No. 10-1491

In the Supreme Court of the United States

ESTHER KIOBEL, INDIVIDUALLY AND ON BEHALF OF HER LATE HUSBAND, DR. BARINEM KIOBEL, ET AL.,
Petitioners,

v.

ROYAL DUTCH PETROLEUM CO., ET AL.,
Respondents.

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

BRIEF OF THE CLEARING HOUSE ASSOCIATION L.L.C. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

Amicus curiae will address the following questions:

1. Whether, if corporations are subject to liability in a federal common law action under the Alien Tort Statute, they may be held liable only as primary violators and not on theories of secondary liability.

2. Whether, if corporations are subject to liability for aiding and abetting in a federal common law action under the Alien Tort Statute, a plaintiff must prove both that the corporation intended to further the alleged primary violation and that the corporation's actions substantially assisted the primary actor's violation.

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INTEREST OF THE *AMICUS CURIAE*[1]

Established in 1853, The Clearing House Association, L.L.C. ("Association"), is the nation's oldest banking association and payments company. It is owned by the world's largest commercial banks, which collectively employ 1.4 million people in the United States and hold more than half of all U.S. deposits. The Association is a nonpartisan advocacy organization representing—through regulatory comment letters, *amicus* briefs, and white papers—the interests of its member banks on a variety of systemically important banking issues. Its affiliate, The Clearing House Payments Company L.L.C., provides payment, clearing, and settlement services to its member banks and other financial institutions, clearing almost $2 trillion daily and representing nearly half of the automated-clearing-house, funds transfer, and check-image payments made in the United States.

Recognition by this Court of a new cause of action for secondary liability under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, would expose the Association's members to litigation seeking potentially astronomical damage awards, based simply on their basic businesses of lending and providing other ordinary financial services. Financial services companies are subject to a disproportionate number of suits un-

[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of *amicus* briefs have been filed with the Clerk's office.

der the ATS. They are particularly vulnerable to ATS suits premised on overreaching theories of secondary liability, in which plaintiffs' attorneys characterize the defendants' core business of lending money as aiding and abetting merely because a state actor alleged to have violated international law obtained a generalized benefit from the borrowed funds.

The Association believes strongly that the Court should affirm the Second Circuit's holding in this case that the ATS does not impose liability on corporations. If, however, this Court declines to affirm that determination, it should limit suits under the ATS to those predicated on primary liability or, alternatively, hold that secondary liability under the ATS requires proof of both the intent to further a violation of international law and substantial assistance in bringing about that violation. Any other result would create great uncertainty and unjustified litigation expense for financial institutions by turning every transaction in which the counterparty can be alleged to have violated international law into grounds for a costly lawsuit under the ATS. Permitting such claims would have a chilling effect upon the business of the Association's members—business that is both critical to the economies of developing nations and an important component of United States foreign policy.

SUMMARY OF ARGUMENT

Petitioners' claims here—based on allegations that respondents assisted the Nigerian government in harming its citizens—are "essentially * * * for secondary liability, *i.e.*, claims that Defendants 'facilitated,' 'conspired with,' 'participated in,' 'aided and abetted,' or 'cooperated with' government actors or

government activity in violation of international law." Pet. App. B-11.

We agree with the court below and respondents that corporations are not subject to liability under the ATS.

This brief addresses additional questions regarding the scope of liability under the ATS that are also before the Court in this case: whether to expand the causes of action available under the ATS to include secondary liability claims and, if so, what standards should govern those claims. That question, which has divided the lower courts and is of immense practical importance, should be resolved by this Court.

Petitioners' aiding-and-abetting claims fail both prongs of the test established by this Court in *Sosa* v. *Alvarez-Machain,* 542 U.S. 692 (2004): they are not grounded in a clear, universal, and definite international norm; and permitting aiding-and-abetting claims would lead to severe adverse practical consequences.

The practical consequences of permitting aiding-and-abetting claims would be extremely significant.

First, aiding-and-abetting claims are the principal source of abusive claims under the ATS. Because virtually all international law norms apply only to government actors, plaintiffs must invoke theories of secondary liability to seek to impose liability on deep-pocketed corporations. The result has been a steady flow of claims that allege liability based on nothing more than ordinary business dealings in countries in which human rights violations are alleged to have occurred.

Financial institutions are a particularly vulnerable target for these claims and, not surprisingly, have been named as defendants in a disproportionate number of suits. As Judge Leval explained, "business corporations engaged in finance" can be sued simply for providing funding to "a government that is known to violate the law of nations." Pet. App. A-99. And such suits can be brought even "where the corporation did not promote, solicit, or desire the violation of human rights." *Id.* That leaves the industry especially vulnerable to sweeping theories of aiding-and-abetting liability when money they have lent can somehow be alleged to be connected to a claimed violation of international law.

The pliable and uncertain standards that the lower courts today apply to aiding-and-abetting claims make it difficult for defendants to prevail on a motion to dismiss. And once a case passes the motion to dismiss stage, the pressure to settle even meritless claims is tremendous because of the high costs of litigation—inevitably involving discovery in remote parts of the world—and the reputational harm from being labeled a "human rights violator," harm that typically is amplified by out-of-court public relations campaigns mounted by the plaintiffs and their allies.

Second, the inevitable result of recognizing secondary liability under the ATS is both to discourage investment in developing countries and put corporations that do business in the United States at a disadvantage by exposing them to liability under the ATS simply for investing resources in parts of the world where international-law violations may occur. That deters economic development in the areas of the world that need it most.

Third, secondary liability claims infringe significantly on U.S. foreign policy prerogatives in two ways. Our government has consistently recognized that international trade promotes democratic value—but the threat of secondary liability suits discourages companies, especially financial institutions, from engaging in that activity. In addition, our government may choose to employ trade sanctions as a nuanced, targeted tool of foreign policy. But permitting aiding-and-abetting actions allows ATS plaintiffs to arrogate those decisions to themselves through aiding-and-abetting claims that retroactively make the simple act of investing or doing business in a foreign country a source of liability.

Aiding-and-abetting claims also fail the first prong of the *Sosa* standard: there is no universal, clear and definite norm prohibiting aiding and abetting in the context of the primary violations alleged here. Because neither prong of the *Sosa* test is satisfied, the Court should hold that secondary liability claims may not be asserted under the ATS.

If the Court concludes that corporate ATS actions premised on aiding-and-abetting liability are not entirely precluded, it should eliminate the confusion among the lower courts by establishing clear standards for such claims: proof of both an intent to further a direct violation of international law and substantial assistance in bringing about that violation. Failing to provide guidance on this issue would perpetuate the current pattern of abusive litigation that exploits aiding-and-abetting liability to extract unjustified settlements from corporations that have done nothing more than engage in routine business activities

ARGUMENT

SOSA BARS RECOGNITION OF AIDING-AND-ABETTING ACTIONS UNDER THE ALIEN TORT STATUTE.

This Court held in *Sosa* v. *Alvarez-Machain* that a damages claim may be asserted under the ATS only if it is grounded an international-law norm that has as "definite content and acceptance among civilized nations" as the three "historical paradigms familiar when § 1350 was enacted" in 1789 (542 U.S. 692, 732 (2004))—*i.e.*, "Blackstone's three common law offenses" against the law of nations: "violation of safe conducts, infringement of the rights of ambassadors, and piracy." *Id.* at 724, 737. In addition, a court must assess the "practical consequences" of creating a new federal common law cause of action for private litigants. *Id.* at 732-33. Aiding-and-abetting claims satisfy neither of these requirements.

A. Secondary Liability Claims Are The Principal Source Of Abusive Litigation Under The ATS.

This Court in *Sosa*, emphasized the importance of assessing the practical consequences of permitting a new form of liability under the ATS: "the determination whether a norm is sufficiently definite to support a cause of action [under the ATS] 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." 542 U.S. at 732-33. The experience with aiding-and-abetting claims in the lower courts demonstrates the very substantial adverse consequences of permitting this new form of liability.

To begin with, the Court has recognized in other contexts that aiding-and-abetting claims carry a significant potential for abuse. They "extend[] [the law's scope] beyond persons who engage, even indirectly, in a proscribed activity; aiding-and-abetting liability reaches persons who do not engage in the proscribed activities at all, but who give a degree of aid to those who do." *Cent. Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 176 (1994) (discussing secondary liability under Section 10(b) of the Securities Exchange Act of 1934). And while "[e]xtending [a] cause of action to aiders and abettors no doubt makes the civil remedy more far reaching," "it does not follow that the objectives of the statute are better served." *Id.* at 188. "Secondary liability for aiders and abettors exacts costs that may disserve the goals of [the underlying statute]." *Ibid.*; see also *Stoneridge Inv. Partners LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148,164 (2008) (concern that permitting secondary liability claims "may raise the cost of being a publicly traded company under our law and shift securities offerings away from domestic capital markets").

Most critically, "the rules for determining aiding-and-abetting liability are unclear," and allowing secondary liability "leads to the undesirable result of decisions made on an ad hoc basis," with "shifting and highly fact-oriented disposition[s]," protracted litigation, and unreliable outcomes. *Cent. Bank,* 511 U.S. at 188 (quoting *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 755 (1975)).

"Because of the uncertainty of the governing rules, entities subject to secondary liability as aiders and abettors may find it prudent and necessary, as a business judgment, to abandon substantial defenses

and to pay settlements in order to avoid the expense and risk of going to trial." *Cent. Bank,* 511 U.S. at 189. And the pressure to settle an uncertain aiding-and-abetting claim is multiplied when the primary theory of liability already "'presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general.'" *Ibid.* (quoting *Blue Chip Stamps*, 421 U.S. at 739).

The danger of vexatious litigation from aiding-and-abetting claims under the ATS is at least as pronounced as it was for claims under the federal securities laws. Pet. App. A-6 ("[C]omplexity and uncertainty—combined with the fact that juries hearing ATS claims are capable of awarding multibillion-dollar verdicts—has led many defendants to settle ATS claims prior to trial."); see also *Khulumani* v. *Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 295 (2d Cir. 2007) (Korman, J., concurring in part and dissenting in part) (aiding-and-abetting claims "simply provide a vehicle to coerce a settlement"), aff'd for lack of quorum sub nom. *Am. Isuzu Motors, Inc.* v. *Ntsebeza*, 553 U.S. 1028 (2008).

Aiding-and-abetting claims also undermine important goals of U.S. foreign policy. Commercial engagement in developing nations has long been recognized by our government as a critical tool for promoting democracy. But companies will be reluctant to do business in those parts of the world if the cost includes multi-billion dollar lawsuits labeling them as "human rights violators."

Financial institutions are much more likely to suffer these adverse consequences than other types of businesses. Indeed, actions involving defendants from the financial sector account for nearly one-fifth of all ATS claims. Because the financial resources

provided by banks are critical to economic development, moreover, the adverse effects of permitting such claims will be especially damaging to economic development and, therefore, to U.S. foreign policy.

1. The indeterminate nature of aiding-and-abetting liability allows plaintiffs to premise multi-billion dollar claims on normal business activities, particularly those of financial services firms.

Most international law norms apply only to government actors. In order to join private parties as defendants—and access their typically deeper pockets—plaintiffs must invoke theories of secondary liability, alleging most frequently that the private party in some way "aided and abetted" the government actor's violation. But the acts alleged to constitute the "aiding and abetting" typically are ordinary business activities.

Perhaps the most well-known example of this practice is the South African Apartheid Litigation. Plaintiffs brought these actions seeking $400 billion in damages for tens of millions of South Africans who were injured by South Africa's apartheid regime. They sued more than fifty U.S. and foreign corporations (including twelve financial services firms) on the theory that simply conducting routine business with South Africa— a policy of constructive engagement that was carefully considered and expressly condoned by these corporations' home country governments—constituted aiding and abetting "the entire system of apartheid—a criminal enterprise." *Khulumani*, 504 F.3d at 295 (Korman, J., concurring

in part, dissenting in part) (quoting a complaint).[2] The plaintiffs did not allege that the corporations acted with the purpose of furthering the apartheid regime and did not attempt to link particular plaintiffs to injuries allegedly caused by particular defendants. *Id.* at 294 (Korman, J., concurring in part, dissenting in part). Rather, their argument is that apartheid "would not have occurred *in the same way*" had defendants not done business in South Africa. *Ibid.* (quoting complaint).

Notwithstanding the unprecedented breadth of the claims, and the outcry from both foreign and domestic sources, including even the democratically elected post-apartheid South African government, over the foreign policy implications of this litigation, see pages xx *infra*, uncertainty about the standard for aiding and abetting has allowed the case to remain pending—with the defendants expending enormous sums of money and constantly living with reputational injury and the threat of huge liability—for over a decade.[3]

Another ATS aiding-and-abetting action involves claims that the plaintiffs were forced to act as slaves

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[2] The financial institutions named in the *In re South African Apartheid Litigation*, included Citigroup, Inc., UBS AG, Credit Suisse Group, J.P. Morgan Securities, Inc., Deutsche Bank AG, Dresdner Bank AG, Commerzbank AG, Barclays Bank PLC, Natwest Bank PLC, Standard Chartered Bank, PLC, Credit Lyonnais,and Banque Indo Suez. Allegations included that "[t]he money from defendant German banks directly benefitted and supported the apartheid reign of terror in South Africa." *Khulumani*, 504 F.3d at 294 (Korman, J., concurring in part, dissenting in part) (quoting the record).

[3] *In re South African Apartheid Litig.*, No. 02-MD-1499 (S.D.N.Y.) was filed Dec. 20, 2002.

on cocoa farms in Côte d'Ivoire. The plaintiffs did not seek damages under the ATS from the cocoa farmers who allegedly imprisoned and abused them. The defendants instead are three multinational companies that purchased cocoa from Cote d'Ivoire—Nestlé U.S.A.; Cargill, Inc.; and Archer Daniels Midland Co.—that are not alleged to have participated in any way in the alleged imprisonment or abuse.

Rather, the plaintiffs' theory is that the corporations aided and abetted the farmers' wrongdoing by purchasing Ivorian cocoa beans and providing various forms of "logistical support" to farming activities—such as agreeing to purchase their entire production, providing fertilizer and other farming supplies, and training in beneficial farming techniques and humane labor practices—allegedly with the knowledge that the use of child labor in that sector of the Ivoirian economy is "well-documented." First Am. Compl. ¶¶ 44, 47, *Doe I* v. *Nestle, S.A.*, 748 F. Supp. 2d 1057 (C.D. Cal. 2010) (No. 2:05-CV-05133), 2009 WL 2921081.

The district court held that the plaintiffs' allegations failed to make out a claim of aiding and abetting: "the overwhelming conclusion is that Defendants were purchasing cocoa and assisting the production of cocoa. It is clear from the caselaw that ordinary commercial transactions do not lead to aiding and abetting liability." 748 F. Supp. 2d at 1109 (emphasis omitted). But that determination came only after multiple rounds of briefing (the case was filed in 2005, but not dismissed until 2010). And the plaintiffs have appealed the dismissal of the complaint, specifically contesting the district court's ruling on the aiding and abetting issue.

More recently, an Iranian journalist filed an ATS suit against Nokia Siemens based on the sale of ordinary products to Iran's oppressive government. See Compl., *Saharkhiz* v. *Nokia Corp. et al.*, No. 1:10-cv-912 (E.D. Va. filed Aug. 16, 2010). The allegations are "aiding and abetting and/or ratification" of acts of torture by providing the government of Iran with cellular technology that enabled it to track down the plaintiff, at which point he was tortured. *Id.* at 3, 25. The plaintiff did not allege that Nokia intended to facilitate the government's acts. Notably, Nokia was in compliance with all restrictions on business with Iran.

These are just three examples of a widespread phenomenon. There are several dozen ATS actions now pending in the federal courts[4]; and in the past two decades, various plaintiffs have filed more than

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[4] See, *e.g.*, *Arias* v. *DynCorp.*, 517 F. Supp. 2d 221 (D.D.C. 2007) (Nos. 01-CV-01908 & 07-cv-1042 (D.D.C.)); *Baloco* v. *Drummond Co.*, 640 F.3d 1338 (11th Cir. 2011) (No. 7:09-CV-00557); *Bauman* v. *DaimlerChrysler Corp.*, 644 F.3d 909 (9th Cir. 2011) (No. 04-CV-00194 (N.D. Cal.)); *In re Chiquita Brands Int'l Inc.*, No. 10-CV-80954 consolidated (S.D. Fla.) (six actions); *Doe* v. *Cisco Systems, Inc.*, No. 11-cv-2449 (N.D. Cal.); *Doe VIII* v. *Exxon Mobil Corp.*, 654 F.3d 11 (D.C. Cir. 2011) (No. 01-CV-01357 (D.D.C.)); *Doe I* v. *Nestle, S.A.*, 748 F. Supp. 2d 1057 (C.D. Cal. 2010) (No. 2:05-cv-5133 (C.D. Cal.)); *Daobin* v. *Cisco Systems, Inc.*, No. 11-cv-01538 (D. Md.); *Flomo* v. *Firestone Natural Rubber Co.*, 643 F.3d 1013 (7th Cir. 2011) (No. 06-CV-00627 (S.D. Ind.)); *Kiobel, supra*; *Licea* v. *Curacao Drydock Co.,* 794 F. Supp. 2d 1299 (S.D. Fla. 2011) (No. 06-CV-22128 (S.D. Fla.)); *Linde* v. *Arab Bank, PLC,* 353 F. Supp. 2d 327 (E.D.N.Y. 2004) (No. 04-CV-02799 (E.D.N.Y) (and eight related actions)); *Mujica* v. *Occidental Petroleum,* 564 F.3d 1190 (9th Cir. 2009) (No. 03-CV-02860 (C.D. Cal.)); *Obe* v. *Royal Dutch Shell PLC,* No. 2:11-cv-14572 (E.D. Mich.); *In re Terrorist Attacks on September 11, 2001,* No. 03-MD-01570 (S.D.N.Y.).

150 ATS lawsuits against U.S. and foreign corporations.[5] The overwhelming majority of these actions have rested on secondary liability theories similar to those in the cases just discussed.

These claims are especially easy to assert against financial institutions. As Judge Leval explained, "business corporations engaged in finance" can be sued simply for providing funding to "a government that is known to violate the law of nations." Pet. App. A-99. And such suits can be brought even "where the corporation did not promote, solicit, or desire the violation of human rights." *Id.*

True to that observation, financial institutions increasingly are the subject of ATS lawsuits premised on aiding-and-abetting liability, based on their ordinary business activities of lending to foreign entities and financing projects in foreign countries. Indeed, the financial services industry is the second most targeted industry in ATS litigation, accounting for 18% of ATS suits, with banks a particular focus.[6] This is true notwithstanding the fact that the Nuremberg Tribunal—one of the most frequently-cited sources of international law—explicitly rejected the notion that a financial entity can be held liable based on its "[l]oans or sale of commodities to be used in an unlawful enterprise," there, the Nazi regime and its instrumentalities.[7]

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[5] Jonathan C. Drimmer & Sarah R. Lamoree, *Think Globally, Sue Locally: Trends and Out-of-Court Tactics in Transnational Tort Actions*, 29 Berkeley J. Int'l L. 456, 460 (2011)

[6] See Drimmer, Berkeley J. Int'l L. at 461.

[7] See *Khulumani*, 504 F.3d at 292-93 (Korman, J., concurring in part, dissenting in part) (quoting *United States* v. *von Weizsaecker* ("*The Ministries Case*"), 14 *Trials of War Criminals Be-*

Financial institutions are frequent and easy targets for particularly attenuated secondary liability claims because the global nature of the industry obviates the need for on-the-ground activity in foreign nations, and, in fact, does not permit direct oversight of the activities of every client who might potentially commit a violation. That leaves the industry especially vulnerable to sweeping theories of aiding-and-abetting liability when money they have lent can somehow be alleged to be connected to a claimed violation of international law.

2. The particular characteristics of Alien Tort Statute litigation enable plaintiffs to force settlements in meritless cases.

No plaintiff has yet prevailed on the merits in an ATS suit predicated on aiding-and-abetting liability.[8] Only two cases have gone to trial on a theory of aiding-and-abetting liability, and the jury found for defendants in both.[9]

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fore the Nurnberg Military Tribunals Under Control Council Law No. 10, 308, 622 (William S. Hein & Co. 1997) (1949)).

[8] *Chowdhury* v. *WorldTel Bangladesh Holding, Ltd.*, 588 F. Supp. 2d 375 (E.D.N.Y. 2009), is the only victory plaintiffs have achieved against a corporation, but the theory was not aiding and abetting liability. In fact the court initially dismissed plaintiffs' claimed premised on aiding and abetting. Plaintiffs then amended their complaint to state claims based on agency and ratification. Amend. Compl. at 1, *Chowdhury,* 588 F. Supp. 2d 375 (No. 108CV01659), 2009 WL 3289358. The award was $1.5 million, with $250,000 in punitive damages awarded against the individual but not the corporation.

[9] See *Bowoto* v. *Chevron Corp.*, 621 F.3d 1116, 1120-21 (9th Cir. 2010) (affirming jury verdict finding in favor of defendants for claims based on Chevron's decision to seek assistance of the Nigerian Government Security Forces to quell a violent protest at an oil rig), petition for cert. filed, 80 BNA U.S.L.W. 3004 (U.S.

All other corporate ATS cases have terminated—often after years of litigation—in dismissal or summary judgment for defendants, or were settled or voluntarily dismissed by plaintiffs. Because it is relatively easy, and largely cost free, for a plaintiff to assert such a claim, and the costs and other burdens imposed on defendants are substantial—these cases have a settlement value unrelated to the claim's merits, and they accordingly continue to proliferate.

First, plaintiffs and their advocates recognize, and exploit, the enormous reputational cost to a corporation of opposing the claims asserted in an ATS case—even when the defendant is sued on an aiding-and-abetting theory. Plaintiffs' advocates regularly employ negative publicity[10] and other external pressures, such as encouraging investors to withdraw their support from the corporation and encouraging

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June 20, 2011) (No. 10-1536); *Estate of Rodriquez* v. *Drummond Co.*, 256 F. Supp. 2d 1250, 1253-54 (N.D. Ala. 2003) (estates of murdered union leaders alleged that Drummond provided support to paramilitary and military units to eliminate the union). Plaintiffs in *Jama* v. *Esmor Correctional Services, Inc.*, 2008 WL 724337 (D.N.J. Mar. 17, 2008) also lost at trial, but their claims involved a theory of respondeat superior.

[10] See Jonathan Drimmer, *Think Globally, Sue Locally: Out-of-Court Tactics Employed by Plaintiffs, Their Lawyers, and Their Advocates in Transnational Tort Cases*, at 14 (U.S. Chamber Inst. for Legal Reform, June 2010). See also *id.* at 20 ("The [plaintiffs' lawyers'] strategy typically is designed to pressure corporate defendants inside the courtroom through plaintiff-directed activities outside of it, creating maximum leverage to compel corporate defendants to consider settling or pay a steep price for refusing.").

consumer boycotts, in order both to tarnish the brand and force the corporation to settle.[11] For example:

- Coca Cola was the target of a campaign that dubbed the corporation "Killer Coke" and accused it of, *inter alia*, murder, rape and torture, implying strongly that the corporation was the direct perpetrator of these acts,[12] when in fact Coca Cola was only tangentially implicated. The ATS claim against Coca-Cola ultimately was dismissed (see *Sinaltrainal* v. *Coca-Cola Co.*, 578 F.3d 1252 (11th Cir. 2009)), but not before a significant number of shareholders sold the company's stock in response to the suit.[13]
- The plaintiffs in *Doe I* v. *Nestle S.A.*, *supra*, mounted a similar media campaign against the defendants in that case, issuing press releases just before Valentines Day and Halloween urging parents and children not to purchase chocolate because it was the product of

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[11] The mere existence of a claim threatens substantial damage to the company's "stock valuations and debt ratings." Joshua Kurlantzick, *Taking Multi-nationals to Court: How the Alien Tort Act Promotes Human Rights,* World Pol'y J. 60, 63-64 (Spring 2004); see also Daniel Diskin, Note, *The Historical and Modern Foundations for Aiding and Abetting Liability Under the Alien Tort Statute*, 47 Ariz. L. Rev. 805, 809-10 (2005) (discussing Unocal settlement).

[12] See Press Release, Campaign to Stop Killer Coke, *Coke Hit with New Charges of Murder, Rape, Torture* (Mar. 1, 2010), http://www.killercoke.org/pr100301.php. In fact, the allegations were that Coca Cola's local bottling companies had coordinated with Colombian para-military and police to commit the alleged violations.

[13] Kurlantzick, World Pol'y J. at 63-64.

"child slavery" and citing the very existence of their pending claims as evidence of this allegation.[14] The fact that the allegations consisted entirely of lawfully purchasing cocoa from farmers was not featured in these campaigns.

In fact, raising the profile of grievances or making a political statement often may be the primary purpose of bringing an ATS claim against a corporation. See Bill Baue, *Win or Lose in Court: Alien Tort Claims Act Pushes Corporate Respect for Human Rights*, Bus. Ethics, Summer 2006, at 12 (Human rights advocates view ATS litigation as "the *only* effective tool out there right now for advancing corporate respect for human rights"). For example:

- Lawyers for the plaintiff in *Saharkhiz* v. *Nokia Corp.*, explained: "Our main goal is to seek restitution for Mr. Saharkhiz and his suffering in Iran. But our second goal is to help establish a certain standard for telecommunication companies doing business in other countries, to require that there be an export of human rights standards along with the export of technology." Kashmir Hill, *How similar is the lawsuit against Nokia Siemens to Wang Xiaoning v. Yahoo?*, Forbes.com (Aug. 20, 2010) available at: http://www.forbes.com/sites/kashmirhill/2010/08/20/how-similar-is-the-lawsuit-against-nokia-siemens-to-wang-xiaoning-v-

[14] See, *e.g.*, Deborah Orr, *Slave Chocolate?*, Forbes, Apr. 24, 2006, available at http://www.forbes.com/forbes/2006/0424/096.html.

yahoo/. The suit was voluntarily dismissed after three months without explanation.[15]

- Similarly, in *Doe* v. *Cisco Systems, Inc.,* No. 11-cv-2449 (N.D. Cal. filed May 19, 2011), a case involving aiding-and-abetting claims based on sales of products to the Chinese government, the lead plaintiff explained that the case was "not only for myself, but also for the freedom of every individual in China, to put an end forever to China's 'literary jail.'" Sui-Lee Wee, *Insight: Cisco suits on China rights abuses to test legal reach*, Reuters.com, (Sept. 8, 2011) available at http://www.reuters.com/article/2011/09/09/us-china-cisco-idUSTRE78809E20110909.
- Some courts have explicitly disapproved this phenomenon, reminding litigants that the ATS is not an appropriate vehicle with which to litigate policy. See *Corrie* v. *Caterpillar, Inc.*, 503 F.3d 974, 983-84 (9th Cir. 2007) (dismissing claims as raising non-justiciable political question because they were based on disagreement with the United States' policy on the Israel-Palestine conflict).

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[15] Nokia issued a press release stating that the plaintiffs "voluntarily withdrew their suit on November 10, 2010." Press Release, Nokia Siemens, *Saharkhiz lawsuit voluntarily withdrawn by plaintiffs* (Nov. 11, 2010), available at http://www.nokiasiemensnetworks.com/news-events/press-room/saharkhiz-lawsuit-voluntarily-withdrawn-by-plaintiffs. The company affirmed its belief that Nokia should not be held responsible for the acts of Iran's governments and stated that it was "hopeful that the plaintiffs' withdrawal of the suit indicates that they have reached the same conclusion." *Ibid.*

Second, the cost of litigating these cases is very high because of their unique characteristics. As the court below recognized, these "civil lawsuits, alleging heinous crimes condemned by customary international law, often involve a variety of issues unique to ATS litigation, not least the fact that the events took place abroad and in troubled or chaotic circumstances." Pet. App. A-6

That means that the cost of discovery—assuming that discovery is even possible—will be far greater than in other types of litigation. See Gary C. Hufbauer & Nicholas K. Mitrokostas, *International Implications of the Alien Tort Statute*, 7 J. Int'l Econ. L. 245, 252-53 (2004) (describing "massive costs" associated with ATS lawsuits). In addition, pretrial and trial proceedings are generally protracted. For example:

- The defendant in *Presbyterian Church* v. *Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009) ("*Talisman*"), underwent onerous discovery with respect to the facts underlying the aiding-and-abetting claim in that case—a claim that the court subsequently rejected on summary judgment. Among other things, the parties conducted approximately 95 depositions, most outside the United States, including in Africa, the UK and Canada, and relevant documents, maintained by a non-party operating company in Sudan, were beyond the reach of the U.S. courts and litigants. The court eventually granted summary judgment for defendants.
- In *Doe* v. *Unocal Corp.*, only the second ATS case brought against a corporation, the plaintiffs alleged that, by using the Myanmar mil-

itary to guard the pipeline it was building, Unocal aided and abetted the military's violation of customary international law. Unocal vigorously defended the suit for eight years before obtaining summary judgment. 395 F.3d 932, 962-63 (9th Cir. 2002). And when the Ninth Circuit partially reversed that hard-fought victory—because, "[v]iewing the evidence in the light most favorable to Plaintiffs, * * * there are genuine issues of material fact whether Unocal's conduct met the *actus reus* and *mens rea* requirements for liability under the [ATS] for aiding and abetting forced labor" (*id.* at 953)—Unocal settled for an undisclosed amount.[16]

- In *Bowoto* v. *Chevron Corp.*, 621 F.3d 1116 (9th Cir. 2010), petition for cert. filed, 80 BNA U.S.L.W. 3004 (U.S. June 20, 2011) (No. 10-1536), the corporation litigated for ten years before receiving a jury verdict in its favor.

As these examples demonstrate, the prospect of lengthy and costly litigation, along with the stigma associated with allegations of human rights violations, make ATS suits particularly effective vehicles for extracting settlements from corporate "deep pockets," even in meritless actions. See Cheryl Holzmeyer, *Human Rights in an Era of Neoliberal Globalization: The Alien Tort Claims Act and Grassroots Mobilization in* Doe *v.* Unocal, 43 Law & Soc'y Rev. 271, 290-91 (2009); *Khulumani*, 504 F.3d at 295 (Korman, J., concurring in part, dissenting in part)

[16] See Lisa Girion, *Unocal to Settle Rights Claims*, L.A. Times, Dec. 14, 2004, at A1.

(characterizing South Africa Apartheid litigation as "a vehicle to coerce a settlement"). Compared to spending years defending against those claims (whatever their merit), a settlement, even an unjustified one, often is the most attractive option.

3. Aiding-and-abetting claims discourage corporations from doing business in developing countries, contrary to settled U.S. government policy.

The inevitable result of recognizing secondary liability under the ATS is both to discourage investment in developing countries and put corporations that do business in the United States at a disadvantage by exposing them to liability under the ATS simply for investing in parts of the world where international-law violations may occur.[17] That effect is deeply troubling because it threatens to reduce investment, lending and other economic activity in precisely those countries where outside investment and the ability to access capital is most needed.

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[17] See*, e.g.*, Elliott J. Schrage, *Judging Corporate Accountability in the Global Economy*, 42 Colum. J. Transnat'l L. 153, 159 (2003) (By permitting claims against corporate entities premised on secondary liability, "all companies whose supply chains or distribution markets reach into developing countries are suspect."); Clearing House Ass'n Amicus Br. at 10-12, *Am. Isuzu Motors, Inc.* v. *Ntsebeza,* 553 U.S. 1028 (2008) (No. 07-919), 2008 WL 437021; Chamber of Commerce Amicus Br. at 16-17, *Rio Tinto Plc.* v. *Sarei et al.*, No. 11-649 (U.S. Dec. 2011), available at: http://www.chamberlitigation.com/rio-tinto-v-sarei-et-al; Chamber of Commerce Amicus Br. at 15-18, *Doe I* v. *Nestle, U.S.A., Inc.,* No. 10-56739 (9th Cir. Oct. 7, 2011), available at http://www.chamberlitigation.com/doe-i-et-al-v-nestle-sa-et-al.

Indeed, the U.S. Government has warned that aiding-and-abetting liability would "have a deterrent effect on the free flow of trade and investment, because it would create uncertainty for those operating in countries where abuses might occur." U.S. Amicus Br. at 20, *Am. Isuzu Motors,* 553 U.S. 1028 (2008) (No. 07-919), 2008 WL 408389.

4. Permitting secondary liability will undermine U.S. foreign policy.

Secondary liability under the ATS also would have serious negative consequences for United States' foreign relations. The theory of aiding-and-abetting liability effectively seeks to enforce, through private litigation, a worldwide embargo on investment in regions where it is reported that violations of international law are occurring or may occur.

That strips the Executive Branch of critical tools in its foreign policy arsenal. First, "[f]ree trade is a critical tool" in the effort to "foster peace and stability between states" by "promot[ing] prosperity, good governance, and social justice within states."[18] For the reasons just discussed, permitting secondary liability under the ATS will undermine free trade.

These adverse consequences—in terms of the impact on promoting economic progress in developing countries—is particularly clear, and even more directly contrary to U.S. government policy when the industry forced to withdraw is the direct source of financing and investment in these nations. "Financial

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[18] Condoleezza Rice, U.S. Sec'y of State, Remarks at the Business Counsel, at 2 (May 9, 2007), available at http://www.latradecoalition.org/files/2010/12/SecretaryRiceRemarksattheBusinessCouncil.pdf.

services are particularly important for developing countries because they are linked to increased economic growth and development. * * * Cross-country analysis shows that greater involvement by private and foreign banks leads to more efficient lending and higher growth."[19] And the progress facilitated by financial institutions in developing countries has significant benefits: "[a]s more nations have integrated into the global economy, * * * the number of democracies in our world has increased dramatically—and with this advance of freedom has come greater stability and security and peace."[20] On the other hand, "[w]eak states and failed ones are a source of international instability. Often, these states may become a sanctuary for terrorism."[21]

Because the threat of secondary liability under the ATS creates disincentives to invest in developing countries, it threatens the growth and stability made possible by open financial markets and risks tipping

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[19] *State of the International Financial System: Hearing Before the H. Comm. on Financial Services*, 110th Cong. 59 (2007) (testimony of Treasory Sec'y Henry M. Paulson, Jr.); *see also* World Bank, *Finance For Growth: Policy Choices in a Volatile World* 4 (2001) ("Most developing countries are too small to be able to afford to do without the benefits of access to global finance, including accessing financial services from foreign or foreign-owned financial firms. Facilitating the entry of reputable foreign financial firms to the local market should be welcomed too: they bring competition, improve efficiency, and lift the quality of the financial infrastructure.").

[20] Rice, U.S. Sec'y of State, Remarks at the Business Counsel, at 2.

[21] Nat'l Sec. Council, *National Strategy for Combating Terrorism* 23 (2003), available at https://www.cia.gov/news-information/cia-the-war-on-terrorism/Counter_Terrorism_Strategy.pdf.

the balance in troubled states away from the progressive and democratic outcomes that are in the best interests of the United States. As we have explained, the threat of ATS litigation is effectively unavoidable unless these firms withdraw entirely from conducting business in troubled countries.

Second, "[e]conomic sanctions [also] are powerful foreign policy tools."[22] For example, the Comprehensive Anti-Apartheid Act of 1986 ("CAAA"), placed some restrictions on financing and trade in South Africa, but did not mandate divestment or place a blanket ban on engaging in business in South Africa. See 22 U.S.C. § 5001 (1988) (repealed 1993); see also Exec. Order No. 12,532, 50 Fed. Reg. 36,861 (Sept. 9, 1985) (revoked 1991).

The United States believed that this policy of constructive engagement, including both economic incentives and sanctions, would promote the end of apartheid. See 22 U.S.C. § 5002 (the purpose of the CAAA was "to guide the efforts of the United States in helping to bring an end to apartheid in South Africa"). That foreign policy choice would have been hamstrung if potential investors knew that investment in South Africa carried the risk of secondary liability under the ATS for damage caused by all of the actions of the apartheid regime.

Similarly, the Department of the Treasury's Office of Foreign Assets Control administers and enforces laws and regulations that impose economic and trade sanctions against countries throughout the

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[22] Office of Foreign Assets Control, U.S. Dep't of the Treasury, *OFAC Regulations for the Financial Community,* at 2 (Oct. 15, 2010), available at http://www.treasury.gov/resource-center/sanctions/Documents/facbk.pdf.

world based on various foreign policy goals. See, *e.g.*, Burmese Freedom and Democracy Act of 2003, Pub. L. No. 108-61, 117 Stat. 864 (2003) (codified at 50 U.S.C. § 1701). Secondary liability under the ATS blunts that foreign policy tool by seeking to enforce a blanket ban on investment anywhere that international-law violations may occur.

It was not Congress's intent in enacting the ATS to interfere with the often-nuanced foreign policy decisions made by the Executive Branch, in furtherance of United States foreign policy goals, regarding investment and provision of financial services in troubled parts of the world. ATS plaintiffs should not be empowered to arrogate those decisions to themselves through aiding-and-abetting claims that retroactively make the simple act of investing or doing business in a foreign country a source of liability.

B. The Court Should Hold That Secondary-Liability Claims Are Not Permitted Under The Alien Tort Statute.

To be actionable under the ATS, an international-law norm must have the same "definite content and acceptance among civilized nations" as "the historical paradigms familiar when § 1350 was enacted," *i.e.*, offenses against ambassadors, violations of safe conducts, and piracy. *Sosa*, 542 U.S. at 732.[23]

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[23] Every court of appeals to address the issue has concluded that the question whether to permit secondary liability claims under the ATS turns on *Sosa*'s international law inquiry, not federal common law. See, *e.g., Talisman*, 582 F.3d at 259 ("Recognition of secondary liability is no less significant a decision than whether to recognize a whole new tort in the first place."); *Doe VIII* v. *Exxon Mobil Corp.*, 654 F.3d 11, 33 (D.C. Cir. 2011)

And that inquiry "is done 'on a norm-specific basis.'" *Doe VIII* v. *Exxon Mobil Corp.*, 654 F.3d 11, 81 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (quoting *Ali Shafi* v. *Palestinian Auth.*, 642 F.3d 1088, 1096 (D.C. Cir. 2011)); see also *Sosa,* 542 at 732 n.20 (in defining the norm, courts must also analyze "the scope of liability"). In other words, the existence of an international law norm prohibiting aiding and abetting genocide would not support blanket recognition of aiding-and-abetting liability for every violation of international law that gives rise to liability under the ATS.

Second, the determination whether to recognize a norm of aiding and abetting for a given violation "must[] involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts." *Sosa*, 542 U.S. at 732-33; see pages 4-5, *supra*.

Thus, the question in the instant case is whether there is a well defined and generally accepted norm of international law that prohibits aiding and abetting the particular primary violations of international law that are alleged here (torture, extrajudicial killing, and prolonged detention); and, if so, whether practical considerations favor recognizing such liability under the ATS. The answer to both questions is no.

("[T]he question is whether the international community would express definite disapprobation toward aiding and abetting * * *."); *Aziz* v. *Alcolac, Inc.*, 658 F.3d 388, 398 (4th Cir. 2011) ("*Sosa* guides courts to international law to deter-mine the standard for imposing accessorial liability ….").

1. International sources have recognized a norm prohibiting aiding and abetting only in the context of criminal war crimes tribunals.

International-law sources have recognized criminal aiding-and-abetting liability in extraordinarily limited circumstances—prosecution of individuals during war time for crimes involving mass human rights violations—and even then, with some reluctance. Recognition in the statutes and charters of the tribunals charged with hearing such cases has no relevance here.

The charters and statutes of the former Yugoslav, Rwanda, and Nuremberg tribunals, which petitioners cite as examples of aiding-and-abetting liability, were narrowly tailored to address the unique circumstances presented by war-induced human-rights tragedies, and prosecutions were limited to the individuals deemed most culpable within this context. See, *e.g.*, *Prosecutor* v. *Tadic*, 36 I.L.M. 908, 920, Case No. IT-94-1-T, ¶ 560 (ICTY May 7, 1997) (in order for ICTY jurisdiction to exist, the statute requires existence of an armed conflict and that the acts of the accused were committed within that context); see also *Khulumani*, 504 F.3d at 334 (Korman, J., concurring in part, dissenting in part) ("The gruesome facts in the *Furundzija* case * * * are illustrative of the circumstances under which the ICTY chose to address aiding-and-abetting liability.").

Even within those tribunals, the use of aiding-and-abetting liability was severely restricted. For example, the Nuremberg Tribunal's charter authorized prosecution of crimes against peace, crimes against humanity, and war crimes, but permitted secondary liability for crimes against peace only. See

The Nurnberg Trial, 6 F.R.D. 69, 126 (1946). The charter recognized that applying aiding-and-abetting liability for broad societal wrongs would cast too wide a net. See *United States* v. *Carl Krauch et al.* (The I.G. Farben Case) 1948, *Trials of War Criminals Before the Nürnberg Military Tribunals*, Vol. VIII, 1081, 1125-26.

Not only was the context narrow, but the tribunals were required, both by mandate and limited resources, to "focus on the persons most responsible for violations of international law." Kitty Felde et al., *The Prosecutor* v. *Dusko Tadic*, 13 Am. U. Int'l L. Rev. 1441, 1445 (1998) (presentation by the head prosecutor of the case). Therefore, every individual accused had already been found intimately involved with the governmental entities responsible for the mass violations. These tribunals' decisions therefore provide little insight into whether aiding-and-abetting liability is a well defined and widely accepted element of customary international law, especially as applied to corporate aiding-and-abetting liability.

Moreover, as Judge Korman correctly recognized in *Khulumani*, these international tribunals frequently referred to allegations as "aiding and abetting" when, in fact, the basis for liability was direct action. See *Khulumani*, 504 F.3d at 334 (Korman, J., concurring in part, dissenting in part). In *Prosecutor* v. *Furundzija*, the tribunal engaged in a lengthy discussion of aiding and abetting notwithstanding that the actual basis for liability was "an open-and-shut case of joint participation in a violation of international law." *Ibid.* (citing *Prosecutor* v. *Furundzija*, 38 I.L.M. 317, 363, Case No. IT-95-17/1-T, Judgment ¶ 230 (Trial Chamber Dec. 10, 1998)).

The same is true of the vast majority of cases claimed to demonstrate international recognition of aiding-and-abetting liability—they base the finding of guilt on some form of direct participation in the commission of the crime, with aiding and abetting at best an afterthought. See*, e.g.*, *Prosecutor* v. *Musema*, No. ICTR-96-13-T, Judgment ¶ 949 (ICTR Jan. 27, 2000) ("*ordering and participating in* the attacks on Tutsi civilians" and "aiding and abetting in the aforementioned attacks by providing motor vehicles * * * for the transport of attackers * * * renders the Accused individually criminally responsible") (emphasis added)*; Prosecutor* v. *Vasiljevic*, IT-98-32-A, Judgment ¶ 102 (ICTY Feb. 25, 2004) (conviction for transporting victims to be executed); *Tadic,* 36 I.L.M. 908, Case No. IT-94-1-T (conviction for active role in an attack on a Muslim town); *Prosecutor* v. *Kvocka*, Case No. IT-98-30/1-T, Judgment ¶ 460 (ICTY Nov. 2, 2001) (administrative aide participated in the *joint criminal enterprise* because his administrative duties constituted one of the many integral cogs in the wheel of a system of gross mistreatment).

In the *Zyklon B* case, not only did the convicted executives know that they were selling Zyklon B for the sole purpose of genocide, but there was evidence that one executive had expressly suggested "the release of prussic acid gas in an enclosed space as a method for exterminating humans" and that he "undertook to train the S.S. men in this new method of killing human beings." Trial of Bruno Tesch and Two Others (*The Zyklon B Case*), 1 Law Reports of Trials of War Crim. 93 (1947) (British Military Ct., Hamburg, Mar. 1-8, 1946).

These determinations not only show the absence of a well defined and generally accepted internation-

al-law norm of aiding-and-abetting liability; they indicate as well that some form of direct participation was necessary to establish liability. To import wholesale into the ATS the enthusiastic but perfunctory discussions of aiding and abetting from the judgments of specialized tribunals that dealt only with the worst individual offenders in mass human rights tragedies is wholly inconsistent with *Sosa's* admonition that courts must approach recognition of a new norm of international law with "great caution." 542 U.S. at 728.[24]

2. The adverse practical consequences preclude recognition of new, common-law aiding-and-abetting claims.

Even if the international law analysis did not demonstrate the absence of a recognizable international-law norm for aiding and abetting here, the practical consequences of creating such liability make clear that the Court should refuse to permit a new common law action grounded in secondary liability.

As we have discussed, the adverse consequences that would flow from permitting aiding-and-abetting claims in this context (see pages 6-22, *supra*), are extremely substantial. They plainly preclude creation of this new liability here.

In his concurring opinion below, Judge Leval recognized the risk that aiding-and-abetting liability

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[24] Petitioners rely on the Rome Treaty provision regarding aiding and abetting. But that source of international law is irrelevant here, because it post-dates the alleged misconduct. See *Khulumani*, 504 F.3d at 333 (Korman, J., concurring in part, dissenting in part).

under the ATS "would go too far in impeding legitimate business, by making a business corporation responsible for the illegal conduct of local government authorities that is beyond the corporation's control, and which the corporation may even deplore." Pet. App. A-99. But he erred in concluding that these consequences could be eliminated by adopting stringent liability standards for aiding-and-abetting claims. *Ibid.* (Leval, J., concurring).

Although a clear, demanding standard is a step in the right direction—and is essential in the event the Court were to permit secondary liability claims (see pages 32-35, *infra*)—it would not address many of the practical concerns that counsel against permitting aiding-and-abetting liability. Even with a "purpose" requirement, the inherently vague nature of aiding-and-abetting liability, combined with pleading standards that require only "plausible" allegations, means that many plaintiffs will be able to plead their way past a motion to dismiss regardless of the merits of their underlying claims. And a demanding standard of liability does little to address the immediate reputational harms of being connected unjustifiably with heinous acts—including through publicity campaigns that plaintiffs pursue in furtherance of their settlement strategy. Because corporations often are unwilling to pay the enormous costs of litigating an ATS claim, or to take even the slightest risk of liability on charges of, for example, "financing terrorism" or "aiding and abetting genocide," such claims likely will continue to settle in large numbers, whatever the standard of liability. The only way to address these adverse consequences is to decline to recognize secondary liability claims.

C. Alternatively, The Court Should Hold That An Aiding-And-Abetting Claim Requires Proof Of A Purpose To Bring About The Underlying Violation Of International Law And Substantial Assistance Toward That End.

Just as courts look to customary international law "in addressing availability of aiding and abetting liability," so too they must be guided by customary international law "to determine the standard for assessing aiding and abetting liability." *Doe VIII*, 654 F.3d at 33; see also *Aziz* v. *Alcolac, Inc.,* 658 F.3d 388, 398 (4th Cir. 2011) ("*Sosa* guides courts to international law to determine the standard for imposing accessorial liability * * *."). And, because this test requires general acceptance by international-law sources of a well defined norm, where varying standards have been utilized by different international law sources, the stricter standard must be applied under the ATS. See, *e.g.*, *Talisman*, 582 F.3d at 259; *Abagninin* v. *AMVAC Chem. Corp.*, 545 F.3d 733, 738 (9th Cir. 2008).

If aiding-and-abetting claims may be asserted under the ATS, a plaintiff should be required to prove that (1) the defendant acted with the specific intent to bring about the underlying violation of international law, and (2) the defendant's conduct provided substantial assistance in accomplishing the violation of international law.

First, although the international-law standard for aiding and abetting is far from clear, the sources that are most widely recognized and the least contextually limited, support an aiding-and-abetting standard that requires purpose to facilitate the commission of the crime and substantial assistance. The

Rome Statute of the International Criminal Court, 37 I.L.M. 1002, 1016 (July 17, 1998) —which is recognized as an authoritative expression of the views of "a great number of states" (*Aziz,* 658 F.3d at 397 (internal quotation marks omitted) (citing *Khulumani* and *Furundzija*))—provides that aiding-and-abetting liability requires proof that the defendant acted with "the purpose of facilitating the commission of [the underlying] crime." See *Talisman*, 582 F.3d at 259 (internal quotation marks omitted); *Khulumani*, 504 F.3d at 276 (Katzmann, J., concurring).

The Nuremberg Tribunal in *The Ministries Case* also rejected, in no uncertain terms, petitioners' proposed standard. The tribunal asked: "is it a crime to make a loan, knowing or having good reason to believe that the borrower will use the funds in financing enterprises which are employed in using labor in violation of international law?" *Ministries Case, United States of America* v. *Ernst von Weizsäcker et al.*, 1949, *Trials of War Criminals Before the Nürnberg Military Tribunals*, Vol. XIV, 622. The tribunal answered the question with a resounding "no." *Ibid.* (although "[l]oans or sale of commodities to be used in an unlawful enterprise may well be condemned from a moral standpoint," the "transaction can hardly be said to be a crime"). This decision demonstrates that mere practical assistance, even with knowledge that the assistance may be used to perpetrate violations of international law, does not suffice to establish aiding and abetting.

While several decisions from the ICTY and ICTR have used the word "knowledge" in articulating the standard for aiding-and-abetting liability, a close reading of the cases shows that, in fact, these courts required the same purpose to facilitate the commis-

sion of the acts that the Rome Statute and Nuremberg Tribunal required, with an *additional* requirement that the alleged aider and abettor know of the primary actor's intent to violate a norm of international law. In other words, the purpose requirement is embodied in the definition of the *actus reus,* with the *mens rea* of knowledge forming an additional requirement.[25]

For example, in *Prosecutor* v. *Blagojevic*, the court stated: "The Appeals Chamber has explained that an aider and abettor carries out acts specifically directed to assist, encourage, or lend moral support *to the perpetration of a certain specific crime*, which have a substantial effect on the perpetration of the crime." No. IT-02-60-A, ¶ 127 (ICTY May 9, 2007). The *mens rea* requirement of knowledge is most relevant in cases of "specific intent crimes such as persecutions and genocide" wherein "the aider and abettor must know of the principal perpetrator's specific intent." *Ibid.* The ICTR confirmed this by explaining:

> [I]f an accused knowingly aided or abetted another in the commission of a murder, while being unaware that the principal was committing such a murder, with [genocidal intent], said accused could be prosecuted for

[25] An additional possible source of confusion is that, because all of these cases involved joint *participants* in the crimes, purpose could be assumed from the *actus reus,* without the court having to explicate the purpose requirement. See *Khulumani*, 504 F.3d at 366 (Korman, J., concurring in part, dissenting in part) (These cases "hold, at most, that 'substantial assistance with knowledge' satisfies the participation necessary for imposition of liability on *joint participants* sharing the common purpose of violating a norm of customary international law.") (emphasis added).

> complicity in murder, and certainly not for complicity in genocide.

Musema, No. ICTR-96-13-T, Judgment ¶ 182. This discussion is independent of the requirement of a purpose of facilitating the commission of the killing, it merely alters whether the charge will be aiding and abetting murder or genocide. The court concluded that by "*ordering and participating in* the attacks on Tutsi civilians" and "aiding and abetting in the aforementioned attacks by providing motor vehicles * * * for the transport of attackers * * * renders the Accused individually criminally responsible." *Id.* ¶ 949. To conclude that this case, and others occurring in similar context, suggest the "knowledge" standard that petitioners advocate, is simply unsupportable.

Moreover, even if these decisions could be read to apply a knowledge requirement, that would simply establish a disagreement among the international law sources requiring application of the stricter standard—because it is the one that limits liability to the set of situations in which liability is universally recognized under international law.

Second, aiding-and-abetting liability also requires *substantial assistance* in the perpetration of a specific crime. See *Khulumani*, 504 F.3d at 277 (Katzmann, J., concurring) ("My research has uncovered nothing to indicate that a standard other than 'substantial assistance' should apply."). For example, the court in *Furundzija*, 38 I.L.M. at 367, Case No. IT-95-17/1-T, Judgment ¶ 249, stated that the act of aiding and abetting must have a "substantial effect on the perpetration of the crime." See also *Tadic*, 36 I.L.M. at 951-52, IT-94-1-T, ¶ 680 ("The court [in *Zyklon B*] *necessarily* must have made the determi-

nation that * * * the actions of the accused *directly assisted* in the commission of the illegal act of mass extermination.") (emphasis added).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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FEBRUARY 2012