

# 09-2778-CV

Nos. 09-2779-cv; 09-2780-cv; 09-2781-cv; 09-2783-cv; 09-2785-cv; 09-2787-cv;  
09-2792-cv; 09-2801-cv; 09-3037-cv

## In the United States Court of Appeals for the Second Circuit

SAKWE BALINTULO, as personal representative of SABA BALINTULO, DENNIS VINCENT FREDERICK BRUTUS, MARK FRANSCH, as personal representative of ANTON FRANSCH, ELSIE GISHI, LESIBA KEKANA, ARCHINGTON MADONDO, as personal representative of MANDLA MADONDO, MPHONG ALFRED MASEMOLA, MICHAEL MBELE, MAMOSADI CATHERINE MLANGENI, REUBEN MPHELA, THULANI NUNU, THANDIWE SHEZI, THOBILE SIKANI, LUNGISILE NTSEBEZA, MANTOA DOROTHY MOLEFI, individually and on behalf of her deceased son, MNCEKELELI HENYN SIMANGENTLOKO, TOZAMILE BOTHA, MPUMELELO CILIBE, WILLIAM DANIEL PETERS, SAMUEL ZOYISILE MALI, MSITHELI WELLINGTON NONYUKELA, JAMES MICHAEL TAMBOER, NOTHINI BETTY DYONASHE, individually and on behalf of her deceased son, NONKULULEKO SYLVIA NGCAKA, individually and on behalf of her deceased son, HANS LANGFORD PHIRI, MIRRIAM MZAMO, individually and on behalf of her deceased son,

*Plaintiffs-Appellees,*

v.

DAIMLER AG, FORD MOTOR CO., INTERNATIONAL BUSINESS MACHINES CORP.,

*Defendants-Appellants,*

GENERAL MOTORS CORPORATION, RHEINMETALL AG,

*Defendants.*

On Appeal from the United States District Court, Southern District of New York

### **BRIEF OF *AMICI CURIAE* U.S. DIPLOMATS IN SUPPORT OF THE PLAINTIFFS-APPELLEES**

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## QUALIFICATIONS OF *AMICI CURIAE*

**Hon. Carl Coon** served in the Foreign Service from 1949 through 1985. He was Ambassador to Nepal from 1981-84. He also served in diplomatic posts in Germany, Syria, India, Iran and Morocco. His Washington assignments included two tours on the India desk at the State Department's Bureau of Near Eastern Affairs, Deputy Director of the Foreign Service Institute, and Country Director for North Africa, among others.

**Edmund McWilliams** served in the Foreign Service for 26 years (1975-2001) in a variety of postings including Department of State desk officer for Laos/Cambodia and Vietnam, Political Officer in Bangkok and Moscow, Political Counselor in Managua and Jakarta, Acting Deputy Chief of Mission in Kabul, Special Envoy to Afghanistan and Charge d'Affaires in Bishkek and Dushanbe. He received the Secretary of State's Secretary's Career Achievement Award, four Superior Honor Awards, two Group Superior Honor Awards, two Meritorious Honor Awards and the Christian A. Herter Award (American Foreign Service Association).

**William A. Root** was employed by the Department of State from 1950 to 1983, most of that time as a Foreign Service Officer. He served in Bonn, Copenhagen, Saigon, Berlin, as well as Washington, D.C. He was Director of the Office of East-West Trade from 1976 to 1983.

**Hon. Robert White** began his 25 year Foreign Service career in 1955. Among the posts he held were Latin America Director of the Peace Corps, Deputy Permanent Representative to the Organization of American States, Ambassador to Paraguay, and Ambassador to El Salvador. After retiring from the Foreign Service in 1981, he served as a Senior Associate at the Carnegie Endowment for International Peace and President of the Center for International Policy in 1989.

## **STATEMENT OF INTEREST OF *AMICI CURIAE*<sup>1</sup>**

This brief brings to the Court’s attention the views and experience of *amici curiae*, United States career foreign service diplomats, relevant to this case’s impact on U.S. foreign policy and, more generally, of aiding and abetting liability under the Alien Tort Statute. 28 U.S.C. § 1350 (“ATS”). *Amici* each served in the U.S. Foreign Service for more than 20 years.

### **STATEMENT OF THE ISSUES ADDRESSED BY *AMICI***

*Amici* herein submit that this case, in which the South African government has expressly stated that the district court is an appropriate forum, does not interfere with United States foreign policy toward South Africa.

More generally, *amici* further submit that continued recognition of liability for aiding and abetting serious violations of universally recognized human rights norms is consistent with, and indeed advances, U.S. foreign policy interests. In so doing, *amici* take no position as to whether the Plaintiffs can demonstrate that any of the Defendants are liable under the appropriate aiding and abetting standard.

### **INTRODUCTION AND SUMMARY OF ARGUMENT**

Plaintiffs allege that the Defendants aided and abetted or were otherwise complicit in egregious violations of well-established human rights norms in

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<sup>1</sup> All parties have consented to the filing of this brief.

apartheid South Africa. The Republic of South Africa “is now of the view that [the Southern District of New York] is an appropriate forum to hear” this case.<sup>2</sup> Given this, *amici* respectfully submit that there is no basis under which this Court could conclude that this litigation will have any negative effect on current U.S. foreign policy toward South Africa that would warrant dismissal.

Defendants argue that the Court must dismiss based on the fact that the Executive branch has submitted statements asserting that this case will interfere with U.S. foreign policy. This Circuit’s prior application of the Supreme Court’s analysis in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n. 21 (2004), as well as due regard for the independent role of the federal judiciary and for Congress’s goals in adopting the ATS, all counsel against recognizing a new abstention doctrine, applicable only in ATS cases, that grants the Executive veto power over individual cases.

Moreover, the consideration that Courts give to Executive foreign policy prerogatives must, at a minimum, be grounded in current realities. The statements Defendants cite have been utterly superseded by events—because they were

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<sup>2</sup> Letter from Jeffrey Thamsanqa Radebe, MP, Minister of Justice and Constitutional Development, Republic of South Africa, to Judge Shira Scheindlin, U.S.D.J., United States District Court for the Southern District of New York, conveyed September 1, 2009 (“Radebe Letter”).

submitted some time ago, they do not reflect the fact that South Africa has changed its position nor that this litigation has been substantially narrowed. Furthermore, as statements of the prior Administration, there is no basis to conclude they even reflect current U.S. foreign policy priorities. Under such circumstances, reliance on these statements would be arbitrary, and certainly would not be compelled by any principle of deference to U.S. foreign policy.

Furthermore, this case should not be dismissed on comity grounds based on purported interference with South African sovereignty, as South Africa now disclaims any such interference.

Last, Defendants claim that there should never be aiding and abetting liability for assisting the acts of a government official, because such liability conflicts with U.S. foreign policy. In fact, holding those who aid and abet egregious violations of universal human rights norms liable under the ATS furthers U.S. foreign policy. Eliminating such liability would undermine U.S. policy objectives and is not justified by concerns over any negative impacts that such liability might have on foreign relations.

The United States has long been regarded as a world leader in its commitment to universal human rights standards and respect for the rule of law. This is one of our greatest assets in our diplomatic relations. Our commitment to

the rule of law and to the punishment of those who commit or abet gross violations of human rights standards has been a hallmark of our foreign policy. The credibility of that commitment will be undermined if we eliminate ATS lawsuits for aiding and abetting, which are a highly visible tool to hold accountable those complicit in heinous acts such as genocide, crimes against humanity, war crimes, rape and torture.

Our Government has spoken clearly about the need to ensure that U.S. corporate entities comply with international human rights obligations. With respect to some countries with poor human rights records, U.S. foreign policy presumes that trade and investment will improve political conditions, an approach sometimes referred to as “constructive engagement.” Complicity liability supports and complements the effectiveness of that approach, since constructive engagement is predicated on the notion that U.S. companies will promote respect for human rights. The potential for liability for those companies that directly aid and abet abuses creates incentives for companies to actively promote liberalization, whereas without such liability, companies might continue to be complicit in the very abuses constructive engagement is designed to prevent.

U.S. foreign policy has many facets. One is to unflinchingly criticize other governments, including allies, that commit human rights abuses. However, even

where we criticize another country's government for its human rights practices, or where an ATS claim is brought against one of its citizens or against a corporation allegedly complicit in abuses in that country, rarely do such actions have a significant adverse impact on our foreign relations. All of us have diplomatic experience in countries where we have engaged in such criticism. Yet bilateral diplomatic relations have continued, U.S. companies have continued to invest, and those countries have continued to cooperate on matters of mutual interest.

There may, of course, be particular cases where a claim under the ATS may be counterproductive to overall U.S. foreign policy goals. In *Sosa*, the Supreme Court suggested that courts should, on a "case-specific" basis, consider such effects. 542 U.S. at 733 n. 21. We have confidence in the capacity of the Courts to weigh these considerations case-by-case, and to dismiss cases where warranted. The suggestion, however, that *all* aiding and abetting claims can be precluded based on alleged foreign policy consequences would undermine the very foreign policy Defendants purport to advance.

## **ARGUMENT**

### **I. Alleged conflicts with U.S. foreign policy do not justify dismissal.**

Cases brought in the United States by private parties do not limit the ability of the Executive Branch to engage with foreign governments. Other governments

generally understand that private lawsuits are not U.S. Government actions.

Other governments do on occasion object to aspects of our legal system. As diplomats, it was our role to explain U.S. policy to the world, including how our government functions and our constitutional separation of powers. It fell to us to explain what may sometimes seem to other countries to be incomprehensible requirements of the U.S. legal system. National legal systems differ and at times conflict. Our task was to promote resolution of such disputes, which often arise from mutual misunderstanding. Mere differences in enforcement systems cannot by themselves justify eliminating a valuable means of human rights enforcement. In any event, the ATS has not caused any greater conflict than other laws to which some foreign nations may object. Courts regularly apply U.S. law despite objections from foreign nations. *E.g.*, *Barclay's Bank, PLC v. Franchise Tax Board of Cal.*, 512 U.S. 298, 303, 324 n. 22 (1994); *Laker Airways Ltd. v. Sabena*, 731 F.2d 909, 935-36 (D.C. Cir. 1984) (where statute grants foreign plaintiffs right to sue, U.S. interests override whatever foreign interests may be infringed when foreigner sues in U.S. courts against wishes of foreign state).

Defendants assert that this case should be dismissed on foreign policy grounds “[f]or two independent reasons”: case-specific deference to the Executive Branch and principles of international comity. Brief of Appellants (“BOA”) at 24.

Neither of these arguments makes sense in light of South Africa’s subsequent statement that it does not object to this litigation, nor does either argument accord with other well established legal principles or U.S. foreign policy concerns.

**A. “Case-specific deference,” *i.e.* the political question doctrine, does not permit dismissal of this action.**

**1. There is no “independent” doctrine of case-specific deference to the Executive Branch under which the Executive can veto the application of a duly enacted federal law.**

Defendants assert that dismissal is required whenever the Executive asserts that adjudication would impair the conduct of foreign policy. BOA at 25. They misread *Sosa* and decades of jurisprudence detailing the proper relationship between courts and the political branches.

*Sosa* suggested in *dicta* that “case-specific deference to the political branches” is a “possible limitation” upon courts applying the ATS, and that courts “should give serious weight to the Executive Branch’s view of the case’s impact on foreign policy.” 542 U.S. at 733 n. 21. This Court has already held that this language refers to the well-established political question doctrine. *Khulumani v. Barclay Nat. Bank Ltd.*, 504 F.3d 254, 261 (2d Cir. 2007); *accord id.* at 263, *citing Whiteman v. Dorotheum GmbH & Co KG*, 431 F.3d 57, 69, 71 (2d Cir. 2005) (determination of when and to what extent stated foreign policy interests of the

United States should be accorded deference should be guided by application of political question doctrine). Thus, the *dicta* in footnote 21 did not create a new federal common law doctrine that circumvents existing separation of powers principles in ATS cases. *Cf.* Reply Brief of Appellants Ford Motor Company and International Business Machines Corporation (“Reply”) at 12-13.

The political question doctrine reflects the appropriate distribution of powers between the judiciary and the political branches. *Baker v. Carr*, 369 U.S. 186, 210 (1962). Accordingly, this Court could not dismiss, even if this case did interfere with foreign relations, unless all of *Baker*’s requirements were met.<sup>3</sup>

Defendants’ claim that a court *must* dismiss when the Executive deems a case to be a political irritant, BOA at 27, would undermine the judiciary’s independence. *See Khulumani*, 504 F.3d at 263, n.14. Indeed, this Court has already rejected Defendants’ argument, finding that an Executive assertion of the political question doctrine “would not necessarily preclude adjudication.” *Khulumani*, 504 F.3d at 263, *quoting Kadac v. Karadzic*, 70 F.3d 232, 250 (2d Cir. 1995); *accord id.* at 292 (Hall, J., concurring) (mere executive fiat cannot control disposition; separation of powers requires judiciary to conduct an independent

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<sup>3</sup> Defendants argue the political question doctrine for the first time in their reply, and do so in only a cursory manner. Reply at 11-12.

inquiry).<sup>4</sup>

*Amici* have dedicated decades to the service of Executive Branch foreign policy. We have always, however, understood Executive power in this field to be situated within a constitutional regime respecting separation of powers, including the role of the Judiciary. These bedrock democratic principles can and must be respected, in *ATS* and other cases, and do not undermine our foreign policy.

**2. Our Government’s existing statements do not support dismissal.**

The fact that the State Department says that a case could potentially pose problems for the United States does not mean the Department is asking for outright dismissal. The State Department knows how to ask for dismissal in those cases where there are insurmountable problems with a particular litigation. *See, e.g., Doe v. Exxon Mobil Corp.*, 473 F.3d 345, 354 (2007) (interpreting State Department Letter “not as an unqualified opinion that this suit must be dismissed,

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<sup>4</sup> Courts ordinarily have the obligation to decide a properly presented case, even where the controversy may potentially implicate foreign affairs. *W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics, Corp.*, 493 U.S. 400, 409-10 (1990). Courts cannot “shirk this responsibility merely because [a] decision may have significant political overtones,” *Japan Whaling Ass’n v. American Cetacean Soc.*, 478 U.S. 221, 230 (1985), or because it may embarrass foreign governments. *W.S. Kirkpatrick*, 493 U.S. at 409-10. Thus, it is “error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.” *Baker*, 369 U.S. at 211.

but rather as a word of caution to the district court alerting it to the State Department's concerns").

That aside, our Government's existing statements do not weigh in favor of dismissal here, because they are obsolete and irrelevant.

**a. The Government's statements about the foreign policy impacts of this litigation are obsolete.**

Our Government has indicated that it may submit a new statement, which of course would supersede those upon which Defendants rely. *See* BOA at 27-33; Reply at 9. Even if, however, the United States does not submit a new statement, the prior statements provide no guidance.

The Court's analysis of whether this case interferes with U.S. foreign policy must be grounded in a realistic consideration of the current posture of the case and its relationship to U.S. policy. Thus, in applying *Baker*, courts must weigh "other relevant facts" in addition to the Government's statements. *Khulumani*, 504 F.3d at 292 (Hall, J., concurring).

Here, other relevant facts make clear that the context in which the Government's existing statements were submitted bears no relationship to this case's present posture. Accordingly, the U.S. statements do not support dismissal under *Baker*. First, Defendants principally rely upon a U.S. Government argument

that was predicated upon South Africa's former opposition to these cases. BOA at 28-29. Thus, it is irrelevant as to South Africa's former statements.

Second, the U.S. statements were submitted with respect to radically different complaints that included many more defendants and a far broader theory of liability than is currently before the Court. Indeed, it was the narrowing of the complaints that apparently led South Africa to change its position. Radebe Letter at 1-2.

Third, the statements were submitted by a prior Administration. We have seen firsthand that our Government's approach to foreign policy often changes drastically from administration to administration. Indeed, the history of ATS litigation has demonstrated that different administrations may take radically different approaches to the validity of ATS litigation in general, or to the appropriateness of particular cases. *See, e.g., In Re Estate of Marcos Human Rights Litig.*, 978 F.2d 493, 500 (9th Cir. 1992) (“[The executive’s] change of position in different cases and by different administrations is not a definitive statement by which we are bound on the limits of § 1350.”). The briefs Defendants cite tell the Court nothing about current U.S. foreign policy.

In sum, reliance on statements that have been so utterly mooted by intervening events would not reflect deference to U.S. foreign policy.

**b. The Government’s statements about foreign investment in the developing world are irrelevant to the issue of case-specific deference.**

Defendants ask this Court to defer to Executive Branch statements that this litigation may deter foreign investment in the developing world, where such investment might improve political and economic conditions. BOA at 30-33; Reply at 10-11. *Sosa*, however, was clear that foreign policy concerns must be addressed on a “case-specific” basis. 542 U.S. at 733 n. 21. This is not a case-specific argument and is therefore irrelevant in this context. *See Khulumani*, 504 F.3d at 262, *citing Sosa*, 542 U.S. at 729 (analysis of collateral consequences of recognizing a norm is distinct from whether adjudication of suit is barred by political question doctrine).

Moreover, this emphasis on a “constructive engagement” approach is precisely the kind of foreign policy that often changes from administration to administration. The Court should not rely on a prior Administration’s statement in assessing current U.S. foreign policy. Regardless, *amici* demonstrate below that aiding and abetting liability *promotes* U.S. foreign policy, including constructive engagement. *See infra* Section II.

**B. South Africa’s statement that the Southern District of New York is an appropriate forum to hear this case precludes comity dismissal.**

Defendants argue that this case should be dismissed on international comity grounds because it interferes with the sovereignty of South Africa. BOA at 33-40. South Africa, however, has now made clear that it disagrees with Defendants. There is no basis to dismiss this case in deference to South African sovereignty when the democratically elected, sovereign government of South Africa believes the district court to be an appropriate forum.

Even if the Court could ignore South Africa’s current position in favor of its prior statement, the views of foreign nations, although important, are not dispositive in a comity analysis. *Khulumani*, 504 F.3d at 263.<sup>5</sup> The United States, like every sovereign nation, has a substantial interest in regulating access to its own courts. *United States v. Davis*, 767 F.2d 1025, 1038 (2d Cir. 1985). A foreign nation’s effort to prevent a U.S. court from applying its own laws is “facially obstructive” of U.S. sovereignty, *id.*, and usurps U.S. judicial functions. *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 939 (D.C. Cir. 1984). This is especially true where a U.S. statute (here the ATS) grants plaintiffs the right to sue. “Our courts are not required to stand by while a [foreign

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<sup>5</sup> *Amici* take no position on the effect of the German letter.

nation] attempts to close a courthouse door that Congress . . . has opened to foreign[ers].” *Id.* at 936. In this circumstance, U.S. interests override whatever foreign interests may be infringed when a foreigner sues in U.S. courts against the wishes of a foreign state. *Id.* at 935. By deferring to foreign interests, a court would abdicate its responsibility to uphold the statute. *Id.* at 941, n. 121. Courts may not undermine a statute to avoid a conflict with foreign law, since they lack the authority to compromise statutorily created jurisdiction. *Id.* at 953-55 & n.175.

In short, “[f]ederal judges cannot dismiss a case because a foreign government finds it irksome, nor can they . . . tailor their rulings to accommodate the expressed interests of a foreign nation that is not even a party.” *Patrickson v. Dole Food Co.*, 251 F.3d 795, 803 (9th Cir. 2001) (considering whether federal question jurisdiction existed). Instead, federal judges “are bound to decide cases before them according to the rule of law.” *Id.*

More specifically, such an extraordinary delegation of the judicial function to a foreign government would conflict with the policies of the ATS. The very essence of this statute is that it authorizes aliens to sue for violations that occurred abroad. *E.g. Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). The ATS (and Torture Victim Protection Act (“TVPA”), 28 U.S.C. § 1350 note) “express[] a policy favoring receptivity by our courts” to suits for torture and summary

execution. *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 105 (2d Cir. 2000).

Looking to foreign governments for permission to proceed in an ATS suit

“invit[es] frustration of the purposes of international law by individual states.”

*Filártiga v. Peña-Irala*, 577 F. Supp. 860, 863 (E.D.N.Y. 1984).

In sum, it is not uncommon for a foreign state to object to a particular case. Foreign governments, however, cannot create the potential for abstention in an ATS suit by merely writing to a U.S. official or submitting their views to a court. As noted above, governments typically understand that private suits are not the acts of the U.S. Government; sometimes it falls upon U.S. diplomats to explain the role of the Judiciary in our legal system. Such circumstances, however, do not permit Courts to ignore that role.

## **II. Complicity liability supports U.S. foreign policy and should not be abolished.**

Defendants argue that the mere existence of private liability for abetting the commission of egregious human rights violations by government actors would result in harmful foreign policy consequences, and that the Court therefore should refuse to recognize that any such liability exists. BOA at 48; Reply at 16. This Court, however, has already recognized in this case that a plaintiff may plead aiding and abetting liability, *Khulumani*, 504 F.3d at 260, and rejected the claim

that “collateral consequences” preclude such liability. *Id.* at 262, n.12; *accord id.* at 289 (Hall, J., concurring). Nonetheless, *amici* herein demonstrate that aiding and abetting liability supports U.S. foreign policy by promoting human rights and, more specifically, constructive engagement.<sup>6</sup>

Regardless, abolishing aiding and abetting liability is unnecessary to prevent the possibility of unwanted effects on foreign policy in individual cases. As noted above, established doctrines allow Courts on a case-by-case basis to permit ATS suits to proceed where warranted, while dismissing cases thought to exceed the Judiciary’s proper role. There can be no dispute that precluding complicity liability would bar at least some ATS claims that do not even potentially interfere with U.S. foreign policy. *See NCGUB v. Unocal Corp.*, 176 F.R.D. 329, 362 (C.D.Cal. 1997) (State Department opining that “at this time” adjudication of ATS case involving allegations that a California oil company was complicit in forced labor and other abuses on its project in Burma would not interfere with U.S. foreign relations).

**A. Aiding and abetting liability furthers the U.S. foreign policy priority of promoting respect for human rights.**

Defendants assume that every case that involves abuses committed by

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<sup>6</sup> As noted above, Defendants’ reliance on statements submitted by a prior Administration makes little sense.

officials of a foreign government, even where the official or the government is not a party, necessarily harms U.S. foreign policy. BOA at 49. Courts, however, may not dismiss cases simply because they may embarrass foreign governments. *W.S. Kirkpatrick*, 493 U.S. at 409-10.

In any event, liability for abettors of abuse supports rather than hinders U.S. foreign policy. Under U.S. law, “a principal goal of the foreign policy of the United States shall be to promote the increased observance of internationally recognized human rights by all countries.” 22 U.S.C. § 2304(a)(1).

This commitment is reflected in many aspects of U.S. policy. For example, an honest, public assessment of the human rights record of other countries is a statutory feature of U.S. foreign policy. Congress has directed the State Department to comprehensively review and report annually on the status of internationally recognized human rights in virtually every nation in the world. 22 U.S.C. §§ 2151n(d); 19 U.S.C. § 2464. Accordingly, for nearly 30 years, the State Department has issued “Country Reports” on human rights practices. These reports are a widely cited authority on human rights practices worldwide.

Numerous U.S. laws condition foreign development, security and investment assistance and trade benefits on compliance with internationally

recognized human rights.<sup>7</sup> In particular, the United States sanctions or withholds aid from various organizations and individuals that aid and abet human rights violations. For example, the U.S. conditions certain funding to the Colombian and Indonesian militaries on their suspending and prosecuting military members who aid or abet militia groups. Pub. L. No. 108-7 §§ 564(a)(2), 569 (2003). The U.S. also withholds funds to any government if it “has aided or abetted . . . in the illegal distribution, transportation, or sale of diamonds mined in” Sierra Leone. *Id.* at § 570(a). Similarly, U.S. law condemns the role of Sudan in abetting and tolerating slave trading. Sudan Peace Act, Pub. L. No. 107-245, § 4(1)(C), 50 U.S.C. § 1701 note.

In 1992, Congress passed the Torture Victim Protection Act, which expanded the possibility for suits in U.S. courts for violations of international human rights law. In signing the TVPA, President George Bush explained:

In this new era, in which countries throughout the world are turning to democratic institutions and the rule of law, we must maintain and strengthen our commitment to ensuring that human rights are respected everywhere.<sup>8</sup>

The drafters of the TVPA explicitly confirmed that it contemplated liability for

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<sup>7</sup> *See, e.g.*, 22 U.S.C. §§ 2151n(a) (development assistance); 22 U.S.C. § 2304(a)(2) (security assistance); 7 U.S.C. § 1733(j)(1) (provision of agricultural commodities).

<sup>8</sup> Statement on Signing the Torture Victim Protection Act of 1991, 28 Weekly Comp. Pres. Doc. 465 (March 12, 1992).

those “who ordered, abetted, or assisted in the torture.” S. Rep. No. 1, 249, 102d Cong., 1st Sess. (1991); *accord Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1157-58 (11th Cir. 2005) (TVPA includes abetting liability).

The ATS is one of the tools in the United States’ overall efforts to promote compliance by government officials and private actors with fundamental human rights standards. U.S. courts have allowed cases to proceed only for the most serious of human rights violations involving gross physical abuse, such as torture, summary execution, genocide, war crimes, and disappearances.<sup>9</sup> These abuses have been widely condemned internationally and by U.S. foreign policy for decades. Particular ATS cases can serve to reinforce U.S. foreign policy.<sup>10</sup>

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<sup>9</sup> See e.g., *Kadic*, 70 F.3d at 236 (genocide, war crimes); *In re Estate of Marcos Human Rights Litig.*, 25 F.3d 1467, 1475 (9th Cir. 1993) (torture, execution, disappearance); *Filartiga*, 630 F.2d at 878 (torture).

<sup>10</sup> Cases involving corporate complicity have helped bring about important resolutions for human rights victims. For example, victims’ lawsuits helped make possible the historic agreement the United States forged in 2000 with the German Government and companies to compensate Holocaust-era slave laborers. After negotiating that agreement, then-Deputy Secretary of the Treasury Stuart Eizenstat said: “It was the American lawyers, through the lawsuits they brought in U.S. courts, who placed the long-forgotten wrongs by German companies during the Nazi era on the international agenda. . . . Without question, we would not be here without them.” Remarks of Deputy Secretary of the Treasury Stuart E. Eizenstat at the 12th and Concluding Plenary on the German Foundation, LS-774 (July 17, 2000) available at <http://www.ustreas.gov/press/releases/l774.htm>. Similarly, *Business Week* noted that a settlement in *Doe v. Unocal* was “A Milestone For Human Rights.” Paul Magnusson, “A Milestone For Human Rights,” *Business Week* at 63 (January 24, 2005). The Plaintiffs had alleged Unocal was complicit in

Indeed, the ATS was designed to respond to “[t]he Framers’ overarching concern that control over international affairs be vested in the new national government to safeguard the standing of the United States among the nations of the world.” *Filartiga*, 630 F.2d at 885. The Framers enacted the ATS to discharge the new nation’s legal and moral duty to comply with international law. Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 Am. J. Int’l. L. 461 (1989). This duty included ensuring that “[i]ndividuals who flouted international law would find no quarter in the United States.” *Id.* at 487. The concerns animating passage of the ATS remain as important to U.S. foreign policy today as they were then.

Our experience as diplomats leads us to concur in the support for prudent application of the ATS expressed by the State and Justice Departments in a joint *amicus* brief in *Filartiga*. There, the Government emphasized that to fail to recognize a claim involving violations of well-defined, universally recognized norms “might seriously damage the credibility of our nation’s commitment to the protection of human rights.” Memorandum for the United States as Amicus Curiae, *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), *reprinted in* 19

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abuses committed by the Burmese military on behalf of Unocal’s pipeline project, and the settlement compensated the Plaintiffs and provided money for a fund to improve living conditions, health care and education in the pipeline region. *Id.*

I.L.M. 585, 604 (1980) (citations omitted). The same is true of aiding and abetting liability. Drastic curtailment of ATS liability to preclude accountability for those who aid and abet serious human rights abuses could undermine American foreign policy by causing other nations to question the strength of our commitment to human rights.

**B. Holding accountable corporations complicit in the commission of human rights violations furthers U.S. foreign policy.**

**1. The United States has a core interest in ensuring that U.S. corporate entities comply with international human rights obligations in their conduct abroad.**

As the State Department notes, “promoting corporate social responsibility around the world contributes to the U.S. foreign policy goals of democracy promotion, free trade, international development, and human rights.”<sup>11</sup>

When U.S. companies operate overseas, their actions reflect upon the United States as a whole. Our standing as a world leader and our commitment to human rights are diminished if we allow our citizens, including our corporate citizens, to commit or assist in the commission of human rights violations with impunity.

Not long ago, the United States State Department, together with the United Kingdom, established the Voluntary Principles on Security and Human Rights,

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<sup>11</sup> U.S. Department of State website, <http://www.state.gov/g/drl/lbr/>.

which provide guidelines for companies in the extractive industries for “maintaining the safety and security of their operations within an operating framework that ensures respect for human rights and fundamental freedoms.”<sup>12</sup> Promoting these Principles remains the official policy of the United States.<sup>13</sup> In announcing those principles, the then-Secretary of State noted that they “demonstrat[e] that the best-run [oil and mining] companies realize that they must pay attention not only to the particular needs of their communities, but also to universal standards of human rights, and that in addressing these needs and standards there is no necessary conflict between profit and principle.”<sup>14</sup>

The Assistant Secretary for Economic and Business Affairs elaborated:

U.S. companies are models overseas for the kind of business practices we encourage others to adopt. Therefore, it is good not only for American business, but also for the global investment climate that American firms be the best corporate citizens possible. . . . More comprehensive risk assessments, guidance on interactions between companies and host government security, and best security practices are central to any

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<sup>12</sup> Voluntary Principles on Security and Human Rights, United States Department of State (Dec. 19, 2000) at 1.

<sup>13</sup> U.S. Department of State website, <http://www.state.gov/g/drl/lbr/vp/index.htm>.

<sup>14</sup> Remarks of Secretary of State Madeleine K. Albright, Press Briefing, (December 20, 2000), Washington, D.C., *available at* <http://secretary.state.gov/www/statements/2000/001220.html>.

investment climate.<sup>15</sup>

We agree with this assessment.

Our experience has not shown ATS litigation over the past 20 years to deter investment by U.S. businesses. *Cf.* BOA at 50. The U.S. courts have not allowed “abusive” litigation, the number of lawsuits to date has been small and businesses have continued to invest overseas. Our understanding is that a corporation may be held liable only if it provided direct and substantial assistance in the commission of violations of universally recognized human rights norms.<sup>16</sup> This liability is necessary to ensure that U.S. multinational corporations will not sully our nation’s reputation through complicity in such violations, and that if they do, our reputation will not suffer the further damage that would result if our legal system afforded

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<sup>15</sup> E. Anthony Wayne, Assistant Secretary of State for Economic and Business Affairs, Announcement of "Voluntary Principles on Security and Human Rights," U.S. Department of State (December 20, 2000) *available at* [http://www.state.gov/www/policy\\_remarks/2000/001220\\_wayne\\_principles.html](http://www.state.gov/www/policy_remarks/2000/001220_wayne_principles.html) (emphasis added).

<sup>16</sup> Accordingly, the concern expressed by the Government to the district court that potential ATS liability “*for operating in a country whose government implements oppressive policies will discourage U.S. (and other foreign) corporations from investing in many areas of the developing world*” is inapposite. Statement of Interest of the United States, October 27, 2003 Letter from William Taft IV, Legal Adviser, U.S. Department of State to Shannen Coffin, Esq., U.S. Department of Justice at 3 (emphasis added).

impunity.<sup>17</sup>

## **2. Aiding and abetting liability furthers constructive engagement.**

With respect to some (but not all) repressive regimes, the United States has adopted a policy of “constructive engagement,” which presumes that responsible investment by U.S. companies will promote democracy and respect for human rights.<sup>18</sup> Defendants claim that aiding and abetting liability will deter investment and interfere with constructive engagement where the U.S. chooses to pursue that

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<sup>17</sup> Nor is there any merit to the argument that ATS liability will put U.S. corporations at a competitive disadvantage. It is dubious, at best, to suggest that a U.S. corporation is less likely to win foreign contracts because the ATS allows liability for aiding in gross human rights abuses that foreign competitors would only face if they are subject to personal jurisdiction in the U.S. Even if this were the case, however, the same argument was advanced against the Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78dd–1 *et. seq.* (FCPA), which prohibits U.S. companies from winning foreign contracts by engaging in bribery or corruption. Just as the FCPA was a reflection of the values of the rule of law and transparency that American foreign policy promotes, ATS liability reflects the value of respect for human rights that is also a cornerstone of U.S. diplomacy. Both our policies and our values suffer if we permit U.S. corporations to emulate the worst practices of foreign companies.

<sup>18</sup> In others, such as Burma, U.S. foreign policy presumes that vigorous economic sanctions best promote democracy. *See* Exec. Order No. 13047, 62 Fed. Reg. 28301 (May 22, 1997) (banning all new investment in Burma), *extended by* Notice of Continuation of the National Emergency with Respect to Burma, May 17, 2005, *available at* <http://www.whitehouse.gov/news/releases/2005/05/20050517-8.html>. *Amici* take no position on whether either approach is effective or which approach works best in general or with respect to any particular nation.

approach. BOA at 30-31, 50. As noted, the premise that abetting liability will deter investment is unwarranted. Further, ATS liability for companies complicit in abuses *supports* constructive engagement by enhancing the mechanisms through which such engagement is presumed to work. Thus, complicity liability facilitates U.S. foreign policy in those countries in which the Executive has chosen a “constructive engagement” approach. Conversely, constructive engagement is unlikely to work well if legal institutions in the United States allow U.S. multinationals to abet abuses. Tort liability, particularly liability for complicity under the ATS, serves this function.

To understand how aiding and abetting liability increases the effectiveness of economic engagement as a tool to promote human rights and democracy, one must consider the mechanisms by which investment is said to accomplish this result. According to advocates of constructive engagement, U.S. investment in countries with repressive regimes promotes human rights in a number of ways.

First, the argument posits that U.S. corporations will impart democratic values to government officials and private citizens, and that contact with Western business promotes greater integration of repressive regimes into the world community and thus further increases such regimes’ exposure to Western values.<sup>19</sup>

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<sup>19</sup> Craig Forcese, *Globalizing Decency: Responsible Engagement in an Era of Economic Intergration*, 5 Yale Hum. Rts & Dev. L.J. 1, 5-6 (2002);

Second, proponents argue that regimes with economic ties to Western governments will seek to maintain those ties and thus will act to promote their reputation through political liberalization.<sup>20</sup> Third, investors purportedly will demand respect for the rule of law so that disputes will be resolved fairly.<sup>21</sup>

To the extent these mechanisms work, ATS complicity liability increases their effectiveness. As a threshold matter, such liability ensures that engagement truly is “constructive.” Engagement that involves complicity in abuses cannot be considered “constructive,” because it supports the very abuses that a constructive engagement policy seeks to end. Moreover, a corporation that abets human rights abuses will not impart democratic values; even if it attempts to do so, its complicity in abuses will demonstrate that it is not serious about any statements it might make concerning democracy or human rights. Furthermore, corporations complicit in abuses will generally have little incentive to take any action that

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USA\*Engage, “Economic Engagement Promotes Freedom,” *available at* [www.usaengage.org/archives/studies/engagement.html](http://www.usaengage.org/archives/studies/engagement.html); Mark B. Baker, *Flying Over the Judicial Hump: A Human Rights Drama Featuring Burma, The Commonwealth of Massachusetts, the WTO and the Federal Courts*, 32 *Law & Pol’y Int’l Bus.* 51, 81 (Fall 2000); Unocal Corp., *Business and Human Rights*, *available at* <http://web.archive.org/web/20050426005828/http://www.unocal.com/responsibility/humanrights/hr4.htm> (corporations promote respect for human rights by raising human rights issues in business meetings with government ).

<sup>20</sup> Baker, *supra*, at 80-81; 85.

<sup>21</sup> USA\*Engage, *supra*.

might actually encourage reform, since such corporations have strong self-interested reasons to prefer the stability of governance by their autocratic partners over the uncertainty of democratization.<sup>22</sup>

Thus, where Congress and/or the Executive have determined that constructive engagement is the most effective policy for encouraging respect for human rights in a given nation, ATS complicity liability serves a vital role in supporting that policy, by ensuring through fact-specific adjudication that corporations that subvert constructive engagement by aiding and abetting rights abuses can be held accountable. This kind of fact-specific inquiry is a role uniquely suited to the Judiciary.

The district court in *Doe v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997), recognized precisely this point. There, an oil company allegedly complicit in abuses committed by the Burmese military asserted that adjudication of Plaintiffs' claims would interfere with U.S. foreign policy, because Congress had recently permitted the President to prohibit new investment in Burma. *Id.* at 892,

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<sup>22</sup> A company in a business partnership with a regime or that has been complicit in its abuses has an enormous stake in maintaining the *status quo*. Democratization might bring to power not only opponents of the regime, but opponents of the company. A democratic opposition would not be likely to look kindly on the company's involvement with the past regime's abuses, and might seek to hold the company to account for its actions. Complicit corporations are not likely to press for respect for the rule of law, which might serve to end their own impunity.

895 n.17. According to Unocal, Congress, in not banning existing investment, demonstrated an official U.S. policy of refraining from taking steps “that might serve only to isolate the Burmese Government [i.e. SLORC] and actually hinder efforts toward reform.” *Id.* at 894, n.17 (bracket in original).

The district court, however, properly rejected that argument. It held:

Even accepting the Congressional and Executive decisions as Unocal frames them, the coordinate branches of government have simply indicated an intention to encourage reform by allowing companies from the United States to assert positive pressure on SLORC through their investments in Burma. . . . Plaintiffs essentially contend that Unocal, rather than encouraging reform through investment, is knowingly taking advantage of and profiting from SLORC’s practice of using forced labor and forced relocation, in concert with other human rights violations . . . to further the interests of the Yadana gas pipeline project. Whatever the Court’s final decision in this action may be, it will not reflect on, undermine or limit the policy determinations made by the coordinate branches with respect to human rights violations in Burma.

*Id.* at 895, n.17. Companies that aid and abet abuses cannot be said to promote democracy or human rights; they inhibit constructive engagement.

Perhaps the most famous attempt to differentiate between “constructive” and harmful engagement, the “Sullivan Principles,” illustrates the wide gulf between complicity in human rights abuses and truly “constructive” engagement. Created as a voluntary code of conduct for corporations in apartheid South Africa, the Sullivan Principles required companies not only to “eliminate all vestiges of

racial discrimination” in their employment, but also to “[s]upport the ending of all apartheid laws.” The (Sullivan) Statement of Principles (Fourth Amplification), Principle I, II, III, VI, (November 8, 1984), *reproduced in Sullivan Principles For U.S. Corporations Operating in South Africa*, 24 I.L.M. 1464, 1496-99 (1985). Thus, the Principles recognized that a constructively engaged corporation not only does not abet serious human rights abuses such as apartheid, it actively opposes them. Many corporations might fall in between, neither engaging in conduct that promotes constructive change nor assisting abuses that might lead to ATS liability.<sup>23</sup> A corporation that is complicit in human rights abuses, however, is not a constructive presence.

ATS cases against corporations typically involve companies that allegedly abet abuses committed on their behalf by repressive government security forces. *E.g. Unocal Corp.*, 963 F. Supp. 880; *Bowoto v. ChevronTexaco*, 312 F.Supp.2d 1229 (N.D.Cal. 2004). The possibility of aiding and abetting liability forces companies to engage their government partners in exactly the kind of dialogue the constructive engagement model contemplates.

A corporation that knows it can be held liable for aiding and abetting will have every incentive to tell its government partner that it will not tolerate human

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<sup>23</sup> *Amici* do not suggest that merely failing to oppose repressive policies is actionable under the ATS.

rights violations on its project and to adopt safeguards to limit the opportunity for government officials to commit such abuses. Indeed, companies will explain to government officials that the U.S. legal system (and international law) forbid complicity in human rights violations; that victims are entitled to present evidence in court before a neutral decision-maker who will decide their case in accordance with the rule of law rather than the will of the government; and that if those victims can prove their allegations they will be entitled to redress. Thus, ATS aiding and abetting liability ensures corporations will not only explain democratic values and institutions to officials of repressive governments, but will also demonstrate by refusing to assist in abuses that those values and institutions are not merely aspirations, but actually govern the conduct of members of democratic societies, including corporations.

Companies will also convey to government officials that if government security forces engage in abuses on behalf of the company, those abuses will become known in the United States. In this sense, potential liability strongly supports the constructive engagement rationale that posits that nations will seek to improve their reputations.

Merely investing in a country that has an authoritarian regime is not sufficient for liability. Companies willing to tell their government partners that

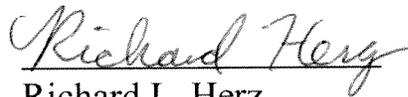
they will not be complicit in abuses will rarely be deterred from investing. That dialogue, however, is exactly what “constructive” engagement requires.

### CONCLUSION

Our experience as diplomats for the United States leads us to conclude that this case will not adversely affect U.S. foreign policy toward South Africa and that aiding and abetting liability under the ATS supports U.S. foreign policy. *Amici* respectfully submit that this Court should not reverse the district court’s finding that this case is justiciable, nor should it preclude the availability of aiding and abetting liability.

November 30, 2009

Respectfully submitted,



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**CERTIFICATE OF COMPLIANCE PURSUANT TO  
FED. R. APP. P. 32(a)(7)(C)**

**Balintulo *et al.* v. Daimler AG, *et. al.* Case Nos. 09-2778-cv; 09-2779-cv; 09-2780-cv; 09-2781-cv; 09-2783-cv; 09-2785-cv; 09-2787-cv; 09-2792-cv; 09-2801-cv; 09-3037-cv.**

I certify that, pursuant to Federal Rules of Appellate Procedure 32(a)(7), 35(b)(2), and 29(d), the attached *amicus* brief is proportionally spaced, has a typeface of 14 points or more and contains 7000 words or less, according to WordPerfect 12, the word-processing program used to prepare the brief.

DATED: November 30, 2009



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**CERTIFICATE OF ANTI-VIRUS SCANNING PURSUANT TO  
INTERIM LOCAL R. 25.1(6)**

**Balintulo *et al.* v. Daimler AG, *et. al.* Case Nos. 09-2778-cv; 09-2779-cv; 09-2780-cv; 09-2781-cv; 09-2783-cv; 09-2785-cv; 09-2787-cv; 09-2792-cv; 09-2801-cv; 09-3037-cv.**

I certify that, pursuant to Second Circuit Local Rule 32(a)(1)(E), I have scanned for viruses the PDF version of the **BRIEF OF AMICI CURIAE U.S. DIPLOMATS IN SUPPORT OF THE PLAINTIFFS-APPELLEES** that was submitted in this case as an email attachment to <civilcases@ca2.uscourts.gov> and that no viruses were detected.

DATED: November 30, 2009



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## CERTIFICATE OF SERVICE

I, Richard Herz, the undersigned, hereby certify that I am employed by EarthRights International, 1612 K St., NW, Suite 401, Washington, DC 20006; I am over the age of eighteen and am not a party to this action. I further declare under penalty of perjury that on November 30, 2009, I served a true copy of the foregoing **Brief of Amici Curiae U.S. Diplomats in Support of the Plaintiffs-Appellees** on the interested parties in this action by first class mail or equivalent upon the following persons:

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**XX BY FIRST CLASS U.S. MAIL**

**XX** I caused such envelopes to be deposited in the mail at Washington, D.C. The envelopes were mailed with postage thereon fully prepaid. I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed on November 30, 2009.



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