Nos. 02-56256, 02-56390, & 09-56381

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,

and

UNITED STATES OF AMERICA,

Movant.

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

BRIEF OF *AMICUS CURIAE* EARTHRIGHTS INTERNATIONAL IN SUPPORT OF PLAINTIFFS-APPELLANTS-CROSS-APPELLEES

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Talbot v. Janson,
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State v. McDonald,
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International treaties and treaty body comments

Rome Statute of the International Criminal Court, July 17, 1998,
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U.N. Human Rights Comm., General Comment No. 31,
U.N. Doc. CCPR/C/21/Rev.1/Add.13 (Mar. 29, 2004) 22 n.9

International cases

Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain),
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Mauthausen Concentration Camp Case (Gen. Mil. Gov't Ct. of the U.S. Zone, Dachau, Germany Mar. 29–May 13, 1946) 18

Prosecutor v. Furundzija,
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United States v. von Weizsacker (The Ministries Case), 14 *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10* (1949) 19–20

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Roger de A.,
Y.B. 22 Edw. 3, fol. 14b, Mich., Lib. Ass. 43 (1348) 14

Thomlinson v. Arriskin
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Yarborough and Others v. The Governor and Company of the Bank of England, (1812) 104 Eng. Rep. 991 (K.B.) 14

Restatements, treatises, briefs, opinions, and law review articles

1 Blackstone, *Commentaries on the Laws of England* (1765) 20

Curtis A. Bradley, *The Alien Tort Statute and Article III*,
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Breach of Neutrality, 1 Op. Att'y Gen. 57 (1795) 15

Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 Am. J. Int'l L. 461 (1989) 17

Brief of Professors of Federal Jurisdiction and Legal History as Amici Curiae in Support of Respondents in *Sosa v. Alvarez-Machain*, 2003 U.S. Briefs 339, 11–13, 2004 U.S. S. Ct. Briefs LEXIS 219, *22–24 (Feb. 27, 2004) 11, 14

Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (2005) 19

William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists,"* 19 Hastings Int'l & Comp. L.

Rev. 221 (1996) 12–13

John G. Fleming, The Law of Torts (Sydney: 8th ed. 1992) 17

Kenneth C. Randall, *Federal Jurisdiction over International Law Claims: Inquiries into the Alien Tort Statute*, 18 N.Y.U. Int'l L. & Pol. J. 1 (1985) 13

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STATEMENT OF CONSENT TO FILE

All parties have consented to the filing of this brief.

STATEMENT OF IDENTITY AND INTEREST OF *AMICUS CURIAE*

EarthRights International (ERI) is a human rights organization based in Washington, D.C., which litigates and advocates on behalf of victims of human rights abuses worldwide. ERI has represented plaintiffs in several lawsuits against corporations under the Alien Tort Statute (ATS), 28 U.S.C. § 1350, alleging liability for, *inter alia*, aiding and abetting security forces in carrying out torture and extrajudicial killings in foreign countries. *E.g. Doe v. Unocal Corp.*, No. 00-56603 (9th Cir.); *Bowoto v. Chevron Corp.*, No. 09-15641 (9th Cir.); *Wiwa v. Royal Dutch Petroleum Corp.*, No. 96 Civ. 8386 (S.D.N.Y.).

Amicus therefore has an interest in ensuring that the courts apply the correct body of law to questions of accessorial and corporate liability under the ATS. *Amicus* addressed the similar issue of the application of federal common law in ATS cases with respect to agency, conspiracy and joint venture liability theories in a prior amicus brief submitted in support of Plaintiffs-appellants-cross-appellees.

STATEMENT OF THE ISSUE ADDRESSED BY *AMICUS CURIAE*

Amicus addresses the question of the appropriate body of law to apply for accessorial and corporate liability under the Alien Tort Statute, the substantive standards for aiding and abetting liability, and the application of the transitory tort

doctrine.

SUMMARY OF ARGUMENT

Defendants-appellees-cross-appellants ("Rio Tinto") argue that claims under the Alien Tort Statute (ATS), 28 U.S.C. § 1350, do not encompass aiding and abetting liability or corporate liability and may not be brought for conduct occurring outside the United States. *Amici* demonstrate that, because ATS claims are primarily federal common law claims, the answers to these questions should be sought in general common law principles. While the ATS requires a violation of a right guaranteed by international law, once such a right has been violated, other questions in an ATS action are determined according to background common law principles. This is consistent with both the Supreme Court's decision in *Sosa*, the general approach to federal claims, and the history of the ATS itself.

Aiding and abetting tort liability has been a feature of the common law since before the passage of the ATS, and should be incorporated into ATS claims. The standard for civil aiding and abetting liability is that the abettor must provide substantial assistance to the primary tortfeasor, knowing that such actions are assisting in the commission of a tort. This standard is also reflected in international law.

Corporate liability has similarly been a feature of the common law since Blackstone's time, and the ATS provides no exception to the rule that corporations

are civilly liable to the same extent as natural persons. International law similarly recognizes corporate personhood and the possibility that corporations can be sued, in part because international law incorporates general principles of law drawn from the world's major legal systems. There is no international law rule providing for corporate immunity.

Finally, the notion of transitory torts, which can provide the basis for an action against a tortfeasor wherever that person is subject to personal jurisdiction, regardless of where the torts occurred, has also been accepted for centuries. International law similarly allows a state to adjudicate claims against a corporation that has substantial business ties to the forum. Claims under the ATS implicate only the power to adjudicate under international law, not the power to project a country's laws extraterritorially, because the ATS remedies give effect to universally applicable international law norms.

ARGUMENT

I. Federal Common Law Governs Remedies in Alien Tort Statute Cases, Including Who May Be Held Liable.

Rio Tinto argues that "there is no international consensus allowing for secondary liability in the civil context," Rio Tinto Br. at 26, and that customary international law does not permit "imposing liability against corporations for violations of international law norms relating to human rights," *id.* at 31. Both

arguments misunderstand the interplay between international law and federal common law as applied to claims under the ATS. International law provides the source of the substantive norms whose violation gives rise to ATS jurisdiction; in other words, it determines whether a plaintiff has suffered a violation of a right guaranteed by the law of nations. Conversely, the Supreme Court's decision in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), and the original understanding of the ATS both suggest that a uniform body of federal common law should be used to fashion the remedy for such a violation, including determining who may be held liable.

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

Sosa held that, while ATS jurisdiction is predicated on a violation of an international law norm, it is the common law that provides the cause of action. 542 U.S. at 725. The federal common law that gives rise to ATS actions incorporates international law to a certain extent; for example, the norm itself—the violation suffered by the plaintiff—is a question of international law. Equally certain is that international law does not define all of the aspects of an ATS action; otherwise, *Sosa*'s holding that the ATS allows federal courts to recognize causes of action at federal common law would be meaningless. *Id.* at 724. For example, federal procedural rules apply, including common law doctrines of personal

jurisdiction, *see Bauman v. DaimlerChrysler Corp.*, 579 F.3d 1088, 1096 (9th Cir. 2009), as well as the federal common law of political questions. *E.g.*, *Corrie v. Caterpillar*, 503 F.3d 974, 980 (9th Cir. 2007). For several reasons, the rules of liability in ATS actions are not governed by international law but, like the political question doctrine, are determined by uniform principles of federal common law.

First, *Sosa* held that the ATS grants jurisdiction over international law causes of action present in federal common law, 542 U.S. at 732; thus, the only question for which *Sosa* requires reference to international law is whether there has been a "violation[] of [an] international law norm." *Id.* The questions of whether a defendant has participated in such a violation, and whether that defendant possesses sufficient legal personality to be subject to liability, are ancillary to the question of whether there has been a violation of an international norm; they do not affect the determination of whether the plaintiff's rights have been violated. While the *right* violated comes from international law, the existence of a *remedy* is a question of federal common law. International law determines whether the conduct that injured the plaintiff—the infringement of the right at issue—is prohibited by international law. But whether to extend a remedy for the violation of that right, either to a particular class of defendants, or at all, *see Sosa*, 542 U.S. at 732–33, is a question of federal law.

Rio Tinto relies on footnote 20 of *Sosa* to argue that international law must

determine questions of liability. The Supreme Court's concern was "whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, *if the defendant is a private actor* such as a corporation or individual." 542 U.S. at 732 n.20 (emphasis added). This passage refers to the state action requirement of many international law norms and distinguishes between violations that only implicate international law when committed by state actors and those that may entail liability even for private actors. But a state action requirement is part of the definition of an international law violation; it is part of what defines the right, and therefore must be determined by international law. Certain acts, such as torture, only implicate international law when there is state involvement in their commission; torture by a private party is generally not a violation of international law. *See id.* Other abuses, such as war crimes and genocide, are prohibited regardless of state involvement. The reason that the question of state action falls within the province of international law is that not all acts that international law forbids if committed by a state actor are of sufficiently "universal concern" if committed by a private actor. *See Kadic v. Karadzic*, 70 F.3d 232, 240 (2d Cir. 1995). Accessorial rules such as aiding and abetting, by contrast, are not part of a distinct "norm"; nor is the question of whether corporate personality is recognized.

Second, international law itself requires the same conclusion. As this Court

previously recognized in the *Marcos* litigation, although international law governs the question of whether there has been a violation, the decision of "'how the United States wishe[s] to react to such violations [is a] domestic question[.]'" *Hilao v. Estate of Marcos*, 25 F.3d 1467, 1475 (9th Cir. 1994) (quoting *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 778 (D.C. Cir. 1984) (Edwards, J., concurring) (in turn quoting L. Henkin, *Foreign Affairs and the Constitution* 224 (1972))). Drawing on the same sources, the Second Circuit noted that international law "leaves to each nation the task of defining the remedies that are available for international law violations." *Kadic*, 70 F.3d at 246 (citing *Tel-Oren*, 726 F.2d at 778 (Edwards, J., concurring)). The principle that international law itself need not provide a right to sue, which was discussed in detail by Judge Edwards in his concurrence in *Tel-Oren*, 726 F.2d at 777–82, was adopted by *Sosa*, 542 U.S. at 724, 731; Judge Bork's contrary view was expressly rejected. *Id.* at 731. The liability rules applicable to defendants complicit in international torts is a matter for the United States to decide in creating the remedy, not an issue governed by international law norms that define the rights. Indeed, as noted below in Part I(C) *infra*, when Congress passed the ATS it would not have recognized any real distinction between international law rules and general principles of law applicable in common law actions.[1]

[1] In any event, as detailed in Parts II(B)& III *infra*, international law encompasses both corporate and aiding and abetting liability. Where international

Third, even if *Sosa* and international law did not already counsel in favor of looking to domestic legal principles for ancillary issues, customary international law contains gaps that would simply make it inappropriate as the primary source for rules regarding civil tort liability. This is the case in part because issues of civil liability are generally a concern for domestic enforcement, not international tribunals. In *Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain)*, 1970 I.C.J. 3 (Feb. 5), for example, the International Court of Justice considered whether a corporation was to be regarded as a separate person, distinct from its shareholders, or whether it simply reflected the personality of those shareholders. The ICJ noted that it could not answer the question solely by reference to customary international law, because "there are no corresponding institutions of international law to which the Court could resort," and needed to look at municipal law instead. *Id.* at 33–34, 37.

Finally, it is worth noting that the general trend in cases both prior to and following *Sosa* has been to apply principles drawn from federal common law to issues beyond the right violated, as the original panel decision in this case did. *Sarei v. Rio Tinto PLC*, 487 F.3d 1193, 1202 (9th Cir. 2007);[2] *see also Cabello v.*

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law accords with established federal law, there can be little argument against its application in ATS cases.

[2] This was also the approach taken by Judge Reinhardt in his concurrence in *Doe v. Unocal Corp.*, 395 F.3d 932, 966 (9th Cir. 2002) (arguing 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

Fernandez-Larios, 402 F.3d 1148, 1158 (11th Cir. 2005) (applying federal common law standards for aiding and abetting and conspiracy liability); *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 application of "[t]ort principles from federal common law" is appropriate 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"); *Xuncax v. Gramajo*, 886 F. Supp. 162, 182–83 (D. Mass. 1995) (holding that "liability standards applicable to international law violations" should be developed "through the generation of federal common law").[3]

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underlying tort"). Judge Pregerson's majority opinion in that case also left open the possibility that federal common law principles might apply in another case, *see* 395 F.3d at 949 n.25, and noted that the distinction made little difference because "the standard for aiding and abetting in international criminal law is similar to the standard for aiding and abetting in domestic tort law." *Id.* at 948 n.23. After the case went en banc, *see* 395 F.3d 978 (2003), the Court's April 9, 2003, Order directed the parties to focus on "whether Unocal's liability should be resolved according to general federal common law tort principles" or under "an international-law aiding and abetting standard." The issue was never decided because the case was dismissed after settlement. 403 F.3d 708 (9th Cir. 2005).

[3] A partial exception to this trend is the Second Circuit's recent decision in *Presbyterian Church of Sudan v. Talisman Energy Inc.*, 582 F.3d 244 (2d Cir. 2009), in which that court borrowed what it considered to be international criminal law aiding and abetting rules rather than federal common law civil aiding and

B. Courts look to federal liability rules to effectuate federal causes of action.

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 federal principles, as informed by traditional common law rules where necessary as well as international law.

Federal courts nearly always apply preexisting, general tort rules of liability to give effect to federal causes of action. *See Khulumani v. Barclay National Bank Ltd.*, 504 F.3d 254, 287 (2d Cir. 2007) (citing *United States v. Kimbell Foods*, 440 U.S. 715, 727 (1979); *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981)). Indeed, "Congress is understood to legislate against a background of common-law adjudicatory principles," and "courts may take it as given that Congress has legislated with an expectation that [such principles] will apply except when a statutory purpose to the contrary is evident." *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991) (internal quotations omitted); *see also 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").

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abetting rules for ATS actions but did not address the corporate liability issue. Another Second Circuit judge, who was not on the *Talisman* panel, previously endorsed the federal common law approach. *See Khulumani v. Barclay National Bank Ltd.*, 504 F.3d 254, 286 (2d Cir. 2007) (Hall, J., concurring).

C. Congress' original understanding of the Alien Tort Statute mandates application of general common law rules of liability.

1. Because the law of nations was incorporated into the common law, general common law rules of liability apply.

When the ATS was enacted, no clear distinction was drawn between international law and the common law; the common law was considered to have encompassed the law of nations in its entirety. It is thus mistaken to think that Congress would have looked to international law for rules of tort liability, which it did not and still does not provide. Instead, Congress treated liability arising under the law of nations as it did any other common law tort and applied general common law rules of liability. *See* Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 Va. J. Int'l L. 587, 595 (2002) ("American courts resorted to this general body of preexisting law to provide the rules of decision in particular cases without insisting that the law be attached to any particular sovereign.").

In our Republic's early years, courts routinely applied the law of nations in both civil and criminal cases, as a matter of general common law. *See* Brief of Professors of Federal Jurisdiction and Legal History as Amici Curiae in Support of Respondents in *Sosa v. Alvarez-Machain* ["Legal Historians' Brief"], 2003 U.S. Briefs 339, 11–13, 2004 U.S. S. Ct. Briefs LEXIS 219, *22–24 (Feb. 27, 2004).[4]

[4] This brief's argument that ATS claims were part of the common law and required no further legislation was adopted by *Sosa*. 542 U.S. at 714.

Thus, they understood that a tort in violation of the law of nations would be "cognizable at common law just as any other tort would be." William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists,"* 19 Hastings Int'l & Comp. L. Rev. 221, 234 (1996). Attribution of liability was, therefore, governed by the common law, which included the law of nations. *See, e.g.*, *Talbot v. Janson*, 3 U.S. 133, 156 (1795) (holding defendant liable for violation of international law of neutrality, and applying general common law principles of aiding and abetting and conspiracy); *United States v. Benner*, 24 F. Cas. 1084, 1087 (C.C.E.D. Pa. 1830) (recognizing that common-law rule of self defense would exonerate defendant alleged to have infringed on foreign minister's international law right of inviolability of person).

2. The original intent of the ATS suggests application of general common law rules of liability.

As *Sosa* recognized, the First Congress enacted the ATS out of concern that the United States was failing to provide a uniform forum for redress of a series of crimes against ambassadors and the international law of neutrality, and eagerness to prove its credibility as a new nation. 542 U.S. at 715–19; *see also* Dodge, *supra*, at 229–30. In so doing, Congress was partially motivated by a fear that state courts, which already had jurisdiction over such suits, could not be trusted to give aliens a fair hearing and might come to divergent conclusions about the

content of the law of nations. *See* Dodge, *supra*, at 235–36. Thus, Congress desired to make federal courts *more accessible* for foreigners' tort claims that, when unaddressed, could give rise to international diplomatic friction. *See* Kenneth C. Randall, *Federal Jurisdiction over International Law Claims: Inquiries into the Alien Tort Statute*, 18 N.Y.U. Int'l L. & Pol. J. 1, 21 (1985).

Given these aims, the First Congress would not have limited civil liability to principles drawn from an external body of international law that generally prescribed no rules of tort liability, when state courts were not so limited. Rather, they expected federal courts, like state courts, to apply the familiar body of general common law that, after all, already incorporated relevant aspects of the law of nations.

The incongruousness of applying international law rules of liability is underlined by the fact that many modern ATS cases also plead domestic common law tort claims for the same conduct implicated in the ATS claims. *See, e.g.*, *Doe v. Unocal Corp.*, 963 F. Supp. 880, 883 (C.D. Cal. 1997). Domestic law claims may be brought against corporations and are typically decided under the general civil liability standard. *E.g.*, *Henry v. Lehman Commer. Paper, Inc.*, 471 F.3d 977, 992–95 (9th Cir. 2006) (recognizing knowing substantial assistance standard as California tort rule for aiding and abetting). The First Congress would not have wanted a foreign diplomat, for example, who is able to benefit from the general

aiding and abetting standard if he or she sues a corporation in California court for abetting an ordinary assault, to face a *higher* burden in federal court on a theory of aiding and abetting a breach of diplomatic inviolability (or indeed to be barred altogether). Aliens' claims arising under the law of nations should not be disadvantaged vis-à-vis their state law claims; to do so would "treat torts in violation of the law of nations less favorably than other torts," Legal Historians' Brief at 14, and thereby frustrate the aims of the First Congress.

II. Aiding and Abetting Liability Has Long Been A Part of the Common Law, and Requires Knowing, Substantial Assistance.

A. Civil aiding and abetting is appropriate for common law claims.

Civil aiding and abetting liability was well established at common law, and would have been familiar to the First Congress. As early as 1348, the courts of England ruled that one who came in aid of a trespasser, without himself doing another wrong, could be held liable as a trespasser. *See Roger de A.*, Y.B. 22 Edw. 3, fol. 14b, Mich., Lib. Ass. 43 (1348) (English paraphrase at http://www.bu.edu/phpbin/lawyearbooks/display.php?id=11792); *see also Thomlinson v. Arriskin*, (1719) 92 Eng. Rep. 1096 (K.B.) (holding defendant liable for aiding trespass); *Yarborough and Others v. The Governor and Company of the Bank of England*, (1812) 104 Eng. Rep. 991 (K.B.) (assuming corporation can be liable for aiding trespass); *Petrie v. Lamont*, (1842) 174 Eng. Rep. 424 (Assizes)

("All persons in trespass who aid or counsel, direct, or join, are joint trespassers").

Contrary to Rio Tinto's argument, *see* Rio Tinto Br. at 27, the foundation of aiding and abetting liability as a common law tort doctrine is not undermined by the Supreme Court's decision in *Central Bank of Denver, N.A., v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994). The issue in *Central Bank* was discerning the intent of Congress with respect to a cause of action provided by specific statutory language. *See* 511 U.S. at 176 (noting that "Congress knew how to impose aiding and abetting liability when it chose to do so"). By contrast, causes of action under the ATS, though enabled by the statute, are provided by "the common law." *Sosa*, 542 U.S. at 724. No congressional intent as to the elements of an ATS action can be discerned from the text of the section 1350 itself. *See Khulumani*, 504 F.3d at 288 n.5 (Hall, J., concurring). Moreover, "the Founding Generation nevertheless understood the [ATS] encompassed aiding and abetting liability," *id.*, as is demonstrated by the 1795 opinion of Attorney General Bradford. *Breach of Neutrality*, 1 Op. Att'y Gen. 57, 59 (1795) (suggesting liability under the ATS for those who "voluntarily joined, conducted, aided and abetted" violations of international law). Although aiding and abetting liability may not be inferred automatically for every statutory cause of action, it still remains a ubiquitous feature of the common law. and thus applies to common law claims such as ATS actions.

B. Civil aiding and abetting requires knowing substantial assistance.

The general common law standard for aiding and abetting, which courts have found is incorporated in federal common law, requires "(1) existence of an independent primary wrong; (2) actual knowledge by the alleged aider and abettor of the wrong and of his or her role in furthering it; and (3) substantial assistance in the wrong." *Hauser v. Farrell*, 14 F.3d 1338, 1343 (9th Cir. 1994);[5] *see also United States v. Dearing*, 504 F.3d 897, 901 (9th Cir. 2007) (same standard for criminal abetting); *see also* Restatement (Second) of Torts § 876(b).

This knowledge standard has long been recognized. Indeed, some early cases suggest that liability for aiding and abetting torts was appropriate not only in the absence of specific intent, but even in the absence of actual knowledge. *See, e.g, Purviance v. Angus*, 1 U.S. (1 Dall.) 180, 185 (Pa. 1786) (shipmaster held liable for aiding the commission of a tort when he had constructive knowledge that the action was trespass).[6] Additionally, in English common law, "there is cogent support both in principle and ancient authority for the suggestion that . . .

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[5] This case was decided under section 10 of the Securities Exchange Act. Although the Supreme Court in *Central Bank* ultimately rejected aiding and abetting liability under that section, it did not suggest that the test adopted for aiding and abetting was in any way erroneous.

[6] *See also Richardson v. Saltar*, 4 N.C. 505 (1817) (co-defendants liable for aiding trespass despite lack of evidence that they knew principal perpetrator was acting without legal authority); *State v. McDonald*, 14 N.C. 468 (1832) (defendants guilty of aiding and abetting wrongful arrest if they had constructive knowledge that warrant was invalid).

[k]nowingly assisting . . . would suffice" for liability. John G. Fleming, *The Law of Torts* 257 (8th ed. 1992). And when the same Congress that enacted the ATS passed a criminal statute outlawing piracy to comply with its obligations under the law of nations, it included criminal penalties for any person "who shall . . . *knowingly aid and assist*, command, counsel or advise any person" to commit piracy. Act of Apr. 30, 1790, ch. 9, §§ 9–10, 1 Stat. 112, 114 (emphasis added). In passing that law, Congress believed that it was merely codifying the law of nations, as it had been incorporated into the general common law. *See Sosa*, 524 U.S. at 719; Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 Am. J. Int'l L. 461, 477 & n.75 (1989) (noting that the Act codified crimes identified as violations of international law in 1781 by the Continental Congress).[7] Thus the standard for aiding and abetting under general common law principles, applicable to federal common law claims under the ATS, is knowing, substantial assistance. *See Cabello*, 402 F.3d at 1158.

Liability rules drawn from background common law principles may be reinforced by rules found in international law. With respect to aiding and abetting liability, international criminal law provides the same standard as the common

[7] Indeed, in a revision to the piracy statutes several years later, Congress explicitly defined the act according to the law of nations. Act of Mar. 3, 1819, ch. 77, § 5, 3 Stat. 510, 513–14 (1819) (providing for prosecution of persons who "shall, on the high seas, commit the crime of piracy, as defined by the law of nations").

law: knowing, practical assistance or encouragement that has a substantial effect on the perpetration of the offense. *Prosecutor v. Furundzija*, Case No. IT-95-17/T, Judgement, ¶¶ 192–249 (Dec. 10, 1998) (analyzing authorities). This standard has been recognized since the Nuremberg trials. *See United States v. Flick*, 6 *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10* (hereinafter "*Trials*"), at 1220 (1949) (finding that the defendants could not "reasonably believe" that all of the money they contributed went to the stated purpose of supporting cultural endeavors); *Mauthausen Concentration Camp Case* (Gen. Mil. Gov't Ct. of the U.S. Zone, Dachau, Germany Mar. 29–May 13, 1946), *quoted in Dachau Concentration Camp Trial*, IX *Law Reports of Trials of War Criminals* 15 (U.N. War Crimes Commission, 1949) (convicting defendants of complicity because the facts made it "impossible" for them to have been present without knowing of the abuses). This reinforces the common law standard.

The Second Circuit's recent decision in *Presbyterian Church of Sudan v. Talisman Energy*, 582 F.3d 244 (2d Cir. 2009), determined that international law only prohibits abetting done with the purpose of facilitating the wrongful act. *Id.* at 259. In so holding, however, the *Talisman* panel made several errors and incorrectly interpreted international law.

First, the court erred in adopting a standard from the Rome Statute and

ignoring the Yugoslavia and Rwanda tribunal rulings. *See id.* This is backward, because while the ad-hoc tribunals considered aiding and abetting as a matter of "customary international law," *Furundzija* ¶ 191, the Rome Statute's definition "introduces a purposive, motive requirement that is not required by custom (under which knowledge suffices). The crime is thus not defined in accordance with customary international law . . . ." Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* 315–16 (2005); *see also* Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 3, art. 10 (providing that the definitions in the Rome Statute shall not "be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute").[8]

Second, *Talisman* cited only one international decision, the Nuremberg-era *Ministries* case, in support of its holding. 582 F.3d at 259. But that case actually reiterated the knowledge standard. *See United States v. von Weizsacker (The Ministries Case)*, 14 *Trials* at 611–22. There, the tribunal found that "it is inconceivable" that banker Karl Rasche "did not possess [the requisite] knowledge" that his loans would facilitate slave labor, *id.* at 622, and that banker

[8] For some forms of aiding and abetting, the Rome Statute does provide a knowledge standard. Pursuant to article 25(3)(d)(ii), contributing to the commission of a crime by "a group of persons acting with a common purpose" is criminal even if the defendant only has "knowledge of the intention of the group to commit the crime," not a purpose to further the crime. *See id*.

Emil Puhl "knew that what was to be received" was property stolen from Jews, *id.* at 620. Rasche was acquitted and Puhl convicted, however, due to the difference in the acts of assistance—making bank loans versus disposing of stolen property—not any distinction in their mental state. *Id.* at 611, 622. Indeed, the tribunal noted that the murder of the Jews "was probably repugnant" to Puhl, but still convicted him due to his knowledge. *Id.* at 621.

Last, even if the *Ministries* case had adopted a purpose standard, the *Talisman* panel erred in holding that this case was indicative of customary international law, in light of the weight of the jurisprudence from Nuremberg and the modern tribunals. *Talisman* notwithstanding, aiding and abetting under customary international law still requires knowing, substantial assistance, and thus the international law standard still reinforces the common law standard.

III. Under Federal Common Law, Corporations Are Subject to the Same Liability Rules as Natural Persons.

As with aiding and abetting, the rule that corporations and natural persons are treated equivalently in terms of their civil liability has been part of the common law for centuries. *E.g.*, 1 Blackstone, *Commentaries on the Laws of England* 463 (1765) (noting that corporations have capacities "[t]o sue and be sued, implead or be impleaded, grant or receive, by its corporate name, and do all other acts as natural persons may"); *Trustees of Dartmouth College v. Woodward*,

17 U.S. (4 Wheat.) 518, 667 (1819) ("An aggregate corporation at common law . . . . possesses the capacity . . . of suing and being sued in all things touching its corporate rights and duties.") (op. of Story, J.); *Cook County v. United States ex rel. Chandler*, 538 U.S. 119, 125 (2003) (noting that by the 19th century "the common understanding" was "that corporations were 'persons' in the general enjoyment of the capacity to sue and be sued").

This general rule is reflected in footnote 20 of *Sosa* itself, in which the Supreme Court treated a "corporation or individual" as equivalent for the purposes of assessing whether a norm of international law prohibits conducts by a "private actor" (as opposed to a state actor). 542 U.S. at 732 n.20. As Judge Illston held in *Bowoto v. Chevron Corp.*, No. C 99-02506, 2006 U.S. Dist. LEXIS 63209 (N.D. Cal. Aug. 22, 2006), "[t]he dividing line for international law has traditionally fallen between states and private actors. Once this line has been crossed and an international norm has become sufficiently well established to reach private actors, there is very little reason to differentiate between corporations and individuals." *Id.* at *37. Footnote 20 is likewise consistent with the distinction between the right (defined by international law) and the remedy (provided by domestic law). *See supra* Part I(A). The question of corporate liability is not part of the definition of the right; it is a matter of the remedy an individual state chooses to provide where the act that injured the plaintiff is of sufficient

international concern to violate international law.

As with aiding and abetting, international law also reinforces the notion that corporations are civilly liable to the same extent as individuals.[9] As noted above, the ICJ in *Barcelona Traction* did not find answers to questions of corporate rights and obligations directly in international law itself; the court noted that international law recognized corporations as institutions "created by States," in a domain within their domestic jurisdiction, and that the court needed to look to municipal law to answer questions about corporate separateness. 1970 I.C.J. at 33, 37. The ICJ looked not to the specific laws of the states at issue but rather to the "rules generally accepted by municipal legal systems," *id.* at 37; that is, it looked to international law in the form of general principles of law. *See, e.g., Flores v. Southern Peru Copper Corp.*, 414 F.3d 233, 251 (2d Cir. 2003) (noting that "general principles of law recognized by civilized nations" are among the sources of international law). The ICJ ultimately concluded that corporations were separate persons under international law.

As a matter of general principles, there is little question that corporations may be held civilly liable in every major legal system. Indeed, this flows directly

[9] If a state were to take the position that it would enforce violations of international law against natural persons but not against corporations, it would likely be in breach of its own international obligations to protect human rights. *See, e.g.*, U.N. Human Rights Comm., General Comment No. 31, U.N. Doc. CCPR/C/21/Rev.1/Add.13 ¶ 8 (Mar. 29, 2004) (noting that states are obligated to protect "against acts committed by private persons or entities").

from the basic principle of corporate personhood, and has been at least implicitly recognized by the Supreme Court. In *First National City Bank (FNCB) v. Banco Para El Comercio Exterior De Cuba (Bancec)*, 462 U.S. 611 (1983), the Court recognized corporate veil-piercing as a principle of international law, based on *Barcelona Traction*'s discussion of general principles. *Id.* at 628 n.20. This holding that corporations are legally separate from their owners in some circumstances necessarily presumes that corporations can be sued in their own right under international law. Indeed, *FNCB* itself is a case where a corporation was held to account for a claim arising under international law. There, the Cuban government seized FNCB's assets. FNCB thus had a claim that arose under international law against Cuba. *Id.* at 623. The Supreme Court held that this claim could be asserted as a set-off against Bancec (in a case brought by Bancec against FNCB), because Bancec, although a corporation, was the alter-ego of the Cuban government.

Refusing to recognize corporate liability would lead to absurd results, not only for ATS plaintiffs but equally so for corporations that could otherwise be sued. The ability to sue the corporation is inherent in the notion of limited liability; plaintiffs may sue the corporation precisely because limited liability ordinarily prevents suits against the shareholders. If international law did not recognize that corporations were legal persons that could be sued, this would also

mean that corporations would not be considered legal persons separate from their shareholders. If a corporation is not a separate person, it is simply an aggregation of agents (the corporation's directors, officers and employees) acting on behalf of principals (the shareholders). Thus, if corporations cannot be sued, the *individual owners* of the companies would be liable on an agency theory for everything that employees of the company do, without any need to pierce any veil, because, absent the concept of corporate personhood, employees of the corporation would all be employees of the shareholders collectively.

In order to find that neither corporations nor their shareholders could be sued, the Court would have to find an affirmative rule of corporate *immunity* in international law—that is, that shareholders may create a corporation to hold their assets and carry on their business, interpose that corporation as a shield against their own liability, yet not subject the corporation itself and the corporation's assets to liability. But there is no possible argument that international law creates any such immunity. Corporate personality for the purposes of limiting shareholders' liability and corporate personality for the purposes of being sued are not separate concepts, and both derive from general principles of domestic law common to all legal systems. Thus, in the absence of corporate personality, liability for violations of international law would be greatly expanded—to all of the shareholder-principals for any act of their agents—rather than limited.

IV. Transitory Tort Cases Have Long Been a Feature of Common Law, and Are Permitted Under International Law.

Rio Tinto argues that not only are aiding and abetting liability and corporate liability impermissible in ATS cases, but also that the basic notion of transitory torts is inapplicable. Again, general common law principles, reinforced by international law, belie this claim.

Rio Tinto argues that claims with "no nexus to the United States" may not be brought under the ATS because they "present[] none of the usual threshold conditions required for a court to exercise jurisdiction consistent with international norms." Rio Tinto Br. at 34. While couched in terms of extraterritorial jurisdiction, this is really an argument against the notion of transitory torts. The argument confuses the power to apply one's own law—"jurisdiction to prescribe," as put by section 402 of the Restatement of the Foreign Relations Law of the United States—with the power to exercise personal jurisdiction and decide claims against a defendant—"jurisdiction to adjudicate." *Id.* § 421. According to the Restatement, its chapter on "jurisdiction to prescribe" applies only to "public law—tax, antitrust, securities regulation, labor law, and similar legislation." *Id.* pt. 4 intro. note at 237. Rio Tinto's argument that the United States lacks the power to prescribe its own statutes and regulations to conduct lacking a domestic nexus, therefore, misses the mark. The ATS is not antitrust or labor law; it does

not involve power to prescribe at all, because the ATS gives effect to international law norms that already apply to Bougainville. Even if the ancillary application of federal common law rules could implicate jurisdiction to prescribe,[10] in an ATS case these rules simply give effect to universal international law rights. *See supra* Part I(A) (international law allows nations to determine domestic remedies for violations). U.S. courts are adjudicating here, not prescribing.

Seen in this light, exercise of jurisdiction here is fully permissible under international law so long as personal jurisdiction is validly asserted. *See* Restatement § 421(b)(h) (international law allows adjudication of claims with respect to a corporation that "regularly carries on business in the state"). Moreover, jurisdiction here is part of a common-law tradition so longstanding that it is now a hornbook rule: a defendant can be sued for torts wherever it may be subject to personal jurisdiction. The Framers understood that civil tort actions were considered transitory because the tortfeasor's wrongful act created an obligation that could follow him or her across national boundaries. *See Mostyn v. Fabrigas*, 1 Cowp. 161 (K.B. 1774), *cited in McKenna v. Fisk*, 42 U.S. 241, 248–49 (1843) (collecting cases); *see also Watts v. Thomas*, 5 Ky. (2 Bibb) 458 (1811). Indeed, Oliver Ellsworth, the author of the First Judiciary Act, had

[10] In any case, as noted above, the federal common law rules at issue here are fully consistent with international law. *See supra* Parts II(B)& III.

himself applied the transitory tort doctrine in 1786, as a sitting judge. *Stoddard v. Bird*, 1 Kirby 65, 68 (Conn. 1786).

For this reason, *Filártiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), expressly rejected the argument that the ATS does not apply to claims arising abroad, finding that, from the Nation's inception to today, common-law courts have regularly adjudicated transitory tort claims arising outside of the jurisdiction. *See id.* at 885 (collecting authorities). And since *Sosa* confirmed that the ATS provided jurisdiction for common-law claims, 542 U.S. at 724, and expressly endorsed *Filártiga*, there can be no dispute that this analysis applies.

Thus Rio Tinto's statement that there is "'no jurisdiction outside the United States in which a freestanding civil suit . . . may be . . . brought under universal jurisdiction,'" Rio Tinto Br. at 36, gives a misleading answer to the wrong question. Any jurisdiction that recognizes the transitory tort doctrine, including but not limited to the U.K., allows civil suits to be brought against any defendant who may be found there. This is not "universal jurisdiction" in the sense that jurisdiction depends on the existence of an international law offense which may be prosecuted universally; it is simply a feature of the common law system.

IV. *Amicus*'s Prior Submission Remains Relevant.

Because the Court requested supplemental briefs, *amicus* does not repeat the arguments from its prior brief. *See* Br. of *Amicus Curiae* EarthRights Int'l in

Supp. of Pls.-App'ts & Reversal Submitted with the Consent of All Parties (Sep. 24, 2007). Nonetheless, *amicus* notes that agency, joint venture, and conspiracy theories of liability, which were addressed in the prior brief, remain relevant and are apparently not challenged by Rio Tinto. *See id.* at 3–21. Furthermore, to the extent that the Court addresses the standard for any required exhaustion of local remedies, *amicus* still submits that the standards of the Torture Victim Protection Act are most appropriate. *Id.* at 21–27.

CONCLUSION

For the foregoing reasons, *amicus* urges this Court to find that corporate liability and aiding and abetting liability are determined by federal common law, under which corporations are subject to the same tort liability as natural persons and knowing substantial assistance is the appropriate standard for accessorial liability, and that the transitory tort doctrine applies in ATS cases.

DATED: January 29, 2009

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(a)(7)(C) AND CIRCUIT RULE 32-1

Case Nos. 02-56256, 02-56390, & 09-56381

I certify that, pursuant to Fed. R. App. P. 29(d) and 9th Cir. R. 32-1, the attached amicus brief is proportionally spaced, has a typeface of 14 points or more and contains 7000 words or less.

DATED: January 29, 2010

Respectfully submitted,

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9th Circuit Case Number(s) 02-56256, 02-56390, 09-56381

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