Nos. 02-56256 & 02-56390

Decided April 12, 2007
by Circuit Judge Fisher, Circuit Judge Bybee, and District Judge Mahan

In the United States Court of Appeals for the Ninth Circuit

ALEXIS HOLYWEEK SAREI, PAUL E. NERAU, THOMAS TAMUASI, PHILLIP MIRIORI, GREGORY KOPA, METHODIUS NESIKO, ALOYSIUS MOSES, RAPHEAL NINIKU, GARBIEL TAREASI, LINUS TAKINU, LEO WUIS, MICHAEL AKOPE, BENEDICT PISI, THOMAS KOBUKO, JOHN TAMUASI, NORMAN MOUVO, JOHN OSANI, BEN KORUS, NAMIRA KAWONA, JOANNE BOSCO, JOHN PIGOLO and MAGDALENE PIGOLO, individually and on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants-Cross-Appellees,

vs.

RIO TINTO, plc and RIO TINTO LIMITED,

Defendants-Appellees-Cross-Appellants.

On Appeal From the Judgment of the United States District Court
For the Central District of California
The Honorable Margaret M. Morrow
District Court No. 00-11695-MMM MANx

BRIEF OF *AMICUS CURIAE* EARTHRIGHTS INTERNATIONAL IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL SUBMITTED WITH THE CONSENT OF ALL PARTIES

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All parties have consented to the filing of this brief pursuant to Federal Rule of Appellate Procedure 29(a).

STATEMENT OF IDENTITY AND INTEREST OF *AMICUS CURIAE*

EarthRights International (ERI) is a human rights organization based in Washington, D.C., that litigates and advocates on behalf of victims of human rights abuses worldwide. ERI is or has been counsel in several lawsuits under the Alien Tort Statute (ATS) involving issues of vicarious or secondary liability. In *Doe v. Unocal Corp.*, No. 00-56603 (9th Cir.), which was settled in March 2005, ERI represented plaintiffs alleging that a corporation was liable under the ATS for complicity in forced labor, rape, and murder carried out for the benefit of a gas pipeline project operated by the defendant and its joint-venture partners. In *Bowoto v. ChevronTexaco Corp.*, No. 99-CV-2506 (N.D. Cal.), and *Wiwa v. Royal Dutch Petroleum Corp.*, No. 96 Civ. 8386 (S.D.N.Y.), ERI represents plaintiffs alleging that corporations are liable under the ATS for complicity in murder and other abuses carried out by Nigerian security forces, including an allegation that the perpetrators were acting as the agents of defendants' Nigerian subsidiaries, which are joint-venture partners of the Nigerian government.

Amicus therefore has an interest in ensuring that the courts apply the correct body of law to decide vicarious liability questions under the ATS. Additionally, *amicus* has an interest in seeing that any exhaustion requirement for ATS claims is

properly applied.

STATEMENT OF THE ISSUE ADDRESSED BY *AMICUS CURIAE*

Amicus addresses questions in two areas: first, the appropriate body of law to apply for vicarious or secondary liability under the ATS and the substantive rules of law for agency, joint venture, and conspiracy liability; second, to the extent that there is an exhaustion requirement for ATS claims, the substance of that requirement.

SUMMARY OF ARGUMENT

The Alien Tort Statute (ATS), 28 U.S.C. § 1350, creates a federal common law claim. Accordingly, uniform federal common law standards determine the appropriate rules of secondary or vicarious liability under the ATS. Because the ATS is a federal statute providing liability for violations of international law as incorporated into federal law, in considering liability rules, the Court should look to preexisting, well-established federal principles, as informed by traditional common law rules where necessary as well as international law. Longstanding federal common law theories, including agency, joint venture and conspiracy provide for liability. These liability theories have also long been recognized in international law, providing an additional basis for their application in ATS cases.

Finally, although no requirement to exhaust local remedies should be imposed under the ATS, plaintiffs submit that if this Court does adopt such a

requirement it should be no more onerous than the similar requirement under the Torture Victim Protection Act (TVPA), 28 U.S.C. § 1350 note. Thus the defendant bears a heavy burden to show the failure to exhaust an adequate and available local remedy.

ARGUMENT

I. Under Uniform Federal Law Standards, Alien Tort Statute Claims May Be Founded on Agency, Joint Venture, and Conspiracy Liability.

The district court opinion indicates that the plaintiffs alleged that the Papua New Guinea (PNG) government "acted as Rio Tinto's agent," that Rio Tinto was a "conspirator" with the government, and that there was "a joint venture between Rio Tinto and PNG." *Sarei v. Rio Tinto*, 221 F. Supp. 2d 1116, 1148–49 (C.D. Cal. 2002). Based in part on these allegations, the district court properly held that plaintiffs adequately alleged Rio Tinto's liability. *Id.* Each of these theories of liability—agency, joint venture and conspiracy—is well-established in general federal common law and international law. Claims asserting these theories are therefore actionable under the ATS, and not frivolous.[1]

[1] *Amicus* takes no position on whether, as the panel in this case ruled, jurisdiction under the ATS requires only that the Court determine that the claims alleged are "nonfrivolous," 487 F.3d at 1201, or whether "a more searching review of the merits" must be performed at the jurisdictional stage, *Kadic v. Karadzic*, 70 F.3d 232, 238 (2d Cir. 1995). In either case, the Court should conclude that alleging these theories is sufficient for jurisdiction under the ATS.

A. Uniform federal law, informed by international law, governs agency, joint venture, and conspiracy liability in Alien Tort Statute cases.

Uniform federal common law rules apply to liability questions for claims under the Alien Tort Statute (ATS), 28 U.S.C. § 1350. Both the Supreme Court's decision in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), and the standard approach to federal claims suggest that a uniform body of federal common law should be used to decide these questions. Due to the unique nature of ATS claims as federal common law claims enforcing international law, the rules of liability for such claims should be drawn primarily from the general background of common law rules, informed where appropriate by international law.

1. Following *Sosa*, federal common law provides the rules of liability in Alien Tort Statute cases.

In *Sosa*, the Supreme Court settled the question of the source of law to be applied in ATS cases. The Court ruled that the ATS grants jurisdiction over causes of action present in federal common law, which incorporates international law. *Sosa*, 542 U.S. at 724. That is, under the ATS "the common law" provides "a cause of action for the modest number of international law violations with a potential for personal liability." *Id.* The Court described the process of determining whether a claim is actionable under the ATS as whether a court should "recognize private claims under federal common law for violations of [an]

international law norm." *Id.* at 732. Thus, courts look to international law to determine whether there has been a violation that would afford jurisdiction, while federal common law governs questions of secondary responsibility.

The panel's decision correctly recognized that federal common law provides the rules of liability, including vicarious liability, to be applied in ATS cases: "Courts applying the [ATS] draw on federal common law, and there are well-settled theories of vicarious liability under federal common law." *Sarei v. Rio Tinto PLC*, 487 F.3d 1193, 1202 (9th Cir. 2007). Prior to *Sosa*, several other courts also suggested that "liability standards applicable to international law violations" should be developed "through the generation of federal common law," an approach that is "consistent with the statute's intent in conferring federal court jurisdiction over such actions in the first place." *Xuncax v. Gramajo*, 886 F. Supp. 162, 182–83 (D. Mass. 1995); *see also Abebe-Jira v. Negewo*, 72 F.3d 844, 848 (11th Cir. 1996) (holding that courts may "fashion domestic common law remedies to give effect to violations of customary international law"); *Doe v. Islamic Salvation Front*, 257 F. Supp. 2d 115, 120 n.12 (D.D.C. 2003) (considering the possibility that "[t]ort principles from federal common law" are appropriately applied to determine liability in ATS cases); *Eastman Kodak Co. v. Kavlin*, 978 F. Supp. 1078, 1094 (S.D. Fla. 1997) (finding liability under the ATS where, "under ordinary principles of tort law [the defendant] would be liable for

the foreseeable effects of her actions").[2]

Similarly, the district court below properly held that plaintiffs adequately alleged Rio Tinto's liability because they alleged, among other things, that the military acted as Rio Tinto's agent or co-conspirator, and that the mine was a joint venture between Rio Tinto and PNG. *Sarei*, 221 F. Supp. 2d at 1148–49. The court did so looking to federal law liability principles drawn primarily from caselaw under 42 U.S.C. § 1983, *id.*, but the same result would obtain under general federal common law tort liability principles.[3]

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[2] In his concurring opinion in *Doe v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002), Judge Reinhardt similarly concluded that federal common law applies in ATS cases "in order to fashion a remedy with respect to the direct or indirect involvement of third parties in the commission of the underlying tort," *id.* at 966 (Reinhardt, J., concurring), and specifically enumerated "agency" and "joint venture" among the applicable "general federal common law tort principles," *id.* at 963. The panel majority, which based its decision on aiding and abetting liability, found it unnecessary to consider plaintiffs' theories of agency and joint venture. *Id.* at 947 n.20. The majority did note that in other cases, "joint venture, agency, negligence, or recklessness may in fact be more appropriate theories than aiding and abetting." *Id.*

The panel decision was subsequently vacated by grant of *en banc* review, 395 F.3d 978 (9th Cir. 2003), but the *en banc* panel never issued an opinion because the case was dismissed by stipulation when the parties settled. *See* 403 F.3d 708 (9th Cir. 2005).

[3] In looking at vicarious liability primarily under the rules governing when a private actor may be held liable for the acts of government agents under section 1983, the district court did not have the benefit of the Supreme Court's decision in *Sosa*, but instead, the court relied primarily on *Doe v. Unocal Corp.*, 110 F. Supp. 2d 1294 (C.D. Cal. 2001). That decision was subsequently reversed by a panel of this Court (whose decision was then taken *en banc*), and then vacated by this Court, *see* 403 F.3d 708 (9th Cir. 2005).

Although it may be useful to "borrow" analysis from section 1983 caselaw

2. Under the standard test, uniform federal law provides the rules of decision in Alien Tort Statute cases.

Even if *Sosa* had not settled the issue, the standard choice-of-law analysis points to the need for uniform federal rules of liability given that ATS claims are federal claims addressing violations of universally recognized norms of international law (which is itself incorporated into federal law).

This Court has held that, where a "federal statute" is concerned, "the predominant consideration" in determining whether a uniform federal rule is appropriate is "whether Congress intended federal judges to develop their own rules or to incorporate state law." *Mardan Corp. v. C.G.C. Music*, 804 F.2d 1454, 1458 (9th Cir. 1986). In the context of the ATS, it seems highly unlikely that Congress would have intended that a statute designed to enforce international law norms would "incorporate state law" rather than implement uniform federal rules.

If congressional intent cannot be determined, however, this Circuit applies a federal test that looks to "the need for uniformity of law across the nation, 'whether application of state law would frustrate specific objectives of the federal

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in some ATS cases, in light of *Sosa*'s conclusion that ATS claims are federal common law claims to enforce international law norms, ATS cases should generally be determined according to ordinary federal common law tort liability principles. Indeed, a more general body of ATS liability rules is necessary, because unlike section 1983 claims, ATS cases may include both claims that require state action and claims (such as war crimes and crimes against humanity in the instant case) that do not. Uniform rules of ATS liability therefore cannot be predicated solely on the caselaw developed from section 1983.

programs,' and 'the extent to which application of a federal rule would disrupt commercial relationships predicated on state law.'" *Norfolk Southern Ry. v. Consol. Freightways Corp.*, 443 F.3d 1160, 1162 (9th Cir. 2006) (quoting *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728–29 (1979)). These factors weigh heavily in favor of uniform federal rules of liability in ATS cases.

Uniformity is desirable in ATS cases. As noted in *Sosa*, the application of federal law in ATS cases is "consistent with the division of responsibilities between federal and state courts after *Erie*." 542 U.S. at 731 n.19. This is because customary international law is part of federal common law. *Id.* at 729. It makes little sense to allow claims for violations of universally-recognized international law norms and then not apply uniform standards to the determination of those claims. The application of a panoply of state and foreign law rules "would eventually lead in other cases to divergent measures of recovery for essentially identical claims against . . . defendants guilty of" violations of international law. *Wagner v. Islamic Republic of Iran*, 172 F. Supp. 2d 128, 135 (D.D.C. 2001).

In addition to the need for uniformity, the application of state law rules of liability would frustrate the purpose of the ATS. Reflecting on the history of the statute, including "a program to assure the world that the new Republic would observe the law of nations," *Sosa*, 542 U.S. at 722 n.15, the Supreme Court held that "Congress intended the ATS to furnish jurisdiction for a relatively modest set

of actions alleging violations of the law of nations." *Id.* at 720. The ATS therefore reflects a federal policy of providing remedies for such international law violations, and this policy should not be thwarted by idiosyncratic rules of state or foreign law. Indeed, "when Congress creates a tort action, it legislates against a legal background of ordinary tort-related vicarious liability rules and consequently intends its legislation to incorporate those rules." *Meyer v. Holley*, 537 U.S. 280, 285 (2003). For this reason, federal courts nearly always apply federal rules of vicarious liability to give effect to federal causes of action. *See, e.g.*, *Burlington Indus., Inc., v. Ellerth*, 524 U.S. 742, 754–55 (1998) (fashioning "a uniform and predictable standard" of vicarious liability in Title VII actions "as a matter of federal law"); *United States v. Burlington Northern & Santa Fe Ry.*, ___ F.3d ___, 2007 U.S. App. LEXIS 21079, at *20–21 n.16 (9th Cir. Sept. 7, 2007) (concluding that "uniform federal common law" applies to the question of apportionment of liability under CERCLA); *Thomas v. Peacock*, 39 F.3d 493, 503 (4th Cir. 1994) (holding that "the determination of whether to pierce the corporate veil in an ERISA action is made under federal law"), *rev'd on other grounds*, 516 U.S. 349, 353–54 (1996); *Davidson v. Enstar Corp.*, 848 F.2d 574, 577 (5th Cir. 1988) (applying federal joint venture test, distinct from Louisiana's idiosyncratic joint

venture rules, to federal statutory claims).[4]

Finally, uniform federal rules of liability would not disrupt commercial relationships, because the relationship between ATS plaintiffs and defendants is far from a commercial relationship; ordinary commercial disputes are not recognized as ATS claims. *See, e.g.*, *Hamid v. Price Waterhouse*, 51 F.3d 1411, 1418 (9th Cir. 1994); *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975). Furthermore, applying uniform rules of liability to the tort claims of third parties does not affect the rights of the commercial partners between and among themselves—which may still be determined by local law. And, even if a particular business relationship were based on the expectation that the parties would be insulated from liability for the worst violations of international law, that expectation would not be reasonable, nor should it outweigh the victims' expectations that they should not be subject to such abuses.

Thus, ATS claims require uniform rules of federal liability, rather than a choice among various state or foreign law rules.

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[4] *See also Intergen N.V. v. Grina*, 344 F.3d 134, 143–44 (1st Cir. 2003); *Moriarty v. Glueckert Funeral Home*, 155 F.3d 859, 865 n.15 (7th Cir. 1998); *Taylor v. Peoples Natural Gas Co.*, 49 F.3d 982, 988 (3d Cir. 1995); *Am. Bell, Inc. v. Fed'n of Tel. Workers*, 736 F.2d 879, 886 (3d. Cir. 1984); *Mayes v. Moore*, 419 F. Supp. 2d 775, 780 n.5 (M.D.N.C. 2006); *Idylwoods Assocs. v. Mader Capital, Inc.*, 915 F. Supp. 1290, 1305 (W.D.N.Y. 1996).

3. In Alien Tort Statute cases, the applicable liability rules incorporate established federal doctrines, informed by traditional common law rules and international law.

Concluding that federal law provides uniform rules of decision does not end the inquiry: This Court must also consider what sources to consult in developing such rules. The primary source is preexisting, well-established federal principles, as informed by traditional common law rules where necessary as well as by international law. Because ATS claims are federal common law claims, however, gaps or inconsistencies in international law principles of liability should not be a barrier to the imposition of federal common law liability rules.

As the panel in this case observed, federal common law already recognizes "well-settled theories of vicarious liability." 487 F.3d at 1202. The ATS is "highly remedial," *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1548 (N.D. Cal. 1987), and liability rules adopted under it must reflect the universal condemnation of the underlying violations. *Filartiga v. Peña-Irala*, 577 F. Supp. 860, 863 (S.D.N.Y. 1984); *Abebe-Jira*, 72 F.3d at 848. Numerous cases have, however, already discussed federal law theories of liability that adequately give effect to the remedial purpose of the ATS, and there is therefore no general need to create a new body of liability law for ATS cases.

With respect to issues that are not already well-settled in federal law, federal courts typically look to "general" common law. *See, e.g.*, *Burlington Indus.*, 524

U.S. at 754 (relying "'on the general common law of agency'" to establish uniform federal standards); *Burlington Northern & Santa Fe Ry.*, 2007 U.S. App. LEXIS 21079 at *19 (looking "to common law principles of tort in general" in fashioning a "uniform federal rule"). And, due to the unique nature of ATS claims as federal common law claims incorporating international law, it may also be appropriate to consider the application of international law principles. Certainly, the fact that a rule of liability is found in international law as well as established federal law and general principles of liability supports its application in ATS cases, because international law is part of federal law. *Sosa*, 542 U.S. at 729. The relevant sources of international law include treaties, "international custom," "general principles of law recognized by civilized nations," and "judicial decisions." *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 251 (2d Cir. 2003). Although international law may contain gaps that make it inappropriate as the primary source of rules of liability, if international law accords with established federal law, there can be little argument against its application in ATS cases. *See Sarei*, 487 F.3d at 1202–03 (noting that both "[a]uthorities contemporaneous to the [ATS]'s passage" and "[m]odern international authorities" have recognized principles of vicarious liability).

Conversely, however, *Sosa*'s holding that an ATS claim sounds in federal common law refutes any contention that a liability theory *must* be recognized in

international law in order to be actionable under the ATS. Indeed, international law, being chiefly concerned with disputes among states or the criminal responsibility of individuals, may have had little occasion to formulate appropriate rules of civil tort liability for individuals and corporations. Regardless, as described below, agency, joint venture, and civil conspiracy liability have long been recognized under international law. This provides further support for their recognition under federal common law in the ATS context, and renders these theories actionable even if the Court were to accept defendants' mistaken argument that ATS liability theories must be based solely on international law.

B. General principles of agency applicable in Alien Tort Statute cases allow principals, including corporations, to be held liable for the acts of their agents.

After noting that ATS courts draw on federal common law, the *Sarei* panel correctly noted that federal common law agency liability principles are among the "well-settled theories of vicarious liability under federal common law." 487 F.3d at 1202. Such principles, which may be drawn from sources such as the Restatement on Agency, *see Burlington Indus.*, 524 U.S. at 755, provide that corporations may be held liable for the acts of their agents. Moreover, the federal common law standards applicable here are also reflected in international law; concepts of vicarious liability are general principles of law common to virtually every legal system. There can be no question that the agency principles described

below apply to ATS claims.

"It is well established that traditional vicarious liability rules ordinarily make principals or employers vicariously liable for acts of their agents or employees in the scope of their authority or employment." *Meyer*, 537 U.S. at 285; *see also* Restatement (Second) of Agency [hereinafter "Restatement"] § 219. The principal may be liable for the agent's torts even though the agent's conduct is unauthorized, as long as it is within the scope of the relationship. Restatement § 216; *see id.* §§ 228–236; *see, e.g.*, *Cantrell v. Forest City Publ'g Co.*, 419 U.S. 245, 253 (1974).

The same agency principles are firmly established in the world's legal systems, and have become part of international law as "general principles of law recognized by civilized nations" as well as "judicial decisions." *See Flores*, 414 F.3d at 251. Courts in common law (and pluralistic or mixed) jurisdictions regularly acknowledge the principle that an employer may be held liable for the acts of its agent, including intentional torts. *See, e.g., Lister v. Hesley Hall, Ltd.*, [2002] 1 A.C. 215 (H.L.) (U.K.) (holding school liable for sexual abuse by warden); *B.C. Ferry Corp. v. Invicta Sec. Serv. Corp.*, No. CA023277, 84 A.C.W.S. (3d) 195 (B.C. Ct. App. Nov. 11, 1998) (holding employer liable for arson committed by its security personnel); *Chairman, Ry. Bd. v. Das*, [2000] 2

L.R.I. 273 (India) (holding railway liable for rape by railway employees).[5]

In some jurisdictions agency principles are also enshrined in statute. This is especially the case in civil law countries. *See, e.g.*, C. Civ. (Civil Code) art. 1384 (1994) (Fr.) (establishing liability for damages "caused by the act of persons for whom [one] is responsible"); § 831BGB (Civil Code) (1975) (F.R.G.) ("A person who employs another to do any work is bound to compensate for damage which the other unlawfully causes to third party in the performance of his work."); Minpō (Civil Code) art. 715 (1997) (Japan) (same).[6] This is persuasive evidence

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[5] *See also Johnson & Johnson (Ir.) Ltd. v. CP Sec. Ltd.*, [1986] I.R. 362 (H.Ct.) (Ir.); *NK v. Minister of Safety & Sec.*, 2005 (9) B.C.L.R. 835 (CC) (S. Afr.); *Carrington v. Attorney Gen.*, [1972] N.Z.L.R. 1106 (Auk. S. Ct.); *On v. Attorney Gen.*, [1987] H.K.L.R. 331 (C.A.) (H.K); *Bohjaraj A/L Kasinathan v. Nagarajan A/L Verappan & Annor,* [2001] 6 M.L.J. 497 (H.Ct. Temerloh) (Malay.); Hamilton, Harrison & Matthews Advocates, *Kenya*, *in* 2 *Int'l Agency & Distribution Law* [hereinafter *IADL*] § 9[2], KEN 21 (Dennis Campbell ed., 2001); Samuel Hong, *Malaysia*, *in* 2 *IADL*, *supra*, Part I (citing Contracts Act, 1950 (Act 136) § 179); Philip Sifrid A. Fortun, Mylene Marcia-Creencia, et al., *Philippines*, *in* 2 *IADL*, *supra*, Part I; The Agency Act, LSDRSG no. 1163 (1974), *quoted and translated in Laws of the Sudan*, vol. 7 (5th ed. 1981) ("The principal is jointly and separately liable with the agent for [the agent's] tortious act[.]").

[6] *See also* C.C. (Civil Code) § 2049 (1991) (Italy) ("Masters and employers are liable for the damage cause by an unlawful act of their servants and employees in the exercise of functions to which they are assigned."); Codigo Civil (Civil Code) art. 800 (1981) (Port.) ("In the case of negligence or default of the agent, the principal is jointly and severally responsible for damages caused to third parties."); Juan Francisco Torres Landa & R. Barrera, *Mexico*, *in* 2 *IADL*, *supra*, § 2(6)(2), MEX 16 ("Where [an] act is in the name of the agent but within his scope of authority, the principal is ultimately liable . . . ."); Leopoldo Olavarria Campagna, *Venezuela*, *in* 2 *IADL*, *supra*, § 9[2], VEN 39; Konstantin Obolensky & Akhmed Glashev, *Russia*, *in* 2 *IADL*, *supra*, Part I § 1[1] RUSS-4 (citing Civil Code Chapter 52); William E. Butler, *Russian Law* 389–91 (2d. ed. 2003).

that agency liability is part of international law through general principles of law.

Thus, whether this Court looks to general federal common law rules, international law, or both, ATS claims may be founded on agency liability.

C. Joint venturers are liable for the torts of their co-venturers in Alien Tort Statute cases.

As with agency, joint venture liability is reflected in general tort principles and international law. The traditional common law doctrine treats joint venturers as mutual agents, equivalent to partners, liable for the torts of their co-venturers committed within the scope of the venture. *See, e.g.*, 46 Am. Jur. 2d Joint Ventures § 35; *Pine Prods. Corp. v. United States*, 945 F.2d 1555, 1560 (Fed. Cir. 1991) (concluding, under "general principles of law applicable to joint ventures," including "general principles of partnership law," joint venturers are "jointly and severally liable for obligations and debts of the" venture).

There is general agreement in most U.S. jurisdictions about the basic test for determining the existence of a joint venture. *See, e.g.*, *United States v. USX Corp.*, 68 F.3d 811, 826 n.30 (3d Cir. 1995). This traditional common law test considers four general factors: "(1) whether the parties intended to form a partnership or joint venture; (2) whether the parties share a common interest in the subject matter of the venture; (3) whether the parties share profits and losses from the venture; and (4) whether the parties have joint control or the joint right of control over the

venture." *Davidson*, 848 F.2d at 577; *see also* 46 Am. Jur. 2d Joint Ventures § 8 ("A joint venture exists where there is a joint interest in property, an express or implied agreement to share profits and losses of the venture, and there are actions or conduct showing joint cooperation in the venture."); *Sasportes v. M/V Sol de Copacabana*, 581 F.2d 1204, 1208 (5th Cir. 1978).

The general features of joint venture law are also general principles of international law, common to numerous legal systems. *See, e.g.*, *Aronovitch & Leipsic Ltd. v. Berney*, 141 A.C.W.S. (3d) 412, 2005 A.C.W.S.J. 11438 ¶¶ 19–28 (Man. Q.B. 2005) (noting that a joint venture can be formed without written contract and can be carried out through"joint venture corporation"); *Talbot Underwriting Ltd. v. Murray*, [2005] E.W.H.C. 2359 (Comm.) (Q.B.) (setting out definition of joint venture without requiring written contract); *Schipp v. Cameron*, 1998 NSW LEXIS 1862, *143–44 (N.S.W. Sup. Ct., Equity Div., 1998) (noting that, regardless of written agreement, a joint venture is form by association for a common end and results in a relationship of mutual agency); William E. Butler, *Russian Law* 389, 461–52 (2d ed. 2003) (noting that joint ventures are formed by the contribution of resources toward common business objective, and that joint venturers are liable for the acts of any venturer on behalf of the venture); Chibli Mallat, *From Islamic to Middle Eastern Law*, 51 Am. J. Comp. L. 699, 706–07 (2003) (noting that "joint adventures" may be formed under Islamic law).

Perhaps the most comprehensive analysis of joint venture liability under international law may be found in Judge Reinhardt's persuasive concurring opinion[7] in *Doe v. Unocal Corp.*, which notes additional authority recognizing that joint venture liability is reflected in international law:

> The principle that a member of a joint venture is liable for the torts of its co-venturer is well-established in international law and in other national legal systems. International legal materials frequently refer to the principle of joint liability for co-venturers. *See, e.g.*, United Nations Convention On the Law of the Sea, Art. 139, Oct. 21, 1982, 21 I.L.M. 1245, 1293 (establishing principle of joint liability in international maritime law for parties acting jointly in maritime ventures); Convention on International Liability for Damage Caused by Space Objects, Mar. 29, 1972, 961 U.N.T.S. 187 (establishing joint liability principles to harms caused by parties launching objects into space); see also John E. Noyes & Brian D. Smith, State Responsibility and the Principle of Joint and Several Liability, 13 YALE J. INT'L. LAW 225, 249 (1988) (describing joint and several liability for co-venturers' actions as a general principle of international law). The status of joint liability as a general principle of law is supported not only by international law sources but also by the fact that it is fundamental to "major legal systems." *See, e.g.*, N.Y. PARTNERSHIP LAW § 24 (McKinney 2002); *Buckley v. Chadwick*, 45 Cal. 2d 183, 190, 288 P.2d 12, 289 P.2d 242 (1955); *Caron v. Lynn Sand & Stone Co.*, 270 Mass. 340, 346, 170 N.E. 77 (1930); 2 LAWS AND REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA 71 (1984) (Chinese joint venture statute); *AIB Group (UK) Plc. v. Martin*, 2001 U.K.H.L. 63 (United Kingdom joint venture law).

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[7] As noted above, *see supra* note 1, Judge Reinhardt's opinion was not expressly contradicted on this point by the panel majority, which noted that in some cases "joint venture" may be an "appropriate theor[y]." 395 F.3d at 947 n.20. As also noted above, the *Unocal* opinion was vacated upon grant of en banc rehearing.

395 F.3d at 971 (Reinhardt, J., concurring). Thus, as with agency, the principles of joint venturer liability are general principles that should be applied to ATS claims, and are consistent with international law.

D. Federal and international law recognize conspiracy liability, allowing co-conspirators to be held liable under the Alien Tort Statute.

Civil conspiracy is both part of the general background of federal rules of liability[8] and found in international law, and therefore also applies to ATS causes of action. Unlike criminal conspiracy, but like agency and joint venture liability, civil conspiracy is not an independent wrong but rather "a means for establishing vicarious liability for the underlying tort." *Beck v. Prupis*, 529 U.S. 494, 503 (2000). Thus, like agency, it makes sense to look to general principles of liability to determine who is civilly liable for conspiring to commit an ATS violation.

This Court already recognized conspiracy liability for ATS claims in *Hilao v. Estate of Marcos*, 103 F.3d 767, 776 (9th Cir. 1996), in which the Court affirmed jury instructions permitting conspiracy liability for torture, summary execution, and disappearance. Every other federal court to address the question, including decisions issued after *Sosa*, has likewise found that liability for ATS

[8] For example, in *United States v. St. Luke's Subacute Hosp. & Nursing Centre, Inc.*, 2004 U.S. Dist. LEXIS 25380 (N.D. Cal. Dec. 16, 2004), the court noted that "[g]eneral principles of civil conspiracy apply to" claims under the federal False Claims Act. *Id.* at *15 (citing *United States ex rel. Durcholz v. FKW, Inc.*, 189 F.3d 542, 545 n.3 (7th Cir. 1999)).

claims extends to conspiracies. *See Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1158–60 (11th Cir. 2005) (recognizing conspiracy liability for a number of international law violations, including torture, extra-judicial killing, cruel and unusual punishment, and crimes against humanity); *In re Terrorist Attacks on September 11*, *2001*, 392 F. Supp. 2d 539, 565 (S.D.N.Y. 2005) (conspiracy claim for aircraft hijacking); *Eastman Kodak Co.*, 978 F. Supp. at 1091–92 (recognizing conspiracy liability for unlawful arbitrary detention).

Under general federal law rules, in order to sustain a claim for conspiracy, the plaintiff must prove that "(1) two or more persons agreed to commit a wrongful act, (2) [the defendant] joined the conspiracy knowing of at least one of the goals of the conspiracy and intending to help accomplish it, and (3) one or more of the violations was committed by someone who was a member of the conspiracy and acted in furtherance of the conspiracy." *Cabello*, 402 F.3d at 1159 (citing *Halberstam v. Welch*, 705 F.2d 472, 481, 487 (D.C. Cir. 1983)).

Since Nuremburg, it has been recognized that international law also provides for conspiracy liability. *See* Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal, art. 6, 82 U.N.T.S. 279 (providing that "leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the

foregoing crimes are responsible for all acts performed by any persons in execution of such a plan"); *see also Prosecutor v. Tadic*, No. IT-94-1-A, Appeal Judgment ¶¶ 204, 205–19 (ICTY Appeals Chamber July 15, 1999); *Prosecutor v. Vasiljevic*, No. IT-98-32, Appeal Judgment ¶99 (ICTY Appeals Chamber Feb. 25, 2004); Rome Statute of the International Criminal Court, July 17, 1998, art. 25(3)(d), 37 I.L.M. 999 (providing for "common purpose" liability). Thus, any uniform federal rules of liability for ATS claims, incorporating federal law and international law, must hold liable individuals who conspire to commit violations of international law.

II. Any Exhaustion Requirement in Alien Tort Statute Cases Should Parallel the Minimal Exhaustion Requirements of the Torture Victim Protection Act.

Amicus believes that the panel correctly rejected the notion that there is a requirement to exhaust domestic remedies before bringing an ATS claim. Every court to consider the question of exhaustion under the ATS, both before and after *Sosa*, has agreed with the panel in this case that there is no exhaustion requirement for ATS claims. *See Jean v. Dorelien*, 431 F.3d 776, 781 (11th Cir. 2005); *Doe v. Saravia*, 348 F. Supp. 2d 1112, 1157–58 (E.D. Cal. 2004); *Abiola v. Abubakar*, 267 F. Supp. 2d 907, 910 (N.D. Ill. 2003); *Jama v. INS*, 267 F.Supp.2d 907, 910 (D.N.J. 1998); *see also Kadic v. Karadzic*, 70 F.3d 232, 241 (2d Cir. 1995) (holding that "[t]he scope of the [ATS] remains undiminished by enactment of the

[TVPA]" and declining to apply TVPA requirements to ATS claims). Although the Supreme Court in *Sosa* noted in *dicta* that an exhaustion requirement might be appropriate in some cases, 542 U.S. at 733 n.21, it did not repudiate the pre-*Sosa* cases that had already rejected an exhaustion requirement.

Nonetheless, even if this Court were to conclude that exhaustion is required for ATS claims, the exhaustion requirement should parallel the requirement under the TVPA. As the dissent from the panel majority in this case pointed out, the TVPA's exhaustion provisions reflect international law on this issue. *See Sarei*, 487 F.3d at 1237 (Bybee, J., dissenting). Moreover, in noting that exhaustion might be appropriate, the Supreme Court in *Sosa* expressly referenced the TVPA's requirements. 542 U.S. at 733 n.21. Thus exhaustion is excused wherever domestic remedies are not both adequate and available, and the burden of pleading and proving failure to exhaust rests with the defendant.

As this Court held in *Hilao*, the exhaustion requirement under the TVPA is not a high bar to suits by victims of abuses. Although section 2(b) of the TVPA requires claimants to exhaust "adequate and available" domestic remedies, this Court noted that the "intended operation of the exhaustion provision is set forth with remarkable clarity in the Senate Report." 103 F.3d at 778 n.5. That report states:

Torture victims bring suits in the United States against their alleged

> torturers only as a last resort. . . . Therefore, as a general matter, the committee recognizes that in most instances the initiation of litigation under this legislation will be virtually prima facie evidence that the claimant has exhausted his or her remedies in the jurisdiction in which the torture occurred. The committee believes that courts should approach cases brought under the proposed legislation with this assumption.
>
> More specifically, . . . the interpretation of section 2(b) should be informed by general principles of international law. The procedural practice of international human rights tribunals generally holds that the respondent has the burden of raising the nonexhaustion of remedies as an affirmative defense and must show that domestic remedies exist that the claimant did not use. Once the defendant makes a showing of remedies abroad which have not been exhausted, the burden shifts to the plaintiff to rebut by showing that the local remedies were ineffective, unobtainable, unduly prolonged, inadequate, or obviously futile. The ultimate burden of proof and persuasion on the issue of exhaustion of remedies, however, lies with the defendant.

S. Rep. No. 102-249, 1991 WL 258662 at *9–10.

The other courts to consider exhaustion under the TVPA have agreed that plaintiffs "are entitled to a presumption that local remedies have been exhausted," *Sinaltrainal v. Coca-Cola Co.*, 256 F. Supp. 2d 1345, 1357 (S.D. Fla. 2003); that the defendant bears a "substantial" burden of proving failure to exhaust, *Jean,* 431 F.3d at 781; that doubts concerning exhaustion should "be resolved in favor of the plaintiffs," *Enahoro v. Abubakar*, 408 F.3d 877, 892 (7th Cir. 2005); and that a failure-to-exhaust defense can be waived if not raised by affirmative defense or a motion to dismiss, *Cabello Barrueto v. Fernández Larios*, 291 F. Supp. 2d 1360,

1364 (S.D. Fla. 2003). *See also Estate of Rodriquez v. Drummond Co.*, 256 F. Supp. 2d 1250, 1267-68 (N.D. Ala. 2003); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1347 n.30 (N.D. Ga. 2002); *Wiwa v. Royal Dutch Petroleum Co.*, 2002 U.S. Dist. LEXIS 3293 at *55–56 (S.D.N.Y. Feb. 28, 2002).

In particular, in order to raise a failure-to-exhaust defense the defendant must prove that adequate and available local remedies were in place that the plaintiff did not use. *See Collett v. Socialist Peoples' Libyan Arab Jamahiriya*,, 362 F. Supp. 2d 230, 242–43 (D.D.C. 2005) (rejecting an exhaustion defense where "defendants allude[d] to the possibility of [local] remedies . . . but provide[d] the court with no details or analysis concerning what those remedies would be"); *Wiwa*, 2002 U.S. Dist. LEXIS 3293 at *56 (finding that the defendant had not carried his burden of proving that a Nigerian court would entertain the claims at issue). As the Senate Report indicates, remedies would not be adequate and available if they "were ineffective, unobtainable, unduly prolonged, inadequate, or obviously futile." S. Rep. No. 102-249, 1991 WL 258662 at *10.

As Judge Bybee's dissent notes, 487 F.3d at 1237, these requirements and exceptions parallel international law. Exhaustion is not required under international law "if it appears that such remedies would be ineffective or unreasonably prolonged." Sub-Commission on Prevention of Discrimination and Protection of Minorities, Res. 1 (XXIV), U.N. Doc. E/CN.4/1070, at 50–51

(1971); *see generally* Paula Rivka Schochet, *A New Role for an Old Rule: Local Remedies and Expanding Human Rights Jurisdiction Under the Torture Victim Protection Act*, 19 Col. Hum. Rts. L.R. 223, 232–50 (1987); Restatement (Third) of the Foreign Relations Law of the United States § 703 cmt. d (noting that any exhaustion "requirement is met if it is shown that [no remedies are] available or that it would be futile to pursue them").

The fact that no TVPA (or ATS) case has yet been dismissed for failure to exhaust local remedies is confirmation of the Senate Report's observation that, generally, the initiation of litigation in the United States is "prima facie" evidence of exhaustion. In particular, the inquiry into "adequacy" or "availability" of local remedies is distinct from the "adequacy" of a foreign forum in the *forum non conveniens* analysis. Whereas a *forum non conveniens* inquiry might find a foreign forum to be "adequate" despite the substantial risk to plaintiffs of litigating there, *see, e.g.*, *Mujica v. Occidental Petroleum Corp*, 381 F. Supp. 2d 1134, 1147 (C.D. Cal. 2005), dangers to plaintiffs will generally rule out a local remedy as being adequate or available for exhaustion purposes. *See, e.g.*, *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 343 n.44 (S.D.N.Y. 2003) (excusing any exhaustion requirement where local remedies "would be futile and would put plaintiffs in great danger"); *Doe v. Qi*, 349 F. Supp. 2d 1258, 1319 (N.D. Cal. 2004) (finding no adequate remedy where "those

making allegations against the government could suffer 'serious reprisals'"); *Estate of Rodriquez*, 256 F. Supp. 2d at 1267–68 (finding local remedies futile where plaintiffs would be "at great risk from retaliation").[9]

Additionally, while courts undertaking a *forum non conveniens* analysis may be reluctant to inquire into the effectiveness of a foreign court system, deficiencies or delays in a domestic justice system provides ample reason for excusing exhaustion. In *Wiwa*, 2002 U.S. Dist. LEXIS 3293 at *57, the court found that Nigerian courts were not adequate because they were "an uncertain forum for justice," plagued by "corruption and inefficiency." *See also Xuncax*, 886 F. Supp. at 178 (finding exhaustion satisfied where the plaintiff had attempted to use local remedies but they stalled); *Doe v. Qi*, 349 F. Supp. 2d at 1319–20 (in finding exhaustion to be "ineffective and futile," noting that the local government had "prohibit[ed] attorneys from engaging in legal advocacy on behalf of petitioners").

[9] While a conclusion as to whether exhaustion should be excused in this case is beyond the scope of this brief, *amicus* notes that the district court did emphasize "that PNG was plaintiffs' wartime adversary for more than a decade, and that defendants were allegedly aligned with PNG in prosecuting the war" in concluding that the *forum non conveniens* factors did not favor PNG as a forum. *Sarei*, 221 F. Supp. 2d at 1208.

In sum, while there should be no exhaustion requirement for ATS claims, to the extent that this Court finds such a requirement it should parallel the TVPA's exhaustion requirement and provide little barrier to human rights lawsuits.

CONCLUSION

For the foregoing reasons, *amicus* urges this Court to hold that federal common law provides uniform rules of secondary liability under the Alien Tort Statute, that agency, joint venture and conspiracy liability theories are therefore actionable or non-frivolous, and that any exhaustion requirement under the Alien Tort Statute should mirror the exhaustion requirement of the Torture Victim Protection Act.

DATED: September 24, 2007 Respectfully submitted,

Marco Simons
Richard Herz
EARTHRIGHTS INTERNATIONAL
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CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(a)(7)(C)

Alexis Holyweek Sarei, *et. al.* v. Rio Tinto, Plc and Rio Tinto Limited

Nos. 02-56256 & 02-56390

I certify that, pursuant to Federal Rules of Appellate Procedure 32(a)(7) and 29(d), and Ninth Circuit Rule 32-1, the attached *amicus* brief is proportionally spaced, has a typeface of 14 points or more and contains 7000 words or less, according to WordPerfect 11, the word-processing program used to prepare the brief.

DATED: September 24, 2007

Marco Simons
EARTHRIGHTS INTERNATIONAL
Counsel for *Amicus Curiae*

CERTIFICATE OF SERVICE

I, Marco Simons, hereby certify that I am employed by EarthRights International, at 1612 K Street NW #401, Washington, DC 20006; I am over the age of eighteen and I am not a party to this action. I further declare that on September 24, 2007, I served the **BRIEF OF *AMICUS CURIAE* EARTHRIGHTS INTERNATIONAL** on the interested parties in this action by placing true and correct copies thereof in envelopes addressed as follows:

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XX I deposited such envelopes in the mail at Washington, D.C. The envelopes were mailed with postage thereon fully prepaid.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed on September 24,2007, at Washington, the District of Columbia.

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Marco Simons
Declarant