Docket Nos. 00-56603, 00-56628, 00-57195, 00-57197

Argued: June 17, 2003

Before: Hon. Mary M. Schroeder, Hon. Stephen R. Reinhardt, Hon. Alex Kozinski, Hon. Pamela A. Rymer, Hon. Thomas G. Nelson, Hon. A. Wallace Tashima, Hon. Susan P. Graber, Hon. M. Margaret McKeown, Hon. William A. Fletcher, Hon. Raymond C. Fisher, and Hon. Johnnie B. Rawlinson

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IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN DOE I *et al.*, Plaintiffs-Appellants,

v.

UNOCAL CORPORATION *et al.*, Defendants-Appellees.

JOHN ROE III *et al.*, Plaintiffs-Appellants,

v.

UNOCAL CORPORATION *et al.*, Defendants-Appellees.

On Appeal from the United States District Court
For the Central District of California
Honorable Richard A. Paez and Honorable Ronald S.W. Lew, District Judges
Nos. CV-96-6959 and CV-96-6112

SUPPLEMENTAL REPLY BRIEF OF DEFENDANTS-APPELLEES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

U.S. CASES

INTERNATIONAL CASES

TABLE OF AUTHORITIES

U.S. STATUTES

OTHER SOURCES & AUTHORITIES

Plaintiffs' Supplemental Brief ("Pls.' Supp. Br.") confirms that their claims are not actionable under the ATS following *Sosa v. Alvarez-Machain,* 124 S. Ct. 2739 (2004).

I. FORCED LABOR IS NOT ACTIONABLE.

Plaintiffs' brief rehashes pre-*Sosa* arguments and inadmissible testimony of their paid expert, Virginia Leary, *compare* Pls.' Supp. Br. at 4-12, *with* EOR 153-184, asserts that the cautionary language in *Sosa* can be ignored, and pretends that this Court can continue to analyze ATS claims in precisely the same method as did *Filartiga v. Pena-Irala,* 630 F.2d 876 (2d Cir. 1980), and other federal courts. *See* Pls.' Supp. Br. at 2. They are wrong.[1]

Plaintiffs falsely claim that *Sosa* did not criticize "a single case in which international norms had been recognized as meeting" the universal, specific, and obligatory standard. Pls.' Supp. Br. at 2-3. In fact, *Sosa* rejected prior federal cases that took too "assertive view of federal judicial discretion" under the ATS. 124 S. Ct. at 2768 & n.27. For example, *Filartiga*– like plaintiffs here – relied upon the International Covenant on Civil and Political Rights ("ICCPR"), Dec. 19, 1996, 999 U.N.T.S. 171. *See Filartiga,* 630 F.2d at 884; Pls.' Supp. Br. at 10.

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[1] *See* Appendix A hereto (state court designation indicating plaintiffs have paid Leary $400 per hour to render her testimony). The legal conclusions of plaintiffs' paid expert are, of course, patently inadmissible. *See* Defendants' Objections to Plaintiffs' Evidence, SER 11685-92; *Crow Tribe of Indians v. Racicot*, 87 F.3d 1039, 1045 (9th Cir. 1996).

Sosa rejected the ICCPR as having "little utility." 124 S.Ct. at 2767. *Filartiga*–like plaintiffs here – also relied on national constitutions as evidence of a norm of customary international law. *See* Pls.' Supp. Br. at 7; *Filartiga,* 630 F.2d at 884. *Sosa* rejected a similar argument. *See* 124 S. Ct. at 2768 n.27.[2]

As plaintiffs concede, the *Restatement (Third) of Foreign Relations Law* does not list forced labor as a violation of customary international law, Pls.' Supp. Br. at 3, or among the norms that *might* some day achieve the status of customary international law. *See Restatement* § 702 cmts. a, j, k, and l.

Rather, in search of a specific, universal, and binding norm of international law, plaintiffs retreat to the definitions of forced labor contained in ILO Conventions No. 29 and 105. However, as we discussed, many nations, including the United States, China, Japan, Korea, the Philippines, Vietnam, and Myanmar have refused to ratify one or both of the Conventions. *See* Defs.' Supp. Br. at 11.

Plaintiffs retort that no government positively endorses forced labor. *See* Pls.' Supp. Br. at 4, 7. Not only does this move reverse *Sosa's* heavy presumption against finding new norms of international law, it fails of its own weight. At the time these claims arose (1993-1996), the constitutions and laws of a number of nations, including Angola, Sierra Leone, and Vietnam, affirmatively allowed for

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[2] Plaintiffs also rely on an ILO finding that forced labor was widespread in Myanmar. *See* Pls.' Supp. Br. at 7. *Sosa* held that such findings are "not addressed to our demanding standard of definition." 124 S. Ct. at 2769 n.29.

forced labor, and dozens of other nations engaged in forced labor. *See* Defs.' Br. at 13-14 n.13. Moreover, signatory nations are permitted to denounce and withdraw from the ILO conventions, and two nations – Singapore and Malaysia – have denounced Convention No. 105. *See* Defs.' Br. at 11.

The European cases plaintiffs discuss undermine their argument that the definitions contained in the ILO conventions are part of customary international law and are universally binding. Plaintiffs are wrong that, in *E.O. v. Openbaar Ministerie, Netherlandshe Jurisprudentie (NJ) 1995/619* (1995),[3] the Netherlands Supreme Court addressed only whether Convention No. 29 is self-executing. *See* Pls.' Br. at 9 n. 12. *E.O.* held that, even assuming a violation of Convention No. 29, the definition of forced or compulsory labor in the Convention does not "provide[] standards that are specific enough to be applied directly, and that are, therefore, *universally binding*." NJ 1995/619 ¶ 6.2 (emphasis added). Similarly, the court in *Van de Mussele v. Belgium*, 6 E.H.R.R. 163 (1984), implicitly held that the definition of forced labor in Convention No. 29 is *not* universally binding. *See id.* at 173 (ILO conventions are binding on "nearly all" member states of the

[3] In their Motion to Strike Defendants' Supplemental Brief – which this Court denied – plaintiffs objected to the version of *E.O.* attached to defendants' brief. To eliminate any questions regarding this authority, defendants attach hereto as Appendix B a certified translation of *E.O.* published in *Netherlandse Jurisprudentie,* the most authoritative publication of case law available in the Netherlands. *See* Declaration of Elizabeth Van Schilfgaarde ¶¶ 3-4 (attached as Appendix C.)

Council of Europe).

Finally, plaintiffs argue that certain unilateral U.S. trade policies reflect a customary international law norm against forced labor. *See* Pls.' Supp. Br. at 11. While some developed countries have argued core labor rights, including forced labor, should be matters for consideration in trade policy, this "controversial" proposal has not been accepted by the WTO. *See* Trade and Labor Standards Subject of Intense Debate, *available at* http://www.wto.org/english/thewto_e/minist_e/min99_e/english/about_e/18lab_e.htm. There is no specifically defined, universal, and binding norm against forced labor actionable under the ATS.[4]

II. PLAINTIFFS' ADDITIONAL CLAIMS ARE NOT ACTIONABLE.

Sosa precludes plaintiffs' last-ditch effort to resurrect their claims for crimes against humanity, torture, and extrajudicial killing. *See* Pls.' Supp. Br. at 12-14. Even aggressive advocates of criminal prosecutions under international law concede that the definition of "crimes against humanity" is "unclear," "shrouded in ambiguity," and "inconclusive." *See, e.g.,* Sharon A. Healey, *Prosecuting Rape*

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[4] Plaintiffs falsely suggest that in its *Amicus Curiae* brief ("U.S. Supp. Br."), the United States confirmed that forced labor is an actionable violation under the ATS. *See* Appellants' Response to U.S. Amicus Brief ("Pls.' Resp. to U.S.") at 1. Not so. Because the United States argued that plaintiffs' claims are barred on other grounds, it had no reason to address the forced labor issues. Moreover, the government noted that the Rome Statute only criminalizes "enslavement," which requires ownership, *not* forced labor. *See* U.S. Supp. Br. at 25 n.17.

Under the Statute of the War Crimes Tribunal for the Former Yugoslavia, 21 BROOKLYN J. INT'L L. 327, 353 (1995); Diane F. Orentlicher, *Settling Accounts*, 100 YALE L.J. 2537, 2585 (1991).[5] Not surprisingly, *Restatement* § 702 does not include crimes against humanity on its list of customary international law violations.

Nor can plaintiffs pursue claims of torture and extrajudicial killing. The panel correctly noted that plaintiffs present no evidence that they were tortured. *See Doe I v. Unocal Corp.,* 2002 WL 31063976, at *16 (Sept. 18, 2002). Moreover, Congress has drawn clear limits around claims of torture and extrajudicial killing, by defining these violations in the Torture Victim Protection Act, ("TVPA") 28 U.S.C. § 1350 app., and by limiting the parties who may be sued. The TVPA applies only to "individuals" – not corporations – who *intentionally* act "under actual or apparent authority, or color of law." Because the TVPA does not expressly provide for aiding and abetting liability, such claims are foreclosed. *See Central Bank of Denver v. First Interstate Bank,* 511 U.S. 164 (1994).

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[5] "[A]t a minimum," crimes against humanity require that a crime be carried by state actors as part of a "state action or policy" based on "discrimination," and with some nexus to armed conflict. Healey, *supra*, at 352, 354. None of those criteria is present here. Plaintiffs' argument that non-state actors can be liable for "crimes against humanity" completely lacks support. *See* Pls.' Supp. Br. at 17-18. *Kadic v. Karadic,* 70 F.3d 232 (2d Cir. 1995), makes only passing reference to allegations of "crimes against humanity," and it is clear that the *Kadic* court analyzed those allegations solely as war crimes.

III. PLAINTIFFS' CLAIMS FAIL BECAUSE DEFENDANTS ARE NOT STATE ACTORS.

Plaintiffs' state action argument rests on equating "forced labor" with "slavery-like" practices. Pls.' Supp. Br. at 16. Relying on the modifier "like" not only invites a walk down the slippery slope that *Sosa* cordoned off, this argument is beside the point. International law clearly distinguishes between "slave trading" (for which *non*-state actors may be liable) and "slavery" (for which only state actors—not private parties—are liable). *See* Defs.' Supp. Br. at 16 n.15. Even if plaintiffs were correct that forced labor is a "slavery-like" practice equivalent to "slavery" (and they are not), plaintiffs are unable to cite a single authority equating forced labor with the more serious, trans-border crime of "slave trading," for which non-state actors may be sued. Not even plaintiffs' own paid expert equates forced labor with "slave trading." *See* Pls.' Mem. at 16.[6]

Plaintiffs argue that "aiding and abetting a state actor provides sufficient nexus with the state to make a private party a state actor." Pl. Supp. Br. at 15 n.27. Plaintiffs do not cite a single authority for this proposition other than the TVPA which, as noted above, only extends liability to state actors, and does not provide for aiding and abetting liability. Nothing in customary international law supports the extension of liability for forced labor to private parties, much less to companies

[6] *Prosecutor v. Kunarac*, IT-96-23 (2002), in which the defendants were clearly state actors, discussed slavery, not slave trading. Nothing in *Kunarac* suggests that slavery is the equivalent of slave trading.

whose subsidiaries are alleged to have aided and abetted forced labor, and *Sosa* does not support "a broader rule." 124 S. Ct. at 2768.

IV. DEFENDANTS CANNOT BE HELD LIABLE UNDER AN AIDING AND ABETTING THEORY.

Contrary to plaintiffs' assertion, the "plain words" of the ATS do not provide for aiding and abetting liability. Pls.' Supp. Br. at 18. Nor can such liability be read into an implied cause of action. *See* U.S. Supp. Br. at 7-8; *Central Bank of Denver*, 511 U.S. at 181-83. Plaintiffs' own authorities powerfully demonstrate that there is no specific, universal, and binding international norm of aiding and abetting liability under international law.[7]

Plaintiffs are wrong that an opinion of Attorney General Bradford, *Breach of Neutrality*, 1 Op. Att'y Gen. 57 (1795), "specifically states that individuals would be liable under the ATS for 'committing, aiding, or abetting' violations of the laws of war." Pls.' Supp. Br. at 19. That opinion, like *Talbot v. Jansen,* 3 U.S. (3 Dall.) 133 (1795), mentions aiding and abetting only in passing and only with regard to a

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[7] There is nothing to suggest that recently articulated and inconsistent standards set out in various ICTY judgments reflect a specific, universal, *and* binding norm of international law. Plaintiffs primarily rely on a decision of the ICTY Appellate Chamber issued in the last several weeks, *Prosecutor v. Blaskic*, IT-95-14-A ¶ 50 (July 29, 2004). *Blaskic* purports to reconcile conflicting aiding and abetting standards announced by the trial court in *Prosecutor v. Furundzija,* IT-95-17/1 T (Dec. 10, 1998) (May 7, 1997) (no knowledge of precise crime required) and *Prosecutor v. Vasiljevic,* ICTY-98-32-A ¶ 102 (Feb. 25, 2004) (aider and abettor must carry out acts "specifically directed" to assist commission of "specific crime," and act with "knowledge" of the specific crime.). *Blaskic*, like plaintiffs, fails to explain how these conflicting standards can be reconciled.

Congressional statute that expressly criminalized accessory to piracy. *See* Act of April 30, 1790, ch. 9 § 10. Significantly, in both cases the parties at issue had directly and actively participated in the alleged criminal acts. *See* 1 Op. Att'y Gen. 57; *Talbot,* 3 U.S. at 155-56.[8]

Plaintiffs argue wrongly that aiding and abetting liability under the Rome Statute does not require that the defendant acted "with the purpose of facilitating the commission of" the crime at issue. Pls.' Supp. Br. at 21; Pls.' Resp. to U.S. at 17. Article 25(3)(C) of the Rome Statute requires just that.[9]

Similarly, the general federal aiding and abetting statute, 18 U.S.C. § 2, *see* Pls.' Resp. to U.S. at 28, criminalizes only acts taken "with the intent to facilitate the crime." *Central Bank,* 511 U.S. at 181; *United States v. Delgado,* 357 F.3d 1061, 1066 (9th Cir. 2004) (requiring "specific intent").[10]

Plaintiffs are flatly wrong that, in *Boim v. Quranic Literacy Institute,* 291 F.3d 1000 (7th Cir. 2002), the court adopted an aiding and abetting standard

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[8] As has been extensively briefed, the Nuremberg tribunal imposed criminal liability only on those who willfully and actively participated in criminal conduct. *See, e.g.*, Defendants'/Appellees' Consolidated Answering Brief at 29-30; *see also* U.S. Supp. Br. at 21-23.

[9] Plaintiffs rely on article 25(3)(d)(ii) of the statute, which defines criminal enterprise liability. The District Court correctly held that plaintiffs presented no evidence "that Unocal 'conspired' with the military." *Doe,* 110 F. Supp. 2d 1294, 1306-07 (C.D. Cal. 2000).

[10] Plaintiffs' reliance on the *Restatement (Second) of Torts*, Pls.' Resp. to U.S. at 12, is misplaced. The *Restatement* does not purport to address international law aiding and abetting standards, and it is not even an accurate statement of U.S. domestic law. *See Central Bank,* 511 U.S. at 181-182.

identical to the standards of ICTY and ICTR. *See* Pls.' Resp. to U.S. at 2, 22. To the contrary, *Boim* held that aiding and abetting requires that defendant act *both* "knowingly and intentionally." 291 F.3d at 1021; *id.* at 1023 (aider and abettor of terrorism must have "*desired to help [illegal] activities succeed*"). Plaintiffs' argument is particularly disingenuous because the Center for Constitutional Rights, which represents the *Doe* plaintiffs, filed an *amicus* brief in *Boim* arguing for the heightened "specific intent" standard. *See Amicus* Br., 2001 WL 34106476 (7th Cir.). Even if the ATS provided for aiding and abetting liability (and it does not), Unocal is unquestionably entitled to summary judgment because there is no evidence that Unocal *intended* to facilitate, much less *actively participated* in, the alleged torts. *See Doe v. Unocal Corp.*, 110 F. Supp. 1294, 1310 (C.D. Cal. 2000).

Plaintiffs wrongly assert that the panel recognized the availability of agency, joint venture, and recklessness as alterative theories of ATS liability. *See* Pls.' Resp. to U.S. at 8-9. In fact, the panel, like the District Court, declined to address these theories. *See* 2002 WL 31063976 at *15 n.30. Plaintiffs have proffered no authority extending liability for a violation of customary international law under these theories (nor do such authorities exist).

V. THE BURMA SANCTIONS ACT AND U.S. FOREIGN POLICY INTERESTS FORECLOSE PLAINTIFFS' CLAIMS.

Plaintiffs' argument that defendants waived their preemption claim is disingenuous. Defendants' common law preemption argument was foreclosed

prior to *Sosa,* which reversed this Court and held for the first time that the ATS does *not* create a statutory cause of action, and that any cause of action must be derived from common law, which may be preempted. *See* 124 S. Ct. at 2755, 2761, 2765.

Plaintiffs do not dispute that Congress – knowing of the allegations of abuses connected to the Yadana pipeline – specifically took into account the positive benefits of the Unocal subsidiaries' investments in Myanmar, and decided not to sanction those investments. *See* Defs.' Supp. Br. at 23 n.22. Given the comprehensive nature of the Burma Sanctions Act, it is clear that Congress has occupied this field, and plaintiffs' claims, which seek to undo this legislative judgment, are preempted. *See Sosa*, 124 U.S. at 2765; *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981).

Even if plaintiffs' claims' are not preempted, this Court should "defer[] to the political branches" where, as here, the Executive Branch has argued that this case will adversely affect U.S. foreign policy. *Sosa*, 124 S.Ct. at 2766 n.20. These lawsuits challenge the "constructive engagement" strategy embodied in the Burma Sanctions Act, undermine U.S. policy to promote free trade and economic development, and promote "diplomatic friction" by allowing foreign citizens to use the U.S. judicial system as an avenue to indirectly challenge the acts of their own government, even when – as in this case – the political branches have granted that

government immunity from suit under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(5). *See* U.S. Supp. at 12-16; Defs.' Supp. Br. at 23-24.

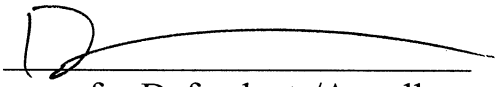
In light of these serious foreign policy considerations, the Court should defer to the political branches and decline to find actionable claims. *See Sosa,* 124 U.S. at 2766 n.21; *American Ins. Ass'n v. Garamendi*, 123 S. Ct. 2374 (2003).

CONCLUSION

For the foregoing reasons, the Court should affirm summary judgment for defendants.

Respectfully submitted,

O'MELVENY & MYERS LLP

By: 
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