Nos. 19-416 & 19-453

In the Supreme Court of the United States

NESTLÉ USA, INC., *Petitioner*,
v.
JOHN DOE I, ET AL., *Respondents.*

CARGILL, INC., *Petitioner*,
v.
JOHN DOE I, ET AL., *Respondents.*

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF INTERNATIONAL LAW SCHOLARS, FORMER DIPLOMATS, AND PRACTITIONERS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

Amici curiae are scholars of international law, former diplomats, and practitioners with expertise in modes of secondary liability under international law who have litigated complicity cases in international and domestic courts (see appendix).[1] They urge this Court not to categorically foreclose such liability under the Alien Tort Statute ("ATS") because complicity liability is well-established under international law and serves an essential purpose to prevent impunity for those who knowingly assist violations of the law of nations.

SUMMARY OF ARGUMENT

Nestlé USA, Inc. and Cargill, Incorporated (collectively "Petitioners") seek impunity from U.S. courts under the ATS, 28 U.S.C. § 1350, for their alleged participation in child slavery, the worst forms of child forced labor, and other abuses. The questions presented on *certiorari* are: (1) whether U.S. corporations can be subject to civil actions under the ATS and (2) whether the conduct alleged sufficiently touches and concerns the United States to displace the presumption against extraterritoriality. The Acting Solicitor General has twice asked this Court to take up a third issue, which would dramatically reframe this litigation: the cognizability of aiding-and-abetting claims in ATS suits. Brief of the United States as

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[1] No counsel for any party authored this brief in whole or in part, and no person other than counsel for *Amici* made a monetary contribution to fund its preparation or submission. Petitioners and Respondents consented to the filing of this brief.

Amicus Curiae (Sept. 8, 2020) 23-26, *Nestlé USA, Inc. v. Doe I*; *Cargill Inc. v. Doe I* (Nos. 19-416; 19-453) ("U.S. Br."). The Acting Solicitor General asks the Court to go beyond the questions presented in this case and issue a ruling that will foreclose secondary liability claims—including those against natural persons who aid and abet violations of the law of nations and seek refuge in the United States—notwithstanding centuries of settled law and circuit precedent. Given the complexity of this issue, the Court should defer consideration of such a sweeping proposal without a full briefing on the merits.

If this Court decides to consider the question raised by the Acting Solicitor General, it should find that the ATS allows Respondents to advance claims premised on secondary liability, so long as other jurisdictional requirements are met. Secondary liability is well-established in international law. Legal systems the world over hold liable those who aid and abet the commission of international offenses. Since the First Congress enacted the Judiciary Act of 1789, international and U.S. courts have imposed liability on both direct perpetrators of violations of the law of nations and their accomplices. This reflects that secondary liability is a customary-international-law norm finding expression in every source of international law: treaties (including treaties binding on the United States), general principles of law, and international jurisprudence. Were this Court to conclude that aiding-and-abetting liability is not actionable under the ATS, it would position the United States as an outlier among the nations of the world,

which universally recognize accomplice liability for internationally tortious behavior and criminal conduct.

ARGUMENT

I. THIS COURT SHOULD DECLINE THE ACTING SOLICITOR GENERAL'S INVITATION TO CONSIDER SECONDARY LIABILITY UNDER THE ATS.

The Court should decline the Acting Solicitor General's invitation to prohibit secondary liability claims under the ATS.

First, the cognizability of secondary liability claims under the ATS is not within the ambit of either issue for which Petitioners have sought *certiorari*. This Court rebuffed this question at the *certiorari* stage, despite the Acting Solicitor General's request that it be taken up. Brief for the United States as *Amicus Curiae* (May 26, 2020) 13, *Nestlé USA, Inc. v. Doe I, et al.*; *Cargill Inc. v. Doe I, et al.* (Nos. 19-416; 19-453). Reviewing it now would contravene the limiting principle in Supreme Court Rule 14.1(a). SUP. CT. R. 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court"); *Yee v. City of Escondido*, 503 U.S. 519, 536 (1992) (noting that the rule serves to focus the parties' attention "on the questions the Court has viewed as particularly important" and allows the Court "to make efficient use of [its] resources"). *See also Lucia v. SEC*, 138 S. Ct. 2044, 2050 n.1 (2018) (declining to consider an issue raised by the Government as *amicus curiae* after the Court omitted it as a question presented, despite the Solicitor General's urging, at the *certiorari* stage).

Second, the cognizability of secondary liability is not an antecedent question "fairly included" within the litigation, SUP. CT. R. 14.1(a), that is "essential" to the disposition of those questions expressly presented. *See Procunier v. Navarette*, 434 U.S. 555, 559-60 n.6 (1978) (considering only antecedent questions on which both parties briefed the Court); *Norfolk S. Ry. Co. v. Sorrell*, 549 U.S. 158, 165 (2007) (noting preference "not to address [a significant issue] when it has not been fully presented."). Both Petitioners treat aiding-and-abetting claims as cognizable under the ATS. *See* Brief for the Petitioner Nestlé USA, Inc. (August 31, 2020) 22-23, *Nestlé USA, Inc. v. Doe I, et al.; Cargill Inc. v. Doe I, et al.* (Nos. 19-416; 19-453); Brief for the Petitioner Cargill, Incorporated (August 31, 2020) 33-36*, Nestlé USA, Inc. v. Doe I, et al.; Cargill Inc. v. Doe I, et al.* (Nos. 19-416; 19-453).

Third, the Court does not have sufficient briefing to address the question of whether the range of secondary liability claims is cognizable under the ATS. As the Government acknowledges, U.S. Br. at 23, U.S. courts—including every Circuit to consider the issue—have held that the ATS provides federal jurisdiction over claims for aiding and abetting law-of-nations violations. *See, e.g., Yousuf v. Samantar,* No. 1:04cv1360 (LMB/JFA), 2012 WL 3730617 (E.D. Va. Aug. 28, 2012), *appeal dismissed*, 699 F.3d 763 (4th Cir. 2014) (holding a former Somali official, found in Virginia, liable for aiding and abetting extrajudicial killings, torture, arbitrary detention, crimes against humanity, war crimes, and other violations of the law of nations).

The Acting Solicitor General's proposed curtailment of ATS jurisdiction demands a focused consideration of the statute's history and the law of its time, *Sosa v. Alvarez-Machain*, 542 U.S. 692, 714 (2004), as well as careful reflection on whether it could still serve its original purpose in such a limited form. This inquiry will provoke weighty questions about the scope and elements of secondary liability tort doctrines, ranging from *respondeat superior* to agency to aiding and abetting, as they are applied to suits arising out of law-of-nations violations.

Barring all aiding-and-abetting claims under the ATS would cut against the grain of history; upend the law in five Circuits;[2] and bar suits against natural *and* legal persons accused of aiding and abetting law-of-nations violations, when only corporate liability is at issue in this case. These potential ramifications of the Acting Solicitor General's proposal merit a full briefing.

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[2] Five Circuits have independently reasoned that aiding-and-abetting liability presents grounds for recovery in ATS suits; others have assumed as much. *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 260 (2d Cir. 2007), *aff'd sub nom., Am. Isuzu Motors, Inc. v. Ntsebeza,* 553 U.S. 1028 (2008); *Aziz v. Alcolac, Inc.*, 658 F.3d 388, 396 (4th Cir. 2011); *Doe I v. Unocal Corp.*, 395 F.3d 932, 947 (9th Cir. 2002); *Cabello v. Fernández-Larios*, 402 F.3d 1148, 1157 (11th Cir. 2005); *Doe VIII v. Exxon Mobil Corp.,* 654 F.3d 11, 19 (D.C. Cir. 2011), *vacated on other grounds,* 527 F. App'x 7 (D.C. Cir. 2013); *see also Flomo v. Firestone National Rubber Co.,* 643 F.3d 1013, 1021 (7th Cir. 2011) (allowing for corporate liability in ATS suits alleging violations of customary international law when "the violations are directed, encouraged, or condoned at the corporate defendant's decision[-]making level").

II. SECONDARY LIABILITY IS COGNIZABLE UNDER THE ATS.

Should the Court consider the cognizability of modes of accessorial liability under the ATS, it should reject the Acting Solicitor General's arguments. This section will demonstrate, first, that the ATS has encompassed concepts of secondary liability, including aiding and abetting, since its enactment in 1789 (II.A). Second, the law of nations imposes aiding-and-abetting liability when an accomplice knowingly provides substantial assistance to the principal perpetrator of the offense. This norm is sufficiently "specific, universal and obligatory", *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1399 (2018) (Kennedy, J., concurring) (quoting *Sosa*, 542 U.S. at 732), as reflected in customary international law and evidenced by universal state practice, *inter alia*, through various treaties and general principles of law in domestic jurisdictions across the world (II.B). Third, international jurisprudence demonstrates that Petitioners' alleged domestic conduct may give rise to aiding-and-abetting liability under international law (II.C). For these reasons, *Amici* ask the Court to refrain from barring a cause of action rooted in the ATS's origins and international law.

A. Claims for aiding-and-abetting liability were always within the ambit of the ATS.

The focus of the ATS is to provide aliens alleging tortious conduct violating the law of nations with a federal forum to pursue a civil action, particularly when such conduct involves U.S. persons or entities or

might provide "just cause for reprisals or war." *See* Anthony J. Bellia & Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. CHI. L. REV. 445, 476, 542-43 (2011) (identifying the original intent of the ATS to ensure the United States complied with its obligations under the law of nations); *Jesner*, 138 S. Ct. at 1417 (Gorsuch, J., concurring) (noting that, at a minimum, the purpose of the ATS was "to ensure foreign citizens could obtain redress for wrongs committed by domestic defendants"). Because "Congress is understood to legislate against a background of common-law adjudicatory principles[,]" claims under the ATS can reach all potentially liable parties—including those who knowingly assist the principal tortfeasor—since those forms of secondary liability existed under federal common law in 1789. *Mohamad v. Palestinian Authority*, 566 U.S. 449, 457 (2012); *see also Jesner*, 138 S. Ct. at 1397 ("Congress enacted [the ATS] against the backdrop of the general common law").

At common law, aiders and abettors were principals in the second degree in the criminal context. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 34-35 (1769) (discussing principals and accessories); *id.* at 73 (recognizing accessories to piracy as "principal pirates"). Judges and legal scholars recognized aiding-and-abetting liability in cases involving piracy, the foundational international delict. *See Case of Benjamin Blackledge, in* JOHN FRANKLIN JAMESON, PRIVATEERING AND PIRACY IN THE COLONIAL PERIOD: ILLUSTRATIVE DOCUMENTS 147-52 (1923) (ascribing secondary liability to a subject of the American colonies in the 18th century for aiding and

abetting a pirate's escape); *see also United States v. Ross*, 27 F. Cas. 899, 901 (C.C.R.I. 1813) (recognizing liability in piracy where one is "aiding and abetting the act"); *Talbot v. Jansen*, 3 U.S. 133, 167-68 (1795); THE TRIAL OF JOHN WILLIAMS, FRANCIS FREDERICK, JOHN P. ROG, NILS PETERSON, AND NATHANIEL WHITE, ON AN INDICTMENT FOR MURDER ON THE HIGH SEAS: BEFORE THE CIRCUIT COURT OF THE UNITED STATES, HOLDEN FOR THE DISTRICT OF MASSACHUSETTS, AT BOSTON, ON THE 28TH OF DECEMBER, 1818 (1819) at 86 (acknowledging liability for an individual who "acted in aid of the general design" or assisted in some way acts of piracy, including mutiny and murder).

The first federal statute on aiding and abetting criminalized aiding, counselling, advising, or commending someone in the commission of murder, piracy, and crimes committed on the high seas or against the law of nations. *See* An Act for the Punishment of Certain Crimes Against the United States, 1 Stat. 113-114 (1790); David P. Currie, *Constitution in Congress: Substantive Issues in the First Congress, 1789-1791*, 61 U. CHI. L. REV. 775, 831-33 (1994). Courts at the time recognized liability under the law of nations for those who "aid[] or abet[] hostilities forbidden by [a] foreign country," and assured that such persons would not find protection in the United States. *Henfield's Case*, 11 F. Cas. 1099 (1793); *see also* Brief for Respondents, 24-25, *Nestlé USA, Inc. v. Doe I*; *Cargill Inc. v. Doe I* (Nos. 19-416; 19-453) ("Resp. Br.").

Members of the First Congress and their contemporaries also understood that aiding and

abetting internationally tortious conduct would violate international law, serving as grounds for aggrieved persons to invoke the ATS in federal court. *Doe VIII v. Exxon Mobil Corp.*, 654 F.3d 11, 29 (D.C. Cir. 2011), *vacated on other grounds,* 527 F. App'x 7 (D.C. Cir. 2013) (highlighting historical evidence that liability for violations of the laws of nations extended to aiders and abettors during the Founding era and determining that "[a]mple authority supports the conclusion that the First Congress considered aiding and abetting itself to be a violation of the law of nations"). Contemporaneous legal opinions support the cognizability of secondary liability under the ATS. The Bradford Opinion of 1795 identified the ATS as offering a legal remedy for those injured within Sierra Leone, then a British colony, by U.S. citizens (engaged in the slave trade incidentally) who had "voluntarily joined, conducted, aided, and abetted a French fleet in attacking the settlement, and plundering or destroying the property of British subjects on that coast." Breach of Neutrality, 1 OP. ATT'Y GEN. 57, 58 (1795).

Although courts generally look to contemporary international law to determine whether a claim is sufficiently established to constitute an actionable cause of action under the ATS, complicity claims are hardly a "new form[] of liability" given the long history of courts adjudicating complicity liability under the law of nations. *Jesner*, 138 S. Ct. at 1390, 1403.

B. Today's law of nations continues to impose secondary liability for aiding and abetting unlawful conduct.

The ATS authorizes the exercise of federal jurisdiction over violations of the law of nations that are "specific, universal, and obligatory" in international law. *Jesner*, 138 S. Ct. at 1399 (Kennedy, J., concurring) (quoting *Sosa*, 543 U.S. at 732). This includes when international law decries the perpetrator as "like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind." *Sosa*, 542 U.S. at 732 (quoting *Filártiga v. Peña-Irala*, 630 F.2d 876, 890 (2d Cir. 1980)).

Nuremberg's post-World War II proceedings confirmed that aiding-and-abetting liability exists under customary international law when accomplices knowingly provide substantial assistance to the principal offense. Complicity liability now finds expression in every source of international law considered by the Court in *Jesner*, 138 S. Ct. at 1400-01 (Kennedy, J., concurring), and *Sosa*, 542 U.S. at 732. This includes the sources in Article 38 of the Statute of the International Court of Justice ("ICJ"): international custom as reflected in a general practice accepted as law, international conventions (including treaties ratified by the United States and incorporated into U.S. domestic law), general principles of law recognized by civilized nations, and international jurisprudence.

Statute of the International Court of Justice art. 38, 59 Stat. 1005, T.S. No. 993.[3]

With the establishment of international criminal tribunals, international criminal jurisprudence has developed customary international law on secondary liability.[4] Nonetheless, violations of those norms are equally remediable through civil suits.[5] National law—domestic and foreign—is in accord. These sources of international law confirm that secondary liability is

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[3] U.S. courts routinely look to Article 38 to identify sources of international law. *See United States v. Yousef*, 327 F.3d 56, 100 (2d Cir. 2003).

[4] The fact that many of the opinions cited herein involve individual criminal responsibility, rather than tort liability, is of no moment as:

> This [civil/criminal] distinction finds no support in our case law, which has consistently relied on criminal law norms in establishing the content of customary international law for purposes of the [ATS]. … Our past reliance on criminal law norms seems entirely appropriate given that, as Justice Breyer observed in *Sosa*, international law does not maintain the kind of hermetic seal between criminal and civil law that the district court sought to impose.

Khulumani, 504 F.3d at 270 n.5 (Katzmann, J., concurring) (citations removed); *see also* RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 407 cmt. f (2018) ("the public-private distinction in international law lacks a clear conceptual basis, because different legal systems draw the line in different places"); *id*. at rptrs' note 5.

[5] *Prosecutor v. Furundžija,* Case No. IT-95-17/1-T, Judgement, ¶ 155 (Dec. 10, 1998) (recognizing the propriety of civil remedies for violations of international criminal law in certain circumstances, including civil suits for damages in foreign courts).

sufficiently "specific, universal and obligatory" to meet the standard for recognizing causes of action under the ATS.

1. Customary international law recognizes secondary liability, including aiding and abetting, for unlawful conduct.

Customary international law "results from a general and consistent practice of states followed out of a sense of international legal right or obligation." RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 401 cmt. a (2018). Customary international law is accepted as a binding source of law in U.S. courts, as identified by jurists, commentators, and scholars "well-acquainted" with it. *See The Paquete Habana*, 175 U.S. 677, 700 (1900) (holding "[i]nternational law is part of our law" and "resort must be [made] to the customs and usages of civilized nations" to enforce it as such).

From post-World War II onward, states have empowered international tribunals to adjudicate modes of secondary liability, such as aiding and abetting, with respect to international law offenses. Such tribunals have consistently drawn upon customary international law to apply concepts of secondary liability to the parties appearing before them. Article 6 of the Nuremberg Charter provided for criminal liability of "leaders, organisers, instigators and accomplices" of the crimes outlined in the Charter. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis art. 6, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279; *see also* International

Military Tribunal for the Far East art. 5, Jan. 19, 1946, T.I.A.S. No. 1589, 4 Bevans 20 (same); Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, Principle VII, II Y.B. INT'L L. COMM'N 374 (1950) ("Complicity in the commission of a crime against peace, a war crime, or a crime against humanity … is a crime under international law.").

In addition to being prosecuted for their direct involvement in international crimes, the defendants at Nuremberg were also held liable for their indirect responsibility for crimes committed across occupied territory. *United States v. Goering et al.*, 22 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 171, 301 (Int'l Mil. Trib. 1946) (convicting Wilheim Frick in part because "Frick knew full well what the Nazi policies of occupation were in Europe … and by accepting the office of Reich Protector he assumed responsibility"); *id.* at 303 (holding Nazi propagandist Julius Streicher responsible because despite his "knowledge of the extermination of the Jews in the Occupied Eastern Territory, [Streicher] continued to write and publish his propaganda of death"). Nazi leaders were found complicit in international crimes committed within the armament and other industries in the war. With respect to Herman Goering, the Tribunal noted that "[t]he record is filled with Goering's admissions of his complicity in the use of slave labor." *Id.* at 281. Similarly, Walther Funk, Reich Minister for Economic Affairs, was found guilty because he was "indirectly involved in the utilization of concentration camp labor," and directed the Reichsbank to provide funding for

factories that ultimately employed forced labor. *Id.* at 306.

Reflecting the centrality of corporate complicity in the Nazi enterprise, the Allies in their respective zones of occupation prosecuted under Control Council Law No. 10 corporate executives on the basis of complicity modes of liability for their provision of practical assistance to Nazi war crimes and crimes against humanity. Two corporate executives were convicted for profiting from genocide by supplying poison gas used to kill Jewish prisoners. *See* Trial of Bruno Tesch and Two Others (The Zyklon B Case), 1 LAW REPORTS OF TRIALS OF WAR CRIMINALS 93, 101 (1947) (Brit. Mil. Ct., Hamburg, Mar. 1-8, 1946) (finding defendants "knew that the gas was to be used for the purpose of killing human beings"). A U.S. military commission held that "[o]ne who knowingly by his influence and money contributes to the support [of a violation of the law of nations] must, under settled legal principles, be deemed to be, if not a principal, certainly an accessory to such crimes." *United States v. Flick*, 6 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 1187, 1217 (1947).

Modern international criminal tribunals have continued to prosecute various forms of secondary liability. The U.N. Security Council directed the International Criminal Tribunal for the former Yugoslavia ("ICTY") to prosecute anyone "who planned, instigated, ordered, committed or otherwise aided and abetted" the crimes outlined in its statute without defining these terms. *See* Statute of the International

Criminal Tribunal for the Former Yugoslavia art. 7(1), May 25, 1993, S.C. Res. 827; *see also* Statute of the International Criminal Tribunal for Rwanda art. 6(1), Nov. 8, 1994, S.C. Res. 955; Statute of the Special Court for Sierra Leone art. 6(1), Mar. 8, 2002, S.C. Res. 1315 (same).[6] In adjudicating complicity charges, the ICTY considered itself bound by customary international law. *Prosecutor v. Tadić*, Case No. IT-94-1-T, Opinion and Judgement, ¶ 662 (May 7, 1997) (noting that the Security Council empowered the ICTY to apply only those standards that are "beyond any doubt customary [international] law") (citations removed); *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Judgement, ¶ 191 (Dec. 10, 1998) ("the Trial Chamber must examine customary international law in order to establish the content" of aiding-and-abetting liability). The *ad hoc* tribunals looked to the post-war precedent and comparative domestic law as indicative of customary international law to identify the elements of these forms of liability. *Tadić*, *supra*, ¶ 674 ("The most relevant sources for such a determination [of the

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[6] The Rome Statute governing the International Criminal Court ("ICC") also recognizes various forms of secondary liability. Rome Statute of the International Criminal Court art. 25(3)(c), July 17, 1998, 2187 U.N.T.S. 90 (establishing liability where the accused "aids, abets or otherwise assists" in the commission or attempted commission of the crime); *id*. art. 25(3)(d) (establishing liability where the person knowingly contributes to a group acting with a common purpose). The ICC's Elements of Crimes contain idiosyncratic formulations of modes of responsibility that do not purport to reflect customary international law. *See* ICC Elements of Crimes arts. 25 and 30, U.N. Doc. PCNICC/2000/1/Add.2 (2000). The Statute clarifies that it is not meant to reflect, or change, customary international law. Rome Statute, *supra*, art. 10.

existence of aiding-and-abetting liability] are the Nürnberg war crimes trials").

After examining state practice backed by *opinio juris*, nearly all international tribunals have held that complicity liability exists under customary international law when accomplices knowingly provide substantial assistance to the principal offense.[7] *See*, *e.g.*, *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-A, Appeals Judgement, ¶¶ 162-72 (Mar. 24, 2000); *Prosecutor v. Brima*, *et al.*, Case No. SCSL-04-16-T, Judgement, ¶ 776 (June 20, 2007); *Prosecutor v. Kalimanzira*, Case No. ICTR-05-88-T, Judgement, ¶ 161 (June 22, 2009); *Prosecutor v. Eav*, Case No. 001/18-07-2007/ECCC/TC, Judgement, ¶ 533 (July 26, 2010). Pursuant to this jurisprudence, a wide range of conduct may give rise to complicity liability under customary international law, including planning, instigating, or otherwise aiding or abetting in the planning, preparation, or execution of an international crime.[8] This reflects the universal understanding that

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[7] *See Amicus Curiae* Brief of Former U.S. Ambassador-At-Large for War Crimes Issues David J. Scheffer in Support of Appellants and Reversal, *Doe I, et al. v. Cisco Systems, Inc., et al.*, (No. 15-16909) (9th Cir. 2016). The Statute of the Special Tribunal for Lebanon enables the imposition of liability for a person who "participated as an accomplice" in enumerated crimes under the precepts of Lebanese, rather than international, law. Statute of the Special Tribunal for Lebanon, art. 3(1)(a), May 30, 2007, S.C. Res. 1757.

[8] Although often uttered jointly, "aiding" involves the provision of assistance to unlawful conduct whereas "abetting" involves encouraging or inducing the principal to act or facilitating the act by being sympathetic thereto. *See Prosecutor v. Milutinović et al.*, Case No IT-05-87-T, Judgement, ¶ 89 n.107 (Feb. 26, 2009).

the contributions of those who do not directly perpetrate a crime are often vital in its commission and evoke the same opprobrium as the conduct of the principal perpetrators. *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgement, ¶ 191 (July 15, 1999) ("the moral gravity of such participation is often no less—or indeed no different—from that of those actually carrying out the acts in question").

Applying these consensus principles, a number of international law cases have involved the attribution of liability for conduct and circumstances similar to those in this case.[9] Individuals who supervised the direct perpetrators have been deemed responsible for international crimes as aiders and abettors. *Prosecutor v. Ntakirutimana*, Case Nos. ICTR-96-10-A/96-17-A, Judgement, ¶ 61 (Dec. 13, 2004) (finding *actus reus* of complicity for defendant who transported assailants and pointed out fleeing refugees); *Eav*, *supra*, ¶ 533 (finding defendant liable for teaching interrogation techniques).

This body of jurisprudence includes cases involving individuals who supervised the use of forced labor and, by lending their authority to a course of conduct, were convicted as accomplices. *Prosecutor v. Brima et al.*, Case No. SCSL-2004-16-A, Appeals Judgement, ¶ 305

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[9] Although none of these criminal tribunals were empowered to exercise jurisdiction over legal entities *per se*, many cases involve complicitous corporate behavior facilitating the commission of international crimes. *See, e.g.*, *Prosecutor v. Musema*, Case No. ICTR-96-13-A, Appeals Judgment, ¶¶ 143, 399 (Nov. 16, 2001) (finding the director of a tea factory guilty of leading attacks on Tutsi refugees with his employees).

(Feb. 22, 2008) (finding that due to his "position of responsibility regarding the women and girls at Newton [camp], Kanu provided practical assistance to a system of sexual slavery and forced labour").

Likewise, secondary liability can attach even when the facilitative conduct would be otherwise legal—namely the provision of training, *matériel*, instructions, logistical support, or financial assistance to the direct perpetrators—except that it materially assisted the unlawful behavior of another. *Prosecutor v. Blagojević & Jokić*, Case No. IT-02-60-A, Appeals Judgement, ¶ 143 (May 9, 2007) (convicting the accused of "co-ordinating, sending, and monitoring the deployment of … resources"); *Prosecutor v. Lukić*, Case No. IT-98-32/1-A, Judgement, ¶ 444 (Dec. 4, 2012) (finding the *actus reus* requirement fulfilled given that the accused was "armed and present" while individuals were transferred, a "key precursory act to the crimes committed").

Courts have also held liable accomplices occupying positions of authority whose mere presence and moral support substantially contributed to unlawful conduct by the principals. *Prosecutor v. Taylor*, Case No. SCSL-03-01-A, Judgment, ¶ 368 (Sept. 26, 2013) (providing moral support and practical assistance); *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15-A, Appeals Judgement, ¶ 541 (Oct. 26, 2009) (discussing the "approving spectator" line of complicity cases).

Although U.S. courts typically look to international criminal law to determine claims under the ATS, even international civil law analogously recognizes secondary liability. Article 16 of the International Law

Commission's ("ILC") Articles on the Responsibility of States for Internationally Wrongful Acts recognizes that a state that "aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if … that State does so with knowledge of the circumstances of the internationally wrongful act." *See* Int'l Law Comm'n, Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, art. 16, Rep. of the Int'l Law Comm'n on the Work of its Fifty-Third Session, U.N. GAOR, 53rd Sess., U.N. Doc. A/56/10 (2001). Comment 9 explains that responsibility extends to a state that "provides material aid to a State that uses the aid to commit human rights violations." *Id.* at 67. Article 41 creates a robust regime in case of violations of peremptory norms (including the prohibition of slavery and the slave trade), forbidding states from rendering aid or assistance to a situation created by a breach of *jus cogens*. *Id*. at art. 41. The ICJ invoked Article 16 to determine whether organs or persons under Serbia's effective control were complicit in the actions of Bosnian Serb forces, holding that Article 16 constitutes customary international law. *See* Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 43, ¶¶ 419-21 (Feb. 26). *See also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1987) (noting a state "violates international law if, as a matter of state policy, it practices, encourages, or condones" genocide, slavery, etc.).

2. Treaties prohibiting international crimes and delicts, including those ratified by the United States, mandate forms of secondary liability.

This customary international law also is reflected in numerous multilateral treaties defining and prohibiting various international law offenses and obliging state parties to repress such violations within their domestic legal frameworks. Widespread subscription to these treaties by nations representing multiple regions and legal systems reflects and, at times, crystallizes customary international law. *Kiobel v. Royal Dutch Petroleum, Co.*, 621 F.3d 111, 137 (2d Cir. 2010). These treaties indicate that holding accomplices responsible for their role in facilitating international offenses is an issue of mutual concern.

The Genocide Convention, one of the earliest international criminal treaties that has been ratified or acceded to by 152 states including the United States, obliges state parties to criminalize "complicity in genocide." Convention on the Prevention and Punishment of the Crime of Genocide art. 3, Dec. 9, 1948, 78 U.N.T.S. 277. States subsequently adopted multilateral conventions against slavery, torture, terrorist bombings, transnational organized crime, and human trafficking, all of which recognize secondary liability and have numerous state parties, including the United States and Côte d'Ivoire. *See* Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery art. 6, Sept. 7, 1956, 226 U.N.T.S. 3; Convention Against Torture and Other Cruel,

Inhuman, or Degrading Treatment or Punishment art. 4, Dec. 10, 1984, 1465 U.N.T.S. 85; International Convention for the Suppression of Terrorist Bombings art. 2, Dec. 15, 1997, T.I.A.S. No. 02-726, 2149 U.N.T.S. 256; U.N. Convention Against Transnational Organized Crime art. 6, Nov. 15, 2000, T.I.A.S. No. 13127, 2225 U.N.T.S. 209; Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children art. 5, Nov. 15, 2000, T.I.A.S. No. 13127, 2237 U.N.T.S. 319.[10] Many of these treaties contain provisions guaranteeing civil remedies or reparations to victims. *See, e.g.*, Torture Convention, *supra*, art. 14(1) (requiring parties to guarantee "an enforceable right to fair and adequate compensation").

The practice of including secondary liability continues in developing treaty frameworks, such as the ILC Draft Articles on Prevention and Punishment of Crimes Against Humanity. Article 6 contemplates states taking "the necessary measures to ensure that … ordering, soliciting, inducing, aiding, abetting or otherwise assisting in or contributing to the commission or attempted commission of" crimes against humanity are actionable within domestic law,

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[10] Two additional treaties not ratified by the United States are in accord. *See* International Convention for the Protection of All Persons from Enforced Disappearance art. 6, Dec. 20, 2006, 2716 U.N.T.S. 3 (obliging signatories to hold accomplices responsible); U.N. Convention on the Law of the Sea art. 101, Nov. 16, 1994, 1833 U.N.T.S. 396 (prohibiting piracy, the voluntary participation in the operation of a ship or aircraft with knowledge that it will be used to commit piracy, and "any act of inciting or of intentionally facilitating" piracy). The United States has signed, but not ratified, the latter.

including with respect to legal persons, and guaranteeing victims "the right to obtain reparation for material and moral damages." Int'l Law Comm'n, Draft Articles on Prevention and Punishment of Crimes Against Humanity arts. 6, 12(3), Report on the Work of Its Seventy-first Session, U.N. Doc. A/74/10 (2019).

The United States has ratified many of these treaties and incorporated their prohibitions into the U.S. Code. These provisions recognize that principal and accessory liability go together. All are subject to 18 U.S.C. § 2 (2020), which treats aiders and abettors like principals when it comes to sentencing, attesting to the importance of holding responsible those assisting unlawful conduct. Although many of these treaties are deemed not self-executing, U.S. ratification expresses political support for their terms. Ensuring that the ATS allows for aiding-and-abetting claims would enable the United States to fulfill its treaty obligations, disincentivize those who would assist in the commission of grave violations of the law of nations, and insulate the United States from the diplomatic repercussions that might ensue were accomplices to enjoy impunity in U.S. courts.

3. Secondary liability is a general principle of law.

Secondary liability is inherent to all legal systems and, as such, constitutes state practice to identify customary international law as well as a general principle of law—an independent source of international law. U.S. and international courts regularly rely on general principles of law to determine the content of international law. *See* Oil Platforms

(Iran v. U.S.), Judgment 2003 I.C.J. 161, 354-58 (Nov. 6) (separate opinion by Simma, J.) (finding joint and several liability for multiple tortfeasors constitutes a general principle of law). Domestic jurisdictions around the world have long relied upon various forms of secondary liability—including the doctrine of aiding and abetting—to reach corporate entities that knowingly and substantially assist other actors in breaching international or domestic law. *See, e.g.*, Bürgerliches Gesetzbuch [BGB] [Civil Code] Jan. 2, 2002, Bundesgesetzblatt, as amended, § 830(2) (finding instigators and accessories to be equivalent to joint tortfeasors). Aiding-and-abetting liability is "one of those rules that States universally abide by, or accede to, out of a sense of legal obligation and mutual concern." *Khulumani,* 504 F.3d at 270 (Katzmann, J., concurring) (internal quotation marks omitted).

Aiding and abetting various forms of tortious conduct is a common feature of U.S. law and routinely the subject of U.S. tort litigation against natural and legal persons. *Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013, 1019 (7th Cir. 2011) (noting that the ATS "is civil, and corporate tort liability is common around the world"). The Restatement (Third) of Torts outlines that aiding and abetting the tortious conduct of another exists when an actor gives knowing and substantial assistance to the wrongdoing or the concealment thereof. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR ECONOMIC HARM § 28 (2020); *see also* RESTATEMENT (SECOND) OF TORTS § 876 (1979) ("For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he … (b) knows that the other's conduct constitutes a breach of

duty and gives substantial assistance or encouragement to the other so to conduct himself.").

All Circuits that have considered the issue have looked to international law to conclude that the ATS permits secondary liability. *See supra*, note 2; *Exxon Mobil*, 654 F.3d at 19 ("Virtually every court to address the issue, before and after *Sosa*, has so held, recognizing secondary liability for violations of international law since the founding of the Republic."). The Circuit Courts have determined that secondary liability is "sufficiently well-established and universally recognized to be considered customary international law for the purposes of the [ATS]." *Khulumani,* 504 F.3d at 277 (Katzmann, J., concurring).[11] Numerous district courts are in accord. *See* Brief for *Amici Curiae* Center for Justice & Accountability and Human Rights First in Support of Respondents 16-17, *Nestlé USA, Inc., v. Doe I; Cargill Inc. v. Doe I* (Nos. 19-416; 19-453) ("CJA Brief"). It would be a dramatic reinterpretation of international law were the Court to reject this unbroken line of authority.

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[11] Federal common law also supports inclusion of secondary liability in the ATS. *See Unocal*, 395 F.3d at 966 ("Third-party liability [including joint venture and agency] … is a straightforward legal matter that federal courts routinely resolve using common law principles.") (Reinhardt, J., concurring); *Khulumani*, 504 F.3d at 287 (Hall, J., concurring) (arguing that federal common law provides "a clearly extant standard of aiding and abetting liability" for application in ATS cases).

C. The conduct alleged in this case is not impermissibly extraterritorial given international jurisprudence on secondary liability.

Extensive international jurisprudence demonstrates that the Petitioners' alleged conduct can constitute "aiding and abetting" under international law. Petitioners have allegedly leveraged their influence as major chocolate producers to establish a lucrative supply chain premised on child and forced labor and have provided financial support, supplies, training on labor practices, and continuous supervision to suppliers to encourage, facilitate, and assist the use of child slaves, forced child labor, and human trafficking and ensure the cheapest supply of cocoa beans possible. *See generally* Joint Appendix 303-44. This substantial and systematic assistance, if proven, falls within the above-referenced international jurisprudence and sufficiently establishes aiding-and-abetting liability under customary international law.

This is so even if the Court looks only to Petitioners' alleged *domestic* conduct. *See Kiobel*, 569 U.S. at 127 (Alito J., concurring); *Mastafa v. Chevron Corp.*, 770 F.3d 170, 189 (2d Cir. 2014); *see also* Resp. Br. at 32-34. International law does not require any temporal or geographic nexus between the defendant's conduct and the commission of the crime to trigger secondary liability so long as the defendant assists the principal perpetrators. *See, e.g.*, *Prosecutor v. Simić*, Case No. IT-95-9-T, Judgement ¶ 162 (Oct. 17, 2003) ("Participation may occur before, during or after the act is committed."). Conduct geographically separated from

the crime can also satisfy the requisite *actus reus*. *See, e.g.*, *Prosecutor v. Fofana,* Case No. SCSL-04-14-A, Appeals Judgment, ¶ 72 (May 28, 2008) ("aiding and abetting" including "encouragement" and "moral support" "can be made at a time and place removed from the actual crime"); *Taylor*, *supra*, ¶ 368 (finding that conduct in Liberia provided substantial assistance to crimes committed in Sierra Leone). Respondents have plausibly alleged a long-standing course of domestic conduct involving Petitioners' integrated corporate decision-making, supervision over a primary source market, and the management of a robust supply chain. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

III. NO PRUDENTIAL REASONS EXIST TO BAR RESPONDENTS FROM ASSERTING SECONDARY LIABILITY CLAIMS UNDER THE ATS.

The Court has acknowledged the importance of considering "foreign-policy and separation-of-powers concerns inherent in ATS litigation." *Jesner*, 138 S. Ct. at 1403. Affirming secondary liability under the ATS would not infringe upon the separation of powers, and allowing the case to proceed would advance U.S. foreign policy by providing redress for the claimed law-of-nations violations.

A. Barring aiding-and-abetting liability under the ATS overrides the intent of Congress.

Analogous statutes within the U.S. Code all provide for secondary forms of liability, even if the text is silent

as to the availability of such claims. *Jesner*, 138 S. Ct. at 1403 (Kennedy, J., concurring) (holding "the Court looks to analogous statutes" when considering limitations on causes of action).

The Torture Victim Protection Act ("TVPA"), 28 U.S.C. § 1350, enacted as a Note to the ATS, supports claims against individuals other than the direct tortfeasor. *Cabello v. Fernández-Larios*, 402 F.3d 1148, 1157 (11th Cir. 2005) (concluding from legislative history that the TVPA is "intended to reach beyond the person who actually committed the acts, to those ordering, abetting, or assisting in the violation"); *Mamani v. Sánchez Bustamante*, 968 F.3d 1216, 1220 (11th Cir. 2020) (noting that plaintiffs can "recover based on theories of indirect liability, including aiding and abetting, conspiracy, agency, and command responsibility"); CJA Brief, *supra*, 4, 14. For the same reasons, the Court should continue to permit complicity liability claims under the ATS.[12]

The Acting Solicitor General relies on *Central Bank* to contend that applying aiding-and-abetting liability without Congress' explicit permission would infringe on separation-of-powers principles. U.S. Br. at 24-25

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[12] The ATS litigation is consistent with other circumstances in which international law is adjudicated within the United States. The United States is empowered to charge individuals for various forms of complicity liability under the Military Commission Act, which is declarative of existing international law. 10 U.S.C. § 950q (2009). The United States has specifically endorsed and advanced the complicity standards contained within *Prosecutor v. Taylor*. *See United States v. Khalid Shaikh Mohammad, et al.*, AE 120B, Governmental Supplemental Filing (Oct. 18, 2013).

(citing *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 182 (1994)). However, this case does not trigger the separation-of-powers concerns driving the decision in *Central Bank*. The Court in *Central Bank* held narrowly that aiding-and-abetting conduct was not actionable under Section 10(b) of the Securities Exchange Act of 1934, because the statute "speaks so specifically in terms of manipulation and deception" about what conduct was prohibited. *Central Bank*, 511 U.S. at 177 (quoting from *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 214 (1976)). The Court felt it should not effectively "amend the statute to create liability for acts that are not themselves manipulative or deceptive" in light of such precise congressional instruction. *Id*. at 177-78.

Unlike Section 10(b), the text of the ATS does not include specific conduct-regulating instructions from Congress that would be contradicted by the application of aiding-and-abetting liability. Instead, the ATS grants jurisdiction over tortious conduct violating the law of nations. Imposing secondary liability under the ATS would not expand its scope in defiance of precise congressional instruction.

B. Retaining aiding-and-abetting liability under the ATS does not trigger foreign policy concerns.

This case does not involve concerns expressed by the *Sosa* Court that lower courts would "consider suits … that would go so far as to claim a limit on the power of foreign governments over their own citizens, and to hold that a foreign government or its agent has transgressed those limits." *Sosa*, 542 U.S. at 727. The

way in which the United States regulates multinational corporations incorporated in the United States, headquartered in the United States, and supervising overseas affiliates from the United States will not jeopardize U.S. foreign relations or antagonize other nations. Preventing corporations from profiting from human rights violations occurring abroad has long stood as a core value of U.S. foreign policy. Brief of *Amici Curiae* Former Government Officials in Support of Respondents, *Nestlé USA, Inc. v. Doe I*; *Cargill Inc. v. Doe I* (Nos. 19-416; 19-453); *see* U.S. Department of Homeland Security, *Trump Administration Strongly Warns U.S. Businesses Against Contributing to China's Human Rights Abuses* (July 1, 2020). Other nations have no grounds to object to adjudication of complicity liability under the ATS because such doctrines are well-established under international law, not idiosyncratic to the United States. *Filártiga*, 630 F.2d at 887 (noting that the ATS "open[s] the federal courts for adjudication of the rights already recognized by international law").

Other *Amici* have demonstrated that the courts of U.S. allies are entertaining similar litigation against multinational corporate actors engaged in violations of international law abroad. Brief of Foreign Lawyers as *Amici Curiae* in Support of Respondents, *Nestlé USA, Inc. v. Doe I*; *Cargill Inc. v. Doe I* (Nos. 19-416; 19-453). No foreign state—including Côte d'Ivoire—has yet appeared in this case expressing concerns about potential diplomatic tensions, as they have in other ATS litigation. *See Khulumani*, 504 F.3d at 259 (discussing opposition expressed by South Africa). In an *amicus* brief in *Kiobel*, the Netherlands and the

United Kingdom took it as axiomatic that litigants could invoke the ATS for claims against U.S. corporations in connection with their foreign operations. Brief of the Governments of the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland as *Amici Curiae* in Support of Neither Party, 14-16, *Kiobel et al. v. Royal Dutch Petroleum Co., et al.*, 569 U.S. 108 (2013) (No. 10-1491).

A bar against aiding-and-abetting claims would dramatically curtail survivors' ability to seek civil redress and position the United States as a safe haven for human rights abusers. *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 133 (2013) (Breyer, J., concurring) (noting that ATS offers an appropriate tool for vindicating "distinct interest in preventing the United States from becoming a safe harbor ... for a torturer or other common enemy of mankind"); CJA Brief, *supra*, 16-24. This is all the more pressing as international law violations today often involve large-scale collective action depending on the assistance of multiple accessories. *Sosa*, 542 U.S. at 694 (noting that the ATS "was intended to have practical effect the moment it became law").

The Acting Solicitor General does not explain how holding U.S. corporations liable for aiding and abetting child slavery in Côte d'Ivoire would fundamentally alter the statutory and regulatory structure created by Congress.[13] Allowing a civil action under the ATS

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[13] As to Côte d'Ivoire, the annual trafficking-in-persons report highlights the need to protect victims of forced labor in the cocoa

against those who aid and abet human trafficking, child slavery, and the worst forms of child labor—particularly U.S. corporations—advances long-standing U.S. interests in upholding its international obligations to ensure accountability for perpetrators of such violations when there is a U.S. nexus.

CONCLUSION

For the foregoing reasons, *Amici* urge the Court to decline the Acting Solicitor General's invitation to categorically bar an established claim under the ATS.

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sector and specifically recommends that the country prioritize "vigorously investigat[ing], prosecut[ing], and convict[ing] traffickers … including complicit officials." U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 169-71 (June 2020).

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APPENDIX

APPENDIX

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