No. 11-649

IN THE
Supreme Court of the United States

RIO TINTO PLC, *et al.*,
Petitioners,
v.

ALEXIS HOLYWEEK SAREI, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF AND BRIEF FOR AMICI CURIAE NATIONAL FOREIGN TRADE COUNCIL, AMERICAN PETROLEUM INSTITUTE, ORGANIZATION FOR INTERNATIONAL INVESTMENT, AND NATIONAL MINING ASSOCIATION IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.2(b) of the Rules of this Court, the National Foreign Trade Council, the American Petroleum Institute, the Organization for International Investment, and the National Mining Association move this Court for leave to file the attached brief amici curiae in support of the petition for a writ of certiorari to review the judgment of the Court of Appeals for the Ninth Circuit in *Sarei* v. *Rio Tinto PLC*, 2011 WL 5041927 (Oct. 25, 2011).

All parties were timely notified of Amici's intent to file the attached brief as required by Rule 37.1. Petitioner has consented to filing of this brief. A letter of

consent to the filing of this brief is on file with the Clerk of the Court. Respondents have declined to consent.

In this case, an en banc court of the Ninth Circuit decided multiple issues of law relating to a suit brought under the Alien Tort Statute (ATS), 28 U.S.C. §1350. Among other things, the Court of Appeals held that corporations may be held liable under the ATS for aiding and abetting violations of international law committed abroad. This holding is of fundamental interest to Amici, organizations with members that conduct substantial business around the world and that therefore are potential defendants in suits brought under the ATS. In particular, Amici have a substantial interest in ensuring the ATS—including applicable mens rea standards—is interpreted correctly so as not to impose substantial and unnecessary costs on businesses.

Accordingly, Amici respectfully request that the Court grant the motion for leave to file a brief amici curiae.

Respectfully submitted.

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FEBRUARY 2012

QUESTION PRESENTED

Amici address only the second question presented:

Whether U.S. courts should recognize a federal common law claim under the [Alien Tort Statute (ATS)] based on aiding-and-abetting liability, even absent concrete factual allegations establishing that the purpose of the defendant's conduct was to advance the principal actor's violations of international law.

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INTEREST OF AMICI CURIAE[1]

The National Foreign Trade Council (NFTC) is the premier business organization advocating a rules-based

[1] Pursuant to Rule 37.6, Amici affirm that no counsel for a party authored this brief in whole or in part and that no person other than Amici, their members, or counsel have made any monetary contributions intended to fund the preparation or submission of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the intention of Amici to file this brief.

world economy. Founded in 1914 by a group of American companies, NFTC and its affiliates now serve more than 250 member companies.

The American Petroleum Institute (API) is a nationwide, not-for-profit trade association whose membership includes over 400 companies involved in all aspects of the oil and natural gas industry. API is a frequent advocate on important issues of public policy affecting its members' interests before courts, legislative bodies and other forums.

The Organization for International Investment (OFII) is the largest business association in the United States representing the interests of U.S. subsidiaries of international companies. Its member companies employ hundreds of thousands of workers in thousands of plants and locations throughout the United States. Members of OFII transact business throughout the United States and are affiliates of companies transacting business around the globe.

The National Mining Association (NMA) is a national not-for-profit trade association that represents all aspects of the mining industry, including producers of most of America's coal, metals, industrial and agricultural minerals; manufacturers of mining and mineral-processing machinery and supplies; bulk transporters; financial and engineering firms; and other businesses related to mining. NMA works with Congress and federal and state regulatory officials to provide information and analyses on public policies of concern to its membership and to promote policies and practices that foster the efficient and environmentally sound development and use of the country's mineral resources.

SUMMARY OF ARGUMENT

The second question presented is:

> Whether U.S. courts should recognize a federal common law claim under the ATS based on aiding-and-abetting liability, even absent concrete factual allegations establishing that the purpose of the defendant's conduct was to advance the principal actor's violations of international law.

That question encompasses two issues: (i) whether aiding-and-abetting liability is permitted under the ATS for the violations alleged, and (ii) if so, whether the mental element that must be alleged and proved is that the accessory acted with the *purpose* to facilitate the principal's violations, rather than with mere *knowledge* of the principal's conduct.

Amici submit that this question warrants the Court's review. In particular, the issue of the appropriate mental element for aiding-and-abetting liability under the ATS warrants the Court's attention because it is the subject of an extensive and acknowledged divide among the courts of appeals, with two circuits on one side and three on the other.

In addition, the scope of aiding-and-abetting liability under the ATS is of great and recurring importance to the business community because of the increasing frequency of ATS claims brought against corporations. Corporate defendants are typically accused not of having been principal violators but of having aided and abetted violations committed by other actors. The difference between purpose and knowledge as a mens rea standard is of profound practical importance. Because allegations of knowledge are easier to plead success-

fully than ones showing purpose, insistence on a mental element no less demanding than purpose will greatly facilitate district courts' ability to police meritless ATS claims at the pleading stage.

Finally, although the en banc court in this case appears to have applied the correct mens rea standard, at least tentatively, it cautioned that its treatment of the issue was not final. The fragmented nature of the en banc decision will only invite further confusion within and outside the Ninth Circuit.

This Court should grant review and hold that, if aiding-and-abetting liability is permissible under the ATS, purpose to facilitate the principal's unlawful conduct, not knowledge, is the mental element that must be pleaded and proved.

ARGUMENT

I. THE COURTS OF APPEALS ARE DEEPLY DIVIDED OVER THE REQUIRED MENTAL ELEMENT FOR AIDING-AND-ABETTING LIABILITY UNDER THE ATS

The issue of the appropriate mental standard for aiding-and-abetting liability under the ATS is the subject of a mature and acknowledged conflict between, on one side, the Second and Fourth Circuits, which have held that purpose to facilitate the principal violator is required, and the D.C. and Eleventh Circuits, which have held that knowledge of the underlying violation suffices. The Ninth Circuit's fragmented en banc decision in this case, which appears to side with the Second and Fourth Circuits, further deepens the split. This Court's review is needed to resolve this well-developed dispute among the courts of appeals.

The Second Circuit first confronted this issue in *Khulumani* v. *Barclay National Bank Ltd.*, 504 F.3d

254 (2d Cir. 2007). In that case, two members of the panel agreed that "a plaintiff may plead a theory of aiding and abetting liability" under the ATS, but they could not agree on the appropriate mental element. *Id.* at 260. Judge Katzmann interpreted this Court's decision in *Sosa* v. *Alvarez-Machain*, 542 U.S. 692 (2004), as requiring federal courts to look to international law to determine whether aiding-and-abetting liability exists. *See* 504 F.3d at 269-270. Judge Katzmann concluded that international law recognizes accessorial liability, but that such liability attaches only when a defendant provides assistance "'[f]or the purpose of facilitating the commission of such a crime.'" *Id.* at 275 (quoting Article 25(3)(c) of the Rome Statute of the International Criminal Court (ICC)). Judge Hall, by contrast, looked to federal common law in defining the scope of accessorial liability, concluding that aiding-and-abetting liability exists, but that the appropriate mental element is mere knowledge. *See id.* at 287-290.

In *Presbyterian Church of Sudan* v. *Talisman Energy, Inc.*, 582 F.3d 244, 258 (2d Cir. 2009), the Second Circuit adopted Judge Katzmann's view "as the law of this Circuit." The court first "agree[d]" with Judge Katzmann that "*Sosa* and our precedents send us to international law to find the standard for accessorial liability." *Id.* at 259. "[A]pplying international law," the Second Circuit held that "the *mens rea* standard for aiding and abetting liability in ATS actions is purpose rather than knowledge alone." *Id.* The Second Circuit reasoned that *Sosa* compelled this result: "Even if there is a sufficient international consensus for imposing liability on individuals who *purposefully* aid and abet a violation of international law no such consensus exists for imposing liability on individuals who *knowingly* (but not purposefully) aid and abet a violation of

international law." *Id.* (citation omitted); *see also Kiobel* v. *Royal Dutch Petroleum Co.*, 621 F.3d 111, 149 (2d Cir. 2010), *cert. granted*, No. 10-1491 (U.S. Oct. 17, 2011); *id.* at 188 (Leval, J., concurring in the judgment).

The Fourth Circuit embraced the Second Circuit's rule in *Aziz* v. *Alcolac, Inc.*, 658 F.3d 388 (4th Cir. 2011). Expressly acknowledging "the conflicting mens rea standards for accessorial liability drawn by our sister circuits," *id.* at 398, the Fourth Circuit explained that it was "persuaded by the Second Circuit's … analysis" and "adopt[ed] it as the law of this circuit." *Id.* at 398. The court agreed that it must "look to the law of nations to determine the reach of the statute," *id.*, and in accord with the Second Circuit, concluded that a "specific intent mens rea standard for accessorial liability … hews as closely as possible" to *Sosa*'s requirements, *id.* at 400. In so holding, the Fourth Circuit "part[ed] company … with the D.C. Circuit's decision to decline to give greater weight to the Rome Statute as the authoritative source on the issue." *Id.* at 399.

A divided panel of the D.C. Circuit in *Doe VIII* v. *Exxon Mobil Corp.*, 654 F.3d 11, 39 (D.C. Cir. 2011), rejected the Second Circuit's position, concluding that aiding-and-abetting liability can be established by satisfying "a 'knowledge' standard."[2] After holding that aiding-and-abetting liability is available under the ATS, the panel turned to "what intent must be proved" to

[2] Judge Kavanaugh dissented in relevant part, as he would have affirmed the district court's dismissal of plaintiffs' ATS claims in full. *See id.* at 72. Because he would have dismissed those claims "for any of four independent reasons," *id.*, he did not address the mens rea issue.

establish such liability. *Id.* at 32. On that score, the panel "agree[d] with the Second Circuit's premise that aiding and abetting must be embodied in a norm of customary international law," but, based on its own reading of international-law sources, determined that knowledge, not purpose, is the appropriate measure of aiding-and-abetting mens rea. *Id.* at 35-37. The panel specifically criticized the Second Circuit's treatment of the Rome Statute, as well as its reading of decisions of various international tribunals. *See id.* at 35-39.

In adopting a knowledge standard, the D.C. Circuit recognized it was aligning itself with the Eleventh Circuit. *See* 654 F.3d at 33 ("The Eleventh Circuit" has held "a knowledge standard applies."). In particular, in *Cabello* v. *Fernández-Larios*, 402 F.3d 1148, 1157 (11th Cir. 2005), the Eleventh Circuit addressed "whether claims based on indirect liability are actionable under the [ATS]." Concluding that indirect liability is available, the court then reviewed a jury instruction directing that the defendant could be found liable for aiding and abetting if the jury concluded that, among other things, the defendant provided assistance to the principal violator and "knew that his actions would assist in the illegal or wrongful activity at the time he provided the assistance." *Id.* at 1158. Finding evidence in the record to support a verdict based on that instruction, the Eleventh Circuit upheld the verdict. *See id.* at 1158-1159; *see also Sinaltrainal* v. *Coca-Cola Co.*, 578 F.3d 1252, 1258 n.5 (11th Cir. 2009) ("[t]he ATS permits … accomplice liability"); *Romero* v. *Drummond Co.*, 552 F.3d 1303, 1315 (11th Cir. 2008) ("the law of this

Circuit permits a plaintiff to plead a theory of aiding and abetting liability under the [ATS]").[3]

The en banc Ninth Circuit's elliptical resolution of the aiding-and-abetting liability issue in this case deepens the division among the courts of appeals and is unlikely to settle matters even within the Ninth Circuit.

Explaining that "the inquiry into aiding and abetting liability is an international-law inquiry," the Ninth Circuit plurality first concluded that aiding-and-abetting liability exists under the ATS. Pet. App. 16a. When it came to the mental element for such liability, however, the plurality equivocated. It noted that, "[u]nder international law … the required *mens rea* for aiding and abetting war crimes is subject to dispute." *Id.* 52a. In the plurality's view, the Nuremberg trials, as well as decisions of various international tribunals, "have required the *mens rea* of knowledge in aiding and abetting cases," while the Rome Statute of the ICC imposes a purpose standard. *Id.* The plurality stated, however, that it did not need to "resolve this dispute" because "*at least* purposive action in furtherance of a war crime constitutes aiding and abetting that crime." *Id.* 53a. After making a remarkable suggestion that the standards of purpose and knowledge might be the same under international law, *see id.* 55a-57a, the plurality deemed the complaint sufficient under any understanding of purpose, *see id.* 53a-58a.

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[3] Adding to the confusion in the lower courts, one district court in the Eleventh Circuit has recently interpreted *Cabello* as endorsing "a *purpose* standard for secondary liability." *In re Chiquita Brands Int'l, Inc. Alien Tort Statute & Shareholder Derivative Litig.*, 792 F. Supp. 2d 1301, 1343 (S.D. Fla. 2011).

Two concurrences addressing aiding-and-abetting liability will only add to the likelihood of continued confusion in the Ninth Circuit on this issue. Judge Reinhardt explained that he would "continue to adhere to the view" that federal common law, not international law, "determin[es] the scope of third-party tort liability under the ATS" and that, under the common law, a knowledge standard is sufficient to impose aiding-and-abetting liability. Pet. App. 65a-66a. Judges Pregerson and Rawlison, in contrast, deemed it appropriate to look to international law, but in their view of international law, "*knowledge* rather than *purpose* is the appropriate *mens rea* standard for aiding and abetting liability." *Id.* 68a.

In short, the issue of the appropriate mental element for aiding-and-abetting liability under the ATS has deeply divided the circuits, not to mention confounded many of the judges who have faced the issue. *See, e.g.*, *Khulumani*, 504 F.3d at 291 (Hall, J., concurring) (noting the case "confronted [the] panel with a number of difficult and unsettled questions in a controversial area of the law"); Pet. App. 4a-5a ("This case has been a perplexing one for judges of this circuit because of the new legal uncertainties in the application of the ATS that flowed in the wake of the Supreme Court's decision in *Sosa*[.]"); *id.* 126a (Kleinfeld, Bea, Ikuta, JJ., dissenting) (noting the Ninth Circuit's "plethora of opinions that cannot agree on what 'the law of nations' prohibits"). Resolution of this pressing and important question is impossible absent this Court's intervention, and the issue's extensive development in five courts of

appeals means there is no reason to delay this Court's review.[4]

II. THE MENTAL ELEMENT OF AIDING-AND-ABETTING LIABILITY UNDER THE ATS IS AN ISSUE OF SIGNIFICANT AND RECURRING IMPORTANCE

Amici strongly agree with Petitioners that questions about aiding-and-abetting liability under the ATS are of significant importance to the business community. *See* Pet. 31-32. In particular, Amici agree that broad doctrines of secondary liability make many major corporations the potential targets of international class-action lawsuits that could impose very substantial costs on business. *See id.* That is especially so in light of the palpable explosion in ATS litigation in the last decade. *See* Chamber of Commerce Br. 5-7.

The difference between a knowledge and purpose standard has profound importance for the ability of district courts to manage ATS litigation. In view of this Court's recent decisions clarifying Rule 8 pleading standards, it would be the rare case in which plaintiffs could sufficiently plead non-conclusory and "plausible" allega-

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[4] The issue has also been addressed in district courts outside those circuits in which the court of appeals has taken a position. A district court in the Third Circuit, explaining that the Third Circuit "does not appear to have addressed the issue of aiding and abetting liability" under the ATS, followed the Second Circuit, concluding "the appropriate *mens rea* for aiding and abetting liability is purpose." *Krishanthi* v. *Rajaratnam*, 2010 WL 3429529, at *7 (D.N.J. Aug. 26, 2010). Likewise, a district court in the Fifth Circuit has dismissed claims under the ATS for failure to allege "the defendants acted with the purpose of assisting terrorists to murder or maim innocent civilians." *Abecassis* v. *Wyatt*, 704 F. Supp. 2d 623, 655 (S.D. Tex. 2010).

tions that a private corporation provided substantial assistance to foreign actors with the purpose to facilitate violations of international law. *Ashcroft* v. *Iqbal*, 129 S. Ct. 1937, 1949-1950 (2009). A purpose standard, in other words, appropriately equips district courts with the ability to police meritless claims at the pleading stage, thereby enabling them to limit the circumstances in which the often heavy costs of global discovery involved in ATS cases could compel a corporation to settle frivolous claims. *See Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 557, 558-559 (2007) (noting the need for judges to weed out implausible claims prior to launching expensive discovery that might compel settlement); Chamber of Commerce Br. 10 (noting that ATS suits are "particularly effective vehicles to extract settlements from corporate 'deep pockets'").

A knowledge standard, by contrast, would limit the ability of district courts to dismiss meritless suits at the threshold, as it will likely be far easier for plaintiffs to point to some facts at the pleading stage supporting an inference that a corporation knew or should have known that its activities would somehow assist, however remotely and indirectly, in enabling violations of international law. *See, e.g.*, *Kiobel*, 621 F.3d at 188 (Leval, J., concurring in the judgment) (noting that the complaint "plausibly alleges that [defendants] knew of human rights abuses … and took actions which contributed indirectly to the commission of those offenses," but that "it does not contain allegations supporting a reasonable inference that [defendants] acted with a purpose of bringing about the alleged abuses"). Under the knowledge standard applied in the D.C. and Eleventh Circuits, it is far more likely that meritless ATS claims will survive motions to dismiss, imposing very substantial litigation costs on corporate defendants.

The correct resolution of this disagreement among the circuits is therefore of enormous practical significance to the business community.

III. This Court Should Grant Review To Clarify That Purpose, Not Mere Knowledge, Is The Appropriate Mental Element For Aiding-And-Abetting Liability Under The ATS

This Court should grant certiorari to clarify that, assuming aiding-and-abetting liability is permissible under the ATS, the required mental element is purpose, not knowledge. Under that standard, moreover, Amici agree with Petitioners that the complaint should be dismissed.

A. There Is No Consensus Supporting A Mens Rea Standard Less Strict Than Purpose That Meets *Sosa*'s Requirements Of Definiteness And Universal Acceptance

The conclusion that purpose is the appropriate mens rea standard for aiding-and-abetting liability flows inexorably from the standards for recognizing ATS claims this Court established in *Sosa*. There, the Court held that only those norms that are as definite and universally accepted as the three paradigm norms considered by the First Congress may form the basis for ATS claims. *See* 542 U.S. at 732. Leading sources of evidence of customary international law demonstrate that the predominant view among States is that purpose to facilitate the principal's unlawful conduct, not knowledge alone, is required to establish aiding-and-abetting liability.

1. Rome Statute of the International Criminal Court

The conclusion that customary international law requires purpose for aiding-and-abetting liability is most authoritatively evidenced in the Rome Statute of the ICC. July 17, 1998, 37 I.L.M. 999. The Rome Statute expressly requires that such liability extend only to acts conducted for "the purpose of facilitating the commission" of a crime. Art. 25(3)(c), *id.* at 1016. The first ICC decision to interpret this article, handed down in December 2011, holds squarely that "article 25(3)(c) of the Statute requires that the person act with the purpose to facilitate the crime; knowledge is not enough for responsibility under this article." *Prosecutor* v. *Mbarushimana*, Situation in the Democratic Republic of Congo, No. ICC-01/04-01/10, Decision on the Confirmation of Charges, ¶274 (Pre-Trial Chamber Dec. 16, 2011); *see also* Ambos, *Article 25: Individual Criminal Responsibility in International Criminal Law*, *in Commentary on the Rome Statute of the International Criminal Court* 475, 483 (Triffterer ed. 1999) ("it is clear that purpose generally implies a specific subjective requirement stricter than mere knowledge").

Signed by 139 States and ratified by 120, the Rome Statute reflects the most comprehensive contemporary view of State practice, as consented to expressly by governments. The United States participated extensively in the drafting of the Rome Statute and signed it on December 31, 2000. In particular, the United States "was very persistent" about codifying the elements of crimes as that would "accommodate relevant differences between common-law and civil-law systems and it would help to reach consensus in as many areas as possible." Crawford, *The Work of the International Law Commission*, *in* Cassesse, *The Rome Statute of the*

International Criminal Court: A Commentary 23, 57 (2002). At the time the Rome Statute was negotiated, various tribunals had issued decisions approving mere knowledge for aiding-and-abetting liability. Yet the governments of the international community—including, the United States—rejected that standard and instead established, through Article 25(3)(c), purpose as the necessary mental element for aiding-and-abetting liability.

2. East Timor

The Rome Statute is not the only document defining the jurisdiction of an international criminal tribunal in which governments have expressed the international community's view that purpose is required for aiding-and-abetting liability. The Regulation for the Special Panels for Serious Crimes in East Timor, promulgated by the United Nations Transitional Administration for East Timor in the wake of atrocities committed there, provided that aiding-and-abetting liability requires the "purpose of facilitating the commission of" a crime. 2000 UNTAET Reg. No. 2000/15, art. 14.3(c). The Regulation confirms that, where there is clear evidence of State practice, customary international law mandates purpose as the mental element for aiding and abetting gross violations of human rights.

3. International Law Commission

The International Law Commission (ILC)—a body of 34 experts on international law elected by the General Assembly of the United Nations—also has identified customary international law on the civil liability of States for aiding or assisting violations of international law. Because States are typically the principal perpetrators of major human rights violations such as the

ones alleged in ATS suits and because the ILC's study concerns civil liability, as does the ATS, the ILC's determination that purpose is necessary to establish aiding-and-abetting liability is particularly persuasive evidence of the relevant international norm.

The ILC's comprehensive study of State practice on this issue, begun in 1964 and completed in 2001, entailed numerous drafts, discussions, and most important, opportunities for governments to comment on proposed language in order accurately to reflect the actual consensus of the international community. The United States in particular, responding to one draft of the Articles on State Responsibility, emphasized the need for purpose in aiding-and-abetting liability, explaining that it should be made clear that the phrase "rendered for" "incorporates an intent requirement." *State Responsibility: Comments and Observations Received from Governments*, U.N. Doc. A/CN.4/488 77 (Mar. 25, 1998). Other countries, including Germany and the United Kingdom, endorsed the same view. *See id.* at 76-77.

Due to this careful and comprehensive process of identifying State practice, the ILC's Articles on the Responsibility of States for International Wrongful Acts have been viewed as an authoritative statement of customary international law by U.S. courts, international courts, and commentators. *See, e.g.*, *Doe I* v. *Nestle, S.A.*, 748 F. Supp. 2d 1057, 1069 n.11 (C.D. Cal. 2010); *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 47, ¶¶385-397, 416-424 (Feb. 26); *Case Concerning Oil Platforms* (Islamic Republic of Iran v. U.S.), Separate Opinion of Judge Simma, 2003 I.C.J. 161, ¶75 (Nov. 6). The U.N. General Assembly adopted

the Articles and Commentary on State Responsibility by acclamation and commended them to member States. *See Articles on the Responsibility of States for Internationally Wrongful Acts*, U.N. Doc. A/Res/56/83 (Dec. 12, 2001).

While the relevant ILC Article, Article 16, uses the phrase "knowledge of the circumstances of the internationally wrongful act," the ILC itself has explained that that phrase requires purpose to advance the direct violation. According to the ILC, Article 16 requires that "the aid or assistance must be given with a view to facilitating the commission of [the underlying wrongful] act and must actually do so." International Law Commission, *Responsibility of States for Internationally Wrongful Acts: General Commentary*, U.N. Doc. A/56/10, Supp. No. 10, at 156 (2001). This required mental element means that "[a] State is not responsible for aid or assistance under article 16 unless the relevant State organ intended, by the aid or assistance given, to facilitate the occurrence of the wrongful conduct." *Id.*

4. Nuremberg

Although the precise bases of decision in some of the judgments of the International Military Tribunal at Nuremberg (IMT) are difficult to discern, at least two of the IMT's leading decisions indicate that mere knowledge that particular conduct might aid in the commission of a crime was insufficient to establish liability for aiding and abetting.

In one case, the IMT acquitted the Chairman of Dresdner Bank, Karl Rasche, who was charged with aiding and abetting crimes against humanity by financing SS enterprises established to exploit slave labor.

Although Rasche provided loans to the SS with knowledge of their activities, the IMT held:

> The real question is, is it a crime to make a loan, knowing or having good reason to believe that the borrower will us[e] the funds in financing enterprises which are employed in using labor in violation of either national or international law? … Loans or sales of commodities to be used in an unlawful enterprise may well be condemned from a moral standpoint and reflect no credit on the part of the lender or seller in either case, but the transaction can hardly be said to be a crime. Our duty is to try and punish those guilty of violating international law and we are not prepared to state that such loans constitute a violation of that law[.]

United States v. *von Weizsacker* (*Ministries Case*), Judgment, XIV *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10*, 622, 854 (1949). If substantial assistance combined with knowledge of the direct violator's criminal conduct sufficed to establish aiding and abetting, the judgment would have come out the other way.

Similarly, in the so called *Zyklon B Case*, the IMT convicted the leading defendant not for merely knowing that his acts would assist in the crime of genocide by supplying the SS with prussic acid, but for "training its members how it could be used to kill human beings." *Khulumani*, 504 F.3d at 276 n.11 (Katzmann, J., concurring) (discussing *Trial of Bruno Tesch and Two Others*, *in* 1 *Law Reports of War Crimes Trials* 93 (1946; reprint 1997)); *see also* Cassel, *Corporate Aiding and Abetting of Human Rights Violations: Confusion*

in the Courts, 6 Nw. U. J. Int'l Hum. Rts. 304, 312 (2008).

5. International-law experts

Courts of appeals that have embraced a purpose standard have also relied on expert opinions submitted by two leading international-law scholars, James Crawford, Whewell Professor of International Law at Cambridge University and sometime Rapporteur of the ILC Articles on State Responsibility, and Christopher Greenwood, previously professor of international law at the London School of Economics and currently a Judge on the International Court of Justice. Both experts have concluded unequivocally that purpose is required for aiding-and-abetting liability under customary international law. *See* Crawford Amicus Br. 13, *Talisman Energy*, No. 07-16 (2d Cir. May 7, 2007); Greenwood Amicus Br. 22, *Talisman Energy*, No. 07-16 (2d Cir. May 4, 2007).

6. ICTY/ICTR

In concluding that knowledge, rather than purpose, suffices to establish aiding-and-abetting liability, the D.C. Circuit relied principally on decisions from the International Criminal Tribunals for the Former Yugoslavia and for Rwanda (ICTY and ICTR). *See Doe VIII*, 654 F.3d at 33-34. Although a number of decisions from those tribunals have endorsed a knowledge standard, they are inadequate to support adoption of such a standard under the ATS for several reasons.

First, although decisions of respected international tribunals may provide some evidence of customary international law, under the authoritative Article 38 of the Statute of the International Court of Justice they represent only "subsidiary means for the determination

of rules of law." That makes sense because, unlike sources such as the Rome Statute and the ILC Articles on State Responsibility, they do not reflect the direct involvement of governments, and thus cannot provide as accurate a reflection of the practice and legal views of States.

Second, the ICTY and ICTR cases addressing aiding-and-abetting liability do not involve corporations, but instead typically involve military leaders, who were present at the site of the alleged crimes even though they did not themselves commit the underlying violation. *See, e.g.*, *Prosecutor* v. *Blaskic*, No. IT-95-14-A, Judgment, ¶47 (Appeals Chamber July 29, 2004); *Prosecutor* v. *Furundzija*, No. IT-95-17/1-T, Judgment, ¶¶124-130, 232 (Trial Chamber Dec. 10, 1998). These decisions thus are as much about command responsibility of a superior military officer over his subordinates at the scene of a crime as they are about general principles of aiding-and-abetting liability that would be appropriate to apply to the very different circumstance of organizational defendants often far removed from the scene.

Third, while ICTY and ICTR tribunals have held that knowledge is sufficient for aiding-and-abetting liability, they have required not simply knowledge of the direct violator's criminal acts, but specific knowledge that the defendant's own acts of assistance would facilitate the specific crime of the principal. *See Prosecutor* v. *Vasiljevic*, No. IT-98-32-A, Judgment, ¶102(ii) (Appeals Chamber Feb. 24, 2004) ("In the case of aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of the specific crime of the principal."); *Prosecutor* v. *Tadic*, No. IT-94-1-A, Judgment, ¶229 (Appeals Chamber July 15, 1999) (an "aider and

abetter carries out acts specifically directed to assist … the perpetration of a certain specific crime").

Finally, the ICTY and ICTR decisions suggest, at most, that customary international law is unsettled with respect to the mental element for aiding and abetting certain kinds of human rights violations. Under the standard established by this Court in *Sosa* for recognizing claims under the ATS, that uncertainty might be a reason to reject aiding-and-abetting liability altogether under the ATS. It certainly mandates that, if aiding-and-abetting liability is permitted, it must include a mental element no less demanding than purpose.

7. General principles of law among civilized nations

Finally, general principles of law among civilized nations do not support application of a knowledge standard. When one looks to this potential source of international law, again one finds not the near universal consensus required by *Sosa*, but instead wide variation and disagreement about the mental element required for aiding-and-abetting liability. This disagreement became apparent during the debates leading up to the adoption of the Rome Statute. *See*, *e.g.*, Cassel, 6 Nw. U.J. Int'l Hum. Rts. at 310 ("There was thus a long-standing disagreement between advocates of a 'knowledge' standard and those who preferred an 'intent' test."); *see also* Ramasastry & Thompson, *Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law, A Survey of Sixteen Countries* 17-20 (2006) ("there are differences in the type of intent an accomplice must possess").

B. The Additional Reasons For Judicial Caution Identified In *Sosa* Also Require A Mental Element Of Purpose, Not Knowledge

Under a straightforward application of the principle established in *Sosa*, the absence of a widely accepted international consensus embracing a mens rea standard more expansive than purpose for aiding-and-abetting liability forecloses the application of a knowledge standard under the ATS. But the Court also explained that "[t]his requirement of clear definition is not meant to be the only principle limiting the availability of relief in the federal courts for violations of international law." 542 U.S. at 733 n.21. The Court pointed to several other reasons for exercising "caution" in expanding liability under the ATS that independently counsel against recognition of a mental element for aiding and abetting any less demanding than purpose. *Id.* at 725; *see id.* at 746-747 (Scalia, J., concurring in part and concurring in the judgment) (agreeing with these principles).

In insisting upon a "cautio[us]" approach to judicial enlargement of liability under the ATS, *Sosa* first pointed to changes since the enactment of the ATS in the American view of the common law and in the role of federal courts in fashioning it. 542 U.S. at 725. The Court explained that "the prevailing conception of the common law has changed since 1789" and that there is now "a general understanding that the [common] law is not so much found or discovered as it is either made or created." *Id.* Active judicial involvement in making substantive law under the ATS would be in significant tension with that change, the Court cautioned, because a judge deciding an ATS claim "in reliance on an international norm will find a substantial element of discretionary judgment in the decision," *id.* at 726, inviting a

return to discarded methods of common law reasoning. In the wake of *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938), and its rejection of a general federal common law, judges now typically "look for legislative guidance before exercising innovative authority over substantive law." 542 U.S. at 726. It would be "remarkable," the Court said, if the federal judiciary nonetheless engaged in robust substantive lawmaking under the ATS unguided by legislative standards. *Id.*

Those concerns are directly implicated here. As we have explained above and, as the en banc court below acknowledged, there is a substantial "dispute" with respect to the "required *mens rea* for aiding and abetting" in international law and whether a standard broader than purpose is permissible. Pet. App. 52a. That dispute, moreover, involves interpreting and reconciling various international documents and writings, as well as arguably conflicting decisions of international tribunals. *See, e.g.*, *Doe VIII*, 654 F.3d at 32-39; *Khulumani*, 504 F.3d at 270-279 (Katzmann, J., concurring). For federal judges to resolve this disagreement and, with no guidance from Congress, to embrace an expansive mens rea standard would invite the very type of common law decisionmaking this Court warned against in *Sosa*. *See, e.g.*, *Doe VIII*, 654 F.3d at 86 (Kavanaugh, J., dissenting in part) (noting that, because customary international law is "notoriously vague and somewhat ill-defined," there is a risk "courts will be left with little more than their own policy preferences when determining the scope of an ATS/customary international law claim").

In addition, the Court in *Sosa* pointed to "the potential implications for the foreign relations of the United States" from expanding liability under the ATS, instructing that courts should be "wary of impinging on

the discretion of the Legislative and Executive Branches in managing foreign affairs." 542 U.S. at 727. The Court warned that "many attempts by federal courts to craft remedies for the violation of new norms of international law would raise risks of adverse foreign policy consequences" and that such efforts "should be undertaken, if at all, with great caution." *Id.* a 727-728.

Those considerations are also apposite here. Whether international law embraces a mens rea standard beyond purpose is, at best, unsettled. For federal judges to resolve these contentious issues of international law in favor of a broad standard of liability—for example, by disparaging the force of the Rome Statute and instead crediting decisions of the ICTY and ICTR, *compare Doe VIII*, 654 F.3d at 35-39, *with Khulumani*, 504 F.3d at 275-276 (Katzmann, J., concurring)—would risk interfering with the constitutionally assigned roles of the political branches in deciding how such questions of law and diplomacy should be resolved, consistent with U.S. foreign policy objectives.

C. The Complaint Fails Sufficiently To Allege Purpose

The complaint's claim of aiding and abetting war crimes should be dismissed under this standard. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 129 S. Ct. at 1949 (quoting *Twombly*, 550 U.S. at 570). "[F]acial plausibility" means the facts alleged must "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* The complaint falls well short of that standard. As Judge McKeown explained below, "Rio Tinto's purported role in the commission of war crimes is difficult

to ascertain from the complaint. The complaint is a jumble of facts and conclusory statements that do not allege a coherent theory of Rio Tinto's involvement in the alleged war crimes." Pet. App. 109a. For the reasons given by Judge McKeown below, Amici agree "the complaint fails to allege the necessary purpose to survive the motion to dismiss." *Id.* 110a-111a.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for certiorari with respect to the second question presented.

Respectfully submitted.

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FEBRUARY 2012