No. 07-0016

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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

Plaintiffs-Appellants,

v.

TALISMAN ENERGY INC. AND REPUBLIC OF THE SUDAN,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF *AMICUS CURIAE* ON CIVIL CONSPIRACY AND JOINT CRIMINAL ENTERPRISE IN SUPPORT OF PLAINTIFFS-APPELLANTS AND IN SUPPORT OF REVERSAL OF THE DISTRICT COURT'S OPINION

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CORPORATE DISCLOSER STATEMENT

Pursuant to FRAP 26.1, *Amici Curiae* hereby certify that they have no parent corporations and that they have not issued any shares of stock to any publicly held company.

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INTEREST OF *AMICI CURIAE*

Amici, described in Appendix A, are human rights organizations and international law experts. *Amici* includes scholars, the Stated Clerk of the General Assembly of the Presbyterian Church (U.S.A.) and former prosecutors with the International Criminal for the former Yugoslavia and the Special Court for Sierra Leone. *Amici* seek to address only one of the many issues raised by the District Court opinion granting summary judgment, and address this issue to further recognition of those international legal norms that are binding upon all nations and peoples. All parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

The District Court granted summary judgment on Plaintiffs' conspiracy theory after erroneously concluding that "liability under the [Alien Tort Statute] for participation in a conspiracy may only attach where the goal of the conspiracy was either to commit genocide or to commit aggressive war" *Presbyterian Church of Sudan v. Talisman Energy, Inc*., 453 F. Supp. 2d 633, 664-65 (2006). The first error arises out of the District Court's failure to look to federal common law to determine the elements of conspiracy applicable to the Alien Tort Statute ("ATS" or "ATCA"), 28 U.S.C. § 1350. *Amici* will review why, under the ATS, the federal common law provides the cause of action and implementation of the norm,

including the standard of liability. *Amici* will then review the elements of the federal common law of civil conspiracy.

The second error is the determination that international law does not include liability for all participants in a common criminal plan. In particular, the International Criminal Tribunals for Rwanda ("ICTR") and the former Yugoslavia ("ICTY") have written numerous opinions on their carefully drawn doctrine of Joint Criminal Enterprise ("JCE") liability. *Amici* will demonstrate that international law provides liability for those who are participants in a common scheme to commit violations of the law of nations.

Given the long accepted understanding that federal common law incorporates international law, the district court's incorrect conclusions about the content of international law are compounded. A federal common law analysis may be guided by international law where international law is clear. Thus, this Court may look to international law in its interpretation of the federal common law. If the Court were to reject the federal common law analysis and look solely to international law, the JCE doctrine is accepted at the international level and is the minimum that would be incorporated in the ATS. *Amici* will establish that the pattern of conduct actionable for civil conspiracy standards under U.S. federal common law is similar to the pattern of conduct under JCE. Thus, the District Court should have found that Talisman was liable for acting in concert with others

under *either* a theory of federal common law conspiracy, or, in the alternative, under JCE.

Finally, *amici* will distinguish between the criminal standards for conspiracy announced in *Hamdan* from the standards applicable to civil claims under the ATS. As set forth below, the District Court's reliance on *Hamdan* is based on an erroneous failure to distinguish between conspiracy as a mode of determining responsibility for the commission of a civil tort and conspiracy as an inchoate crime.

ARGUMENT

I. FEDERAL COMMON LAW PROVIDES THE CAUSE OF ACTION UNDER THE ATS

In his opinion in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 778 (D.C. Cir. 1984), Judge Edwards noted that the law of nations generally does not create private causes of action, but leaves to each nation the task of defining the remedies that are available for international law violations. The ATS, at least in part, addresses that task by providing a remedy for violations of international norms in federal tort law. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), established that the ATS creates jurisdiction for claims asserting violations of international norms for which federal common law would provide the cause of action. In *Sosa,* the Court held*:*

> [A]lthough the [ATS] is a jurisdictional statute creating no new causes of action, the reasonable inference from the historical materials is that the statute was intended to have practical effect the moment it became law. The jurisdictional grant is best read as having been enacted on the understanding that the *common law* would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time.

542 U.S. at 724 (emphasis added).

Reviewing the historical context in which the ATS was enacted, *Sosa* cited the 1795 opinion of Attorney General Bradford for the principle that the ATS was intended "to provide jurisdiction over what must have amounted to common law causes of action." *Id.* at 721; s*ee also id*. at 694 ("[T]he reasonable inference from history and practice is that the ATS was intended to have practical effect the moment it became law, on the understanding that the *common law* would provide a cause of action for the modest number of international law violations") (emphasis added). *Sosa*'s conclusion that common law would provide a cause of action for claims brought under the ATS and the ATS's use of the word "tort" indicate that tort principles are to be used to effectuate the jurisdiction granted in the ATS.[1]

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[1]*See Xuncax v. Gramajo,* 886 F. Supp. 162, 180 (D. Mass. 1995), *quoting Filartiga v. Peña-Irala*, 577 F. Supp. 860, 863 (E.D.N.Y. 1984):

> By enacting Section 1350, Congress entrusted that task to the federal courts and gave them power to choose and develop remedies to effectuate the purposes of the international law incorporated into the United States common law.

Therefore, federal common law is the appropriate place to look to standards of liability under the ATS.

Despite *Sosa*'s understanding that the ATS provided federal common law remedies for violations of international law, the District Court never considered the application of federal common law to conspiracy claims. 453 F. Supp. 2d at 662-65.

The applicability of federal common law principles of liability under the ATS was directly addressed in *Sarei v. Rio Tinto*, 456 F.3d 1069 (9th Cir. 2006). In *Sarei,* the Ninth Circuit explicitly held that federal common law principles were to be applied to ATS claims.

> A predicate question is whether, post-*Sosa,* claims for *vicarious liability* for violations of jus cogens norms are actionable under the ATCA. We conclude that they are. Courts applying the ATCA draw on federal common law, and there are well-settled theories of vicarious liability under federal common law.

456 F.3d at 1078.

The Eleventh Circuit has also recognized that the ATS "establishes a federal forum where courts may fashion domestic common law remedies to give effect to violations of customary international law." *Abebe-Jira v. Negewo*, 72 F.3d 844, 848 (11th Cir. 1996); *accord Estate of Rodriquez v. Drummond Co., Inc.*, 256 F.

The *Filartiga* court looked to federal common law choice principles to determine the availability of punitive damages. *Id.* at 865.

Supp. 2d 1250, 1258 (N.D. Ala. 2003); *see also In re "Agent Orange" Prods. Liab. Litig.*, 373 F. Supp. 2d 7, 17 (E.D.N.Y. 2005) ("Federal common law, not *Erie,* governs").

This reliance on common law jurisprudence is consistent with general principles of statutory interpretation of federal statutes.[2] In *Meyer v. Holley*, 537 U.S. 280, 285 (2003), the Supreme Court reviewed those principles in the context of the Fair Housing Act. The Court first concluded that statute provided for tort actions by victims of housing discrimination. The Court then reviewed the basic presumptions inherent in the creation of a tort claim.

> [T]he Court has assumed that, when Congress creates a tort action, it legislates against a legal background of ordinary tort-related vicarious liability rules and consequently intends its legislation to incorporate those rules. *Monterey v. Del Monte Dunes at Monterey, Ltd.,* 526 U.S. 687, 709 (1999) (listing this Court's precedents that interpret Rev. Stat. § 1979, 42 U.S.C. § 1983, in which Congress created "a species of tort liability," "in light of the background of tort liability" (internal quotation marks omitted)). *Cf. Astoria Fed. Sav. & Loan Assn. v. Solimino,* 501 U.S. 104, 108 (1991) ("Congress is understood to legislate against a background of common-law ... principles"); *United States v. Texas,* 507 U.S. 529, 534 (1993) ("In order to abrogate a common-law principle, the statute must 'speak directly' to the question addressed by the common law").

537 U.S. at 285. This Court followed the same principle in *Cleveland v. Caplaw Enters.*, 448 F.3d 518 (2d Cir. 2006), in predicating liability for Title VIII of the Civil Rights Act of 1968 on federal common law principles of agency.

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[2] Of course, international law is part of federal common law. *Filartiga v. Pena-Irala*, 630 F.2d 876, 887 (2d Cir. 1980). Thus, as discussed below, international law is also available to inform the court's analysis of the causes of action available under the ATS. *See Kadic v. Karadžić,* 70 F.3d 232, 246 (2d Cir. 1995) (terming it

The Supreme Court turned to the federal common law to determine the principles of liability under RICO. *Beck v. Prupis*, 529 U.S. 494 (2000). Although liability for conspiracy was explicitly provided in the RICO statute, the Court looked to federal common law to determine its elements. The Court's analysis in *Beck* distinguishes between the statutory basis for the claim, that is the tort itself, and issues of liability. The Court emphasized that conspiracy itself is not a tort, but rather, bears on the liability of joint tort-feasors. *Id.* at 503. "Since liability for civil conspiracy depends on performance of some underlying tortious act, the conspiracy is not independently actionable; rather, it is a means for establishing vicarious liability for the underlying tort." *Id.*

As *Beck* explained, conspiracy is means of establishing who may be held liable for harm caused by tortious conduct. Thus, in the ATS context, conspiracy is a method of determining vicarious liability for torts in violation of the law of nations. In the same way that the federal common law defines who may be liable for a domestic tort, the scope of liability for violations of international law norms is determined by federal common law. International law provides the content of the norm which is actionable. Consistent with *Sosa* and *Beck*, federal common law provides the means for establishing who may be liable.

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a "settled proposition that federal common law incorporates international law").

Reliance on common law principles to determine vicarious liability under the ATS is consistent with ATS jurisprudence developed both before and after *Sosa*. In *Agent Orange*, 373 F. Supp. 2d at 59, the court looked to federal common law to determine that corporations could be held liable for tort claims brought under the ATS. *See Eastman Kodak v. Kavlin*, 978 F. Supp. 1078, 1094 (S.D. Fla. 1997) ("[T]he Alien Tort Claims Act makes responsible anyone who conspires with state actors to achieve such an unlawful arbitrary detention").

This Court's decision in *Kadic*, 70 F.3d at 245, does not deal explicitly with the applicability of federal common law to issues of vicarious liability under the ATS. Nevertheless, this Court's reliance on 42 U.S.C. § 1983 jurisprudence to determine the defendant's liability for acting "together with state officials or with significant state aid" supports a federal common law analysis. *Kadic* engaged in the same analytical processes urged here. The court looked first to international law to determine the content of the norm actionable under the ATS and then to federal law to understand issues of liability.

Prior to the District Court's decision granting summary judgment in this case, every federal court to address the issue has found that liability for ATS claims extends to conspiracies beyond genocide and aggressive war. In *Cabello v. Fernanzes-Larios*, 402 F.3d 1148 (11th Cir. 2005), the court recognized claims for torture, extra-judicial killing, and crimes against humanity. *Cabello* did not

explicitly draw on common law but it did cite to *Halberstam* for the elements of conspiracy. 402 F.3d at 1158-59. Herein, the District Court declined to follow *Cabello* because it incorrectly held that international law, not federal common law, governs the accomplice liability standards in ATS cases. *Talisman*, 453 F. Supp. 2d at 665 n.64.

In *Hilao v. Estate of Marcos*, 103 F.3d 767, 776 (9th Cir. 1996), the court approved a jury instruction that the defendant would be "liable if it found either that (1) Marcos directed, ordered, conspired with, or aided the military in torture, summary execution, and 'disappearance' or (2) if Marcos knew of such conduct by the military and failed to use his power to prevent it." The defendant objected that the instruction was incorrectly based on "analogous federal claims." *Id.* The court looked to both ATS jurisprudence and international law and concluded that the instruction was consistent with international law. *Id.* at 777-78.

In re Terrorist Attacks on Sept. 11, 2001, 349 F. Supp. 2d 765, 826 (S.D.N.Y. 2005), addressed the issue of whether there was liability for aiding and abetting and conspiracy under the ATS. Quoting *Presbyterian Church of Sudan v. Talisman Energy, Inc.,* 244 F. Supp. 2d 289, 311 (S.D.N.Y. 2003), the court concluded: "courts, including the Second Circuit, have almost unanimously permitted actions premised on a theory of aiding and abetting and conspiracy." *Id.*

The court further concluded that the ATS may provide a basis for a concerted action claim of material support to an international law violation (hijacking). *Id.*

Burnett v. Al Baraka Inv. & Dev. Corp., 274 F. Supp. 2d 86 (D.D.C. 2003), held that for a defendant "who was not a direct perpetrator of a tort committed in violation of the law of nations, proof that they were accomplices, aiders and abetters, or co-conspirators would support a finding of liability under the [ATS.]" *Id*. at 100. *Burnett* relied on *Talisman*, 244 F. Supp. 2d at 321; *Mehinovic v. Vuckovic,* 198 F. Supp. 2d 1322, 1355 (N.D. Ga. 2002); *Kodak,* 978 F. Supp. at 1091-92. *Kodak* looked to the federal law to determine that the ATS "reaches conspiracies so long as some state actor is involved." *Id.* at 1091, while *Mehinovic,* 198 F. Supp. 2d at 1355, found that "[p]rinciples of accomplice liability are well-established under international law."

In *Doe v. Islamic Salvation Front*, the court noted the split between courts which applied federal common law principles and those applying principles derived from international law. The court opined that "[t]ort principles from federal common law may be more useful." 257 F. Supp. 2d 115, 121 n.12 (D.D.C. 2003), *citing Doe I v. Unocal Corp.,* Nos. 00-56603, 00-57197, 00-56628, 00-57195, 2002 WL 31063976, at *26-35 (9th Cir. Sept. 18, 2002) (Reinhardt, J. concurring) (rejecting the majority's application of international law and urging application of federal common law to determine third party liability for tort claims

against foreign defendants); Note, 116 Harv. L. Rev. 1525 (2003) (supporting Judge Reinhardt's position). Thus, whether federal law or international law was considered, courts have consistently found that a co-conspirator may be held liable under the ATS.

II. THE ELEMENTS OF CIVIL LIABILITY FOR CONSPIRACY UNDER FEDERAL COMMON LAW

There is widespread consensus on the elements of civil liability under the federal common law. It generally requires: (1) an agreement between two or more persons; (2) to participate in an unlawful act, or a lawful act in an unlawful manner; (3) an injury caused by an unlawful overt act performed by one of the parties to the agreement; and (4) the overt act was done pursuant to and in furtherance of the common scheme. *Halberstam v. Welch*, 705 F.2d 472, 477 (D.C. Cir. 1983). *See also In re Sumitomo Copper Litigation*, 120 F. Supp. 2d 328 (S.D.N.Y. 2000); *Kashi v. Gratsos,* 790 F.2d 1050, 1055 (2d Cir.1986) (Winter, J.). *Cabello*, 402 F.3d at 1157-58; *In re Terrorist Attacks on Sept. 11, 2001*, 392 F. Supp. 2d 539, 554 (S.D.N.Y. 2005) ("Conspiracy and aiding and abetting are varieties of concerted-action liability: conspiracy requires an agreement to commit a tortious act ... aiding and abetting requires that the defendant have given substantial assistance or encouragement to the primary wrongdoer.... In order to be liable for acting in concert with the primary tortfeasor under either theory, the defendant must know the wrongful nature of the primary actor's conduct.").

In *Cabello,* as in the pending case, the defendant joined an ongoing conspiracy. *Cabello* interpreted *Halberstam* to encompass liability in such circumstances. The articulation of the common law standard presented in *Cabello* is particularly apt here. Liability for conspiracy requires a showing that:

> (1) two or more persons agreed to commit a wrongful act, (2) [the defendant] joined the conspiracy knowing of at least one of the goals of the conspiracy and intending to help accomplish it, and (3) one or more of the violations was committed by someone who was a member of the conspiracy and acted in furtherance of the conspiracy.

402 F.3d at 1159.

A conspirator is liable for the acts of his co-conspirators if they are the reasonably foreseeable consequences of the unlawful scheme. *Halberstam,* F.2d at 487. *See also Ungar v. Islamic Republic of Iran*, 211 F. Supp. 2d 91, 100 (D.D.C. 2002), *citing Pinkerton v. United States*, 328 U.S. 640, 647-48 (1946); *SEC v. Yun*, 148 F. Supp. 2d 1287, 1292 (M.D. Fla. 2001); *Williams v. Fedor*, 69 F. Supp. 2d 649, 666 (M.D. Pa. 1999). The defendant need not be the perpetrator of the tortious conduct. "As to the extent of liability, once the conspiracy has been formed, all its members are liable for injuries caused by acts pursuant to or in furtherance of the conspiracy. A conspirator need not participate actively in or benefit from the wrongful action in order to be found liable. He need not even have planned or known about the injurious action." *Halberstam* at 482. "It is only where means are employed, or purposes are accomplished, which are themselves

tortious, that the conspirators who have not acted but have promoted the act will be held liable." *Halberstam* at 477, *citing* W. Prosser, *Law of Torts* §§ 46, at 293 (4th ed. 1971) (footnotes omitted). Proof of a tacit, as opposed to explicit, understanding is sufficient to show agreement. *Halberstam* at 477, *citing* Prosser, *supra,* at 292; 16 Am. Jur. 2d *Conspiracy* § 68 (1979).

The *mens rea* for civil conspiracy is reflected in the defendant's knowledge of the unlawful act and his or her agreement to participate in the act. *Moore v. Brewster*, 96 F.3d 1240, 1245 (9th Cir. 1996) ("The indispensable elements of civil conspiracy include a wrongful act and knowledge on the part of the alleged conspirators of [the conspiracy's] unlawful objective."); *Jones v. Chicago*, 856 F.2d 985, 992 (7th Cir. 1988) (a defendant need not agree to the details of the conspiratorial scheme or even know who the other conspirators are, so long as he understands the general objectives of the scheme, accepts them, and agrees to do his part to further them); *United States v. Andolschek*, 142 F.2d 503, 507 (2d Cir. 1944) (L. Hand, J.) (same); *Ungar*, 211 F. Supp. 2d at 100 (same).

III. INTERNATIONAL LAW RECOGNIZES LIABILITY FOR PARTICIPATION IN A JOINT CRIMINAL ENTERPRISE

The statutes for international criminal tribunals generally have not included inchoate crimes, except for genocide. However, international criminal law does assign liability to those who *commit* a crime through participation in a joint criminal enterprise ("JCE"). The customary international law doctrine of JCE

developed as a way to hold accountable perpetrators of mass atrocities, which often involve a multiplicity of individuals performing distinct but interrelated acts in a coordinated, non-hierarchical, and distributed fashion. The seminal case expounding JCE liability is *Prosecutor v. Tadić*, in which the ICTY addressed "collective criminality":

> Most of the time these crimes do not result from the criminal propensity of single individuals but ... are often carried out by groups of individuals acting in pursuance of a common criminal design. Although only some members of the group may physically perpetrate the criminal act...the participation and contribution of the other members of the group is often vital in facilitating the commission of the offence in question. It follows that the moral gravity of such participation is often no less - or indeed no different - from that of those actually carrying out the acts in question.

Case No. IT-94-1-A, Appeal Judgement, ¶191 (July 15, 1999). *Tadić* recognized JCE's roots in post-World War II jurisprudence and defined its current bounds. *Tadić*'s delineation of JCE liability has been followed in numerous other cases before the ICTY, the ICTR, and the Special Court for Sierra Leone ("SCSL"). Its basis in customary international law is not disputed, even if questions about JCE's precise scope remain. *See* Antonio Cassese, *The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise*, 5 J. Int'l Crim. Just. 109-33 (forthcoming 2007). Because the law of nations is part of federal

common law, JCE liability provides a means for holding human rights violators accountable under the ATS.[3]

a. Joint criminal enterprise is a mode of liability for participation in mass atrocities

1. *Actus reus*

The *actus reus* elements for JCE liability are: (1) a plurality of persons; (2) the existence of a common objective, which amounts to or involves the commission of a crime; and (3) participation of the defendant in execution of the common plan. *Tadić*, ¶227.

For the plurality of persons, it is clear that such a group need not be organized as a formal military, political, or administrative structure. *Id*.; *Prosecutor v. Vasiljević*, Case No. IT-98-32-A, Appeal Judgment, ¶100 (Feb. 25, 2004). The groups implicated are often quite large and broadly defined, with "core members" identified. For example, in *Prosecutor v. Krajišnik*, the ICTY Trial Chamber found that, in addition to the named members, the "rank and file" of the regionally-defined enterprise consisted of "local politicians, military and police commanders, paramilitary leaders, and others." Case No. IT-00-39-T, Judgement,

[3] In this regard, *Amici* emphasize that JCE is a means to hold violators – and violators only, i.e., those who have the necessary *actus reus* and *mens rea* – accountable; *Amici* do not seek to advance a broad theory of "collective guilt" or guilt by association.

¶1087 (Sept. 27, 2006); *See also id.* ¶¶1079-88 (identifying indicia of JCE participation).

On, the second element, a common objective, *Tadić* explained that: "There is no necessity for this plan, design or purpose to have been previously arranged or formulated. The common plan or purpose may materialise extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise." *Tadić*, ¶227. *See also Krajišnik*, ¶¶883-84 (emphasizing that interaction or cooperation among persons with a common criminal objective, i.e., "their joint action," triggers shared criminal responsibility).

As for the participation of the defendant in the execution of the common design, *Tadić* explained: "This participation need not involve commission of a specific crime...but may take the form of assistance in, or contribution to, the execution of the common plan or purpose." *Tadić*, ¶227. Liability does not arise, however, merely because an individual is a member of a criminal organization or group, such as a paramilitary organization or gang. *See Prosecutor v. Milutinović*, Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction - Joint Criminal Enterprise, ¶26 (May 21, 2003); *Prosecutor v. Stakić*, Case No. IT-97-24-T, Judgement, ¶433 (July 31, 2003) (membership in an organization does not constitute a crime). The defendant must have taken some action in carrying out the criminal plan. *Id.* A defendant need not, however,

physically participate in, be physically present at, or be a necessary cause, i.e., *condition sine qua non*, of the crime, provided s/he contributed in some manner to its commission. *See Prosecutor v. Kvočka*, Case No. IT-98-30/1-A, Appeal Judgment, ¶¶97-99, 112 (Feb. 28, 2005) ("*Kvočka* Appeal");[4] *see also Krajišnik*, ¶883(iii); *Prosecutor v. Krnojelac,* Case No. IT-97-25-T, Judgement, ¶81 (Mar. 15, 2002). Kvočka, for instance, was a deputy commander of guards at a prison camp in Bosnia, and his liability arose not from carrying out specific abuses but from his knowledge of and failure to prevent or deter them, thereby indicating his intention to further the common criminal purpose. *Kvočka* Appeal, ¶¶2, 3, 238-46.

2. *Mens rea*

Tadić understood JCE liability to encompass three categories of common criminal designs, each of which has an attendant *mens rea* requirement. *Prosecutor v. Stakić*, Case No. IT-97-24-A, Appeal Judgement, ¶65 (Mar. 22, 2006)("*Stakić* Appeal"). These categories are referred to as *basic*, *systemic*, and *extended* JCE. Basic JCE arises where all members of the criminal enterprise "possess the same criminal intention." *Tadić*, ¶¶196, 228; *see also Vasiljević*, ¶9; *Krajišnik*, ¶879). The classic example is a JCE to commit murder, where each of

[4] In *Kvočka* Appeal, the Appeals Chamber rejected the Trial Chamber's requirement that liability depended on a defendant's "substantial contribution" to the criminal enterprise. At ¶98 (*see Prosecutor v Kvočka*, IT-98-30/1-T, Judgement, ¶312 (Nov. 2, 2001)).

the participants has the specific intent to murder but carry out a different role in affecting the murder. *Tadić*, ¶196.

The systemic JCE often arises in a concentration camp or prison camp context. Those involved in supporting the functioning of systems of this prototype are liable for crimes perpetrated therein, even if they were not direct participants in the crimes. *Tadić*, ¶202. To demonstrate systemic JCE, it must be shown that: 1) there is an organized criminal system; 2) the defendant was aware of the repressive nature of the system; and 3) the defendant intended to advance the purposes of the system. *Tadić*, ¶228; *Kvočka* Appeal, ¶82. The requisite intent may be inferred from a defendant's position of authority or job function in such an environment. *Tadić*, ¶¶203, 228; *Kvočka* Appeal, ¶103.

The extended JCE includes cases "involving a common design to pursue one course of conduct where one of the perpetrators commits an act which, while outside the common design, was nevertheless a natural and foreseeable consequence of the effecting of that common purpose" *Tadić*, ¶204; *see also Vasiljević*, ¶99 ("While murder may not have been explicitly acknowledged to be part of the common purpose, it was nevertheless foreseeable that the forced removal of civilians at gunpoint might well result in the deaths of one or more of those civilians."); *Krajišnik*, ¶881. The defendant must have intended to advance the criminal purpose of the enterprise. *Tadić*, ¶228. However, liability is

established even where – having satisfied the elements for basic JCE - the crime at issue is outside the scope of the original criminal purpose, if: 1) it was foreseeable to the defendant that such a crime might be perpetrated by one or other members of the group, and 2) the defendant willingly took the risk that the foreseeable crime would be committed.[5] *Kvočka* Appeal, ¶86; *Tadić*, ¶228. *See also Krajišnik*, ¶882 (highlighting the objective element (resulting crime is a natural and foreseeable consequence of the JCE's execution) and the subjective element (participation with awareness of the possible consequence of the commission of the crime) for extended JCE). In the case of Milomir Stakić, the Appeals Chamber found that he was a member of JCE that had as its common purpose, "a discriminatory campaign to ethnically cleanse the Municipality of Prijedor by deporting and persecuting Bosnian Muslims and Bosnian Croats in order to establish Serbian control" and that the campaign consisted of the crimes against humanity of persecutions, deportation and other inhumane acts. *Stakić* Appeal, ¶73. The Appeals Chamber further found that murder, as both a crime against humanity and a war crime, and extermination were natural and foreseeable consequences of the ethnic cleansing, and that Stakić was aware of these crimes and "reconciled himself to that likelihood." *Stakić* Appeal, ¶¶88-98.

[5] *Tadić* described this standard as "advertent recklessness." At ¶220.

3. JCE and other modes of liability

JCE liability is distinct from conspiracy primarily because conspiracy is a substantive offense whereas JCE is a mode of liability. *Kvočka* Appeal, ¶91 (as JCE is a means of committing a crime and not a crime itself, it would be inaccurate to refer to "aiding and abetting a joint criminal enterprise"); *see also Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2785 n.40 (2006). Conspiracy has been limited under international law to genocide and aggressive war, while JCE has been applied more broadly, including to crimes against humanity and war crimes. *Tadić; See also Hamdan*, 126 S. Ct. at 2784.

Nonetheless, JCE liability, particularly in its extended form, can be thought of as the international analogue to the *Pinkerton* doctrine under U.S. federal common law. *See* Allison Marston Danner and Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 Calif. L. Rev. 75, 140-41 (Jan. 2005) ("Danner, Guilty Associations"). Based on *Pinkerton v. U.S.*, liability can be imposed for acts committed in furtherance of a common criminal purpose where those acts could be reasonably foreseen as the necessary or natural consequence of the unlawful agreement. 328 U.S. 640, 646-48 (1946). *Tadić* itself noted the similarity between JCE and the Pinkerton doctrine:

> Although there is no clearly defined doctrine of common purpose under the United States' Federal common law, similar principles are

> promulgated by the Pinkerton doctrine. This doctrine imposes criminal liability for acts committed in furtherance of a common criminal purpose, whether the acts are explicitly planned or not, provided that such acts might have been reasonably contemplated as a probable consequence or likely result of the common criminal purpose.

Tadić, ¶224 n.289, *citing Pinkerton,* 328 U.S. 640; *State v. Walton*, 630 A.2d 990 (Conn. 1993); *Connecticut v. Diaz*, 679 A. 2d 902 (Conn. 1996)). Thus, under both *Pinkerton* and extended JCE, a defendant can be held liable for conduct beyond that which was originally intended, provided the result was foreseeable. Another similarity between conspiracy under federal law and JCE is that both require an agreement and "overt act."[6] *Milutinović* at ¶23; *see Halberstam,* 705 F.2d at 477. As discussed above, JCE additionally requires that a crime be completed while conspiracy does not. For this reason, JCE can be considered as a "completed conspiracy" parallel to civil conspiracy at common law.

JCE is also distinct from aiding and abetting. First, the aider and abettor is an accessory rather than a principal. *Tadić*, ¶229; *Vasiljević*, ¶102. Second, aiding and abetting does not require proof of a plan or agreement, while JCE does. *Id*. Third, the aider and abettor must provide support that has a substantial effect on the perpetration of the crime, whereas for JCE it is "sufficient for the participant to perform acts that in some way are directed to the furthering of the common plan

[6] Conspiracy under international law does not require an overt act. *Milutinović* ¶ 23.

or purpose." *Tadić,* ¶229. Finally, JCE and aiding and abetting have differing *mens rea* elements: aiding and abetting requires knowledge, while JCE requires the intent to pursue the criminal purpose. *Id.*; *Kvočka* Appeal, ¶¶89-90.

b. JCE liability is a customary international law doctrine

Numerous international tribunals have confirmed that JCE liability is rooted in customary international law. In *Tadić*, the ICTY Appeals Chamber looked to international jurisprudence, treaties and conventions, and the law of individual states and concluded that liability for common criminal purpose or design is a well-established customary rule codified in Article 7(1) of the Tribunal's Statute. *Tadić*, ¶¶193-226. The Appeals Chamber looked to post-World War II international criminal trials, finding that numerous tribunals applied JCE principles, even if they did not refer to it as JCE *per se*. *Tadić*, ¶¶197-219. It also found a basis for JCE in the laws of various states. *Tadić*, ¶224. The Appeals Chamber further looked to Article 25(3)(d) of the Rome Statute of the International Criminal Court, which states that criminal liability is established where a defendant intentionally "contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose" and where the contribution is "made with the aim of furthering the criminal activity or criminal purpose of the group" or "made in the knowledge of the intention of the group to commit the crime." *Tadić,* ¶¶222-23.

Tadić's recognition of JCE liability has been followed in subsequent ICTY cases, including those referred to above, and JCE liability is pleaded in the majority of ICTY indictments. Decisions from the ICTR have also recognized JCE liability. *See Rwamakuba v. Prosecutor*, Case No. ICTR-98-44-AR72.4, Decision, ¶¶14-25 (Oct. 22, 2004); *Prosecutor v. Kayishema*, Case No. ICTR-95-1-T, Judgment, ¶¶203-04 (May 21, 1999) (stating that the members of such a group "united in this common intention [to destroy the Tutsi population] ... would be responsible for the result of any acts done in furtherance of the common design where such furtherance would be probable from those acts"). ICTR prosecutors have brought indictments explicitly on the basis of JCE liability. *See Prosecutor v. Karemera*, Case No. ICTR-98-44-I, Amended Indictment, ¶¶7, 15, 66, 69 (Feb. 23, 2005) (charging government officials with rape where they were aware that rape was widespread and the "natural and foreseeable" consequence of the object of the enterprise to destroy the Tutsi as a group and where the defendants nonetheless knowingly and willfully participated in that enterprise); *Karemera et al. v. Prosecutor*, Cases Nos. ICTR-98-44-AR72.5, ICTR-98-44-AR.72.6, Decision on Jurisdictional Appeals: Joint Criminal Enterprise (Apr. 12, 2006). Furthermore, Charles Taylor, the former president of Liberia, has been indicted at the SCSL for various crimes against humanity and war crimes, including under a

JCE theory. *Prosecutor v. Taylor*, SCSL-2003-01-I, Amended Indictment, (Mar. 16, 2006).

All of the above authorities confirm that JCE liability is firmly established in customary international law, as the Supreme Court acknowledged in *Hamdan*. 126 S. Ct. at 2785 n.40.

c. JCE provides a means for holding defendants liable under the ATS

Because JCE liability is rooted in customary international law, it provides a means for holding defendants liable under the ATS. It has been long recognized that international law forms a part of federal common law. *The Paquete Habana*, 175 U.S. 677, 700 (1900) ("International law is part of our law…."); *see also Sosa* 542 U.S. at 728-29. On this basis, an ATS defendant could be held liable for its participation in a joint criminal enterprise in violation of the law of nations. *See Cabello v. Larios*, 205 F. Supp. 2d 1325, 1333 (S.D. Fla. 2002) (approving *Tadić* as a basis for liability under the ATS), *aff'd* 402 F.3d 1148 (11th Cir. 2005).

If (a) Talisman and the government of Sudan engaged in a common design intended to remove plaintiffs from their lands in order to create "buffer zones" around oil production facilities, and (b) Talisman contributed to and furthered this design by providing substantial material and logistical support to the military in the form of airstrips, transportation, fuel, roads, communications equipment, ordnance storage, and direct payments, then Talisman could be held liable for all injuries to

plaintiffs which occurred as a natural and foreseeable consequence of this common plan. Liability here would be consistent with ICTY cases that have imposed liability upon those who participate in the forced removal of civilians. *See Milutinović,* ¶1 (expulsion of Albanians from Kosovo); *Stakić* Appeal, ¶5 (ridding the Prijedor region of non-Serbs).

In sum, the principle that a defendant is responsible for the foreseeable actions of an agreed upon crime has a basis in customary international law and is available in ATS actions through federal common law.

IV. *HAMDAN* DOES NOT LIMIT TORT CLAIMS FOR CONSPIRACY UNDER THE ATS

The District Court's reliance on *Hamdan,* 126 S. Ct. 2749, is misplaced. The issue in *Hamdan* was whether the offense of conspiracy to commit war was triable by a military commission. Justice Stevens, joined by Justices Souter, Ginsberg, and Breyer, noted that, assuming the military commission was properly constituted, it could only have jurisdiction to try "violations of the laws and usages of war" and "[b]reaches of military orders or regulations for which offenders are not legally triable by court-martial under the Articles of war." *Id.* at 2777, *quoting* W. Winthrop, *Military Law and Precedents* 831, 839 (rev. 2d ed. 1920). Under this analysis, the commission could not, consistent with the statute and Constitution, entertain a prosecution where "neither the elements of the offense nor the range of permissible punishments is defined by statute or treaty" unless the

precedent was "plain and unambiguous." Having reviewed precedent, the Court concluded that the "crime of 'conspiracy' has rarely if ever been tried as such in this country by any law-of-war military commission not exercising some other form of jurisdiction, and does not appear in either the Geneva Conventions or the Hague Conventions – the major treaties on the law of war." *Id.* at 2780-81.

The Supreme Court has specifically rejected reliance on criminal conspiracy precedents in its analysis of conspiracy in the civil context. In *Beck*, the Court, considering the meaning of RICO conspiracy, rejected reliance of the common law of criminal conspiracy to interpret civil liability. "The obvious source in the common law for the combined meaning of the [substantive offenses and conspiracy liability] is the law of civil conspiracy." 529 U.S. at 501, n.6.[7] The District Court's reliance on *Hamdan* is inconsistent with *Beck*. *Hamdan* looked exclusively to criminal law precedents because the charge of conspiracy arose in a criminal context. Here, the issue is one of civil liability for tortious conduct and federal common law of civil conspiracy is the appropriate authority. Rather than looking to federal common law, as *Beck* requires, the District Court rested its analysis entirely on the inchoate crime of criminal conspiracy under international law and failed entirely to consider conspiracy as a theory of civil liability.

[7] Determining principles of liability under international law, in contrast, require 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.

Properly understood, *Hamdan* is inapplicable to determining co-conspirator liability under the ATS.

The District Court also misunderstands the authorities it relies on. Danner, Guilty Associations, at 116 notes that the Nuremberg Charter had two theories called "conspiracy". One, which was limited to conspiracy to commit a crime against peace, was an inchoate theory (or "substantive"). *Id.* The other, which applied to all crimes within the jurisdiction of the Tribunal, did not "refer to conspiracy as a substantive crime, but instead provides that conspirators should be liable for all crimes committed in execution of a 'common plan or conspiracy'." Danner at 115, footnote omitted. This theory is closely related to the theory adopted by the U.S. Supreme Court in 1946 in *Pinkerton*. It is the inchoate ("substantive") conspiracy that the Nuremberg Tribunal limits to the crime against peace. The Nuremberg Judgment does not deal further with conspiracy as a commitment to the execution of a common plan because the defendants in Nuremberg were clearly either principals or aiders and abettors so nothing more was needed to assess their responsibility. The Tribunal did not deny the validity of such a theory.

The Brief of Specialists in Conspiracy and International Law as Amicus Curiae Supporting Petitioner in *Hamdan*, also relied upon by the District Court judge, does not support her conclusion. That brief draws a very clear distinction

between inchoate conspiracy doctrines in U.S. law and in the Nuremberg Charter's provision on conspiracy to commit aggression and "conspiracy as a criterion of complicity for the commission of substantive crimes." It is, again, the former that Nuremberg limited to aggression.

Similarly, the District Court's reliance on the Genocide Convention is mistaken. The Genocide Convention is unusual for an international criminal law treaty in providing for responsibility for those who engage in a conspiracy to commit genocide. The type of conspiracy involved in the Convention is of the inchoate type. William Schabas, *Genocide in International Law* 259-61 (2000) (exhaustive discussion of the legislative history in the leading work on the subject; Genocide Convention uses the concept of "complicity" to evaluate the responsibility of "secondary" parties). Given the Nuremberg Tribunal's approach to limiting inchoate conspiracies to aggression, it was necessary that the Convention included the inchoate crime of conspiracy to commit genocide. Thus, the inclusion of the inchoate crime in the Genocide Convention is not inconsistent with the application of tort liability for conspiracy under U.S. federal common law and international law.

CONCLUSION

For the above-mentioned reasons, this Court should find that Talisman could be held liable for its participation in international law violations under either federal common law or international law.

March 7, 2007

Respectfully submitted,

/s

Jennifer M. Green

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned certifies this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B).

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APPENDIX A

The Center for Constitutional Rights is a non-profit legal and educational organization dedicated to advancing and protecting the rights guaranteed by the United States Constitution and the Universal Declaration of Human Rights. CCR has successfully litigated many important international human rights cases since 1980, including *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), which established that the Alien Tort Statute grants federal courts jurisdiction to hear cases seeking compensation and other relief for violations of international law. CCR has litigated the following cases, among others: *Abebe-Jiri v. Negewo*, 72 F.3d 844 (11th Cir. 1995); *Doe v. Karadzic*, 70 F. 3d 232 (2d Cir. 1995); *Doe v. Unocal*, 963 F. Supp. 880 (C.D. Cal 1997) (case settled, 2004); *Paul v. Avril*, 901 F. Supp. 330 (S.D.Fla. 1994); *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995); *Forti v. Suarez-Mason*, 672 F. Supp. 1531 (N.D. Cal. 1987) and 694 F. Supp. 707 (N.D. Cal. 1988). CCR also represents the plaintiffs in *Wiwa v. Royal Dutch Petroleum,* 226 F.3d 88 (2d Cir. 2000); pending before the S.D.N.Y. (96 Civ. 8386). The Court's disposition in this case is therefore of great interest to CCR and its clients.

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Clifton Kirkpatrick, **as Stated Clerk of the General Assembly, is the senior continuing officer of the Presbyterian Church (U.S.A.)**. The Presbyterian Church (U.S.A.) is a national Christian denomination with nearly 2.5 million members in more than 11,200 congregations, organized into 173 presbyteries under the jurisdiction of 16 synods. It is organized through an ascending series of organizations known as church sessions, presbyteries, synods, and, ultimately, a general assembly. Through its antecedent religious bodies, it has existed as an organized religious denomination within the current boundaries of the United States since 1706. Since 1833, PC (U.S.A.) has been in mission service around the world. Missionaries of the PC (U.S.A.) founded the Presbyterian Church of Sudan and other Presbyterian churches around the world. This brief is consistent with the policies adopted by the General Assembly regarding religious freedom, human rights, and due process in protection of human life from governmental and/or corporate genocide in Sudan. It is also consistent with the General Assembly intent to support its sister denominations around the world. The General Assembly does not claim to speak for all Presbyterians, nor are its decisions binding on the membership of the Presbyterian Church. The General Assembly is the highest legislative and interpretive body of the denomination, and the final point of decision in all disputes. As such, its statements are considered worthy of respect and prayerful consideration of all the denomination's members.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief of *Amici Curiae* was sent this day via first class mail to the following:

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