No. 24-856

IN THE

Supreme Court of the United States

CISCO SYSTEMS, INC., *et al.*,

Petitioners,

v.

DOE I, *et al.*,

Respondents.

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

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BRIEF OF FORMER U.S. AMBASSADORS-AT-LARGE FOR WAR CRIMES ISSUES/GLOBAL CRIMINAL JUSTICE AND PROSECUTORS OF INTERNATIONAL CRIMES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Treaties and International Instruments

Decisions of International Courts and Tribunals

Other Materials

INTEREST OF *AMICI CURIAE*[1]

Amici curiae are former United States Ambassadors-at-Large for War Crimes Issues (later renamed Ambassadors-at-Large for Global Criminal Justice), serving in multiple administrations, and/or Chief Prosecutors of international crimes with first-hand experience in the establishment and operation of international criminal courts and tribunals. All possess expertise in the modes of secondary liability under customary international law, including aiding and abetting liability. The prosecutor *amici* have litigated or overseen the prosecution of aiding and abetting cases in international and domestic courts.

Beth Van Schaack served as the United States Ambassador-at-Large for Global Criminal Justice from 2022 to 2025. During her tenure, she oversaw U.S. policy regarding the prevention of and accountability for mass atrocities, including in Belarus, the Central African Republic, Colombia, Liberia, Myanmar, South Sudan, Sudan, Syria, The Gambia, Uganda, and Ukraine; led U.S. engagement with international criminal courts and tribunals; and coordinated interagency efforts to support accountability mechanisms worldwide. Prior to her appointment,

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[1] Pursuant to Supreme Court Rule 37(6), *amici curiae* state that no counsel for any party authored this brief in whole or in part, and that no entity or person other than *amici curiae* or their counsel made any monetary contribution toward the preparation and submission of this brief.

Ambassador Van Schaack was the Leah Kaplan Visiting Professor of Human Rights at Stanford Law School, where she taught international criminal law and published extensively on secondary liability. Earlier in her career, Ambassador Van Schaack served in the Office of the Prosecutor of the International Criminal Tribunals for Rwanda and the former Yugoslavia in The Hague. She is currently a Visiting Fellow at the European University Institute.

Stephen J. Rapp served as the United States Ambassador-at-Large for War Crimes Issues from 2009 to 2015. During his tenure, he organized efforts that successfully brought major fugitives to justice at international tribunals and strengthened the capacity of civil society groups to provide evidence to support the prosecution of perpetrators of international crimes, including in Syria. Prior to his appointment, Ambassador Rapp served as the Chief Prosecutor of the Special Court for Sierra Leone, where he led the prosecution of former Liberian President Charles Taylor, and as Chief of Prosecution and Senior Trial Attorney at the International Criminal Tribunal for Rwanda. Since leaving the State Department, Ambassador Stephen Rapp has been a Genocide Prevention Fellow at the U.S. Holocaust Memorial Museum.

Clint Williamson served as the United States Ambassador-at-Large for War Crimes Issues from 2006 to 2009. During his tenure, he advanced U.S. support for the International Criminal Tribunal for

the former Yugoslavia and coordinated efforts to pursue accountability for atrocities in Darfur, Sudan. Prior to his appointment, Ambassador Williamson served as a Trial Attorney at the ICTY, where he prosecuted individuals for war crimes and crimes against humanity. Following his term as Ambassador, he served as the Chief Prosecutor of the European Union Special Investigative Task Force, the predecessor body of the Kosovo Specialist Court. Ambassador Williamson currently serves as the Lead Coordinator of the Atrocity Crimes Advisory Group for Ukraine, a joint initiative of the Governments of the United States, United Kingdom, and the European Union.

David J. Scheffer served as the first United States Ambassador-at-Large for War Crimes Issues, from 1997 to 2001. During his tenure, he led the U.S. delegation that negotiated the Rome Statute of the International Criminal Court and its supplemental documents. He also negotiated the statutes of, and coordinated U.S. support for, the establishment of the International Criminal Tribunals for the former Yugoslavia and Rwanda, the Special Court for Sierra Leone, and the Extraordinary Chambers in the Courts of Cambodia. Ambassador Scheffer was the Mayer Brown/Robert A. Helman Professor of Law at Northwestern University Pritzker School of Law and is currently a Senior Fellow at the Council on Foreign Relations and Professor of Practice at Arizona State University.

Brenda J. Hollis served as the Chief Prosecutor of the Special Court for Sierra Leone and its residual mechanism from 2010–2019, where she led the prosecution of former Liberian President Charles Taylor. Brenda Hollis also served as the International Co-Prosecutor of the Extraordinary Chambers in the Courts of Cambodia from 2019 until 2022, having been the Reserve International Co-Prosecutor from April 2015. Prior to these appointments, she served as a Senior Trial Attorney at the International Criminal Tribunal for the former Yugoslavia, where she prosecuted cases involving war crimes and crimes against humanity. She also served in the U.S. Air Force Judge Advocate General's Corps for 22 years, retiring with the rank of Colonel.

David M. Crane served as the Founding Chief Prosecutor of the United Nations Special Court for Sierra Leone, from 2002 to 2005. During his tenure, he directed the investigation and prosecution of those bearing the greatest responsibility for war crimes and crimes against humanity in the Sierra Leone conflict, including the landmark prosecution of former Liberian President Charles Taylor for aiding and abetting war crimes and crimes against humanity. Professor Crane is Distinguished Scholar in Residence at Syracuse University College of Law.

Amici's collective experience in negotiating, on behalf of the United States, the founding instruments of international courts and tribunals, and in

prosecuting perpetrators of such international crimes, provides them with unique insight into the origins, uniform acceptance, and critical role played by aiding and abetting liability in advancing the United States' longstanding and vital foreign policy interest in ensuring that those responsible for the worst of crimes are brought to justice.

SUMMARY OF ARGUMENT

This case concerns whether United States courts will continue to allow aiding and abetting as a form of liability under the Alien Tort Statute. It should do so. Aiding and abetting liability is among the most firmly established norms of international law. It has been recognized and applied without interruption since the Allied Powers, led by Supreme Court Justice Robert H. Jackson, prosecuted Nazi-era war criminals at Nuremberg. Reflecting the importance of this mode of liability to advancing its foreign policy interests, the United States supported its codification in international instruments. Indeed, as a form of accessory liability, aiding and abetting is found in the domestic laws of virtually every nation, including the United States.

Notwithstanding its pedigree, Petitioners would have this Court foreclose aiding and abetting liability under the ATS. Such a ruling would contradict the overwhelming weight of international law; disregard decades of consistent federal appellate precedent; and undermine the longstanding foreign policy

interests of the United States, interests that have been promoted across administrations of both political parties.

Petitioners do not challenge the fact that aiding and abetting liability is a "specific, universal, and obligatory" norm of international law. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004); *see* Pet. Br. at 27–38. Nor could they credibly do so. The record of international law and practice on this point is overwhelming. As such, *amici* address the second step of *Sosa*, which requires determining "whether allowing [a] case to proceed under the ATS is a proper exercise of judicial discretion, or instead whether caution requires the political branches to grant specific authority before [] liability can be imposed," *Jesner v. Arab Bank, PLC*, 584 U.S. 241, 258 (2018) (citing *Sosa*, 542 U.S. at 732).

It is *amici*'s professional judgment, based on their expertise and engagement on behalf of the United States in matters of international criminal justice, that recognizing aiding and abetting as a form of liability is vital for promoting the country's foreign policy interests. Indeed, for decades, U.S. foreign policy as undertaken by the political branches has been marked by steadfast support for the prosecution of perpetrators for aiding and abetting international crimes. U.S. foreign policy concerns therefore present no reason for the Court to decline to exercise its discretion to recognize such liability under the ATS.

INTRODUCTION

Whether a claim maybe be asserted under the ATS turns on a two-step analysis. *See Sosa*, 542 U.S. at 732; *Jesner*, 584 U.S. at 258. The first step requires that the alleged violation be of an international norm that is "specific, universal, and obligatory." *Sosa*, 542 U.S. at 732. The second requires determining "whether allowing [a] case to proceed under the ATS is a proper exercise of judicial discretion, or instead whether caution requires the political branches to grant specific authority before [] liability can be imposed." *Jesner*, 584 U.S. at 258 (citing *Sosa*, 542 U.S. at 732).

The Ninth Circuit correctly held that "aiding and abetting liability is a norm of customary international law with sufficient definition and universality to establish liability under the ATS." *Doe I v. Cisco Sys., Inc.*, 73 F.4th 700, 717 (9th Cir. 2023). Every circuit to consider the issue reached this same conclusion. *See Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 270–77 (2d Cir. 2007) (Katzmann, J., concurring); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 258 (2d Cir. 2009); *Aziz v. Alcolac, Inc.*, 658 F.3d 388, 396–401 (4th Cir. 2011); *Cabello v. Fernández-Larios*, 402 F.3d 1148, 1157–58 (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).

The reasons for this consensus are plain. Aiding and abetting liability has been recognized in international law since at least the end of World War II. In 1945, the Allied Powers concluded the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, commonly known as the London Charter, which established the International Military Tribunal at Nuremberg. Article 6 of the Charter defined the Tribunal's jurisdiction over crimes against peace, war crimes, and crimes against humanity. It expressly provided for the criminal liability of "instigators and accomplices" who participated in the formulation or execution of a common plan or conspiracy to commit those crimes. *See* 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. The same is true in regard to the tribunal established to prosecute international crimes committed in the Pacific. *See* Charter of the International Military Tribunal for the Far East art. 5, Jan. 19, 1946, T.I.A.S. No. 1589, 4 Bevans 20. Thus, the founding instruments of modern international criminal law recognized secondary liability as indispensable for ensuring accountability.

Following the conclusion of the International Military Tribunal proceedings, the Allied Powers authorized each occupying power to prosecute individuals for international crimes within their respective zones of occupation. *See* Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes

Against Peace and Against Humanity, Dec. 20, 1945, 3 Official Gazette Control Council for Germany 50-55 (1946). This authority extended to prosecuting those who were "an accessory to" or "ordered or abetted" the commission of crimes against peace, war crimes, and crimes against humanity. *Id*. at art. II(2)(b).

Acting pursuant to such authority, the United States conducted 12 trials at Nuremberg before U.S. Military Tribunals. Several focused specifically on the role of private corporate actors and their executives in facilitating Nazi atrocity crimes. For instance, the United States prosecuted 24 executives of I.G. Farben, which had manufactured the gas known as Zyklon B, used in the gas chambers of Nazi concentration camps, for aiding and abetting war crimes and crimes against humanity. *See United States v. Carl Krauch, et al.,* VII–VIII Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No. 10, at 14 (1948).

Another U.S. Military Tribunal convicted the German industrialist Friedrich Flick for aiding and abetting war crimes and crimes against humanity based on his having provided funding to the Schutzstaffel ("SS") paramilitary organization. The Military Tribunal 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.*

Friedrich Flick et al., VI Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No. 10, at 1187, 1217 (1947).

From its role prosecuting aiders and abettors of Nazi war crimes to its contemporary efforts to establish, resource, support, and staff modern international criminal tribunals, the political branches of the United States have consistently promoted aiding and abetting liability as an essential means for holding perpetrators of international crimes to account. There is thus no prudential reason whatsoever for this Court to decline to accept that form of liability under the ATS. Indeed, to hold otherwise would be to act at cross-purposes to a vital foreign policy interest that the United States has long sought to promote.

ARGUMENT

Under *Sosa*, courts must determine "whether allowing [a] case to proceed under the ATS is a proper exercise of judicial discretion, or whether caution requires the political branches to grant specific authority before [] liability can be imposed." *Jesner*, 584 U.S. at 258 (citing *Sosa*, 542 U.S. at 732).

No such caution is warranted here. Allowing cases under the ATS based on aiding and abetting liability is a proper exercise of judicial discretion. Indeed, for decades the political branches have uniformly promoted this form of liability. Such support is reflected in, among other things, the United States'

central role in establishing international tribunals with jurisdiction to prosecute perpetrators for aiding and abetting international crimes, and its applauding of convictions under that liability mode (**Section A**). Further, the political branches' support for aiding and abetting liability on the international level is consistent with the fact that modes of secondary liability—both criminal and civil—is a cornerstone of the U.S. legal system, as codified by Congress in other statutes, and commonplace in legal systems around the world (**Section B**).

A. RECOGNIZING AIDING AND ABETTING LIABILITY ADVANCES U.S. FOREIGN POLICY INTERESTS IN ENSURING ACCOUNTABILITY FOR VIOLATIONS OF INTRNATIONAL LAW

The U.S. effort to fight impunity for violations of international norms that began at Nuremberg continues today, with its support for the establishment of modern international and hybrid tribunals to achieve accountability for war crimes and crimes against humanity, including in the former Yugoslavia, Rwanda, Sierra Leone, Cambodia, Lebanon, Kosovo, and before the International Criminal Court—all efforts with which *amici* were intimately involved.

In each instance, the United States championed the establishment of the tribunal and supported the inclusion of aiding and abetting liability in its founding statute. This support reflects the U.S.'s recognition that aiding and abetting liability is

essential to preventing impunity for violations of international norms. Denying a safe haven to aiders and abettors of international tortious acts is consonant with U.S. foreign policy interests and merits the exercise of judicial discretion to continue to recognize aiding and abetting liability under the ATS.

1. The International Criminal Tribunal for the Former Yugoslavia

The armed conflicts accompanying the dissolution of the former Yugoslavia beginning in 1991 were marked by atrocities, including ethnic cleansing, mass killings, systematic rape employed as a weapon of war, torture, and other inhumane treatment, and the forcible expulsion of hundreds of thousands of civilians from their homes. At the end of 1992, a global political consensus coalesced around the need for an international forum to prosecute individuals responsible for these atrocities, including those who aided and abetted them. *See* Michael J. Matheson [2] and David Scheffer, *The Creation of the Tribunals*, 110 AM. J. INT'L L. 173, 174–75 (2016) ("Matheson & Scheffer").

The U.S. played a leading role in the establishment of the International Criminal Tribunal for the former Yugoslavia ("ICTY"). *Amicus* Ambassador David Scheffer, at the time Senior Adviser and Counsel to the U.S. Permanent Representative to the United

[2] Mr. Matheson served as the Acting Legal Adviser of the State Department.

Nations and who represented the U.S. Mission to the United Nations on the Deputies Committee of the National Security Council, was deeply engaged in discussions with the relevant foreign and U.N. officials and in drafting the preparatory documents leading to the ICTY's constitutive document.

On February 22, 1993, the U.N. Security Council, of which the United States is a Permanent Member, unanimously decided that "an international tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991." S.C. Res. 808, ¶ 1 (Feb. 22, 1993). To that end, the Security Council requested that the U.N. Secretary-General prepare and submit a draft report, which would include proposals for such a tribunal. *Id*. ¶ 2.

On April 5, 1993, the United States sent a letter reflecting its views to the U.N. Secretary-General for consideration in the preparation of this report. Permanent Rep. of the U.S. to the U.N., Letter dated 5 Apr. 1993 from the Permanent Rep. of the United States of America to the U.N. addressed to the Secretary-General, U.N. Doc. S/25575 (Apr. 12, 1993). Recognizing that aiding and abetting liability was a critical means for ensuring accountability, the United States' proposal included the following: "Those who […] were accomplices to any of the violations [herein] are

individually criminally responsible for such violations." *Id.*, art. 11(d); *see also id.*, art. 11(b).[3]

The U.N. Secretary-General included the United States' proposed text in the report and draft statute that was circulated to the U.N. Security Council. U.N. Secretary-General, *Report of the U.N. Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, U.N. Doc. S/25704 (May 3, 1993). Article 7(1) of the draft provided: "A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime." *Id.* at 15.

The United States supported the adoption of the draft statute verbatim. With that support, on May 25, 1993, the U.N. Security Council approved the creation of the ICTY. Matheson & Scheffer, *supra*, at 176 (citing S.C. Res. 827, Annex (May 25, 1993)). In view of the consensus regarding aiding and abetting liability, the U.N. Security Council directed the ICTY to prosecute anyone "who planned, instigated, ordered,

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[3] *Id.*, art. 11(b) ("[A]n accused person is also individually responsible if he or she had actual knowledge, or had reason to know, through reports to the accused person or through other means, that troops or other persons subject to his or her control were about to commit or had committed such violations, and the accused person failed to take necessary and reasonable steps to prevent such violations or to punish those committing such violations.").

committed, or otherwise aided and abetted" war crimes and crimes against humanity. Statute of the International Criminal Tribunal for the Former Yugoslavia art. 7(1), S.C. Res. 827, Annex (May 25, 1993).

Indeed, the United States considered that aiding and abetting liability to be essential for achieving the foreign policy objective of ensuring accountability and an integral feature of the tribunal's jurisdiction. At the session adopting the ICTY's statute, then-U.S. Permanent Representative to the United Nations Madeleine Albright decried the "heinous crimes" committed in Yugoslavia and underscored that accessory liability under the statute should be applied to any superior "whether political or military." Provisional Verbatim Record of the 3217th mtg., U.N. Doc. S/PV.3217 (May 25, 1993).

The importance of aiding and abetting liability was demonstrated in the prosecution of General Radislav Krstić for his role in the Srebrenica massacre, one of the gravest atrocities in European history since World War II. *Amicus* Ambassador David Scheffer hailed the prosecution as "historic" and explained that "[t]he United States ha[d] worked hard to assist the Prosecutor in preparing this case." David J. Scheffer, Ambassador-at-Large for War Crimes, Briefing on "War Crimes Rewards Program" (Mar. 2, 2000), https://1997-2001.state.gov/policy_remarks/2000/000302_scheffer_rewards.html. While the ICTY initially convicted General Krstić for

genocide, the ICTY's Appeals Chamber set aside that conviction and instead entered a conviction for aiding and abetting genocide. Prosecutor v. Krstić, Case No. IT-98-33-A, Judgment, ¶¶ 134, 137, 143 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 19, 2004). Without this mode of liability, General Krstić would have escaped accountability.

2. The International Criminal Tribunal for Rwanda

Between April and July 1994, Rwanda endured one of the most horrific genocides in modern history. Over approximately 100 days, an estimated 800,000 people—primarily members of the Tutsi ethnic minority—were systematically massacred. In the face of these atrocities, the United States undertook efforts to persuade the U.N. Security Council to take action to ensure the prosecution of the perpetrators. Matheson & Scheffer, *supra*, at 176–77.

To achieve this, the United States "engaged in bilateral discussions and consultations" with members of the U.N. Security Council. *Id*. at 177. Together with non-Permanent Member New Zealand, it submitted a proposal to the Council for the establishment of the International Criminal Tribunal for Rwanda ("ICTR"). *Id*. The proposal contained draft text that the Security Council adopted *verbatim* as the ICTR's statute in November 1994. Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, Annex (Nov. 8, 1994). Like the ICTY before it, the

ICTR's statute codified aiding and abetting liability. *Id.,* art. 6(1); *see also* Matheson & Scheffer, *supra*, at 179 (noting that the ICTR statute enshrined aiding and abetting liability in the exact same terms as the ICTY's statute).

Prosecutions of the Rwandan genocide again demonstrated the importance of aiding and abetting liability. In *Prosecutor v. Renzaho*, for example, the ICTR convicted Tharcisse Renzaho, one of the genocide's masterminds, for aiding and abetting the killing of Tutsi civilians by ordering roadblocks, sanctioning conduct at them, and providing material support through the distribution of weapons. Prosecutor v. Renzaho, Case No. ICTR-97-31-T, Judgment and Sentence, ¶¶ 766, 770, 779, 788–89 (Int'l Crim. Trib. for Rwanda Jul. 14, 2009).

The United States fully supported Mr. Renzaho's prosecution. It "welcome[d]" his arrest and transfer to the custody of the ICTR. U.S. Dep't of State, Press Statement: Arrest of Rwanda Genocide Suspect Tharcisse Renzaho (Sep. 30, 2002), https://2001-2009.state.gov/r/pa/ei/pix/b/wc/15882.htm. Indeed, the State Department's "Rewards for Justice War Crimes program" was instrumental to his apprehension. U.S. Dep't of State, Briefing on Rewards for Justice Search for Rwandan War Criminals (May 12, 2008), https://2001-2009.state.gov/p/af/rls/rm/2008/104667.htm.

3. The Special Court for Sierra Leone

From 1991 to 2002, a brutal civil war in Sierra Leone claimed an estimated 50,000 to 75,000 lives, displaced over two million people, and left thousands of mutilated victims.

To achieve accountability, the Special Court for Sierra Leone ("SCLC") was established by an agreement between the United Nations and Sierra Leone, within a framework negotiated through the U.N. Security Council. *See* Matheson & Scheffer, *supra*, at 181; S.C Res. 1315 (Aug. 14, 2000). The United States played a central role in this process. On behalf of the U.S., *Amicus* Ambassador David Scheffer negotiated the Special Court's Statute and coordinated U.S. support for it. *Amici* David M. Crane, Brenda J. Hollis, and Ambassador Stephen J. Rapp served as its Chief Prosecutors.

Aiding and abetting liability was an important feature of the SCSL. Article 6(1) of its Statute reproduced verbatim the formulations codifying that form of liability which the United States had already supported in the Statutes of the ICTY and the ICTR, as well as those of the Extraordinary Chambers in the Courts of Cambodia and International Criminal Court. Statute of the Special Court for Sierra Leone art. 6(1), Jan. 16, 2002, 2178 U.N.T.S. 138. The United States thus endorsed, for a fifth time in the post-Cold War era, the incorporation of aiding and abetting liability as a foundational element of an international criminal

tribunal's jurisdiction. Matheson & Scheffe, *supra*, at 178–79.

Aiding and abetting was crucial to securing accountability for the perpetrators of international crimes in Sierra Leone. In *Prosecutor v. Taylor*, the Special Court convicted former Liberian President Charles Taylor of aiding and abetting war crimes and crimes against humanity for having provided arms, ammunition, supplies, and advice to rebel groups. *Prosecutor v. Taylor*, Case No. SCSL-03-01-A, Appeals Judgment, ¶ 483 (Spec. Ct. for Sierra Leone Sept. 26, 2013). President Taylor was not a direct perpetrator of any of the charged crimes. His liability thus rested on providing assistance to the perpetrators. This took the form of, *inter alia*, communications technology—such as a communications system, satellite phones, a long-range radio, and radio operators—that others used for the operations during which crimes were committed. *Id.* ¶¶ 323, 326, 332, 342. Notably, these acts closely resemble those of which Petitioners are accused in this case. Taylor was convicted on all eleven counts and sentenced to fifty years' imprisonment. *Id.* ¶¶ 13–14.

Without aiding and abetting liability,[4] President Taylor would have escaped accountability even

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[4] Further illustrating the centrality of aiding and abetting liability in promoting U.S. foreign policy goals, the United States has relied on the example of aiding and abetting in *Taylor* to pursue its own prosecution of Khalid Shaik Mohammad, a key al-Qaeda

though, as *Amicus* Brenda J. Hollis contemporaneously put it, "Mr Taylor was one of those who bore greatest responsibility for the crimes against them." *Taylor Sierra Leone war crimes trial verdict welcomed*, BBC (Apr. 27, 2012), https://www.bbc.com/news/world-africa-17864387.

Indeed, the United States "welcome[d] the issuance of the judgment." U.S. Dep't of State, Press Statement: The Verdict in the Charles Taylor Trial at the Special Court for Sierra Leone (Apr. 26, 2012), https://web.archive.org/web/20220126112757/https://2009-2017.state.gov/r/pa/prs/ps/2012/04/188534.htm. It declared the conviction to be "an important step toward delivering justice and accountability for victims, restoring peace and stability in the country and the region, and completing the Special Court for Sierra Leone's mandate to prosecute those persons who bear the greatest responsibility for the atrocities committed in Sierra Leone." *Id*.

4. The Extraordinary Chambers in the Courts of Cambodia

Between April 1975 and January 1979, the Khmer Rouge regime killed an estimated two million

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figure, in the Military Commissions at Guantánamo Bay. See *United States v. Khalid Shaikh Mohammad, et al.,* Case No. AE 120B, Governmental Supplemental Filing, at 3–4 (Oct. 18, 2013), https://www.justsecurity.org/wp-content/uploads/2015/12/KSM-AE120B-Govt-Supp-Brief-10182013.pdf.

Cambodians—roughly a quarter of the country's population—through execution, forced labor, starvation, and disease. In 1994, President Clinton signed the Cambodian Genocide Justice Act, which directed U.S. resources toward investigating and documenting Khmer Rouge crimes. Cambodian Genocide Justice Act, Pub. L. No. 103-236, tit. V, pt. D, §§ 571–574, 108 Stat. 486 (1994).

The Extraordinary Chambers in the Courts of Cambodia ("ECCC") was established pursuant to a June 6, 2003, agreement between the United Nations and the Royal Government of Cambodia, to prosecute those crimes. *Amicus* Ambassador David Scheffer negotiated the ECCC's statute—the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia, as amended on October 27, 2004— and coordinated U.S. support for, as he had done for the ICTY, ICTR, and SCSL.

The ECCC's statute provides for the individual criminal responsibility of any person who "aided and abetted" the commission of crimes within its jurisdiction. Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia NS/RKM/1004/006 art. 29 (2004). The provision was deliberately included, tracking the aiding and abetting language that the U.S. had previously endorsed in the Statutes of the ICTY, ICTR, and SCSL. Its inclusion thus reflects the continuation of the United States' policy of working to ensure accountability for

all who bear responsibility international crimes, both direct perpetrators and their aiders and abettors.

5. The Special Tribunal for Lebanon

On February 14, 2005, a massive bomb detonated in central Beirut, killing former Prime Minister Rafiq Hariri along with 21 others and wounding a further 226 individuals. The United States championed the establishment of a tribunal to try those responsible. In particular, it sponsored U.N. Security Council Resolution 1757, which brought the Special Tribunal for Lebanon ("STL") into existence under Chapter VII of the United Nations Charter. S.C. Res. 1757 (May 30, 2007). *See also* Rep. of the S.C., U.N. Doc. S/PV.5685 (May 30, 2007).

The STL is a hybrid tribunal applying Lebanese domestic criminal law—specifically the Lebanese Penal Code. Its statute extends individual criminal responsibility to those who participate in crimes as accomplices. Statute of the Special Tribunal for Lebanon art. 3(1)(a), annexed to S.C. Res. 1757 (May 30, 2007). This is given effect through application of Article 219 of the Lebanese Criminal Code, which covers, among other things, any person who "aids or abets the perpetrator in acts that are preparatory to the offence." Lebanese Penal Code art. 219(4). In so doing, the STL's legal framework reflects the foundational principle that those who assist in the violation of law bear responsibility alongside direct perpetrators.

Prosecutor v. Ayyash et al. demonstrates that accomplice liability was indispensable to achieving accountability for the Hariri assassination. Three of the four accused did not face charges as direct perpetrators; instead, the Prosecution charged them as accomplices under Article 219 of the Lebanese Penal Code based on their alleged roles in a false-claim-of-responsibility operation that had been designed to shield the true perpetrators from justice. Two of the three accused accomplices—Hassan Habib Merhi and Hussein Hassan Oneissi—were convicted for, among other things, acting and as accomplices to committing a terrorist act, to the intentional homicide of Hariri and 21 others, and to the attempted intentional homicide of 226 persons. Prosecutor v. Ayyash *et al.*, Case No. STL-11-01, Appeals Judgment, ¶ 1 (Special Trib. for Lebanon Mar. 10, 2020). Both were sentenced to life imprisonment. Prosecutor v. Ayyash *et al.*, Case No. STL-11-01, Appeals Sentencing Judgment (Special Trib. for Lebanon June 16, 2022). Without accomplice liability, the architects of a deliberate disinformation campaign to shield the killers from justice would have escaped accountability.

6. The Kosovo Specialist Court

As a result of a campaign of persecution and violence launched by Serbia against the ethnic Albanian population of the province of Kosovo, the United States and its NATO allies intervened militarily in early 1999 to halt the attacks on the Kosovo Albanians.

During the latter part of this conflict and in its aftermath, crimes were committed by all sides, including retaliatory violence by ethnic Albanian militias against Serbs and other non-Albanian communities. The crimes that occurred during and in the aftermath of the Kosovo conflict fell outside the temporal jurisdiction of the ICTY, and attempts to investigate and prosecute them through successive United Nations and European Union rule of law missions and the domestic justice system of Kosovo proved unsuccessful. In 2010, an investigation commissioned by the Council of Europe concluded that the perpetrators of these crimes had largely escaped with impunity and called for a renewed international effort to pursue accountability. This ultimately led to the establishment of an internationally administered tribunal, based in The Netherlands but operating under Kosovo law—the Kosovo Specialist Chambers ("KSC").

The KSC was created with political backing and funding from the United States and the European Union. *Amicus* Ambassador Clint Williamson was seconded by the U.S. Department of State to serve as Chief Prosecutor for what became the Kosovo Specialist Prosecutors Office. *Amicus* Ambassador Clint Williamson's three successors as Chief Prosecutor, including the currently serving Prosecutor, have also been seconded by the U.S. Government. U.S. support, including both funding and these secondments, extended across the Obama, first Trump and Biden

Administrations, and has continued in the second Trump Administration.

Aiding and abetting liability was included in the Statute of the KSC, which was adopted by the Assembly of the Republic of Kosovo, with the strong backing of the United States. Article 16 of the Statute reproduced verbatim the formulations the United States had supported in the Statutes of the ICTY, ICTR and SCSL to codify aiding and abetting liability. Article 16 provides: "For crimes in Articles 13-14: a person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of such a crime shall be individually responsible for the crime."

7. The International Criminal Court

The United States played a lead role in negotiating the Rome Statute, which created the International Criminal Court ("ICC"). It too enshrines aiding and abetting as a mode of liability. *See* Rome Statute of the International Criminal Court art. 25(3)(c), July 17, 1998, 2187 U.N.T.S. 90 (providing for liability of one who "aids, abets or otherwise assists in [the] commission [of a crime] or its attempted commission, including providing the means for its commission."). *Id*.

The inclusion of aiding and abetting liability in the statute was never in doubt. The first draft, prepared in spring 1997, provided: "[With [intent] [knowledge] to facilitate the commission of such a

crime,] aids, abets or otherwise assists." U.N. Preparatory Comm. on the Establishment of an Int'l Crim. Ct., Feb. 11-21, 1997, U.N. Doc. (A/AC.249/1997/L.5) (Mar. 12, 1997), at 21 (brackets in original). The bracketed text reflects differing proposals for phrasing the relevant provision. The words "aids, abets or otherwise assists" were not in brackets, confirming its inclusion was not subject to further discussion.

Amicus Ambassador David Scheffer—who from 1997 to 2001 headed the U.S. delegation to the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an ICC, after serving as the delegation's deputy head from 1995 to 1997—was deeply engaged in the Rome Statute's drafting and negotiation. During the years leading to its adoption, the United States consistently supported the inclusion of aiding and abetting liability because it considered that to be a necessary means to achieving the foreign policy goal of ensuring accountability for grave violations of international norms. No participant in the negotiations disputed that aiding and abetting a violation of international law should give rise to liability.

The United States' position in this regard is illustrated by its support for the ICC's work, notwithstanding its decision not to ratify the Rome Statute. Among other things, the United States sponsored U.N. Security Council Resolution 1970, which referred war crimes allegedly committed in the course of the Libyan Civil War to the ICC. Upon passage of that

resolution, the then-U.S. Permanent Representative to the U.N., Ambassador Susan E. Rice, stated that the United States was "pleased to have supported this entire resolution and all of its measures including the referral to the ICC (International Criminal Court). We are happy to have the opportunity to co-sponsor this, and we think it is a very powerful message to the leadership of Libya that this heinous killing must stop and that individuals will be held personally accountable." Susan E. Rice, U.S. Permanent Representative to the U.N., Remarks in an Explanation of Vote on Resolution 1970 on Libya Sanctions (Feb. 26, 2011), https://2009-2017.state.gov/p/io/rm/2011/157390.htm.

Acting pursuant to that referral, the ICC Prosecutor issued arrest warrants for individuals associated with the al-Kaniyat militia, which is allegedly responsible for murder, torture, cruel treatment, and sexual violence in the city of Tarhuna between 2019 and 2020. In October 2024, the ICC unsealed six such warrants, all which included charges for crimes under the aiding and abetting theory of liability.[5]

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[5] Int'l Crim. Ct., Libya situation: ICC Pre-Trial Chamber I unseals six arrest warrants (Oct. 4, 2024), https://www.icc-cpi.int/news/libya-situation-icc-pre-trial-chamber-i-unseals-six-arrest-warrants; Warrant of Arrest, *Prosecutor v. Al-Kani*, Case No. ICC-01/11-93-US-Exp (Int'l Crim. Ct. Pre-Trial Chamber I Apr. 6, 2023); Warrant of Arrest, *Prosecutor v. Douma*, Case No. ICC-01/11-94-US-Exp (Int'l Crim. Ct. Pre-Trial Chamber I Apr. 6, 2023); Warrant of Arrest, *Prosecutor v. Al Lahsa*, Case No.

The United States "welcom[ed]" the unsealing of those warrants, which it commended as "represent[ing] significant strides in pursuing accountability for the most atrocious crimes committed in Libya and sending a message to victims that they are not forgotten." Mark Simonoff, U.S. Mission to the United Nations, Remarks at a U.N. Security Council Briefing by the ICC Prosecutor on the Situation in Libya, (Nov. 19, 2024), https://usun.usmission.gov/remarks-at-a-un-security-council-briefing-by-the-icc-prosecutor-on-the-situation-in-libya-2/. This statement reflects the same consistent U.S. policy judgment that undergirds its support for aiding and abetting liability across every international tribunal it has helped to establish.

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In short, the history of the United States' engagement with international courts and tribunals demonstrates its long-held view that aiding and

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ICC-01/11-95-US-Exp (Int'l Crim. Ct. Pre-Trial Chamber I Apr. 6, 2023); Warrant of Arrest, *Prosecutor v. Salheen*, Case No. ICC-01/11-96-US-Exp (Int'l Crim. Ct. Pre-Trial Chamber I Apr. 6, 2023); Warrant of Arrest, *Prosecutor v. Al Shaqaqi*, Case No. ICC-01/11-119-US-Exp (Int'l Crim. Ct. Pre-Trial Chamber I Jul. 18, 2023); Warrant of Arrest, *Prosecutor v. Al Zinkal*, Case No. ICC-01/11-120-US-Exp (Int'l Crim. Ct. Pre-Trial Chamber I Jul. 18, 2023).

abetting liability is indispensable to the pursuit of accountability for the gravest violations of international law. Recognizing such liability under the ATS is entirely consistent with, and advances, the foreign policy interests of the United States.

B. RECOGNIZING AIDING AND ABETTING LIABILITY, A CORNERSTONE OF LEGAL SYSTEMS AROUND THE WORLD, IS CONSISTENT WITH THE TEXT AND PURPOSE OF THE ALIEN TORT STATUTE

The ATS authorizes federal courts to hear "any civil action" brought by an alien "for a tort only, committed in violation of the law of nations." 28 U.S.C. § 1350. This language imposes no limitation on the forms of liability that may be recognized; it requires only that the underlying conduct violate international law. The statute was enacted to overcome a "significant constraint" faced by the federal government: "its inability to 'cause infractions of treaties, or of the law of nations, to be punished.'" *Sosa*, 542 U.S. at 716 (quoting J. Madison, Journal of the Constitutional Convention 60 (E. Scott ed. 1893)). Aiding and abetting liability under the ATS is entirely consistent with this statutory text and purpose.

This Court's recent ATS decisions reflect an appropriate reluctance to create new causes of action without explicit congressional authorization—a concern distinct from applying established modes of liability to recognized violations. In *Kiobel v. Royal*

Dutch Petro. Co., the Court held that the presumption against extraterritoriality applies to ATS claims, restricting suits where "all the relevant conduct took place outside the United States." 569 U.S. 108, 124–25 (2012). In *Jesner*, the Court declined to extend ATS liability to foreign corporations, emphasizing that "the political branches, not the Judiciary, have the responsibility and institutional capacity to weigh foreign-policy concerns." 584 U.S., at 265. And in *Nestlé USA, Inc. v. Doe*, the Court reaffirmed *Kiobel*'s extraterritoriality bar, holding that allegations of "general corporate activity"—such as "making operational decisions" in the United States—were insufficient to displace the presumption. 593 U.S. 628, 632–34 (2021). Recognizing aiding and abetting liability in this case does not implicate the concerns that animated these decisions.

Aiding and abetting is not a separate tort or a distinct violation of international law that would expand the reach of the ATS. It is a mode of participation in the commission of an underlying violation—one inherent in the international law norms the ATS incorporates. *Amici* can attest to this from direct experience: when they negotiated the statutes of the ICTY, ICTR, SCSL, ECCC, STL, KSC, and the ICC, the inclusion of aiding and abetting liability was a foregone conclusion because the negotiators recognized it to be an established and uncontroversial facet of the world's major legal traditions. It was not an American imposition. The founding instruments of these tribunals

reflect, rather than create, the universal acceptance of secondary liability.

The concerns that animated *Kiobel*, *Jesner*, and *Nestlé* do not counsel against recognizing aiding and abetting liability. None held—or even suggested—that aiding and abetting is not a cognizable mode of liability under the ATS. *Nestlé* assumed it is. In *amici*'s view, based on their experience serving in the Executive Branch and engaging with the Judiciary and Congress on matters of international criminal justice, the lower courts properly exercised their discretion to recognize aiding and abetting liability. That exercise of discretion is consistent with the broad language and purpose of the ATS, advances its remedial objectives, and reflects the considered judgment of the political branches, which, when supporting the establishment of modern international criminal tribunals, drew upon legal systems that recognized aiding and abetting as a fundamental mode of accountability.

Aiding and abetting liability is not confined to the criminal context, as basic principles of tort law—a foundation upon which the international tribunals themselves were built—confirms. Section 876 of the Restatement (Second) of Torts provides that one "is subject to liability" for harm caused by another's tortious conduct if he "knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself." Restatement (Second) of Torts § 876(b) (Am.

Law Inst. 1979). The Restatement (Third) of Torts reaffirms this principle. Restatement (Third) of Torts: Liability for Economic Harm § 28 ((Am. Law Inst.) (2020).

Indeed, aiding and abetting is so deeply embedded in American civil practice that it is the subject of standard model jury instructions. *See, e.g.*, Judicial Council of Cal. Civ. Jury Instructions (CACI) No. 3610 (2024). The application of aiding and abetting principles to civil actions is thus neither novel nor disruptive—it is how American law operates.

Amici observe that Congress has extended this same logic to *amici*'s own work: the State Department's Rewards for Justice program, which several *amici* have administered or relied upon in their official capacities, explicitly authorizes rewards for information leading to the arrest of those who "aid and abet" a range of international and transnational crimes. 22 U.S.C. § 2708(b)(4).

The consistency between Congressional policy and the instruments establishing the international courts and tribunals described above is not coincidental; both rest on the same bedrock principle that those who knowingly facilitate grave wrongs must be held accountable. ATS aiding-and-abetting claims are thus hardly a "new form[] of liability," *Jesner*, 584 U.S. at 281.

The practice of foreign jurisdictions confirms that continuing to recognize this form of liability carries no risk of foreign-policy friction, a conclusion *amici* can affirm based on their decades of direct engagement as the United States' interlocutors. When *amici* negotiated the founding instruments of international tribunals, they worked alongside representatives of civil law and common law jurisdictions alike, all of whom were trained in legal traditions that recognized aiding and abetting as a fundamental mode of responsibility. The resulting tribunal statutes reflect this shared understanding.

In fact, courts around the world apply secondary liability to hold accountable those who knowingly assist in violations of international or domestic law. In France, the Cour de Cassation upheld the indictment of Lafarge S.A., a multinational cement company, for complicity in crimes against humanity arising from payments to armed groups in Syria, including the Islamic State. *See* Cour de cassation, Chambre criminelle, Arrêt du 7 septembre 2021, Pourvoi No. 19-87.367; *see also* Tassilo Hummel, Lafarge Can Be Charged with 'Complicity in Crimes Against Humanity,' French Court Says, REUTERS (Jan. 16, 2024), https://www.reuters.com/business/lafarge-can-be-charged-with-complicity-crimes-against-humanity-over-syria-plant-2024-01-16/. Similarly, in Sweden, prosecutors have indicted corporate executives for complicity in war crimes arising from their company's oil-extraction operations in Sudan, alleging that

corporate infrastructure facilitated the violent displacement of civilian populations.

As these cases illustrate, aiding and abetting liability, including for serious international law violations, is a feature of legal systems worldwide, not a uniquely American invention that might unsettle foreign relations. Recognizing such liability under the ATS places the United States in alignment with the international consensus that *amici* observed and helped to codify.

CONCLUSION

In sum, recognizing aiding and abetting liability under the ATS would not expand federal common law in a manner that counsels in favor of judicial caution. This critical mode of establishing liability reflects a faithful application of a foundational principle of international law. It is codified in international instruments the United States helped to draft, embedded in American tort law and applied by legal systems around the world. There is no prudential reason to decline to recognize aiding and abetting liability under the ATS.

Accordingly, *amici* urge the Court to affirm the decision of the Ninth Circuit.

Respectfully submitted,

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