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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

LARRY BOWOTO, et al.,

Plaintiffs,

v.

CHEVRON CORPORATION, et al.,

Defendants.

Case No. C-99-2506-SI

DECLARATION OF PROFESSOR RALPH G. STEINHARDT

Washington, D.C.

United States of America

I. Introduction

1. I am the Arthur Selwyn Miller Research Professor of Law and International Relations at the George Washington University Law School, in Washington, D.C. I am a member of the District of Columbia bar and admitted to practice in numerous federal courts, including the Supreme Court of the United States. I teach courses in a range of international subjects, including public and private international law and have taught international and comparative human rights at University College Galway (Ireland) and at Oxford University. I am also the co-founder and -director of the Oxford Programme in International Human Rights Law, held every year since 1995 at New College, Oxford (U.K.). My scholarly specialization is the application of international law in domestic courts, and I have published in that field since 1980, including INTERNATIONAL CIVIL LITIGATION, published in 2002 by Lexis/Nexis and THE ALIEN TORT CLAIMS ACT (with D'Amato) published in 1999 by Transnational Publishers. In 2006, West Publishing Company will publish my casebook in international human rights law. My lectures on the human rights obligations of multinational corporations, at the Human Rights Academy of the European University Institute in Florence, have been published by Oxford University Press under the title, "Corporate Responsibility and the International Law of Human Rights: The New *Lex Mercatoria*," in NON-STATE ACTORS AND HUMAN RIGHTS (Alston ed. 2005). My article analyzing some of the issues in this case, entitled "Laying One Bankrupt Critique to Rest: *Sosa v. Alvarez-Machain* and the Future of International Human Rights Litigation in U.S. Courts," appears at 57 VANDERBILT LAW REVIEW 2241-2301 (2004). I have appeared as an expert witness in other alien tort litigation raising the issue of corporate liability. *Presbyterian Church of Sudan v. Talisman*, 244 F. Supp. 2d 289, 315, 316 (S.D.N.Y. 2003) and 374 F. Supp. 2d 331 (S.D.N.Y. 2005). I have also appeared as co-counsel in several cases under the Alien Tort Statute, including counsel to the respondent in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 124 S.Ct. 2739 (2004) ("*Sosa*"). A complete listing of these cases and relevant publications appears in my *curriculum vitae*, attached at Annex 1.

2. I offer this declaration for the purpose of laying before the Court a body of legal principles

pertinent to the Defendants' Motion for Summary Judgment. The Supreme Court has determined that, for the purpose of determining the content of international law, "where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, *as evidence of these, to the works of jurists and commentators* who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is." *The Paquete Habana*, 175 U.S. 677, 700 (1900) (emphasis supplied). I here submit points and authorities in support of the argument that treaties and well-established principles of customary international law, as interpreted in U.S., foreign, and international courts, contemplate the imposition of tort liability on private actors including multinational corporations in certain well-defined circumstances. I offer no opinion on how the complaint in this case will fare under these principles.

II. Summary

3. Post-*Sosa*, the ATS requires that the actionable tort be "committed" in violation of international law, not that international law itself recognize a right to sue or define the scope of accomplice liability. Of course, international law must offer a "specific, universal, and obligatory" norm that the underlying conduct is wrongful, as with torture and crimes against humanity *inter alia*. In consequence, it is *sufficient* if international treaties, customary international law, or "general principles of law recognized by civilized nations" impose aiding-and-abetting liability, enforceable in domestic courts. As shown below, international law in these forms does in fact recognize liability for aiding and abetting fundamental violations of international law. It would also be *sufficient* if the common law defined an aiding-and-abetting cause of action in the circumstances of this case. After all, the ATS itself refers not to "violations of" international law generally but to a "tort only, committed in violation of" international law, establishing that common law tort doctrine determines what conduct amounts to an actionable violation of international law and what conduct does not. As shown below, the common law of torts as understood in 1789 and today recognizes the existence and determines the scope of aiding-and-abetting liability. But nothing in the Supreme Court's decision in *Sosa* or other authorities supports the more sweeping proposition that it is *necessary* under the ATS for international law to provide a "specific, universal, and obligatory" civil cause of action for

aiding-and-abetting liability. The proper question is therefore whether the underlying wrongs alleged in the complaint violated "specific, universal, and obligatory" norms of international law with "the potential for personal liability," not whether international law provides a specific, universal, and obligatory civil cause of action for aiding-and-abetting liability in domestic courts.

III. *Sosa* Establishes that the Common Law, Not the Law of Nations *Per Se*, Defines the Cause of Action under the Alien Tort Statute.

4. In its modern form, the Alien Tort Statute provides that "the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350 ("ATS" or "Section 1350"). In *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), the Supreme Court established that the statute does not itself create a cause of action but that it does *recognize* a cause of action, derived from the common law, for certain violations of international law:

> The jurisdictional grant is best read as having been enacted on the understanding that *the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time.*

124 S.Ct. at 2761 (emphasis supplied). In other words, the ATS requires only that the tort be "committed" in violation of international law, not that international law itself recognize a right to sue.

5. That the cause of action would be defined by the common law and not by the law of nations *per se* is consistent with the hornbook principle that international law does not specify the means of its domestic enforcement. It can define the underlying conduct as wrongful and establish the obligation to assure conformity, without specifying a statute of limitations, or the requirements of standing, or – as in this case – the precise contours of direct and secondary liability. International law "never has been perceived to create or define the civil actions to be made available; by consensus, the states leave that determination to their municipal laws." *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 778 (D.C. Cir. 1984) (*per curiam*), *cert. denied,* 470 U.S. 1003 (1985) (Edwards, J. concurring). (The *Sosa* Court cited Judge Edwards' opinion in *Tel-Oren* with approval. 124 S.Ct. at 2766.) In consequence, "to require international accord on a right to sue, when in fact the law of nations relegates decisions on such questions to the states themselves, would be to effectively nullify the 'law of nations' portion of section 1350." *Id.*

6. As of 1789, according to the Supreme Court, three torts were recognized under the common law as being violations of the law of nations with a potential for personal liability: violation of safe conducts, infringement of the rights of ambassadors, and piracy. *Sosa*, 124 S.Ct. at 2761. The Court also found however that the international law violations recognized at federal common law were not frozen as of 1789. *Id.* at 2761. The recognition of a claim under the "present-day law of nations" as an element of common law is limited to "norm[s] of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized." *Id.* at 2761-62.

7. What the actionable norms across the centuries have in common is a "specific, universal, and obligatory" character, combined with the "potential for personal liability;" indeed, the essence of *Sosa* is that the ATS authorizes federal courts to develop common law rules of liability where the underlying abuse violates such a norm. This is precisely what the lower courts had done – *Sosa* noted with approval, *id.* at 2766 – in *Filártiga*, *supra*; *Karadzic*, 70 F.3d 232, 236 (2d Cir.1995), *cert. denied*, 518 U.S. 1005 (1996); and *In re Estate of Marcos Human Rights Litigation*, 25 F.3d 1467, 1475 (9th Cir. 1994). In fact, the *Sosa* Court did not question a single case in which this demanding standard had been satisfied, other than the arbitrary arrest claim advanced by Alvarez-Machain himself.

8. The *Sosa* court thus apparently recognized that the lower courts have consistently sustained jurisdiction under the ATS only for certain egregious violations of international human rights law. *See, e.g., Hilao v. Estate of Marcos*, 25 F.3d 1467 (9th Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995) (torture, summary execution, arbitrary detention); *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996) (torture, genocide, war crimes); *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996), *cert. denied*, 519 U.S. 830 (1996) (torture, sexual assault); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1232 (N.D. Ga. 2002) (genocide); *Mushikiwabo v. Barayagwiza*, No. 94CIV3267 (JSM), 1996 WL 164496 (S.D.N.Y. Apr. 9, 1996) (genocide); *Cabello v. Fernandez-Larios*, 157 F. Supp. 2d 1345 (S.D. Fla. 2001) (summary execution, war crimes); *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1985) (summary execution); *Paul v. Avril*, 901 F. Supp. 330 (S.D. Fla. 1994) (arbitrary detention).

9. Equally significant, the federal courts have routinely dismissed claims that did not clear this high evidentiary hurdle. *Maugein v. Newmont Mining Corp.*, 298 F. Supp. 2d 1124 (D. Colo. 2004) (defamation is not a violation of international law); *Bigio v. Coca-Cola*, 239 F.3d 440 (2d Cir. 2001) (U.S. corporation's

purchase or lease of property from a foreign government with full knowledge that the property had been unlawfully confiscated on the basis of religion did not establish a violation of the law of nations by the corporation); *Ibrahim v. Titan Corp.*, 391 F. Supp.2d 10 (D.D.C. 2005) (corporations not liable for torture in the absence of state participation); *Guinto v. Marcos*, 654 F. Supp. 276 (S.D. Cal. 1986) (full First Amendment freedoms do not exist at international law); *Zapata v. Quinn*, 707 F. 2d 691 (2d Cir. 1983) (international law does not address claims for loss of money from state lottery distribution system); *Hamid v. Price Waterhouse*, 51 F.3d 1411 (9th Cir. 1995) (fraud is not a violation of the law of nations). In *Flores v. Southern Peru Copper Corporation*, 343 F.3d 140 (2d Cir. 2003), *republished at* 414 F.3d 233 (2d Cir. 2003), for example, the Second Circuit Court of Appeals affirmed that ATS claimants were required to allege a violation of "specific, universal, and obligatory" norms. Without calling into question its analysis in *Filartiga* or *Karadzic*, the *Flores* court concluded that environmental torts were not currently in violation of international law.

10. As a consequence, the rhetoric of caution in *Sosa* – referring for example to the enforceability of "only a very limited set of claims," 124 S.Ct. at 2759, or "the modest number of international law violations with a potential for personal liability," 124 S.Ct. at 2761 – is a dramatic new restriction on ATS litigation only according to those litigants and scholars who systematically exaggerate the reach of the ATS in the first place.

IV. Corporations Are Not In Principle Immune From ATS Liability for Violations of International Law.

11. In *Karadzic*, *supra*, the Second Circuit Court of Appeals articulated what has become a dominant principle of ATS jurisprudence:

> Certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals.

70 F.3d at 239. The *Karadzic* court articulated two separate circumstances under which a nominally private actor might bear international responsibility: the first in those instances when the individual commits one of a narrow class of wrongs identified by treaty and custom as not requiring state action to be considered wrongful (now generally considered "*per se* obligations"), and the second in those less extreme circumstances when the offensive conduct is sufficiently infused with state action to engage international

standards.

12. The first category, a group of *per se* wrongs, comprises conduct requiring no state action as a matter of law. For at least two hundred years, it has been recognized that there are acts or omissions for which international law imposes responsibility on individuals and for which punishment may be imposed, either by international tribunals or by national courts. The Genocide Convention for example requires that persons committing genocide be punished, "whether they are constitutionally responsible rulers, public officials or private individuals." Certain aspects of the war crimes regime of the Geneva Conventions of 1949, especially common Article 3, similarly bind non-state actors when they are parties to an armed conflict. The anti-slavery regime is similar in not requiring state action. *Karadzic*, 70 F.3d at 241-244. These regimes do not distinguish between natural and juridical individuals, and it is implausible that international law would protect a corporation that engaged in the slave trade or produced the contemporary equivalent of Zyklon B for the destruction of Jews in concentration camps.

13. The framers of the ATS certainly understood that private citizens could in principle be sued under § 1350, regardless of state action. A private citizen who tripped a French diplomat on the streets of Philadelphia infringed the rights of diplomats in ways that would be actionable under the ATS. *Sosa*, 124 S.Ct., at 2757. Pirates, the exemplar of intended defendants under the ATS, were not necessarily state actors, but their actions clearly violated international law; indeed, one of the earliest exercises of jurisdiction under the ATS involved an unlawful seizure of property by a non-state actor. *Bolchos v. Darrell*, 3 F. Cas. 810 (D.S.C. 1795). The statute subsequently provided jurisdiction over a child custody dispute that involved a breach of the law of nations. *Adra v. Clift*, 195 F. Supp. 857 (D. Md. 1961). Roughly a century ago, the executive branch concluded that corporations are in principle capable of violating the law of nations or a treaty of the United States for purposes of the ATS. 26 *Op. Att'y Gen.* 250 (1907) (concluding that aliens injured by a private company's diversion of water in violation of a bilateral treaty between Mexico and the United States could sue under the ATS).

14. Equally consistent with precedent and principle is the second category of nominally private conduct that is actionable under the ATS: *viz.*, conduct of private actors that is sufficiently infused with or related to state action as to engage international standards. There is certainly no rule that corporations, regardless of their relationship with a government, enjoy immunity for their state-like or state-related

activities, as when they interrogate detainees, provide public security, work weapons systems in armed conflict, or run prisons. In defining this second category of cognizable wrongs, courts have consistently turned to the interpretation of Section 1983 of the federal anti-discrimination statutes. 42 U.S.C. 1983. *See, e.g., Karadzic*, *supra* at 245; *Hilao*, *supra.* Specifically, as the Second Circuit noted in *Karadzic*, "[t]he 'color of law' jurisprudence under 42 U.S.C. Sec. 1983 is a relevant guide to whether a defendant has engaged in official action for purposes of the Alien Tort Act." 70 F. 3d at 245. In *Karadzic*, the plaintiffs were entitled to take to the trier of fact their allegations that Karadzic acted in concert with Yugoslav officials or with significant Yugoslavian aid.

15. Nothing in *Sosa* undermines this pillar of ATS jurisprudence. To the contrary, citing *Karadzic* with approval, the Supreme Court reasoned that "the determination whether a norm is sufficiently definite to support a cause of action" is "related [to] 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." 124 S.Ct. 2739, 2766 n.20 (2004). For these purposes, the Supreme Court contrasted torture – which does require state action to be internationally unlawful – with genocide, which does not.

V. Aiding-and-Abetting Liability is Established at the Common Law Generally and under the ATS Specifically.

16. To require international consensus on aiding-and-abetting liability is inconsistent with the use of the word "tort" in the statute, which indicates that principles of tort law would be used to effectuate the jurisdiction granted in the ATS. To rule against aiding-and-abetting liability in principle in this case is to erect an unprincipled exception to American tort law generally. The RESTATEMENT (SECOND) OF TORTS §876(b) explicitly recognizes an aiding-and-abetting standard for civil liability:

> For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he (a) does a tortious act in concert with the other or pursuant to a common design with him, or (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.

This standard does not impose liability by association, nor does it erect a vicarious or strict liability. Certainly nothing in the ATS or its interpretation revokes the law of proximate cause. Mere indirect economic benefit from wrongful conduct does not by itself constitute a tort for these purposes. *Bigio v. Coca-Cola*, 239 F.3d 440, 449 (2d. Cir. 2001). Nor would mere knowledge of the tort combined with some benefit from the tort satisfy the secondary liability standards of the common law. But imposing liability for knowingly providing substantial assistance in the commission of wrongful conduct requires no revolutionary insight. It only requires faithful adherence to modern common law principles as well an understanding of the ATS at its inception.

17. Specifically, the founding generation understood that aiding-and-abetting liability for violations of international law was accepted under then-contemporary legal principles. In an opinion interpreting the ATS, Attorney General Bradford concluded in 1795 that the Act covered liability for "committing, *aiding, or abetting*" violations of the laws of war arising extraterritorially. *Breach of Neutrality*, 1 Op. Att'y Gen. 57, 59 (1795) (emphasis supplied). There were no law-of-war treaties or customary norms that defined the "aiding or abetting" standard for these purposes, but the Attorney General could draw on the common law of tort and the understanding that a rigid distinction between committing the act and aiding or abetting it was unjustified given the enormity of the international wrongs at issue. Similarly, the Supreme Court held in 1795 that a French citizen who had aided a U.S. citizen in unlawfully capturing a Dutch ship acted in contravention of the law of nations and was civilly liable for the value of the captured assets, despite the absence of an internationally-defined standard of secondary liability. *Talbot v. Jansen*, 3 U.S. (3 Dall.) 133 (1795). *See also The Amiable Nancy*, 16 U.S. 546, 559 (1818) (holding that owners of a ship used to commit piracy were liable notwithstanding the fact that they were "innocent of a demerit of this transaction, having neither directed it, not countenanced it, nor participated in it in the slightest degree.") Blackstone himself recognized that those who aided or abetted piracy, the paradigmatic ATS norm, were liable as pirates. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, Book IV, Chap. 5 (1769). Here too there was no treaty or law of nations norm that explicitly defined "aiding and abetting" piracy for these purposes, but there was an understanding that piracy and violations of the laws of war were wrongs committed in many forms and with varying degrees of complicity. To hold in principle that aiding-and-abetting principles are unknown for purposes of the ATS is to hold that the ATS would cover the pirate who

boarded and plundered a ship on the high seas but not the helmsman who conned the ship. Neither the statute nor *Sosa* can be parsed in this way.

18. Prior to *Sosa*, as this Court recognized, *Bowoto v. Chevron Texaco Corp.*, 312 F. Supp. 2d 1229, 1247 (N.D. Cal. 2004), the possibility of aiding-and-abetting liability was the rule. Certainly, the Second Circuit recognized this principle when it declared that the ATS includes liability for private defendants who have "acted in concert" with a state to commit torture and other egregious human rights violations. *Karadzic*, 70 F.3d at 244-45. S*ee also Hilao v. Estate of Marcos,* 103 F.3d 767, 776-77 (9th Cir.1996), *cert. denied*, 513 U.S. 1126 (1995); *Carmichael v. United Tech. Corp.*, 835 F.2d 109, 113-14 (5th Cir.1988);; *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117, 128 (E.D.N.Y. 2000); *Eastman Kodak Co. v. Kavlin*, 978 F. Supp. 1078, 1091(S.D. Fla. 1997). *Accord*, *Burnett v. al Baraka Inv. & Dev. Corp.*, 274 F. Supp. 2d 86, 99-100 (D.D.C. 2003); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1355-56 (N.D. Ga. 2002). In part, the conclusion that federal common law authorizes aiding-and-abetting liability under the ATS for human rights violations is driven by the legislative history of the Torture Victim Protection Act ("TVPA"), 28 U.S.C. §1350 note. *Karadzic*, *supra*, at 241. *Mehinovich, supra*; *Doe v. Saravia*, *supra*.

19. Nothing in *Sosa* called that conclusion into question, as the majority of courts *post-Sosa* has recognized by ruling that aiding-and-abetting liability is available under the ATS for tortious violations of international law. *See, e.g.*, *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1157 (11th Cir. 2005) (the ATS "permit[s] parties injured by acts of torture, crimes against humanity and the like to pursue recovery, not only against those who are directly liable, but against those that conspired with or assisted those directly liable on conspiracy or accomplice liability theory.") *Accord*, *Presbyterian Church of Sudan, supra*; *Doe v. Saravia*, 348 F.Supp. 2d 1112 (E.D.Cal. 2004); *In re Agent Orange Product Liability Litigation*, 373 F.Supp.2d 7, 2005 WL 729177 (E.D.N.Y. 2005); *In re Terrorist Attacks on September 11, 2001*, 349 F.Supp.2d 765, 826 (S.D.N.Y. 2005). *Contra In re South African Apartheid Litigation*, 346 F. Supp. 2d 538 (S.D.N.Y. 2004); *Doe v. Exxon Mobil Corp.*, 393 F.Supp.2d 20 (D.D.C. 2005).

VI. Aiding-and–Abetting Liability is Generally Recognized at International Law for Knowingly Providing Substantial Assistance to the Tortfeasor.

20. Even if *Sosa* requires plaintiffs to show that aiding-and-abetting liability is "specific, universal and obligatory" under international law, it is far too late in the development of international human rights

standards to contend that individual aiders and abettors of egregious human rights violations escape personal liability.

21. *Custom*. Customary international law provides a "specific, universal, and obligatory" norm against aiding-and-abetting; indeed, the United States government recently instructed U.S. military commissions to apply this standard as pre-existing international law. The fact that these cases arise in a criminal setting cannot be dispositive under *Sosa*: Blackstone's three paradigmatic international law violations were also considered criminal, but the Framers understood that "*the common law would provide a cause of action*" because international law recognized a potential for individual liability. 124 S.Ct. at 2764-65 (emphasis supplied). In identifying the three offenses that gave rise to liability under the traditional law of nations when the ATS was enacted, the Supreme Court relied on the traditional evidence used to establish the content of international law in U.S. courts:

> where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators.

The Paquete Habana, 175 U.S. 677, 700 (1900). In practice, the courts have turned to "diplomatic acts and instructions as well as public measures and other governmental acts and official statements of policy, whether they are unilateral or undertaken in cooperation with other states...." AMERICAN LAW INSTITUTE, RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES ("RESTATEMENT (THIRD)"), § 102(2), comment b at 25. Widely ratified treaties, or a series of treaties in consistent form, may also constitute evidence of customary law in both domestic courts, *Filártiga*, *supra*, and in the International Court of Justice, *Nottebohm Case (Liech. v. Guat)*, Second Phase, 1955 I.C.J. Rep. 4, 21-23. Evidentiary weight may be given to resolutions of international organizations, such as the United Nations or the Organization of American States, the decisions of international and national courts and arbitral tribunals, as well as the opinions of prominent scholars, not because they are binding in themselves but because they can qualify as evidence of customary international law, *i.e.*, uniform state practice combined with *opinio juris*. In short, courts with ATS cases are obliged to be "vigilant doorkeep[ers]" according to Justice Souter in *Sosa*, but the standards for vigilance have been the law of the United States for decades, if not centuries.

22. These sources establish a standard for aiding-and abetting international wrongs that is

sufficiently "specific, universal, and obligatory" to satisfy the *Sosa* standard. The concept of secondary or indirect liability is especially well-developed with respect to genocide, war crimes, and similar wrongs. The Statute of the International Military Tribunal, established to try Nazi war criminals and following principles accepted as customary international law, provided that

> [l]eaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such a plan

Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal, art. 6, 82 U.N.T.S. 279. Allied Control Council Law No. 10, which framed domestic prosecutions of German war criminals, similarly recognized criminal liability for principals who committed war crimes and acts of genocide and for those who were connected with plans or enterprises involving the commission of such crimes. The standard was sufficiently definite to allow both convictions and acquittals, and the cases in aggregate establish that *knowingly providing substantial assistance* in the commission of these crimes – the international version of the Restatement standard for torts, *supra* – has long violated international law.

23. In *United States v. Ohlendorf*, for example, the United States Military Tribunal concluded that defendant Klingelhoefer could be convicted "as an accessory" because in turning over lists of Communists "he was aware that the people listed would be executed when found." 4 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10 ("TR. WAR CRIM."), 1, 569 (1949). In *U.S. v. Flick*, Steinbrinck was convicted "under settled legal principles" for "knowingly" contributing money to an organization committing widespread abuses, even though it was "unthinkable" he would "willingly be a party" to atrocities. 6 TR. WAR CRIM., 1217, 1222 (1952). Similarly, in *In re Tesch,* certain industrialists were sentenced to death for selling poison gas to Auschwitz "with knowledge" that the gas would be used to kill prisoners. 13 *Int'l L. Rep.* 250 (1947). By contrast, certain industrialists who ran I.G. Farben were acquitted on the ground that they honestly believed that Zyklon B would be used as a delousing agent. *United States v. Krauch,* 8 TR. WAR CRIM. 1169 (1948).

24. Drawing in part on the jurisprudence of the Nuremberg Tribunal, the International Criminal Tribunal for the Former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR")

have applied the customary international standard for aiding-and-abetting liability in a variety of settings. Because the ICTY is "only empowered to apply" standards that are "beyond any doubt customary law," *Prosecutor v. Tadic* (Case No. IT-94-1-T), Opinion and Judgment, May 7, 1997, at ¶¶ 661-62, its judgements should be accorded "substantial weight" in determining the content of customary international law, RESTATEMENT (THIRD), § 103(2). Because the United States government "has explicitly endorsed the approach of the ICTY Statute and the convening of the Tribunal," domestic courts have routinely found the Tribunals' statutes and jurisprudence to be "particularly relevant" sources of international law in ATS cases and relied on that jurisprudence in recognizing aiding-and-abetting liability under the ATS. *Mehinovic*, 198 F.Supp.2d at 1344, and nn. 21, 22, 1355-56; *Presbyterian Church of Sudan, supra.*

25. In *Tadic*, the tribunal conducted "a detailed investigation" of individual responsibility under international law and articulated an aiding-and-abetting standard considered customary international law. *Prosecutor v. Delalic* (Case No. IT-96-21-T), Trial Judgment, Nov. 16, 1998, ¶¶ 321, 325-29 (citing *Tadic*, at ¶¶ 669, 674-91). The result of this careful review of precedent and other international authorities is a standard requiring that the assistance be "direct and substantial." *Tadic*, at ¶¶ 691-2; *Delalic*, at ¶ 326; *Prosecutor v. Furundzija* (Case No. IT-95-17/1-T) Judgment, June 25, 1999, at ¶ 61. Specifically, *Furundzija* defined the *actus reus* element of aiding-and abetting as "practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime." The ICTR's standard similarly finds the *actus reus* in "all acts of assistance in the form of either physical or moral support" that "substantially contributes to the commission of the crime." *Prosecutor v. Musema* (Case No. ICTR-96-13-T), Judgment, Jan. 27, 2000, at ¶ 126. Under this standard, "silent approval" or mere presence is not a convictable offence, at least among civilians, though a spectator may aid and abet illegal conduct if he occupies some position of authority. The act in short must have "made some difference to the course of events," *Furundzija*, at ¶ 221, a standard sufficiently definite to support the conviction of a special police force commander for violating the laws of war and the prohibition of torture by substantially contributing to the commission of those wrongs.

26. *Furundzija* also defines the *mens rea* requirement of aiding-and-abetting liability under international law. The accomplice need not share the *mens rea* of the principal to have a culpable mental state, but he or she must have actual or constructive knowledge that his or her actions would aid in the

commission of the offence. Under that standard, defendants who acted as drivers for co-defendants who murdered Allied airmen in World War II were acquitted because they did not know the principals' intentions. By contrast, defendants who are aware of the consequences of their actions may satisfy the *mens rea* requirement.

27. The United States government itself has recognized that aiding-and-abetting is specifically defined in international law. United States military commissions prosecute aiding-and-abetting a host of crimes, including war crimes, murder by an unprivileged belligerent, spying, terrorism, hijacking, and perjury before a military commission. Military Commission Instruction No.2, Art. 6(A), 6(B), 6(C) (April 30, 2003). The government defines aiding-and-abetting *more* broadly than the general international standard in that the government's definition does not require that assistance have a substantial effect on the perpetration of the crime. *Id.* at 6(c)(1) (aiding-and-abetting is "in any ... way facilitating the commission" of an offense, with knowledge the act would aid or abet). The military commission standard "derives from the law of armed conflict," *i.e.* a branch of international law, and is "declarative of existing law." *Id.* at art. 3(A). Indeed, the government believes that aiding-and-abetting is so well established and defined in international law that, although commissions cannot prosecute offenses that "did not exist prior to the conduct in question," commissions may prosecute aiding-and-abetting "crimes that occurred prior to [the] effective date" of Instruction No. 2. *Id.*

28. In *Boim v. Quranic Literacy Institute*, 291 F.3d 1000 (7th Cir. 2002), the government of the United States successfully argued that aiding-and-abetting liability is available under 18 U.S.C. § 2333(a), which permits U.S. nationals "injured.., by reason of an act of international terrorism" to sue for damages. The government noted that (like the ATS), section 2333(a) creates a common law tort claim and "precisely specifies the range of possible plaintiffs, but.., in no way restricts.., the range of possible defendants." *Brief for the United States as Amicus Curiae Supporting Affirmance* ("*Boim Br.*") at 914 Thus, any restrictions on who may be held liable "must arise, if at all, from background tort principles that Congress presumably intended to incorporate." *Id.* at 10. Critically, in that common law tort claim, the government argued that "those principles include aiding/abetting liability" and articulated the same standard of aiding-and-abetting as this Court defined under international law. According to the government, liability arises "when the defendant knowingly and substantially assisted tortious conduct." *Boim Br.*, at 9. *Id.* at 9. The Seventh

Circuit adopted the government's reasoning virtually verbatim. 291 F.3d at 1010. If "settled principles of civil liability" allowed aiding-and-abetting liability under section 2333(a), *id.* at 10, those principles must similarly apply to claims under the ATS.

29. *General principles.* Domestic courts may also consider "general principles of law recognized by civilized nations" as a source of international law. *See* Statute of the International Court of Justice, art. 38(1)(c). Section 102(1)(c) of the RESTATEMENT (THIRD) specifically provides that "[a] rule of international law is one that has been accepted as such by the international community of states . . . by derivation from general principles common to the major legal systems of the world."

30. Rather than work through every legal system in the world, I have undertaken a representative sampling of various legal systems to determine whether there are general principles of civil aiding-and-abetting liability. I have discovered no domestic legal system that fails to recognize civil liability for accomplices and joint-tortfeasors. To the contrary, legal systems in the common law tradition, the civil law tradition, and the Islamic law tradition routinely impose "indirect" liability for contributing to or causing damage to another person. *See generally,* W.V.H. Rogers, ed., UNIFICATION OF TORT LAW: MULTIPLE TORTFEASORS *passim* (2004) (hereinafter "Rogers"); R. YOUNGS, ENGLISH, FRENCH, AND GERMAN COMPARATIVE LAW 288-9 (1998). Although the precise details of secondary liability vary (especially on the vexed, here irrelevant question of a joint tortfeasor's responsibility for the entire damage to the victim), at a minimum the common principle – consistent with the international standard and the domestic tort standard *supra* – is that *knowingly providing substantial assistance* in the commission of wrongful conduct triggers civil sanctions.

31. Joint liability (or "solidarity") in tort is universally recognized. For example:

- *Austria*: "According to §1301 of the Austrian Civil Code. . ., two or more persons can be held liable for the same 'unlawful' harm if their behaviour [*sic*] has 'jointly contributed' thereto, be it *directly or indirectly*." Bernhard A. Koch & Peter Schwarzenegger, *Multiple Tortfeasors under Austrian Law, in* Rogers, *supra*, at 9.
- *Czech Republic*: "in principle, it is not necessary to draw a line, in the stipulation of joint liability, between the manner of involvement and the form of involvement of the individual tortfeasors. . . ." Luboš Tichy, *Multiple Tortfeasors under Czech Law*, in Rogers, *supra*, at

54.

- *Germany*: Bürgerliches Gesetzbuch [BGB] [Civil Code], art. 830: "If several persons have caused any damage by an act committed in common, each is responsible for the damage. . . . Instigators and *accomplices* are in the same position as joint-doers."
- *Israel*: Section 12 of the Civil Wrong Ordinance (CWO) provides that "any person who joins or *aids in*, authorizes, counsels, commands, procures, or ratifies any act done or to be done, or any omission made or to be made, by any other person, shall be liable for such act or omission." Israel Gilead, *Multiple Tortfeasors under Israeli Law*, in Rogers, *supra*, at 103.
- *Japan*: Minpo (Japanese Civil Code), art. 719: "When damages have been caused to another person by an unlawful act committed in common by several persons, they are all jointly bound to make compensation therefore. . . . *Instigators and accomplices are considered as joint doers*." *See* H. ODA, JAPANESE LAW 211 (1999)
- *South Africa*: "[A] person who does not participate in the wrongful act which inflicts the harm but who assists, aids or abets the wrongdoer in any way to commit such an act, should also be considered to be a joint wrongdoer since such a person is in principle liable ex delicto under South African law." Johann Neethling, *Multiple Tortfeasors under South African Law*, in Rogers, *supra*, at 176-7.
- *Spain*: "The decisions of the Spanish Supreme Court apply solidarity as a general rule even if the persons contributing to causing the damage have not acted as co-authors (*i.e.* as persons who are acting with common intent) and even though the behavior of each one of them has not been sufficient, by itself, to cause the whole damage." Rogers, *supra*, at 192.
- *Draft Principles of European Law*, Art. 9:101: "Liability is solidary [*sic*] where the whole or a distinct part of the damage suffered by the victim is attributable to two or more persons. Liability is solidary [*sic*] where . . . a person knowingly participates in or instigates or encourages wrongdoing by others which causes damage to the victim." W.V. Horton Rogers, *Comparative Report on Multiple Tortfeasors*, in Rogers, *supra*, at 308.

There must generally exist a causal connection between each actor's conduct and the underlying injury, and virtually all states require some showing of a "common design" – captured in the requirement of "knowing"

assistance, *supra*. *De minimis* contributions to the underlying wrong do not generally trigger liability.

32. The predictable variation at the margins of the international aiding-and-abetting standard – whether within international institutions or among the municipal legal systems around the world – does not undermine its core meaning. In *United States v. Smith*, 5 Wheat. 153 (1820), the Supreme Court had to determine the international definition of piracy. The Court undertook an encyclopedic analysis of authorities in various nations and multiple languages. Applying the evidentiary standard later articulated in *Paquete Habana,* the *Smith* court found a sufficient consensus that piracy was a "crime of settled and determinate nature." Acknowledging controversy in some particulars, the Court concluded that "*whatever may be the diversity of definitions in other respects*, all writers concur in holding that robbery or forcible depredations upon the sea, *animo furandi* [*i.e.*, with the intention to steal] is piracy." 18 U.S. (5 Wheat.) 161 (emphasis supplied).Tthe Court determined ruled that piracy had been defined by the law of nations "with reasonable certainty." *Id.*, at 160. Similarly, the international definition of aiding and abetting for purposes of the ATS may less settled elements, such as extending "moral support" to the tortfeasor and yet be reasonably certain for putposes of the ATS. Indeed, addressing the "novel" moral support standard after the *Sosa* decision, Judge Cote concluded in *Presbyterian Church*, *supra*, that:

> The ubiquity of disagreement among courts and commentators regarding the fringes of customary international legal norms is unsurprising. The existence of such peripheral disagreement does not, however, impugn the core principles that form the foundation of customary international legal norms – principles about which there is no disagreement.

374 F. Supp. 2d at 340-1. Judge Cote's approach to the aiding-and-abetting standard is correct, consistent with *Smith* and *Sosa*, and should be the prevailing rule here.

33. The United Nations International Law Commission's Articles on State Responsibility ("ILCASR") do not undermine the conclusion that international law – in the form of custom and general principles – recognizes aiding-and-abetting liability; indeed, the ILCASR are not directly relevant to the issue of corporate responsibility at all. As the title suggests, these Articles, drafted by scholars and jurists in their private capacities rather than by government representatives, offer principles governing the responsibility of *states* for internationally wrongful acts. They were never intended to and do not offer a comprehensive and exclusive restatement of all forms of responsibility under international law. As shown

above, for example, it is well-established that individuals, whether acting under color of authority or not, can be liable for violations of international law, as for example if they commit acts of piracy, slave trading, or genocide. But these and the other examples of individual responsibility laid out below are explicitly *not* the subject of the ILC Articles. It follows that the Articles can offer no guidance on the essential question at this stage in this litigation, namely whether international law distinguishes in principle between natural and juridical persons on the question of responsibility.

34. Nor does the distinction between civil and criminal aiding-and-abetting standards vitiate the existence of aiding-and-abetting liability under the ATS. Certainly, nothing in the *Sosa* court's foundational analysis turns on the distinction between civil and criminal law. It was well-understood in 1789 that both civil and criminal liability could arise out of a single act. 2 William Blackstone COMMENTARIES, at *123. The *Sosa* Court noted that, although Blackstone's three paradigmatic international law violations were considered criminal, the Framers also understood that "the common law would provide a cause of action" because international law recognized a potential for individual liability. 124 S. Ct. at 2764-65. Post-*Sosa*, the majority of courts to address the issue has utilized international criminal standards to define the scope of ATS liability. *Presbyterian Church of Sudan*, *supra*, 374 F.Supp.2d at 338-41(holding that standards promulgated by the *ad hoc* tribunals for Yugoslavia and Rwanda "occupy a special role in enunciating the current content of customary international law norms"); *Doe v. Saravia*, 348 F. Supp. 2d 1112, 1153-57 (E.D.Cal. 2004) (utilizing a variety of international sources to define aiding-and-abetting liability under the TVPA and the ATS). *Accord*, *Doe I v. Liu Qi*, 349 F.Supp.2d 1258, 1330-1333 n. 48 (N.D.Cal. 2004); *In re Agent Orange*, 373 F.Supp.2d 7 (E.D.N.Y. 2005). Similarly, in addressing liability under the Torture Victim Protection Act ("TVPA"), the Eleventh Circuit Court of Appeals rejected the argument that international criminal standards of command responsibility were irrelevant to the determination of domestic civil liability:

> The TVPA allows plaintiffs to bring civil actions against commanders, whereas much of the relevant authority on the command responsibility doctrine has arisen in the context of criminal proceedings before international tribunals. We find no indication from legislative history, however, that when Congress adopted the doctrine from international law, it intended courts to draw any distinction in their application of command responsibility in the civil arena.

Ford ex rel Estate of Ford v. Garcia, 289 F.3d 1283, 1289 n. 6 (11th Cir. 2002).

VII. Conclusion

35. *Sosa* reaffirmed the practice of ATS courts which had imposed liability under the statute "for the modest number of international law violations with a potential for *personal* liability." 124 S.Ct. at 2761 (emphasis supplied). This Court among many others has correctly determined under international law and under federal common law that the "person" facing liability can be either natural or juridical. As a consequence, the burden rests on those who would carve out a special immunity under the ATS for one kind of "person" and not the other kind. Nothing in international law authorizes or justifies so rigid a distinction.

Respectfully submitted,

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