07-0016-cv

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THE PRESBYTERIAN CHURCH OF SUDAN, by and through Rev. John Sudan Gaduel, JOHN SUDAN GADUEL, MATTHEW MATHIANG DEANG, JAMES KOUNG NINREW, NUER COMMUNITY DEVELOPMENT SERVICES IN U.S.A., NYOT TOT RIETH, individually and on behalf of the Estate of her husband Joseph Thiet Makuac, STEPHEN HOTH, KUEIGWONG TUNGUAR RAT, LUKA AYUOL YOL, THOMAS MALUAL KAP, PUOK BOL MUT, PATAI TUT, PETER RING PATAI, GATLUAK CHIEK JANG, YIEN NYINAR RIEK, MORIS BOL MAJOK, on behalf of themselves and all other similarly situated,

Plaintiffs-Appellants,

(*Caption continued on inside cover)*

On Appeal from the United States District Court
for the Southern District of New York

Brief for the Chamber of Commerce of the United States of America As *Amicus Curiae* in Support of Defendant-Appellee Talisman Energy, Inc., and in Support of Affirmance

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May 8, 2007

NYEYANG MOON, STEPHEN KUINA, PETER GADUEL, FATUMA NYAWANG GARBANG, and DANIEL WOUR CLUOL, individually and on behalf of all other similarly situated,

Plaintiffs,

v.

TALISMAN ENERGY, INC., REPUBLIC OF THE SUDAN, and JOHN GARANG DEMABIOR,

Defendants-Appellees,

SALVA KIR MAYARDIT,

Third-Party Defendant.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, *amicus* Chamber of Commerce of the United States of America makes the following disclosure.

The Chamber of Commerce of the United States of America ("the Chamber") is a membership organization, not a publicly held corporation. No publicly held corporation owns 10 percent or more of any stock in the Chamber.

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INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation, representing a membership of more than three million businesses and organizations that transact business around the world. Chamber members have a direct and substantial interest in the legal issues raised by this appeal because they have been and may in the future be defendants in suits under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350. Many of these lawsuits are brought by large numbers of plaintiffs or as class actions against multiple corporate defendants.[1]

Chamber members operating abroad are already subject to the laws of the foreign countries in which they operate and, in many cases, remain subject to certain provisions of U.S. law. They also recognize the benefits of doing business in the United States and other countries that have incorporated into their domestic law many principles of human rights. But the threat of liability for foreign operations under other, vaguely-stated principles of alleged customary international law imposes risks that are both unpredictable and unreasonable.

In this case, appellants have sued a Canadian corporation alleging, *inter alia*, that the corporation, acting through various subsidiaries operating an oil

[1] *See, e.g.*, cases cited at 22–24 *infra*. The Chamber does not defend the actions of Government of Sudan, which is not participating in this appeal, and it has not reviewed the enormous factual record in this case. It addresses only legal issues that will be significant in most ATS cases against corporations.

concession in southern Sudan, aided and abetted the Government of Sudan's alleged campaign of war crimes, crimes against humanity, and genocide against non-Muslim peoples of southern Sudan. Appellants' theory of ATS liability is, in part, that the defendant corporation knew of the human rights violations, but nevertheless provided substantial assistance to the Government of Sudan by upgrading and maintaining air strips that were used by military aircraft, expanding exploration into new areas that required military support, providing financial assistance to the Government of Sudan in the form of oil revenues, and upgrading roads in the oil concession area.

The district court declined to dismiss the case, 244 F. Supp. 2d 289 (S.D.N.Y. 2003) (Schwartz, J.) ("*Talisman I*"), or to grant judgment on the pleadings, 374 F. Supp. 2d 331 (S.D.N.Y. 2005) (Cote, J.) ("*Talisman II*"). In those decisions, the court ruled that corporations could be sued under the ATS and that aiding and abetting violations of international law was actionable under the ATS. Ultimately, however, the district court granted defendant Talisman's motion for summary judgment. 453 F. Supp. 2d 633 (S.D.N.Y. 2006) (Cote, J.) ("*Talisman III*"). In doing so, the court ruled that, to establish actionable aiding and abetting, a plaintiff must show:

> "1) that the principal violated international law;
>
> "2) that the defendant knew of the specific violation;

> "3) that the defendant acted with the intent to assist that violation, that is, the defendant specifically directed his acts to assist in the specific violation;
>
> "4) that the defendant's acts had a substantial effect upon the success of the criminal venture; and
>
> "5) that the defendant was aware that the acts assisted the specific violation." 453 F. Supp. 2d at 668.

Applying that standard, the district court ruled that plaintiffs had produced insufficient evidence that Talisman aided and abetted any violation of international law.

Appellants challenge the district court's 2006 rulings on this appeal, and two of the six *amicus* briefs supporting appellants—one by a group of law professors and one by Earthrights International—argue for corporate aiding and abetting liability in ATS suits, for a standard substantially less demanding than that adopted by the district court, and for theories of imputed or vicarious liability that would expose parent corporations to liability even when they are far removed from any direct involvement in injurious actions.

As the Chamber explains below, the legal positions embraced in the 2003 and 2005 decisions of the district court—that corporations can be held liable in ATS actions and that aiding and abetting violations of international law is actionable under the ATS—are legally incorrect. Acceptance of those positions could gravely harm the interests of Chamber members that have been or are likely to be subjected to ATS lawsuits arising from conduct in other countries.

The parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

The Supreme Court has instructed federal courts to proceed cautiously in developing a federal common law of liability under the ATS for violations of international law. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). Appellants and their *amici* have misapprehended that instruction in arguing for corporate aiding and abetting liability.

First, the international human-rights and war-crimes norms that are typically involved in ATS suits (and that are involved here) do not extend liability to corporations. Accordingly, under *Sosa's* requirements that a purported norm of international law must be universally accepted and definite, corporations cannot be held liable in ATS suits such as these.

Second, whatever the current status of aiding and abetting under international *criminal* law, it is indisputable that international law does not provide *civil* damage liability for aiding and abetting. Plaintiffs in ATS cases premised on conduct alleged to have aided and abetted the violation of a norm of international criminal law may base their cause of action on federal statutory law or, as here, ask federal courts to create a federal-common-law cause of action for such conduct. But judicial recognition of a federal-common-law cause of action for aiding and abetting is prohibited by *Sosa*'s extensive cautions, the teaching of *Central Bank of*

Denver v. First Interstate Bank of Denver, 511 U.S. 164 (1994), and the absence of necessary legislative guidance.

ARGUMENT

I. Because Customary International Law Does Not Subject Corporations to Liability for Violations of International Human Rights or Humanitarian Law, a Federal-Common-Law Cause of Action Against Corporations May Not Be Created for Such Actions Under the Alien Tort Statute.

The district court's ruling that corporations can be liable in ATS suits is inconsistent with the teaching of *Sosa*. After ruling that "federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted," the Supreme Court stated in footnote 20 that "[a] related consideration is 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. Thus, a private person or entity can be

sued under the ATS for violating a purported norm of international law only if that particular norm "extends the scope of liability" to such persons or entities.[2]

As an initial matter, international criminal tribunals beginning with Nuremberg have never provided for corporate criminal liability, a fact not contested by appellants. Moreover, the treaty drafters for the newly created International Criminal Court expressly rejected attempts to include corporate liability for the international human rights and humanitarian law violations within its jurisdiction.[3] Under these circumstances, there is no basis for saying that

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[2] In ruling that not only the *existence* of a norm but also the *application* of the norm to "a private actor such as a corporation" must meet the *Sosa* standards of universal acceptance and specificity, the Court suggested that whether corporations can be liable for violations of international norms is an unsettled issue and that efforts to recover damages from corporations under the ATS must therefore fail under *Sosa*.

[3] The nations participating in the Rome Conference debated at length the inclusion of corporations within the jurisdiction of the International Criminal Court. *See* United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Report of the Preparatory Committee on the Establishment of an International Criminal Court, Addendum, Draft Statute at Art. 23(5), U.N. Doc. A/Conf. 183/2/Add. 1 at 49 (1998) (suggesting jurisdiction over "legal persons"); United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Official Records, U.N. Doc. A/Conf. 183/13 (Vol. II) (1998) (debates); Andrew Clapham, *The Question of Jurisdiction Under International Criminal Law Over Legal Persons: Lessons from the Rome Conference on an International Criminal Court, in* Liability of Multinational Corporations Under International Law 139, 141–58 (Menno T. Kamminga & Saman Zia-Zarifi eds., 2000); Albin Eser, *Individual Criminal Responsibility, in* 1 The Rome Statute of the International Criminal Court: A Commentary 767, 778–79 (Antonio Cassese *et al.*, eds., 2002).

corporate liability for violations of international law—at least as to violations covered by the Rome Statute—meets the test of widespread acceptance required by *Sosa*.

The principal lower court decision recognizing corporate liability is the district court's 2003 decision in this case, *Talisman I*, 244 F. Supp. 2d at 311–19. That decision predated and failed to anticipate *Sosa*. There the court held that corporations could be liable under international law in reliance on five international conventions, *none* of which had been ratified by the United States,[4] and one of which had never gone into effect in any country.[5] These conventions do not demonstrate the widespread acceptance required by *Sosa*. The district court's 2005 decision denying judgment on the pleadings reaffirmed the prior decision

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[4] Convention Concerning the Application of the Principles of the Right To Organise and To Bargain Collectively (ILO No. C98), *opened for signature* July 1, 1949; Convention on Third Party Liability in the Field of Nuclear Energy (Org. for Econ. Co-operation & Dev.), *opened for signature* July 29, 1960, as amended, 956 U.N.T.S. 251; International Convention on Civil Liability for Oil Pollution Damage (Inter-Governmental Maritime Consultative Org.), *opened for signature* Nov. 29, 1969, 973 U.N.T.S. 3 (erroneously cited by the court to 26 U.S.T. 765, the citation for a different treaty ratified by the U.S.); Vienna Convention on Civil Liability for Nuclear Damage (Int'l Atomic Energy Agency), *opened for signature* May 21, 1963, 1063 U.N.T.S. 265; Convention Relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material (Inter-Governmental Maritime Consultative Org.), *opened for signature* Dec. 17, 1971, 974 U.N.T.S. 255.

[5] Convention on Civil Liability for Oil Pollution Damage Resulting from Exploration for and Exploitation of Seabed Mineral Resources, *opened for signature* Dec. 17, 1976, 16 I.L.M. 1450 (insufficient signatures for entry into force, *see* http://sedac.ciesin.org/entri/register/reg-092.rrr.html).

after *Sosa*, but showed no appreciation of the 2003 decision's improper treatment of international treaties. *Talisman II*, 374 F. Supp. 2d at 335.

A more recent lower court decision in this circuit, *In re Agent Orange Product Liability Litigation*, 373 F. Supp. 2d 7 (E.D.N.Y. 2005),[6] incorrectly recognizes corporate liability in ATS litigation in *dicta*, mistakenly treating the issue as one of "immunity." 373 F. Supp. 2d at 58. The Chamber does not claim that international law grants corporations "immunity" from civil liability for international law violations. It argues only that international law, at least at this stage in its evolution, does not extend liability to corporate entities.

Regulation of corporations has thus far been left by the international community to the laws of individual states. There appear to be a number of reasons for this decision by the international community.

- Most international law obligations are aimed at states rather than private individuals, let alone corporations. As a prominent treatise states:

> "States are the principal subjects of international law. This means that international law is primarily a law for the international conduct of states, and not of their citizens. As a rule, the subjects of the rights and duties arising from international law are states solely and exclusively, and international law does not normally impose duties or confer rights directly upon an individual human being * * *." 1 Robert

[6] *Appeal docketed sub nom. Vietnam Ass'n for Victims of Agent Orange/Dioxin v. Dow Chem. Co.*, No. 05-1953-cv (2d Cir. Apr. 20, 2005).

> Jennings & Arthur Watts, Oppenheim's International Law § 6, at 16 (9th ed. 1996).

- The first focus of international *criminal* law was on punishing individuals who violated certain norms of international law and rejecting such excuses as "following orders," in contexts in which it was accepted that state entities were immune from prosecution.[7] With that initial emphasis, international criminal law understandably has not been applied to corporations.[8]
- The ways in which individual states impose criminal liability upon corporations lack uniformity. As a prominent scholar of genocide has written:

> "Not all domestic legal systems allow for responsibility of corporate bodies. Those that do take a variety of approaches to

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[7] "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced." *The Nürnberg Trial (United States et al. v. Goering et al.)*, 6 F.R.D. 69, 110 (Int'l Military Tribunal at Nuremberg 1946).

[8] In a different context, but for similar reasons, the Supreme Court declined to extend to private corporations the federal-common-law cause of action for damages created in *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), for certain violations of constitutional law. *Correctional Services Corp. v. Malesko*, 534 U.S. 61 (2001). The Court explained that the purpose of *Bivens* is "to deter individual federal officers from committing constitutional violations"; that "the threat of litigation and liability will adequately deter federal officers for *Bivens* purposes"; that "the threat of suit against an individual's employer was not the kind of deterrence contemplated by *Bivens*"; and that, with such suits, "'[t]he deterrent effects of the *Bivens* remedy would be lost.'" 534 U.S. at 70–71 (citation omitted). Similar policy decisions may continue to cause international law to stop short of corporate liability.

> the issue of the *mens rea* of the corporate defendant. Some apply vicarious liability, holding a corporation liable for the acts of its employees, in the same way that parents are held liable for the acts of their children. Others impute to the society the *mens rea* of its *alter ego* or guiding spirit. Yet others attempt to establish a *mens rea* of the corporate body itself, based on a criminalized 'corporate culture'." William A. Schabas, Genocide in International Law 444 (2000).

Such lack of consensus has apparently militated against recognition of international rules governing corporate liability.

- For international law to apply to corporations, the international community would have to reach agreement upon rules for the different ways in which corporations may be held liable. For example, would a corporation be liable for the actions of (1) "rogue" officers acting contrary to the interests and perhaps even the directions of the corporation; (2) "rogue" low-level employees; (3) officers or employees, when the requisite intent or knowledge, cannot be found not in the mind of any single individual but only by the adding together the states of knowledge or intent of different officers or employees; (4) actions by wholly-owned subsidiaries; (5) actions by subsidiaries of subsidiaries, or (6) actions by partially-owned subsidiaries? The Chamber does not believe that international rules on any of these issues have become settled.[9]

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[9] With particular reference to the doctrine of *respondeat superior*—the most common ground for corporate civil liability—one of the international law scholars

The district court in *In re Agent Orange* nakedly rested its decision on its personal view of logic and sound policy, rather than on the current state of international law,[10] and the district court in this case likewise relied heavily on its view of "logic."[11] But the federal-common-law cause of action permitted in

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filing an *amicus* brief supporting plaintiffs has recently written:

> "There is little, if any, international law precedent regarding the availability of *respondeat superior* liability because traditional disputes arising under international law seldom, if ever, involve a claim for damages against a private employer. Therefore, establishing a general acceptance of *respondeat superior* as a principal of international law will be, at best, difficult and probably impossible." William R. Casto, *Regulating the New Privateers of the Twenty-First Century*, 37 Rutgers L.J. 671, 697 (2006) (footnote omitted).

One *amicus* brief supporting plaintiffs suggests that international law has taken a position on the circumstances under which the corporate veil may be pierced. *Amicus* Br. of Earthrights International at 12–13, citing *Case Concerning The Barcelona Traction, Light & Power Co. (Belg. v. Spain)*, 1970 I.C.J. 3, 38–39, as quoted in *First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 628–29 n.20 (1983). But the *Barcelona Traction* case did not concern a suit against a corporation or veil-piercing by third-party tort plaintiffs. It concerned the right of Belgium to sue Spain on behalf of Belgian shareholders of a Canadian corporation, the assets of which had been expropriated. Had that case led to a body of international law on corporate liability or corporate-parent liability, plaintiffs or their *amici* would no doubt have cited such law.

[10] "Limiting civil liability to individuals while exonerating the corporation directing the individual's action through its complex operations and changing personnel makes little sense in today's world." 373 F. Supp. 2d at 58.

[11] *Talisman I*, 244 F. Supp. 2d at 319 ("Given that private individuals are liable for violations of international law in certain circumstances, there is no logical reason why corporations should not be held liable, at least in cases of *jus cogens* violations."). *See also Bowoto v. Chevron Corp.*, No. C 99-02506 SI, 2006 WL 2455752, at *9 (N.D. Cal. Aug. 22, 2006) (to same effect).

limited circumstances under *Sosa* is for a violation of international law, not domestic law.[12] If corporations are not recognized as defendants with respect to the international law violations at issue, they cannot be subject to ATS actions under *Sosa*. It is immaterial that American law and the law of many other countries generally recognizes corporate liability for torts, unless that law was developed in response to perceived obligations under international law.[13] Appellants and their *amici* do not and could not make that showing. Furthermore, when Congress enacted an express cause of action for certain violations of international law in the Torture Victim Protection Act ("TVPA"),[14] it chose not to extend liability to corporations, strongly suggesting an understanding that international law did not extend to corporations.[15]

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[12] The plain words of the ATS require that the allegedly tortious conduct in question be "committed in violation of the law of nations or a treaty of the United States."

[13] For example, as pointed out in *Flores v. Southern Peru Copper Corp.*, 414 F.3d 233, 249 (2d Cir. 2003), and earlier cases there cited, the mere fact that every nation's municipal law may prohibit theft does not incorporate the Eighth Commandment, "Thou shalt not steal," into the law of nations.

[14] Pub. L. No. 102-256, 106 Stat. 73 (1992), *reprinted in* 28 U.S.C. § 1350 note.

[15] *See, e.g., Corrie v. Caterpillar*, 403 F. Supp. 2d 1019, 1026 (W.D. Wash. 2005), *appeal docketed*, No. 05-36210 (9th Cir. Dec. 23, 2005). Even if—contrary to the decisions to date of most lower courts—the TVPA is ultimately held to extend liability to corporations, that would suggest only that Congress had made a deliberate decision to enact corporate liability for the specific offenses covered by the TVPA as a matter of United States policy, and would not prove that *international law* provides for corporate liability either for those specific offenses

* * * *

In sum, there is no substantial authority for the proposition that corporations that aid and abet violations of international law themselves violate international law. Those who prefer a different rule, such as appellants and their *amici*, can only rely on policy arguments rather than any universally accepted norm of international law.

II. No Federal Cause of Action for Aiding and Abetting the Misconduct of Third Parties May Be Created or Recognized Under the Alien Tort Statute.

The Supreme Court's decision in *Sosa* establishes that a purported norm of international law should not be enforced under the ATS unless it is both "accepted by the civilized world" and "defined with a specificity" comparable to the features of three 18th century paradigms—"violation of safe conducts, infringement of the rights of ambassadors, and piracy." 542 U.S. at 724–25. The district court in this case found aiding and abetting actionable under the ATS. Its post-*Sosa* decision, *Talisman II*, 374 F. Supp. 2d at 337–41, focused on the question whether there is a

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or more generally. If the TVPA's failure to extend liability to corporations, as most courts have held, was not based on Congress's understanding of international law, it must have been based on sound policy reasons. Those same reasons would counsel against creating a federal-common-law cause of action for international law violations even if international law norms applied to corporations (which they do not). As one of the international law scholars filing an *amicus* brief in this case has stated: "If, in fact, Congress decided in enacting the TVPA that corporations should not be subject to liability for torts committed in violation of international law, then the TVPA's legislative wisdom should be adopted for all such torts." William R. Casto, *supra*, 37 Rutgers L.J. at 697 n.137 (2006).

norm of international law that meets the *Sosa* standard of sufficient definition and passed over the further necessary question whether federal common law under the ATS should create or recognize a cause of action for aiding and abetting. Appellants argue that such a cause of action need not exist or be defined in international law; in their view, once someone has engaged in genocide or other international law violations, aiding and abetting liability may be derived entirely from federal common law. Appellants' Br. at 66. This Court should reject that position because, whatever the status of aiding and abetting under international criminal law, there is no basis for civil liability for aiding and abetting under international law, *Sosa*, or federal common law.

In holding that the ATS does not establish a cause of action for damages, *Sosa* rejected efforts to base civil liability on the ATS itself. Appellants here do not attempt to derive a civil cause of action for aiding and abetting from a self-executing treaty ratified by the United States. Nor do they rely on a federal statute such as the TVPA that expressly creates a private cause of action for damages. Accordingly, there are only three other possible bases for a cause of action for aiding and abetting conduct that allegedly violates international law: (1) state law or foreign law, which appellants do not invoke; (2) international law itself; and (3) federal common law, relying on the limited authority of federal courts after *Sosa* to create federal-common-law causes of action for damages in ATS suits for alleged

violations of widely accepted and specific norms of international law. As we show in Part II.A below, appellants have no cause of action under international law because international law does not impose civil liability for violations of international criminal law. As we show in Part II.B, federal courts may not create a federal-common-law cause of action for aiding and abetting because that would be contrary to both the cautionary instructions of *Sosa* and the teaching of *Central Bank*. And as we show in Part II.C, existing case law does not convincingly support aiding and abetting liability in ATS cases.

A. International Law Does Not Provide Civil Aiding and Abetting Liability for Violations of International Criminal Law.

Although international law in certain circumstances provides for individual criminal liability, it "never has been perceived to create or define the civil actions to be made available by each member of the community of nations; by consensus, the states leave that determination to their respective municipal laws." *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 778 (D.C. Cir. 1984) (Edwards, J., concurring). That this 1984 statement remains valid is supported by its endorsement in the Brief *Amici Curiae* of International Law Scholars William Casto *et al.* at 4.

Under these circumstances, no purported norm of international civil liability for aiding and abetting could possibly meet the test of *Sosa*. Even if international law recognized civil liability for violations of international criminal law, the task of

defining the content of civil aiding and abetting liability with sufficient specificity to meet the *Sosa* test would require the international community to resolve many open and disputed issues that do not arise in the context of criminal aiding and abetting liability, including what standard of causation should apply; how to apportion liability among multiple tortfeasors; whether proceedings could be instituted by private parties (as in common law countries); and what types of damages are recoverable. This task has barely begun in the international community, much less resulted in a consensus that could be the basis for liability under the ATS after *Sosa*.

B. Under *Sosa* and *Central Bank*, Whether To Impose Civil Aiding and Abetting Liability for Alleged Violations of International Norms Under the ATS Is a Decision for Congress.

For a federal court to create a federal-common-law cause of action for aiding and abetting violations under the ATS would transgress *Sosa*'s cautions against judicial legislation and would also clash with the dictates of *Central Bank*.

1. *Sosa*'s Cautionary Instructions

The Supreme Court took pains in *Sosa* to highlight why a court must act with "a restrained conception of [its] discretion * * * in considering a new cause of action" for purported violations of international law. 542 U.S. at 725. The Court specifically instructed that courts should use "great caution in adapting the law of nations to private rights." 542 U.S. at 728.

In rejecting a claim for damages for alleged illegal detention, the *Sosa* Court noted that "[a] series of reasons argue for judicial caution when considering the kinds of individual claims that might implement the jurisdiction conferred by the [ATS]." *Id.* at 725. Many of those same reasons for caution strongly counsel against recognizing a cause of action for civil aiding and abetting. For example, the Court noted that even in the limited areas where federal courts retain the power to create federal-common-law rules after *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938), "the general practice has been to look for legislative guidance before exercising innovative authority over substantive law." 542 U.S. at 726. As the Court stressed, "a decision to create a private right of action is one better left to legislative judgment in the great majority of cases." *Id.* at 727.

> "The creation of a private right of action raises issues beyond the mere consideration whether underlying primary conduct should be allowed or not, entailing, for example, a decision to permit enforcement without the check imposed by prosecutorial discretion. Accordingly, even when Congress has made it clear by statute that a rule applies to purely domestic conduct, we are reluctant to infer intent to provide a private cause of action where the statute does not supply one expressly." *Id.*

Moreover, the Court made clear that there should be a "high bar" to recognizing new private causes of action for violations of international law because of the danger of "impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs." *Id.*

Many important practical foreign policy considerations counsel restraint against creation of a new cause of action for aiding and abetting in ATS cases.

First, many developing countries have questionable or poor human rights records. Those countries include some in which U.S. foreign policy encourages investment and commerce to promote development and human rights. The prospect that companies doing business with such countries might later find themselves facing massive discovery and jury trials in U.S. courts under nebulous theories of "aiding and abetting" liability might deter their participation in those economies, thus defeating U.S. policy. The determination of whether and to what extent to pursue a constructive engagement policy is precisely the type of foreign affairs decision that is constitutionally vested in the other branches of government and with which courts should not interfere. *See, e.g., American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414–15 (2003).

Second, recognizing a cause of action for aiding and abetting would encourage a wide range of ATS suits in which plaintiffs would indirectly challenge the conduct of foreign nations that is protected from direct challenge under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602–1611. Such suits typically generate serious diplomatic friction for the United States.[16]

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[16] *See* Brief for the United States as *Amicus Curiae* in *Khulumani v. Barclays International Bank Ltd.*, Nos. 05-2141 & 05-2326 (2d Cir. filed October 14, 2005), at 17 (argued Jan. 24, 2006). (As of the date of filing this brief, the Chamber has

Third, adoption of accessorial liability for ATS claims could also deter investments within the United States by foreign companies because of their concern that such contacts would provide a basis for ATS jurisdiction and expose their investments to attachment to satisfy adverse judgments.

Fourth, recognizing accessorial liability in cases in which the immune foreign sovereign or its officers or employees are the primary wrongdoers would unfairly place the financial burden of compensating victims of international law violations solely on the aider and abetter.[17]

2. *Central Bank*'s Teaching

To *Sosa's* specific admonitions must be added the Supreme Court's more general teaching about the inappropriateness of federal courts creating or implying federal causes of action for aiding and abetting even in a purely domestic context.

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not had an opportunity to see the Brief for the United States in this case, which is due one week after the due date for this brief.) *See also Doe v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20, 25 (D.D.C. 2005) ("assessing whether Exxon is liable for [aiding and abetting genocide and crimes against humanity] would be an impermissible intrusion in Indonesia's internal affairs"), *Exxon Mobil's appeal from other rulings dismissed for lack of appellate jurisdiction*, 473 F.3d 345 (D.C. Cir. 2007).

[17] Indeed, while both international and domestic criminal law sentencing regimes permit a sentence for aiders and abettors that is *less* than that imposed on principals, civil law conventionally permits the entire liability to be imposed on the aider and abettor, possibly subject to contribution claims that would be of no avail against a foreign sovereign immune from suit in U.S. courts under the Foreign Sovereign Immunities Act. Thus, corporate civil liability for aiding and abetting would have a potential greater and more disproportionate impact than corporate criminal liability.

Although aiding and abetting liability is a long-established norm of federal criminal law, 18 U.S.C. § 2(a), *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164 (1994), teaches that a federal court can recognize a federal cause of action for damages for aiding and abetting only where the legislature has expressly or implicitly authorized such liability.

Where the underlying norm is one of international law (as plaintiffs claim in this case) rather than one created directly by Congress, there is even less justification than there was in *Central Bank* for recognizing civil aiding and abetting liability, for that would involve creating federal-common-law liability for aiding and abetting without any relevant congressional direction whatsoever in the civil context.

In *Central Bank*, the Court declined to permit a plaintiff to maintain an aiding and abetting suit for money damages under Section 10(b) of the Securities Exchange Act of 1934. Although that Act expressly provides a cause of action for direct liability, it does not expressly provide a remedy for secondary liability. The Court found it significant that "Congress has not enacted a general civil aiding and abetting statute—either for suits by the Government (when the Government sues for civil penalties or injunctive relief) or for suits by private parties." *Id.* at 182. As a result, "when Congress enacts a statute under which a person may sue and recover damages from a private defendant for the defendant's violation of some

statutory norm, there is no general presumption that the plaintiff may also sue aiders and abettors." *Id.* [18]

Rejecting policy arguments urged in favor of aiding and abetting liability, the Court in *Central Bank* noted that "the rules for determining aiding and abetting liability are unclear, in 'an area that demands certainty and predictability,'" *id.* at 188 (internal citation omitted),[19] and that allowing secondary liability would increase the "danger of vexatiousness" in litigation. *Id.* at 189. Because it found "no expression of congressional direction to do so," the Court declined to endorse the "vast expansion of federal law" that adopting civil aiding and abetting liability would entail. *Id.* at 183.[20]

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[18] The *amicus* brief of Earthrights International suggests, that "ordinary tort-related vicarious liability rules" should be adopted in ATS suits, because "'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.'" Br. at 8, citing *Meyer v. Holley*, 537 U.S. 280, 285 (2003). That principle did not carry the day in *Central Bank* with respect to aiding and abetting liability. Moreover, because *Sosa* makes clear that Congress did not create a tort action in the ATS, but merely conferred jurisdiction in the expectation that courts would themselves create or recognize common-law causes of action as appropriate, the *Meyer* principle is irrelevant here.

[19] The Court observed that the Restatement (Second) of Torts (1979) addressed the issue (at § 876) "under a concert of action principle" that "has been at best uncertain in application" and that some States appeared to reject the principle. *Id.* at 181–82.

[20] *Boim v. Quranic Literacy Institute*, 291 F.3d 1000 (7th Cir. 2002), permitted the imposition of accessorial liability under the 1992 federal criminal statute creating a specific norm of conduct and providing a civil cause of action for damages, 18 U.S.C. § 2333, because it found clear evidence of congressional intent

The reasoning of *Central Bank* applies here and prohibits a federal court from creating a cause of action for civil aiding and abetting of purported international law violations.[21]

C. Existing Case Law Does Not Convincingly Support the Recognition of Civil Liability for Aiding and Abetting Under the ATS.

Case law supporting a federal-common-law cause of action for aiding and abetting under the ATS is sparse.

The Ninth Circuit recognized civil liability for aiding and abetting violations of international law in claims brought under the ATS in *Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002). But the Ninth Circuit denied that decision precedential effect pending rehearing *en banc*, 395 F.3d 978 (9th Cir. 2003), and then dismissed the appeal on stipulated motion. 403 F.3d 708 (9th Cir. 2005). The recent Ninth Circuit decision in *Sarei v. Rio Tinto, PLC*, ___ F.3d ___, 2007 WL

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sufficient to overcome the presumption against an implied civil remedy for aiding and abetting. *Id.* at 1010–11, 1019–21. Indeed, the provisions of Chapter 113B of Title 18, §§ 2331–2339D, expressly criminalize financial and material support to terrorists that might otherwise be treated as aiding and abetting. That kind of evidence of congressional intent and relevant congressional legislation is absent from the ATS, which neither proscribes any conduct nor creates a cause of action for any violation of international law.

[21] *See* Curtis A. Bradley, Jack L. Goldsmith & David H. Moore, Sosa, *Customary International Law, and the Continuing Relevance of* Erie, 120 Harv. L. Rev. 869, 924–29 (2007). "Whether corporations should be liable for aiding and abetting violations of customary international law is an issue that will need to be addressed in the first instance by the political branches." *Id.* at 929.

1079901 at *5 (9th Cir. Apr. 12, 2007) (Nos. 02-56256 & 02-56390) (on rehearing), states only that claims of vicarious liability for violations of *jus cogens* norms are not frivolous for purposes of ATS subject-matter jurisdiction.

In *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1157 (11th Cir. 2005), the Eleventh Circuit stated that the ATS "reaches * * * accomplice liability." But the statement is dictum because the suit was against a military official of the Pinochet government for having himself allegedly killed a member of the Allende government, and its holding was limited to that official's direct liability for the killing. Moreover, that dictum incorrectly relied on the two circuit cases that do not in fact recognize aiding and abetting liability.[22] And perhaps most significantly, *Cabello* did not even cite *Sosa*, much less discuss the impact of that decision.[23]

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[22] In *Hilao v. Estate of Marcos*, 103 F.3d 767, 776–77 (9th Cir. 1996), the court considered only the application of "command responsibility"—a doctrine unique to war crimes prosecutions—not accessorial liability. In *Carmichael v. United Technologies Corp.*, 835 F.2d 109, 113–14 (5th Cir. 1988), the court "only assume[d], because it [was] unnecessary to decide," that the ATS reached private parties who aided or abetted violations of international law.

[23] A later Eleventh Circuit that did discuss *Sosa* stated, relying on *Cabello*, that a claim for state-sponsored torture under the ATS "may be based on indirect liability as well as direct liability." *Villeda Aldana v. Del Monte Fresh Produce, Inc.*, 416 F.3d 1242, 1248 (11th Cir. 2005) (*per curiam*), *rehearing en banc denied*, 452 F.3d 1284 (11th Cir. 2006), *cert. denied*, 127 S. Ct. 596 (2006). That brief statement should not persuade this Court on the issue of aiding and abetting.

With respect to the non-controlling district court cases that have recognized civil aiding and abetting liability, many are not about aiding and abetting liability but instead concern active participation in violations of international law. In any event, this Court should not follow those lower court opinions, nearly all of which predate *Sosa* or are based on pre-*Sosa* decisions.[24]

Two post-*Sosa* decisions reach the correct result under *Sosa* by declining to find that aiding and abetting is actionable under the ATS.[25] This Court should do the same.[26]

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[24] In a recent interlocutory decision by a district court in this Circuit, the court ruled that aiding and abetting liability was permissible under the ATS (based on *Talisman*), but described it as a "close question" and certified its decision for interlocutory appeal. *Kiobel v. Royal Dutch Petroleum*, 456 F. Supp. 2d 457 (S.D.N.Y. Sep. 29, 2006), *leave for interlocutory appeal granted*, Nos. 06-4800-mv & 06-4876-mv (2d Cir. Dec. 27, 2006).

[25] *In re South African Apartheid Litigation*, 346 F. Supp. 2d 538, 549 (S.D.N.Y. 2004), *appeals docketed sub nom. Khulumani v. Barclay Nat'l Bank*, No. 05-2141-cv (2d Cir. May 2, 2005), and *Ntsebeza v. Sulzer AG*, No. 05-2326-cv (2d Cir. May 11, 2005) (argued Jan. 24, 2006); *Doe v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20, 24 (D.D.C. 2005), *Exxon Mobil's appeal from other rulings dismissed for lack of appellate jurisdiction*, 473 F.3d 345 (D.C. Cir. 2007).

[26] For the reasons set forth above, a claim of civil aiding and abetting by a corporation cannot meet the standards of *Sosa*. If, however, this Court should choose to approve a federal-common-law cause of action for aiding and abetting a violation of international law, it should approve the specific standards set forth by the district court, including that the defendant's actions be "with the intent to assist" the specific violation of international law, 453 F. Supp. 2d at 668. In addition to the reasons set forth in the Talisman Brief (at 76–78), the International Court of Justice has recently declined to reach the question whether the international norm of aiding and abetting genocide requires that the aider and abettor "shares the specific intent (*dolus specialis*) of the principal perpetrator"—

CONCLUSION

The Court should reject the district court's ruling that *Sosa* authorizes corporate aiding and abetting liability in ATS suits and should affirm summary judgment for defendants on those grounds.

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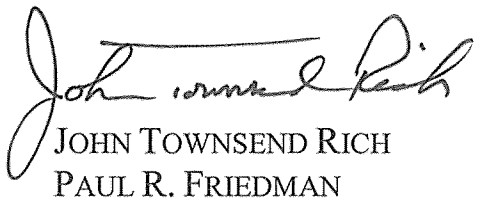
thus indicating the lack of international consensus on a standard lower than "intent to assist." *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia & Herz. v. Serbia & Montenegro)*, No. 91 (I.C.J. Feb. 26, 2007), ¶ 421 (finding it sufficient to rule that the party charged with complicity had not been "aware of the specific intent * * * of the principal perpetrator").

While the *amicus* brief of International Law Scholars William Casto *et al.* states (at 9 n.8) that the international criminal law standard it advocates "is also consistent with existing U.S. case law on aiding and abetting," the brief does not even mention that well-established federal criminal law requires not just knowledge of another's criminal purpose but the sharing of that purpose. *See, e.g.*, 2 Wayne R. LaFave, Substantive Criminal Law § 13.2(d), at 349 (2d ed. 2003), describing *United States v. Peoni*, 100 F.2d 401 (2d Cir. 1938) (L. Hand, J.), as a "leading case" in which

> "the court took the position that the traditional definitions of accomplice liability '* * * all demand that [the accessory] in some sort associate himself with the venture, that he participate in it as something that he wishes to bring about, that he seek by his action to make it succeed. All the words used—even the most colorless, "abet"—carry an implication of purposive attitude towards it.'"

See also Talisman Br. at 78 n.54 (citing other federal cases).

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This *amicus* brief complies with the type-volume limitation of Fed. R. App. P. 29(d), because the brief contains **6851** words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and that number is "no more than one-half the maximum length authorized by these rules for a party's principal brief." *Id.* 29(d). The maximum length authorized for a party's principal brief is 14,000 words. *Id.* 32(a)(7)(B)(i).

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 8th day of May 2007 I caused ten bound copies of the foregoing *amicus* brief of the Chamber of Commerce of the United States of America and the required anti-virus certification to be mailed pursuant to Fed. R. App. P. 25(a)(2)(B)(i) by first-class mail, postage prepaid, addressed to the Acting Clerk of the Court, United States Court of Appeals for the Second Circuit, Daniel Patrick Moynihan U.S. Courthouse, 500 Pearl Street, New York, NY, 10007. In addition, I e-mailed an electronic copy of the brief and the required anti-virus certification in PDF format to the Court pursuant to Local Rule 32 to briefs@ca2.uscourts.gov.

I further certify that, on this 8th day of May 2007, I caused two copies of the foregoing *amicus* brief of the Chamber of Commerce of the United States of America to be served upon each party separately represented by first-class mail addressed to counsel for the parties at the addresses shown below and caused an electronic copy of the brief in PDF format to be served by e-mail upon the parties by e-mailing such a copy to principal counsel for the parties at the e-mail addresses shown below:

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