to be committed and know that his support or encouragement has a substantial effect on its perpetration."); *Prosecutor v. Tadic*, Case No. IT-94-1-A, Appeals Judgment, ¶ 229 (July 15, 1999) ("In the case of aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of a specific crime by the principal.").

rather than knowledge alone. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 259 (2d Cir. 2009). In its analysis of aiding and abetting, the Second Circuit referenced the Rome Statute of the International Criminal Court, presumably to indicate that specific intent to assist the tortfeasor is a required element for aiding and abetting. *Id*. at 259. As a preliminary matter, it is unclear whether the cited provisions of the Rome Statute even require such specific intent. The language in Article 30 of the Rome Statute, which addresses the mental element for crimes within the International Criminal Court's jurisdiction, reveals a definition of intent that is much closer to knowledge than specific intent. Rome Statute of the International Criminal Court, art. 30, July 17, 1998, 2187 U.N.T.S. 3. More importantly, however, the Rome Statute does not supersede the detailed international jurisprudence that has developed on aiding and abetting liability by the ICTY or ICTR. In fact, the Rome Statute itself acknowledges in Article 10 that it was not meant to affect existing customary international law. *See, e.g.*, Leila Nadya Sadat, *Custom, Codification and Some Thoughts About the Relationship Between the Two: Article 10 of the ICC Statute*, 49 DePaul L. Rev. 909 (2000).

> The framers of the Rome Treaty apparently intended their creation to be "law" only in cases involving application of the Court's jurisdiction. That is, even though the prescriptive norms of the Statute apply to the entire world in cases referred

> to the Court by the Security Council, the clear import of the text is that the substantive criminal law definitions of the Statute, insofar as their import might be restrictive, is to have no influence on customary international law outside the Statute.

Id. at 917 (citations omitted). *See also* Leila Nadya Sadat, The International Criminal Court and the Transformation of International Law 261-262 (2002); Otto Triffterer, *Article 10*, *in* Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article 531 (Otto Triffterer ed., 2d ed. 2008). In this respect, it is crucial to distinguish between the Rome Statute, which constitutes treaty law, and customary international law. While the Rome Statute constitutes binding law for the countries that have ratified the treaty, its norms only apply to those countries and only as they relate to the operation of the International Criminal Court. Customary international law, on the other hand, has broader applicability. Indeed, "[t]he fact that the law applied by the *ad hoc* Tribunals is more than mere statutory law gives their pronouncements particular authority and resonance outside of The Hague and Arusha courtrooms. And it may persuade other courts, not least the ICC [International Criminal Court], to regard their legal findings, if not as precedents, at least as important jurisprudential guideposts." Mettraux, *supra*, at 12. *See also* Theodor Meron, *Reflections on the Prosecution of War Crimes by International Tribunals*, 100 Am. J. Int'l L. 551, 578 (2006).

The Second Circuit's reliance on *United States v. von Weizsaecker* for finding that the *mens rea* standard for aiding and abetting is purpose rather than knowledge alone is equally misplaced. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d at 259. In this 1949 decision, a U.S. military tribunal examined the criminal liability of several defendants, including Karl Rasche, a banker who had participated in setting up loans with several Nazi enterprises during World War II. *United States v. von Weizsaecker*, 14 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, at 621 (1949). The passage relied upon by the Second Circuit is inapplicable because the military tribunal was not addressing aiding and abetting liability there. Rather, it was considering the defendant's direct liability. *Id*. at 622. In a subsequent passage, the military tribunal did, in fact, determine that knowledge alone is sufficient for purposes of aiding and abetting liability. *Id*. at 478. *See generally* Norman Farrell, *Attributing Criminal Liability to Corporate Actors*, 8 J. Int'l Crim. Just. 873 (2010); Chimene Keitner, *Conceptualizing Complicity in Alien Tort Cases*, 60 Hastings L.J. 61, 91 (2010).

In sum, secondary liability, including aiding and abetting, is well-established in international law and, therefore, actionable under the ATS. Claims involving aiding and abetting require the knowing provision of

substantial assistance to the tortfeasor. They do not require specific intent to further the goals of the tortfeasor. Indeed, to hold otherwise would obliterate the distinction between aiders and abettors and direct perpetrators of human rights abuses.

CONCLUSION

For the reasons submitted, the district court's decision should be reversed and remanded.

Date: September 13, 2010 Respectfully submitted,

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[11] Affiliations are provided for informational purposes only.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(C)

I hereby certify, pursuant to Fed. R. App. P. 32(a)(7)(C) and D.C. Circuit Rule 32(a), that the foregoing brief is proportionally spaced, has a typeface of 14 point, and contains 5,538 words, (which does not exceed the applicable 7,000 word limit).

/s/ William J. Aceves

CERTIFICATE OF SERVICE

I, William J. Aceves, the undersigned, hereby certify that I am employed by California Western School of Law at 225 Cedar Street, San Diego, California 92101. I further declare under penalty of perjury that on September 13, 2010, I caused to be served a true copy of the foregoing Brief of *Amici Curiae* International Law Scholars via the Court's CM/ECF electronic filing system upon the following persons:

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ADDENDUM: STATUTES AND REGULATIONS

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STATUTES AND REGULATIONS

The statutes pertinent to this appeal are set forth below.

18 U.S.C. § 2340A

> (a) Offense.— Whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life.
>
> (b) Jurisdiction.— There is jurisdiction over the activity prohibited in subsection (a) if—
>
> > (1) the alleged offender is a national of the United States; or
> >
> > (2) the alleged offender is present in the United States, irrespective of the nationality of the victim or alleged offender.
>
> (c) Conspiracy.— A person who conspires to commit an offense under this section shall be subject to the same penalties (other than the penalty of death) as the penalties prescribed for the offense, the commission of which was the object of the conspiracy.

28 U.S.C. § 1350

> The 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 (note)

> SECTION 1. SHORT TITLE.
> This Act may be cited as the 'Torture Victim Protection Act of 1991'.
>
> SEC. 2. ESTABLISHMENT OF CIVIL ACTION.
> (a) Liability.—An individual who, under actual or apparent authority, or color of law, of any foreign nation—
>
> > (1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or
> >
> > (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.
>
> (b) Exhaustion of Remedies.—A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred.
>
> (c) Statute of Limitations.—No action shall be maintained under this section unless it is commenced within 10 years after the cause of action arose.
>
> SEC. 3. DEFINITIONS.
> (a) Extrajudicial Killing.—For the purposes of this Act, the term 'extrajudicial killing' means a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. Such term, however, does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation.

(b) Torture.—For the purposes of this Act—

(1) the term ‘torture’ means any act, directed against an individual in the offender’s custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind;
and

(2) mental pain or suffering refers to prolonged mental harm caused by or resulting from—

(A) the intentional infliction or threatened infliction of severe physical pain or suffering;
(B) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
(C) the threat of imminent death; or
(D) the threat that another individual will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.