No. 07-919

In the Supreme Court of the United States

AMERICAN ISUZU MOTORS, INC., ET AL., PETITIONERS

v.

LUNGISILE NTSEBEZA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

These lawsuits were filed on behalf of all persons living in South Africa between 1948 and 1994 who were injured by that nation's system of apartheid. Petitioners are more than 50 United States and foreign corporations that allegedly did business in South Africa during that era. Respondents contend that, by conducting business in South Africa, petitioners aided and abetted violations of international law committed by the apartheid-era South African government and, for that reason, may be held liable in a federal common law action under the Alien Tort Statute (ATS), 28 U.S.C. 1350. The questions presented are:

1. Whether, in light of the opposition to this litigation expressed by the Executive Branch, by South Africa, and by other nations—because respondents' suits effectively seek to overturn South Africa's post-apartheid policy of reconciliation as well as the foreign policies of the United States and other nations—the cases should be dismissed on grounds of case-specific deference to the political branches, political question, or international comity.

2. Whether a private defendant may be sued under the ATS for aiding and abetting a violation of international law by a foreign government in its own territory.

3. Whether a private defendant may be held directly liable under the ATS for violating international law standards codified in a ratified treaty that Congress expressly provided does not create enforceable rights.

STATEMENT OF COMPLIANCE WITH SUPREME COURT RULE 37.2(a)

Counsel of record received notice of the United States' intent to file this amicus curiae brief ten days before the due date. Pursuant to Rule 37.4, the consent of the parties is not required for the United States to file this brief.

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INTEREST OF THE UNITED STATES

This case presents the question whether private corporations may be sued under the Alien Tort Statute (ATS), 28 U.S.C. 1350, for aiding and abetting the system of apartheid imposed by the former government of South Africa. Because so dramatic an extension of United States law would have serious consequences for the Nation's foreign relations, the United States has a substantial interest in that question.

STATEMENT

1. Respondents filed these class actions under the ATS against various multinational corporations that did business in South Africa during the apartheid regime. Respondents claim that petitioners provided "resources,

such as technology, money, and oil, to the South African government," which it used "to further its policies of oppression and persecution of the African majority." Pet. App. 187a. Respondents allege, *inter alia*, violations of international law norms regarding apartheid, forced labor, genocide, torture, sexual assault, unlawful detention, extrajudicial killings, war crimes, and racial discrimination. *Id.* at 194a. Respondents contend that petitioners "aided and abetted the apartheid regime in the commission of these violations." *Ibid.* Respondents seek damages in excess of $400 billion. *Id.* at 85a.

In the district court, the government of South Africa filed a statement by its Minister of Justice urging dismissal of the litigation. Pet. App. 297a-309a. The statement explained that the South African government views the litigation as an "attempt[] to undermine South African sovereignty," *id.* at 304a (citation omitted), and stated that "the litigation could have a destabilising effect" because it would "discourage much-needed direct foreign investment in South Africa," thereby undermining both "economic growth and employment." *Id.* at 308a-309a. The United States also filed a Statement of Interest, advising that the suit "risks potentially serious adverse consequences for significant interests of the United States" by "imped[ing] South Africa's on-going efforts at reconciliation and equitable economic growth." *Id.* at 244a-245a. In addition, recognition of aiding and abetting liability would undermine United States policy, which "relies, in significant part, on economic ties and investment to encourage and promote positive change in the domestic policies of developing countries." *Id.* at 245a.

The district court granted petitioners' motion to dismiss. Pet. App. 181a-213a. Relying on this Court's cau-

tionary admonitions in *Sosa* v. *Alvarez-Machain*, 542 U.S. 692 (2004), and its holding in *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994), the court held that aiding and abetting claims are not actionable under the ATS. Pet. App. 199a-200a. It explained that "[i]n a world where many countries may fall considerably short of ideal economic, political, and social conditions, this Court must be extremely cautious in permitting suits here based upon a corporation's doing business in countries with less than stellar human rights records, especially since the consequences of such an approach could have significant, if not disastrous, effects on international commerce." *Id.* at 206a.

2. On appeal, the governments of the United States and South Africa appeared as amici to urge affirmance. The United States argued that recognizing a federal common law cause of action under the ATS for aiding and abetting a foreign state's violation of international law with respect to its own citizens risked serious consequences for the Nation's foreign relations and would limit the political Branches' ability to use economic investment as a tool of foreign policy. South Africa restated its position that "[t]hese foreign litigations fundamentally interfere with South Africa's independence and sovereignty," and its chosen policy for dealing with the wrongs of apartheid, and could "disrupt the growth of the South African economy." Pet. App. 290a, 292a.

A divided panel of the court of appeals reversed. Pet. App. 1a-180a. Judges Katzmann and Hall definitively held that "a plaintiff may plead a theory of aiding and abetting liability" under the ATS. *Id.* at 12a (per curiam). They rejected the district court's conclusion that *Central Bank* precludes recognition of civil aiding

and abetting liability in the absence of statutory authorization. *Id.* at 57a-58a (Katzmann, J., concurring); *id.* at 70a n.5 (Hall, J., concurring). They further held that "a private actor may be held responsible for aiding and abetting the violation of a norm that requires state action or action under color of law." *Id.* at 55a-56a (Katzmann, J., concurring); *id.* at 72a (Hall, J., concurring).

Judge Katzmann concluded that the appropriate standard for proving civil aiding and abetting liability under the ATS is that applied by international tribunals for criminal liability, which, he stated, makes a defendant liable "for aiding and abetting the violation of that law by another when the defendant (1) provides practical assistance to the principal which has a substantial effect on the perpetration of the crime, and (2) does so with the purpose of facilitating the commission of that crime." Pet. App. 47a. District Judge Korman, sitting by designation, disagreed that the ATS authorizes aiding and abetting suits against private defendants where the relevant international law norm applies only to states, *id.* at 157a, 164a-165a, but he concurred in Judge Katzmann's articulation of the international law standard, in order to provide a controlling opinion on remand, *id.* at 170a.[1]

The majority declined to "affirm the dismissal of plaintiffs' [ATS] claims on the basis of the prudential concerns raised by the defendants." Pet. App. 14a (per curiam). The court concluded that such considerations were appropriate to the question whether "to recognize a cause of action," which the majority viewed as distinct

[1] Judge Hall believed that the appropriate aiding and abetting standard should be drawn from the Restatement (Second) of Torts § 876 (1991).

from the question whether the international law norm was sufficiently universal and definite, a question the majority viewed as jurisdictional. *Id.* at 12a, 14a; *id.* at 48a (Katzmann, J., concurring). The majority concluded that the district court had not yet considered "case-specific prudential doctrines" and "remand[ed] to the district court to allow it to engage in the first instance in the careful 'case-by-case' analysis that questions of this type require." *Id*. at 18a.

District Judge Korman dissented. In addition to disagreeing on aiding and abetting liability, he stated that several case-specific factors required dismissal. Pet. App. 86a-122a.

DISCUSSION

The court of appeals' decision allows an unprecedented and sprawling lawsuit to move forward and represents a dramatic expansion of U.S. law that is inconsistent with well-established presumptions that Congress does not intend to authorize civil aiding and abetting liability or extend U.S. law extraterritorially. The decision does so, moreover, in an area fraught with foreign relations perils, where "judicial caution" is especially appropriate before "exercising innovative authority over substantive law." *Sosa*, 542 U.S. at 726. The consequence is to invite lawsuits challenging the conduct of foreign governments toward their own citizens in their own countries—conduct as to which the foreign states are themselves immune from suit—through the simple expedient of naming as defendants those private corporations that lawfully did business with the governments. Such lawsuits inevitably create tension between the United States and foreign nations, as the present litigation demonstrates. See pp. 19-22, *infra*.

This Court should grant certiorari on the second question presented to review the court of appeals' extension of the ATS to encompass claims of aiding and abetting a foreign state's violation of international law in its own territory. Although the court left open the possibility that the district court might yet dismiss the lawsuit based on "case-specific prudential doctrines," Pet. App. 18a, it has categorically held that "a plaintiff may plead a theory of aiding and abetting liability under the [ATS]," *id.* at 12a. That holding invites similar lawsuits to be filed and will preclude their early dismissal, which, in turn, will undermine efforts to encourage foreign investment.

I. THE COURT OF APPEALS' EXTENSION OF THE ATS IS INCONSISTENT WITH PRINCIPLES OF JUDICIAL RESTRAINT AND RAISES SERIOUS FOREIGN POLICY CONCERNS

A. *Sosa* Requires "Judicial Caution" In Recognizing New Causes Of Action Under The ATS

The ATS was first enacted by Congress in the Judiciary Act of 1789. Act of Sept. 24, 1789, ch. 20, § 9, 1 Stat. 76. As presently codified, it provides: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. 1350. In *Sosa*, the Court held that "the ATS is a jurisdictional statute creating no new causes of action," but that it 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." *Sosa*, 542 U.S. at 724.

Recognizing the Court's "practice * * * to look for legislative guidance before exercising innovative authority over substantive law," the Court identified a number of factors that counseled special "judicial caution" and a "restrained conception of the discretion a federal court should exercise in considering a new cause of action" under Section 1350. *Sosa*, 542 U.S. at 725-726. In particular, the Court noted that "the decision to create a private right of action" raises significant questions beyond defining a substantive norm to govern primary conduct, such as whether "to permit enforcement without the check imposed by prosecutorial discretion." *Id.* at 727. In addition, the Court recognized the "potential implications for the foreign relations of the United States" that "should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs," especially if the court would be called upon to pronounce "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." *Ibid.* Accordingly, the Court stressed that devising new federal common law causes of action based on international law "should be undertaken, if at all, with great caution." *Id.* at 727-728.

The Court declined to recognize a new cause of action based on international law in *Sosa*. It explained that "[w]hatever the ultimate criteria for accepting a cause of action subject to jurisdiction under § 1350, * * * federal 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": piracy, violation of safe conducts, and assaults against ambassadors. *Sosa*,

542 U.S. at 719, 732. The Court held that the asserted prohibition against arbitrary arrest and detention was not "so well defined as to support the creation of a federal remedy." *Id.* at 738.[2]

B. Recognizing Aiding And Abetting Liability Constitutes An Improper Expansion Of Judicial Authority To Fashion Federal Common Law

As this Court has explained, the creation of civil aiding and abetting liability is a legislative act separate and apart from the recognition of a cause of action against the primary actor, and one that the courts should not undertake without congressional direction. *Central Bank*, 511 U.S. at 182. Such "a vast expansion of federal law," *id.* at 183, is all the more inappropriate where, as here, it raises significant "risks of adverse foreign policy consequences," *Sosa*, 542 U.S. at 728.

1. In *Central Bank*, the Court explained that "when Congress enacts a statute under which a person may sue and recover damages from a private defendant for the defendant's violation of some statutory norm, there is no general presumption that the plaintiff may also sue aiders and abettors." 511 U.S. at 182. To the contrary, the adoption of aiding and abetting liability is a "vast expansion of federal law" that federal courts must eschew in the absence "of congressional direction to do so." *Id.* at 183.

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[2] The Court also noted related questions that might be raised in other cases: "whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued"; whether there is a requirement that "the claimant must have exhausted any remedies available in the domestic legal system"; and whether "case-specific deference to the political branches" might counsel against recognizing a claim. *Id.* at 732 n.20, 733 n.21.

Central Bank rejected the argument that civil aiding and abetting liability is appropriate wherever it is recognized in the criminal context. The Court noted that "[a]iding and abetting is an ancient criminal law doctrine," 511 U.S. at 181, and that, in 18 U.S.C. 2, Congress has enacted "a general aiding and abetting statute applicable to all federal criminal offenses," 511 U.S. at 181. The Court found more significant, however, the fact that Congress "has not enacted a general civil aiding and abetting statute," *id.* at 182, and that "the doctrine has been at best uncertain in application" in the civil context, *id.* at 181. That difference reflects the judgment that while aiding and abetting is a useful tool for prosecutors, it vastly expands liability to allow private parties, unconstrained by prosecutorial discretion, to sue alleged aiders and abettors. Cf. *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta*, 128 S. Ct. 761, 771 (2008) (noting that Congress responded to *Central Bank* by authorizing the SEC, but not private parties, to sue aiders and abettors).

2. In holding that courts may impose aiding and abetting liability as a matter of federal common law, the court of appeals majority categorically dismissed *Central Bank*'s analysis as irrelevant. Judge Katzmann characterized this Court's "instruction in *Central Bank*" as "inapposite" because "the relevant norm" under the ATS "is provided not by domestic statute but by the law of nations, and that law extends responsibility for the violations of its norms to aiders and abettors." Pet. App. 57a-58a. He also found *Central Bank*'s refusal to extend *criminal* aiding and abetting principles to the *civil* context inapplicable to international law norms. *Id.* at 33a n.5.

Judge Hall likewise concluded that *Central Bank* "poses no bar" to aiding and abetting liability. Pet. App. 70a n.5. He concluded that, because the ATS's "textual brevity and dearth of legislative history leave us with inconclusive evidence of Congress's intent to include or exclude aiding and abetting liability," *Central Bank*'s "reasoning cannot apply to the [ATS]." *Ibid.* He instead relied on Congress's provision for aiding and abetting liability in certain early criminal statutes. *Ibid.*[3]

3. Both members of the majority misapplied *Central Bank* and veered far off course under the ATS. By relying on the *absence* of evidence of Congress's intent to allow aiding and abetting liability, Judge Hall's reasoning turns *Central Bank* on its head. Nor, contrary to Judge Katzmann's view, does the fact that the ATS refers to substantive norms of international law render *Central Bank* "inapposite." Pet. App. 57a-58a. As this Court made clear in *Sosa*, causes of action recognized under the ATS are "federal common law" causes of action, 542 U.S. at 732, and the fashioning of such law must be guided by *Central Bank*. Indeed, *Sosa* not only acknowledged the Court's "general practice" to look for legislative guidance before fashioning federal common law; it observed that "[i]t would be remarkable to take

[3] Judge Hall also cited (Pet. App. 70a n.5) Attorney General Bradford's opinion, *Breach of Neutrality*, 1 Op. Att'y Gen. 57, 59 (1795). That opinion, however, makes clear that the American citizens did far more than aid and abet another's wrongdoing in the broad sense the court of appeals used that phrase. Rather, they had "voluntarily *joined*, *conducted*, aided, and abetted a French fleet in attacking the settlement, and plundering or destroying the property of British subjects." *Id.* at 58 (emphasis added); see *ibid.* (describing "acts of hostility committed by American citizens"). The attacks were not the Americans' private criminal acts, but were part of a foreign power's act of war, and thus constituted a breach of the United States' neutrality.

a more aggressive role in exercising a jurisdiction [under the ATS] that remained largely in shadow for much of the prior two centuries." *Id.* at 726.

The fact that courts have previously considered decisions of international criminal tribunals as evidence of the "law of nations" for purposes of the ATS, see Pet. App. at 33a n.5 (Katzmann, J., concurring), does not diminish the force of *Central Bank*. Whatever relevance principles of criminal liability have in informing the substantive content of international law for purposes of the ATS, the question of the relevance of criminal-law principles of secondary liability for civil actions is settled by *Central Bank*. *Central Bank* makes clear that the existence of criminal aiding and abetting liability does not support civil liability, 511 U.S. at 181-183, because civil aiding and abetting liability "has been at best uncertain in application," *id.* at 181, would represent a "vast expansion of federal law," *id.* at 183, and would eliminate the check of prosecutorial discretion, *ibid.*; *Stoneridge*, *supra*. Thus, *Central Bank* speaks directly to the relevance of criminal aiding and abetting liability under international law to the existence of civil liability under the ATS. Moreover, the absence of a prosecutorial check has special salience as a reason to reject civil aiding and abetting liability in the ATS context. See *Sosa*, 542 U.S. at 727 (judicial caution required because a cause of action under the ATS entails "permit[ting] enforcement without the check imposed by prosecutorial discretion").

C. Extraterritorial Aiding And Abetting Liability Under The ATS Interferes With The Nation's Foreign Relations

When construing a federal statute, there is a strong presumption that Congress does not intend to extend U.S. law over conduct that occurs in foreign countries. See *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991). That presumption "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." *Ibid.* *A fortiori*, there should be a compelling presumption against recognizing a power in the courts to project U.S. law into foreign countries through the fashioning of federal common law. The court of appeals not only ignored that presumption, it exacerbated the risk of "international discord" by endorsing aiding and abetting suits in which the primary conduct at issue is the foreign state's own conduct in its own territory, and the sovereign is itself immune from civil suit in our domestic courts. Recognition of ATS liability in such circumstances is the antithesis of the "great caution" that this Court admonished the courts to use in exercising their modest federal-common-law-making authority under the ATS. *Sosa*, 542 U.S. at 728.

1. The presumption against extraterritorial legislation was well-established at the time the ATS was adopted. See *The Apollon*, 22 U.S. (9 Wheat.) 362, 370 (1824); *Rose* v. *Himely*, 8 U.S. (4 Cranch) 241, 279 (1808). That presumption was applied with respect to statutes adopted by Congress to enforce the laws of nations. In *United States* v. *Palmer*, 16 U.S. (3 Wheat.) 610 (1818), for example, this Court held that an early federal statute punishing piracy—one of the paradigmatic 18th century norms of international law—did not

apply to conduct of foreign nationals on a foreign ship that did not threaten American interests. *Id.* at 630-631. Similarly, the 1795 opinion of Attorney General Bradford, to which this Court referred in *Sosa*, 542 U.S. at 721, states that insofar as "the transactions complained of originated or took place in a foreign country, they are not within the cognizance of our courts; nor can the actors be legally prosecuted or punished for them by the United States." 1 Op. Att'y Gen. 57, 58 (1795).[4]

The presumption against extraterritorial application of U.S. law avoids the "serious risk of interference with a foreign nation's ability independently to regulate its own commercial affairs." *F. Hoffmann-La Roche Ltd.* v. *Empagran*, 542 U.S. 155, 165 (2004). Those concerns are fully present here, and, in fact, foreign governments have protested that respondents' claims seek to hold petitioners liable for doing business with South Africa, which "was in accordance with the domestic laws of all the countries concerned" at the time. App., *infra*, 11a,

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[4] In his concurring opinion in *Sosa*, Justice Breyer stated there was an international consensus as to "the jurisdictional principle that any nation that found a pirate could prosecute him." 542 U.S. at 762. Attorney General Bradford's opinion reflects that that consensus extended only to "crimes committed on the high seas," *i.e.*, where no national sovereign was in place, and not to crimes that "took place in a foreign country." 1 Op. Att'y Gen. at 58. *United States* v. *Smith*, 18 U.S. (5 Wheat.) 153 (1820), also cited by Justice Breyer, which concerned the post-*Palmer* piracy statute, also applied to any person who committed piracy "upon the high seas." *Id.* at 157 (quoting Act of Mar. 3, 1819, ch. 77, § 5, 3 Stat. 513). *Smith* illustrates that the presumption against extraterritoriality does not apply where Congress has enacted criminal laws that either expressly apply outside the United States or cannot logically be limited to its territorial bounds. See, *e.g.*, *United States* v. *Bowman*, 260 U.S. 94, 98 (1922).

13a (diplomatic notes from Governments of the United Kingdom and Federal Republic of Germany).

Concerns for international friction are even greater when domestic courts purport to sit in judgment over the conduct of the foreign state itself, especially in its own territory. Justice Story reflected the understanding of the framing generation in *United States* v. *La Eugenie*, 26 F. Cas. 832 (D. Mass. 1822) (No. 15,551): "No one [nation] has a right to sit in judgment generally upon the actions of another; at least to the extent of compelling its adherence to all the principles of justice and humanity in its domestic concerns." *Id.* at 847. "No nation," he explained, "has ever yet pretended to be the *custos morum* of the whole world; and though abstractedly a particular regulation may violate the law of nations, it may sometimes, in the case of nations, be a wrong without a remedy." *Ibid.* But that is precisely the result created by the Second Circuit decision below, which virtually invites an ATS action in New York whenever there are allegations of human rights violations anywhere in the world.

2. The court of appeals ignored such concerns, however, and proceeded to hold that "a private actor may be held responsible for aiding and abetting the violation of a norm that requires state action or action under color of law." Pet. App. 55a-56a (Katzmann, J., concurring); *id.* at 72a (Hall, J., concurring). The court recognized that, in order to make out an aiding and abetting claim, the plaintiff must prove "a predicate offence by someone other than the accomplice, in this case, a state actor or someone acting under color of law." *Id.* at 56a (quotation marks omitted). But it apparently did not trouble the court that, under its holding, the federal courts would be called upon to adjudicate the legality under

international law of the conduct of foreign states as to which Congress has conferred sovereign immunity from civil suits. See 28 U.S.C. 1605(a)(5) (abrogating immunity only for torts "occurring in the United States"); *Saudi Arabia* v. *Nelson*, 507 U.S. 349, 363 (1993) (abuse by police within Saudi Arabia immune from suit); *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 436-438 (1989) (no jurisdiction over foreign states under ATS). Principles of foreign sovereign immunity reflect and implement Justice Story's concerns, while the court of appeals' aiding and abetting holding provides a clear means for effectively circumventing those limits.

3. The court of appeals' disregard for the serious foreign policy consequences of its ruling is directly contrary to the purposes for which the ATS was enacted and with this Court's admonishment that courts must use "great caution" in exercising their authority under that statute. *Sosa*, 542 U.S. at 728. The founding generation had no intention of ordaining the courts of the new Nation as the "*custos morum* of the whole world." *La Eugenie*, 26 F. Cas. at 847. Rather, "those who drafted the Constitution and the Judiciary Act of 1789 wanted to open federal courts to aliens for the purpose of *avoiding*, not provoking, conflicts with other nations." *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774, 812 (D.C. Cir. 1984) (Bork, J., concurring) (emphasis added), cert. denied, 470 U.S. 1003 (1985). Enactment of the ATS was motivated in large part by assaults on foreign ambassadors *in the United States* that had caused international incidents. See *Sosa*, 542 U.S. at 716-717. And the only early references to the statute lend no support to the notion that it could be invoked to regulate conduct or redress injury in a foreign country. See 1 Op. Att'y Gen.

at 58-59 (ATS suit could be brought against American citizens for breaching neutrality with Britain only if acts did not "t[ake] place in a foreign country"); *Bolchos* v. *Darrel*, 3 F. Cas. 810 (S.C. 1795) (No. 1607) (claim by French privateer for seizure of property in contravention of treaty from ship in U.S. port); *Moxon* v. *The Fanny*, 17 F. Cas. 942 (Pa. 1793) (No. 9895) (seizure of British ship by French privateer in U.S. waters).

Sosa provides no support for expanding the ATS in so dramatic a fashion. The Court specifically questioned whether a court should entertain "at all" a suit under the ATS seeking to enforce "a limit on the power of foreign governments over their own citizens." 542 U.S. at 727-728. Rather than supporting the court of appeals' vast expansion of ATS liability, *Sosa* calls for "vigilant doorkeeping" with respect to the "narrow class of international norms" to which the ATS may appropriately be applied. *Id.* at 729. The court of appeals' decision is incompatible with *Sosa*'s "restrained conception" of the judicial function under the ATS. *Id.* at 725.

II. THE COURT SHOULD GRANT REVIEW TO DECIDE WHETHER SUITS MAY BE ENTERTAINED UNDER THE ATS BASED ON AIDING AND ABETTING A FOREIGN STATE'S CONDUCT IN ITS OWN TERRITORY

A. The Court Of Appeals Definitively Decided The Aiding And Abetting Issue, But Did Not Resolve The First And Third Questions Presented

The court of appeals definitively held that "a plaintiff may plead a theory of aiding and abetting liability" under the ATS. Pet. App. 12a (per curiam). Although the court of appeals left open the possibility that respondents' complaints might later be dismissed on other grounds, it conclusively rejected the reasoning of the

district court and arguments of petitioners and United States that aiding and abetting should not be recognized as a viable theory of liability under the ATS. As discussed above, the majority summarily rejected arguments based on *Central Bank*, *id.* at 57a-58a (Katzmann, J., concurring); *id.* at 70a n.5 (Hall, J., concurring). The majority further ruled out the contention that a private actor could not be held responsible for "aiding and abetting the violation of a norm that requires state action or action under color of law." *Id.* at 56a (Katzmann, J., concurring); *id.* at 72a (Hall, J., concurring). As we explain in Point II.B, *infra*, this Court should grant review on the aiding and abetting issue.

By contrast, the court of appeals expressly declined to resolve the first and third questions presented in the petition. With respect to the first question, the court of appeals determined that the district court had "explicitly refrained from addressing" petitioners' political question argument, and the court of appeals declined to address that and other "case-specific prudential doctrines now," choosing instead to allow the district court to "engage in the first instance in the careful 'case-by-case' analysis that questions of this type require." Pet. App. 16a, 18a (per curiam). See *id.* at 219a (denial of stay) ("This Court has not ruled adversely to the Corporations on the issues of case-specific deference or the political question doctrine."). Likewise, the court of appeals did not consider the third question: *viz.*, whether the legislation by which Congress implemented the Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, precludes recognizing a cause of action for genocide. Although Judge Korman, in dissent, stated that the implementing legislation should preclude a common law cause of action

for genocide, Pet. App. 143a, the majority specifically declined to resolve that issue, "leav[ing] it to the district court to address in the first instance," *id.* 61a n.18 (Katzmann, J., concurring); accord *id.* at 76a (Hall, J., concurring). In the view of the United States, because there is no decision of the court of appeals on those issues, review by this Court of those issues is not warranted at this time.

B. The Court Of Appeals' Aiding And Abetting Holding Has Significant Adverse Foreign Policy Consequences That Warrant The Court's Review At This Time

This Court noted in *Sosa* the "risks of adverse foreign policy consequences" of recognizing new private causes of action for violating international law, and cautioned that "the potential implications for the foreign relations of the United States * * * should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs." 542 U.S. at 727-728. The court of appeals' vast expansion of the ATS to reach claims against private parties who are alleged to have aided and abetted a foreign state's violation of international law in its own territory poses serious risks to the United States' relations with foreign states and to the political Branches' ability to conduct the Nation's foreign policy.

The Court has not hesitated to review an interlocutory decision when "it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Constr. Co.* v. *Jacksonville, Tampa & Key West Ry.*, 148 U.S. 372, 384 (1893). When "there is some important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari, the

case may be reviewed despite its interlocutory status." Robert L. Stern et al., *Supreme Court Practice* 259 (8th ed. 2002).[5]

1. As discussed above, suits brought under the court of appeals' theory of liability will require federal courts to sit in judgment of the conduct of foreign states when Congress has determined those states should be immune from suit. Such litigation will inevitably give rise to tension in relations between the United States and the country whose conduct is at issue. Even when the government whose acts are under scrutiny has been removed from power, a suit brought in United States court to redress those wrongs is not a proper function of a United States court and will often be viewed by the foreign state's new government as an infringement on its sovereignty.

This litigation vividly illustrates that point. The democratically elected government of South Africa has repeatedly objected to this litigation as interfering with its sovereign authority to address the wrongs according to its own policy judgments. Pet. App. 300a, 307a-308a. After the court of appeals ruled, the President of South Africa spoke forcefully before that country's National Assembly expressing his government's view that it is "completely unacceptable that matters that [a]re central to the future of our country should be adjudicated upon in foreign courts which [bear] no responsibility for the wellbeing of our country and the observance of the perspective contained in our Constitution on the promotion of national reconciliation." *Id.* at 312a-313a. And South Africa has reaffirmed that position in diplomatic corre-

[5] See, *e.g.*, *Cutter* v. *Wilkinson*, 544 U.S. 709 (2005); *Norfolk S. Ry.* v. *Kirby*, 543 U.S. 14 (2004); *Jones* v. *R.R. Donnelley & Sons Co.*, 541 U.S. 369 (2004); *Gratz* v. *Bollinger*, 539 U.S. 244 (2003).

spondence. App., *infra*, 1a (diplomatic note). Other countries have similarly protested that the assertion of authority over their own nationals with regard to their conduct in a third country is "inconsistent with established principles of international law," *id.* at 7a (Aide Memoire from the Government of Switzerland), and that such assertion "infringes the sovereign rights of States to regulate their citizens and matters within their territory," *id.* 4a (letter to Secretary of State from British Ambassador, on behalf of the Government of the United Kingdom, with concurrence of the Government of Germany) (U.K. letter).

2. The pendency of this case and the prospect of such litigation more broadly has further and current real world consequences. As the President recently said in his address to the United Nations, "In the long run, the best way to lift people out of poverty is through trade and investment. * * * Open markets ignite growth, encourage investment, increase transparency, strengthen the rule of law, and help countries help themselves." President George W. Bush, Address to the United Nations General Assembly (Sept. 25, 2007) <http:// www.whitehouse.gov/news/releases/2007/09/20070925-4.html>. Civil aiding and abetting liability would, however, have a deterrent effect on the free flow of trade and investment, because it would create uncertainty for those operating in countries where abuses might occur. As foreign governments have noted in protest, the prospect of costly litigation under so expansive a theory of liability "may hinder global investment in developing economies, where it is most needed, and inhibit efforts by the international community to encourage positive changes in developing countries." App., *infra*, 5a (U.K letter). The mere prospect of such litigation can frus-

trate governments' ability to achieve their policy objectives. The government of South Africa, for example, has warned that the present "litigation could have a destabilising effect on the South African economy as investment is not only a driver of growth, but also of employment." Pet. App. 308a.

Litigation such as this would also interfere with the ability of the U.S. government to employ the full range of foreign policy options when interacting with regimes whose policies the United States would like to influence. In general, the U.S. government supports open markets and trade and investment with other countries. But in certain circumstances, the U.S. government may determine that more limited commercial interaction is desirable in encouraging reform and pursuing other policy objectives. Indeed, in the 1980s, the United States supported economic ties with black-owned companies and urged companies to use their influence to press for change away from apartheid, while at the same time using limited sanctions to encourage the South African government to end apartheid. See Pub. L. No. 99-440, §§ 4, 101, 304-305, 100 Stat. 1089, 1099-1100; National Security Decision Directive 187 (Sept. 7, 1985) <http://www.fas.org/irp/offdocs/nsdd/nsdd-187.htm>. Such policies would be greatly undermined if the corporations that invest or operate in the foreign country are subjected to lawsuits under the ATS as a consequence.

The adverse consequences of the decision below and additional such litigation are not confined to South Africa, and would not be met by the possibility that this case might be dismissed at some time in the future on the basis of case-specific deference to the Executive's assessment of foreign relations consequences. To the contrary, such a case-by-case approach could complicate

the Nation's foreign relations still further and exacerbate the present apprehension and its deterrent effect on international trade and investment.

3. The court of appeals' decision also merits this Court's review at this time because of the precedential effect it has on other pending litigation. A search of the Westlaw database indicates that 24 lower court decisions involving ATS claims since *Sosa* have included aiding and abetting claims. The decision below will preclude any district courts within the Second Circuit from dismissing such claims, involving conduct in foreign countries, on the ground that aiding and abetting is not an available theory of liability. And because that Circuit covers New York, which is central to the Nation's domestic and international commerce, the decision invites plaintiffs to bring many such suits in that forum in the future.

In *Sosa*, the Court recognized the need for "caution" and "vigilant doorkeeping" in ensuring that the self-evident potential for ATS suits to interfere with foreign policy should not become a reality. 542 U.S. at 725, 729. Those same considerations justify an exercise of the Court's certiorari jurisdiction at this juncture in the case.

CONCLUSION

The petition for a writ of certiorari should be granted on the second question presented.

Respectfully submitted.

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Solicitor General

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FEBRUARY 2008

APPENDIX A

[Letterhead Omitted]

Ref: BL1/USA/3/A24.29

The Embassy of the Republic of South Africa presents its compliments to the Department of State and has the honour to refer to the lawsuit Khulumani v. Barclay's National Bank, Ltd. (a.k.a. Apartheid Court Case).

The Embassy of the Republic of South Africa wishes to confirm to the Department of State that the position of the Republic of South Africa concerning the litigation has not changed. Taking into account Supreme Court Rule 37(2)(a), the Embassy of the Republic of South Africa reaffirms that no final decision has been made whether to file an amicus curiae brief at the present Petition stage. The Embassy of the Republic of South Africa furthermore wishes to advise that if the petition for a writ of certiorari is granted, the Republic of South Africa will, at the merits stage, reaffirm its position.

The Embassy of the Republic of South Africa avails itself of this opportunity to renew to the Department of State the assurances of its highest consideration.

Washington D.C. [Seal Omitted]
8 February 2008

APPENDIX B

[Letterhead Omitted]

30 January 2008

Dr. Condoleezza Rice
Secretary of State
U.S. Department of State
2201 C Street NW
Washington, DC 20520
United States of America

Dear Madam Secretary,

Khulumani et al v Barclay National Bank et al,
Ntsebeza et al v Daimler Chrysler Corp et al

I refer to Diplomatic Note No 126/2007 dated 13 December 2007 in which Her Britannic Majesty's Embassy, together with the Embassy of the Federal Republic of Germany, urged the United States Government to support the petition for certiorari seeking Supreme Court review of the judgment of 12 October 2007 of the United States Court of Appeals for the Second Circuit in the above mentioned cases, also known as the South Africa 'Apartheid' cases.

I write to confirm the continuing concern of the Government of the United Kingdom at the application of the Alien Tort Statute to British defendants in this case. I understand that the issue before the Supreme Court is whether to grant the petition for certiorari, rather than to decide the underlying issues of substance raised by this case. Given the present procedural juncture, and in the interests of international comity, the Government of the United Kingdom is reluctant to file a brief as amicus

curiae in order to bring its concerns to the attention of the Court. However, this decision should not be understood to represent any waning of concern felt and previously expressed by the Government of the United Kingdom.

The Government of the United Kingdom believes that it is important that the United States Government should intervene in these cases given our concerns set out below. I understand that the Solicitor General may recommend to the Supreme Court that it should grant certiorari in a particular case, either on invitation from the Court or of his own initiative. Given this practice, the Government of the United Kingdom writes to urge the United States Government to recommend to the Supreme Court that certiorari be granted in this case and to request that it inform the Court of our considerable concerns.

I reiterate the Government's opposition, in principle, to broad assertions of extraterritorial jurisdiction over British persons and entities arising out of activities that take place outside of the State asserting jurisdiction. Such litigation can interfere with national sovereignty, create legal uncertainty and costs, and risks damaging international relations with several affected foreign countries including close allies of the United States. These concerns have previously been expressed to the U.S. Supreme Court by the Government of the United Kingdom, in amicus briefs filed in *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004) and *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

The present litigation treats the Alien Tort Statue as a broad charter to extend United States jurisdiction beyond the limits well established and widely recognised

under customary international law. Plaintiffs, who are present or former residents of South Africa, have brought proceedings asserting corporate liability for the acts and omissions of the previous South African Government. The Government of the United Kingdom takes no position on the factual claims and statements made by the parties. However, I note that the allegations made by the plaintiffs are principally that the corporate defendants did business in South Africa during the apartheid era. This attempt to hold private parties liable for actions taken by a foreign State in its own territory, with respect to its own citizens, based on conduct by the defendants that took place outside the United States, infringes the sovereign rights of States to regulate their citizens and matters within their territory. This is despite the fact that the defendants' conduct is not alleged to have been at variance with the domestic laws of South Africa or any other of the countries concerned. The judgment of the Second Circuit Court of Appeals therefore calls into question decisions and laws made decades ago by the United Kingdom, the United States, and many other countries.

The Government of the United Kingdom also notes that the Government of South Africa expressed its concern at these proceedings in a submission to the District Court, in which it observed that the litigation will 'intrude upon and disrupt [its] own efforts to achieve reconciliation and reconstruction', and that it will 'interfere with matters of domestic policy which are pre-eminently South African'. I am also aware that, since the Court of Appeals handed down its judgment, the Government of South Africa has repeated its concerns in unambiguous terms.

The Government of the United Kingdom respectfully concurs with the assessment of the Government of South Africa when it stated that matters central to the future of that country should not be adjudicated in foreign courts. The democratically-elected Government of South Africa is charged with responsibility for dealing with the legacy of apartheid and is entitled to do so free from interference by these proceedings. I understand, from the judgment of the Second Circuit Court of Appeals, that it is common ground that the plaintiffs would be entitled to seek relief from the South African courts, which the Government of the United Kingdom maintains is the forum that can consider claims of this nature most appropriately. The Government of the United Kingdom agrees with the statement by the Government of the United States to the Second Circuit that '[i]t would be extraordinary to give U.S. law an extraterritorial effect in [these] circumstances . . . by rendering private defendants liable for the sovereign acts of the apartheid government of South Africa.'

The Government of the United Kingdom is troubled that the judgment of the Second Circuit Court of Appeals has allowed this case to continue. The very existence of this litigation infringes upon sovereign interests of the United Kingdom, South Africa and other States. Litigation of this nature may hinder global investment in developing economies, where it is most needed, and inhibit efforts by the international community to encourage positive changes in developing countries. Whatever the appropriate approach, be it case-specific deference to the political branches, the political question doctrine, or consideration of the practical consequences of permitting the cause of action claimed, the Government of the

United Kingdom would urge an interpretation of the Alien Tort Statute that allows cases that pose a threat to international relations to be reviewed as soon as possible and dismissed as appropriate.

In view of these concerns, the Government of the United Kingdom respectfully considers this litigation at odds with the deference encouraged by principles of international comity and judicial caution urged by the Supreme Court in *Sosa v. Alvarez-Machain*, where it suggested, in its careful guidance, that the courts should exercise deference to the political branches in respect of this case: 542 U.S. at 733, n 21.

In light of the foregoing, I urge the Government of the United States to take action consistently with its previously stated views and intervene in the U.S. Supreme Court proceedings to recommend that certiorari be granted.

Knowing of the Federal Republic of Germany's concerns, we have shared this letter with them. The Federal Republic of Germany has asked us to inform you that they share the concerns we express herein.

May I take this opportunity to renew to the U.S. Department of State the assurances of the Government of the United Kingdom's highest consideration.

I am copying this letter to Solicitor General Paul D. Clement and His Excellency Klaus Scharioth, Ambassador of the Federal Republic of Germany.

Yours faithfully,

Dominick Chilcott

pp Nigel Sheinwald

APPENDIX C

December 2007

Aide Memoire

The Government of Switzerland wishes to express its concern regarding the October 12 decision of the Court of Appeals for the Second Circuit in the South Africa "Apartheid" cases. The result appears to us to be inconsistent with well-accepted principles of international comity and jurisdiction. Accordingly, we request the United States Government to urge the U.S. Supreme Court to review this important case.

In its decision, the Second Circuit by a 2-1 majority decided that claims for aiding and abetting violations of customary international law could form the basis of a civil claim against corporate defendants under the U.S. Alien Torts Statute. The panel majority declined to consider the positions expressed by the United States and South Africa that the cases should not be permitted to go forward because to do so would impermissibly infringe on the sovereign interests of those and other governments contrary to the doctrine of international comity.

We believe that the Second Circuits decision is in error for important legal and policy reasons.

First, the extraterritorial assertion of jurisdiction in this case is inconsistent with established principles of international law. The Government of Switzerland recognizes and supports the view that individuals who commit human rights violations should be held criminally accountable before an appropriate tribunal. Such tribunals must be properly constituted and exercise their jurisdiction according to the rule of law. But a broad as-

sertion of jurisdiction to provide civil remedies for violations perpetrated by foreign corporations against aliens in foreign places is inconsistent with international law and may indeed undermine efforts to promote human rights and their protection. International law does not recognize the principle of universal civil jurisdiction over the foreign conduct of foreign defendants not affecting the forum State, unless the States involved have expressly consented to it.

The case at issue asserts claims on behalf of alien plaintiffs with the aim of imposing civil liabilities under U.S. law on numerous non-U.S. defendants for foreign activities that have no effect in the United States, based on allegations that the defendants were "doing business" in South Africa, with no causal connection to the plaintiffs' injuries. Such an assertion of extraterritorial jurisdiction interferes with the sovereignty of foreign nations. In addition, such claims subject foreign nationals and enterprises to a risk of conflicting legal commands and proceedings, as well as to uncertainties pertaining to the defense of their rights in a foreign forum.

Second, the case impinges on South African sovereignty. South Africa has made one of the most successful and peaceful political transitions in history, supported in no small part by policies adopted by the United States and other western democracies. As South Africa and the United States explained to the courts below, this success was based on a truth and reconciliation process, as opposed to a "victors justice." The South African government repeatedly and recently has made clear that the pendency of the U.S. litigation at issue here is incompatible with the process South Africans have chosen to address their country's past.

The Government of Switzerland believes that review of the case by the Supreme Court would give an opportunity to put an end to the mounting international uncertainty surrounding the Alien Tort Statute and thus minimize the potential conflicts with other sovereign States that may arise from assertions of jurisdiction under that statute. We hope that the Department of State agrees and that it will take the necessary actions to cause the United States Government to present its views on certiorari to the Supreme Court.

APPENDIX D

Note No: 126/2007

Her Britannic Majesty's Embassy and the Embassy of the Federal Republic of Germany present their compliments to the Department of State. The Government of the Federal Republic of Germany and Her Britannic Majesty's Government ('the Governments') write jointly to urge the United States Government to support the petition for certiorari seeking Supreme Court review of the judgment of 12 October 2007 of the United States Court of Appeals for the Second Circuit in the South Africa 'Apartheid' cases, captioned *Khulumani et al v Barclay National Bank et al, Ntsebeza et al v Daimler Chrysler Corp et al.*

The Governments are concerned at the application of the Alien Tort Statute to British and German corporations in this case. The Governments reiterate their opposition, in principle, to broad assertions of extraterritorial jurisdiction over British and German persons and entities arising out of activities that take place outside of the State asserting jurisdiction. Such litigation can interfere with national sovereignty, create legal uncertainty and costs, and risks damaging international relations. These concerns have previously been expressed to the U.S. Supreme Court by Her Britannic Majesty's Government, in amicus briefs submitted in *Hoffman-La Roche Ltd v Empagran,* No 03-724, and *Sosa v Alvarez-Machain,* No 03-339.

The judgment of the Second Circuit Court of Appeals allows proceedings asserting corporate liability for the acts and omissions of the previous South African Government to continue, based on claims that the corporate

defendants did business in South Africa during the apartheid era. This is despite the fact that such activity was in accordance with the domestic laws of all the countries concerned. The judgment therefore calls into question decisions and laws made decades ago by the Governments, the United States and many other countries. It may impair investment in emerging economies, and recognizes the liability of corporations for aiding and abetting which, under international law, is neither generally accepted nor clearly defined.

The Governments concur completely with the statement by the United States Government to the Second Circuit, that '[i]t would be extraordinary to give U.S. law an extraterritorial effect in [these] circumstances . . . by rendering private defendants liable for the sovereign acts of the apartheid government of South Africa.'

Accordingly, we urge the United States Government to take action and intervene in the United States Supreme Court proceedings concerning this case.

The Governments avail themselves of this opportunity to renew to the Department of State the assurances of their highest consideration.

BRITISH EMBASSY [Seal Omitted]
WASHINGTON, DC
13 December 2007

APPENDIX E

RK 520. SE Khulumani

Note Verbale 168/07

The Embassy of the Federal Republic of Germany and Her Britannic Majesty's Embassy present their compliments to the Department of State.

The Government of the Federal Republic of Germany and Her Britannic Majesty's Government ('the Governments') write jointly to urge the United States Government to support the petition for certiorari seeking Supreme Court review of the judgment of 12 October 2007 of the United States Court of Appeals for the Second Circuit in the South Africa 'Apartheid' cases, captioned *Khulumani et al* v *Barclay National Bank et al, Ntsebeza et al* v *Daimler Chrysler Corp et al.*

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The Governments concur completely with the statement by the United States Government to the Second Circuit, that '[i]t would be extraordinary to give U.S. law an extraterritorial effect in [these] circumstances . . . by rendering private defendants liable for the sovereign acts of the apartheid government of South Africa.'

Accordingly, we urge the United States Government to take action and intervene in the United States Supreme Court proceedings concerning this case.

The Governments avail themselves of this opportunity to renew to the Department of State the assurances of their highest consideration.

Washington, DC, December 13, 2007

L.S.

United States
Department of State
Washington, D.C.

cc: German Desk

[Seal Omitted]