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 of the Estate of her husband JOSEPH THEIT MAKUAC, 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, YIEN NYINAR RIEK AND MORIS BOL MAJOK, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

v.

TALISMAN ENERGY, INC., *Defendant-Appellee,* REPUBLIC OF THE SUDAN, *Defendant.*

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

BRIEF OF *AMICUS CURIAE* CENTER FOR CONSTITUTIONAL RIGHTS IN SUPPORT OF PLAINTIFFS-APPELLANTS' PETITION FOR PANEL REHEARING AND REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP Rule 26.1, *Amicus Curiae* Center for Constitutional Rights hereby certifies that it has no parent corporations and has not issued any shares of stock to any publicly held company.

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Identity and Interest of *Amicus Curiae*

Amicus curiae, 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 litigated several significant international human rights cases under the Alien Tort Statute (ATS) before this Court, including *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980), *Doe v. Karadzic*, 70 F. 3d 232 (2d Cir. 1995), and *Wiwa v. Royal Dutch Petroleum,* 226 F.3d 88 (2d Cir. 2000). The Court's disposition in this case is therefore of great interest to CCR and its clients.

Amicus herewith files a motion for leave to file this amicus brief on the standard for civil conspiracy under federal common law in support of Plaintiffs-Appellants' Petition for Panel Rehearing and Rehearing *en banc*. In a prior amicus brief accepted by the Panel in this case, CCR addressed the applicability of federal common law and the elements of a civil conspiracy, among related issues.

Summary of Argument

The Panel's summary conclusion that Plaintiffs would not be able to prove a conspiracy even under federal common law because Defendant would be required to have acted with the "purpose" to advance the Government of Sudan's human rights abuses conflicts with the precedent of this Court as well as decisions by

other Courts of Appeals holding defendants liable for a civil conspiracy under a knowledge standard.

Argument

I. The Panel's Refusal to Apply Federal Common Law for Conspiracy Claims Under the ATS Conflicts with Precedent.

As argued by Plaintiffs-Appellants and amicus curiae EarthRights International (ERI), the Panel incorrectly applied international law, rather than federal common law, to address theories of liability under the Alien Tort Statute (ATS), as evidenced by *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), the original understanding of the ATS, and appellate court decisions. *See, e.g., Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1158 (11th Cir. 2005) (applying federal common law standards to find conspiracy and aiding and abetting liability).

As found by this Court in *Kadić v. Karadžić*, the "law of nations generally does not create private causes of action to remedy its violations, but leaves to each nation the task of defining the remedies that are available for international law violations." 70 F.3d 232, 246 (2d Cir. 1995). *See also, Filártiga 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 federal remedies to effectuate the purposes of the international law incorporated into United States common law.").

II. The Panel's Summary Conclusion that Defendant Would Not Be Liable Even Under A Federal Common Law Civil Conspiracy Standard Conflicts With Circuit Court Decisions Finding Civil Conspiracies, Including This Court's Precedent.

Although the Panel looked to international jurisprudence to reject plaintiffs' conspiracy allegations, it also summarily concluded that Plaintiffs "would fare no better" under federal common law, referencing conspiracy elements articulated in an Eleventh Circuit case, under which they would have to prove that defendant "'joined the conspiracy knowing of at least one of the goals of the conspiracy and intending to help accomplish it.'" *Presbyterian Church of Sudan v. Talisman Energy, Inc*., No. 07-0016, 2009 U.S. App. LEXIS 21688 at *43 (2d Cir. Oct. 2, 2009) (quoting *Cabello v. Fernandez-Larios,* 402 F.3d 1148, 1159 (11th Cir. 2005). In enumerating the elements of a conspiracy, *Cabello* relied on the authoritative *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983), which lists the elements of civil conspiracy as:

> (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; (4) which overt act was done pursuant to and in furtherance of the common scheme.

705 F.2d at 477.

To the extent the Panel interpreted the language cited from *Cabello* to impose a requirement that in order to be liable for a conspiracy, Defendant must have "acted with the 'purpose' to advance the Government's human rights abuses"

Presbyterian Church at *44-45, it conflicts with the federal common law civil conspiracy standard as set forth in *Halberstam,* by this Court, and by other Courts of Appeals.

Cabello found the defendant had knowledge of the conspiracy's plan and intended to help accomplish it because a jury could have reasonably concluded that it was "foreseeable" to defendant that plaintiff would be tortured and killed by his co-conspirators, and could have reasonably inferred that defendant had "actual knowledge" that his co-conspirators were going to kill plaintiff. 402 F.3d at 1159. Whether defendant acted with the purpose – or desired – that plaintiff be killed was not probed by the court - it was sufficient for conspiracy liability that the jury could reasonably infer that the killing was *foreseeable* to defendant or that he *knew* it would happen.

Similarly in *Halberstam*, the D.C. Circuit found that defendant Hamilton, the "passive but compliant" partner of co-defendant Welch who killed a man in the course of a burglary, was liable for the killing as a co-conspirator because she "knew" her co-conspirator was engaged in illegal activities. *Id.* at 486, 474. Defendant Hamilton had been told by Welch that he bought estates and made investments, and during the five years they lived together she assumed he had meetings or was checking on investments when he left the house for several hours most evenings. *Id.* at 475. The court found Hamilton liable for a conspiracy based

on three factual inferences: (1) that she "'knew full well the purpose of [Welch's] evening forays and the means' he used to acquire their wealth," i*d.* at 486 (citation omitted); (2) that she "'was a willing partner in his criminal activities,'" *id.* (citation omitted), finding her "unquestioning accession of wealth" consistent with an agreement, *id.* at 487; and (3) that various of her acts "were performed knowingly to assist Welch in his illicit trade," such as typing sales letters, handling accounts, and maintaining financial transactions in her name. *Id.* at 486. "As to the inference of Hamilton's knowledge of Welch's criminal doings," the D.C. Circuit found that "it defies credulity that Hamilton did not know that something illegal was afoot." *Id.*

In *Kashi v. Gratsos*, 790 F.2d 1050 (2d Cir. 1986), this Court similarly held a defendant liable for a civil conspiracy without requiring that he acted with the purpose to advance the violation at issue.[1] The plaintiff had contracted to make a shipment of grain to Iran, and opened a letter of credit to be payable when the ship was en route, but the proceeds from the letter of credit were distributed to defendants' accounts even though no grain had been shipped. *Id.* Defendant Gratsos, who chaired a joint venture with a grain selling business to handle the business's shipping, was found liable for the full extent of damages from the civil

[1] *Kashi* required a plaintiff to prove "'(1) the corrupt agreement between two or more persons, (2) an overt act, (3) their intentional participation in the furtherance of a plan or purpose, and (4) the resulting damage.'" 790 F.2d at 1055 (quoting *Suarez v. Underwood,* 426 N.Y.S.2d 208, 210 (Sup.Ct.1980)).

conspiracy, because it was found he deliberately participated in an agreement to defraud the plaintiff. *Id.* at 1051, 1055.

This Court's decision that Gratsos had a deliberate and vital role in the conspiracy was based on: (1) Gratsos's "active role in initiating the transaction" because his participation in and assurances regarding a previous shipment that had been completed had induced plaintiff to deal with defendants (*id.* at 1055), even where the district court had found that Gratsos had probably not been consulted about the second shipment at issue (*id.* at 1058 (Kaufman, J., dissenting)); (2) his "failure to intervene" or to take steps "to protect" the plaintiff when he learned that the grain had not been shipped (*id.*), which was two months after the letter of credit had been cashed (*id.* at 1058 (Kaufman, J., dissenting)); and (3) his "profiting from the fraud". *Id.* at 1055. *See also, In re Dana Corp.*, 574 F.3d 129, 155 (2d Cir. 2009) (finding summary judgment in favor of defendant company on a conspiracy claim improper where "jury could permissibly infer that [defendant] had knowledge of the theft, and/or the planned theft, of Jasco trade secrets as early as the summer of 1999 and that, either at that time or thereafter, Dana agreed to--and eventually did--knowingly take advantage of that misappropriation in order to lower its purchasing costs by many millions of dollars").

In *Jones v. Chicago*, a case against Chicago police for false arrest and imprisonment, malicious prosecution, intentional infliction of emotional distress,

and "conspiracy to commit these wrongs," 856 F.2d 985, 988 (7th Cir. 1988), the Seventh Circuit decided that the jury reasonably found that defendants were voluntary participants in a "common venture to railroad" the plaintiff. *Id.* at 992.[2] Some of the defendant officers were found determined to "put away [plaintiff] regardless of the evidence." *Id.* at 993. The Court upheld the supervisor defendants' liability for a civil conspiracy because they knew of and approved "every false step" of their subordinates and had done their part to make the scheme work. *Id.* The defendant lab technician's liability was upheld because she had failed to include information in a report and in a file, as the jury was entitled to conclude that she "had for whatever reason decided to help the officers" who were determined to put plaintiff away. *Id.* at 993. Whether defendant acted — or failed to act — with the purpose of advancing the officers' false arrest and imprisonment was of no import whatsoever – what mattered was that the jury could conclude that she had decided to help, despite her testimony that her omission was inadvertent. *Id.* at 993.

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[2] Judge Posner explained civil conspiracy liability as follows:

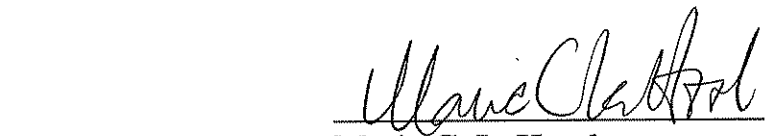
> To be liable as a conspirator you must be a voluntary participant in a common venture, although you need not have agreed on the details of the conspiratorial scheme or even know who the other conspirators are. It is enough if you understand the general objectives of the scheme, accept them, and agree, either explicitly or implicitly, to do your part to further them. *Jones,* 856 F.2d at 992.

Conclusion

The Panel's implicit and summary conclusion that civil conspiracy liability under federal common law requires defendant to have acted with the "purpose" to advance the violations at issue conflicts with the federal common law civil conspiracy standard set forth by the leading appellate decisions, including by this Court in *Kashi,* by the D.C. Circuit in *Halberstam,* by the Seventh Circuit in *Jones,* and by the Eleventh Circuit in *Cabello.* Plaintiffs-Appellants' Petition for Panel Rehearing and Rehearing *en banc* should be granted.

Date: New York, New York
October 28, 2009

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE WITH F.R.A.P. 32(a)(7)

I, Maria C. LaHood, hereby certify that the foregoing *amicus curiae* brief complies with the requirements of F.R.A.P. 32(a)(7) because it does not exceed 7.5 pages (not including the signature block), which is no more than half of the 15 pages authorized by these rules for a party's principal brief, or as here, the Plaintiffs-Appellants' Petition for Rehearing.

Maria C. LaHood