Nos. 02-56256, 02-56390

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

JOHN B. BELLINGER, III
Legal Adviser
State Department

JEFFREY S. BUCHOLTZ
Acting Assistant Attorney General

DEBRA WONG YANG
United States Attorney

DOUGLAS N. LETTER
Appellate Litigation Counsel

ROBERT M. LOEB, (202) 514-4332
LEWIS S. YELIN, (202) 514-3425
Attorneys, Appellate Staff
Civil Division, Room 7318
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES & TREATIES

OTHER AUTHORITIES

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]

[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

[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

---

[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

[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.

---

[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

[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.

[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,

JOHN B. BELLINGER, III
Legal Adviser
State Department

JEFFREY S. BUCHOLTZ
Acting Assistant Attorney General

DEBRA WONG YANG
United States Attorney

DOUGLAS N. LETTER
Appellate Litigation Counsel

ROBERT M. LOEB, (202) 514-4332
LEWIS S. YELIN, (202) 514-3425
Attorneys, Appellate Staff
Civil Division, Room 7318
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

Attorneys for the United States

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

CERTIFICATE OF SERVICE

I certify that on this 28th day of September, 2006, I caused the foregoing Brief for the United States as Amicus Curiae Supporting Panel Rehearing or Rehearing en Banc to be filed with the Court and served on counsel by causing an original and 50 copies to be delivered by OVERNIGHT DELIVERY to:

Cathy A. Catterson
Clerk of Court
U.S. Court of Appeals
for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103
(415) 556-9800

and by further causing two copies to be delivered by OVERNIGHT DELIVERY to:

Steve W. Berman
R. Brent Walton
Nick Styant-Browne
Hagens Berman LLP
1301 Fifth Avenue, Ste. 2900
Seattle, WA 98101
(206) 623-7292

James J. Brosnahan
Jack W. Londen
Peter J. Stern
Morrison & Foerster, LLP
425 Market Street
San Francisco, CA 94105
(415) 268-7000

Lewis S. Yelin
Attorney for the United States