international terrorism" to sue for damages. The government noted that (like the ATS), section 2333(a) creates a common law tort claim and "precisely specifies the range of possible plaintiffs, but . . . in no way restricts . . . the range of possible defendants." *Brief for the United States as Amicus Curiae Supporting Affirmance* ("*Boim* Br.") at 9.[14] Thus, any restrictions on who may be held liable "must arise, if at all, from background tort principles that Congress presumably intended to incorporate." *Id.* at 10. As the government argued, "those principles include aiding/abetting liability." *Id.* at 9. The Seventh Circuit adopted the government's reasoning practically verbatim. 291 F.3d at 1010.

Critically, the government used the *same* standard of aiding-and-abetting as the Panel here: liability arises "when the defendant knowingly and substantially assisted tortious conduct." *Boim Br.* at 9. Just as "settled principles of civil liability" allowed aiding-and-abetting liability under section 2333(a), *id.* at 10, such principles likewise apply to claims under the ATS. Federal common law agency, joint venture, and recklessness standards also apply for the same reason. The government nowhere even mentions these theories of liability.

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[14] *Available at* http://pdfserver.amlaw.com/nlj/061702dow-amicus.pdf.

B. The Government's Reliance on *Central Bank* is Misplaced.

Contrary to the government's argument, *Central Bank of Denver v. First Interstate Bank*, 511 U.S. 164 (1994), does not preclude recognition of aiding-and-abetting liability. *Central Bank* rejected aiding-and-abetting liability in the entirely different context of violations of the Securities Exchange Act. The Supreme Court's holding was based on the text of Section 10(b) of the Act, which prohibited the use of any "manipulative or deceptive device or contrivance" in connection with a securities transaction. Because aiders and abettors did not themselves use any manipulative or deceptive device or contrivance, the Court found no liability. 511 U.S. at 175. The Court specifically held that this language in Section 10(b) "resolves the case," 511 U.S. at 178, and expressly limited its holding to the securities context, *id.* at 182.

In contrast, both the text and congressional intent of the ATS support aiding-and-abetting liability. Given international law's express prohibition on aiding-and-abetting gross human rights abuses, a person who does so has himself committed a tort in violation of international law and is therefore liable by the statute's plain terms. *Appellants' Supp. Br.* at 18-19; *see also* Military Commission Instruction No.2, Art. 6(C)(abettor is responsible "as a principal, even if another individual more directly perpetrated the offense.")

Moreover, the ATS recognizes a federal common law tort cause of action. Thus, Congress has authorized federal courts to develop common law rules of liability where the underlying abuse violates an international norm that is "specific, universal, and obligatory." In *Boim*, the Government argued and the Seventh Circuit held that *Central Bank* was inapposite, in part precisely because Congress intended "to import general tort law principles, and those principles include aiding-and-abetting liability." 291 F.3d at 1019. The Seventh Circuit also observed that the Supreme Court "carefully crafted *Central Bank*'s holding to clarify that aiding-and-abetting liability would be appropriate in certain cases, albeit not under 10(b)." 291 F.3d at 1019. Thus, the United States' argument that *Central Bank* stands for some broad presumption against imposing civil aiding-and-abetting liability in any context is both disingenuous and unfounded.

Finally, while *Central Bank* expressed concern that imposing aiding-and-abetting liability in the securities context might lead to excessive deterrence and therefore inefficient markets, 511 U.S. at 188, *Boim* found such arguments inapplicable to "cutting off the flow of money to terrorists." 291 F.3d at 1019. Economic efficiency concerns are similarly inapplicable to aiding-and-abetting liability for rape, torture, and crimes against humanity.

Courts have correctly rejected the argument that *Central Bank* precluded aiding-and-abetting liability in the context of ATS claims, based on the text of the ATS, and the existence of other ATS cases specifically upholding such liability. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289 (S.D.N.Y. 2003).

C. "Practical Consequences" Do Not Counsel Against The Recognition of Aiding-and-Abetting Liability.

Although the government cannot argue that this litigation will interfere with United States relations with Burma, it nonetheless argues that because in its view similar lawsuits alleging aiding-and-abetting might cause problems with other foreign governments, this norm should not be recognized. This argument should be rejected as contrary to the "case-specific" methodology established by the Supreme Court. 124 S. Ct. at 2766 & n.21. In any event, the government's argument regarding the "practical consequences" of allowing aiding-and-abetting liability is implausible, since it asserts that preventing corporations from abetting human rights violations will preclude economic engagement with oppressive governments. Corporations that do not aid and abet abuses would not be deterred from doing business in such countries.

1. The Government Misconstrues the Notion of "Practical Consequences" in *Alvarez*.

The Supreme Court was clear that foreign policy concerns must be addressed on a "case-specific" basis. 124 S. Ct. at 2766 & n.21. Rather than argue that such case-specific dismissal is appropriate here, the government impermissibly attempts to make a broad foreign policy argument under the guise of "practical consequences." That analysis is irrelevant.

The *Alvarez* Court held that the "practical consequences" inquiry is relevant to "the determination whether a norm is *sufficiently definite* to support a cause of action." 124 S. Ct. at 2766 (emphasis added). The Court applied this rule in stating that the implications of the proposed norm against simple arbitrary arrest were "breathtaking" in that it would support a cause of action "for the violation of any limit that the law of any country might place on the authority of its own officers to arrest." *Id.* at 2768.

Thus, the Supreme Court looked to the *legal significance* of the proposed norm, noting that the practical consequences of recognizing it entailed potential liability based on minor violations of local law. By contrast, the government's claim that aiding-and-abetting liability might interfere with U.S. foreign policy in future, hypothetical cases is not an argument that the norm is so broad as to be judicially unmanageable. The facts here fall under a norm against aiding-and-

abetting that is uniform worldwide and reaches conduct that even the government is unwilling to defend.

Indeed, the Court was explicit that "practical consequences" is a separate inquiry from "case-specific" foreign policy analysis. In a footnote immediately following its language on "practical consequences," the Court suggested that "case-specific deference to the political branches" was "*[a]nother* possible limitation." *Id.* at 2766 n.21 (emphasis added).

The government theorizes that recognition of aiding-and-abetting might "deter many businesses from . . . economic engagement because of fear of potential liability," *U.S. Br.* at 11, or even deter "trade and investment more generally," *id.* at 16. But instead of fitting its argument into the *Alvarez* framework by showing how the norm against aiding-and-abetting has similar flaws to the proposed norm against arbitrary arrest, it asks this Court to accept its suppositions regarding the acts that private individuals might or might not take as a result of recognition of the norm. They can point to no analogous reasoning in *Alvarez*, because the Supreme Court did not engage in a similar flight of fancy.

2. The Government's Parade of Horribles is Implausible.

Even accepting that consideration of these types of purported consequences is proper, the government's position is implausible. U.S. corporations and

individuals are already subject to criminal prosecution for aiding-and-abetting torture, genocide, and war crimes *even when committed abroad*, *see* 18 U.S.C. §§ 2, 1091, 2340A, 2441, as well as for aiding-and-abetting forced labor[15] and numerous other crimes. *See, e.g.*, *id.* §§ 2, 1589. They are also subject to highly developed regulatory and tort regimes in many foreign countries, which impose liability for conduct far less egregious than that challenged here. Yet corporations manage to continue operating abroad, presumably because the vast majority would not even consider doing what Unocal did. Recognizing narrow civil liability for conduct that already violates international and domestic law would not deter legitimate investment. Corporations rarely decline potentially profitable business opportunities due to the mere possibility of tort liability.

Furthermore, the proposed aiding-and-abetting norm at issue here only reaches conduct that *knowingly* assists in the commission of serious human rights abuses. Thus, aiding-and-abetting is not a strict liability offense, such that a corporation may suddenly find itself aiding-and-abetting without realizing it. Plaintiffs have never contended, and this norm does not entail, that those who

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[15] No court has considered whether the criminalization of forced labor, applies extraterritorially; nonetheless, the immigration code makes any "knowing aider [or] abettor" of "severe forms of trafficking in persons," which include forced labor, inadmissible to the United States. *See* 8 U.S.C. § 1182(a)(2)(H)(I); 22 U.S.C. § 7102(8)(B).

simply invest in or do business with an abusive regime are liable for aiding and abetting. Instead, plaintiffs challenge Unocal's conduct in providing assistance to the Burmese military knowing the military would commit widespread forced labor and other abuses *on Unocal's behalf.*

The government fails to provide any examples in which corporations have failed to engage in desirable economic investment due to fears that they may be knowingly providing substantial assistance in the commission of serious human rights abuses. Nor does the government suggest it would ever encourage conduct that knowingly assists in the commission of human rights abuses. Congress has moved in exactly the opposite direction, taking specific action to prevent such conduct in the very context at issue here. In the Burmese Freedom and Democracy Act of 2003, which imposed an import ban on Burmese products, Congress specifically heeded the ILO's call that "governments, employers, and workers organizations take appropriate measures to ensure that their relations with the [Burmese military] do not abet the government-sponsored system of forced, compulsory, or slave labor in Burma." Pub. L. No. 108-61, § 2(10), 117 Stat. 864, 865 (2003).

It is simply implausible to suggest that the recognition of a cause of action for aiding-and-abetting violations of international law—conduct that is already

criminal, that requires *knowing* assistance in the commission of severe human rights abuses, and that is *condemned* by Congress—would have any substantial affect in deterring legitimate trade and investment.

The government also ignores the damaging effects of the ruling it seeks. A holding that an American company cannot be held liable in a U.S. court for abetting a pariah regime would be exactly the kind of decision the government argued in *Filartiga* "might seriously damage" our nation's credibility regarding human rights. Moreover, in prosecuting the war on terrorism, the United States is justifiably asking other countries not to serve as safe havens for egregious international law violators. If we expect others to comply, the United States cannot do otherwise within its own borders.

3. Case-Specific Deference is Sufficient to Address the Government's Political Concerns.

The government argues that aiding-and-abetting will lead to "greater diplomatic friction," *U.S. Br.* at 15, "trigger foreign government protests,"[16] *id.* at 16, and impede the government's promotion of "[c]onstructive engagement strategies," *id.* at 12. These are all the sort of concerns that the government raised in *Alvarez*, and that the Court held are appropriately addressed, if at all, under the

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[16] Although the government asserts that such protests occur "often," it fails to cite even a single example of such a protest. *U.S. Br.* at 16.

Court's suggestion of "case-specific deference to the political branches." 124 S. Ct. at 2766 n.21. Indeed, the government uses the very example cited by the Court in its discussion of such deference—suits arising out of activities in apartheid South Africa—to support its "practical consequences" argument. *U.S. Br.* at 12 & n.4 (citing *Alvarez*, 124 S. Ct. at 2766 n.21).

The government does not suggest that case-specific deference is warranted here,[17] or even that this suit will create problems for U.S. relations with Burma.[18] The government concedes that the United States does not currently promote business investment in Burma. *U.S. Br.* at 13. Indeed, the United States bans *all* new investment in Burma, *see* Exec. Order No. 13,047, 62 Fed. Reg. 28301 (May 22, 1997), prohibits *all* imports from Burma, *see* Burmese Freedom & Democracy Act of 2003, Pub. L. No. 108-61, § 3(a), 117 Stat. 864, 865–67 (2003), and the

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[17] This refusal to argue for case-specific deference forecloses Unocal's argument that such deference is appropriate *See Defs.' Br.* at 24.

[18] The government does note that Congress intended "'to provide the President with flexible and effective authority over economic sanctions against Burma,'" *U.S. Br.* at 14 (quoting *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 374 (2000)), but this case has nothing to do with investment sanctions. Even if Congress had intended to "encourag[e] reform through investment," the allegations here that Unocal "is knowingly taking advantage of and profiting from SLORC's practice of using forced labor and forced relocation, in concert with other human rights violations," lie far from that goal. *Doe v. Unocal Corp.*, 963 F. Supp. 880, 895 n.17 (C.D. Cal. 1997); *see also Nat'l Coalition Gov't*, 176 F.R.D. at 355 n.31.

State Department previously told then–District Judge Paez that the case would not prejudice or impede the conduct of U.S. foreign relations with the current government of Burma." *National Coalition Gov't of the Union of Burma v. Unocal, Inc.*, 176 F.R.D. 329, 362 (C.D. Cal. 1997).

Instead, the government argues that because such political questions *might* arise in *other* cases, the entire notion of aiding-and-abetting should be rejected. The government fails to explain why case-specific deference, as suggested by the Supreme Court, would be inadequate to deal with a case in which aiding and abetting liability is inconsistent with the political goals of the United States (or with a political process of accountability for human rights abuses, such as in South Africa).

In any event, if the aiding-and-abetting liability really did broadly affect foreign policy, it is up to Congress, not the Executive or the Courts to rewrite the statute. *See Alvarez*, 124 S. Ct. at 2765 (Congress may "may modify or cancel any judicial decision so far as it rests on recognizing an international norm"); *Japan Whaling Assn. v. American Cetacean Soc.*, 478 U.S. 221, 230 (1985)(Courts cannot shirk responsibility to interpret statutes merely because decision may affect foreign relations). This is surely why the Court held foreign policy dismissal must be "case-specific."

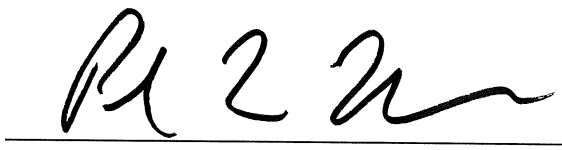
In short, the "practical consequences" of recognizing a cause of action for aiding-and-abetting are simply that those who knowingly assist in the commission of severe human rights abuses will be held liable. Rather than deter legitimate investment, such a norm would deter the kind of direct and substantial support for egregious human rights violations this country regularly condemns in its public and private diplomacy. The government's argument is simply a back-door attempt to renew its blanket opposition to the ATS.

CONCLUSION

For all of these reasons, the government's proposed construction of the ATS should once again be rejected.

Dated: September 15, 2004

Respectfully submitted,



By Paul L. Hoffman
Terrence C. Collingsworth
Attorneys for the *Doe* and *Roe*
Plaintiffs and Appellants

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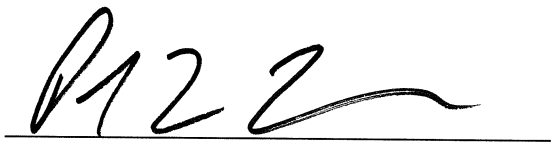
Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I hereby certify that this brief complies with the type-volume limitation in Rule 32(a)(7)(B). The foregoing brief is presented in Times New Roman 14 point font. The word count for the brief (as calculated by Word Perfect 10.0 word-processing program, excluding exempt material) is 6,934, and is under the 7,000 word limitation. The 7,000 word limit is derived from Ninth Circuit Rule 32-3, which expressly permits the conversion of a page limitation set by order into a word-count limit of 280 words per page.



By Paul L. Hoffman
Attorney for Appellants

SERVICE LIST

ATTORNEY FOR DEFENDANTS

Daniel M. Petrocelli
M. Randall Oppenheimer
Wallace M. Allan
O'MELVENY & MEYERS LLP
1999 Avenue of the Stars
Los Angeles, California 90067
Fax: (310) 246-8550
Century City Office Fax:
(310) 246-6779

ATTORNEYS FOR UNITED STATES

Douglas N. Letter
(202) 514-3602
Robert M. Loeb
(202) 514-4332
Attorneys, Appellate Staff
Civil Division, Room 7268
Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

William Howard Taft, IV
Legal Adviser
Department of State
Washington, D.C. 20510

Daniel Meron
Acting Assistant Attorney General

ATTORNEYS FOR PLAINTIFF JOHN DOE

DAN STORMER (S.B. #101967)
ANNE RICHARDSON (S.B. 151541)
HADSELL & STORMER, INC.
128 North Fair Oaks Avenue, Suite 204
Pasadena, CA 91103
Tel: 626-585-9600
Fax: 626-577-7079

JUDITH BROWN CHOMSKY
P.O. Box 29726
Elkins Park, PA 19027
Tel: 215-782-8367
Fax: 215-782-8368

RICK HERZ
KATHARINE J. REDFORD
EARTHRIGHTS INTERNATIONAL
1612 K St. N.W., Suite 401
Washington, D.C. 20006
202-466-5188

JENNIFER M. GREEN
BETH STEPHENS
CENTER FOR
CONSTITUTIONAL RIGHTS
666 Broadway, 7th floor
New York, NY 10012
212-614-6464

ATTORNEYS FOR PLAINTIFF JOHN ROE

JOSEPH C. KOHN
MARTIN J. D'URSO
KOHN, SWIFT & GRAF, P.C.
One South Broad Street, Suite 2100
Philadelphia, PA 19107-3389
Tel: (215) 238-1700
Fax: (215) 238-1968

CRISTOBAL BONIFAZ
JOHN C. BONIFAZ
LAW OFFICES OF CRISTOBAL BONIFAZ
48 North Pleasant Street
P.O. Box 2488
Amherst, MA 01004-2488
413-253-5626

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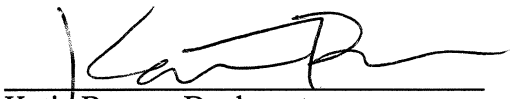

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