Docket Nos. 00-56603, 00-56628, 00-57195, 00-57197

Argued: June 17, 2003

Before: Hon. Mary M. Schroeder, Hon. Stephen R. Reinhardt, Hon. Alex Kozinski, Hon. Pamela A. Rymer, Hon. Thomas G. Nelson, Hon. A. Wallace Tashima, Hon. Susan P. Graber, Hon. M. Margaret McKeown, Hon. William A. Fletcher, Hon. Raymond C. Fisher, and Hon. Johnnie B. Rawlinson

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IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN DOE I *et al.*, Plaintiffs-Appellants,

v.

UNOCAL CORPORATION *et al.*, Defendants-Appellees.

JOHN ROE III et al., Plaintiffs-Appellants,

v.

UNOCAL CORPORATION *et al.*, Defendants-Appellees.

On Appeal from the United States District Court
For the Central District of California
Honorable Richard A. Paez and Honorable Ronald S. W. Lew, District Judges
Nos. CV-96-6959 and CV-96-6112

APPELLANTS' RESPONSE TO UNITED STATES AMICUS CURIAE BRIEF

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I. INTRODUCTION.

The government's *amicus* brief ("U.S. Br.") attempts to relitigate arguments it recently lost in the Supreme Court. In *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004), six Justices rejected the government's arguments that the Alien Tort Statute ("ATS") was a dead letter, with no contemporary significance, and that all ATS actions interfered with the Executive's ability to conduct foreign policy and protect national security. The government's new *amicus* brief repackages the Administration's antagonism toward the ATS in new garb.

This renewed attack on the ATS should likewise be rejected. After *Alvarez,* the only foreign relations issues relevant to the actionability of ATS claims must be "case-specific." 124 S. Ct. at 2766 n.21. But the government here has nothing to say about case-specific factors. Obviously, the government cannot state that this case would adversely affect United States–Burma relations, because such relations are virtually nonexistent due to the military regime's egregious human rights record.

This case is fully consistent with U.S. policy toward Burma. Instead, the government argues that ATS cases against corporations might somehow adversely affect future hypothetical efforts at constructive engagement. This is nothing more than a rehash of the government's argument that all ATS cases may interfere with

the Executive's conduct of foreign affairs, which was rejected by the Supreme Court in *Alvarez*.

The government itself elsewhere agrees that the specific aiding-and-abetting standards applied by the Panel are well established in both international law and federal common law. For example, the government recently instructed U.S. military commissions to apply this standard as pre-existing international law, and also convinced the Seventh Circuit to apply this standard as federal common law applicable—without express Congressional directive—to suits for injuries caused by terrorism. Only here, after the Supreme Court rejected its views in *Alvarez*, does the government contradict its previously established position regarding aiding-and-abetting liability.

Significantly, the government's brief confirms by its silence that forced labor is a customary norm that is actionable under the *Alvarez* standard, leaving Unocal with no support for its contrary position. Indeed, the government could hardly argue otherwise after spending years criticizing Burma's forced labor practices as violations of international law.

II. THIS COURT NEED NOT DEFER TO THE ADMINISTRATION'S VIEWS.

The meaning of a statute does not change from year-to-year or administration-to-administration. The current brief is at least the tenth time that the government has offered an interpretation of the ATS, and it is inconsistent with most of the others. As this Court noted, a "change of position in different cases and by different administrations is not a definitive statement by which we are bound on the limits of § 1350. Rather, we are constrained by what § 1350 shows on its face . . . ." *In re Estate of Marcos Human Rights Litigation*, 978 F.2d 493, 500 (9th Cir. 1992).

Perhaps the most persuasive government interpretation of the ATS is the contemporaneous opinion of Attorney General Bradford, which recognized liability for "committing, aiding, or abetting" violations of the laws of war arising extraterritorially. *Breach of Neutrality*, 1 Op. Att'y Gen. 57, 59 (1795). More recently, in 1980, the government argued to the Second Circuit that official torture committed by foreign governments against their own citizens was actionable under the ATS, stating that "a refusal to recognize a private cause of action in these circumstances might seriously damage the credibility of our nation's commitment to the protection of human rights." *Memorandum for the United States Submitted*

to the Court of Appeals for the Second Circuit in Filartiga v. Pena-Irala, *reprinted at* 12 Hastings Int'l & Comp. L. Rev. 34, 46 (1988). Again in 1995, the government "emphatically restated . . . its position that private persons may be found liable under the [ATS] for acts of genocide, war crimes, and other violations of international humanitarian law." *Kadic v. Karadzic*, 70 F.3d 232, 239–40 (2d Cir. 1995). The government's current views contradict all of these prior statements.

The ATS is a jurisdictional statute which is not administered by the Executive and whose interpretation is not "within the special competence of the Secretary," and thus any dispute over its meaning "must ultimately be resolved . . . by *judicial* application of canons of statutory construction." *Barlow v. Collins*, 397 U.S. 159, 166 (1970) (emphasis added). This conclusion is only reinforced by the fact that the government has departed from so many of its previously-held views.

The Supreme Court in *Alvarez* barely mentioned the views of the government; it did not defer to them, but soundly rejected them. 124 S. Ct. at 2754. This Court is under no greater obligation.

III. THE GOVERNMENT'S ARGUMENTS ABOUT EXTRATERRITORIALITY WERE REJECTED IN *ALVAREZ*.

Even if this case involving the domestic decisions and obligations of a California corporation could be considered "extraterritorial," the Supreme Court has rejected the argument that the ATS has no extraterritorial application. The government made exactly the same argument, citing much of the same caselaw, in its brief in *Alvarez*. *Br. for the United States as Resp't Supporting Pet'r* at 46–50, *Sosa v. Alvarez-Machain* (No. 03-339).[1] Rather than accept this argument, the Court explicitly noted that "modern international law is very much concerned with" limits on foreign governments' treatment of their own citizens, 124 S. Ct. at 2763, and endorsed the reasoning of courts which had exercised jurisdiction under the ATS over claims by foreign nationals against officials of their own governments for abuses committed within their own states. *Id.* at 2766 (citing *Filartiga v Pena-Irala*, 630 F. 2d 876 (2d Cir. 1980) (suit by Paraguayan plaintiff against Paraguayan official for abuses committed in Paraguay), and *In re Estate of Marcos Human Rights Litigation*, 25 F.3d 1467, 1475 (9th Cir. 1994)("*Marcos*") (same with respect to the Philippines)).

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[1] *Available at* http://www.usdoj.gov/osg/briefs/2003/3mer/2mer/2003-0339.mer.aa.pdf.

This was no accident. There is no historical or statutory basis for a territorial limitation on the ATS. Courts of general jurisdiction have long exercised jurisdiction over torts between aliens arising abroad. The ATS simply provides jurisdiction for federal courts to hear "claim[s] under the law of nations." 124 S. Ct. at 2761.

The government's position would entail the perverse conclusion that while state courts have the power to hear torts between aliens, federal courts do not, even where important questions of international law are concerned. It is undisputed that state courts do enjoy such jurisdiction, and have since the Framers' time. Even before the American Revolution, civil actions in tort were routinely considered transitory, in that the tortfeasor's wrongful act created an obligation to make reparations that followed him across national boundaries and was enforceable wherever he was found:

> [A]s to transitory actions, there is not a colour of doubt but that any action which is transitory may be laid in any county in England, though the matter arises beyond the seas. *Mostyn v. Fabrigas*, 1 Cowp. 161 [(K.B. 1774)]. . . . The same doctrine in respect to local and transitory actions has been repeatedly affirmed in the courts of the states of this Union.

McKenna v. Fisk, 42 U.S. 241, 248–49 (1843). The state courts understood and regularly exercised this power.[2] Indeed, the author of the ATS, Oliver Ellsworth, had himself applied the transitory tort doctrine in 1786, while a sitting state court judge. *Stoddard v. Bird*, 1 Kirby 65, 68, 1786 WL 19 at *2 (Conn. 1786).

Thus, in 1789, as now, the government's proffered construction of the ATS would inexplicably give state courts exclusive authority over extraterritorial tort claims between aliens arising abroad. *See* William R. Casto, *The Federal Courts' Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations*, 18 Conn. L. Rev. 467, 510 (1986). In order to avoid the prospect of multiple and inconsistent interpretations of international law, the First Congress understandably provided a federal forum for that limited subset of transitory torts that also involve a violation of the law of nations or a treaty of the United States. *See* App. A at 3–11 (*amicus* brief submitted to the Supreme Court in *Alvarez* by leading historians of the ATS). Section 1350 filled the need for that federal option. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 n.25 (1964) (Section

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[2] *See, e.g.*, *Watts v. Thomas*, 5 Ky. (2 Bibb) 458, 1881 WL 853 (1811); *Stout v. Wood*, 1 Blackf. 70 (Ind. Circ. Ct. 1820); *Taxier v. Sweet*, 2 U.S. (2 Dall.) 81, 84 (Sup. Ct. Penn. 1766); *Pease v. Burt*, 3 Day 485, 1806 WL 202, at *2 (Conn. 1806) ("a right to a personal action, whether founded on a contract, or on tort . . . extend to, and may be exercised, and enforced in, any other civilized country, where the parties happen to be").

1350 reflects "a concern for uniformity in this country's dealings with foreign nations and . . . a desire to give matters of international significance to the jurisdiction of federal institutions").

IV. THIS COURT SHOULD RECOGNIZE AIDING-AND-ABETTING AS A GROUND FOR RELIEF UNDER THE ATS.

A. Aiding-and-Abetting Liability Is Fully In Accord with *Alvarez*.

There is no question that, as the Panel recognized, customary international law provides a "specific, universal, and obligatory" norm against aiding-and-abetting. The government admits that such a norm is widely recognized in international criminal law, and has argued for its application in numerous contexts. Nonetheless, the government errs in suggesting that there is any *requirement* that aiding-and-abetting liability be "specific, universal, and obligatory." *U.S. Br.* at 17. *Alvarez* confirms that ATS claims are common law claims, 124 S. Ct. at 2765, and thus courts can fashion common law liability rules while drawing on international law principles.[3] Here, the Panel correctly applied established principles of aiding-and-abetting liability, found in both international and

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[3] In citing this Court's decision in *Marcos* with approval, the Court could not have overlooked the fact that former President Marcos was found liable based on a command responsibility theory.

domestic law, and also recognized the availability of federal agency, joint venture, and recklessness standards.

The First Congress understood that aiding-and-abetting liability for violations of international law was accepted under contemporary legal principles. Attorney General Bradford's 1795 opinion demonstrates this understanding. *See Breach of Neutrality*, 1 Op. Att'y Gen. at 59. Similarly, the Supreme Court held in 1795 that a French citizen who had aided a U.S. citizen in unlawfully capturing a Dutch ship acted in contravention of the law of nations and was liable for the value of the captured assets. *Talbot v. Jansen*, 3 U.S. (3 Dall.) 133 (1795). Blackstone himself also recognized that those who aided or abetted piracy, the paradigmatic ATS norm, were liable as pirates:

> By the statute 8 Geo. I. c.24., the trading with known pirates, or furnishing them with stores or ammunition, or fitting out any vessel for that purpose, or in any wise consulting, combining, confederating, or corresponding with them . . . shall be deemed piracy: and all accessories to piracy, are declared to be principal pirates . . . .[4]

Indeed, seven months after it passed the ATS, the First Congress itself criminalized aiding-and-abetting piracy. Act of April 30, 1790, ch. 9 § 10, 1 Stat. 114.

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[4] William Blackstone, Commentaries on the Laws of England, Book IV, Chap. 5 (1769).

Congress reconfirmed the availability of aiding-and-abetting liability for human rights violations with the Torture Victim Protection Act (TVPA), which was intended to apply to those who "ordered, abetted, or assisted" torture. *See* S. Rep. No. 102-249, at 8 (1991); *Mehinovich v Vukovic*, 198 F. Supp. 2d 1322, 1355 (N.D. Ga. 2001). It is far too late in the development of international human rights law to contend that aiders and abettors of egregious human rights violations may escape liability.

1. The Fact That the International Aiding-and-Abetting Norm Typically Arises in International Criminal Law is Irrelevant.

The government concedes that there is "substantial international consensus" supporting criminal aiding-and-abetting liability, *U.S. Br.* at 18, but suggests plaintiffs must further demonstrate international consensus that they have a right to sue the aider/abettor for money damages, *id.* at 20. Even if plaintiffs were required to show that aiding-and-abetting liability is " specific, universal and obligatory," the government's proposed additional requirement conflicts with both the text of the statute and *Alvarez*. In short, it is sufficient but not necessary for plaintiffs to show that aiding-and-abetting liability is recognized in international law.

The ATS requires only that the tort be "committed" in violation of international law, not that international law itself recognizes a right to sue. *Marcos,* 25 F.3d at 1475; *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 779 (1984) (Edwards, J. concurring). *Alvarez* affirmed that common law, not international law itself, provides the claim for relief in ATS cases. 124 S. Ct. at 2764-65. Indeed, the Court noted that although Blackstone's three paradigmatic international law violations were considered criminal, the Framers understood that "the common law would provide a cause of action" because international law recognized "a potential for personal liability." *Id.*

In any event, international law recognizes a right to compensation for violations of fundamental rights.[5] International law "never has been perceived to create or define the civil actions to be made available; by consensus, the states leave that determination to their municipal laws." *Tel-Oren,* 726 F.2d at 778 (Edwards, J. concurring).[6] Given this, "to require international accord on a right to

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[5] Beth Stephens, *Translating Filartiga:* A *Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 Yale J. Int'l L. 1, 46-49 (2002)(collecting authorities). Given the differences in domestic legal systems, with some systems joining criminal and civil remedies, international law could not plausibly require separate civil remedies. *Id.* at 44-46.

[6] The legislative history of the TVPA confirms that "[s]tates have the option under international law" to provide a private right of action for human rights violations that occur abroad. S.Rep. No. 102-249 at 5 (1992).

sue, when in fact the law of nations relegates decisions on such questions to the states themselves, would be to effectively nullify the 'law of nations' portion of section 1350." *Id.* This would have been true from the law's inception, since the law of nations did not create a right to sue for the three torts *Alvarez* held were actionable when the ATS was enacted. *Id.* at 779. Critically, *Alvarez* cited Judge Edwards opinion as applying the proper approach. 124 S. Ct. at 2766.[7]

2. International Law Specifically Defines Aiding-and-Abetting.

The government has elsewhere recognized that aiding-and-abetting is specifically defined in international law. United States military commissions prosecute aiding-and-abetting a host of crimes, including war crimes, murder by an unprivileged belligerent, spying, terrorism, hijacking, and perjury before a military commission. Military Commission Instruction No.2, Art. 6(A), 6(B), 6(C)(April 30, 2003).[8] The government defines aiding-and-abetting more broadly

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[7] United States tort law recognizes the same aiding-and-abetting standard as international law making the application of this norm as federal common law all the more appropriate. *Restatement (Second) of Torts* §876(b)(1977)(requiring only that one *knowingly* provide substantial assistance to a person committing a tort)

[8] Available at *http://www.defenselink.mil/news/May2003/d20030430milcominstno2.pdf*. The government is disingenuous when it suggests its recognition of aiding-and-abetting applies only to international terrorism. *U.S. Br.* at 18.

than the standard applied by the Panel in that the government's definition does not require that assistance have a substantial effect on the perpetration of the crime. *Id.* at 6(C)(1)(aiding-and- abetting is "in any . . . way facilitating the commission" of an offense, with knowledge the act would aid or abet). The military commission standard "derives from the law of armed conflict," *i.e.* international law, and is "declarative of existing law." *Id.* Art. 3(A). Indeed, the government believes (correctly) that aiding-and-abetting is so well established and defined in international law that, although commissions cannot prosecute offenses that "did not exist prior to the conduct in question," commissions may prosecute aiding-and- abetting "crimes that occurred prior to [the] effective date" of Instruction No. 2. *Id.*

The government also concedes that the decisions of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR") define aiding-and-abetting. *U.S. Br.* at 24. It further acknowledges that the Tribunals' definitions are based on the Nuremberg jurisprudence. *Id.* at n 15. Because judgments of international tribunals are accorded "substantial weight" in determining the content of customary international law, *Restatement (Third) Foreign Relations*, §103(2), there is no question that international law specifically defines aiding-and-abetting.

The Tribunals' jurisprudence is obviously not "specific to their limited jurisdiction." *U.S. Br.* at 24. This Court has relied upon the ICTY Statute as evidence of generally applicable international law. *Hilao v. Estate of Marcos*, 103 F.3d 767, 777 (9th Cir. 1996). The ICTY is "only empowered to apply" standards that are "beyond any doubt customary law." *Tadic*, Trial Judgment ¶¶661-62. Indeed, the Tribunal explicitly held that the aiding-and- abetting standards it and the Panel applied are customary international law principles; and did so only after conducting "a detailed investigation" of individual responsibility under international law. *Prosecutor v. Delalic*, Trial Judgment, IT-96-21 (Nov. 16, 1998) ¶¶ 321, 325-29, *citing Tadic*, Trial Judgment ¶¶669, 674-91. The Tribunal clearly has applied general international law, not standards applicable only to abuses in the former Yugoslavia or Rwanda.[9] Likewise, the Panel concluded that the ICTY's aiding-and-abetting standard was based upon "an exhaustive analysis" of international law. 2002 WL 31063976 *12-13, n. 26, 27.

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[9] For precisely this reason, and because the United States "has explicitly endorsed the approach of the ICTY Statute and the convening of the Tribunal," courts have found the Tribunals' jurisprudence to be "particularly relevant" sources of international law in ATS cases, and relied on that jurisprudence in recognizing aiding-and-abetting liability under the ATS. *E.g. Mehinovic v. Vuckovic*, 198 F.Supp.2d at 1344, and nn. 21, 22, 1355-56; *Presbyterian Church of Sudan*, 244 F.Supp.2d 289, 323-24 and n.30 (S.D.N.Y. 2003).

The government's claim that the Nuremberg jurisprudence does not establish a specific aiding-and-abetting standard, *U.S. Br.* at 21, is amply refuted by the fact that the "exhaustive analysis" conducted by the Yugoslavia Tribunals consisted in substantial part of a review of post-World War II caselaw. Furthermore, the Panel noted the standard it applied "goes back at least to the Nuremberg trials." 2002 WL 31063976 *11.

The very cases the government cites establish that knowingly providing substantial assistance has long violated international law. For example, in *United States v. Ohlendorf (Einsatzgruppen Case)*, the United States Military Tribunal concluded that defendant Klingelhoefer could be convicted "as an accessory" because in turning over lists of Communists "he was *aware* that the people listed would be executed when found." 4 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, 1, 569 (1949). The Tribunal also recognized defendants could be convicted for failure to protest abuses about which the defendant knew, when failure to do so "in any way contributed" to the abuses. *Id.* at 572-73, 581, 585. Unocal's failure to protest surely contributed to the abuses committed here.[10] *See* 2002 WL 31063976*14,

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[10] Most of the defendants in *Ohlendorf* actually planned, oversaw or committed killings. *Id.* at 412. Accordingly, although the prosecution charged that all of the defendants "were principals in, accessories to, ordered, [or] abetted. . ."

n.33 (Unocal encouraged abuses by paying military and showing them where to build infrastructure despite knowing they would commit abuses).

In *U.S. v. Flick*, Steinbrinck was convicted "under settled legal principles" for "knowingly" contributing money to an organization committing widespread abuses, even though it was "unthinkable" he would "willingly be a party" to atrocities. 6 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, 1217, 1222 (1952). Similarly, in *In re Tesch (Zyklon B Case)*, industrialists were sentenced to death for selling poison gas to Auschwitz "with knowledge" that the gas would be used to kill prisoners. 13 Int'l L. Rep. 250 (1947).[11]

The government erroneously relies on the same portions of *Flick*, *Krauch* and *Krupp* as the district court. *Compare, U.S. Br.* at 23 and n.14; 110 F.Supp.2d at 1309-10. As the Panel concluded, the district court erred in borrowing an

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the crimes at issue, *id.* at 15, 21, abetting liability was not necessary. In stating that "more than mere knowledge of illegality" was required, *id.* at 585, the Tribunal was not suggesting that abetting had a greater *mens rea* than knowledge. Rather, the Tribunal was noting that the defendant could not be convicted as an accessory because he "was not in a position to protest against the illegal actions of others." *Id.*

[11] The government inexplicably claims that Tesch "undertook to train S.S. officers on how to use the new gas to kill people." *U.S. Br.* at 23, n.14. The decision says nothing of the kind.

"active participation" standard from those cases, because the Tribunals applied that standard "only to overcome the defendants' 'necessity defense.'" 2002 WL 31063976 *10. Unocal has no such defense. *Id.* The standard *Flick* applied in convicting Steinbrinck is the relevant one, since Steinbrinck was not compelled to contribute to the Nazis. *Flick* at 1221. In any event, Unocal's conduct met even the District Court's erroneous "active participation" standard because Unocal knew that the expansion of its business would result in forced labor. 2002 WL 31063976 *10, n.22.

Contrary to the government's claim, the Rome Statute of the International Criminal Court does not require a *mens rea* of purpose to facilitate the crime to establish aiding-and-abetting liability. *U.S. Br.* at 26. Instead, anyone who contributes to the commission of a crime by a group is guilty if the person knows the group intends to commit the crime. Art. 25(3)(d)(ii).[12] Although the United States has not ratified the Rome Statute, Instruction No. 2 to U.S. military

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[12] In any event, the Statute was *not* intended to be an exhaustive statement of international criminal law. Indeed, the Statute explicitly seeks to preclude attempts to cite the Statute to argue that the scope of international law is more limited than the norm established by other sources; exactly the argument the government makes here. It states that its definitions "shall not affect the characterization of any conduct as criminal under international law independently of this Statute," Art. 22(3).

commissions demonstrates that the U.S. agrees that international law does not require purpose.

3. The Government's Position is at Odds With Its Own Policy of Imposing Sanctions on Individuals and Organizations That Aid- and-Abet Human Rights Violations.

The United States government sanctions or withholds aid from various organizations and individuals that aid and abet human rights violations. For example, Executive Order No. 13,348 blocks assets of individuals who "materially assisted, sponsored, or provided financial, materials, or technical support for, or goods or services in support of" illegal actions of the former Charles Taylor regime. Exec. Order No. 13,348, *Blocking Property of Certain Persons and Prohibiting the Importation of Certain Goods From Liberia*, 69 Fed. Reg. 44,885 (July 22, 2004). Additionally, the U.S. conditions funding to the Colombian and Indonesian militaries on their suspending and prosecuting military members who aid or abet militia groups. Pub. L. No. 108-7 §§ 564, 569, 570 (2003). Section 570 withholds funds to any government if it "has aided or abetted...in the illegal distribution, transportation, or sale of diamonds mined in" Sierra Leone. *Id.* at § 570(a). Moreover, under 22 U.S.C. § 2798, the President can impose procurement and import sanctions against foreign persons who "knowingly" assist the illegal acquisition of chemical or biological weapons. The Executive Branch has

imposed sanctions pursuant to this statute as recently as August 2003. Public Notice 4435, *Imposition of Chemical and Biological Weapons Proliferation Sanctions Against a Foreign Person, Including a Ban on U.S. Government Procurement*, 68 Fed. Reg. 47,144 (Aug. 7, 2003). Similarly, Congress recently condemned the role of the Government of Sudan in abetting and tolerating slave trading. Sudan Peace Act, Pub. L. No. 107-245, § 4(1)(C), 116 Stat. 1504, 1506 (2002).

4. The Government's Position is At Odds With Its Recogniton of Aiding-and-Abetting Liability in International Law With Respect to Terrorism.

The government and the international community have repeatedly reaffirmed international aiding-and-abetting standards in the wake of the events of September 11, 2001. For example, U.N. Security Council Resolution 1373 asserts that all states shall criminalize "the wilful provision or collection . . . of funds . . . *in the knowledge that they are to be used*, in order to carry out terrorist attacks." (emphasis added).

Likewise, President Bush stated before a special joint session of Congress with respect to Afghanistan's assistance to Al Qaeda: "By aiding-and-abetting murder, the Taliban regime is committing murder. . . They will hand over the

terrorists, or they will share in their fate." [13] Subsequently, Congress' authorization of force against the Taliban approved military action against those who "aided the terrorist attacks" or "harbored" the perpetrators. Public Law 107-40, Sec. 2(a), September 18, 2001. Thus, aiding-and-abetting was the United States' *causus bellum* against Afghanistan.

Indeed, a central tenet of U.S. foreign policy is that: "We make no distinction between terrorists and those who *knowingly* harbor or provide aid to them." The National Security Strategy of the United States of America, September 17, 2002 (emphasis added) There is no basis in international law to afford those who aid and abet forced labor, torture and murder more favorable treatment than those accused of acts of terrorism.

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[13] *http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html* (Sept. 20, 2001).

5. The Government's Position is at Odds With Its Position that Federal Common Law Principles of Tort Liability Include Aiding-and-Abetting.

The government's argument that aiding-and-abetting liability cannot be allowed in ATS cases unless it is a universal principle of international law is inconsistent both with *Alvarez*'s holding that ATS claims are common law claims and with the government's own position that aiding-and-abetting liability is part of federal common law.

The government argues that every legal principle in an ATS case, including subsidiary rules of liability, must have universal adherence in international law. This position would make international law norms unenforceable because international law is silent about many issues. This contradicts *Alvarez*'s holding that, from its inception, the ATS was intended to afford redress for international law violations, 124 S. Ct. at 2761, 2764, and it is inconsistent with the use of the word "tort," which indicates that principles of tort law would be used to effectuate the jurisdiction granted in the ATS.

Such common law principles of tort law include aiding-and-abetting liability. In *Boim v. Quranic Literacy Institute*, 291 F.3d 1000 (7th Cir. 2002), the government successfully argued aiding-and-abetting liability is available under 18 U.S.C. § 2333(a), which permits U.S. nationals "injured . . . by reason of an act of