

Nos. 10-56739

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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

Plaintiffs-Appellants,

v.

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

Defendants and Appellees,

Appeal from United States District Court
for the Central District of California,
No. 2:05-cv-05133-SVW-JTL

The Honorable Stephen V. Wilson, United States District Judge

APPELLANTS' OPENING BRIEF

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INTRODUCTION

This case concerns Defendants' use of child labor under conditions that violate the international standard for the worst forms of child slave labor.

Plaintiffs are children taken from Mali and forced to work in appalling conditions on the cocoa plantations of the Ivory Coast. The conditions under which they work are an international scandal.¹

Defendants are the largest users of cocoa beans in the world. Between them, they exert nearly total control of the cocoa production in the Ivory Coast. Child slave labor would not have continued on the plantations where Plaintiffs were exploited without Defendants' active participation and cooperation in the entire system of child slavery.

The district court, after years of proceedings related to Defendants' motions to dismiss the complaint, dismissed all of Plaintiffs' claims under the Alien Tort Statute ("ATS") and all of Plaintiffs' state law claims. ER 175. In doing so, the district court became the first court to hold that corporations could not be sued, even for their involvement in child slavery, under the ATS. In rendering its opinion, the court ignored established ATS jurisprudence, especially the Supreme

¹ See generally, Carol Off, *Bitter Chocolate: Investigating the Dark Side of the World's Seductive Sweet* (2006). ER 251 (FAC ¶ 32).

Court's seminal decision in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), and basic principles of domestic and international law.

Accepting that Plaintiffs had properly alleged they were victims of a violation of the international norm prohibiting child slavery (ER 41), the district court then absolved the three corporate Defendants by finding that customary international law provides the standard for Plaintiffs' aiding and abetting claims under the ATS and imposing a specific intent standard found nowhere in any principle of customary international law. The district court concluded as a matter of law that Plaintiffs could not allege this level of intent against Defendants.

In general, the district court's analysis disregarded the drafters' intent that the ATS provide *civil* tort remedies for law of nations violations. The district court's attempt to impose contemporary and inapplicable principles of international criminal law on the civil tort remedies the Founders envisioned conflicts with the remedial purposes of the ATS and has no basis in the text, history or purpose of the statute.

The district court's rulings and its erroneous interpretation of the ATS should be reversed by this Court and Plaintiffs' claims should be allowed to proceed.²

STATEMENT OF JURISDICTION

This appeal is taken from a final judgment entered on October 13, 2010. ER 5. Appellants filed a timely Notice of Appeal on November 4, 2010, in response to the district court's orders of dismissal. ER 1. The district court had subject matter jurisdiction over Appellants' forced labor claim pursuant to 28 U.S.C. §§ 1331 and 1350.

ISSUES PRESENTED FOR REVIEW

1. Did the district court err in determining that private corporations are not subject to civil tort liability under the ATS?
2. Did the district court err in failing to apply the federal common law standard for civil aiding and abetting liability to Plaintiffs' ATS claims?

² To focus this appeal and action, Plaintiffs pursue only Count I of the First Amended Complaint ("FAC") for forced labor under the ATS. Plaintiffs will not assert any claims requiring a showing of state action (i.e. torture or cruel, inhuman or degrading treatment or punishment). In addition, though they disagree with the district court's dismissal of their agency claims, Plaintiffs pursue only their aiding and abetting theory of ATS liability. Plaintiffs likewise do not appeal their claims based on California state law.

3. Even if international law applied to Plaintiffs' aiding and abetting claims, did the court use the correct international law standard?

STATEMENT OF THE CASE

A. Procedural History

Plaintiffs filed their original Complaint on July 14, 2005. Defendants filed a motion to dismiss. After a February 6, 2005 hearing on Defendants' motion, the district court advised the parties it was taking the matter under submission and would order further briefing.

On September 21, 2006, after receiving the parties' supplemental briefs, the district court issued an order that included a tentative analysis on Plaintiffs' state law claims and invited further briefing in response to its analysis. After the parties submitted the requested supplemental brief, the district court stayed the case until January 2009 pending this Court's *en banc* ruling in *Sarei v. Rio Tinto*.

On January 8, 2009, the district court granted the parties' stipulation requesting a lift of the stay, and set a new briefing schedule for Defendants' renewed motion to dismiss.

After a June 8, 2009, hearing on Defendants' renewed motion, Plaintiffs were granted leave to file an amended complaint. On June 9, 2009, the district

court ordered further supplemental briefing regarding the use of international criminal law in ATS cases.

On July 22, 2009, Plaintiffs filed their First Amended Complaint (“FAC”). ER 241. Defendants filed a motion to dismiss Plaintiffs’ FAC. Defendants also filed supplemental authority on October 6, 2009, based on the Second Circuit’s decision in *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009). After a November 10, 2009 hearing on Defendants’ motion, the court once again requested further briefing on certain issues.

On September 8, 2010, the district court granted Defendants’ Motion to Dismiss with leave to amend if Plaintiffs could allege the criminal law equivalent of specific intent. ER 175. On September 30, 2010, Plaintiffs informed the district court that they were unable to make more detailed factual allegations on the disputed issues without the benefit of discovery and were not in a position to allege that Defendants acted with specific intent to cause the particular human rights violations the Plaintiffs had suffered. ER 11-12. On October 13, 2010, the district court entered an order dismissing Plaintiffs’ claims with prejudice.

B. Statement of Facts

Between 1994 and 2000, Plaintiffs John Doe I, John Doe II, and John Doe III were forced to work as child slaves on cocoa plantations in the Ivory Coast.

ER 258-59 (FAC ¶¶ 57-59). Plaintiffs, aged 12 to 14 when first forced to work as child slaves, had to work 12 to 14 hour days with no pay. *Id.* They often worked with guns pointed at them, and were given only the bare minimum of food scraps. *Id.* Plaintiffs were forced to stay on the farms under threat of severe beatings, which they had witnessed occur to other forced child laborers who had attempted escape. *Id.* Plaintiffs were locked in small rooms at night with other child slaves so they could not escape the plantations. *Id.* They were whipped and beaten by the guards and overseers when the guards felt they were not working quickly or adequately. *Id.*

These brutal conditions in the Ivory Coast's cocoa industry occurred against the backdrop of the country's civil conflict, which left the country divided after hostilities ended in 2003. ER 250-51 (FAC ¶ 31-32). The conflict has left an "Enron-type structure" of companies that insulate their criminal activities through secret bank accounts and other layers of deception. *Id.* Journalist Carol Off observed that the "dirty work" of the Ivory Coast's cocoa industry has been dominated by Defendants in this case. ER 251 (FAC ¶ 32).

It has also been well-documented by the U.S. State Department, the International Labor Organization ("ILO"), and UNICEF that child slavery has existed on Ivory Coast cocoa plantations since the 1990s. ER 254 (FAC ¶ 45).

UNICEF reported in 1997 that children were being trafficked to Ivory Coast's cocoa farms from Burkina Faso and Mali, as Plaintiffs were, and in 2004 the U.S. State Department "estimated that 15,000 child laborers work[ed] on cocoa, coffee, and cotton farms." ER 255 (FAC ¶ 46).

This environment enabled Defendants to extend economic dominance over the cocoa farms and provide logistical support and supplies essential to continuing the profitable system of child slavery. Plaintiffs allege that "through exclusive supplier/buyer relationships, maintained in the form of memorandums of understanding, agreements, and/or contracts, both written and oral, Defendants are able to dictate the terms by which such farms produce and supply cocoa to them, including specifically the labor conditions under which beans are produced." ER 251, 255 (FAC ¶¶ 33-34, 48). Defendants thus have a distinct ability to control the labor practices on the cocoa plantations. *Id.*

In addition, given Defendants' intimate and direct involvement in their supply chains, their provision of technical assistance and training programs to farmers, and the well-documented international and U.S. reports on child labor in the cocoa farms, Defendants had specific knowledge of the pervasive use of child labor in Ivory Coast's cocoa sector and on the farms and cooperatives they used to produce cocoa beans. ER 251-55 (FAC ¶¶ 33-34, 36-38, 44, 47). Defendants have

admitted that they “actively participate as the first link in an integrated supply chain,” that they “continually monitor the performance, reliability and viability of suppliers,” that they have “[s]pecific programmes directed at farmers in West Africa includ[ing] field schools to help farmers with supply chain issues,” and that they have “an unprecedented degree of control over raw material supply, quality and handling.” ER 252-53, (FAC ¶¶ 36-39).

Defendants claim that they are “against all forms of exploitation of children,” that they “will not condone the employment or exploitation of legally underage workers or forced labor and will not knowingly use suppliers who employ such workers or labor,” and that they will “comply with the letter and spirit of all applicable . . . laws designed to accomplish equal and fair opportunities in employment.” ER 256-57 (FAC ¶¶ 49-51). However, Defendants’ long-term profitable participation in a system of child slavery directly contradicts their public relations strategy.

Defendants provided myriad forms of assistance to the farming activities of the Ivorian farmers, knew that these farms operated on child slave labor, and then kept the farms in business by buying all of their crops. ER 251 (FAC ¶ 34).

Plaintiffs allege that Defendants maintained exclusive supplier/buyer relationships, and that they provided the farmers advance payments and personal spending money

to maintain the farmers' loyalty as exclusive suppliers. *Id.* Defendants knew that the money they were contributing was providing the essential financial support and incentive for these farmers to employ slave labor to meet the demand of Defendants for the valuable cocoa beans. Defendants received significant benefits from the forced labor practices by purchasing cocoa beans at extremely low prices due to severely diminished labor costs. ER 267 (FAC ¶ 90). Defendants' profits depended on their complicity in this system of child exploitation.

Plaintiffs also allege that Defendants had an "ongoing and continued presence on the cocoa farms," that they had "first-hand knowledge of the widespread use of child labor on said farms," and that they had influential status based on their exclusive purchasing agreements and the level of control they exercised over the farms. ER 254 (FAC ¶ 44). Plaintiffs allege specific instances of practical assistance and encouragement that had a substantial effect on the perpetration of forced labor at issue in this case.

C. Summary of Argument

The district court erred in granting immunity to corporations under the ATS. No case besides this case and *Kiobel v. Royal Dutch Petroleum Co.*, 621 F. 3d 111 (2d Cir. 2010), has rejected the idea of holding corporations liable under the ATS. The district court used footnote 20 of *Sosa* to justify corporate immunity, but,

contrary to the district court's interpretation, *Sosa* allows ATS claims to be brought against both natural and juridical persons.

The language, history and remedial purpose of the ATS further support corporate liability because the statute only limits who can be a plaintiff. The history of the ATS supports corporate liability, and common law tort principles should apply. No basis exists for employing principles of international criminal law automatically in ATS cases. The ATS is a civil tort statute designed to provide aliens with remedies for law of nations violations in U.S. courts, and federal common law principles are more appropriate for use in ATS cases once a violation of the law of nations has been established.

Even if international law applied to the issue of corporate liability, there is no legal system that absolves corporations from liability for serious torts of the kind the *Sosa* Court found actionable under the ATS. Corporate liability is a general principle of international law available for use as a rule of decision in ATS cases. The fact that international criminal tribunals have not imposed criminal penalties on corporations is irrelevant to the scope of corporate civil liability under the ATS. The exclusion of corporations from *criminal* liability reflects a difference of view on whether criminal penalties against non-natural persons are appropriate

in a specific setting; it says nothing about the immunity of corporations from *civil* tort liability.

The district court also erred in imposing a specific intent standard not found in either federal common law or customary international law for aiding and abetting liability. Domestic federal common law standards apply in ATS cases to aiding and abetting liability, but even if international standards apply, the test for aiding and abetting liability under both federal common law and customary international law is essentially the same – namely, that the defendant must knowingly provide practical assistance or encouragement that has a substantial effect on the commission of the human rights violation.

Whether federal common law or customary international law standards are applied, Plaintiffs' allegations satisfy these standards and Plaintiffs' forced labor claims should not have been dismissed. Defendants' provision of supplies, technical assistance, training, and financial assistance, coupled with their extraordinary economic leverage over the farmers engaged in child slavery and their knowledge of this endemic system of slavery, more than suffices to allege aiding and abetting liability under any standard.

ARGUMENT

I. CORPORATIONS ARE NOT IMMUNE FROM LIABILITY FOR SLAVE LABOR UNDER THE ATS.

The district court was the first court to hold that corporations could not be sued under the ATS, despite the existence of dozens of ATS cases involving corporations and other juridical entities. ER 134.³ This holding is completely at odds with the text, history and remedial purposes of the ATS. Moreover, the district court's analysis is in conflict with the entire body of ATS jurisprudence endorsed by the Supreme Court in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).⁴

³ See, e.g., *Mujica v. Occidental Petroleum Corp.*, 564 F.3d 1190 (9th Cir. 2009); *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252 (11th Cir. 2009); *Sarei v. Rio Tinto, PLC*, 550 F.3d 822 (9th Cir. 2008); *Romero v. Drummond Co., Inc.*, 552 F.3d 1303 (11th Cir. 2008); *Alperin v. Vatican Bank*, 410 F.3d 532 (9th Cir. 2005); *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242 (11th Cir. 2005); *Herero People's Reparations Corp. v. Deutsche Bank, A.G.*, 370 F.3d 1192 (D.C. Cir. 2004); *Deutsch v. Turner Corp.*, 324 F.3d 692 (9th Cir. 2003); *Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002), *vacated on other grounds*, 403 F.3d 708 (9th Cir. 2005); *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161 (5th Cir. 1999); *Carmichael v. United Technologies Corp.*, 835 F.2d 109 (5th Cir. 1988); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984).

⁴ Shortly after the district court's decision, the majority of a sharply divided panel in the Second Circuit reached a similar conclusion in *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010). Judge Leval's eloquent and comprehensive refutation of the majority opinion in *Kiobel* applies equally to the district court's flawed analysis of this issue. 621 F.3d at 149 (Leval, J. concurring). Plaintiffs rely upon Judge Leval's detailed analysis herein. A petition for rehearing *en banc* was denied by an equally divided five-to-five vote, *Kiobel v. Royal Dutch Petroleum Co.*, Nos. 06-4800-CV, 06-4876-CV, 2011 WL

As the Supreme Court recognized in *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 438 (1989), “[the ATS] by its terms does not distinguish among classes of defendants.” Although only the Eleventh Circuit has *explicitly* ruled that corporations may be sued under the ATS, no case had ever excluded *any* category of defendant from the scope of the ATS before this case and *Kiobel*. Corporate immunity from civil tort liability simply does not exist.

A. Nothing in *Sosa* Supports the District Court’s Corporate Immunity Analysis.

The district court’s holding is based on the flawed premise that the *Sosa* Court determined that international law applies to the issue of corporate liability. However, the *Sosa* Court did not hold, or even suggest, that the issue of appropriate defendants in an ATS action must be determined by international law. The issue of corporate liability was not before the Court in *Sosa* and the Court expressed no view about how this issue should be resolved. Instead, the *Sosa* Court made it clear that federal common law provided the cause of action in an ATS case. *Sosa*, 542 U.S. at 725. In doing so, the Court specifically rejected the views of Judge

338151 (2d Cir. Feb 4, 2011). It is unclear whether the Second Circuit will long adhere to the majority’s unprecedented decision, as two new judges have joined the Second Circuit since *Kiobel* was decided, creating a substantial possibility that the Circuit will revisit this issue and reject the panel majority’s unprecedented analysis.

Bork in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 811 (D.C. Cir. 1984) (Bork, J., concurring), that causes of action under the ATS are defined by international law. Instead, the Court adopted Judge Edwards' views in *Tel-Oren*, 726 F.2d at 778 (Edwards, J., concurring), that federal courts must look to domestic law to supply the rules of decision in ATS cases once an ATS plaintiff has satisfied the jurisdictional requirement of a law of nations violation. *Sosa*, 542 U.S. at 730-31. There is no question that corporations may be subject to civil tort liability under domestic law, just as corporations are subject to such liability in every legal system in the world. *See infra* § I C.

The district court's holding is based on an erroneous interpretation of footnote 20 of the *Sosa* opinion. ER 138-39. Footnote 20 is concerned with the issue of which international norms may be violated directly by non-state actors, such as corporations and natural persons, and which norms require a showing of state action. As Judge Leval observed in his concurring opinion in *Kiobel*: "Far from implying that natural persons and corporations are treated *differently* for purposes of civil liability under ATS, the intended inference of the footnote is that they are treated *identically*." 621 F.3d at 165; *see also Khulumani v. Barclay Nat'l Bank, Ltd.* 504 F.3d 254, 269 (2d Cir. 2007) (Katzmann, J., concurring). The distinction the Court observed in footnote 20 concerned only the fact that some

international norms require a showing of state action (e.g. torture), and some do not (e.g. genocide). *See Kadie v. Karadzic*, 70 F.3d 232, 239 (2d Cir. 1995). Indeed, corporate liability first developed as a loss-allocating mechanism. *See* Gary T. Schwartz, *The Character of Early American Tort Law*, 36 UCLA L. Rev. 641, 649-51 (1989). Because international law leaves issues such as loss allocation mechanisms to domestic law, no basis exists for inquiring whether corporate liability is an international norm. *Cf. The Paquete Habana*, 189 U.S. 453, 465 (1903) (looking to domestic law to determine procedure for allocating damages for ship seized in violation of law of nations). Of course, the notion that the Supreme Court intended to resolve important choice of law issues in ATS cases in a footnote in a case in which neither corporate liability nor aiding and abetting liability was involved is unfathomable.

There is no doubt that a corporation is capable of committing acts that violate customary international law. For example, a corporation, like those that supported Nazi atrocities, can aid and abet forced labor or mass murder. Modern day pirates or human traffickers can easily use modern day corporate forms to conduct business or conceal assets. *Kiobel*, 621 F.3d at 156 n.10 (Leval, J., concurring) (discussing how “Somali pirates essentially operate as limited

partnerships”). Nothing in *Sosa* suggests that such entities are immune from civil tort liability under the ATS.

Thus, contrary to the district court’s conclusion, there is nothing in *Sosa* that precludes any particular category of defendant from being held liable for violations of the law of nations under the ATS. In fact, the reasoning and methodology employed by the *Sosa* Court, supported by its analysis of the history and purpose of the ATS, dictate that once a plaintiff establishes a violation of the law of nations, he or she may bring a claim against a defendant in U.S. courts regardless of whether that defendant is a natural or juridical person.

B. The Language, History and Remedial Purpose of the ATS Do Not Support Immunity For Corporate Defendants.

The language, history, and remedial purpose of the ATS establish that the statute extends to corporate defendants. The text of the ATS limits who can be a plaintiff by confining jurisdiction to suits by “an alien.” Judiciary Act, ch. 20, § 9, 1 Stat. at 77. By contrast, the text places no limits on who can be a defendant. The phrase “all causes,” further undermines any implied limitations not contained in the text. “The text of the [ATS] provides no express exception for corporations.”

Romero v. Drummond Co. Inc., 552 F.3d 1303, 1315 (11th Cir. 2008); *See also Aldana* at 1253.

The use of the term “tort” also indicates that the First Congress intended that common law tort principles apply in ATS cases. Tort liability against juridical entities, such as corporations, was well known at the time the ATS was enacted. The absence of any excluded category of defendants is consistent with contemporary understandings about the scope and reach of the common law.

In *Sosa*, the Court emphasized the use of history in discerning the meaning of the ATS. *Sosa*, 542 U.S. at 712-24. The weight of the textual and historical evidence further supports the fact that the First Congress would have considered corporations to be proper defendants under the ATS. The drafters of the ATS were quite familiar with common law tort liability for corporations.⁵ See 1 William Blackstone, *Commentaries*, *475 (1765) (explaining that corporations have the capacity “to sue and be sued . . . and do all other acts as natural persons may”).⁶

⁵ The ATS is consistent with the general approach taken toward international law in the eighteenth century. Courts would recognize a cause of action deriving from an international norm of conduct, and the common law would govern its administration. See, e.g. *Booth v. L’Esperanza*, 3 F. Cas. 885 (No. 1547) (D.S.C. 1798) (applying domestic agency law and law of nations to dispute over prize of war); see generally Oliver Wendell Holmes, Jr., *The Common Law*, Lecture III (1991).

⁶ Indeed, such liability dates back at least to the activities of the East India Company in the seventeenth century. See *The Case of the Jurisdiction of the House of Peers Between Thomas Skinner, Merchant, and the East-India Company* (1666), 6 State Trials 710, 711 (H.L.) (awarding tort damages against the company for assault and other injuries). The district court found that Blackstone’s

Moreover, there is no basis for the district court's assumption that the scope of ATS liability is somehow implicitly limited to international criminal law.⁷ In 1795, shortly after the enactment of the ATS, Attorney General William Bradford issued an opinion finding that a British corporation could pursue a civil action under the ATS for injury caused to it in violation of international law by American citizens who, in concert with a French fleet, had attacked a settlement managed by the corporation in Sierra Leone. *See* 1 Op. Att'y Gen. 57 (1795). *See Sosa*, 542 U.S. at 721 (relying on Bradford opinion as an important source of legislative intent). Significantly, Bradford found such civil remedies available even where criminal jurisdiction was absent. *Id.*

observations about the limits of corporate criminal liability somehow limited civil remedies under the ATS. ER 152. However, there is no evidence that the drafters of the ATS intended criminal law to be applied in ATS cases, given their use of the term “tort.”

⁷ Violations of some human rights norms are considered international crimes but not all human rights violations are crimes, nor did the Founders address criminal law in the ATS. The “offenses against the law of nations,” with which the Continental Congress was concerned in its 1781 resolution, were not limited to criminal conduct. Blackstone used the phrase “offences against the law of nations” to connote any violation of that law without regard to whether it was criminal. 4 William Blackstone, *Commentaries* * 66. Indeed, he noted that “offences against the law of nations can rarely be the object of the criminal law of any particular state.” *Id.*

Also supporting this position is *Bolchos v. Darrel*, 3 F. Cas. 810 (No. 1607) (D.S.C. 1795), an early case sustaining jurisdiction on the basis of the ATS. *See Sosa*, 542 U.S. at 720 (discussing *Bolchos*). There, a French privateer brought suit pursuant to Article 14 of the 1778 Treaty of Amity and Commerce with France,⁸ to reclaim proceeds from the sale of slaves aboard the ship. At the time, the acts of the defendant in seizing and selling the slaves were not criminal under the law of nations and the treaty did not criminalize them. Article 14 was purely a civil provision dealing with rights in captured property. Yet, the district court had no difficulty finding jurisdiction over the civil claim on the basis that it was “for a tort, in violation of . . . a treaty of the United States.” *Bolchos*, 3 F. Cas. at 810. Moreover, there is no basis for the proposition that a corporation could be a plaintiff in an ATS suit but not a defendant.⁹

The district court’s discussion of piracy and its statement, that “[t]here is some authority for the proposition that piracy can only be committed by

⁸ Treaty of Amity and Commerce Between the United States of America and His Most Christian Majesty, U.S.-Fr., art. 14, Feb. 6, 1778, 8 Stat. 12, 20 (1778).

⁹ In 1907, the Attorney General rendered an opinion that an American corporation could be held liable under the ATS to Mexican nationals if the defendant’s “diversion of the water [of the Rio Grande] was an injury to substantial rights of citizens of Mexico under the principles of international law or by treaty.” 26 Op. Att’y Gen. 250, 253 (1907).

individuals, not legal entities” (ER 151), misconstrues *United States v. Smith*, ER 151. None of the vast array of authorities listed in the *Smith* footnote quoted by the district court were originally cited for that proposition. ER 151.¹⁰ Rather, the Rutherford quote taken from *Smith* merely distinguishes acts of war by nations, from acts of piracy by parties not acting under state authority. *United States v. Smith*, 18 U.S. 153, 168-89 n.h (1820).

The district court also misconstrues the history and purpose of the ATS. The remedial purpose of the ATS requires that corporations be liable as defendants when they violate the law of nations, or assist in such violations. Congress intended to provide jurisdiction for tort actions to compensate victims of violations of the law of nations and to demonstrate to the international community that our new nation would enforce the law of nations. *Sosa*, 542 U.S. at 716-17. See William R. Casto, *The Federal Courts’ Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations*, 18 Conn. L. Rev. 467 (1986). Indeed, in 1781 the Continental Congress recommended that the States authorize

¹⁰ Instead, these authorities were cited to confirm that the law of nations adequately defines the crime of piracy. Moreover, *Smith* is irrelevant because the court was not considering entity liability or civil tort liability in that case.

damage suits for violations of the law of nations without any limit on the categories of defendants.¹¹

The First Congress would not have allowed a corporation or partnership operating in the United States to engage in systematic piracy or breaches of neutrality with immunity from civil liability under the ATS.¹² Such a result could have led to incidents of the kind the ATS was clearly enacted to prevent. *Sosa*, 542 U.S. at 724 (discussing the Marbois incident as “point[ing] to a prevalent assumption that Congress did not intend the ATS to sit on the shelf until some future time when it might enact further legislation”).

As Judge Leval points out in his *Kiobel* concurrence, the notion that Congress would exclude corporations that engaged in slavery, human trafficking or

¹¹ This resolution is the direct precursor of the ATS. *See* Casto, *supra* §IB, at 490-91; William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the “Originalists,”* 19 *Hastings Int’l & Comp. L. Rev.* 221, 226-28 (1996).

¹² Indeed, there are numerous cases in which juridical entities (e.g. ships) were the defendants in cases claiming compensation for violations of the law of nations. *See, e.g.,* Jordan J. Paust, *Nonstate Actor Participation in International Law and the Pretense of Exclusion*, 51 *Va. J. Int’l L.* 977, 987 n.38 (2011); Jenny S. Martinez, *Antislavery Courts and the Dawn of International Human Rights Law*, 117 *Yale L. J.* 550 (2008). Thus, the idea that only individuals could be held responsible in tort for violations of the law of nations simply has no historical support.

genocide from liability under the ATS is an absurd reading of this tort statute. 621 F.3d at 150-51.

C. Even if International Law Is Found to Apply, Corporate Liability is a Well-Established General Principle of International Law.

Even if this Court found that international law governed the issue of corporate liability, such liability is a general principle of law found in every legal system.¹³ General principles of law are available as a source of international law for federal courts to implement the congressional purpose of enforcing the law of nations. *See Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 251 (2d Cir. 2003) (recognizing that “general principles of law recognized by civilized nations” form part of international law).

There is no legal system in which corporations are not subject to some form of liability (civil, administrative or criminal) for these kinds of actions.¹⁴ While

¹³ The district court also misapprehended the significance of treaties and conventions concerning the claim that corporations are not the subjects of international law. ER 257-58. The fact that certain treaties contemplate corporate liability, *see Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 316-17 (S.D.N.Y. 2003), is evidence that refutes any contention that corporations are not the subjects of international law.

¹⁴ *See, e.g.*, International Commission of Jurists, *Report of the Expert Legal Panel on Corporate Complicity in International Crimes* (2008) (hereinafter *ICJ Report*), available at <http://www.business-humanrights.org/Updates/Archive/ICJPaneloncomplicity>. (“ICJ Report”).

there may be some differences of view on whether corporations should be subjected to criminal liability, every legal system holds corporations accountable in some way for actions like those alleged in this case. The law of civil remedies does not necessarily use the terminology of human rights law, but in every jurisdiction it protects interests such as life, liberty, dignity, and physical and mental integrity, and it includes remedial mechanisms that mirror the reparations required by international law for the suffering inflicted by abuse. *ICJ Report*, Vol. 3 at 11.

The uniform recognition of corporate liability in legal systems around the world demonstrates that legal responsibility accompanies legal personality – a proposition that qualifies as a general principle of law. *See* Statute of the International Court of Justice, art. 38(1) (c). General principles are discerned by reference to the common domestic legal doctrines in representative jurisdictions worldwide.¹⁵ International law is routinely established through this exercise in comparative law and would have been especially familiar to the founding

¹⁵ Section 102(1) (c) of the Restatement (Third) of U.S. Foreign Relations Law similarly provides that “[a] rule of international law is one that has been accepted as such by the international community of states . . . by derivation from general principles common to the major legal systems of the world.” *See also* Bin Cheng, *General Principles of Law as Applied by International Courts* 390 (1953) (noting that general principles encompass “the fundamental principles of every legal system” and that they “belong to no particular system of law but are common to them all.”).

generation and the drafters of the ATS. *See, e.g., United States v. Smith*, 18 U.S. 153 (1820).

The Supreme Court has recognized the international principles governing corporate personhood, holding that under international law “the legal status of *private* corporations . . . is not to be regarded as legally separate from its owners in all circumstances,” and that veil-piercing is a general principle of international law, as well as of federal common law. *First Nat’l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 628-29, n.20 (citing *Barcelona Traction, Light and Power Co. (Belgium v. Spain)*, 1970 I.C.J. 3, 38-39).

The district court erroneously refused to consider arguments premised on general principles of international law, based in part on a misreading of *Sosa*. ER 173 n.70. *Sosa*, however, did not suggest that general principles of law could not be employed to provide the rules for other issues in ATS cases. Indeed, the Supreme Court did just this in *First Nat’l City Bank*.

Moreover, the district court’s rejection of general principles on the grounds that Plaintiffs could not show *opinio juris*, (ER 173-4 n.70), is based on the district court’s fundamental misunderstanding of international law. General principles, unlike customary international law, require no such showing. General principles derive from the empirical fact that the world’s disparate legal systems employ

many similar principles to common issues and that it is appropriate to employ such principles in international litigation or in domestic litigation involving international law claims. The use of general principles responds to any concern that the federal courts would employ idiosyncratic American principles in ATS cases.

D. The District Court’s Reliance on the Limitations of the Jurisdiction of International Criminal Tribunals Was Erroneous.

1. The District Court Opinion Misapplies Nuremberg Jurisprudence.

The district court’s assertion that the Nuremberg jurisprudence supports corporate immunity because only individuals were subject to prosecution is based on a fundamental misunderstanding of the history and context of the Nuremberg Tribunals. The Nuremberg jurisprudence establishes that juridical entities, as well as states and natural persons, can be liable for international law violations.¹⁶

The district court’s statement — that “the Nuremberg-era tribunals did not impose any form of liability on corporations or organizations as such” (ER 157) — is incomplete and fails to consider the context in which these issues were decided. Significantly, the district court failed to note that by the time these organizations

¹⁶ *See also* Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis art. 9, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.C. 280, *available at* <http://www.unhcr.org/cgi-bin/texis/utx/refworld/rwmain?docid=47fdfb34d>.

were declared criminal by the IMT, they had already been punished *under international law* through dissolution and the confiscation of all their assets.

The crucial point, which the district court missed (ER 157), is that this punishment was imposed by the Allied Powers *through the mechanism of international law*. On September 20, 1945 (after the issuance of the London Charter on August 8, 1945, and before the commencement of the IMT Trial on November 20, 1945), the Nazi Party, with its constituent parts, was disbanded through an international treaty.¹⁷

Significantly, the Nuremberg-era tribunals understood that corporations were capable of violating the law of nations. At the trial of I.G. Farben, the court stated that: “Charged with the responsibility of meeting fixed production quotas, Farben yielded to the pressure of the Reich Labor Office and utilized involuntary foreign workers in many of its plants. It is enough to say here that the utilization of forced

¹⁷ Agreement Between Governments of the United Kingdom, United States of America, and Union of Soviet Socialist Republics, and the Provisional Government of the French Republic on Certain Additional Requirements to Be Imposed on Germany, Art. 38, *reprinted in* Supplement: Official Documents, 40 Am. J. Int’l. L. 21, 29 (1946) (Article 38 reads: “The National Socialist German Workers’ Party (NSDAP) is completely and finally abolished and declared to be illegal.”). *See also*, Control Council Law No. 2, *Providing for the Termination and Liquidation of the Nazi Organizations* (Oct. 10, 1945), *reprinted in* Enactments and Approved Papers of the Control Council and Coordinating Committee, Vol. 1, 131, *available at* http://www.loc.gov/rr/frd/Military_Law/Enactments/Volume-I.pdf.

labor, unless done under such circumstances as to relieve the employer [the Farben company] of responsibility constitutes a violation of [international law].” *United States v. Krauch (The Farben Case)*, 8 Trials of War Criminals Before the Nuernberg Military Tribunal (T.W.C.), at 1173-74 (1952) (cited in *Kiobel*, 621 F.3d at 155 n.6) (Leval, J., concurring).¹⁸ The fact that only individuals were prosecuted does not mean that corporations were deemed incapable of violating international law. The decision to try only individuals in criminal cases was a political judgment and not based on any notion that international law was inapplicable to corporations.

2. The Rome Statute Does Not Limit the ATS.

The district court’s reliance on the Rome Statute was also misplaced. ER 163. As Professor David Scheffer, the United States Ambassador to the Rome Conference, has explained, the exclusion of corporations from the Rome Statute had nothing to do with corporate liability in international law generally. *See* David Scheffer and Caroline Kaeb, *The Five Levels of CSR Compliance: The Resiliency of Corporate Liability Under the Alien Tort Statute and The Case For a*

¹⁸ *See also The Farben Case*, 8 T.W.C. at 1132 (“Where private individuals, including juristic persons, proceed to exploit the military occupancy by acquiring private property against the will and consent of the former owner, such action, not being expressly justified by any applicable provision of the Hague Regulations, is in violation of international law.”) (emphasis added).

Counterattack Strategy in Compliance Theory, 29 Berkeley J. Int'l L. 334, 359-60 (2011). The fact that the Rome Statute does not provide for corporate criminal liability does not establish an absence of corporate liability in customary international law.

II. THE DISTRICT COURT ERRED IN HOLDING THAT PLAINTIFFS WERE REQUIRED TO ALLEGE SPECIFIC INTENT TO STATE A CLAIM BASED ON AIDING AND ABETTING UNDER THE ATS.

A. The Cause of Action Recognized in *Sosa* is Based on Federal Common Law.

In *Sosa*, the Court held that federal common law provides the cause of action for a limited number of customary international law norms “accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized.” *Sosa*, 542 U.S. at 725; *see also Tel-Oren*, 726 F. 2d at 777-78 (Edwards, J., concurring) (“[T]he law of nations never has been perceived to create or define the civil actions to be made available . . . [S]tates leave that determination to their respective municipal laws.”)¹⁹ The application of domestic federal common law standards is essential because

¹⁹ *See* Br. for U.S. as *Amicus Curiae* at 20, *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163 (2d Cir. 2009) (No. 09-34) (“the validity of a federal-common-law claim under *Sosa* should generally be treated as a merits question, with the ATS conferring subject-matter jurisdiction so long as the allegations of a violation of customary international law are not plainly insubstantial.”)

international law does not provide for the means of its own enforcement in domestic courts. *Sosa*, 542 U.S. at 731 (endorsing Judge Edwards’ view that domestic rules govern the litigation of ATS claims in U.S. courts).

In reaching its conclusion, the Supreme Court conducted an extensive review of the Founders’ understanding of the common law and the history of the ATS, which demonstrates that the Founders expected federal common law to supply the rules in ATS cases. *See* Br. of Professors of Federal Jurisdiction and Legal History as *Amici Curiae* in Support of Respondents, *Sosa*, 542 U.S. 692 (2004) (No. 03-339). Courts routinely treated causes of action arising under international law as they did other common law torts—by applying general common law principles. *See, e.g., Talbot v. Jansen*, 3 U.S. 133, 156-58 (1795); *United States v. Benner*, 24 F. Cas. 1084, 1087, (No. 14,568) (C.C.E.D. Pa. 1830).²⁰ The application of common

²⁰ *See* Beth Stephens, *Sosa v. Alvarez-Machain: “The Door is Still Ajar” for Human Rights Litigation in U.S. Courts*, 70 *Brook. L. Rev.* 533, 558 (2004) (“*Sosa* does not require that every ancillary rule applied in an ATS case meet the level of international consensus required for the definition of the underlying violation. As in any case in which the federal courts exercise discretion to recognize federal common law, the courts will fashion rules to fill gaps, borrowing from the most analogous body of law.”).

law rules to ATS cases is entirely consistent with the way federal courts implement other federal statutes.²¹

Consistent with *Sosa*, the Eleventh Circuit applies federal common law standards in ATS cases. *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1258 (11th Cir. 2009); *Romero v. Drummond*, 552 F.3d 1303, 1315 (11th Cir. 2008); *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1157-60 (11th Cir. 2005); *Abebe-Jira v. Negewo*, 72 F.3d 844, 848 (11th Cir. 1996) (utilizing Restatement (Second) of Torts § 876 (standard for civil aiding and abetting and conspiracy liability for ATS claims));²² *see also, e.g., Doe v. Islamic Salvation Front*, 257 F. Supp. 2d 115, 120 n.12 (D.D.C. 2003) (considering that “tort principles from federal common law

²¹ *See, e.g., U.S. v. Kimbell Foods, Inc.*, 440 U.S. 715, 727 (1979); *see also Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981) (courts should apply the federal common law “in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations”).

²² A similar result was reached by a Ninth Circuit panel before the case was taken *en banc* to address another issue. *See Sarei v. Rio Tinto*, 487 F.3d 1193, 1202 (9th Cir. 2007), *vacated by grant of reh’g en banc*, 499 F.3d 923 (9th Cir. 2007), *limited remand on other grounds*, 550 F.3d 822 (9th Cir. 2008) (courts considering ATS claims “draw on federal common law”). A prior panel of this Court was split on the issue of whether international law or federal common law governs the standards for aiding and abetting liability under the ATS. *See Doe v. Unocal*, 395 F.3d 932, 951, 963 (9th Cir. 2002), *vacated*, 403 F.3d 708 (2005).

may be more useful” in ATS cases); *Xuncax v. Gramajo*, 886 F. Supp. 162, 182-83 (D. Mass. 1995).

The district court erred in reading *Sosa* to require that plaintiffs who bring claims under § 1350 must allege *both* a substantive violation *and* a theory of liability “accepted by the civilized world and defined with a specificity comparable to the features of the 18th Century paradigms.” ER 46. *Sosa* stands for the proposition that judges retain “residual common law discretion” to manage ATS claims, though the substance of those claims must be subject to “judicial caution” and “vigilant doorkeeping.” *Sosa*, 542 U.S. at 729. *Sosa* did not hold that its evidentiary standard applied to issues other than the threshold “law of nations” violations.

Aiding and abetting and other ancillary rules of decision need not meet the threshold test for substantive law of nations violations under the ATS. “By enacting Section 1350, Congress entrusted [the task of enforcing international law] to the courts, and gave them power to choose and develop federal remedies to effectuate the purposes of the international law incorporated into U.S. common law.” *Filartiga v. Pena Irala*, 577 F. Supp. 860, 863 (E.D.N.Y. 1984). Numerous courts have followed this approach, drawing upon international and domestic norms to craft federal common law principles to govern ATS litigation. *See, e.g.*,

Kadic v. Karadzic, 70 F.3d 232, 246 (2nd Cir. 1995); *In re Estate of Ferdinand E. Marcos Human Rights Litigation*, 978 F.2d 493, 502 (9th Cir. 1992), *cert. denied*, 508 U.S. 972 (1993). *Sosa* adopted this methodology and cited these cases with approval. *Sosa*, 542 U.S. at 732.

Further, the district court's reliance on *Sarei v. Rio Tinto, PLC*, 550 F.3d 822, 828 (9th Cir. 2008), is misplaced. ER 29-30. The *Sarei en banc* opinion did not address aiding and abetting standards and was limited to the question of whether there is a requirement under the ATS to exhaust local remedies. The court declined to rule on whether federal common law or international law applies to other "nonsubstantive aspects of ATS jurisprudence," *id.* at 828, but concluded that "it is fair to assume (at least for the purposes of exhaustion) that we may freely draw from both federal common law and international law without violating the spirit of *Sosa*'s instructions." *Id.* The court went on to rule that "exhaustion under the ATS should be approached consistently with exhaustion principles in other *domestic contexts*." *Id.* at 831-32 (emphasis added).

An appropriate federal common law analysis, as indicated in *Sarei*, employs accepted international law principles where they exist and common law principles where necessary to fulfill the statutory purposes of the ATS. Thus, the fact that aiding and abetting liability is established in international criminal law is relevant

to a federal common law analysis and supports the availability of this theory of liability in civil cases under the ATS. However, there is no reason to impose criminal law *mens rea* requirements in ATS civil tort actions. The purposes of criminal and tort law are different. The remedial purpose of tort law is better served by the ordinary federal common law standards of aiding and abetting liability, as the Founders contemplated, and not principles designed to identify individuals who should suffer criminal punishment for their crimes. The district court rejects this approach, (ER 52), but it is, in fact, the approach most in keeping with the original intent of the ATS' drafters and the *Sosa* opinion.

The federal common law standard for aiding and abetting is knowing assistance that has a substantial effect on the commission of the violation of the norm. In its seminal opinion, *Halberstam v. Welsh*, 705 F.2d 472 (D.C. Cir. 1983), the D.C. Circuit defined the scope of aiding and abetting tort liability in the civil context: “(1) the party whom the defendant aids must perform a wrongful act that causes an injury; (2) the defendant must be generally aware of his role as part of an overall illegal or tortious activity at the time that he provides the assistance; [and] (3) the defendant must knowingly and substantially assist the principal violation.” *Id.* at 477 (citing Restatement (Second) of Torts § 876(b)). This standard is well-

established and decisions interpreting its meaning²³ can provide guidance to courts considering secondary liability under the ATS. Plaintiffs' allegations clearly satisfy this standard. *See infra* § II B 3 b.

B. Even if International Law Provides the Standard for Aiding and Abetting Liability in ATS Cases, the District Court Failed to Apply the Proper International Law Standard.

1. The *Actus Reus* Standard in International Criminal Law is Practical Assistance, Encouragement, or Moral Support Which Has a Substantial Effect on the Perpetration of the Crime.

The customary international law standard for aiding and abetting requires as the *actus reus*, “practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime,” *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Judgment, ICTY ¶ 235 (Dec. 10, 1998). The *Furundzija* court was authorized by the Security Council to apply only law that was “beyond any doubt customary law.”²⁴

²³ *See, e.g., In re First Alliance Mortgage Co.*, 471 F.3d 977, 993 (9th Cir. 2006); *Aetna Cas. & Sur. Co. v. Leahey Constr. Co.*, 219 F.3d 519, 535-37 (6th Cir. 2000); *In re Temporomandibular Joint (TMJ) Implants Prods. Liab. Litig.*, 113 F.3d 1484 (8th Cir. 1997); *Rochez Bros., Inc. v. Rhoades*, 527 F.2d 880, 886 (3d Cir. 1975).

²⁴ Report of the Secretary-General Pursuant to Para. 2 of Security Council Resolution 808 (1993) on the Establishment of the ICTY, U.N. Doc. S/25704, para. 34; *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1344 n.21 (N.D. Ga. 2002). *See also Prosecutor v. Tadic*, Case No. IT-94-1-T Opinion and Judgment,

It determined this standard based on a comprehensive analysis of international case law and international instruments. *Furundzija*, IT-95-17/I-T at ¶¶ 192-234. This standard is established law in the ICTY. *See, e.g., Prosecutor v. Fatmir Limaj*, Case No. IT-03-66-T, Judgment, ¶ 517 (ICTY Nov. 2005); *Prosecutor v. Radoslav Brdjanin*, Case No. IT-99-36-T, Judgment (ICTY Sept. 2004).²⁵

The district court refused to apply the well-established *Furundjiza* standard to Plaintiffs' claims. ER 48-49. Instead, the district court held that the *actus reus* required the alleged acts to be "specifically directed to assist . . . a certain specific crime." *Id.* (citing *Prosecutor v. Blagojevic and Jokic*, Case No. IT-02-60-A, Judgment, (ICTY 9 May 9, 2007)). The *Blagojevic* court, however, made clear that "specific direction has not always been included as an essential element of the *actus reus* of aiding and abetting."²⁶ *Id.* at ¶ 189. *Blagojevic* clearly held that the "principal question" for the *actus reus* element of aiding and abetting is whether

¶ 662 (ICTY May 7, 1997).

²⁵ Several other courts in ATS suits have also looked to the *Furundjiza* standard for aiding and abetting under international law. *See, e.g., Almog v. Arab Bank, PLC*, 471 F. Supp. 2d 257, 286 (E.D.N.Y. 2007); *In re Agent Orange Product Liability Litigation*, 373 F. Supp. 2d 7 (E.D.N.Y. 2005).

²⁶ *See also Prosecutor v. Mrksic*, Case No. IT-95-13/1-A, Judgment, ¶ 159 ("[T]he Appeals Chamber has confirmed that 'specific direction' is not an essential ingredient of the *actus reus* of aiding and abetting").

the accused's conduct had a "substantial effect on the perpetration of the crime."

Id. ¶ 193.

Additionally, the district court mistakenly found that "there is a great deal of uncertainty about the *actus reus* of 'tacit approval and encouragement.'" ER 51.

However, criminal liability for aiding and abetting a human rights violation through tacit approval and encouragement dates back to Nuremberg-era precedents such as *The Synagogue Case* and *United States v. Ohlendorf* ("The *Einsatzgruppen Case*"), 4 (T.W.C. at 570-73) (1949). The district court believed that liability could be found only where the defendant has "a combination of a position of authority and physical presence at the crime scene which allows the inference that non-interference by the accused actually amounted to tacit approval and encouragement." ER 51 (citing *Prosecutor v. Oric*, No. IT-03-68-A, ¶ 42 (ICTY Appeals Chamber, July 3, 2008)). The ICTY has noted this combination of conditions in previous cases, but has not held that "presence" and a "position of authority" are the *necessary* conditions for finding such liability. The district court also fails to cite any authority for this proposition. The ICTY has held that "[p]resence, particularly when coupled with a position of authority, is therefore a *probative, but not determinative*, indication that an accused encouraged or supported the perpetrators of the crime." *Prosecutor v. Kvočka*, Case No. IT-98-

30/1-T, (2001) at ¶ 257 (2001) (emphasis added). The Appeals Chamber left this formulation undisturbed. *Prosecutor v. Kvocka*, Case No. IT-98-30/1-A, Appeal Judgment (ICTY Feb. 28, 2005). Whether defendants can be held liable on this theory depends on the facts and circumstances of the situation and the district court erred by finding that this theory of liability could not be proved as a matter of law before any discovery had been taken in this case.

Finally, despite the district court's erroneous analysis to the contrary, it is well-established that a defendant's "assistance . . . need not constitute an indispensable element, that is, a *conditio sine qua non* for the acts of the principal." *Presbyterian Church of Sudan v. Talisman*, 244 F. Supp. 2d 289, 324 (S.D.N.Y. 2003) (quoting *Furundzija*, IT-95-17/1-T at ¶ 209). Rather, it suffices that "the acts of the accomplice make a significant difference to the commission of the criminal act by the principal." *Furundzija*, IT-95-17/1-T at ¶ 233. The acts of the accomplice have the required "[substantial] effect on the commission of the crime" where "the criminal act most probably would not have occurred in the same way [without] someone act[ing] in the role that the [accomplice] in fact assumed." *Prosecutor v. Tadic*, Case No. IT-94-1-T, Opinion and Judgment, ¶ 688 (ICTY May 7, 1997). Plaintiffs' allegations satisfy these criteria, and the district court's findings are unsupported by international law.

2. The Aiding and Abetting Standard for *Mens Rea* in International Law is Knowledge.

The district court erred in holding that “the appropriate *mens rea* for aiding and abetting violations of international law requires that the defendant act with “the purpose of facilitating the commission of that crime.” ER 52. The correct *mens rea* standard for aiding and abetting violations of international law is “knowledge that the acts assist the commission of the offense.” *Furundzija*, IT-95-17/1-T, at ¶¶ 245-49 (noting that “the clear requirement in the vast majority of the [Nuremberg-era] cases is for the accomplice to have knowledge that his actions will assist the perpetrator in the commission of the crime”); *see also Prosecutor v. Delalic*, Case No. IT-96-21-T, Judgment, ¶¶ 321, 325-29 (ICTY Nov. 16, 1998) (holding, based on a “detailed investigation” of post-World War II case law, that knowledge was the accepted *mens rea* for aiding and abetting liability). In adopting this standard, the *Furundzija* tribunal engaged in a comprehensive discussion of the customary international law standard for aiding and abetting liability.

In light of ample international law precedent, the district court’s finding that the “[k]nowledge standard” . . . has not obtained universal recognition and acceptance” is plainly incorrect. ER 52. Decades of customary international law

dating back to Nuremberg establishes knowledge, not purpose, as the *mens rea* for criminal aiding and abetting under customary international law.²⁷

The *Furundzija* tribunal also made clear that an aider and abettor need not know the particular crime that the perpetrator intends to commit; instead, he need only be “aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed” *Furundzija*, IT-95-17/1-T at ¶ 246.

Under such circumstances, the aider and abettor is deemed to have “intended to facilitate the commission of that crime, and is guilty as an aider and abettor.” *Id.* In other words, the accomplice need not share the *mens rea* of the principal to have a culpable mental state; actual or constructive knowledge that his or her actions would aid in the commission of the offense is sufficient for liability to attach.²⁸

²⁷ The district court’s finding— that the “purpose” standard appears in the United Nations regulations governing human rights tribunals in East Timor— is of no moment. ER 61. Unlike the ICTY, the United Nations Transitional Administration in East Timor (UNTAET) Statute calls for the application of Indonesian domestic law, applying customary international law only in the case of a conflict between Indonesian domestic law and internationally recognized human rights standards. *See* §§ 2-3 of UNTAET Reg. No. 1999/1, 27 Nov. 1999. There is no conflict in applying a higher level of *mens rea* found in Indonesian criminal law in that context.

²⁸ *See, e.g., Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 445-446 (D.N.J. 1999) (“[t]he allegation that Ford Werke pursued its own economic interests [in subjecting plaintiffs to forced labor] . . . does not preclude a determination” that it was acting in the interest of the Nazi’s war aims); *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp.2d 1164, 1181, 1183 (C.D. Cal. 2005)

The district court disregards these important decisions claiming that they are “factually inapposite” and that they discuss “aiding and abetting liability in the context of civil wars and military control of the population.” ER 74. Violations occurring in the context of conflict are subject to the same aiding and abetting standard under customary international law, as violations in any other context. The district court cites no support for a variable definition of aiding and abetting in international law.

Finally, the district court found that “to the extent that a knowledge *mens rea* standard applies (a conclusion that the Court rejects),” then the ICTY and the ICTR can provide the definition for the *mens rea* of aiding and abetting, which the district court found would be “knowledge that the acts performed assist the commission of the specific crime of the principal perpetrator.” ER 53. Under this analysis, the district court found that knowledge would require “that the aider and abettor must know or have reason to know of the relationship between his conduct and the wrongful acts.” ER 54. Again, the district court misapplied the

(plaintiffs stated claim for “war crimes” under the ATS though the alleged violation (bombing of civilians) furthered the interests of a private oil company); *In re South African Apartheid Litigation*, 617 F.Supp.2d 228, 262 (S.D.N.Y. 2009) (“[I]t may reasonably be inferred that an arms dealer providing weapons to perpetrators of a genocide tacitly supports the genocide, as it creates demand for the [sic] that increases profit”).

international standard. Moreover, as a matter of pleading, Plaintiffs satisfied even the district court's incorrect standard, because Defendants knew their actions aided and abetted the forced labor of Plaintiffs.

International law does not require the perpetrators of serious human rights violations, or their aiders or abettors, to know each of their victims or the precise way in which their unlawful acts will be visited upon their victims. In *Prosecutor v. Mrksic*, the tribunal held that “[w]hile it is not necessary that the aider and abettor know the precise crime that was intended and was in fact committed, if he is aware that one of a number of crimes will probably be committed, and one of those crimes is committed, he has intended to facilitate the commission of that crime, and is guilty as an aider and abetter [sic].” IT-95-13/1-A at ¶ 159. The basic principle is to redress and deter such acts, not to offer such escapes from liability.

a. The Nuremberg-Era Cases Establish that the *Mens Rea* is Knowledge.

The district court misapprehends a long line of precedent, making several grave errors concerning Nuremberg jurisprudence in analyzing aiding and abetting. First, the district court erroneously relies on the *Hechingen* case in support of its “purpose” standard. Contrary to the district court's assertion (ER 57), in *Hechingen*, the tribunal upheld a knowledge *mens rea* standard, but set aside the

conviction because the evidence did not show that the accused had met that standard. *The Hechingen and Haigerloch Case, translated in Modes of Participation in Crimes Against Humanity*, 7 J. Int'l Crime. Just. 131, 151 (2009).

The district court's reliance on the *Ministries Case* is equally unavailing. ER 64-65. In that case, the Tribunal applied a knowledge standard to the *mens rea* inquiry and determined that defendant Karl Rasche met that standard because he knew that the loan was being used to facilitate slave labor. *See United States v. Weizsaecker (The Ministries Case)* 14 T.W.C. at 622 (1949) ("It is inconceivable to us that the defendant did not possess that knowledge, and we find that he did."). Rasche was acquitted because his acts did not satisfy the *actus reus* standard. *Id.*

The district court also erred in its interpretation of the *Zyklon B* and *I.G. Farben* cases. ER 67-69. Indeed, a comparison of these two cases underscores the fact that the Tribunal applied a knowledge *mens rea* standard. In *The Zyklon B Case*, two industrialists were sentenced to death based on a knowledge standard for supplying poison gas used to kill concentration camp prisoners. *The Zyklon B Case*, 1 Law Reports of Trials of War Criminals (L.R.T.W.C.) 93 (1974). In *The Farben Case*, however, I.G. Farben executives were acquitted because they did not "knowingly participate in the planning, preparation or initiation of an aggressive war." 8 Tr. War. Crim. at 1117.

Further, the district court's claim that I.G. Farben was "plainly not an example of aiding and abetting liability" (ER 73) is without merit. The Tribunal found Krauch guilty as an accomplice and not as a principal actor. *See The Farben Case*, 8 T.W.C. at 1187, 1189 ("The evidence does not convince us that Krauch was either a moving party or an important participant in the initial enslavement of workers in foreign countries.").

Finally, the district court erroneously characterizes the *Krupp* case as a direct liability case, and relies on this case for evidence that "personal involvement" of the defendant was required for liability to attach. Order at 73-74. The language relied on by the district court concerns the defendants' claim of necessity, which they asserted in their defense. *United States v. Krupp, (The Krupp Case)* 9 T.W.C. at 1435 (1948). There, the Tribunal rejected the necessity defense because of evidence of the defendants' willing participation. *Id.* at 1439-48. The district court mistakes language contradicting Krupp's necessity defense for language setting a standard for liability. In fact, nothing in *Krupp* alters the well-established knowledge *mens rea* standard.

b. The Rome Statute Does Not Alter the Customary International Law *Mens Rea* Standard.

In finding that the *mens rea* for aiding and abetting required “purpose,” the district court relied on the Rome Treaty, which created the International Criminal Court. ER 58-61. The district court’s view that the Rome Statute “clearly articulates . . . and harmonizes all of the relevant case law from the international tribunals,” (ER 58), is simply wrong. Ambassador David Scheffer had explained that the Rome Treaty was not intended to reflect customary international law on this issue. *See* Scheffer and Kaeb, *supra*, at 348-49.

The adoption of the Rome Statute did nothing to alter the well-established customary international law *mens rea* standard for aiding and abetting liability. Even after the Rome Statute went into effect, the ICTY continued to apply the “knowledge” *mens rea* standard. *See, e.g., Prosecutor v. Milutinovic*, Case No. IT-05-87-T, Judgment, Vol. I, ¶ 94 (Feb. 26, 2009) (“[T]he accused must have knowledge that his acts or omissions assist the principal perpetrator or intermediary perpetrator in the commission of the crime or underlying offense.”). The Rome Statute was not intended to supplant established customary international law standards and, unlike the ICTY and ICTR, the ICC is not mandated to apply customary international law.

Moreover, the provisions of the Rome Statute have yet to be interpreted by the ICC. Article 25(3)(d)(ii) of the Rome Statute specifies a knowledge *mens rea*

for those assisting crimes committed by a group acting with a common purpose and Article 30 contains a general *mens rea* provision defining “intent” and “knowledge.” The ICC has not yet interpreted the provision referenced by the district court, nor has the relationship between this provision and Article 25(3)(d)(ii) or Article 30 been established. Thus, the precise *mens rea* for aiding and abetting liability in the Rome Statute is at best uncertain, and cannot serve as the basis for supplanting customary international law.

c. ATS Jurisprudence Does Not Support a Purpose Standard.

The district court concluded that existing ATS jurisprudence supported the *mens rea* standard it applied.²⁹ Although the ATS case law on this issue is divided, the district court failed to consider persuasive ATS jurisprudence applying a federal common law standard for aiding and abetting. For example, the district court failed to consider Eleventh Circuit precedent, which has consistently applied the federal common law standard for aiding and abetting found in the *Halberstam* case. *See, e.g., Romero*, 52 F.3d at 1315.

²⁹ The same Second Circuit panel that decided the *Kiobel* case determined that the “purpose” standard, derived from international law, applied. *Talisman* 244 F. Supp. 2d 289. A prior Second Circuit panel was divided on this issue. *Khulumani, supra*, 504 F.3d at 275-77 (Katzmann, J., concurring) (applying Rome Statute), and 504 F.3d at 286-87 (Hall, J., concurring) (applying federal common law).

The district court's analysis of ATS jurisprudence is flawed. For instance, the district court relies on *Corrie v. Caterpillar*, 403 F. Supp. 2d 1019, 1024-27 (W.D. Wash. 2005), but *Corrie* relied upon the now superseded opinion in *In re South Africa Apartheid Litigation*, 346 F. Supp. 2d 538 (S.D.N.Y. 2004), and addressed the liability of a corporation for the US-government authorized sale of bulldozers to the Israeli army.³⁰ *Abagninin v. Amvac Chemical Corp.*, 545 F.3d 733 (9th Cir. 2008), is also inapposite because this Court was addressing a human rights norm, genocide, which requires specific intent; the Court was not addressing the intent required for aiding and abetting a violation of the law of nations. Unlike genocide, forced labor does not require specific intent as part of the definition of the norm.

3. Plaintiffs Have Properly Alleged Aiding and Abetting Claims Under Any Standard.

Plaintiffs' FAC sets forth allegations establishing plausible forced labor claims under any arguably applicable aiding and abetting standard. Plaintiffs' allegations must be considered as a whole, not in the disjointed manner employed by the district court. *See, e.g., Consumer Protection Corp. v. Neo-Tech News*, 2009

³⁰ This Court ruled for the defendants on political questions grounds. *Corrie v. Caterpillar*, 503 F.3d 974, 977, 984 (9th Cir. 2007).

WL 2132694, at *4 (D. Ariz. July 16, 2009) (considering the factual allegations for aiding and abetting as a whole and denying the motion to dismiss because the allegations were sufficient under Rule 8(a)(2)).

Plaintiffs alleged Defendants' specific knowledge of the ongoing child labor on the farms and cooperatives they used to produce the cocoa beans, and their ongoing and even escalating direct support to a system based upon child slave labor. If Plaintiffs prove what they allege, there is no question that Defendants would face liability for aiding and abetting forced child labor. The district court erred in dismissing Plaintiffs' claims without allowing them to develop a factual record in this case.

a. Plaintiffs' Allegations Satisfy The *Mens Rea* Standard Under Federal Common Law And Customary International Law.

Plaintiffs' allegations easily satisfy the knowledge *mens rea* standard. Plaintiffs allege, *inter alia*, that Defendants have had *specific knowledge* of the pervasive use of forced child labor in the entire cocoa sector of the Ivory Coast and on the farms that supply cocoa to them exclusively. ER 251, 254-55 (FAC) ¶¶ 33-34, 44, 47. Furthermore, Plaintiffs need only prove that Defendants had constructive knowledge that their actions would assist in the specific violations, though Plaintiffs' allegations are that Defendants had actual knowledge. *See*

Prosecutor v. Kayishema, Case No. ICTR-95-1-T, Judgment, ¶¶ 133-34 (May 21, 1999).

Even if this Court finds that the requisite *mens rea* is purpose, Plaintiffs' allegations support a reasonable inference that Defendants acted with purpose. Plaintiffs concede that they do not currently possess facts sufficient to support the district court's standard that Defendants specifically intended the human rights violations at issue in this case. ER 10-14. However, the district court erred in imposing this standard—more stringent than any international or federal common law standard—in this case.

b. Plaintiffs' Allegations Satisfy the *Actus Reus* Standard

Plaintiffs' allegations unquestionably satisfy the *actus reus* standard, which requires that knowledge be coupled with practical assistance, encouragement, or moral support which has a substantial effect on the violations of international law. Providing the myriad forms of assistance to the farming activities of the Ivorian farmers, knowing that these farms operated on child slave labor, and then keeping them in business by buying all of their crops, easily satisfies this standard.

The district court erroneously found that Plaintiffs “do not allege that Defendants' conduct [in providing supplies, assistance, and training] was specifically related to those primary violations.” ER 89. Defendants' acts in

providing supplies, technical assistance, and training are not merely “general farming assistance.” Acts of substantial assistance need not be wrongful in themselves.³¹ Perfectly normal business activities may become wrongful once a defendant knows that the activities provide substantial assistance to the perpetrators of slavery.

The district court assessed Plaintiffs’ allegations far too restrictively. Plaintiffs’ allegations vastly exceed merely “doing business” or providing generalized assistance. Plaintiffs’ FAC alleges that Defendants provided the farmers with supplies and technical assistance and provided the farmers with the necessary means by which to carry out slave labor, and that Defendants’ profits depended on their complicity in this system of child exploitation. ER 251-53 (FAC ¶¶ 34, 38-40, 47-48). “Not every violation of the law of nations involves killing, and therefore not every commercial entity that aids and abets violations of customary international law need provide a gun, a tank, or poison gas.” *In re South Africa Apartheid Litig.*, 617 F. Supp. 2d at 265. Supplying a good or material that

³¹ See, e.g., *JP Morgan Chase Bank v. Winnick*, 406 F. Supp. 2d 247, 257 (S.D.N.Y. 2005) (“The critical test is not . . . whether the alleged aiding and abetting conduct was routine, but whether it made a substantial contribution to the perpetration of the [crime].”).

may have a primary, legal use can also constitute “the means by which a violation of the law of nations was committed.” *Id.* at 258.

For example, poison gases designed to disinfect and delouse buildings in legitimate businesses can constitute the means to perpetrate genocide. *See The Zyklon B Case*, 1 L.R.T.W.C. 93. Similarly, technical farming assistance and farming supplies can constitute the means to perpetrate slave labor. Unlike specialized military components required for vehicles to be linked to extrajudicial killings, *see In re South Africa Apartheid Litig.*, 617 F. Supp. 2d at 267, there are no specialized components necessary to link a defendant to slave labor.³²

Defendants also provided financial assistance with the knowledge that such funds will be used to further wide-scale violations of international law.³³ Plaintiffs

³² The district court’s reliance on the ICTY’s decision in *Prosecutor v. Delalic*, Case No. IT-96-21-A, Appeal Judgment, (ICTY Feb. 20, 2001), is misplaced. The Appellate Chamber in *Delalic* simply described Delalic’s actions of logistical support in order to establish his employment role in the prison, which was equivalent to the prison camp’s electrician and maintenance provider. The court found that Delalic was not liable because he did not hold a supervisory role in the prison and “was not in a position to affect the continued detention of the civilians at the Celebici camp.” *Id.* at ¶ 355. That is not the case here where, as set forth below, Defendants extend economic dominance over the farms and supplied logistical support and supplies essential to continuing the forced labor and torture.

³³ *See United States v. Flick*, 6 T.W.C. at 1187, 1220 (1949) (finding that the defendants could not “reasonably believe” that all of the money they contributed went to the stated purpose of supporting cultural endeavors).

alleged that Defendants maintained exclusive supplier/buyer relationships, and that they provided the farmers advance payments and personal spending money to maintain the farmers' loyalty as exclusive suppliers. ER 251. (FAC ¶¶ 33-34).

As in *Flick*, Defendants knew that the money they were contributing was providing the essential financial support and incentive for these farmers to employ slave labor. See *The Zyklon-B Case*, 1 L.R.T.W.C. at 101-02 (finding the defendant liable for selling Zyklon, an insecticide which could legitimately be used for delousing, to the Nazis knowing that it would be used to kill Jews and others in gas chambers).

The district court's decision applies *The Ministries Case* too broadly. ER 86. *The Ministries Case* involved a single bank making a loan, which is different from the situation here involving three Defendant corporations with a virtual monopoly on the chocolate market, entering into exclusive purchasing agreements and providing farmers with advance payments and spending money across a period of years. Neither *The Ministries Case*, nor any other case of which Plaintiffs are aware, stands for the proposition that financial assistance can never, as a matter of law, regardless of the circumstances, give rise to aiding and abetting liability.

The district court's reliance on *In re South African Apartheid Litigation*, is also unavailing because there the defendants were banks whose primary function

was providing loans and other monetary payments. 617 F. Supp. 2d at 269. In this case, Defendants gave the farmers ongoing financial support and incentive to perpetuate the farmers' system of child slave labor, with the knowledge that the farmers were employing these illegal practices. Under these circumstances, Defendants' actions give rise to aiding and abetting liability. *See Linde v. Arab Bank, PLC*, 384 F. Supp. 2d 571, 584 (E.D.N.Y. 2005) (finding that financial services provided to a foreign terrorist organization satisfies the substantial assistance requirement). The particular circumstances surrounding the provision of financial assistance is crucial and the district court erred in dismissing Plaintiffs' claims before a complete record of these circumstances was created.

Defendants' misuse of their economic leverage to perpetuate the system of child slavery that trapped Plaintiffs cannot be evaluated in isolation. ER 94.³⁴ Defendants' actions must be evaluated as a whole.

Moreover, the district court's limitations on the concepts of moral support or tacit encouragement do not find support in international law. ER 102-103. First, liability for acts of omission are not limited to situations involving military commanders or public officials. Indeed, "an approving spectator who is held in

³⁴ *See e.g., The Einsatzgruppen Case*, 4 T.W.C. at 570-72; *Furundjiza*, IT-95-17/1-T at ¶¶ 205, 207 (citing *The Synagogue Case*, Strafsenat. Urteil vom. 10 August 1948 gegen K. und. A. StS 18/48 (Entscheidungen, Vol. I, pp. 53, 56)).

such respect by other perpetrators that his presence encourages them in their conduct, may be guilty of complicity in a crime against humanity.” *Furundjiza*, IT-95-17/1-T at ¶ 207 (citing *The Synagogue Case*). In *The Synagogue* case, one of the accused was found guilty of a crime against humanity (devastation of a synagogue), despite the fact that he had not taken part in the crime, because his intermittent presence on the crime scene combined with his status as long-time militant of the Nazi party and his knowledge of the crime were sufficient to convict him. *Id.* at ¶ 205. Similarly, Plaintiffs have alleged that Defendants had an “ongoing and continued presence on the cocoa farms,” that they had “first-hand knowledge of the widespread use of child labor on these farms,” and that they had influential status based on their exclusive purchasing agreements and the level of control they exercised over the farms. ER 251, 254 (FAC ¶¶ 33-34, 44).

Further, liability does not depend on the existence of an independent duty to intervene. It is sufficient that the conduct at issue have a “direct and substantial effect” on the commission of the offense. *Delalic*, IT-96-21-A, at ¶ 345, citing *Tadic*, IT-94-1-T at ¶ 689. A “direct and substantial effect” will be found where a different course of conduct could have been pursued that would have mitigated or prevented the offense. For example, in *The Einsatzgruppen* Case, the U.S. Military Tribunal at Nuremberg convicted a military officer of aiding and abetting summary

executions because he had the power to object to these offenses, yet “chose to let the injustice go uncorrected.”³⁵ Similarly, in *The Zyklon B Case*, officials of a chemical manufacturer were charged with selling poison gas to Auschwitz knowing that the gas would be used to kill prisoners. The British Military Tribunal convicted the owner and the second-in-command of the company because they were in a position to influence the sale.³⁶

Here, Plaintiffs allege that “through exclusive supplier/buyer relationships, maintained in the form of memorandums of understanding, agreements, and/or contracts, both written and oral, Defendants are able to dictate the terms by which such farms produce and supply cocoa to them, including specifically the labor conditions under which beans are produced.” ER 251 (FAC ¶ 33).

The district court erroneously analyzed Plaintiffs’ allegations in separate pieces rather than evaluating these allegations in context and as a whole. Plaintiffs’ FAC alleges specific instances of practical assistance, encouragement, and moral support that had a substantial effect on the perpetration of the forced labor Plaintiffs suffered. Defendants’ actions and intent cannot be divorced from the

³⁵ *U.S. v. Ohlendorf*, 4 T.W.C. at 572, cited in *Furundizija*, IT-95-17/1-T at ¶ 218.

³⁶ *The Zyklon B Case*, 1 L.R.T.W.C. at 102, cited in *Furundzija*, IT-95-17/1-T at ¶ 222.

system of child slave labor that sustained their businesses and created substantial profits. When analyzed under the proper standards, based on international law or federal common law, Defendants' motion to dismiss should have been denied.

III. CONCLUSION

For all of the foregoing reasons, this Court should reverse the district court's dismissal of Plaintiffs' forced labor claims under the ATS and remand the case for further proceedings on the merits.

Dated: June 24, 2011

By: s/ Paul L. Hoffman
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**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME
LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE
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This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,838 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word Perfect version X3 in Times New Roman font size 14.

Dated: June 24, 2011

s/ Paul L. Hoffman

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CERTIFICATE OF SERVICE

I hereby certify that on June 24, 2011, I electronically filed the foregoing **Appellants' Opening Brief** 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.

I further certify that one of the participants in the case is not a registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, to the following non-CM/ECF participant:

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