INTRODUCTION AND SUMMARY

Pursuant to Rule 29(a), Fed. R. App. P., the United States of America hereby submits this amicus curiae brief.

As the Supreme Court recently recognized, if improperly construed or applied, the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, could improperly impinge upon the "discretion of the Legislative and Executive Branches in managing foreign affairs." Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2763 (2004). Thus, the United States has a very substantial interest in the proper construction and application of the statute.

In Sosa, the Supreme Court held that the ATS is a jurisdictional statute that does not establish a cause of action. The Court held, however, that the ATS permits federal courts, in limited circumstances, to recognize a federal common law claim of an alien alleging a violation of the law of nations. The Court found that the claim in that case failed on the ground that it did not satisfy a necessary, but not in itself sufficient, requirement for such a federal common law cause of action under the ATS: that the claim must "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms [i.e.,violations of safe conducts, infringement of the rights of ambassadors, and piracy]." Sosa, 124 S.Ct. at 2761.

Significantly, the Sosa Court rejected the notion that the ATS grants federal courts unencumbered common law powers to recognize and remedy international law violations. Rather, the Court went out of its way to chronicle reasons why a court

must act cautiously and with "a restrained conception of the discretion" in both recognizing ATS claims and in extending liability. Sosa, 124 S.Ct. at 2761-2764, 2766 n.20. The Court instructed the federal courts to refrain from an "aggressive role in exercising a jurisdiction that remained largely in shadow for much of the prior two centuries." Id. at 2762-2763. The Court then discussed at length the reasons for approaching this federal common law power with "great caution," id. at 2764: in general, courts must rely upon legislative guidance before exercising substantive law-making authority, and there is a heightened need for such guidance when the issues could impinge upon the "discretion of the Legislative and Executive Branches in managing foreign affairs." Id. at 2763.

The Supreme Court's strongest cautionary note pertained to claims relating to a foreign government's treatment of its own citizens in its own territory: "It is one thing for American courts to enforce constitutional limits on our own State and Federal Governments' power, but quite another to consider suits under rules that would go so far as to claim a limit on the power of foreign governments over their own citizens, and to hold that a foreign government or its agent has transgressed those limits." Ibid. The Court left open whether it would ever be appropriate to project the common law of the United States to resolve such extraterritorial claims. Citing to Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 813 (D.C. Cir. 1984) (Bork, J., concurring), where Judge Bork expressed "doubt that § 1350 should be read to require

‘our courts [to] sit in judgment of the conduct of foreign officials in their own countries with respect to their own citizens’” Sosa, 124 S.Ct. at 1263, the Court concluded that recognition of such claims “should be undertaken, if at all, with great caution.” Ibid.

While the Court spoke in that case to the recognition of a cause of action based upon international law norms, as we explain below, all of the Court’s admonitions and cautions apply fully to the question of whether a federal court exercising its federal common law authority should recognize the right to assert an aiding and abetting liability claim under the ATS.

Plaintiffs in the present case, citizens of South Africa, seek to bring aiding and abetting claims under the ATS on behalf of millions of purported class members against various multinational corporations that did business over a 40-year period in South Africa during the apartheid regime. As then President Reagan explained, the “policy and practice of apartheid” were “repugnant to the moral and political values of democratic and free societies.” Exec. Order No. 12532, 50 FR 36861 (September 9, 1985). As we detail below, the United States actively sought to end the apartheid regime through a policy of constructive engagement and tailored economic sanctions. While the regime and its treatment of the people of South Africa were indisputably abhorrent, the district court in this case correctly construed its federal common law

powers under the ATS and rejected plaintiffs' vast aiding and abetting claims.[1] We explain below that all of the cautionary admonitions articulated by the Sosa Court apply with full force to the aiding and abetting claims in this case.

As the U.S. Government explained in its district court filing, adjudication of these aiding and abetting claims would interfere with South Africa's own reconciliation and redress efforts, and would cause significant tension between the United States and South Africa. Notably, the current South African Government opposes this case being allowed to proceed and deems these actions incompatible with South Africa's own internal reconciliation process. More generally, recognition of an aiding and abetting claim as a matter of federal common law would hamper the policy of encouraging positive change in developing countries via economic investment.

Furthermore, the Supreme Court has instructed that whether or not to permit a civil aiding and abetting claim is a legislative choice. See Central Bank of Denver v. First Interstate Bank, 511 U.S. 164 (1994). Accordingly, absent a clear direction from Congress, a federal court should not recognize such claims under the ATS. Finally, civil aiding and abetting liability does not, in any event, satisfy Sosa's threshold

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[1] In this brief, the United States does not address the separate question of whether appellants have demonstrated the requisite international norm to support a "state action" theory of secondary liability for the various wrongs attributed to the South African government. The district court found that such liability had not been adequately pleaded. See In re: South African Apartheid Litigation, 346 F. Supp. 2d 538, 548 (S.D.N.Y. 2004).

requirement that an international law norm be both firmly established and well defined.

ARGUMENT

ALLEGATIONS OF AIDING AND ABETTING OTHERS' MISCONDUCT ARE NOT ACTIONABLE UNDER THE ATS.

A. The Court Should Be Very Hesitant To Apply Its Federal Common Law Powers To Resolve A Claim Centering On The Treatment of Foreign Nationals By Their Own Government.

Under the ATS, although the substantive norm to be applied is drawn from international law or treaty, any cause of action recognized by a federal court is one devised as a matter of federal common law -- i.e., the law of the United States. The question, thus, becomes whether the challenged conduct should be subject to a cause of action under -- and thus governed by -- U.S. law. In this case, the aiding and abetting claim asserted against defendants turns upon the abusive treatment of the South African people by the apartheid regime previously controlling that country. It would be extraordinary to give U.S. law an extraterritorial effect in such circumstances to regulate conduct of a foreign state over its citizens, and all the more so for a federal court to do so as a matter of common law-making power. Yet plaintiffs would have this Court do exactly that by rendering private defendants liable for the sovereign acts of the apartheid government of South Africa.

When construing a federal statute, there is a strong presumption against projecting U.S. law to resolve disputes that arise in foreign nations, including disputes between such nations and their own citizens. See EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991). This presumption "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." Ibid. Notably, the same strong presumption existed in the early years of this Nation, and, significantly, even the federal statute that defined and punished as a matter of U.S. law one of the principal law of nations offenses -- piracy -- was held not to apply where a foreign state had jurisdiction. See United States v. Palmer, 16 U.S. 610, 630-631 (1818) (the federal piracy statute should not be read to apply to foreign nationals on a foreign ship). See also The Apollon, 22 U.S. (9 Wheat.) 362, 370 (1824) ("The laws of no nation can justly extend beyond its own territories, except so far as its own citizens."); Rose v. Himely, 8 U.S. (4 Cranch) 241, 279 (1807) (general statutory language should not be construed to apply to the conduct of foreign citizens outside the United States). The view of that time is reflected by Justice Story:

> No one [nation] has a right to sit in judgment generally upon the actions of another; at least to the extent of compelling its adherence to all the principles of justice and humanity in its domestic concerns * * *. It would be inconsistent with the equality and sovereignty of nations, which admit no common superior. No nation has ever yet pretended to be the custos morum of the whole world; and though abstractedly a particular regulation may violate the

> law of nations, it may sometimes, in the case of nations, be a wrong without a remedy.

United States v. La Eugenie, 26 F. Cas. 832, 847 (D. Mass. 1822) (emphasis added).

Plaintiffs cite Attorney General Bradford's opinion from 1795. That opinion noted the availability of ATS jurisdiction for offenses on the high seas in 1795, but also explained that insofar "as the transactions complained of originated or took place in a foreign country, they are not within the cognizance of our courts." See 1 Op. Att'y Gen. 57, 58 (1795) (emphasis added).[2]

While the Sosa Court concluded that Congress, through the ATS, intended the federal courts to have a limited federal common law power to adjudicate well-established and defined international law claims, the Court expressly questioned whether this federal common law power could properly be employed "at all" in regard to disputes between a foreign nation and its own citizens. Sosa, 124 S.Ct. at 2763. Indeed, given the accepted principles of the time, it is highly unlikely that the drafters of the ATS intended to grant the newly created federal courts unchecked power to apply their federal common law powers to decide extraterritorial disputes regarding a foreign nation's treatment of its own citizens. Nothing in the ATS, or in its

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[2] See also 1 Op. Att'y Gen. 29, 29 (1792) ("[t]he bringing away of slaves from Martinique, the property of residents there, may be piracy, and, depending upon the precise place of its commission, may only be an offence against the municipal laws") (emphasis added).

contemporary history, suggests that Congress intended it to apply to conduct in foreign lands. To the contrary, the ambassador assaults that preceded and motivated the enactment of the ATS involved conduct purely within the United States. See id. at 2756-2657.

Moreover, "those who drafted the Constitution and the Judiciary Act of 1789 wanted to open federal courts to aliens for the purpose of avoiding, not provoking, conflicts with other nations." Tel-Oren, 726 F.2d at 812 (Bork, J., concurring). The point of the ATS was to ensure that the National Government would be able to afford a forum for punishment or redress of violations for which the nation offended by conduct against it or its nationals might hold the United States accountable. A foreign government's treatment of its own nationals is a matter entirely distinct and removed from these types of concerns.

Against this backdrop, reinforced by caution recently mandated by the Supreme Court in Sosa, courts should be very hesitant ever to apply their federal common law powers to resolve claims, such as the ones here, centering on the mistreatment of foreign nationals by their own government. The fact that plaintiffs have sued corporate defendants does not alter these concerns. The fact remains that these claims turn upon the acts of the previous South African Government and would require a U.S. court to pass judgment on the acts of a foreign nation against its own citizens.

B. The Significant Policy Decision To Impose Aiding And Abetting Liability For ATS Claims Should Be Made By Congress, Not The Courts.

As the Supreme Court has held, the creation of civil aiding and abetting liability is a legislative act that the courts should not undertake without Congressional direction, and there is no indication in either the language or history of the ATS that Congress intended such a vast expansion of suits in this sensitive foreign policy area.

1. The ATS speaks to a "civil action by an alien for a tort only, committed in violation of the law of nations." 28 U.S.C. § 1350. An aiding and abetting claim is not brought against a party charged as having "committed" a tort in violation of the law of nations. Rather, allowing aiding and abetting liability for ATS common law claims would extend liability not only to violators of international norms, but also to those who allegedly gave aid and assistance to the tortfeasor. By its very terms, the ATS simply does not suggest such third-party liability.[3]

2. Even where Congress expressly establishes domestic criminal aiding and abetting liability, the question whether to impose such liability for civil claims as well is still deemed a separate legislative judgment typically requiring legislative action.

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[3] Plaintiffs cite to Attorney General Bradford's 1795 opinion, regarding whether U.S. Citizens who violated U.S. law by assisting a foreign nation at war, as supporting aiding and abetting liability. That opinion while suggesting possible ATS liability, does not discuss theories of civil liability or approve or address aiding and abetting liability. See 1 Op. Att'y Gen. at 58.

The Supreme Court's ruling in Central Bank of Denver v. First Interstate Bank, 511 U.S. 164 (1994), is key to this case; there, the Court explained that there is no "general presumption" that a federal statute should be read to extend aiding and abetting liability to the civil context. In the criminal law context "aiding and abetting is an ancient * * * doctrine," id. at 181, but its extension to permit civil redress is not well established: "the doctrine has been at best uncertain in application." Ibid. While in the criminal context the government's prosecutorial judgment serves as a substantial check on the imposition of criminal aiding and abetting liability, there is no similar check on civil aiding and abetting liability claims. Cf. Sosa, 124 S.Ct. at 2763.

Significantly, the Central Bank of Denver Court noted that "Congress has not enacted a general civil aiding and abetting statute – either for suits by the Government (when the Government sues for civil penalties or injunctive relief) or for suits by private parties." 511 U.S. at 182. The Court concluded, "when Congress enacts a statute under which a person may sue and recover damages from a private defendant for the defendant's violation of some statutory norm, there is no general presumption that the plaintiff may also sue aiders and abettors." Ibid. (emphasis added).[4] Thus,

[4] This general presumption against implying aiding and abetting liability can be overcome in our domestic law. For example, the United States successfully argued in favor of aiding and abetting liability under a statute providing a civil cause of action for those injured by an act of international terrorism, 18 U.S.C. § 2333. See Boim v. Quranic Literacy Institute, 291 F.3d 1000 (7th Cir. 2002). That argument (continued...)

under Central Bank of Denver, a court must not presume that there is any right to assert an aiding and abetting claim under the ATS.

Moreover, in Central Bank of Denver, the Court explained that adoption of aiding and abetting liability for civil claims would be "a vast expansion of federal law." 511 U.S. at 183. Such an expansion of the law, the Court held, required legislative action, and could not be carried out through the exercise of federal common law. Ibid. So, too, under the ATS. Reading this statute to permit aiding and abetting claim would vastly increase its scope and range. That vast increase should not be undertaken without clear guidance from Congress. Notably, the Supreme Court described the ATS as an "implicit sanction to entertain the handful of international law cum common law claims." Sosa, 124 S.Ct. at 2754 (emphasis added).

In the ATS context, the Sosa Court explicitly cautioned that federal courts should be wary of "exercising innovative authority over substantive law" without "legislative guidance." Sosa, 124 S.Ct. at 2762. The Court also warned against assuming a legislative function in "crafting remedies" where resolution of the legal issue could adversely implicate foreign policy and foreign relations. Id. at 2763. The caution mandated by Sosa in deciding whether to recognize and enforce an

[4] (...continued)
was based, however, on the particular context, language, and purposes of that statute.

international law norm under the ATS, when coupled with the teaching of Central Bank of Denver that the decision whether to adopt aiding and abetting liability for a civil claim is typically a legislative policy judgment, leads to the unmistakable conclusion that aiding and abetting liability should not be recognized under the ATS, absent further Congressional action. Ultimately, the questions of whether and, if so, how to expand the reach of civil liability under international law beyond the tortfeasor would present difficult policy and foreign relations considerations that should be determined by the political branches, not the individual federal courts.

C. Practical Consequences Counsel Against The Adoption Of Aiding And Abetting Liability Under The ATS.

Under Sosa, a court deciding whether to adopt a federal common law rule extending aiding and abetting liability under the ATS must also consider the potential practical consequences, including the foreign policy effects of such a ruling. See 124 S.Ct. at 2766 ("the determination whether a norm is sufficiently definite to support a cause of action should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts"); id. at 2766 n.21 (in discussing other possible limiting principles, the Court stated, "there is a strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy"). Those

consequences strongly counsel against the judicial creation of aiding and abetting liability for ATS claims.

1. One of the "practical consequences" of embracing "aiding and abetting" liability for ATS claims would be to create uncertainty that would in some instances interfere with the ability of the U.S. government to employ the full range of foreign policy options when interacting with regimes with oppressive human rights practices. One of these options is to promote active economic engagement as a method of encouraging reform and gaining leverage. Individual federal judges exercising their own judgment after the fact by imposing aiding and abetting liability under the ATS for aiding oppressive regimes would generate significant uncertainty concerning private liability, which would surely deter many businesses from such economic engagement. Even when companies are not party to or directly responsible for the abuses of an oppressive regime, they would likely become targets of ATS aiding and abetting suits, and the fact-specific nature of an aiding and abetting inquiry would expose them to protracted and uncertain proceedings in U.S. courts. Cf. Central Bank of Denver, 511 U.S. at 188-189.

While the benefits of constructive engagement strategies have been debated for many years, such foreign policies have been employed by the United States in the past, such as with regard to the South African apartheid regime, at issue in this case,

and China.[5] The policy determination of whether to pursue a constructive engagement policy is precisely the type of foreign affairs question that is constitutionally vested in the Executive Branch and over which the courts lack institutional authority and ability to decide. See Fong Yue Ting v. United States, 149 U.S. 698, 705 (1893); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319, 320 (1936); American Ins. Ass'n v. Garamendi, 123 S. Ct. 2374, 2386 (2003).

In the case of China, constructive engagement has been advocated as a means of advancing human rights over the long term and serving important U.S. national interests:

> Underlying th[e economic engagement] approach, for some, is a belief that trends in China are moving inexorably in the "right" direction. That is, the PRC is becoming increasingly interdependent economically with its neighbors and the developed countries of the West and therefore will be increasingly unlikely to take disruptive action that would upset these advantageous international economic relationships * * *. Some also believe that greater wealth in the PRC will push Chinese society in directions that will develop a materially better-off, more educated, and cosmopolitan populace that will, over time, press its government for greater political pluralism and democracy.

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[5] See National Security Decision Directive 187 (Sept. 7, 1985) (http://www.fas.org/irp/offdocs/nsdd/nsdd-187.htm); Peter D. Feaver, The Clinton Administration's China Engagement Policy in Perspective (presented at Duke University "War and Peace Conference," February 26, 1999) (http://www.duke.edu/web/cis/pass/pdf/warpeaceconf/p-feaver.pdf).

Congressional Research Service, Issue Brief for Congress: China-U.S. Relations, 13 (January 31, 2003).[6]

In the case of South Africa, at issue here, the United States employed both engagement and sanctions in the effort to end apartheid. The policy of economic constructive engagement included use of "U.S. influence to promote peaceful change away from apartheid." National Security Decision Directive 187 at 1. Methods used to achieve that goal included increased funding of educational, labor, and business programs. Id. at 2. Also, U.S. businesses were urged to "assist black-owned companies." Ibid.

While employing the policy of constructive engagement, the United States also, by Executive Order, and then by statute, strongly condemned the practice of apartheid and prohibited the "making or approval of any loans by financial institutions in the United States to the Government of South Africa or to entities owned or controlled by

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[6] See also CNN All Politics, Clinton Defends China Trip, Engagement Policy, http://www.cnn.com/ALLPOLITICS/1998/06/11/clinton.china (June 11, 1998) (quoting President Clinton: "Choosing isolation over engagement * * *would make it more dangerous. It would undermine, rather than strengthen, our efforts to foster stability in Asia. It will eliminate, not facilitate, cooperation on issues relating to weapons of mass destruction."); 144 Cong. Rec. E1440 (1998) (remarks of Rep. Roemer) ("I support constructive engagement with China as a method of improving our critically important bilateral relationship and pursuing our foreign policy goals to advance human rights and religious freedom * * *. Our policy of constructive engagement has also helped expand cooperation with China in critical areas important to our national security * * *.").

that Government," and "[a]ll exports of computers, computer software, or goods or technology intended to service computers to or for use by" specified entities of the South African government.[7] This mix of engagement and limited sanctions was part of carefully crafted political and diplomatic efforts to encourage the Government of South Africa to end apartheid. See Pub. L. 99-440, §§ 4, 101. A court 20 years after the fact should not employ its common law powers to sit on judgment on whether this policy was in hindsight the best course of action. See Schneider v. Kissinger, 412 F.3d 190 (D.C. Cir. 2005) (refusing to review the propriety of foreign policy decisions made by the U.S. Government in the 1970s).

Importantly, the adoption of an aiding and abetting rule in this case could prospectively restrict policy options for the United States around the world. Adopting aiding and abetting liability under the ATS would undermine the ability of the Executive to employ an important tactic of diplomacy and available tools for the political branches in attempting to induce improvements in foreign human rights practices. The selection of the appropriate tools, and the proper balance between rewards and sanctions, requires difficult policymaking judgments that can be rendered

[7] Exec. Order No. 12532, 50 FR 36861 (September 9, 1985); Pub. L. 99-440, §§ 304-305 (1986). The Executive Order and subsequent statute extended the export ban to, inter alia, the South African military, police, prison system, and national security agencies, and any apartheid enforcing agency.

only by the federal political branches. See Crosby v. National Foreign Trade Council, 530 U.S. 363, 375-385 (2000).

2. Another important practical consideration is that allowing for the proliferation of ATS suits through adoption of an aiding and abetting liability standard would inevitably lead to greater diplomatic friction for the United States. Aiding and abetting liability under the ATS would trigger a wide range of ATS suits with plaintiffs challenging the conduct of foreign nations -- conduct that would otherwise be immune from suit under the Foreign Sovereign Immunities Act ("FSIA").[8] Aiding and abetting liability would afford plaintiffs the ability to, in effect, challenge the foreign government's conduct by asserting claims against those alleged to have aided and abetted the government.

Experience has shown that aiding and abetting ATS suits often trigger foreign government protests, both from the nations where the alleged abuses occurred, and, in cases against foreign corporations, from the nations where the corporations are based or incorporated (and therefore regulated). This serious diplomatic friction can lead to a lack of cooperation on important foreign policy objectives.

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[8] Under the FSIA, foreign governments are immune from suit, subject to certain specified exceptions. For tort claims, foreign governments generally cannot be sued unless the tort occurs within the United States. See 28 U.S.C. 1605(a)(5); Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 439-41 (1989).

In this specific case, as the district court noted, the "South African government indicated that it does not support this litigation and that it believes that allowing this action to proceed would preempt the ability of the government to handle domestic matters and would discourage needed investment in the South African economy." In re: South African Apartheid Litigation, 346 F.Supp.2d 538, 553 (S.D.N.Y. 2004). The statement of interest filed by the United States Government "expressed its belief that the adjudication of this suit would cause tension between the United States and South Africa." Id. at 553. In accord with Sosa, 124 S.Ct. at 2766 n. 21, the district court then properly gave great weight to these specific foreign policy statements, as well as to the Executive Branch's view as to broader foreign policy ramifications of recognition of aiding and abetting liability under the ATS.

3. Aiding and abetting liability can also have a deterrent effect on the free flow of trade and investment more generally, because of the uncertainty it creates for those operating in countries where abuses might occur. The United States has a general interest in promoting the free flow of trade and investment, both into and out of the United States, in order to increase jobs domestically and the standard of living overseas. Apart from this national economic interest, the U.S. has broader foreign

policy interests in using trade and investment to promote economic development in other countries as a way of promoting stability, democracy and security.[9]

Thus, serious foreign policy and other consequences relating to U.S. national interests strongly counsel against the adoption of a rule extending civil aiding and abetting liability to ATS claims.

D. Civil Aiding And Abetting Liability Does Not Satisfy Sosa's Threshold Requirement That An International Law Norm Be Both Firmly Established And Well Defined.

Under Sosa, whatever other considerations are relevant in determining whether an international law norm should be recognized and enforced as part of an ATS federal common law cause of action, a necessary requirement is that the international law principle must be both sufficiently established and well defined. The Supreme Court did not provide any definitive methodology for assessing when international law norms meet these standards. The Court explained, however, that the principle at issue must be both "accepted by the civilized world" and "defined with a specificity," and in both respects the norms must be "comparable to the features of the 18th-century paradigms" – i.e., violation of "safe conducts, infringement of the rights of

[9] Adopting aiding and abetting liability for ATS claims could also have a potential deterrent effect on investments within the United States because of the concern of ATS jurisdiction based on contacts here and the exposure of such investments to attachment to satisfy adverse judgments.

ambassadors, and piracy." See Sosa, 124 S.Ct. at 2761-62. Thus, in resolving whether the necessary conditions are met, this Court must examine: 1) whether civil aiding and abetting liability is broadly, if not universally, accepted by the international community and 2) whether the principle, as accepted by the international community, is defined with "specificity" in each regard to a degree comparable to the "18th-century paradigms."

The common law imposition of civil aiding and abetting liability does not meet this test.[10]

1. First, there is no such international norm for civil aiding and abetting liability. Plaintiffs do not contend otherwise, choosing instead to base their argument

[10] Plaintiffs argue that it is unnecessary to find an international norm altogether because aiding and abetting liability is merely an "ancillary rule of decision." But, as we have explained, all of the cautions and admonitions of the Sosa Court apply in full to the question of substantive law of whether to adopt aiding and abetting liability for ATS claims. It would be directly at odds with Sosa for the federal courts to adopt substantive legal principles, as matter of federal common law, without proof of an universal and specifically defined international norm. Aiding and abetting is undoubtedly a separate cause of action and, indeed, when predicated on mistreatment by a government of its own citizens poses the very question raised by the Supreme Court in Sosa, i.e., "whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual." Id. at 2766 n.20. Although the Supreme Court has "recently and repeatedly said that a decision to create a private right of action is one better left to legislative judgment," Id. at 2744, on plaintiffs' theory, the courts would be free to create a wide variety of private rights of action as "ancillary rules of decision" with no limitation based upon international law. As we discuss supra, this is directly contrary to the Supreme Court's approach in Central Bank of Denver, which focused specifically on aiding and abetting.

entirely on practice of certain international criminal tribunals.[11] (No. 05-2326 at 35-39; No. 05-2141 at 34-40). But in Sosa, the Court stressed that the federal courts should exercise "great caution in adapting the law of nations to private rights," 124 S.Ct. at 2764. It is highly relevant that the law of nations generally does not recognize a specific private right to redress for civil aiding and abetting liability.

While the concept of criminal aiding and abetting liability is well established, the statutes of the international criminal tribunals appellants rely upon do not provide for civil aiding abetting liability.[12] Indeed, one of the only contexts in which civil liability for aiding and abetting is addressed explicitly is in an annex to a U.N.

[11] The charters of the modern international criminal tribunals embrace the concept of criminal aiding and abetting liability. See Nuremberg International Military Tribunal Control Council Order No. 10; Statute of the International Criminal Tribunal for the Former Yugoslavia (1993, updated 2004) ("ICTY Statute"), art. 7(1); Statute of the International Criminal Tribunal for Rwanda (1994) ("ICTR Statute"), art. 6(1); Rome Statute of the International Criminal Court (1998). Aiding and abetting liability likewise has been adopted by the United States when defining acts of international terrorism subject to prosecution before military commissions. See Military Commission Instruction No. 2, Art. 6(C)(1) (April 30, 2003) (available at http://www.defenselink.mil/news/May2003/d20030430milcominstno2.pdf).

[12] The statutes of the international criminal tribunals provide only for the possibility of restitution as a discretionary penalty. ICTY Statute, art. 24(3); ICTR Statute, art. 23(3).

Resolution, and that document only addresses aiding and abetting <u>between states</u> and provides a different standard from that put forward by the plaintiffs.[13]

Lacking any international consensus on civil aiding and abetting liability, plaintiffs are in essence asking our federal courts to use their federal common law powers, recognized in <u>Sosa</u>, to legislate a standard. The task of filling out its content in ATS suits would confront U.S. courts with a host of issues that do not arise with criminal aiding and abetting. The court would have to create new rules governing, among other things: how to allocate liability among multiple potential tortfeasors, including the party responsible for the primary tort; how to determine proportionality between the aider and abettor's role and the extent of its liability; what standard of causation to apply in establishing the aider and abettor's contribution to the damage; whether remedies should be allowed for "moral" as well as material damage, and if so, whether those remedies should go beyond restitution and compensation to include

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[13] <u>See</u> article 16 of the International Law Commission's draft articles on "Responsibility of States for Internationally Wrongful Acts," annexed to UN General Assembly Resolution 56/83, adopted January 28, 2002 ("A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) That State does so with knowledge of the circumstances of the internationally wrongful act; and (b) The act would be internationally wrongful if committed by that State.") This formulation does not address the degree of assistance required. Moreover, the Commentary on this article indicates that the State must have intended to facilitate the wrongful conduct, a purpose element also missing from plaintiffs' proposed ATS standard. See J. Crawford, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY, 149 (2002).

such categories as punitive damages; whether the underlying liability of the primary tortfeasor must be previously established and, if not, how to address the inability of the parties to obtain relevant information from a non-party state accused of the central wrongdoing; and, ultimately, whether it is appropriate to create a private cause of action against an alleged aider and abettor in circumstances where a foreign state actor cannot itself be sued.

Plaintiffs' bold request for judicial legislation cannot be squared with the Supreme Court's instructions. In Sosa, the Court recognized "that the general practice * * * [is] to look for legislative guidance before exercising innovative authority over substantive law." 124 S.Ct. at 2762. For this and other reasons, the Court instructed that the courts use "great caution in adapting the law of nations to private rights." Id. at 2764. Here, plaintiffs are not simply asking the court to "adapt" a well-established and well-defined civil norm of aiding and aiding liability. Rather, they are asking this Court to create such a norm and provide all of the content for the norm as well. This is far beyond the cautious and limited exercise of common law authority permitted under Sosa.

2. Plaintiffs try to remedy this fatal shortcoming by appealing to international practice regarding criminal aiding and abetting. Not only does that practice not answer the questions that would confront American courts, but it is particularly unsuited as a springboard to domestic civil aiding and abetting liability. As discussed

above, there is no "general presumption" that criminal aiding and abetting liability extends liability to the civil context. Rather, the general presumption under our domestic law is that such an extension requires an independent legislative policy choice. Central Bank of Denver, 511 U.S. at 182.

Moreover, the decision to charge a person for an international crime is a grave matter requiring careful exercise of prosecutorial judgment by government officials. That prosecutorial judgment serves as a substantial practical check on the application of the criminal aiding and abetting standard.[14] Opening the doors to civil aiding and abetting claims in U.S. courts through the ATS could not be more different. Any aggrieved aliens, anywhere in the world, could potentially bring an ATS civil suit in the United States, claiming that a private party aided or abetted abuses committed abroad against them by their own government. Such a "vast expansion" of civil liability by adoption of an aiding and abetting rule, Central Bank of Denver, 511 U.S.

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[14] Notably, one stated reason why the United States refused to join the Rome Statute of the International Criminal Court, which provides for criminal aiding and abetting liability, is that it lacks sufficient checks on prosecutorial discretion. See American Foreign Policy and the International Criminal Court, Marc Grossman, Under Secretary for Political Affairs, Remarks to the Center for Strategic and International Studies, Washington, DC, May 6, 2002 (http://www.state.gov/p/9949pf.htm). See also Presbyterian Church of Sudan v. Talisman Energy, Inc., 374 F.Supp.2d 331, 339-340 (S.D.N.Y. 2005) ("the United States feared 'unchecked power in the hands of the prosecutor' that could lead to 'politicized prosecutions.'").

at 183, is not contemplated in any competent source of international or federal law, criminal or civil.

Under Sosa, before creating federal common law aiding and abetting liability for civil ATS claims, a court should examine whether there is an international consensus that criminal aiding and abetting liability should necessarily translate into a right to sue the aider/abettor for money damages. Given Central Bank of Denver's statement that the extension of criminal aiding and abetting concepts to the civil context is "at best uncertain," 511 U.S. at 181, it is not possible to draw that conclusion.

3. Even on its own merits, the international criminal norms plaintiffs seek to rely upon do not satisfy Sosa's requirements for incorporation into federal common law under the ATS. International criminal aiding and abetting is not one of those "handful of heinous actions - each of which violates definable, universal and obligatory norms," Sosa at 2766 (quoting Edwards, J., in Tel-Oren, supra at 781), nor is it all similar to the historical precedents that Sosa teaches should be the measure for supporting a new cause of action under the ATS. See E. Kontorovich, Implementing Sosa v. Alvarez-Machain: What Piracy Reveals about the Limits of the Alien Tort Statute, 80 Notre Dame L. Rev. 111, 134, 158 (2004) (describing six characteristics of piracy that made it suitable for ATS coverage and absence of those characteristics in aiding and abetting claims).

Moreover, the standard the plaintiffs propose differs materially from the most recent formulations adopted in international practice. While the plaintiffs propose a "knowledge" standard, the Rome Statute to which 99 countries are party requires a defendant to act "for the purpose of facilitating the commission" of a crime (article 25(3)). The same standard was adopted by the United Nations Administration for East Timor. See 2000 UNATET Reg. No. 2000/15-14.3(1).

Plaintiffs draw their "knowledge" standard from the ad hoc International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda. While "the ICTY and ICTR Statutes were created by resolutions of the United Nations Security Council," Presbyterian Church of Sudan v. Talisman Energy, Inc., 374 F.Supp.2d at 338, the rulings of the ICTY and the ICTR are specific to their jurisdictions,[15] and their discussions do not bind other international bodies. Accordingly, it would be inappropriate for a federal court, as a matter of federal common law, to adopt these criminal statutes and rulings as establishing a general civil aiding and abetting liability rule of "international character accepted by the civilized world." Sosa, 124 S.Ct. at 2761.

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[15] United Nations Security Council resolution 827 of May 25, 1993, established the ICTY to address violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991. See ICTY Statute, art. 1. The ICTR's jurisdiction is likewise limited to the prosecution of persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda in 1994. See ICTR Statute, art. 1.

Particularly given the enormous practical consequences of broadening the scope of the ATS if this form of secondary civil liability were added, the courts should follow the Supreme Court's admonition in Sosa to exercise great caution against importing international criminal concepts of aiding and abetting into domestic tort law.

CONCLUSION

For the foregoing reasons, this Court should affirm the dismissal of the aiding and abetting claims.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I hereby certify that this brief complies with the type-volume limitation in Rule 32(a)(7)(B). The foregoing brief is presented in Time New Roman 14 point font. The word count for the brief (as calculated by the WordPerfect 9.0 word-processing program, excluding exempt material) is 6,875, and is under the 7,000 word limitation.

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