Nos. 02-56256, 02-56390
Decided August 7, 2006
Before Circuit Judges Fisher and Bybee and District Judge Mahan

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALEXIS HOLYWEEK SAREI, PAUL E. NERAU, THOMAS TAMUASI, PHILLIP MIRIORI, GREGORY KOPA, METHODIUS NESIKO, ALOYSIUS MOSES, RAPHAEL NINIKU, GABRIEL TAREASI, LINUS TAKINU, LEO WUIS, MICHAEL AKOPE, BENEDICT PISI, THOMAS KOBUKO, JOHN TAMUASI, NORMAN MOUVO, JOHN OSANI, BEN KORUS, NAMIRA KAWONA, JOANNE BOSCO, JOHN PIGOLO and MAGDALENE PIGOLO, individually and on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants/Cross-Appellees,

vs.

RIO TINTO plc and RIO TINTO LIMITED,

Defendants-Appellees/Cross-Appellants.

On Appeal from the United States District Court,
Central District of California — Western Division
U.S.D.C. No. 00-11695-MMM MANx
The Honorable Margaret M. Morrow, Judge Presiding

PETITION FOR PANEL REHEARING AND FOR REHEARING EN BANC

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INTRODUCTION

The divided panel's opinion in this case under the Alien Tort Statute, 28 U.S.C. § 1350 (ATS), should be reheard *en banc* because it conflicts with the Supreme Court's decision construing the ATS, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (*Sosa*), and because it permits the case to go forward even though the U.S. State Department has warned that adjudication threatens "important" U.S. foreign policy objectives.

Plaintiffs here pursue claims of alleged international law violations involving the development and operation of the Panguna Copper Mine on Bougainville Island, in Papua New Guinea (PNG), and the official police and military response after rebels violently closed the mine in 1989. *Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d 1116 (C.D. Cal. 2002), *aff'd in part and rev'd in part,* Nos. 02-56256, 02-56390 (9th Cir. Aug. 7, 2006). In *Sosa*, the Supreme Court instructed that courts must exercise "great caution" and "vigilant doorkeeping" in evaluating such claims. 542 U.S. at 727-28, 729. The majority erred in rejecting, over Judge Bybee's strong dissent, the principle that plaintiffs must exhaust local remedies before suing under the ATS. *Sosa*, 542 U.S. at 733 n.21. The majority also departed from *Sosa* in declining to give "case-specific deference" to the Executive Branch on questions of foreign policy (*id.*); engage in "vigilant doorkeeping" as to whether claimed violations of international norms are actionable (*id.* at 729); and exercise great care before judging acts of other sovereigns in their own territory. *Id.* at 727-28. These errors warrant rehearing *en*

banc because they expand the "narrow" jurisdiction granted by the ATS. *See id.* at 729.

As this Court recognized in *Alperin v. Vatican Bank*, 410 F.3d 532, 541 n.4 (9th Cir. 2005), *cert. denied*, 126 S. Ct. 1141 (2006), *Sosa* "limited the ATS" by "curtailing the scope of actionable international norms." *Sosa* and *Alperin* properly recognized the modest role the judiciary plays in adjudicating such claims, and squarely conflict with the decision of the panel majority on several grounds.

Contrary to *Sosa* and *Alperin*, the majority opinion establishes U.S. courts as a forum of first resort for civil conflict anywhere in the world, based on very general allegations that a defendant corporation was complicit in what are labeled as violations of international law. The important issues raised in this petition are also presented in a number of pending ATS cases,[1] and warrant rehearing and review by this Court *en banc*.

I. THE MAJORITY'S REFUSAL TO REQUIRE EXHAUSTION OF LOCAL REMEDIES CONFLICTS WITH *SOSA* AND WITH WELL-ESTABLISHED U.S. AND INTERNATIONAL LAW.

The majority's rejection of the exhaustion requirement conflicts with the language and the logic of *Sosa*. The Supreme Court's decision acknowledges that

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[1] *See, e.g., Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164 (C.D. Cal. 2005), *appeal pending*, No. 05-56175 (9th Cir.); *In re S. African Apartheid Litig.*, 346 F. Supp. 2d 538 (S.D.N.Y. 2004), *appeal pending*, No. 05-2326 (2d Cir.); *Bowoto v. Chevron Corp.*, No. C 99-2506 SI (N.D. Cal.); *Doe v. Exxon Mobil Corp.*, No. 01-01357 (LFO) (D.D.C.); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, No. 01 Civ. 9882 (DLC) (S.D.N.Y.).

"basic principles of international law require that before asserting a claim in a foreign forum, the claimant must have exhausted any remedies available in the domestic legal system," and states that the Court "would certainly consider" the exhaustion "requirement in an appropriate case." 542 U.S. at 733 n.21. This, as Judge Bybee's scholarly dissent observed, is such a case. *Sarei v. Rio Tinto PLC*, Nos. 02-56256, 02-56390, slip op. at 8991, 8992 (9th Cir. Aug. 7, 2006) (*Sarei*) ("This case cries for exhaustion of local remedies before we assume jurisdiction.") (Bybee, J., dissenting).[2]

A. Rejecting Exhaustion Conflicts with Applicable International Law for Allocating Jurisdiction and Minimizing Conflict Between Sovereigns.

The majority declines to enforce the exhaustion requirement in ATS cases, "leaving it to Congress or the Supreme Court to take the next step if warranted." *Sarei* at 8987-88. But no change in applicable law is involved in recognizing the exhaustion requirement under the ATS. As the dissent persuasively demonstrates, exhaustion is an accepted principle of international law — which applies to the ATS, under *Sosa* — ensuring that an allegedly offending nation has an opportunity to remedy a wrong through its own legal process, thereby avoiding potential conflicts between nations. *Sarei* at 9005-06 (Bybee, J., dissenting).

The majority's reasons for rejecting the exhaustion requirement lack merit. Speculation that "the absence of explicit exhaustion language" in the statute may have been "purposeful," *id.* at 8973, cannot be credited in the face of the history

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[2] A copy of the Slip Opinion is attached to this Petition at Tab A.

that *Sosa* recites. As the majority acknowledges, exhaustion was a well-established rule of international law when the ATS was enacted and remains so today. *Id.* at 8973-74. That the ATS — a one-sentence grant of jurisdiction — is silent on exhaustion and other common-law defenses therefore implies that Congress intended common-law doctrines *would* be applied.

Moreover, *Sosa* makes clear that Congress understood the exhaustion requirement very well in 1789, when the ATS was enacted. *Sosa* holds that the ATS was enacted "on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time," 542 U.S. at 724, because a state was required to provide a domestic legal remedy if international law was violated within its jurisdiction — by an assault on an ambassador, for example — or face "serious consequences in international affairs." *Id.* at 715-16.[3] The First Congress enacted the ATS to provide remedies in the federal courts for violations of international law that occurred within U.S. jurisdiction, on the understanding that aggrieved aliens would be required to exhaust those remedies before pursuing any remedies the law of nations might afford. *Id.* at 719. It defies logic to suppose that Congress intended that aliens would not be bound by the exhaustion requirement when they sue for international law violations that occurred outside the U.S.

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[3] Thus, contrary to the majority's view, "the international norm of exhaustion" *does* "speak to the hybrid situation" where a national court "is charged with adjudicating violations of customary international law" in a civil suit. *Sarei* at 8982.

B. The Majority's Reliance on Congressional Intent in 1991 Conflicts with Settled Rules of Statutory Construction and with Legislative History.

The majority improperly draws a conclusion about the ATS from the legislative history of the Torture Victim Protection Act of 1991 (TVPA), Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350, historical and statutory notes). *Sarei* at 8986. Worse, the conclusion is not based on what the Congress said or did when it passed the TVPA, but on the fact that the Congress did *not* amend the ATS in 1991 to require exhaustion. *Id.* at 8976. It is not permissible to draw inferences on congressional intent based on "the legislative choice Congress could have easily made, but did not." *Id.*; *see Sega Enters. Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1521 (9th Cir. 1992) (enactment of a specific statute without amending the more general Copyright Act does not reflect intent that conduct authorized by the specific statute is not also authorized under the general statute). While "it is generally presumed that Congress acts intentionally and purposefully" when it "includes particular language in one section of a statute but omits it in another section of *the same Act*," *see Bates v. United States*, 522 U.S. 23, 29-30 (1997) (emphasis added), no such inference can be drawn with respect to statutes enacted 200 years apart — particularly as to the ATS, which the 1991 Congress said "should remain intact." S. Rep. No. 102-249, at 5 (1991) (TVPA Senate Report).

The majority also flatly contradicts Congress's finding that federal courts are "familiar" with the international exhaustion rule because "general principles of international law" on exhaustion are "generally consistent with common-law

principles of exhaustion as applied by courts in the United States." TVPA Senate Report at 10; *see Sarei* at 8983 n.29 (courts should not assume "familiarity" with the international exhaustion rule).

The majority concedes that federal courts have discretion to require exhaustion when Congress has not clearly done so, if exhaustion is not contrary to Congressional intent. *Sarei* at 8972. It then concludes that Congress's "intent and understanding" on the question is "unclear." *Id.* at 8979. But a long line of Supreme Court cases dating back to *Ex parte Royall*, 117 U.S. 241, 251 (1886), holds that the exhaustion requirement is *presumed* to apply unless Congress has expressed a *contrary* intention. *Sarei* at 8993-94 (discussing habeas and tribal law cases) (Bybee, J., dissenting). The majority simply ignores this controlling Supreme Court authority.

C. This Is an Optimal Case for the Exhaustion Requirement.

"The dispute before us is a textbook case for exhaustion." *Sarei* at 9029 (Bybee, J., dissenting). It is undisputed on the record that PNG is a mature constitutional democracy with an independent judiciary. Judge Morrow specifically found, in the context of forum non conveniens, that PNG was an adequate forum and that remedies are available there. *Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d at 1208. Moreover, if the courts of PNG are not actually available to plaintiffs, the dismissal is without prejudice to further proceedings here. *Sarei* at 9030 (Bybee, J., dissenting).

The exhaustion requirement is a core principle of the international legal order. *Id.* at 9003-06. This Court should not permit plaintiffs to bypass the

remedies available to them in their own country by filing their case in federal court under the ATS.

II. THE MAJORITY'S POLITICAL QUESTION ANALYSIS WARRANTS REVIEW BECAUSE IT SECOND-GUESSES THE STATE DEPARTMENT'S DIPLOMATIC JUDGMENT AND CONFLICTS WITH *SOSA* AND *ALPERIN.*

Recognizing the "risks of adverse foreign policy consequences" presented by ATS claims, *Sosa* endorsed the limiting principle of "case-specific deference to the political branches." 542 U.S. at 727-28, 733 n.21. When the State Department expresses its diplomatic judgment in an ATS case, "there is a strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy." *Id.* at 733 n.21.

Here, the Executive Branch registered its concerns by means of a Statement of Interest (SOI) filed in the district court, in which the State Department said that this litigation risks a "serious adverse impact" on important U.S. foreign policy objectives. *Sarei* at 8956. The majority's holding that dismissal on political question grounds is not warranted is contrary to *Sosa* and to established precedents that prevent courts from impinging on the foreign policy domain. It also contradicts this Court's holding in *Alperin* that dismissal on political question grounds is called for, even absent State Department intervention, where a court is asked to "make a retroactive political judgment as to the conduct of war." 410 F.3d at 548.

A. The Majority Invaded the Foreign Policy Prerogative of the Executive Branch Contrary to Core Separation of Powers Doctrines.

The crux of the political question analysis is whether "judicial resolution of a question would contradict prior decisions taken by a political branch in those limited contexts where such contradiction would seriously interfere with important governmental interests." *Kadic v. Karadzic*, 70 F.3d 232, 249 (2d Cir. 1995). Though courts have disagreed with the State Department on questions of law, foreign policy decisions "'belong in the domain of political power not subject to judicial intrusion or inquiry.'" *Alperin*, 410 F.3d at 560 (quoting *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948)).

The government's Statement of Interest in this case, as in other cases that have been dismissed on political question grounds, provides a "clear expression of the will of the Executive branch in the realm of foreign affairs." *In re Nazi Era Cases Against German Defs. Litig.*, 129 F. Supp. 2d 370, 382 (D.N.J. 2001). The majority impermissibly took it upon itself to second-guess the judgment of the Executive Branch in matters respecting U.S.-PNG and regional relations.

The majority crossed over into the political realm in its analysis of two unauthenticated letters written by PNG officials in 2005 that purport to change the position originally expressed to the U.S. State Department. *Sarei* at 8958 n.13.[4] The majority concluded that, if authentic and accurate, these letters "would

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[4] Contrary to the majority's view, it is undisputed that these letters are not authenticated as required by the Federal Rules of Evidence, which require authentication through diplomatic channels. Fed. R. Evid. 902(3).

seriously undercut the State Department's concerns." *Id.* Moreover, according to the majority, "by suggesting there exists today a different reality in PNG from that portrayed in the SOI," the letters "illustrate why it is inappropriate to give the SOI final and conclusive weight as establishing a political question under *Baker*." *Id.*

It is not open to the majority to reconstruct a "different" diplomatic "reality" in PNG, or to discount the State Department's conclusion that this case risks a "serious adverse impact" on U.S. foreign relations. Whatever one makes of the recent letters purporting to speak for PNG, they did not speak for the Executive Branch.[5] It was error for the majority to determine that the Executive's judgment should have changed.

The majority acknowledges that the State Department "would prefer that [this] suit disappear," *Sarei* at 8957, yet discounts the SOI based on a supposed lack of urgency in its language (*see id.*, noting "guarded nature of the SOI"). But courts must not dictate the manner in which the Executive Branch articulates its position on foreign policy. How to state the position is itself an exercise in diplomacy. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 436 (1964) (requirement that Executive Branch must "expressly stipulate[]" that it does not wish courts to adjudicate "would work serious inroads on the maximum effectiveness of United States diplomacy"); *In re Assicurazioni Generali S.p.A. Holocaust Ins. Litig.*, 340 F. Supp. 2d 494, 506 (S.D.N.Y. 2004) (Executive

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[5] *Alperin* held that the views of a foreign sovereign are entitled to no independent consideration in a political question analysis, and that the refusal of the U.S. government to weigh in can never be more than a "neutral factor." 410 F.3d at 555-56.

Branch's decision whether and how to express foreign policy views in litigation is informed by "intricate diplomatic and political considerations," making judicial inferences about governmental motives "a perilous enterprise"). It is a "deep invasion of the political question domain" for courts to set standards on how the political branches must express themselves when "highly complex considerations of diplomacy [and] foreign policy" are at stake. *Orlando v. Laird*, 443 F.2d 1039, 1043 (2d Cir. 1971).

B. The Majority's Failure to Give Proper "Case-Specific Deference" to the Views of the Executive Branch Conflicts With *Sosa*.

The majority gives no valid reason why the SOI does not merit the "case-specific deference" highlighted by *Sosa*. In applying the fourth, fifth, and sixth *Baker* factors, the majority purports to give "serious weight" to the SOI, but against the specific foreign relations concerns it expresses,[6] the majority puts nothing more in the balance than its "independent duty" to decide cases. *Sarei* at 8957-58. The majority's disagreement with the district court's conclusion that "passing judgment on the pre-war and wartime conduct of the PNG government" has serious implications for "the foreign policy objectives the executive branch has set," *Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d at 1198, rests on nothing more than

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[6] The SOI, for example, refers to events in PNG, the U.N.-sponsored multilateral peace process, and "local custom" that placed the concept of reconciliation "at the heart of the peace process." ER 723. The State Department relied on its own analysis of U.S. interests in the region and concerns expressed by "[c]ountries participating in the multilateral peace process" to reach the conclusion that continued adjudication poses a serious risk to the conduct of U.S. foreign relations. *Id.*

ipse dixit. *Sarei* at 8957-58 ("[W]e are confident that proceeding does not express any disrespect for the executive.").

In light of *Sosa*'s mandate to give the views of the Executive "serious weight," a court's generalized Article III responsibilities in an ATS case cannot outweigh a detailed State Department expression of foreign policy concern in an area of diplomatic sensitivity. *See Sosa*, 542 U.S. at 733 n.21.

C. The Majority's Political Question Analysis Contradicts This Court's Decision in *Alperin*.

Alperin, in which the U.S. government declined to submit a Statement of Interest, held that ATS claims that would involve "a retroactive political judgment as to the conduct of war" were properly dismissed under the political question doctrine. 410 F.3d at 548.[7] Just as in *Alperin*, adjudicating the claims in this case would require a court to "look behind" Rio Tinto's conduct and "indict" the PNG "regime for its wartime conduct." *Id.* at 560, 561. Such judgments, *Alperin* held, were the exclusive province of the political branches by virtue of their constitutional responsibility for foreign affairs, and particularly matters of war and peace. *Id.* at 559-60.

Unlike a case seeking redress from a specific individual for a particularized injury, *Sarei*, like *Alperin*, attacks the overall conduct of a war. But courts have no basis on which "to undertake the complex calculus of assigning fault for actions taken by a foreign regime during the morass" of war. *See id.* at 562. Moreover,

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[7] The plaintiffs' claims in *Alperin* included allegations that the Vatican Bank was complicit in war crimes and slave labor exploitation carried out by the Ustasha, a Nazi puppet regime. *Id.* at 538-40.

plaintiffs' theory of Rio Tinto's liability assumes that it "controlled" the actions of the PNG government by advocacy at high levels of government. *Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d at 1148-49. Adjudicating the claim that a corporation decided how a friendly, democratic foreign sovereign conducted its response to civil insurrection presents an obvious risk to U.S.-PNG relations, and an inherently political question.

The majority's attempt to limit *Alperin*'s holding to the "narrow[] category of war crimes committed by enemies of the United States," *Sarei* at 8959, is untenable. Allegations of war crimes committed by our nation's friends (such as PNG) are not *more* appropriate for judicial resolution than similar claims directed against our nation's enemies. Both "entail meddling in matters reserved to the political branches," and in neither is a federal court fit to serve as "a war crimes tribunal." *Alperin*, 410 F.3d at 560, 561-62.

III. THE MAJORITY DECLINED TO FOLLOW *SOSA*'S CALL FOR CAUTION AND RESTRAINT IN EXERCISING JURISDICTION UNDER THE ATS.

Sosa mandates "great caution in adapting the law of nations to private rights," particularly when courts are asked to consider suits that challenge the official conduct of foreign governments with respect to their own citizens. 542 U.S. at 728. The majority declined to apply *Sosa*'s rigorous standard for determining which international norms are actionable under the ATS, whether the conduct alleged in the complaint falls within the international consensus, and whether claims based on a foreign sovereign's treatment of its own citizens should

be adjudicated by U.S. courts "at all." *Id.* The majority's conclusions as to subject matter jurisdiction and the act of state doctrine are in error, and rest on a flawed understanding of *Sosa* and the applicable international law.

A. The Majority's Perfunctory Analysis of Subject Matter Jurisdiction Falls Far Short of What *Sosa* Requires.

The majority found that claims of war crimes, racial discrimination, and violations of the law of the sea had been adequately stated under the ATS without conducting the rigorous analysis *Sosa* requires.[8] Its conclusion that *Sosa* "ratified" the Ninth Circuit's approach to ATS claims, *id.* at 8948, cannot be squared with *Sosa* itself, which reversed this Court's judgment, or this Court's acknowledgment, in *Alperin*, that *Sosa* "limited the ATS" by "curtailing the scope of actionable international norms" and required "'vigilant doorkeeping'" in the assessment of ATS claims. 410 F.3d at 541 n.4 (quoting *Sosa*, 542 U.S. at 729).

Sosa requires two distinct inquiries. First, does the specific conduct alleged in the complaint violate an international norm comparable to the norms such as that against piracy recognized by the "18th century paradigm" under which the ATS was enacted? 542 U.S. at 732. Second, should U.S. courts create a common-law cause of action to redress the alleged wrong, bearing in mind the multiple factors

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[8] Neither party briefed the question whether the facts alleged in the complaint were sufficient to satisfy the jurisdictional requirements of the ATS as construed by *Sosa*. Rio Tinto argued, before *Sosa*, that the court did not have to decide subject matter jurisdiction before addressing the "threshold" grounds for dismissal presented on appeal, and requested the opportunity to brief the question if the court found it necessary to do so. Brief of Appellees and Cross-Appellants at 3-4.

that counsel against an expansive reading of federal common law and judicial intrusion into the foreign policy realm? *Id.* at 722-23. The majority neither asked the right questions nor reached the right conclusions under *Sosa*.

1. The Majority Addressed the Wrong Law and Reached the Wrong Conclusion on Vicarious Liability.

The majority addressed in one sentence the crucial question whether an ATS claim may be based on theories of secondary liability: "Courts applying the [ATS] draw on federal common law, and there are well-settled theories of vicarious liability under federal common law." *Sarei* at 8950.[9] By permitting plaintiffs' "vicarious liability" claims to go forward as a matter of federal common law rather than international law, and based on purely conclusory allegations, the majority departed from *Sosa* and dramatically expanded the scope of jurisdiction under the ATS.

Courts in ATS cases must decide "whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual." *Sosa*, 542 U.S. at 732-33 n.20. Such a finding depends on whether there is an international consensus, comparable to the norm outlawing piracy in the 18th

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[9] The single case cited by the majority for this proposition, *Moriarty v. Glueckert Funeral Home, Ltd.*, 155 F.3d 859, 866 n.15 (7th Cir. 1998), is an ERISA case that has nothing to do with vicarious liability.

century, on the scope of secondary civil liability for private actors (under aiding and abetting or complicity theories, for example). *Id.* There is not.[10]

The theory on which Rio Tinto is alleged to be complicit in any war crimes of the PNG military — that it controlled PNG's use of force in response to a violent secessionist rebellion (*Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d at 1149) — is at or beyond the "fringe" of U.S. civil rights jurisprudence, and far removed from any international consensus comparable to the 18th-century paradigm under which the ATS was enacted. *Bowoto v. Chevron Corp.*, No. C 99-2506 SI, 2006 WL 2455752, at *7-9 (N.D. Cal. Aug. 22, 2006). A recent study by the United Nations confirms this.[11]

The majority's conclusion on vicarious liability is wrong even under federal law. The question of secondary liability goes to the "scope of liability," and it is a question on which federal courts look to Congress even when construing a purely domestic statute. *Central Bank of Denver, N.A. v. First Interstate Bank of Denver N.A.*, 511 U.S. 164, 189-90 (1994) (holding that where Congress has not explicitly

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[10] The panel majority's reliance on the 1795 opinion of Attorney General Bradford, *Sarei* at 8950 n.5, is misplaced. It did not address aiding and abetting a violation of international law, but rather aiding and abetting a foreign combatant in a legitimate act of warfare, in violation of the United States' neutrality in the hostilities.

[11] United Nations Commission on Human Rights, *Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, 62 Sess., Provisional Agenda Item 17, U.N. Doc. No. E/CN.4.2006/97 at 15-16 (Feb. 22, 2006) (the notion that corporations may be held liable "for committing, or for complicity in, the most heinous human rights violations" is at best "emerging" under customary international law).

provided civil aiding and abetting liability, it should not be inferred). *Sosa* establishes *a fortiori* that secondary liability under the ATS is not a proper subject of interstitial judicial rulemaking and must await Congressional action. 542 U.S. at 726 (noting that "the general practice" of looking "for legislative guidance before exercising innovative authority over substantive law" is particularly appropriate in exercising ATS jurisdiction "that remained largely in shadow for much of the prior two centuries").

Courts have no Congressional mandate to "seek out and define new and debatable violations" of international law under the ATS. *Id.* at 728. The majority's summary approval of vicarious liability under the ATS goes far beyond "any residual common law discretion" that is "appropriate" for U.S. courts to exercise. *Id.* at 738.

2. The Majority's Analysis of Other Norms Fails to Apply *Sosa*'s Rigorous Standards.

Sosa makes clear that invoking an international law norm is only "the beginning of the enquiry" under the ATS. *Id.* at 737. "Any credible invocation" of an international norm requires a "factual basis." *Id.* at 737-38. In *Sosa*, the Supreme Court examined the particular facts presented and reversed this Court because ATS jurisdiction was held to be absent unless *those facts* would violate international norms as universal and basic as the norms recognized under the 18th-century paradigm. As the Supreme Court observed, it is "easy to say that some policies of prolonged arbitrary detentions" violate universal norms, *id.* at 737, but a

far stricter analysis is necessary to determine "which policies cross that line" with the "certainty" required under the ATS. *Id.*

The majority's analysis of the international norms invoked in this case does not meet the *Sosa* standard. With respect to the customary law of the sea, the majority makes no effort to define the customary norm supposedly codified in UNCLOS (*Sarei* at 8949)[12] that could possibly apply to facts alleged in this case — pollution of inland rivers, which reached a territorial bay, with unspecified consequences for the sea. *Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d at 1162. The record contains no basis for any international norm broad enough to capture the alleged pollution of rivers flowing into PNG's territorial waters; if there were, it would also cover, for example, agricultural run-off. Nothing in UNCLOS, or in the customary law of the sea, suggests the recognition of such a norm, nor could it possibly surmount *Sosa*'s high bar for *actionable* norms.

Discussing the norms against racial discrimination, the majority quotes the words "systematic racial discrimination" and "policies of racial discrimination" in the complaint and cites the Foreign Relations Law Restatement as deeming them violations of jus cogens norms. *Sarei* at 8962-63. But broad legal conclusions cast

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[12] While a treaty may codify pre-existing customary norms, the "'baseline'" norms that the United Nations Convention on the Law of the Sea (UNCLOS) codifies, *Sarei* at 8949 (quoting *United States v. Alaska*, 503 U.S. 569, 588 n.10 (1992)), deal with the geographical definition of territorial waters, not with land-based pollution. Moreover, it is improper to use a treaty not ratified by the U.S., such as UNCLOS, as the basis for an ATS norm. *Sosa*, 542 U.S. at 728. And even a well-subscribed treaty does not establish a customary norm, which must rest instead on the actual practice of nations undertaken out of a sense of legal obligation. *Id.* at 734-35.

as allegations are not assumed to be true on a motion to dismiss. *Ileto v. Glock Inc.*, 349 F.3d 1191, 1200 (9th Cir. 2003). Moreover, the Restatement is not a primary source on customary international law, *Arc Ecology v. U.S. Dep't of Air Force*, 411 F.3d 1092, 1102 n.8 (9th Cir. 2005), and the jus cogens norm it describes prohibits only systematic racial discrimination committed "by the government of a state as *official policy*" — *i.e.*, apartheid. Restatement (Third) of Foreign Relations § 702, cmt. b (1987) (emphasis added). The allegations set out in the complaint in this case, by contrast, challenge a private employer's allegedly disparate housing and wage scales based on distinctions between local and non-local mine employees; the selection of the mine site and its effects on a specific ethnic and cultural group; and the PNG government's allegedly aggressive response to the Bougainville crisis as having been motivated by racial animus. *Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d at 1154-55. This is not what the jus cogens norm addresses. Restatement § 702, cmt. b (the involvement of government officials in the alleged discrimination is not sufficient to establish the "state action" required by international law).

The majority concludes that the claims arising from harm inflicted by the PNG response to insurrection are cognizable against Rio Tinto — as war crimes and crimes against humanity that constitute jus cogens violations — without referring to the allegations of the complaint. *Sarei* at 8949-50. Just as in *Alperin*, the plaintiffs here do not allege that Rio Tinto committed the acts that injured anyone during the war. Rio Tinto is alleged, instead, to be liable for instigating and supporting the PNG government's use of force to quell the secessionist

rebellion on Bougainville. But no international norm prohibits the use of force in response to a violent rebellion. *Alperin*, 410 F.3d at 560; *Linder v. Portocarrero*, 963 F.2d 332, 337 (11th Cir. 1992). And no international norm, or provision of U.S. law, prohibits a corporate citizen from petitioning its government to take action when its facilities and personnel are attacked. *Cf. Arnold v. IBM*, 637 F.2d 1350, 1356 (9th Cir. 1981).

3. Practical Consequences Strongly Counsel Against Recognizing a Cause of Action on These Allegations.

Sosa held that the determination of whether to recognize a common-law cause of action under the ATS required "an element of judgment about the practical consequences" of making that cause of action available to plaintiffs in federal court. 542 U.S. at 732-33 & n.20. Here, the practical consequence of the majority's interpretation is to make every U.S. district court a permanent forum of first resort for allegations about incidents anywhere in the world, based on general language invoking norms against racial discrimination, war crimes, or environmental pollution remotely connected to the high seas.

Further, it is a relevant practical consideration, weighing strongly against the majority's approach in this case, that "enforcement of an international norm by one nation's courts implies that other nations' courts may do the same." *Id.* at 761 (Breyer, J., concurring).

B. The Majority's Analysis of the Act of State Doctrine Contradicts *Sosa*'s Mandate.[13]

Sosa describes the act of state doctrine as supplying "judicial rules of decision" in cases "of particular importance to foreign relations," and having special significance in ATS cases. 542 U.S. at 726-27. Under the act of state doctrine, "the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid" for purposes of deciding a case, *W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., Int'l*, 493 U.S. 400, 409 (1990); *Sabbatino*, 376 U.S. at 428.

Sosa made clear that while U.S. courts are accustomed to enforcing limits on domestic governmental power, "it is quite another [thing]" 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. Such an inquiry should be undertaken under the ATS, "*if at all*, with great caution." *Id.* at 728 (emphasis added).

Everything plaintiffs challenge occurred in PNG's territory; and most was done by or under the authority of the sovereign, Australia before independence and then PNG. As noted above, although the complaint alleges violations of purported international norms, the facts alleged in the complaint do not implicate norms that could be actionable under the ATS. The majority errs in concluding that a plaintiff

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[13] The majority wrongly concluded that Rio Tinto waived any challenge to adverse findings on the act of state doctrine. *Sarei* at 8964 n.17. Rio Tinto won dismissal of all claims based on the political question doctrine, and no cross-appeal is necessary to challenge adverse findings as to an alternative basis for affirming the judgment of dismissal, such as act of state. *Rivero v. City & County of San Francisco*, 316 F.3d 857, 862 (9th Cir. 2002). The parties addressed act of state fully in their briefs and at oral argument.

can plead around the act of state doctrine by conclusory invocations of jus cogens norms. *Sarei* at 8962-63. The Ninth Circuit case cited for the proposition does not so hold,[14] and *Sosa* requires a rigorous analysis of whether the facts alleged would violate an actionable norm. As argued above, that analysis was not done here.

CONCLUSION

For each of the foregoing reasons this case merits rehearing and *en banc* review.

Respectfully submitted,

Dated: September 8, 2006

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[14] *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 707 (9th Cir. 1992), did not hold dismissal on act of state grounds is never appropriate for an alleged jus cogens violation. It noted that international law does not consider a jus cogens violation to be a sovereign act, but squarely held that it was still a sovereign act for purposes of the Foreign Sovereign Immunities Act.

CERTIFICATE OF COMPLIANCE WITH NINTH CIRCUIT RULE 32-2

The preceding Petition for Panel Rehearing and for Rehearing En Banc has a proportionally-spaced typeface, Times New Roman, 14 points. The word count is 5,563.

Dated: September 8, 2006

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Attorneys for Defendants-Appellees/ Cross-Appellants Rio Tinto plc and Rio Tinto Limited

Nos. 02-56256, 02-56390
Decided August 7, 2006
Before Circuit Judges Fisher and Bybee and District Judge Mahan

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALEXIS HOLYWEEK SAREI, et al.,

Plaintiffs/Appellants,

v.

RIO TINTO, PLC; RIO TINTO LIMITED,

Defendants/Appellees.

On Appeal from the United States District Court for the
Central District of California, Honorable Margaret M. Morrow

AMICUS CURIAE BRIEF OF CHEVRON CORPORATION IN SUPPORT OF PETITION FOR REHEARING AND REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Chevron Corporation states that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

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INTEREST OF AMICUS CURIAE

Chevron Corporation is an integrated energy company, whose affiliates and subsidiaries conduct business in approximately 180 countries. Its affiliates and subsidiaries engage in every aspect of the oil and natural gas industry, including exploration and production, refining, marketing and transportation.

Because of their worldwide operations, Chevron and its affiliates have a strong interest in the proper interpretation of the Alien Tort Statute ("ATS"). Suits under the ATS have proliferated in recent years, and numerous companies with global operations, including Chevron, have been subject to claims that they are vicariously or secondarily liable under the ATS for the conduct of foreign governmental entities.

Chevron believes that the panel's decision was mistaken in several important respects, particularly in its ruling on vicarious liability under the ATS and the scope of international law. Chevron urges the Court to grant rehearing or rehearing en banc to correct these errors.

INTRODUCTION AND SUMMARY

Rehearing should be granted because the panel's opinion decides important issues of first impression in this Circuit regarding the scope of liability under the ATS without the benefit of any briefing and in ways that directly conflict with the Supreme Court's decision in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). Among other things, the panel ruled, relying on "federal common law," that private corporations may be held vicariously liable under the ATS for the alleged wrongful conduct of foreign governmental entities. Slip

Op. at 8950. In *Sosa*, however, the Supreme Court specifically instructed courts to look to international law (not domestic law) to determine such scope of liability issues. 542 U.S. at 732 n.20 (directing courts to determine "whether *international law* extends the scope of liability for a violation of a given norm to the perpetrator being sued") (emphasis added). The panel's decision does not address this controlling instruction from *Sosa,* and it nowhere analyzes whether international law would extend liability to private parties for the alleged violations of international law at issue here.

The issue of when a private corporation may be held vicariously or secondarily liable under the ATS is one of far-reaching importance. It was one of the principal issues in *Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002), *en banc reh'g ordered*, 395 F.3d 978 (2003), *vacated and dismissed*, 403 F.3d 708 (2005)—and was the focus of this Court's en banc consideration of that case before the case settled. It is a principal issue—and has been extensively briefed (including by the United States as amicus)—in at least two appeals now pending in this Court. *Corrie v. Caterpillar Inc.*, No. 05-36210; *Mujica v. Occidental Petroleum Corp.*, Nos. 05-56056, 05-56175 & 05-56178 . In this case, however, neither party raised or briefed the question of vicarious liability. Briefing was instead devoted to the political question and other justiciability grounds upon which the district court had ruled in dismissing this case.

In addition to being mistaken, the majority's cursory disposition of this important issue was also unnecessary to resolve this appeal. Contrary to the panel's assertion, the panel was not required to address the merits of plaintiffs'

allegations as a jurisdictional prerequisite to deciding the justiciability issues that were the subject of the parties' briefing. The Court may resolve threshold grounds for dismissal not going to the merits without first resolving jurisdictional questions—and it may do so without regard to whether its decision is to reverse, rather than affirm, the district court's dismissal, as both the Supreme Court and this Court have previously recognized.

Rehearing should be granted, and the opinion revised to delete the discussion of vicarious liability as unnecessary, or to reconsider the issue and follow the Supreme Court's direction to look to international law rather than federal common law. An issue of such broad importance should be decided on the basis of full briefing, and in an appeal in which its resolution is necessary, not in the truncated fashion it is addressed in the panel's opinion.

For the same reasons, rehearing should also be granted on the Court's discussion of whether plaintiffs have alleged violations of international law norms that satisfy the standards of *Sosa*. As with vicarious liability, those issues were not briefed and the Court did not need to reach them to resolve this appeal. Moreover, the Court did not conduct the analysis required by *Sosa* and reached a result inconsistent with *Sosa,* particularly as to plaintiffs' allegations of racial discrimination and violation of the United Nations Convention on the Law of the Sea ("UNCLOS").[1]

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[1] Although Chevron focuses in this brief on vicarious liability and actionable international norms, it fully endorses Rio Tinto's petition for rehearing on each of the other issues that petition raises.

ARGUMENT

I. THE PANEL DID NOT NEED TO DECIDE, AND SHOULD NOT HAVE REACHED, THE UNBRIEFED VICARIOUS LIABILITY AND LAW OF NATIONS ISSUES.

The questions whether private persons may be held vicariously liable under the ATS and whether the alleged international norms here satisfy *Sosa* were not raised by either party and were not briefed. The issues presented on appeal were limited to the propriety of the district court's rulings on justiciability (*i.e.*, political question, act of state, international comity) and exhaustion, and on the subsidiary question whether plaintiffs should have been given leave to amend.

Despite the absence of any briefing, the panel concluded that it was required to reach the underlying ATS issues because (in the panel's view) they go to the Court's jurisdiction. Assuming that the issues are indeed jurisdictional, however, the panel was not required to decide them as a prerequisite to resolving the non-merits grounds upon which the district court dismissed the case. It is certainly true that a court must decide whether it has subject matter jurisdiction before it may decide the merits of a case. *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94-95 (1998). But in *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574 (1999), the Supreme Court made clear that a court does not violate that rule by addressing "threshold grounds" that do not go to the merits, such as the political question and other justiciability grounds at issue here. *Id.* at 585; *see Tenet v. Doe*, 544 U.S. 1, 6 n.4 (2005) (assuming jurisdiction in order to decide whether complaint was categorically barred on threshold public policy

grounds); *Hwang Geum Joo v. Japan*, 413 F.3d 45, 47-48 (D.C. Cir. 2005) (assuming subject matter jurisdiction in order to resolve whether case presented nonjusticiable political question).

The panel acknowledged this principle. Slip. Op. at 8948 n.3. But it concluded that it was inapplicable here because the panel's decision on justiciability was to reverse, rather than affirm, the district court's dismissal. *Id.* This was mistaken. *Ruhrgas* did not hold that a court may address a non-merits threshold ground only if its ruling on that ground will be to dismiss the case. Any such holding would be circular: a court would not know whether it can decide a threshold issue without first deciding that issue. Instead, the rationale of *Ruhrgas* was that a court does not violate Article III limits on its law-making power when it rules on "threshold grounds for denying audience to a case on the merits." 526 U.S. at 585. This rationale does not depend on which way the court resolves the threshold ground. Either way, the court's ruling is limited to the threshold ground and not does reach the merits. Of course, if the threshold ground for dismissal is denied, the subject matter jurisdiction question will have to be resolved before any proceedings on the merits may occur. But such resolution will be a prerequisite to deciding the merits, not to deciding the threshold issue. And, when, as here, the case is on appeal from a dismissal, the court of appeal need not itself resolve the jurisdictional issue (because it is not itself proceeding to resolve the merits), but may leave that issue for the district court.

Ellis v. Dyson, 421 U.S. 426 (1975), one of the cases on which *Ruhrgas* relied, illustrates the point. In that case, the lower courts had dismissed the case on *Younger* abstention grounds without deciding the jurisdictional question whether an Article III case or controversy existed. The Supreme Court reversed the *Younger* abstention ruling, just as the panel here reversed the district court's justiciability dismissal. But, unlike the panel here, the Supreme Court did not conclude that its decision on abstention meant that it was required to resolve the jurisdictional issue as a prerequisite to its ruling on abstention. Instead, the Court left that jurisdictional issue for the lower courts to address on remand, subject to later appellate review on a complete record.

Similarly, in *Alperin v. Vatican Bank*, 410 F.3d 532 (9th Cir. 2005), this Court reversed in part the district court's ruling that an ATS claim was barred by the political question doctrine. The Court, however, did not rule on the viability of the claim apart from the political question doctrine. Instead, the Court left it for the district court to resolve on remand whether the plaintiffs "have correctly invoked the [ATS] and other jurisdictional bases" for their claim. *Id.* at 541 n.4.

There is good reason for the panel to follow that course here. Because of its mistaken view, the panel felt compelled to address important issues of far-reaching consequence (not only to this case, but to numerous other cases under the ATS) without the benefit of any briefing from either party. As we demonstrate below, the panel's resolution of the issues is irreconcilable with *Sosa*. Rather than this Court attempting to resolve the issues at this point, we believe the proper course is for the Court to delete that portion of its opinion as

unnecessary. Doing so would be consistent with the fact that, with the justiciability ruling having been reversed, this case is in the same posture as any other case in which a district court has denied a motion to dismiss on jurisdictional grounds. The case can now proceed in the district court for that court to consider the issue further if it chooses in light of *Sosa* and other developments, and with the district court's ruling preserved for this Court's later review.[2]

II. THE PANEL'S RULING ON VICARIOUS LIABILITY WAS ERRONEOUS.

A. The question of vicarious liability under the ATS is governed by international law, not domestic law.

Sosa holds that international law, rather than domestic law, provides the substantive law for ATS claims. The purpose of the ATS was to "enable[] 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). In other words, "the ATS gave the district courts 'cognizance' of certain causes of action, and the term bespoke a grant of jurisdiction, *not power to mold substantive law*." *Id.* at 713 (emphasis added). Consistent with this understanding, *Sosa* specifically instructed courts that international law governs

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[2] As noted, Chevron supports Rio Tinto's arguments that the panel's decision on justiciability was erroneous. Should rehearing be granted and the Court affirm the dismissal on justiciability grounds, the discussion of the underlying ATS issues should in that event be deleted from the Court's opinion as clearly unnecessary under *Ruhrgas*.

whether "the scope of liability for a violation of a given norm [extends] to the perpetrator being sued." *Id.* at 732 n.20.

The panel's decision is irreconcilable with *Sosa*. Rather than looking to international law, the majority stated that courts should "draw on federal common law" and cited to an ERISA decision that relied on the Restatement of Agency to derive principles for imposing agency liability. Slip Op. at 8950. The majority did not explain why such domestic law principles are relevant to deciding liability under the ATS for violations of the "law of nations." Nor did it suggest that the "law of nations" embraces liability using domestic agency principles.

The panel's footnote suggestion that the law of nations "encompasse[s] vicarious liability" (Slip Op. at 8950 n.5) does not solve the problem, but rather exacerbates it. The footnote does not indicate that international law is controlling on the issue, as *Sosa* dictates. Moreover, the purported international authorities the majority cited do not address vicarious liability at all, but rather refer only to aiding and abetting liability. As this Court has long recognized, these species of liability are entirely distinct. *State Farm Fire and Cas. Co. v. Bomke*, 849 F. 2d 1218, 1220 (9th Cir. 1988). And neither of the authorities the majority cited supports imposing even aiding and abetting liability under international law.[3]

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[3] The 1795 Attorney General opinion (1 Op. Att'y Gen. 57 (1795)) addressed a claim that American citizens had breached the United States' neutrality in the war between England and France by aiding France. But this was a claim for direct liability; there was no aiding and abetting liability because

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Sosa's requirement that issues of vicarious (or aiding and abetting) liability under the ATS be governed by international law goes to the core of the concerns *Sosa* addressed regarding federal court authority under the ATS. *Sosa* mandates that courts use "great caution in adapting the law of nations to private rights," in part because of the "potential implications for the foreign relations of the United States" and in part because courts have no "congressional mandate to seek out and define new and debatable violations of the law of nations." 542 U.S. at 727, 728. These concerns are not limited to defining *what* conduct is prohibited but extend as well to determining *who* may be sued. When a private entity is alleged to be secondarily or vicariously liable for the conduct of a foreign government, that claim necessarily involves in the first instance adjudicating the lawfulness of the foreign government's conduct in that government's absence and without its cooperation. Additionally, the threat of such liability may affect the willingness of private individuals to do business in such countries. In part because of such concerns, the United States has strongly opposed improper application of aiding and abetting and vicarious liability theories in these cases in amicus briefs in cases pending in this Court and elsewhere. *See supra*, p. 2. These concerns are not addressed by the

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the only violation of law at issue was that of the American citizens themselves. The allegedly aided entity—France—was not a wrongdoer because it obviously was not breaching any neutrality obligation of the United States.

The Act of April 30, 1790, ch. 9, § 10, 1 Stat. 114, also does not establish any international law principle. It was a domestic statute enacted by Congress. And it imposes criminal aiding and abetting liability—not civil liability of the type being asserted here.

indiscriminate application of legal principles that have been developed solely in an unrelated domestic context without regard to any of the sensitivities that are involved in context of the relations between nations.

B. International law does not recognize the theories of secondary or vicarious liability suggested by the majority.

If the panel had correctly looked to international law principles, it could not have reached the conclusion it did regarding the availability of vicarious liability in this case. Although the panel declined to decide the specific standard that would ultimately govern (Slip Op. at 8951 n.6), it suggested that Rio Tinto could be held liable for the government's conduct on a theory that Rio Tinto encouraged the conduct at issue and "exercised control" over the military actions. Slip. Op. at 8950. But we are not aware of any authority under international law—and the panel cites none—holding private persons liable for the conduct of governmental entities based on such allegations. The panel cited to the district court's opinion below. But the district court rested its reasoning, not on international law, but on domestic law principles. 221 F. Supp. 2d at 1142-49. For the reasons discussed above, such reliance was improper under *Sosa*.[4]

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[4] Some courts, without discussing *Sosa*'s direction on this issue, have continued to apply domestic law following *Sosa* to determine issues related to whether liability extends to the defendant being sued. *E.g., Aldana v. Del Monte Fresh Produce, N.A.*, 416 F.3d 1242 (11th Cir. 2005). Other courts, however, have correctly recognized that international law, not domestic law, governs such issues. *Doe v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20, 26 (D.D.C. 2005).

To the extent the panel suggested that international law might impose aiding and abetting liability in cases such as this, that suggestion likewise cannot withstand scrutiny. While international law recognizes *criminal* aiding and abetting liability in certain circumstances,[5] there is no such recognition in international law of civil aiding and abetting liability. Nor can criminal liability be equated to civil liability, given the important safeguards of indictments, prosecutorial discretion and a reasonable doubt standard available in the criminal context that are lacking in civil cases. In addition, criminal aiding and abetting liability is recognized only against natural persons, not against corporations. In the negotiations leading to the formation of the International Criminal Court (ICC), the international community specifically considered and rejected a proposal to apply secondary criminal liability to corporations. *See, e.g.*, *The Rome Statute of the International Criminal Court: A Commentary* 778-79 (Cassesse et al. eds., 2002). Extending these limited principles of criminal aiding and abetting liability to civil cases such as this would be to engage in the very creation of "new and debatable violations of the law of nations" that *Sosa* prohibits. 542 U.S. at 728.

Moreover, even in the criminal context, there is no international consensus sufficient to satisfy *Sosa*'s "demanding standard of definition." 542 U.S. at 738 n.30. Under the ICC Statute, an aider and abettor must have

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[5] *See, e.g.*, Rome Statute of the International Criminal Court art. 25(3) ("ICC Statute"); Statute of the International Criminal Tribunal of the Former Yugoslavia art. 7(1) ("ICTY Statute"); Statute of the International Criminal Tribunal for Rwanda art. 6(1) ("ICTR Statute").

"the *purpose* of facilitating" the crime, but under the ICTY Statute the aider and abetter need only have "*knowledge* that acts . . . assist the commission of the specific crime." *Compare* ICC Statute, art. 25(3)(c), with *Prosecutor v. Vasiljevic*, ICTY-98-32-A, Judgment, ¶ 102 (Feb. 25, 2004) (emphases added). These disparate definitions, diverging on the central issue of the necessary mens rea, belie the notion that a specific universal consensus sufficient to satisfy *Sosa* exists.[6]

III. THE PANEL ERRONEOUSLY RECOGNIZED CLAIMS UNDER THE ATS BASED ON ALLEGED INTERNATIONAL NORMS THAT DO NOT SATISFY SOSA'S MINIMUM CRITERIA.

The panel also erred in its analysis of whether plaintiffs have asserted underlying violations of international law that meet *Sosa*'s requirements. The panel's error was most evident in its ruling with respect to plaintiffs' claim for violation of the UNCLOS for allegedly causing water pollution in the course of mining operations that ended in 1989. The panel reasoned that the UNCLOS represents "customary international law" because it has been ratified by 149 nations. Slip. Op. at 8949. But the UNCLOS did not receive the sixty signatures required to enter into force until 1994, five years after Rio Tinto

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[6] The majority's assertion that it can decide that some form of secondary or vicarious liability can exist under the ATS without deciding "what standard must govern such determinations of liability" (Slip Op. at 8951 n.6) is itself inconsistent with *Sosa*. Without resolving the governing standard, there is no way to say that the standard has the specificity and definitiveness *Sosa* requires.

ceased operations. UNCLOS art. 308.[7] Moreover, PNG did not ratify the UNCLOS until 1997, and the United States still has not ratified it.[8]

The panel cites *United States v. Alaska*, 503 U.S. 569, 588 n.10 (1992), as support for its holding that the UNCLOS "baseline" environmental provisions constitute customary international law. Slip Op. at 8949. This was a misreading of that decision. *Alaska* was not using "baseline" in the sense of "basic" or "fundamental" as the panel's opinion suggests, but rather as a term of art meaning "[t]he line that divides the land from the sea, by which the extent of a state's coastal jurisdiction is measured." *Black's Law Dictionary* 160 (8th Ed. 2004); *see* UNCLOS art. 2 ("Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention."). The UNCLOS contains detailed rules for drawing baselines that have been recognized as customary international law. *See, e.g.* UNCLOS Arts. 5-10, 13.[9] The claim in this case, however, is not based on these provisions, but rather on Article 207, which obliges States to take "measures" and adopt laws to reduce pollution, "taking into account characteristic regional features, the economic capacity of

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7 *See* http://www.un.org/Depts/los/convention_agreements/convention_agreements.htm

8 *Id.*

9 *See, e.g.,* Proclamation No. 5928, 54 Fed. Reg. 777 (Dec. 27, 1988) (declaring United States territorial sea extending 12 nautical miles from the United States baselines).

developing States and their need for economic development."[10] The panel cites no authority suggesting that this obligation represents customary international law. In fact, this Court has recognized that there is serious doubt as to the customary status of the UNCLOS environmental provisions. *See ARC Ecology v. U.S. Dept. of Air Force*, 411 F.3d 1092, 1102 & n.8 (9th Cir. 2005) (noting that "it is uncertain" whether the Restatement (Third) For. Rel. § 601, which is substantially identical to UNCLOS art. 207, "provide[s] accurate statements of international law"); *see also* Peter Malanczuk, *Akehurst's Modern Introduction to International Law* 242, 245 (7th rev. ed. 1997) (the UNCLOS environmental provisions "only provide[] for general principles," and "customary international law dealing with the environment is at best rudimentary"). In short, the UNCLOS environmental rules do not constitute universally accepted international law, and they certainly did not in 1989.

Further, even if Article 207 represented customary international law, it still would be too vague to satisfy *Sosa*'s "clear definition" requirement. 542 U.S. at 733 n.21. There are no recognized standards by which United States courts can evaluate, among other things, whether a foreign nation properly balances the value of environmental protection against its need for economic development. *See also* UNCLOS art. 193 ("States have the sovereign right to exploit their natural resources pursuant to their environmental policies and in

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[10] *See Sarei,* 211 F. Supp. 2d at 1161 (quoting UNCLOS art. 207). The UNCLOS can be found at http://www.un.org/Depts/los/convention_agreements/convention_overview_convention.htm.

accordance with their duty to protect and preserve the marine environment."); *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 167 (5th Cir. 1999) ("federal courts should exercise extreme caution when adjudicating environmental claims under international law to insure that environmental policies of the United States do not displace environmental policies of other governments")

Finally, the UNCLOS does not provide any basis for imposing personal liability. In general, the UNCLOS applies only to the "State parties" to the convention. *See* UNCLOS "Preamble" & art. 2(2)(1). In particular, Article 207 only imposes an obligation on States to "adopt laws and regulations . . . [and] take other measures" to reduce pollution. It makes no sense to hold a private citizen liable because a foreign nation failed to enact sufficiently stringent environmental laws.[11]

Similarly, the panel erroneously recognized a claim under the ATS for racial discrimination based on plaintiffs' allegations that Rio Tinto paid native workers less than imported expatriate workers. Slip Op. at 8949. The only international law source the panel cited for this holding is the Restatement (Third) of Foreign Relations. *Id.* at 8962-63. But, "[h]owever respectable the Restatement may be, it is not a primary source of authority upon which, standing

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[11] Treating the UNCLOS as creating norms enforceable in federal court is also inconsistent with the fact that the UNCLOS includes a specific jurisdictional article mandating that claims for violation of the UNCLOS be settled by international or arbitral tribunals specified in the UNCLOS itself. UNCLOS arts. 287-88, 297(1)(c); *see also* UNCLOS art. 295 (requiring prior exhaustion of local remedies where required by international law).

alone, courts may rely for propositions of customary international law." *ARC Ecology*, 411 F.3d at 1102 n.8 (internal quotation marks omitted); *Sosa*, 542 U.S. at 737 ("the Restatement's limits are only the beginning of the enquiry"). Moreover, the panel does not address the fact that the Restatement applies only to "systematic racial discrimination" by a "state." *Restatement*, § 702; see also *id.* cmt i ("Racial discrimination is a violation of customary law when it is practiced systematically as a matter of state policy, *e.g.*, apartheid in the Republic of South Africa."). Finally, while the United States is a party to the International Convention on the Elimination of All Forms of Racial Discrimination, it ratified this convention on the express understanding that it was not self-executing. 140 Cong. Rec. S7634-02 (1994). *Sosa* held that ATS claims cannot be founded on non-self-executing treaties. 542 U.S. at 735. In short, the panel did not cite, and we are not aware of, any evidence establishing an international norm prohibiting racial discrimination on which an ATS claim can be based in this case.

Nos. 02-56256 & 02-56390

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALEXIS HOLYWEEK SAREI, *ET AL.*,

Plaintiffs/Appellants/Cross-Appellees,

v.

RIO TINTO, PLC; RIO TINTED LIMITED,

Defendants/Appellees/Cross-Appellants.

On Appeal from the United States District Court
for the Central District of California, Case No. CV-00-11695-MMM
The Honorable Margaret M. Morrow, United States District Judge

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BRIEF FOR THE NATIONAL FOREIGN TRADE COUNCIL AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS' PETITION FOR PANEL REHEARING AND FOR REHEARING EN BANC

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Amicus curiae The National Foreign Trade Council ("NFTC") respectfully submits this brief in support of the petition for rehearing and rehearing en banc ("Petition") filed by Defendants/Appellees/Cross-Appellants Rio Tinto plc, *et al.* ("Defendants").

INTEREST OF *AMICUS CURIAE*

The NFTC is the premier business organization advocating a rules-based world economy. Founded in 1914, the NFTC and its affiliates now serve more than 300 member companies. The NFTC regularly represents the legal and policy interests of its members in matters of national importance, and is frequently involved in litigation concerning international commerce and foreign policy.

The *amicus* and its members have a vital interest in the issues raised by the Petition. Over the past decade, numerous U.S. and international companies have been sued under the Alien Tort Statute, 28 U.S.C. § 1350 ("ATS"), in cases stemming from their investments and operations outside the U.S. While some companies are alleged to have committed violations of the law of nations directly, more often plaintiffs have treated companies as surrogates for foreign governments — alleging that companies' overseas investments aided and abetted or otherwise facilitated human rights abuses by those governments. Not only do these lawsuits strain relations between the U.S. and the foreign governments thus targeted, but they discourage foreign investment. Because of the critical importance of these

issues to its member companies, *amicus* has a strong interest in assisting the Court in its consideration of the issues raised by the panel opinion in this case.

ARGUMENT

I. Lower Courts Urgently Need Clear Guidance Regarding the Threshold Legal Standards That Govern ATS Cases

The panel majority addressed four key threshold legal issues that frequently arise on motions to dismiss in ATS cases: whether aliens must exhaust domestic remedies before filing suit in a U.S. court, as they must under the Torture Victim Protection Act, 28 U.S.C. § 1350 *note* ("TVPA"); whether a corporation may be held vicariously liable for a violation of international law; and the extent to which the political question and act of state doctrines permit courts to sit in judgment of disputes involving a foreign government's actions. As set forth below, NFTC respectfully submits that the panel's disposition of each of these issues conflicts with Supreme Court and Ninth Circuit authority and that these conflicts alone justify a grant of rehearing en banc. *See infra* at 4-15.

En banc review is warranted for the further reason that clear and correct guidance now regarding these ATS issues is uniquely important. Numerous ATS cases are pending in this Court and in the lower courts. *See, e.g.*, *Galvis Mujica v. Occidental Petroleum Corp.*, C.A. Nos. 05-56056 & 05-56175 (9th Cir.); *Corrie v. Caterpillar, Inc.*, C.A. No. 05-36210 (9th Cir.); *Bauman v. DaimlerChrysler AG*, No. C-04-00194-RMW (N.D. Cal.); *Bowoto v. Chevron Corp.*, No. C-99-02506-SI

(N.D. Cal.); *Doe v. Nestle, S.A.*, No. CV-05-5133-SVW (C.D. Cal.); *Mamallacta Shiguago v. Occidental Petroleum Corp.*, No. CV-06-4982-SJO (C.D. Cal.).

A district court's decision on a defendant's motion to dismiss in an ATS action carries much more significance than in other contexts. If the lawsuit erroneously proceeds past the pleading stage, all of the potential adverse foreign policy implications of having district judges sitting as *ad hoc* referees of international affairs — the very implications identified by the Supreme Court in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727-28 (2004) — will be realized. Moreover, very substantial costs will be imposed on the defendants: these suits' allegations inevitably turn on events occurring in the furthest corners of the developing world (*e.g.*, Papua New Guinea, Indonesia, Ivory Coast, and Ecuador), and discovery undoubtedly will be extraordinarily burdensome and expensive. *Doe v. Nestle, S.A.*, for example, involves claims arising in Cote d'Ivoire, a country only now emerging from a civil war that could well reignite. *See* BBC News, Timeline: Ivory Coast, Sept. 6, 2006, at http://news.bbc.co.uk/2/hi/africa/country_profiles/1043106.stm. And because the legal and political cultures of these various countries are very different from ours, it is uncertain whether any party actually will be able to obtain the evidence needed to adjudicate the claims fairly.

Moreover, if permitted to stand, the panel's decision threatens to invite a further proliferation of ATS actions, given the large number of U.S. corporations

engaged in commerce in many countries in which human rights abuses may occur. The inevitable result would be to deter active engagement with and investment in the developing world. *In re South African Apartheid Litigation*, 346 F. Supp. 2d 538, 554 (S.D.N.Y. 2004), *appeal pending*, No. 05-2141 (2d Cir.).

For these reasons, it is important for this Court to give lower courts accurate guidance on threshold ATS issues now — before erroneous rulings open the door to illegitimate claims and the resulting harm to U.S. foreign policy interests and international commerce.

II. The Panel Majority's Rulings Conflict With Binding Authority

A. The Panel Majority's Holding That Exhaustion Is Not Required Under the ATS Conflicts with Supreme Court Precedent

In rejecting Defendants' assertion that the action should have been dismissed for Plaintiffs' failure to exhaust domestic remedies, the panel majority held that, because the ATS (unlike the TVPA) does not contain any language explicitly requiring exhaustion, slip op. at 8972-79, courts may not read into the ATS what Congress presumably chose to leave out, *id.* at 8973 (stating that "the absence of explicit exhaustion language in the [ATS]" may have been "purposeful"). The panel's reasoning and result cannot be squared with the Supreme Court's controlling decision in *Sosa v. Alvarez-Machain*.

The panel's reliance on congressional silence might have had force under this Circuit's pre-*Sosa* case law, which had held that "the [ATS] not only provides

federal courts with subject matter jurisdiction, but also *creates a cause of action* for an alleged violation of the law of nations." *Alvarez-Machain v. United States*, 331 F.3d 604, 612 (9th Cir. 2003) (en banc) (emphasis added). *Sosa*, however, unanimously rejected this view, holding instead that "the ATS is a jurisdictional statute creating no new causes of action" and that, to the extent any cause of action may be enforced under this jurisdictional grant, "federal common law" must supply it. 542 U.S. at 724, 732. Because the ATS does not itself create a cause of action, the omission of an explicit exhaustion requirement has no significance: Congress, in enacting the ATS, did *not* undertake to define the contours of a cause of action, and thus its silence on the exhaustion point (or any other such point) cannot be read as having settled a question Congress did not address. *See Musick, Peeler & Garrett v. Employers' Ins. of Wausau*, 508 U.S. 286, 291 (1993) (because the "private right of action under Rule 10b-5 was implied by the Judiciary," it "would be futile to ask whether the 1934 Congress also displayed a clear intent to create a contribution right collateral to the remedy").

Accordingly, whether exhaustion is required here cannot be resolved by the text or legislative history of the ATS, but instead must be evaluated as a matter of federal common law, "gauged against the current state of international law." *Sosa*, 542 U.S. at 733. For several reasons, application of that controlling standard leads inescapably to the view that exhaustion is required.

First, as Judge Bybee concluded (slip op. at 9005), the requirement that "'local remedies must be exhausted'" is a "'well-established rule of customary international law'" (quoting *Switzerland v. U.S.* (*Interhandel*), 1959 I.C.J. Rep. 6, 27),[1] and it would be anomalous to create a federal cause of action that seeks to "enforce" one "international norm" by flouting another. *Sosa*, 542 U.S. at 729. The panel's decision cannot be squared with this principle. *See also id.* at 733 n.21 (favorably commenting that the Court "would certainly consider this [exhaustion] requirement in an appropriate case").

Second, exhaustion is required under established principles governing judicially created private rights of action. By holding that the ATS "is a jurisdictional statute" *only*, and that any cause of action must come from federal common law, 542 U.S. at 724, *Sosa* invokes the well-established body of principles governing the *judicial* creation of private rights of action. One of the most important such principles is that courts must respect and defer to the policy judgments that Congress has made in the relevant area of law. *Sosa*, 542 U.S. at 726-27. Hence, in fashioning a judicially created private right of action, courts must be guided by the policy judgments Congress has made in creating analogous "express causes of action." *Central Bank of Denver v. First Interstate Bank of*

[1] *See also Enahoro v. Abubakar*, 408 F.3d 877, 886 (7th Cir. 2005); *id.* at 890 n.6 (Cudahy, J., dissenting) (collecting authorities); S. Rep. No. 249, 102d Cong., 1st Sess. 10 (1991) (the TVPA's express exhaustion requirement reflects "general principles of international law").

Denver, 511 U.S. 164, 178 (1994). This rule of restraint has special force here, given that the ATS's federal common law authority must be exercised, "if at all, with great caution" in light of the "risks of adverse foreign policy consequences." *Sosa*, 542 U.S. at 728.

These principles compel the conclusion that any federal common law cause of action under the ATS should be modeled after the express cause of action embodied in the TVPA, which this Circuit already has held is the "appropriate vehicle for interstitial lawmaking" for the ATS, *Papa v. United States*, 281 F.3d 1004, 1011-12 (9th Cir. 2002). *Cf. Enahoro*, 408 F.3d at 885-86 (emphasizing the importance, post-*Sosa*, of respecting policy judgments Congress made in crafting the TVPA); *id.* at 890 (Cudahy, J., dissenting).[2]

Third, contrary to the majority's suggestion (slip op. at 8981), an exhaustion requirement follows directly from *Sosa*'s admonition that federal common law authority in this area must be exercised, "if at all, with great caution." 542 U.S. at 728. One of the major reasons for such caution is that federal judicial efforts to adjudicate the conduct of foreign governments on their own soil inevitably would risk "adverse foreign policy consequences." *Id.* By affording the foreign state "an

[2] The panel erred in distinguishing *Papa* (slip op. at 8980 n.28) on the ground that the TVPA supposedly provides guidance only in shaping procedural requirements that *in fact* exist (not in answering *whether* they should exist). Under *Central Bank* and the principles set forth above, the existence of the TVPA as an analogous express cause of action *does* "answer the antecedent question of whether exhaustion should be imported" into the ATS. *Id.*

opportunity to redress [the matter] by its own means, within the framework of its own domestic legal system," *Switzerland v. U.S.*, 1959 I.C.J. Rep. at 27, an exhaustion requirement serves to eliminate *avoidable* foreign policy conflicts between the U.S. and foreign nations. *Cf. Coleman v. Thompson*, 501 U.S. 722, 731 (1991) (exhaustion requirement in federal habeas corpus law rests on principles of comity and avoidance of conflict).

B. The Majority's Discussion of "Vicarious Liability" Was Unnecessary, Unwarranted, and Contrary to Controlling Authority

One of the most extraordinary aspects of the panel opinion in this case is that the majority *sua sponte* reached out to address the issue of "vicarious liability" under the ATS, even though none of the parties had raised or even briefed the issue. The majority's only justification for doing so was that it had to determine its own subject-matter jurisdiction, slip op. at 8947-50, but, in fact, the panel did not need to reach the issue to make a jurisdictional determination; there were compelling reasons *not* to reach it; and the majority's *dicta* concerning vicarious liability is at odds with Supreme Court precedent.

The majority's conclusion that it had to address these issues in order to assure itself of its jurisdiction is plainly wrong. Under the Supreme Court's recent decision in *Arbaugh v. Y&H Corp.*, 126 S. Ct. 1235, 1245 (2006), a particular limitation on a cause of action will not be deemed to have jurisdictional

significance unless *Congress* has explicitly stated that the factor is jurisdictional. As explained above, Congress did not create any cause of action under the ATS, and the various substantive limitations that the *Sosa* Court imposed in its role as the ultimate expositor of *federal common law* are therefore not jurisdictional. The ATS, by its terms, only requires an alien, a tort, and a violation of international law, 28 U.S.C. § 1350; *In re Estate of Ferdinand E. Marcos Human Rights Litigation*, 978 F.2d 493, 499 (9th Cir. 1992), and under *Arbaugh* the panel did not need to go further to satisfy itself of its jurisdiction.[3] Beyond that, "'a motion to dismiss for lack of subject matter jurisdiction rather than for failure to state a claim is proper only when the allegations of the complaint are frivolous.'" *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1040 (9th Cir. 2004) (citation omitted). Plaintiffs' non-frivolous invocation of the still-extant federal common law authority under the ATS was sufficient to satisfy jurisdictional concerns. *Bell v. Hood*, 327 U.S. 678, 682-83 (1946).

There also were compelling reasons *not* to address the issue of vicarious liability: the question was neither presented nor briefed by the parties here, as the majority opinion explicitly acknowledged. Slip op. at 8947. The panel's action in

[3] Moreover, although 28 U.S.C. § 1331 (unlike § 1350) does not itself carry with it an opportunity to develop federal common law, *Sosa*, 542 U.S. at 731 n.19, the panel wholly failed to consider whether the *federal* common law authority recognized in *Sosa* nonetheless would not now also fit within the broader federal-question jurisdictional grant of § 1331 (which did not exist when the ATS was enacted). *Cf.* 542 U.S. at 745 n.* (Scalia, J., concurring in the judgment).

reaching out to address this important issue without the benefit of sufficient briefing was wrong.

The panel's unnecessary discussion of the issue also was incorrect, both as a matter of federal common law and as a matter of international law. The Supreme Court has squarely held that federal law does *not* permit courts to create or infer secondary liability absent explicit congressional authorization. *See Central Bank*, 511 U.S. at 181-82. Accordingly, courts relying upon *Sosa*'s highly "restrained" federal common law authority, 542 U.S. at 725, cannot create or impose such liability. The majority's citation (slip op. at 8950) of a single, out-of-circuit, non-ATS case applying agency principles in an entirely different context cannot undermine this controlling Supreme Court authority.

Moreover, *Sosa* held that a federal common law action under the ATS may only be recognized where the claim rests on an international law norm with the same sort of "definite content and acceptance" among civilized nations as "the historical paradigms" of piracy, assaults on ambassadors, and violations of safe conducts that were "familiar when § 1350 was enacted" in 1789, 542 U.S. at 732.[4] This "demanding standard of definition," *id.* at 738 n.30, applies not only to the

[4] This requirement must be met "to raise even the possibility of a private cause of action." 542 U.S. at 738 n.30. Even where this standard is satisfied, no private cause of action may be recognized where "the practical consequences of making that cause available to litigants in the federal courts" counsel against doing so. *Id.* at 732-33.

underlying substantive norm, but also to the question "whether international law extends the scope of liability for a violation of a given norm *to the perpetrator being sued*, if the defendant is a private actor such as a corporation or individual," *id.* at 732 n.20 (emphasis added). The majority here failed to consider whether there is a universal and well-defined international law norm in favor of corporate vicarious liability here. As Defendants explain, there is not. *See* Petition 15.[5]

Indeed, the one point for which there *is* a consensus is that *international law generally does not impose vicarious liability on corporate entities*. *See, e.g.*, Statute of the International Criminal Tribunal for the former Yugoslavia, art. 6, 32 I.L.M. 1192, 1194 (1993, updated 2004); Statute of the International Criminal Tribunal for Rwanda, art. 5, 33 I.L.M. 1602, 1604 (1994); *accord* Charter of the International Military Tribunal at Nuremberg, art. 6, 82 U.N.T.S. 279 (1945) (describing "crimes ... for which there shall be *individual* responsibility") (emphasis added). In drafting the Rome Statute to establish the International Criminal Court, the international community recently explicitly considered — and

[5] The majority's contrary assertion that "violations of the law of nations have always encompassed vicarious liability" is based on two inapposite citations. Slip op. at 8950 n.5. The opinion of Attorney General Bradford in *Breach of Neutrality*, 1 Op. Att'y Gen. 57 (1795), does not address civil secondary liability at all; rather, the opinion merely states that certain U.S. citizens, by assisting France in its (lawful) hostilities against England, had *directly* violated international law by breaching the U.S.'s "state of neutrality." *Id.* at 58-59. The 1790 statute making it a federal crime to aid and abet piracy would seem, if anything, to confirm that, without statutory authorization, vicarious liability should not be inferred.

declined to recognize — corporate liability. *See* Draft Statute for the International Criminal Court, art. 23, at p.49 & n.3, U.N. Doc. A/Conf. 183/2/Add.1 (1998) (available at http://www.un.org/law/n9810105.pdf); United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court at 133-36, ¶¶ 32-66, U.N. Doc. A/Conf. 183/13 (Vol. II) (1998) (available at http://www.un.org/law/icc/rome/proceedings/E/Rome%20Proceedings_v2_e.pdf); *id.* at 275, ¶ 10 (noting deletion of corporate liability).[6]

C. The Majority's Political Question Analysis Creates An Intra-Circuit Conflict With *Alperin*

The majority's holding (slip op. at 8951-60) that Plaintiffs' claims did not present political questions under *Baker v. Carr*, 369 U.S. 186 (1962), is incorrect and conflicts with *Alperin v. Vatican Bank*, 410 F.3d 532 (9th Cir. 2005).

In *Alperin*, this Court held that war-crimes claims based on allegations of "assistance to the war objectives" of a government were nonjusticiable. 410 F.3d at 548. Although *Alperin* supported the district court's application of the political question doctrine here, the majority purported to limit *Alperin* to its facts: "[we] read its holding to apply only to the narrower category of war crimes committed by *enemies* of the United States." Slip op. at 8959 (emphasis added). The majority

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[6] The majority's application of *Sosa*'s "demanding standard of definition," 542 U.S. at 738 n.30, is problematic in other respects as well. *Sosa* repeatedly states that the courts here must defer to the judgments of the political branches, 542 U.S. at 728, 731, 734-35, and yet the majority still recognized an ATS claim based on *a treaty the U.S. has refused to ratify* (UNCLOS). *See* slip op. at 8949.

argued that this crabbed reading of *Alperin* was necessary to avoid conflicting with the out-of-circuit decision in *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995) (upholding the justiciability of certain war-crimes claims against a Serbian officer during the Balkans conflict), but that is wrong. Rather than relying upon an inappropriate (and inherently political) distinction between "friendly" and "enemy" regimes, *Alperin* itself correctly distinguished *Kadic* on the grounds that the U.S. had affirmatively *endorsed* the *Kadic* suit and on the fact that *Kadic* focused on "the acts of a *single individual* during a localized conflict," not an attempt to "assign[] fault for actions taken by a foreign regime" during the overall conduct of war. *Alperin*, 410 F.3d at 562. Had the majority applied *Alperin*'s grounds for distinguishing *Kadic* (as it should have), the judgment here should have been affirmed: the U.S. *has* objected to this suit and Plaintiffs seek to hold Defendants liable, not for the discrete actions of a "single individual," but rather for Papua New Guinea's entire course of conduct during a 10-year civil war. These "retroactive political judgment[s] as to the conduct of war" are, "by nature, political questions." *Alperin*, 410 F.3d at 548.

The majority's decision also disregards *Sosa*'s admonition that "federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy." 542 U.S. at 733 n.21. Although the majority acknowledged *Sosa*'s cautionary language (slip op. at 8955), it failed to give the

requisite deference to the U.S.'s official view that adjudicating these claims "'would risk a potentially serious adverse impact ... on the conduct of our foreign relations,'" slip op. at 8956, and it failed to explain how this suit could possibly be adjudicated in a manner that would avoid these substantial foreign-affairs concerns. The majority's disregard of the Executive's views is inconsistent with *Sosa*'s express "policy of *case-specific deference* to the political branches" in ATS lawsuits. 542 U.S. at 733 n.21 (emphasis added); *see also Republic of Austria v. Altmann*, 541 U.S. 677, 702 (2004).

D. The Majority's "Act of State" Holding Misconstrues That Doctrine in Conflict With Supreme Court Precedent

The majority also seriously misconstrued the act of state doctrine, which generally precludes U.S. courts from judging the validity of a foreign sovereign's official acts within its own territory. *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.*, 493 U.S. 400, 405 (1990).

The majority concluded that the state-practiced racial discrimination challenged by Plaintiffs did not satisfy the act of state doctrine's threshold requirement that the challenged conduct be "official," because "'[i]nternational law does not recognize an act that violates *jus cogens* as a sovereign act.'" Slip op. at 8962-63 (quoting *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 718 (9th Cir. 1992)). The majority's out-of-context quotation from *Siderman* is inapposite because (1) the quote appears to be a summary of the *plaintiff's*

description of (2) *customary international law* (3) concerning *foreign sovereign immunity*. 965 F.2d at 718. Indeed, *Siderman did not address the merits of the act of state doctrine*, and it therefore provides no support for the majority's holding.

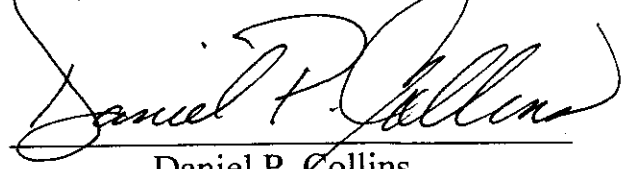
The panel's act-of-state analysis also ignores Supreme Court precedent by incorrectly confusing one of the *discretionary* factors the Court has identified for declining to apply the doctrine with the threshold requirement that the act be "official." *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964) (identifying the degree of consensus surrounding a norm as a case-specific factor for declining to apply the act of state doctrine, notwithstanding its technical availability); *see also W.S. Kirkpatrick*, 493 U.S. at 409 (reaffirming the distinction between the threshold requirements of the doctrine and the discretionary factors for declining to apply it).

CONCLUSION

Amicus respectfully requests that the petition for rehearing and rehearing en banc be granted.

DATE: September 28, 2006 Respectfully submitted,

MUNGER, TOLLES & OLSON LLP

By: 

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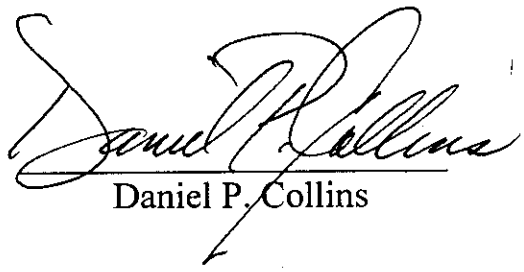
CERTIFICATE OF COMPLIANCE

I certify that the attached brief is proportionately spaced, has a typeface of 14 points, and contains 3,697 words.

Dated: September 28, 2006



Daniel P. Collins

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 02-56256, 02-56390

ALEXIS HOLYWEEK SAREI, et al.,

Plaintiffs-Appellants,

v.

RIO TINTO, PLC, et al.

Defendants-Appellees,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PANEL REHEARING OR REHEARING EN BANC

INTERESTS OF THE UNITED STATES

Pursuant to this Court's order of September 15, 2006, the United States files this amicus brief in support of Rio Tinto's petition for panel rehearing and for rehearing en banc.

Plaintiffs in this case, current and former residents of Bougainville, Papua New Guinea, brought suit against the corporate parent companies of a mine located in Bougainville, asserting claims under the Alien Tort Statute (ATS), 28 U.S.C. § 1350. The United States has a significant interest in the proper construction and application of the ATS. As the Supreme Court recently acknowledged, the federal courts' recognition of claims under the ATS can have significant implications for the United States' foreign relations. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004).

This is the first case since *Sosa* in which this Court has considered the types of claims that may be asserted as a matter of federal common law under the ATS. The panel majority considered that issue, however, even though no party had raised it and without any briefing by the parties regarding the proper application of *Sosa*. In this context, the panel simply held that *Sosa* changed nothing and that all of plaintiffs' international law claims upheld by the district court were cognizable as a matter of federal common law. The panel went further and opined on the availability of vicarious liability for these claims. Again, the panel reached its conclusion although the issue was not raised or briefed by the parties.

In recognizing "vicarious" liability the panel did not differentiate among accomplice liability, aiding and abetting liability, and other forms of secondary liability. These issues are of great importance and a holding recognizing such

secondary liability vastly increases the scope of the common law claims to be heard under the ATS. Notably, the availability of aiding and abetting liability has been at issue before this Court sitting en banc, but, because the parties settled, the Court dismissed the case before argument. *See Doe I v. Unocal Corp.*, 395 F.3d 932, 949–50 (9th Cir. 2002) (panel opinion); 395 F.3d 978 (9th Cir. 2003) (order vacating panel opinion); 403 F.3d 708 (9th Cir. 2005) (order dismissing case). The issue is fully briefed in two cases pending before the Court. *See Corrie v. Caterpillar, Inc.*, No. 05-36210 (9th Cir.); *Mujica v. Occidental Petroleum Corp.*, No. 05-56175 (9th Cir.). The panel majority, however, improperly addressed this important issue without any briefing, and in a single paragraph. In doing so, the majority significantly erred, and its decision threatens to limit the discretion of subsequent panels of this Court to consider the question of secondary liability in cases that fully brief the issue.

In this amicus brief, the United States explains that the panel should not have reached out to decide the validity of plaintiffs' claims. We further demonstrate that the majority's evaluation of the claims does not comport with the requirements of *Sosa*. Finally, we join Rio Tinto's call for en banc consideration of the issue whether exhaustion of local remedies is a prerequisite to suit under the ATS.[1]

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[1] The United States expresses no views on the validity of any aspect of the Court's decision not discussed in this brief.

ARGUMENT

I. THE COURT NEED NOT HAVE REACHED THE VALIDITY OF PLAINTIFFS' CLAIMS, AND THE COURT'S RESOLUTION OF THAT ISSUE IS INCONSISTENT WITH SOSA.

A. The Validity of Plaintiffs' Claims Does Not Affect the Courts' Subject Matter Jurisdiction Under the Alien Tort Statute.

Although "[n]either party has expressly appealed" the district court's determination that plaintiffs' claims are valid under the ATS, the panel majority considered the issue, because it believed that the validity of the claims has some bearing on the courts' subject matter jurisdiction. Slip Op. 8947. But because the courts' jurisdiction does not turn on the validity of plaintiffs' claims, the majority need not have addressed the issue, and should not have addressed it without briefing from the parties.

"[I]t is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction." *Bell v. Hood*, 327 U.S. 678, 682 (1946). Failure to state a claim does not generally affect a court's subject matter jurisdiction (*see Arbaugh v. Y&H Corp.*, 126 S. Ct. 1235, 1242–45 (2006)), unless the claim is so "plainly unsubstantial" that it falls outside of the statutory grant of jurisdiction (*Ex parte Poresky*, 290 U.S. 30, 32 (1933)). In *Sosa*, the Supreme Court recognized that federal courts have "residual common law discretion"

to recognize a "narrow class" of federal common law claims based on international norms that could be asserted under the ATS. 542 U.S. at 738, 730. Because plaintiffs claims are not "plainly unsubstantial," the validity of those claims has no bearing on the district court's subject matter jurisdiction.

Accordingly, it was error for the panel to address the validity of plaintiffs' claims, where the appellee had not raised the issue on appeal. And, certainly, the Court should not have reached this important issue without full briefing by the parties. *See Galvan v. Alaska Dept. of Corrections*, 397 F.3d 1198, 1204 (9th Cir. 2005).

B. The Majority Fundamentally Misconstrued *Sosa* as Affirming this Court's Prior Standard for Recognizing Claims under the ATS.

Here, briefing was critical, because this is the first time that this Court addressed how to apply the Supreme Court's *Sosa* decision. Before *Sosa*, this Court had held that the ATS "not only provides for federal jurisdiction, but also creates a cause of action for an alleged violation of the law of nations." *Alvarez-Machain v. United States*, 331 F.3d 604, 612 (9th Cir. 2003) (en banc), *rev'd sub nom Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). The Supreme Court rejected that view, holding instead that the ATS is "in terms only jurisdictional." *Sosa*, 542 U.S. at 712.

Although the ATS does not provide a cause of action, the Supreme Court explained that, in enacting the ATS in 1789, Congress intended to "enable[] federal

courts to hear claims in a very limited category defined by the law of nations and recognized at common law." *Ibid.* Congress likely had in mind three historic paradigms: "violations of safe conducts, infringement of the rights of ambassadors, and piracy." *Id.* at 715. But the Supreme Court held that federal courts may have "restrained" discretion to recognize, as a matter of federal common law, ATS claims based on "the present-day law of nations." *Id.* at 725. The Supreme Court repeatedly admonished the lower courts to exercise "great caution in adapting the law of nations to private rights" (*id.* at 728; *see id.* at 725), enumerating "a series of reasons" why the courts must engage in "vigilant doorkeeping" (*id.* at 725, 729).

The Supreme Court made abundantly clear that it conceived of at most a "relatively modest set of actions" that could be brought under the ATS. *Id.* at 720; *see id.* at 738 n.30 (noting the "demanding standard of definition, which must be met to raise even the possibility of a private cause of action" under the ATS). It also questioned whether purely extraterritorial claims are cognizable under the ATS, especially those claims that would require courts to review the propriety of a foreign sovereign's conduct towards its own citizens, and it cautioned that such claims "should be undertaken, if at all, with great caution." *Id.* at 727–28.

The Supreme Court directed the lower courts to undertake a detailed inquiry when considering the validity of ATS claims: Courts must ask whether asserted ATS

claims are "defined with a specificity comparable to the features of the [three] 18th-century paradigms" (*id.* at 725), and they "should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when [the ATS] was enacted" (*id.* at 732), taking into account "the practical consequences of making [a] cause available to litigants in the federal courts" (*id.* at 732–33). The Court expressly admonished the lower courts to consider "whether international law extends the scope of liability for violations of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual." *Id.* at 732 n.20.

Under its pre-*Sosa* standard, this Court, sitting en banc, had recognized Alvarez' claim for arbitrary arrest as sufficiently "universal, obligatory, and specific" to state a valid claim under the ATS. *Alvarez-Machain*, 331 F.3d. at 621. The Supreme Court reversed. It held that the international instruments on which Alvarez relied — the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights — could not be used to "establish the relevant and applicable rule of international law" (542 U.S. at 735), because "the Declaration does not of its own force impose obligations as a matter of international law" (*id.* at 734), and, although the Covenant binds the United States in international law, "the United States ratified

the Covenant on the express understanding that it was not self-executing and so did not itself create obligations enforceable in federal courts" (*id.* at 735).

Turning to the nature of Alvarez' claim, the Supreme Court observed that Alvarez invoked a prohibition against "officially sanctioned detention exceeding positive authorization to detain under the domestic law of some government, regardless of the circumstances." *Id.* at 736. This Court had upheld that norm as a sufficient basis for an ATS claim. *See Alvarez-Machain*, 331 F.3d at 621 (stating that "[d]etention is arbitrary if it is not pursuant to law" and that "arbitrary detention * * * [is an] actionable violation[ ] of international law" (quotation marks omitted) (some alterations in original)). The Supreme Court rejected that view, holding that such a norm "expresses an aspiration that exceeds any binding customary rule having the specificity we require." *Sosa*, 542 U.S. at 738. It also unequivocally repudiated the "authority from the federal courts, to the extent it supports Alvarez's position" because that authority "reflects a more assertive view of federal discretion over claims based on customary international law." *Id.* at 736 n.27.

In this case, the panel majority held that, in *Sosa*, the Supreme Court had "ratified" (Slip Op. 8948) the Ninth Circuit's prior standard, under which a claim is cognizable under the ATS so long as it implicates "specific, universal and obligatory norms of international law" (Slip Op. 8949 (alteration and quotation marks omitted)).

But *Sosa* represents a significant departure from this Court's previous ATS jurisprudence. The foregoing discussion makes clear that the Supreme Court did not "ratify" this Court's prior standard. Rather, *Sosa* calls for a significantly more searching and cautious inquiry, requiring courts to evaluate both the sources of law relied upon to establish the obligatory nature of an asserted norm, and the specificity of the norm itself, including consideration of the practical consequences of recognizing the norm as the basis for a cause of action. As we next explain, neither the majority nor the district court undertook the cautious evaluation mandated by *Sosa*.

C. The Majority's Evaluation of Plaintiffs' Claims Does Not Comply with *Sosa*'s Requirements.

Having concluded that *Sosa* had ratified this Court's standard for recognizing ATS claims, the majority endorsed the district court's analysis of plaintiffs' claims. Slip Op. 8949. However, neither the district court (which ruled prior to *Sosa*) nor the majority considered whether the ATS applies to purely extraterritorial claims such as those asserted here. *See Sosa*, 542 U.S. at 714–17, 727–28. Nor did either court consider whether the sources of law plaintiffs relied on "establish the relevant and applicable rule of international law," in the sense *Sosa* requires. *Sosa*, 542 U.S. at 735. And neither considered whether those norms are "defined with a specificity comparable to the features of the 18th-century paradigms." *Id.* at 725.

1. The ATS Does Not Apply to the Extraterritorial Claims in this Case.

In evaluating plaintiffs' claims post-*Sosa*, this Court was required to address a serious concern raised by the Supreme Court: whether federal courts could properly project federal common law extraterritorially to resolve disputes centered in foreign countries. *See Sosa*, 542 U.S. at 727–28 ("It is one thing for American courts to enforce constitutional limits on our own State and Federal Governments' power, but quite another to consider suits under rules that would go so far as to claim a limit on the power of foreign governments over their own citizens, and to hold a foreign government or its agent has transgressed those limits. * * * Since many attempts by federal courts to craft remedies for the violation of new norms of international law would raise the risk of adverse foreign policy consequences, they should be undertaken, if at all, with great caution.").

The answer to that question should be "no." As we explain below (and as we have argued in two pending appeals in this court),[2] Congress enacted the ATS to provide a mechanism through which certain private insults to foreign sovereigns could be remedied in federal courts. In the late 18th-century, the law of nations included

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[2] *See* the United States' amicus curiae briefs in *Corrie v. Caterpillar, Inc.*, No. 05-36210 (9th Cir.), and in *Mujica v. Occidental Petroleum Corp.*, No. 05-56175 (9th Cir.).

"rules binding individuals for the benefit of other individuals," the violation of which "impinged upon the sovereignty of the foreign nation." *Sosa*, 542 U.S. at 715. Such violations, "if not adequately redressed[,] could rise to an issue of war." *Ibid.* Violations of safe conducts, infringement of the rights of ambassadors, and piracy came within this "narrow set." *Ibid.* But under the Articles of Confederation, "[t]he Continental Congress was hamstrung by its inability to cause infractions of treaties, or the law of nations to be punished." *Id.* at 716 (quotation marks omitted).

The Continental Congress recommended that state legislatures authorize suits "for damages by the party injured, and for the compensation to the United States for damages sustained by them from an injury done to a foreign power by a citizen." *Ibid.* (quotation marks omitted). Most states failed to respond to the Congress' entreaty. Physical assaults on foreign ambassadors in the United States, and the absence of a federal forum for redress of the ambassadors' claims, led to significant diplomatic protest. *Id.* at 716–17. After ratification of the Constitution, the First Congress adopted the ATS to remedy this lacuna, thereby reducing the potential for international friction. *Id.* at 717–18.

This history shows that Congress enacted the ATS to provide a forum for adjudicating alleged violations of the law of nations occurring within the territory or jurisdiction of the United States. There is no indication that Congress intended the

ATS to apply to purely extraterritorial claims, especially to disputes that center on a foreign government's treatment of its own citizens in its own territory. Indeed, the recognition of such claims would directly conflict with Congress' purpose in enacting the ATS, which was to reduce diplomatic conflicts.

Since the early years of the Republic, there has been a strong presumption "that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (quotation marks omitted). The Supreme Court "assume[s] that Congress legislates against the backdrop of the presumption against extraterritoriality." *Ibid.* Thus, "unless there is the affirmative intention of the Congress clearly expressed," in "the language [of] the relevant Act," the Court will presume that a statute does not apply to actions arising abroad. *Ibid.* (quotation and alteration marks omitted).

The ATS does not "clearly express[]" Congress' intent to authorize the courts to project common law claims to conduct occurring entirely outside the jurisdiction of the United States. Indeed, the evidence is to the contrary. The same Congress that enacted the ATS enacted a statute criminalizing piracy, assaults on ambassadors, and violations of safe conduct — the three historic paradigm violations of the law of nations identified by *Sosa*. 1 Stat. 112, §§ 8, 25 (April 30, 1790). That statute was

written in general terms and contained no geographic limitation. But in a case involving acts of piracy committed by foreigners within the jurisdiction of a foreign sovereign, the Supreme Court held that the statute did not apply. *United States v. Palmer*, 16 U.S. 610, 630–34 (1818). Noting that the statute was entitled "'an act for the punishment of certain crimes against the United States,'" the Supreme Court explained that Congress intended to punish "offences against the United States, not offences against the human race." *Palmer*, 16 U.S. at 632. It is highly unlikely that the same Congress, in enacting the ATS, meant to authorize an extension of federal common law to regulate conduct by foreigners in a foreign country, which would go well beyond conduct Congress sought to reach in the criminal statute.

The presumption against extraterritoriality "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." *Arabian Am. Oil*, 499 U.S. at 248. That danger is especially grave in suits under the ATS, where a court's projection of federal common law abroad can interfere with a foreign sovereign's choice about how to resolve conflicts within its jurisdiction. Thus, for example, in the apartheid litigation, plaintiffs seek to hold multinational corporations that did business with South Africa liable for the harms committed by the apartheid regime, despite the fact that the litigation is inconsistent with South Africa's own reconciliation efforts. *See In re S. African*

Apartheid Litigation, 346 F. Supp. 2d 538 (S.D.N.Y. 2004). Similarly, the peace agreement ending the ten-year Bougainville conflict contains its own reconciliation provisions and provides immunity for certain conflict-related behavior.[3] Constitution of the Autonomous Region of Bougainville, § 187(1), *available at* http://www.paclii.-org/pg/legis/consol_act/ac185/ (reconciliation); *id.* sched. 6.1, *available at* http://www.-paclii.org/pg/legis/consol_act/acs272/ (immunity). A court in the United States is not well-positioned to evaluate what effect adjudication of claims such as those asserted here may have on a foreign sovereign's efforts to resolve conflicts. It is precisely to avoid "unintended clashes" with such efforts that the Supreme Court requires

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[3] At the request of the district court, in November 2001, the Government filed a statement of interest, presenting the State Department's views about the effect this litigation would have on the Bougainville peace process and the conduct of the United States' foreign relations. That statement was based on the State Department's assessment of the Government's foreign relations interests and the peace process and as they existed in 2001, which are different from the interests and circumstances that exist today. In any event, the statement did not recommend a specific disposition of any of the legal issues presented, and the United States is not here seeking dismissal of the litigation based on purely case-specific foreign policy concerns. *Sosa*, 542 U.S. at 733 n.21.

Nevertheless, as discussed above, we continue to believe that, because of the interference they entail in the affairs of foreign governments, ATS suits such as this carry a significant risk to the foreign policy interests of the United States and that, in light of the cautionary instructions of the Supreme Court in Sosa, federal courts should not fashion a cause of action based on the plaintiffs' claims in this case, especially since the conduct alleged occurred in a foreign country and involves a foreign government's treatment of its own citizens.

Congress to speak clearly when it intends for legislation to apply extraterritorially. Congress has not done so in the ATS. Accordingly, claims under the ATS should be recognized only if they arise within the ordinary jurisdiction of the United States.

Plaintiffs' claims here involve actions committed entirely outside the United States' jurisdiction and require a court to review a foreign government's treatment of its own citizens. Such claims are not cognizable under the ATS.[4] In any event, the district court and the majority erred in upholding the validity of plaintiffs' claims without considering whether purely extraterritorial claims of this sort can be brought under the ATS.

2. The Majority Did Not Properly Consider Whether the Sources of Law on which Plaintiffs Rely Can Support an ATS Claim.

The majority erred in its approach to deciding how ATS claims should be recognized as a matter of federal common law. The Supreme Court in *Sosa* warned courts to be cautious in recognizing "new and debatable violations of the law of nations" as actionable in United States courts. *Sosa*, 542 U.S. at 727. In particular, the Supreme Court rejected this Court's reliance on non-self-executing treaties as

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[4] At the very least, no such cause of action should be recognized in the absence of extraordinary circumstances, such as where there is no functioning government and the political branches have determined that it would be appropriate to apply United States law (incorporating international law).

"establish[ing] the relevant and applicable rule of international law." *Id.* at 735. Without mentioning that aspect of *Sosa*, the majority here returned to the repudiated practice of reliance on non-self-executing treaties as the basis for ATS claims.

Plaintiffs assert claims for crimes against humanity, violations of the laws of war, racial discrimination, and violations of the United Nations Convention on the Law of the Sea (UNCLOS), 21 I.L.M. 1261–1354 (1982). The panel majority held that, with the exception of the UNCLOS claims, plaintiffs' claims are cognizable under the ATS because they implicate *jus cogens* norms.[5] But this Court has recognized that "[t]he development of an elite category of human rights norms is of relatively recent origin in international law, and although the concept of jus cogens is now accepted, its content is not agreed." *Alvarez-Machain*, 331 F.3d at 614 (quotation and alteration marks omitted). For that reason, it is critical that courts not simply rely on the description of a norm as *jus cogens*, but carefully consider the source of law supporting the cause of action.

Here, for example, plaintiffs rely on the prohibition against genocide contained in the Convention on the Prevention and Punishment of the Crime of Genocide (Dec.

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[5] This Court has described a *jus cogens* norm as "a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 714 (9th Cir. 1992) (quotation marks omitted).

7, 1948, 78 U.N.T.S. 277), and on prohibitions contained in the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Dec. 10, 1984, 1465 U.N.T.S. 85) to support their claim for crimes against humanity. *See, e.g.*, First Amend. Compl. ¶¶ 213, 214. As with the International Covenant on Civil and Political Rights, discussed in *Sosa*, the United States ratified those conventions on the understanding that neither is self-executing.[6] *See* 132 Cong. Rec. S1362 (Feb. 19, 1986)(conditioning ratification of Genocide Convention on enactment of implementing legislation); 136 Cong. Rec. S17486-01, S17492 (Oct. 27, 1990) (ratifying Torture Convention; declaring arts. 1-16 not self-executing). Thus, these conventions cannot by "themselves establish the relevant and applicable rule of international law" for an ATS claim. *Sosa*, 542 U.S. at 735.

In addition, when considering whether a treaty provision can support a claim under the ATS, courts must consider Congress' intent, as expressed in implementing legislation. Thus, for example, Congress implemented the Genocide Convention by making genocide a crime, punishable by death or life imprisonment. 18 U.S.C. § 1091(a), (b). But in that same legislation, Congress expressly stated that nothing "in this chapter [shall] be construed as creating any substantive or procedural right

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[6] Plaintiffs similarly rely on non-self-executing treaties for their war crimes and racial discrimination claims.

enforceable by law by any party in any proceeding." 18 U.S.C. § 1092. Thus, courts must carefully examine whether Congress has considered and foreclosed private rights of action for civil claims based on the Genocide Convention, before recognizing such claims under the ATS. A similar inquiry is necessary when plaintiffs rely in an ATS case on any treaty for which there is implementing legislation. *See, e.g., Enahoro v. Abubakar*, 408 F.3d 877, 883–86 (7th Cir. 2005) (considering implementing legislation for the Torture Convention in ATS case asserting a claim of torture).

3. The Majority Did Not Consider Whether the Norms on Which Plaintiffs Rely Are of the Type, or Are Defined with the Specificity, Required by *Sosa*.

Even when plaintiffs have identified a source of law that might provide a basis for a claim under the ATS, courts must consider whether the international norm is of the appropriate type and whether the norm "is sufficiently definite to support a cause of action" in a federal court. *Sosa*, 542 U.S. at 732.

Sosa identified three historical examples of the kinds of international law norms to which Congress intended the ATS to apply, each of which was a "rule[] binding individuals for the benefit of other individuals." 542 U.S. at 715. "It was this narrow set of violations of the law of nations * * * that was probably on the minds of the men who drafted the ATS with its reference to tort." *Ibid.* The panel, however, failed to

consider whether the ATS should be expanded beyond the three paradigmatic examples to encompass norms of international law that can *only* be violated by action under color of law. *Cf. id.* at 732 n.20 (noting lower court opinions analyzing the question whether genocide or torture by private actors violates international law).

At the very least, when the defendant in an ATS case is "a private actor such as a corporation or individual," the specificity inquiry involves consideration of "whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued." *Ibid.* It further involves consideration of whether the content of the norm, i.e., the standard to be applied in evaluating the alleged condcut, is well-defined. What the Supreme Court endorsed in *Sosa* were paradigmatic norms of a specific, definite character not requiring the exercise of judicial discretion for their determination. Federal courts are not to give content incrementally to otherwise imprecise legal concepts under the ATS. *See, e.g., Sosa*, 542 U.S. at 713, 728. Neither the district court nor the majority considered whether the norms plaintiffs identified have the requisite specificity.

Thus, for example, the majority held that plaintiffs may state claims under two provisions of the UNCLOS because it is a "codif[ication] of customary international law that can provide the basis of an [ATS] claim." Slip Op. 8949. One of the provisions imposes obligations on state parties to take "all measures * * * necessary

to prevent, reduce and control pollution of the marine environment." UNCLOS, art. 194. That provision leaves to state parties the significant discretion in how to implement that provision, directing states to take "the best practicable means at their disposal." *Ibid.* The other requires states to "adopt laws and regulations to prevent, reduce and control pollution of the marine environment from land-based sources." *Id.* art. 207; *see Sarei v. Rio Tinto*, 221 F. Supp. 2d 1116, 1161 (C.D. Cal. 2002) (discussing UNCLOS claims). The parameters of these requirements are not clear, and the provisions are not defined with the specificity *Sosa* requires.

It is difficult to discern a standard by which a federal court could determine that a state has failed to take "all measures * * * necessary" to prevent marine pollution. It is even more difficult to fathom how a federal court could adjudicate a claim that a state has failed to adopt appropriate environmental legislation, without sitting in judgment of the sovereign acts of a foreign nation. *Cf. Republic of Austria v. Altmann*, 541 U.S. 677, 700–701 (2004) (discussing act of state doctrine). Even more problematic, neither the district court nor the majority considered whether UNCLOS "extends the scope of liability" for a *state*'s violation of its treaty obligations to "a private actor such as a corporation or individual." *Sosa*, 542 U.S. at 732 n.20.

Similarly, the majority held that plaintiffs' claim of "'systematic racial discrimination' and 'policies of racial discrimination' in Rio Tinto's operation of the

mine" were cognizable under the ATS because allegations of racial discrimination "constitute jus cogens violations." Slip Op. 8963; *see id.* at 8949. But whether or not "systematic racial discrimination" is a violation of a *jus cogens* norm, the norm is limited to state action. "A *state* violates international law if, as a matter of state policy, it practices, encourages, or condones * * * systematic racial discrimination." *Kadic v. Kradžić*, 70 F.3d 232, 240 (2d Cir. 1995) (emphasis added) (quotation marks omitted). We are aware of no international law norm encompassing racial discrimination by a private actor.

It would be remarkable if a federal court were to recognize claims of private racial discrimination as cognizable under the ATS, in light of the Supreme Court's admonition that courts should consider "the practical consequences of making [a] cause available to litigants in the federal courts." *Sosa*, 542 U.S. at 732–33. It was practical consequences that led the Court to reject Alvarez' arbitrary arrest claim, because "[h]is rule would support a cause of action in federal court for any [unauthorized] arrest, anywhere in the world." *Id.* at 736. It would be similarly problematic for federal courts to recognize claims of private racial discrimination, "anywhere in the world."

4. Vicarious Liability Should Not Be Recognized Absent Authorization By Congress.

Plaintiffs' war crimes and crimes against humanity claims are based principally on acts allegedly committed by the Papua New Guinea army. Plaintiffs seek to hold Rio Tinto vicariously liable for those harms. The majority quite properly asked "whether, post-*Sosa*, claims for *vicarious* liability" are available under the ATS. Slip Op. 8950. Without distinguishing among the various types of secondary liability, the majority concluded that vicarious liability claims are available, because courts draw on federal common law in adjudicating ATS claims, and vicarious liability is recognized under federal common law. *Ibid.*

But in light of the many warnings the Supreme Court gave about the need for courts to exercise "restrained" discretion in recognizing new federal common law claims under the ATS, the institutional disadvantages courts have in constructing new theories of liability, and the effect ATS claims can have on the Nation's foreign relations, it is most doubtful that the Supreme Court would approve of the importation into the ATS context of federal common law theories of vicarious liability, which federal courts developed to "effectuate" the policies underlying substantive federal statutes. *See Textile Workers Union of Am. v. Lincoln Mills of Ala.*,

353 U.S. 448, 456-57 (1957). Instead, the relevant inquiry is Congress' intent in enacting the ATS.

In *Sosa*, the Supreme Court explained that Congress enacted the ATS in order to confer jurisdiction in the district courts over a "very limited" class of claims, defined by international law. *Sosa*, 542 U.S. at 712. Congress did not intend to give courts the "power to mold substantive law." *Id.* at 713. Vicarious liability is a form of "secondary liability" in persons other than those who have caused the harm. *See Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 184 (1994). The Supreme Court has held that judicial imposition of "aiding and abetting" liability (another form of secondary liability) under federal civil statutes that do not expressly provide for such liability would be a "vast expansion of federal law." *Id.* at 183. For that reason, the Supreme Court declined to recognize aiding and abetting liability in the civil context absent a "congressional direction to do so." *Ibid.* Accordingly, we have recently argued in this Court and others that it would be inappropriate for courts to recognize aiding and abetting liability under the ATS without a congressional directive. *See* Brief of the United States as Amicus Curiae in *Mujica v. Occidental Petroleum Corp.*, No. 05-56175 (9th Cir.) (pending); *Corrie v. Caterpillar, Inc.*, No. 05-36210 (9th Cir.) (pending); *In re S. African Apartheid Litigation*, No. 05-2326 (2d Cir.) (pending).

Aiding and abetting and vicarious liability are distinct forms of secondary liability. *See, e.g., State Farm Fire & Cas. Co. v. Bomke*, 849 F.2d 1218, 1220 (9th Cir. 1988). Nevertheless, recognition of any form of secondary liability under the ATS would represent "a vast expansion" of the type of liability historically available under the ATS. We are aware of no authority recognizing secondary civil liability under the ATS even for the paradigm violations: "violations of safe conducts, infringement of the rights of ambassadors, and piracy." *Sosa*, 542 U.S. at 715; *cf. In re S. African Apartheid Litigation*, 346 F. Supp. 2d at 554 (declining to recognize aiding and abetting liability under the ATS because such a rule "would not be consistent with the 'restrained conception' of new international law violations that the Supreme Court mandated for the lower federal courts").

The majority relied on a 1795 opinion of Attorney General William Bradford to support its conclusion that "violations of the law of nations have always encompassed vicarious liability." Slip Op. 8950 n.5. But that opinion does not support the majority's conclusion. It states that "all those who should render themselves *liable to punishment* under the laws of nations, by committing, aiding, or abetting hostilities against [foreign states at peace with the United States], would not receive the protection of the United States *against such punishment*." 1 Op. Att'y Gen. 57, 59 (1795) (emphasis added). As the Supreme Court explained, at the time the

ATS was enacted, the law of nations encompassed certain criminal offenses that could be prosecuted in a state's domestic courts. *See Sosa*, 542 U.S. at 715 (discussing "offenses against the law of nations addressed by the criminal law of England"). The Bradford opinion is principally concerned with the availability of United States courts for the prosecution of such crimes. *See, e.g.*, 1 Op. Att'y Gen. at 58 (discussing whether the acts are "offenses against the United States * * * punishable by indictment in the district or circuit courts").

At most, then, Attorney General Bradford's opinion suggests that those who aid and abet hostilities against foreign nations with whom we are at peace may be liable for punishment under *criminal law*. *See Cent. Bank of Denver*, 511 U.S. at 181 ("Aiding and abetting is an ancient criminal law doctrine."). But, as we have noted, the Supreme Court has expressly refused to recognize aiding and abetting liability under civil law, based on its existence in criminal law.[7] *See id.* at 183. Thus, Attorney General Bradford's opinion provides no support for the proposition that federal common law tort claims under the ATS "have always encompassed" secondary liability.

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[7] For this reason, the majority's reliance on a 1790 statute criminalizing aiding and abetting liability for piracy does not support the conclusion that secondary liability is available in an ATS case alleging piracy. *See* Slip Op. 8950 n.5.

The Bradford opinion does say that those injured by the hostile acts of United States citizens on the high seas, in violation of the law of nations, "have a remedy by a *civil* suit" under the ATS. 1 Op. Att'y Gen. at 59. But the American citizens whose actions prompted the Attorney General's opinion were alleged to have "voluntarily joined, conducted, aided, and abetted" the hostile acts. *Id.* at 58. Because direct action was alleged, in addition to aiding and abetting, the opinion does not clearly suggest that aiding and abetting liability is cognizable under the ATS.

In the absence of an international law norm of secondary civil liability with a "definite content and acceptance among civilized nations" comparable to that of the 18th-century paradigms, courts should wait for "congressional direction" before recognizing vicarious liability under the ATS. *Cent. Bank of Denver*, 511 U.S. at 181.

II. THE MAJORITY ERRED IN HOLDING THAT EXHAUSTION OF FOREIGN REMEDIES IS NEVER REQUIRED FOR ATS CLAIMS ARISING ABROAD.

The majority erroneously concluded that, because Congress had not specifically mandated exhaustion of foreign remedies, where a claim asserted under the ATS arises abroad, a court should not itself impose such a requirement. Slip Op. 8972–80. In so holding, the majority relied on the Supreme Court's admonition in *Sosa* to exercise "judicial caution." *Id.* at 8981. As an initial matter, it was plain error to read *Sosa* as somehow counseling against the adoption of an exhaustion requirement. To

the contrary, the Supreme Court expressly stated that it "would certainly consider this [exhaustion] requirement in an appropriate case." 542 U.S. at 733 n.21.

The majority also erred in focusing on the lack of a clear congressional statement. Looking for such a statement is highly relevant where Congress creates a cause of action. In that context, the job of a court is to discern the legislative intent. Here, however, we are dealing with a jurisdictional statute and federal common law power to recognize a very limited number of claims that may be asserted under that statute. The cautions iterated by the Supreme Court were to ensure that, when exercising this common law authority, courts do so in a restrained and modest fashion. The Supreme Court went out of its way to chronicle reasons why a court must act cautiously and with "a restrained conception of * * * discretion" in both recognizing ATS claims and in extending liability. *Id.* at 726; *see id.* at 725-730, 732 n.20. The Court discussed at length the reasons for approaching this federal common law power with "great caution." *Id.* at 728. That caution fully supports adoption of an exhaustion requirement in appropriate cases.

As a matter of international comity, "United States courts ordinarily * * * defer to proceedings taking place in foreign countries, so long as the foreign court had proper jurisdiction and enforcement does not prejudice the rights of United States citizens or violate domestic public policy." *Finanz AG Zurich v. Banco Economico S.A.*,

192 F.3d 240, 246 (2d Cir. 1999) (citations and internal quotation marks omitted). Such international comity seeks to maintain our relations with foreign governments, by discouraging a United States court from second-guessing a foreign government's judicial or administrative resolution of a dispute or otherwise sitting in judgment of the official acts of a foreign government. *See generally Hilton v. Guyot*, 159 U.S. 113, 163–164 (1895). To reject a principle of exhaustion and to proceed to resolve a dispute arising in another country, centered upon a foreign government's treatment of its own citizens, when a competent foreign court is ready and able to resolve to dispute, is the opposite of the model of "judicial caution" and restraint contemplated by *Sosa*. As noted above, in *Sosa*, the Court expressly questioned whether this federal common law power could properly be employed "at all" in regard to a foreign nation's actions taken abroad. *Sosa*, 542 U.S. at 728. If a court is ever to do so, it is important that it show due respect to competent tribunals abroad and mandate exhaustion where appropriate.

Moreover, an exhaustion requirement is fully consistent with Congress' intent in enacting the ATS. As discussed above, the whole point of the ATS was to *avoid* international friction. The ATS was enacted to ensure that the National Government would be able to afford a forum for punishment or redress of violations for which a nation offended by conduct against it or its nationals might hold the

offending party accountable. As we have explained, against this backdrop, reinforced by cautions recently mandated by the Supreme Court in *Sosa*, courts should be very hesitant ever to apply their federal common law power to adjudicate a foreign government's treatment of its own nationals. But even assuming that such claims are cognizable under the ATS, an exhaustion requirement would further Congress' intent to minimize the possibility of diplomatic friction by affording foreign states the first opportunity to adjudicate claims arising within their jurisdictions.

Consistent with that result, it is notable that, when Congress has clearly created a private right for claims that may arise in foreign jurisdictions, it has required exhaustion as a prerequisite to suit. *See, e.g.*, Torture Victim Protection Act of 1991 (TVPA), Pub. L. No. 102-256, § 2(b), *reproduced at* 28 U.S.C. § 1350 note. And Congress adopted this requirement in the TVPA, in part, because it viewed exhaustion as a as a procedural requirement of international human rights tribunals, as the dissent notes. Slip Op. 9000 (Bybee, J., dissenting) (discussing S. Rep. No. 102-249, pt. 4, at 10 (1991).

Finally, it was error for the majority to look for a congressional directive regarding exhaustion, when the majority fails to look for the congressional directive required before extending federal common law to extraterritorial disputes. As we have discussed above, when construing a federal statute, there is a strong presumption

against projecting United States law to resolve disputes that arise in foreign territories. Indeed, courts should not apply our law extraterritorially without a "clear express[ion]" in the statute of congressional intent. *See Arabian Am. Oil*, 499 U.S. at 248. Here, the majority did not consider whether Congress clearly intended to authorize courts to use federal common law to resolve foreign disputes. A court cannot legitimately ignore the absence of such authorization and then blame Congress for failing to inform the court whether or not to require exhaustion for disputes arising in other countries. In rejecting an exhaustion requirement due to a lack of congressional direction, the majority employed a double standard and undertook the "aggressive" judicial role the Supreme Court warned against. *Sosa*, 542 U.S. at 726. The majority's ruling ignores the import of *Sosa*, is incorrect, and warrants *en banc* review.

CONCLUSION

For the foregoing reasons, the Court should grant Rio Tinto's petition for panel rehearing, or rehearing en banc.

Respectfully submitted,

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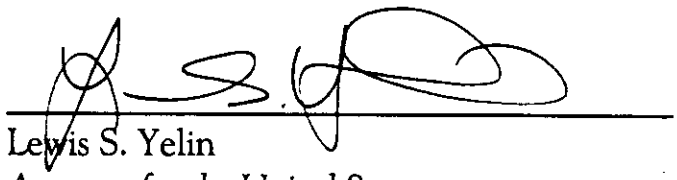
September 28, 2006

CERTIFICATE OF COMPLIANCE

I certify that this brief uses 14 point, proportionately spaced font and is 6,953 words, excluding those parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). The United States has filed a motion seeking leave to file a brief in excess of the word limit in Circuit Rule 40-1(a).



Lewis S. Yelin
Attorney for the United States

Date: September 28, 2006

Nos. 02-56256 & 02-56390

Decided August 7, 2006
Before Circuit Judges Fisher and Bybee and District Judge Mahan

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALEXIS HOLYWEEK SAREI, PAUL E. NERAU, THOMAS TAMUASI, PHILLIP MIRIORI, GREGORY KOPA, METHODIUS NESIKO, ALOYSIUS MOSES, RAPHEAL NINIKU, GARBIEL TAREASI, LINUS TAKINU, LEO WUIS, MICHAEL AKOPE, BENEDICT PISI, THOMAS KOBUKO, JOHN TAMUASI, NORMAN MOUVO, JOHN OSANI, BEN KORUS, NAMIRA KAWONA, JOANNE BOSCO, JOHN PIGOLO and MAGDALENE PIGOLO, individually and on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants/Cross-Appellees,

v.

RIO TINTO, plc and RIO TINTO LIMITED,

Defendants-Appellees/Cross-Appellants.

On Appeal from the United States District Court,
Central District Of California, Western Division
U.S.D.C. No. 00-11695-MMM MANx
(Honorable Margaret M. Morrow)

OPPOSITION TO PETITION FOR PANEL REHEARING AND FOR REHEARING EN BANC

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INTRODUCTION

On August 7, 2006, a divided panel of this Court reversed the district court's dismissal of Plaintiffs' tort claims brought under 28 U.S.C. § 1350 ("ATS") ("Opinion" or "Op."). The panel, after two oral arguments and supplemental briefing, reversed the dismissal of Plaintiffs' claims under the political question doctrine and confirmed that, after the Supreme Court decision in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), Plaintiffs' claims are actionable under the ATS just as the district court ruled. Lastly, the panel affirmed the district court's refusal to judicially rewrite the ATS to include an exhaustion of local remedies requirement before an ATS claim may be asserted.

Rio contends – albeit incorrectly – that FRAP 35 is satisfied because the Opinion allegedly conflicts with *Sosa*, in three ways: (i) failing to give appropriate "case-specific" deference to the Executive's Statement of Interest ("SOI") (Rio 7-12); (ii) failing to conduct a sufficiently rigorous analysis to confirm federal jurisdiction (Rio 13-21); and (iii) failing to require exhaustion of local remedies before an otherwise valid claim may be asserted (Rio 2-7). Rio additionally alleges that the Opinion conflicts with *Alperin*. Each argument is without merit.

Issue (i), there is no conflict with *Sosa* because *Sosa* does not require dismissal of ATS claims whenever the Executive suggests continued adjudication of a case might interfere with foreign policy. *Sosa*'s entire discussion of deference

to SOIs is contained in footnote 21, which is *obiter dictum*; no holding of this Court can possibly contradict dicta because dicta is exceptionally unimportant and not precedent.

Furthermore, the U.S. *Amicus* Brief ("USA") contradicts Rio's description of the foreign policy concerns and fatally wounds Rio's position. USA confirms that the ***facts which led to the State Department's issuance of the SOI in 2001 have changed*** – just as the Plaintiffs explained to the Court (Op. 8946-47, 8958 n.13) – and ***the U.S. is not requesting nor suggesting that "case-specific deference" to foreign policy concerns constrain the Court's adjudication of the claims***. (USA 14 n.3.) Because foreign policy concerns are not present, the reversal of the dismissal on political question grounds was correct – "[W]ithout the SOI, there would be little reason to dismiss this case on political question grounds." (Op. 8956.)[1]

Issue (ii): the panel conducted a sufficient analysis to confirm jurisdiction over Plaintiffs' claims because "jurisdiction does not turn on the validity of plaintiffs' claims." (USA 4.) Moreover, because Congress empowered courts to

[1] Because the foreign policy concerns identified by the district court no longer apply, the panel correctly reversed the act of state and comity dismissals. (Op. 8960-64.) Additionally, in *Republic of Austria v. Altmann*, 541 U.S. 677 (2004), the Supreme Court explained "the act of state doctrine provides ***foreign states with a substantive defense on the merits***." *Id.* at 700 (emphasis added). Rio did not appeal the merits decision of the district court and thus has waived any argument concerning the act of state doctrine and Plaintiffs' *jus cogens* claims. (Op. 8964 n.17.)

recognize claims under federal common law for customary international law ("CIL") norms that are no less definite in "content and acceptance ... than the historical paradigms familiar when § 1350 was enacted," (*Sosa*, 542 U.S. at 732, citing the reasoning of *In re Estate of Marcos Human Rights Litig.*, 25 F.3d 1467, 1475 (9th Cir. 1994), as "generally consistent" with this standard), the panel sufficiently analyzed the court's ruling on the merits upholding Plaintiffs' claims to satisfy jurisdiction. *Filartiga v. Pena-Irala*, 630 F.2d 876, 887-88 (2d Cir. 1980).

Thus, a further fatal flaw in Rio's petition is its failure to appeal the court's merits ruling. Rio is abusing the privilege of making this petition by seeking rehearing of merits issues, a scope greater than which it appealed. FRAP 40; *Armster v. U.S. Dist. Court for Cent. Dist. of California*, 806 F.2d 1347, 1356 (9th Cir. 1987).

Issue (iii): No conflict exists because *Sosa* does not require exhaustion of local remedies as a prerequisite to jurisdiction. Although the dissent would imply such a requirement for all ATS claims, *Sosa* did not and Congress has not amended the ATS to include one; not even when it augmented the ATS through the Torture Victim Protection Act ("TVPA"), 28 U.S.C. § 1350. No court in the county has imposed such a requirement.

Though Rio may not like the Opinion, Rio fails to demonstrate any conflict or reason to warrant en banc rehearing.

ARGUMENT

I. RIO FAILS TO SATISFY THE LIMITED CRITERIA FOR GRANTING REHEARING

A. An Illusory Conflict With *Sosa* Is Insufficient Under FRAP 35

To obtain review Rio attempts to manufacture a conflict between the Opinion as it concerns the political question doctrine and *Sosa*'s statement in footnote 21, which posited there might be another "possible limitation ... [upon a court's discretion to decide whether a CIL norm is sufficiently definite to state a claim, namely,] a policy of case-specific deference to the political branches." *Sosa*, 542 U.S. at 733 n.21. Rio contends the 2001 SOI invokes the exact foreign policy concerns of footnote 21 and thus the Opinion, which reversed a dismissal of the case predicated on the SOI, conflicts with the alleged "mandate" articulated in the footnote. (Rio 11.) The contention is without merit.

First, Rio overstates what *Sosa* held. Nowhere – not in footnote 21 or elsewhere – did the Supreme Court find a foreign policy "mandate" as a limit on the ATS; instead, what *Sosa* stated was that foreign policy sensitivities are a "possible limitation" on a court's federal common law power to remedy a CIL violation. *Sosa*, 542 U.S. at 732-33. Furthermore, recognizing that foreign policy implications exist in all ATS cases, looking to the future the Justices explicitly invited Congress to provide additional "guidance" of when and how to exercise power under the ATS. *Id.* at 731. Discussion of a possible limitation on judicial

discretion that neither Congress nor *Sosa* "mandates" or requires does not pose a conflict. The fact that *Sosa* itself explained it was not going to apply or consider the concerns expressed in footnote 21 to determine the validity of Alvarez's ATS claim – as it would have if "mandated" – unmasks Rio's alleged conflict. *Sosa*, 542 U.S. at 733 n.21.

Second, footnote 21 is non-biding *obiter dictum* and thus not precedential. *Best Life Assur. Co. v. Commissioner*, 281 F.3d 828, 833-34 (9th Cir. 2002).[2] As dicta – not precedent – no opinion can conflict.

Third, and most importantly, Rio's entire argument is inconsistent with USA's expression of the foreign policy impacts this case may have. Based on the 2001 SOI, Rio contends the Opinion fails to properly respect a prior Executive decision, and thus violates the "mandate" contained in footnote 21. (Rio 8-11.) USA contradicts Rio's position, stating that ***the U.S.'s "foreign relations interests" which existed in 2001 "are different from the interests and circumstances that exist today" in PNG***. (USA at 14 n.3 (emphasis added).) Furthermore, "***the United States is not here seeking dismissal of the litigation based on purely case-specific foreign policy concerns***." (*Id.* (emphasis added).)

[2] *Central Virginia Com. College v. Katz*, 126 S. Ct. 990, 996 (2006) (confirming Supreme Court dicta not precedential); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399-400 (1821) ("[G]eneral expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision").

Because only the Executive can assert "case-specific deference," and because no such assertion is made, and because the facts have changed since the 2001 SOI, any argument for rehearing concerning political questions or "case-specific deference" to foreign policy is without merit.

B. Opinion Does Not Conflict With *Alperin*

Rio argues that *Alperin v. Vatican Bank*, 410 F.3d 555 (9th Cir. 2005), precludes any ATS claim based on wartime conduct, allegedly presenting an intra-circuit conflict. (Rio 11-12.) Rio is mistaken.

First, *Alperin* is not as broad as Rio proclaims. Indeed, this Court limited it to the specific facts and context of WWII – a formally declared, international armed conflict – stating "courts are not powerless" to review wartime actions (410 F.3d at 559 n.17), and emphasizing the "holding does not signify that slave labor claims automatically raise" nonjusticiable issues. *Id.* at 562 n.20.

> Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, ***it most assuredly envisions a role for all three branches when individual liberties are at stake.***

Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004) (emphasis added). Furthermore, *Alperin* permitted several claims arising from wartime conduct to proceed. 410 F.3d at 548, 552.[3]

[3] *Alperin* instructs courts to take a "surgical approach" and "examine each of the claims with particularity" when determining which claims might present

Second, *Alperin* cites *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995), with approval. 410 F.3d at 562.[4] In *Kadic* the Second Circuit held the court had "jurisdiction pursuant to the [ATS] over appellants' claims of war crimes and other violations of international humanitarian law." 70 F.3d at 243. Approval of *Kadic* is recognition that some claims arising from the laws of war are actionable.[5/6]

If *Alperin* does not preclude all ATS claims arising from wartime conduct, which claims does it preclude? The panel answered this questions by construing *Alperin* to apply to enemies of the U.S., concluding that *Alperin* was correct to dismiss claims 50 years after the U.S. already "made the policy choice not to prosecute" the Vatican Bank for the same alleged war crimes while prosecuting other enemies arising from the same facts. In such a circumstance judicial review "would risk creating a conflict with the steps the United States actually chose to

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nonjusticiable political questions. 410 F.3d at 547. Rio's sweeping characterization of *Alperin* is belied by the Court's description and holding.

[4] Like *Kadic*, Plaintiffs assert claims arising from a single, localized conflict on one island against a single entity for its conduct and the conduct of the PDGDF that it directed, ordered, and controlled; adjudication does not require sorting through the "morass of a ***world*** war." *Id.* Furthermore, and again like *Kadic*, the U.S. has not invoked or argued for dismissal under the political question doctrine. *Id.* Contrary to Rio's characterization, Plaintiffs do not "attack the overall conduct of a war." (Rio 11.) In fact, Plaintiffs specified the violations of the laws of war. (E.g., ER 1112-21, 1211-13, 1225-30, 2008-32.)

[5] *See also Rasul v. Bush*, 542 U.S. 466, 484-85 (2004) (holding ATS claims challenging acts taken pursuant to War Powers in prosecuting the ongoing war against al Qaeda and the Taliban regime were justiciable).

[6] The mere fact that human rights violations occur in the context of armed conflict does not make them nonjusticiable. If so, *Alperin* would have overruled *Hilao v. Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996), where CIL violations arose in the context of a longstanding armed insurrection in the Philippines.

take in prosecuting that war." (Op. 8959-60).

Adopting Rio's construction of *Alperin* creates an inter-circuit conflict with *Kadic* and contradicts *Sosa*, which ratified the analysis *Kadic* employed in permitting the ATS claims for violations of the laws of war to proceed. FRAP 35 permits en banc review to avoid conflicts, not to create one.

C. Panel Correctly Determined Subject Matter Jurisdiction

Rio contends *Sosa* requires a more rigorous analysis than the panel applied to determine jurisdiction. Specifically, Rio asserts that *Sosa* did not ratify this Court's pre-*Sosa* ATS jurisprudence, and therefore the Court must re-test all prior ATS decisions against *Sosa* to determine jurisdiction. (Rio 12-19.) Rio is clearly wrong.

1. *Sosa* and jurisdiction

All agree *Sosa* is determinative of the jurisdiction issue. Evidently, though, the parties and *Amici* have different interpretations of what *Sosa* held and what *Sosa* requires. For example, USA disagrees with Rio and asserts that because neither party appealed the determination that Plaintiffs' claims are valid, and because "the courts' jurisdiction does not turn on the validity of plaintiffs' claims," the panel was not required under *Sosa* to reach this issue. (USA 4.)

What does *Sosa* say? First, *Sosa* states the ATS "is only jurisdictional." 542 U.S. at 729. Right after this conclusion, however, *Sosa* explains that this was not always so: "[ATS] jurisdiction was originally understood to be available to

enforce a small number of international norms that a federal court could properly recognize as within the common law enforceable without further statutory authority." *Id.* *Sosa* then rejected the U.S.'s argument that, in the modern era and under federal common law post-*Erie*, judges cannot continue to derive substantive CIL federally enforceable under the ATS without further Congressional action:

> For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations. ... ***It would take some explaining to say now that federal courts must avert their gaze entirely from any international norm intended to protect individuals.*** [*Id.* at 729-30 (citations omitted) (emphasis added).]

The Court explained that Congress's intent regarding the ATS and understanding of ATS jurisprudence when enacting the TVPA bolstered this decision:

> We think an attempt to justify such a position would be particularly unconvincing in light of what we know about congressional understanding bearing on this issue .... The First Congress, ... assumed that federal courts could properly identify some international norms as enforceable in the exercise of § 1350 jurisdiction. We think it would be unreasonable to assume that the First Congress would have expected federal courts to lose all capacity to recognize enforceable international norms simply because the common law might lose some metaphysical cachet on the road to modern realism. ***Later Congresses seem to have shared our view. The position we take today has been assumed by some federal courts for 24 years***, ever since the Second Circuit decided *Filartiga* ... and for practical purposes the point of today's disagreement has been focused since the exchange between Judge Edwards and Judge Bork.... ***Congress, however, has not only expressed no disagreement with our view of the proper exercise of the judicial power, but has responded to its most notable***

> ***instance by enacting legislation supplementing the judicial determination in some detail.*** [*Id.* at 730-31 (emphasis added).]

Sosa then articulated the legal standard applicable to recognizing "private claims under federal common law" today: "[F]ederal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted." *Id.* at 732. In so doing, *Sosa* favorably cited the Ninth Circuit's prior articulation of the law as correct:

> ***This limit upon judicial recognition is generally consistent with the reasoning of many of the courts and judges who faced the issue before it reached this Court.*** *See Filartiga*, ... ("[F]or purposes of civil liability, the torturer has become – like the pirate and slave trader before him – *hostis humani generis*, an enemy of all mankind"); ... *see also In re Estate of Marcos Human Rights Litigation*, 25 F.3d 1467, 1475 (CA9 1994) ("Actionable violations of international law must be of a norm that is specific, universal, and obligatory"). [*Id.* at 732-33 (footnotes omitted) (emphasis added).]

Sosa then applied the law to Alvarez's claim that his detention was in violation of the law of nations. To ascertain the applicable law, *Sosa* looked to the same sources long recognized. *Id.* at 734 (quoting *The Paquete Habana*, 175 U.S. 677, 700 (1900)).[7] The Court reviewed the scant few materials Alvarez submitted

[7] *Amici* erroneously contend that *Sosa* "precludes reliance on non-self-executing treaties" or treaties with limiting remarks as a basis for deriving or discerning what the CIL is. (USA 15-16, Chevron 16.) From the sources described in *Paquete Habana*, from *Sosa* itself which permits judicial recognition of federally

in support of his claim but did not find any applicable substantive CIL rule to support his contention that CIL prohibited his arrest and detention. *Id.* at 737 (noting CIL support for ***prolonged*** detention). Consequently, *Sosa* determined that Alvarez's detention of less than a day, followed by his transfer of custody to lawful authorities, violated no CIL enforceable in federal court. *Id.* at 738.

Sosa's effects are three-fold: (i) confirmed Congress granted judges power to recognize ATS claims; (ii) judges may to continue to recognize federally enforceable norms provided the substantive CIL norm is as definite and obligatory as the historical paradigms, just as was properly done in *Filartiga*, *Tel-Oren*, and *Marcos*; and (iii) plaintiffs are required to produce evidence of a CIL norm enforceable under the facts that is sufficiently specific, universal and obligatory, through reference to treaties; executive or legislative acts, judicial decisions;[8] or the customs and usages of nations as evidenced through experts.

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enforceable CIL norms without Congressional action, it is clear non-self-executing treaties can be used and are used to determine what the customs and usages of civilized nations are and thus what the CIL of today is. Indeed, *Sosa* confirmed that "Congress has not in any relevant way amended [the ATS] or limited civil common law power by another statute," which includes statutory remarks in treaties. *Sosa*, 542 U.S. at 725.

Self-executing treaties are generally only required if an ATS claim is being asserted solely under the treaty, just as § 1350 provides. Otherwise, as *Sosa* confirmed, CIL that is actionable under the ATS "is 'self-executing' and is applied by courts in the United States without any need for it to be enacted or implemented by Congress." Louis Henkin, *International Law: International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1561 (1984).

[8] With *Sosa*'s approval, the rulings of *Filartiga*, *Marcos*, and Judge Edwards concurrence in *Tel-Oren*, unless overruled or modified by Congress, these cases and their progeny reflect binding federal common law.

2. Jurisdiction does not require valid ATS claims

As USA notes, ATS "jurisdiction does not turn on the validity of plaintiffs' claims." (USA 4-5). As long as plaintiffs' claims are not frivolous or plainly unsubstantial, a court ordinarily has jurisdiction to decide the merits of the claims. *Id.*; *Arbaugh v. Y&H Corp.*, 126 S. Ct. 1235, 1244-45 (2006). However, under the ATS, courts are required to conduct some review of the merits to confirm jurisdiction. *Filartiga*, 630 F.2d at 887-88 (citing *O'Reilly de Camara v. Brooke*, 209 U.S. 45, 52 (1907)). Here, the district court employed a searching and rigorous review of the merits (like *Sosa*) to determine jurisdiction and the panel sufficiently scrutinized the court's "comprehensive and thoughtful" testing of the merits to satisfy *Bell v. Hood* to confirm jurisdiction. (ER 1574-75; Op. 8945.) Thus, as explained below, because Rio did not appeal the court's merits determinations and thus waived all argument regarding the merits, and because the parties did not brief these issues to the panel, this case is the wrong vehicle to address any argument about *Sosa* and the merits of Plaintiffs' ATS claim.[9] The Court can decide these issues later on direct appeal, if required, after a full record and briefing. Moreover, *Amici* note such issues are ripe to decide in other appeals.

[9] Chevron argues the panel went too far in deciding merits issues in addition to threshold issues. (Chevron 4-6.) The Court needed to address some merits issues because the appeal was for a 12(b)(6) dismissal, which is on the merits; ATS claims, where jurisdiction is intertwined with the merits; and act of state issues, an affirmative defense "on the merits," *Republic of Austria v. Altmann*, 541 U.S. 677, 701 (2004).

3. No basis to review Plaintiffs' ATS claims; this case is the wrong vehicle to decide the scope of *Sosa*

Just as the panel ruled, *Sosa* ratified this Court's pre-*Sosa* analysis for determining ATS jurisdiction. (Op. 8948-49; *Sosa*, 542 U.S. at 732.)[10] Rio's and *Amici*'s contentions that *Sosa* undermined *Marcos* is clearly wrong. (USA 5; Chevron 3.) Accordingly, because the panel confirmed that the court applied the same substantive law *Sosa* requires to the facts, and because Rio did not appeal these merits determinations, FRAP 35 is not satisfied.

a. Rio waived right to contest ruling that Plaintiffs state valid ATS claims

The district court dismissed all claims as nonjusticiable political questions but expressly ruled that Plaintiffs stated valid ATS directly against Rio, and also derivatively for certain acts committed by PNGDF who were under Rio's command. (Op. 8945-46; ER 1592-1612.) Rio did not appeal. Rio's failure to appeal these rulings means it waived and abandoned its right to appeal these decisions on the merits.[11]

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[10] *See also Aldana v. Del Monte*, 416 F.3d 1242, 1250 (11th Cir. 2005) (holding *Sosa* confirmed its pre-*Sosa* ATS interpretations and analysis; Eleventh Circuit's pre-*Sosa* analysis tracked *Marcos* and *Filartiga*).

[11] Failure to raise an issue on appeal constitutes waiver. *Dilley v. Gunn*, 64 F.3d 1365, 1367-68 (9th Cir. 1995); *Wilcox v. Commissioner*, 848 F.2d 1007, 1008 n.2 (9th Cir. 1988); *see also Kates v. Crocker Nat. Bank*, 776 F.2d 1396, 1397 n.1 (9th Cir. 1985) (defenses not addressed in the briefing deemed abandoned); *Simpson v. Union Oil Co. of Cal.*, 411 F.2d 897, 900 n.2 (9th Cir.) (issues not discussed in briefs, although referred to in statement of case and specifications of error, deemed abandoned), *rev'd on other grounds*, 396 U.S. 13 (1969).

b. *Sosa* ratified this Court's ATS jurisprudence

Rio and *Amici* argue *Sosa* overruled this Court's ATS jurisprudence, pointing out, for example, that *Sosa* reversed the en banc decision in *Alvarez-Machain*[12] and rejected the idea that the ATS not only provides jurisdiction but also provides a cause of action, noting *Sosa* held that the ATS was only jurisdictional. (*E.g.*, USA 5.) This argument asserts too much.

Sosa expressly ratified the legal reasoning and analysis of *Marcos* to determine whether the ATS provides a federal remedy, stating:

> This [18th century paradigm] limit upon judicial recognition is generally consistent with the reasoning of many of the courts and judges who faced the issue before it reached this Court. ... *In re Estate of Marcos Human Rights Litigation*, 25 F.3d 1467, 1475 (CA9 1994) ("Actionable violations of international law must be of a norm that is specific, universal, and obligatory").

542 U.S. at 732 (some citations omitted).

This Court, in *Miller v. Gammie*, 335 F.3d 889 (9th Cir. 2003), explained that a prior panel opinion can only be revisited when a higher court has "undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable." *Id.* at 900. Rather than undercut this Court's ATS precedent, the Supreme Court declared that *Marcos* was "generally consistent

[12] The fact that the Court employed the same legal standard as *Sosa* but reached a different a conclusion under the facts which was reversed on direct appeal does not mean the legal standard was likewise reversed. It just means that the Court made an incorrect application of the proper analysis on the merits; no more, no less.

with the reasoning of" *Sosa*. *Sosa*, 542 U.S. at 732. FRAP 35 is not satisfied.

The argument that *Sosa* rejected rather than ratified *Marcos* and *Filartiga* and the whole body of pre-*Sosa* ATS jurisprudence is clearly incorrect. *Sosa* provides no rationale or justification for revisiting *Marcos* or its ATS progeny. Instead, ***Sosa expressly adopted the "same position" most federal courts have "for 24 years***, ever since the Second Circuit decided *Filartiga*." *Id.* at 730-31.

D. Even If Rio Could Appeal The Validity Of Plaintiffs' ATS Claims, The Standard Of *Sosa* Is Satisfied

Except UNCLOS, Plaintiffs' claims are *jus cogens*[13] and thus recognized as enforceable under *Sosa*, and have been repeatedly recognized by this Court and others that applied the same reasoning as *Sosa*.[14] Furthermore, some of Plaintiffs' claims are self-executing and inherently actionable under § 1350. *E.g.*, *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 478-79 (D.D.C. 2005) (holding Third and Fourth Geneva Conventions are self-executing).[15] In fact, most of

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[13] A *jus cogens* norm is one accepted and recognized by the entire international community and "from which no derogation is permitted." *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 714 (9th Cir. 1992). While *jus cogens* and CIL are related, they differ in one important respect. CIL, defined by treaties and other international agreements, rests on the consent of states, whereas *jus cogens* "embraces customary laws considered binding on all nations," and do not require consent of states; they transcend such consent. *Id.* at 714-15.

[14] *E.g.*, *Siderman* (genocide, slavery, murder or causing disappearance of individuals, prolonged arbitrary detention, and systematic racial discrimination); *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995) (private parties violate CIL committing acts of genocide, war crimes, or torture); *id.* at 239-41 (U.S. argued same understanding).

[15] *United States v. Alvarez-Machain*, 504 U.S. 655, 667 (1992) ("a court must enforce [a self-executing treaty right] on behalf of an individual regardless of the offensiveness of the practice of one nation to the other").

Plaintiffs' claims reflect not only universal substantive agreement but also procedural agreement[16] that universal jurisdiction exists over a subset of that behavior which includes torture, genocide, crimes against humanity, and war crimes. *Sosa*, 542 U.S. at 762-63 (Breyer, J., concurring, citing authorities).[17]

Given that the court had jurisdiction over at least one claim, Rio's and *Amici*'s specific discussions of UNCLOS and racial discrimination and allegations that these claims fail *Sosa*'s standard[18] – which is incorrect[19] – illustrates the relative insignificance of this issue and fails to satisfy FRAP 35. If a court has jurisdiction over one claim, supplemental jurisdiction over other claims arising out the same facts is proper even if UNCLOS and discrimination might not be actionable under the ATS standing alone. 28 U.S.C. § 1367; *Burnett v. Al Baraka Inv. & Dev. Corp.*, 274 F. Supp. 2d 86, 99 (D.D.C. 2003).

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[16] Unlike Justice Breyer, the *Sosa* majority does not also require such procedural agreement for an ATS claim to be actionable in the federal courts.

[17] For a discussion of the treaties, conventions and legal standards before the Court applicable to war crimes, see ER 1418-19, 1588-1603, 2015-23; genocide see ER 1417-18, 1605-06; crimes against humanity, see ER 1419, 1603-06, 2013-15.

[18] *See, e.g.*, USA 19 (UNCLOS); Chevron 11-15 (same); USA 20 (racial discrimination); Chevron at 3, 12, 15-16 (same). It bears noting the court ruled Plaintiffs sufficiently alleged Rio was a state actor and thus satisfied the state action requirement for systematic racial discrimination. (ER 1611-12.) The state action requirement prevents courts from hearing ordinary private claims of discrimination that might occur anywhere in the world, which the U.S. erroneously suggests is the holding here. (USA 21.)

[19] For a discussion of the treaties, conventions, decisions and legal standards applicable to Plaintiffs' systematic racial discrimination claim see ER 1606-12, 2024-25, for UNCLOS see ER 1620-24, 1798-1807.

E. Rehearing Vicarious Or Corporate Liability Ruling Not Needed

Rio and *Amici* oppose the panel's vicarious liability ruling and ruling that corporations may be sued under the ATS. (Rio 14-16; USA 22-26; Chevron 1-2, 7-11; NFTC 8-12.) The arguments are not well-founded.

Because *Amici* contend that this part of the Opinion is dicta, (USA 4-5; NFTC 8; Chevron 4), FRAP 35 is not satisfied. If dicta, other courts can easily distinguish the Opinion on such grounds, if warranted. Indeed, that is what lawyers do and courts decide all the time.

More to the point, *Sosa* does not address vicarious liability and/or corporate liability. Although *Sosa* requires rigorous investigation to determine ***substantive*** CIL norms, *Sosa* is silent about which law (domestic or international) is used to determine issues unrelated to the substantive elements of a claim. (Op. 8984.) *Sosa*'s discussion in footnote 20 is addressed to substantive provisions – not decisional rules or nonsubstantive issues – when it cites and compares the section of *Tel-Oren* that explained an element of an ATS torture claim is state action with the section in *Kadic* that explained a genocide claim does not require state action; private action satisfies the substantive elements.[20] Again, *Sosa* holds actionable

[20] Rio's and *Amici*'s argument (Rio 14; Chevron 2, 8; NFTC 10-11) that *Sosa*, through its references to *Tel-Oren* and *Kadic* in footnote 20, requires consensus of CIL for the decisional rules governing the scope of liability (*e.g.*, vicarious liability) thus misses the mark. *Sosa* mandates that CIL establish the substantive elements of a claim, and for some ATS claims state action or action under "color of state law" (as opposed to purely private conduct) is required. *Sosa* said nothing

CIL norms (regardless of the actor) may be remedied in federal court. *Id.* at 724.

Moreover, Rio violates FRAP 40 by arguing vicarious liability is not actionable because ***Rio argued to the district court that it, a corporation,[21] could be liable if it "controlled" the military conduct.*** (ER 134, 379-80, 1592.) Rio made this argument for good reason. Numerous courts, including the Supreme Court and this Court, have decided (pre-*Sosa* and post) that ATS claims include vicarious or indirect liability. *Hilao v. Estate of Marcos*, 103 F.3d 767, 776-77 (9th Cir. 1996) ("control" or "command responsibility" recognized under CIL);[22]

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about whether courts must look to CIL to also decide procedural rules, agency principles, affirmative defenses, rules of decision or other non-substantive issues attendant to every case. (Op. 8984.) The ordinary ATS practice has been to apply domestic law for rules of decision and implementation of CIL. For example, *Kadic*, which *Sosa* uses as a proper example of how to determine the "scope of liability" under the ATS, employs § 1983 jurisprudence as a rule of decision to determine state action. 70 F.3d at 245; *see also Aldana*, 416 F.3d at 1247 (same; post-*Sosa*); *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2685-86 (2006) ("rules of domestic law generally govern implementation of an international treaty," including procedural rules).

[21] Under federal common law and CIL, corporations may be liable. *Abdullahi v. Pfizer, Inc.*, 2002 U.S. Dist. Lexis 17436 (S.D.N.Y. Sept. 16, 2002) (jurisdiction proper; corporation allegedly acted in concert with Nigeria); *Wiwa v. Royal Dutch Petroleum Co.*, 2002 U.S. Dist. Lexis 3293 (S.D.N.Y. Feb. 28, 2002) (jurisdiction proper; corporation alleged complicit with foreign state); *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117, 127-28 (E.D.N.Y. 2000) (French bank complicit with Nazi regime); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 445 (D.N.J. 1999) ("No logical reason exists for allowing private individuals and corporations to escape liability for universally condemned violations of international law"); *Eastman Kodak Co. v. Kavlin*, 978 F. Supp. 1078, 1090-95 (S.D. Fla. 1997) (jurisdiction proper in against Bolivian corporation); *Presbyterian Church v. Talisman Energy*, 244 F. Supp. 2d 289, 315-19 (S.D.N.Y. 2003) (collecting CIL authority, consensus showing corporations liable for *jus cogens* violations); Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443 (2001).

[22] Chevron stated it was not aware of "control" being used to assess private party

Talbot v. Jansen, 3 U.S. (3 Dall.) 133, 156 (1795) (Talbot, a French citizen, found in violation of CIL by "seducing," aiding and abetting Ballard, an American, into belligerent act against Holland and thus liable for the value of the captured assets);[23] *Harmony v. United States (The Malek Adhel)*, 43 U.S. (2 How.) 210, 233-34 (1844) (civil liability proper even without participation directly in the tortious acts); *The Amiable Nancy*, 16 U.S. (3 Wheat.) 546, 559 (1818) (same); *Kadic*, 70 F.3d at 244-45; *Aldana*, 416 F.3d at 1248; *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1157 (11th Cir. 2005); *Carmichael v. United Tech. Corp.*, 835 F.2d 109, 113-14 (5th Cir. 1988); *Burnett*, 274 F. Supp. 2d at 99-100; *In re Terrorist Attacks On September 11, 2001*, 349 F. Supp. 2d 765, 826 (S.D.N.Y. 2005); *see also* Op. 8950 n.5 (discussing the Bradford 1795 Attorney General Opinion);[24] *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 374 F. Supp. 2d 331, 340-41 (S.D.N.Y.

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liability for military actions. (Chevron 10.)

[23] The U.S. indicated it was unaware of any authority recognizing secondary liability for a paradigm violation. (USA 24.)

[24] USA acknowledges that this 1795 AG Opinion arguably confirms "aiding and abetting" or other forms of derivative liability are actionable under ATS. (USA 26.) Chevron's suggestion that the Bradford Opinion concerns direct liability only because the aided entity (France) did not violate CIL is untenable. (Chevron 8-9.) Attorney General Bradford's opinion concerned the relationship between the U.S. citizen and the acts of plunder. It was irrelevant whether the French were violating CIL; the U.S. citizen violated CIL by aiding and abetting the French and Attorney General Bradford specifically recognized aiding and abetting as a viable theory of liability. Plus, the Bradford Opinion rejects Chevron's contention on p.11 that criminal CIL standards are not appropriately used for civil standards. *Kadic* 70 F.3d at 240. Indeed, the 18th century paradigms recognized by *Sosa* were based on criminal law, as was the doctrine of command responsibility, see *In re Yamashita*, 327 U.S. 1 (1946).

2005) (post-*Sosa*, noting the weight of CIL authority for aiding and abetting); *In re "Agent Orange" Prod. Liab. Litig.*, 373 F. Supp. 2d 7, 53-54, 58-59 (E.D.N.Y. 2005) (same; collecting authorities re corporate liability); *Bowoto v. Chevron Texaco Corp.*, 312 F. Supp. 2d 1229, 1247 (N.D. Cal. 2004).[25]

One clear form of secondary liability under CIL is "aiding and abetting." The Nuremberg Trials leave little doubt as to its consensus in CIL.[26] The Statute of the International Military Tribunal at Nuremberg stated, "leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan."[27] Nuremberg jurisprudence provides that knowingly facilitating grave abuses creates liability.[28]

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[25] Citing to *Central Bank of Denver* and judicial construction of Congress's intent under 10b-5 of the Securities Exchange Act, USA contends Congressional action is required for "aiding and abetting" liability under the ATS. (USA 23.) In a more similar statutory scheme than the market trades and securities, USA argued the opposite, requesting judicial incorporation of traditional tort principles and aiding and abetting liability in the Anti-Terrorism Act of 1990. *Boim v. Quaranic Literacy Inst.*, 291 F.3d 1000, 1010, 1019-20 (7th Cir. 2002) (rejecting the *Central Bank* argument); *see Brief for the U.S. as Amicus Curiae*, 2001 WL 34108081, at *10.

[26] *See Mehinovic v. Vuckovic,* 198 F. Supp. 2d 1322, 1355-56 (N.D. Ga. 2002); *Presbyterian Church*, 244 F. Supp. 2d. at 322 (*citing* William Schabas, "Enforcing International Humanitarian Law: Catching the Accomplices," 83 I.R.R.C. 439 (Jun. 2001)).

[27] Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal, art. 6, 82 U.N.T.S. 279.

[28] *United States v. Friedrich Flick*, 6 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, 1216-1223 (1952) (civilian industrialist convicted "under settled legal principles" for

Also, *Sosa*'s core holding that courts retain power to recognize new ATS claims and provide remedies contradicts Rio's suggestion that *Sosa* found that "secondary liability ... is not a proper subject of interstitial judicial rulemaking and must await Congressional action." (Rio 16.) In fact, *Sosa* considered this issue and incorporated concerns about interstitial rulemaking as the second reason for adopting its "restrained conception" of judicial discretion in its 18th century paradigm standard. *Id.* at 725. A reason for adopting this more restrictive legal standard than otherwise would have been adopted does not become a distinct legal standard. Considerations of "interstitial judicial rulemaking" helped the Supreme Court arrive at its "restrained" as opposed to an unrestrained standard.

Pre-*Sosa* this Court decided that forms of vicarious liability were actionable under the ATS using the same analytical reasoning employed in *Sosa* (*Hilao*, *supra*), thus the panel, in following existing precedent, correctly stated the law of the Circuit, which is also consistent with the law of every circuit court of appeals that has addressed this issue pre- and post-*Sosa*. FRAP 35 is not satisfied.[29]

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contributing money to the Nazi regime when aware of murderous activities); *In re Tesch*, 13 Int'l. L. Rep. 250 (Br. Mil. Ct. 1946) (industrialist convicted for supplying poison gas to a concentration camp, knowing its use); *United States v. Krauch*, 8 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, 1081, 1169-72 (1952) (pharmaceutical executives charged with sending experimental vaccines to SS, knowing SS would use them in tests on concentration camp inmates).

[29] *Amici* suggest only claims of indirect liability are alleged. This is not correct. Plaintiffs assert ATS claims of direct and derivative liability. Plaintiffs allege Rio directed, commanded, paid for, supplied, armed, and otherwise actively

F. *Sosa* Confirms The ATS Has Extraterritorial Application

The U.S. argues at length that the petition should be granted because ATS only applies territorially, and *Sosa* purportedly "required" the Court to address whether jurisdiction over disputes centered in foreign countries is proper. (USA at 9-15.) This argument misapprehends *Sosa*.

First, Rio never made this argument and thus this issue is not before the Court. FRAP 40. Second, *Sosa* rejects the contention that the ATS applies only to territorial torts. *Sosa* stated the ATS provided courts with the common law power "to entertain claims" recognized under federal common law and CIL, which in 1789 included, in part, a body of rules of law binding on "individuals for the benefit of other individuals" that "overlapped with the norms of state relationships." *Id.* at 714-15. *Sosa* noted the first Congress probably enacted the ATS to address this body of law, one that expressly concerns the "conduct of individuals situated outside domestic boundaries" and involving "norms governing the behavior of national states." *Id.* at 715.[30]

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participated (*e.g.*, provided and piloted gunship) in the atrocities. (ER 890, 892, 896-900, 911-20, 1037-40, 1074, 1096-99, 1103, 1112-16, 1227-28.) Hiring, paying others to commit war crimes and orchestrating with others to execute a genocide campaign are allegations of direct liability. Further, the district court held that "whether examined in terms of joint action" or the "control" necessary to a find "proximate cause," Plaintiffs alleged the acts of the PNGDF were "fairly attributable" to Rio and Rio was a "willful participant" in those acts. (ER 1600-03; Op. 8950-51.) Indeed, the court concluded that Plaintiffs sufficiently pled Rio's conduct was under color of state law. (ER 1611-12.)

[30] "Attorney General William Bradford, who was asked whether criminal prosecution was available against Americans who had taken part in the French

The U.S.'s territorial argument neglects this discussion and latches onto the fourth reason *Sosa* gave for imposing a "restrained conception" of judicial discretion to recognize "new private causes of action" under the ATS. *Id.* at 727. Foreign policy concerns over enforcing norms against foreign sovereigns or their agents for actions taken against their own citizens was a reasons the Court decided upon the restrained standard it did: holding CIL norms that have the acceptance and specificity as "the 18th-century paradigm" norms are federally enforceable. As a reason for this standard, foreign policy do not become a separate standard; *Sosa* weighed and struck the proper balance between individual rights and foreign policy in adopting this standard.[31]

Third, a territorial restraint directly conflicts with the cases *Sosa* identifies as proper applications of its restrained standard. *Sosa* lists *Filartiga* as one example of a proper application of its holding, which concerned a suit by a Paraguayan plaintiff against a Paraguayan official for abuses committed in Paraguay. Similarly, *Sosa* cites *Marcos* which concerned heinous conduct committed by the Philippine military and paramilitary forces under the command of Ferdinand

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plunder of a British slave colony in Sierra Leone. 1 Op. Att'y Gen. 57. Bradford was uncertain, but he made it clear that a federal court was open for the prosecution of a tort action growing out of the episode." *Sosa*, 542 U.S. at 721.

[31] The judicially created act of state doctrine specifically addresses official acts of foreign sovereigns committed within own territory. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964). It would be redundant for the ATS to share the same legal standard.

Marcos during his nearly 14-year rule of the Philippines.

Fourth, a territorial limitation of the ATS is inapplicable to the facts. In part because Rio is found in the U.S. and courts have personal jurisdiction over Rio, and in part because Alexis Sarei is a legal resident of the U.S. seeking damages for harm done to him and his son, a U.S. citizen. (ER 1040.) Even before the American Revolution, civil torts were considered transitory, in that the tortfeasor's wrongful act created an obligation to pay damages that followed him across national boundaries and enforceable wherever found. *McKenna v. Fisk*, 42 U.S. 241, 248 (1843); *Slater v. Mexican Nat'l Ry. Co.*, 194 U.S. 120, 126 (1904). Under any conception of common law in effect when the ATS was enacted, Mr. Sarei had a right to assert tort claims against Rio in a court of his domicile (state or federal) provided the court could obtain personal jurisdiction over the defendant.[32]

Finally, the argument is contrary to the national policy that spawned the ATS. If ATS only applies territorially, the U.S. would be a safe haven for those who are "*hostis humani generis*, enemies of all mankind." Being a safe haven for war criminals, perpetrators of genocide or other *jus cogens* violators could be reason for war, which was the main reason Congress enacted the ATS.[33]

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[32] Common law courts traditionally adjudicated transitory tort claims, such as those embodied by CIL, no matter where the tort occurred. *Filartiga*, 630 F.2d at 885.

[33] *Sosa*, at 715.

II. THE PANEL'S RULING THAT EXHAUSTION OF LOCAL REMEDIES IS NOT REQUIRED DOES NOT CONFLICT WITH *SOSA*; IT COMPORTS WITH *SOSA* AND CONGRESS'S INTENT

Rio incorrectly contends *Sosa* "mandates" exhaustion of local remedies as a prerequisite to jurisdiction because exhaustion is CIL. First, courts have expressly held that the exhaustion is not required under the ATS. *Jean v. Dorelien*, 431 F. 3d 776, 781 (11th Cir. 2005) (post-*Sosa*); *Doe v. Saravia*, 348 F. Supp. 2d 1112, 1157 (E.D. Cal. 2004); *Jama v. I.N.S.*, 22 F. Supp. 2d 353, 364 (D.N.J. 1998). The Opinion comports with precedent.

Second, *Sosa* recognizes ATS claims derive substantive elements from CIL. Exhaustion is not one of the substantive elements of Plaintiffs' claims,[34] nor substantive at all. *Sosa* does not require adoption of CIL's procedural rules. (Op. 8983-84.) Even still, Rio failed to satisfy *Sosa* and prove it is a substantive norm. (Op. 8987; ER 22-23 (arguing only TVPA impliedly amended ATS and citing Restatement of Foreign Relations Law)).

Third, *Sosa*'s exhaustion discussion is in footnote 21, which, in addition to being dicta, only notes exhaustion might be considered by the Court in the some future, "appropriate case,"[35] as a limitation on the availability of relief in that

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[34] No *jus cogens* norm identifies exhaustion as one of its substantive elements. (Op. 8984.) In fact, universal jurisdiction over violators of certain *jus cogens* norms precludes imposing an exhaustion requirement; perpetrator to be accountable wherever found. *Sosa*, 542 U.S. at 761-63 (Breyer, J., concurring).

[35] Rio may petition the Supreme Court to see if this case is an "appropriate case."

specific case. The Supreme Court would not relegate a mandatory precondition to judicial enforcement of all CIL norms through the ATS to a footnote in the decision that establishes the very standard for determining which norms are enforceable. If exhaustion were mandated, the Court would have said so.

In over 200 years, pre and post-*Sosa*, no court has required plaintiffs to exhaust local remedies in a foreign land before asserting an ATS claim. Given this history and Congress's awareness of federal ATS jurisprudence when it augmented the ATS with the TVPA, *Sosa* requires "some explaining" from those who would impose any additional burden (or any other hurdle) to federal jurisdiction above the "restrained" standard ratified by *Sosa* and adopted in *Marcos*. (Op. 8987.) As *Sosa* responded to the U.S.'s contention that additional Congressional action is required to pursue an ATS claim and federally enforce CIL norms:

> We think an attempt to justify such a position would be particularly unconvincing in light of what we know about congressional understanding....
>
> The position we take today has been assumed by some federal courts for 24 years, ever since ... *Filartiga*.... Congress ... has not only expressed no disagreement with our view of the proper exercise of the judicial power [the restrained standard of judicial discretion], but has responded to its most notable instance by enacting legislation supplementing the judicial determination in some detail. [*Id.* at 730-31.]

Exercising caution, the district court rejected Rio's request to require exhaustion, reasoning, "Congress could, had it wished to do so, have amended the

ATCA to impose such a requirement at the time it enacted the TVPA. It did not do so.... [T]herefore, the court declines to find that ATCA plaintiffs must exhaust national remedies" before suing in the U.S. (ER 1585); *see also Kadic*, 70 F.3d at 241 (rejecting argument Congress intended TVPA to amend ATS by implication; "scope of the [ATS] remained undiminished by enactment of the [TVPA]"); *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1154 (11th Cir. 2005) ("TVPA creates no new liabilities nor does it impair rights"); *Aldana*, 416 F.3d at 1251 (rejecting argument that TVPA impliedly amended ATS).

Indeed, *Sosa* expressly stated that to date "***Congress has not in any relevant way amended [the ATS] or limited civil common law power by another statute.***" 542 U.S. at 725.[36] Recognition that Congress has not amended or limited judicial power under the ATS is fatal to the argument that exhaustion is a precondition to the exercise of judicial power.

Moreover, numerous principles of statutory construction confirm Congress did not and does not intend an exhaustion requirement to apply to the ATS:

- If ATS claims required exhaustion, Congress's inclusion of an exhaustion requirement in the TVPA would be superfluous, violating a "cardinal principle of statutory construction." (Op. 8976-77); *Williams v. Taylor*, 529 U.S. 362, 404 (2000); *Market Co. v. Hoffman*, 101 U.S. 112, 115 (1879);

[36] *Sosa* thus rejects any *amici*'s contention that the TVPA can be used as a model for ATS claims or impliedly amend the ATS. (NFTC 7.)

- Implying exhaustion into the ATS would violate the rule that where Congress employed a term in one place of an Act (28 U.S.C. § 1350) and excluded it in another, courts should not imply where excluded. (Op. 8976-77); *Bates v. United States*, 522 U.S. 23, 29-30 (1997); *FTC v. Sun Oil Co.*, 371 U.S. 505, 515 (1963);
- To imply an exhaustion requirement now, after the TVPA because the TVPA requires exhaustion is impliedly amending the ATS, which is disfavored; Congress's intent to repeal or amend must be clear and manifest. *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974); *Aldana*, 416 F.3d at 1251 (TVPA does not impliedly amend the ATS).

Additionally, the one-size-fits-all exhaustion requirement Rio suggests fails to respect Congress's decisions regarding exhaustion requirements and lawsuits concerning foreign affairs. For example, Congress required exhaustion where intended for specific claims concerning foreign relations, *e.g.*, TVPA (Op. 8978), and required different kinds of exhaustion requirement for suits against foreign sovereigns depending on the facts or claims. Under FSIA, Congress requires some claimants to offer the foreign state an option of ADR through arbitration in accordance with international rules before asserting claims. 28 U.S.C. § 1605(a)(7)(b)(1). At the same time, Congress does not impose any arbitration or exhaustion requirement on other claims asserted against foreign sovereigns. *See*, *e.g.*, 28 U.S.C. §§ 1605(a)(1) (sovereign immunity waived);[37] (a)(3)(takings cases).

[37] PNG has waived its sovereign immunity as applied to Plaintiffs' claims. (ER 1895). Thus, if exhaustion were required for the ATS claims, Rio – though it performed egregious acts – would be insulated from federal jurisdiction while PNG could be defending itself against claims arising out of the same facts. This is an anomalous result, especially if one's concern is avoiding international friction.

There is no reason[38] to impose a heightened burden on all ATS litigants to access the federal courts above the burdens Congress actually imposed on litigants suing foreign sovereigns. Courts should await Congressional action.

Rio seeks to avoid and silence Congress here suggesting *Sosa* mandates courts to look to CIL to determine whether to impose this procedural prerequisite to federal jurisdiction. (Rio 3-4; USA 29.) Such silence is had only by rewriting the Constitution, and is a very perilous slope to traverse. If CIL, not Congress, determines the procedures and prerequisites to jurisdiction, does CIL then also govern statute of limitations? The political question doctrine? What about discovery rules? Doctrine of *forum non conveniens*, comity, summary judgment standards? The clear answer is "No." Likewise, the clear answer to what is required to access federal jurisdiction is and has always been to look to Congress.

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[38] Policy considerations alone "cannot justify judicially imposed exhaustion" requirements. (Op. 8972, 8981.) What Rio suggests is radical: transform the ATS into a global habeas statute whereby U.S. courts review, and ostensibly correct, foreign adjudications involving violations of CIL. If so, the ATS runs the judiciary headfirst into issues of comity which might render the ATS stillborn, and introduces even more complexity and potential for litigation. There will be questions about standards for judging the procedures that should be exhausted, whether notice is required to federal courts showing attempts to exhaust are being implemented to protect ATS rights, tolling requirements and time limitations for exhaustion, the *res judicata* and collateral estoppel effects, if any, and collateral litigation concerning each of these issues along with the foreign forum's due process protections. The Supreme Court has stated that these considerations require Congressional action before judicially implying an exhaustion requirement. *Patsy v. Board of Regents*, 457 U.S. 496, 514 (1982).

Further, federal domestic courts are not intended to be an International Tribunal to sit in judgment over other nation's adjudications and legal process, nor is federal jurisdiction coterminous with International Tribunals. (Op. 8982-83.)

Here, Congress enacted the ATS and *Sosa* explained what Congress meant and what is required before courts may adjudicate ATS claims, namely Congress provided a federal remedy for claims that fit the 18th century paradigm. Both Congress and the Supreme Court have spoken; no court should require more as a prerequisite to jurisdiction absent further Congressional action.[39]

Finally, even if the Court thought exhaustion of local remedies might be warranted, exhaustion is satisfied. Plaintiffs are presumed to have exhausted their local remedies; the burden of proving non-exhaustion lies with Rio. *Marcos*, 103 F.3d at 778 n.5 (quoting Sen. Rep. No. 249). Plaintiffs brought their ATS claims to the U.S. out of fear of physical reprisals in PNG, which the district court weighed heavily in favor of keeping the case in the U.S. (ER 1640-41 (denying *forum nonconveniens*), 1929-48.) No evidence in the record suggests Plaintiffs' claims are actionable in PNG today. In fact, the evidence indicates the claims are barred under PNG's statute of limitations if asserted now. (ER 1441-53, 1717.)

CONCLUSION

For these reasons the Court should deny the petition for rehearing en banc.

[39] *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 789 (D.C. Cir. 1984) (Edwards, J., concurring) ("[i]f Congress determined that aliens should be permitted to bring actions in federal courts, only Congress is authorized to decide that those actions 'exacerbate tensions' and should not be heard").

DATED: October 30, 2006.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 02-56256, 02-56390

ALEXIS HOLYWEEK SAREI, et al.,

Plaintiffs-Appellants,

v.

RIO TINTO, PLC, et al.

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING REHEARING EN BANC

INTERESTS OF THE UNITED STATES

Pursuant to 28 U.S.C. § 517, the United States files this amicus brief in support of defendants-appellees' second petition for rehearing en banc.

Plaintiffs in this case, current and former residents of Bougainville, Papua New Guinea, sued the corporate parent companies of a mine located in Bougainville, asserting claims under the Alien Tort Statute (ATS), 28 U.S.C. § 1350. The United

States has a significant interest in the proper construction and application of the ATS. As the Supreme Court recently acknowledged, the federal courts' recognition of claims under the ATS can have significant implications for the United States' foreign relations. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004).

In its original opinion in this case, this Court addressed the validity of plaintiffs' claims under the ATS, even though no party had briefed the issue, because it believed the question had some bearing on the district court's subject matter jurisdiction under the ATS. *Sarei v. Rio Tinto, PLC*, 456 F.3d 1069, 1077 (9th Cir. 2006), *withdrawn* April 12, 2007. In its amicus brief in support of defendant-appellees' initial petition for rehearing, the United States explained that the Court's analysis of the validity of plaintiffs' claims was significantly flawed, and that the Court need not have addressed those issues because a court has jurisdiction under the ATS so long as an alien asserts a colorable tort claim in violation of international law, even if the claim turns out to be invalid. In its revised opinion, the Court accepted that analysis and reserved the question of the validity of plaintiffs' claims. *See Sarei v. Rio Tinto, PLC*, Slip Op. 4134 (9th Cir. Apr. 12, 2007) ("[W]e need not and do not decide whether plaintiffs' substantive claims and theories of vicarious liability constitute valid ATCA claims after *Sosa*.").

However, the panel's revised opinion rejected defendant-appellees' argument that plaintiffs could not properly assert claims under the ATS at this time, because they failed to exhaust their local remedies in Papua New Guinea. The majority held that it would be inappropriate for a court to require exhaustion of local remedies where Congress has not specifically mandated such a requirement. Slip Op. 4170–71. Defendants-appellees have filed a new petition seeking en banc rehearing of the exhaustion issue.

As we explained in our prior filing in this case (and in two appeals pending before this Court),[1] the presumption against extraterritorial application of U.S. law absent express direction from Congress, the history of the ATS' enactment, and the Supreme Court's many warnings in *Sosa* necessarily lead to the conclusion that the ATS does not authorize federal courts to fashion federal common law — i.e., *law of the United States* — to govern conduct arising in the jurisdiction of a foreign sovereign, especially where those claims involve a foreign government's treatment of its own citizens. However, the factors that foreclose the projection of U.S. law into foreign countries counsel strongly in favor of requiring plaintiffs to exhaust available local

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[1] *See* the United States' amicus curiae briefs in *Corrie v. Caterpillar, Inc.*, No. 05-36210 (9th Cir.), and in *Mujica v. Occidental Petroleum Corp.*, No. 05-56175 (9th Cir.).

remedies for redress of injuries resulting from such conduct before they can sue in a U.S. court to urge the court to impose U.S. law under the ATS.[2]

ARGUMENT

A Plaintiff's ATS Claims Arising in a Foreign Jurisdiction May Be Considered, if at All, Only after Exhaustion of Available Local Remedies.

A. As noted, the majority held that, where a claim asserted under the ATS arises abroad, a court should not require exhaustion of foreign remedies, because Congress has not specifically mandated that prerequisite. Slip Op. 4170–71. In so holding, the majority relied on the Supreme Court's admonition in *Sosa* to exercise "judicial caution." *Id.* at 4165. As an initial matter, we do not think it appropriate to construe *Sosa* as counseling against the adoption of an exhaustion requirement. Indeed, the Supreme Court stated that it "would certainly consider this [exhaustion] requirement in an appropriate case." 542 U.S. at 733 n.21.

The majority also erred in focusing on the lack of a clear Congressional statement. Looking for such a statement is proper when Congress creates a cause of action, and a court is attempting to discern legislative intent. Here, however, the Court is considering a jurisdictional statute and circumscribed power of the courts to

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[2] The United States expresses no views on the validity of any aspect of the Court's decision not discussed in this brief.

recognize a very limited number of federal common law claims that may be asserted under that statute. The Supreme Court went out of its way to chronicle reasons why a court must act cautiously and with "a restrained conception of * * * discretion" in recognizing ATS claims and extending liability. *Id.* at 726; *see id.* at 725–730, 732 n.20. The Court discussed at length the reasons for approaching this federal common law power with "great caution." *Id.* at 728. Adopting an exhaustion requirement in appropriate cases is fully in keeping with the Supreme Court's instruction that, when exercising common law authority under the ATS, courts should do so in a restrained and modest fashion.

In *Sosa*, the Court questioned whether the courts' limited federal common law power could properly be invoked "at all" in regard to a foreign nation's actions taken abroad. *Sosa*, 542 U.S. at 727–28 ("It is one thing for American courts to enforce constitutional limits on our own State and Federal Governments' power, but quite another to consider suits under rules that would go so far as to claim a limit on the power of foreign governments over their own citizens, and to hold a foreign government or its agent has transgressed those limits. * * * Since many attempts by federal courts to craft remedies for the violation of new norms of international law would raise the risk of adverse foreign policy consequences, they should be undertaken, if at all, with great caution."). Assuming arguendo, however, that a court

could ever do so, it is important that the court show due respect to competent tribunals abroad and mandate exhaustion where appropriate.

As a matter of international comity, "United States courts ordinarily * * * defer to proceedings taking place in foreign countries, so long as the foreign court had proper jurisdiction and enforcement does not prejudice the rights of United States citizens or violate domestic public policy." *Finanz AG Zurich v. Banco Economico S.A.*, 192 F.3d 240, 246 (2d Cir. 1999) (citations and internal quotation marks omitted). Such international comity seeks to maintain our relations with foreign governments, by discouraging U.S. courts from second-guessing a foreign government's judicial or administrative resolution of a dispute or otherwise sitting in judgment of the official acts of a foreign government. *See generally Hilton v. Guyot*, 159 U.S. 113, 163–164 (1895). To reject a principle of exhaustion and proceed to resolve a dispute arising in another country, concerning a foreign government's treatment of its own citizens, is the opposite of the model of "judicial caution" and restraint mandated by *Sosa*.

Moreover, exhaustion is fully consistent with Congress' intent in enacting the ATS. Congress enacted the ATS to provide a mechanism through which certain private insults to foreign sovereigns committed within U.S. jurisdiction could be remedied in federal courts. In the late 18th-century, the law of nations included "rules binding individuals for the benefit of other individuals," the violation of which

"impinged upon the sovereignty of the foreign nation." *Sosa*, 542 U.S. at 715. Such violations, "if not adequately redressed[,] could rise to an issue of war." *Ibid.* Violations of safe conducts, infringement of the rights of ambassadors, and piracy came within this "narrow set." *Ibid.* But under the Articles of Confederation, "[t]he Continental Congress was hamstrung by its inability to cause infractions of treaties, or the law of nations to be punished." *Id.* at 716 (quotation marks omitted).

The Continental Congress urged state legislatures to authorize suits "for damages by the party injured, and for the compensation to the United States for damages sustained by them from an injury done to a foreign power by a citizen." *Ibid.* (quotation marks omitted). Most states failed to respond to the Congress' entreaty. Physical assaults on foreign ambassadors in the United States, and the absence of a federal forum to redress ambassadors' claims, led to significant diplomatic protest. *Id.* at 716–17. After ratification of the Constitution, the First Congress adopted the ATS to remedy this lacuna, thereby reducing the potential for international friction. *Id.* at 717–18.

The whole point of the ATS was thus to *avoid* international friction. The ATS was enacted to ensure that the National Government would be able to provide a forum for punishment or redress of violations for which a nation offended by conduct against it or its nationals might hold the offending party (and, in turn, the United

States) accountable. Those animating purposes of the ATS have nothing to do with a foreign government's treatment of its won citizens abroad. Against this backdrop, reinforced by cautions mandated by the Supreme Court in *Sosa* and the prescription against extraterritorial application of U.S. law, courts should be very hesitant *ever* to apply their common law power to apply *U.S. law* to adjudicate a foreign government's treatment of its own nationals. But even assuming that such extraterritorial claims are cognizable under the ATS, an exhaustion requirement manifestly would *further*, not undermine, Congress' intent to minimize the possibility of diplomatic friction by affording foreign states the first opportunity to adjudicate claims arising within their jurisdictions.

Consistent with that result, it is notable that when Congress by statute *has* created a private right for claims that may arise in foreign jurisdictions, it has required exhaustion as a prerequisite to suit. *See, e.g.*, Torture Victim Protection Act of 1991 (TVPA), Pub. L. No. 102-256, § 2(b). And Congress adopted this requirement in the TVPA, in part, because it viewed exhaustion as a procedural practice of international human rights tribunals, as the dissent notes. Slip Op. 4186 (Bybee, J., dissenting) (discussing S. Rep. No. 102-249, pt. 4, at 10 (1991).

B. Finally, we reiterate that the ATS does not encompass claims arising within the jurisdiction of a foreign sovereign, especially where the claims would require a U.S.

court to evaluate a foreign sovereign's treatment of its own citizens. As we have noted, the Supreme Court expressly identified — as one of the questions to be considered in demarcating the limited scope of the judge-made law that may be fashioned in accordance with the ATS — whether it would ever be proper for federal courts to project the (common) law of the United States extraterritorially to resolve disputes arising in foreign countries. *See Sosa*, 542 U.S. at 727–28.

The history of the ATS' enactment, described above, shows that Congress enacted the ATS to provide a forum for adjudicating alleged violations of the law of nations occurring within the jurisdiction of the United States and for which the United States therefore might be deemed responsible by a foreign sovereign. There is no indication whatsoever that Congress intended the ATS to apply — or to authorize U.S. courts to apply U.S. law — to purely extraterritorial claims, especially to disputes that center on a foreign government's treatment of its own citizens in its own territory. Indeed, the recognition of such claims would conflict with Congress' purpose in the ATS of reducing diplomatic conflicts.

Moreover, recognizing ATS claims arising in foreign states conflicts with the presumption, adopted in the early years of the Republic, "that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248

(1991) (quotation marks omitted). This presumption reflects not only a judgment about the appropriate exercise of the United States' own power to impose its law to govern conduct and afford remedies, but also a corresponding respect for the sovereign authority of other states. *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164–65 (2004). The Supreme Court "assume[s] that Congress legislates against the backdrop of the presumption against extraterritoriality." *Arabian Am. Oil Co.*, 499 U.S. at 248. Thus, "unless there is the affirmative intention of the Congress clearly expressed," in "the language [of] the relevant Act," the Court presumes that a statute does not apply to actions arising abroad. *Ibid.* (quotation and alteration marks omitted).

The ATS does not "clearly express[]" Congress' intent to authorize the courts to project the law of the United States to govern conduct and redress injuries in the jurisdiction of a foreign sovereign. Indeed, contemporaneous actions by Congress confirm that it did not. The same Congress that enacted the ATS enacted a statute criminalizing piracy, assaults on ambassadors, and violations of safe conduct — the three historic paradigm violations of the law of nations identified by *Sosa*. 1 Stat. 112, §§ 8, 25 (April 30, 1790). That statute was written in general terms and contained no geographic limitation. But in a case involving acts of piracy committed by foreigners within the jurisdiction of a foreign sovereign, the Supreme Court held that

the statute did not apply. *United States v. Palmer*, 16 U.S. 610, 630–34 (1818). Noting that the statute was entitled "'an act for the punishment of certain crimes *against the United States*,'" the Supreme Court explained that Congress intended to punish "offences against the United States, not offences against the human race." *Palmer*, 16 U.S. at 632 (emphasis added). It is inconceivable that the same Congress, in enacting the ATS, meant to authorize an extension of the common law of the United States to regulate conduct in a foreign country (especially conduct involving a foreign government's treatment of its own nationals), which would go well beyond conduct Congress sought to reach in the criminal statute — and well beyond the purpose Congress sought to advance in enacting the ATS itself.[3] *See supra* at 6–8.

The presumption against extraterritoriality "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." *Arabian Am. Oil*, 499 U.S. at 248; *Empagran*, 542 U.S. at 164–65. That danger is especially grave in ATS suits, where a court's projection of common law of the United States abroad can interfere with a foreign sovereign's choice about how to resolve conflicts within its jurisdiction. Thus, for example, in one

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[3] In *United States v. Klintock*, the Supreme Court held that the statute considered in *Palmer* did apply to acts of piracy committed on the high seas by a United States citizen. 18 U.S. 144 (1820). But crimes committed on the high seas arise outside the territorial jurisdiction of any sovereign.

ATS case, plaintiffs seek to hold multinational corporations that did business with South Africa liable for the harms committed by the apartheid regime, despite the fact that the litigation is inconsistent with South Africa's own current reconciliation efforts. *See In re S. African Apartheid Litigation*, 346 F. Supp. 2d 538 (S.D.N.Y. 2004).

A court in the United States is not well-positioned to evaluate what effect adjudication of claims asserted under the ATS may have on a foreign sovereign's own efforts to resolve conflicts, or the effect such adjudication will have on the diplomatic relations of the foreign state. It is precisely to avoid "unintended clashes" with such efforts that the Supreme Court requires Congress to speak clearly when it intends for legislation to apply extraterritorially. Congress has not done so in the ATS. Accordingly, claims under the ATS should not be recognized if they arise within the jurisdiction of another sovereign.

Moreover, Congress enacted the ATS to minimize diplomatic tensions. However, experience has shown that ATS suits asserting extraterritorial claims often trigger foreign government protests, both from the nations where the alleged abuses occurred, and, in cases (such as this one) against foreign corporations, from the nations where the corporations are based or incorporated (and therefore regulated). Thus serious diplomatic friction can result from judicial recognition of claims under the ATS arising within the jurisdiction of a foreign sovereign.

With these considerations in mind, plaintiffs' claims here are not cognizable under the ATS — i.e., courts may not apply the law of the United States in the form of judge-made federal common law to regulate and award damages for the alleged conduct — because there is no indication whatever, much less the requisite clear statement in the ATS itself, that Congress intended the ATS to authorize courts to project common law of the United States to govern conduct arising in the jurisdiction of a foreign sovereign, especially in suits against foreign corporations that require a court to review a foreign government's treatment of its own citizens.

We recognize that this Court previously held that the ATS encompasses claims arising within the territory of a foreign sovereign. *See In re Estate of Ferdinand Marcos Human Rights Litigation*, 978 F.2d 493, 499–501 (9th Cir. 1992). But in clarifying the standard courts should apply in considering claims under the ATS, the Supreme Court has since expressly noted that the extraterritorial reach of the ATS is a question courts must address. Moreover, in the *Marcos* decision, this Court failed to consider the historical origin of the ATS and the presumption against extraterritoriality. For these reasons, should the Court decide to grant rehearing en banc in this case, it would be appropriate for the Court to reconsider the territorial reach of the ATS and order briefing on the issue by the parties.

Defendants-appellees have requested rehearing en banc on the question whether exhaustion of local remedies is required. That question is en-banc-worthy in its own right, for reasons stated above and as requested in the defendants-appellees' rehearing petition. But the two doctrines discussed in this brief (exhaustion and non-extraterritoriality) grow out of similar concerns of not projecting our sovereign authority (either judicial or legislative) into the affairs of another sovereign. Indeed, the question whether the ATS authorizes courts to apply federal common law to conduct arising in a foreign country *at all* can fairly be regarded as logically antecedent to whether exhaustion of local remedies should be required for such a claim.

The en banc court could address the interrelated concerns underlying exhaustion and extraterritoriality in either of two ways. It could hold that, even assuming plaintiffs have a valid ATS claim, they would first be required to exhaust available local remedies before bringing suit in the United States under the ATS. Alternatively, because the issue of exhaustion only arises if the ATS applies extraterritorially, and because the Supreme Court's decision in *Sosa* provides a basis for the en banc court to reconsider that question, the court could take up that question first.[4]

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[4] This circuit precedent likely explains why the extraterritoriality issue was not fully litigated or addressed by the panel.

CONCLUSION

For the foregoing reasons, the Court should grant defendant-appellees' petition for rehearing en banc.

Respectfully submitted,

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May 18, 2007

Nos. 02-56256, 02-56390
Decided April 12, 2007
Before Circuit Judges Fisher and Bybee and District Judge Mahan

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALEXIS HOLYWEEK SAREI, PAUL E. NERAU, THOMAS TAMUASI, PHILLIP MIRIORI, GREGORY KOPA, METHODIUS NESIKO, ALOYSIUS MOSES, RAPHAEL NINIKU, GABRIEL TAREASI, LINUS TAKINU, LEO WUIS, MICHAEL AKOPE, BENEDICT PISI, THOMAS KOBUKO, JOHN TAMUASI, NORMAN MOUVO, JOHN OSANI, BEN KORUS, NAMIRA KAWONA, JOANNE BOSCO, JOHN PIGOLO and MAGDALENE PIGOLO, individually and on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants/Cross-Appellees,

vs.

RIO TINTO plc and RIO TINTO LIMITED,

Defendants-Appellees/Cross-Appellants.

On Appeal from the United States District Court,
Central District of California — Western Division
U.S.D.C. No. 00-11695-MMM MANx
The Honorable Margaret M. Morrow, Judge Presiding

PETITION FOR REHEARING *EN BANC*

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INTRODUCTION

This case should be reheard *en banc* because the divided panel's majority opinion disregards the Supreme Court's instructions in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), for the proper construction and application of the Alien Tort Statute, 28 U.S.C. § 1350 ("ATS"). In *Sosa*, the Supreme Court reversed this Court and spelled out the reasons why the ATS should be "narrow[ly]" construed. 542 U.S. at 729. *Sosa* expressly mandated that federal courts exercise "vigilant doorkeeping" in ATS cases. *Id.* Indeed, where, as here, plaintiffs challenge the official acts (including military conduct) of a foreign sovereign within its own territory and with respect to its own citizens, *Sosa* states that such claims should be heard under the ATS only with "great caution" — "*if at all.*" *Id.* at 727-28 (emphasis added).[1]

Contrary to *Sosa*'s mandate, the panel majority refused to apply the rule requiring exhaustion of available local remedies — a form of judicial doorkeeping long required under both international and domestic law when courts are called upon to review conduct subject to the jurisdiction of another sovereign. The exhaustion principle "require[s] that before asserting a claim in a foreign forum, the claimant must have exhausted any remedies available in the domestic legal

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[1] Plaintiffs' allegations are based on the development and operation of the Panguna copper mine on Bougainville Island, in Papua New Guinea ("PNG"), and the official police and military response of the PNG government after secessionist violence caused the mine to close in 1989. *Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d 1116 (C.D. Cal. 2002), *aff'd in part and rev'd in part*, *Sarei*, Nos. 02-56256, 02-56390, slip op. (9th Cir. Apr. 12, 2007).

system," such as the local remedies available to plaintiffs in the PNG courts. *Sosa*, 542 U.S. at 733 n.21. The Supreme Court stated that it "would certainly consider this requirement in an appropriate case" under the ATS. *Id.* As Judge Bybee said in his strong and scholarly dissent, "[t]his is such a case." *Sarei* at 4177.[2]

The panel majority gave no valid reason for declining to apply the exhaustion requirement. It is undisputed on the record in this case that the PNG judicial system would provide tort remedies, under the PNG Constitution and statutes based on English common law, for all of the claims plaintiffs seek to pursue here. ER 0182. As the district court specifically found, even the plaintiffs' experts agree that the PNG judicial system is "'independent, impartial, honest, and has integrity.'" 221 F. Supp. 2d at 1167 n.201 (quoting ER 1743).[3]

The courts of PNG should have the first opportunity to address plaintiffs' claims. The panel's error in rejecting the exhaustion rule warrants rehearing *en banc* because the majority opinion would make U.S. courts the only jurisdiction in the world to offer any alien plaintiff a forum of first resort, without regard to the availability of domestic remedies, for asserting international law claims arising out of civil conflict in any nation. That result directly contravenes not only the

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[2] This petition is filed following this Court's order, *Sarei v. Rio Tinto*, slip op. at 4123, Nos. 02-56256, 02-56390 ("*Sarei*") (9th Cir. Apr. 12, 2007) (attached at Tab A hereto), which withdrew the panel's original opinion and issued a superseding opinion.

[3] The defendants-appellees have agreed that they are subject to jurisdiction in PNG, ER 1402-1407, and seek a dismissal based on exhaustion that would be without prejudice, expressly allowing plaintiffs to refile a case in the United States if they are denied a fair hearing in PNG. *Sarei* at 4216 (Bybee, J., dissenting).

rationale of *Sosa* — which prohibits U.S. courts from expanding available remedies beyond what has been generally accepted and clearly defined in international law precedents — but also *Alperin v. Vatican Bank*, 410 F.3d 532, 561 (9th Cir. 2005), *cert. denied*, 126 S. Ct. 1141 (2006), which held that this Court is "not a war crimes tribunal."

I. THIS IS THE "APPROPRIATE CASE" FOR THE EXHAUSTION REQUIREMENT THAT *SOSA* CONTEMPLATES.

"The dispute before us is a textbook case for exhaustion." *Sarei* at 4215 (Bybee, J., dissenting). It is undisputed on the record that PNG is a mature constitutional democracy with an independent judiciary. The district court specifically found, in the context of *forum non conveniens*, that PNG is an adequate forum and that remedies based on the kinds of facts alleged in this case are available there. *Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d at 1165-72.

PNG's independent judiciary is well-equipped to provide such remedies. The "Papua New Guinea Constitution establishes a comprehensive human rights regime consistent with the highest international standards." ER 811. Its "Courts have a proud record of judicial independence," and its legal system "therefore provides more than adequate avenues through which citizens of Papua New Guinea" may "seek redress from the Courts of Papua New Guinea." *Id.*

As the district court specifically found, even plaintiffs' declarants agree with this assessment. 221 F. Supp. 2d at 1167. For example, the Honorable Brian Danesbury Brunton, a former Justice of PNG's National and Supreme Courts,

states that the PNG judicial system is "'independent, impartial, honest, and has integrity.'" *Id.* at 1167 n.201 (quoting ER 1743). In his opinion, it "is not possible to bribe" or "unduly influence a judge in Papua New Guinea." ER 1756. Indeed, as the district court found, plaintiffs' declarants uniformly praise the quality and integrity of PNG's courts. ER 1630 n.201; *see also* ER 1768 (PNG judges "carry out their duties with the greatest commitment, dedication, and integrity"); ER 1718 ("I have no doubt in the competency of the Courts in Papua New Guinea to hear and determine the Plaintiffs['] claim . . . ."); ER 1890 ("There is no doubt about the independence of the Papua New Guinea judiciary.").

The Honorable Teresa Anne Doherty, also a former Justice of the National and Supreme Courts of PNG, and Anthony Paul Wano Deklin, an expert in PNG law, declare that plaintiffs' claims are fully cognizable under PNG law. ER 0188-0191, 0198-0199, 0208-0224. The PNG Constitution guarantees "all persons in our country" "life, liberty, security of the person and protection of the law," "freedom from inhuman treatment," and "protection for privacy of their homes and other property from unjust deprivation of property." ER 0208-0210. Under Section 41 of the PNG Constitution,

> [E]ven an act done under a valid law may amount to an unlawful act if it is "harsh or oppressive," or "is not warranted by, [or] is disproportionate to, the requirements of the particular circumstances or of the particular case," or "is otherwise not, in particular circumstances, reasonably justifiable in a democratic society having proper regard for the rights and dignity of mankind."

ER 0215. These constitutional rights are enforceable in PNG courts, including by actions for damages. ER 0210.[4] Common-law torts and PNG customary law claims are also enforced in private lawsuits. ER 0210. The record cites and describes a number of cases in which the PNG courts have awarded damages and other remedies against high government officials, the Police, and the Defence Force. ER 0213-0217. PNG's judiciary is "fearless" in holding the executive and legislative branches accountable to the rule of law, and has "been vigilant against abuses of power by public officials." ER 0213-0219.

In short, if this is not a case in which it is appropriate to require exhaustion of local remedies, there never will be such a case.[5]

II. THE MAJORITY'S REFUSAL TO REQUIRE EXHAUSTION OF LOCAL PNG REMEDIES CONFLICTS WITH *SOSA* AND WITH WELL-ESTABLISHED U.S. AND INTERNATIONAL LAW.

The *Sosa* Court's directives to the lower courts compel the conclusion that the exhaustion rule should be applied in this case.[6] As we demonstrate below, it is also consistent with congressional intent.

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[4] Plaintiffs' experts agree with this assessment as well. ER 1716-1718, 1743-1744, 1882-1887, 2045-2047.

[5] The district court correctly ruled that PNG's 6-year statute of limitations did not undercut the adequacy of PNG as a forum. ER 1550. The court noted that plaintiffs' claims might be barred even in the U.S., ER 1550, and that defendants' written "consent to litigation in Papua New Guinea," ER 1541, "waived any statute of limitations defense based on the passage of time between the date plaintiffs first filed this action" and final judgment. ER 1552. "This is all that is required." ER 1552.

A. Rejecting Exhaustion Makes Remedies Available in the U.S. for Relief Under International Law Norms Beyond What Would Be Accepted in International Tribunals or Foreign Jurisdictions.

International law precedents on the exhaustion requirement were an issue in this case even before *Sosa*, and both sides have made repeated presentations on the subject.[7] Judge Bybee brought additional scholarship to bear on the subject in his dissent. The *Sosa* Court received ample briefing on the issue of exhaustion as a principle of international law. 542 U.S. at 732-33 n.21. It is remarkable that, in the briefs in this case and in *Sosa*, not a single case is cited in which the issue of exhaustion was raised and a foreign or international forum has allowed a private claimant to proceed with a claim for relief under international law norms without first exhausting adequate remedies available in the local jurisdiction.[8]

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[6] *Sosa*'s endorsement of the exhaustion rule cannot be dismissed as a mere "aside." *Sarei* at 4172; *United States v. Montero-Camargo*, 208 F.3d 1122, 1132 n.17 (9th Cir. 2000) ("Supreme Court dicta have a weight that is greater than ordinary judicial dicta as prophecy of what that Court might hold; accordingly, we do not blandly shrug them off.").

[7] In support of its motion to dismiss, Rio Tinto submitted an expert declaration that exhaustion of local remedies is a requirement of international law, ER 0166-0167, which was not challenged by any of plaintiffs' experts on the law of nations. ER 0362. Indeed, one of plaintiffs' experts, Professor Ratner has written that exhaustion is required under the ATS. Steven R. Ratner & Jason S. Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* 245 (2d ed. 2001) ("Ratner & Abrams"). *See* ER 2008-2042.

[8] There are, of course, many examples of cases in which exhaustion is not mentioned, and may not have been raised as an issue. Exhaustion is excused if the claim arose in a nation without a fair justice system. *See, e.g., Kadic v. Karadzic*, 70 F.3d 232, 250 (2d Cir. 1995) (it was "evident that the courts of the former Yugoslavia . . . are not now available to entertain plaintiffs' claims"). Further,

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Thus, the panel's decision would make the United States the first jurisdiction in the world to offer private plaintiffs the unfettered choice to forgo available substantive law and procedures of the nation where the claim arose in favor of international law claims in a forum outside that nation's jurisdiction. By dispensing with the international requirement of exhaustion, the panel's unprecedented decision permits private plaintiffs to choose a U.S. federal court regardless of the reason for their preference — whether it is to invoke international law norms, or to litigate with the benefit of favorable U.S. procedures such as extensive discovery, contingent fees, and jury trials that are unavailable elsewhere. This is an expansion of the reach of international law that cannot be justified in the common-law manner that *Sosa* contemplated — that is, by ascertaining and carefully following the rules already accepted by other nations and international tribunals.

The *Sosa* Court declined to close the door on international law claims beyond those recognized in 1789, but left it "ajar" only subject to "vigilant doorkeeping" according to "cautious" development of federal common law in which U.S. courts never exceed norms that have already gained "acceptance

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exhaustion is an affirmative defense. In cases against foreign officials who have escaped to the U.S. from countries that have turned hostile to them, defendants have understandably not demanded exhaustion. *See, e.g., In re Estate of Marcos Human Rights Litig.*, 25 F.3d 1467, 1469 (9th Cir. 1994) (suit against deposed Philippines president Marcos after he fled to the United States); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1536 (N.D. Cal. 1987) (suit against former general who fled Argentina after being summoned by Argentinean judicial body prosecuting human rights abuses by the military).

among civilized nations." *Sosa*, 542 U.S. at 732. The Court acknowledged Justice Scalia's objections, in dissent, that allowing any common-law development of claims under the ATS beyond those accepted in 1789 allows courts to legislate, and contradicts the "fundamental holding" of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), "that a general common law *does not exist*." 542 U.S. at 744 (Scalia, J., dissenting) (emphasis in original). The substance of Justice Scalia's objections provides the content for the first three of the Supreme Court's five stated reasons in *Sosa* why lower courts must follow, and not expand upon, generally accepted and clearly defined international precedent. *Id.* at 725-27. That precedent provides the standards without which common-law decision making would be indistinguishable from an exercise of discretion that belongs to the legislature, not the courts.

The panel majority in this case purported to take "the Supreme Court's admonition of caution in *Sosa* to heart" in declining to read an exhaustion requirement into the ATS, "leaving it to Congress or the Supreme Court to take the next step if warranted." *Sarei* at 4172. But, as Judge Bybee points out, "[t]his turns the Court's reasoning on its head; the majority's conception of caution would expand, rather than restrict, the availability of claims under the [ATS]." *Id.* at 4188 n.7. It would also achieve that expansion without any international law precedent for doing so, contrary to the clear admonitions of *Sosa*.

B. The Exhaustion Requirement Avoids the Undue Exercise of U.S. Jurisdiction over Foreign Sovereigns' Actions in Their Own Territory and Thus Avoids a Significant Risk to U.S. Foreign Policy Interests.

As its fourth "reason[] for caution," the Supreme Court stated:

> It is one thing for American courts to enforce constitutional limits on our own State and Federal Governments' power, but quite another to consider suits under rules 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. Cf. *[Banco National de Cuba v.] Sabbatino*, [376 U.S. 398,] 431-432. Yet modern international law is very much concerned with just such violations, and apt to stimulate calls for vindicating private interests in § 1350 cases. Since many attempts by federal courts to craft remedies for the violation of new norms would raise risks of adverse foreign policy consequences, they should be undertaken, *if at all*, with great caution.

Sosa, 542 U.S. at 727-28 (emphasis added).

The United States as *amicus curiae* supporting rehearing in this case argued forcefully that claims under the ATS must be limited in accordance with "a strong presumption 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" Brief for the United States as *Amicus Curiae* Supporting Panel Rehearing or Rehearing *En Banc* ("United States *Amicus* Br.") at 12 (quoting *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991)). The United States pointed out (*id.* at 13) that the presumption against extraterritoriality "serves to protect against unintended clashes between our laws and those of other nations which could result in international

discord." *Arabian Am. Oil*, 499 U.S. at 248. The panel's superseding Order and Opinion ignores the United States' assertion that "ATS suits such as this carry a significant risk to the foreign policy interests of the United States." United States *Amicus* Br. at 14 n.3.[9]

The majority also disregards *Alperin*, the first case in this circuit to construe *Sosa*, which held that U.S. courts may not "make a retroactive political judgment as to the conduct of war." 410 F.3d at 548.[10] As the district court correctly

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[9] The changes in the superseding Order and Opinion have failed to correct other significant errors that should not stand as the law of this circuit. For example, the majority erred on a basic point of appellate procedure in holding that Rio Tinto waived its right to appeal the district court's adverse rulings on act of state and international comity by failing to cross-appeal on those issues. *Sarei* at 4146 n.17. The majority's disregard of the blackletter rule that "a defendant-appellee seeking to uphold the judgment need not cross-appeal and *may urge affirmance on any ground appearing in the record*," *Rivero v. City & County of San Francisco*, 316 F.3d 857, 862 (9th Cir. 2002) (emphasis added), introduces confusion on a settled point of law and invites a raft of unnecessary cross-appeals in this circuit.

The majority also erred in concluding that an ATS plaintiff can plead around the act of state doctrine simply by invoking *jus cogens* norms. The panel's citation of *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 701 (9th Cir. 1992), which interprets the Foreign Sovereign Immunities Act (not the ATS), does not support the majority's premise that *jus cogens* allegations trump domestic legal doctrines. *Sarei* at 4147-48. What *Siderman* held was that there is no basis in FSIA jurisprudence for allowing such norms to overcome the presumption of immunity. 965 F.2d at 718-19.

[10] *Alperin* was decided under the political question doctrine. *Sarei* at 4177 n.1 (Bybee, J., dissenting). It rejected, in the strongest terms, *any* role for U.S. courts in assigning fault for the wartime conduct of a foreign sovereign. *Alperin*, 410 F.3d at 561. The panel majority's political question analysis is also in error, and its attempt to limit *Alperin* to "the "narrow[] category of war crimes committed by *enemies* of the United States," *Sarei* at 4144 (emphasis added), is untenable.

observed about this case, "[r]uling on the merits of these allegations will inevitably require passing judgment on the pre-war and wartime conduct of the PNG government." *Sarei*, 221 F. Supp. 2d at 1198. Both the reasoning of *Alperin* and the fourth "reason for caution" discussed in *Sosa* very directly support application of the exhaustion requirement in this case. "To reject a principle of exhaustion and to proceed to resolve a dispute arising in another country, centered upon a foreign government's treatment of its own citizens, when a competent foreign court is ready and able to resolve the dispute, is the opposite of the model of 'judicial caution' and restraint contemplated by *Sosa*." United States *Amicus* Br. at 28.

The fact that plaintiffs seek remedies against Rio Tinto rather than against the PNG government does not change the analysis. Plaintiffs' theory of Rio Tinto's liability is that Rio Tinto "controlled" the PNG government, *i.e.*, that PNG was a puppet regime. The PNG courts have the right and the duty to adjudicate those issues in the first instance before they can be adjudicated in a foreign forum under international law.

Plaintiffs' claims relating to the founding and operation of the Panguna mine likewise rest on a supposed collaboration between Rio Tinto and the Australian Administration to develop the mine in disregard of the rights of the indigenous people, and later with the PNG government to divert the mine's profits to the national government rather than the province. This is an internal dispute over the development of natural resources and the distribution of the profits they generate — a type of dispute that may arise wherever such resources are found. The claim that this dispute implicates international law is tenuous at best, but even

if it does, that claim cannot properly be adjudicated in a foreign forum until it has been addressed by PNG's courts.

Significantly, the specific objections to exhaustion that plaintiffs raised in the district court included arguments that the court could not accept without contradicting U.S. foreign policy. Plaintiffs argued that they should not be required to litigate in PNG because they were "at war" with PNG and did not recognize PNG's sovereignty in Bougainville. ER 1714-1715, 1770, 1887. To excuse exhaustion on this ground would directly conflict with U.S. foreign policy, which supported PNG's sovereignty over Bougainville Island throughout the civil conflict. ER 0122-0123. Further, former Bougainville Governor Momis's assertion that "the *Sarei* litigation . . . is viewed as another source of rectifying the historic injustices perpetrated against the people of Bougainville," *Sarei* at 4142 n.16, makes clear that a United States court is being used to pursue territorial grievances with PNG national policy, and as a forum for one PNG administration to promote criticism of a prior administration. This illustrates exactly the potential for adverse impact on foreign relations that concerned the *Sosa* Court and the United States as *amicus*, and that applying the exhaustion requirement would obviate.

Judge Bybee notes that foreign policy interests are subject to "shifting winds" over time. *Sarei* at 4212. As he correctly observes, not only does the exhaustion requirement shelter United States courts in appropriate cases from exposure to the consequences of changing foreign policy conditions, but also "by requiring parties to assure the court that they have pursued their local remedies

before coming to our courts, exhaustion may sharpen the issues for us *and* for the executive and Congress . . . ." *Id.* at 4214.

C. The Majority's Analysis of Congressional Intent Conflicts with Settled Rules of Statutory Construction and with the Legislative History.

The majority's legislative history analysis is at odds with *Sosa*. From Congress's silence, the panel majority inferred permission, at least, to decline to enforce the exhaustion requirement. But the Supreme Court in *Sosa* interpreted Congress's silence as a fifth "reason[] for caution" in ATS cases. *Sosa* states that "modern indications of congressional understanding of the judicial role in the field [of international law] have not *affirmatively encouraged* greater judicial creativity." *Sosa*, 542 U.S. at 728 (emphasis added). Further, *Sosa* observed that "although the legislative history [of the Torture Victim Protection Act of 1991][11] includes the remark that [the ATS] should 'remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law,' [citation omitted], Congress as a body *has done nothing to promote* such suits." *Id.* (emphasis added). Hence, according to *Sosa*, congressional inaction with respect to the ATS implies restraint. The majority's conclusion to the contrary was in error.

The majority's faulty analysis under the Torture Victim Protection Act ("TVPA") rests not on what Congress said or did when it passed the TVPA, but on

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[11] Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350, historical and statutory notes).

the fact that Congress did *not* amend the ATS to require exhaustion at the time it passed the TVPA. *Sarei* at 4170. It is not permissible to draw inferences regarding congressional intent based on "the legislative choice Congress could have easily made, but did not." *Id.*; *Sega Enters. Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1521 (9th Cir. 1992) (enactment of a specific statute without amending the more general Copyright Act does not reflect an intent that conduct authorized by the specific statute is not also authorized under the general statute).

Moreover, while "it is generally presumed that Congress acts intentionally and purposefully" when it "includes particular language in one section of a statute but omits it in another section of *the same Act*," *see Bates v. United States*, 522 U.S. 23, 29-30 (1997) (emphasis added), no such inference can be drawn with respect to two acts enacted 200 years apart.

The majority concedes that federal courts have discretion to require exhaustion when Congress has not clearly done so, if "exhaustion is consistent with congressional intent." *Sarei* at 4156. The majority never concludes that exhaustion under the ATS would be *in*consistent with congressional intent. Instead, it finds that Congress's "intent and understanding" on the question is "unclear," *id.* at 4163, and declines to adopt the exhaustion requirement "given the lack of clear direction from Congress."

The majority's reasoning is contrary to the long line of controlling Supreme Court authority, dating back to *Ex parte Royall*, 117 U.S. 241, 251 (1886), which holds that the exhaustion requirement is *presumed* to apply when another sovereign has jurisdiction unless Congress has expressed a *contrary* intention. In *Ex parte*

Royall, 117 U.S. at 248-50, the Supreme Court construed the Great Writs Act of 1867, which directed that a writ should issue "forthwith" unless it "appears from the petition itself that the party is not entitled thereto." Even so, the Supreme Court held, complete exhaustion of state remedies was required, because "forbearance" to avoid unnecessary conflict between state and federal courts "is something more" than a principle of comity and utility: "It is a principle of right and law, and, therefore, of necessity." *Id.* at 252.

Modern cases involving federal court jurisdiction over matters within the jurisdiction of Native American tribes rely on the same principles. Even though Congress has not addressed whether tribal court remedies must be exhausted before a suit may be brought in federal court, a unanimous Supreme Court nevertheless concluded that exhaustion is required. *See Nat'l Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 851, 856 (1985). This Court also has required exhaustion in Native American tribal forums "because of the important comity considerations involved." *Allstate Indem. Co. v. Stump*, 191 F.3d 1071, 1073 (9th Cir.), *amended*, 197 F.3d 1031 (9th Cir. 1999); *Crawford v. Genuine Parts Co.*, 947 F.2d 1405, 1407 (9th Cir. 1991).

The panel majority states that declining to recognize the exhaustion requirement finds support from, or is at least consistent with, the absence of evidence in the ATS of a congressional intent in 1789 to require exhaustion. The panel majority speculates that "the absence of explicit exhaustion language" in the statute may have been "purposeful." *Sarei* at 4158. This cannot be squared with the main holding of *Sosa* that the ATS is solely a jurisdictional grant, which means

that courts must look to the common law for the definitions of actionable claims. That this one-sentence grant of jurisdiction is also silent as to exhaustion and all other common-law defenses implies that Congress intended that common-law doctrines *would* be applied, not the opposite.

D. The Exhaustion Rule Supports the Protection of Internationally Recognized Human Rights.

It is widely acknowledged that the exhaustion rule serves particularly important purposes in the international human rights context. The exhaustion rule is the principal means of assuring all nations that their sovereignty is not threatened by the expansion of international law, and protects the legitimacy of international law applicable to human rights when local remedies fail. *See* Paula Rivka Schochet, *A New Role for an Old Rule: Local Remedies and Expanding Human Rights Jurisdiction Under the Torture Victim Protection Act*, 19 Colum. Hum. Rts. L. Rev. 223, 226, 235 (1987). The exhaustion requirement also promotes the development of "adequate and effective domestic remedies for violations of human rights." *Id.* at 250; *see also* Ratner & Abrams, *supra* n.7, at 160 (local legal systems are "the forum of first resort," "as part of the state's duty to uphold the rule of law").

The modern consensus recognizing international human rights obligations running from nations to their own citizens depends upon the exhaustion of local remedies rule. Under each of the U.N. human rights covenants, the regional human rights conventions, and the U.N. Universal Declaration of Human Rights, member states agree to uniform standards of human rights, and to provide an

effective local remedy to enforce those rights. The conventions, on which substantive human rights norms rest, all require exhaustion of local remedies, which is "directly related" to the substantive duty to provide effective local remedies. A.A. Cançado Trindade, *Exhaustion of Local Remedies Under the UN Covenant on Civil and Political Rights and Its Optional Protocol*, 28 Int'l & Comp. L.Q. 734, 739, 755-56 (1979). Indeed, the conventions would not have granted individuals the right of petition at all in the absence of an exhaustion rule. *Id.*

CONCLUSION

The courts of PNG are entitled to the initial opportunity to address plaintiffs' claims. If those courts fail in the task of delivering justice to their own citizens, "the plaintiffs may renew their action in our courts and, judging from our experience with domestic exhaustion, in the long run we will all be better off for it." *Sarei* at 4216 (Bybee, J., dissenting).

Respectfully submitted,

Dated: May 10, 2007

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Nos. 02-56256, 02-56390
Decided April 12, 2007
Before Circuit Judges Fisher and Bybee and District Judge Mahan

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALEXIS HOLYWEEK SAREI, et al.,

Plaintiffs/Appellants,

v.

RIO TINTO, PLC; RIO TINTO LIMITED,

Defendants/Appellees.

On Appeal from the United States District Court for the Central District of California, Honorable Margaret M. Morrow

AMICUS CURIAE BRIEF OF CHEVRON CORPORATION IN SUPPORT OF PETITION FOR REHEARING AND REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Chevron Corporation states that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

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INTEREST OF AMICUS CURIAE

Chevron Corporation is an integrated energy company, whose affiliates and subsidiaries conduct business in approximately 180 countries. Its affiliates and subsidiaries engage in every aspect of the oil and natural gas industry, including exploration and production, refining, marketing and transportation.

Because of their worldwide operations, Chevron and its affiliates have a strong interest in the proper interpretation of the Alien Tort Statute ("ATS"). Suits under the ATS have proliferated in recent years, and numerous companies with global operations, including Chevron, have been subject to claims that they are liable for the conduct of foreign government entities.

INTRODUCTION AND SUMMARY

Rehearing should be granted because the panel's opinion conflicts with the decisions of other circuits, and with the Supreme Court's decisions in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), and *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964). In a single sentence, without any analysis, the panel held that allegations of *jus cogens* violations are categorically exempt from the act of state doctrine. This exemption finds no support in domestic or international law. It is contrary to the cases that have addressed the issue. It conflicts with *Sabbatino*'s holding that "the act of state doctrine is applicable even if international law has been violated." 376 U.S. at 431. And it conflicts with *Sosa*'s direction, for which the Court cited *Sabbatino*, that courts be "particularly wary . . . [when] consider[ing] suits under rules 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." 542 U.S. at 727.

That a particular international norm may qualify as *jus cogens* does not resolve any of the concerns that underlie the act of state doctrine. The act of state doctrine is a domestic principle, adopted to protect the foreign relations of the United States and avoid judicial interference with the executive's conduct of foreign affairs. Whether international law characterizes a given norm as *jus cogens* does not determine whether the United States' foreign relations would be harmed by adjudicating alleged violations of that norm in United States courts. That determination can be made only by the flexible, case-by-case analysis called for by the act of state doctrine—an analysis that the panel majority's categorical rule forecloses.

The panel's blanket rule is particularly problematic given the ill-defined nature of what conduct qualifies as *jus cogens*—a lack of clarity that the panel's decision seriously exacerbates. The majority erroneously held, again without significant analysis, that differences in wages and working conditions between expatriate and local workers violated a *jus cogens* norm prohibiting systematic racial discrimination. This ruling is not supported by precedent or any legitimate source of international law. To the extent international conventions address racial discrimination, they deal with apartheid, not the type of alleged employment discrimination asserted here.

Finally, adopting another categorical rule, the majority held that exhaustion is not required in ATS cases, without regard to whether the plaintiff

has shown that local remedies are unavailable or that pursuing them would be futile. This ruling squarely conflicts both with *Sosa* and with settled international law. As Judge Bybee shows, the exhaustion rule "certainly qualifies as 'norm of international character' that is 'defined with specificity' comparable to the classical causes of action ... and it is an integral part of almost every claim in international law." Slip Op. at 4198 (Bybee, J., dissenting) (*quoting Sosa*, 542 U.S. at 725).

Each of the foregoing issues has far reaching consequences to a broad range of cases. Allegations of *jus cogens* violations are frequently made in ATS cases—and the contours of what constitutes a *jus cogens* norm are far from settled. Moreover, *jus cogens* violations are often alleged with respect to conduct that is clearly governmental in nature, including use of excessive force in responding to civil unrest. If alleging a *jus cogens* violation were sufficient to categorically bar even considering the act of state doctrine, the fundamental purpose of that doctrine of avoiding interference with the executive branch's conduct of foreign affairs would be frustrated and the federal courts would find themselves entertaining an even greater number of cases challenging the actions of foreign governments in their own countries. Similar consequences will flow from permitting plaintiffs to sue in this country without ever having presented their claims in the country where the alleged conduct occurred (or, alternatively, showing that doing so would be futile). The broad importance of these issues justifies rehearing or rehearing en banc.

I. THE PANEL ERRONEOUSLY HELD THAT ATS CLAIMS BASED ON *JUS COGENS* NORMS ARE EXEMPT FROM THE ACT OF STATE DOCTRINE.

The act of state doctrine is founded on the principle that "the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory." *Sabbatino*, 376 U.S. at 416. It is a "domestic legal principle, arising from the peculiar role of American courts" and is "designed to avoid judicial action in sensitive areas." *Int'l Assn. of Machinists & Aerospace Workers v. Org. of Petroleum Exporting Countries*, 649 F.2d 1354, 1359 (9th Cir. 1981). It does not, however, automatically render a case non-justiciable. The doctrine is "flexible." *Liu v. Republic of China*, 892 F.2d 1419, 1432 (9th Cir. 1989). It is administered on a case-by-case basis where the "'touchstone' or 'crucial element' is the potential for interference with our foreign relations." *Id.*

A. No *jus cogens* exception to the act of state doctrine exists.

No previous court has recognized a *jus cogens* exception to the act of state doctrine.[1] Rather, the contrary is true. In *Bernstein v. Van Heyghen Freres Societe Anonyme*, 163 F.2d 246 (2d Cir. 1947) (L. Hand, J.), claims for torts

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[1] The concept of *jus cogens* is based on Article 53 of the Vienna Convention on Treaties, which defines *jus cogens* norms as "rules from which States are not competent to derogate at all by a treaty arrangement, and which may be changed only by another rule of the same character." *See* [1966] 2 Y.B. Int'l L. Comm. 247. As the Seventh Circuit recently noted, "no one knows where *jus cogens* comes from, no one knows whether or how or why it is part of international law, no one knows its content, no one knows how to modify it once it is articulated, and indeed no one knows whether it even exists." *Sampson v. Fed. Republic of Germany*, 250 F.3d 1145, 1155 (7th Cir. 2001) (internal quotation marks omitted).

committed by Nazi officers as part of the persecution of the Jews were barred by the act of state doctrine. The court noted the Nuremberg tribunal's declaration that this persecution constituted crimes against humanity, but found that it "has nothing whatever to do with the propriety of the district court's entertaining the action." *Id.* at 252. The court reached the same conclusion two years later. *Bernstein v. N.V. Nederlandsche-Amerikanasche Stoomvaart-Maatschappij*, 173 F.2d 71 (2d Cir. 1949). Only after receiving a letter from the State Department advising that adjudication would not interfere with United States' foreign policy did the court allow the case to proceed. *Bernstein v. N.V. Nederlandsche-Amerikanasche Stoomvaart-Maatschappij*, 210 F.2d 375, 376 (2d Cir. 1954).

The Supreme Court cited these cases approvingly in *Sabbatino*, 376 U.S. at 419-20, and in *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 764-65 (1972) (plurality). Although no court of appeals has confronted the issue since, every district court to address it has likewise held that there is no *jus cogens* exception to the act of state doctrine. *See, e.g., Doe I v. State of Israel*, 400 F. Supp. 2d 86, 114 (D.D.C. 2005) ("[t]he fact that plaintiffs have alleged *jus cogens* violations does not . . . preempt the act of state doctrine"); *Doe I v. Qi*, 349 F. Supp. 2d 1258, 1292 (N.D. Cal. 2004) (same).

B. The panel erred in deriving an exception to the act of state doctrine from international law.

The sole basis for the panel's contrary conclusion was a statement in *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992), that "international law does not recognize an act that violates *jus cogens* as a sovereign act." Slip. Op. at 4147 (quoting *Siderman*, 965 F.2d at 718). This

statement, for which *Siderman* cited no authority, does not support the panel's ruling. First, the Supreme Court subsequently held that a foreign government's "abuse of the power of its police" is "peculiarly sovereign," "however monstrous such abuse undoubtedly may be." *Saudi Arabia v. Nelson*, 507 U.S. 349, 361 (1993). Indeed, the quoted statement from *Siderman* appears to be merely summarizing the plaintiffs' argument in that case, without adopting it. The actual holding in *Siderman* was to reject the claim that a *jus cogens* exception exists to sovereign immunity. This has likewise been the conclusion of the International Court of Justice, European Court of Human Rights, and the State Department.[2]

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[2] *See Case Concerning the Arrest Warrant of 11 April 2000*, 2002 I.C.J. 3, at ¶ 58 (after "examin[ing] the rules concerning the immunity or criminal responsibility of persons having an official capacity contained in the legal instruments creating international criminal tribunals," the Court found "that these rules . . . do not enable it to conclude that any such exception exists in customary international law in regard to national courts"); *Al-Adsani v. United Kingdom*, 34 E.H.H.R. 11, at ¶ 61 (Eur. Ct. of Hum. Rts. 2002) ("Notwithstanding the [*jus cogens*] character of the prohibition of torture in international law, the Court is unable to discern . . . any firm basis for concluding that, as a matter of international law, a State no longer enjoys immunity from civil suit in the courts of another State."); *Matar v. Dichter*, 2007 WL 1276960 (S.D.N.Y. 2007) (quoting letter from State Dept. recognizing an "international consensus" that sovereign immunity exists for *jus cogens* violations). Departing from this consensus and holding that alleged *jus cogens* violations are not entitled to sovereign immunity under international law "threaten[s] serious harm to U.S. interests, by inviting reciprocation in foreign jurisdictions. Given the global leadership responsibilities of the United States, its officials are at special risk of being made the targets of politically driven lawsuits abroad—including damages suits arising from alleged war crimes." *Matar*, 2007 WL 1276960, at *6 (quoting letter from the State Department).

Even if a *jus cogens* exception existed to sovereign immunity, however, that would not be relevant to the act of state doctrine at issue here. Unlike sovereign immunity, which "is a principle of international law, recognized in the United States by statute," the act of state doctrine is governed by domestic law and is designed to preserve separation of powers and safeguard the United States' foreign relations. *Machinists*, 649 F.2d at 1359 (recognizing that the two doctrines "differ . . . in significant respects"). Moreover, sovereign immunity is jurisdictional; when it applies, courts are powerless to act. Given these fundamental differences, there is no basis for concluding that any exceptions to sovereign immunity should be co-extensive with those potentially applicable to the more flexible act of state doctrine. *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 728 (1976) ("Whatever exceptions there may be to sovereign immunity ought not be transferred automatically . . . to the act of state doctrine") (Marshall J., dissenting, joined by Brennan, Stewart and Blackmun).

Accordingly, a United States court may decline to exercise its jurisdiction under the act of state doctrine for domestic reasons, even when jurisdiction may not be precluded as a matter of international sovereign immunity principles. *Sabbatino*, 376 U.S. at 422 (because "international law does not prescribe use of the [act of state] doctrine, neither does it forbid application of the rule even if it is claimed that the act of state in question violated international law"). Nor does international law (if it were relevant), forbid application of the act of state doctrine to alleged *jus cogens* violations. *Sampson*, 250 F.3d at 1145 ("*jus*

cogens norms do not require Congress (or any government) to create jurisdiction").

C. Under federal law, governmental acts are sovereign for act of state purposes regardless of whether they allegedly violate *jus cogens*.

Nothing in the domestic law principles governing the act of state doctrine supports the panel's categorical *jus cogens* exception. An "act of state has been said to be any governmental act in which the sovereign's interest qua sovereign is involved." *Sabbatino*, 376 U.S. at 445 n.3; *see also Alfred Dunhill*, 425 U.S. at 693 (describing "acts of state" as exercises of "governmental as opposed to commercial, authority"); *Republic of Austria v. Altmann*, 541 U.S. 677, 700 (2004) ("Under [the act of state] doctrine, the courts of one state will not question the validity of public acts (acts *jure imperii*) performed by other sovereigns within their own borders"). An allegation that a foreign government has committed a *jus cogens* violation does not establish that a foreign government's public acts are not involved. As this case demonstrates, plaintiffs frequently file lawsuits alleging *jus cogens* violations in connection with governmental responses to protests and other civil unrest, asserting that the government's response was so excessive as to amount to war crimes, crimes against humanity or torture. Such claims, asserted in a United States court, obviously implicate the governmental interests of the foreign government sued—as well as the United States' relations with those governments. Indeed, foreign governments alleged to have committed *jus cogens* violations have consistently protested our courts' exercise of jurisdiction, and the State

Department has frequently advised that adjudicating these cases seriously threatens United States' foreign affairs. *See, e.g., Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1194 (C.D. Cal. 2005); *Qi*, 349 F. Supp. 2d at 1270-71; *Doe v. Exxon Mobil*, 393 F. Supp. 2d 20, 22 (D.D.C. 2005); *In re S. African Apartheid Litig.*, 346 F. Supp. 2d 538, 553-54 (S.D.N.Y. 2004).[3] The panel's categorical rule here would prevent any consideration of these objections and thus any opportunity to "prevent judicial pronouncements on the legality of the acts of foreign states which could embarrass the Executive Branch in the conduct of foreign affairs." *Liu*, 892 F.2d at 1432.

The panel's ruling is also inconsistent with the framework *Sabbatino* creates for deciding whether to apply the act of state doctrine. Under *Sabbatino*, the "degree of codification or consensus concerning a particular area of international law" (376 U.S. at 428) is only one factor to be considered in the court's exercise of its discretion to hear the case. Yet, by focusing on alleged acceptance of a given norm as *jus cogens*, the panel's decision effectively makes this one factor dispositive. Further, *Sabbatino* was concerned, not with consensus at a high level of abstraction, but with consensus regarding controlling principles of law, so that courts could "focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of

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[3] Such objections from foreign governments are hardly surprising. The United States would certainly assert that its interests were implicated (and its foreign relations with the forum state threatened) if another country were to entertain claims that the United States violated *jus cogens* norms in its conduct of the wars in Kosovo or Iraq, or in its administration of the death penalty.

establishing a principle not inconsistent with the national interest or with international justice." *Sabbatino*, 376 U.S. at 428. That a given international norm qualifies as *jus cogens* does not mean any consensus exists regarding its specific elements.[4]

Similarly, if immunity principles were relevant (*see supra*, p. 7), federal courts applying domestic law have held that allegations of *jus cogens* violations do not defeat claims of official immunity or non-justiciability. Thus, there is no *jus cogens* exception to sovereign immunity. *See supra,* pp. 5-6. Nor is there a *jus cogens* exception to former-head-of-state immunity, which, like the act of state doctrine, is non-jurisdictional and is based on the constitutional separation of powers, not international law. *Ye v. Zemin*, 383 F.3d 620, 625-27 (7th Cir. 2004), *cert. denied*, 544 U.S. 975 (2005).[5] Similarly, the immunity of the United States in federal court is governed by domestic common law and is not subject to a *jus cogens* exception. *Schneider v. Kissinger*, 310 F. Supp. 2d 251 (D.D.C. 2004), *aff'd*, 412 F.3d 190 (D.C. Cir. 2005), *cert. denied,* 126 S. Ct. 1768 (2006). Courts have also found that there is no *jus cogens* exception to the immunity of federal employees. *See Bancoult v. McNamara*, 370 F. Supp. 2d 1, 7-8 (D.D.C. 2004) (rejecting the contention that alleged *jus cogens* violations are

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[4] The panel, for example, asserts that systematic racial discrimination is a *jus cogens* violation. Even if there were some basis for that conclusion (*see infra,* pp. 11-13), there is certainly no international consensus regarding the conduct that violates that prohibition.

[5] Unlike subordinate government officials, the Foreign Sovereign Immunities Act does not cover heads-of-state. *Matar*, 2007 WL 1276960, at *5-6.

necessarily outside the scope of employment), *aff'd*, 445 F.3d 427 (D.C. Cir. 2006), *cert. denied,* 127 S. Ct. 1125 (2007); *Gonzalez-Vera,* 449 F.3d at 1264; *In re Iraq and Afghanistan Detainees Litig.*, __ F. Supp. 2d __, 2007 WL 926145, at *23-24 (D.D.C. 2007) (same).

II. THERE IS NO *JUS COGENS* NORM APPLICABLE TO THE TYPE OF RACIAL DISCRIMINATION ALLEGED HERE.

No court of appeal has previously held that "systematic racial discrimination" qualifies as a *jus cogens* norm. The panel again cites *Siderman.* Slip. Op. at 4147. However, as the panel acknowledges, *Siderman* merely noted, in a parenthetical, that a comment in the Restatement (Third) of Foreign Relations identifies racial discrimination as a *jus cogens* norm. *Id.* As this Court has previously noted, "[h]owever respectable the Restatement may be, it 'is not a primary source of authority upon which, standing alone, courts may rely for propositions of customary international law.'" *ARC Ecology v. U.S. Dep't of Air Force*, 411 F.3d 1092, 1102 n.8 (9th Cir. 2005); *Sosa*, 542 U.S. at 737 ("the Restatement's limits are only the beginning of the enquiry"). Indeed, the Second Circuit has extensively criticized the Restatement for reflecting the views of its authors as to what international law should be, rather than stating what it actually is. *United States v. Yousef*, 327 F.3d 56, 100 n.31 (2d Cir. 2003).

The sources the Restatement cites do not support the notion that any *jus cogens* norm reaches the conduct alleged here. First, the Restatement cites the International Convention on the Elimination of All Forms of Racial

Discrimination ("ICERD"), 660 U.N.T.S. 195 (Sept. 28, 1966). No court of which amicus is aware has found that this Convention reflects *jus cogens*. Indeed, many of its provisions conflict with our most basic free speech and other constitutional protections. *See, e.g.,* ICERD, art. 4(a) (obliging States to make unlawful "all dissemination of ideas based on racial superiority"). Further, in contrast to many other international instruments, the ICERD does not declare that racial discrimination is a crime under international law;[6] provide for individual liability;[7] or provide for universal jurisdiction.[8] Finally, the ICERD was ratified by the United States on the understanding that it was non-self-executing. 140 Cong. Rec. S6601-01, 1994 WL 247596 (June 8, 1994). Therefore, it "d[oes] not itself create obligations enforceable in the federal courts." *Sosa*, 542 U.S. at 735.

The only other source the Restatement specifies is the International Convention on the Suppression and Punishment of the Crime of Apartheid ("Apartheid Convention"), G.A. res. 3068 (1973). But the United States has not signed or ratified this Convention, nor have many other nations of significant

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[6] *Compare* ICERD *with, e.g.*, Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), 78 U.N.T.S. 277 (Jan. 127, 1951), art. 1 ("genocide . . . is a crime under international law which [the Contracting Parties] undertake to prevent and to punish").

[7] *Compare* ICERD, arts 2-7 (imposing obligations only on States) *with, e.g* Genocide Convention, art. 4 ("Persons committing genocide . . . shall be punished . . . .").

[8] *Compare* ICERD *with, e.g.,* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 6, G.A. res. 39/46, 39 U.N. GAOR Supp. (No. 51) at 197 (April 18, 1988).

international standing (including the United Kingdom, France, Germany and Japan). *See* Restatement (Third) Foreign Relations § 702, rptr. note 7. As such, it does not constitute evidence of customary international law, much less *jus cogens*. *See Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 256 (2d Cir. 2003). Moreover, the Apartheid Convention reaches only certain "inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group and systematically oppressing them." Apartheid Convention, art. 2 (emphasis added). It therefore provides no support for the existence of any norm addressing the conduct alleged here, *i.e.*, differences in wages and working conditions between expatriate and local workers. *Sarei v. Rio Tinto*, 221 F. Supp. 2d 1116, 1124, 1152 (C.D. Cal. 2002).

Finally, and most importantly, state practice—which is the source of customary international law—does not support an international norm imposing individual liability for racial discrimination. *Sampson*, 250 F.3d at 1150. Racial discrimination not rising to the level of apartheid has not been included among the crimes within the jurisdiction of any of the international criminal tribunals convened since Nuremberg. Further, no nation of which amicus is aware exercises universal jurisdiction, or imposes international civil or criminal liability, for alleged racial discrimination. In short, there is little evidence of an international norm against "systematic racial discrimination," and there is no evidence that any such norm is *jus cogens*.

III. EXHAUSTION OF LOCAL REMEDIES IS REQUIRED BY INTERNATIONAL LAW AND BY SOUND PUBLIC POLICY.

The majority offers two primary reasons for declining *Sosa*'s invitation to incorporate the international law exhaustion requirement into ATS claims. Neither withstands scrutiny. First, the majority asserts that exhaustion is "procedural," and therefore not required to establish a prima facie violation of international law. Slip. Op. at 4167-69. As Judge Bybee correctly shows, the exhaustion rule is considered procedural with respect to some international norms and substantive as to others, but in either event it is "widely accepted and well-defined," and "the international community does not recognize virtually any 'violation of the law of nations' without it." Slip. Op. at 4193-97 & n.11. Because exhaustion "is an integral part of almost every claim in international law" (*id.*), there can be no "violations of any international law . . . with . . . acceptance among civilized nations" comparable to the historical paradigms identified in *Sosa* without an exhaustion requirement. *Sosa*, 542 U.S. at 732.

Second, the Court held that "it would not be appropriate" to require exhaustion of remedies for causes of action brought under the ATS without clear direction from Congress. Slip. Op. at 4171-72. This ignores that the ATS is a purely jurisdictional statute. *Sosa*, 542 U.S. at 724. Federal courts have created private causes of action for violations of international human rights norms—complete with standing requirements, statutes of limitations and remedies—without any affirmative encouragement from Congress. *See id.* at 728 ("Several times, indeed, the Senate has expressly declined to give the federal courts the

task of interpreting and applying international human rights law."). Given this history, it is deeply ironic to demand unequivocal congressional direction before imposing any limitations on these judicially crafted causes of action.

Moreover, if Congress' endorsement were needed, it has been given. In creating two explicit causes of action for law-of-nations violations under the TVPA, Congress specifically required exhaustion. 28 U.S.C. § 1350, Note. Recognizing that it is generally required by international law, Congress noted that exhaustion ensures that United States courts will not intrude on cases more appropriately handled by local courts, and encourages development of meaningful remedies in other countries. H. Rep. No. 102-367, at *5 (1991); S. Rep. No. 102-249, at *10 (1991). Contrary to the majority's hypothesis (Slip. Op. at 4161), this explicit exhaustion requirement under the TVPA does not indicate that Congress believed no such requirement exists under the ATS. Congress' stated purpose in passing the TVPA was to make explicit what had been implicit in the ATS. *See* S. Rep. No. 102-249, at *3-5 (1991). Further, requiring exhaustion brings the ATS into harmony with the TVPA, fulfills *Sosa*'s admonishment to exercise "great caution," expresses respect for foreign sovereigns, and refines the issues and the record in a way that will aid United States courts. Whether analyzed in terms of international law, domestic law, or public policy, there is no valid reason to admit international law claims to United States courts without requiring exhaustion of local remedies.

CONCLUSION

For the foregoing reasons, the petition for rehearing or rehearing en banc should be granted.

Dated: May 21, 2007

JONES DAY
Robert A. Mittelstaedt
Craig E. Stewart
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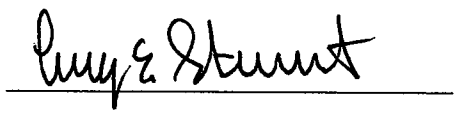
By 

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Nos. 02-56256 & 02-56390

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALEXIS HOLYWEEK SAREI, *ET AL.*,

Plaintiffs/Appellants/Cross-Appellees,

v.

RIO TINTO, PLC; RIO TINTED LIMITED,

Defendants/Appellees/Cross-Appellants.

On Appeal from the United States District Court
for the Central District of California, Case No. CV-00-11695-MMM
The Honorable Margaret M. Morrow, United States District Judge

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BRIEF FOR THE NATIONAL FOREIGN TRADE COUNCIL AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS' RENEWED PETITION FOR PANEL REHEARING AND FOR REHEARING EN BANC

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Amicus curiae The National Foreign Trade Council ("NFTC") respectfully submits this brief in support of the renewed petition for rehearing and rehearing en banc ("Renewed Petition") filed by Defendants/Appellees/Cross-Appellants Rio Tinto plc, *et al.* ("Defendants").

INTEREST OF *AMICUS CURIAE*

The NFTC is the premier business organization advocating a rules-based world economy. Founded in 1914, the NFTC and its affiliates now serve more than 300 member companies. The NFTC regularly represents the legal and policy interests of its members in matters of national importance, and is frequently involved in litigation concerning international commerce and foreign policy.

The *amicus* and its members have a vital interest in the issues raised by the Renewed Petition. Over the past decade, numerous U.S. and international companies have been sued under the Alien Tort Statute, 28 U.S.C. § 1350 ("ATS"), in cases stemming from their investments and operations outside the U.S. While some companies are alleged to have committed violations of the law of nations directly, more often plaintiffs have treated companies as surrogates for foreign governments — alleging that companies' overseas investments aided and abetted or otherwise facilitated human rights abuses by those governments. Not only do these lawsuits strain relations between the U.S. and the foreign governments thus targeted, but they discourage foreign investment. Because of the

critical importance of these issues to its member companies, *amicus* has a strong interest in assisting the Court in its consideration of the issues raised by this case.

ARGUMENT

I. This Case Provides an Excellent Opportunity for the En Banc Court to Provide Urgently Needed Guidance Concerning Several Critical Threshold Legal Issues That Routinely Arise in ATS Cases

In its amended opinion, the panel majority addressed several key threshold legal issues that frequently arise on motions to dismiss in ATS cases: whether aliens must exhaust domestic remedies before filing suit in a U.S. court, as they must under the Torture Victim Protection Act, 28 U.S.C. § 1350 *note* ("TVPA"), and the extent to which the political question and act of state doctrines permit courts to sit in judgment of disputes involving a foreign government's actions. As set forth below, NFTC respectfully submits that the panel's disposition of each of these issues conflicts with Supreme Court and Ninth Circuit authority and that these conflicts alone justify a grant of rehearing en banc. *See infra* at 4-11.[1]

En banc review is warranted for the further reason that clear and correct guidance now regarding these ATS issues is uniquely important. Numerous ATS cases are pending in this Court and in the lower courts. *See, e.g.*, *Galvis Mujica v.*

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[1] Although the panel no longer purports to decide the question whether vicarious liability is available under the ATS, the amended opinion still contains an unusual and inappropriate amount of erroneous *dicta* on that topic. In the absence of a further amended opinion eliminating this *dicta*, rehearing en banc would have the welcome consequence of withdrawing the panel opinion (thereby mooting any concern over the panel's *dicta*). *See infra* at 11-15.

Occidental Petroleum Corp., C.A. Nos. 05-56056 & 05-56175 (9th Cir.) (argued April 19, 2007); *Corrie v. Caterpillar, Inc.*, C.A. No. 05-36210 (9th Cir.) (set for argument July 9, 2007); *Bauman v. DaimlerChrysler AG*, No. C-04-00194-RMW (N.D. Cal.); *Bowoto v. Chevron Corp.*, No. C-99-02506-SI (N.D. Cal.); *Doe v. Nestle, S.A.*, No. CV-05-5133-SVW (C.D. Cal.); *Mamallacta Shiguago v. Occidental Petroleum Corp.*, No. CV-06-4982-SJO (C.D. Cal.). Indeed, since the Defenants' prior petition was filed, additional ATS cases have continued to be filed. *See, e.g., Wang Xiaoning v. Yahoo! Inc.*, No. C-07-2151-CW (N.D. Cal.).

The issues presented by the Renewed Petition warrant the en banc Court's immediate attention because a district court's decision on a defendant's motion to dismiss in an ATS action carries much more significance than in other contexts. If the lawsuit erroneously proceeds past the pleading stage, all of the potential adverse foreign policy implications of having district judges sitting as *ad hoc* referees of international affairs — the very implications identified by the Supreme Court in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727-28 (2004) — will be realized. Moreover, very substantial costs will be imposed on the defendants: these suits' allegations inevitably turn on events occurring in the furthest corners of the developing world (*e.g.*, Papua New Guinea, Nigeria, Ivory Coast, and Ecuador), and discovery undoubtedly will be extraordinarily burdensome and expensive. And because the legal and political cultures of these various countries

are very different from ours, it is uncertain whether any party actually will be able to obtain the evidence needed to adjudicate the claims fairly.

Furthermore, if permitted to stand, the panel's decision threatens to invite a further proliferation of ATS actions, given the large number of U.S. corporations engaged in commerce in many countries in which human rights abuses may occur. The inevitable result would be to deter active engagement with and investment in the developing world. *In re South African Apartheid Litigation*, 346 F. Supp. 2d 538, 554 (S.D.N.Y. 2004), *appeal pending*, No. 05-2141 (2d Cir.).

For these reasons, it is important for this Court to give lower courts accurate guidance on threshold ATS issues now — before erroneous rulings open the door to illegitimate claims and the resulting harm to U.S. foreign policy interests.

II. The Panel Majority's Rulings Conflict with Binding Authority

Although the panel's amended opinion substantially revises its discussion of vicarious liability, *see infra* at 11, the amended opinion's discussion of the issues of exhaustion of domestic remedies, the political question doctrine, and the act of state doctrine were largely unchanged. We continue to believe that the panel erroneously resolved each of these issues and that rehearing en banc is warranted.

A. The Panel Majority's Holding That Exhaustion Is Not Required Under the ATS Conflicts with Supreme Court Precedent

In rejecting Defendants' assertion that the action should have been dismissed for Plaintiffs' failure to exhaust domestic remedies, the panel majority held that,

because the ATS (unlike the TVPA) does not contain any language explicitly requiring exhaustion, slip op. at 4156-64, courts may not read into the ATS what Congress presumably chose to leave out, *id.* at 4158 (stating that "the absence of explicit exhaustion language in the [ATS]" may have been "purposeful"). The panel's reasoning and result cannot be squared with the Supreme Court's controlling decision in *Sosa v. Alvarez-Machain.*

The panel's reliance on congressional silence might have had force under this Circuit's pre-*Sosa* case law, which had held that "the [ATS] not only provides federal courts with subject matter jurisdiction, but also *creates a cause of action* for an alleged violation of the law of nations." *Alvarez-Machain v. United States*, 331 F.3d 604, 612 (9th Cir. 2003) (en banc) (emphasis added). *Sosa*, however, unanimously rejected this view, holding instead that "the ATS is a jurisdictional statute creating no new causes of action" and that, to the extent any cause of action may be enforced under this jurisdictional grant, "federal common law" must supply it. 542 U.S. at 724, 732. Because the ATS does not itself create a cause of action, the omission of an explicit exhaustion requirement has no significance: Congress, in enacting the ATS, did *not* undertake to define the contours of a cause of action, and thus its silence on the exhaustion point (or any other such point) cannot be read as having settled a question Congress did not address. *See Musick, Peeler & Garrett v. Employers' Ins. of Wausau*, 508 U.S. 286, 291 (1993) (because

the "private right of action under Rule 10b-5 was implied by the Judiciary," it "would be futile to ask whether the 1934 Congress also displayed a clear intent to create a contribution right collateral to the remedy").

Accordingly, whether exhaustion is required here cannot be resolved by the text or legislative history of the ATS, but instead must be evaluated as a matter of federal common law, "gauged against the current state of international law." *Sosa*, 542 U.S. at 733. For several reasons, application of that controlling standard leads inescapably to the view that exhaustion is required.

First, as Judge Bybee concluded (slip op. at 4191), the requirement that "'local remedies must be exhausted'" is a "'well-established rule of customary international law'" (quoting *Switzerland v. U.S.* (*Interhandel*), 1959 I.C.J. Rep. 6, 27),[2] and it would be anomalous to create a federal cause of action that seeks to "enforce" one "international norm" by flouting another. *Sosa*, 542 U.S. at 729. The panel's decision cannot be squared with this principle. *See also id.* at 733 n.21 (favorably commenting that the Court "would certainly consider this [exhaustion] requirement in an appropriate case").

Second, exhaustion is required under established principles governing judicially created private rights of action. By holding that the ATS "is a

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[2] *See also Enahoro v. Abubakar*, 408 F.3d 877, 886 (7th Cir. 2005); *id.* at 890 n.6 (Cudahy, J., dissenting) (collecting authorities); S. Rep. No. 249, 102d Cong., 1st Sess. 10 (1991) (the TVPA's express exhaustion requirement reflects "general principles of international law").

jurisdictional statute" *only*, and that any cause of action must come from federal common law, 542 U.S. at 724, *Sosa* invokes the well-established body of principles governing the *judicial* creation of private rights of action. One of the most important such principles is that courts must defer to the policy judgments that Congress has made in the relevant area of law. *Sosa*, 542 U.S. at 726-27. Hence, in fashioning a judicially created right of action, courts must be guided by the policy judgments Congress has made in creating analogous "express causes of action." *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 178 (1994). This rule of restraint has special force here, given that the ATS's federal common law authority must be exercised, "if at all, with great caution" in light of the "risks of adverse foreign policy consequences." *Sosa*, 542 U.S. at 728.

These principles compel the conclusion that any federal common law cause of action under the ATS should be modeled after the express cause of action embodied in the TVPA, which this Circuit already has held is the "appropriate vehicle for interstitial lawmaking" for the ATS, *Papa v. United States*, 281 F.3d 1004, 1011-12 (9th Cir. 2002). *Cf. Enahoro*, 408 F.3d at 885-86 (emphasizing the importance, post-*Sosa*, of respecting policy judgments Congress made in crafting the TVPA); *id.* at 890 (Cudahy, J., dissenting).[3]

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[3] The panel erred in distinguishing *Papa* (slip op. at 4164 n.30) on the ground that the TVPA supposedly provides guidance only in shaping procedural requirements that *in fact* exist (not in answering *whether* they should exist). Under *Central Bank*

Third, contrary to the majority's suggestion (slip op. at 4165), an exhaustion requirement follows directly from *Sosa*'s admonition that federal common law authority in this area must be exercised, "if at all, with great caution." 542 U.S. at 728. One of the major reasons for such caution is that federal judicial efforts to adjudicate the conduct of foreign governments on their own soil inevitably would risk "adverse foreign policy consequences." *Id.* By affording the foreign state "an opportunity to redress [the matter] by its own means, within the framework of its own domestic legal system," *Switzerland v. U.S.*, 1959 I.C.J. Rep. at 27, an exhaustion requirement serves to eliminate *avoidable* foreign policy conflicts between the U.S. and foreign nations. *Cf. Coleman v. Thompson*, 501 U.S. 722, 731 (1991) (exhaustion requirement in federal habeas corpus law rests on principles of comity and avoidance of conflict).

B. The Majority's Political Question Analysis Creates An Intra-Circuit Conflict With *Alperin*

The majority's holding (slip op. at 4135-44) that Plaintiffs' claims did not present political questions under *Baker v. Carr*, 369 U.S. 186 (1962), is incorrect and conflicts with *Alperin v. Vatican Bank*, 410 F.3d 532 (9th Cir. 2005).

In *Alperin*, this Court held that war-crimes claims based on allegations of "assistance to the war objectives" of a government were nonjusticiable. 410 F.3d

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and the principles set forth above, the existence of the TVPA as an analogous express cause of action *does* "answer the antecedent question of whether exhaustion should be imported" into an ATS-based federal common law claim. *Id.*

at 548. Although *Alperin* supported the district court's application of the political question doctrine here, the majority purported to limit *Alperin* to its facts: "[we] read its holding to apply only to the narrower category of war crimes committed by *enemies* of the United States." Slip op. at 4144 (emphasis added). The majority argued that this crabbed reading of *Alperin* was necessary to avoid conflicting with the out-of-circuit decision in *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995) (upholding the justiciability of certain war-crimes claims against a Serbian officer during the Balkans conflict), but that is wrong. Rather than relying upon an inappropriate (and inherently political) distinction between "friendly" and "enemy" regimes, *Alperin* itself correctly distinguished *Kadic* on the grounds that the U.S. had affirmatively *endorsed* the *Kadic* suit and on the fact that *Kadic* focused on "the acts of a *single individual* during a localized conflict," not an attempt to "assign[] fault for actions taken by a foreign regime" during the overall conduct of war. *Alperin*, 410 F.3d at 562. Had the majority applied *Alperin*'s grounds for distinguishing *Kadic* (as it should have), the judgment here should have been affirmed: the U.S. *has* objected to this suit and Plaintiffs seek to hold Defendants liable, not for the discrete actions of a "single individual," but rather for Papua New Guinea's entire course of conduct during a 10-year civil war. These "retroactive political judgment[s] as to the conduct of war" are, "by nature, political questions." *Alperin*, 410 F.3d at 548.

C. The Majority's "Act of State" Holding Misconstrues That Doctrine in Conflict With Supreme Court Precedent

The majority also seriously misconstrued the act of state doctrine, which generally precludes U.S. courts from judging the validity of a foreign sovereign's official acts within its own territory. *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.*, 493 U.S. 400, 405 (1990).

The majority concluded that the state-practiced racial discrimination challenged by Plaintiffs did not satisfy the act of state doctrine's threshold requirement that the challenged conduct be "official," because "'[i]nternational law does not recognize an act that violates *jus cogens* as a sovereign act.'" Slip op. at 4147 (quoting *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 718 (9th Cir. 1992)). The majority's out-of-context quotation from *Siderman* is inapposite because (1) the quote appears to be a summary of the *plaintiff's* description of (2) *customary international law* (3) concerning *foreign sovereign immunity*. 965 F.2d at 718. Indeed, *Siderman did not address the merits of the act of state doctrine*, and it therefore provides no support for the majority's holding.

The panel's act-of-state analysis also ignores Supreme Court precedent by incorrectly confusing one of the *discretionary* factors the Court has identified for declining to apply the doctrine with the threshold requirement of an "official" act. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964) (identifying the degree of consensus surrounding a norm as a case-specific factor for declining to

apply the act of state doctrine, notwithstanding its technical availability); *see also W.S. Kirkpatrick*, 493 U.S. at 409 (reaffirming distinction between the threshold requirements of the doctrine and the discretionary factors for declining to apply it).

III. At a Minimum, the Panel Opinion Should Be Further Amended to Eliminate Its Erroneous *Dicta* Concerning Vicarious Liability

The amended opinion in this case substantially revises the panel's prior discussion of the issue of vicarious liability under the ATS, an issue which the panel had raised *sua sponte* in the context of addressing whether the Court had federal subject matter jurisdiction. The panel's amended opinion now makes explicit that, with respect to that issue (as well as the issue of what international-law norms meet *Sosa*'s "demanding standard of definition," 542 U.S. at 738 n.30), the only question addressed by the panel is whether the ATS claims in this case were so "wholly insubstantial and frivolous" as to deprive the Court of subject matter jurisdiction. Slip op. at 4131 (citation and internal quotation marks omitted). Thus, the opinion now states that "*we need not and do not decide* whether plaintiffs' substantive claims and theories of vicarious liability constitute valid [ATS] claims after *Sosa*." Slip op. at 4134 (emphasis added).

Nonetheless, the amended opinion still contains an unusual and inappropriate amount of *dicta* on the question it purports not to decide; indeed, the amended opinion actually *expands* the panel's discussion of the issue of vicarious liability. *Compare* slip op. at 4133-34 *with* 456 F.3d at 1078. Although the

panel's erroneous *dicta* would not, standing alone, warrant a grant of rehearing en banc, it does warrant a further amended opinion that eliminates this unnecessary and flawed discussion. In any event, as explained above, the remaining issues addressed by the panel independently warrant a grant of rehearing en banc, and an order granting the renewed petition would have the salutary effect of automatically withdrawing the panel opinion in its entirety (thereby mooting any concern over this erroneous *dicta*). *See* Ninth Cir. Gen. Order 5.5(d) (upon grant of rehearing, the panel opinion is withdrawn and non-citeable).

No extended analysis was necessary to establish the largely undisputed point that the *Sarei* plaintiffs' claims were not so "wholly frivolous" as to deprive the federal courts of jurisdiction. Although we continue to believe that, under the principles set forth in *Sosa*, aiding and abetting liability is clearly unavailable under ATS-based federal common law claims, *see* NFTC *Amicus Curiae* Brief in Support of Rio Tinto's (First) Rehearing Petition 10-12,[4] the *Sarei* Plaintiffs'

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[4] *See also In re South African Apartheid Litigation*, 346 F. Supp. 2d at 554 (rejecting aiding and abetting liability under the ATS); *Doe v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20, 24 (D.D.C. 2005) (same); *Corrie v. Caterpillar, Inc.*, 403 F. Supp. 2d 1019, 1027 (W.D. Wash. 2005) (same), *appeal pending*, No. 05-36210 (9th Cir.); Curtis A. Bradley, *et. al*, "*Sosa*, Customary International Law, and the Continuing Relevance of *Erie*," 120 HARV. L. REV. 869, 926-27 (2007); Phillip A. Scarborough, Note, "Rules of Decision for Issues Arising Under the Alien Tort Statute," 107 COLUM. L. REV. 457, 481 (2007).

contrary argument has been accepted by at least one court post-*Sosa*.[5] The panel here specifically noted that court's decision, slip op. at 4134, and no more was needed to establish that the Plaintiffs' claims were not wholly frivolous.

Moreover, what the amended opinion says in *dicta* on the subject of vicarious liability is demonstrably wrong:

- ***"Courts applying the [ATS] draw on federal common law, and there are well-settled theories of vicarious liability under federal common law."*** Slip op. at 4133.

In support of this assertion, the amended opinion adds a citation of the "Restatement (Second) of Torts, §§ 876-77 (setting forth tort principles of vicarious liability)." Slip op. at 4134. Contrary to the panel's suggestion that the Restatement's theories are "well-settled," the Supreme Court has held that federal law does *not* permit courts to recognize secondary liability absent explicit congressional authorization. *Central Bank*, 511 U.S. at 181-82 (noting that the Restatement's aiding and abetting theory has been rejected by some jurisdictions; that it is "uncertain in application"; and that Congress has not endorsed it).

The amended opinion also adds a citation of *Project Hope v. M/V IBN SINA*, 250 F.3d 67, 76 (2d Cir. 2001), but that decision has nothing to do with vicarious liability. *Project Hope* merely holds that, when two common carriers are both

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[5] *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 374 F. Supp. 2d 331, 337-41 (S.D.N.Y. 2005) (reaffirming, post-*Sosa*, court's prior opinion on this point at 244 F. Supp. 2d 289).

primarily liable under the "Carmack Amendment," that statute permits reference to federal common law principles of joint and several liability to allocate liability *between the two*. *Id.* at 74-76.[6]

- ***"Authorities contemporaneous to the [ATS's] passage also suggest that the law of nations has long incorporated principles of vicarious liability."*** Slip op. at 4134.

None of the three authorities cited in the amended opinion supports the erroneous assertion that international law has long incorporated vicarious liability:

(1) The amended opinion adds a reference to *Talbot v. Jansen*, 3 U.S. 133 (1795), but *Talbot* did not rest upon a theory of secondary liability: Talbot was held liable, in admiralty, for his own possession of a ship held to have been unlawfully seized as prize. 3 U.S. at 156-57 (Talbot was an "original trespasser" and his "possession was gained by a fraudulent cooperation with Ballard").

(2) The opinion of Attorney General Bradford in *Breach of Neutrality*, 1 Op. Att'y Gen. 57 (1795), does not address civil secondary liability at all; rather, the opinion merely states that certain U.S. citizens, by assisting France in its (lawful) hostilities against England, had *directly* violated international law by breaching the U.S.'s "state of neutrality." *Id.* at 58-59.

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[6] The panel also retains its earlier citation of the irrelevant (and out-of-circuit) decision in *Moriarty v. Glueckert Funeral Home, Ltd.*, 155 F.3d 859, 866 n.15 (7th Cir. 1998), which applies agency principles in the quite different context of ERISA and the LMRA.

(3) The 1790 *statute* making it a federal crime to aid and abet piracy would seem, if anything, to confirm that, without such statutory authorization, vicarious liability would not otherwise have existed on its own under international law.

At a minimum, the opinion should be further amended to eliminate the erroneous *dicta* on the subject of vicarious liability.

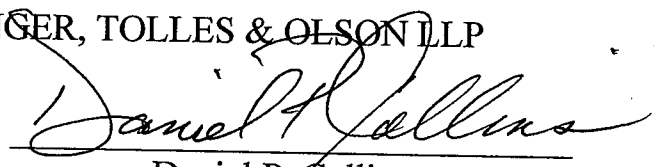
CONCLUSION

Amicus respectfully requests that the petition for rehearing and rehearing en banc be granted.

DATE: May 23, 2007

Respectfully submitted,

MUNGER, TOLLES & OLSON LLP

By: 

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To: **Panel and all active judges and any interested senior judges**

AMICUS CURIAE BRIEF

Re: **Petition for panel rehearing and petition for rehearing en banc**

02-56256 *Sarei v. Rio Tinto, PLC*

02-56390 *Rio Tinto, PLC v. Sarei, et al*

Opinion Dated April 12, 2007

Panel Judges: Honorable Raymond C. FISHER, Circuit Judge

Honorable Jay S. BYBEE, Circuit Judge

Honorable James C. Mahan, District Judge

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BRIEF OF THE GOVERNMENTS OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AND THE COMMONWEALTH OF AUSTRALIA AS AMICI CURIAE IN SUPPORT OF THE DEFENDANTS-APPELLEES'/CROSS-APPELLANTS' MOTION FOR REHEARING EN BANC.

INTEREST OF AMICI CURIAE

The governments of the United Kingdom of Great Britain and Northern Ireland ("UK Government") and the Commonwealth of Australia (jointly, "the Governments") are committed to the international rule of law as an essential part of international relations and a global trading and investment system. The Governments are opposed to broad assertions of extraterritorial jurisdiction arising out of aliens' claims for injuries allegedly sustained abroad. To this end, the Governments filed an amicus brief in *Sosa v. Alvarez—Machain*, 542 U.S. 692, 712 (2004) ("*Sosa*"), in which the Supreme Court ruled that the Alien Tort Statute, 28 U.S.C. §1350 ("ATS"), provided jurisdiction for a "very limited category" of claims by alien plaintiffs.

Similarly, the UK Government filed an amicus brief in *F. Hoffman-La Roche v. Empagran,* 542 U.S. 155 (2004) ("*Empagran*"), in which the Supreme Court and the D.C. Circuit, on remand, read the Foreign Trade Antitrust Improvements Act of 1982 as excluding most foreign purchasers' claims for foreign injuries.

The Governments are deeply concerned when U.S. courts misapply international law in construing the ATS and other statutes involving extraterritorial jurisdiction. The panel decision elaborates a broad charter to extend jurisdiction, disregarding well-established limiting principles under customary international law ("the law of nations"), thereby expanding foreign defendants' civil liabilities for activities unrelated to the United States. There is a real risk that this type of decision will interfere with the sovereignty of other nations by generating potential jurisdictional conflicts, while imposing unnecessary legal costs and uncertainties for their nationals.

The Governments are filing this amicus brief to reaffirm the position they took before the Supreme Court in *Sosa*. Notwithstanding the careful limitations expressed by the Supreme Court, the Governments are seriously concerned that the panel decision appears to depart from those limitations. Furthermore, even if narrowly construed, the ATS remains a source of excessive extraterritorial jurisdiction.

The Governments take no position in this brief on any factual statements or allegations made by either party.

SUMMARY OF ARGUMENT

By sustaining a suit by a large class of aliens for a broad range of alleged conduct by two foreign companies in a foreign jurisdiction, the panel disregarded the limits on national jurisdiction imposed by the law of nations. It also failed to follow the Supreme Court's careful guidance on the application of the ATS that is the benchmark for lower courts, and thereby failed to discharge its duty of "vigilant doorkeeping". *Sosa*, at 729.

In restricting the ATS to a "narrow class of international norms", *id.*, the Supreme Court acknowledged the existence of other "principle[s] limiting the availability of relief in the federal courts for violations of customary international law". *Id.*, at 733 n.21. The Governments submit that limiting principles can be properly drawn from international law, and that they include respect for immunities conferred under international law, concerns regarding the inappropriate application of private law doctrines of vicarious liability, and, the main principle raised in the present case, the rule on the exhaustion of local remedies. The Governments submit that the panel did not give serious weight to this exhaustion rule. This Brief is without prejudice to the Governments' wider concerns on extraterritoriality that are not put in issue by the panel decision.

ARGUMENT

I. THE PANEL DID NOT FOLLOW THE *SOSA* JURISDICTIONAL AND "VIGILANT DOORKEEPING" REQUIREMENTS LIMITING THE CLAIMS THAT CAN BE BROUGHT UNDER THE ALIEN TORT STATUTE

A. The Supreme Court Has Emphasized the Importance of Avoiding Jurisdictional Conflicts When Determining Whether U.S. Jurisdiction Exists over Claims by Foreign Parties Injured Abroad

Twice in 2004 the Supreme Court decided cases in which aliens asserted claims against other aliens for injuries suffered outside the U.S. Each time the Court made clear that U.S. law must be consistent with international law and interpreted to minimize conflicts of jurisdiction. In *Sosa,* the majority opinion noted that U.S. judicial authority was questionable when rules went "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." 542 U.S. at 727.

In *Empagran*, the Court was more emphatic, finding that in statutory construction, courts should "assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws" and, accordingly, should not construe statutes to violate the law of nations if any other possible construction remains. 542 U.S. at 165.

This is particularly important when one country provides a forum to settle disputes between citizens of another nation under a legal rule

which infringes on national sovereignty. As noted by the Governments in their amicus brief in *Sosa*, unwarranted assertion of jurisdiction by the courts of one state infringes on the rights of other states to regulate matters within their territories. Allowing this case is of serious concern to the Governments, especially because it undercuts the teachings of both *Sosa* and *Empagran.*

Moreover, the Governments do not read the Supreme Court's judgment in *Sosa* as authorizing extraterritorial claims with no connection to the United States. This point was made by the US Government which observed that the Supreme Court questioned "whether it would ever be proper for federal courts to project the (common) law of the United States extraterritorially to resolve disputes arising in foreign countries." Brief for the United States as Amicus Curiae Supporting Rehearing en Banc at 9 (May 18, 2007).

B. The Alien Tort Statute Provides Jurisdiction Over "a Relatively Modest Set of Actions Alleging Violations of the Law of Nations"

Sosa is now the leading authority on how the long-dormant ATS is to be applied and is the benchmark for lower courts in deciding ATS cases. The Supreme Court unanimously concluded in *Sosa* that the ATS is "a jurisdictional statute creating no new causes of action." *Id.*, at 724. Rather:

> The jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time.

Id.

The Supreme Court emphasized that judicial caution should be exercised in construing the kinds of contemporary claims to be admitted under the ATS. These reasons included changing conceptions of the common law and the role of the federal courts in relation to it; the modern preference for legislation in creating new causes of action; and considerations of international comity. *Id.*, at 725. Therefore, in exercising ATS jurisdiction today:

> [C]ourts should require any claim based on the present-day law of nations to 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 we have recognized."

Id.

Summarizing this careful mandate, the Court said that "the door to further independent judicial recognition of actionable international norms . . . is still ajar *subject to vigilant doorkeeping*, and thus open to a narrow class of international norms today." *Id.*, at 729 (emphasis added). The Governments consider that the panel did not follow the Supreme Court's guidance. It is clear from *Sosa* that conduct which is objectionable and contrary to national law may fall short of a violation of the norms actionable under the ATS.

II. TO AVOID THE RISKS OF JURISDICTIONAL OVERREACHING AND INTER-GOVERNMENTAL CONFLICTS, U.S. COURTS SHOULD GIVE SUBSTANTIAL WEIGHT TO THE LIMITS IMPOSED BY INTERNATIONAL LAW, INCLUDING THE RULE REQUIRING EXHAUSTION OF LOCAL REMEDIES

In *Sosa,* the Supreme Court explained that "clear definition is not meant to be the only principle limiting the availability of relief in the federal courts for violations of customary international law . . . ." *Id.*, at 733 n.21. As the Governments have noted, other relevant principles include respect for immunities and exhaustion of local remedies. Discussing "the basic principles of international law requir[ing] that . . . the claimant must have exhausted any remedies available in the domestic legal system," the Supreme Court said, "We would consider this requirement in an appropriate case." *Id.*

This case presents precisely such an appropriate opportunity. Consequently, the Governments are concerned that the panel's decision found, on the basis that there was "complete silence" on the issue of exhaustion from Congress in 1789, that exhaustion is not required by the ATS. *Sarei v. Rio Tinto PLC*, Nos. 02-56256, 05-56390, at 4156 (April 17, 2007) ("*Sarei*").

A. The Exhaustion of Local Remedies Doctrine Is an Important Principle of International Law

The International Court of Justice has emphasized that "[t]he rule that local remedies must be exhausted before international proceedings

may be instituted is a well-established rule of customary international law." *Switzerland v. U.S.*, 1959 ICJ Rep. 6, 27 (Mar. 21); *see* Restatement (Third) Foreign Relations Law §703 comment d (1987). Indeed, the exhaustion rule is such an "important principle of customary international law [that it cannot be] tacitly dispensed with" absent clear language in an agreement or treaty to do so. *Case Concerning Elettronica Sicula S.p.A.*, 1989 I.C.J. 15, 42, 76 (July 20).

B. Requiring Careful Consideration of Exhaustion of Local Remedies in Alien Tort Statute Cases will Reduce the Risk of Inter-Governmental Conflicts and be Consistent with the Principle that International Law is Part of U.S. Law

The ATS depends entirely on the "law of nations" to provide the substantive basis for a claim. This has important practical implications: it means that the U.S. court must weigh seriously the *restrictions* that international law imposes on claims based on the law of nations and not selectively exclude important international law doctrines. Careful invocation of the local remedies rule may help ameliorate the risks of intergovernmental conflict in some cases, and implements the Supreme Court's broader concerns in *Empagran* and *Sosa.*

Two highly distinguished international jurists (Sir Ninian M. Stephen and Judge Stephen M. Schwebel) explained the practical implications in their amicus brief:

> The rule of exhaustion of local remedies is a universal and binding international norm, which should not be severed from the "law of nations." It serves a significant and constructive role in the international legal system, and in particular the international human rights regime. It may be expected that if one country—and especially the United States of America—disregards the exhaustion rule, like disregard by courts in other nations will follow.

Brief of Amici Curiae Sir Ninian M. Stephen and Judge Stephen M. Schwebel in Support of Rio Tinto's Cross-Appeal Regarding Exhaustion of Local Remedies at 4-5 (Feb. 24, 2003).

Moreover, requiring district courts to evaluate whether local remedies are available and have been exhausted in an ATS case is consistent with the long-standing doctrine that international law is part of U.S. law, as held by the Supreme Court in the *The Paquete Habana*:

> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. 175 U.S. 677, 700 (1900).

The Governments respectfully submit that the panel should have read exhaustion into the ATS, to the extent of requiring that the District Court, on remand, thoroughly inquire into the availability of local remedies.

CONCLUSION

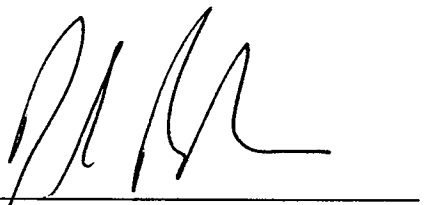
The Supreme Court recognized in *Sosa* that there may be other "principle[s] limiting the availability of relief in the federal courts for violations of customary international law" under the ATS. 542 U.S. at

733 n.21. This court should accept the exhaustion of local remedies rule as one limiting principle.

Moreover, the Governments consider that the assertion of jurisdiction by U.S. courts in these circumstances interferes with the sovereignty of nations, which is why the Supreme Court set the "vigilant doorkeeping" requirement for lower courts.

For the foregoing reasons, the Governments urge the court to grant Rio Tinto's petition for rehearing en banc and then to determine the appropriate post-*Sosa* analysis for courts to exercise jurisdiction in a claim under the ATS.

Respectfully submitted,



May 24, 2007

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Nos. 02-56256 & 02-56390

Decided April 12, 2007
Before Circuit Judges Fisher and Bybee and District Judge Mahan

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALEXIS HOLYWEEK SAREI, PAUL E. NERAU, THOMAS TAMUASI, PHILLIP MIRIORI, GREGORY KOPA, METHODIUS NESIKO, ALOYSIUS MOSES, RAPHEAL NINIKU, GARBIEL TAREASI, LINUS TAKINU, LEO WUIS, MICHAEL AKOPE, BENEDICT PISI, THOMAS KOBUKO, JOHN TAMUASI, NORMAN MOUVO, JOHN OSANI, BEN KORUS, NAMIRA KAWONA, JOANNE BOSCO, JOHN PIGOLO and MAGDALENE PIGOLO, individually and on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants/Cross-Appellees,

v.

RIO TINTO, plc and RIO TINTO LIMITED,

Defendants-Appellees/Cross-Appellants.

On Appeal from the United States District Court,
Central District Of California, Western Division
U.S.D.C. No. 00-11695-MMM MANx
(Honorable Margaret M. Morrow)

OPPOSITION TO PETITION FOR REHEARING EN BANC

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INTRODUCTION

Rio Tinto's Petition For Rehearing *En Banc* asks the Court to rewrite the Alien Tort Claims Act ("ATCA"), 28 U.S.C. § 1350, and judicially impose an exhaustion requirement for all ATCA claims. Rio does so in the face of two centuries of judicial considerations addressing claims under the law of nations, none of which have mandated such a rule and in light of Congress's refusal to impose an exhaustion requirement under ATCA when it supplemented the ATCA through the Torture Victim Protection Act ("TVPA"). The Panel's repudiation of an exhaustion requirement thus maintains two-centuries of a uniform *status quo*.

Rio Tinto and its allies can point to ***no*** conflict within this Court or with any other circuit court of appeal that warrants *en banc* review. In fact ***every*** court to consider whether exhaustion is an element of or prerequisite to an ATCA claim has concluded it is not.

Therefore, as a basis for review, Rio is left with arguing that the Panel's decision conflicts with a footnote in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), that expressly declines to decide the exhaustion issue. While in *Sosa* the Supreme Court commented that in a different ATCA case it ***might*** consider an exhaustion requirement as a restriction on the exercise of judicial authority, *id.* at 733 n.21, no overarching "rule" of exhaustion was created. As *Sosa* did not create an absolute rule, no conflict calling for this Court's *en banc* review exists.

Still, Rio argues that *en banc* review is warranted because the Panel purportedly "gave no valid reason for declining to apply the exhaustion requirement." Rio at 2. This attempt to reargue the merits is dead wrong. The majority, after a 20-page painstaking analysis of the exhaustion issue, concluded "that it would be inappropriate, given the lack of clear direction from Congress (either in 1789 or when it revisited the issue in 1991), and with only an aside in a footnote on the issue from the Supreme Court, now to superimpose on our circuit's existing ATCA jurisprudence an exhaustion requirement where none has been required before." *Sarei v. Rio Tinto*, slip. op. at 4171-72, Nos. 02-56256, 02-56390 (9th Cir. Apr. 12, 2007) ("Opinion" or "Op.").

The Panel thus heeded existing and uniform precedent and followed established principles of statutory construction in refusing to read into ATCA an exhaustion requirement to impose a new and mandatory restriction on the exercise judicial power. In so doing it recognized that such an act – altering the *status quo* – was up to "Congress or the Supreme Court." *Id.* at 4125. Quite simply, the Panel's reliance on established rules and choosing to defer to Congress and the Supreme Court while maintaining the two-century old *status quo* fails to present the lack of uniformity or conflict that the requirements for *en banc* review require.

ARGUMENT

I. RIO'S PETITION FAILS TO SATISFY FRAP 35[1]

Rio and *amici* try to create a conflict by misconstruing *Sosa* . They elevate a statement in footnote 21 concerning a future possibility to the status of a "rule." Footnote 21 posits that the Supreme Court "would" consider whether an "exhaustion requirement" limits a court's ability to enforce a recognized cause of action, but only in "an appropriate case," *Sosa*, 542 U.S. at 733 n.21, which necessarily implies that the Court did not consider the issue, let alone establish a "rule" on the issue. Rio contends that the Court's acknowledgment here, that it might consider an exhaustion requirement, "mandates" this Court impose a hard and fast rule requiring exhaustion in ***all*** ATCA cases now. Rio is desperately overreaching; *Sosa* did not impose a universal exhaustion requirement to assert an ATCA claim and would not have used the words "appropriate case" if a bright line rule was contemplated. Moreover, the Court also notes that deference to political branches is "another possible limitation" that the Court "need not apply" in *Sosa*, which again necessarily

[1] Some *amici* request *en banc* review of issues Rio failed to petition to review. *E.g.*, NFTC at 10-15 (requesting review of act of state doctrine, merits of Plaintiffs' claims and other issues); Chevron at 1-14 (same and requesting review of racial discrimination issues). As non-parties, *amici* lack standing to request this relief. Moreover, these issues were either waived and/or Rio never appealed the district court's ruling on the merits and thus are not before the Court. FRAP 35, 40. Accordingly, Plaintiffs do not address these arguments. To the extent the Court desires briefing on these specific issues – which the Panel and/or the district court correctly resolved – Plaintiffs refer the Court to their opposition to Rio's first Petition for *en banc* review which Plaintiffs filed on October 31, 2006.

implies that the Court did not actually consider either possible limitation and therefore did not establish any rule that the Panel was required to follow.

A. The Panel's Opinion Comports with *Sosa*, Existing Precedent, Congress's Intent and Settled Rules of Statutory Construction

Rio incredibly contends that the Panel's refusal to re-write the ATCA to include an exhaustion requirement where Congress has not provided one is somehow not exercising the "restraint" *Sosa* requires. Rio at 13. A judicial refusal to amend an Act of Congress – and usurp the job of the Legislative Branch – is the epitome of judicial restraint.

Sosa's entire exhaustion discussion is contained in one footnote, which, in addition to being dicta, explains exhaustion might be considered by the Court in the future,[2] but as a "practical" limitation on the availability of federal relief in that specific case. It strains credulity to contend that the Court would relegate a mandatory precondition to judicial enforcement of ***every*** ATCA claim to a footnote in the seminal decision that establishes the very standard for determining which

[2] Rio may petition the Supreme Court to see if this is an "appropriate case." However, as discussed below, it is not for several reasons. Most importantly, Plaintiffs' *jus cogens* claims are subject to universal jurisdiction under international law and thus do not require exhaustion of local remedies. One *amici* concedes this. Chevron at 12 n.6-8 (genocide). Second, footnote 21 identifies exhaustion as a "practical consequence" to consider in its "judgment" about whether a norm is sufficiently "definite" to enforce. *Sosa*'s reference here to practical considerations and judgments (similar to the weighing and balancing the district court undertook in its comity analysis and other decisions that were not appealed) evidence that an abuse of discretion review standard applies. This standard cannot apply if exhaustion were the rule of law Rio seeks.

international norms are federally enforceable. If exhaustion were mandated, the Court would have said so.[3]

Sosa and other cases confirm *en banc* review is unwarranted. Significantly, the Supreme Court ratified this Court's pre-*Sosa* ATCA jurisprudence.

> The position we take today has been assumed by some federal courts for 24 years, ever since ... Filartiga.... Congress ... has not only expressed no disagreement with our view of the proper exercise of the judicial power [the restrained standard of judicial discretion], but has responded to its most notable instance by enacting legislation supplementing the judicial determination in some detail. [Id. at 730-31.]4

No court has required one to exhaust local remedies in a foreign land as a condition precedent to asserting an ATCA claim both before and after *Sosa*, even for claims that arguably concern a sovereign's conduct against its citizens. ***In fact, all courts that have squarely addressed this issue are in agreement: exhaustion is not required under the ATCA.*** *Jean v. Dorelien*, 431 F.3d 776, 781 (11th Cir. 2005) (post-*Sosa*); *Doe v. Saravia*, 348 F. Supp. 2d 1112, 1157 (E.D. Cal. 2004) (citing cases); *see also Kadic v. Karadzic,* 70 F.3d 232, 241-44 (2d Cir. 1995) (implicitly

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[3] Rio explains that the Supreme Court had "ample briefing" on this issue, and yet *Sosa* still did not impose an exhaustion requirement. Rio at 6.

[4] *Sosa* cites to *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), Judge Edwards' concurrence in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), and *In re Estate of Marcos, Human Rights Litig.*, 25 F.3d 1467 (9th Cir. 1994) ("*Marcos*"), as proper articulations and applications of its holding. *Sosa*, 542 U.S. at 732. These decisions and their progeny are binding federal common law for ATCA claims. *Id.*; *The Paquete Habana*, 175 U.S. 677, 700 (1900).

rejecting an exhaustion requirement for ATCA claims of torture while considering TVPA claims based on same alleged abuses).[5]

The Eleventh Circuit's decision in *Jean* is particularly relevant though neglected by Rio and all *amici*. The ATCA claims there concerned a Haitian military execution of a Haitian in Haiti. The defendant argued that both ATCA and TVPA required exhaustion and the district court agreed. On appeal, the Eleventh Circuit reversed holding, post-*Sosa*, "***the exhaustion requirement does not apply to the ATCA***." *Jean*, 431 F.3d at 781 (emphasis added). The Panel's decision thus comports with the only other circuit precedent directly on point and the contrary decision urged by Rio would create an inter-circuit split.

Similarly, exercising the appropriate caution and judicial restraint that *Marcos* (and now *Sosa*) requires, the district court rejected Rio's request to impose an exhaustion requirement reasoning, "Congress could, had it wished to do so, have amended the ATCA to impose such a requirement at the time it enacted the TVPA. It did not do so.... [T]herefore, the court declines to find that ATCA plaintiffs must

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[5] Rio starts its Petition with a two-page argument that Papua New Guinea ("PNG") is an appropriate forum. It does so by selective and incomplete citations to the Record. When this case was filed, Plaintiffs risked grave harm and imprisonment if they brought claims in PNG. ER 1929, 1932, 1935, 1943 (attesting to bounties on plaintiffs' lives). In addition to omitting that PNG sought to injure or imprison the Plaintiffs when the case was filed in 2000, Rio omits to mention the significant ties between the U.S., Rio and Plaintiffs' injuries. Over 40% of Rio's assets are in America, which include its 100% ownership of U.S. Borax, a California company; and lead plaintiff Alexis Sarei's adopted son, who was a U.S. citizen, was killed in the conflict. (ER 7, 19-23.)

exhaust national remedies." (ER 1585).[6] Confirming the accuracy of the district court's conclusion, the Supreme Court explained in *Sosa* that "***Congress has not in any relevant way amended [the ATCA] or limited civil common law power by another statute.***" 542 U.S. at 725 (emphasis added).[7] *Sosa*, too, thus rejected the only argument Rio presented to the district court; *viz*, TVPA amended the ATCA to require exhaustion. (ER 22-23.)

The Supreme Court's confirmation that, to date, Congress has neither amended nor limited federal judicial power under the ATCA is fatal to the argument that exhaustion of local remedies is a condition precedent to the lawful exercise of jurisdiction.[8] Over 200 years of cases adjudicating claims and enforcing the law of

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[6] *See also Kadic,* 70 F.3d at 241 (rejecting argument Congress intended TVPA to amend ATCA); *Aldana v. Del Monte*, 416 F.3d 1242, 1251 (11th Cir. 2005) (post-*Sosa*) (rejecting argument TVPA impliedly amended ATCA).

[7] This also means that the Foreign Sovereign Immunities Act ("FSIA") and official reservations attached to treaty ratifications or implementation Acts likewise have not limited judicial authority under ATCA.

[8] *Sosa* thus has dispatched *amici*'s argument that the TVPA should be used as a model for ATCA causes of action or that it amended ATCA. NFTC at 7; Chevron at 14-15. *Sosa* concerned substantive elements of an ATCA claim and when they are sufficiently universal and definite to be federally enforced. *Sosa* said nothing about whether courts must look to customary international law ("CIL") for procedural rules, agency principles, affirmative defenses, rules of decision or other non-element issues attendant to every case. Op. at 4165-69 (noting *Sosa* makes a substance procedure distinction).

Before and after *Sosa*, the general and ordinary practice in ATCA cases has been to apply domestic law for rules of decision, procedural rules and implementation of CIL. *Sosa* endorsed this approach when it cites *Kadic* as a proper example of how to determine the "scope of liability" under the ATCA and *Kadic* employs § 1983 jurisprudence as a rule of decision to determine state action. 70 F.3d at 245; *Aldana*, 416 F.3d at 1247 (same); *see also Sanchez-Llamas v. Oregon*, 126 S. Ct.

nations as federal common law, both under the ATCA and otherwise, without imposing an exhaustion requirement is *stare decisis* that no requirement exists. Certainly Congress does not require it, and Congress presumably relied on the absence of any requirement when it enacted the TVPA. *Bowen v. Massachusetts*, 487 U.S. 879, 896 (1988).

As a matter of statutory interpretation, ATCA's plain language does not demand the exhaustion of local remedies. Statutes are interpreted by the "cardinal canon" that presumes "a legislature says in a statute what it means and means in a statute what it says," *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992), and the concomitant recognition that when a provision is not fairly

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2669, 2685-86 (2006) ("rules of domestic law generally govern the implementation of an international treaty," including procedural rules); *Marcos*, 25 F.3d at 1475 (ATCA claim employing § 1983 jurisprudence; "Whether and how the [U.S.] wished to react to such [CIL] violations are domestic questions."); *Abebe-Jira v. Negewo,* 72 F.3d 844, 848 (11th Cir. 1996) (ATCA "establishes a federal forum where courts may fashion domestic common law remedies to give effect to violations of [CIL]"); *Xuncax v. Gramajo*, 886 F. Supp. 162, 180 (D. Mass. 1995) (same); *Doe v. Islamic Salvation Front*, 257 F. Supp. 2d 115, 121 n.12 (D.D.C. 2003) (same re secondary liability); *Filartiga*, 630 F.2d at 865 (domestic legal principles determined availability of punitive damages).

Sosa's federal common law approach requires more than examining international law. Courts must consider a variety of sources, ranging from historical application to established tort principles (Congress's chose "tort" to effectuate jurisdiction under ATCA). *Sosa* cites a 1795 Opinion issued by Attorney General Bradford and relies on this opinion and other historical understandings to inform and derive its holding. Similarly, courts must look to applicable restatements of law and rely on general tort principles and existing case law. They also draw on principles of CIL from international tribunals and principles commonly applied. Thus, CIL is one source of law consulted under ATCA's common law approach. According to the Supreme Court's hierarchy, however, CIL is consulted only if domestic law fails to provide an answer. *Sosa*, 542 U.S. at 734 (quoting *Paquete Habana*).

contained in statutory language, the Court will not, in pursuit of the alleged policy of the statute, "engraft" it, even where the absent provision "undoubtedly would serve the Government's objectives." *United States Dep't of Justice v. Landano*, 508 U.S. 165, 181 (1993); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 495 n.13 (1985) ("[C]ongressional silence, no matter how 'clanging,' cannot override the words of the statute."). Application of "cardinal principles" of statutory construction confirms Congress did not intend for an exhaustion requirement to apply to the ATCA:

- If ATCA required exhaustion, Congress's inclusion of exhaustion in TVPA would be superfluous, violating a "cardinal principle of statutory construction." (Op. at 4161); *Williams v. Taylor*, 529 U.S. 362, 404 (2000); *Market Co. v. Hoffman*, 101 U.S. 112, 115 (1879).
- Implying exhaustion into ATCA would violate the ***rule*** that where Congress employed a ***term*** in one place of an Act (28 U.S.C. § 1350) and excluded it in another, courts should ***not imply*** where excluded. Op. at 4161; *Bates v. United States*, 522 U.S. 23, 29-30 (1997); *FTC v. Sun Oil Co.*, 371 U.S. 505, 515 (1963) (same); *see also Russello v. United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (quotation omitted)).[9]

[9] Rio baldly asserts, without any authority, that there is a temporal limitation on this principle of construction in an attempt to avoid the obvious: because Congress required exhaustion under TVPA and not ATCA when it amended ATCA, Congress did not intend ATCA to include one. Rio at 14. Rio's effort to limit this principle must be rejected as its logic knows no bounds and threatens to aggrandize judicial power. Congress is Congress and an Act is an Act. How many years must pass for this "cardinal rule" to cease? Members of Congress change all the time. Rio's logic permits courts to say Congress did not mean what it said as Members today are different.

- To imply exhaustion now, after TVPA because TVPA requires exhaustion, would mean TVPA impliedly amended ATCA. It is "a cardinal principle of statutory construction that repeals by implication are not favored ... [and that] the intention of the legislature to repeal must be clear and manifest." *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976); *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974) (same); *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 471 (1982) ("Since an implied repeal must ordinarily be evident from the language or operation of a statute, the lack of such manifest incompatibility between [two provisions in apparent tension] is enough to [end this Court's] inquiry.").

- The requirement that intent to repeal or amend must be clear and manifest makes sense because "Congress understands the state of existing law when it legislates," *Bowen*, 487 U.S. at 896, and "it is not lightly to be assumed that Congress intended to depart from a long established policy" or judicial interpretation of the statute. *Robertson v. Railroad Labor Bd.*, 268 U.S. 619, 627 (1925).[10]

- Where statutory language and structure answer an interpretation question – as ATCA's language and structural juxtaposition with TVPA does – resort to policy is inappropriate. *Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001) (noting "statutory intent ... is determinative" and that it will not be disregarded "no matter how desirable that might be as a policy matter").[11]

Additionally, the one-size-fits-all exhaustion requirement that Rio seeks to graft onto ATCA disrespects Congress's considered policy choices regarding

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[10] When Congress enacted TVPA it was aware that no ATCA decision had ever imposed an exhaustion requirement and courts had rejected the argument.

[11] Rio and *amici* incorrectly contend that Congress's intent or silence as to an exhaustion requirement under ATCA is irrelevant because ATCA is only "jurisdictional and does not create a cause of action. *E.g.*, Rio at 15-16; NFTC at 5-6. While ATCA might be "jurisdictional only" today, *Sosa* recognized that the intent of Congress was otherwise, explaining "We think it would be unreasonable to assume that the First Congress would have expected federal courts to lose all capacity to recognize enforceable international norms simply because the common law might lose some metaphysical cachet on the road to modern realism." 542 U.S. at 730. Congress intended that ATCA would provide the modern day equivalent of a "cause of action" where courts could identify and enforce some CIL norms. *Id.*

exhaustion and suits impacting foreign affairs. Congress has shown the ability to impose an exhaustion requirement where it deems one needed for cases impacting foreign affairs, *e.g.*, TVPA or FSIA. Congress has also shown the ability to refrain from imposing such a requirement for cases impacting foreign affairs, *e.g.*, ATCA or FSIA. To complicate matters further, Congress has shown, in its considered judgment, that different kinds of exhaustion requirements should apply in suits against foreign sovereigns depending on the facts or claims alleged.[12] Given Congress's illustrated and exercised ability to create an exhaustion requirement where it deems one is needed and to narrowly tailor that requirement to specific situations, claims, and parties be it under the TVPA or FSIA, and given that Congress failed to initially, and refused to nearly 200 years later, include an exhaustion requirement with the ATCA, there is no valid reason for the judiciary to require exhaustion as a prerequisite for all ATCA litigants to access the federal courts nor any principled mechanism by which the judiciary can discern which of

[12] Under FSIA, Congress requires some claimants to offer the foreign state arbitration before asserting claims. 28 U.S.C. § 1605(a)(7)(b)(1). At the same time, Congress does not impose any exhaustion requirement on other claims asserted against foreign sovereigns even when conduct occurs in a foreign land. *See, e.g.*, 28 U.S.C. §§ 1605(a)(1) (sovereign immunity waived); (a)(3)(takings cases); *see also Agudas Chasidei Chabad v. Russian Fed'n*, 466 F. Supp. 2d 6, 21 (D.D.C. 2006) (holding FSIA has not incorporated an exhaustion requirement and distinguishing and refusing to apply CIL's exhaustion requirement because it concerns "actions between states on behalf of their nationals" or sovereign state to state interactions not private parties).

Congress's exhaustion requirements to apply. The judiciary, frankly, is not the proper branch to make this policy choice.[13]

The Panel ruling preserves the *status quo*, one that has remained unchanged by the courts and Congress for over 200 years. Rio and *amici* fail to cite to any holding of *Sosa* that remotely suggests it is now time to change course. Instead, *Sosa* ratified *Marcos*, *Filartiga* and their progeny and the majority of ATCA cases decided over the last 24 years, thus confirming that the course charted by this Court comports with Congress's design. 542 U.S. at 731-32. To grant Rio's Petition asks the Court to substantially alter the two-century old *status quo* and create a circuit conflict, both of which are reasons to deny *en banc* review not grant it.

B. The Panel Does Not Expand Remedies Beyond Those Endorsed by *Sosa* and Comports With Principles of International Law

Although Rio proclaims exhaustion is an accepted principle under international law, it cannot identify a single ATCA case that has imposed such a requirement on any ATCA claim. In contrast, Rio acknowledges and cites ATCA cases where exhaustion was not required even though the claims arose in a foreign land and involved actions taken by foreign governments against its citizens. Rio at 6-7 n.8 (citing *Kadic*, *Marcos*, and *Forti*). Two of these cases – *Kadic* and *Marcos* – were cited by *Sosa* with approval. Tellingly, Rio and all *amici* fail to draw the

[13] Consistent with cardinal interpretive principles, as the Panel noted, the Supreme Court has warned against judicial invention of exhaustion requirements not mandated by Congress based on judicial views about policy. *Patsy v. Board of Regents of Fla.*, 457 U.S. 496, 501, 514 (1982); Op. at 4165.

Court's attention to *Jean*, the Eleventh Circuit's post-*Sosa* precedent directly at odds with the Petition.

In the face of contrary legal authority, Rio's argument (and *amici*'s) is relegated to policy concerns solely suited for a plea to Congress to amend ATCA. Rio contends that international law requires exhaustion in ***every*** case and if this Court does not likewise impose such a requirement the U.S. would flout international law to become the "first jurisdiction in the world" to provide a "forum of first resort" and provide litigants "the unfettered choice[14] to forgo available" remedies in the country where the conduct occurred. Rio at 2, 7. This byproduct, according to Rio, illustrates a conflict between the Panel's analysis and *Sosa*'s holding, allegedly expanding the reach of enforceable norms beyond accepted international precedent. Rio at 8.[15]

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[14] Rio exaggerates the ease of bringing ATCA claims and the import of an exhaustion requirement as a scare tactic. No plaintiff has an "unfettered choice" to assert any claim in federal court or assert a claim at all. Numerous legal doctrines readily and efficiently circumscribe the claims that may be adjudicated in federal court including personal jurisdiction, international comity, *forum non conveniens*, political question doctrine, and FSIA to name a few. *In re Estate of Marcos Human Rights Litig.*, 978 F.2d 493, 500 (9th Cir. 1992) ("*Marcos II*") (identifying "traditional brakes" on access to federal courts). Moreover, as Judge Bybee notes in dissent, this kind of case – thankfully – is "rare." Op. at 4207 n.15.

Additionally, Rio, the U.S. and *amici* ignore Rio's substantial ties to the U.S. and this case: (a) Over 40% of the company's assets are in America, which include U.S. Borax, a California company; and (b) lead plaintiff Alexis Sarei's adopted son, who was a U.S. citizen, was killed in the conflict. (ER 7, 19-23.)

[15] Rio does not suggest the Panel expanded the ***substance*** of CIL, only its purported remedial reach. It appears Rio, the U.S. and other *amici* agree that Plaintiffs' *jus*

Rio is dead wrong, on both the law and its characterization of *Sosa*'s prescription.[16] Long-established and well-settled principles of international law permit universal jurisdiction over Plaintiffs' *jus cogens* claims without first resorting to local remedies. A *jus cogens* norm is one universally accepted and recognized by the international community and "from which no derogation is permitted." *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 715 (9th Cir. 1992).[17] While *jus cogens* and CIL are related, they differ in one important respect. CIL, defined by treaties and other international agreements, rests on the consent of states, whereas *jus cogens* "embraces customary laws considered binding on all nations," and do not require consent of states; they transcend such consent. *Id.* at 714-15.

Because Plaintiffs' *jus cogens* claims are subject to "universal jurisdiction,"[18]

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cogens claims of genocide and other war crimes and crimes against humanity satisfy *Sosa* and are enforceable in federal court.

[16] *Sosa* did not tie federal judicial power under the ATCA to what the international world has generally accepted and clearly defined. Rather, *Sosa* restrained judicial power to recognize and enforce only those norms of international law resembling "torts" and prescribing conduct that have the same acceptance and specificity as "the 18th-century paradigm" norms did when ATCA was enacted. After, domestic law applies. *Marcos*, 25 F.3d at 1475 ("International law 'does not require any particular reaction to violations of law.... Whether and how the [U.S.] wished to react to such violations are domestic questions.'").

[17] *See also Marcos,* 25 F.3d at 1475; *United States v. Matta-Ballesteros*, 71 F.3d 754, 764 n.5 (9th Cir. 1995) ("[*j*]*us cogens* norms, which are nonderogable and peremptory, enjoy the highest status within customary international law, are binding on all nations").

[18] Under international law, the "legitimacy" of domestic jurisdiction principally rests on reconciling one sovereign's interest in a particular case with another State's

this means every country is permitted to assert jurisdiction over the limited category of offenses generally recognized as of universal concern (*jus cogens* norms), regardless of the *situs* of the offense and the nationalities of the offender or offended.[19] This principle, which has been accepted since the Italian Renaissance, through English common law and into modern times,[20] has largely been seen in criminal cases but it applies equally to civil adjudications and reflects the principle

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interests. *See generally* Louis Henkin, *et al.*, INTERNATIONAL LAW 820-25 (2d ed. 1987); Ian Brownlie, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 298-320 (3d ed. 1979); Oscar Schachter, INTERNATIONAL LAW IN THEORY AND PRACTICE 240-65 (1985); Michael Akehurst, *Jurisdiction in International Law*, 46 BRIT. Y.B. INT'L L. 145, 152-257 (1972-1973); Derek Bowett, *Jurisdiction: Changing Patterns of Authority over Activities and Resources*, 53 BRIT. Y.B. INT'L L. 1 (1982). This reconciliation is what concerns the doctrine of international comity.

Rio did not appeal the district court's comity ruling which expressly found, after balancing and weighing the factors identified in RESTATEMENT § 403(2) including the relative interests of PNG and the U.S. along with the many issues identified in Rio and *amici*'s briefs, that the assertion of jurisdiction in the U.S. over Plaintiffs' war crimes and genocide claims was reasonable. Op. at 4149-53. Likewise, no foreign domestic court (as opposed to an international tribunal) requires exhaustion of local remedies before it can assert jurisdiction. Foreign domestic courts address the local remedies concern under comity or conflicts of laws just as federal courts do. RESTATEMENT (THIRD) FOREIGN RELATIONS LAW § 403(2). In contrast, the CIL exhaustion requirement addresses "actions between states on behalf of their nationals." *Chabad*, 466 F. Supp. 2d at 21 (citing RESTATEMENT § 713).

The U.S. and U.K. largely bemoan the Panel's perceived lack of consideration for comity concerns. However, the district court made the comity findings in accordance with applicable law and Rio did not appeal. Rio did not petition to review comity. Issues of comity are not before the Court.

[19] Willard B. Cowles, *Universality of Jurisdiction over War Crimes*, 33 CAL. L. REV. 177 (1945); Thomas H. Sponsler, *The Universality Principle of Jurisdiction and the Threatened Trials of American Airmen*, 15 LOY. L. REV. 43 (1968); A.R. Carnegie, *Jurisdiction Over Violations of the Laws and Customs of War*, 39 BRIT. Y.B. INT'L L. 402, 405 (1963).

[20] Akehurst, *supra*, at 172-73; Emmerich de Vattel, THE LAW OF NATIONS 232, 233 (J. Chitty ed., new ed., Philadelphia, T & J.W. Johnson & Co. 1876) (1758).

that every country has a mutual and substantial interest in exercising jurisdiction to combat all egregious, universally condemned conduct.[21]

Courts have long recognized the application of universal jurisdiction over those who are *hostis humani genesis*. Post-WWII the list of *jus cogens* norms grew,

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[21] When a country can assert criminal jurisdiction, it can also assert civil jurisdiction. Luc Reydams, UNIVERSAL JURISDICTION: INTERNATIONAL AND MUNICIPAL LEGAL PERSPECTIVES 3 (2003). Furthermore, under international law, the limits on international jurisdiction in civil cases largely are left "to the states themselves for determination, each in accordance with its own internal law." Gerald Fitzmaurice, *The General Principles of International Law Considered from the Standpoint of the Rule of Law,* 92 RECUEIL DES COURS 1, 218 (1957). "Aside from sovereign immunity and a possible reasonableness standard, international law appears uninterested in regulating state civil jurisdiction." George, *Defining Filartiga: Characterizing International Torture Claims in the United States Courts*, 3 DICK. J. INT'L L. 1, 19 (1984); *see also* RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE U.S., § 404, cmt. b ("Universal jurisdiction not limited to criminal law"); *Sosa*, 542 U.S. at 762-63 (Breyer, J., concurring) (noting that that "universal criminal jurisdiction necessarily contemplates a significant degree of civil tort recovery as well" because many nations allow victims to attach claims for civil compensation to criminal prosecutions. As a result, "universal tort jurisdiction would be no more threatening" than universal criminal jurisdiction.)

Justice Breyer is referring to the traditional *action civile* (a process recognized in most civil law countries). Hence, in numerous countries around the world when universal, extraterritorial jurisdiction is exercised over genocide, crimes against humanity, and war crimes, victims piggyback on that criminal proceeding to seek monetary compensation. For examples of such statutes see, Code de Procedure Penale Arts. 689-2 to -10 (universal jurisdiction), Arts. 2-3 (*action civile*) (Fr.); Volkerstrafgesetbuch [Code of Crimes Against International Law] § 1 (universal jurisdiction) (Ger.); Strafprozessordnung [StPO] [Federal Criminal Procedure Code] §§ 403-406c (*action civile*) (Ger.); Ley Organica del Poder Judicial [Organic Law of the Judiciary] Art. 23(4) (universal jurisdiction); Ley de Enjuiciamiento Criminal [Criminal Proceedings Law] Art. 112 (criminal complaint also a civil claim unless victim expressly states otherwise); *see also* Redress, *Universal Jurisdiction in the European Union, at* www.redress.org/conferences/country-%20studies.pdf (document for conference entitled Legal Remedies for Victims of "International Crimes," Nov. 24-25, 2002).

which also caused the conduct subject to universal jurisdiction to expand.[22] In *Eisentrager*, defendants argued that because they were German citizens residing in China they were subject only to Chinese law and jurisdiction. Relying, in part, on the universality principle the tribunal rejected the argument:

> A war crime ... is not a crime against the law or criminal code of any individual nation, but a crime against the *jus gentium.* The laws and usages of war are of universal application, and do not depend for their existence upon national laws and frontiers. Arguments to the effect that only a sovereign of the *locus criminis* has jurisdiction and that only the *lex loci* can be applied, are therefore without any foundation.

14 Law Reports of Trials of War Criminals at 15.

Post-WWII and in this modern era of international law, numerous cases from foreign domestic tribunals recognize the legitimacy of adjudicating *jus cogens* claims that involve actions taken in a foreign land against foreign citizens without resorting to local remedies, and all do so relying on domestic or national procedures (as opposed to international) for implementation.[23]

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[22] *See, e.g., In re List,* 11 Trials of War Criminals 757, 1241-42 (1946-1949) (U.S. Mil. Trib. – Nuremberg 1948); *Almelo Trial of 1945*, 1 Law Reports of Trials of War Criminals 35 (Brit. Mil. Ct. – Almelo 1945); *Zyklon B Case of 1946*, 1 Law Reports of Trials of War Criminals 93 (1949) (Brit. Mil. Ct. – Hamburg 1946); *Hadamar Trial*, 1 Law Reports of Trials of War Criminals 46 (1949) (U.S. Mil. Comm'n – Wiesbaden 1945); *In re Eisentrager*, 14 Law Reports of Trials of War Criminals at 8, 15 (U.S. Mil. Comm'n – Shanghai 1947). Some of these cases are instances where Britain exercised extraterritorial and universal jurisdiction without requiring exhaustion of local remedies. The U.K. *amicus* brief fails to mention this.

[23] *E.g.*, Cass., sez. un., 6 Nov. 2003, n.5044, 87 Rivista di Diritto Internazionale 539, P 12 (2004) (Italy); Andrea Bianchi, Case Report: *Ferrini v. Federal Republic of Germany*, 99 AJIL 242 (2005); *Attorney Gen. of Isr. v. Eichmann*, 36 I.L.R. 18, 273-76 (Isr. Dist. Ct. – Jerusalem 1961), *aff'd*, 36 I.L.R. 277 (Isr. Sup. Ct. 1962);

In accordance with international law and its modern-day practice, federal courts also recognize universal jurisdiction over terrorism, torture, piracy, genocide, and war crimes (and other claims) in a variety of contexts, including ATCA cases.[24]

Prosecutor v. Kallon, Kamara, Decision on Challenge to Jurisdiction, Nos. SCSL-2004-15-AR72(E), SCSL-2004-16-AR72(E), P 71 (Mar. 13, 2004); Maria del Carmen Marquez Carrasco & Joaquin Alcaide Fernandez, Case Report: *In re Pinochet*, in 93 AJIL 690, 694 (1999) (Spain legitimately asserted jurisdiction over Augusto Pinochet without first resorting to remedies in Chile). The *Pinochet* decision also meant that Pinochet's victims receive compensation – like an ATCA case – because Spain, like some other countries, automatically includes civil damage remedies as part of criminal prosecutions. Codigo Penal [C.P.], arts. 109-100 (Spain); Ley De Enjuiciamiento Criminal [L.E.Crim.], art. 100 (Spain). Furthermore, Spain permits private parties to initiate criminal proceedings, which is how the *Pinochet* case began; a process directly analogous to Plaintiffs assertion of war crimes against Rio.

Moreover, England, Canada, and Australia permit tort claims arising out of corporate activities in foreign lands when the corporation is found there (which is no different than Rio being found in the U.S.). Richard Meeran, *Accountability of Transnationals for Human Rights Abuses*-1, 148 NEW L.J. 1686 (1998); Richard Meeran, *Accountability of Transnationals for Human Rights Abuses*-2, 148 NEW L.J. 1706 (1998); *e.g.*, *South Africa Lubbe v. Cape Plc*, 1 W.L.R. 1545 (H.L. 2000).

Additionally, In *Prosecutor v. Furundzija*, Yugoslavia expressly recognized the legitimacy of ATCA remedies observing that, if a national law purported to authorize a violation of a *jus cogens* norm such as torture, "the victim could bring a civil suit for damage in a foreign court." No. IT-95-17/1-T, P 155 (Dec. 10, 1998), *reprinted in* 38 ILM 317 (1999) (Yugo.).

[24] *E.g.*, *Tel-Oren*, 726 F.2d at 781, 788 (referencing domestic jurisdiction over extraterritorial offenses under universality principle); *Filartiga*, 630 F.2d at 890 (analogizing Paraguayan torturer to pirates and slave traders); *Von Dardel v. Union of Soviet Socialist Republics*, 623 F. Supp. 246, 254 (D.D.C. 1985) ("concept of extraordinary judicial jurisdiction over acts in violation of significant international standards ... embodied in the principle of 'universal' violations of international law"); *Xuncax v. Gramajo*, 886 F. Supp. 162, 183 n.25 (D. Mass. 1995) (ATCA under universal jurisdiction); *In re Extradition of Demjanjuk*, 612 F. Supp. 544, 555 (N.D. Ohio) (holding Israel's jurisdiction to prosecute a concentration camp guard "conforms with the international law principles of 'universal jurisdiction'"), *aff'd sub nom.*, *Demjanjuk v. Petrovsky*, 776 F.2d 571 (6th Cir. 1985); *United States v. Layton*, 509 F. Supp. 212, 223 (N.D. Cal.) (recognizing universal jurisdiction over terrorist acts), *appeal dismissed*, 645 F.2d 681 (9th Cir. 1981). *Tel-Oren, Filartiga,*

To underscore this point, *Filartiga v. Pena-Irala* deliberately emphasized: "[T]he torturer has become like the pirate and slave trader before him *hostis humani generis,* an enemy of all mankind." 630 F.2d at 890; *see also United States v. Brig Malek Adhel*, 43 U.S. (2 How.) 210, 232 (1844) (explaining those who are *hostis humani generis* are punishable in every State).

Contrary to Rio's contentions, international law thus allows and encourages universal jurisdiction over and adjudication of *jus cogens* claims wherever a perpetrator can be found without first resorting to local remedies. Though each country's implementation of this principle may be different and not mirror the ATCA, the principle remains the same transnationally, as illustrated by the national procedures permitting civil plaintiffs to piggyback on criminal proceedings for *jus cogens* violations. And, this well-defined and long accepted principle of international law confirms that the Panel's ruling squarely comports with international law when it permits the assertion of jurisdiction over Plaintiffs' *jus cogens* claims. As the International Court of Justice explained in *In re Barcelona Traction, Light & Power Co. (Belg. v. Spain)*, 1970 ICJ 4 (Judgment of Feb. 5), all

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and *Von Dardel* are civil cases; and in *Filartiga*, *Kadic* and *Tel-Oren* the courts explained the universality principle applies to ATCA. *Kadic*, 70 F.3d at 240.

states have a substantial legal interest in protecting against *jus cogens* violations – "they are obligations *erga omnes*." *Id.* at 32.[25]

The above discussion illustrates, notwithstanding Rio's representations, established principles and ***actual practice*** of international law permits all countries to assert jurisdiction over those who become the "enemies of all mankind" and violate *jus cogens* norms without regard to *situs* or *lex loci* of the acts or connection to the perpetrator, and do so without exhausting local remedies.

C. An Exhaustion Requirement Is Not Mandated by Foreign Policy Nor Impacts Exercises of Jurisdiction Over Foreign Sovereigns[26]

Rio contends the Panel failed to give sufficient regard to foreign policy concerns potentially caused by adjudicating ATCA claims that would allegedly be

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[25] *See also Almog v. Arab Bank*, 471 F. Supp. 2d 257, 271 (E.D.N.Y. 2007) ("offenses that may be purely intra-national in their execution, such as official torture, extrajudicial killings, and genocide, do violate customary international law because the nations of the world have demonstrated that such wrongs are of mutual concern and capable of impairing international peace and security"); S.Rep. No. 102-249, at 5 (1992) ("according to the doctrine of universal jurisdiction, the courts of all nations have jurisdiction over 'offenses of international concern'") (accompanying TVPA). Thus, consistent with the purpose of the ATCA, (*Sosa*, 542 U.S. at 715; USA at 7), providing a forum for claims against those who are the enemy of all mankind helps to avoid war, promotes peace and security. Failing to provide such judicial authority or to become a safe haven for war criminals and terrorists, as the world has seen, can lead to war (*e.g.*, Iraq, Syria, Somalia).

[26] Rio incorrectly explains that the Panel and ATCA allow the "exercise of jurisdiction over a foreign sovereign's actions." Rio at 9. FSIA is the exclusive means of federal jurisdiction over a foreign sovereign. Even still, not even FSIA imposes an exhaustion requirement for all claims brought against foreign governments for conduct in foreign lands. *See, e.g.*, § 1605(a)(1) (sovereign immunity waived); (a)(3) (takings cases). Rio is thus also incorrect when it suggests that it makes no difference that Plaintiffs' claims are asserted against it and not PNG. Rio at 11. Claims against PNG are governed by FSIA.

mitigated by requiring exhaustion. Rio at 9-12. It argues that this, one of *Sosa*'s five reasons for adopting a "restrained" standard of judicial common law discretion, coupled with *Alperin* illustrates the Panel's error. Rio's argument – apart from being convoluted and cobbled – is unpersuasive.

First, as the Court now knows, and as the Panel ruled, this case does not present the foreign policy concerns that call jurisdiction into question. USA 1st Amicus Br. at 14 n.3. The U.S. notified this Court that because of changes in PNG, it "***is not here seeking dismissal of the litigation based on purely case-specific foreign policy concerns***." *Id.* (emphasis added).[27] There is no factual basis to conclude adjudication would negatively impact foreign affairs with PNG.[28] Absent these foreign policy concerns in this ***case***, Rio's argument founders.

Second, there is no reason – certainly no basis in fact – to conclude exhaustion would mitigate foreign policy concerns anyway. Assume Plaintiffs were to bring suit in PNG and get dismissed based on PNG's statute of limitations.[29] Plaintiffs would be back in the U.S. adjudicating the same claims, with the same foreign policy concerns post exhaustion. Op. at 4167 n.31.

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[27] The NFTC incorrectly states the U.S. objects to this suit. NFTC at 9.

[28] *Tel-Oren*, 726 F.2d at 789 ("If Congress determined that aliens should be permitted to bring actions in federal courts, only Congress is authorized to decide that those actions 'exacerbate tensions' and should not be heard.").

[29] PNG's statute of limitations bars Plaintiffs' claims if asserted in PNG today. (ER 1441-53, 1717.)

Or, assume Plaintiffs brought claims in PNG and the claims were heard. According to Rio, if Plaintiffs are dissatisfied with the ruling they could then assert ATCA claims here. The ATCA, as Rio postulates, becomes a global habeas statute whereby U.S. courts review, and ostensibly correct, foreign adjudications. This conception runs the judiciary headfirst into issues of comity and renders the ATCA "stillborn" contrary to Congress's intent, *Sosa*, 542 U.S. at 714. It also introduces more complexity and greater potential for litigation and hence the possibility of even greater international friction. There will be questions about standards for judging procedures that should be exhausted; whether notice is required to federal courts showing attempts to exhaust are being implemented to protect ATCA rights, tolling requirements and time limitations for exhaustion; *res judicata* and collateral estoppel effects, if any; and collateral litigation concerning each of these issues along with evaluations of the foreign fora due process protections. With these considerations present the Supreme Court mandates further congressional action before judicially imposing any exhaustion requirement. *Patsy*, 457 U.S. at 514.

Perhaps more importantly, imposition of a federal exhaustion requirement on ATCA claims would not prevent Plaintiffs from asserting tort claims in California state court – a court that would probably have general jurisdiction over Rio. (ER 7,

19-23.) That state tort action, which would arise from the same conduct and facts, does not require exhaustion of local remedies.[30]

Additionally, consideration of foreign affairs was itself the fourth reason *Sosa* gave for imposing the "restrained conception" of judicial common law discretion for enforcing "***new*** private causes of action for violating international law." 542 U.S. at 727 (emphasis added). A reason for adopting this more restrictive legal standard of judicial discretion than the Court would otherwise have adopted cannot become a distinct legal standard that gets double-counted on the scales of justice. *Sosa* weighed and struck the proper balance between individual rights and foreign policy in arriving at its "restrained" version of judicial common law discretion, which is the same "restrained" version of discretion this Court has long employed. Abstract considerations concerning foreign affairs did not compel the *Sosa* to engraft an exhaustion requirement onto the ATCA. To do so now (based on a consideration and factor that the Supreme Court considered in its calculus) improperly alters the sensitive and careful balance struck by *Sosa*'s holding.

Lastly, *Alperin v. Vatican Bank*, 410 F.3d 555 (9th Cir. 2005), does not further Rio's cause; adjudication of Plaintiffs' claims will ***not*** "make a retroactive

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[30] *Tel-Oren*, 726 F.2d at 790 (noting intent of the ATCA was "to provide an *alternative* forum to state courts" because ATCA cases potentially implicate foreign affairs) (emphasis in original); *Marcos II*, 978 F.2d at 502-03 (same).

political judgment as to the conduct of war." Rio at 10.[31] The retroactive political judgment in *Alperin* was to prosecute Vatican Bank for its assistance of an Axis regime during WWII – an armed international conflict – where the U.S. had already chosen which wartime enemies to prosecute for war crimes and, for whatever reason, did not bring claims against Vatican Bank when it asserted claims against other Axis collaborators arising out of the facts plaintiffs alleged. Prosecutorial discretion is a political judgment. In contrast, here, the U.S. was not involved in the armed conflict, did not and has not sought to resolve or involve itself in any way in the affairs in Bougainville, nor attempted to prosecute Plaintiffs' claims.

The Supreme Court recently confirmed that the federal judiciary "assuredly" has a role to play when claims are asserted stemming from wartime conduct.

> Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.

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[31] *Alperin* is a political question case. Rio has not petitioned to review this issue. Plaintiffs fail to understand how *Alperin* relates to exhaustion except to note that *Alperin* did not require exhaustion. Regardless, *Alperin* does not preclude claims arising from wartime conduct. This Court limited *Alperin* to the specific facts and WWII – a formally declared, international armed conflict – stating "courts are not powerless" to review wartime actions (410 F.3d at 559 n.17), and the "holding does not signify that slave labor claims automatically raise" nonjusticiable issues. *Id.* at 562 n.20. *Alperin* took a "surgical approach," "examine[d] each of the claims with particularity," and permitted several claims arising from wartime conduct to proceed. *Id.* at 547-48, 552.

Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004). Moreover, in *Kadic*,[32] which *Alperin* cites with approval, the Second Circuit held the court had "jurisdiction pursuant to [ATCA] over appellants' claims of war crimes." 70 F.3d at 243. This Court's approval of *Kadic* likewise recognizes that claims arising under the laws of war are actionable; because violations occur in the context of armed conflict does not render them nonjusticiable.[33] Otherwise, if it did, in addition to conflicting with *Kadic* – a case *Sosa* cites with approval – *Alperin* would conflict with *Marcos* which *Sosa*

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[32] Like *Kadic*, Plaintiffs assert claims arising from a single, localized conflict against a single entity seeking remedies for its conduct and the specific military conduct that Rio directed, ordered, and controlled; adjudication does not require sorting through the "morass of a world war." *Alperin*, 410 F.3d at 562. Moreover, Plaintiffs have alleged very specific violations of the laws of war, (*e.g.*, ER 1112-21, 1211-13, 1225-30, 1590-91, 2008-32); they do not seek liability for an "entire course of conduct" as NFTC states. NFTC at 9. These war crimes claims include some that are self-executing. *E.g.*, *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 478-79 (D.D.C. 2005) (Third and Fourth Geneva self-executing), *rev'd on other grounds*, *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007). Courts "must enforce [a self-executing treaty right] on behalf of an individual regardless of the offensiveness of the practice of one nation to the other." *United States v. Alvarez-Machain*, 504 U.S. 655, 667 (1992). Further, these Conventions affirmatively permit jurisdiction over claims, regardless of one's nationality, even if the U.S. has no connection to and is not engaged in the armed conflict or occupation during which the offense occurs. Geneva Convention III, art. 129, at 3418, T.I.A.S. No. 3364, at 104, 75 U.N.T.S. at 236; Geneva Convention IV, art. 146, at 3616, T.I.A.S. No. 3365, at 102, 75 U.N.T.S. at 386. Congress's ratification of these Conventions, which provide for universal jurisdiction as do other Conventions, are instances where Congress has "promoted" ATCA suits. Rio at 13. Rio's discussion ignores these Conventions. Rio at 16-17. *See also Sosa*, 542U.S. at 722 ("As Blackstone clarified the relation between positive law and the law of nations, 'those acts of parliament, which have from time to time been made to enforce this universal law, or to facilitate the execution of [its] decisions, are not to be considered as introductive of any new rule, but merely as declaratory of the old fundamental constitutions of the kingdom; without which it must cease to be a part of the civilized world.' 4 Commentaries 67.").

[33] *Rasul v. Bush*, 542 U.S. 466, 484-85 (2004) (ATCA claims challenging acts taken pursuant to War Powers in prosecuting ongoing war against al Qaeda justiciable).

expressly ratified because *Marcos* concerned violations arising from a longstanding armed insurrection in the Philippines.

The Panel correctly limited *Alperin* to the declared enemies of the U.S. in an international armed conflict where the U.S. had 50 years earlier already "made the policy choice not to prosecute" the Vatican Bank for the same alleged war crimes while prosecuting other enemies for war crimes arising out of the same facts. Rio's contention that a distinction based on enemy status is "untenable" (Rio at 10 n.10) is itself untenable. Indeed, Rio ignores the Supreme Court's historic and recent use of the same distinction. *See, e.g., Rasul*, 542 U.S. at 476.

D. *Sosa* Reaffirms Precedent; ATCA Applies Extraterritorially

The U.S. argues at length that Rio's Petition should be granted because ATCA purportedly only applies territorially, and *Sosa* "required" courts to address whether jurisdiction over disputes centered in foreign countries is proper. (USA at 3, 9.)[34] This argument misapprehends *Sosa* and is inapplicable to the facts here.

Sosa rejected the notion that ATCA only applies territorially explaining the First Congress enacted ATCA to address "***conduct ... situated outside domestic boundaries***" and involving "norms governing the behavior of national states." 542

[34] Rio never made this territorial argument to the district court or the Panel, and thus this issue is not before the Court. Equally, neither did the U.S. despite having the opportunity to in its Statement of Interest and subsequent request for clarification in the district court. *See also* UK at 3 (explaining its larger concerns over extraterritoriality were not put at issue in Panel opinion).

U.S. at 714-15 (emphasis added).[35] The U.S.'s territorial argument neglects this discussion which directly bears on Congress's intent and explains the Supreme Court's binding interpretation of that intent.

Moreover, the U.S. likewise ignores the wealth of cases – all ratified by *Sosa* – that directly address conduct of a foreign government or official taken against its citizenry, including *Marcos*.[36] *Marcos* is the Circuit law and has now been ratified

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[35] Accordingly, discussion of Congress's intent and citations to *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991), (*e.g.*, Rio at 9-10; USA at 9-10), are irrelevant. The Court in *Sosa* concluded Congress intended ATCA to apply extraterritorially.

In so doing, the Court noted that the Attorney General's 1795 opinion concluded ATCA applied extraterritorially: "Attorney General William Bradford, who was asked whether criminal prosecution was available against Americans who had taken part in the French plunder of a British slave colony in Sierra Leone.... Bradford was uncertain, but he made it clear that a federal court was open for the prosecution of a tort action growing out of the episode." *Sosa*, 542 U.S. at 721; *Paquete Habana*, 175 U.S. at 700 ("International law is part of our law"); *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160-61 (1820) (same); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 n.25 (1964) (citing ATCA as example of congressional intent to make claims implicating foreign affairs cognizable in federal court).

The U.S. citation to *United States v. Palmer*, 16 U.S. 610 (1818), does not support a contrary interpretation of Congress's intent. Indeed, *Palmer* concerned the criminal prosecution for "piracy" under federal criminal law for a crime "against the United States." USA at 11. *Palmer* said nothing about a CIL tort action, unlike Attorney General Bradford's opinion. Two years after *Palmer* the Supreme Court explained in *Smith*, 18 U.S. (5 Wheat.) at 161-62, that piracy – as the substantive norm is defined under the law of nations not the criminal statute – is punishable and redressable wherever the pirate may be found, as was the "***general practice of all nations***." *Id.* at 162 (emphasis added). Further, the U.S. is mistaken to suggest conduct on the high seas is outside territorial jurisdiction as the floating-territorial principle applies to vessel on the high seas; they are the territory of the flag that registers the vessel. Schachter, INTERNATIONAL LAW IN THEORY AND PRACTICE 245 (1985); Harvard Research in Int'l Law, *Draft Convention and Comment on Piracy,* 26 AM. J. INT'L L. 739, 760-64, 825 (Supp. 1932).

[36] *See, e.g.*, *Filartiga*; *Kadic*; *Aldana*, 416 F.3d at 1250 (*Sosa* ratified Eleventh Circuit's pre-*Sosa* jurisprudence which tracked *Marcos* and *Filartiga*).

by the Supreme Court; there is no room to argue that the ATCA does not apply extraterritorially. Indeed, *Marcos* held, quoting *Filartiga*, ATCA creates federally enforceable rights "for violations of specific, universal and obligatory international human rights standards which 'confer[] fundamental rights upon all people vis-à-vis their own governments.'" 25 F.3d at 1475; *see also Marcos II*, 978 F.2d at 499-500 (rejecting the U.S.'s extraterritoriality argument and considering historical origin of the ATCA).[37] The seminal decision of *Filartiga* is another example of the proper application of *Sosa*, and *Filartiga* concerned a suit by a Paraguayan plaintiff against a Paraguayan official for abuses committed in Paraguay. Thus, the suggested territorial restraint directly conflicts with *Marcos*, *Filartiga* and other cases over the last 24 years that follow *Sosa* and are proper applications of its adopted "cautious" and "***restrained***" legal standard.[38]

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[37] Because the Supreme Court ratified *Marcos*, under *Miller v. Gammie*, 335 F.3d 889 (9th Cir. 2003), which held that a prior panel opinion can only be revisited when a higher court has "undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable," *id.* at 900, *en banc* review based on this extraterritoriality argument is improper. *Sosa* provides no rationale for revisiting *Marcos* or its ATCA progeny. ***Sosa expressly adopted the "same position" most federal courts have "for 24 years***, ever since the Second Circuit decided *Filartiga,*" 542 U.S. at 730-31 (emphasis added), most of which involved actions committed by foreign government officials within their own territories. *Id.* at 730-33. *Sosa* did not "expressly" note that the extraterritorial reach of ACTA was a question for courts to address as the U.S. contends. USA at 13.

[38] The U.S. is focused on disputes arising in a foreign land and concerning government treatment of citizens. (USA at 5-13.) These issues are the province of the act of state doctrine – not ATCA – as it provides the judicial rules when adjudicating official acts of foreign governments committed within their own territory. *Sabbatino*, 376 U.S. at 401. Furthermore, for any court to foreclose all

Lastly, Plaintiffs' claims satisfy traditional territorial jurisdiction for two reasons: (i) Rio is found in the U.S. and the district court has obtained personal jurisdiction over Rio, and (ii) plaintiff Alexis Sarei is a legal resident of the U.S. seeking damages for harm done to him and his murdered son, who was a U.S. citizen. (ER 7, 19-23, 1040.)[39] Even before the American Revolution torts were transitory in that the tortfeasor's wrongful act created an obligation to pay damages that followed him across national boundaries and enforceable wherever found. *McKenna v. Fisk*, 42 U.S. 241, 248 (1843); *Slater v. Mexican Nat'l R. Co.*, 194 U.S. 120, 126 (1904). Under federal common law, Mr. Sarei can assert his tort claims

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ATCA claims concerning conduct in a foreign land and a government's treatment of its citizens would be contrary to *Sabbatino* where the Supreme Court acknowledged courts can adjudicate claims involving the official acts of foreign governments against their own citizens. *Id.* at 428; *see also W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp.*, 493 U.S. 400, 405 (1990); *Kadic*, 70 F.3d at 250 ("it would be a rare case in which the act of state doctrine precluded suit [for claims under ATCA]"); *Liu v. Republic of China*, 892 F.2d 1419, 1432 (9th Cir. 1989); RESTATEMENT FOREIGN RELATIONS § 443 cmt. c (1987).

Similarly, the comity doctrine addresses situations when the exercise of federal jurisdiction over claims arising in foreign lands or involving foreign interests can reasonably be declined. Op. at 4149-53. The doctrine neither impels nor obliges a federal court to decline jurisdiction in a particular case. Instead, the doctrine is premised upon a respect for the acts of another nation balanced by recognition of international duty and convenience, and consideration for the rights of a nation's own citizens and others under the protection of its laws. *In re Simon*, 153 F.3d 991, 998 (9th Cir. 1998). Again, Rio did ***not*** appeal the district court's comity ruling nor seek *en banc* review of the Panel's opinion on this score – which is plainly consistent with existing precedent – thus *en banc* review of comity issues would be improper. Further, Rio's comparison to issues of federalism and internal comity (*e.g.*, habeas and tribal cases) is therefore irrelevant. Rio at 14-15.

[39] Rio, the U.S. and *amici* mischaracterize this case to the extent they do not acknowledge that this case ***also*** concerns harm done to at least one U.S. citizen and a U.S. legal resident. Rio at 1, 11, 17; USA at 3, 5, 8-10, 12-14; U.K. at 2. The U.S. has a direct connection to the conduct in question. *Cf.* USA at 6.

against Rio in any court that can obtain personal jurisdiction over Rio, which the district court has obtained.[40]

CONCLUSION

For these reasons the Court should deny Rio's Petition for rehearing *en banc*.

DATED: June 6, 2007.

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[40] Common law courts adjudicate transitory tort claims, such as those embodied by CIL, no matter where the tort occurs. *Filartiga*, 630 F.2d at 885.

CERTIFICATE OF COMPLIANCE UNDER FED. R. APP. P. 32(A)(7)(C)

Appellants submit this Brief under Rules 32(a)(5) and 32(a)(7)(b) of the Federal Rules of Appellate Procedure. As required by Rule 32(a)(7)(c), by my signature below, I hereby certify that this Brief is written in Times New Roman 14 and the page count is 30, excluding the Table of Contents, Table of Authorities, and the Certificate of Compliance.

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02-56256, 02-56390

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALEXIS HOLYWEEK SAREI, *et al.*,

Plaintiffs-Appellants/Cross-Appellees,

v.

RIO TINTO PLC and RIO TINTO LIMITED,

Defendants-Appellees/Cross-Appellants.

On Appeal from the
United States District Court
for the Central District of California,
Case No. 00-11695-MMM
The Honorable Margaret M. Morrow, United States District Judge

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BRIEF OF *AMICI CURIAE* INTERNATIONAL LAW PROFESSORS IN SUPPORT OF PLAINTIFFS-APPELLANTS' OPPOSITION TO THE PETITION FOR REHEARING EN BANC

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DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER ENTITIES WITH A DIRECT FINANCIAL INTEREST IN LITIGATION

Pursuant to Fed. R. App. P. 26.1, the *Amici* make the following disclosure:

1. Is the party a publicly held corporation or other publicly held entity?

NO.

2. Is the party a parent, subsidiary, or affiliate of, or a trade association representing, a publicly held corporation, or other publicly held entity?

NO.

3. Is there any other publicly held corporation, or other publicly held entity, that has a direct financial interest in the outcome of the litigation?

NO.

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INTEREST OF *AMICI CURIAE*

Amici curiae are professors of international law, U.S. foreign relations law, and international human rights law with expertise regarding the Alien Tort Statute, 28 U.S.C. § 1350 (ATS). While they pursue a wide variety of legal interests, they all share a deep commitment to the rule of law and respect for human rights.[1]

Amici believe that the efforts of the Defendants and the U.S. Justice Department to restrict the nature and scope of the ATS conflict with the text of the statute, the historical record, and well-established case law, including the U.S. Supreme Court's 2004 decision in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). Given their expertise, *Amici* would like to provide the Court with their perspective on these issues. They believe this submission will assist the Court in its deliberations.

SUMMARY OF ARGUMENT

The Defendants and their *amici*, including the U.S. Justice Department, have sought to undermine this Circuit's long-standing approach to ATS litigation by arguing that the ATS does not encompass claims arising in foreign countries. This argument is flatly contradicted by the plain text of

[1] A complete list of *Amici* appears in the Appendix.

the statute and the historical record, which evinces no such locus restriction. It is equally inconsistent with well-established case law issued by this Circuit. It has also been rejected by the U.S. Supreme Court's decision in *Sosa v. Alvarez-Machain.*

The Federal Rules of Appellate Procedure impose a rigorous standard for *en banc* review. *See* Fed. R. App. P. 35 (b). As this Circuit states in its own rules, "[w]hen the opinion of a panel directly conflicts with an existing opinion by another court of appeals and substantially affects a rule of national application in which there is an overriding need for national uniformity, the existence of such conflict is an appropriate ground for suggesting a rehearing en banc." 9th Cir. R. 35-1. There is no federal circuit conflict regarding the extraterritorial reach of the ATS, and the Ninth Circuit's decision in *Sarei v. Rio Tinto, PLC*, 2007 U.S. App. LEXIS 8430 (9th Cir. 2007), comports with the Supreme Court's jurisprudence in *Sosa v. Alvarez-Machain.* The Defendants have thus failed to meet the rigorous standards for *en banc* review. For these reasons, *Amici* respectfully urge this Court to reject the petition for rehearing *en banc*.

ARGUMENT

THE ALIEN TORT STATUTE ENCOMPASSES CLAIMS ARISING IN FOREIGN COUNTRIES

In seeking *en banc* review of the Ninth Circuit's decision in *Sarei v. Rio Tinto, PLC*, the Defendants and the U.S. Justice Department assert that the Alien Tort Statute does not encompass claims arising within the jurisdiction of a foreign sovereign and, therefore, they urge the Court to graft a territorial requirement onto the ATS. Respectfully, the Court should decline their invitation to do so.[2]

As a preliminary matter, the historical record does not support this restrictive approach to the ATS. In 1795, for example, Attorney General William Bradford noted that British citizens injured in a French raid on a British colony had a civil remedy in the courts of the United States through the ATS. *Breach of Neutrality*, 1 Op. Att'y Gen. 57, 59 (1795). *See also Mexico Boundary Diversion of the Rio Grande*, 26 Op. Att'y Gen. 250, 253 (1907) (recognizing possible civil action under the ATS against a U.S. corporation for harm caused to Mexican citizens in Mexico); *Abduction and*

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[2] The Defendants and the Justice Department conflate a sufficient condition for ATS jurisdiction with a necessary one. If an alien were injured by a tortious violation of international law in the United States, subject matter jurisdiction under the ATS would be established. *See, e.g., Moxon v. The Fanny*, 17 F. Cas. 942 (D. Pa. 1793). But it hardly follows that territoriality is a precondition for all exercises of jurisdiction under the ATS.

Restitution of Slaves, 1 Op. Att'y Gen. 29, 30 (1792) (recognizing possible civil action under the ATS where the defendant had committed piracy by stealing slaves from a French colony).

In *Bolchos v. Darrel*, 3 F. Cas. 810 (D.C.S.C. 1795), the first reported case involving the ATS, a French plaintiff sought restitution for the seizure and sale of slaves who had been taken from a captured Spanish prize vessel. Jurisdiction was premised on the ATS. The court found that it had jurisdiction, dismissing "all doubt upon this point." *Id.* at 810. The fact that the claims arose on a Spanish vessel did not preclude the application of the ATS.

The basic error in calling for a locus requirement in ATS litigation is that it fails to recognize the transitory nature of torts. The Framers understood that civil actions sounding in tort were considered transitory because the tortfeasor's wrongful act created an obligation that could follow him or her across national boundaries.[3] This understanding of tort was also well-recognized in the early case law of the U.S. Supreme Court.

> [T]he courts in England have been open in cases of trespass other than trespass upon real property, to foreigners as well as to subjects, and to foreigners against foreigners when found in

[3] *See Cheshire's Private International Law*, 257-261 (8th ed. 1970); *Watts v. Thomas*, 5 Ky. (2 Bibb) 458 (1811); *Stout v. Wood*, 1 Blackf. 71 (Ind. Circ. Ct. 1820); *Mostyn v. Fabrigas*, 1 Cowp. 161 (K.B. 1774).

> England, for trespasses committed within the realm and out of the realm, or within or without the king's foreign dominions.

McKenna v. Fisk, 42 U.S. 241, 249 (1843). *See also United States v. Palmer*, 16 U.S. (3 Wheat.) 610 (1818). Indeed, the transitory nature of torts reflects the general acceptance that a state or nation has a legitimate interest in the orderly resolution of disputes within its borders. *Filartiga v. Pena-Irala*, 630 F.2d 876, 885 (2d Cir. 1980).

One reason that the drafters of the First Judiciary Act sought federal review of transitory torts involving claims of international law through the ATS was to ensure uniformity in matters pertaining to foreign affairs. According to the Justice Department in its 1980 submission to the Second Circuit in *Filartiga v. Pena-Irala*, the ATS "is one of several provisions of the Judiciary Act 'reflecting a concern for uniformity in this country's dealings with foreign nations and indicating a desire to give matters of international significance to the jurisdiction of federal institutions.'" Memorandum for the United States as Amicus Curiae, *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (No. 79-6090) *reprinted in* 19 ILM 585, 588 (1984) (*quoting Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 (1964)).

Another reason that the drafters of the First Judiciary Act sought review of transitory torts through the ATS was to fulfill the nation's duty to

enforce international law. Considered in its historical context, the ATS "was a direct response to what the Founders understood to be the nation's duty to propagate and enforce those international law rules that directly regulated individual conduct." Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 Am. J. Int'l L. 461, 475 (1989). As several courts have properly observed, "[b]ecause of the nature of the alleged acts, the United States has a substantial interest in affording alleged victims of atrocities a method to vindicate their rights." *Presbyterian Church of Sudan v. Talisman Energy, Inc.,* 244 F. Supp. 2d 289, 340 (S.D.N.Y. 2003).

It is not surprising, therefore, that efforts to add a locus requirement to the ATS have been explicitly rejected by the courts. In *Trajano v. Marcos*, 978 F.2d 493 (9th Cir. 1992), this Circuit rejected such a restriction. "[W]e are constrained by what § 1350 shows on its face: no limitations as to the citizenship of the defendant, or the locus of the injury." *Id.* at 500. Indeed, the Defendants and the Justice Department would be unable to find support in any Ninth Circuit decision for the proposition that the ATS does not encompass claims arising in a foreign country. *See, e.g., In re Estate of Marcos, Human Rights Litig.*, 25 F.3d 1467 (9th Cir. 1994); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992).

In *Sosa v. Alvarez-Machain*, the Justice Department submitted an *amicus* brief to the U.S. Supreme Court where it argued that ATS claims could not be based on conduct against aliens in foreign countries. Brief for the United States Supporting Petitioner at 53-57, Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) (No. 03-339). And yet, the Court declined to accept this argument. While *Sosa* involved an ATS claim based on conduct occurring in a foreign country, the Supreme Court did not find this point relevant in determining whether the claim was viable. Indeed, the *Sosa* decision is replete with references, and cites approvingly, to ATS cases involving claims arising in a foreign country, including *Filartiga v. Pena-Irala*, 630 F.2d at 877, *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 776 (D.C. Cir. 1984), and *In re Estate of Marcos, Human Rights Litig.*, 25 F.3d at 1469. It is, therefore, disingenuous to suggest that *Sosa* limits the extraterritorial reach of the ATS.

Congress has also acknowledged the extraterritorial reach of the Alien Tort Statute. When Congress considered adopting the Torture Victim Protection Act in 1991, it reviewed the ATS and existing case law, including *Filartiga v. Pena-Irala*. Both the House and Senate reports observed that the ATS and the *Filartiga* precedent should remain intact to permit suits involving violations of international human rights norms. *See* H.R. Rep. No.

367, 102d Cong., 1st Sess., pt. 1, at 4 (1991); S.Rep. No. 249, 102d Cong., 1st Sess., at 3. *See also Wiwa v. Royal Dutch Petroleum Company*, 226 F.3d 88, 104 (2d Cir. 2000); *Abebe-Jira v. Negewo*, 72 F.3d 844, 848 (11th Cir. 1996); *In re Estate of Marcos Human Rights Litigation*, 25 F.3d at 1475-1476.

Finally, prior statements by the Executive branch cast doubt on efforts to graft a locus requirement to the ATS. In 1980, the United States submitted an *amicus* brief to the Second Circuit in *Filartiga v. Pena-Irala* which recognized the extraterritorial reach of the ATS. Memorandum for the United States as Amicus Curiae, *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (No. 79-6090). In 1995, the United States submitted another *amicus* brief to the Second Circuit in *Kadic v. Karadzic*, where it embraced the *Filartiga* analysis that the ATS could address violations of international law committed in foreign countries. Brief of the United States as Amicus Curiae at 4, *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995) (Nos. 94-9035, 9409069). In 2000, the State Department declared to the U.N. Committee against Torture that "U.S. law provides statutory rights of action for civil damages for acts of torture *occurring outside the United States*. One statutory basis for such suits, the Alien Tort Claims Act . . . represents an early effort to provide a judicial remedy to individuals whose rights had

been violated under international law." U.N. Committee against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: United States of America, U.N. Doc. CAT/C/28/Add.5 (2000), at para. 277 (emphasis added). It is difficult to reconcile these statements with the arguments now proffered by the Defendants and the Justice Department in this case.[4]

In sum, the arguments set forth by the Defendants and the U.S. Justice Department are unpersuasive. They contradict the express terms of the statute and do not comport with the historical or modern record. They invite the courts to amend the ATS without considering the views of Congress, which not only adopted the ATS in 1789 but affirmed it with the adoption of the Torture Victim Protection Act of 1991. And, they conflict with the case law of this Circuit and of the U.S. Supreme Court.

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[4] *See also* Testimony of Abraham Sofaer, the State Department's Legal Adviser, with respect to the Convention against Torture. "The Administration . . . believes . . . that, as a member of the international community, we must stand with other nations in pledging to bring to justice those who engaged in torture, *whether in U.S. territory or in the territory of other countries*." U.N. Convention on Torture, Hearings before the Committee on Foreign Relations, U.S. Senate, 100th Cong., 2d Sess. (Jan. 30, 1990), at 8 (emphasis added).

CONCLUSION

The Defendants have failed to meet the rigorous standards for *en banc* review. There is simply no circuit conflict regarding the extraterritorial reach of the ATS, and the Ninth Circuit's decision in *Sarei v. Rio Tinto, PLC* comports with its own jurisprudence as well as the Supreme Court's decision in *Sosa v. Alvarez-Machain*. For the foregoing reasons, *Amici* respectfully request that this Court reject the petition for rehearing *en banc*.

June 6, 2007

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