Nos. 15-16909

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DOE I, DOE II, Ivy HE, DOE III, DOE IV, DOE V, DOE VI, ROE VII, Charles LEE, ROE VIII, DOE IX, LIU Guifu, WANG Weiyu, individually and on behalf of proposed class members,

Plaintiffs-Appellants,

v.

CISCO SYSTEMS, INC., John CHAMBERS, Fredy CHEUNG, and Does 1-100,

Defendants and Appellees,

Appeal from United States District Court
for the Northern District of California
No. 5:11-cv-02449-EJD
The Honorable Edward J. Davila, United States District Judge

APPELLANTS' REPLY BRIEF

Paul L. Hoffman (SB #71244)
Schonbrun Seplow Harris & Hoffman, LLP
723 Ocean Front Walk
Venice, CA 90291
Telephone: (310) 396-0731
Facsimile: (310) 399-7040

Terri E. Marsh (SB #447125)
Human Rights Law Foundation
1615 L Street, NW
Suite 1100
Washington, D.C. 20036
Telephone: (202) 697-3858
Facsimile: (202) 355-6701

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

INTRODUCTION

Plaintiffs allege detailed facts about the complicity of a U.S. corporation, Cisco Systems, Inc., and its executives (together "Cisco") in well-established international law violations actionable under the Alien Tort Statute ("ATS"). It is these allegations, rather than Cisco's caricature of them, that controls.

Cisco created, designed, and implemented the Golden Shield and its anti-Falun Gong features in the U.S. to meet the specific needs of Chinese security and the Chinese Communist Party ("Party") in implementing a pattern of religious-based persecution and forced conversion through torture. Cisco knew its clients were committing – and acted with the purpose to facilitate – these widely known violations and should be held accountable.

Cisco's acts in the United States displace the presumption against extraterritoriality identified in *Kiobel v. Royal Dutch Petroleum Co*, 133 S. Ct. 1659 (2013). And Cisco's complicity clearly constitutes aiding and abetting. This is true even if the Court applies the unwarranted "purpose" standard Cisco advocates rather than the "knowledge" standard universally recognized by international courts and tribunals.

The District Court's analysis is at odds with this Court's decision in *Doe v. Nestle USA, Inc.,* 766 F.3d 1013, 1023-24 (9th Cir. 2014), and should be reversed. Nor should this Court affirm the District Court based on the laundry list of

alternate grounds asserted by Cisco on appeal. These arguments are wrong and, in any event, should be considered by the District Court in the first instance.

ARGUMENT

I. CISCO MISCHARACTERIZES PLEADING STANDARDS AND PLAINTIFFS' ALLEGATIONS.

Cisco labels many of Plaintiffs' allegations as "conclusory" or "legal conclusions" in an attempt to claim they are insufficient under *Aschcroft v. Iqbal*, 556 U.S. 662 (2009). But Cisco both misstates the proper standard under *Iqbal* and routinely mischaracterizes or omits Plaintiffs' actual specific allegations. Those allegations easily satisfy the pleading burden and, if proven, suffice to find Cisco was complicit in torture, crimes against humanity, prolonged arbitrary detention, and other abuses suffered by Plaintiffs. Federal Rule of Civil Procedure ("FRCP") 8 does not require "detailed factual allegations," but rather "more than labels and conclusion." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Plaintiffs satisfy this test.

Cisco relies on *Eclectic Props. E, LLC v. Marcus & Millichap Co.,* 751 F.3d 990 (9th Cir. 2014), in arguing that Plaintiffs' allegations are insufficient. Answering Brief ("AB") 14 n. 6. But by conflating the deference required for two equally plausible explanations with that required for two equally possible explanations, Cisco asks the Court to deny Plaintiffs' "plausible" allegations the deference they merit. *See Eclectic*, 751 F.3d at 996-97. This case is more like *Starr*

v. Baca, 652 F. 3d 1202, 1216 (9th Cir. 2011), which explains how courts should treat a complaint when the facts suggest two plausible explanations. Indeed, in *Starr*, the plaintiff had a plausible complaint because he did more than state "bald" or "conclusory" allegations. Whereas, in *Eclectic*, the plaintiffs stated only conclusory allegations. 751 F. 3d at 997.

Regardless, Plaintiffs' allegations are sufficient even under Cisco's proposed standard, because they *do* exclude Cisco's alternative explanations. As shown *infra* at § III.B, Plaintiffs' Second Amended Complaint ("SAC") makes clear that Cisco knew its products and services would be used for purposes well beyond legitimate law enforcement, including the systematic persecution and torture of Falun Gong believers based solely on their spiritual beliefs.

Cisco misleadingly cites snippets of Plaintiffs' allegations out of context. In essence, Cisco has rewritten and discounted key allegations as if the SAC should be read in the light most favorable to defendants, despite the obligation that courts do the opposite. *Abagninin v. AMVAC Chem. Corp.*, 545 F.3d 733 (9th Cir. 2008). For example, while arguing that Plaintiffs fail to show that Cisco knew or intended that the Golden Shield would be used "for purposes other than the lawful apprehension of individuals suspected of violating Chinese law," Cisco omits key allegations. AB5-6. Cisco says that the SAC describes the Golden Shield as a "surveillance and internal security network," failing to add that the very next

sentence states that Cisco knowingly and intentionally designed, implemented, and maintained this network *to subject Falun Gong believers to a variety of human rights abuses*. ER30 (¶ 1) (emphasis added).

In the same paragraph, Cisco refers to SAC ¶ 190 to suggest that Plaintiffs allege that the Golden Shield's capabilities support standard police activities to "'fight [] against crime.'" AB6. But that paragraph says that Cisco upgraded the apparatus to fight crime and "maintain social stability", a phrase "defined in a Cisco internal file as including the '*douzheng* (i.e. violent persecution) of Falun Gong'" ER71 (¶ 190).

Similarly, Cisco quotes SAC ¶ 59 to suggest that the Golden Shield merely furthers general "Chinese security objectives." AB5. But it omits the last two sentences of this paragraph, stating that documentary sources make clear these objectives "included torture and other human rights abuses." ER42 (¶ 59). Other examples abound, the most important of which are discussed below.

II. PLAINTIFFS' CLAIMS ARE NOT BARRED BY THE *KIOBEL* PRESUMPTION AGAINST EXTRATERRITORIALITY.

A. Cisco Omits and Mischaracterizes Plaintiffs' Allegations of U.S. Conduct.

Cisco avoids discussing Plaintiffs' allegations showing a sufficient connection between Plaintiffs' claims and the United States to displace the *Kiobel* presumption. It ignores allegations that (1) the Golden Shield was designed in San

Jose, ER21, 30, 32, 34 (¶¶ 95, 127, 134, 143); (2) Chinese engineers turned to Western companies to create an apparatus to suppress dissidents because local expertise was unavailable, ER1-2, 12 (¶¶ 2, 5, 54-55); and (3) Cisco provided continuous support from San Jose to assist Chinese security in subjecting Falun Gong believers to the alleged abuses. ER51, 32, 34 (¶¶ 97(b), 134, 143). Instead of addressing these allegations, Cisco misleadingly cites only two paragraphs, 117 and 151, ignoring all of the other allegations that establish substantial connections between Cisco's conduct and this forum. Even these two paragraphs show ongoing connections between Chinese officials and Cisco in the United States that are significant particularly when coupled with Plaintiffs' other allegations of U.S.-based conduct.

B. The *Morrison* "Focus" Test Does Not Govern the *Kiobel* Analysis.

Cisco's entire *Kiobel* argument depends on their contention that *Kiobel* adopted the "focus" test in *Morrison v. National Australia Bank LTD*, 561 U.S. 247 (2010). But this Court has already rejected that argument. *Nestle*, 766 F.3d at 1028. Cisco misleadingly cites *Nestle*'s summary of the "focus" test as if it were an endorsement. AB18. But *Nestle* rejected that test in the very next paragraph: "*Kiobel II* did not explicitly adopt *Morrison*'s focus test, and chose to use the phrase 'touch and concern' rather than the term 'focus' . . ." 766 F.3d at 1028.

Since Cisco's *Kiobel* argument rests on an interpretation this Court has already rejected, its *Kiobel* argument fails.

C. Plaintiffs' Claims Sufficiently Touch and Concern the United States to Overcome the Presumption Against Extraterritoriality.

Cisco argues that the connections between the United States and Plaintiffs' claims are insufficient to overcome the *Kiobel* presumption. AB20. But this case implicates several factors that must be considered when determining whether the claims touch and concerns U.S. territory, and which are sufficient to overcome the presumption against extraterritoriality. The application of the presumption in these circumstances was deliberately left open in *Kiobel*. 133 S.Ct. at 1670. (Kennedy, J., concurring).

First, this case involves a U.S. corporation. This Court has recognized that U.S. citizenship is one relevant factor to the *Kiobel* analysis. *Mujica v. Air Scan Inc.,* 771 F.3d 580, 594-96 (9th Cir. 2014). The District Court's failure even to consider that factor was error.

Second, Plaintiffs allege that the conduct aiding and abetting the violations occurred in the United States. Even the Second Circuit, which appears to have adopted Justice Alito's minority "focus" methodology in *Kiobel*, accepts that

aiding and abetting from U.S. soil is sufficient. *Mastafa v. Chevron Corp.,* 770 F.3d 170, 183-85 (2d Cir. 2014).[1]

Third, Plaintiffs allege specific acts that took place on U.S. soil which go far beyond the "generic development, manufacturing and marketing" of a product that Cisco mentions. AB20. These acts are enough to satisfy a multi-factor test such as the one laid out in *Al Shimari v. CACI Premier Tech. Inc.*, 758 F.3d 516, 530-31 (4th Cir. 2014). In *Al Shimari*, the court examined all relevant connections and found that the presumption had been displaced. *Id* at 530-31. Specifically, the Fourth Circuit concluded that the presumption was displaced based on: (1) the defendant's status as a U.S. corporation; (2) the U.S. citizenship of the defendant's employees, upon whose conduct the ATS claims were based; (3) the contract to perform the relevant services was issued in the U.S. by the U.S. Department of the Interior and required security clearances from the U.S. Department of Defense; (4) the defendant's managers in the U.S. gave tacit approval to the acts of torture committed by the defendant's employees by attempting to "cover up" the

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[1] In *Mastafa*, the Court ultimately found that although the plaintiffs' allegations displaced the *Kiobel* presumption, they were insufficient to establish liability. 770 F.3d at 194. The Second Circuit appears to require a showing of specific intent for aiding and abetting liability, though this is not entirely clear from that court's jurisprudence. *See, e.g., Presbyterian Church of Sudan v. Talisman Energy, Inc*., 582 F.3d 244, 260 (2d Cir. 2009). For the reasons set forth in § III, Plaintiffs' aiding and abetting allegations satisfy the operative standards for this Circuit.

misconduct and "implicitly, if not expressly, encourag[ing]" it; and (5) the expressed intent of Congress through enactment of the TVPA and 18 U.S.C. § 2340A to provide aliens access to U.S. courts and to hold U.S. citizens accountable for acts of torture committed abroad. *Id*.

Under the reasoning of *Al Shimari*, Plaintiffs' claims sufficiently "touch and concern" the U.S. because, *inter alia*, (1) Cisco is a U.S. corporation, ER35 (¶ 22); (2) Defendant John Chambers is a U.S. citizen, ER35 (¶ 23); (3) Cisco designed, serviced, and managed the implementation of the Golden Shield and its *douzheng*-related features from San Jose, ER21, 30, 32, 34 (¶¶ 95, 127, 134, 143); (4) Cisco gave tacit approval to the persecutory acts by marketing its services expressly for the *douzheng* of Falun Gong with ratification from San Jose, ER43 (¶ 58, 61-62); and (5) the same expressed intent of Congress considered by the court in *Al Shimari*, 758 F.3d at 530-31. Most of Cisco's acts took place in San Jose, and to the extent that they did not, Cisco's San Jose headquarters maintained control over the entire project, including planning, implementation, and optimization by Cisco's San Jose-based Advanced Services Team. ER34, 35 (¶¶144-45). Although Cisco attempts to distinguish *Al Shimari* by focusing on the fact that no U.S. Cisco employee physically committed any act of torture in China, Cisco applies the inapplicable "focus" test to do so and ignores many factors deemed relevant in *Al Shimari*. AB16-19.

III. PLAINTIFFS' ALLEGATIONS ESTABLISH AIDING AND ABETTING LIABILITY UNDER THE ATS.

A. Knowledge is the Customary International Law Standard For Aiding and Abetting.

Cisco's argument that Plaintiffs must prove "Defendants specifically intended that Chinese authorities torture or harm Falun Gong members" (AB29) is inconsistent with this Court's decision in *Nestle* and with international law. It was precisely the district court's requirement of specific intent that this Court overruled in *Nestle*. *See Doe v. Nestle*, 747 F.Supp.2d 1057, 1087-88 (C.D. Cal. 2010); *see also Nestle*, 766 F.3d at 1029-30 (Rawlinson, J., dissenting) (dissenting opinion arguing that "purpose" should mean specific intent).

Nestle did not decide whether a *mens rea* of knowledge would be sufficient under customary international law, but it did, as Cisco concedes (AB28), hold that the standard is based on customary international law. *Nestle*, 766 F.2d at 123. This Court should now hold that "knowledge" is the correct *mens rea* for aiding and abetting under the ATS. *See* Appellants' Opening Brief ("OB") 23-24; *Amicus Curiae* Brief of Former Amb. Scheffer ("Scheffer Br.") at 5-20. There is simply *no* question that "knowledge" is the standard under international law, which explains why Cisco has provided no expert declarations or supporting *amici* on this issue.

Since Nuremberg, international tribunals have uniformly and unequivocally applied a knowledge standard for aiding and abetting liability.[2] *See generally* Scheffer Br. at 5-10. Ambassador Scheffer, who was the U.S. Ambassador to the Rome Conference, provides a detailed description of modern jurisprudence and leaves no doubt on this issue. Cisco utterly fails to refute these authorities. Under international law, the argument that "we knew we were assisting atrocities, we just did not care" is not a defense.

Ambassador Scheffer also explains that even if this Court were to adopt the "purpose" standard discussed in *Nestle*, that standard does not require specific intent or that an aider and abettor share the direct perpetrator's *mens rea*, as Cisco contends. Scheffer Br. at 11. The only mental state required would be a purpose to facilitate the commission of the violation. *Id*. at 12. This must not be confused with specific intent, shared intent, specific direction, or motive.

[2] Compare, *The Zyklon B Case: Trial of Bruno Tesch and Two Others*, 1 L. Rep of Tr. of War Crim. 94 (1947) (convicting corporate officials who knowingly sold Zyklon-B to the Nazis) ("*Zyklon B*") and *United States v. Flick et al.* [Trial No. 5], 6 Tr. War Crim. Before Nuremberg Mil. Trib. 1187, 1216-23 (1947) (convicting industrialists who contributed financial support to the S.S, knowing the crimes the S.S. were committing), with *United States v. Krauch, I.G. Farben*, 8 Tr. War Crim. Before Nuremberg Mil. Trib. 1081, 1168-69 (1948) (acquitting executives who were unaware of the "criminal purposes to which this substance was being put").

B. Plaintiffs' Allegations Satisfy Either the Knowledge or Purpose Standard.

Under either a knowledge or purpose standard, Plaintiffs' allegations establish the required *mens rea*. Cisco knew that its conduct would assist the underlying violations. It was common knowledge that Chinese security were torturing Falun Gong believers, and Cisco knew well the human rights violations for which their technology would be deployed. *See* OB25-32.

Cisco ignores or misconstrues many of Plaintiffs' allegations. For example, Cisco's embrace of the term *douzheng* in its marketing and other internal documents, emanating from San Jose, demonstrates knowledge of the persecution of Falun Gong believers. ER43, 71-72, 76 (¶¶ 61-62, 187-93, 216). Cisco's Falun Gong "signatures", uniquely customized in San Jose, with an industry-leading capability of recognizing over 90% of Falun Gong pictorial information, could not have been achieved without Cisco's collection and analysis of Falun Gong-related pictorial content, including graphic depictions of torture. ER51 (¶ 97(c)). And that was followed by tests, optimizations, and continuous updates (with Cisco San Jose's approval) to differentiate the content from other Falun Gong images widely distributed by Party outlets. ER47-50, 52-53, 59-60 (¶¶ 82-86, 88, 91, 98, 127, 131). Cisco designed the anti-Falun Gong system in San Jose for the torture and persecution of Falun Gong believers by, for instance, feeding Falun Gong database information to detention centers and other torture sites. ER 47-50, 52-53 (¶¶ 82-86,

88, 91). Such features are wholly distinct from Cisco's San Jose designs created to aid identification, surveillance, and apprehension, such as the integration of Falun Gong databases with command and dispatch centers. ER53 (¶ 98(g)).

San Jose Defendants' pre-contract solicitations of Chinese security, tightly controlled project operations and management structure, and post-implementation training and support services further establish knowledge. *See* OB25-32. Cisco manages and structures its business in San Jose through the use of an "Advanced Services Team" to work on major projects and share information with company superiors, including Party reports documenting the use of Falun Gong databases to "solve the problem of [Falun Gong's] forced conversion easily." ER48-49, 54, 63-64, (¶¶ 88-89, 102, 145-46).

Cisco's complicity in human rights abuses was brought to its attention in the U.S. on numerous occasions, including several annual shareholder meetings, third-party reports to which Cisco executives responded in 2005, and congressional hearings in 2006 and 2008. *See* OB28; ER67, 69 (¶¶ 166, 177). Yet during and after all such events, Cisco continued to develop, market, and service its customized anti-Falun Gong "solutions" to Chinese security. *See generally* ER12-55.

There is widespread information and knowledge, of which Cisco must be aware, that China tortures Falun Gong detainees. In *Nestle,* the defendants were

found to be "well aware" of the practice of child slavery "due to the many reports issued by domestic and international organizations." 766 F.3d at 1017. The use of the Golden Shield to detain and torture Falun Gong believers is similarly demonstrated by widespread reports from a number of different sources. ER 40, 66-69 (¶¶ 49, 159-65, 167, 173).[3]

Even if the Court could ignore all of this knowledge of torture and find that Cisco merely knew that its products and services would be used to identify and apprehend Falun Gong believers – and Cisco essentially concedes they did (AB30) (Plaintiffs' allegations "at most support the inference that defendants knew that the Golden Shield would be used to apprehend practitioner of Falun Gong") – such knowledge is sufficient. The widespread apprehension of believers on the basis of their religion constitutes persecution as a crime against humanity.[4] Cisco does not deny that it knew its assistance would abet such persecution.

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[3] Cisco cites *Mujica* for the proposition that the "mere awareness" of a "general problem" is the type of circumstantial allegation that cannot support inferences of knowledge. AB31-32 (citing *Mujica*, 771 F.3d at 592 & n.6). Here, Plaintiffs are not alleging "mere awareness" of a "general problem," they are alleging awareness of the specific "problem" underpinning this case: the widespread torture and persecution of Falun Gong believers.

[4] Persecution is "the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity" and rises to the level of a crime against humanity when it is "committed as part of a widespread or systematic attack directed against any civilian population." Rome Statute of the International Criminal Court ("Rome Statute"), 37 I.L.M. 999 (1998), art. 7(h). Plaintiffs plainly allege that they were identified and apprehended

Plaintiffs' allegations also establish that Cisco acted with the purpose to facilitate its client's torture and persecution. Cisco relies on its mistaken assumption that purpose requires specific intent. Cisco does not attempt to argue that Plaintiffs' allegations are insufficient to show purpose in the absence of a specific intent requirement.

In particular, Plaintiffs' allegations meet the purpose standard this Court articulated in *Nestle*, because the Defendants in San Jose (1) directly benefitted from human rights abuses against Falun Gong believers; (2) intentionally provided the technology needed to commit the alleged human rights violations in order to secure its share of the Chinese market now and in the future; and (3) attempted to shape U.S. policy to support Chinese human rights violations. *See Nestle,* 766 F.3d at 1025-26; *Amicus Curiae* Brief of Electronic Frontier Foundation ("EFF Br.") at 14-19.

C. Plaintiffs Sufficiently Allege the Requisite *Actus Reus* For Aiding and Abetting Liability.

Cisco argues that its actions must be "specifically directed" toward the commission of human rights violations, based on *Prosecutor v. Perisic*, No. IT-04-81-A, ¶ 27 (ICTY Feb. 28, 2013). AB33. But this argument fails, because that conclusion has been repeatedly rejected in subsequent ICTY jurisprudence. *See*

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as a result of their religious beliefs and that the harm they suffered formed part of a wider persecutory campaign against a religious group. ER36-39 (¶¶ 27-29, 39-43).

Prosecutor v. Popovic, Case No. IT-05-88-A, Appeal Judgment, ¶ 1758 (ICTY Jan. 30, 2015); *Prosecutor v. Sainovic*, Case No. IT-05-87-A, Appeal Judgment, ¶ 1650 (ICTY Jan. 23, 2014). As this Court observed in *Nestle*, 766 F.3d at 1026, international jurisprudence reflects "less focus on specific direction and more of an emphasis on the existence of a causal link between the defendants and the commission of the crime." *See* Scheffer Br. at 21-22.

Plaintiffs' allegations establish the necessary link between Cisco's actions and the abuses those actions facilitated. Cisco's claim that it cannot be held liable because its technologies could be used for lawful purposes misstates both the law and the allegations. AB34. The mere possibility that assistance could be used for lawful ends has never absolved the abettor. In *Zyklon B*, the poison used in Auschwitz's gas chambers also had a possible legitimate use of killing rodents and insects. Yet Tesch, an industrialist who provided it, was convicted at Nuremberg and executed. *Zyklon B*, 1 L. Rep. of Tr. Of War Crim. 94. Nor is Cisco's proposed new defense necessary to protect the blameless, because a plaintiff has to show that the defendant knew he was abetting illegal acts. Thus, in *Zyklon B*, the defendants were convicted for supplying poison "with *knowledge*" that it would be used to kill. *Id*.

Cisco's description of *Zyklon B* is misleading. AB38. Cisco relies on the prosecutor's allegations that, e.g., Tesch proposed using the gas, rather than the

Judge Advocate's findings, which emphasized the mere fact of providing the gas with knowledge of its unlawful purposes. Even if the Tribunal had relied on these allegations, Plaintiffs allege specific facts showing that Cisco similarly recommended use of the Golden Shield for unlawful purposes. ER 45-46, 51, 70 (¶¶ 76, 97(b), 181).

More generally, where a substantial effect has been demonstrated, assistance that is not inherently criminal in the abstract can lead to liability. OB10-11. Contrary to Cisco's contentions, AB34, the tribunal in *Taylor* cited several forms of neutral assistance that were found to have a substantial effect on the underlying offenses. OB11 (citing *Prosecutor v. Taylor*, Case No. SCSL-03-01-A, Appeal Judgment, ¶ 369 (SCSL Sep. 26, 2013). Rasche's acquittal in the *Ministries Case* did not rest on the neutral nature of the bank loans provided, but rather on the quality of the assistance. *United States v. Von Weizsacker,* 14 T.W.C. 621, 622 (1950). The money provided in that case was a fungible resource that could be used for any product or service. Here, by contrast, Cisco provided architectural configurations through which the violations were committed. These goods were specifically designed to subject persons to torture and crimes against humanity. ER 47-50, 52-53 (¶¶ 82-86, 88, 91, 98).[5] The possibility that assistance *could* be used

[5] Cisco cites the erroneous holding in *Daobin v. Cisco Systems, Inc.,* 2 F. Supp. 3d 717, 729 (D. Md. 2014). While that case was filed against the same defendants, the pleadings are significantly distinct: the *Daobin* Complaint did not allege many of

for a legal end simply has no bearing on the relevant *actus reus* question: whether that assistance abetted abuse.

Cisco also misstates the allegations. The San Jose Defendants' customized anti-Falun Gong features served illegitimate purposes: to serve as the critical first step—mass, efficient, and targeted identification—in a campaign of human rights violations, to enable the religious persecution of Falun Gong believers and their forced conversion through torture. Cisco did not simply sell plug-and-play hardware available to any customer. Their technology and design systems were essential to this persecution and forced conversion. ER49, 53, 61, 63 (¶¶ 88, 90, 98(h), 134, 143). *See* OB13-18. Indeed, the anti-Falun Gong systems would not have been built but for Cisco's contribution. Although the "assistance need not constitute an indispensable element, that is, a *conditio sine qua non* for the acts of the principal," *Prosecutor v. Furundzija,* Case No. IT-95-17/1 T, ¶ 209 (ICTY Dec. 10, 1998), *reprinted in* 38 I.L.M. 317 (1999), and Plaintiffs need not establish specific direction, their allegations establish both. *Id*.

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the essential acts of complicity committed by Cisco in California, any system analogous to the anti-Falun Gong systems, or how those systems furthered the violations. It therefore did not demonstrate the strong causal link between the Cisco's conduct and the alleged crimes alleged here.

Cisco claims that its technology merely furthered the "legitimate" security purpose of apprehending people who violate Chinese law.[6] AB35, 37. But Cisco was well aware that its technology specifically targeted *Falun Gong believers*. Thus, the "people" being apprehended through the use of Cisco's technology were a specific group of religious adherents whose widespread arrest and detention constituted the crime against humanity of persecution. *See supra* at III.B n. 4. Cisco would also have this Court ignore the fact that the people being apprehended were then being tortured on the basis of their religious beliefs and practices. Substantially assisting the apprehension of individuals is sufficient to establish the required *actus reus* for aiding and abetting liability. *See The Einsatzgruppen Case*, 4 Trials of War Criminals 569 (1948);[7] OB18-19.

[6] In addition, Cisco makes a fundamentally flawed argument that something that is lawful in China is also lawful under international law. AB37. But the fact that law enforcement practices employed by Chinese officials do not breach Chinese law (AB3-4) is irrelevant where the ATS is concerned, because the legal standard against which those actions are evaluated is an international legal standard.

[7] Cisco notes that the relevant defendant in *Einsatzgruppen* was likely "an active leader and commander" who additionally ordered executions. AB37 n. 17. But even if he acted only as an interpreter, it would not have exonerated him, because in locating and turning over lists of Communist Party functionaries, he was aware the people listed would be executed. "In this function, therefore, he served as an accessory to the crime." *Einsatzgruppen*, 4 Trials of War Criminals 569. Moreover, an accomplice need not be superior to, or have control over, the principal perpetrator under customary international law. *See Taylor*, ¶ 370.

Cisco inappropriately analogizes this case to *In re South African Apartheid Litig*., 617 F.Supp.2d 228 (S.D.N.Y. 2009). AB25. There, computers sold to South Africa were not the "means by which" torture was carried out. 617 F.Supp.2d at 269. Here, by contrast, Cisco's anti-Falun Gong system was directly used to carry out the forced conversion torture practices. Sensitive information used to forcibly convert Falun Gong targets was collected, analyzed, and profiled through the anti-Falun Gong system, and then integrated with torture sites to be used by Chinese security during interrogations.[8]

IV. CISCO'S OTHER ARGUMENTS ARE UNAVAILING.

A. Aiding and Abetting.

This Court has already decided, like all other Circuits to consider this issue, that there is aiding and abetting liability under the ATS. *Nestle*, 766 F.3d at 1023. The availability of such liability is so readily apparent that the Court in *Nestle* did not even raise the issue, instead directing its analysis to the question of whether the elements of aiding and abetting were alleged. *Id*. Cisco's attempt to resurrect this long-settled issue is unpersuasive.

[8] Cisco further misstates the facts by conflating the Golden Shield as a whole with the anti-Falun Gong features customized to persecute Falun Gong believers. The anti-Falun Gong system is independent and separate from all other systems, including those used for crime control. *See* ER31, 39, 46-47 (¶¶ 5, 45, 80-81); EFF Br. at 19-22.

B. There is Corporate Liability Under The ATS.

Cisco's argument that corporate liability is unavailable under the ATS is precluded by *Nestle*. *Id.* at 1021-22. Cisco concedes this point and asks the Court to "revisit" its conclusion. AB42. But Cisco provides no arguments outside of those in a dissenting opinion that this Court has already considered and rejected. *Nestle*, 788 F.3d at 954-56. There is no reason for the Court to reverse itself.

C. Plaintiffs' Allegations Establish the Required State Action.

A private party's participation with state officials in allegedly unlawful conduct is sufficient to qualify that party as a state actor, even if the private party's conduct is not the ultimate cause of the injury alleged. *Lugar v. Edmonson Oil Co., Inc.*, 457 U.S. 922, 941 (1982). In addition, the state action requirement is met where a private party enters into an agreement with the state or its agents that confers mutually derived and interdependent benefits. *See Burton v. Wilmington Parking Authority*, 365 U.S. 715, 724-25 (1961). Cisco collaborated with Chinese security forces to plan and implement the central technological tool used to persecute Falun Gong, in a manner that mutually benefitted both parties, thus engaging in state conduct resulting in harms to Plaintiffs. ER45-47, 51-54 (¶¶ 75-80, 96-102). Thus, Cisco acted under color of law. Regardless, Plaintiffs' claims of crimes against humanity do not even require state action. *See Kadic v. Karadzic*, 70 F.3d 232, 243 (2d Cir. 1995).

D. Plaintiffs Adequately Allege Conspiracy and Joint Criminal Enterprise.

Conspiracy liability is available under the ATS. *See Hilao v. Estate of Marcos*, 103 F.3d 767, 776 (9th Cir. 1996). Cisco participated in a conspiracy or a joint criminal enterprise under international law. *See generally* ER65-66, 70-72. The District Court failed to even address this issue. Thus, even if this Court were to affirm the District Court's dismissal of Plaintiffs' aiding and abetting claims, it should remand to the lower court to address conspiracy or joint criminal enterprise liability.

E. Plaintiffs' Allegations Against Cisco Executives Are Sufficient.

The allegations against Cisco CEO John Chambers and Vice President Freddy Cheung are "facial[ly] plausib[le]" because the court may "draw the reasonable inference that the defendant[s] [are] liable." *Iqbal*, 556 U.S. at 678. Contrary to Cisco's assertions, the SAC does not rely on "generalized allegations" or "speculation." AB44. Instead, the SAC alleges detailed facts tying these executives to the violations. *See* ER72-77.

V. PLAINTIFFS' TVPA ALLEGATIONS ARE SUFFICIENT.

The "TVPA contemplates liability against officers who do not personally execute . . . torture or extrajudicial killing . . . ." *Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702, 1709 (2012). In particular, the TVPA encompasses aiding and abetting liability. *See, e.g., Doe v. Drummond Co.*, 782 F.3d 576, 607 (11th Cir.

2015); *Chowdhury v. Worldtel Bangladesh Holding, Ltd.*, 746 F.3d 42, 53 (2d Cir. 2014).

Congress has explicitly stated that the TVPA provides for aiding and abetting liability. The Senate Report on the TVPA states that the Act permits "lawsuits against persons who ordered, *abetted or assisted*" torture or extrajudicial killing. S. Rep. No. 102-249, at 8-9 1991) (emphasis added). Because Congress has made its view clear, no recourse to *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 182 (1994), is appropriate.

VI. CISCO'S ALTERNATIVE GROUNDS FOR AFFIRMANCE SHOULD BE REJECTED.

A. The Political Question Doctrine Is Inapplicable.

The political question doctrine is "primarily a function of the separation of powers." *Baker v. Carr*, 369 U.S. 186, 210 (1962). Without a potential violation of the separation of powers, the doctrine does not apply, lest the judiciary "abdicate [its] Article III responsibility—the resolution of 'cases' and 'controversies'—in favor of the [political branches]." *Alperin v. Vatican Bank*, 410 F.3d 532, 538 (9th Cir. 2005). The doctrine may only bar adjudication "where there is a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it." *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1427 (2012)

(*quoting Nixon v. United States*, 506 U.S. 224, 228 (1993)). Neither concern applies here.[9]

Cisco raises the Tiananmen Act as the political branches' exercise of their power to enact U.S. export law and policy vis-à-vis China. AB48. In the Tiananmen Act, Congress commended the President for his condemnation of Chinese human rights abuses and barred the export of items that would aid such abuses. Pub. L. No. 101-246, 104 Stat. 15 §§ 901(a)(4), 901(b)(1), 902(a) (1990). Thus, adjudication of the ATS claims here actually comports with the political branches' decisions not to support or enable repression in China. Just because the political branches did not categorically bar exports of software or technology products does not remotely suggest that Congress sought to immunize all exporters of these products from tort liability when they assist the very human rights abuses Congress and the Executive routinely condemn. *See Doe v. Unocal*, 963 F. Supp. 880, 896 (C.D. Cal. 1997).

Many of the cases Cisco cites actually reject the use of the political question doctrine. *See Baker*, 369 U.S. at 237; *Zivotofsky*, 132 S. Ct. at 1430; *Mingtai Fire & Marine Ins. Co. v. United Parcel Serv.*, 177 F.3d 1142, 1147 (9th Cir. 1999). The cases that do find a claim nonjusticiable are inapposite. In *United States v.*

[9] Respondents do not deny that there are judicially discoverable and manageable standards for resolving Plaintiffs' claims. *See* AB48-50.

Mandel, 914 F.2d 1215 (9th Cir. 1990), the court was asked to directly review a government official's policy determination. Similarly, in *Saldana v. Occidental Petroleum Corp.*, 774 F.3d 544, 552 (9th Cir. 2014), the plaintiffs challenged the defendant's funding of a Colombian military group which the United States also funded, which would require the court to implicitly condemn U.S. foreign policy decisions. Here, the United States has made no policy decision to support the persecution of Falun Gong believers.

B. The Act of State Doctrine Does Not Bar Plaintiffs' Claims.

The act of state doctrine is narrow and inapplicable here. Cisco bears the burden of showing that an act of state occurred *and* that the policies underlying the doctrine require its application. *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 713 (9th Cir. 1992). Cisco fails at both requirements.

The act of state doctrine applies only to "official," "sovereign" acts. *W. S. Kirkpatrick & Co. v. Envtl. Tectonics Corp.*, 493 U.S. 400, 406, 410 (1990). "International law does not recognize an act that violates *jus cogens* [international law norms from which no derogation is permitted] as a sovereign act." *Siderman*, 965 F.2d at 714, 718. Accordingly, human rights abuses that violate *jus cogens* norms are not acts of state. *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 757 (9th Cir. 2011) (en banc) (vacated on other grounds by *Rio Tinto PLC v. Sarei*, 133 S. Ct. 1995 (2013). Plaintiffs allege torture (ER101-102), crimes against humanity

(including persecution) (ER104-105), forced labor (ER103-104), and extrajudicial killing. ER105-106. All violate *jus cogens* norms. There is no "act of state" at issue here.

Moreover, acts violating a nation's own laws cannot be considered "official." *See In re Estate of Marcos Human Rights Litig.*, 25 F.3d 1467, 1471-72 (9th Cir. 1994); *Kadic*, 70 F.3d at 250. Cisco admits that Chinese law prohibits torture. AB4. China has previously stated that "any such violations would be contrary to Chinese law." *Doe v. Qi*, 349 F. Supp. 2d 1258, 1303, 1306 (N.D. Cal. 2004); *see also* CHINA'S THIRD PERIODIC REPORT TO THE UN COMMITTEE AGAINST TORTURE, ADDENDUM, CAT/C/39/Add.2, arts. 4, 10, 11 (Jan. 5, 2000). No high-level Chinese official has ever publicly endorsed or ratified torture or persecution against Falun Gong believers. *See* ER38 (¶¶ 35-46).[10]

Cisco cites the district courts' erroneous holdings in *Qi* and *Daobin* that abuses against Falun Gong were acts of state. AB52, 54 (citing *Qi,* 349 F.Supp.2d at 1294-95; *Daobin,* 2 F.Supp.3d at 726). Neither can be reconciled with the fact that *jus cogens* violations and acts violating local law are not acts of state. Indeed, *Qi* recognized that the acts violated "official laws" but erroneously found that they were authorized by "covert *unofficial* policy." 349 F.Supp.2d at 1286, 1294

[10] Moreover, Cisco repeatedly mischaracterizes the CCP's *unofficial* political *douzheng* campaigns against dissidents as components of China's *official* criminal justice system. AB51. But Plaintiffs allege otherwise. ER 37-39 (¶¶ 30-43).

(emphasis added). This holding contravenes the requirement that acts of state be "official." *Kirkpatrick*, 493 U.S. at 406, 410; *accord Kadic*, 70 F.3d at 250 (requiring "officially approved policy").

Regardless, *Qi* supports Plaintiffs, not Cisco. Cisco misstates that case. AB52-53. The district court did not "dismiss;" it issued a declaratory judgment against Chinese officials for abuses against Falun Gong. *Qi*, 349 F.Supp.2d at 1306. The court held that such relief was "consistent with" the State Department's pronouncements condemning such abuses, that a declaratory judgment does not command the state or its officials to do anything, and that the risk to U.S. foreign relations was "minimal." *Id.* at 1302-06. The court declined to provide damages and injunctive relief only because the claims were against *sitting Chinese officials*. *Id*. at 1306. Plaintiffs' claims here are against *private U.S. parties*. Liability here would not require anything of China or its officials and would no more interfere with U.S. foreign policy than the judgment in *Qi.*

Even if acts of state were at issue, the doctrine is inapplicable where a plaintiff is "not trying to undo or disregard the governmental action, but only to obtain damages from private parties who procured it." *Kirkpatrick*, 493 U.S. at 407. Finding for Plaintiffs would not invalidate any sovereign act; it would simply issue a remedy against Cisco. *See id.* at 404-10.

Cisco also fails to show that the policies underlying the doctrine "justify its application." *Kirkpatrick*, 493 U.S. at 409. Courts do not bar adjudication unless defendants show a multi-factor balancing test favors abstention. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964). But Cisco does not even mention the *Sabbatino* test and ignores three of the four factors. As a result, Cisco cannot meet its burden.

The first factor, "the degree of codification or consensus concerning a particular area of international law," *Sabbatino*, 376 U.S. at 428, weighs against dismissal because ATS claims must reflect broad international consensus. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004). Therefore, "it would be a rare case in which the act of state doctrine precluded suit under section 1350." *Kadic*, 70 F.3d at 250. The second factor, considering whether the suit has foreign policy implications, *Sabbatino*, 376 U.S. at 428,[11] also weighs against dismissal because both Congress and the Executive have criticized abuses against Falun Gong. *See Qi*, 349 F.Supp.2d at 1302-03. The third factor, which shifts the balance against application of the doctrine where the government that committed the acts is no longer in power, *Kirkpatrick*, 493 U.S. at 409, also weighs against dismissal, because China's current leaders, President Xi Jinping and Premier Li Keqiang,

[11] *Daobin*, which Cisco cites (AB54), likewise addresses only this factor and thus does not perform the required analysis. 2 F.Supp.2d at 726.

have not endorsed any act alleged. Finally, the Ninth Circuit asks "whether the foreign state was acting in the public interest." *Liu v. Republic of China*, 892 F.2d 1419, 1432 (9th Cir. 1989). Violations of international human rights cannot be in the public interest. *See, e.g., Qi*, 349 F.Supp.2d at 1306.

For these reasons, Cisco has failed to meet their burdens and the act of state doctrine is inapplicable.

C. Abstention on International Comity Grounds is Inappropriate.

International comity is a prudential doctrine that does not obligate federal courts to defer to foreign courts. *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1237 n. 13 (11th Cir. 2004). To the contrary, federal courts have a "virtually unflagging obligation . . . to exercise jurisdiction." *Colorado River Water Cons. Dist. v. U.S.*, 424 U.S. 800, 817 (1976). This obligation exists even where the controversy potentially implicates foreign affairs. *Kirkpatrick*, 493 U.S. at 409. Only in "exceptional circumstances" may courts abdicate jurisdiction in deference to the laws or interests of a foreign country. *Colorado River*, 424 U.S. at 813; *Neuchatel Swiss General Ins. Co. v. Lufthansa Airlines*, 925 F.2d 1193, 1194 (9th Cir. 1991).

As Cisco admits, comity applies only where "[a] federal court has jurisdiction but defers to the judgment of an *alternative forum*." AB54 (quoting *Ungaro-Benages,* 379 F.3d at 1237) (emphasis added). Comity in deference to a

foreign court "is appropriate [only if] the foreign proceedings are procedurally fair and do not contravene the laws or public policy of the United States." *Mujica*, 771 F.3d at 599 (internal quotations omitted).

Cisco cannot meet that threshold burden. There is no adequate forum in China for these claims. Unlike in *Mujica*—where this Court found that the plaintiffs could bring suit in Colombia, and in fact had done so—Plaintiffs have no remedy in China. The practice of Falun Gong is illegal there, and any attempt to seek redress would only inspire further abuse. *See id.* at 613-14.[12] Nor has Cisco even consented to jurisdiction in China. *See id.* at 613. Cisco's failure to show an adequate foreign forum is fatal to its argument.

Declining to exercise jurisdiction on comity grounds requires evaluating "the strength of the United States' interest in using a foreign forum" and "the strength of the foreign government's interests." *Id*. at 603. Unlike in *Mujica*, the State Department here has not filed a Statement of Interest, instead choosing to remain silent. Cisco points to statements from the State Department in *Qi*, 349 F.Supp.2d 1258, a significantly older and different case *against Chinese government officials*. No Chinese officials are defendants here. The State Department's expressed interest in a case against another sovereign's officials cannot be equated to its

[12] Cisco argues generically that there is due process in Chinese courts, AB56 n. 26, but fails to address the relevant question of whether *these Plaintiffs* would be afforded due process.

silence in a case against a U.S. corporation. Similarly, the Chinese government has not expressed a view here. Cisco asks this Court to rely on its statement in *Qi*. AB54. But this Court does not take direction from the Chinese Communist Party. A foreign government's opinion cannot be a basis for dismissal. *Patrickson v. Dole Food Co.*, 251 F.3d 795, 803-04 (9th Cir. 2001).

CONCLUSION

For these reasons, the Judgment below should be reversed and the case remanded for further proceedings.

Dated: April 15, 2016

By: /s/ Paul L. Hoffman
Paul L. Hoffman
Attorney for Appellants

/s/ Terri E. Marsh
Terri E. Marsh
Attorney for Appellants

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,885 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word version 14.5.6 in Times New Roman font size 14.

Dated: April 15, 2016

s/ Terri E. Marsh
Terri E. Marsh
Attorney for Plaintiffs/Appellants

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I hereby certify that on April 15, 2016, I electronically filed the foregoing Appellants' Reply Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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Dated: April 15, 2016

s/ Terri E. Marsh
Terri E. Marsh
Attorney for Plaintiffs/Appellants

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9th Circuit Case Number(s): 15-16909

I, Terri E. Marsh , certify that this brief is identical to the version submitted electronically on [date] April 15, 2016 .

Date April 18, 2016

Signature s/ Terri E. Marsh

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