
No. 07-0016

In the United States Court of Appeals for the Second Circuit

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

Plaintiffs-Appellants,

vs.

TALISMAN ENERGY, INC.,

Defendants-Appellees.

On Appeal From the Judgment of the United States District Court
For the Southern District of New York
The Honorable Denise L. Cote
District Court No. 01 Civ. 9882 (DLC)

BRIEF OF AMICUS CURIAE EARTHRIGHTS INTERNATIONAL IN SUPPORT OF THE PLAINTIFFS-APPELLANTS' PETITION FOR REHEARING OR REHEARING EN BANC

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STATEMENT OF IDENTITY AND INTEREST OF AMICUS CURIAE

EarthRights International (ERI) is a human rights organization based in Washington, D.C., which litigates and advocates on behalf of victims of human rights abuses worldwide. ERI has represented plaintiffs in several lawsuits under the Alien Tort Statute, 28 U.S.C. § 1350, alleging liability for, *inter alia*, aiding and abetting security forces in carrying out torture and extrajudicial killings. *E.g.* *Doe v. Unocal Corp.*, No. 00-56603 (9th Cir.); *Bowoto v. Chevron Corp.*, No. 09-15641 (9th Cir.); *In re Chiquita Brands International, Inc., Alien Tort Statute and Shareholder Derivative Litigation*, No. 08-01916-MD-KAM (S.D. Fla.).

Amicus therefore has an interest in ensuring that the courts apply the correct body of law to questions of accessorial liability under the ATS. *Amicus* addressed the similar issue of the application of federal common law in ATS cases with respect to agency, veil-piercing and joint venture liability theories in a prior *amicus* brief to the panel, and argued that issue before the panel at the Court's invitation.

STATEMENT OF THE ISSUE ADDRESSED BY AMICUS CURIAE

Amicus addresses the question of the appropriate body of law to apply for accessory liability under the Alien Tort Statute, and the substantive standards for aiding and abetting liability.

SUMMARY OF ARGUMENT

The panel erred by failing to recognize that under *Sosa v. Alvarez Machain*, 542 U.S. 692 (2004), well-developed rules of federal common law are the source for theories of liability for claims brought under the Alien Tort Statute, and that aiding and abetting liability properly requires “knowledge” as the *mens rea*. Judge Hall’s concurring opinion in *Khulumani v. Barclay National Bank Ltd.*, 504 F.3d 254, 286–91 (2d Cir. 2007), sets forth the proper analysis.

Under the plain language of *Sosa*, the ATS gives jurisdiction to federal courts to recognize violations of the law of nations as causes of action at federal common law. 542 U.S. at 724. As a federal statute providing liability for violations of international law as incorporated into federal law, the ATS looks to federal common law rules for aiding and abetting and conspiracy liability.

Furthermore, the original intent of the First Congress, which enacted the ATS, would have been to apply rules of liability drawn from general common law (the predecessor to federal common law), which was understood to incorporate the law of nations. In the early years of the United States, courts regularly interpreted the law of nations and applied general common law principles to attribute liability.

Finally, the standard of liability for aiding and abetting under general common law principles is knowing, substantial assistance.

ARGUMENT

I. Federal Common Law Governs Accessory Liability in Alien Tort Statute Cases.

The panel erred by declining to apply uniform federal common law rules to determine who may be held liable for claims under the ATS. *See* slip op. at 37–41. The panel erroneously concluded that the Supreme Court’s decision in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), requires courts to look to international law rather than federal common law for “accessorial liability.” Slip op. at 41. In fact, both *Sosa* and the original understanding of the ATS suggest that a uniform body of federal common law should be used to decide this question.

A. Following *Sosa*, federal common law provides the rules of liability in Alien Tort Statute cases.

The panel reasoned that *Sosa* points to “international law to find the standard for accessorial liability,” because “secondary liability is no less significant a decision than whether to recognize a whole new tort in the first place,” and because it concluded that *Sosa* footnote 20, which the panel conceded referred to a different issue, supported the “broader principle that the scope of liability for ATS violations should be derived from international law.” Slip op. at 39–41. But *Sosa* ruled that the ATS grants jurisdiction over causes of action present in federal common law, which incorporates international law, 542 U.S. at 732; thus, the only question for which *Sosa* requires reference to international law is whether there has been a

“violation[] of [an] international law norm.” *Id.* *Sosa* footnote 20, upon which the panel relied, suggested that the question of whether the perpetrator must be a state actor is one of international law. 542 U.S. at 732 n.20. But a state action requirement is part of the definition of an international law violation. For example, torture by a private party is not a violation of international law (unless, for example, committed as part of crimes against humanity), whereas torture by a state actor is a violation. *See id.*

Accessory rules such as aiding and abetting or conspiracy, by contrast, are not part of a distinct “norm.” Indeed, the panel here explicitly held that conspiracy is *not* a separate, inchoate offense, slip op. at 44–45, and the opinions in *Khulumani* rejected the idea that aiding and abetting must be a distinct offense under international law. *See* 504 F.3d at 284 (Hall, J., concurring) (rejecting notion that international law provides the aiding and abetting standard); *id.* at 280, 281 (Katzmann, J., concurring) (aiding and abetting is “a theory of liability for acts committed by a third party,” not “an offense in itself.”). International law is the source to determine whether there has been a primary violation, but nothing in *Sosa* suggests that the question of “who should be held responsible for a particular act,” *Khulumani*, 504 F.3d at 281, is resolved according to international law.

The other circuits that have addressed this question since *Sosa* have, like Judge Hall, found that settled federal common law doctrines determine who may

be held responsible in ATS cases. *See Sarei v. Rio Tinto PLC*, 487 F.3d 1193, 1202 (9th Cir. 2007), *vacated by grant of en banc review and remanded on other grounds* by 550 F.3d 822 (9th Cir. 2008) (“Courts applying the [ATS] draw on federal common law, and there are well-settled theories of vicarious liability under federal common law.”); *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1158 (11th Cir. 2005) (applying federal common law standards for aiding and abetting and conspiracy liability). Prior to *Sosa*, several other courts suggested that “liability standards applicable to international law violations” should be developed “through the generation of federal common law,” an approach that is “consistent with the statute’s intent in conferring federal court jurisdiction over such actions in the first place.” *Xuncax v. Gramajo*, 886 F. Supp. 162, 182–83 (D. Mass. 1995); *see also Abebe-Jira v. Negewo*, 72 F.3d 844, 848 (11th Cir. 1996) (holding that courts may “fashion domestic common law remedies to give effect to violations of customary international law”); *Doe v. Islamic Salvation Front*, 257 F. Supp. 2d 115, 120 n.12 (D.D.C. 2003) (considering the possibility that “[t]ort principles from federal common law” are appropriately applied to determine liability in ATS cases); *Doe v. Unocal Corp.*, 395 F.3d 932, 966 (9th Cir. 2002) (Reinhardt, J., concurring) (differing with majority and arguing that federal common law applies in ATS cases “in order to fashion a remedy with respect to the direct or indirect involvement of third parties in the commission of the underlying tort”), *majority opinion vacated*

by grant of *en banc* review, 395 F.3d 978 (2003)¹; *Eastman Kodak Co. v. Kavlin*, 978 F. Supp. 1078, 1094 (S.D. Fla. 1997) (finding liability under the ATS where “under ordinary principles of tort law [the defendant] would be liable for the foreseeable effects of her actions”).

B. Courts look to federal liability rules to effectuate federal causes of action.

Concluding that federal law provides uniform rules of decision does not end the inquiry: This Court must also consider what sources to consult in developing such rules. The primary source is preexisting federal principles, as informed by traditional common law rules where necessary as well as international law.

Federal courts nearly always apply preexisting, general tort rules of liability to give effect to federal causes of action. *See Khulumani*, 504 F.3d at 287 (Hall, J., concurring) (citing *United States v. Kimbell Foods*, 440 U.S. 715, 727 (1979); *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981)). Indeed, “Congress is understood to legislate against a background of common-law adjudicatory principles,” and “courts may take it as given that Congress has legislated with an expectation that [such principles] will apply except when a statutory purpose to the contrary is evident.” *Astoria Fed. Sav. & Loan Ass’n v.*

¹ According to the subsequent order of April 9, 2003, *en banc* review was to focus on “whether Unocal’s liability should be resolved according to general federal common law tort principles” or under “an international-law aiding and abetting standard.”

Solimino, 501 U.S. 104, 108 (1991) (internal quotations omitted); *see also Burlington Indus., Inc., v. Ellerth*, 524 U.S. 742, 754–55 (1998) (fashioning “a uniform and predictable standard” of vicarious liability in Title VII actions “as a matter of federal law”); *Project Hope v. M/V Ibn Sina*, 250 F.3d 67, 76 (2d Cir. 2001) (applying federal common law of joint and several liability to federal statutory claims).

Applying exclusively international law to “significant” issues in ATS cases, slip op. at 41, rather than applying established federal law doctrines, would lead to absurd consequences. For example, international law does not recognize personal immunities for offenses such as genocide, *see Rome Statute of the International Criminal Court*, art. 27., July 17, 1998, 2187 U.N.T.S. 3. Doctrines such as head-of-state immunity, government contractor immunity, and even the sovereign immunity of the United States itself, are all federal common-law doctrines, not derived from international law. *See, e.g., Tachiona v. United States*, 386 F.3d 205, 220 (2d Cir. 2004) (head-of-state immunity); *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504 (1988) (Government contractor defense); *Gray v. Bell*, 712 F.2d 490, 506 (D.C. Cir. 1983) (sovereign immunity). Were courts to apply international law to these undoubtedly significant issues, all of which bear on a defendant’s liability, these common law doctrines would fall away. To avoid this, the Court should incorporate into ATS claims settled common law principles, including civil aiding

and abetting liability.

As Judge Hall recognized, ““international law does not specify the means of its domestic enforcement,”” *Khulumani*, 504 F.3d at 286 (Hall, J., concurring). International law contains gaps that make it inappropriate as the primary source for rules of tort liability, especially since individual civil liability is generally a concern for domestic enforcement, not international tribunals. While the panel here imported an aiding and abetting standard drawn from international criminal law, the better approach in a civil case is to use established domestic doctrines of civil liability. “[W]hen international law and domestic law speak on the same doctrine, domestic courts should choose the latter.” *Id.* at 287.² And, as demonstrated below, when it passed the ATS, Congress would have expected that, as with other areas of federal law, general common law principles would apply in ATS cases.

C. Congress’ original understanding of the Alien Tort Statute mandates application of general common law rules of liability.

1. Because the law of nations was incorporated into the common law, general common law rules of liability apply.

The panel’s suggestion that, under *Sosa*, “significant” decisions in ATS

² The plaintiffs here assert that international law adopts a knowledge standard. Where international law accords with established federal law, there can be little argument against its application in ATS cases. However, the importation into federal common law tort cases of a criminal purpose standard that exceeds the federal tort “knowledge” standard is inappropriate.

cases, slip op. at 41, must be determined according to international law misapprehends the original understanding of Congress as to the relationship between the law of nations and the common law. When the ATS was enacted, no clear distinction was drawn between the two bodies of law; the common law was considered to have encompassed the law of nations in its entirety. It is thus mistaken to think that Congress would have looked to international law for rules of tort liability—which, of course, it did not and still does not provide. Instead, Congress treated liability arising under the law of nations as it did any other common law tort and applied general common law rules of liability. *See* Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 Va. J. Int'l L. 587, 595 (2002) (“American courts resorted to this general body of preexisting law to provide the rules of decision in particular cases without insisting that the law be attached to any particular sovereign.”).

In our Republic’s early years, courts routinely applied the law of nations in both civil and criminal cases, as a matter of general common law. *See* Brief of Professors of Federal Jurisdiction and Legal History as Amici Curiae in Support of Respondents in *Sosa v. Alvarez-Machain* [“Legal Historians’ Brief”], 2003 U.S. Briefs 339, *reprinted in* 28 *Hastings Int'l & Comp. L. Rev.* 99, 108–109 (2004). Thus, they understood that a tort in violation of the law of nations would be “cognizable at common law just as any other tort would be.” William S. Dodge,

The Historical Origins of the Alien Tort Statute: A Response to the “Originalists,” 19 Hastings Int’l & Comp. L. Rev. 221, 234 (1996). Attribution of liability was, therefore, governed by the common law, which included the law of nations. See, e.g., *Talbot v. Janson*, 3 U.S. 133, 156 (1795) (holding defendant liable for violation of international law of neutrality, and applying general principles of aiding and abetting and conspiracy without searching international law); *United States v. Benner*, 24 F. Cas. 1084, 1087 (C.C.E.D. Pa. 1830) (recognizing that common-law rule of self defense would exonerate defendant alleged to have infringed on foreign minister’s inviolability of person, even though that right is conferred under the law of nations).³

2. The original intent of the ATS suggests application of general common law rules of liability.

As *Sosa* recognized, the First Congress enacted the ATS to give federal courts jurisdiction over tort suits under the law of nations brought by aliens out of concern that the United States was failing to provide a uniform forum for redress of

³ Civil aiding and abetting liability was well established at common law. As early as 1348, the courts of England ruled that one who came in aid of a trespasser, without himself doing another wrong, could be held liable as a trespasser. See *Roger de A.*, Y.B. 22 Edw. 3, fol. 14b, Mich., Lib. Ass. 43 (1348) (English paraphrase at <http://www.bu.edu/phpbin/lawyearbooks/display.php?id=11792>). See also *Thomlinson v. Arriskin*, (1719) 92 Eng. Rep. 1096 (K.B.) (holding defendant liable for aiding trespass); *Yarborough and Others v. The Governor and Company of the Bank of England*, (1812) 104 Eng. Rep. 991 (K.B.) (assuming corporation can be liable for aiding trespass); *Petrie v. Lamont*, (1842) 174 Eng. Rep. 424 (Assizes) (“All persons in trespass who aid or counsel, direct, or join, are joint trespassers”).

a series of crimes against ambassadors and the international law of neutrality, and eagerness to prove its credibility as a new nation. 542 U.S. at 715–19; *see also* Dodge, *supra*, at 229–30. In doing so, they were partially motivated by a fear that state courts, which already had jurisdiction over such suits, could not be trusted to give aliens a fair hearing and might come to divergent conclusions about the content of the law of nations. *See* Dodge, *supra*, at 235–36. Thus, the First Congress desired to make federal courts *more accessible* for foreigners’ tort claims that, when unaddressed, gave rise to international diplomatic friction. *See* Kenneth C. Randall, *Federal Jurisdiction over International Law Claims: Inquiries into the Alien Tort Statute*, 18 N.Y.U. Int’l L. & Pol. J. 1, 21 (1985).

Given these aims, the First Congress would not have limited accessorial liability to principles drawn from an external body of international law that generally prescribed no rules of tort liability, when state courts were not so limited. Rather, they expected federal courts, like state courts, to apply the familiar body of general common law that, after all, already incorporated relevant aspects of the law of nations.

The incongruousness of applying international law standards of liability is underlined by the fact that many modern ATS cases also plead domestic common law tort claims for the same conduct implicated in the ATS claims. *E.g.*, *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 Civ. 8386 (KMW) (HBP) (S.D.N.Y.).

Domestic law claims are typically decided under the general civil liability standard. *E.g.*, *Pittman v. Grayson*, 149 F.3d 111, 123 (2d Cir. 1998) (recognizing knowing substantial assistance standard as New York tort rule for aiding and abetting). The First Congress would not have wanted a foreign diplomat, for example, who is able to benefit from the general aiding and abetting standard if he or she sues for ordinary assault in a New York court, to face a *higher* burden in federal court on a theory of aiding and abetting a breach of diplomatic inviolability. The panel’s rule would disadvantage aliens’ claims arising under the law of nations vis-à-vis their state law claims—thus “treat[ing] torts in violation of the law of nations less favorably than other torts,” Legal Historians’ Brief at 110—and frustrating the aims of the First Congress.

II. Under Federal Common Law, Aiding and Abetting Liability Requires Knowing, Substantial Assistance.

Courts in this Circuit have found that the federal common law elements of aiding and abetting a tortfeasor are: “(1) the existence of a violation by the primary wrongdoer; (2) knowledge of this violation on the part of the aider and abettor; (3) substantial assistance by the aider and abettor in the achievement of the primary violation.” *Stutts v. De Dietrich Group*, No. 03-CV-4058, 2006 U.S. Dist. LEXIS 47638, at *47 (E.D.N.Y. June 30, 2006). This test is functionally identical to the ordinary common law rule embodied in the Restatement (Second) of Torts, § 876(b) (1977); *see also Khulumani*, 504 F.3d at 288 (Hall, J., concurring) (liability

may be found for “knowingly and substantially assisting a principal tortfeasor”).

This knowledge standard has long been recognized. Indeed, some early cases suggest that liability for aiding and abetting torts was appropriate not only in the absence of specific intent, but even in the absence of actual knowledge. *See, e.g., Purviance v. Angus*, 1 U.S. (1 Dall.) 180, 185 (Pa. 1786) (shipmaster held liable for aiding the commission of a tort when he had constructive knowledge that the action was trespass).⁴ Additionally, in English common law, “there is cogent support both in principle and ancient authority for the suggestion that . . . [k]nowingly assisting . . . would suffice” for liability. John G. Fleming, *The Law of Torts* 257 (Sydney: 8th ed. 1992).⁵ And when the same Congress that enacted the ATS passed a criminal statute outlawing piracy to comply with its obligations under the law of nations, it included criminal penalties for any person “who shall . . . knowingly aid and assist, command, counsel or advise any person” to commit piracy. Act of Apr. 30, 1790, ch. 9, §§ 9–10, 1 Stat. 112, 114 (emphasis added). In

⁴ *See also Richardson v. Saltar*, 4 N.C. 505 (1817) (co-defendants liable for aiding trespass despite lack of evidence that they knew principal perpetrator was acting without legal authority); *State v. McDonald*, 14 N.C. 468 (1832) (defendants guilty of aiding and abetting wrongful arrest if they had constructive knowledge that warrant was invalid).

⁵ *See also BMTA v. Salvadori*, [1949] Ch. 556 (defendant would be liable for inducing breach of contract if he knowingly entered into a contract inconsistent with the contracting party’s obligations (citing *De Francesco v. Barnum*, (1890) 45 Ch.D.430)); *Midland Rollmakers Ltd. v. Collins*, (1981) *The Times*, 18 June (Ch.) (bankers who “knowingly lent their aid and assistance to a fraudulent conspiracy” can be liable as members of the conspiracy).

passing that law, Congress believed that it was merely codifying the law of nations, as it had been incorporated into the general common law. *See Sosa*, 524 U.S. at 719; Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 Am. J. Int'l L. 461, 477 & n.75 (1989) (noting that the Act codified crimes that had been identified as violations of the law of nations by the Continental Congress in 1781).⁶

CONCLUSION

For the foregoing reasons, *amicus* urges this Court to grant rehearing or rehearing *en banc*.

DATED: October 28, 2009

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⁶ Indeed, in a revision to the piracy statutes several years later, Congress explicitly defined the act according to the law of nations. Act of Mar. 3, 1819, ch. 77, § 5, 3 Stat. 510, 513–14 (1819) (providing for prosecution of persons who “shall, on the high seas, commit the crime of piracy, as defined by the law of nation”).

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

**The Presbyterian Church of Sudan, *et al.*, v. Talisman Energy, Inc., *et al.*
Case No. 07-0016**

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 3500 words or less, according to WordPerfect 11, the word-processing program used to prepare the brief.

DATED: October 28, 2009

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

**The Presbyterian Church of Sudan, *et al.*, v. Talisman Energy, Inc., *et al.*
Case No. 07-0016**

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 AMICUS CURIAE EARTHRIGHTS INTERNATIONAL** that was submitted in this case as an email attachment to <civilcases@ca2.uscourts.gov> and that no viruses were detected. The anti-virus software used is AVG Anti-Virus Version 8.5.423, using Virus Base 270.14.34/2463, released on October 27, 2009, at 8:18 a.m.

DATED: October 28, 2009

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International

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 April 28, 2010, I served a true copy of the foregoing **Brief of *Amicus Curiae* EarthRights International in Support of the Plaintiffs-Appellants' Petition for Rehearing or Rehearing en Banc** by hand delivery upon the following persons:

Marc J. Gottridge, Esquire
Joseph P. Cyr, Esquire
Scott W. Reynolds, Esquire
Andrew M. Behrman, Esquire
Lovells
590 Madison Avenue
New York, NY 10022
Counsel for Defendants-Appellees

I further declare that on October 28, 2009, I served a true copy of the foregoing **Brief of *Amicus Curiae* EarthRights International in Support of the Plaintiffs-Appellants' Petition for Rehearing or Rehearing en Banc** on the interested parties in this action by first class mail or equivalent upon the following persons:

Paul L. Hoffman, Esquire
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XX BY FIRST CLASS U.S. MAIL

XX I deposited such envelopes 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 October 28, 2009, at Washington, the District of Columbia.

Richard Herz
EARTHRIGHTS INTERNATIONAL
Declarant
*Counsel for Amicus Curiae EarthRights
International*