No. 10-56739

IN THE

United States Court of Appeals for the Ninth Circuit

JOHN DOE I, individually and on behalf of proposed class members, JOHN DOE II, individually and on behalf of proposed class members, JOHN DOE III, individually and on behalf of proposed class members, and GLOBAL EXCHANGE,

Plaintiffs-Appellants,

- v. -

NESTLE USA, INC., ARCHER DANIELS MIDLAND COMPANY, CARGILL INCORPORATED COMPANY, CARGILL COCOA,

Defendants-Appellees.

On Appeal from a Decision of the United States District Court for the Central District of California

AMICUS BRIEF OF NATIONAL ASSOCIATION OF MANUFACTURERS AND PROFESSORS OF INTERNATIONAL AND FOREIGN RELATIONS LAW AND FEDERAL JURISDICTION IN SUPPORT OF DEFENDANTS-APPELLEES

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INTEREST OF *AMICI CURIAE*

This brief amicus curiae is respectfully submitted by the National Association of Manufacturers (NAM) and by law professors with expertise in international law, U.S. foreign relations law and U.S. federal jurisdiction. The NAM is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. Its mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media and the general public about the vital role of manufacturing to America's economic future and living standards.

Amici believe the instant case raises important issues concerning the application of the Alien Tort Statute (ATS), 28 U.S.C. §1350, the proper approach for determining customary international law, and the federal courts' limited role in developing federal common law. They write to encourage the proper application of international law and federal common law in ATS litigation.[1]

SUMMARY OF ARGUMENT

Plaintiffs in this case seek to hold corporate defendants liable under the Alien Tort Statute (ATS), 28 U.S.C. §1350, for aiding and abetting international

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[1] This brief was not authored in whole or in part by persons other than amici curiae and their Counsel. Affiliations are provided for identification purposes only. This brief is filed with the consent of Plaintiffs-Appellees and Defendants-Appellants.

law violations respecting forced labor and child labor by unidentified farmers in the Ivory Coast. We believe the District Court was correct in dismissing these claims. First, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), directs that only violations of well-established, specifically defined, and universally agreed-upon international law rules may be recognized under the ATS. In this case, the international legal consensus required by *Sosa* is absent for at least two essential aspects of the Plaintiffs' claim. There is no international consensus that aiding and abetting liability may be based on a mens rea of mere knowledge of unlawful activity by others rather than sharing in the purpose of that activity; and there likewise is no consensus that private corporations can be liable for violations of customary international law.

Moreover, even if Plaintiffs could show the necessary international consensus, recognition of an ATS action for the violations alleged here would be an inappropriate expansion of federal common law. Those violations, involving non-U.S. farmers' infringement of alleged obligations to their own countrymen, are radically different from the violations that were the focus of the ATS at the time of its enactment — conduct that directly affronted, and thereby jeopardized relations with, other nations. Recognition of an ATS action for the entirely different violations at issue here would exceed the sharply limited authority of federal courts

to expand implied rights of action, and the equally sharp limits on judicial interference in foreign affairs.

ARGUMENT

I. A Defendant's Liability Under the Alien Tort Statute is Governed by International Law and Is Further Subject to the Limiting Principles Recognized by the U.S. Supreme Court in *Sosa*.

A. An ATS Plaintiff Must as a Threshold Matter Show that the Particular Defendant's Conduct Violated International Law.

An essential element in any ATS action is a claim that the particular defendant's conduct violated international law. It is not sufficient to show that an international norm was violated by *someone*, while treating the liability of a particular defendant as a matter for domestic law. Rather, the very text of the ATS requires the defendant himself to have violated international law, as it provides jurisdiction only over torts "committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. §1350.[2] Thus, "the scope of liability for ATS violations should be derived from international law," and principles borrowed from domestic law "cannot render conduct actionable under the ATS." *Presbyterian Church v. Talisman Energy Inc.*, 582 F.3d 244, 258 (2d Cir. 2009); *see also Abagninin v. Amvac Chemical Corp.*, 545 F.3d 733, 737-38 (9th Cir. 2008) (plaintiffs must "state a claim … under prevailing norms of international law"). If

[2] Plaintiffs in this case predicate their claims entirely on the "the violation of law of nations clause" of the ATS. This case does not deal with the scope of the "[violation of] a treaty of the United States" clause.

the defendants have not violated international law, Plaintiffs' claims against them simply are not claims for "tort[s] … in violation of the law of nations …."

Sosa itself confirms this principle. *Sosa* held that the ATS did not directly create a cause of action, 542 U.S. at 712-14, but that Congress in passing the ATS tacitly acknowledged federal courts' authority to recognize causes of action for "the modest number of international law violations with a potential for personal liability at the time." *Id.* at 724. The Court added that with respect to newer violations not recognized in 1789 but sharing certain "features of the 18th-century paradigms" on which the ATS was premised,[3] courts could, in appropriately limited circumstances, "recogniz[e] a claim under the law of nations as an element of common law." *Id.* at 725.

Thus, because the jurisdiction conferred by the ATS is limited to "recogniz[ing]" established "claim[s] under the law of nations," *id.* at 725, an "international law violation[]," *id.* at 724, by the particular defendant remains a necessary (but not sufficient) element in that inquiry. Put differently, neither the ATS nor *Sosa* authorizes U.S. courts to create common law liability for conduct that does *not* violate international law. Confirming this point, *Sosa* directed that courts must determine "whether international law extends the scope of liability for

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[3] The Court identified those paradigms as "violation of safe conducts, infringement of the rights of ambassadors, and piracy." 542 U.S. at 724.

a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual." *Id.* at 732 n.20. *See also id.* at 760 (Breyer, J., concurring) (under the Court's approach "to qualify for recognition under the ATS a norm of international law … must extend liability to the type of perpetrator (e.g., a private actor) the plaintiff seeks to sue").

Thus, contrary to plaintiffs' contention, the liability of a particular defendant is not a mere ancillary question whose answer may be borrowed from domestic law. Liability under the ATS requires a showing that "*international law* extends the scope of liability for a violation of a given norm to the perpetrator being sued." *Id.* at 732 n.20 (emphasis added).

B. *Sosa* Directs that Only a Small Class of Universally Recognized International Law Violations May be Recognized under the ATS.

Sosa repeatedly emphasized the great caution courts should use in recognizing causes of action based on international law rules not extant at the time the ATS was passed. 542 U.S. at 725 (emphasizing "judicial caution" in implementing ATS); *id.* at 727 (noting a "high bar to new private causes of action for violating international law"); *id.* at 728 (calling for "great caution").

Most notably, the Court warned that "[w]e have no congressional mandate *to seek out and define new and debatable violations of the law of nations.*" *Id.* (emphasis added). Accordingly, courts may not recognize ATS claims "for violations of any international norm with less definite content and acceptance

among civilized nations than the historical paradigms familiar when [the ATS] was enacted." *Id.* at 732. Thus a domestic court in creating ATS causes of action may not choose among competing versions of what international law requires or should require.

Sosa also emphasized that even where international law rules obtain undisputed acceptance as a general matter, they must be defined to a level of specificity that plainly encompasses the particular defendant's alleged conduct. *See id.* at 732-33 & n.21. It is not sufficient to show uncontroversial agreement upon an abstract rule; there must also be uncontroversial agreement that the defendant's specific alleged conduct violated that rule. In *Sosa*, it was immaterial that a rule against arbitrary detention in some forms might command universal agreement, because there was no widespread agreement that the *specific* conduct in *Sosa* (detention for a short period of time) violated that rule. *Id*. at 737.

Sosa's insistence on specificity comports with its reading of the ATS as making actionable only undisputed, binding rules of international law. Norms or principles may be widely subscribed to in the abstract while many specific applications remain hotly disputed. Requiring that general acceptance extend to the specific applications at issue further ensures that courts are not minting new international law by extending abstract principles, nor picking sides in international law debates.

II. Plaintiffs' Proposed Knowledge Standard for Aiding and Abetting Liability Does Not Reflect a Well-Established, Specifically Defined and Universally Agreed-UponRule of Customary International Law Satisfying the Requirements of *Sosa.*

The corporate defendants in this case are not alleged to have committed any of the forced and child labor violations of which Plaintiffs complain. They did not employ Plaintiffs or in any way directly engage in the underlying conduct claimed to violate international law. Rather, they are in this case solely on a theory of accessorial liability[4] – that they should be held responsible for others' violations of international law because they purportedly aided and abetted those violations by purchasing cocoa and assisting the production of cocoa with knowledge of labor violations within the farming industry.

Plaintiffs' proposed *mens rea* standard for such liability requiring only knowledge of unlawful activity by others, rather than sharing in the purpose of that activity, does not enjoy the requisite level of international consensus. That is fatal under *Sosa*, which requires, at a minimum, that the defendant's alleged conduct be universally recognized as a violation of international law.

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[4] We do not address plaintiffs' agency theory – that the direct employers of plaintiffs were acting as agents of the corporate defendants – and instead rest on the District Court's able rejection of this claim.

A. As A Matter of International Law, There Is No Consensus That Mere Knowledge is a Sufficient *Mens Rea* for Aiding and Abetting Liability.

The standard for aiding and abetting liability does not reflect a well-established, universally agreed-to, and sufficiently specific rule of international law as required by *Sosa*. There is considerable controversy over the required *mens rea* for such liability – whether a defendant must share in the criminal purpose of the principal wrongdoer or whether it is sufficient that a defendant merely *know* that a violation will (or will likely) occur.[5]

Given the uncertainty in international law, aiding and abetting claims premised upon mere knowledge do not meet *Sosa*'s strict standard. That view accords with recent decisions of the Second and Fourth Circuits. *Talisman*, 582 F.3d at 258; *Aziz v. Alcolac*, No. 10-1908, slip op. at 18 (4th Cir. Sept. 19, 2011); *see also Khulumani v. Barclays National Bank Ltd.*, 504 F.3d 254, 277 (2d Cir. 2007) (Katzmann, J., concurring); *id.* at 333. [6]

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[5] While we focus on *mens rea*, we also think that there is also no well-defined standard for the *actus reus* element of aiding and abetting liability, particularly where, as here, the alleged aiding and abetting consists of mere commercial activity. It is not clear to what extent a defendant's acts must give "substantial assistance" to the wrongful act nor what would constitute "substantial assistance" in the commercial context.

[6] Only the panel majority in *Doe v. Exxon Mobil Corp.*, No. 09-7125 (D.C. Cir. July 8, 2011), is to the contrary. That opinion erred in the same manner that Plaintiffs in this case err – most notably, in the failure to require a *Sosa*-compliant international law consensus on the relevant issues.

Plaintiffs argue that "[t]he correct *mens rea* standard for aiding and abetting violations of international law is 'knowledge that the acts assist the commission of the offense'" (quoting *Prosecutor v. Furundzija*, Case No. IT-95-17/1 (ICTY 1998), at ¶¶ 245-49). We think that conclusion is incorrect and arises from three critical errors Plaintiffs make in analyzing customary international law (CIL).

First, Plaintiffs rely on CIL sources that, standing alone, are inadequate. As the Second Circuit stated in *Flores v. Southern Peru Copper Corp*., 414 F.3d 233, 250 (2d Cir. 2003), "the usage and practice of States – as opposed to judicial decisions or the works of scholars – constitute the primary sources of customary international law." *See also The Paquete Habana*, 175 U.S. 677 (1900) (finding CIL law rules on blockade by examining nations' actual prior conduct in blockade situations). Plaintiffs, however, do not point to *any* "usage and practice of States" supporting their proffered *mens rea* standard.

Instead, Plaintiffs rely almost entirely on decisions of the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and various *ad hoc* military tribunals established to try Nazi officials and collaborators after World War II. While these tribunals' opinions may be useful supplementary sources (particularly if they themselves collect evidence of nations' actual practices), they are not primary sources of CIL. Decisions of international tribunals "can be secondary evidence of what nations'

practices are, if it appears that the tribunal sought to identify nations' practices and persuasively assembled evidence of them. But tribunal decisions are not authoritative in themselves; they are only as persuasive as the authorities on which they rely."[7]

Second, the tribunal decisions that Plaintiffs invoke provide weak support for their proposed *mens rea* standard. The ICTR and ICTY decisions principally arose in the entirely distinct factual setting of individual liability for members of a criminal paramilitary group. *See, e.g.*, *Prosecutor v. Furundzija*, Case No. IT-95-17/1 (ICTY 1998); *Prosecutor v. Vasiljevic*, Case No. IT-98-32-A (ICTY 2004). Whatever authority they provide as to nations' practices regarding participants in such groups, they provide no clear analogue remotely applicable to commercial activities such as buying ordinary products from sellers who are claimed to have committed abuses in the production process.

Further, it may be questioned whether the *mens rea* discussion in these opinions was necessary to their holdings. Liability in those cases likely could have been premised on co-participation in a joint criminal enterprise (such as a rogue paramilitary unit), which is a distinct category of criminal liability as a principal,

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[7] Michael D. Ramsey, *International Law Limits on Investor Liability in Human Rights Litigation*, 50 Harvard Int'l L.J. 271, 306 (2009).

not simply an accessory. *See* Gerhard Werle, *Principles of International Criminal Law* 120-23 (2005) (discussing this category of liability).

Moreover, even the ICTY jurisprudence has not settled on a *mens rea* standard for accessorial liability. Although the *Furundzija* decision expressly adopts a "knowledge" standard, a subsequent decision, *Vasiljevic*, requires that the aider and abettor's act be "specifically directed to assist … the perpetration of a specific crime." *See Khulumani*, 504 F.3d at 278 n.15 (Katzmann, J., concurring) (noting this tension).

Finally, and importantly, the ICTY/ICTR decisions did not themselves provide material authority for their views (aside from the post-Nazi-era military tribunals, which, as we describe below, were inconclusive). The ICTY and ICTR did not point to the "usage and practice of States" regarding *mens rea*. To the contrary, they seem to have recognized that the law was undeveloped, and applied the rules they thought most reasonable. They cannot be understood as applying authoritative and well-settled CIL.

Plaintiffs also heavily rely (as did the ICTR and ICTY) on decisions of the Nuremberg era tribunals adjudicating Nazi war crimes. These tribunals, however, also reached inconsistent conclusions. As the ICTY conceded, for example, the *Hechingen Deportation* cases initially adopted a broad standard for indirect liability but were partially reversed on appeal (and some defendants were

exonerated) because "the aider and abettor *has to have acted out of the same cast of mind as the principal*." *See Furundzija*, ¶ 240 & n.262 (emphasis added) (quoting and discussing the *Hechingen Deportation* cases). Another key case, *United States v. Von Weizsacker*, involved a German banker who lent money to Nazi enterprises knowing of their crimes. The court found this insufficient for aiding-and-abetting liability. *See* 14 *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Order No. 10,* at 308, 622 (1997) (British Military Court, 1948); *see also Talisman*, 582 F.3d at 259 (relying on *Von Weizsacker* and stating that "international law at time of the Nuremberg trials recognized aiding and abetting liability only for purposeful conduct"); *Khulumani*, 504 F.3d at 276 (Katzmann, J., concurring) (similar).[8] Although some tribunal decisions from this period do suggest a lower *mens rea,* no consensus can be found. In sum, these decisions reflect varying and incompletely reasoned approaches, adopted by various authorities – German courts, British military courts, and American military courts – operating under different constituting documents, with little precedent and in the exigency of post-war occupation.

[8] Plaintiffs claim that the *Von Weizsacker* decision rested upon insufficient *actus reus*, rather than insufficient *mens rea*. This is pure speculation, however, as the tribunal did not discuss its decision in those terms.

Unsurprisingly, no single overarching position on aiding-and-abetting *mens rea* can be found in them.[9]

Nor did the Nazi-era cases inspire any subsequent national and international consensus on the question of *mens rea*. For example, the Model Penal Code adopted a view of accomplice liability that required the accomplice to act for the purpose of facilitating the crime. *See Model Penal Code* §2.06 (1962). This is consistent with how federal courts have construed the federal aiding-and-abetting statute, 18 U.S.C. §2. *See United States v. Hamilton*, 334 F.3d 170, 180 (2d Cir. 2003) (government must prove that "the defendant acted with the intent to contribute to the success of the underlying crime.").[10]

In sum, the Nazi-era cases produce a mixed message; subsequent international practice did not develop a consensus; and the ICTR/ICTY tribunals adopted contested (and possibly inconsistent) views based on debatable readings of the Nazi-era decisions and their own sense of what the rules should be. This provides no support for the proposition that the "mere knowledge" standard is

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[9] For further discussion, *see* Ramsey, *supra*, at 306-09.

[10] To be sure, in civil cases many U.S. jurisdictions follow §876 (b) of the Restatement (Second) of Torts (1977), which embraces a broader principle of liability. But others do not. *See Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 181 (1994). At a minimum, it is clear that there is no single consensus standard, even within U.S. law, for all forms of aiding and abetting liability.

settled and widely accepted even in the decisions of tribunals applying international law.

Third, even giving the tribunal decisions material weight, the other — more significant — sources of international law establish that the "mere knowledge" standard has nothing like the undisputed international acceptance required by *Sosa*. The International Criminal Court (ICC), a permanent international court established by treaty among over 100 countries in 2002, has a detailed constituting document (known as the Rome Statute) that, among other things, defines offenses subject to its jurisdiction. Article 25, ¶3(c) of the Rome Statute authorizes the ICC to punish aiders and abettors only when they act "[f]or the purpose of facilitating the commission of such a crime…." Rome Statute of the International Criminal Court, 2187 U.N.T.S. 90, Art. 25(3)(c). In adopting this language, one leading commentary reports, the drafters noted:

> The expression "for the purpose of facilitating" is borrowed from the [U.S.] Model Penal Code. . . . *[I]t is clear that purpose generally implies a specific subjective requirement stricter than mere knowledge*. The formula, therefore, *ignores … the jurisprudence of the ICTY and ICTR,* since this jurisprudence holds that the aider and abetter must only know that his or her acts will assist the principal in the commission of an offense.

Kai Ambos, Article 25, *in Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* 757 (2d ed. 2008) (emphasis supplied). Another commentator observes that under Article 25(3)(c), the accomplice "must know *as well as wish* that his assistance shall facilitate the

commission of the crime." Albin Esser, Chapter 20 ("Individual Criminal Responsibility"), in 1 *The Rome Statute of the International Criminal Court: A Commentary* 801 (Antonio Cassese et al. eds., 2002) (emphasis supplied). *See also* Werle, *International Criminal Law*, *supra*, at 126-27 (contrasting ICTY approach with ICC approach and describing ICC approach as taken from the Model Penal Code).

Although the Rome Statute is not conclusive evidence of CIL, it is certainly evidence of what a large number of nations have shown by their official acts that they believe to be an appropriate standard for prosecutions under international law. *See Aziz*, slip op. at 21 (relying on Rome Statute to find *mens rea* of "purpose" for aiding and abetting claims under the ATS); *Talisman*, 582 F.3d at 259 (referring to Rome Statute and stating that "[o]nly a purpose standard .. has the requisite 'acceptance among civilized nations'" under *Sosa*); *Khulumani*, 504 F.3d at 276 (Katzmann, J., concurring) (same). Unlike the sources Plaintiffs cite, the ICC reflects the official views of more than 100 nations; in contrast, the ICTY or ICTR were created by the Security Council without specific direction on the *mens rea* of aiding and abetting, and do not in any way reflect state practice. *See Khulumani*, 504 F.3d at 275-77 (Katzmann, J., concurring). At minimum, there is no reason to believe that States adopted the ICC standard in the face of their (purported)

universal and uncontroversial acceptance of the ICTY standard.[11]

B. As a Matter of Customary International Law, There is No Consensus among the Nations as to How, If At All, Aiding and Abetting Liability Should Apply to Commercial Relationships.

The lack of international consensus over the specifics of aiding and abetting liability is particularly apparent with respect to commercial aiding-and-abetting claims of the type alleged here. Plaintiffs here seek to hold the defendants liable for doing business with the alleged violators of their rights, yet they point to almost no national or international practice in which aiding and abetting liability has been applied to such business activities under CIL. Indeed, such cases are essentially non-existent outside ATS litigation in the United States. *See* 3 International Commission of Jurists, Corporate Complicity and Legal Accountability: Civil Remedies 6 (2008) (describing ATS cases premised on international law liability as "unique"). The ICTY and ICTR tribunals did not consider fact patterns even remotely similar to the present allegations, and the few Nazi-era cases that involved aiding and abetting in commercial contexts were infrequent, had underdeveloped rationales and inconsistent results, and in any event did not involve the present situation of secondary liability for purchasers of products

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[11] Thus, while amicus David Scheffer is correct in saying that states did not "intend" to create a norm of CIL for accessory liability, see Brief Amicus Curiae of David Scheffer in Support of Appellants, at 6-11, he offers no reason to discount the Rome Statute as evidence of state practice in favor of inconsistent and ambiguous opinions from international criminal tribunals.

allegedly made by forced and child labor. *See supra* pp. 11-14. In recent times, there has been no widespread national or international practice of holding businesses liable for aiding and abetting CIL violations through their commercial relationships. U.N. study groups have considered what the potential approaches should be, and have acknowledged that there is a complete lack of established practice: "[N]o international forum yet has jurisdiction to prosecute a company as a legal entity…."[12]

As a result, not only would federal courts face scattered and inconsistent international practice in commercial aiding and abetting cases, but that practice would be found (if at all) in entirely distinct contexts and factual situations (such as the ICTY paramilitary prosecutions) that would not readily translate to the commercial setting. Federal courts would be tasked to create a new international code of business conduct on the basis of little more than their own intuitions. Such unmoored elaboration of international norms is entirely inconsistent with *Sosa*.

III. The Lack of a Well-Established, Undisputed and Binding Rule of Liability for Private Corporations Under Customary International Law Requires Rejection of Plaintiffs' Claims.

This Court has never ruled directly on whether private corporations owe duties under customary international law. If it reaches the question here, this

[12] 2 Report of the International Commission of Jurists, Criminal Law and International Legal Crimes: Corporate Complicity & Legal Accountability (2008), p.6.

Court should follow the Second Circuit in declining to recognize corporate liability under the ATS for alleged violations of international law, especially with respect to aiding and abetting liability.[13]

A. Settled Customary International Law Does Not Recognize Corporate Entity Liability

Although it may seem remarkable to domestic U.S. audiences, the liability of private corporations is not well-established in customary international law. Although the Nuremberg trials immediately after World War II spurred recognition of natural persons' liability for certain violations of international law, those trials did not impose liability on corporations, and no similar international consensus has emerged over the liability of private corporations.

"The major legal significance of the Nuremberg judgments, lies in those portions of the judgments dealing with the *area of personal responsibility* for international law crimes." *Flores*, 414 F.3d at 244 n.18 (quoting Telford Taylor, Chief of Counsel for War Crimes, *Final Report of the Secretary of the Army on the Nuremberg War Crimes Trials Under Council Law No. 10*, at 109 (Aug. 15, 1949) (1997 ed.) (emphasis in court opinion)). Many corporations and other businesses aided the war crimes committed by Nazi Germany and its allies. In a few cases, as

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[13] This does not mean that individuals can escape personal liability by operating under a corporate form. Individuals who are responsible for the challenged corporate activities may be responsible as individual actors.

as with I.G. Farben, where the companies functioned as instrumentalities of the Nazi regime, or were critical to the German war, the companies were dissolved and their assets taken over as an exercise of military authority by the occupation forces. However, with respect any determination of war-crime liability under customary international law, only individuals were brought to account.[14]

The Nuremberg adjudicative machinery was established by Article 6 of the Charter of the International Military Tribunal (Oct. 6, 1945), 81 U.N.T.S. 284 (1951), which provided that the Tribunal had the power "to try and punish persons who…, whether as individuals or members of organizations," committed certain crimes. *Id.* at 286 (Art. 6). Whether as unaffiliated individuals or as members of organizations, the accused were natural persons, not legal entities. Provision was

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[14] The Brief of Amici Curiae Nuremberg Scholars (pp. 16 ff.) conflates the actions of the military occupation with the adjudication of criminal liability of CIL violators by the International Military Tribunal. Amici rely on Control Council Law No. 9, which makes clear that the Control Council was seizing the asserts of I.G, Farben as an exercise of occupation military authority: "In order to insure that Germany will never again threaten her neighbours or the peace of the world, and taking into consideration that I.G. Farben industrie knowingly and prominently engaged in building up and maintaining the German war potential, the Control Council enacts as follows: All [I.G. Farben assets] are hereby seized . . . ." (Preamble & Article I). The Potsdam Agreement between the occupying powers of 1945 authorized the Control Council to secure "the elimination or control of all German industry that could be used for military production" (Art. II, A ¶ 3); "to control German industry … with the aim of preventing a war potential" (Art. II, B ¶ 15).

To like effect is also Control Council Law No. 57 (also relied upon by plaintiffs).

made for proving that "the group or organization of which the individual was a member was a criminal organization." *Id.* at 290 (Art. 9). The effect, however, was not enterprise liability but to give a signatory state "the right to bring *individuals* to trial for membership [in the criminal organization]." *Id.* (Art. 10) (emphasis added). Similarly, Control Council Law No. 10 speaks only of punishment of "persons," not entities; of "war criminals and others similar offenders, other than those dealt with by the International Military Tribunal"; and of "[t]he delivery … of persons for trial" (preamble, Articles II & V).

Even where a commercial organization was involved in the commission of war crimes, as in the case of the business executives charged with supplying Zyklon B gas to Nazi concentration camps, the Nuremberg prosecutions were against the individual who owned the firm, his immediate deputy and the senior technical expert for the firm; the firm itself was the not the subject of the prosecution. *See In re Tesch and Others* (Zyklon B Case), excerpted in *Ann. Digest and Reports of Public International Law Cases, Year 1946* (H. Lauterpacht ed., 1951) (heading: "Subjects of the Law of War").

The U.N. International Law Commission's 1950 commentary on the Nuremburg Tribunal noted the distinction between individual and entity responsibility:

> 99. The general rule … is that international law may impose duties on individuals directly without any interposition of internal law. The findings

> of the [International Military] Tribunal were very definite on the question…. "That international law imposes duties and liabilities upon individuals, as well as upon States," said the judgment of the Tribunal, "has long been recognized." It added: "Crimes against international law are committed *by men, not by abstract entities*, and only by punishing individuals who commit such crimes can the provision of international law be enforced."

Vol. II, 1950 *Y.B. of the I.L.C. 374* (2005 repr.), quoting 1 *Trial of the Major War Criminals before the International Military Tribunal* 223 (1947) (emphasis supplied).

The existence of an international consensus on the responsibility of natural persons or states for certain violations of international law, and the absence of any similar consensus regarding the liability of private corporations (other than perhaps in the ruminations of commentators), continues to the present. Thus, the statutes of the ICTY and ICTR confer jurisdiction on these tribunals only to try individuals. *See* U.N. Doc. S/RES/827 (May 25, 1993); U.N. Doc. S/RES/955 (Nov. 8, 1994).

Similarly, Article 25(1) of the Rome Statute establishing the ICC confirms the principle of "Individual criminal responsibility" and the limit of the ICC's authority to "natural persons." This limit reflected considerable disagreement among signatory states. A leading observer of the ICC negotiation process explained:

> [*T*]*he decision whether to include "legal" or "juridical" persons within the jurisdiction of the court was controversial.* The French delegation argued strongly in favour of inclusion . . . . [T]he proposal was rejected for several reasons which as a whole are quite convincing. The inclusion of collective liability would detract from the Court's jurisdictional focus, which is on

> individuals. Furthermore, the Court would be confronted with serious and ultimately overwhelming problems of evidence. In addition, *there are not yet universally recognized common standards for corporate liability; in fact, the concept is not even recognized in some major criminal law systems*.

Ambos, Article 25, *supra*, at 477-78 (emphasis supplied).

Given the continuous tradition from the post-war period to the present of limiting the responsibility of non-state actors for customary international law offenses to natural individuals, the range of views attending the abortive inclusion of a limited form of corporate liability in the Rome Statute, the absence of "universally recognized common standards for corporate liability," and the absence of the very concept in "some major criminal law systems," the liability of corporate defendants cannot be considered a universally supported rule of sufficient specificity to satisfy the requirements of *Sosa*. While it is true that the discussion under the Rome Statute was limited to criminal liability, it is nonetheless the only significant state practice on the duties of corporations under customary international law.[15] As such, it is a highly probative source of guidance for determining whether under well-established international law principles, a "given norm" applies "to the perpetrator being sued." *Sosa*, 542 U.S. at 732 n. 20

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[15] The Brief of David J. Scheffer as Amicus Curiae (p. 3) argues that "[t]he Rome Statute was never intended, in its entirely, to reflect customary international law." Such post-hoc accounts do not change the fact that states disagreed over scienter standards and corporate liability in drafting the Rome Statute, a fact that refutes the existence of the consensus on those matters required by *Sosa*.

B. The Dearth of International Law Precedents Defining Any Criteria for Attributing Liability to Private Corporations Further Supports Dismissal of Such Claims

The dearth of international law precedents guiding *when* a corporate entity should be deemed liable for the acts of a corporate agent or actor provides an additional reason for not recognizing an implied ATS cause of action in this case. Implementing corporate liability under the ATS would inevitably, and inappropriately, require selective borrowings from U.S. domestic law to determine the scope of what are ostensibly violations of international law.

The dearth of settled international law on corporate liability is reflected in the debates during the drafting of the Rome Statute. One widely-discussed draft of the Rome Statute included jurisdiction over juridical entities, including private corporations, but it conditioned such liability on a simultaneous criminal conviction of a natural person "who was in a position of control" of the juridical entity and was acting on behalf of and with the explicit consent of the juridical person. *See* Andrew Clapham, *The Question of Jurisdiction Under International Criminal Law Over Legal Persons: Lessons Learned from the Rome Conference on an International Criminal Court*, *in* Liability of Multinational Corporations Under International Law 150-51 (M.T. Kamminga & S. Zia-Zarifi eds., 2000). In the end, even this relatively restrictive standard was dropped due to an inability to satisfy all delegations' "queries about this innovative use of international criminal

law." *Id.* at 157.

Courts considering ATS claims against private corporations have encountered a similar problem when considering plaintiffs' claims against the subsidiaries of certain defendants. In the *South Africa Apartheid Litigation*, for instance, plaintiffs sought to hold the parent companies liable on a theory of alter ego and agency. *See In re S. Africa Apartheid Litig.*, 617 F. Supp. 2d 228, 270 (S.D.N.Y. 2009). As the court in that case openly acknowledged, the utter lack of customary international law standards for "piercing the corporate veil" required the court to rely instead on federal common law. *Id.* at 271.

But the lack of "precise standards" under international law is exactly the type of situation that warrants dismissal of the entire cause of action. An ATS action requires that the defendant's conduct amount to a violation under settled principles of *international* law. Resort to domestic law to determine the substantive scope of liability runs contrary to the ATS and to *Sosa*. The very necessity of such "gap filling" throws in sharp relief the innumerable practical obstacles of applying an "international law of agency" to an "international law of corporate liability" when no such law exists in the agreed upon practice of nations.[16] Federal courts will necessarily be required to develop and innovate new

[16] See Julian G. Ku, *The Curious Case of Corporate Liability Under the Alien Tort Statute*, 51 Va. J. Int'l L. 353, 392-93 (2010).

rules of international law to fill the gaps left by the paucity of international law precedent. Such a role for the federal courts is exactly opposite to *Sosa's* vision of the judicial role.

IV. Principles of Federal Common Law Preclude Plaintiffs' Claims in this Case.

Sosa made clear that satisfying the requirements of universal acceptance and precise definition is merely a starting point. *See* 542 U.S. at 733 n.21 ("This requirement of clear definition is not meant to be the only principle limiting the availability of relief in the federal courts for violations of customary international law."). In particular, ATS claims are limited not only by the substantive content of international law, but by broader concerns about federal judicial lawmaking and its potential to interfere with the conduct of foreign affairs by the political branches of the United States government.

It is thus necessary, but not sufficient, that Plaintiffs ground their claims in well-established principles of international law. They must also satisfy *Sosa*'s "good reasons for a restrained conception of the discretion a federal court should exercise in considering a new cause of action." 542 U.S. at 725. In particular, post-*Erie* principles of separation of powers limit the lawmaking role of courts, especially with respect to recognizing implied private rights of action. *Id.* at 725-27. Moreover, separation of powers principles limit judicial intrusions into the conduct of foreign affairs. *Id.* at 727-28. And, Congress has taken the lead in

defining and enforcing international human rights law, suggesting that courts should confine any implied rights under the ATS to a very narrow scope. *Id.* at 728. All of these reasons of U.S. domestic law counsel strongly against recognizing Plaintiffs' claims here..

A. Well-Established Limits on Implied Private Rights of Action Counsel Against Judicial Expansion of ATS Liability

As *Sosa* noted, the ATS was merely jurisdictional and created no express cause of action; it relied instead on the common law "forms of action" to provide a right to sue. As such, any cause of action recognized under this jurisdictional grant — and particularly those based on new international rules not extant in 1789 — amounts to an implied right of action, subject to all of the restrictions on the creation of such causes of action. As *Sosa* recognized, the Court "has recently and repeatedly said that a decision to create a private right of action is one better left to legislative judgment in the great majority of cases." 542 U.S. at 727. This reluctance applies not only to entirely new causes of action but to the extension of existing implied rights. As the Supreme Court observed in *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008), "[c]oncerns with the judicial creation of a private cause of action caution against its expansion. The decision to extend the cause of action is for Congress, not for us." *Id.* at 165.

Moreover, it is clear that courts must consider not only the "ambient law of the era" when the ATS was enacted, *Sosa*, 542 U.S. at 714, but also contemporary

doctrine limiting the common law powers of federal courts. *See, e.g., Alexander v. Sandoval*, 532 U.S. 275, 287 (2001) (rejecting plaintiffs' urging to "revert in this case to the understanding of private causes of action that held sway 40 years ago when Title VI was enacted"). The modern limits on recognition of implied rights of action therefore operate to compel "judicial caution" in the recognition of any new rights under the ATS. *Sosa*, 542 U.S. at 727.[17]

B. The Significant Potential for Interference with the Primacy of the Political Branches in Foreign Affairs Counsel Against Extension of ATS Liability.

Sosa recognized that "the potential implications for the foreign relations of the United States of recognizing such causes [of action for violating international law] should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs." 542 U.S. at 727. Federal common law authority in the international sphere typically has been used to *limit* judicial interference with political branch primacy in foreign relations. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964). Whenever, as in the present case, private parties ask a United States court to judge the legality of

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[17] Also relevant is an analogy to the implied damages remedy of *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971). Since 1980, the Court has "consistently refused to extend *Bivens* liability to any new context or new category of defendants," *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 68 (2001), and similar restraint is warranted with respect to newly-recognized principles of international law that, as here, depart from the "paradigms" that motivated the ATS.

actions that occurred in a foreign land, there is a potential to undermine the United States' relations with foreign governments by questioning the legality of those governments' domestic policies.

Perhaps recognizing that ATS litigation is a blunt instrument for the conduct of United States foreign policy, Congress has enacted far more specific remedies for violations of international law. The TVPA, for example, "is confined to specific subject matter," *Sosa*, 542 U.S. at 728, and includes both an explicit "state action" limitation, TVPA § 2(a), and a requirement that the plaintiff first exhaust local remedies. TVPA § 2(b). Moreover, as this Court recently held, the TVPA expressly limits liability to natural persons and thereby excludes corporate liability. *See Bowoto v. Chevron Corp*., 621 F.3d 1116 (9th Cir. 2010). Similarly, the War Crimes Act, 18 U.S.C. § 244, limits the definition of prosecutable "grave breaches" of the Geneva Conventions and places other conditions on the scope of what the United States will prosecute. As *Sosa* recognized, the ATS era's reliance on pre-*Erie* conceptions of broad, undefined common law powers has given way to an age of statutes in which Congress specifically defines the extent to which international norms will be actionable in U.S. courts and dictates the processes by which those norms are vindicated. *See* 542 U.S. at 725-28.

This is why "modern indications of congressional understanding of the judicial role in the field [of international law] have not affirmatively encouraged

greater creativity." *Sosa*, 542 U.S. at 728. Courts "have no congressional mandate to seek out and define new and debatable violations of the law of nations." *Id.* Accordingly, courts should not interpret Congress's failure to enact legislation extending ATS liability to corporations and/or aiders and abbettors as a mere oversight; rather, if anything, Congress's inaction suggests awareness of the foreign affairs concerns articulated above. In any event, the judgment is Congress's to make, and Congress has not made it here.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

s/ Meir Feder

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that this brief is proportionately spaced, has a serif typeface of 14-point, and contains **6,917** words, exclusive of the material not counted under Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 7, 2011.

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