No. 09-1262

JUN 21 2010

IN THE

Supreme Court of the United States

THE PRESBYTERIAN CHURCH OF SUDAN, REV. MATTHEW MATHIANG DEANG, REV. JAMES KOUNG NINREW, NUER COMMUNITY DEVELOPMENT SERVICES IN U.S.A., FATUMA NYAWANG GARBANG, NYOT TOT RIETH, individually and on behalf of the Estate of her husband JOSEPH THIET MAKUAC, STEPHEN HOTH, STEPHEN KUINA, CHIEF TUNGUAR KEIGWONG RAT, LUKA AYOUL YOL, THOMAS MALUAL KAP, PUOK BOL MUT, CHIEF PATAI TUT, CHIEF PETER RING PATAI, CHIEF GATLUAK CHIEK JANG,

Petitioners,

v.

TALISMAN ENERGY INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF TALISMAN ENERGY INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In an action filed against a corporation under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, alleging that the defendant aided and abetted and conspired with a foreign government to commit violations of international law:

1. Whether the Second Circuit correctly held that, under this Court's decision in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), the standard for assessing secondary liability under the ATS should be supplied by international law, not domestic law.

2. Whether the Second Circuit correctly held—in conflict with no other federal appellate court—that aiding and abetting liability under international law (and therefore the ATS) may be imposed only if the defendant provided substantial assistance for the specific purpose of facilitating the principal's violation of international law, rather than simply with the knowledge that its actions would assist the principal.

3. Whether this Court should decline to review the petitioners' conspiracy claims, given that they are categorically barred by this Court's decision in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), as well as petitioners' claims of joint criminal enterprise liability, given that they were never raised in the District Court and, in any event, are unsupported by any decision from this Court or federal court of appeals.

CORPORATE DISCLOSURE STATEMENT OF RESPONDENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court, respondent Talisman Energy Inc. states that it is a nongovernmental corporate party that has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

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COUNTERSTATEMENT OF THE CASE

Talisman Energy respectfully refers the Court to the Statement of the Case set forth in its Conditional Cross-Petition for a Writ of Certiorari, No. 09-1418, filed on May 20, 2010.

INTRODUCTION

In *Sosa v. Alvarez-Machain*, this Court rejected the expansive applications of the Alien Tort Statute ("ATS") that some federal appellate courts had begun to embrace. Realigning the ATS with its text and historical underpinnings, this Court set a "high bar" for claims under the Act. 542 U.S. 692, 720 (2004). And for good reason: that high hurdle would ensure that any claims would be consistent with the First Congress's intent that "the ATS [would] furnish jurisdiction for a relatively modest set of actions alleging violations of the law of nations." *Id.* at 727.

The Petition in this case attempts to lower *Sosa*'s bar. It does so by advocating a promiscuous theory of secondary liability, one that would stigmatize corporations as "aiders and abetters" of human-rights abuses for nothing more than doing business in countries with imperfect governments. But what the Petition fails to do is identify any square conflict between the Second Circuit's decision below rejecting that expansive view of the ATS and the decisions of any other federal court of appeals.

Nor could it. Since *Sosa*, a number of appellate courts have decided the general question of whether an ATS plaintiff can bring claims for aiding and abetting an international law violation. But despite what the Petition claims, none of those courts—apart from the Second Circuit—has ever analyzed the first two questions raised in the Petition: what source of law provides the standard for adjudicating aiding and abetting claims in ATS cases, and what that standard is.

By contrast, these two issues were at the heart of the Second Circuit's decision below. In looking to

international law for the aiding and abetting standard, and holding that international law requires an intent to facilitate the primary violation, the Second Circuit took seriously this Court's admonition in *Sosa* that claims "'based on the present-day law of nations' should be recognized only if 'accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms' contemporary with enactment of the ATS." Pet. App. A-21 (citing *Sosa*, 542 U.S. at 725). The Second Circuit also took heed of this Court's enumeration of five reasons for courts to exercise "great caution" before recognizing violations of international law that were not recognized in 1789.

Since the Second Circuit rendered its decision, no circuit court has addressed these issues in an ATS case, and only two district courts outside of the Second Circuit have done so. Both those courts (one of which was notably in the Eleventh Circuit, the decisions of which petitioners hold out as creating a circuit split with the Second Circuit) found the Second Circuit's decision "persuasive" and adopted its holdings on both the source and standard for aiding and abetting liability. In light of the impact of the Second Circuit's decision, and the absence of any true conflict with other circuit courts, there is no need for this Court to consider these issues now.

Petitioners' argument that "[c]ontrary to one of the primary original purposes of the ATS, the Second Circuit's decision, if followed, ensures that corporate aiding and abetting cases would be heard in state courts" (Pet. 18) is purely speculative and inappropriately suggests that it would be unwise to allow state courts to hear tort cases arising under international law. As this Court explained in *Sosa*, the ATS was

enacted to provide federal jurisdiction in situations where the Continental Congress previously had unsuccessfully requested that the state legislatures create state court fora to resolve such matters. The ATS therefore gave federal courts concurrent, not exclusive, jurisdiction. 542 U.S. at 718. That is a clear indication that the First Congress was happy for state courts to hear cases that also could be heard by the federal judiciary under the ATS.[1]

Nor should this Court exercise its discretionary jurisdiction to review the petitioners' third question: whether the Second Circuit correctly rejected their claims based on conspiracy and joint criminal enterprise liability. As to conspiracy liability, the Second Circuit faithfully applied this Court's decision in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006). There, this Court held that conspiracy liability under international law is reserved exclusively for charges of genocide and waging aggressive war. Petitioners abandoned any claim for the former and never brought a claim for the latter. Nor is there any true conflict in the lower courts. The Eleventh Circuit cases that petitioners cite to suggest a broader acceptance of conspiracy liability under the ATS all either predate *Hamdan* or fail to discuss it.

Petitioners' joint criminal enterprise argument is likewise unfit for review. For one thing, because petitioners raised this argument for the first time on

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[1] That Congress knew how to ensure the "uniform application" of law (Pet. 18) in an exclusive federal forum is seen in the very same statute (the First Judiciary Act) that enacted the ATS. That statute provided exclusive jurisdiction to federal courts to hear admiralty cases, in stark contrast to the concurrent jurisdiction granted by the ATS. First Judiciary Act, 1 Stat. 73 sec. 9.

appeal, this case is a poor vehicle for passing upon the question. But in any event, the Second Circuit's decision on the merits was a highly fact-bound resolution that presents no certworthy issue. The panel held that even if such a claim were appropriate in an ATS case, petitioners failed to demonstrate, in opposition to a motion for summary judgment after exhaustive discovery, the requisite intentional conduct. There is, in short, no reason to grant plenary review. The Petition should be denied.

REASONS FOR DENYING THE PETITION

I. THE SECOND CIRCUIT'S RULING THAT AIDING AND ABETTING UNDER THE ATS IS ASSESSED UNDER INTERNATIONAL LAW CONFLICTS WITH NO DECISION FROM THIS COURT OR CIRCUIT COURT.

Petitioners insist that the Second Circuit's ruling—that international law, not federal common law, provides the standard for accessorial liability under the ATS—is "in direct conflict" with a handful of Eleventh Circuit decisions and is even "inconsistent" with *Sosa*. Pet. 13, 15. Not so. The decision below faithfully applies *Sosa* and honors this Court's admonition that federal courts narrowly construe the ATS to reach "a relatively modest set of actions alleging violations of the law of nations." *Id.* at 727. And petitioners' purported circuit split is more imagined than real. That is why the petitioners resort to meaningless string cites instead of actually explaining where the Eleventh Circuit considered—and decided—the question presented in the Petition. The reality is that the Second Circuit remains the only federal appeals court to squarely consider this ques-

tion, let alone articulate a rule of decision. This Court should wait until at least one other federal circuit has adopted the expansive rule that the petitioners press before attempting to resolve the question.

A. The Second Circuit's Decision Correctly Applies the Settled Rule from *Sosa*.

In *Sosa*, this Court held that when Congress enacted the ATS, it intended to vest federal courts with a narrow jurisdictional grant: to hear and adjudicate "the modest number of international law violations with a potential for personal liability at the time" the ATS was enacted in 1789. This Court confirmed that federal courts 200 years later must continue to honor that fundamental intent when applying the Act. Accordingly, this Court articulated a narrow bright-line rule of decision: federal courts may "recogniz[e] a claim under the law of nations as an element of common law" only if that claim shared certain "features of 18th-century paradigms" on which the ATS was premised. 542 U.S. at 724-25. And for such a claim to exist, this Court clarified that it must be based on "a norm" that is "sufficiently definite" under international law. *Id.* at 732. Thus, under *Sosa*, federal courts lack a roving commission to mint new causes of action, but must instead carefully limit their jurisdiction to just the handful of well-defined and established violations of international law.

Naturally, the same rule that governs whether a claim exists under the ATS also governs how liability should be measured for such a claim. Again, this Court's ruling in *Sosa* was crystal clear. The Court emphasized that its decision extended to the "related consideration [of] whether international law extends the scope of liability for a violation of a given norm to

the perpetrator being sued." 542 U.S. at 732 n.20. Thus, under *Sosa*, whether a defendant can be held responsible as an aider and abetter—and what rubric should apply to measure liability—are inquiries that require courts to locate a universally accepted and specifically defined norm in international law. Where no such well-defined norm exists for a particular species of liability, federal courts are powerless to import it into the ATS.

The Second Circuit followed that rule exactly and therefore rejected petitioners' argument that complicit liability is a matter ordinarily left to each particular forum country. It held that "such an expansion would violate *Sosa's* command that we limit liability to 'violations of ... international law ... with ... definite content and acceptance among civilized nations [equivalent to] the historical paradigms familiar when § 1350 was enacted.'" Pet. App. A-30 (citing *Sosa*, 542 U.S. at 732). Instead, the Second Circuit held, "*Sosa* and our precedents send us to international law to find the standard for accessorial liability." *Id.* Because this holding follows *Sosa* to the letter, there is no conflict for this Court to resolve.

B. There is No Circuit Split on the Governing Law for Complicit Liability Claims Under the ATS.

Petitioners concede that the Second Circuit's decision does not conflict with the decisions of any other circuit with respect to the governing law to be applied to complicit liability claims under the ATS except the Eleventh Circuit.[2] But even the one "split" they

[2] In footnote 17 of the Petition, petitioners' state that the Ninth Circuit was divided in its only case to address this issue,

identify proves to be no true split at all. Although petitioners cite a number of Eleventh Circuit cases that they contend "applied civil federal common law tort principles to aiding and abetting liability in ATS cases," (Pet. 13), the cases certainly say no such thing. In fact, the majority of petitioners' cases merely cite back to the same case, *Cabello v. Fernandez-Larios*, 402 F.3d 1148 (11th Cir. 2005), and even then they do so only for the proposition that claims for aiding and abetting and conspiracy can sometimes be properly brought under the ATS—precisely the point that the Second Circuit below recognized. *See Aldana v. Del Monte Fresh Produce, N.A.*, 416 F.3d 1242, 1248 (11th Cir. 2005) (the ATS "reaches conspiracies and accomplice liability") (citing *Cabello*, 402 F.3d at 1157); *Romero v. Drummond Co.*, 552 F.3d 1303, 1315 (11th Cir. 2008) ("the law of this Circuit permits a plaintiff to plead a theory of aiding and abetting liability under the Alien Tort Statute") (citing *Cabello*, 402 F.3d at 1157-58); *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1258

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citing *Doe v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002). But petitioners acknowledge that that panel's decision was vacated by the Ninth Circuit by grant of *en banc* review, and the case was settled "before this issue was resolved." Pet. 14 n.17. That decision therefore lacks any precedential value. Even aside from the vacatur of the opinion, the decision fails to help petitioners because the majority of the panel in that case held, consistent with the Second Circuit here, that the ATS required application of international law to the question of aiding and abetting liability. 395 F.3d at 948-49. Judge Reinhardt, in a concurring opinion, believed that federal common law provided the source for such liability, but his analysis, as was true of the majority's analysis, was necessarily given without the benefit of this Court's guidance and instructions in *Sosa*, which was decided nearly two years after the *Unocal* decision.

n.5 (11th Cir. 2009) (same) (citing *Aldana*, 416 F.3d at 1248 and *Romero*, 552 F.3d at 1315).

But the court in *Cabello* did not go further and meaningfully assess—let alone pass upon—the key question decided by the Second Circuit below and challenged here in the Petition: whether secondary liability under the ATS should be measured by domestic or international law. To the contrary, the Eleventh Circuit in *Cabello*, which did not even cite *Sosa*, merely noted that it had not previously "addressed whether claims based on indirect liability are actionable under the [ATS] and the [Torture Victim Protection Act ("TVPA")]." 402 F.3d at 1157. It then held that "by their terms the [ATS] and the TVPA are not limited to claims of direct liability. The courts that have addressed the issue have held that the [ATS] reaches conspiracies and accomplice liability." *Id.*

In none of these cases did the Eleventh Circuit do more than acknowledge that secondary theories of liability are available in ATS cases. That is no different from the Second Circuit's holding either in this case, or in *Khulumani v. Barclay Nat'l Bank, Ltd.*, 504 F.3d 254 (2d Cir. 2007).[3] None of these

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[3] Petitioners try to manufacture a split within the Second Circuit premised on Judge Hall's concurring opinion in *Khulumani*, in which he opined that federal common law provides the standard for aiding and abetting liability under the ATS. (Pet. 14 n.17). But as the Second Circuit held below, Judge Hall's concurrence was just one opinion within a fractured decision that resulted in a lack of binding precedent on this issue in the Second Circuit. Pet. App. A-28. And the other two judges on the *Khulumani* panel agreed that international law provides the source for complicit liability in ATS cases. *See* 504 F.3d at 268-69 (Katzmann, J., concurring); 504 F.3d at 337 (Korman, J., concurring in part and dissenting in part). The Second Circuit's

Eleventh Circuit cases actually addressed the issue at hand, *i.e.*, when an ATS plaintiff brings a claim for aiding and abetting, what law governs that claim? Accordingly, petitioners' contention that the panel's decision here, a decision which expressly addressed the issue of the governing law, conflicts with the Eleventh Circuit's prior decisions, is wrong.

Because the Second Circuit's decision on the correct source of law for aiding and abetting liability comports with this Court's precedent, and there is no circuit split on this issue, the Petition should be denied.

Talisman Energy also argued below that, contrary to the holdings of the District Court and the Second Circuit, aiding and abetting liability is not sufficiently accepted or specifically defined in international law so as to provide the basis for a claim in ATS cases. If this Court grants certiorari to decide the issue of the correct source of law for aiding and abetting claims in ATS cases, Talisman Energy will substantively brief this issue as well.

II. THE SECOND CIRCUIT'S MENS REA RULING PRESENTS NO CERTWORTHY QUESTION.

Petitioners next contend that even if the Second Circuit was correct to look to international law, as opposed to federal common law, for the aiding and abetting standard in ATS cases, this Court should grant certiorari because the Second Circuit errone-

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denial of petitioners' request for *en banc* review also suggests that the active judges in the Second Circuit did not believe that the panel's decision here conflicted with its prior decisions or presented any other need for further review.

ously imposed a purposeful facilitation requirement instead of a knowing substantial assistance standard. Petitioners wisely spend little time attempting to gin up a circuit split; none exists. Instead, petitioners largely dispute the Second Circuit's application of this rule of law to the unique facts of this case—for which "[a] petition for a writ of certiorari is rarely granted." S. Ct. Rule 10.

A. Petitioners' Purported Circuit Split on the Correct Standard for Secondary Liability under International Law is Nonexistent.

As with the issue of the correct governing law, petitioners try to manufacture a circuit split on the issue of the standard for aiding and abetting liability from Eleventh Circuit dicta. That is not enough.

The Second Circuit is the only appellate court to have conducted a comprehensive and thorough analysis of customary international law on aiding and abetting liability, as required by this Court in *Sosa*. In determining that the proper standard for such liability is purposeful facilitation the Second Circuit in this case adopted the analysis and reasoning of Judge Katzmann's concurring opinion in *Khulumani*. Both Judge Katzmann and the panel below examined a variety of international law sources and took seriously this Court's admonition in *Sosa* that before a norm of international law can give rise to an ATS claim, it must be both universally accepted and specifically defined.

By contrast, the Eleventh Circuit decisions on which petitioners rely barely allude to that question, let alone meaningfully analyze and resolve it. The

closest that the Eleventh Circuit came to actually discussing the standard for aiding and abetting was in *Cabello*, where the court quoted a jury instruction on aiding and abetting that required the plaintiff to demonstrate that the defendant knowingly provided substantial assistance to the primary wrongdoer. But that instruction was quoted without analysis because the question of the correctness of the instruction was not an issue on appeal.[4] Accordingly, as a district court in the Eleventh Circuit recently held, the Eleventh Circuit's discussion of aiding and abetting liability was mere dicta. *Doe v. Drummond Co.*, 09-cv-01041, slip op. at 16 (N.D. Ala. Nov. 9, 2009). *See also Swann v. So. Health Partners, Inc.*, 388 F.3d 834, 837 (11th Cir. 2004) ("the prior panel rule does not extend to dicta"); *McDonald's Corp. v. Robertson*, 147 F.3d 1301, 1315 (11th Cir. 1998) (Carnes, J., concurring) ("dicta in our opinions is not binding on anyone for any purpose").[5] Such dicta has no role to play in this Court's determination of whether to grant certiorari. *See, e.g., Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 351 n.12 (2005) ("Dictum settles nothing, even in the court that

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[4] Defendant's arguments on appeal in *Cabello* were: (1) that the plaintiff's claims were barred by the statute of limitations; (2) that neither the TVPA nor the ATS provided private causes of action such as the one at issue; (3) that he did not have any command responsibility and did not personally participate in the alleged human rights violations, and, as a result, he was not liable under the TVPA or the ATS; and (4) that the trial court erred with regard to several discovery issues. 402 F.3d at 1151-52.

[5] None of the subsequent Eleventh Circuit cases cited by petitioners and that relied on *Cabello* for the proposition that aiding and abetting claims were cognizable under the ATS even mentioned the correct standard for such claims.

utters it."); *cf. Stickel v. United States*, 76 S. Ct. 1067, 1068 (1956) (Harlan, J.) (denying application for stay and continuance of bail and noting lower court *dictum* "present[s] nothing reviewable by this Court").

Apart from the Second Circuit here, the only other appellate court to address the issue of the correct standard for aiding and abetting liability under international law was the Ninth Circuit in *Unocal*. But as set forth above (*supra*, p. 7 n.2), that decision was vacated and so lacks any precedential value. In addition, because it was issued before this Court's decision in *Sosa*, the Ninth Circuit did not analyze the issue under the strict instructions contained in that decision, *i.e.*, that any norm of international law must be universally accepted and specifically defined before it can support an ATS claim. Without the benefit of those instructions, the Ninth Circuit based its decision solely on several decisions of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda. But decisions of those tribunals are, at most, secondary sources of international law. *See* Statute of the International Court of Justice, Art. 38. The Ninth Circuit did not even address other primary sources, such as the Rome Statute of the International Criminal Court, or the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts, both of which require intentional facilitation for aiding and abetting liability. If the Ninth Circuit had reviewed those sources, it could not have determined that a knowledge standard is universally accepted in customary international law.

Setting a well-reasoned and comprehensive decision of one circuit that relied on this Court's

precedent, against a vacated decision from another circuit, rendered before this Court's decision, and dicta from a third circuit, does not suffice for certiorari. The Petition should therefore be denied and the issue left to further discussion and consideration by the lower courts. That such percolation could resolve any split, if one even exists, is evidenced by the decisions on aiding and abetting liability under the ATS that courts outside of the Second Circuit have rendered subsequent to the Second Circuit's decision in this case. The court in *Drummond*, after holding *Cabello's* discussion of aiding and abetting liability to be dicta, held that the decisions in both the District Court and the Second Circuit in the present action "are consistent with *Sosa's* command that courts act as 'vigilant door keep[ers]' and exercise restraint in recognizing new causes of action under the ATS." 09-cv-01041, slip op. at 21 (N.D. Ala. Nov. 9, 2009) (citing *Sosa*, 542 U.S. at 729). The court in *Drummond* therefore found the decisions in this action "persuasive and well-reasoned, and adopt[ed] their reasoning." *Id.* The same is true of *Abecassis v. Wyatt*, in which the court found the Second Circuit's holding on the source of law for secondary liability claims "persuasive" and adopted the same standard, *i.e.*, "the ATS will only confer jurisdiction [over secondary liability claims] if there are allegations of purposefulness." No. H-09-3884, 2010 WL 1286871, at * 27 (S.D. Tex. Mar. 31, 2010).[6]

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[6] Petitioners' citation to a number of earlier district court cases holding that "knowledge is the mental element for aiding and abetting under the ATS" (Pet. 14 n.18) is of little import. Nearly half of the decisions cited are from courts within the Second Circuit. These are therefore implicitly overruled by the Second Circuit's decision below, as recognized by a recent Eastern District of New York decision. *Lev v. Arab Bank, PLC*,

This Court should therefore allow the lower courts to continue to address this issue with the benefit of the Second Circuit's decision before endeavoring to resolve a "conflict" that is likely never to arise.

B. The Second Circuit's Holding Below is Consistent with Customary International Law, Which Requires Intent for Aiding and Abetting Liability.

In determining whether a particular rule is part of customary international law courts must look to concrete evidence of the customs and practices of States. *Flores v. Southern Peru Copper Corp.*, 414 F.3d 233, 250 (2d Cir. 2003). Article 38 of the International Court of Justice Statute, to which the United States and all United Nations member States are parties, embodies the understanding of States as to what sources constitute competent proof of the content of customary international law. It establishes that the proper primary evidence consists of only those conventions that set forth rules expressly recognized by the contracting States, international custom insofar as it provides evidence of a general practice accepted as law, and the general principles of law recognized by civilized nations. By contrast, judicial decisions only provide secondary evidence of international law. Finally, although Article 38 also recognizes "the teachings of the most highly qualified publicists of the various nations" as another possible

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No. 08-cv-3251 (NG), 2010 WL 623636, at * 1 (E.D.N.Y. Jan. 29, 2010) (applying the Second Circuit's purposeful facilitation standard to aiding and abetting claims in ATS case). And the other cases, even if district court cases could create a conflict with that of a circuit court, which they cannot, contain insufficient analysis of the issue to support a claim of real conflict with the Second Circuit's decision.

secondary source, this Court has expressly stated that 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). *See also Flores*, 414 F.3d at 251 n.26 (same).

1. The Rome Statute of the International Criminal Court

Under the Article 38 analysis, the Rome Statute constitutes stronger evidence of customary international law than the decisions of the various international criminal tribunals on which petitioners place so much weight. Unlike those single-purpose tribunals, the Rome Statute reflects the outcome of years of deliberations by States in an effort to reach a consensus regarding its provisions, including the appropriate mens rea standard for aiding and abetting liability. *See, e.g.,* Doug Cassel, *Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts*, 6 Nw. U. J. Int'l Hum. Rts. 304, 310 (2008) ("There was thus a longstanding disagreement between advocates of a 'knowledge' standard and those who preferred an 'intent' test.") That is exactly what makes the Rome Statute compelling evidence of international law, which is made up of State practice and principles upon which there is substantial, if not universal, agreement. Even the tribunal decisions petitioners cite in their Petition recognize this fact. *See, e.g., Prosecutor v. Furundzija*, Trial Chamber Judgment, ¶ 227 (the Rome Statute may be taken "by and large ... as constituting an authoritative expression of the legal views of a great number of States").

The Second Circuit's reliance on the Rome Statute's standard of purposeful facilitation for aiding and abetting liability is therefore beyond reproach.

2. The ILC Articles of State Responsibility

The same standard is also found in the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts, which, *inter alia*, set out the general international definition of complicity. Those Articles make clear that aiding and abetting liability only exists if the relevant acts were done with a view to facilitating the commission of a wrongful underlying act.[7]

3. ICTY Decisions

Although some decisions of the ICTY appear to utilize a knowledge standard for aiding and abetting liability, there is also support in the decisions of that tribunal for the intent standard. For instance, in *Prosecutor v. Tadic*, the ICTY Trial Chamber canvassed relevant Nuremberg judgments and found "a clear pattern ...: First there is a requirement of intent, which involves awareness of the act of participation coupled with *a conscious decision to participate*." Case No. IT-94-1-T, Opinion and Judgment, ¶ 674 (May 7, 1997) (emphasis added). Accordingly, the Trial Chamber found the defendant guilty because he had "intentionally assisted directly and substantially in the common purpose of the group." *Id.* at ¶¶ 735, 738. On appeal, the Appeals Chamber confirmed the Trial Chamber's analysis, holding that

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[7] A detailed explanation of the status of the ILC and the drafting process of its Articles is set forth in the Brief of *Amicus Curiae* Professor James Crawford in Support of Defendant-Appellee, submitted to the Second Circuit in this action.

"[an] aider and abettor carries out acts *specifically directed* to assist ... the perpetration of a certain specific crime." *Tadic* Case No. IT-94-1-A, Appeal Judgment, ¶ 229 (July 15, 1999) (emphasis added). *See also Prosecutor v. Vasiljevic*, Case No. IT-98-32-A, Appeal Judgment, ¶ 102(i) (Feb. 25, 2004). The fact that some Tribunal decisions utilize an intent standard, and others, as petitioners argue, a knowledge standard, demonstrates that, as set forth in more detail below (*see* pp. 19-20, below), only the more stringent intent standard has achieved the level of universal acceptance required by this Court in *Sosa*.

4. The Nuremberg Decisions

The Nuremberg decisions on which petitioners rely are also equivocal at best—which is not enough under *Sosa* to constitute a well-defined norm. For instance, in *United States v. Weizsaecker (The Ministries Case)*, the Tribunal declined to impose criminal liability on a bank officer who made a loan with the knowledge, but not the purpose, that the borrower would use the funds to commit a crime. Pet. App. A-31. *See also* Cassel, 6 Nw. U. J. Int'l Hum. Rts. at 314 ("In another case known as the *Ministries Case*, an American military court at Nuremberg rejected a knowledge test."). Similarly, although petitioners and their amici see only a knowledge standard in the *Zyklon B* case in which, they claim, two top officials of the firm that supplied Zyklon B gas for Nazi gas chambers *knowing* it would be used to kill concentration camp prisoners were convicted for their assistance based on the mens rea of knowledge, (Pet. 28, 30 n.34), the principal defendant in that case "not only supplied prussic acid to the S.S. but undertook to train its members how it could be used to kill human beings." *Khulumani*, 504 F.3d at 276 n.11

(Katzmann, J., concurring). From such actions, it is not a great leap to conclude that the defendant had the requisite intent. *See* Cassell, 6 Nw. U. J. Int'l Hum. Rts. at 312 ("[B]y supplying gas in the knowledge that it would be used to kill human beings, one may infer that one of [defendants'] purposes – admittedly secondary – was to encourage continued mass killings of Jews.").

C. Only A Standard of Purposeful Facilitation Has Been Universally Accepted, and is Sufficiently Specifically Defined, So As to Permit Federal Courts to Create a Cause of Action for Aiding and Abetting Liability Under the ATS.

Even if petitioners are correct that some international law sources apply a knowledge standard for aiding and abetting liability, that would not help them here. To create a cause of action in a case brought under the ATS, *Sosa* holds that a federal court must "require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the 18th-century paradigms [this Court has] recognized." *Sosa*, 542 U.S. at 732. *See also id.* at 759 (Breyer, J., concurring) ("to qualify for recognition under the ATS a norm of international law must have a content as definite as, and an acceptance as widespread as, those that characterized 18th-century international norms prohibiting piracy").

The Second Circuit followed this Court's instruction and correctly held that "[e]ven if there is a sufficient international consensus for imposing liability on individuals who *purposefully* aid and abet a violation of international law ... no such consensus

exists for imposing liability on individuals who *knowingly* (but not purposefully) aid and abet a violation of international law." Pet. App. A-30-31 (emphasis in original).

In ATS cases, "[t]he critical question is whether there is a discernible core definition that commands the same level of consensus as the 18th-century crimes identified by the Supreme Court in *Sosa*." *Khulumani*, 504 F.3d at 276 n.12 (Katzmann, J., concurring). At most, a purpose standard for aiding and abetting liability falls within that core; petitioners' knowledge standard certainly does not.

Petitioners' proposed knowledge standard also fails *Sosa's* specificity requirement. Although petitioners cite a number of purported international law sources holding knowledge to be the standard for aiding and abetting liability (Pet. 28-32), nowhere do petitioners, or the sources they cite, set forth the contours of what "knowledge" means. For instance, is it sufficient for a defendant to have constructive knowledge, or is actual knowledge required? In the absence of any specific definition, petitioners' knowledge standard is insufficiently specific to permit a federal court to create a cause of action in ATS cases.

D. Petitioners' Proposed Standard Would Have a Severe Impact on International Trade, And Would Improperly Derogate to Private Parties the Role of Governments and International Organizations.

Central to the "vigilant doorkeeping" this Court required in *Sosa*, is due regard for the "collateral consequences of making international rules privately actionable." 542 U.S. at 727. Petitioners' proposed

aiding and abetting standard would severely and inappropriately impact international trade.

As both lower courts recognized here, the activities that the petitioners identify as assisting the Government of Sudan in committing crimes against humanity and war crimes generally accompany any natural resource development business or the creation of any industry. Pet. App. A-34; B-78. None of the acts was inherently criminal or wrongful. The petitioners' theories of substantial assistance "serve essentially as proxies for their contention that Talisman should not have made any investment in the Sudan, knowing as it did that the Government was engaged in the forced eviction of non-Muslim Africans from lands that held promise for the discovery of oil." Pet. App. B-79.

Petitioners can point to no evidence that Talisman Energy, its indirect subsidiary, or the actual operating company in Sudan in which Talisman Energy's indirect subsidiary owned a 25% share, participated in any attack against a petitioner, or had any illicit intent. No such evidence exists. Instead, petitioners argue that Talisman Energy's general knowledge of the Government of Sudan's record of human rights violations, and its understanding of how the Government would benefit from oil exploration, is a sufficient basis on which to hold Talisman Energy liable. But, as the Second Circuit held, "if ATS liability could be established by knowledge of those abuses coupled only with such commercial activities as resource development, the statute would act as a vehicle for private parties to impose embargos [sic] or international sanctions through civil actions in United States courts. Such measures are not the province of private parties but are, instead, properly

reserved to governments and multinational organizations." Pet. App. A-42.

That the Second Circuit's concern about misuse of the ATS is well-founded is demonstrated by the number of ATS cases brought against multinational corporations operating in developing nations. Such actions, premised on a theory that the defendant corporation aided and abetted the host government's international law violations, have been brought against companies working in Colombia, Papua New Guinea, Nigeria, Indonesia, Iraq, Israel, and South Africa,[8] in addition to this action against Talisman Energy for its alleged activities in Sudan. The "collateral consequences" of imposing secondary liability on corporations in ATS cases under petitioners' lenient standard would include chilling private investment in developing nations for fear that an investor's legitimate business activities will subject it to costly, burdensome and reputation-damaging lawsuits in this country – contrary to the policies of the U.S. government, and other governments around the world, of encouraging investment and commerce in developing nations. The Government of Canada made this exact point in its amicus brief submitted to the Second Circuit below. Brief of Amicus Curiae The Government of Canada in Support of Dismissal of the Underlying Action at 12, *Presbyterian Church*

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[8] *See Romero v. Drummond Co.*, 03-cv-00575 (N.D. Ala.) (Colombia); *Sarei v. Rio Tinto plc*, 00-cv-11695 (C.D. Cal.) (Papua New Guinea); *Wiwa v. Royal Dutch Petroleum Corp.*, 02-cv-7618 (S.D.N.Y.) (Nigeria); *Doe v. Exxon Mobil Corp.*, 07-cv-1022 (D.D.C.) (Indonesia); *In re XE Services Alien Tort Litig.*, 09-cv-615 (E.D. Va.) (Iraq); *Corrie v. Caterpillar, Inc.*, 05-cv-5192 (W.D. Wash.) (Israel); *In re S. African Apartheid Litig.*, 02-cv-4712 (S.D.N.Y.) (South Africa).

of Sudan v. Talismen Energy Inc., 582 F.3d 244 (2nd Cir. 2009) (07-cv-0016) ("The involvement of the Canadian private sector in the economic development of a developing country such as Sudan is an important element of Canada's overall foreign policy."). *See also* Letter from German Government to Second Circuit in *Balintulo et al. v. Daimler AG et al.*, Case No. 09-2778 (2d Cir. Oct. 8, 2009) ("there is a risk that civil lawsuits in cases of alleged human rights violations could be misused as an instrument against multinational companies, thereby harming international trade").

While these collateral consequences militate against any extraterritorial exercise of jurisdiction in situations where non-U.S. plaintiffs allege wrongful conduct occurring outside the U.S. (*see* Conditional Cross-Petition for a Writ of Certiorari of Talisman Energy Inc., No. 09-1418, filed May 20, 2010), they also demonstrate why petitioners' proposed standard, far from ensuring that the "door to further independent judicial recognition of actionable international norms ... is still ajar subject to vigilant doorkeeping" (*Sosa*, 542 U.S. at 729), would instead blow that door off its hinges.

III. Even Under Petitioners' Proposed Aiding and Abetting Standard, Their Claims Still Would Fail.

Even if this Court grants certiorari and determines that both the District Court and the unanimous panel of the Second Circuit applied the wrong standard for aiding and abetting liability, it would not change the outcome of the case. Under petitioners' proposed standard, they still would have to produce admissible evidence that Talisman Energy (1) knowingly provided (2) substantial assistance and (3) that such

assistance caused petitioners' injuries. Because petitioners did not, and cannot, produce such evidence, their claims would be subject to dismissal on summary judgment even if they are correct on the legal standard. This Court's review would therefore have no impact on the ultimate disposition of this action, and so certiorari is unwarranted.

A. Petitioners Did Not Present Any Admissible Evidence of Talisman Energy's Knowledge.

The knowledge requirement for aiding and abetting liability requires knowledge of the specific international law violations alleged, not merely of the principal's bad acts in general. *See, e.g., Tadic*, Appeals Judgment, ¶ 229 (requiring proof that the defendant carried out acts "specifically directed to assist ... the perpetration of a certain specific crime" with the knowledge that the acts "assist the commission of a specific crime by the principal"). At most petitioners provided evidence that Talisman Energy had general knowledge of the Government of Sudan's wrongful acts in southern Sudan. But neither the District Court nor the Second Circuit held that Talisman Energy knew of the specific international law violations in which petitioners allege they were injured. Without evidence of such specific knowledge, petitioners cannot succeed on their aiding and abetting claims.

B. Petitioners Did Not Present Any Admissible Evidence of Talisman Energy's Substantial Assistance.

Petitioners put forward a number of activities that they allege Talisman Energy carried out that provided substantial assistance to the Government of

Sudan. These included (1) upgrading airstrips; (2) designating specified areas for oil exploration; (3) providing financial assistance to the Government through the payment of royalties; and (4) giving general logistical support to the Sudanese military. Pet. App. A-36.

But as the Second Circuit recognized in affirming Judge Cote's decision on summary judgment after review of the exhaustive record in this case, "[a]s a threshold matter, Talisman [Energy] did not manage oil operations in the Sudan: its indirect subsidiary Greater Nile was a 25% shareholder in GNPOC, the corporation responsible for developing the concessions. The rest of the GNPOC shares were held by entities from China, Malaysia, and the Sudan." *Id.* A-35. Accordingly, it is undisputed that none of the activities on which petitioners base their claims was carried out by Talisman Energy, the sole corporate defendant in this action. It follows, therefore, that petitioners cannot produce any admissible evidence that Talisman Energy provided any assistance, substantial or otherwise, to the Government of Sudan's international law violations.

C. Petitioners Did Not Present Any Admissible Evidence That Talisman Energy Caused Their Alleged Injuries.

Contrary to petitioners' previous argument in this action, aiding and abetting liability requires that petitioners demonstrate a causal link between Talisman Energy's alleged aiding and abetting and their own injuries. *See, e.g., Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.)*, 2007 I.C.J. No. 91, ¶ 462 (Feb. 26) (to recover damages, Bosnia had to demonstrate "a sufficiently direct

and certain causal nexus between [Serbia's] wrongful act ... and the injury suffered by [Bosnia]").

Petitioners failed to produce any such admissible evidence supporting the requisite causal link between Talisman Energy's alleged knowing substantial assistance and their own alleged injuries.

Because petitioners' claims for aiding and abetting would fail even under the aiding and abetting standard for which they advocate in the Petition, certiorari is unwarranted.

IV. THE PETITION'S REMAINING ARGUMENTS ARE EITHER WAIVED OR SQUARELY CONFLICT WITH THIS COURT'S SETTLED PRECEDENTS.

As with aiding and abetting liability, *Sosa* mandates that federal district courts apply international law to an ATS plaintiff's conspiracy claim. As both the District Court and the Second Circuit recognized, this Court, in *Hamdan v. Rumsfeld*, held that "the only 'conspiracy' crimes that have been recognized by international war crimes tribunals ... are conspiracy to commit genocide and common plan to wage aggressive war." 548 U.S. at 610. Petitioners never pleaded the waging of aggressive war, and abandoned any claim of conspiracy to commit genocide.

The Eleventh Circuit cases that petitioners cite as the only evidence of a purported circuit split on the issue of conspiracy liability (Pet. 34) do not cite *Hamdan*, contain no detailed analysis, and simply assume that federal common law supplies the standard. *See, e.g., Cabello*, 402 F.3d at 1159. Such

decisions do not therefore constitute a true conflict with the Second Circuit's detailed analysis.[9]

Petitioners' belated reliance on joint criminal enterprise liability fares no better. In opposing Talisman Energy's motion for summary judgment, petitioners argued that the court should apply federal common law to the allegations of conspiracy. On appeal, in addition to arguing that Judge Cote was wrong in applying international law, petitioners also argued for the first time that Talisman Energy could be liable under the theory of joint criminal enterprise, as that term has been used by the ICTY. In response, the Second Circuit correctly held that regardless of the appropriateness of such a theory of liability in ATS cases, "an essential element of a joint criminal enterprise is 'a criminal intention to participate in a common criminal design.'" Pet. App. A-33 (citing *Tadic*, Appeal Judgment, ¶ 206). And, as with their aiding and abetting claim, petitioners could not demonstrate such intent.

Petitioners can cite to no other appellate decision that even discusses the concept of joint criminal enterprise liability, let alone reaches a definitive deci-

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[9] As the Second Circuit recognized, even if it had adopted petitioners' preferred definition of conspiracy, petitioners would fare no better "because that definition (derived from domestic law) also requires proof 'that ... [the defendant] joined the conspiracy *knowing of at least one of the goals of the conspiracy and intending to help accomplish it*.'" Pet. App. A-32 (citing *Cabello*, 402 F.3d at 1159 (emphasis added by Second Circuit)). In the absence of any admissible evidence supporting the allegation that Talisman Energy intended to help the Government of Sudan accomplish human rights violations, petitioners' conspiracy claim, even if permissible, must fail.

sion on the issue, and so can point to no circuit split requiring this Court's review.

Petitioners now raise yet another theory of liability—common purpose liability under the Rome Statute—and criticize the Second Circuit for not being omniscient in addressing an issue that petitioners never put before it. Because petitioners never before raised the argument that Talisman Energy could be liable under Article 25(3)(d) of the Rome Statute either before the District Court or on appeal, it is inappropriate for them to do so at this stage.

But even if it had, certiorari would still be unwarranted. No U.S. court has ever addressed the issue of common purpose liability. This Court should therefore follow its customary practice and refuse to consider a question in the first instance without the guidance of the lower federal courts. By allowing this issue to percolate in the lower courts—and by waiting until at least one circuit court adopts petitioners' rule—this Court will be able to reach a sounder decision in the event it wishes to review the question in the future.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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