07-0016

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

THE PRESBYTERIAN CHURCH OF SUDAN, REV. MATTHEW MATHIANG DEANG, REV. JAMES KOUNG NINREW, NUER COMMUNITY DEVELOPMENT SERVICES IN U.S.A., FATUMA NYAWANG GARBANG, NYOT TOT RIETH, individually and on behalf of the Estate of her husband JOSEPH THIET MAKUAC, STEPHEN HOTH, STEPHEN KUINA, CHIEF TUNGUAR KEIGWONG RAT, LUKA AYOUL YOL, THOMAS MALUAL KAP, PUOK BOL MUT, CHIEF PATAI TUT, CHIEF PETER RING PATAI, CHIEF GATLUAK CHIEK JANG,

Plaintiffs-Appellants,

v.

TALISMAN ENERGY INC.,

Defendant-Appellee,

and

REPUBLIC OF THE SUDAN,

Defendant.

On Appeal From The United States District Court For The Southern District of New York

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BRIEF FOR DEFENDANT-APPELLEE TALISMAN ENERGY INC.

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Corporate Disclosure Statement of Appellee

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, defendant-appellee Talisman Energy Inc. states that it is a nongovernmental corporate party that has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

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Preliminary Statement

In this action, fifteen Plaintiffs sought to hold a Canadian energy company, an indirect 25% owner of a Mauritius company engaged in oil exploration in southern Sudan, responsible for alleged acts of genocide, crimes against humanity and war crimes by the Government of Sudan ("GOS"). After almost five years of litigation, the District Court granted summary judgment to defendant Talisman Energy Inc. ("Talisman Energy") because Plaintiffs had not "supplied sufficient admissible evidence to proceed to trial on their claims." (JA __ [453 F. Supp. 2d 633, 640]). That decision was correct.

More fundamentally, this litigation never should have proceeded at all. Under *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), Plaintiffs' claims did not properly invoke the limited jurisdiction afforded by the Alien Tort Statute, 28 U.S.C. § 1350 (the "ATS"). In *Sosa*, the Supreme Court directed federal courts to be "vigilant doorkeep[ers]" in ATS litigation, *id*. at 729, and to "require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized." *Id.* at 725.

The only claims at issue were for conspiracy and aiding and abetting, as Plaintiffs abandoned any contention that Talisman Energy itself committed any acts of genocide, crimes against humanity or war crimes. To invoke ATS jurisdiction, such claims must be based on universally accepted and specifically defined

international law norms (not, as Plaintiffs suggest, supposed federal common law norms). Both conspiracy and aiding and abetting lack the clear definition and universal acceptance in international law that *Sosa* requires; so does the notion of corporate liability.

The *Sosa* Court admonished against embracing expansive liability theories, given "the practical consequences of making [such a] cause available to litigants in the federal courts," *id.* at 732-33 (footnote omitted), including "the potential implications for the foreign relations of the United States." *Id.* at 727. Those considerations, time-honored precepts of international comity, and international law all counsel strongly against allowing ATS plaintiffs to make federal courts the forum for adjudicating claims against foreign corporations for their conduct abroad, having nothing to do with the United States – especially where, as here, the government of the country in which the foreign corporation is organized has objected to such extraterritorial jurisdiction.

If dismissal is not affirmed on these grounds, the grant of summary judgment in favor of Talisman Energy should be sustained. Judge Cote correctly applied the standards governing Rule 56 motions, and Plaintiffs have identified no admissible evidence from which a jury could have reasonably found that Talisman

Energy conspired with or aided and abetted the GOS in committing international law violations.

Equally unfounded are Plaintiffs' challenges to the District Court's holdings regarding the scope of civil claims for conspiracy and aiding and abetting under customary international law (assuming *arguendo* that any such claims may be adjudicated, post-*Sosa*). If customary international law recognizes the doctrine of conspiracy at all, Judge Cote properly held it limited to conspiracies to commit genocide and to wage aggressive war; Plaintiffs alleged no such conspiracy. As to aiding and abetting, Judge Cote required Plaintiffs to prove that Talisman Energy had the "intent" to "assist [a] specific violation" of international law by the GOS – *i.e.*, "that the defendant specifically directed his acts to assist in the specific violation" (JA __ [453 F. Supp. 2d at 668]). This standard was abundantly supported by the international law sources upon which the District Court relied. As Plaintiffs produced no admissible evidence of such intent – or of substantial assistance or causation – summary judgment was proper. Even if Plaintiffs' watered-down aiding and abetting test were accepted, Plaintiffs still offered no evidence from which a reasonable jury could have found Talisman Energy liable. There was no evidence that any Talisman Energy officer or employee ever knowingly assisted the GOS in injuring anyone.

Plaintiffs also challenge Judge Cote's denial, for lack of "good cause," of their eleventh-hour motion to amend their Second Amended Complaint ("SAC") to add entirely new substantive allegations. The District Court, however, did not abuse its broad discretion in disallowing a proposed amendment that would have "drastically alter[ed] the plaintiffs' theories of liability and the focus of the entire case," especially where it appeared that "plaintiffs acted in bad faith in waiting until the eve of summary judgment practice to file the motion to amend." (JA __ [453 F. Supp. 2d at 680]) (footnotes omitted). Plaintiffs' suggestion that these new allegations were subsumed within the SAC, which governed the action throughout fact and expert discovery, stretches beyond recognition the concept of "notice pleading." In any event, as the District Court also held, granting leave to amend would have been futile. Plaintiffs failed to demonstrate that their new theories – which would have entailed, *inter alia*, piercing the corporate veils of several entities under the laws of various foreign jurisdictions – could withstand summary judgment.

Finally, the District Court did not abuse its discretion in denying Plaintiffs' class certification motions. Judge Cote correctly determined that Rule 23(b)(2) certification was inappropriate because the action was one for monetary damages, and that Rule 23(b)(3) certification was unwarranted because the core question –

whether there was evidence linking each putative class member's alleged harm to Talisman Energy – inevitably was an individual question, so that common issues did not predominate over individual ones. The District Court also correctly rejected "issue certification" under Rule 23(c)(4)(A).

Jurisdictional Statement

Plaintiffs alleged subject matter jurisdiction under the ATS. Although Talisman Energy disputes such jurisdiction, the District Court had jurisdiction to determine its jurisdiction. *See United States v. United Mine Workers*, 330 U.S. 258, 293 (1947).

On September 12, 2006, the District Court entered an order (the "September 2006 Order") (i) granting Talisman Energy's motion for summary judgment on all claims against it, and (ii) denying Plaintiffs' motion for leave to file a Third Amended Complaint ("TAC").

On October 11, 2006, Plaintiffs filed a notice of appeal (the "First Appeal") from the September 2006 Order. However, because Plaintiffs' claims against the other defendant, the GOS (which had defaulted), remained to be adjudicated, the September 2006 Order was not appealable under 28 U.S.C. § 1291.

On October 16, 2006, Talisman Energy moved for entry of judgment pursuant to Rule 54(b), and on December 4, 2006 the District Court granted that motion. Judgment was entered, dismissing all claims against Talisman Energy, on

December 5, 2006. On December 27, 2006, Plaintiffs filed a notice of appeal from the judgment, together with a motion to dismiss their First Appeal pursuant to Fed. R. App. P. 42(b). On January 5, 2007, this Court granted that motion.

This Court has appellate jurisdiction under 28 U.S.C. § 1291.

Statement of Issues and Standard of Review

1. Whether the action should have been dismissed for lack of federal subject matter jurisdiction under the ATS because Plaintiffs' claims that Talisman Energy, a corporation, conspired with and aided and abetted the GOS in committing international law violations lacked the clear definition and universal acceptance *Sosa* required.[1]

2. Whether, under *Sosa*, customary international law principles must furnish all conduct-regulating norms on which ATS claims are based.

3. Whether, under *Sosa*, the practical consequences of judicially recognizing such claims counsel against their recognition.

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[1] No cross-appeal is required to assert such alternative bases for affirming judgment in Talisman Energy's favor, *Kosakow v. New Rochelle Radiology Associates, P.C.*, 274 F.3d 706, 715 (2d Cir. 2001), and federal subject matter jurisdiction may be raised at any time. *Kontrick v. Ryan*, 540 U.S. 433, 455 (2004).

4. Whether international law and comity required dismissal of an action commenced by foreign plaintiffs against foreign defendants arising entirely outside the United States.

5. Whether, assuming *arguendo* that aiding and abetting claims can be adjudicated in light of *Sosa*, the District Court properly required proof that the defendant knew of a specific violation of international law and, with intent to assist that violation, provided to the principal wrongdoer assistance having a substantial effect on the success of that violation.

6. Whether, assuming *arguendo* that Plaintiffs' claims could be adjudicated in light of *Sosa*, the District Court correctly granted summary judgment dismissing Plaintiffs' claims against Talisman Energy because Plaintiffs failed to adduce sufficient admissible evidence creating a genuine issue of material fact.

7. Whether the District Court acted within its discretion in denying Plaintiffs leave to file the TAC when their motion (a) was made after five years of litigation and on the eve of briefing a summary judgment motion, (b) was untimely under a Rule 16(b) scheduling order, (c) would have drastically altered Plaintiffs' theories of liability and the focus of the action, and (d) was based on new theories lacking sufficient merit to withstand summary judgment.

8. Whether the District Court properly denied Plaintiffs' class certification motions.

The standard of review for issues 1 through 5 is *de novo*, *New York v. National Serv. Indus., Inc*., 460 F.3d 201, 206 (2d Cir. 2006), except that challenges to the District Court's refusal to dismiss on international comity grounds are reviewed for abuse of discretion. *Finanz AG Zurich v. Banco Economico S.A.*, 192 F.3d 240, 246 (2d Cir. 1999).

The standard of review for issue 6 is *de novo*, *Bickerstaff v. Vassar College*, 196 F.3d 435, 445 (2d Cir. 1999), except that challenges to the District Court's evidentiary rulings in deciding the summary judgment motion are reviewed for manifest error. *Raskin v. Wyatt Co*., 125 F.3d 55, 65-66, 67 (2d Cir. 1997).

The standard of review for issue 7 is abuse of discretion, although "a district court does not abuse its discretion in denying leave to amend the pleadings after the deadline set in [a Rule 16(b)] scheduling order where the moving party has failed to establish good cause," and "a finding of 'good cause' depends on the

diligence of the moving party." *Parker v. Columbia Pictures Indus.*, 204 F.3d 326, 340 (2d Cir. 2000) (citations omitted).[2]

The standard of review for issue 8 is abuse of discretion, except that: (a) to the extent the ruling on any Rule 23 class certification requirement is supported by a finding of fact, that finding will be affirmed unless clearly erroneous; and (b) to the extent the ruling involves an issue of law, review is *de novo*. *In re Initial Public Offering Sec. Litig.*, 471 F.3d 24, 40-41 (2d Cir. 2006), *reh'g denied*, __ F.3d __, 2007 WL 1097892 (2d Cir. Apr. 6, 2007).

Statement of the Case

A. The Pleadings and Talisman Energy's Motions to Dismiss and for Judgment on the Pleadings

Plaintiffs, purporting to represent a class of hundreds of thousands of southern Sudanese, commenced this action against Talisman Energy on November 8, 2001. Plaintiffs' First Amended Complaint, filed on February 25, 2002, added the GOS as a defendant. The GOS neither appeared nor answered. On March 19, 2003, the District Court (per the Hon. Allen G. Schwartz),[3] denied Talisman

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[2] *Monahan v. New York City Dep't of Corrections*, 214 F.3d 275 (2d Cir. 2000), cited by Plaintiffs (*see* Opening Brief for Plaintiffs-Appellants ("Br.") 43), did not involve a Rule 16(b) scheduling order and is therefore inapposite.

[3] The action was reassigned to Judge Cote on April 16, 2003, following Judge Schwartz's death.

Energy's motion to dismiss. (JA __ [244 F. Supp. 2d 289]) (the "March 2003 Order").

On August 18, 2003, Plaintiffs filed the SAC (JA __ [Gottridge Ex. 1]), which Talisman Energy answered on September 8, 2003. (Docket 81).[4] As Judge Cote summarized, Plaintiffs alleged that Talisman Energy "conspired with or aided and abetted the [GOS] in committing three crimes recognized under international law: genocide, crimes against humanity, and war crimes." (JA __ [453 F. Supp. 2d at 639]). The alleged "crime against humanity" was "the widespread and systematic transfer of a civilian population" and the "war crime" alleged was "targeted attacks on civilians." (*Id*.).

On December 8, 2004, Talisman Energy moved for judgment on the pleadings, pursuant to Rule 12(c), arguing that *Sosa* and *Flores v. Southern Peru Copper Corp.*, 414 F.3d 233 (2d Cir. 2003) required dismissal as a matter of law. On March 23, 2005, Talisman Energy filed additional papers in support of its motion, based on the Statement of Interest of the United States of America, an annexed letter from the Department of State and a diplomatic note of the Embassy

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[4] Talisman Energy moved to dismiss for lack of personal jurisdiction. That motion was originally filed on July 11, 2003, withdrawn and refiled on February 14, 2004 and fully submitted (after certain discovery had been concluded) on August 12, 2004. The District Court denied that motion by order entered on August 30, 2004. (JA __ [2004 U.S. Dist. LEXIS 17030]).

of Canada. Judge Cote denied that motion in two orders, on June 13, 2005 (JA __ [374 F. Supp. 2d 331]) and August 30, 2005 (JA __ [2005 WL 202846]).

B. Plaintiffs' Class Certification Motions and Associational Standing

The District Court twice denied class certification. On March 25, 2005, Judge Cote denied Plaintiffs' first such motion because common issues of law and fact did not predominate over issues affecting individual class members, as Rule 23(b)(3) requires, and because Rule 23(b)(2) certification was inappropriate as the relief sought related exclusively to money damages. (JA __ [226 F.R.D. 456, 467-68]). On May 9, 2005, the District Court entered an Order (the "May 2005 Order"), holding that the organizational Plaintiffs, Presbyterian Church of Sudan ("PCOS") and Nuer Community Development Services ("NCDS"), lacked standing to sue on behalf of their members in light of *Bano v. Union Carbide Corp.*, 361 F.3d 696 (2d Cir. 2004), because each member would have to provide "individual proof of proximate causation." (JA __ [2005 WL 1060353]).[5]

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[5] Plaintiffs have abandoned their appeal from the May 2005 Order, as they do not contend in their brief that PCOS or NCDS have standing to assert claims on behalf of their members. *Storey v. Cello Holdings, L.L.C.*, 347 F.3d 370, 380 n.6 (2d Cir. 2003). Furthermore, NCDS is a Minnesota corporation and not an "alien." Judge Cote correctly held that NCDS therefore "may not bring suit under the ATS." (JA __ [453 F. Supp. 2d at 661]). Plaintiffs do not challenge this ruling.

Plaintiffs moved again to certify a class, proposing two alternative class definitions. On September 20, 2005, the District Court denied that motion, and also declined to certify certain issues for class treatment. (JA __ [2005 WL 2278076]). This Court denied Plaintiffs' Rule 23(f) petition for an interlocutory appeal on July 19, 2006. (JA __ [July 19, 2006 Order]).

C. Discovery, Talisman Energy's Motion for Summary Judgment and Plaintiffs' Motion for Leave To File the TAC

By Order entered on June 18, 2003, the District Court set the dates for motion practice and ordered fact discovery to close on March 25, 2005. (Docket 68). Talisman Energy produced approximately 1,000,000 pages of documents, and the parties took 95 depositions, mainly outside the United States (*e.g.*, in Canada, the United Kingdom, the Netherlands, South Africa and Kenya). (JA __ [453 F. Supp. 2d at 640]).

On April 12, 2006, just two weeks before Talisman Energy moved for summary judgment and well into the fifth year of the litigation, Plaintiffs requested leave to file the TAC. (Docket 296). The June 18, 2003 Scheduling Order, entered pursuant to Rule 16(b), established August 15, 2003 as the last date for amending the pleadings. (Docket 68). Plaintiffs' motion to amend was made over two and one-half years after this deadline.

On April 28, 2006, Talisman Energy moved for summary judgment dismissing Plaintiffs' claims. (Docket 303).

D. The September 2006 Order

In the September 2006 Order, the District Court granted Talisman Energy's motion for summary judgment and denied Plaintiffs' motion for leave to amend. (JA __ [453 F. Supp. 2d 633]). Holding that Plaintiffs "failed to locate admissible evidence that Talisman has violated international law," the District Court observed:

> the plaintiffs have not distinguished between the admissible and inadmissible. The plaintiffs repeatedly describe 'Talisman' as having done this or that, when the examination of the sources to which they refer reveals that it is some other entity or an employee of some other company that acted. They assert that this or that event happened, when the documents to which they refer consist of hearsay embedded in more hearsay. Indeed, most of the admissible evidence is either statements made by or to Talisman executives, and the plaintiffs' descriptions of their own injuries, with very little admissible evidence offered to build the links in the chain of causation between the defendant and those injuries.

(JA __ [453 F. Supp. 2d at 639]). Judge Cote did not minimize the harms Plaintiffs and other southern Sudanese sustained or the GOS's "gross violations of international law and the norms of civilized behavior." (JA __ [453 F. Supp. 2d at 640]). Rather, she comprehensively analyzed "an issue that applies to every civil

lawsuit in this country as it nears trial"[6] – *i.e.*, "whether the plaintiffs have supplied sufficient admissible evidence to proceed to trial on their claims" – and concluded: "They have not." *Id*.[7]

As Judge Cote noted, "[i]n recognition of the very serious gaps in their proof, the plaintiffs moved on the eve of the summary judgment practice to reconfigure the legal landscape with a far reaching proposal for amending their complaint." (JA __ [453 F. Supp. 2d at 639]). That motion sought to "impose liability on Talisman for the activities of the consortium of oil companies that operated on the ground in the Sudan" and was "unsupported by the legal or factual analysis that should have accompanied such an untimely and potentially transformative motion." *Id.*

Statement of Facts

A. Talisman Energy

Talisman Energy is a Canadian energy corporation. (JA __ [Gottridge Ex. 125, 2]). It purchased an indirect interest in ongoing oil operations in Sudan in October 1998 by acquiring another Canadian corporation, Arakis Energy

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[6] By Order dated September 20, 2005, trial was scheduled for January 8, 2007. (Docket 263).

[7] Accordingly, the District Court denied as moot other pending motions, including the parties' respective motions to exclude each others' proposed expert testimony (Docket 402).

Corporation ("Arakis"). (JA __ [Gottridge Ex. 106]). Arakis's wholly owned subsidiary State Petroleum Corporation ("SPC") held a 25% interest in Greater Nile Petroleum Operating Company Limited ("GNPOC"), a Mauritius company operating in southern Sudan, and in a series of agreements (the "GNPOC Project Agreements") governing, *inter alia*, GNPOC's shareholders' oil exploration, production and transportation rights. (JA __ [Gottridge Exs. 95-98; 99, Arts. 2.1, 2.3(e), 3.9]).

Through intercorporate transactions, an indirect Talisman Energy subsidiary, State Petroleum Corporation B.V., later renamed Talisman (Greater Nile) B.V. ("TGNBV"), acquired these interests. (JA __ [Gottridge Exs. 101, 102 and 106]). Talisman Energy, through intermediate subsidiaries and TGNBV, maintained its indirect investment in GNPOC until March 2003. (JA __ [Gottridge Exs. 121, 124]). Talisman Energy itself never conducted oil operations in Sudan. (JA __ [Gottridge Ex. 20, 118:4-16]).

B. TGNBV

TGNBV was organized under Dutch law in 1998. (JA __ [Gottridge Ex. 105]). Until its sale in March 2003, TGNBV was a wholly owned subsidiary of another Dutch company, Goal Olie-en Gasexploratie B.V. ("Goal"). (JA __ [Gottridge Ex. 108]). In 2001, TGNBV's net assets exceeded $400 million and its

net income was over $90 million. (JA __ [Gottridge Ex. 118]).[8] From October 1998, Goal was wholly owned by Supertest Petroleum (U.K.) Limited ("Supertest"), an English company. (JA __ [Gottridge Ex. 108]). Supertest sold its shares in Goal to Igniteserve Limited ("Igniteserve"), another English company, in December 1999. (JA __ [Gottridge Ex. 112]). Both Supertest and Igniteserve were wholly owned by Talisman Energy (UK) Limited ("TUK"), an English company wholly owned by Talisman Energy. (*Id.*; *see also* JA __ [Gottridge Exs. 108, 119]). In 2001, TUK's net assets exceeded £420 million and it and its subsidiaries collectively reported revenues exceeding £1 billion. (JA __ [Gottridge Ex. 119]).

TGNBV itself never conducted oil operations in Sudan. (JA __ [Gottridge Ex. 20, 118:4-16]). On March 12, 2003, Goal sold TGNBV to ONGC Videsh Ltd., a subsidiary of an Indian government-controlled company. (JA __ [Gottridge Exs. 121, 124]).

C. GNPOC

On December 2, 1996, SPC and three other companies (China National Petroleum Corporation ("CNPC"), Petronas Carigali Overseas SDN BHD ("Petronas"), and Sudapet Ltd. ("Sudapet")) (collectively, the "Consortium

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[8] Although TGNBV initially borrowed money from Talisman Energy to fund its GNPOC obligations (Br. 19), it soon became self-sufficient and internally funded such obligations. (JA __ [D'Avino Ex. 30, 197:12-198:19]).

Members"), established a consortium to conduct oil exploration in Sudan. (JA __ [Gottridge Ex. 96, TE 0347346]). The Consortium Members expressly disclaimed any intention to "create a partnership, joint venture, association, trust, or fiduciary relationship." (JA __ [*Id.*, TE 0347355]). The GOS granted the Consortium Members certain rights in an Exploration and Production Sharing Agreement ("EPSA"), governing oil exploration, production and development in Blocks 1, 2 and 4,[9] and a Crude Oil Pipeline Agreement ("COPA"), governing construction and operation of a pipeline from the GNPOC concession area to the Red Sea. (JA __ [Gottridge Exs. 95, 96]).[10]

The GNPOC Project Agreements also included two agreements setting forth the Consortium Members' rights and obligations – the Joint Operating Agreement ("JOA") regarding the oil exploration rights described in the EPSA, and the Joint Construction and Operating Agreement ("JCOA") regarding the pipeline rights described in the COPA. (JA __ [Gottridge Exs. 97, 98]).[11] The JOA and the JCOA

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[9] *See* JA __ [453 F. Supp. 2d at 644-45] (map showing Blocks 1, 2 and 4).

[10] Under the EPSA, all interests in land (including buildings and fixed structures thereon) acquired by the Consortium Members became the property of the GOS at the time of such acquisition. (JA __ [Gottridge Ex. 96, Art. 8]).

[11] Although Plaintiffs contend the GOS signed the GNPOC Project Agreements (Br. 13), the GOS signed only the EPSA and COPA. The GOS was not a party to the many other agreements among the Consortium Members relating to GNPOC's incorporation and operation.

expressly disclaimed any intention to create a "partnership, association or trust" among the Consortium Members. (JA __ [Gottridge Exs. 97, Art. 14.1; 98, Art. 15.1]).

The Consortium Members incorporated GNPOC in 1997 as a Mauritius company with its shareholders' liability "limited by shares." (JA __ [Glover Decl. ¶¶ 7-9]). Its shareholders then were CNPC, Petronas, SPC and Sudapet, which owned 40%, 30%, 25% and 5% of GNPOC, respectively. (*Id.*).

Most GNPOC corporate actions required approval of shareholders owning at least 60% of its shares, although some required unanimous approval. (JA __ [Gottridge Ex. 99, TE 0347174]). GNPOC was governed by a board of directors which, *inter alia*, approved GNPOC's budgets. (JA __ [Gottridge Ex. 99, TE 0347175-78; D'Avino Ex. 33, 114:1-15]).[12]

D. Lundin and Block 5A

In 1998, the GOS awarded Lundin Oil AB ("Lundin Oil"), a Swedish company, the rights to explore for and produce oil in Block 5A, a large area to the south of GNPOC's Blocks 1 and 4. Most Plaintiffs resided in Block 5A when they

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[12] In addition to direct hires, GNPOC employed secondees from TGNBV, Talisman Energy and other affiliates, as well as other Consortium Members. The seconding entity paid their salaries, and was reimbursed by GNPOC. (JA __ [Gottridge Ex. 50, 257:20-258:1]).

allegedly were injured or displaced. (JA __ [453 F. Supp. 2d at 643, 646]). In 2001, Lundin Oil conveyed its interests in Block 5A to a Swedish affiliate, Lundin Petroleum AB, which sold those interests in April 2003. (JA __ [453 F. Supp. 2d at 646]).[13]

While operating in Block 5A, Lundin constructed and maintained roads within its concession area. (JA __ [Capeling Decl. ¶ 12]). During the period of Talisman Energy's indirect investment in Sudan, neither GNPOC nor Talisman Energy (nor any of its affiliates) owned any interest in Block 5A, or constructed or maintained any roads there. (JA __ [*Id.* ¶¶ 11-12]).[14]

E. Sudan's Civil War

1. Background

Upon gaining independence from Britain and Egypt in 1956, Sudan erupted into civil war when troops in the South mutinied against the North. A 1972 Agreement ended that war, but hostilities recommenced in 1983. (JA __ [Gottridge Ex. 87 at 7]). The renewed war against the North was waged principally by the

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[13] Lundin Oil and Lundin Petroleum AB are collectively referred to as "Lundin."

[14] Although GNPOC constructed roads in its concession area, Judge Cote found that Plaintiffs "pointed to no evidence that Talisman shaped that decision in any way." (JA __ [453 F. Supp. 2d at 676]). Furthermore, those roads were not built, as Plaintiffs allege, "for the stated purpose of improving access of these areas by Sudanese security forces." (Br. 34-35). None of the documents Plaintiffs cite supports this proposition.

Sudan People's Liberation Army ("SPLA"), formed in 1983 and commanded by Lieutenant Colonel John Garang. (JA __ [Gottridge Ex. 87, 7]).

2. The SPLA Violently Splits

In 1991, the SPLA split into two factions when Riek Machar ("Machar") led a break-away group later named the South Sudan Independence Movement/Army ("SSIM/A"). (JA __ [Gottridge Ex. 87, 10-12]). Battles between the SPLA and the SSIM/A killed, injured and displaced many civilians in Unity State, in which the GNPOC concession area would mainly later be located. (JA __ [Gottridge Exs. 25, 382:21-383:9; 51, 28:8-9, 122:2-123:3]).

3. The 1997 Khartoum Peace Agreement

In April 1997, the GOS, the SSIM/A, and several other rebel movements entered into the Khartoum Peace Agreement ("KPA"). (JA __ [Gottridge Ex. 88 at 15]). The KPA provided for, *inter alia*, a cessation of hostilities; guarantees of religious freedom and equal treatment irrespective of gender, race, color, religion or origin; wealth and power-sharing between North and South; and the consolidation of rebel groups, other than the SPLA, into the South Sudan Defense Force ("SSDF"). (JA __ [Gottridge Exs. 88 at 3-9, 15-17; 34, 47:12-48:4, 55:8-57:21]). The new pro-GOS SSDF was to coordinate its defensive activities with Sudan's army, and its leader Machar was appointed First Assistant to the President

of Sudan and President of the South Sudan Coordinating Council. (JA __ [Gottridge Exs. 32, 15:20-16:21; 34, 69:17-70:14; 88 at 10-13).

The KPA promised to bring peace and security to the region comprising and surrounding the GNPOC concession area. Plaintiff Gatluak Chiek Jang ("Jang") and Plaintiff PCOS's representatives so testified. (JA __ [Gottridge Exs. 36, 147:3-18; 41, 52:13-53:12; 43, 180:23-182:22; 62, 186:2-21]).[15]

4. Talisman Energy's Due Diligence

It was during this relatively peaceful period that Talisman Energy made its indirect investment in GNPOC. Before acquiring Arakis, Talisman Energy engaged in over four months of due diligence, including a July 1998 visit to Sudan. (JA __ [Gottridge Ex. 65, 109:5-18, 112:22-113:19]). Talisman Energy's CEO James Buckee ("Buckee") and other senior executives met with Machar and other GOS officials. Machar gave Talisman Energy assurances of safety, security and peace and encouraged it to invest in Sudan. (JA __ [Gottridge Exs. 21, 9:22-11:15, 40:22-41:2; 37, 72:11-73:17, 82:5-24; 51, 10:11-16:21; 65, 143:16-147:2]).

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[15] Plaintiffs criticize the District Court's finding that the KPA brought a "period of hope" (JA _ [453 F. Supp. 2d at 647], noting that Douglas Johnson, one of their proposed experts, opined that the KPA was "widely regarded by Sudanese as a sham." (JA __ [Gottridge Ex. 85, 6]). (*See* Br. 45). However, he conducted no analysis or poll to measure public sentiment and admitted not knowing whether the Sudanese so regarded it. (JA __ [Reynolds *Daubert* Ex. 42, 82:8-85:7, 85:19-86:4, 88:8-25]).

Unity State Governor Taban Deng Gai ("Gai") provided the same assurances to Talisman Energy and encouraged its investment. Gai, a former (and future) SPLA officer, also urged Talisman Energy to develop roads in Unity State. (JA __ [Gottridge Exs. 21, 18:12-21; 32, 11:21-12:5, 15:20-16:2]). Talisman Energy executives also met with GNPOC employees in southern Sudan and visited several areas, including GNPOC's base camp at Heglig. (JA __ [Gottridge Ex. 65, 117:12-118:6, 174:14-175:21]).

Talisman Energy executives discussed the political and security situation with the British Foreign Office, which had a significant diplomatic presence in Sudan. (JA __ [Gottridge Ex. 37, 67:18-68:20]). Talisman Energy commissioned two independent reports concerning that situation, one from consultants recommended by the Foreign Office. (*Id.*).

Talisman Energy also consulted other government officials and NGO representatives. For example, Buckee and then-Vice President M. Jacqueline Sheppard attended a roundtable discussion in Ottawa hosted by the Canadian Department of Foreign Affairs and International Trade. (JA __ [D'Avino Ex. 28, ¶¶ 3-4]). Attendees included representatives of NGOs, church groups and others, such as Robert Norton ("Norton"), Arakis's former head of security in Sudan. (JA __ [D'Avino Ex. 103, ¶¶ 11-13]). At the meeting, Norton and Mel Middleton of

Freedom Quest International opined that Talisman Energy should not invest in Sudan. (JA __ [D'Avino Exs. 28, ¶¶ 5, 6, 8; 103, ¶ 12]).

5. The KPA Collapses

Notwithstanding the KPA's promise, during the period of Talisman Energy's indirect investment southern Sudan became "the site of increasing levels of violent conflict among a number of armed groups." (JA __ [453 F. Supp. 2d at 643]).

Internecine violence in Unity State increased significantly in late 1999, when Commander Peter Gadet ("Gadet") and many of his soldiers defected from a pro-GOS militia, eventually joining the SPLA. (JA __ [Gottridge Exs. 34, 154:18-155:7, 172:3-20; 51, 183:16-184:3]). Plaintiff Matthew Mathiang Deang ("Deang") testified to Gadet's reputation as a "vicious fighter who injures civilians." (JA __ [Gottridge Ex. 25, 328:13-329:10]).

By 2000, the KPA had completely collapsed. Machar broke from the GOS, and his new Sudan People's Democratic Front ("SPDF") clashed violently with the SPLA. (JA __ [Gottridge Exs. 34, 69:17-70:10, 82:15-22, 168:1-6, 172:3-20; 132]).

Deang wrote a December 2000 "Christmas Pastoral Letter" on behalf of Plaintiff PCOS, addressing the "immense loss of innocent human lives" in Unity State resulting from interfactional fighting and the "[e]xodus of more than 80,000 people from their homes to Bentiu," a GOS-controlled town in the GNPOC

concession area. (JA __ [Gottridge Exs. 126; 135, 1]). Deang stated: "Our concern is highlighted ... by the current fighting in [Unity State] between forces of [SPLA] Cdr. Peter [Gadet] and the forces of SPDF of [Machar's deputy] Cdr. Peter Par Jeck." (JA __ [Gottridge Ex. 135, 1]). Emphasizing the effect of such fighting on civilians, Deang called upon "the leaders of the conflicting factions and members of the SPDF and SPLM/A to have the will and courage to move forward steadily in search for solution for the current conflict in [Unity State]." (JA __ [Gottridge Ex. 135, 2; *see also* JA __ [Gottridge Ex. 25, 67:22-72:19]) (describing the consequences of SPLA/SPDF conflict in the Unity State area).

6. SPLA and SPDF Attacks on Oil Facilities

Rebel groups also targeted oil operations in southern Sudan. In May 1999, the SPLA announced that it had "the capability to strike at" the "investments by international oil companies in South Sudan," and "that any oil works including personnel and assets are legitimate military targets." (JA __ [Gottridge Ex. 128]; *see also* JA __ [Gottridge Exs. 34, 137:18-138:13; 130; 137]). Machar's SPDF publicly took responsibility for killing a Lundin employee near Bentiu, declaring his death "a good signal to the consortium co-owned by the Talisman Energy Inc., National Petroleum Company of China, and National Oil Company of Malaysia ... . We see the way forward is to halt the production [of the oil] ... the people of

South Sudan will do everything possible to realize this, including the use of force to get those companies out of [Unity State]." (JA __ [Gottridge Ex. 130]).

In 1999, rebels attacked a GNPOC rig site. (JA __ [Gottridge Exs. 56, 87:6-90:5; 111, 14]). In August 2001, GNPOC's Heglig camp, where approximately 700 employees lived and worked, was subjected to a barrage of rockets for approximately thirty minutes, and GNPOC security began to evacuate the camp. (JA __ [Gottridge Ex. 31, 6:14-20, 97:23-102:14]).[16] This followed shortly after SPLA ground forces attacked the village of Paryiang and the market at Heglig, killing and wounding civilians. (JA __ [D'Avino Exs. 101.097, 101.098]).

F. The Airstrips at Heglig and Unity

There were three airstrips in the GNPOC concession area, located at Heglig, Unity, and Rubkona. The GOS owned the airstrips. (JA __ [Gottridge Ex. 96, Art. 8]). GNPOC maintained the Heglig and Unity airstrips, but neither used nor maintained the Rubkona airstrip. Instead, Lundin used the Rubkona airstrip to support its operations in Block 5A. (JA __ [D'Avino Ex. 101.104]).

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[16] As a result, TGNBV requested the GOS to have "helicopter gunships on GNPOC facilities" (Br. 34 (quoting JA __ [Whinston Class Ex. 28])) but only to provide "security for the oilfields," and not for "offensive operations." (JA __ [*Id.*, TE 0349227]).

Beginning in 2000, GNPOC upgraded the Heglig and Unity airstrips. Heglig airstrip required improvements to: "(1) avoid accident/incident; (2) reduce the frequency of maintenance [and] thus save cost; and (3) accommodate aircraft at any time of day." (JA __ [Whinston Class Ex. 25]). Although the Heglig airstrip could accommodate large Antonov cargo planes before the upgrade (*see, e.g.,* JA __ [Whinston Class Ex. 7 at 5]), GNPOC extended the runway to enable aircraft to more efficiently move large groups of GNPOC workers, particularly if evacuation of the Heglig camp was needed. (JA __ [Reynolds Class Ex. 5]). GNPOC upgraded Unity airstrip "to support operations during the period when the Heglig airstrip [was] not available due to upgrade work." (JA __ [Whinston Class Ex. 25]; *see also* JA __ [Reynolds Class Ex. 6, 158:12–158:23]).

G. Plaintiffs and Their Claimed Injuries

Thirteen of the Plaintiffs were individuals who "assert[ed] that they were displaced, and most of them report[ed] being displaced several times and from several locations." (JA __ [453 F. Supp. 2d at 657]). Two were organizations.

Deang alleged that he was displaced and lost property in a GOS raid in Block 5A (the Lundin concession area) (JA __ [453 F. Supp. 2d at 660]), but he admittedly was not present at the time of the attack. (*Id.* at 660 n.54; *see also* JA __ [Gottridge Ex. 25, 481:16-482:22]).

James Kuong Ninrew ("Ninrew"), a Kenyan resident since 1994, claimed displacement from Block 5A by GOS attacks four years before Talisman Energy's indirect investment in Sudan. (JA __ [Gottridge Ex. 55, 20:24-21:15, 26:1-13, 39:16-20]).

Fatuma Nyawang Garbang ("Garbang") alleged that she was shot in the leg, lost her home, farm and cattle, and was displaced from a village in the south of Block 5A (approximately 60 miles from the GNPOC concession area) (JA __ [Reynolds Class Ex. 26]) by a GOS attack four years before Talisman Energy's indirect investment in Sudan. (JA __ [Gottridge Exs. 1 ¶ 2(e); 4 No. 2]). Since 1994, she has lived in Kenya and the United States. (JA __ [Gottridge Ex. 33, 33:9-21, 51:16-52:6]).

Nyot Tot Rieth ("Rieth") alleged displacement from villages in Block 5A and that her husband was killed in an air attack in Block 5A. (JA __ [453 F. Supp. 2d at 659]).

Stephen Hoth ("Hoth") alleged that he was displaced from and denied access to his village before Talisman Energy's indirect investment in Sudan. (JA __ [Gottridge Ex. 39, 66:11-68:7]).

Stephen Kuina ("Kuina") claimed that he was displaced and lost property as a result of attacks by the GOS and GOS-supported militia on several villages in Block 4. (JA __ [453 F. Supp. 2d at 660]).

Tunguar Kueigwong Rat ("Rat") claimed he was displaced and lost his homes in ground and air attacks on two villages in Block 5A. (JA __ [453 F. Supp. 2d at 660]).

Luka Ayuol Yol ("Yol") claimed displacement from villages in Block 1 due to air and ground attacks (JA __ [453 F. Supp. 2d at 658]).

Thomas Malual Kap ("Kap") alleged injury and displacement from several villages in Block 5A during air and ground attacks. (JA __ [453 F. Supp. 2d at 660 & n.57]).

Puok Bol Mut ("Mut") alleged that he was shot during, and displaced by, a GOS air attack in Block 4. (JA __ [Gottridge Ex. 54, 89:13-93:20]).

Patai Tut ("Tut") claimed injury and displacement due to air and ground attacks in Block 4 (JA __ [453 F. Supp. 2d at 658-59]).

Peter Ring Patai ("Patai") claimed displacement from two villages in Block 5A, one in an aerial attack. (JA __ [453 F. Supp. 2d at 660-61]).

Jang claimed displacement from a village on the border of Blocks 4 and 5A and later from Block 5A (JA __ [Gottridge Ex. 41, 73:20-24, 74:12-16, 105:11-16, 127:7-128:10, 132:20-23, 134:5-17, 137:18-138:3, 140:7-141:3, 142:3-14]).

PCOS claimed that the GOS destroyed "various of its churches." (Br. 12).[17]

Summary of Argument

The District Court's dismissal of this action should be affirmed on several independent grounds.

Most fundamentally (and contrary to the District Court's rulings), the ATS does not confer subject matter jurisdiction over this action. The ATS is, as all the Justices agreed in *Sosa*, purely a jurisdictional statute permitting federal courts to adjudicate only a narrow class of international law violations. Plaintiffs must assert that the defendant violated a "norm of international character accepted by the civilized world and defined with a specificity comparable to the features of 18th-century paradigms" recognized as violations of the "law of nations" when the ATS was enacted. *Sosa*, 542 U.S. at 725.

Talisman Energy is not accused of directly violating international law. Plaintiffs instead premised ATS jurisdiction on allegations that it conspired with,

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[17] Although PCOS also claimed injuries on behalf of its parishioners, Judge Cote held that it could recover, if at all, only for its own injuries. (JA __ [2005 WL 1060353 at *1]). *See* p. 11 n.5, above, regarding NCDS.

or aided and abetted the GOS. However, no norm of customary international law meeting the requirements of *Sosa* and *Flores* supports holding a corporation liable on such theories. *Sosa* also requires that the collateral consequences of recognizing such bases for liability be considered; these militate strongly against federal subject matter jurisdiction. Moreover, it is contrary to international law and comity to exercise such jurisdiction over a case unconnected to the United States – involving only foreign plaintiffs and defendants and conduct and effects occurring exclusively outside this country.

Assuming *arguendo* that the District Court had jurisdiction under the ATS, the case was properly dismissed on summary judgment. Judge Cote impeccably applied the Rule 56 standards and her conclusion that Plaintiffs failed to produce sufficient evidence demonstrating the existence of a material factual dispute is amply supported. If (contrary to Talisman Energy's contention) aiding and abetting liability meets the *Sosa* standards, the court below correctly required proof of intent. But even under Plaintiffs' diminished standard – requiring only knowledge, substantial assistance and causation of their injuries – the result would not vary, as Plaintiffs did not present sufficient evidence to require a trial.

In the context of Plaintiffs' untimely motion for leave to amend, the District Court properly disposed of Plaintiffs' unpleaded agency, alter-ego and joint

venture theories, which aimed to pin on Talisman Energy liability for the supposed wrongdoing of a Mauritius company in which a Dutch indirect subsidiary of Talisman Energy was a 25% shareholder. Judge Cote did not abuse her discretion in denying Plaintiffs' motion, made over two and one-half years after the deadline established in a Rule 16(b) Scheduling Order, for leave to file a new pleading containing these assertions. There was no "good cause" for the motion, and the proposed amendment was in any event futile, as no admissible evidence supported the new claims.

Finally, Judge Cote acted well within her discretion in denying Plaintiffs' motions to certify the case (under either Rule 23(b)(2) or (3)) or certain issues for class treatment. This was a tort action for monetary relief, involving diverse injuries allegedly suffered at various times and places in many different incidents. Common issues did not predominate over individual ones; the converse was true.

Argument

I. Under *Sosa*, The District Court Lacked Subject Matter Jurisdiction Pursuant to the ATS to Adjudicate Plaintiffs' Claims.

A. The ATS is a Jurisdictional Statute for a Limited Category of Claims for International Law Violations.

The ATS, the sole possible basis for subject matter jurisdiction here,[18] confers on district courts "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.

The ATS is only jurisdictional and does not create or provide for any cause of action. *Sosa*, 542 U.S. at 712; *see also id.* at 743 (Scalia, J., dissenting). In enacting the statute in 1789, "Congress intended the ATS to furnish jurisdiction for a relatively modest set of actions alleging violations of the law of nations." *Id.* at

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[18] Although the SAC also premised jurisdiction on 28 U.S.C. §§ 1330 and 1331 and "universal jurisdiction" (JA __ [Gottridge Ex. 1, ¶ 9]), Plaintiffs abandoned such allegations by failing to raise them on either summary judgment or appeal. In any case, those theories are unavailing. Section 1330 only provides for jurisdiction against foreign states, not private parties. The assertion of international law claims under federal common law does not support jurisdiction under Section 1331. *See Sosa*, 542 U.S. at 731 n.19; *see also* Curtis A. Bradley, et al., *Sosa, Customary International Law, and the Continuing Reliance of Erie*, 120 Harv. L. Rev. 869, 911-14 (2007) ("Bradley"). No federal court has ever exercised "universal jurisdiction" in a civil case; the doctrine has not been universally accepted in State practice, and remains aspirational at best. *See generally*, Donald Donovan & Anthea Roberts, *The Emerging Recognition of Universal Civil Jurisdiction*, 100 Am. J. Int'l L. 142 (2006) ("Donovan").

720 (majority opinion). There is "no basis to suspect Congress had any examples in mind beyond those torts corresponding to Blackstone's three primary offenses: violations of safe conducts, infringement of the rights of ambassadors, and piracy." *Id.* at 724. *Sosa* holds that "courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized." *Id*. at 725.

It is insufficient for a plaintiff to show that the defendant committed *some* customary international law violation; the ATS provides jurisdiction only over a limited subset of such claims. For the Court, Justice Souter explained why judicial restraint is required in defining the "narrow class of international norms today" that support jurisdiction under the ATS. *Id.* at 729. For example, the Court "ha[d] recently and repeatedly said that a decision to create a private right of action is one better left to legislative judgment in the great majority of cases." *Id*. at 727 (citations omitted). In addition, "the possible collateral consequences of making international rules privately actionable argue for judicial caution," *id*.; "the subject of those collateral consequences is itself a reason for a high bar to new private causes of action for violating international law, for the potential implications for the foreign relations of the United States in recognizing such causes should make

courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs." *Id*. Courts "have no congressional mandate to seek out and define new and debatable violations of the law of nations, and modern indications of congressional understanding of the judicial role in the field have not affirmatively encouraged greater judicial creativity." *Id.* at 728.

The threshold question here is whether the narrow class of international law norms satisfying the *Sosa* criteria includes claims against a corporation for conspiring to commit, or aiding and abetting a government in committing, the wrongs Plaintiffs alleged. Before demonstrating that there is no such norm, we show that there is no merit to Plaintiffs' assertion that federal common law – rather than customary international law – "determine[s] issues like the availability and scope of aiding and abetting and conspiracy liability" in ATS cases. (Br. 65).

B. International Law – Not Domestic Common Law – Must Provide All Conduct-Regulating Norms in ATS Cases.

In *Sosa*, the Court clarified the relationship between customary international law and federal common law under the ATS. In the 18th Century, lawsuits based on customary international norms then deemed actionable were part of the general common law, so 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. This is consistent with the Court's oft-stated affirmance that "the domestic law of the United States recognizes the law of nations." *Id*. at 729 (citations omitted).[19]

In discussing the judgment that federal courts must exercise in "determin[ing] whether a norm is sufficiently definite to support a cause of action," *id.* at 732, the *Sosa* Court made plain that international law, not domestic law, must furnish the norm under which a particular defendant is sued:

> A related consideration is whether *international law* extends the scope of liability for violations of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual.

Id. at 732 n.20 (emphasis added; citations omitted); *see also id*. at 760 (Breyer, J., concurring) ("The [international] norm must extend liability to the type of perpetrator (*e.g.*, a private actor) the plaintiff seeks to sue.").

Sosa thus repudiates the view that "federal common law provides the means for establishing who may be liable" in an ATS action. (Brief of *Amicus Curiae* on Civil Conspiracy and Joint Criminal Enterprise in Support of Plaintiffs-Appellants

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[19] Of course, until *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), there was no "federal common law" *per se* but only the "general common law" which was applied (albeit not always consistently) in state and pre-*Erie* federal courts. *See* Bradley, 120 Harv. L. Rev. at 874-75.

("Conspiracy Amici Br.") 7).[20] That theory cannot stand without excising the words "international law" from *Sosa's* footnote 20 and replacing them with "federal common law."

One of Plaintiffs' *amici* has helpfully explained that under *Sosa*, "the norm for which a remedy is provided in ATS litigation is clearly governed by international law. All questions as to whether the defendant has acted unlawfully must be answered by recourse to rules of decision found in international law." William R. Casto, *The New Federal Common Law of Tort Remedies for Violations of International Law*, 37 Rutgers L.J. 635, 643 (2006) ("Casto").

In addition to *Sosa*, *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994), *Dinsmore v. Squadron, Ellenoff, Plesent,*

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[20] Plaintiffs would "bifurcate[]" a claim for conspiracy to commit genocide (or aiding and abetting genocide) (Br. 66) – the elements of the claim requiring proof that the primary actor committed genocide would be governed solely by customary international law, but the elements of the claim requiring proof that an additional defendant conspired with it to commit, or aided it in committing, genocide would be governed by supposed federal common law standards. Such "mix-and-match" jurisprudence is unsupported by any fair reading of *Sosa*. Moreover, the Convention on the Prevention and Punishment of the Crime of Genocide ("Genocide Convention") Jan. 12, 1951, 78 U.N.T.S. 277, treats genocide and complicity in genocide as separate international law violations. *See* Genocide Convention, Arts. III(a), (e). *See also Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.) ("Bosnia")*, No. 91 (I.C.J. Feb. 26, 2007) ¶ 379 (available at http://www.icj-cij.org/docket/files/91/13685.pdf).

Sheinfeld & Sorkin, 135 F.3d 837 (2d Cir. 1998) and *Erie* foreclose reliance on federal common law as the source of a conduct-regulating norm. In *Central Bank*, the Court held that Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78b, "d[id] not itself reach those who aid and abet a § 10(b) violation," and that this conclusion "resolve[d] the case" because it is inappropriate

> [t]o extend liability beyond the scope of conduct prohibited by the statutory text. To be sure, aiding and abetting a wrongdoer ought to be actionable in certain instances. The issue, however, is not whether imposing private civil liability on aiders and abettors is good policy but whether aiding and abetting is covered by the statute.

511 U.S. at 177 (citation and footnotes omitted). This Court reached the same conclusion as to Section 10(b) conspiracy claims in *Dinsmore*, 135 F.3d at 841-42.

Central Bank and *Dinsmore* held that federal common law does not extend liability for Section 10(b) violations to actors whose conduct is not proscribed by the statute. Similarly, in ATS cases, federal common law may not extend liability to persons whose conduct is not prohibited by the narrow class of international law norms recognized under *Sosa*. As Professor Casto explained:

> [A]t a fundamental level, *Central Bank* suggests a process for determining whether aiding-and-abetting liability is available in ATS litigation. Both the majority and the dissenters in *Central Bank* agreed that aiding-and-abetting is a conduct-regulating norm. In other words, there is no liability unless the aiding-and-abetting norm proscribes assisting direct violators of another norm. Therefore, aiding-and-abetting liability for private

> persons is inappropriate in ATS litigation unless a norm of international law forbids private persons to assist violators.

Casto, 37 Rutgers L. J. at 650 (citations omitted).[21]

Plaintiffs' argument for a wide-ranging federal common law power to create secondary liability in ATS cases is also inconsistent with *Erie*. *Sosa* reiterated the Court's "adhere[nce] to a conception of limited judicial power first expressed in" *Erie, i.e.*, "that federal courts have no authority to derive 'general' common law." *Sosa*, 542 U.S. at 729.[22]

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[21] In ATS cases, as in *Central Bank* and *Dinsmore*, courts are not construing statutes that expressly create rights of action and/or were intended to provide for aiding and abetting or conspiracy liability. This distinguishes cases such as *Boim v. Quranic Literacy Inst. & Holy Land Found. for Relief & Dev.*, 291 F.3d 1000, 1018-21 (7th Cir. 2002) (liability under 18 U.S.C. § 2333, part of the Anti-Terrorism Act); *Arar v. Ashcroft*, 414 F. Supp. 2d 250, 261-62 (E.D.N.Y. 2006) (liability under the Torture Victims Protection Act), *appeal docketed*, No. 06-4216 (2d Cir. Sept. 12, 2006); and *Linde v. Arab Bank, Plc*, 384 F. Supp. 2d 571, 583 (E.D.N.Y. 2005) (18 U.S.C. § 2333).

[22] When a federal court, following *Erie*, adjudicates a state law tort claim for aiding and abetting or conspiracy, it applies and construes state law as to *both* the elements of the underlying tort *and* the elements required for aiding and abetting or conspiracy liability to attach; it does not apply state law to the former, but supposed federal common law principles to the latter. *See, e.g., Design Strategy, Inc. v. Davis*, 469 F.3d 284, 300-04 (2d Cir. 2006) (applying New York law both to claims of breach of fiduciary duty against one defendant and claims that other defendants aided and abetted that breach); *Pittman v. Grayson*, 149 F.3d 111, 121-24 (2d Cir. 1998) (applying New York law to claims of aiding and abetting and conspiracy to interfere with parental custody of a child). There is no sound reason

In sum, Plaintiffs' suggestion that federal common law should be used in ATS cases to create norms against conspiracy and aiding and abetting violations of international law is wrong. Such liability can exist only if and to the extent it can be located in the narrow class of customary international law norms satisfying *Sosa's* rigorous requirements.[23]

C. Application of Federal Common Law Would Violate the Presumption Against Extraterritoriality and Talisman Energy's Due Process Rights.

In this case – involving foreign plaintiffs, defendants, conduct and effects – the application of domestic law would be particularly inappropriate because domestic law should not be applied extraterritorially, and arbitrarily applying domestic law to disputes lacking any significant connection with this country

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to follow a different procedure when the law on which a claim is founded is customary international law.

[23] There is no federal common law principle that generally makes conspiracy or aiding and abetting actionable in a civil case. *See, e.g.*, *Central Bank*, 511 U.S. at 181 (although "[a]iding and abetting is an ancient criminal law doctrine," it is "uncertain in application" in domestic law); *Dinsmore*, 135 F.3d at 843 (Section 10(b) may not be premised solely on participation in a conspiracy); *Haughton v. Burroughs*, No. 98 Civ. 3418 (BSJ), 2004 U.S. Dist. LEXIS 2611, at *12 (S.D.N.Y. Feb. 19, 2004) (no *Bivens* action lies against corporations for aiding and abetting alleged constitutional violations); *Goldfine v. Sichenzia*, 118 F. Supp. 2d 392, 406 (S.D.N.Y. 2000) (no private right of action for aiding and abetting a RICO violation).

would violate the due process rights of non-U.S. nationals whose challenged conduct took place entirely abroad.

Extraterritoriality. There is a longstanding presumption against the extraterritorial application of United States law. *See, e.g., F. Hoffman-La Roche, Ltd. v. Empagran, S.A.*, 542 U.S. 155, 164 (2004) (construing the Sherman Act). Absent specific legislative command, extraterritorial application is permissible only where not "unreasonable," which depends on such factors as the extent to which the activity or persons regulated are linked to the United States, the extent to which other states have an interest in regulating, and do regulate, the activity at issue, and the likelihood of conflict with another state's regulation. *Id.* at 165.

There is no substantial justification for applying domestic law to this case. An American court would be creating American common law rules to regulate the conduct of a Canadian corporation taking place entirely outside of this country, ignoring Canada's strong interest in regulating its own citizens' conduct and in enforcing its own policies with respect to Sudan. On this record, applying domestic law would be "unreasonable."

Due Process. In *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), the Supreme Court held that it violated due process for a Kansas court to apply Kansas law to certain claims involving natural gas royalties when over 99% of the gas

leases and 97% of the plaintiff class had no apparent connection to Kansas except for the lawsuit. *Id.* at 814-15. The Court rejected, as an invitation to forum-shopping, the argument that plaintiffs' supposed preference for Kansas law was entitled to weight, *id.* at 820, and held that Kansas law could only be constitutionally applied if Kansas had a "'significant contact or significant aggregation of contacts' to the claims asserted by each member of the plaintiff class, contacts 'creating state interests,' in order to ensure that the choice of Kansas law [was] not arbitrary or unfair." *Id.* at 821-22 (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981) (plurality opinion)).

Because neither Talisman Energy nor Plaintiffs are American, the claims arose exclusively abroad and there are no significant contacts with this country, it would violate due process to apply domestic law here.

D. No Norm of Customary International Law Meeting the Requirements of *Sosa* and *Flores* Supports Holding a Corporation Liable for Conspiracy to Commit or Aiding and Abetting a Violation of International Law.

Under customary international law, no norm satisfying the requirements established by the Supreme Court and this Court supports corporate liability for either conspiracy to commit, or aiding and abetting, a violation of international

law.[24] For this reason, dismissal of the action against Talisman Energy must be affirmed.

1. Conspiracy Liability

Plaintiffs alleged that Talisman Energy "joined a conspiracy to commit a crime against humanity, specifically, a widespread and systematic attack on a civilian population to displace it forcefully." (JA __ [453 F. Supp. 2d at 665]). However, international law recognizes no such claim. In *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2784 (2006), the Supreme Court held that international law only recognizes the crime of conspiracy in two specific contexts: conspiracy to commit genocide or to wage aggressive war. The Court noted that the post-World War II United States Military Tribunals did not "recogniz[e] as a separate offense conspiracy to commit war crimes or crimes against humanity." *Id.* at 2785 n.40 (citation omitted; alteration in original). Judge Cote correctly held that conspiracy liability in an ATS case is so limited. (JA __ [453 F. Supp. 2d at 664-65]).[25]

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[24] As Judge Cote noted, Plaintiffs did "not oppose [Talisman Energy's] motion for summary judgment to the extent that it is addressed to Talisman's direct liability for violations of customary international law." (JA __ [453 F. Supp. 2d at 662]). Plaintiffs now deny abandoning any direct liability claims (Br. 64 n.69), but their assertion is supported by no citation to any supporting evidence.

[25] Plaintiffs cite various cases in support of a broader norm of conspiracy liability (Br. 77-78), but those cases were decided before *Hamdan* and none of those courts conducted the international law analysis that *Sosa* required. *Hilao v. Estate of*

Plaintiffs argue that *Hamdan* "is not controlling for ATS claims" because it dealt with "a war crimes prosecution," rather than a civil action. (Br. 78 n.83). However, as Plaintiffs' *amici* recognize, "[d]etermining principles of liability under international law … require[s] a court to look to international criminal law, since that is the only basis of jurisdiction of the tribunals that have adjudicated law of nations violations." (Conspiracy Amici Br. 26 n.7).[26] Plaintiffs' attempt to impose even greater civil liability than exists criminally flouts the Supreme Court's instruction that greater caution is required in creating civil causes of action than in criminal cases due to, for example, the absence of prosecutorial discretion. *Sosa*, 542 U.S. at 727.

Plaintiffs attempt to bring their conspiracy claim within the scope of *Hamdan* by arguing that the District Court incorrectly found that they abandoned any claim that Talisman Energy "conspired with the [GOS] to commit genocide."

Marcos, 102 F.3d 767 (9th Cir. 1996) and *Eastman Kodak Co. v. Kavlin*, 978 F. Supp. 1078 (S.D. Fla. 1997) predated *Sosa*. Although both *Cabello v. Fernandez-Larios*, 402 F.3d 1148 (11th Cir. 2005) (*per curiam*) and *In re Terrorist Attacks on September 11, 2001*, 392 F. Supp. 2d 539 (S.D.N.Y. 2005), *appeal docketed* (2d Cir. 2006), were decided after *Sosa*, neither even mentioned it. As Judge Cote noted, in *Cabello* "the Eleventh Circuit erred ... by drawing on domestic law, and not international law." (JA __ [453 F. Supp. at 665 n.64]).

[26] The International Court of Justice (the "ICJ") may adjudicate claims for reparations, *i.e.*, of a non-criminal nature, in inter-State conflicts. *See, e.g.*, *Bosnia*. However, the ICJ has not addressed the existence or scope of conspiracy under international law.

(JA __ [453 F. Supp. 2d at 665]). (*See* Br. 79-80). However, Plaintiffs never pleaded that Talisman Energy conspired with the GOS to commit *genocide*, while alleging a conspiracy to commit ten *other* crimes listed in their SAC. (*See* JA __ [Gottridge Ex. 1, ¶ 65]). In opposing summary judgment, Plaintiffs claimed a conspiratorial agreement to "clear the oil concession and surrounding area" of civilians. (JA __ [SJ Opp. 46]). As the ICJ recently held, clearing people out of an area is not synonymous with genocide, nor is "ethnic cleansing." *Bosnia*, ¶ 190. Judge Cote correctly found that Plaintiffs had not asserted that Talisman Energy conspired with the GOS to commit genocide.

On appeal, Plaintiffs attempt to recast their conspiracy claim as one for "joint criminal enterprise." (Br. 79). Plaintiffs, however, did not plead such a claim, which is distinct from conspiracy.[27] (*See, e.g.*, JA __ [Gottridge Ex. 1, ¶ 65]) ("Defendant willfully conspired to carry out a campaign of ethnic cleansing ... ."). [28] Nor did Plaintiffs argue a "joint criminal enterprise" in opposing summary

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[27] *See, e.g., Prosecutor v. Milutinovic*, Case No. 17-99-37-AR72, Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction – Joint Criminal Enterprise, ¶ 23 (Appeals Chamber May 21, 2003).

[28] For the proposition that they alleged a joint criminal enterprise claim (Br. 79), Plaintiffs cite only excerpts from their depositions and declarations, none of which made such an allegation.

judgment. Plaintiffs therefore may not first raise it on appeal. *Singleton v. Wulff*, 428 U.S. 106, 120-121 (1976).[29]

2. Aiding and Abetting Liability

No universally accepted international law norm, supported by "concrete evidence of the customs and practices of States," *Flores*, 414 F.3d at 250, and defined with the specificity *Sosa* requires, provides for aiding and abetting liability.

Plaintiffs suggest that the statutes establishing the International Criminal Tribunals for the former Yugoslavia and Rwanda ("ICTY" and "ICTR," respectively) and decisions of those tribunals and of the Nuremburg Tribunal furnish an international law standard. (Br. 69-72). However, there is no doctrine of binding precedent in international law, so such judicial decisions are only

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[29] Contrary to Plaintiffs' contention (Br. 79), the District Court also correctly held that the federal criminal law doctrine under which a party joining a conspiracy is liable for the acts of all other conspirators taken in furtherance of the conspiracy (*Pinkerton v. United States*, 328 U.S. 690 (1946)) is not universally recognized in international law. (JA __ [453 F. Supp. 2d at 663]).

The ICTY Tribunal in *Prosecutor v. Tadic*, Case No. IT-94-1, Judgment (Appeals Chamber July 15, 1999), while applying the doctrine, noted that it lacked universal acceptance. *Id.* ¶ 224. The Nuremberg Tribunal declined to adopt this rule. *See* Brief for Specialists in Conspiracy and International law as Amicus Curiae Supporting Petitioner at 15, *Hamdan*, 2006 WL 53979 ("As to the yet-to-be-denominated *Pinkerton* rule, the Tribunal failed to apply the rule in the case of Rudolph Hess."). Accordingly, no international law norm, sufficiently accepted and well-defined to satisfy *Sosa*, extends conspiratorial liability to all foreseeable crimes. In any case, Plaintiffs presented no evidence regarding which GOS crimes were foreseeable consequences of its alleged agreement with Talisman Energy.

"subsidiary means for the determination of [international] law." *Flores*, 414 F.3d at 251 (quoting ICJ Statute); *id.* at 263 (the ICJ is not "empowered to create binding norms of international law"). Furthermore, the ICTY, ICTR and Nuremburg tribunals were *ad hoc* courts of limited geographical and temporal scope, dealing with specified crimes in specific contexts. *See* Nuremburg Charter (limiting the tribunal's jurisdiction to "the trial and punishment of the major war criminals of the European Axis countries" in World War II);[30] ICTY Statute, art. 8; ICTR Statute, art. 7. *See Flores*, 414 F.3d at 264 (European Court of Human Rights not binding source of customary international law); *In re South Africa Apartheid Litig.*, 346 F. Supp. 2d 538, 550 (S.D.N.Y. 2004) (ICTY and ICTR tribunals and Nuremberg trial rulings are not binding sources of international law), *appeal docketed*, Nos. 05-2141, 05-2326 (2d Cir., filed Apr. 27, 2005 and May 3, 2005; argued Jan. 24, 2006).

In any event, such tribunal decisions do not provide an aiding and abetting standard with the requisite "specificity" of definition. *Sosa*, 542 U.S. at 725. The post-World War II tribunals analyzed each case on a fact-specific basis, and did not attempt to create a standard to be used in determining liability for aiding and

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[30] Indeed, the "international military tribunals at [Nuremberg] and Tokyo … represent[ed] only part of the world community." *Prosecutor v. Tadic*, Case No. IT-94-1-T, Opinion and Judgment, ¶ 1 (Trial Chamber May 7, 1997).

abetting, a term undefined by their creating statutes. (JA _ [2004 Greenwood Decl. ¶¶ 49-52]). Nor did the ICTY and ICTR Statutes define what conduct constituted aiding and abetting. In interpreting those statutes, the tribunals drew on disparate sources of law and applied inconsistent standards. *Compare Tadic*, Judgment, ¶ 229 (Appeals Chamber) and *Prosecutor v. Vasiljevic*, Case No. IT-98-32-A, Judgment, ¶ 102(ii) (Appeals Chamber Feb. 25, 2004) (aiding and abetting liability requires a showing the defendant intended to facilitate the principal's wrongful act) *with Prosecutor v. Blaskic*, Case No. IT-95-14-A, Judgment, ¶ 49 (Appeals Chamber July 29, 2004) (rejecting such a requirement); *compare Prosecutor v. Akayesu*, Case No. ICTR-96-4, Judgment, ¶ 485 (Trial Chamber Sept. 2, 1998) (an alleged aider and abettor of genocide must have the "specific intent to commit genocide")[31] *with Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Judgment, ¶ 533 (Trial Chamber May 15, 2003) (mere knowledge of the principal's intent sufficed for complicity in, and aiding and abetting, genocide); *see also* Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 3 ("Rome Statute"), Art. 25(3)(c) (requiring an aider and abettor to have acted "for the purpose of facilitating the commission" of the crime).

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[31] The *Akayesu* tribunal's decision was internally inconsistent because it also held that complicity in genocide did not require proof of specific intent. *Id.* ¶ 545.

The ICJ's recent *Bosnia* decision shows a similar lack of consistency. The court's opinion left open the question of whether "complicity presupposes that the accomplice shares the specific intent … of the principal perpetrator." *Id.* ¶ 421. One judge in the majority, however, expressed his view that the Genocide Convention (pursuant to which the ICJ had jurisdiction) "requires genocidal intent for every proscribed act enumerated in it," including complicity. Declaration of Judge Skotnikov at 8 (available at www.icj-cij.org/docket/files/91/13705.pdf). Another judge in the majority, by contrast, rejected that requirement, requiring an aider and abettor to have only "the intent to provide the means by which the perpetrator may realize his own intent to commit genocide." Declaration of Judge Keith, ¶ 6 (available at www.icj-cij.org/docket/files/91/13701.pdf).

Absent any universally accepted and specifically defined norm of aiding and abetting liability, such claims cannot be recognized under the ATS.[32]

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[32] The ATS cases Plaintiffs and their *amici* cite as recognizing aiding and abetting liability were either decided pre-*Sosa*, or do not conduct the international law analysis *Sosa* requires. *See, e.g., Cabello*, 402 F.3d at 1158-59; *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1355-56 (N.D. Ga. 2002); *In re Agent Orange Prod. Liab. Litig.*, 373 F. Supp. 2d 7, 54 (S.D.N.Y. 2005), *appeal docketed sub nom.* Vietnam Ass'n of Victims of Agent Orange/Dioxin v. Dow Chemical Co., No. 05-1953-CV (2d Cir. 2005).

3. Corporate Liability

The law of nations generally applies to States. Robert Jennings & Arthur Wells, 1 *Oppenheim's International Law* 16 (9th ed. 1992); *see also Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398, 422-23 (1964) (discussing international law's "peculiar nation-to-nation character"). Customary international law for certain egregious international crimes has been applied to individuals but not to corporations. (JA __ [2004 Greenwood Decl. ¶¶ 22-29]). *See also The Nürnberg Trial,* 6 F.R.D. 69, 110 (Int'l Military Tribunal at Nuremberg, 1946) ("Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.").[33] No convention or treaty even purports to hold corporations liable for genocide, war crimes, crimes against humanity or torture.[34]

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[33] Although the Nuremberg Charter provided for declaring a group "a criminal organization," 82 U.N.T.S. 279 (Art. 9), the effect of such determination was not enterprise liability, but to make an individual's membership in the group a punishable offense. *Id.* (Art. 10). Similarly, although the Nuremberg Tribunal occasionally spoke of a corporation acting illegally, such statements are not recognition of corporate liability because the corporations were not, and could not have been, on trial. (*See, e.g.,* JA __ [2004 Greenwood Decl. ¶ 26]).

[34] *See* Genocide Convention; Genocide Convention Implementation Act, 18 U.S.C. § 1091(d)(2); The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85; The Agreement for the Prosecution and Punishment of Major War Criminals of the

No international tribunal has imposed liability on a corporation for violating international law.[35] The ICTY and ICTR Statutes grant jurisdiction only over *natural* persons, ICTY Statute, Art. 6; ICTR Statute, Art. 5,[36] as does the Rome Statute. In the negotiations preceding the adoption of the Rome Statute, a proposal to extend the ICC's jurisdiction to juridical persons, such as corporations, *was expressly rejected* in part because "there are not yet universally recognized common standards for corporate liability; in fact, the concept is not even recognized in some major criminal law systems." Kai Ambos, Article 25 ("Individual Criminal Responsibility"), in Commentary to the Rome Statute of the International Criminal Court: Observers' Note, Article by Article 977-78 (O.

European Axis, and Establishing the Charter of the International Military Tribunal, art. 6, 82 U.N.T.S. 279.

[35] This Court has never addressed corporate liability under international law. Silence on this point in ATS cases involving corporate defendants (*see, e.g., Flores, supra; Bigio v. Coca-Cola Co.*, 239 F.3d 440 (2d Cir. 2000)) is not tantamount to a finding of subject matter jurisdiction. *See Hagans v. Lavine*, 415 U.S. 528, 533 n.5 (1974) ("[W]hen questions of jurisdiction have been passed on in prior decisions *sub silentio*, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us.") (citations omitted); *Garay v. Slattery*, 23 F.3d 744, 745 n.2 (2d Cir. 1994) (citations omitted).

[36] The Report of the United Nations Secretary-General on which the ICTY Statute was based (United Nations Doc. S/25704, 3 May 1993) expressly rejected the proposition that juridical persons should be subject to the ICTY's jurisdiction because "[t]he criminal acts set out in this statute are carried out by natural persons." 32 ILM 1159 (1993) ¶ 51.

Titterer 1999). *See also* JA __ [2004 Greenwood Decl. ¶¶ 28-30] (setting forth differing corporate liability standards in various countries). Similarly, Congress refrained from providing for corporate liability when enacting the Torture Victim Protection Act, 28 U.S.C. § 1350, note. *See, e.g., Corrie v. Caterpillar Inc.*, 403 F. Supp. 2d 1019, 1026 (W.D. Wash. 2005), *appeal docketed*, No. 05-36210 (9th Cir. Dec. 23, 2005); *Arndt v. UBS AG*, 342 F. Supp. 2d 132, 141 (E.D.N.Y. 2004).

Absent any consistent "customs and practices of States," *Flores*, 414 F.3d at 250, the notion that corporate liability is recognized for international law violations "expresses an aspiration that exceeds any binding customary rule having the specificity [*Sosa*] require[s]." *Sosa*, 542 U.S. at 738.

4. The Collateral Consequences of Permitting Corporate Liability for Aiding and Abetting or Conspiracy Under the ATS Militate Against Recognizing Such Liability.

Central to the "vigilant doorkeeping" *Sosa* requires is due regard for the "collateral consequences of making international rules privately actionable." 542 U.S. at 727. The "collateral consequences" of imposing secondary liability on a corporation in an ATS case may include chilling private investment in developing nations for fear that an investor's legitimate business activities will subject it to costly, burdensome and reputation-damaging lawsuits in this country – contrary to U.S. policy encouraging investment and commerce in developing nations. The

issue is especially significant for energy and mining companies, which must of necessity contract with governments of countries having natural resources.[37]

Moreover, recognizing secondary liability in a case such as this one would inevitably interfere with the internal affairs of sovereign nations. The *Sosa* Court expressed doubt that federal courts should "consider suits under rules that would go so far as to claim a limit on the power of foreign governments over their own citizens, and to hold that a foreign government or its agent transgressed those limits." *Sosa*, 542 U.S. at 727.[38] To hold Talisman Energy indirectly liable for the GOS's international law violations, the court would have to first find that the GOS committed such violations. *See Doe I v. ExxonMobil Corp.*, 393 F. Supp. 2d 20, 30 (D.D.C. 2005) (dismissing ATS claims for aiding and abetting the Indonesian military in committing genocide and crimes against humanity: "[B]y definition, these claims require adjudication of whether the Indonesian military was engaged in a plan allegedly to eliminate segments of the population" and any assessment of

[37] The problem is exacerbated to the extent that aiding and abetting liability is recognized under the lenient "knowledge" standard Plaintiffs advocate.

[38] Indeed, the Court questioned whether federal courts should ever employ their federal common law power under the ATS with respect to a foreign nation's actions taken abroad. *Sosa*, 542 U.S. at 727-28 (citing with approval *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 813 (D.C. Cir. 1984) (Bork J., concurring) (doubting that the ATS should be read to require "our courts [to] sit in judgment of the conduct of foreign officials in their own countries with respect to their own citizens")).

Exxon's derivative liability "would be an impermissible intrusion on Indonesia's internal affairs"); *Doe v. Qi*, 349 F. Supp. 2d 1258, 1312 (N.D. Cal. 2004) (dismissing ATS genocide and crimes against humanity claims when those claims required the court to evaluate a foreign state's actions).

E. Exercising Extraterritorial Jurisdiction In This Case Was Contrary To International Law And Comity.

"[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, C.J.). The exercise of jurisdiction over Talisman Energy in this case violated this principle because it was not based on any of the traditionally accepted international law bases of jurisdiction, *i.e.*, over conduct occurring within a State's territory, conduct of its citizens, conduct injuring its citizens, or conduct affecting its sovereignty or security. *United States v. Yousef*, 327 F.3d 56, 103 (2d Cir. 2003). So-called universal jurisdiction is not applicable. Although that concept is arguably accepted in the criminal context for a very limited group of offenses, it is not universally accepted in civil cases. *See generally* Donovan, *supra*. Even if the concept were sufficiently accepted, it could not be more extensive than universal criminal jurisdiction. *Cf. Sosa*, 542 U.S. at 727 (requiring greater caution in creating civil causes of action than in criminal prosecutions). At most, universal criminal

jurisdiction exists "only for [a] few, near-unique offenses." *Yousef*, 327 F.3d at 103. *A fortiori*, universal civil jurisdiction could not include claims for complicit liability.

A further international law limitation is the requirement that the defendant be present in the State exercising jurisdiction. *See, e.g.*, *Demjanjuk v. Petrovsky*, 776 F.2d 571, 582 (6th Cir. 1985) (universality principle permits "any nation which has custody of the perpetrators" to punish them). Although it is readily apparent when an individual is present in a State, application of this concept to corporations under international law is unclear. There is certainly no universally accepted rule that a corporation is present in a State based on U.S.-law minimum contacts lacking connection to the dispute.

Universal criminal jurisdiction additionally "may only be exercised to *substitute for other countries* that would be in a better position to prosecute the offender, but for some reason do not." Antonio Cassese, *Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction*, 1 J. Int'l Crim. Just. 589, 593 (2003) (emphasis in original). This principle is incorporated in the Rome Statute, pursuant to which the ICC only has jurisdiction if the States with jurisdiction over the crime are unwilling or unable to exercise such jurisdiction. *See* Rome Statute, Art. 17. In this case, Canada, the State with

nationality jurisdiction, is not only able to exercise jurisdiction, but has objected to the exercise of jurisdiction by the U.S. (JA __ [Diplomatic Note]).

In recognizing the limited power of district courts to create causes of action for international law violations, the Supreme Court has emphasized the importance of respecting international comity. *See Sosa*, 542 U.S. at 727. That power must be exercised "consistent[ly] with those notions of comity that lead each nation to respect the sovereign rights of other nations by limiting the reach of its laws and their enforcement" in order "to ensure that ATS litigation does not undermine the very harmony that it was intended to promote." *Id*. at 761 (Breyer, J., concurring); *see also Tel-Oren*, 726 F.2d at 812 (Bork J., concurring) ("[T]hose who drafted the Constitution and the Judiciary Act of 1789 wanted to open federal courts for the purpose of avoiding, not provoking, conflicts with other nations."). Far from promoting international harmony, the exercise of jurisdiction here, as evidenced by Canada's objection, disrupts it.

Respect for comity is particularly important where, as here, a federal court is asked by foreign plaintiffs to assume jurisdiction over claims arising entirely outside the United States, asserted only against foreign defendants. *See Sosa*, 542 U.S. at 761 (Breyer, J., concurring) (comity considerations arise "when foreign persons injured abroad bring suit in the United States under the ATS, asking the

courts to recognize a claim that a certain kind of foreign conduct violates an international norm"). If an American court adjudicates the claim of Sudanese nationals that a Canadian energy company, by its alleged conduct outside the United States, aided and abetted the GOS in injuring them in Sudan, what is to prevent a Canadian court from adjudicating the claim of, say, Saudi citizens that an American energy company, by its conduct outside of Canada, aided and abetted the Saudi government in injuring Saudis? What would prevent a court in Belgium, Bangladesh, Bolivia or Burma from adjudicating such claims against an American defendant?

Accordingly, even if our courts have jurisdiction, they often "decline to exercise [it] in a case properly adjudicated in a foreign state, the so-called comity among courts." *In re Maxwell Communication Corp*., 93 F.3d 1036, 1047 (2d Cir. 1996).[39] The District Court should have done so in this case.

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[39] The question whether the court has personal jurisdiction under domestic law is entirely distinct from the question whether the assertion of extraterritorial jurisdiction under the ATS is consistent with international law and comity. The existence of the "minimum contacts" that may justify personal jurisdiction under *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) and its progeny does not compel a federal court to adjudicate a case when international comity considerations counsel restraint. *See, e.g.*, *Maxwell*, 93 F.3d at 1054-55 (bankruptcy court properly declined to exercise jurisdiction over transactions in which the American interest was far less than that of England).

II. The District Court Correctly Granted Summary Judgment Dismissing Plaintiffs' Claims Against Talisman Energy.

If, as argued in Point I, above, this action should have been dismissed for lack of federal subject matter jurisdiction, the Court need not address Plaintiffs' challenge to the September 2006 Order granting summary judgment to Talisman Energy. That challenge, in any event, lacks merit.

A. The District Court Correctly Applied the Rule 56 Standards.

Summary judgment dismissing claims is proper where, "after adequate time for discovery and upon motion, [the non-moving] party ... fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). "A material fact is one that would affect the outcome of the suit under the governing law, and a dispute about a genuine issue of material fact occurs if the evidence is such that a reasonable factfinder could return a verdict for the non-moving party." *GlobalNet Financial.com, Inc. v. Frank Crystal & Co.*, 449 F.3d 377, 381 (2d Cir. 2006) (internal quotations omitted). "If the party moving for summary judgment demonstrates the absence of any genuine issue as to all material facts, the nonmoving party must, to defeat summary judgment, come forward with evidence that would be sufficient to support a jury verdict in its favor." *Burt Rigid Box, Inc. v. Travelers Prop. Cas. Corp.*, 302 F.3d 83, 91 (2d Cir.

2002)). "If the non-movant fails to meet this burden, summary judgment will be entered against it." *Powell v. Nat'l Bd. of Med. Exam'rs*, 364 F.3d 79, 84 (2d Cir. 2004).

"The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could *reasonably* find for the plaintiff." *Anderson v. Liberty Lobby*, 477 U.S. 242, 252 (1986) (emphasis added); *see also Jeffreys v. City of New York*, 426 F.3d 549, 554 (2d Cir. 2005). The non-movants may not rely on "conclusory allegations or unsubstantiated speculation." *Id.* at 554 (quotations omitted).

Plaintiffs argue that Judge Cote "systematically" committed error by misapplying these settled standards – in particular, by "denying Plaintiffs the benefit of every evidentiary inference" and "excluding admissible evidence on a wholesale basis." (Br. 43). These assertions cannot withstand scrutiny.

1. The District Court Properly Gave Plaintiffs the Benefit of Those Inferences to Which They were Entitled.

Plaintiffs claim that Judge Cote deprived them of "the benefit of every evidentiary inference" and "the benefit of all favorable inferences." (Br. 43-44). That is not the law. The party opposing summary judgment is entitled only to "all *reasonable* inferences." *Rounseville v. Zahl*, 13 F.3d 625, 630 (2d Cir. 1994)

(emphasis added); *see also Bickerstaff*, 196 F.3d at 448 ("all reasonable factual inferences").

Courts must "carefully distinguish between evidence that allows for a reasonable inference ... and evidence that gives rise to mere speculation and conjecture." *Bickerstaff*, 196 F.3d at 448 (affirming summary judgment in defendant's favor). "An inference is not a suspicion or a guess. It is a reasoned, logical decision to conclude that a disputed fact exists on the basis of another fact [that is known to exist]." *Id.* (quoting 1 Leonard B. Sand, *et al.*, Modern Federal Jury Instructions ¶ 6.01, instr. 6-1 (1997)).

Judge Cote did not depart from these principles. Plaintiffs claim that the District Court should have granted them the benefit of two inferences relevant to whether they had sufficient evidence of causation: (1) that aerial attacks displacing five of them from Block 5A (the Lundin concession area) (*see* JA __ [453 F. Supp. 2d at 678]) "originated from Heglig or Unity" airstrips (Br. 44), rather than from the Rubkona airstrip which was "clearly closer to the site of each attack in Block 5A than either the Heglig or Unity airstrip." (JA __ [453 F. Supp. 2d at 678]); and (2) that the ground "attacks against them were committed by [GOS] soldiers or [GOS]-sponsored militias." (Br. 45). Those arguments fail for two reasons. First, the inferences Plaintiffs urged were not reasonable, but constituted mere

speculation. Second, Judge Cote's conclusions on the causation issues were (as the September 2006 Order states) unnecessary to the grant of summary judgment, so that even if the District Court had drawn the inferences Plaintiffs requested, it would not have changed the result.

Plaintiffs presented no evidence on the origin of the aerial attacks on Block 5A, but simply made the counterintuitive argument that the attacks came from the more distant Heglig or Unity airstrips, rather than the closer Rubkona airstrip, which was controlled by the GOS and adjacent to Block 5A. (JA __ [453 F. Supp. 2d at 678]).[40] Such conjecture is insufficient to defeat summary judgment. Plaintiffs improperly attempted to shift their burden to Talisman Energy "by arguing that Talisman has not shown that the attacks did not originate from Rubkona." *Id.*[41]

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[40] For example, PCOS "only presented evidence of a single attack that may be linked to the [GOS], the destruction of a church in Leer by a bomber. That attack occurred in Block 5A, and there is no evidence that the attack originated from Heglig or Unity airstrips." (JA __ [453 F. Supp. 2d at 678-79] (footnote omitted)).

[41] The two TGNBV security reports Plaintiffs cite on this point do not demonstrate that the "GOS aerial attacks on villages in Block 5A originated from Heglig or Unity." (Br. 44-45). Instead, they both reported that GOS aircraft were operating in areas of Block 5A where numerous rebel groups were located. (JA __ [D'Avino Ex. 101.130; Whinston Ex. 19]). Furthermore, the first report expressly stated it was based on "some additional reports," and, as Judge Cote recognized, the second "does not appear to be based on any first-hand observations." (JA __ [453 F. Supp. 2d at 654]). Both reports were therefore inadmissible hearsay.

Even if Judge Cote had indulged Plaintiffs' conjecture that Heglig or Unity were the likely sources of the attacks in Block 5A, that would not have averted summary judgment. As Judge Cote found, and Plaintiffs do not contest, the Heglig and Unity airstrips "were operated by GNPOC," not Talisman Energy, and "[t]here is no evidence that Talisman had any role in operating the airstrips, nor is there any evidence that Talisman had any role in upgrading the runways or in any other improvements to the airstrips." (JA __ [453 F. Supp. 2d at 673] (footnote omitted)).[42]

Equally flimsy is Plaintiffs' argument that the District Court "failed to accord Plaintiffs the inference that its [sic] attacks against them were committed by Government soldiers or Government-sponsored militias." (Br. 45). Judge Cote in fact inferred that Plaintiffs displaced and/or injured by aerial attacks were victims of GOS activity; this inference was logical, as only the GOS had the means to conduct aerial attacks. (JA __ [453 F. Supp. 2d at 658]). As to Plaintiffs displaced by ground attacks, however, there was no reasonable basis for the District Court to infer either that (a) the GOS, as opposed to armed rebel groups carried out the attacks, or (b) even if carried out by the GOS, they were deliberate attacks on

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[42] As set forth at pp. 98-100, below, Plaintiffs adduced no evidence sufficient to justify holding Talisman Energy responsible for GNPOC's conduct.

civilians as opposed to mistakes or legitimate military attacks on armed rebel groups in which civilians unfortunately were caught up. (JA __ [*Id.* at 658 n.49, 659 n.52]). As Judge Cote correctly noted:

> Because southern Sudan was a war-torn area, with violence ongoing for decades among competing factions, every civilian injury cannot be attributed to attacks directed at civilians. Similarly, not every attack is necessarily an attack by the military or militia aligned with the Government. Thus, to recover in this lawsuit, a plaintiff must show that he or she was displaced or injured in an attack by Government forces and that the attack either targeted civilians or was undertaken to displace civilians.

(JA __ [*Id.* at 677]).

Plaintiffs' "evidence" on this point was purely conclusory: "[t]he plaintiffs frequently state that they have been displaced by the 'Government' without giving any explanation for how they distinguished the Government forces from other armed groups." (JA __ [*Id.* at 657-58] (footnote omitted)). It would have been merely speculative for the District Court to have assumed that every ground attack injuring a Plaintiff was an attack by the GOS or an allied militia group targeting civilians. (JA __ [*Id.* at 658 & n.49, 659 n.52]). Judge Cote made no credibility determination (*see* Br. 46), but merely noted the absence of evidence supporting Plaintiffs' claimed causal link. In any event, causation was not material because Plaintiffs failed "to present evidence that would raise a question of fact as to

whether Talisman performed any act that assisted the [GOS] in its violations of international law." (JA __ [453 F. Supp. 2d at 679]).

2. The District Court Did Not Commit Manifest Error in Its Evidentiary Rulings.

Plaintiffs next argue that Judge Cote (a) "utiliz[ed] an improper procedure for handling evidentiary issues" and (b) "h[eld] inadmissible" certain evidence "that was in fact admissible." (Br. 46). Neither complaint is well-founded.

a. The District Court Employed Appropriate Procedures to Resolve Evidentiary Issues.

Because Plaintiffs had the ultimate burden of persuasion, Talisman Energy could make a prima facie case for dismissal on summary judgment "by *either* identifying the portions of the record 'which it believes demonstrates the absence of a genuine issue of material fact' *or* 'pointing out ... that there is an absence of evidence to support [Plaintiffs'] case.'" *Golden Pac. Bancorp v. FDIC*, 375 F.3d 196, 200 (2d Cir. 2004) (quoting *Celotex*, 477 U.S. at 323, 325) (emphasis added). Talisman Energy pointed out the absence of admissible evidence to support Plaintiffs' claims on many issues. (*See, e.g.*, JA __ [SJ Br. 29-31, 34, 38-44, 46-63]). The burden then shifted to Plaintiffs to "respond with 'specific facts showing that there [was] a genuine issue for trial,'" *Golden Pac.*, 375 F.3d at 200 (quoting Fed. R. Civ. P. 56(e)), supported by admissible evidence. *See, e.g., Rubens v. Mason*, 387 F.3d 183, 188 (2d Cir. 2004).

Plaintiffs attempted to meet that burden in their opposition papers by pointing to particular evidence (*see, e.g.*, JA __ [SJ Opp. 47-48]) (citing evidence allegedly demonstrating Talisman Energy's assistance to the GOS by upgrading Heglig and Unity airstrips). Talisman Energy in reply demonstrated why such evidence did not support Plaintiffs' claims and/or was inadmissible (*see, e.g.*, JA __ [SJ Reply 21-23]) (Plaintiffs' "evidence" regarding the airstrips did not say what Plaintiffs claimed and many of the documents contained layers of hearsay). Judge Cote then ruled on the evidentiary and/or other issues raised by the motion.

Plaintiffs now argue that this standard procedure was inappropriate, and that an entirely different protocol should have been employed. They suggest that Talisman Energy had an obligation to sift through the million pages of documents produced and transcripts of 95 depositions and bring to Judge Cote's attention "specific evidentiary objections explaining why the evidence" that Plaintiffs might later rely upon in opposing the motion was inadmissible. (Br. 48). They further chastise the District Court for "not issu[ing] specific rulings on evidentiary objections and provid[ing] no procedural opportunity for the Plaintiffs to refute specific objections", *i.e.*, "to demonstrate that there were grounds for admissibility (*e.g.*, exceptions to the hearsay rule)." (*Id.*).

Plaintiffs' complaint is unsupported by precedent,[43] and misconstrues the procedure the Supreme Court endorsed in *Celotex*. By pointing out the lack of admissible evidence supporting Plaintiffs' claims, Talisman Energy was not making "objections" to evidence Plaintiffs offered; indeed, Plaintiffs had not yet identified any evidence. Plaintiffs, therefore, miss the point in arguing that the supposed "evidentiary objections" in Talisman Energy's moving papers failed to comply with Fed. R. Evid. 103(a)(1). (Br. 48).

In any event, Plaintiffs did not object in the District Court to the procedure employed below and never requested an opportunity to address evidentiary issues before the District Court ruled on summary judgment. They therefore cannot raise the issue on appeal.

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[43] The authorities Plaintiffs cite (at Br. 48) do not remotely aid them. In *United States v. McDermott*, 245 F.3d 133, 141 (2d Cir. 2001), this Court held that a defendant had sufficiently preserved an objection to the admission at trial of certain evidence by raising it in an *in limine* motion. In *United States v. Carson*, 52 F.3d 1173, 1187-88 (2d Cir. 1995), a defendant failed to preserve an objection to evidence admitted at trial by not making a specific objection even though the trial court afforded him ample opportunity to do so. This case involves neither a trial, an *in limine* motion nor (as addressed in the text, above) any failure by Talisman Energy to make a timely objection to evidence Plaintiffs identified or offered.

b. The District Court Properly Excluded Hearsay Within TGNBV Documents.

Plaintiffs contend the District Court erred in concluding that "to the extent that a TGNBV security report is based on hearsay, it may not be used to show the occurrence of the incidents described in it." (JA __ [453 F. Supp. 2d at 673 n.80]). (*See* Br. 49). Plaintiffs argue that the security reports are admissible because they "contain first hand eyewitness descriptions of what the authors observed." (*Id.*). However, the report they use to support that proposition expressly states it was based on, *inter alia*, "other" sources, and so was inadmissible hearsay. (JA __ [D'Avino Ex. 101.130, TE 0520992]).

Plaintiffs' "admission by a party-opponent" argument (Br. 50) fares no better. TGNBV's statements are not admissions of Talisman Energy under Fed. R. Evid. 801(d)(2)(D) because, as set forth below (*see* pp. 104-106), TGNBV was neither Talisman Energy's agent nor authorized to speak for it. *See, e.g., Westfed Holdings, Inc. v. United States*, 55 Fed. Cl. 544, 564-65 (2003) (excluding party's subsidiary's statements). Furthermore, Plaintiffs' argument ignores the multiple levels of hearsay lurking in the TGNBV reports. To the extent "facts" in the reports are based on statements from third parties (as was the case with most TGNBV security reports), Rule 801(d)(2)(D) renders them admissible at most for the fact that TGNBV was told something, but not for the truth of the third-party's

statements. *See Pittman*, 149 F.3d at 124 (statement made by defendant's employee was properly excluded where "it was clear that "[the employee] was repeating a story she had heard from someone else").[44]

c. The District Court Did Not Improperly Exclude Any "Public Records".

Plaintiffs argue that the District Court "erred by excluding" the "Congressional Findings" contained in the Sudan Peace Act (the "SPA"), 107 P.L. 245, 116 Stat. 1504, codified at 50 U.S.C. § 1701 note 2(10). (Br. 51-52). Judge Cote made no such ruling. Rather, she noted that the parties disputed the admissibility under Fed. R. Evid. 803(8)(C) of the SPA's "finding" of genocide, but found it unnecessary either to admit or exclude that "finding." (JA __ [453 F.

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[44] The only specific example of an alleged admission of a party-opponent that Judge Cote supposedly excluded were certain notes assertedly written by Ralph Capeling ("Capeling"), TGBNV's General Manager (Br. 50-51). However, Judge Cote did not exclude the notes as inadmissible. Instead, she concluded they did not support the inference Plaintiffs urged – *i.e.*, that Talisman Energy upgraded and improved the Unity airstrip with the knowledge and intention that the GOS would use it to launch attacks on civilians. (JA __ [453 F. Supp. 2d at 673]). Plaintiffs do not even question the District Court's conclusion that "[a]ssuming that the plaintiffs can show that Capeling is the author of the notes", that would demonstrate only TGNBV considered a proposal to upgrade the Unity airstrip, and would not constitute "evidence that TGNBV (a 25% participant in GNPOC) decided to make the proposal, that it presented the proposal to GNPOC, or that GNPOC adopted it." (*Id.*). There was, moreover, "no evidence" that the GOS military's movement of aircraft to Unity after the airstrip there was upgraded "was due to a request from GNPOC." (JA __ [*Id.* at 674]).

Supp. 2d at 669]).[45] The question whether the GOS "was committing genocide in the southern Sudan" (*Id.*) was ultimately immaterial to the District Court's decision because, as Judge Cote held, Plaintiffs produced no "evidence that Talisman knew or should have understood that during the period of its investment in oil development in the southern Sudan that the [GOS] was engaged in genocide." (JA __ [*Id.* at 669-70]). As a result, Talisman Energy was "entitled to summary judgment on the claim that [it] aided and abetted genocide" (JA __ [*Id.* at 670]), whether or not the Congressional "finding" was considered.

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[45] The District Court would have been correct in excluding that "finding," because it was actually a conclusion of law. Although this Court has not yet decided the issue, "the consensus from other jurisdictions strongly favors the view that legal conclusions are not admissible as 'findings of fact' under [Rule 803(8)(C)]." *Miranda-Ortiz v. Deming*, No. 94 Civ. 476 (CSH), 1998 WL 765161, at *1-2 (S.D.N.Y. Oct. 29, 1998) (excluding legal conclusion) (citations omitted); *see also United States v. Davidson*, 308 F. Supp. 2d 461, 475-76 (S.D.N.Y. 2004) (same).

Nor was the SPA "the type of factual investigatory report contemplated by" Rule 803(8)(C). *Ariza v. City of New York*, 139 F.3d 132, 134 (2d Cir. 1998) (affirming exclusion). Neither Congress nor the five witnesses before the relevant House subcommittee (only one of whom had ever been to Sudan), *see America's Sudan Policy: A New Direction?: Joint Hearing before the Subcomm. on International Operations and Human Rights*, 107th Cong. (Mar 28, 2001), possessed the "skill or experience" Rule 803(8)(C) requires. *See*, *e.g.*, *Anderson v. City of New York*, 657 F. Supp. 1571, 1579 (S.D.N.Y. 1987). The trustworthiness of the SPA's "genocide" finding is also undermined by its blatantly political motivation. *See* Statement of Rep. Payne, Markup before the Subcomm. on Africa, Comm. on International Relations, 107th Cong., 1st Sess., on H.R. 931 at 16 (May 16, 2001) (including "genocide" was intended to "bring attention to those [in the State Department] we need to bring attention to").

Nor did Judge Cote exclude a report made to the Canadian Ministry of Foreign Affairs and International Trade ("DFAIT") by John Harker (the "Harker Report"). (*See* Br. 52). The District Court cited the Harker Report and indicated that Talisman Energy contested its admissibility. (JA __ [453 F. Supp. 2d at 651 & n.18, 652 & n.24]). However, Judge Cote never determined that evidentiary issue, because doing so was unnecessary to her decision to grant summary judgment; Plaintiffs failed to present any evidence tying Talisman Energy to the displacement of civilians or the use of the Heglig Airstrip by GOS aircraft described by Harker.[46]

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[46] Exclusion of the Harker Report as multiple hearsay would have been justified. Harker testified that he lacked personal knowledge about many of the statements set forth in his Report and the only basis for the statements was what he was told by others. (JA __ [Gottridge Reply Ex. 6, 143:15-145:4]). In any case, the Harker Report is not a "record[], report[], statement[], or data compilation[]" of a public office or agency "setting forth ... factual findings resulting from an investigation made pursuant to authority granted by law." Fed. R. Evid. 803(8)(C). Where a report "is submitted to a commission or other public agency charged with making formal findings, only those factual statements from the staff reports that are approved and adopted by the agency will qualify as 803(8)(C) 'findings.'" *Jama v. U.S. INS*, 334 F. Supp. 2d 662, 679 n.20 (D.N.J. 2004) (internal quotations and citations omitted). Plaintiffs presented no evidence that DFAIT ever approved or adopted the Harker Report. Indeed, the Harker Report recites that it was "prepared by Mr. John Harker" and includes this disclaimer: "The views and opinions contained in this report are not necessarily those of [DFAIT]." (JA __ [D'Avino Ex. 94]).

d. The District Court Did Not Improperly Exclude Portions of Plaintiffs' Expert Reports.

Plaintiffs contend that Judge Cote erroneously "ignored the expert reports submitted by Plaintiffs." (Br. 52). Although phrased in the plural, this contention boils down to a single claim: that Judge Cote excluded one opinion expressed in the report of Plaintiffs' supposed military expert Sherwood Goldberg ("Goldberg"), concerning "the financial relationship between oil revenues and military expansion." (Br. 53). However, Judge Cote did not exclude that opinion, although she would have been well within her discretion to do so.[47] The District Court instead merely noted an obvious limitation on its probative value: "While Goldberg may be able to offer his expert opinion on the importance of the financial relationship to the military's effectiveness in the south, his opinion is not evidence of that relationship." (JA __ [453 F. Supp. 2d at 675-76]).

The Goldberg opinion was in any event immaterial. The District Court assumed *arguendo* that the GOS had spent "money [from oil revenues] to buy

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[47] Goldberg based his "expert opinion" of the effect of oil revenues on GOS military spending on a Human Rights Watch report, which he cut and pasted into his report without applying any independent expertise of his own. *Compare* JA __ [Reynolds Ex. 22 (Goldberg Report at Tab 4, p. 1)] *with* JA __ [Reynolds Reply Ex. 6A (HRW Report, 343-44)]. *See United States v. Dukagjini*, 326 F.3d 45, 59 (2d Cir. 2003) (an expert may not offer testimony that "repeat[s] hearsay evidence without applying any expertise whatsoever").

helicopters and cargo planes, crudely convert the latter to bombers, and buy munitions," but found no evidence that Talisman Energy "specifically directed" that the GOS use its oil revenues to purchase weapons "to target civilians and displace them." (JA __ [453 F. Supp. 2d at 676]).[48]

e. The District Court Properly Did Not Consider Norton's Declaration to the Extent It Contradicted His Deposition Testimony.

Plaintiffs also discern error in the District Court's treatment of the declaration, submitted by Plaintiffs in opposition to summary judgment, of former Arakis security advisor Norton. (Br. 54-55). Norton declared that, while with Arakis, he told Talisman Energy Vice President Nigel Hares ("Hares") that "the Sudanese military cleared the proposed work area of inhabitants to create a safety zone." (JA __ [D'Avino Ex. 28, ¶ 10]).

However, at his deposition fourteen months earlier, Norton testified he "did not specifically recall [his] conversation with Mr. Hares" and had "no personal knowledge" that "Sudan Armed forces ever commit[ed] any human rights

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[48] To the extent that Goldberg opined that Talisman Energy possessed such intent, that opinion was inadmissible. "Inferences about the intent or motive of parties or others lie outside the bounds of expert testimony." *In re Rezulin Prods. Liab. Litig.*, 309 F. Supp. 2d 531, 547 (S.D.N.Y. 2004).

violations against civilians in the country." (JA __ [Gottridge Reply Ex. 10, 129:1-2, 148:23-149:2]). Norton also testified:

> Q. Am I correct that you did not understand the Government of Sudan to be proposing to clean the area out of civilians?
>
> [Objection omitted.]
>
> Q. Is that correct?
>
> A. If you're asking me whether I thought Paulino Matiep and his thousand people were going to go and take everybody out of there, no, it was not part of my thoughts. There was some SPLA in there, according to them, and had to get them out of there.
>
> Q. You didn't expect them to displace civilians?
>
> A. I didn't expect it, and I don't think it happened.

(JA __ [*Id.*, 190:5-19]).

By declaring that the GOS military displaced civilians (and that he so informed Hares in 1998), Norton contradicted his deposition. "The rule is well-settled in this circuit that a party may not, in order to defeat a summary judgment motion, create a material issue of fact by submitting an affidavit disputing his own prior sworn testimony." *Trans-Orient Marine Corp. v. Star Trading & Marine, Inc.*, 925 F.2d 566, 572 (2d Cir. 1991) (citations omitted); *see also Margo v. Weiss*, 213 F.3d 55, 60-61 (2d Cir. 2000) (party cannot defeat summary judgment by "responding with affidavits recanting … earlier testimony"); *Bickerstaff*, 196 F.3d

at 455.[49] Judge Cote properly declined to consider Norton's declaration insofar as he contradicted his previous testimony (JA __ [453 F. Supp. 2d at 647 n.11]).

B. Plaintiffs Failed to Adduce Admissible Evidence Supporting Their Conspiracy Or Joint Criminal Enterprise Claims.

Summary judgment dismissing Plaintiffs' conspiracy claim was proper, because Plaintiffs presented no admissible evidence supporting that claim.[50]

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[49] *Hayes v. New York City Dep't of Corr.*, 84 F.3d 614 (2d Cir. 1996) (*see* Br. 54-55) did not involve "an affidavit crafted for the specific purpose of defeating a motion for summary judgment" – indeed, it "did not arise out of an affidavit at all." *Id*. at 619. Rather, *Hayes* involved an alleged contradiction between two depositions of the plaintiff, both "taken long before the defendants filed their motion for summary judgment." *Id.* Moreover, the depositions in *Hayes* were "only arguably contradictory." *Id.* at 620. By contrast, Norton's declaration was crafted for the purpose of opposing summary judgment and directly contradicted Norton's prior testimony. Nor does *Hayes* support Plaintiffs' argument that the District Court was required to give them an opportunity to explain the contradiction in Norton's declaration. (Br. 54).

[50] The District Court did not expressly address this issue, because it held that: international law does not recognize claims for conspiracy to displace civilians; Plaintiffs had waived any claim that Talisman Energy conspired with the GOS to commit genocide; and international law does not incorporate the *Pinkerton* doctrine. (As set forth at pp. 42-45, above, these rulings were correct.) Nevertheless, this Court may affirm dismissal on the alternative ground set forth in the text, above, "if the facts in the record adequately support the proper result." *Stetson v. Howard D. Wolf & Assocs.*, 955 F.2d 847, 850-51 (2d Cir. 1992). In particular, this Court may affirm summary judgment for different reasons than those which persuaded the court below, at least where – as here – the ground relied upon by this Court was raised and argued in the district court. *See Cumberland Oil Corp. v. Thropp*, 791 F.2d 1037, 1043 (2d Cir. 1986).

Plaintiffs acknowledge that either a conspiracy or joint criminal enterprise claim requires an agreement between two or more actors to commit a violation of law. (Br. 80-81). Plaintiffs contend that "[t]he conspiratorial agreement in this case was the agreement to create a buffer zone or *cordon sanitaire* to protect" GNPOC's operations. (Br. 81). But Plaintiffs have failed to point to any admissible evidence that Talisman Energy entered into such an agreement with the GOS or that its "predecessors" (*id.*) – presumably, Arakis – did so. At most, they claim that Talisman Energy, when it acquired its indirect investment in Sudan, was "aware" of a supposed strategy of the GOS "of clearing out the villagers in the concession area by force and violence." (*Id.*).

Plaintiffs also acknowledge that they must prove Talisman Energy joined a conspiracy knowing of at least one of its goals and "intending to help accomplish it." (Br. 80).[51] However, Plaintiffs point to no evidence of such intent, but instead

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[51] Such intent has been required by international tribunals for both conspiracy and joint criminal enterprise. *See, e.g., Tadic* (Appeals Chamber), Judgment, ¶ 228 (requiring "intention to participate in and further the criminal activity or the criminal purpose of a group and to contribute to the joint criminal enterprise or in any event to the commission of a crime by the group"); *Prosecutor v. Nahimana*, ICTR 99-52-T, Judgment and Sentence 2003 WL 23190998, ¶ 1042 (Trial Chamber Dec. 3, 2003) ("The requisite intent for the crime of conspiracy to commit genocide is the same intent required for the crime of genocide."); *Prosecutor v. Musema*, ICTR 96-13-T, Judgment, ¶ 189 (Trial Chamber Jan. 27,

simply argue (without citing any admissible evidence) that Talisman Energy, with supposed knowledge of the conspiratorial agreement, "helped accomplish" the "displacement of thousands of non-Muslim Sudanese." (Br. 81).

The District Court, in adjudicating Plaintiffs' aiding and abetting claims, held that Plaintiffs failed to submit admissible evidence of such intent. In particular, Judge Cote found that: "plaintiffs have not shown that Talisman took any steps to upgrade either the Heglig or Unity airstrips … with the intent that the Government of Sudan would use the airstrips to launch attacks on civilians" (JA __ [453 F. Supp. 2d at 674]); there was "a complete absence of evidence of Talisman's illicit intent" with regard to designating areas for oil exploration, (JA __ [*Id.* at 675]); and Plaintiffs had not even produced "circumstantial evidence of an intent to assist in the Government's commission of war crimes and crimes against humanity" by paying royalties. (JA __ [*Id.* at 676]). Plaintiffs' brief identifies no evidence contradicting these conclusions.

2000) (conspiracy requires "(1) an agreement to act; (2) concerted wills; and (3) the common goal to achieve the substantive offence").

C. The District Court Correctly Dismissed Plaintiffs' Aiding and Abetting Claims.

1. If Aiding and Abetting Liability Can Support a Claim Under the ATS, the District Court Correctly Held That it Requires Proof of Intent.

The District Court held that "in order to show that a defendant aided and abetted a violation of international law, an ATS plaintiff must show:

1. that the principal violated international law;
2. that the defendant knew of the specific violation;
3. that the defendant acted with the intent to assist that violation, that is, the defendant specifically directed his acts to assist in the specific violation;
4. that the defendant's acts had a substantial effect upon the success of the criminal venture; and
5. that the defendant was aware that the acts assisted the specific violations."

(JA __ [453 F. Supp. 2d at 668]).[52]

Plaintiffs contend that under international law, "[t]he *mens rea* requirement is knowledge and not specific intent" (Br. 69), and that Judge Cote therefore erred

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[52] Plaintiffs misconstrue the District Court's standard, arguing that an aider and abettor need not share the perpetrator's intent. (Br. 70). The District Court did not require Plaintiffs to show that Talisman Energy shared the GOS's intent, just that it intended its actions to facilitate the GOS's international law violation. (JA __ [453 F. Supp. 2d at 668]).

in requiring evidence of the third element.[53] Plaintiffs are mistaken. The Rome Statute provides that "a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the [ICC] if that person … *[f]or the purpose of facilitating* the commission of such a crime, aids, abets or otherwise assists in its commission." Rome Statute, Art. 25(3)(c) (emphasis added) (cited by the District Court at JA __ [453 F. Supp. 2d at 666]).

The international tribunal cases Judge Cote also cited (JA __ [*Id.* at 666-668]) are to the same effect. In *Tadic*, the ICTY Trial Chamber held that "[t]he most relevant sources for [determining the defendant's liability] are the [Nuremberg] war crimes trials." ¶ 674. Canvassing the relevant Nuremberg judgments, the tribunal found "a clear pattern …: First there is *a requirement of intent*, which involves awareness of the act of participation coupled with *a conscious decision to participate*." *Id.* (emphasis added). Accordingly, the Trial Chamber held that "aiding and abetting includes all acts of assistance by words or acts that lend encouragement or support, as long as the requisite intent is present." *Id.* at ¶ 689. It found the defendant guilty because he had "intentionally assisted

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[53] Although Plaintiffs also refer to a supposed federal common law standard for aiding and abetting liability in tort (Br. 69), no such standard exists, *see* p. 39 n.23, above, and in any event it is international law – not domestic common law – that governs, *see* pp. 34-39, above.

directly and substantially in the common purpose of the group." *Id.* at ¶¶ 735, 738. On appeal, the Appeals Chamber confirmed the Trial Chamber's analysis, holding that:

> "[An] aider and abettor carries out acts *specifically directed* to assist, encourage or lend moral support to the perpetration of a certain specific crime (murder, extermination, rape, torture, wanton destruction of civilian property, etc.), and this support has a substantial effect on the perpetration of the crime."

Tadic (Appeals Chamber) Judgment ¶ 229 (emphasis added).[54] *See also Vasiljevic*, Judgment ¶ 102(i) (same).[55]

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[54] This intent standard is also consistent with federal criminal law. "Under 18 U.S.C. § 2, a defendant may be convicted of aiding and abetting where the government proves that the underlying crime was committed by a person other than the defendant, that the defendant knew of the crime, and that the defendant acted with the intent to contribute to the success of the underlying crime." *United States v. Hamilton*, 334 F.3d 170, 180 (2d Cir. 2003). To the extent that any federal common law of aiding and abetting can be discerned, it, too, requires such intent. *See Boim*, 291 F.3d at 1024 (a claim for aiding and abetting a violation of 18 U.S.C. § 2333333 required that the defendants "knew about Hamas' illegal operations and provided aid to Hamas with the intent to facilitate those illegal activities.").

[55] Plaintiffs' reliance on the "standard articulated by the ICTY [Trial Chamber] in *Prosecutor v. Furundzija*" (Br. 69) is misplaced. As the District Court noted, "the Appeal Chambers of both the ICTR and ICTY are endowed with the power to review and reverse Trial Chamber decisions for errors of law and that where there are inconsistencies between Trial Chamber decisions and Appeals Chambers decisions, decisions of the Appeal Chambers are authoritative." (JA. _ [453 F. Supp. 2d at 663 n.70]) (internal quotations omitted). Accordingly, *Furundzija* is

2. Even Under Plaintiffs' Proposed Standard, Plaintiffs Failed to Present Sufficient Evidence of Aiding and Abetting.

Even under Plaintiffs' diluted standard, they failed to produce admissible evidence to support an aiding and abetting claim.

a. No Evidence of Knowledge

The District Court correctly held that international law requires knowledge of the specific international law violation alleged, not merely of the principal's alleged bad acts in general. (JA __ [453 F. Supp. 2d at 667-68]). *See, e.g., Tadic,* (Appeals Chamber) Judgment ¶ 229 (requiring proof that the defendant carried out acts "specifically directed to assist ... the perpetration of a certain specific crime" with knowledge that the acts "assist the commission of a specific crime by the principal"). Judge Cote additionally, and again correctly, held that "Plaintiffs have not pointed to evidence that Talisman knew or should have understood during the period of its investment in oil development in southern Sudan, that the [GOS] was engaged in genocide, as opposed to the forcible displacement of a population, for example." (JA __ [453 F. Supp. 2d at 669-70]). Judge Cote concluded there was evidence from which Plaintiffs could argue that Talisman Energy had some general knowledge of war crimes and crimes against humanity, (*id.*), but found no evidence

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unpersuasive in light of the later Appeals Chambers' decisions in *Tadic* and *Vasiljevic*. *But see Blaskic,* Judgment ¶ 49.

that it knew of the specific international law violations in which Plaintiffs were injured.

The evidence that Plaintiffs claim demonstrates Talisman Energy's "knowledge of the ongoing human rights violations in and near the [GNPOC] concession area," (Br. 75), does no such thing.[56] For instance, the security reports that Talisman Energy received prior to making its indirect investment (Br. 26) provided information about the civil war, not about any human rights abuses. (JA __ [D'Avino, Exs. 45, 46 and 47]). Similarly, although several individuals voiced their general personal opinions against doing business in Sudan (JA __ [D'Avino, Exs. 30, 70:22-71, 103]), none provided Talisman Energy specific information that, for example, the GOS "was displacing civilians to explore for oil." (Br. 27).[57] Plaintiffs also had no evidence to support their allegations that Talisman Energy knew the pro-GOS militia of Paulino Matiep ("Matiep") provided security to the

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[56] Plaintiffs' argument that constructive knowledge suffices is unsupported even under the Restatement (Second) of Torts § 876(b) (1977), which Plaintiffs incorrectly claim represents federal common law (Br. 69). The Restatement requires actual, not constructive, knowledge. *See, e.g.*, *In re Consol. Welfare Fund ERISA Litig.*, 856 F. Supp. 837, 842-43 (S.D.N.Y. 1994).

[57] Plaintiff Patai's declaration, which Plaintiffs cite in support of this allegation (*see* Br. 27), does not even address Talisman Energy's knowledge. (JA __ [D'Avino Ex. 20]). Norton testified that he was unaware of any human rights violations carried out by the GOS and so could not have informed Talisman Energy about such violations. (JA __ [Gottridge Reply Ex. 10, 148:23-149:2, 190:5-19]).

GNPOC concession area[58] and was instructed by the GOS "to clear areas of the oil concession of all civilian inhabitants to create safe zones for oil development." (Br. 27).[59]

Plaintiffs suggest that Talisman Energy knew of GNPOC's strategy to create buffer zones without inhabitants throughout GNPOC's vast concession area. (Br. 27-28). However, they presented no evidence of such a widespread strategy. They instead misconstrue a report by Mark Dingley, who became a TGNBV security advisor in Sudan, describing GNPOC's security strategy of maintaining two small areas of 5 km and 8 km around Heglig and Unity camps, respectively, to protect its facilities. (JA __ [D'Avino Ex. 101.042, TE 0160948]). From this, Plaintiffs argue that the District Court should have inferred that the same strategy "was employed throughout the concession area." (Br. 28). The District Court correctly rejected this speculation. No Plaintiff alleged any injury in, or displacement from, the small areas around Heglig and Unity. Nor did Plaintiffs present any evidence that any

[58] The documents Plaintiffs cite state only that Matiep's forces were fighting rebels in and near the GNPOC concession area. (*See, e.g.*, JA __ [D'Avino Ex. 27] ¶¶ 3-5).

[59] The alleged instruction (JA __ [Whinston Class Ex. 9]) was never authenticated and in any event was inadmissible hearsay, and so could not defeat summary judgment. *See, e.g., White Diamond Co. v. Castco, Inc.*, 436 F. Supp. 2d 615, 624 (S.D.N.Y. 2006) ("Evidence that is not properly authenticated is not in admissible form and therefore may not be considered in support of or in opposition to a summary judgment motion.").

individuals were displaced to create such areas, or that these so-called "buffer zones" were found anywhere else in the GNPOC concession area.

Finally, Plaintiffs' claim that Buckee admitted "Talisman relied on and had knowledge of the government's 'cordon sanitaire' strategy of clearing out areas of the concession near oil operations of local villages by violent attacks," (Br. 27-28) is unsupported by the document they cite. (*See* JA __ [D'Avino Ex. 30]). Even on Plaintiffs' "knowledge" standard, their claims failed.

b. No Evidence of Substantial Assistance

The District Court also correctly held that Plaintiffs failed to present any evidence that Talisman Energy substantially assisted the GOS.[60] For instance, Plaintiffs produced no admissible evidence that Talisman Energy (as opposed to GNPOC) expanded the airstrips at Heglig and Unity at all. (Br. 33). Similarly, Plaintiffs' evidence does not support the allegation that GNPOC, after upgrading Unity airstrip, "handed it over to the GOS to use as a base for helicopter gunships."

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[60] The District Court did not, as Plaintiffs contend, "impose[] a requirement that the acts of 'substantial assistance' have to be inherently criminal." (Br. 73). Rather, Judge Cote held that when the "acts which the plaintiffs identify as substantial assistance have no necessary or obvious criminal component" (JA __ [453 F. Supp. 2d at 672]), Plaintiffs must "show that the business activity, which would otherwise appear to be a normal component of the conduct of a lawful business, was in fact specifically directed to assist another to commit a crime against humanity or a war crime." (*Id.*). Plaintiffs failed to do so.

(*Id.*) (citing JA __ [D'Avino Exs. 102.021; 101.104; 114]), or that the GOS preferred to "use Unity field as a helicopter gunship base because it offered an unlimited supply of free, clean fuel." (*Id.*) (citing JA __ [D'Avino Ex. 102.021]).

In fact, Plaintiffs presented no admissible evidence the GOS even used Heglig or Unity as a base for deliberate air attacks on civilians. Harker, who wrote the report Plaintiffs cite (Br. 30), testified he could not conclude that attacks were carried out "to [ensure] that there were no people in the area to stand on the way of the oil field." (JA __ [Gottridge Reply Ex. 6, 110:3-111:20]). Furthermore, although TGNBV security advisor Mark Reading opined that the GOS was using Heglig to "wage war in the South," he did not remotely state as a fact that the GOS was launching attacks targeting civilian populations. (JA __ [D'Avino Ex. 101.054]) (cited at Br. 30). Finally, Buckee's letter to the GOS (JA __ [D'Avino 101.109]), far from acknowledging that such attacks were directed "against civilians" or "unrelated to the civil war" (Br. 33-34), actually urged the GOS to prevent attacks in which civilians might be injured.

Contrary to Plaintiffs' contention, Judge Cote found that Talisman Energy played no role in deciding whether to build roads in the GNPOC concession area. (JA __ [453 F. Supp. 2d at 676]). Additionally, the evidence does not support Plaintiffs' allegation that the "stated purpose" of building roads was to "improve[]

access ... by Sudanese security forces." (Br. 34-35 & n.48). To the extent that Plaintiffs and their proposed expert Sharon Hutchinson testified that villages near oil roads were destroyed (Br. 35), much of that testimony referred to roads in Block 5A, to which GNPOC had no connection. (*See, e.g.*, JA __ [Capeling Decl. ¶ 12]). In any event, Plaintiffs failed to demonstrate the admissibility of this testimony.

The air transportation, communication facilities, accommodation and medical treatment Plaintiffs rely on to show "substantial assistance" (Br. 36), were only provided by GNPOC on an *ad hoc* basis, and only to GOS soldiers providing security to GNPOC's facilities. (JA __ [D'Avino Ex. 101.104, TE 0349267; Reynolds Class Ex. 10, 161:8-165:7]).[61] Furthermore, Plaintiffs have not alleged any causal link between GNPOC's provision of such support and any of their alleged injuries. *A fortiori*, there can be no such link to any actions of TGNBV and certainly not Talisman Energy.

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[61] Judge Cote correctly identified as hearsay (JA __ [453 F. Supp. 2d at 655]) the statement of Kwong Danhier, a former SSDF and SPDF intelligence chief, that an unnamed Sudanese security officer told him "if [he] ever needed anything from the oil company, *e.g.*, use of a company helicopter, that he would arrange it with Talisman." (Br. 36 (citing JA __ [D'Avino Ex. 27, ¶ 9])). Similarly, contrary to Plaintiffs' assertion, James Gatluak, another militia member, did not testify that Talisman Energy "made direct payments to the GOS-sponsored militias" and had no knowledge of any such payments. (Br. 23 (citing JA __ [Gatluak Tr., 117-19])).

Plaintiffs' "substantial assistance" argument also relies on their allegations regarding GNPOC's exploration activities in portions of its concession area not under GOS control (Br. 75). However, Plaintiffs identify no evidence to support a claim that identifying areas for oil exploration "south of the river" assisted the GOS in violating international law. (Br. 36-38).[62]

Similarly, Plaintiffs' evidence does not demonstrate that "GNPOC security established the policy that exploration and production outside the small blocks designated Heglig 2B and Unity 1B [sub-blocks in Blocks 2 and 1 respectively] required Sudanese military forces to clear the designated work area to protect oil workers and oil installations" or that "Talisman knew that military attacks against civilians and forced displacement within the GNPOC concession were part of GNPOC's and the government's security strategy for the area." (Br. 37).[63]

Without any evidence that Talisman Energy itself provided any assistance to the GOS, Plaintiffs' aiding and abetting claims failed.

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[62] In fact, the opposite is true. TGNBV insisted to GNPOC that "community development activity should precede work south of the river." (JA __ [TE 0091319]).

[63] Finally, although Plaintiffs contend that Talisman Energy "publicly den[ied] that forced displacement and human rights violations were taking place in the [GNPOC] concession area," (Br. 38) they provide no evidence as to how such denials "substantially assisted" the GOS's alleged violations.

3. Plaintiffs Failed to Present Admissible Evidence that Talisman Energy Caused their Alleged Injuries.

Contrary to Plaintiffs' assertion,[64] aiding and abetting does require causation in international law. In *Bosnia*, the ICJ held that to recover damages, Bosnia had to demonstrate "a sufficiently direct and certain causal nexus between [Serbia's] wrongful act ... and the injury suffered by [Bosnia]." ¶ 462.

Plaintiffs argue that they were "not required to establish the exact airstrip from which their [sic] attacks originated" because they established, as a general matter, that Talisman Energy assisted "an entire campaign of genocide, crimes against humanity and war crimes." (Br. 76-77).[65] But even if Talisman Energy did upgrade airstrips or provide fuel to GOS aircraft (which it did not), this would not

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[64] The ICTY cases Plaintiffs cite (*Prosecutor v. Kunurac*, Case No. IT-96-23 & 23/1 (Trial Camber Feb. 22, 2001); *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T (Trial Chamber Dec. 10, 1998)) only hold that an aider and abettor's "assistance need not be the sole or proximate cause of the *perpetrator's actions*." (Br. 75) (emphasis added). These criminal cases do not support the argument that international law exempts an alleged tort victim from establishing a casual link between the defendant's wrongdoing and his or her injuries.

[65] In any case, Plaintiffs failed to present admissible evidence supporting their claim (Br. 12) that their alleged injuries resulted from a pattern of attacks, accomplished with Talisman Energy's assistance, for the purpose of depopulating the GNPOC concession area. For instance, the evidence Plaintiffs claim demonstrates such a concerted strategy does no such thing. (Br. 37). Gai's testimony that he was "aware of but had not seen an agreement between the Government and 'Talisman'" to create "safe zones" to clear villagers out of the GNPOC concession area is inadmissible because he admittedly never saw any such agreement or knew any details about it. (JA __ [D'Avino Ex. 31, 157:18-158:20]).

suffice to impose on Talisman Energy liability for an attack it did not know about and that was launched from an airstrip with which Talisman Energy had no connection, even indirectly, *e.g.*, Rubkona or an airstrip outside the GNPOC concession area altogether.[66] (*See* JA __ [Reynolds Class Ex. 20]). Accordingly, as Judge Cote required, "to recover in this lawsuit, a plaintiff [had to] show that he or she was displaced or injured in an attack by Government forces [,] that the attack either targeted civilians or was undertaken to displace civilians" (JA __ [453 F. Supp. 2d at 677]), and that Talisman Energy conspired with, or aided and abetted, the GOS to carry out each such attack. (JA __ [226 F.R.D. at 482]).

"Because Talisman [was] entitled to summary judgment on all of the claims that plaintiffs [] brought against it," the District Court held it was not necessary to resolve the individual causation issues for each Plaintiff. (JA __ [453 F. Supp. 2d at 677]). However, Judge Cote conducted a "brief review of the plaintiffs' evidence" and found no admissible evidence that Talisman Energy's actions caused any of Plaintiffs' alleged injuries.

Six Plaintiffs – Ninrew, Deang, Rieth, Kap, Patai and Rat – were not injured in the GNPOC concession area, but rather in Block 5A, the Lundin concession

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[66] For example, refueling an aircraft at Heglig could not constitute "substantial assistance" to a bombing in violation of international law carried out by another aircraft taking off from another airstrip tens or even hundreds of miles away.

area. The District Court correctly held that Plaintiffs "failed to present sufficient evidence to find Talisman Energy (or TGNBV or GNPOC) liable for any displacement from Government attacks on civilians in Block 5A." (JA __ [453 F. Supp. 2d at 677]). Those Plaintiffs who claimed injury by ground attacks failed to present evidence as to who attacked them or why. (*Id.*)

Even if an air attack alleged to have injured a Plaintiff in Block 5A was carried out by the GOS, Plaintiffs failed to produce evidence linking any such attack to GNPOC – much less to TGNBV or Talisman Energy. (*Id.*). The District Court held that Plaintiffs did not meet their burden of showing that the aerial attacks in Block 5A "were or were at least [as] likely to have been launched" from Heglig or Unity airstrips as they were from the Rubkona airstrip, which was much closer to Block 5A, and not used or maintained by GNPOC. (JA __ [*Id.* at 678]).

Garbang and Hoth alleged injuries occurring before Talisman Energy even acquired its indirect interest in GNPOC. (JA __ [*Id.* at 658]). Therefore, even if they were injured by GOS attacks, they could not link such attacks to any actions of Talisman Energy.

Only five Plaintiffs – Kuina, Yol, Mut, Jang and Tut – alleged they were displaced by attacks within the GNPOC concession area after Talisman Energy acquired its indirect interest in GNPOC. (JA __ [453 F. Supp. 2d at 657 n.39]).

Kuina and Jang did not allege injury arising out of aerial attacks. Accordingly, the District Court correctly held that "they have not identified any basis to infer that the attacks were by [GOS] forces, or forces aligned with the [GOS], or that the displacement occurred because of an attack that targeted civilians." (JA __ [453 F. Supp. 2d at 677]).

Only Plaintiffs Yol, Mut and Tut alleged that they were displaced by aerial attacks within the GNPOC Concession Area. Judge Cote suggested that those Plaintiffs had "shown that they were displaced by Government attacks to which GNPOC arguably provided assistance." (JA __ [453 F. Supp. 2d at 677]).[67] However, they produced no evidence to support a causal link between Talisman Energy (as opposed to GNPOC) and their injuries,[68] or that the attacks in which

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[67] As to Mut and Tut, this suggestion is inconsistent with the rest of the District Court's causation analysis. The District Court held that Plaintiffs presented no evidence to support the inference that air attacks in Block 5A were launched from Unity or Heglig rather than the closer airstrip at Rubkona. (JA __ [*Id.* at 678]). The same is true of Mut and Tut, who claimed injuries at sites in Block 4 closer to Rubkona than Unity or Heglig. *Id.*

[68] Plaintiffs claim that Yol observed "villages being bulldozed to make room for roads and oil development." (Br. 9). However, Yol only testified that he saw construction equipment and that he "heard" that "people of Talisman" followed the construction crew into the area. (JA __ [D'Avino Ex. 13 at 148]). Yol's testimony with respect to Talisman Energy's alleged presence in the area is not based on personal knowledge and is therefore inadmissible hearsay.

they were allegedly injured were "either targeted civilians or ... undertaken to displace civilians," as the District Court correctly required. (JA __ [*Id*]).

PCOS claimed it "suffered the destruction of various of its churches by the Government." (Br. 12). However, only one such church "may be linked to the [GOS]," *i.e.*, the one that Ninrew testified was damaged in an air attack. (JA __ [*Id.* at 678-79]). Because this church was in Leer, in the southern part of Block 5A, the District Court correctly held that "there is no evidence to support an inference that the attack originated from Heglig or Unity airstrips." (JA __ [*Id.* at 649]). Nor, for that matter, is there any evidence that the particular attack was aimed at or carried out for the purpose of displacing civilians. With regard to the other churches testified to by Ninrew, Deang and Jang, their evidence is either inadmissible hearsay because they did not witness the attacks or insufficient to demonstrate the destruction was carried out by GOS, as opposed to rebel, forces. (JA __ [453 F. Supp. 2d at 661 & n.20]).

In sum, Plaintiffs failed to present sufficient evidence to tether their injuries to GOS attacks targeting civilians, or to any actions by GNPOC, TGNBV or Talisman Energy, and summary judgment was warranted. *See, e.g.*, *Ruggiero v. Warner-Lambert Co.*, 424 F.3d 249 (2d Cir. 2005); *Amorgianos v. Nat'l R.R. Passenger Corp.*, 303 F.3d 256, 270-71 (2d Cir. 2002).

D. Plaintiffs' Agency, Joint Venture and Alter-Ego Liability Theories Were Not Pleaded in the SAC.

Plaintiffs contend that the District Court erred in rejecting their arguments that Talisman Energy should be held liable on agency, joint venture and alter-ego theories. (Br. 83-84, 89, 92, 93). As Judge Cote correctly observed, these were "new theories" that were first advanced in the proposed TAC, which Plaintiffs sought leave to file "[o]n the eve of summary judgment practice." (JA __ [453 F. Supp. 2d at 679-80]).

On appeal, Plaintiffs argue that these theories were not new at all, but supported by the SAC (their operative pleading since 2003). That argument is disingenuous. In telling this Court that they "have always sought to hold Talisman for the acts of its agents" (Br. 83), Plaintiffs ignore the world of difference between the unremarkable assertion of *respondeat superior* – *i.e.*, Talisman Energy "was liable for the acts of its employees" (*id.*) – and the convoluted agency claim they first tried to introduce nearly five years into the litigation – *i.e.*, Talisman Energy was "liable for the acts of first TGNBV, and through TGNBV, for the acts of GNPOC." (JA __ [453 F. Supp. 2d at 679]).[69]

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[69] Plaintiffs cite paragraph 5 of the SAC as evidence that their "agency" allegations were not new. (Br. 83). That paragraph, however, relates not to TGNBV, but to two *U.S.*-based subsidiaries that Plaintiffs described to justify the assertion of personal jurisdiction over Talisman Energy. Those subsidiaries had nothing to do

Plaintiffs' contention that their SAC contained a joint venture allegation is equally facile. At most, that pleading stated that "Talisman and the [GOS] worked together to devise a plan for the security of the oil fields and related facilities." (Br. 89). This not only failed to put Talisman Energy on notice that any type of joint venture was being alleged but also bore no resemblance to the joint venture eventually asserted in the TAC – *i.e.*, that if TGNBV's acts could be attributed to Talisman Energy, then liability could attach "for activities of GNPOC and the Consortium Partners" because TGNBV and the other Consortium Members had carried on a joint venture. (JA __ [453 F. Supp. 2d at 679]).[70]

Finally, Plaintiffs assert that their alter-ego theory was part of the case since 2003, because the SAC alleged that Plaintiffs "were suing Talisman for its 'own

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with GNPOC, TGNBV or Sudan. Far from alleging that Talisman Energy was liable for the acts of TGNBV, Plaintiffs' SAC included no reference to TGNBV whatsoever. (JA __ [Gottridge Ex. 1]).

[70] Contrary to Plaintiffs' assertion (Br. 88-89), Judge Schwartz did not characterize Plaintiffs' then-operative complaint as asserting a joint venture claim. Instead, he wrote, "[t]o the extent that the Amended Complaint alleges acts by GNPOC [citation omitted], Talisman may potentially be held liable for the acts of other GNPOC members under a theory of joint venture liability." (JA __ [244 F. Supp. 2d 289, 352 n.50]). As Judge Cote noted, "Plaintiffs thereafter amended their complaint ... and did not plead a joint venture theory." (JA __ [453 F. Supp. 2d at 680 n.95]). In any event, judicial dicta is no substitute for Plaintiffs' pleading. *Cf. Kara Holding Corp. v. Getty Petroleum Mktg., Inc.*, No. 99 Civ. 0275 (RWS), 2005 WL 53266, at *2 (S.D.N.Y. Jan. 10, 2005) (plaintiff could not rely on past discovery responses "as a substitute for a properly pled claim").

actions and omissions as well as in its capacity as a successor in interest to [Arakis] and as a member of [GNPOC].'" (Br. 93). However, this quotation from the introductory paragraphs of the SAC does not come close to giving notice that Plaintiffs would ask the District Court to disregard the separate corporate existence of a series of Dutch and English direct and indirect subsidiaries of Talisman Energy as well as GNPOC. While pleading standards are liberal, a plaintiff still "must provide the defendant with 'fair notice of what the plaintiff's claim is and the grounds upon which it rests.'" *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 346 (2005) (quoting *Conley v. Gibson*, 355 U.S. 42, 47 (1957)).

In short, until they moved for leave to amend in April 2006, Plaintiffs had not pleaded any facts giving Talisman Energy fair notice of their agency, joint venture and alter-ego claims.[71] Judge Cote was right not to consider those claims, except in the context of Plaintiffs' untimely motion for leave to amend.

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[71] The cases Plaintiffs rely on (Br. 84, 89, 93-94) are not to the contrary. For example, in *Marbury Mgmt., Inc. v. Kohn*, 629 F.2d 705, 711-12 & n.4 (2d Cir. 1980), the complaint's factual allegations (and the evidence at trial) sufficed to invoke a *respondeat superior* theory of liability even though not denominated as such. By contrast, Plaintiffs' SAC did not plead facts fairly putting Talisman Energy on notice that Plaintiffs were: seeking to hold it liable for the acts of TGNBV and GNPOC as supposed agents of Talisman Energy; accusing Talisman Energy, GNPOC and the Consortium Members of carrying on the activities of a joint venture; or seeking to pierce the corporate veils of several Talisman Energy subsidiaries.

E. Plaintiffs Adduced No Admissible Evidence Supporting Their Unpleaded Theories.

Plaintiffs present their agency, joint venture and alter-ego claims as three alternative theories of liability, suggesting that any one of these would suffice to impose liability on Talisman Energy for all the wrongdoing that allegedly injured them. (*See* Br. 81-94). However, as the District Court correctly recognized, the necessary analysis is far more complicated. Because the company conducting operations in Sudan was GNPOC (not TGNBV, much less Talisman Energy), Plaintiffs would first have to establish a basis for disregarding GNPOC's corporate personhood. If they could do that, Plaintiffs would then also have to pierce the corporate veil of TGNBV (the 25% shareholder in GNPOC) as well as the several intermediate corporations between TGNBV and Talisman Energy, or alternatively establish that TGNBV functioned as Talisman Energy's agent. Plaintiffs did not identify sufficient admissible evidence to justify any, and certainly not all, of the findings required to establish these claims.

1. The District Court Correctly Applied New York Choice of Law Rules to Plaintiffs' Vicarious Liability Theories.

At the threshold, it is necessary to determine what law should be applied to the analysis of each individual entity's corporate personhood. The District Court noted that this Court has "'never definitively resolved' the question of choice of law in ATS cases" (JA __ [453 F. Supp. 2d at 681] (quoting *Wiwa v. Royal Dutch*

Petroleum Co., 226 F.3d 88, 105 n.12 (2d Cir. 2000)), and followed this Court's holding that "[o]nce it is recognized that federal choice of law rules are a species of federal common law, the framework the Supreme Court has established for determining whether the creation of federal common law is appropriate must be utilized." *In re Gaston & Snow*, 243 F.3d 599, 606 (2d Cir. 2001). Judge Cote then held that the choice of law rules of the forum state should apply, unless the case presents not only a unique federal interest but a significant conflict between federal and state law that would require displacing state law rules, which Plaintiffs failed to demonstrate. (JA __ [453 F. Supp. 2d at 681-83]). This analysis is consistent with Supreme Court and Second Circuit precedent.[72]

Contrary to the views of one of Plaintiffs' *amici* (*see* Brief of *Amicus Curiae* Earthrights International ("ERI Br.") 7-8), *Sosa's* incorporation of a limited set of

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[72] *See, e.g., Empire Healthchoice Assurance, Inc. v. McVeigh*, 126 S. Ct. 2121, 2132 (2006) (declining to fashion federal common law for insurance carrier's claim for reimbursement of amounts paid to federal employees under a statutory program for health insurance for such employees and noting that an area of uniquely federal interest was a necessary, but not a sufficient, condition for displacing state law); *Atherton v. FDIC*, 519 U.S. 213, 218-226 (1997) (declining to create federal common law rules, displacing state rules, as to the standard of care that federally chartered banks must exercise); *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 83-88 (1994) (refusing to create a federal common law rule, displacing state law, as to attribution of dishonest officers' knowledge to a corporation in cases brought by the FDIC as federal receiver); *Pescatore v. Pan Am. World Airways, Inc.*, 97 F.3d 1, 12-13 (2d Cir. 1996) (applying state choice of law rules to a case where liability was governed by the Warsaw Convention).

international law norms into federal common law does not require federal courts to create uniform federal common law rules governing every issue arising in ATS actions. To the contrary, as the Court unanimously held in *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90 (1991), absent a statutory scheme "evidenc[ing] a distinct need for nationwide legal standards," or "express provisions in analogous statutory schemes embody[ing] congressional policy choices readily applicable to the matter at hand," "federal courts should 'incorporat[e] [state law] as the federal rule of decision,' unless 'application of [the particular] state law [in question] would frustrate specific objectives of the federal programs.'" *Id*. at 98 (quoting *United States v. Kimbell Foods, Inc*., 440 U.S. 715, 728 (1979); alterations in the original; citations omitted).

Plaintiffs presented no reason for the District Court to depart from "[t]he presumption that state law should be incorporated into federal common law." *Kamen*, 500 U.S. at 98. To the contrary, that presumption "is particularly strong in areas in which private parties have entered legal relationships with the expectation that their rights and obligations would be governed by state-law standards," and "[c]orporation law is one such area." *Id.*[73]

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[73] One of Plaintiffs' *amici* argues that "uniform federal rules of liability would not disrupt commercial relationships, because the relationship between ATS plaintiffs

Thus, Judge Cote correctly looked to New York choice of law rules, under which "[t]he law of the state of incorporation determines when the corporate form will be disregarded and liability will be imposed on shareholders." *Fletcher v. Atex, Inc.*, 68 F.3d 1451, 1456 (2d Cir. 1995) (alteration in original; citation omitted); *Kalb, Voorhis & Co. v. Am. Fin. Corp.*, 8 F.3d 130, 132 (2d Cir. 1993). Accordingly, in determining whether to ignore the legal personhood of GNPOC to impose liability on TGNBV, and ultimately Talisman Energy, the law of GNPOC's place of incorporation (Mauritius) governs. Likewise, in determining whether to pierce the corporate veil of each intermediate subsidiary between TGNBV and Talisman Energy, the law of the place of incorporation of each intermediate subsidiary applies (*i.e.*, Dutch law as to TGNBV-Goal and Goal-Supertest/Igniteserve; English law as to Supertest/Igniteserve-TUK and TUK-Talisman Energy).

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and defendants is far from a commercial relationship ... ." (ERI Amicus 9). That contention misses the mark. Plaintiffs had no "relationship" at all with Talisman Energy, yet tried to impose liability on it by concocting rules that would overturn long-established commercial and corporate relationships between Talisman Energy and its subsidiaries, among the Consortium Members and between the Consortium Members and GNPOC.

2. There was No Basis to Hold TGNBV Liable for the Acts of GNPOC.

a. Judge Cote Properly Respected GNPOC's Personhood Under Mauritius Law.

GNPOC is a Mauritius private limited liability company with its members' liability limited by shares. (JA __ [Glover Decl. ¶¶ 7-9]). Even if Plaintiffs had produced admissible evidence of misconduct by GNPOC, TGNBV could not be liable for GNPOC's conduct because in Mauritius law, "a shareholder shall not be liable for an obligation of the company by reason only of being a shareholder." (JA __ [*Id.* ¶ 13, Ex. E]).

Mauritian law pierces the corporate veil in certain circumstances, *e.g.*, where the company conducts business with the intent to defraud creditors or the incorporation of a company is "a mere façade." (JA __ [*Id.* ¶¶ 16-17]). None of these circumstances apply here. The District Court correctly found that Plaintiffs "have not presented evidence that the Consortium Members created GNPOC to shield themselves from existing liabilities or that GNPOC conducted its business with an intent to defraud creditors." (JA __ [453 F. Supp. 2d at 683]). Judge Cote properly refused to disregard GNPOC's corporate form.[74]

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[74] Plaintiffs do not contest this holding. They only argue that they are seeking to "pierc[e] the corporate veils of Talisman's subsidiaries." (Br. 94). GNPOC was never a subsidiary of Talisman Energy.

b. GNPOC was Not a Joint Venture Under Mauritius Law.

Mauritius law recognizes two forms of joint venture. The first is a *de jure* joint venture, which must be registered as such with the Mauritian Registrar of Companies. The second is a *de facto* joint venture, which is not registered or incorporated but meets the following elements: (1) ownership in equal shares; (2) of an entity formed for a specific purpose; and (3) operating for the benefit of a third party. As Judge Cote correctly held (JA __ [453 F. Supp. 2d at 685]), GNPOC cannot be a joint venture because (a) it is incorporated as a corporation, precluding a finding of a *de jure* joint venture (JA __ [Glover Reply Decl. ¶ 6]); and (b) its shareholders do not own equal interests in it, prohibiting a finding of a *de facto* joint venture. (JA __ [*id.* ¶ 7]).[75]

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[75] As Judge Cote further held, the result would be no different under New York law. First, the parties must "evidence their intent to be joint venturers." *Itel Containers Int'l Corp. v. Atlanttrafik Express Serv. Ltd.*, 909 F.2d 698, 701 (2d Cir. 1990). Plaintiffs presented no evidence of any such intent, which the GNPOC Project Agreements expressly disclaimed. (*See, e.g.*, JA __ [Gottridge Ex. 98, Art. 15.1] ("this Agreement shall not be deemed or construed to create a partnership, association or trust"). Second, "[a] joint venture and a corporation are mutually exclusive ways of doing business." *Dinaco Inc. v. Time Warner Inc.*, No. 98 Civ. 6422 (JSM), 2002 WL 31387265, at *3 (S.D.N.Y. Oct. 22, 2002) (granting defendants' summary judgment motion) (citation omitted); *see also Itel Containers*, 909 F.2d at 702 (entity "was not a joint venture because it was a corporation").

Plaintiffs acknowledge that even under their purported federal common law test, they must also demonstrate "joint control" over the alleged joint venture. (Br. 90). This element is missing because the consent of shareholders collectively owning at least 60% of GNPOC shares was required to take corporate actions (*see* p. 18, above). TGNBV, with only a 25% shareholding, could not "dictate [GNPOC's] decisions about where to [explore for oil], whom to hire, what techniques to use, and the like." *Sasportes v. M/V Sol de Copacabana*, 581 F.2d 1204, 1209 (5th Cir. 1978) (reversing district court's finding of joint venture).

3. There was No Basis to Hold Talisman Energy Liable for the Acts of TGNBV.

a. Judge Cote Properly Respected TGNBV and the Intermediate Corporations' Personhoods Under Dutch and English Law.

Even if GNPOC's corporate separateness were disregarded, Plaintiffs would still have to show that Talisman Energy was responsible for the acts of TGNBV, the

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The only exception to this rule applies where the parties intended a joint venture to survive alongside a subsequently formed corporation, and only with regard to relationships among the parties, not between the venturers and third parties. *See, e.g., Sagamore Corp. v. Diamond W. Energy Corp.*, 806 F.2d 373, 378-79 (2d Cir. 1986). Neither element is present here. Even accepting Plaintiffs' argument (not made to the District Court) that the alleged joint venture was not GNPOC but some amorphous overarching entity comprised of CNPC, Petronas, Sudapet and TGNBV, Plaintiffs still failed to present evidence of any intent to form a joint venture. *See* p. 17, above. And, Plaintiffs, as third parties, cannot take advantage of any joint venture rights among those entities.

actual shareholder in GNPOC, by presenting admissible evidence that the separate judicial personhood of TGNBV and every intermediate subsidiary between it and Talisman Energy should be ignored under applicable law. The District Court correctly held that Plaintiffs failed to meet this burden.

Under Dutch law, which governs Goal's and TGNBV's corporate personhoods, a company is a separate legal entity from its shareholders. (JA __ [Winter Decl. ¶ 6]). Accordingly, shareholders are not liable for a company's misconduct. (JA __ [*Id.* ¶ 7]). Under the "equation" doctrine, however, a parent company will be liable for its subsidiary's actions if it ignores the formal corporate separateness between itself and the subsidiary. (JA __ [Winter Decl. ¶ 12]). The Dutch Supreme Court has held a parent company so liable where both companies almost totally overlapped, employing the same managing director, and conducting similar business via the same employees, materials and equipment, making them essentially one entity. (*Id*. ¶ 14). In all of its other "equation" cases, the Dutch Supreme Court has declined to apply the doctrine, even where there was substantial overlap between the parent company and the subsidiary. (*Id*. ¶ 15).

Under English law, which governs Supertest's, Igniteserve's, and TUK's corporate personhoods, each company in a group "is a separate legal entity possessed of separate legal rights and liabilities." (JA __ [Gruder Decl. ¶ 5]). An

English court will only pierce the corporate veil where the parent so completely controls the subsidiary that the latter is not carrying out its own business separate from the parent, or if the subsidiary was established for the purpose of evading existing obligations to other parties. (*Id*. ¶¶ 8-9). A degree of supervision or even control by the parent over the subsidiary is insufficient, because that is common to all parent-subsidiary relationships. (*Id*. ¶ 8). Nor may an English court disregard corporate personhoods "merely because it considers that justice so requires," or because the corporate group has been structured to ensure that any future legal liabilities fall on a different member. (*Id*. ¶¶ 6-7).

As Judge Cote correctly held, Plaintiffs did not produce any admissible evidence justifying veil-piercing under the relevant Dutch and English standards (JA __ [453 F. Supp. 2d at 683, 688]). For instance, TUK, a large oil and gas exploration and production company which, among other activities, is active in the North Sea, had net assets in 2001 exceeding £420 million and it and its subsidiaries collectively reported revenues in excess of £1 billion. (JA __ [Gottridge Ex. 119 at 8]). Similarly, TGNBV operated as an independent corporation with a separate board of directors – which held regular board meetings and maintained minutes – and a separate place of business from Talisman Energy. (JA __ [Gottridge Exs. 47, 66:13-25, 72:10-73:1, 85:4-9; 67, 71:15-25; 114; 115; 120]). TGNBV also had an

office in Sudan with a significant number of employees and separate payroll and administration. (JA __ [Gottridge Exs. 50, 251:19-258:6; 107; 113]).

Moreover, Plaintiffs presented no admissible evidence that Talisman Energy abused any alleged control over TGNBV to harm Plaintiffs. TGNBV was formed as an indirect subsidiary of Talisman Energy for tax-efficient purposes. (JA __ [Gottridge Exs. 24, 43:9-21; 29, 8:12-19, 20:13-19; 47, 31:23-32:13, 123:6-124:1]). In November 2001, when this action was filed, TGNBV was not judgment-proof, and Talisman Energy never depleted it of assets in order to prevent Plaintiffs from recovering for their alleged injuries.[76] Plaintiffs made a strategic choice not to sue TGNBV and, indeed, to draft their SAC as if it did not exist. (*See* JA __ [Gottridge Ex. 1]).

In sum, the District Court properly ruled that Plaintiffs failed to present evidence that would create a material issue of fact that the corporate veil of any of TGNBV or the intermediate subsidiaries should be pierced.[77]

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[76] As of December 31, 2001, TGNBV's net assets exceeded $400 million. The company earned net income of over $90 million in 2001. (JA __ [Gottridge Ex. 118]).

[77] Contrary to Plaintiffs' argument (*see* Br. 94), federal common law would not lead to a different outcome. Under federal common law "[i]t is a general principle of corporate law deeply 'ingrained in our economic and legal systems' that a parent corporation ... is not liable for the acts of its subsidiaries." *United States v. Bestfoods*, 524 U.S. 51, 61 (1998); *see also Anderson v. Abbott*, 321 U.S. 349, 362

b. TGNBV was Not Talisman Energy's Agent.

Plaintiffs also argued that Talisman Energy was liable for TGNBV's actions through an agency theory. (Br. 89). "The tests for finding agency so as to hold a parent corporation liable for the obligations of its subsidiary, however, are virtually the same as those for piercing the corporate veil." *Fidenas AG v. Honeywell Inc.*, 501 F. Supp. 2d 1029, 1037 (S.D.N.Y. 1981) (granting summary judgment to defendants).[78] "Applying a different standard would undermine the strong policy that exists concerning the presumption of separateness and respecting the corporate

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(1944) ("Limited liability is the rule, not the exception… ."); *Interocean Shipping Co. v. National Shipping and Trading Corp.*, 523 F.2d 527, 539 (2d Cir. 1975) (no veil-piercing despite a "close familial relationship" between the parent and subsidiary where "there is no evidence in the record before us that such control was used to perpetrate a fraud or something akin to a fraud"); *Bowoto v. Chevron Texaco Corp.*, 312 F. Supp. 2d 1229, 1246 (N.D. Cal. 2004) (ATS plaintiffs had to show that "failure to disregard the separate nature of the corporate entities would result in fraud or injustice" and possibly also "whether the corporate entities committed fraud in incorporation"; granting defendant summary judgment on alter-ego claims). Plaintiffs offered no evidence to support piercing the veil under these tests. Plaintiffs claim that "failing to pierce in this instance would result in injustice and defeat an overriding public policy interest" (Br. 94), but "the inability of plaintiffs to recover for their losses is not a sufficient inequity to justify overlooking the corporate form." *Bowoto*, 312 F. Supp. 2d at 1247 (citation omitted).

[78] Plaintiffs' reliance on *Bowoto* (Br. 85) to support a lower standard is unconvincing. The *Bowoto* court relied upon many "cases in which the issue presented to the court was jurisdiction." 312 F. Supp. 2d at 1243. Such reliance is misplaced because "[f]inding agency sufficient to validate service of process is a different matter from finding agency sufficient for imputing tort liability." *Fidenas AG*, 501 F. Supp. at 1038 n.15.

entity." *Kashfi v. Phibro-Salomon, Inc.*, 628 F. Supp. 727, 735 (S.D.N.Y. 1986) (applying New York law; granting summary judgment for defendant).[79] This Court should not permit Plaintiffs to perform an end run around the "veil-piercing" doctrine by styling their claim in agency terms.[80]

Even under traditional tests of actual or apparent agency, Plaintiffs failed to present admissible evidence to hold Talisman Energy liable for TGNBV's acts. Actual authority is "the power of the agent to affect the legal relations of the principal by acts done in accordance with the principal's manifestations of consent to him." *Fletcher*, 68 F.3d at 1461 (affirming summary judgment for defendant). Because Plaintiffs produced no evidence that Talisman Energy "actually authorized [TGNBV] to act as its agent or that it in any way led [TGNBV] to believe [TGNBV] was so authorized," this theory fails. *Itel Containers Int'l Corp.*, 909

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[79] The application of federal common law would not lead to a different outcome. Plaintiffs concede "there is no substantive difference between New York agency law and federal common law principles." (Br. 84).

[80] Even if Plaintiffs had presented sufficient evidence to hold Talisman Energy liable for TGNBV's acts, that still would not have defeated summary judgment. As the District Court noted, "[t]agging Talisman for TGNBV's conduct gets Plaintiffs only part way on their journey," (JA __ [453 F. Supp. 2d at 689 n.113]) because they would still need to get from TGNBV to GNPOC, which they cannot do. (*See* pp. 98-100, above).

F.2d at 702.[81] "[A]pparent authority is dependent upon verbal or other acts by a principal which reasonably give an appearance of authority to conduct the transaction." *Fletcher*, 68 F.3d at 1462 (citation omitted). "Key to the creation of apparent authority ... is that the third person, accepting the appearance of authority as true, has relied upon it." *Id.* (citation and internal quotations omitted). Plaintiffs presented no evidence to support such a theory.[82]

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[81] Plaintiffs also claim that GNPOC and the GOS security forces were Talisman Energy's agents. They made no such claim in opposing summary judgment and so are precluded from doing so now. Moreover, they cite no admissible evidence supporting their claim. Their attempt to create an agency relationship by "ratification" (Br. 87-88) also fails because ratification "presupposes an agency relationship; it does not create one where none otherwise existed." *Kaye v. Grossman*, No. 97 Civ. 8679 (JSR), 1999 WL 33465, at *2 n.1 (S.D.N.Y. Jan. 27, 1999).

[82] If this Court does not affirm dismissal for the reasons set forth in either Point I or Point II, Talisman Energy respectfully requests that, in remanding the action, the Court direct the District Court to consider anew two discretionary grounds for dismissal: international comity (*see* p. 56, above), and *forum non conveniens*. As to the latter, the District Court should consider, *inter alia*, whether any judgment that may ultimately be entered against Talisman Energy would be unenforceable in Canada (*see* JA __ [Foran and Bredt Declarations]), rendering the imposition of jury duty on residents of a forum having no connection to the dispute a waste of resources. *See, e.g., Scottish Air Intern., Inc. v. British Caledonian Group, PLC*, 81 F.3d 1224, 1233 (2d Cir. 1996) (affirming dismissal of case in favor of England, for various reasons including that "plaintiffs would have problems securing the injunctive relief they sought, because it would be unenforceable in Great Britain"). Judge Schwartz's rejection of *forum non conveniens* was based in substantial part on his assessment of the "policy interest implicit in our federal statutory law in providing a forum for adjudication of claims of violations of the law of nations," *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 100 (2d Cir.

III. The District Court Properly Denied Plaintiffs Leave to Amend.

The District Court acted well within its broad discretion in denying Plaintiffs' untimely motion to file their TAC. The District Court correctly held that: (a) Plaintiffs failed to show good cause for their proposed amendment as Rule 16(b) required; and (b) Plaintiffs' proposed amendment would be futile.

A. Plaintiffs Failed to Show Good Cause For Their Untimely Motion.

"[A] district court does not abuse its discretion in denying leave to amend the pleadings after the deadline set in the [Rule 16(b)] scheduling order where the moving party has failed to establish good cause." *Parker v. Columbia Pictures Indus.*, 204 F.3d 326, 340 (2d Cir. 2000).

A finding of good cause depends on the diligence of the moving party. *See id.*; *Lincoln v. Potter*, 418 F. Supp. 2d 443, 454 (S.D.N.Y. 2006). Plaintiffs were not diligent in seeking to amend, moving two and a half years after the Rule 16(b) Order's deadline and just 16 days before the Court-ordered deadline for filing summary judgment motions, and therefore could not show good cause. Judge Cote

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2000) (see JA __ [244 F. Supp. 2d at 339-40]), which is at odds with the restraint that *Sosa* later commanded, absent specific legislative guidance. Not only does Canada have a greater interest than the U.S. in adjudicating this dispute because one of its corporations is a defendant, but Canada is unquestionably an adequate alternative forum (JA _ [244 F. Supp. 2d at 338]) and Talisman Energy would not object to Plaintiffs' use in a Canadian court of the evidence obtained in discovery in this action.

observed that "[i]t could even be said that the plaintiffs acted in bad faith in waiting until the eve of summary judgment practice to file the motion to amend." (JA __ [453 F. Supp. 2d at 689]). Denial of Plaintiffs' motion to amend should be affirmed on this basis alone.

In attempting to show good cause for their untimely motion to amend, Plaintiffs make two contradictory arguments. They assert (1) that the TAC simply "clarif[ied]" their SAC, (Br. 96) and (2) that their proposed amendment was based on "discovery [that] was finally completed in early 2006" (Br. 97). Plaintiffs cannot have it both ways.

If amending was a "simple housekeeping matter" (Br. 96), Plaintiffs had no excuse to wait two and one-half years after the deadline for amendments before proposing the TAC. *See In re Wireless Tel. Servs. Antitrust Litig.*, 02 Civ. 2637 (DLC), 2004 U.S. Dist. LEXIS 19977, at *18 (S.D.N.Y. Oct. 6, 2004). If, on the other hand, the motion to amend was necessitated by facts recently obtained in discovery, then the proposed TAC did not merely clarify and focus issues that were in the case all along.

In fact, the TAC was no mere "clarifying" amendment. As Judge Cote noted, Plaintiffs' "far reaching proposal" would have "reconfigure[d] the legal landscape" of the case and "dramatically alter[ed] the plaintiffs' theories of

liability." (JA _ [453 F. Supp. 2d at 639, 680]). The TAC alleged for the first time that:

- Talisman Energy conspired with one or more of GNPOC, the GNPOC shareholders and TGNBV (as opposed to the GOS) to engage in wrongful acts or omissions (JA __ [TAC ¶¶ 10, 75]);
- Talisman Energy aided and abetted GNPOC's (as opposed to the GOS's) wrongful acts and omissions (JA __ [TAC ¶¶ 9, 73, 74]);
- Talisman Energy was liable under a "joint venture liability" theory for acts of GNPOC and the other GNPOC shareholders (JA __ [TAC ¶¶ 11, 76]); and
- Talisman Energy was liable for TGNBV's acts under alter-ego and agency theories (JA __ [TAC ¶¶ 12, 77]).

Plaintiffs pointed to no specific fruits of recent discovery justifying their last-minute attempt at such a drastic amendment. Indeed, they presented no "good cause" at all.

B. Judge Cote Properly Denied the Motion as Futile.

The District Court also acted within its discretion in denying Plaintiffs' motion because their proposed amendment would have been futile. *See, e.g.*, *Marchi v. Board of Cooperative Educ. Servs. of Albany*, 173 F.3d 469, 478 (2d Cir. 1999). Plaintiffs' argument that the District Court applied the wrong standard in determining the futility of their proposed amendment is meritless. Although the futility of a proposed amendment offered in the face of a motion to dismiss is measured by Rule 12(b)(6)'s lenient standard, Judge Cote correctly held that far

more is required at the summary judgment stage. (JA __ [453 F. Supp. 2d at 681, n.98]).

After discovery has closed and the case is ripe for summary judgment, a district court may deny an amendment as futile when the evidence in support of the movant's proposed new claim creates no triable issue of fact and the non-moving party would be entitled to summary judgment. *Milanese v. Rust-Oleum Corp.*, 244 F.3d 104, 110 (2d Cir. 2001) ("[E]ven if the amended complaint would state a valid claim on its face, the court may deny the amendment as futile when … the defendant would be entitled to judgment as a matter of law under Fed. R. Civ. P. 56(c)."); *see also Azurite Corp. v. Amster & Co.*, 844 F. Supp. 929, 939 (S.D.N.Y. 1994), *aff'd*, 52 F.3d 15 (2d Cir. 1995). That was precisely the case here.

IV. The District Court Did Not Abuse Its Discretion In Refusing to Certify Plaintiffs' Proposed Classes.

Plaintiffs' class certification motions sought to certify three different classes, the narrowest of which comprised:

> All non-Muslim, African Sudanese civilian inhabitants of blocks 1, 2 or 4 or Unity State as far south as Leer and areas within ten miles thereof (the "Class Area") who assert injury or damage from attacks by the Government of Sudan which utilized Antonov bombers or Hind helicopter gunships on [a list of 142 villages] during the

> period January 1, 1999, through March 30, 2003 (the "Class Period"). (JA __ [2005 WL 2278076, at *2]).[83]

The District Court properly denied Plaintiffs' motions under Rules 23(b)(2) and (b)(3) and declined to certify certain issues for class treatment pursuant to Rule 23(c)(4)(A).

A. Judge Cote Properly Denied Plaintiffs' Motion To Certify A Rule 23(b)(2) Class.

A plaintiff class may be certified if "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final *injunctive relief* or *corresponding declaratory relief* with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2) (emphasis added). The District Court correctly recognized that Rule 23(b)(2) does not apply to "cases in which the appropriate final relief relates exclusively or predominantly to money damages." (JA __ [226 F.R.D. at 467]) (citation omitted). "Insignificant or sham requests for injunctive relief should not provide cover for (b)(2) certification of claims that are brought essentially for monetary recovery." *Robinson v. Metro-North Commuter R.R.*, 267 F.3d 147, 164 (2d Cir. 2001).

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[83] (*See also* JA __ [*Id.*; 226 F.R.D. at 458]) (two alternative class definitions).

1. Plaintiffs Did Not Seek Injunctive or Declaratory Relief.

Plaintiffs' SAC did not seek injunctive relief, but instead invoked only other equitable remedies – *i.e.*, a constructive trust and disgorgement. Federal courts refuse to equate such equitable remedies with the injunctive relief required by Rule 23(b)(2). *See, e.g., Owner-Operator Indep. Drivers Assoc. v. New Prime, Inc*., 213 F.R.D. 537, 545 (W.D. Mo. 2002) (denying motion to certify a Rule 23(b)(2) class "[a]lthough disgorgement is an equitable remedy, it does not qualify as injunctive relief"); *Pickett v. IBP*, 182 F.R.D. 647, 656 (M.D. Ala. 1998) (same); *Sugai Prods., Inc. v. Kona Kai Farms, Inc.*, No. 97-00043 SPK, 1997 WL 824022, at *10 (D. Hawaii 1997) (same). Rule 23(b)(2) certification was properly rejected on this basis alone.[84]

2. Plaintiffs Did Not Meet the Test for Rule 23(b)(2) Certification Set Forth in *Robinson*.

Even if the equitable remedies Plaintiffs invoked were somehow construed to qualify as "injunctive relief," Rule 23(b)(2) certification was inappropriate because (1) the relief Plaintiffs sought related predominantly to money damages;

[84]Plaintiffs' request for a "declaration that Defendants have violated international law in connection with their oil exploration and drilling activities in Sudan, or have aided and abetted therein" (JA __ [Gottridge Ex. 1, p. 37]), did not implicate Rule 23(b)(2). "An action seeking a declaration concerning defendant's conduct that seems designed simply to lay the basis for a damage award rather then injunctive relief [does] not qualify under [this provision]." *In re Nigeria Charter Flights Contract Litig.*, 233 F.R.D. 297, 304 (E.D.N.Y. 2006).

and (2) Plaintiffs did not establish that "the injunctive or declaratory relief sought would be both reasonably necessary and appropriate were [P]laintiffs to succeed on the merits." *Robinson*, 267 F.3d at 164.

Where a plaintiff seeks both injunctive relief and monetary damages, a district court should consider "the relative importance of the remedies sought, given all the facts and circumstances of the case." *Id.* (citation omitted). Judge Cote correctly held that because "[t]he plaintiffs' request for a constructive trust is an ill-disguised claim for damages" (225 F.R.D. at 468), any injunctive relief Plaintiffs sought failed to predominate. *See, e.g.*, *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 564 (2d Cir. 1968) ("Subsection (b)(2) was never intended to cover cases like the instant one where the primary claim is for damages, but is only applicable where the relief sought is exclusively or predominantly injunctive or declaratory.")

The equitable relief Plaintiffs sought was, moreover, not "reasonably necessary and appropriate were plaintiffs to succeed on the merits." *Robinson*, 267 F.3d at 164. Any injury Plaintiffs suffered could have been remedied through compensatory damages. "With respect to constructive trusts specifically, New York courts have clarified that as an equitable remedy, a constructive trust should not be imposed unless it is demonstrated that a legal remedy is inadequate." *In re*

First Central Financial Corp., 377 F.3d 209, 215 (2d. Cir. 2004) (citations omitted). Plaintiffs did not so demonstrate.

Further, a constructive trust and disgorgement are only available when a defendant deprives a plaintiff of property in which the plaintiff can claim entitlement. *See, e.g., In re United States Lines, Inc.*, 79 B.R. 542, 545 (S.D.N.Y. Bankr. 1987) ("The remedy of a constructive trust ... requires and is limited to … the property to which the claimant is entitled."); *Coane v. American Distilling Co.*, 81 N.E.2d 87, 90 (N.Y. 1948) (purpose of constructive trust is to "strip the individual wrongdoers of specific property and to decree its restitution to its proper and equitable owner"). Plaintiffs did not, and could not, allege any ownership interest in the oil GNPOC produced. For a United States court to vest in Plaintiffs an interest in Sudan's oil resources would violate established notions of international comity. *See, e.g, Int'l Ass'n of Machinists & Aerospace Workers v. OPEC*, 649 F.2d 1354, 1361 (9th Cir. 1981) (affirming dismissal of claims against OPEC and member nations under the principle of supreme state sovereignty over natural resources). The District Court properly denied Plaintiffs' motion to certify a class pursuant to Rule 23(b)(2).

B. The District Court Properly Denied Plaintiffs' Motion to Certify a Class Pursuant to Rule 23(b)(3).

Judge Cote properly denied certification under Rule 23(b)(3) because the rule's predominance requirement was not satisfied. Alternatively, Plaintiffs failed to meet the rule's superiority requirement.

1. Plaintiffs Did Not Satisfy the Predominance Requirement.

Plaintiffs' narrowest proposed class comprised individuals asserting different injuries from at least 142 discrete events spread across hundreds of square miles over more than four years in a war-torn region. Proving each putative class member's entitlement to recovery would require individual proof:

- that the particular airstrike in which he was injured violated international law, *i.e.*, it was deliberately directed at a civilian population, and was neither directed at rebel positions in an active conflict zone nor a mistake;
- that Talisman Energy conspired to commit, or aided and abetted, the particular airstrike that caused his injury;
- that he was actually injured in an airstrike by the GOS in the putative Class Area and during the putative Class Period, and not at some other time, place, or event;
- that he was a "civilian" as Plaintiffs' proposed class definitions contemplate, and not associated with any of the violent rebel groups active in the putative Class Area;
- that he is non-Muslim;
- that he is African Sudanese; and
- the nature and amount of his damages.

Adjudicating the named Plaintiffs' claims would not draw out the proof necessary to make those separate determinations, because the named plaintiffs were not subject to and did not witness airstrikes in each of those 142 villages. Nor did they offer any other admissible evidence of those attacks. Proof that the GOS launched an airstrike purposefully and knowingly directed at a civilian population in one or in ten villages does not prove that it did so in 142 or more separate instances. Similarly, proof that an airstrike on one or on ten villages was in furtherance of a conspiracy between the GOS and Talisman Energy, or was aided and abetted by Talisman Energy, does not prove that more than 142 separate airstrikes also were. The scale and complexity of these individualized determinations would require hundreds or thousands of mini-trials, precluding certification under Rule 23(b)(3). Where, as here, the critical questions of actual injury, proximate causation and damages all require individualized proof to establish a right to recovery, litigation through representation will not suffice. *See, e.g.*, *Bano v. Union Carbide Corp.*, 361 F.3d 696, 714-15 (2d Cir. 2004) ("The claims are that individuals have suffered bodily harm and damage to real property they own. Necessarily, each of those individuals would have to be involved in the proof of his or her claims.").

Plaintiffs argue that the District Court's class certification decisions are inconsistent with this Court's later decision in *In re Nassau County Strip Search Cases*, 461 F.3d 219 (2d Cir. 2006). *Strip Search Cases* is inapposite. There, the district court had held that the defendants' concession of common liability issues removed such issues from the predominance analysis, leaving only individual issues and thereby defeating class certification. *Id.* at 224. This Court rejected that rationale because it would work the "perverse result of allowing [defendants] to escape the cost of their unconstitutional behavior precisely because their liability is too plain to be denied." *Id.* at 229.

Here, by contrast, liability was hotly contested, and even under Plaintiffs' narrowest proposed class, would have required adjudication of a multitude of individual issues, including Talisman Energy's liability to tens of thousands of individuals claiming injury by virtue of events occurring "over more than four years, a territory of many hundreds of square miles, and at its narrowest, through 142 separate incidents." (JA __ [2005 WL 2278076, at *3]).

Further, in *Strip Search Cases*, the individualized issues presented applied only to a limited number of plaintiffs, so that the inquiries necessary to resolve those outstanding issues would be "*de minimis.*" *Id.*, 461 F.3d at 224. Here, however, the individual liability issues to be resolved apply to *every* putative class

member, and go to the heart of the controversy: Did each plaintiff seeking recovery (i) suffer injury, (ii) caused by the GOS, (iii) as a result of a tort committed, (iv) in violation of international law, (v) in furtherance of a conspiracy with, or aided and abetted by, Talisman Energy? Judge Cote correctly held that these fundamental elements of Plaintiffs' claims were subject to individualized proof and could not be resolved on a class-wide basis.[85] Plaintiffs do not cite any case analogous to this one supporting their motion to certify a class pursuant to Rule 23(b)(3). No such precedent exists. *Cf. Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534 (S.D.N.Y. 2001) (doubting whether predominance requirement would be met in an ATS action: "[e]ven the bare question of liability could not readily be handled here as a class action, given the multiple causation issues raised by plaintiffs' claims of indirect injuries extending over hundreds of miles and dozens of years and affecting individual members of the classes ... in a multitude of different ways").

[85] Equally unavailing is Plaintiffs' reliance on *In re Initial Public Offering Securities Litig.*, 461 F.3d 219 (2d Cir. 2006), *reh'g. denied*, __ F.3d __, 2007 WL 1097892 (2d Cir. Apr. 6, 2007). Judge Cote's analysis actually presaged this Court's holding in that case, for example when she held that:

> "While class certification is not an occasion for *deciding* the merits of a party's case, courts may not accept all of the allegations of a complaint as true while simultaneously ignoring the existence of defenses. Identifying subjects that will be contested at trial and evaluating each party's burden of proof on the elements of its cause of action or defense is not the same as concluding which party will ultimately prevail." (JA __ [226 F.R.D. at 483-84]).

2. Plaintiffs Did Not Satisfy the Superiority Requirement.

Rule 23(b)(3) certification also would have been improper because a class action was not superior to other methods for a fair and efficient adjudication of this controversy. In particular: (a) it would have been impossible to give notice to putative class members consistent with due process; and (b) any class judgment would not have had meaningful preclusive effect.

a. Inability to Provide Notice

Plaintiffs proposed to provide notice to tens or hundreds of thousands of putative class members widely disbursed throughout southern Sudan by word-of-mouth because there is in the putative class area no mail service, no newspapers, and no widely received television or radio broadcasts. (JA __ [Class Cert. Reply, 30-32]). "Exceptions in the name of necessity do not sweep away the rule that within the limits of practicability notice must be such as is reasonably calculated to reach interested parties." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 318 (1950). *See also* Advisory Committee's Note to Rule 23 ("mandatory notice pursuant to subdivision (c)(2) ... is designed to fulfill requirements of due process to which the class action procedure is of course subject"); *In re Prudential Secs. Inc. P'ships Litig.*, 164 F.R.D. 362, 368 (S.D.N.Y. 1996) (court must select a means likely to apprise interested parties), *aff'd without opinion*, 107 F.3d 3 (2d Cir. 1996). There is no authority for the proposition that word-of-mouth notice

comports with due process, even in a circumstance – unlike this one – where those intended to receive the notice can be identified and effectively reached.

Because Plaintiffs did not meet their burden of demonstrating that notice could be effected as due process requires, class certification was properly denied. *See Mateo v. M/S Kiso*, 805 F. Supp. 761, 774 (N.D. Cal. 1991) (denying certification of a class of seamen who were foreign nationals); *Cape Henry Bird Club v. Laird*, 359 F. Supp. 404, 410 (W.D. Va. 1973) (rejecting class certification where the "members of the class cannot reasonably be determined, and [where] there is no reasonable method of giving such people proper notice as required by due process and Rule 23(c)(2)").

b. Lack of Meaningful Preclusive Effect

Class certification is also inappropriate where foreign class members will not be bound by an ultimate judgment of the court. *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 996-997 (2d Cir. 1975) (directing that foreign plaintiffs be dropped from the class because England, Germany, Switzerland, Italy and France would not recognize a U.S. judgment as binding on their citizens, even where citizens had received actual notice of their opt-out right); *Ansari v. New York Univ.*, 179 F.R.D 112 (S.D.N.Y. 1998) (refusing to certify class where case law demonstrated that at least six prospective class members are residents of countries that would not give preclusive effect to a class action judgment).

The putative class members overwhelmingly live outside the United States. The majority reside in Sudan, and Plaintiffs contended that the greatest number of putative class members outside Sudan reside in Kenya, Ethiopia and Uganda. (JA __ [Mezhoud Decl. ¶ 10]). There are also substantial Sudanese communities in the United Kingdom and Canada, where Talisman Energy or its affiliates have significant assets.[86] Talisman Energy would be vulnerable to being haled into those foreign jurisdictions, among others, by individuals making claims mirroring those asserted here. Even if later plaintiffs have received actual notice of this action and the opportunity to opt out of the class, courts in Kenya, Ethiopia, Uganda, Sudan, and the United Kingdom will not enforce a class judgment of this Court on the grounds that U.S. class action procedures binding putative class members who have not affirmatively manifested their consent to be bound by the judgment of a U.S. court are inconsistent with their domestic policies. (JA __).[87]

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[86] *See, e.g.*, United Nations High Commissioner For Refugees, 2005 Global Refugee Trends, available at www.unhcr.org/statistics.4486ceb12.pdf.

[87] There is also considerable doubt that a Canadian court would enforce a class judgment in this case (*see* JA __ [Foran and Bredt Declarations]); *see also Currie v. McDonald's Restaurant of Canada Limited*, [2004] 70 O.R. 3d 53 (affirming refusal to enforce U.S. class action judgment).

Because any judgment that the District Court ultimately might render could not bar significant number of putative class members from re-litigating their claims against Talisman Energy, class certification was properly denied.

C. Judge Cote Properly Declined to Certify Certain Issues For Class Treatment Under Rule 23(c)(4)(A).

Finally, Plaintiffs argue that the District Court erred under *Strip Search Cases* by declining to certify certain issues for class treatment under Rule 23(c)(4)(A). The District Court made no such error. *Strip Search Cases* holds that a district court may certify certain issues for class treatment even if the entire controversy fails to satisfy the predominance requirement. 461 F.3d at 224. Judge Cote, however, rejected issue certification for a different reason: because the issues that could be resolved on a class-wide basis would have led virtually nowhere in establishing Talisman Energy's liability to any putative class member. (JA __ [226 F.R.D. at 484-85; 2005 WL 2278076, at *3]). The District Court was correct.

Although bifurcating liability and damages for trial is permissible, courts must be able to "carve at the joint" between the two. *In re Methyl Tertiary Butyl Ether ("MTBE") Products Liab. Litig.*, 209 F.R.D. 323, 352 (S.D.N.Y. 2002) (citation omitted). Thus, "where courts have severed the issue of general liability in a class setting, it was only where a complete determination as to liability could actually be made at a class wide trial." *Id*. at 352. This was the approach approved

in *Strip Search Cases*, 461 F.3d at 227. For the reasons explained above, virtually no element of Plaintiffs' claims is subject to class-wide determination. It therefore would be impossible to have a single, manageable proceeding whose outcome could establish Talisman Energy's liability to the putative class.

The District Court also correctly identified the unfairness with Plaintiffs proposition that it could certify a class on specific liability issues.

> This suggests that the plaintiffs anticipate using a trial phase to prove in a general way that the defendants waged the Campaign described above, followed by an administrative phase where each class member must show that he was harmed by Government, not rebel forces or some private actor. This, however, is precisely the type of scenario that could prejudice defendants by "lifting the description of the claims to a level of generality that tears them from their substantively required moorings to actual causation and discrete injury." *In re Fibreboard Corp.,* 893 F.2d 706, 712 (5th Cir. 1990). In such a scenario, the jury trial would become but a precursor to a capacious administrative morass where the majority of substantive issues of causality would be resolved on a piecemeal basis.

(JA __ [226 F.R.D. at 484-85]). *See also Blyden v. Mancusi,* 186 F.3d 252 (2d Cir. 1999) (improper to permit liability trial that did not determine class-wide liability, but required damages-phase jurors to revisit many of the same issues considered by the liability jury); *In re Agent Orange Prod. Liab. Litig.,* 818 F.2d 145, 164 (2d Cir. 1987) (the question whether Agent Orange is harmful was not appropriate for class

treatment, where individual causation would have to be tried separately for each plaintiff); *In re MTBE,* 209 F.R.D. at 352.

Finally, adjudication of whatever limited issues might be subject to class-wide resolution would not, as Rule 23(c)(4)(A) requires, "materially advance a disposition of the litigation as a whole." *Robinson*, 267 F.3d at 167 n.12. After the resolution of the few common questions of fact, an untold number of years of follow-on litigation would be required to determine Talisman Energy's liability on a person-by-person basis.

As the Eleventh Circuit observed in *Rutstein v. Avis Rent-A-Car Sys., Inc.*, 211 F.3d 1228, 1241 n.12 (11th Cir. 2000), "[o]nce one understands that the issues involved in the instant case are predominantly case-specific in nature, it becomes clear that there [was] nothing to be gained by certifying this case as a class action; nothing, that is, except the blackmail value of a class certification that can aid plaintiffs in coercing the defendant into a settlement."

Conclusion

For the reasons set forth above, judgment dismissing this action against Talisman Energy should be affirmed.

Dated: April 26, 2007

Respectfully submitted,

LOVELLS

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Certificate of Compliance

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), as modified by stipulation of the parties (subject to court approval which has been sought), because this brief contains 29,990 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. 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 2002 in 14 point Times New Roman.

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April 26, 2007

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I, Lorraine Barth, certify that I have scanned for viruses the PDF version of the Brief for Defendant-Appellee Talisman Energy Inc. that was submitted in this case as an email attachment to brief@ca2.uscourts.gov and that no viruses were detected. The virus protection program used is Symantec Anti-Virus, Version 10.0.0.359.

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Certificate of Service

I, Lorraine Barth, certifies that on April 27, 2007, nine plus original paper copies of the Brief for Defendant-Appellee Talisman Energy Inc., have been hand-delivered to the Office of the Clerk and an electronic version of same has been filed by forwarding it by electronic mail to brief@ca2.uscourts.gov. I also certify that two (2) copies of the Brief for Defendant-Appellee Talisman Energy Inc. have been served upon the persons and in the matter indicated below.

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