

2010

## To Proceed with Caution: Aiding and Abetting Liability under the Alien Tort Statute

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### Recommended Citation

Ryan S. Lincoln, *To Proceed with Caution: Aiding and Abetting Liability under the Alien Tort Statute*, 28 BERKELEY J. INT'L LAW. 604 (2010).

Available at: <http://scholarship.law.berkeley.edu/bjil/vol28/iss2/12>

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# To Proceed with Caution?

## *Aiding and Abetting Liability Under the Alien Tort Statute*

Ryan S. Lincoln\*

### I.

#### INTRODUCTION

Accomplice liability is central to many of the Alien Tort Statute (ATS) cases that have arisen since *Filártiga v. Peña-Irala*.<sup>1</sup> Many plaintiffs bring ATS claims against non-state actors for aiding and abetting tortious conduct by state actors and other principals, instead of against the principals themselves. The proliferation of actions against alleged accomplices is not merely an attempt to get around doctrines that shield state actors from liability, such as the act of state doctrine or the Foreign Sovereign Immunities Act. Rather, a globalizing economy has increased the involvement of third-party actors in regions of the world where alleged tortious activity often occurs. This has increased the number of ATS claims against defendants for aiding and abetting violations of the law of nations, and resulted in doctrinal confusion concerning the contours of these types of violations.

While the Supreme Court's 2004 decision in *Sosa v. Alvarez-Machain*<sup>2</sup> narrowed the scope of claims that could violate the law of nations and therefore be actionable under the ATS, it did not specifically address the question of accomplice liability. In footnote 20 the Court noted, but did not take up, the issue of "whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual."<sup>3</sup> Following *Sosa*, plaintiffs have brought

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1. *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980).
2. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).
3. *Id.* at 733 n.20.

several aiding and abetting complaints in district courts under the ATS, with a few cases receiving appellate review.<sup>4</sup> However, a split has emerged at the appellate level regarding the proper standard for finding aiding and abetting liability. Without a Supreme Court ruling on this issue, significant ambiguity remains regarding the aiding and abetting rule for those involved in ATS litigation.

This Article's purpose is threefold: (1) to parse the state of ATS adjudication regarding aiding and abetting liability, (2) to evaluate reasons underlying the circuit court split in order to clarify the complex factors that surround the aiding and abetting standard, and (3) to assess what the aiding and abetting standard should be.

Part II discusses the circuit split regarding the aiding and abetting standard. Part III addresses what facts would be sufficient under the standards adopted by the different circuit courts. Part IV discusses possible reasons underlying the split. Finally, Part V gives a brief suggestion for what the aiding and abetting standard should be.

## II.

### THE MULTIPLE STANDARDS OF ACCOMPLICE LIABILITY UNDER ATS

*Sosa* left open the question of whether the aiding and abetting standard should be drawn from domestic or international law.<sup>5</sup> While subject to debate, this choice of laws question is outside the narrow scope of this Article.<sup>6</sup> Instead, this Article adopts the trend that international law, rather than federal common law (or even domestic law of foreign states) is the proper source for determining the aiding and abetting standard. Furthermore, this Article assumes that corporations may be sued under the ATS, even though many debate this issue. The thrust of this Article, then, is to analyze the way courts have discerned the aiding and abetting standard under international law. The following section discusses the different approaches taken by courts regarding the sources of international law that bear on the rule.

#### A. *John Doe I v. Unocal Corp.* (9th Circuit 2002)

*Unocal* is one of only three appellate decisions to discuss aiding and abetting liability under the ATS.<sup>7</sup> While it was vacated as part of settlement, *Unocal* remains an important exemplar of the reasoning underlying the liability

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4. See Douglas Cassell, *Corporate Aiding and Abetting of Human Rights: Confusion in the Courts*, 6 NW. U. J. HUM. RTS. 304-05 (2008) (listing corporations that have been sued as accomplices under the ATS).

5. *Sosa*, 542 U.S. at 733 n.20.

6. See Charles Ainscough, *Choice of Law and Accomplice Liability Under the Alien Tort Statute*, 28 BERKELEY J. INT'L L. 588 (2010).

7. *John Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002).

standard. In *Unocal*, the Ninth Circuit considered a summary judgment motion submitted by defendant Unocal—a California-based gas company operating in Burma—on charges of aiding and abetting under the ATS. The petitioners, Burmese villagers, alleged that Unocal was an accomplice to the Myanmar Military Governments’ rape, murder, and torture of villagers carried out in the context of forced labor that was used to build a pipeline.<sup>8</sup>

The court, by *de novo* review, found that forced labor, murder, rape, and torture are violations of the law of nations<sup>9</sup> and that certain violations, when done “in furtherance of other crimes like slave trading, genocide or war crimes” do not require state action to be justiciable.<sup>10</sup> After engaging in a choice of laws analysis, the court looked to international law for the aiding and abetting standard.<sup>11</sup>

Judge Pregerson, noting that international human rights law has largely developed in the context of criminal law, reasoned that “what is a crime in one jurisdiction is often a tort in another jurisdiction, and this distinction is therefore of little help in ascertaining the standards of international human rights law.”<sup>12</sup> The court noted with approval recent decisions from the district courts to follow aiding and abetting standards from international criminal law, and looked to opinions from the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) for guidance on the proper international law standard.<sup>13</sup>

First, the court cited *Prosecutor v. Furundzija*,<sup>14</sup> noting that the decision was based on an “exhaustive analysis of international case law and international instruments.”<sup>15</sup> The court also referenced *Prosecutor v. Musema*,<sup>16</sup> calling it “especially helpful” on the issue of aiding and abetting liability.<sup>17</sup> From these cases, the court defined the international standard for aiding and abetting as “knowing practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime.”<sup>18</sup>

8. *Id.* at 936.

9. *Id.* at 945.

10. *Id.* at 946 (holding that forced labor is a modern variant of slavery and thus under the law of nations does not require state action).

11. *Id.* at 948.

12. *Id.* at 949.

13. *Id.* at 950.

14. *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Judgment (Dec. 10, 1998).

15. *Unocal*, 395 F.3d at 950 n.26.

16. *Prosecutor v. Musema*, Case No. ICTR-96-13-T, Judgment (Jan. 27, 2000).

17. *Unocal*, 395 F.3d at 951.

18. *Id.* at 951 (noting that this standard is very similar to the domestic tort law standard for aiding and abetting in the Restatement (Second) of Torts). The court left aside the question of liability for moral support for the purpose of reviewing the grant of summary judgment, given that there was sufficient evidence that Unocal gave assistance and encouragement to the Myanmar Military.

B. *Khulumani v. Barclay National Bank* (2d Circuit 2007)

The Second Circuit also considered the question of aiding and abetting in *Khulumani*, yet arrived at a different standard, introducing a circuit split that has not been resolved.<sup>19</sup> In *Khulumani*, plaintiffs sued approximately fifty corporate defendants alleging that they had “actively and willingly” maintained the apartheid system in collaboration with the South African Government.<sup>20</sup> In its *per curiam* opinion, the Second Circuit vacated the district court’s decision that the ATS provided no jurisdiction for aiding and abetting. The circuit court instead held that the ATS does support aiding and abetting, but the three judge panel split on the standard for liability.

Unlike the majority in *Unocal*, which predated *Sosa*, the *Khulumani* court could draw upon the *Sosa* decision, and Judge Katzmman used this Supreme Court benchmark for his opinion.<sup>21</sup> Judge Katzmman began his analysis from *Sosa*’s standard that “federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted.”<sup>22</sup> Under *Sosa*, the norm in question must be specific, universal, and obligatory under international law.<sup>23</sup> Therefore, reasoned Judge Katzmman, federal courts must undertake two distinct analyses in ATS cases. First, the court must determine whether jurisdiction exists under the ATS and, second, whether a common-law cause of action exists, following the *Sosa* standard.<sup>24</sup>

The district court, Judge Katzmman said, correctly asked whether international law contains specific recognition of liability for aiding and abetting law of nations violations, highlighting footnote 20 of *Sosa* as a general principle that international law should define the scope of aiding and abetting liability.<sup>25</sup> In sum, he wrote, “[b]ut to assure itself that it has jurisdiction to hear a claim under ATS, [a court] should first determine whether the alleged tort was in fact ‘committed in violation of the law of nations.’”<sup>26</sup>

With regard to aiding and abetting liability, Judge Katzmman noted that individual liability for aiding and abetting a violation of international law is

19. *Khulumani v. Barclay Nat’l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007) (*per curiam*).

20. *Id.* at 258.

21. *Id.* at 264. (Katzmann, J., concurring).

22. *Id.* at 266 (Katzmann, J., concurring) (quoting *Sosa*, 542 U.S. at 692, 732).

23. *Sosa*, 542 U.S. at 732 (citing *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984) (suggesting that the “limits of section 1350’s reach” be defined by “a handful of heinous actions—each of which violates definable, universal and obligatory norms”)); *Id.* (quoting *In re Estate of Marcos*, 25 F.3d 1467, 1475 (9th Cir. 1994) (“Actionable violations of international law must be of a norm that is specific, universal, and obligatory.”)).

24. *Khulumani*, 504 F.3d at 266.

25. *Id.* at 269.

26. *Id.* at 270 (quoting 28 U.S.C. § 1350).

universally recognized, thus meeting the *Sosa* requirement.<sup>27</sup> As evidence, he cited the tribunals following World War II, the ICTY, the ICTR and the Rome Statute of the International Criminal Court, which have all recognized a cause of action for aiding and abetting.<sup>28</sup>

Of these sources, Judge Katzmman found the Rome Statute especially significant regarding the *mens rea* standard for aiding and abetting which finds liability for conduct done “for the purpose of facilitating the commission of such a crime.”<sup>29</sup> Judge Katzmman also cited the ICTY *actus reus* standard in *Furundzija*: “[T]he *actus reus* of aiding and abetting in international criminal law requires practical assistance, encouragement, or moral support which has a *substantial effect* on the perpetration of the crime.”<sup>30</sup>

In conclusion, Judge Katzmman stated that aiding and abetting is sufficiently well-established and universally recognized to meet the *Sosa* standard and held that “a defendant may be held liable under international law for aiding and abetting the violation of that law by another when the defendant (1) provides practical assistance to the principal which has a substantial effect on the perpetration of the crime, and (2) does so with the purpose of facilitating the commission of that crime.”<sup>31</sup> Judge Katzmman did, however, qualify his proposed rule by recognizing that international law may shift, and pointed out that the ICTY and ICTR set a lower *mens rea* standard of “knowledge.”<sup>32</sup>

Judge Korman took a different stance. With regard to aiding and abetting liability, Judge Korman maintained that while the language of ATS could support liability, it does so only if the plaintiff *first* invokes an international law norm actionable under the ATS.<sup>33</sup> Only if the norm at issue passed the *Sosa* standard, should the question of aiding and abetting be raised. Thus, Judge Korman said, a court must first engage in a norm-by-norm analysis under *Sosa*, and then, if necessary, determine whether the defendant aided and abetted the violation of that norm. To hold, as Judge Katzmman did, that aiding and abetting is actionable *per se* violates the dictates of *Sosa*.<sup>34</sup> Ultimately, however, Judge Korman agreed with Judge Katzmman that the Rome Statute’s “purpose” standard reflects international consensus on the aiding and abetting standard and has the added advantage of comports with domestic law.<sup>35</sup>

27. *Id.*

28. *Id.*

29. *Id.* at 275 (quoting Rome Statute of International Criminal Court art. 25(3)(c), July 17, 1998, 2187 U.N.T.S. 90).

30. *Id.* at 277 (quoting Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgment, ¶ 235 (Dec. 10, 1998)).

31. *Id.*

32. *Id.* ¶ 279.

33. *Id.* at 327 (Korman, J., concurring).

34. *Id.*

35. *Id.* at 333.

C. *Presbyterian Church of Sudan v. Talisman Energy, Inc* (2d Circuit 2009)

*Khulumani* ultimately left the standard for aiding and abetting unresolved. In *Talisman*, the Second Circuit answered the open question.<sup>36</sup> There, the Second Circuit held that the district court correctly dismissed the case because plaintiffs could not show that Talisman provided substantial assistance to the Government of Sudan with the purpose of aiding its unlawful conduct.

Talisman Energy Inc.—a Canadian energy company—held a 25 percent stake in oil development operations of the Greater Nile Petroleum Exporting Company (GNPOC) that operated in Sudan. Against the backdrop of the Sudanese civil war, the GNPOC relied on Sudanese military forces for security while conducting its resource development operations.<sup>37</sup> Many GNPOC activities—such as building airstrips—both furthered the development projects and proved advantageous for the Sudanese military.<sup>38</sup> Plaintiffs argued that Talisman knew that these activities furthered Sudanese military actions, and brought suit alleging that Talisman aided and abetted the Government of Sudan in committing genocide, torture, war crimes, and crimes against humanity.

The Second Circuit framed the “live” question, following *Khulumani*, as whether the ATS imposes accessorial liability “absent a showing of purpose.”<sup>39</sup> Following the reasons given in *Sosa* for vigilant door-keeping of the ATS statute,<sup>40</sup> the Second Circuit held that determining whether a norm is sufficiently definite to support a cause of action necessarily entails judgment regarding the “practical consequences of making that cause available to litigants in the federal courts.”<sup>41</sup>

The court relied heavily on Judge Katzmann’s concurrence from *Khulumani*, passing over international law sources that specify a “knowledge” standard for aiding and abetting in favor of the Rome Statute’s “purpose” standard.<sup>42</sup> Thus, the Second Circuit held that purpose, rather than “knowledge

36. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009).

37. *Id.* at 249.

38. *Id.* at 249-50.

39. *Id.* at 255.

40. “First . . . the [modern] understanding that the law is not so much found or discovered as it is either made or created[.] . . . [s]econd, . . . an equally significant rethinking of the role of the federal courts in making it[.] . . . [t]hird, [the modern view that] a decision to create a private right of action is one better left to legislative judgment in the great majority of cases[.] . . . [f]ourth, . . . risks of adverse foreign policy consequences[.] . . . fifth[.] . . . the lack of a congressional mandate to seek out and define new and debatable violations of the law of nations.” *Id.* at 255-56 (quoting *Sosa*, 542 U.S. at 725-28).

41. *Id.* at 256 (quoting *Sosa*, 542 U.S. at 732-33).

42. *Id.* at 259.

alone,” is the *mens rea* standard for aiding and abetting under the ATS.<sup>43</sup> Employing the purpose standard, the Court found that Talisman’s activities were of the type that normally accompany development projects, and that Talisman’s knowledge of the Sudanese Government’s international law violations did not rise to the *mens rea* level necessary to hold the company accountable.<sup>44</sup>

### III.

#### CURRENT STATE OF THE RULE

*Talisman* introduced a split within the circuit courts regarding the standard for aiding and abetting with its holding that aiding and abetting requires purpose, as opposed to *Unocal*’s knowledge standard.<sup>45</sup> It seems settled that aiding and abetting is actionable under the ATS and that international law provides the source for a cause of action. Granting this assumption, can the rule be synthesized across circuits? Such a synthesis requires looking at the sources of international law that provide the basis for the causes of action pleaded in these cases, parsing the elements of the rule as stated in each case, and evaluating how each circuit treats the facts under the rule.

In reversing summary judgment, the Ninth Circuit in *Unocal* discussed conduct that, at least, presented a genuine issue of material fact under the court’s aiding and abetting rule.<sup>46</sup> The district court had found evidence that Unocal knew forced labor was being used by the Myanmar Military to construct a pipeline in the mining areas and that Unocal gave practical assistance to this violation of international law by hiring the Myanmar Military to provide security and build infrastructure along the pipeline route.<sup>47</sup> Additionally, Unocal had used photos, surveys, and maps in daily meetings with the Myanmar Military to show them where the company needed such security and infrastructure.<sup>48</sup> In a footnote, Judge Pregerson reasoned that further evidence might support a finding that Unocal “encouraged” the Myanmar military to use forced labor through daily meetings in which Unocal knew that forced labor might be used and paying the Myanmar Military to provide these services.<sup>49</sup>

The court held that a reasonable factfinder could determine that Unocal met

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43. *Id.*

44. *Id.* at 260-61.

45. There is one district court decision, *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1356 (N.D. Ga. 2002), that has considered the aiding and abetting question, and it set the *mens rea* standard at knowledge. The Eleventh Circuit in 2005 in *Cabello v. Fernandez-Larios*, 402 F.3d. 1148, 1158 (11th Cir. 2005), found a defendant guilty of aiding and abetting under the ATS by virtue of “active participation”—defined as substantial assistance given to the principal done with knowledge that would assist the activity at the time the assistance was provided.

46. *Unocal*, 395 F.3d at 947.

47. *Id.* at 952.

48. *Id.*

49. *Id.* at 952 n.29.



the *mens rea* standard through actual or constructive knowledge that the Myanmar Military used forced labor.<sup>50</sup> Judge Pregerson stated that “Unocal knew or should reasonably have known that its conduct—including the payments and the instructions where to provide security and build infrastructure—would assist or encourage the Myanmar Military to subject plaintiffs to forced labor.”<sup>51</sup> In another footnote, Judge Pregerson cited a company Vice President’s testimony that Unocal knew that using the Myanmar Military for security might result in actions beyond Unocal’s control and of which Unocal would disapprove.<sup>52</sup> Finally, in assessing the possibility of Unocal’s aiding and abetting the Myanmar Military’s acts of murder and rape, Judge Pregerson again referred to *Furundzija* citing under that *mens rea* standard, actual or constructive knowledge of the *specific* acts is not necessary, but rather if a defendant knows that “one of a number of crimes will probably be committed and one of those crimes is in fact committed, he has intended to facilitate the commission of that crime.”<sup>53</sup>

On the *actus reus* element of assistance that requires the action in question to have a “substantial effect” on the violation of the norm, the court held that the use of forced labor would not have occurred in the same way without Unocal’s hiring of the Myanmar Military and assistance in showing them where to employ security forces and build infrastructure.<sup>54</sup>

*Talisman* provides marginally more guidance on what facts suffice under its aiding and abetting rule. Setting the *mens rea* standard at purpose, Judge Jacobs evaluated whether the facts could support an inference that *Talisman* aided and abetted the Sudanese Government’s international norm violations. On the *actus reus* prong, four activities—upgrading airstrips, designating certain geographical areas for oil exploration, paying royalties to the Sudanese Government, and giving general logistic support to the Sudanese military—were actions that, Judge Jacobs said, accompany any development operation and do not rise to the level of aiding and abetting.<sup>55</sup>

More importantly, Judge Jacobs determined that none of these activities was done with “improper purpose,” even if they were possibly carried out “notwithstanding awareness” of the Sudanese government’s activities.<sup>56</sup> Even evidence that GNPOC (of which *Talisman* was a stakeholder) coordinated activities with the Sudanese Military did not support an inference of purpose because the company had a legitimate need for military protection while

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50. *Id.* at 953.

51. *Id.*

52. *Id.* at 953 n.32.

53. *Id.* at 956 (quoting *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Judgment, ¶ 246 (Dec. 10, 1998)).

54. *Id.* at 952-53.

55. *Talisman*, 582 F.3d 244, 260-61 (2d Cir. 2009).

56. *Id.* at 262.

working in this area.<sup>57</sup> In short, while plaintiffs could show that the Sudanese Government violated international law, they could not show that Talisman purposely aided and abetted this violation.<sup>58</sup> While not ruling out the possibility that intent could be inferred in certain situations, the facts of *Talisman* did not warrant such an inference.<sup>59</sup>

From this reasoning we may draw a few conclusions. First, the courts have given dispositive weight to the *mens rea* element of the aiding and abetting standard. While Judge Jacobs granted that Talisman was aware that some of its activities aided Sudanese military operations, he consistently found that the plaintiffs failed to prove the requisite purpose.<sup>60</sup> Second, the door to inferring purpose based on actions may still be open, but we do not know what set of circumstances might warrant such an inference. Judge Jacobs did seem to give some evidentiary weight to facts that Talisman was angered by the Sudanese military's actions, undertook some activities to remedy the problems faced by Sudanese civilians, and eventually abandoned its operations due to Sudanese military activities, all of which are factors that might weigh against inferring purpose.<sup>61</sup> Third, Judge Jacobs seemed troubled by the policy outcome of using a knowledge standard coupled with "commercial activities such as resource development" that could allow "private parties to impose embargos or international sanctions through civil actions in United States courts," which are the preserve of governments and multinational organizations.<sup>62</sup>

Side-by-side, the decisions from *Unocal* and *Talisman* offer a few points of comparison. For both circuits the dispositive element is *mens rea*. Had *Unocal* not settled, there may be guidance on what actions satisfy the *actus reus* and *mens rea* standards, but all that remains is the reasoning of a vacated decision. *Talisman* focused primarily on the *mens rea* standard—with some dicta that "development activities" fall short of the *actus reus* requirement. On the higher *mens rea* bar of purpose, Talisman's actions did not warrant a finding of aiding and abetting liability. For potential litigants and any future Supreme Court ruling on aiding and abetting, the key issue will likely be the *mens rea* standard.

#### IV. ACCOUNTING FOR DIFFERENCE

There are two possible ways to account for the different *mens rea* standards. Either one of the courts erred in its interpretation of international law, or the caution mandated by *Sosa* accounts for the difference between the

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57. *Id.*

58. *Id.* at 263.

59. *Id.*

60. *Id.* at 264.

61. *Id.* at 263-64.

62. *Id.* at 264.

pre and post-*Sosa* decisions. The second is more speculative than the first, but absent Supreme Court rulings on the issues, an evaluation of each is useful both for the practitioner and for considering what rule the Supreme Court might hand down if it takes up the issue.

The first possibility for distinction lies in the weight given to different sources of international law. Each circuit court included the Nuremberg tribunals, ICTY and ICTR jurisprudence, and the Rome Statute of the International Criminal Court within its scope of analysis, yet came down differently on the *mens rea* standard.

The Ninth Circuit, citing *Filártiga* that the law of nations “may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law,” approved a district court practice of looking to international criminal tribunals to determine aiding and abetting standards and said that recent decisions by the ICTY and ICTR were “especially helpful for ascertaining the current standard for aiding and abetting under international law as it pertains to the ATS.”<sup>63</sup> The court then briefly engaged with *Furundzija*—carefully noting its “exhaustive analysis of international case law regarding the *actus reus* and *mens rea* requirements<sup>64</sup>—and *Musema* to formulate its “modified” *Furundzija* rule of “knowing practical assistance which has a substantial effect on the perpetration of the crime.”<sup>65</sup> The court’s treatment of international law is slim, and it seems to let *Furundzija* do the heavy lifting of a comprehensive international law review. It supports its choice to look only at the ICTY and ICTR on recent district court practice—citing two cases—and a conclusion that international human rights law has developed more from criminal than civil law.<sup>66</sup>

*Talisman*, however adopted the higher purpose standard set by the Rome Statute, following Judge Katzmann’s concurrence from *Khulumani* and noting that Judge Korman would have agreed with the proposed rule were he not

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63. *Unocal*, 395 F.3d at 949. See U.N. Human Rights Council, Special Representative of the Sec’y-Gen. on the issue of human rights and transnat’l corps. and other bus. enterps., *Bus. and Human Rights: Mapping Int’l Standards of Responsibility and Accountability for Corporate Acts* ¶¶ 22-32, U.N. Doc. A/HRC/4/35 (Feb. 9, 2007) (noting the expanding risks of liability for corporations operating abroad and the ICTY and ICTR aiding and abetting *mens rea* standard of “knowledge”).

64. *Unocal*, 395 F.2d at 950 n.26, 951 n.27.

65. *Id.* at 951.

66. *Id.* at 949, 950. This latter statement is curious, given that criminal law *mens rea* standards align more closely with the higher bar of “purpose” rather than the typical, lower civil standard of “knowledge.” This potential discrepancy might be reconciled by the Ninth Circuit’s reliance on international law—specifically ICTY and ICTR jurisprudence—rather than domestic law for the *mens rea* standard. Thus, the Ninth Circuit’s interpretive move is based on the *source* of international law it analyzes, rather than on a choice of law analysis. See BETH STEPHEN ET AL., INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS (2008). See also Ainscough, *supra* note 6.

dissenting on other grounds.<sup>67</sup> *Sosa's* requirement that a norm obtain universal acceptance under the ATS was central for Judge Katzmman.<sup>68</sup> The *Talisman* court approved both Judge Katzmman's choice of laws analysis and his assessment that the purpose standard best meets the universal acceptance criteria. The court relied heavily on Judge Katzmman's international law survey in *Khulumani* that concluded that the ICTY and ICTR jurisprudence are only "sporadic forays in the direction of a knowledge standard" and that the Rome Statute better signals the universally accepted purpose standard.<sup>69</sup> The court then cited *United States v. von Weizsaecker* (The Ministries Case) for the proposition that the international law standard, even at the time of Nuremberg, recognized aiding and abetting liability based on a purpose standard.<sup>70</sup> The court concluded that only the purpose standard satisfies *Sosa's* universal acceptance standard.<sup>71</sup>

What accounts for the different weight the courts placed on the sources of international law? First, neither the Ninth nor Second Circuit engaged in its own rigorous analysis. Rather, both rested on other courts' assessments of the aiding and abetting standard. *Unocal* relied heavily on *Furundzija*, giving strong deference to the ICTY's analysis of the current international aiding and abetting standard, mirrored by the ICTR's decision in *Musema*. It gave much less weight to the Rome Statute, reasoning that the lack of jurisprudence surrounding the aiding and abetting standard makes it less reliable as a rule. *Talisman*, too, yielded much of its analytical prerogative to other jurisprudence, adopting almost wholesale Judge Katzmman's preference for the Rome Statute. It did, however, reference the Ministries Case from Nuremberg, but gave no attention to the claim made by the Ninth Circuit that *Furundzija* embodies the current state of the rule in international law, or that the consensual nature of international law would caution against adopting the older Nuremberg standard.

Such lack of analysis is problematic, and one could argue that the Second Circuit employed the wrong standard.

First, the Ministries Case was not representative of the state of aiding and abetting liability in customary international law, even at that point in time. Professor Chimene Keitner notes that in that case the acquittal of defendant Rasche on the purpose standard was accompanied by a concurrent conviction of the banker Emil Puhl as an accomplice for crimes against humanity for *knowingly* disposing of valuables looted from holocaust victims.<sup>72</sup>

Second, there is evidence that the ICTY and ICTR are much more than

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67. *Talisman*, 582 F.3d at 258.

68. *Id.* at 259 (quoting *Khulumani*, 504 F.3d at 277 (Katzmann, J., concurring)).

69. *Id.* at 259.

70. *Id.*

71. *Id.* (citing *Sosa*, 542 U.S. at 732).

72. See Chimene Keitner, *Conceptualizing Complicity in Alien Tort Cases*, 60 HASTINGS L.J. 61, 86 (2008).

“sporadic forays” into the knowledge standard. International tribunals, according to the Secretary-General of the United Nations, emphasize the “legality principle” that requires them to “apply rules of international humanitarian law which are beyond any doubt part of customary law.”<sup>73</sup> As a result, the ICTY jurisprudence that established the knowledge standard had taken “great pains to establish the customary international law foundation that it applies, including the elements of aiding and abetting.”<sup>74</sup>

Finally, reliance on the Rome Statute is itself problematic. The language of the statute contains two references to aiding and abetting liability. The first, article 25(c) does call for a purpose standard.<sup>75</sup> Article 25(d)(ii), however, establishes liability for anyone who

[i]n any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall [. . .] (ii) [b]e made in the knowledge of the intention of the group to commit the crime.<sup>76</sup>

This reveals that there is not a uniform standard within the Rome Statute, a tension complicated by the fact that most violations asserted under ATS litigation will implicate aiding and abetting for groups acting with a common purpose.<sup>77</sup> In short, the Second Circuit’s conclusion that the international consensus on aiding and abetting liability sets the *mens rea* standard at purpose is likely incorrect.

Another possibility is that the difference is attributable to *Sosa*. The *Sosa* court struck a vigilant posture regarding what violations of the law of nations could be brought under the ATS. Thus, another plausible reading of *Talisman* is that the Second Circuit interpreted international law with caution taken from *Sosa*, and, encountering what the court considered to be a discrepancy in international law regarding the *mens rea* standard, it conservatively opted for the higher bar of purpose.

*Sosa*’s cautious approach, however, was not new—*In re Estate of Marcos* and several subsequent cases from Ninth Circuit required the norms of

73. *Id.* at 76-77.

74. *Id.* See also Kevin Jon Heller, *Talisman Energy – Amateur Hour at the International Law Improv*, OPINIO JURIS, Oct. 6, 2009, available at <http://opiniojuris.org/2009/10/06/talisman-energy-amateur-hour-at-the-international-law-improv> (noting that the Special Court for Sierra Leone and Special Court for Cambodia also follow the knowledge standard. Only the Rome statute and the Special Panels for Serious Crimes in East Timor whose statute is based on the Rome Statute follow the purpose standard).

75. Rome Statute, *supra* note 7, art. 25(c) (“In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person . . . (c) [f]or the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission.”).

76. *Id.* art. 25(d)(ii).

77. Heller, *supra* note 74.

international law to be “specific, universal, and obligatory.”<sup>78</sup> *Sosa* held that the ATS, by way of federal common law, “furnish[es] jurisdiction for a relatively modest set of actions alleging violations of the law of nations.”<sup>79</sup> So, after *Sosa*, while the door is still “ajar” for allowing recognition of violations of international law that did not exist at the time the ATS was enacted, any alleged violation must be of the same “definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted.”<sup>80</sup> *Sosa* attempted to ensure that the crack in the door remained narrow by cautioning judges to weigh other “practical considerations” when ascertaining a norm, including United States or foreign government opinion and the possible impact of the litigation on United States’ foreign relations.<sup>81</sup> In short, *Sosa* suggested strong caution to courts hearing ATS claims.<sup>82</sup>

The majority opinion in *Talisman* was aware of *Sosa*’s caution. Judge Jacobs followed *Sosa* not only by looking to international law for the aiding and abetting standard,<sup>83</sup> but also by conservatively appraising that standard. Judge Jacobs cited *Sosa*’s “five cautions”<sup>84</sup> and acknowledgment of an “element of judgment about the practical consequences of making a cause of action available”<sup>85</sup> prior to addressing the aiding and abetting question left open by *Khulumani*. Judge Jacobs reasoned that “[r]ecognition of secondary liability is no less significant a decision than whether to recognize a whole new tort in the first place.”<sup>86</sup> As such, he adopted purpose as the aiding and abetting standard.

While he never made the point explicitly, Judge Jacobs seemed to be taking *Sosa*’s caution into consideration. A purpose standard is more likely than the lower knowledge standard to keep the ATS door ajar, but not let it swing open too wide. If there is some debate within sources of international law about the aiding and abetting *standard*, but not about aiding and abetting as a violation of international law in and of itself, this move is understandable. Nevertheless, it introduces an issue that may remain open until the Supreme Court takes up the aiding and abetting issue: can such caution restrict interpretation of the elements of a rule recognized in international law? The answer remains to be seen.

78. *In re Estate of Marcos*, 25 F.3d 1467, 1475 (9th Cir. 1994); *see also* *Papa v. United States*, 281 F.3d 1004, 1013 (9th Cir. 2002) and *Alvarez-Machain v. United States*, 331 F.3d 604, 612 (9th Cir. 2003) (quoting *In re Estate of Marcos*, 25 F.3d at 1475).

79. *Sosa*, 542 U.S. at 720.

80. *Id.* at 732.

81. *Id.* at 732 n.21.

82. *See* Teddy Nemeroff, *Untying the Khulumani Knot: Corporate Aiding and Abetting Liability Under the Alien Tort Claims Act After Sosa*, 40 COLUM. HUM. RTS. L. REV. 231 (offering a more lengthy discussion of *Sosa*’s cautionary approach to international norms).

83. *Talisman*, 582 F.3d at 247 (2d Cir. 2009).

84. *See supra* note 40.

85. *Talisman*, 582 F.3d at 256 (quoting *Sosa*, 542 U.S. at 722-23).

86. *Id.* at 259.

V.

WHAT SHOULD THE STANDARD BE?

The Second Circuit's cautious consideration of the aiding and abetting standard in light of *Sosa* is, at first glance, both appropriate and warranted. The *Talisman* Court's decision came in an ATS landscape mapped by *Sosa*—even if all the ATS ground has not been authoritatively covered. Judge Pregerson's reasoning in *Unocal* did not carry the imprimatur of *Sosa* that *Talisman* displays, but it did incorporate the persuasive urge of caution that came from *Filártiga*. It is important, then, to give full consideration to the role *Sosa* played in the *Talisman* decision. This point, I think, gives the best guidance for the proper discernment of the aiding and abetting standard.

It is possible that the Second Circuit used *Sosa's* caution to guide its approach to the elements of the international law norm as to which there was some ambiguity. If the court thought that the norm *itself* met the *Sosa* standard of specificity and universal obligation but that its elements—in particular, the *mens rea* standard—were unclear, it may be reasonable to choose the higher standard of purpose. However, this over-interprets *Sosa*. While urging caution, *Sosa* gave definite guidance on *how* federal courts are to employ this caution. The standard of specific and universal acceptance that is the central holding of *Sosa* is the built-in manner by which courts are to discern what violations of international norms are covered by the ATS. If a norm has the requisite specificity and acceptance, then it is actionable under the ATS. Such specificity and universal acceptance should entail the elements that comprise the rule. It would be anomalous for a norm to reach universal acceptance and contain the appropriate specificity if its constitutive elements, and the standards by which those elements are satisfied, were in flux.

Judge Katzmann's choice of purpose for the aiding and abetting standard recognizes this. His reliance on the Rome Statute depends heavily on the number of states that have ratified the statute. To the extent that the *Talisman* Court adopted this reasoning, its decision was sensible. If, however, the *Talisman* court tried to impose *Sosa's* caution on the elements of the rule, then it takes *Sosa* too far.

The ultimate problem, then, lies in the analysis of international law. The weight of international authority is toward a knowledge standard, as discussed above. *Sosa's* standard of specificity and universal acceptance must extend to the norm writ large—that is, aiding and abetting as a justiciable norm under the ATS cannot exist independently of its elements. The knowledge standard extends across the international criminal tribunals, Nuremberg, and the text of the Rome Statute. On balance, aiding and abetting based on a *mens rea* standard of knowledge meets with such specificity and universal acceptance to be actionable following *Sosa*, and should be the standard despite any forays into a purpose standard.

VI.  
CONCLUSION

Currently aiding and abetting liability under the ATS has taken rough shape, but is probably not in its final form. It seems that most districts recognize aiding and abetting as a viable theory of liability, and agree that the rule should be drawn from international law. Furthermore, there may also be a trend toward a purpose standard, following the *Talisman* decision, but the trend is not without significant counterweight. The Second Circuit could be wrong in its analysis of international law, and the proper international consensus should instead be read as knowledge. However, it may also be that *Sosa* colors not only reference to international law in the analysis of the rule, but also the way courts should read international law so that the higher *mens rea* standard should be adopted. This, however, seems to take *Sosa* too far. Currently, this situation puts two obstacles in front of plaintiffs pursuing aiding and abetting claims. To be successful a plaintiff would have to argue not only against the jurisprudential trend towards a purpose standard, but might also have to argue that *Sosa*'s caution does not extend to the way a court should read international law.