05-36210

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CYNTHIA CORRIE AND CRAIG CORRIE *ET AL.*,
Plaintiffs/Appellants,

v.

CATERPILLAR INC.,
Defendant/Appellee.

On Appeal from the United States District Court
for the Western District of Washington
Case No. CV-05192-FDB
The Honorable Frank D. Burgess

Brief for the Chamber of Commerce of the United States of America and Business Roundtable As *Amici Curiae* in Support of Affirmance [Filed with the consent of all parties]

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America and Business Roundtable are membership organizations, not publicly held corporations. No publicly held corporation owns 10 percent or more of any stock in either organization.

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INTEREST OF THE *AMICI CURIAE*

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation, representing a membership of more than three million businesses and organizations that transact business in countries around the world. Business Roundtable is an association of chief executive officers of leading U.S. companies with over $4.5 trillion in annual revenues and more than 10 million employees. Chamber and Business Roundtable members have a direct and substantial interest in the issues raised by this appeal because they have been and may in the future be defendants in suits under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350. Many of these lawsuits are brought by large numbers of plaintiffs or as class actions against multiple corporate defendants.[1]

Chamber and Business Roundtable members operating abroad are already subject to the laws of the foreign countries in which they operate and, in many cases, remain subject to certain provisions of U.S. law. They also recognize the benefits of doing business in the United States and other countries that have incorporated into their domestic law many principles of human rights. But the threat of liability for foreign operations under other, vaguely-stated principles of

[1] See, *e.g.*, cases cited at 20–22 *infra*.

alleged customary international law imposes risks that are both unpredictable and unreasonable.

In this case, appellants have sued a U.S. corporation alleging that by selling bulldozers to the Israeli government the corporation aided and abetted violations of international law, rendering it liable for damages under the ATS and the Torture Victim Protection Act ("TVPA").[2] Appellants' theory is that the defendant corporation knew or should have known that the Israeli Defense Forces used the bulldozers supplied by defendant to violate international law. While dismissing this case in part under the political question and Act of State doctrines, the district court also ruled that appellants failed to state a claim for relief under the ATS or the TVPA. In doing so, the district court correctly ruled that selling a legal, non-defective product to Israel does not meet the standard for ATS actions set forth in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), and that, because the TVPA provides an express remedy for extrajudicial killing under color of foreign law, there is no ATS remedy for such extrajudicial killing. *Corrie v. Caterpillar Inc.*, 403 F. Supp. 2d 1019, 1024–27 (W.D. Wash. 2005).

Appellants challenge these ATS rulings on this appeal, and two *amicus* briefs—one by a group of law professors and one by several career foreign service diplomats—argue in favor of corporate liability and aiding and abetting liability in

[2] Pub. L. 102-256, 106 Stat. 73 (1992), *reprinted in* 28 U.S.C. § 1350 note.

ATS suits. As *amici* explain below, those positions are legally incorrect, and their acceptance could gravely harm the interests of *amici* members that have been or are likely to be subjected to ATS lawsuits.

The parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

The Supreme Court has instructed federal courts to proceed cautiously in developing a federal common law of liability under the ATS for violations of international law. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). Appellants and their *amici* have ignored that instruction in arguing for a cause of action in this case.

First, international law applies to states and, in some instances, to individuals but does not extend liability to corporations. Accordingly, under *Sosa's* requirements that a purported norm of international law must be universally accepted and definite, corporations cannot be held liable in ATS suits.

Second, whatever the current status of aiding and abetting under international *criminal* law, it is indisputable that international law does not provide *civil* damage liability for aiding and abetting. Plaintiffs in ATS cases premised on aiding and abetting a violation of a norm of international criminal law have no cause of action in international law. They must either base their claim on federal statutory law or ask federal courts to create a federal-common-law cause of action

for damages for such alleged aiding and abetting. But *judicial* recognition of a federal-common-law cause of action for aiding and abetting is prohibited by *Sosa*'s extensive cautions, the teaching of *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164 (1994), and the lack of legislative guidance.

Third, in arguing for an ATS remedy for extrajudicial killing in addition to the remedy provided by the TVPA, appellants mischaracterize the relationship between the ATS and the TVPA. As the Supreme Court clarified in *Sosa*, the ATS (unlike the TVPA) is a jurisdictional statute only and does not itself provide any private right of action. The district court correctly recognized that it would be inappropriate under *Sosa* to create a federal-common-law remedy for extrajudicial killing in the face of Congress's express creation of a statutory private cause of action in the TVPA.

ARGUMENT

I. Customary International Law Does Not Subject Corporations to Liability for Violations of International Law.

Appellants' contention (at 22) that corporations can be liable in ATS suits is inconsistent with the teaching of *Sosa*. After ruling that "federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted," the Court stated in footnote 20: "A related consideration is 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." 542 U.S. at 732 & n.20. Thus, a private person or entity can be sued under the ATS for violating a purported norm of international law only if the norm in question "extends the scope of liability" to such persons or entities.[3]

As an initial matter, international criminal tribunals beginning with Nuremberg have never provided for corporate criminal liability, a fact not contested by appellants (see Br. at 23–25) or by *amici curiae* international law scholars Philip Alston *et al*. (see Br. at 16–19). Moreover, the treaty drafters for the newly created International Criminal Court expressly rejected attempts to include corporate liability.[4] Under these circumstances, there is no basis for saying

[3] In ruling that not only the *existence* of a norm but also the *application* of the norm to "a private actor or corporation" must meet the *Sosa* standards of universal acceptance and specificity, the Court suggested that whether corporations can be liable for violations of international norms is an unsettled issue and that efforts to recover damages from corporations under the ATS must therefore fail under *Sosa*.

[4] The nations participating in the Rome Conference debated at length the inclusion of corporations within the jurisdiction of the International Criminal Court. See United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. Doc. A/Conf. 183/2/Add. 1 (1998); United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. Doc. A/Conf. 183/13 (Vol. II) (1998); Andrew Clapham, *The Question of Jurisdiction Under International Criminal Law Over Legal Persons: Lessons from the Rome Conference on an International Criminal Court*, in Liability of Multinational Corporations Under International Criminal Law 139 (Menno T. Kamminga & Saman Zia-Zarifi eds., 2000)

that corporate liability for violations of international law meets the test of widespread acceptance required by *Sosa*.

The principal lower court decision recognizing corporate liability, *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 311–19 (S.D.N.Y. 2003), predates and fails to anticipate *Sosa*. There the court held that corporations could be liable under international law in reliance on five international conventions, *none* of which had been ratified by the United States,[5] and one of which had never gone into effect in any country.[6] These conventions do not demonstrate the widespread acceptance required by *Sosa*.[7]

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[5] Convention Concerning the Application of the Principles of the Right To Organise and To Bargain Collectively (ILO No. C98), *opened for signature* July 1, 1949; Convention on Third Party Liability in the Field of Nuclear Energy (Org. for Econ. Co-operation & Dev.), *opened for signature* July 29, 1960, as amended, 956 U.N.T.S. 251; International Convention on Civil Liability for Oil Pollution Damage (Inter-Governmental Maritime Consultative Org.), *opened for signature* Nov. 29, 1969, 973 U.N.T.S. 3 (erroneously cited by the court to 26 U.S.T. 765, the citation for a different treaty ratified by the U.S.); Vienna Convention on Civil Liability for Nuclear Damage (Int'l Atomic Energy Agency), *opened for signature* May 21, 1963, 1063 U.N.T.S. 265; Convention Relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material (Inter-Governmental Maritime Consultative Org.), *opened for signature* Dec. 17, 1971, 974 U.N.T.S. 255.

[6] Convention on Civil Liability for Oil Pollution Damage Resulting from Exploration for and Exploitation of Seabed Mineral Resources, *opened for signature* Dec. 17, 1976, 16 I.L.M. 1450 (insufficient signatures for entry into force, see http://sedac.ciesin.org/entri/register/reg-092.rrr.html).

[7] A post-*Sosa* decision by Judge Cote in *Talisman*, 374 F. Supp. 2d 331 (S.D.N.Y. 2005), reaffirmed the prior decision (at 335) but showed no awareness of the 2003 decision's cavalier treatment of international treaties and relied in part (at 337) on Canada's unexplained failure to object to corporate liability on behalf

A more recent lower court decision, *In re Agent Orange Product Liability Litigation*, 373 F. Supp. 2d 7 (E.D.N.Y. 2005),[8] recognizes corporate liability in ATS litigation in *dicta*, but mistakenly treats the issue as one of "immunity." 373 F. Supp. 2d at 58. *Amici* do not claim that international law grants corporations "immunity" from civil liability for international law violations. They argue only that international law does not extend liability to corporate entities. Regulation of corporations has thus far been left by the international community to the laws of individual states.

In fact, the court in *In re Agent Orange* nakedly rested its decision on its view of sound policy, rather than on the current state of international law.[9] But the federal-common-law claim permitted in limited circumstances under *Sosa* is a cause of action for a violation of international law, not domestic law.[10] If corporations are not recognized as defendants in international law, they cannot be subject to ATS actions under *Sosa*. It is immaterial to that analysis that American

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of its corporation.

[8] *Appeal docketed sub nom. Vietnam Ass'n of Victims of Agent Orange/Dioxin v. Dow Chemical Co.*, No. 05-1953-cv (2d Cir. Apr. 20, 2005).

[9] "Limiting civil liability to individuals while exonerating the corporation directing the individual's action through its complex operations and changing personnel makes little sense in today's world." 373 F. Supp. 2d at 58.

[10] The plain words of the ATS require that the allegedly tortious conduct in question be "committed in violation of the law of nations or a treaty of the United States."

law generally recognizes corporate liability for torts, unless that law and similar law in virtually all other countries was developed in response to perceived obligations under international law.[11] Appellants and their *amici* do not and could not make that showing. And it is immaterial that holding liable corporations that are complicit in the commission of human rights violations might "further[] U.S. foreign policy," as argued in the Brief of *Amici Curiae* Career Foreign Service Diplomats at 12. Congress could certainly make such a determination and impose such liability, but absent such a determination the ATS does not authorize federal courts to go beyond imposing liability for violations of current international law.

Apart from the fact that federal judges are not authorized to impose liability based upon what they view as good foreign policy, there are a number of sound policy reasons for omitting corporate liability for alleged violations of international law:

- Most international law obligations are aimed at states, explaining why international law has been slow to move towards corporate liability. As a prominent treatise states:

> "States are the principal subjects of international law. This means that international law is primarily a law for the

[11] For example, as pointed out in *Flores v. Southern Peru Copper Corp.*, 414 F.3d 233, 249 (2d Cir. 2003), and earlier cases there cited, the mere fact that every nation's municipal law may prohibit theft does not incorporate the Eighth Commandment, "Thou shalt not steal," into the law of nations.

> international conduct of states, and not of their citizens. As a rule, the subjects of the rights and duties arising from international law are states solely and exclusively, and international law does not normally impose duties or confer rights directly upon an individual human being * * *." 1 Robert Jennings & Arthur Watts, Oppenheim's International Law § 6, at 16 (9th ed. 1996).

- The first focus of international *criminal* law was on punishing individuals who violated certain norms of international law and rejecting such excuses as "following orders," in contexts in which it was accepted that the state entities themselves were immune from prosecution.[12] With that initial emphasis, international criminal law understandably has not been applied to corporations.
- The imposition of direct obligations on private corporations, backed by effective international enforcement of those obligations, would significantly disempower sovereign states, the laws of which comprehensively regulate the existence and conduct of corporations operating within their borders. Accordingly, states are likely to resist such a fundamental change.
- Assuming, as most courts have held and as appellee argues, that the TVPA does not extend liability to corporations, Congress is presumed to have had

[12] "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced." *The Nürnberg Trial*, 6 F.R.D. 69, 110 (Int'l Military Tribunal at Nuremberg 1946).

sound policy reasons for that decision, and those reasons would counsel against federal-common-law liability for international law violations.

- Even if the TVPA does extend liability to corporations, contrary to the district court's ruling, that by itself would show only that Congress made a deliberate decision to create such liability for the specific offenses covered by the TVPA as a matter of United States policy, not that *international law* provides for corporate liability either for those specific offenses or more generally.
- On the one occasion when the Supreme Court has considered extending to private corporations the federal-common-law cause of action for damages created in *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), for certain violations of constitutional law, the Court declined to do so. *Correctional Services Corp. v. Malesko*, 534 U.S. 61 (2001). The Court explained that the purpose of *Bivens* is "to deter individual federal officers from committing constitutional violations"; that "the threat of litigation and liability will adequately deter federal officers for *Bivens* purposes"; that "the threat of suit against an individual's employer was not the kind of deterrence contemplated by *Bivens*"; and that, with such suits, "'[t]he deterrent effects of the *Bivens* remedy would be lost.'" 534 U.S. at 70–71 (citation omitted).

Similar policy decisions may continue to cause international law to stop short of corporate liability. [13]

* * * *

In sum, there is no substantial authority for the proposition that corporations that aid and abet violations of international law themselves violate international law. Those who prefer a different rule, such as appellants and their *amici*, have reached a conclusion based on policy arguments that the international community has not embraced.

[13] A ruling that corporations are not civilly liable for violations of international law would not make them unique in that respect. The ATS does not waive the sovereign immunity of the United States, *e.g.*, *Goldstar (Panama) S.A. v. United States*, 967 F.2d 965, 968 (4th Cir. 1992), and suits for violation of international law have not succeeded against the United States under the Federal Tort Claims Act. *Goldstar (Panama) S.A.*, *supra; Sosa*, 542 U.S. at 699–712. And any entity, corporate or not, that is treated as a sovereign for purposes of the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602–1611, is immune from tort liability under the ATS unless a specified exception applies, because a foreign corporation that is majority-owned by a foreign state or political subdivision thereof is an "agency or instrumentality of a foreign state," and thus is a "foreign state" for purposes of the Foreign Sovereign Immunities Act. 28 U.S.C. § 1603(a), (b). Finally, any government employee sued for a violation of the ATS for conduct within the scope of his authority is exempted from liability, with the United States substituted in as the defendant. See *Elmaghraby v. Ashcroft*, No. 04 CV 1409, 2005 WL 2375202 (E.D.N.Y. Sept. 27, 2005) (construing 28 U.S.C. § 2679), *appeal docketed*, No. 05-5768-cv (2d Cir. Oct. 25, 2005); *Bancoult v. McNamara*, 370 F. Supp. 2d 1, 7–10 (D.D.C. 2004), *aff'd on other grounds*, 445 F.3d 427 (D.C. Cir. 2006).

II. Aiding and Abetting the Misconduct of Third Parties Is Not Actionable Under the ATS.

The Supreme Court's decision in *Sosa* establishes that a purported norm of international law should not be enforced under the ATS unless it is both "accepted by the civilized world" and "defined with a specificity" comparable to the features of three 18th century paradigms—"violation of safe conducts, infringement of the rights of ambassadors, and piracy." 542 U.S. at 724–25. Without addressing the underlying legality of the actions of the Israeli Defense Forces, the district court ruled, among other things, that "where a seller merely acts as a seller, he cannot be an aider and abettor." 403 F. Supp. 2d at 1027. Appellants attack that ruling, arguing that overwhelming authority supports ATS liability for aiding and abetting and that their complaint adequately alleged aiding and abetting unlawful extrajudicial killing and war crimes in violation of international law. Thus, they argue that federal courts can use their limited federal-common-law powers to provide a right of action to those injured by such aiding and abetting. This Court should reject those arguments because, whatever the status of aiding and abetting under international criminal law, there is no basis for civil liability for aiding and abetting.[14]

[14] In arguing that international law clearly and specifically defines aiding and abetting, appellants and the Brief *Amici Curiae* of International Law Scholars Philip Alston *et al.* rely primarily on the decisions of the Nuremberg tribunals, the International Criminal Tribunal for the Former Yugoslavia and the International

In holding that the ATS does not establish a cause of action for damages, *Sosa* rejected efforts to base civil liability on the ATS itself. Appellants here do not attempt to derive a civil cause of action for aiding and abetting from a self-executing treaty ratified by the United States or from foreign law. They rely in part on a federal statute—the TVPA—under which, as Appellees demonstrate, they cannot succeed. For the remaining claims, there are only three other possible bases for a non-statutory civil cause of action for aiding and abetting conduct that allegedly violates international law: (1) state law, which this brief does not

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Criminal Tribunal for Rwanda, all ad hoc tribunals given specific charters with respect to specified crimes in specific historical contexts. It is striking that seven prominent scholars submit an *amicus* brief arguing (at 19, 20) that international criminal law clearly defines aiding and abetting as "direct and substantial" assistance, with "actual or constructive knowledge that his or her actions would aid in the commission of the offence," without even mentioning that well-established U.S. criminal law requires not just knowledge of another's criminal purpose but the sharing of that purpose. See *United States v. Peoni*, 100 F.2d 401 (2d Cir. 1938) (L. Hand, J.). *Peoni* is a "leading case" in which "the court took the position that the traditional definitions of accomplice liability 'have nothing whatever to do with the probability that the forbidden result would follow upon the accessory's conduct; and that they all demand that he in some sort associate himself with the venture, that he participate in it as something that he wishes to bring about, that he seek by his action to make it succeed. All the words used—even the most colorless, "abet"—carry an implication of purposive attitude towards it.'" 2 Wayne R. LaFave, Substantive Criminal Law § 13.2(d), at 349 (2d ed. 2003).

It is also striking that the International Law Scholars' brief includes (at 22–24) only a perfunctory survey of the law of a few other jurisdictions that does not come close to demonstrating the kind of scholarly evidence of consistent widespread practice required by *Sosa*.

address;[15] (2) international law itself; and (3) federal common law, relying on the limited authority of federal courts after *Sosa* to create federal-common-law causes of action for damages in ATS suits for alleged violations of widely accepted and specific norms of international law. As we show in Part II.A below, appellants have no cause of action under international law because international law does not impose civil liability for violations of international criminal law. And as we show in Part II.B, federal courts may not create a federal-common-law cause of action for aiding and abetting because that would be contrary to the cautionary instructions of *Sosa* and the teaching of *Central Bank*.

A. International Law Does Not Provide Civil Aiding and Abetting Liability for Violations of International Criminal Law.

Although international law in certain circumstances provides for individual criminal liability, it "never has been perceived to create or define the civil actions to be made available by each member of the community of nations; by consensus, the states leave that determination to their respective municipal laws." *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 778 (D.C. Cir. 1984) (Edwards, J., concurring). That this 1984 statement remains valid is supported by its endorsement in the Brief *Amici Curiae* of International Law Scholars Philip Alston *et al.* at 5.

[15] The district court dismissed plaintiffs' claims under Washington or Illinois law in part on state law grounds and in part on political question and Act of State grounds.

Under these circumstances, no purported norm of international civil liability for aiding and abetting could possibly meet the test of *Sosa*. The task of defining the content of civil aiding and abetting liability with sufficient specificity to meet the *Sosa* test would require the international community to resolve many open issues that do not arise in the context of criminal aiding and abetting liability, including what standard of causation should apply; how to apportion liability among multiple tortfeasors; whether proceedings could be instituted by private parties (as in common law countries); and what types of damages are recoverable. This task has barely begun in the international community, much less resulted in a consensus that could be the basis for liability under the ATS after *Sosa*.

B. Under *Sosa* and *Central Bank*, Whether To Impose Civil Aiding and Abetting Liability for Alleged Violations of International Norms Under the ATS Is a Decision for Congress.

For a federal court to create a federal-common-law cause of action for aiding and abetting violations under the ATS would transgress *Sosa*'s cautions against judicial legislation and would also clash with the dictates of *Central Bank*.

1. *Sosa*'s Cautionary Instructions

The Supreme Court took pains in *Sosa* to highlight why a court must act with "a restrained conception of [its] discretion * * * in considering a new cause of action" for purported violations of international law. 542 U.S. at 725. In

particular, the Court instructed that courts should use "great caution in adapting the law of nations to private rights." 542 U.S. at 728.

In rejecting the claim for damages for alleged illegal detention, the *Sosa* Court noted that "a series of reasons argue for judicial caution when considering the kinds of individual claims that might implement the jurisdiction conferred by the [ATS]." *Id.* at 725. Many of those same reasons for caution strongly counsel against recognizing a cause of action for civil aiding and abetting. For example, the Court noted that even in the limited areas where federal courts retain the power to create federal common law rules after *Erie Railroad v. Tomkins*, 304 U.S. 64 (1938), "the general practice has been to look for legislative guidance before exercising innovative authority over substantive law." 542 U.S. at 726. As the Court stressed, "a decision to create a private right of action is one better left to legislative judgment in the great majority of cases." *Id.* at 727.

> "The creation of a private right of action raises issues beyond the mere consideration whether underlying primary conduct should be allowed or not, entailing, for example, a decision to permit enforcement without the check imposed by prosecutorial discretion. Accordingly, even when Congress has made it clear by statute that a rule applies to purely domestic conduct, we are reluctant to infer intent to provide a private cause of action where the statute does not supply one expressly." *Id.*

Moreover, the Court made clear that there should be a "high bar" to recognizing new private causes of action for violations of international law because of the

danger of "impinging on the discretion of the Legislative and Executive branches in managing foreign affairs." *Id.*

Even brief reflection points to many important practical foreign policy considerations that should alert a court after *Sosa* to exercise restraint in the creation of a new cause of action.

First, many developing countries have questionable or poor human rights records. Those countries include some in which U.S. foreign policy encourages investment and commerce to promote development and human rights. The prospect that companies doing business with such countries might later find themselves facing massive discovery and jury trials in U.S. courts under nebulous theories of "aiding and abetting" liability might deter their participation in those economies, thus defeating U.S. policy. The determination of whether and to what extent to pursue a constructive engagement policy is precisely the type of foreign affairs decision that is constitutionally vested in the other branches of government and with which courts should not interfere. See, *e.g.*, *American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414–15 (2003).

Second, recognizing a cause of action for aiding and abetting would encourage a wide range of ATS suits in which plaintiffs would indirectly challenge the conduct of foreign nations that is protected from direct challenge under the

Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602–1611. Such suits typically generate serious diplomatic friction for the United States.[16]

Third, adoption of accessorial liability for ATS claims could also deter investments within the United States by foreign companies because of their concern that such contacts would provide a basis for ATS jurisdiction and expose their investments to attachment to satisfy adverse judgments.

Fourth, recognizing accessorial liability in cases in which the foreign sovereign or its officers or employees are the primary wrongdoers would unfairly place the financial burden of compensating victims of international law violations on the aider and abetter.

2. *Central Bank*'s Teaching

To *Sosa's* specific admonitions must be added the Supreme Court's more general teaching about the inappropriateness of federal courts creating or implying federal causes of action for aiding and abetting even in a purely domestic context. Although aiding and abetting liability is a long-established norm of federal criminal law, 18 U.S.C. § 2(a), *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164 (1994), teaches that a federal court can recognize a federal

[16] See Brief for the United States as *Amicus Curiae* in *Galvis Mujica v. Occidental Petroleum Corp.*, Nos. 05-56175, -56178 & -56056 (9th Cir. filed Mar. 20, 2006), at 19–20.

cause of action for damages for aiding and abetting only where the legislature has expressly or implicitly authorized such liability.

Where the underlying norm is one of international law (as in this case) rather than one created directly by Congress, there is even less justification than in *Central Bank* for recognizing civil aiding and abetting liability, for that would involve creating federal-common-law civil liability for aiding and abetting without any relevant congressional direction whatsoever in the civil context.

In *Central Bank*, the Court declined to permit a plaintiff to maintain an aiding and abetting suit for money damages under Section 10(b) of the Securities and Exchange Act of 1934. Although that Act expressly provides a cause of action for direct liability, it does not expressly provide a remedy for secondary liability. The Court found it significant 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." *Id.* at 182. As a result, "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." *Id.*

Rejecting policy arguments urged in favor of aiding and abetting liability, the Court noted that "the rules for determining aiding and abetting liability are

unclear, in 'an area that demands certainty and predictability,'" *id.* at 188,[17] and that allowing secondary liability would increase the "danger of vexatiousness" in litigation. *Id.* at 189. Accordingly, the Court declined to endorse the "vast expansion of federal law" that adopting civil aiding and abetting liability would entail, "with no expression of congressional direction to do so." *Id.* at 183.[18]

The reasoning of *Central Bank* applies here and prohibits a federal court from creating a cause of action for civil aiding and abetting of purported international law violations.

C. Existing Case Law Does Not Support the Recognition of Civil Liability for Aiding and Abetting Under the ATS.

For a brief time, this Court, which has been at the forefront of the development of ATS jurisprudence, recognized civil liability for aiding and abetting violations of international law in claims brought under the ATS. *Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002). But this Court denied that decision

[17] The Court observed that the Restatement (Second) of Torts (1979) addressed the issue (at § 876) "under a concert of action principle" that "has been at best uncertain in application" and that some States appeared to reject the principle. *Id.* at 181–82.

[18] *Boim v. Quranic Literacy Institute*, 291 F.3d 1000 (7th Cir. 2002), permitted the imposition of accessorial liability under a 1992 federal criminal statute creating a specific norm of conduct and providing a civil cause of action for damages, 18 U.S.C. § 2333, because it found clear evidence of congressional intent sufficient to overcome the presumption against an implied civil remedy for aiding and abetting. *Id.* at 1010–11, 1019–21. That kind of evidence is absent from the ATS, which neither proscribes any conduct nor creates a cause of action for any violation of international law.

precedential effect pending rehearing *en banc*, 395 F.3d 978 (9th Cir. 2003), and then dismissed the appeal on stipulated motion. 403 F.3d 708 (9th Cir. 2005).

Case law from other circuits is sparse. In *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1157 (11th Cir. 2005), the court stated that the ATS reached "accomplice liability." But the statement is dictum because the case involved a suit against a military official of the Pinochet government for having himself fatally stabbed a member of the Allende government, and its holding was limited to that official's direct liability for the killing. Moreover, that dictum incorrectly relied on the two circuit cases that do not in fact recognize aiding and abetting liability.[19] Finally, *Cabello* did not even cite *Sosa*, much less discuss the impact of that decision.[20]

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[19] In *Hilao v. Estate of Marcos*, 103 F.3d 767, 776–77 (9th Cir. 1996), the Ninth Circuit considered only the application of "command responsibility"—a doctrine of international law unique to war crimes prosecutions—not accessorial liability; and in *Carmichael v. United Tech. Corp.*, 835 F.2d 109 (5th Cir. 1988), the Fifth Circuit "only assume[d], because it [was] unnecessary to decide," that the ATS reached private parties who aided or abetted violations of international law. *Id.* at 113–14.

[20] An Eleventh Circuit panel that did discuss *Sosa* stated, relying on *Cabello*, that a claim for state-sponsored torture under the ATS "may be based on indirect liability as well as direct liability." *Villeda Aldana v. Del Monte Fresh Produce, Inc.*, 416 F.3d 1242, 1248 (11th Cir. 2005) (*per curiam*), but a petition for rehearing *en banc* is pending. No. 04-10234 (filed July 29, 2005). Whether or not that general statement survives rehearing, it should not persuade this Court on the issue of aiding and abetting.

With respect to the non-controlling district court cases that have recognized civil aiding and abetting liability, nearly all were not about aiding and abetting liability but were instead about active participation in violations of international law. In any event, this Court should not follow those lower court opinions, nearly all of which predate *Sosa* and were based in part on the faulty assumption, corrected by *Sosa*, that they were applying or construing a federal statutory cause of action.

Two post-*Sosa* decisions relied upon by the district court correctly apply *Sosa* in declining to find that aiding and abetting is actionable under the ATS. In *In re South African Apartheid Litigation*, 346 F. Supp. 2d 538, 549 (S.D.N.Y. 2004),[21] the court found "little that would lead this Court to conclude that aiding and abetting international law violations is itself an international law violation that is universally accepted as a legal obligation." In *Doe v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20, 24 (D.D.C. 2005),[22] the court came to the same correct conclusion and cited the *South Africa* decision with approval."

[21] *Appeals docketed sub nom. Khulumani v. Barclay Nat'l Bank*, No. 05-2141-cv (2d Cir. May 2, 2005), and *Ntsebeza v. Sulzer AG*, No. 05-2326-cv (2d Cir. May 11, 2005) (argued together Jan. 24, 2006).

[22] *Appeal from other rulings docketed*, No. 05-7162 (D.C. Cir. Nov. 17, 2005).

III. There Is No Federal-Common-Law Cause of Action for Extrajudicial Killing in Violation of International Law in Addition to the Statutory Remedy Provided by the TVPA.

The district court correctly declined (at 1025) to find a federal-common-law cause of action for extrajudicial killing in violation of international law on the ground that the TVPA is the exclusive remedy for extrajudicial killing under color of foreign law, following *Enahoro v. Abubakar*, 408 F.3d 877 (7th Cir. 2005), *cert. denied*, 126 S. Ct. 1341 (2006). Appellants (at 17) attack this ruling on three grounds. We show that two are wrong and one is logically irrelevant.

A. A Federal-Common-Law Cause of Action for Extrajudicial Killing Apart from the TVPA Cannot Be Squared with *Sosa*.

Appellants' claim (at 17) that *Sosa* supports "the continued vitality" of an ATS remedy—that is, a federal common law remedy—for extrajudicial killing rests on the *Sosa* statement that "Congress has not in any relevant way amended § 1350 or limited civil common law power by another statute," 542 U.S. at 725. But this statement offers no support at all for the "continued vitality" of an alleged federal common law tort for extrajudicial killing.

Until *Sosa*, most federal courts were under the mistaken impression that the ATS was a cause-of-action statute, rather than a jurisdictional statute. *Sosa* corrected that misimpression and instructed federal judges to apply its cautionary instructions before recognizing or creating a federal-common-law tort for any alleged violation of international law. Because no issue concerning extrajudicial

killing was presented in *Sosa*, that case cannot be said to support the existence or continuation of such a cause of action.

As noted in *Sosa*, "a decision to create a private right of action is one better left to legislative judgment in the great majority of cases," 542 U.S. at 727. The Supreme Court expressed great concern for the "collateral consequences" of making international rules privately actionable and noted that courts should be "particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs." *Id.* Moreover, the *Sosa* Court specifically identified the TVPA as establishing "'an unambiguous and modern basis for' federal claims of torture and extrajudicial killing." *Id.* at 728, quoting H.R. Rep. No. 102-367, pt. 1, at 3 (1991). The strong inference from those comments is that federal courts must refrain from exercising their common law power to create an alternative remedy for the same misconduct addressed by the TVPA when Congress has specifically provided a cause of action for such violations and has delineated how such claims are to proceed.

For these reasons, the *Enahoro* court correctly concluded that the TVPA is the exclusive statutory remedy and occupies the field for claims of extrajudicial killing. As that court noted, if the TVPA did not occupy the field, it would be meaningless (as to aliens) because no one would plead a cause of action under the TVPA and subject himself to its congressionally mandated limitations and

requirements (such as exhaustion of remedies) if he or she could simply seek relief under international law. 408 F.3d at 884–85.

B. The Legislative History of the TVPA Does Not Support a Federal-Common-Law Cause of Action for Extrajudicial Killing Apart from the TVPA.

Appellants argue (at 17) that the TVPA legislative history makes clear that Congress intended to "'enhance the remedy already available' under the ATS by extending it to U.S. citizens" (quoting S. Rep. No. 102-249, at 5 (1991)). The legislative history cited by appellants deserves no weight when it is so divorced from the words and effect of the statute.[23] But, even assuming the legislative history deserves some consideration, it cannot carry the day for appellants.

In describing the need for the legislation, the Senate Report on which appellants rely states: "The TVPA would establish an unambiguous basis for a cause of action that has been successfully maintained under an existing law [the ATS] * * *." S. Rep. No. 102-249 at 4 (1991). The cited section of the Senate Report notes (at 5) that Judge Bork in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d

[23] As the Supreme Court recently stated:

> "[J]udicial reliance on legislative materials like committee reports, which are not themselves subject to the requirements of Article I, may give unrepresentative committee members—or, worse yet, unelected staffers and lobbyists—both the power and the incentive to attempt strategic manipulations of legislative history to secure results they were unable to achieve through the statutory text." *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 125 S. Ct. 2611, 2626 (2005).

774 (D.C. Cir. 1984), had "questioned the existence of a private right of action under the [ATS], reasoning that separation of powers principles required an explicit grant by Congress of an private right of action for lawsuits which affect foreign relations." Immediately thereafter, the report continues as follows: "The TVPA *would provide such a grant, and would also* enhance the remedy already available under section 1350 in an important respect: while the [ATS] provides a remedy to aliens only, the TVPA would extend a civil remedy also to U.S. citizens who may have been tortured abroad." (Emphasis added.)

Two things are clear from this passage. First, the primary purpose of the enactment of the TVPA was to remedy—for torture and extrajudicial killing—the problem identified by Judge Bork: that the ATS might not itself provide a private cause of action for any violation of international law. Second, Congress wished to extend to U.S. citizens the remedy for torture and extrajudicial killing already possibly available to aliens under the ATS. To the extent that the drafters of the report believed that Judge Bork was wrong and that the ATS itself provided a cause of action, *Sosa* has cleared up that misunderstanding. The legislative history evidences some intention to leave the ATS "intact to permit suits *based on other norms* that already exist or may ripen in the future into rules of customary international law." H.R. Rep. No. 102-367, pt. 1, at 4 (emphasis added). The quotation draws a distinction between the norms covered by the TVPA and "other

norms" and thus does not support the existence of a federal-common-law cause of action for extrajudicial killing apart from the TVPA.

C. A Ruling That the TVPA Is the Exclusive Remedy for Extrajudicial Killing Would Not Repeal the ATS.

Appellants' final argument for being allowed to maintain a claim for extrajudicial killing under the ATS is that TVPA did not explicitly repeal the ATS and that "[i]t is well settled that repeals by implication are disfavored." Appellants' Br. at 17. But as discussed above, *Sosa* silently overruled the earlier circuit court decisions—including a decision of this Court—that had treated the ATS as creating a cause of action: *In re Estate of Ferdinand Marcos Human Rights Litig. (Hilao)*, 25 F.3d 1467, 1474–76 (9th Cir. 1994); *Abebe-Jira v. Negewo*, 72 F.3d 844, 847 (11th Cir. 1996).[24] Accordingly, appellants' arguments about repeals by implication are logically irrelevant. The principle that implied repeals of pre-existing federal statutes is disfavored simply has nothing to do with the question whether a new federal statutory cause of action preempts the power of the judiciary to create a federal-common-law cause of action for the same conduct.

[24] While *Sosa* cited *Hilao* as "generally consistent" with its ruling that private claims under federal common law may not be recognized "for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted," 542 U.S. at 732, it manifestly was not approving that part of *Hilao* that ruled that the ATS created a private cause of action. *Sosa* cited only the part of *Hilao* that stated: "Actionable violations of international law must be of a norm that is specific, universal, and obligatory." 25 F.3d at 1475.

CONCLUSION

The Court should reject the arguments of appellants and their *amici* that *Sosa* permits corporate liability and aiding and abetting liability in ATS suits and rule that the TVPA precludes a federal-common-law remedy for extrajudicial killing.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(a)(7)(c) AND CIRCUIT RULE 32-1 FOR CASE NUMBER 05-36210

I certify that:

Pursuant to Fed. R. App. P. 29(d) and 9th Cir. R. 32-1, the attached *amicus* brief is proportionately spaced, has a typeface of 14 points or more, and contains 7000 words or less (actual count: 6993 words).

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of June 2006 I caused two copies of the foregoing Brief of the Chamber of Commerce of the United States and Business Roundtable As *Amici Curiae* in Support of Affirmance to be served upon each party separately represented by first-class mail addressed to counsel for the parties at the addresses shown below and that I e-mailed electronic copies of the brief to counsel for the parties at the e-mail address shown below:

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