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

BRIEF FOR INTERNATIONAL LAW SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are scholars of international law. They have an interest in the proper application of customary international law by domestic courts, including the customary international law on aiding and abetting.

E. Tendayi Achiume is Professor of Law at Stanford Law School and the former U.N. Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination,

[1] Pursuant to this Court's Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of the brief, and that no person other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Institutional affiliation listings are for identification purposes only and do not imply the institution's endorsement of the brief.

Xenophobia and Related Intolerance. In 2023, she was awarded a MacArthur Fellowship.

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SUMMARY OF ARGUMENT

In *Sosa* v. *Alvarez-Machain*, 542 U.S. 692 (2004), this Court recognized an implied cause of action under the Alien Tort Statute ("ATS"), 28 U.S.C. §1350, for claims "based on the present-day law of nations" if those claims "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms" with which the First Congress was familiar. 542 U.S. at 725. In *Jesner* v. *Arab Bank, PLC*, 584 U.S. 241 (2018), the plurality articulated a two-step test. First, a plaintiff must "demonstrate that the alleged violation is 'of a norm that is specific, universal, and obligatory.'" *Id.* at 257-258 (plurality) (quoting *Sosa*, 542 U.S. at 732). Second, a court must determine "whether allowing th[e] case to proceed under the ATS is a proper exercise of judicial discretion." *Id.* at 258. *Amici* focus on the first step and argue that the pro-

hibition on aiding and abetting violations of international law is itself a "specific, universal, and obligatory" norm under customary international law.

Neither Petitioners nor the United States as *amicus curiae* dispute that proposition. But two of the *amici* supporting Petitioners do. *Amicus* Washington Legal Foundation ("WLF") argues "there is no universal standard for civil aiding-and-abetting liability, much less one that is 'accepted by the civilized world' and defined with the specificity *Sosa* requires." WLF Br. 2 (quoting *Sosa*, 542 U.S. at 725). WLF further draws a distinction between international *criminal* liability for aiding and abetting and *civil* liability under the ATS. *Id.* at 6. The U.S. Chamber of Commerce and its co-*amici*, meanwhile, contend that "recognizing a cause of action under the ATS for aiding-and-abetting liability expands the ATS far beyond the party in violation of international law itself." Chamber Br. 6.

Those assertions are mistaken. The prohibition against aiding and abetting violations of international law is both generally accepted and specifically defined. WLF's distinction between civil and criminal liability misunderstands how international law works: Whereas international law establishes binding norms, each nation decides for itself whether and how to impose liability for violations of such norms. The U.S. did so in the ATS, choosing to impose civil liability for "tort[s] * * * in violation of the law of nations." 28 U.S.C. § 1350. And recognizing a cause of action for aiding and abetting does not expand liability beyond the party violating international law, because aiding and abetting *is itself* a violation of international law. In short, aiding and abetting human rights violations is a tort in violation of "the present-day law of nations * * * accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century para-

digms." *Sosa*, 542 U.S. at 725. It is therefore actionable under *Sosa*.

ARGUMENT

I. Under This Court's Precedents, Whether Aiding And Abetting Is Actionable Under The Alien Tort Statute Is Determined By Customary International Law

As codified today, the Alien Tort Statute provides: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. By referring to the "law of nations," the statutory text makes clear that the ATS's applicability depends on whether the tort alleged violates customary international law.

In *Sosa* v. *Alvarez-Machain*, 542 U.S. 692 (2004), this Court elaborated on the kinds of torts that are actionable under the ATS. The Court observed that the First Congress likely had three such torts in mind when it enacted the statute: violation of safe conducts, infringement of ambassadors' rights, and piracy. See *id.* at 720. These were "offenses against the law of nations addressed by the criminal law of England" that Blackstone discussed in his *Commentaries*. *Id.* at 715 (citing 4 W. Blackstone, *Commentaries on the Laws of England* 68 (1769)). *Sosa* recognized that ATS liability is not limited to these paradigm torts, however. Federal courts may hear claims "based on the present-day law of nations" if those claims "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms [this Court has] recognized." *Id.* at 725. In *Jesner* v. *Arab Bank, PLC*, 584 U.S. 241 (2018), the Court reaffirmed *Sosa*'s holding that "courts may recognize a common-law cause of action for claims

based on the present-day law of nations, in addition to the 'historical paradigms familiar when § 1350 was enacted.'" 584 U.S. at 256 (quoting *Sosa*, 542 U.S. at 732)).

Consistent with the plain language of the ATS, *Sosa* makes clear that whether a claim is actionable under the statute depends on customary international law. *Sosa* noted that, at the time of the statute's enactment, the ATS "enabled federal courts to hear claims in a very limited category *defined by the law of nations* and recognized at common law." 542 U.S. at 712 (emphasis added). It repeatedly described the claims actionable under the ATS as violations of "international norm[s]." See, *e.g.*, *id.* at 730 ("international norm intended to protect individuals"); *ibid.* ("enforceable international norms"); *id.* at 732 ("violations of any international law norm"); see also *id.* at 733 (referring to "the current state of international law"). And when addressing the ATS's applicability to private actors, *Sosa* looked to "whether *international law* extends the scope of liability for a violation of a given norm to the perpetrator being sued." *Id.* at 732 n.20 (emphasis added). As the cases *Sosa* cited in footnote 20 make clear, *Sosa* examined that question because international law requires state action for some human rights violations (*e.g.*, torture) but not for others (*e.g.*, genocide). See *ibid.*

The point is that whether a claim is actionable under *Sosa* turns on the content of customary international law, not U.S. domestic law. The norm must be both "accepted by the civilized world" and "defined with a specificity comparable" to the international law torts familiar to the First Congress. *Sosa*, 542 U.S. at 725.

II. Customary International Law's Prohibition Against Aiding And Abetting Human Rights Violations Meets The *Sosa* Standard

A review of customary international law demonstrates that the prohibition against aiding and abetting international law violations meets the *Sosa* standard. It is both "accepted by the civilized world" and "defined with a specificity comparable" to the paradigmatic torts this Court has recognized. *Sosa*, 542 U.S. at 725. The prohibition on aiding and abetting is "a norm that is specific, universal, and obligatory." *Jesner*, 584 U.S. at 258 (plurality) (quoting *Sosa*, 542 U.S. at 732).[2]

A. The Prohibition Against Aiding and Abetting Is Generally Accepted

In customary international law, "the development [of aiding-and-abetting liability] began in earnest with the work of the International Military Tribunals after the Second World War." Oona A. Hathaway, Alexandra Francis, Aaron Haviland, Srinath Reddy Kethireddy & Alyssa Yamamoto, *Aiding and Abetting in International Criminal Law*, 104 Cornell L. Rev. 1593, 1601 (2019). After the war, the victorious nations promulgated the London Charter establishing the International Military Tribunal at Nuremberg to try the major war criminals of the European Axis. See Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis and Charter of the International Military Tribunal ("London Charter"), Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279.

The drafters of the London Charter found it insufficient simply to punish those who directly perpetrated the hei-

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[2] Aiding-and-abetting liability was well established when the ATS was enacted. See Resp. Br. 13-15. *Amici* focus on "the present-day law of nations." *Sosa*, 542 U.S. at 725.

nous violations of international law at issue. Instead, they extended liability for crimes against peace, war crimes, and crimes against humanity to "[l]eaders, organizers, instigators *and accomplices* participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes." London Charter art. 6 (emphasis added). Control Council Law No. 10, under which the Allied powers conducted additional trials, similarly provided that a person would be deemed to have committed a crime under the London Charter if he "was an *accessory* to the commission of any such crime or ordered or *abetted* the same." Control Council Law No. 10 art. II(2)(b), 1 Enactments and Approved Papers of the Control Council and Coordinating Committee: Allied Control Authority, Germany–1945, at 309, 311 (1946) (emphasis added). Several defendants were convicted at Nuremberg of aiding and abetting under these standards. See, *e.g.*, *The Zyklon B Case (Trial of Bruno Tesch and Two Others)*, 1 Law Reports of Trials of War Criminals 93 (1947); *The Einsatzgruppen Case* (*Trial of Otto Ohlendorf and Others*), 4 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, at 411 (1952); *United States* v. *Flick*, 6 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, at 1187 (1952).

Those prosecutions were neither making new law nor meting out *ex post facto* punishments. Consistent with the international law principle of legality that prohibits creating new crimes after the fact (*nullum crimen sine lege*), the London Charter, Control Council Law No. 10, and the prosecutions conducted under them reflect the international community's understanding that customary international law prohibited aiding and abetting international law violations when the charged conduct occurred. The Inter-

national Military Tribunal said as much: "The [London] Charter is not an arbitrary exercise of power on the part of the victorious Nations, but * * * the expression of international law existing at the time of its creation." Judgment of the International Military Tribunal, 1 Trial of the Major War Criminals Before the International Military Tribunal 171, 218 (1947). And in 1950, the International Law Commission summarized the customary international law applied at Nuremberg as including the principle that "[c]omplicity in the commission of a crime against peace, a war crime, or a crime against humanity * * * is a crime under international law." Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, Principle VII, Report of the International Law Commission on the Work of Its Second Session, U.N. Doc. A/1316 (1950).

International agreements and international legal tribunals since Nuremberg have consistently reaffirmed that aiding and abetting a violation of international law is itself a violation of customary international law.

In 1993, the U.N. Security Council established the International Criminal Tribunal for the former Yugoslavia ("ICTY") to prosecute violations of customary international law. See Security Council Resolution 827 (May 25, 1993). Defining the crimes over which the Tribunal has jurisdiction, the ICTY Statute provides: "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." Statute of the International Criminal Tribunal for the Former Yugoslavia art. 7(1), in Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808 ("ICTY Report"), U.N. Doc. S/25704 (May 3, 1993) (em-

phasis added); see also Updated Statute of the International Criminal Tribunal for the Former Yugoslavia art. 7(1) (July 7, 2009) (same).

That provision reflected customary international law at the time. Like the Nuremberg Tribunals, the ICTY was specifically required to "apply rules of international humanitarian law which are beyond any doubt part of customary law." ICTY Report ¶34; see also *Prosecutor* v. *Blaškić*, IT-95-14-A, Appeals Judgment, ¶141 (ICTY 2004) ("[T]he Tribunal may enter convictions only where it is satisfied that the offence is proscribed under customary international law at the time of its commission."). The ICTY convicted many defendants of aiding and abetting. See, *e.g.*, *Prosecutor* v. *Popović*, IT-05-88-A, Appeals Judgment (ICTY 2015); *Prosecutor* v. *Lukić*, IT-98-32/1-A, Appeals Judgment (ICTY 2012); *Prosecutor* v. *Mrkšić*, IT-95-13/1-A, Appeals Judgment (ICTY 2009); *Prosecutor* v. *Blagojević*, IT-02-60-A, Appeals Judgment (ICTY 2007); *Prosecutor* v. *Simić*, IT-95-9-A, Appeals Judgment (ICTY 2006); *Prosecutor* v. *Kvočka*, IT-98-30/1-A, Appeals Judgment (ICTY 2005); *Prosecutor* v. *Vasiljević*, IT-98-32-A, Appeals Judgment (ICTY 2004); *Prosecutor* v. *Furundžija*, IT-95-17/1, Trial Judgment (ICTY 1998).

The International Criminal Tribunal for Rwanda ("ICTR"), established in 1994, was likewise created to prosecute crimes under existing customary international law. See Security Council Resolution 955 (Nov. 8, 1994). The ICTR Statute contains language identical to the ICTY Statute on aiding and abetting. Statute of the International Tribunal for Rwanda art. 6(1) (Nov. 8, 1994), in Security Council Resolution 955 annex ("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 4 of the present

Statute, shall be individually responsible for the crime." (emphasis added)). The ICTR likewise convicted many defendants of aiding and abetting international law violations, primarily genocide. See, *e.g.*, *Prosecutor* v. *Nyiramasuhuko*, ICTR-98-42-A, Appeals Judgment (ICTR 2015); *Prosecutor* v. *Ntawukulilyayo*, ICTR-05-82-A, Appeals Judgment (ICTR 2011); *Prosecutor* v. *Rukundo*, ICTR-2001-70-A, Appeals Judgment (ICTR 2010); *Prosecutor* v. *Karera*, ICTR-01-74-A, Appeals Judgment (ICTR 2009); *Prosecutor* v. *Nahimana*, ICTR-99-52-A, Appeals Judgment (ICTR 2007); *Prosecutor* v. *Muhimana*, ICTR-95-1B-A, Appeals Judgment (ICTR 2007); *Prosecutor* v. *Ntagerura*, ICTR-99-46-A, Appeals Judgment (ICTR 2006); *Prosecutor* v. *Ntakirutimana*, ICTR-96-10-A & ICTR-96-17-A, Appeals Judgment (ICTR 2004); *Prosecutor* v. *Kayishema*, ICTR-95-1-A, Appeals Judgment (ICTR 2001).[3]

Liability for complicity, which includes aiding and abetting, is also recognized in international conventions codifying established norms such as torture and genocide. The Convention Against Torture provides in Article 4(1): "Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to

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[3] A database of aiding-and-abetting cases decided by the ICTY, ICTR, and other international criminal tribunals is available at *Aiding and Abetting in International Criminal Law*, Yale Law School Lillian Goldman Law Library Documents Collection Center, https://documents.law.yale.edu/aiding-and-abetting-cases. Although the United Nations later established other criminal tribunals for Sierra Leone, Cambodia, and Lebanon, those tribunals apply varying combinations of international and domestic law, rather than purely customary international law, and thus "should be approached with caution." Hathaway et al., *supra*, at 1624. The Rome Statute of the International Criminal Court art. 25(3)(c), July 17, 1998, 2187 U.N.T.S. 90, provides for aiding-and-abetting liability, but it too was not intended to codify customary international law. See Section II.B, *infra*.

an attempt to commit torture and to an act by any person which constitutes *complicity or participation* in torture." Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 4(1), Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85 (emphasis added). Article III of the Genocide Convention similarly provides that "[c]omplicity in genocide" is "punishable." Convention on the Prevention and Punishment of the Crime of Genocide art. III, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277.[4]

In sum, international criminal tribunals from Nuremberg to the ICTY and ICTR have consistently proscribed and punished aiding and abetting as a violation of customary international law. Modern human rights treaties such as the Convention Against Torture and the Genocide Convention confirm that norm by recognizing liability for complicity. There is thus no doubt today that the prohibition against aiding and abetting human rights violations is a generally accepted norm of customary international law "accepted by the civilized world." *Sosa*, 542 U.S. at 725.

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[4] The International Court of Justice has noted that "the principles underlying the [Genocide] Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation." *Reservations to the Convention on Prevention and Punishment of the Crime of Genocide,* Advisory Opinion, 1951 I.C.J. 15, 23 (May 28, 1951). And the ICTY Appellate Chamber has stated that "[t]he definition of the crime of torture, as set out in the [Convention Against Torture], may be considered to reflect international law." *Prosecutor* v. *Kunarac*, IT-96-23 & IT-96-23/1-A, Appeals Judgment, ¶ 146 (ICTY 2002). If anything, the Torture Convention is *narrower* in certain respects than customary international law. See *id.* ¶ 148 (Convention's "public official" requirement more restrictive than customary international law).

B. The Prohibition Against Aiding and Abetting Is Specifically Defined

To meet the *Sosa* standard, a customary international law norm must also be specifically defined. *Amicus* WLF argues that the prohibition against aiding and abetting is not specifically defined because international law sources "cannot agree on the *mens rea* and *actus reus* required for a conviction." WLF Br. 6. This is incorrect.[5]

While not defined in the instruments establishing international criminal tribunals, the *actus reus* and *mens rea* requirements for aiding-and-abetting liability under customary international law have been repeatedly articulated in judicial decisions applying the prohibition. Those decisions clearly establish two requirements: (1) assistance that has a substantial effect on the perpetration of the principal's offense (the *actus reus*); and (2) knowledge that the acts assist the commission of the offense (the *mens rea*).

1. *Actus Reus*

The Appeals Chamber of the ICTY has held that "under customary international law, the *actus reus* of aiding and abetting 'consists of practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime.'" *Prosecutor* v. *Šainović*, IT-05-87-A, Appeals Judgment, ¶1649 (ICTY 2014) (quoting *Prosecutor* v. *Blaškić*, IT-95-14-A, Appeals Judgment, ¶46 (ICTY 2004)); see also *Popović*, IT-05-88-A, Appeals Judgment, ¶1732; *Prosecutor* v. *Stanišić*, IT-03-69-A, Appeals Judg-

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[5] Petitioners sought certiorari on the substantive *mens rea* standard for aiding-and-abetting liability, but this Court did not grant certiorari on that question. See Pet. i; Order (Jan. 9, 2026). *Amici* therefore address the standards for aiding-and-abetting liability under customary international law for the limited purpose of showing that the prohibition against aiding and abetting is defined with sufficient specificity to meet the *Sosa* standard.

ment, ¶104 (ICTY 2015); *Lukić*, IT-98-32/1-A, Appeals Judgment, ¶422; *Prosecutor* v. *Aleksovski*, IT-95-14/1-A, Appeals Judgment, ¶162 (ICTY 2000); *Furundžija*, IT-95-17/1-T, Trial Judgment, ¶249 (ICTY 1998).

The ICTR has adopted an identical rule. See *Nyiramasuhuko*, ICTR-98-42-A, Appeals Judgment, ¶1955; *Prosecutor* v. *Ndahimana*, ICTR-01-68-A, Appeals Judgment, ¶147 (ICTR 2013); *Ntawukulilyayo*, ICTR-05-82-A, Appeals Judgment, ¶214; *Rukundo*, ICTR-2001-70-A, Appeals Judgment, ¶52; *Prosecutor* v. *Seromba*, ICTR-01-66-A, Appeals Judgment, ¶139 (ICTR 2008); *Muhimana*, ICTR-95-1B-A, Appeals Judgment, ¶189; *Ntagerura*, ICTR-99-46-A, Appeals Judgment, ¶370; *Prosecutor* v. *Ntakirutimana*, ICTR-96-10-A & ICTR-96-17-A, Appeals Judgment, ¶530 (ICTR 2004).

That standard dates back to the Nuremberg tribunals. See *Furundžija*, IT-95-17/1-T, Trial Judgment, ¶¶217-226, 233-234 (tracing use of the "substantial effect" standard at Nuremberg). In the *Einsatzgruppen Case*, for example, the U.S. Military Tribunal distinguished between defendants who could affect the course of events and those who could not. See *The Einsatzgruppen Case*, 4 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, at 411 (1952). Thus, the Tribunal acquitted one defendant because his "low rank [did not] place him automatically into a position where his lack of objection in any way contributed to the success of any executive operation," and it held that another defendant "cannot be found guilty as an accessory" because he was not "in a position to protest against the illegal actions of others." *Id.* at 581, 585. Similarly, in the *Zyklon B Case*, the British Military Tribunal convicted two individuals for supplying poison gas for use in concentration camps, but acquitted a subordinate because, "[i]f

he were not in such a position [either to influence the transfer of gas to Auschwitz or to prevent it], no knowledge of the use to which the gas was being put could make him guilty." *The Zyklon B Case*, 1 Law Reports of Trials of War Criminals 93, 93, 102 (1947).

The decisions of the ICTY and ICTR have defined the *actus reus* standard with even greater specificity. They have held, for example, that but-for causation is not required. See, *e.g.*, *Popović*, IT-05-88-A, Appeals Judgment, ¶1740; *Simić*, IT-95-9-A, Appeals Judgment, ¶85; *Nyiramasuhuko*, ICTR-98-42-A, Appeals Judgment, ¶1955; *Prosecutor* v. *Kalimanzira*, ICTR-05-88-A, Appeals Judgment, ¶86 (ICTR 2010). They have clarified *when* the conduct in question must have occurred. See, *e.g.*, *Lukić*, IT-98-32/1-A, Appeals Judgment, ¶425; *Kalimanzira*, ICTR-05-88-A, Appeals Judgment, ¶87 n.238. They have explained when omissions may constitute the *actus reus*. See, *e.g.*, *Popović*, IT-05-88-A, Appeals Judgment, ¶1740; *Mrkšić*, IT-95-13/1-A, Appeals Judgment, ¶¶146-152; *Ntagerura*, ICTR-99-46-A, Appeals Judgment, ¶370. And they have clarified that the acts of aiding and abetting need not be directed toward a specific crime. See *Šainović*, IT-05-87-A, Appeals Judgment, ¶1649; *Nyiramasuhuko*, ICTR-98-42-A, Appeals Judgment, ¶1955.

2. *Mens Rea*

The Appellate Chambers of the ICTY and ICTR have likewise applied, without exception, the same *mens rea* standard: "knowledge that [the defendant's] acts assist the commission of the offense." *Šainović*, IT-05-87-A, Appeals Judgment, ¶1649 (quoting *Blaškić*, IT-95-14-A, Appeals Judgment, ¶46); *Nyiramasuhuko*, ICTR-98-42-A, Appeals Judgment, ¶1955 (quoting *Šainović*, IT-05-87-A, Appeals Judgment, ¶1649); see also *Blagojević*, IT-02-60-A, Appeals Judgment, ¶127; *Kvočka*, IT-98-30/1-A, Ap-

peals Judgment, ¶89; *Prosecutor* v. *Krnojelac*, IT-97-25-A, Appeals Judgment, ¶33 (ICTY 2003); *Prosecutor* v. *Tadić*, IT-94-1-A, Appeals Judgment, ¶229 (ICTY 1999); *Furundžija*, IT-95-17/1-T, Trial Judgment, ¶249; *Ndahimana*, ICTR-01-68-A, Appeals Judgment, ¶157; *Ntawukulilyayo*, ICTR-05-82-A, Appeals Judgment, ¶222; *Rukundo*, ICTR-2001-70-A, Appeals Judgment, ¶53; *Muhimana*, ICTR-95-1B-A, Appeals Judgment, ¶189; *Ntakirutimana*, ICTR-96-10-A & ICTR-96-17-A, Appeals Judgment, ¶530.

"Knowledge" was also the *mens rea* standard applied by the international military tribunals at Nuremberg. In the *Einsatzgruppen Case*, the tribunal noted that a defendant who turned over lists of Communist party members "served as an accessory" to their subsequent executions because he "*was aware* that the people listed would be executed when found." *The Einsatzgruppen Case*, 4 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, at 569 (1952) (emphasis added); see also *The Zyklon B Case*, 1 Law Reports of Trials of War Criminals 93 (1947) (convicting defendants who "suppl[ied] poison gas used for the extermination of allied nationals interned in concentration camps *well knowing* that the said gas was to be so used." (emphasis added)); *I.G. Farben Case*, 8 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, at 1081, 1169 (1952) (acquitting corporate executives who did not have "any significant knowledge" that "an improper use was being made of [Zyklon B]"). It was a "settled legal principl[e]" even then that "[o]ne who *knowingly* by his influence and money contributes to the support [of crimes against humanity and war crimes] must * * * 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, at 1187, 1217 (1952) (emphasis added).[6]

As with *actus reus*, the ICTY and ICTR decisions have defined the *mens rea* requirement with even greater specificity. For instance, an aider and abettor "need not share the intent of the principal perpetrator" but "must be aware of such intent." *Popović*, IT-05-88-A, Appeals Judgment, ¶1794; see also *Ndahimana*, ICTR-01-68-A, Appeals Judgment, ¶157; *Ntawukulilyayo*, ICTR-05-82-A, Appeals Judgment, ¶222. Thus, "[s]pecific intent crimes such as genocide require that the aider and abettor must know of the principal perpetrator's specific intent." *Ndahimana*, ICTR-01-68-A, Appeals Judgment, ¶157; see also *Rukundo*, ICTR-2001-70-A, Appeals Judgment, ¶53; *Kalimanzira*, ICTR-05-88-A, Appeals Judgment, ¶86.

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[6] *United States* v. *von Weizsaecker (The Ministries Case)*, 14 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, at 314 (1952), is not to the contrary. Though sometimes cited to support a requirement that the defendant act with the purpose of facilitating the violation, see *Presbyterian Church of Sudan* v. *Talisman Energy, Inc.*, 582 F.3d 244, 259 (2d Cir. 2009), the relevant portion of the *Ministries Case* was actually about *actus reus*, not *mens rea*. In acquitting the banker Karl Rasche, the tribunal concluded that, although Rasche knew that a loan he made would be used to "financ[e] enterprises which are employed in using labor in violation of either national or international law," merely making a loan does not make the lender a "partner in [the] enterprise." *The Ministries Case*, 14 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, at 622 (1952). In other words, the tribunal found a lack of *actus reus* rather than *mens rea*. Indeed, the tribunal clearly articulated and applied a knowledge standard to other defendants in the same case. See *id.* at 478 ("The question is whether [Von Weizsaecker and Woermann] knew of the program and whether in any substantial manner they aided, abetted, or implemented it."); *id.* at 620 (convicting banker who "knew that what was to be received and disposed of was stolen property and loot taken from the inmates of concentration camps").

Although two Circuits have adopted a narrower "purpose" standard for aiding-and-abetting liability, they did so based on authorities that by their terms do not reflect customary international law. See *Presbyterian Church of Sudan* v. *Talisman Energy, Inc.*, 582 F.3d 244, 259 (2d Cir. 2009); *Aziz* v. *Alcolac, Inc.*, 658 F.3d 388, 400-401 (4th Cir. 2011). Neither those cases nor the authorities they cite call into question that, *under customary international law*, the "knowledge" standard is well-defined and universally accepted.

Both courts adopted the "purpose" standard from the Rome Statute of the International Criminal Court ("Rome Statute"), July 17, 1998, 2187 U.N.T.S. 90. See *Talisman*, 582 F.3d at 258-259; *Aziz*, 658 F.3d at 398-401; see also Pet. App. 52a-58a. The Rome Statute extends criminal liability to a person who, "[f]or the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission." Rome Statute art. 25(3)(c). But this provision of the Rome Statute does not reflect customary international law. The lead negotiator for the United States, Ambassador David Scheffer, told this Court in 2010 that "Article 25(3)(c) of the Rome Statute was negotiated *not to codify customary international law* but to accommodate the numerous views of common law and civil law experts about how, precisely, to express the *mens rea* of the aider or abettor." Scheffer Br. in *Presbyterian Church of Sudan* v. *Talisman Energy, Inc.*, No. 09-1262, at 11 (May 19, 2010) (emphasis added). Thus, "understanding the Rome Statute as an effort to

codify customary international law at the time it was drafted is a mistake." Hathaway et al., *supra*, at 1599.[7]

Relying on the Rome Statute to interpret the ATS disregards *Sosa*'s direction to consult customary international law. It also disregards the text of the ATS, which refers to torts "in violation of the law of nations or a treaty *of the United States*." 28 U.S.C. § 1350 (emphasis added). Because the United States is not a party to the Rome Statute, it cannot qualify as a treaty "of the United States."

Any divergence in the standards for aiding-and-abetting liability merely reflects differences between tribunals that are charged with applying customary international law and those that are not. See Hathaway et al., *supra*, at 1610-1611, 1613-1617. Tribunals applying customary international law from Nuremberg onward have consistently required (1) assistance that has a substantial effect on the perpetration of the principal's offense; and (2) knowledge that the acts assist the commission of the offense. Customary international law thus defines the prohibition against aiding and abetting international law violations with all the specificity that *Sosa* requires.

III. International Law Allows The United States To Impose Civil Liability For Aiding And Abetting Human Rights Violations

Amicus WLF acknowledges that aiding-and-abetting liability "finds some support in international criminal tribunals," but argues that "no source of international law

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[7] Several of the Rome Statute's provisions distinguish its rules from those of customary international law. See Rome Statute art. 10 ("Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute."); *id.* art. 22(3) ("This article [on *nullum crimen sine lege*] shall not affect the characterization of any conduct as criminal under international law independently of this Statute.").

* * * provides a *civil* remedy for any international crime." WLF Br. at 6-7 (emphasis original). That distinction between civil and criminal remedies misunderstands how customary international law works.

Customary international law establishes substantive norms of conduct but does not dictate how those norms are enforced in national legal systems. See Eileen Denza, *The Relationship Between International and National Law*, in *International Law* 411, 411 (Malcolm D. Evans ed., 3d ed. 2010) ("[I]nternational law does not itself prescribe how it should be applied or enforced at the national level."); Louis Henkin, *Foreign Affairs and the United States Constitution* 245 (2d ed. 1996) ("International law itself * * * does not require any particular reaction to violations of law."); Restatement (Third) of U.S. Foreign Relations Law § 111 cmt. h (1987) ("In the absence of special agreement, it is ordinarily for the United States to decide how it will carry out its international obligations."). This Court acknowledged that relationship between customary international law and domestic law in *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398 (1964), noting that "the public law of nations can hardly dictate to a country * * * how to treat [a violation of international law] within its domestic borders." *Id.* at 423. Different legal systems thus can and do take different approaches to implementing international law norms. See, *e.g.*, Chimène I. Keitner, *Conceptualizing Complicity in Alien Tort Cases*, 60 Hastings L.J. 61, 85 (2008) ("The sharp distinction between civil and criminal proceedings and penalties is a feature identified with modern common law systems, not the international system as a whole.").

The consistent practice described in Part II clearly establishes that the prohibition against aiding and abetting international law violations is a generally accepted and

clearly defined norm of customary international law. Although that norm has generally been enforced *internationally* by criminal tribunals, that practice does not foreclose countries like the United States from imposing civil liability *domestically* for violations.[8]

That is what the First Congress did when it created civil liability for torts "in violation of the law of nations" in the ATS. 28 U.S.C. §1350. The three paradigmatic offenses it had in mind—violations of safe conducts, infringement of the rights of ambassadors, and piracy—were all offenses "addressed by the *criminal* law of England." *Sosa*, 542 U.S. at 715 (citing 4 W. Blackstone, *Commentaries on the Laws of England* 68 (1769)) (emphasis added). Nevertheless, Congress chose to open the doors of the federal courts to *civil* claims for the same offenses.

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[8] The statutes of some international criminal tribunals do provide for restitution to victims. See, *e.g.*, ICTY Statute art. 24(3); ICTR Statute art. 23(3). Civil aiding-and-abetting liability also finds a counterpart in the customary international law of state responsibility. Article 16 of the International Law Commission's Draft Articles on State Responsibility provides: "A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State." Int'l Law Comm'n, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, art. 16, Report of the International Law Commission on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10, at 65 (2001). The International Court of Justice has referred to Article 16 as reflecting a rule of customary international law. See *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia* v. *Serbia)*, 2007 I.C.J. 43, ¶420 (Feb. 26, 2007).

Under this Court's decision in *Sosa*, whether the prohibition on aiding and abetting is the kind of norm actionable under the ATS is determined by customary international law. Since at least the 1940s, customary international law has prohibited aiding and abetting violations of international law. That norm is both generally accepted and specifically defined. And the fact that the international community has chosen to enforce that norm through international criminal tribunals does not preclude countries from imposing civil liability for the same violations, as the United States has done in the ATS.

CONCLUSION

The court of appeals' judgment should be affirmed.

Respectfully submitted.

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