Nos. 00-56603, 00-56628

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN DOE I, ET AL.,

Plaintiffs-Appellees,

v.

UNOCAL CORPORATION, ET AL.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

SUPPLEMENTAL BRIEF FOR THE UNITED STATES OF AMERICA, AS AMICUS CURIAE

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ARGUMENT

The en banc panel asked the parties to submit supplemental briefs addressing the effect of Sosa v. Alvarez-Machain, 124 S.Ct. 2739 (2004), on the present case. In submitting this brief, the United States wishes to make clear that it in no way endorses or approves of the human rights record of the Burmese military government. As we have previously noted to this Court, the United States unequivocally deplores and strongly condemns the anti-democratic policies and blatant human rights abuses

of the Burmese government. The United States has specifically condemned the use of forced labor by the Burmese government, and forced labor more generally. The legal issues presented in this appeal, however, have broader implications for overall United States policy that necessitate the filing of this brief.

In Sosa, the Supreme Court held that the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, is a jurisdictional statute and does not establish a cause of action. The Court, however, held that the ATS permits federal courts in limited circumstances to recognize a federal common law claim of an alien alleging a violation of the law of nations. The Court found that the claim there failed on the ground that it did not satisfy a necessary, but not in itself sufficient, requirement for such a federal common law cause of action under the ATS: that it must "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms[, i.e.,violations of safe conducts, infringement of the rights of ambassadors, and piracy]." Sosa, 124 S.Ct. at 2761.

Significantly, the Sosa Court rejected the notion that the ATS grants federal courts unencumbered common law powers to recognize and remedy international law violations. Rather, the Court went out of its way to chronicle reasons why a court must act very cautiously and with "a restrained conception of the discretion" in both recognizing ATS claims and in extending liability. Sosa, 124 S.Ct. at 2761-2764, 2766 n.20. The Supreme Court instructed the federal courts to refrain from an

"aggressive role in exercising a jurisdiction that remained largely in shadow for much of the prior two centuries." Id. at 2762-2763. The Court discussed at length the reasons for approaching this federal common law power with "great caution," id. at 2764: in general, courts must rely upon legislative guidance before exercising substantive law-making authority, and there is a heightened need for such guidance when the issues could impinge upon the "discretion of the Legislative and Executive Branches in managing foreign affairs." Id. at 2763.

The Supreme Court's strongest cautionary note pertained to claims relating to a foreign government's treatment of its own citizens in its own territory: "It is one thing for American courts to enforce constitutional limits on our own State and Federal Governments' power, but quite another to consider suits under rules that would go so far as to claim a limit on the power of foreign governments over their own citizens, and to hold that a foreign government or its agent has transgressed those limits." Ibid. The Court left open whether it would ever be appropriate to project the common law of the United States to resolve such extraterritorial claims. Citing to "Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 813 (C.A.D.C.1984) (Bork, J., concurring) (expressing doubt that § 1350 should be read to require 'our courts [to] sit in judgment of the conduct of foreign officials in their own countries with respect to their own')," Sosa, 124 S.Ct. at 1263, the Court concluded that recognition of such claims "should be undertaken, if at all, with great caution." Ibid (emphasis added).

Thus, under Sosa, there would have to be a clear basis and justification for a court to recognize a common law cause of action under U.S. law to govern such extraterritorial conduct. Far from there being such a basis and justification here, a number of considerations weigh strongly against doing so. As we detail below, all of the cautionary admonitions articulated by the Sosa Court apply with full force to the claims in this case, and should lead the Court to affirm the district court's dismissal of the aiding and abetting counts of the complaint.

A. The Court Should Be Very Hesitant To Apply Its Federal Common Law Powers To Resolve A Claim Centering On The Treatment of Foreign Nationals By Their Own Government.

Under the ATS, although the substantive norm to be applied is drawn from international law or treaty, any cause of action recognized by a federal court is one devised as a matter of federal common law -- i.e., the law of the United States. The question, thus, becomes whether the challenged conduct should be subject to a cause of action under -- and thus governed by -- U.S. law. In this case, the aiding and abetting claim asserted against defendants turns upon the abusive treatment of the Burmese people by their military government. It would be extraordinary to give U.S. law an extraterritorial effect to regulate conduct by a foreign country vis-avis its own citizens in its own territory, and all the more so for a federal court to do so as a matter of common law-making power.

Even when construing a federal statute, there is a strong presumption against projecting U.S. law to resolve disputes that arise in foreign nations, especially disputes between such nations and their own citizens. See EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991). This presumption "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." Ibid.

Notably, the same strong presumption existed in the early years of this nation, and, significantly, applied even to the federal statute that defined and punished as a matter of U.S. law one of the principal law of nations offenses -- piracy. See United States v. Palmer, 16 U.S. 610, 630-631 (1818). See also The Apollon, 22 U.S. (9 Wheat.) 362, 370 (1824) ("The laws of no nation can justly extend beyond its own territories, except so far as its own citizens."); Rose v. Himely, 8 U.S. (4 Cranch) 241, 279 (1807) (general statutory language should not be construed to apply to the conduct of foreign citizens outside the United States). The view of that time is reflected by Justice Story:

> No one [nation] has a right to sit in judgment generally upon the actions of another; at least to the extent of compelling its adherence to all the principles of justice and humanity in its domestic concerns * * *. It would be inconsistent with the equality and sovereignty of nations, which admit no common superior. No nation has ever yet pretended to be the custos morum of the whole world; and though abstractedly a particular regulation may violate the

> law of nations, it may sometimes, in the case of nations, be a wrong without a remedy.

United States v. La Eugenie, 26 F. Cas. 832, 847 (D. Mass. 1822) (emphasis added).

While the Supreme Court in Sosa concluded that Congress, through the ATS, intended the federal courts to have a limited federal common law power to adjudicate well established and defined international law claims such as piracy and attacks on ambassadors, as noted above, the Court expressly questioned whether this federal common law power could properly be employed "at all" in regard to disputes between a foreign nation and its own citizens. Sosa, 124 S.Ct. at 2763. Indeed, it is difficult to imagine that the drafters of the ATS intended to grant the newly created federal courts the unchecked power to apply their federal common law powers to decide extraterritorial disputes regarding a foreign nation's treatment of its own citizens. Nothing in the ATS, or in its contemporary history, suggests that Congress intended it to apply to conduct in foreign lands. To the contrary, the ambassador assaults that preceded and motivated the enactment of the ATS involved purely domestic conduct. See id. at 2756-2657.

Moreover,"those who drafted the Constitution and the Judiciary Act of 1789 wanted to open federal courts to aliens for the purpose of avoiding, not provoking, conflicts with other nations." Tel-Oren, 726 F.2d at 812 (Bork, J., concurring). The point of the ATS and the Constitution's Law of Nations Clause was to ensure that the

National Government would be able to afford a forum for punishment or redress of violations for which the nation offended by conduct against it or its nationals might hold the United States accountable. A foreign government's treatment of its own nationals is a matter entirely distinct and removed from these types of concerns.

Against this backdrop, reinforced by caution mandated by the Supreme Court in Sosa, courts should be very hesitant ever to apply their federal common law powers to resolve a claim, such as the one here, centering on the mistreatment of foreign nationals by their own government.

B. The Significant Policy Decision To Impose Aiding And Abetting Liability For ATS Claims Should Be Made By Congress, Not The Courts

As the Supreme Court has held, the creation of civil aiding and abetting liability is a legislative act that the courts should not undertake without a conclusion that Congress so intended, and there is no indication in either the language or history of the ATS that Congress intended such a vast expansion of suits in this sensitive foreign policy area.

The ATS speaks to a "civil action by an alien for a tort only, committed in violation of the law of nations." 28 U.S.C. § 1350. An aiding and abetting claim is not brought against a party charged as having "committed" a tort in violation of the law of nations. Rather, allowing aiding and abetting liability for ATS common law claims would extend liability not only to violators of international norms, but also

against all those who allegedly gave aid and assistance to the tortfeasor. The ATS simply does not by its terms suggest such third-party liability.

Even where Congress expressly establishes domestic criminal aiding and abetting liability, the question whether to impose such liability for civil claims as well is still deemed a separate legislative policy that typically requires legislative action. The Supreme Court's ruling in Central Bank of Denver v. First Interstate Bank, 511 U.S. 164 (1994), is key to this case; there, the Court explained that there is no "general presumption" that a federal statute should be read as extending aiding and abetting liability to the civil context. In the criminal law context "aiding and abetting is an ancient * * * doctrine," id. at 181, but its extension to permit civil redress is not well established: "the doctrine has been at best uncertain in application." Ibid. While in the criminal context the government's prosecutorial judgment serves as a substantial check on the imposition of criminal aiding and abetting liability, there is no similar check on civil aiding and abetting liability claims. Cf. Sosa, 124 S.Ct. at 2763.

Significantly, the Central Bank of Denver Court noted that "Congress has not enacted a general civil aiding and abetting statute -- either for suits by the Government (when the Government sues for civil penalties or injunctive relief) or for suits by private parties." 511 U.S. at 182. The Court concluded, "when Congress enacts a statute under which a person may sue and recover damages from a private defendant

for the defendant's violation of some statutory norm, there is no general presumption that the plaintiff may also sue aiders and abettors." Ibid. (emphasis added).[1] Thus, under Central Bank of Denver, a court must presume that there is no right to assert an aiding and abetting claim under the ATS.

Moreover, in Central Bank of Denver, the Court explained that adoption of aiding and abetting liability for civil claims would be "a vast expansion of federal law." 511 U.S. at 183. Such an expansion of the law, the Court held, required legislative action, and could not be carried out through the exercise of federal common law. Ibid. So, too, under the ATS. Reading this statute to permit aiding and abetting claim would vastly increase its scope and range. That vast increase should not be undertaken without clear guidance from Congress. Notably, the Supreme Court described the ATS as an "implicit sanction to entertain the handful of international law cum common law claims." Sosa, 124 S.Ct. at 2754 (emphasis added).

The Sosa Court cautioned that federal courts should be wary of "exercising innovative authority over substantive law" without "legislative guidance." Sosa, 124 S.Ct. at 2762. The Court also warned against assuming a legislative function in

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[1] This general presumption against implying aiding and abetting liability can be overcome in our domestic law. For example, the United States recently successfully argued in favor of aiding and abetting liability under a statute providing a civil cause of action for those injured by an act of international terrorism, 18 U.S.C. § 2333. See Boim v. Quranic Literacy Institute, 291 F.3d 1000 (7th Cir. 2002). That argument was based, however, on the particular context, language, and purposes of that statute.

"crafting remedies" where resolution of the legal issue could adversely implicate foreign policy and foreign relations. Id. at 2763. The caution mandated by Sosa in deciding whether to recognize and enforce an international law norm under the ATS, when coupled with the teaching of Central Bank of Denver that the decision of whether to adopt aiding and abetting liability for a civil claim is typically a legislative policy judgment, lead to the unmistakable conclusion that aiding and abetting liability should not be recognized under the ATS, absent further congressional action. Ultimately, the questions of whether and, if so, how to expand the reach of civil liability under international law beyond the tortfeasor would present difficult policy and foreign relations considerations that should be determined by Congress, not the courts.

C. Practical Consequences Counsel Against The Adoption Of Aiding And Abetting Liability Under The ATS.

Under Sosa, a court deciding whether to adopt a rule extending aiding and abetting liability under the ATS must also consider the potential practical consequences, including the foreign policy effects of such a ruling. See 124 S.Ct. at 2766 ("the determination whether a norm is sufficiently definite to support a cause of action should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts"); id. at 2766 n.21 (in discussing other possible limiting principles, the Court

stated, "there is a strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy"). Those consequences strongly counsel against the creation of aiding and abetting liability for ATS claims.

1. One of the "practical consequences" of embracing "aiding and abetting" liability for ATS claims would be to create uncertainty that could interfere with the ability of the U.S. government to employ the full range of foreign policy options when interacting with regimes with oppressive human rights practices. One of these options is to promote active economic engagement as a method of encouraging reform and gaining leverage. Judicial development of aiding and abetting liability under the ATS for aiding oppressive regimes would generate significant uncertainty concerning private liability that could deter many businesses from such economic engagement because of fear of potential liability. Even when companies are not party to or directly responsible for the abuses of an oppressive regime, they would likely become targets of ATS aiding and abetting suits, and the fact-specific nature of an aiding and abetting inquiry would expose them to protracted and uncertain proceedings in U.S. courts. Cf. Central Bank of Denver, 511 U.S. at 188-189.

Constructive engagement strategies have been employed by the United States in the past, such as with regard to South Africa and China.[2] Constructive economic engagement policies have been adopted by other countries, as well.[3] In other situations, the United States has adopted a policy of limiting or prohibiting economic engagement. Even in these situations, however, the possibility of adopting an engagement policy is an important foreign policy tool.

In the case of South Africa, the policy of economic constructive engagement included use of "U.S. influence to promote peaceful change away from apartheid." National Security Decision Directive 187 at 1. Methods used to achieve that goal included increased funding of educational, labor, and business programs. Id. at 2. Also, U.S. businesses were urged to "assist black-owned companies." Ibid.[4]

In the case of China, constructive engagement has been advocated as a means of advancing human rights over the long term and serving important U.S. national interests:

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[2] See National Security Decision Directive 187 (Sept. 7, 1985); Peter D. Fever., The Clinton Administration's China Engagement Policy in Perspective (presented at Duke University "War and Peace Conference," February 26, 1999) (http://www.duke.edu/web/cis/pass/pdf/warpeaceconf/p-feaver.pdf).

[3] See, e.g., J. Tamayo, Canada Reviewing "Constructive Engagement" Policy Over Cuba's Crackdown on Dissent, Miami Herald (June 30, 1999).

[4] As the Sosa Court noted, corporations that did business in South Africa under this policy are now being subject to ATS claims under an aiding and abetting theory. See Sosa, 124 S.Ct. at 2766 n.21.

> Underlying th[e economic engagement] approach, for some, is a belief that trends in China are moving inexorably in the "right" direction. That is, the PRC is becoming increasingly interdependent economically with its neighbors and the developed countries of the West and therefore will be increasingly unlikely to take disruptive action that would upset these advantageous international economic relationships. They contrast this behavior favorably with that of disruptive states * * * – those who are not part of the international system and who may support the kind of global terrorism that struck the United States on September 11, 2001. Some also believe that greater wealth in the PRC will push Chinese society in directions that will develop a materially better-off, more educated, and cosmopolitan populace that will, over time, press its government for greater political pluralism and democracy.

Congressional Research Service, Issue Brief for Congress: China-U.S. Relations, 13 (January 31, 2003).[5]

While the United States has no current policy of promoting investment in Burma, the complexity and sensitivity of policy decisions about Burma illustrate why the courts should not embark on a new category of ATS liability that could constrain

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[5] See also CNN All Politics, Clinton Defends China Trip, Engagement Policy, http://www.cnn.com/ALLPOLITICS/1998/06/11/clinton.china (June 11, 1998) (quoting President Clinton: "Choosing isolation over engagement * * *would make it more dangerous. It would undermine, rather than strengthen, our efforts to foster stability in Asia. It will eliminate, not facilitate, cooperation on issues relating to weapons of mass destruction."); 144 Cong. Rec. E1440 (1998) (remarks of Rep. Roemer) ("I support constructive engagement with China as a method of improving our critically important bilateral relationship and pursuing our foreign policy goals to advance human rights and religious freedom * * *. Our policy of constructive engagement has also helped expand cooperation with China in critical areas important to our national security * * *.").

policy options for the future. As the Supreme Court recognized in Crosby v. National Foreign Trade Council, 530 U.S. 363, 374 (2000), Congress, when enacting sanctions against Burma, "clearly intended the federal Act to provide the President with flexible and effective authority over economic sanctions against Burma. Although Congress immediately put in place a set of initial sanctions * * *, it authorized the President to terminate any and all of those measures upon determining and certifying that there had been progress in human rights and democracy in Burma * * *. And, most significantly, Congress empowered the President 'to waive, temporarily or permanently, any sanction [under the federal Act] * * * if he determines and certifies to Congress that the application of such sanction would be contrary to the national security interests of the United States.'"

Importantly, the adoption of an aiding and abetting rule for ATS cases would not be limited to the case of Burma, but potentially could affect policy options for the United States around the world. Hence, this Court must look to the "practical consequences" beyond its application to the facts of this case. Adopting aiding and abetting liability under the ATS would, in essence, be depriving the Executive of an important tactic of diplomacy and available tools for the political branches in attempting to induce improvements in foreign human rights practices. The selection of the appropriate tools, and the proper balance between rewards and sanctions,

requires policymaking judgment properly left to the federal political branches. See Crosby, 530 U.S. at 375-385.

The Supreme Court's admonitions in Sosa counsel that such a significant judicial infringement upon the Executive's foreign policy powers should be in accord with the constitutional commitment of "the entire control of international relations" to the political branches. Fong Yue Ting v. United States, 149 U.S. 698, 705 (1893). See also United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319, 320 (1936); American Ins. Ass'n v. Garamendi, 123 S. Ct. 2374, 2386 (2003).

2. Another important practical consideration is that allowing for the proliferation of ATS suits, by adopting an aiding and abetting liability standard, would inevitably lead to greater diplomatic friction. Adopting aiding and abetting liability under the ATS would trigger a wide range of ATS actions where plaintiffs seek to challenge the conduct of foreign nations -- conduct that would otherwise be immune from suit under the Foreign Sovereign Immunities Act ("FSIA").[6] Aiding and abetting liability would afford plaintiffs the ability to, in effect, challenge the foreign

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[6] Under the FSIA, foreign governments are immune from suit, subject to certain specified exceptions. For tort claims, foreign governments generally cannot be sued unless the tort occurs within the United States. See 28 U.S.C. § 1605(a)(5); Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 439-41 (1989). In the present case, the Burmese governmental entities alleged to have been involved in perpetrating the forced labor were found by the district court to be immune under the FSIA. See Doe v. Unocal, 923 F. Supp. 880 (C.D. Cal. 1997).

government's conduct by asserting claims against those alleged to have aided and abetted the government.

Experience has shown that aiding and abetting ATS suits often trigger foreign government protests, both from the nations where the alleged abuses occurred, and, in cases against foreign corporations, from the nations where the corporations are based or incorporated (and therefore regulated). This can and already has led to a lack of cooperation on important foreign policy objectives.

3. Aiding and abetting liability can also have a deterrent effect on the free flow of trade and investment more generally, because of the uncertainty it creates for those operating in countries where abuses might occur. The United States has a general interest in promoting the free flow of trade and investment, both into and out of the United States, in order to increase jobs and the standard of living. Apart from this national economic interest, the U.S. has broader foreign policy interests in using trade and investment to promote economic development in other countries as a way of promoting stability, democracy and security.[7]

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[7] Adopting aiding and abetting liability for ATS claims could also have a potential deterrent effect on investments within the United States because of the concern of ATS aiding and abetting liability based on contacts here and the exposure of such investments to attachment to satisfy adverse judgments.

Thus, serious foreign policy and other consequences relating to U.S. national interests strongly counsel against the judicial common law adoption of a rule extending civil aiding and abetting liability to ATS claims.

D. Aiding And Abetting Liability Does Not In Any Event Satisfy Sosa's Threshold Requirements That An International Law Norm Be Both Firmly Established And Well Defined.

Under Sosa, whatever other considerations are relevant in determining whether an international law norm should be recognized and enforced as part of an ATS federal common law cause of action, a necessary requirement is that the international law principle must be both sufficiently established and well defined. The Court did not provide any definitive methodology for assessing when international law norms meet these standards. The Court explained, however, that the principle must be both "accepted by the civilized world" and "defined with a specificity," and in both respects the norms must be "comparable to the features of the 18th-century paradigms" – i.e., violation of safe conducts, infringement of the rights of ambassadors, and piracy." Sosa, 124 S.Ct. at 2761. Thus, in resolving whether the necessary conditions are met, this Court should examine: 1) whether aiding and abetting liability is broadly, if not universally accepted, by the international community in a manner comparable to the "18th-century paradigms," and 2) whether the principle, as accepted by the international community, is defined with "specificity."

The application of those inquiries to aiding and abetting liability demonstrates that a court should not exercise its common law powers to adopt such liability for ATS claims.

1. a. The charters of the modern international criminal tribunals embrace the concept of criminal aiding and abetting liability. See Nuremberg International Military Tribunal Control Council Order No. 10; Statute of the International Criminal Tribunal for the Former Yugoslavia (1993, updated 2004) ("ICTY Statute"), art. 7(1); Statute of the International Criminal Tribunal for Rwanda (1994) ("ICTR Statute"), art. 6(1); Rome Statute of the International Criminal Court (1998).[8] Aiding and abetting liability has also been adopted by the United States when defining acts of international terrorism subject to prosecution before military commissions.[9]

b. Although there is a substantial international consensus on the general concept of extending aiding and abetting criminal liability to offenses punishable by

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[8] A number of criminal multilateral treaties to which the United States is a party have some form of provision asking the signatory nations to criminalize the acts of those who aid or abet or are otherwise accomplices to the criminal acts covered by the treaty. See, e.g., OECD: Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 37 ILM 1, art. 1(2); Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, art. 2. These treaties generally do not create international law crimes. Rather, they are agreements to domestically enforce a particular crime. For example, a treaty agreeing that all countries should enact domestic laws criminalizing murder does not transform all murders into violations of international law.

[9] Military Commission Instruction No. 2, Art. 6(C)(1) (April 30, 2003) (available at http://www.defenselink.mil/news/May2003/d20030430milcominstno2.pdf).

international tribunals, this fact does not translate to an established principle of extending criminal aiding and abetting liability concepts to the civil context. As discussed above, there is no "general presumption" that criminal aiding and abetting liability should be read to extend aiding and abetting liability to the civil context. Rather, the general presumption under our domestic law is that such an extension requires an independent legislative policy choice. Central Bank of Denver, 511 U.S. at 182.

Moreover, the decision to charge a person before an international criminal tribunal is a grave matter requiring careful exercise of prosecutorial judgment. As noted earlier, that prosecutorial judgment serves as a substantial check on the application of the criminal aiding and abetting standard.[10] Opening the doors to civil aiding and abetting claims in U.S. courts through the ATS could not be more different. Any aggrieved alien, anywhere in the world, could potentially bring such an ATS civil suit in the United States and claim that a private party aided or abetted abuses committed abroad. Such a "vast expansion" of civil liability by adoption of an aiding

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[10] One of the reasons the United States refused to join the Rome Statute is the lack of sufficient checks on prosecutorial discretion. See American Foreign Policy and the International Criminal Court, Marc Grossman, Under Secretary for Political Affairs, Remarks to the Center for Strategic and International Studies, Washington, DC, May 6, 2002 (http://www.state.gov/p/9949pf.htm) (objecting to ICC because "placing this kind of unchecked power in the hands of the prosecutor would lead to controversy, politicized prosecutions, and confusion. Instead, the U.S. argued that the Security Council should maintain its responsibility to check any possible excesses of the ICC prosecutor.").

and abetting rule, Central Bank of Denver, 511 U.S. at 183, is not authorized by any international law document or international tribunal decision.[11]

Under Sosa, before creating aiding and abetting liability for civil ATS claims, a court should examine whether there is an international consensus that criminal aiding and abetting liability should necessarily translate into a right to sue the aider/abettor for money damages. Given Central Bank of Denver's statement that the extension of criminal aiding and abetting concepts to the civil context is "at best uncertain," 511 U.S. at 181, it is not possible to make that claim.

2. Even if the general concept of aiding and abetting liability were deemed sufficiently established under international law to satisfy the first Sosa threshold limitation, there remains the second threshold question of whether the principle, as accepted by the international community, is defined with "specificity." In Sosa, the Court found that the claim of arbitrary detention, previously deemed by this Court to have achieved universal acceptance, had not achieved the status of a well-defined and broadly embraced international law principle such that it could enforced under the ATS. The Supreme Court explained that any consensus concerning this norm was "at

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[11] Notably, some instruments allow for the possibility of an award of reparations to victims. See Article 75(2) of the Rome Statute. However, this is a new development in international criminal law, it is not uniform (it is not reflected, for example, in the ICTY or ICTR statutes), it concerns only the award of reparations in the criminal context rather than a stand-alone civil action, it simply allows for the possibility of reparations rather than requires it, and it provides for an award by the international tribunal itself, rather than through the domestic courts of any nation in the world.

a high level of generality." Sosa, 124 S.Ct. at 2768 n.27. The same is true here. A survey of the available international law materials confirms that the general principle of aiding and abetting liability for international law violations has not achieved a universally recognized specific definition. There is simply no established international law standard as to civil aiding and abetting, and even as to a criminal law standard, there is no one universally accepted, well-defined standard established by the international community.

a. The post-WWII Nuremberg tribunals did not establish a specific, well-defined aiding and abetting standard. Article 6 of the Charter of the International Military Tribunal at Nuremberg did not address aiding and abetting liability. Two defendants, Fritz Sauckel and Albert Speer, who had principal responsibility for the Nazi forced labor policy, were found guilty of war crimes and crimes against humanity, but not for Crimes against peace because of their lack of personal participation in planning a "war of aggression."[12]

The Nuremberg International Military Tribunal gave way to subsequent proceedings under Control Council Order No. 10, which provided the legal basis for the four major World War II allies to prosecute war crimes. This provided that a person "is deemed to have committed a crime * * * if he was * * * an accessory to

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[12] See 22 TRIAL OF MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, 566-568, 576-579.

the commission of any such crime or ordered or abetted the same." Control Council Law No. 10, Article II (2). The Order did not, however, define an aiding and abetting standard.

The aiding and abetting standard applied by the U.S. tribunals convened under Control Council Law No. 10 has been described by some as establishing a standard of "knowing practical assistance or encouragement that has a substantial effect on the perpetration of the crime."[13] The actual decisions of the U.S. tribunal, however, never specify that standard. In holding individuals liable, the tribunal held guilty those in positions of responsibility or command who planned, oversaw, and provided for the executions and other atrocities, as well as those who carried out these acts. 4 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNAL UNDER CONTROL COUNCIL LAW NO. 10 (1946-1949), 51, 568-586. Regarding those associated with the Einsatzgruppen, the tribunal explained that "more than mere knowledge of illegality or crime is required," id. at 585, and found not guilty those who did not participate in executions and whose ranks did not automatically place the person in "a position where his lack of objection in any way contributed to the success of any execution operation," id. at 581; see also id. 52 ("the rank and position of these defendants carried with it the power and duty to control their subordinates. This power, coupled

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[13] Marisa Anne Pagnattaro, "Enforcing International Labor Standards: The Potential of the Alien Tort Claims Act," 37 Vand. J. Transnat'l L. 203, 229 (Jan. 2004).

with the knowledge of intended crime and the subsequent commission of crime during their time of command imposes clear criminal responsibility.").

The U.S. Tribunal in United States v. Flick refused to hold some of the executives of steel companies guilty for aiding and abetting Nazi forced labor programs. Even though all of the charged steel company executives employed forced laborers, only those executives who actively solicited and sought to increase the number of forced laborers were deemed criminally guilty. 4 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNAL UNDER CONTROL COUNCIL LAW NO. 10 at 1181-1206. Other tribunal cases similarly held guilty corporate executives who sought out forced laborers or otherwise acted with greater complicity with Nazi forced labor operations.[14]

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[14] See United States v. Krauch, 8 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNAL UNDER CONTROL COUNCIL LAW NO. 10 at Nuremberg Military Tribunal, 1187-1188 (holding high ranking industrialists guilty where they affirmatively sought out the employment of forced laborers); United States v. Krupp, 9 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNAL UNDER CONTROL COUNCIL LAW NO. 10 at 1187-1188 (holding guilty Krupp corporation executives who actively sought the employment of forced laborers and assisted German officials in securing the return of escaped workers). See also In re Tesch, 13 Int'l L. Rep. 250 (1947) (British tribunal decision holding the manufacturer of the poison gas Zyklon B guilty because he knew the purpose of the gas produced was to kill people and he also undertook to train S.S. officers on how to use the new gas to kill people).

At bottom, the U.S. tribunal decisions were very contextual in nature and cannot fairly be read as themselves establishing a clear generally applicable definition of aiding and abetting liability.

b. More recently, the ad hoc International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda articulated definitions for criminal aiding and abetting.[15] See Prosecutor v. Tadic, ICTY-94-1-A, ¶ 194 (July 15, 1999); Prosecutor v. Vasiljevic, ICTY-98-32-A (Feb. 25, 2004); Prosecutor v. Kajelijeli, ICTR-98-44A-T (2003). These tribunals, are, however, of limited scope and authority. United Nations Security Council resolution 827 of May 25, 1993, established the ICTY to address the violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991. See ICTY Statute, art. 1. The ICTR's jurisdiction is likewise limited to the prosecution of persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda between January 1, 1994 and December 31, 1994. See ICTR Statute, art. 1. Though of great significance in their own contexts, the statutes and rulings of the ICTY and the ICTR are specific to their limited jurisdictions and do not create general international law.

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[15] The ICTY trial court looked to the Nuremberg cases when attempting to define the ICTY Statute, which provides for, but does not define, criminal aiding and abetting liability. See ICTY Statute, art. 7(1). The ICTY trial court noted, however, that the Nuremberg charter and related documents provided little guidance. See Prosecutor v. Furundzija, IT-95-17/1 T (1998).

c. A distinct criminal aiding and abetting standard was included in the Rome Statute of the International Criminal Court. The Rome Statute is a multilateral statute that establishes a court to enforce a limited international criminal code for those nations that are party to the Statute.[16] Article 25(3)(c) of the Rome Statute provides that:

> A person shall be criminally responsible * * * if that person * * *[f]or the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission.

Because the United States has declined to become a party to the Rome Statute, however, it would not be appropriate for a U.S. court to directly embrace the precepts of that Statute as governing international law regarding aiding and abetting liability.[17] See Sosa, 124 S.Ct. at 2767 (rejecting plaintiff's invocation of nonbinding and non-self-executing treaties in his effort to "establish the relevant and applicable rule of international law").

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[16] The Statute was adopted on July 17, 1998, and went into effect July 1, 2002. The Statute currently has 94 parties. The United States is not a party.

[17] Moreover, reliance upon the Statute's aiding and abetting standard is further undermined by the fact that the Statute does not criminalize forced labor generally, but, rather, limits its application to forced labor in the context of armed conflict or circumstances involving "enslavement," which it defines as "the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children." See Rome Statute, Article 7(2); ICC, "Element of Crimes," Article 8(2)(b)(xxii)-2 (2002).

It is notable, however, that the Rome Statute differs in a very significant respect from the ICTY and ICTR tribunal jurisprudence on the question of mens rea. Where the ICTY and ICTR tribunals require an aider/abettor to have "knowledge that the acts performed by the aider and abettor assist the commission of a specific crime by the principal," see Vasiljevic, supra, at ¶ 102, the Rome Statute requires more -- the purpose to facilitate the crime.

* * * * *

In sum, there simply is no established international law standard as to civil aiding and abetting, and, even as to the criminal law standard, there is no one well-defined universally accepted standard established by the international community. The concept is still developing and has not achieved international consensus. Accordingly, the adoption of aiding abetting liability for civil claims under the ATS does not meet the "high bar" established by the Sosa Court for recognizing a cause of action under U.S. common law, especially with respect to a claim where the primary conduct involves a foreign government's treatment of its own nationals in its own territory.

CONCLUSION

For the foregoing reasons, this Court should affirm the dismissal of the aiding and abetting claims.

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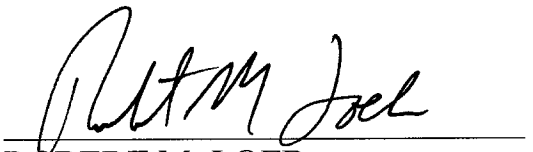
CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I hereby certify that this brief complies with the type-volume limitation in Rule 32(a)(7)(B). The foregoing brief is presented in Time New Roman 14 point font. The word count for the brief (as calculated by the WordPerfect 9.0 word-processing program, excluding exempt material) is 6,528, and is under the 7,000 word limitation. The 7,000 word limit is derived from Ninth Circuit Rule 32-3, which expressly permits the conversion of a page limitation set by order (here 25 pages) into a word-count limit (of 280 words per page).



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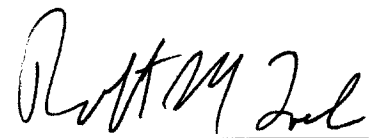

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