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 on the Estate of her husband JOSEPH THIET 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, 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

OPENING BRIEF FOR PLAINTIFFS-APPELLANTS

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PRELIMINARY STATEMENT

This appeal arises out of Defendant Talisman Energy, Inc.'s ("Talisman") complicity in the Government of Sudan's ("GOS") campaign of war crimes, crimes against humanity and genocide. This campaign was the result of a deliberate strategy to depopulate large areas of an oil concession area[1] in Southern Sudan to facilitate the oil exploration and development activities of Talisman and its partners, including the GOS. Talisman collaborated with the GOS in systematic and widespread attacks against the non-Muslim, African peoples of Southern Sudan, including the plaintiffs in this case, as an integral part of a joint plan of militarized commerce designed to maximize oil exploration and development in areas of Southern Sudan outside of GOS control

Plaintiffs are two organizations and thirteen individuals, including two Presbyterian ministers and four tribal chiefs belonging to the Nuer or Dinka tribes, who were injured by military attacks by the GOS and its agents aimed at removing them from areas where oil was believed to exist and as a part of a larger genocidal campaign waged for years by the GOS against the non-Muslim, African population of Southern Sudan. Plaintiffs, on behalf of themselves and the other villagers who suffered these egregious human rights violations, seek to hold Talisman responsible for its complicity in these attacks.

Talisman was fully aware, before it became a partner in this oil venture in

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[1] The concession area at issue occupied a huge swath of Southern Sudan, which is largely inhabited by members of the Nuer and Dinka tribes. J.A.___. *Whinston*, Exh. 28; *D'Avino,* Exhs. 15 (Talisman map); 100 (GNPOC map).

October 1998, of the human rights violations visited upon Plaintiffs and their families and kinsmen. J.A. ___. *D'Avino,* Exh. 103.[2] Talisman was also fully aware that these violations continued during its time in Sudan: October 1998 to March 2003. Nevertheless, Talisman and its partners and agents continued to provide substantial assistance to the Sudanese military forces that were perpetrating this violent campaign. J.A.___. *D'Avino*, Exh. at 17:6-22; 45:9-11.

Although the District Court recognized that Plaintiffs had alleged actionable human rights claims against Talisman due to its complicity in these abuses under the Alien Tort Statute ("ATS") and recognized that Plaintiffs had suffered from these abuses, it made numerous errors in applying the law governing these ATS claims, and systematically failed to apply accepted summary judgment and evidence standards to the record before it. While acknowledging the standard Rule 56 principles, the Court, in fact, improperly applied a more demanding standard, gave Talisman the benefit of evidentiary inferences, and excluded most of Plaintiffs' evidence from consideration, often without analysis, despite clear grounds for admissibility.

Perhaps the central flaw in the District Court's analysis was its failure to recognize that a huge, multinational corporation like Talisman can only act through its employees, subsidiaries or agents. Talisman is liable for what its partners and agents, be they natural persons or corporations, did to facilitate the

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[2] The parties have filed a stipulation providing for the submission of a Deferred Appendix pursuant to F.R.A.P. 30.

human rights violations committed against Plaintiffs.

Moreover, the Court also erred in refusing to certify a class, or sub-classes, or even common issues. The human rights violations at the heart of Plaintiffs' case were widespread and systemic. There is no reason to deprive other victims not named in Plaintiffs' complaint of their chance for relief in this case.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the District Court erred in finding that Plaintiffs had failed to introduce sufficient evidence to create a genuine issue of material fact supporting their war crimes, crimes against humanity and genocide claims under the ATS?

2. Whether the District Court erred in failing to follow Rule 56 standards, such as drawing all inferences in favor of the non-moving party, finding evidence to be inadmissible in the absence of any specfic evidentiary objections and making adverse credibility determinations?

3. Whether the District Court erred by holding there was a specific intent requirement for aiding and abetting liability?

4. Whether the District Court erred by holding that acts of assistance had to be inherently criminal to trigger aiding and abetting liability?

5. Whether the District Court erred in finding that conspiracy liability is not available for crimes against humanity and war crimes under the ATS, and in finding that Plaintiffs had waived their conspiracy to commit genocide claims?

6. Whether the District Court erred in refusing to consider Plaintiffs' agency, joint venture and alter ego theories of liability?

7. Whether the District Court erred in denying Plaintiffs' motion to amend their complaint?

8. Whether the District Court erred in denying Plaintiffs' motions for class certification?

JURISDICTION

The District Court had subject matter jurisdiction under 28 U.S.C. § 1350. On December 4, 2006, the Court issued an order pursuant to F.R. Civ. P. 54 (b) allowing Plaintiffs to take an immediate appeal from the Court's September 12, 2006, order granting Defendants' Motion for Summary Judgment. (Docket No. 418). *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 453 F. Supp. 2d 633 (S.D.N.Y. 2006) ("*Talisman III*"). Plaintiffs timely filed their Notice of Appeal on December 28, 2006. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE CASE

A. Procedural History

The Presbyterian Church of Sudan and four individual plaintiffs filed a class action complaint against Talisman on November 8, 2001. (Docket No. 1). An amended complaint naming several additional plaintiffs and adding the GOS as a defendant was filed on February 25, 2002.

On March 19, 2003, the Court denied Talisman's motion to dismiss. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289 (S.D.N.Y. 2003) (Schwartz, J.) ("*Talisman I*").

On August 18, 2003, Plaintiffs filed a Second Amended Class Action Complaint to add additional Plaintiffs. (Docket No. 75).

On March 28, 2005, the Court denied Plaintiffs' motion for class certification, finding that Plaintiffs had failed to establish a predominance of common questions of fact. 226 F.R.D. 456 (S.D.N.Y. 2005) ("*Talisman Class I*").

After the decision in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) ("*Sosa*"), Talisman renewed many of its prior arguments in a motion for judgment on the pleadings. (Docket No. 141). The motion was denied. 374 F. Supp. 2d 331 (S.D.N.Y. 2005) ("*Talisman II*").

On September 20, 2005, the Court denied Plaintiffs' renewed motion for class certification under F.R.C.P. 23(b)(3). 2005 U.S. Dist. LEXIS 20414 (S.D.N.Y. 2005) ("*Talisman Class II*").

On April 12, 2006, shortly after expert discovery was completed, Plaintiffs filed a Proposed Third Amended Class Action Complaint, which sought to formally set forth theories of liability that had been in litigation throughout the case, including the joint venture theory of liability recognized in *Talisman I*. (Docket No. 296).

On April 28, 2006, Talisman moved for summary judgment with respect to all of Plaintiffs' claims. Plaintiffs requested additional time to respond but the request was denied. (Docket No. 339). Plaintiffs filed opposition papers on May 26, 2006. (Docket No. 413). There was no hearing or oral argument on the motion. On September 12, 2006, the Court granted Talisman's motion.

B. Statement of Facts[3]

1. Introduction

In opposition to Talisman's motion, Plaintiffs submitted: 1) a Rule 56.1(b) response regarding 191 separate factual assertions that Talisman claimed to be "undisputed;" 2) two Declarations of Stephen A. Whinston ("*Whinston*") attaching 81 exhibits; 3) a Statement of Additional Disputed Facts containing 426 additional facts; 4) the Declaration of Carey R. D'Avino ("*D'Avino*") attaching 117 exhibits; and 8 expert reports submitted by experts in history, cultural anthropology, military tactics, international human rights, accounting and comparative economics. J.A. ___ *Whinston,* Exh. 29, 31, 123; *D'Avino,* Exh. 116; Docket No. 306.

2. The Human Rights Violations Against Plaintiffs

a. The Indiscriminate Attacks

Plaintiffs presented substantial evidence of a pattern of indiscriminate attacks on civilians in the concession area by GOS forces and GOS-controlled militia groups, before and during Talisman's time in Sudan, including expert reports;[4] admissions in Talisman documents;[5] the declarations of Plaintiffs[6] and

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[3] Statement of Facts, [hereinafter "SOF"] An Appendix with a Glossary of key actors is included at the end of this brief.

[4] J.A.___. Goldberg Expert Report ("Goldberg") Tab 4, at 2; *Whinston,* Exh. 29; *D'Avino,* Exh. 108; *D'Avino,* Exh. 116.

[5] J.A.___. *D'Avino,* Exh. 102.032 (ETE0251578-579); Exh. 114, at 156:17-157:20; Exh. 101.064 (Pl. Ex. 304, TE0250279-292) at TE0250281-282.

[6] *See, e.g.*, J.A. ___ *Whinston,* Exh. 11; 19; 21.

witnesses;[7] and reports by human rights groups and government agencies.[8] J.A.___. In the period between 1998 and 2003, hundreds of civilian villagers were attacked either by bombers or helicopter gunships, separately or in conjunction with ground attacks, by GOS military forces or GOS-controlled militias.[9] These attacks also destroyed sixty-four churches, J.A.___. *D'Avino,* Exhs. 2, 3, 12 and 121, a World Food Program relief center, *Id.*, Exhs. 4, 6, 14 and 101, 134, at TE0521014-5, and countless civilian homes. *Id.,* Exhs. 4, 10, 11, 14, 16, 18, 19, 26, 27, 32, 104, 119 and 120. *Whinston*, Exh, 123, at 31.

The aerial attacks on civilian villagers were inherently indiscriminate. As one eyewitness described:

> you would hear this drone approaching . . . and the village would almost come to a standstill . . . The tailgate would open, and people would be screaming, running for cover. And when the barrel bombs would roll out the back, you would — you could very clearly hear the whistling sound, whoo-whoo-whoo (phonetic), this air rush of these bombs falling through the air. And that was absolutely terrifying.

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[7] J.A.___. *Whinston Decl. to Second Class Cert Motion ("Whinston Class Decl.")* Exh. 14, at 146-147; *Whinston,* Exh. 119; 120, at 27:7-28:3, 29:9-40:18.

[8] J.A.___. *D'Avino,* Exhs. 94, at 11, 48-52; 34 at 10:10-14:18; 99 at X02455-X02459; X02465-X02487.

[9] J.A.___. *D'Avino,* Exh. 116; Mezhoud Expert Report ("*Mezhoud*") at 5, 8-9; *D'Avino,* Exh. 25 Hutchinson Expert Report ("*Hutchinson*") at 5; *D'Avino,* Exh. 31, at 157:18-158:8.

Whinston Class Decl, Exh. 13.[10] Talisman's own records confirm the indiscriminate nature of the weapons used in waging war on civilians in the concession area. J.A.___. *D'Avino,* Exh. 102.032 (ETE0251578-579).

Although small bands of rebel troops operated in the concession area in this period, the rebels lacked any airplanes or helicopters, as the Court acknowledged. *Talisman III*, 453 F. 2d at 658.

b. The Attacks on Plaintiffs

Each Plaintiff testified that the GOS military or GOS-controlled militias was responsible for the attacks against them. J.A.___. *D'Avino,* Exhs. 1, 3, 8, 10, 12, 14, 16, 18, 20 and 22. Each of the Plaintiffs was forcibly displaced from his or her village; some were displaced from more than one village. A number of the Plaintiffs also suffered severe physical injuries. All of these violations and injuries were caused by the pattern of attacks on civilian villages, recognized by the District Court, and amply documented in great detail by Talisman's own internal documents as well as other evidence in the record. The following is a representative sample of this testimony.

Plaintiff Luka Ayoul Yol lived in the village of Athonj in December 1998 when it was attacked by Government soldiers and aircraft. *Id.* at 46-49. Yol saw his attackers and identified them as "government soldiers." The attack killed a number of people and forced Yol and others to flee. Six oil wells were later

[10] The same witness described a helicopter gunship attack in similarly dramatic detail. *Id.* at 146-47.

constructed on the site. *Id.* Yol observed the village being bulldozed to make room for roads and oil development. *Id.* 148. After his forcible displacement from Athonj,[11] Yol was attacked in and displaced from a series of villages located in the GNPOC concession.[12]

Plaintiff Chief Patai Tut was attacked in various villages located in GNPOC Block 4. Some of these attacks involved bombers or helicopter gunships, while others involved ground forces. He was shot in the leg during one attack, forcibly displaced several times and lost virtually all of his property. *Talisman III*, 453 F. Supp. 2d at 658-659. Chief Tut specifically identified his attackers as Government forces. J.A.___. *D'Avino,* Exh 18, at ¶5; 19, at 61:2-24.

In late 1998, after Talisman began operations in Sudan, Plaintiff Stephen Kuina was attacked by air and ground forces and displaced from two locations. In 2000, he was attacked in several additional Block 4 villages and forcibly displaced. *Talisman III*, 453 F. Supp 2d at 659.[13]

Plaintiff Nyot Tot Rieth brought this action for her own injuries as well as

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[11] The Court was unable to locate Athonj on any map, *Talisman III*, 453 F. Supp.2d at 658 n. 46. However, Plaintiffs submitted evidence that Athonj was renamed El Toor, which became the site of a substantial oil field. J.A.___. *D'Avino,* Exh. 114, at 441:13-16.

[12] The Court's recitation of the facts relating to Yol fails to include this critical information linking the attack on Athonj to oil development.

[13] The Court incorrectly stated that Kuina had not claimed to have been displaced by "helicopter or gunship" attacks. *Talisman III*, 453 F. Supp. 2d at 659 n. 51. Kuina testified that he was displaced from Mankien as a result of a Government attack involving both gunships and Antonov bombers. J.A.___. *Whinston*, Exh. 11, at ¶¶ 5,7; 12 at 111:11-22.

the for the death of her husband, Joseph Thiet Makuac.[14] The Court's entire description of Rieth's injuries referred only to displacement "from a village near Leer in Block 5a in 2002 when her village was burned by 'Arabs'." *Talisman III*, 453 F. Supp. 2d at 659. Actually, Rieth's displacement was the result of repeated attacks on her village by Government forces over the course of several years. J.A.___. *D'Avino,* Exh 8, at 209-211; *Whinston*, Exh. 8, at 100:13-22; 101:21-102:3.

Plaintiff Rev. Matthew Mathiang Deang was forcibly displaced from two locations in Block 5a, Gany and Koch. The District Court's description of these events, *Talisman III*, 453 F. Supp. 2d at 659-660, omits the critical fact that the attack on Koch involved Antonov bombers and helicopter gunships. J.A.___. *Whinston,* Exh. 14, at 107-08, 111, 268-270. The Court also noted that in his deposition, Rev. Deang testified that the "Government" attacked Gany, while in his declaration, he referred to the attackers as "militia." *Talisman III*, 453 F. Supp. 2d at 660. The record contained ample evidence that the GOS utilized militias to attack villages in the concession area.

Plaintiff Chief Tunguar Kueigwong Rat was forcibly displaced from Nhialdiu and Biel in various attacks during 2002. J.A.___. *Whinston,* Exh. 14, at

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[14] The Court discounted this claim because Rieth did not witness the death of her husband. However, Rieth was aware that her husband had gone to the food distribution site, she saw or heard the attack, she went to look for her husband and found his dead body with bullet wounds penetrating from his back to his chest. She then buried him. Based on this admissible testimony, Plaintiffs are entitled to an inference that Makuac was killed by the Government attack on Bieh that day. J.A.___. *D'Avino,* Exh. 6, at 107-109.

107-108, 111, 268-270. The attack on Nhialdiu involved gunships and bombers. *Talisman III*, 453 F. Supp. 2d at 660. Plaintiffs submitted admissible evidence that the Government attack on this area was undertaken for the purpose of driving out civilians so that Talisman and its partners could explore for oil in this area. J.A. ___. *Whinston,* Exh. 53, at 153, 247-255.[15]

Plaintiff Chief Thomas Malual Kap was displaced from a series of locations in Block 5a, including Koch, Pultuni, Mirmir and Bieh, where he was victimized by the same attack that was witnessed by Rev. Ninrew and that killed Mr. Makuac. *Talisman III*, 453 F. Supp. 2d at 660. Chief Kap was shot in the foot during an attack on Ngony that also involved gunships. *Id.* and n.57. J.A.___. *D'Avino*, Exh. 14, at ¶¶3-11. Although ignored by the District Court, each of these locations was along the path of an all weather road that was being constructed by the Government to facilitate oil exploration and production in Block 5a. *Id.* at ¶8.

Plaintiff Chief Peter Ring Patai was displaced from two locations in Block 5a due to Government attacks. In one of these locations, Nimne, bombers and gunships were used and Chief Patai received injuries to his leg caused by shrapnel and to his head and eye from falling debris. *Talisman III*, 453 F. Supp. 2d at 660-661. Although not noted by the District Court, Talisman employees with a Government military escort had visited Nimne a few days before the attack. J.A.__ . *D'Avino*, Exh. 32, at 249:02-252:14; Exh. 114, at 395:17-18, 401:9-

[15] At the time in question, Mr. Gatluak was an adjutant to Sudanese Maj. Gen. Paulino Matiep. *Id.*

402:11.[16]

Plaintiff Presbyterian Church of Sudan suffered the destruction of various of its churches by the Government. According to the District Court, Rev. Ninrew saw five damaged churches, with damages to one having been caused by an aerial attack. Chief Rat reported the burning of one church and Chief Jang saw eight churches that he testified were burned by the Government. *Talisman III*, 453 F. Supp.2d at 661.

3. The GOS Was Responsible For These Attacks.

The Court held that the Plaintiffs who were victims of air attacks were attacked by GOS forces. *Talisman III*, 453 F. Supp. 2d at 658. Plaintiffs also introduced a wealth of evidence, in addition to Plaintiffs' own testimony, that their injuries were part of the overall pattern of GOS air and ground attacks launched with Talisman's assistance for the purpose of de-populating the oil concession area to advance the purposes of the joint venture. J.A. ___. *D'Avino*, Exh. 31, at 157:18-158:20; 28, at 101.156 (TE0550800); 30, at 352:4-6. The Heglig History Report prepared for Talisman in 2000 stated that during 1986-2000, military operations involving bomber aircrafts, helicopter gunships and ground troops caused 50% or more displacement in various villages in Block 1 with permanent

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[16] This visit was noteworthy in that Nimne was not within the GNPOC concession area. Viewed in light of all of the evidence of Talisman's connections with the GOS, a reasonable jury could infer that Talisman was involved in assisting the Government with pre-attack reconnaisance. Talisman also reported that gunship attacks on Nimne were launched from its Unity Airstrip. J.A.___. *D'Avino*, Exh. 101.131.

and temporary displacement of locals continuing. J.A.___. *D'Avino*, Exh 42, at TEO101386, TE0101390; 101.096 (TE0340459-499).

C. The Basis For Talisman's Responsibility

1. The Joint Venture

State Petroleum Corporation ("State Petroleum") and the GOS entered into a joint venture in 1993 to develop and produce oil from Blocks 1, 2, & 4.[17] In 1996, when it became clear that State Petroleum would be unable to finance the project alone, State Petroleum and the GOS entered into a Production Sharing Agreement, whereby they agreed that "the best possible means [to finance the project was through] a joint venture in the form of a consortium of parties who will participate in the finance and have equity shares in the exploration, production and transportation (pipeline) to export terminal." J.A. ___. *D'Avino,* Exh. 72. The GOS entered into a new joint venture with four oil companies–State Petroleum, China National Petroleum Corporation ("CNPC"), Petronas Carigali Overseas Sdn. Bhd. ("Petronas"), and Sudapet.[18] J.A. __. *D'Avino,* Exh. 73, 75: 101.101.

Under the joint venture, the GOS received 50-60% of the oil profit and its Minister of Energy and Mining was tasked with resolving all disputes among the parties. J.A. __. *D'Avino,* Exh. 101.101. The consortium partners owned the rights

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[17] J.A.___. *D'Avino*, Exh. 101.101 (TE0347194); *Talisman III*, 453 F. Supp. 2d at 645.

[18] In reality the GOS was the joint venture partner and the GOS signed the consortium documents. J.A.___. *D'Avino,* Exh. 73. At the time the joint venture was formed, Sudapet was not yet in existence and was included as a member of the joint venture in anticipation of its formation.

to produce and explore for oil, the oil pipeline, the marine terminal, and all oil revenues. The GOS also created a Joint Coordinating Committee ("JCC") to coordinate the activities between the GOS and the oil companies. J.A.___. *D'Avino*, Exh. 101.088, 38, at 87:21-88:4.

After entering into this joint venture with the GOS, the four corporations formed another corporation, the Greater Nile Petroleum Operating Company, Ltd. ("GNPOC"), to act as their agent in carrying out the terms of various agreements and the other operations of the joint venture.[19] State Petroleum was accorded a 25% ownership stake in this newly-formed cooperation.[20] GNPOC operated under the supervision and control of the Consortium partners and did not have any ownership rights to the oil revenue, exploration rights, transportation system or marine terminal. J.A.___. *D'Avino,* Exh. 101.062 (TE0246918-TE0246948), at TE0246928-929 (Joint Operating Company Shareholders Agreement); 101.101: 101.21 (TE0111913). The partners did not transfer any incidence of ownership or joint venture assets to GNPOC. GNPOC was merely an agent of the joint venture partners, conducting operations under the supervision of the Joint Operating

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[19] J.A.___. *See D'Avino*, Exhs. 88, at TE0254793;102.022 (ETE01257777-810), at ETE0125779;101.043 (TE0168349-437) at TE0168366; 101.0070 (TE0276708-917), at TE0276782.

[20] One of the Court's errors was to confuse the actual joint venture which included the oil companies and the GOS with the corporation GNPOC that was set up to be the agent of the oil companies. *Talisman III*, 453 F. Supp. 2d at 684. *See* § C (2)(b), *infra*. The joint venture was more than the formal arrangement in the documents described by the Court. The GOS and Talisman were the actual partners in this joint venture with the Chinese and Malaysian oil companies. As set forth herein there was substantial evidence in the record to support this reality.

Committe ("JOC") and the Downstream Operating Committe ("DOC"). *Id.*

State Petroleum was later acquired by Arakis, which in turn was acquired by Talisman in October 1998. *Talisman III*, 453 F. Supp. 2d at 645-46. In anticipation of acquiring Arakis Talisman senior executives traveled from Calgary to Sudan to meet with GOS officials. J.A.___. *D'Avino,* Exh. 30. Because of the GOS's controlling role in the joint venture, Talisman met with the GOS on many occasions in the course of conducting due diligence. Talisman became the newest member of the joint venture in 1998 when it acquired Arakis. Following the acquisition, Talisman created a new subsidiary, Talisman (Greater Nile) B.V., to which it transferred its 25% share in the Sudandese venture in a series of tax-driven transactions.[21] Talisman Energy, Inc., however, never relinquished its role as the actual participant and decision-maker in the joint venture. *See* § C (2) *infra.*

The formal agreements entered into by the parties established an "Operating Committee" to provide for the "orderly supervision and direction of Joint Operations." J.A.___. *D'Avino*, Exhs. 33, at 108:1-7,73 at TE0193107, and 102:032. This JOC was chaired by Talisman executives in Calgary and Sudan for the entire period that Talisman was involved in the project. J.A.___. *D'Avino*, Exh. 38 at 85:25-86:2; 35, at 10:16-11:1.[22] As Chair of the JOC, Talisman directly participated in the day to day management of the consortium and the supervision of GNPOC, on a wide range of matters central to the conduct of the oil operations,

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[21] J.A.___. *D'Avino*, Exh. 108, at 20:2-19;101.079, TE0320708.

[22] J.A.___. *D'Avino*, Exh. 38, at 18:3-12.

including security. J.A. ___. *D'Avino*, Exh. 38 109:19-111:7; 73, at TE0193107.[23]

JOC meetings covered all aspects of GNPOC's activities for the joint venture and decisions by the JOC were rubber-stamped by the GNPOC Board. J.A.___. *D'Avino,* Exh. 38, at 111. Thus, GNPOC always did the bidding of the joint venture in which Talisman participated directly in the decision-making through TGBNV, the paper subsidiary it completely dominated.

Finally, Talisman provided direct financing of the oil project and security operations in its capacity as the real joint venture partner with GOS. J.A.___. *D'Avino,* Exh. 107, at 95-96, 112, 154-55, 161-62, 189-92, 198-203; Exh. 36.

2. Talisman's Control Over Its Sudan Operations

In 1998, Talisman Energy, Inc. was a publicly traded Canadian oil exploration and production company with operations in Canada, U.S., North Sea, Trinidad, Algeria, Indonesia and Sudan. J.A.___/ *D'Avino*, Exh. 102.103, at ETE0020450. Talisman organized its international operations through a series of international subsidiaries and managed its international operations through a "matrix" system of management. J.A.___. *D'Avino,* Exh 29, at 32:5-33:18, 35:21-25, 36:1-16. Under this system, Talisman employees were "seconded" or "loaned" to one of its international subsidiaries for a period of time. J.A.___. *D'Avino*, Exh. 36, at 138:5-139:3, 141:13-143:19; 101.092. Despite the fact that they were working for a subsidiary, "seconded employees" remained on Talisman's payroll

[23] Nigel Hares, Talisman's Vice-President of International Operations, had so many obligations on the Project that he traveled to Sudan "nearly every month." J.A.___. *D'Avino,* Exh. 105, at 22.

and were paid directly by Talisman throughout their "secondment."

In order to maintain control over its secondees, Talisman created a dual reporting system, to oversee its secondees through "functional reports" and "administrative reports." *Id.*, J.A.___. Exhs. 30, at 90:9-22; 29 at 32-33, 35-36; 35, at 21:21-22:12. While the secondees reported to local management with respect to administrative matters (*e.g.* personnel and administrative issues), every employee reported directly to the senior manager of his or her functional department (*e.g.* exploration, production, legal) at Talisman Energy, Inc. in Canada. *Id.*, J.A.___. Exh. 108, at 5:6-6:5, 69:1-70:2; 111, at 8:3-10, 65:18-66:5. TGNBV was the classic, local support vehicle for the Talisman secondees in Sudan. Though it performed an administrative role, all substantive decisions with respect to the oil project were made in Calgary. *Id.* J.A.___. *D'Avino*, Exh 38 at 81:7-20:4. *Id.*

Talisman was, thus, able to directly supervise and participate in all of the substantive work of each of its seconded employees and maintain control over its international operations. The "matrix" system of management was a critical component of Talisman's ability to maintain control over the entity to which it had transferred its *de jure* interest in the project, TGNBV.

a. Talisman's Control over TGNBV[24]

TGNBV operated on behalf of Talisman Energy, Inc.'s interests in the Sudan project, but Talisman, from the beginning, exercised direct and total control over TGNBV and its activities in a number of ways. In addition to its direct financing of the project and the security operations, Talisman also indirectly financed the oil project by maintaining absolute financial control over TGNBV. During the period of TGNBV's operation, Talisman directly transferred $288 million to TGNBV, which represented over 80% of TGNBV's financing. The remainder came from other Talisman subsidiaries at the direction of Talisman. J.A.___. Vollmar Expert Report ("*Vollmar*"), at 2. TGNBV forwarded 82% of its net revenue directly to Talisman ($457 million) and the rest to other Talisman subsidiaries as directed by Talisman. *Id.* at 3.

The capital moving in and out of TGNBV was, thus, subject to Talisman's complete control.[25] Each of the intervening subsidiaries between Talisman and TGNBV were largely ignored and bypassed with regard to financial transactions.

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[24] Talisman's corporate structure was an issue earlier in the case in connection with its argument that the Court lacked personal jurisdiction. Resolving this issue required the Court to analyze the relationship between Talisman and its American subsidiary, Fortuna U.S. Inc. Based on the factual record, the Court concluded that Fortuna was a "mere department" of Talisman. Among other factors cited by the Court were Fortuna's ownership by Talisman, its financing through intercompany loans, Talisman's payment of compensation for Fortuna directors, and Talisman's "extensive control over the operational and marketing policies of Fortuna." *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 2004 U.S. Dist. LEXIS 17030 at *7 (S.D.N.Y. August 30, 2004). The subsidiaries in the Sudan project were organized in the same way.

[25] J.A.___. *D'Avino,* Exh. 15, at TE0511718.

J.A. ___. *Vollmar* at §4 and Exh. 5.[26] Moreover, Talisman also provided the costs of TGNBV's participation in GNPOC. J.A.___. *D'Avino,* Exh. 30, at 197; 108, at 26-27. All cash calls by GNPOC to TGNBV were funded directly by Talisman. J.A.___. *D'Avino*, Exhs. 125, at 168-69,170,173,176; 101.044 (TE0181558): 101.076 (TE0320560-572);101.024 (TE0117651-663).

In addition to maintaining tight control over TGNBV's financial transactions, Talisman also maintained tight control over TGNBV's operations through its matrix system of management.[27] Nineteen of the twenty executives employed by TGNBV were senior Talisman executives[28] who were "seconded" or loaned to TGNBV on a full or part-time basis. J.A.___. *D'Avino*, Exh. 106 at 15.[29] Most of these management personnel supervised the TGNBV employees from their offices in Canada. J.A.___. *D'Avino*, Exhs. 38; 35, at 4:4-12:13. While

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[26] In the end, when TGNBV was sold, most of the proceeds went directly to Talisman rather than to TGNBV's shareholder. *Id.*

[27] Indeed, although TGNBV was a Dutch company, it had no separate office and only one employee in the Netherlands. J.A.___. *D'Avino*, Exhs. 101.063 (TE0247551-568); 101.121 (TE0516903); 101.093 (TE0336840); 106, at 88-89, 138; 107, at 114-115; 36, at 143, 148.

[28] J.A. ___. *Whinston,* Exh. 49, at 25:7-26:14. The referenced testimony of Talisman secondee Ralph Capeling was in the context of the discussion of deposition exhibit 557. This document, which was inadvertently not included with the deposition excerpt is bring submitted with Plaintiffs' Rule 10(e) motion.

[29] Talisman officers received no additional compensation for serving as officers or directors of Talisman international subsidiaries. J.A.___. *D'Avino*, Exh. 107, at 89:24-90:15. Although the entirety of the Blakeley deposition was submitted, the exhibits were inadvertently omitted from Plaintiffs' opposition papers.

Talisman artificially set percentages to allocate the time of these executives between Talisman and TGNBV, these executives were paid with a single check by Talisman.

Talisman also maintained control of the Board of Directors of TGNBV. J.A.___. *D'Avino*, Exh. 30, at 63:20-23; 101.074 (TE0320080, TE0320088); 107, at 233:18-234:6. James Buckee, Talisman's President and CEO, was made one of three directors of TGNBV,[30] and the only director with an independent role.[31] Furthermore, in correspondence relating to Talisman's business in Sudan, senior Talisman officials, including Buckee and Hares, regularly represented themselves as affiliated exclusively with Talisman Energy, Inc., writing on Talisman stationery, and not TGNBV.[32] The results of their reporting relationships to Talisman senior management remained unchanged.

In addition to the fact that Canada-based Talisman senior executives held virtually all of the executive positions at TGNBV and the fact that Talisman controlled TGNBV's Board of Directors, TGNBV's staff was comprised, almost

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[30] In May 2000, Hares took over for Buckee as the Talisman representative on the boards of the Dutch Companies. J.A.___. *D'Avino,* Exhs. 101.089 (TE0321660); 101.074 (TE0320080).

[31] The other two directors worked from home and were mere figureheads with no independent role. J.A.___. *D'Avino,* Exh. 38, at 16:11-13; *See also D'Avino*, Exhs. 101.089 (TE0321660); 101.074 (TE0320080); 126, at 47.

[32] *See, e.g.*, J.A.___. *D'Avino*, Exhs. 102.012 (ETE0015774); 101.013 (TE0089931); 101.006 (TE0054855); 101.010 (TE0086808); 101.009 (TE0086261); 101.017 (TE010768); 101.046 (TE0184609); 101.058 (TE0239521); 101.037 (TE0145536); and 101.041 (TE0160821).

entirely, of Talisman "secondees."[33] J.A.___. *Whinston*, Exh. 49, at 25:7-26:14. Consistent with Talisman's matrix system of management, these "secondees" received their salaries and benefits directly from Talisman, and remained in contact with Talisman executives in Calgary "on virtually a daily basis." J.A.___. *Whinston,* Exh. 127, at 10-12.

b. Talisman's Control Over GNPOC.

Talisman maintained control over GNPOC in several ways. Nigel Hares and then Ralph Capeling served as the Chairman of the Joint Operating Committee ("JOC") and the Downstream Operating Committee ("DOC") during the entire time that Talisman was in Sudan.[34] These JOC and DOC are committees of the consortium partners and functioned to give the partners control over GNPOC's operations. J.A.___. *D'Avino*, Exh. 39, at 85:16--86:13. JOC meetings covered all aspects of GNPOC's activities. J.A.___. *D'Avino*, Exh. 38, at 109:19-111:17. Decisions made by the JOC were rubber stamped by the GNPOC board of directors. J.A.___. *D'Avino*, Exh. 38, at 110:25-111:7.

As chair of the JOC Talisman directly participated in the day to day management of the consortium and the supervision of the details of GNPOC's exploration and production program. GNPOC management reported to the JOC on

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[33] J.A.___. *D'Avino*, Exhs. 101.121 (TE0516903); 101.093(TE0336840); 107, at 114:19-115:1; 141:17-142:14. Sudanese nationals were hired primarily to work as clerks and security guards. J.A.___. *Id.* 111, at 17:14-20, 34:5-18.

[34] *D'Avino*, Exhs. 35, 10:16-20; 38, 85:12-15, 109:2-3.

every aspect of GNPOC's business, including, oil development work programs and budgets, approval of area relinquishments, approval of the timing, location and depth of wells to be drilled, determine whether a crude oil discovery is in Commercial Quantity, Submission of a Development plan for an Oil Field or Gas Field, determine whether to cease or curtail production in a certain area, and any Decision by the Partners to carry out a development on behalf of the government of Sudan pursuant to Article III of the contract. J.A.___. *D'Avino*, Exh. 73, at TE0193110; 38, at 109:19-111:17.

Talisman CEO Jim Buckee, and later Hares, served on GNPOC's board of directors throuughout the time that Talisman was in Sudan. J.A.___. *D'Avino*, Exhs. 105, at 100-01; 38. Talisman provided GNPOC with significant, direct financial assistance, including payments for the airstrips and the all-weather roads that were authorized by Talisman. Other direct payments to GNPOC , which circumvented Talisman's paper subsidiary in Sudan included a $9 million dollar payment for downstream expenditures. J.A.___. *D'Avino,* Exh. 107, at 188-192; 195:2-201:15.

Talisman was also able to control GNPOC through the many employees it seconded to them, either directly or through TGNBV. Talisman had the right to appoint several senior management positions at GNPOC, including, *inter alia*, General Manager Pipeline, Operations Manager, Procurement Manager, and Exploration Manager. Capeling received weekly reports from the Talisman secondees to GNPOC, reviewed the compensation for these secondees, rated their

job performance and determined whether they would be reassigned. J.A.___. *D'Avino*, Exh. 38 at 46:6-48:1. He would also communicate frequently with Rod Wade, who held the position of General Manager, International Liason,[35] in Calgary to coordinate TASA requests "related to exploration and development requests within GNPOC." J.A.___. *D'Avino* Exh. 38, at 36:17-22. *See* § C(3)(b), *infra*.

3. Talisman Was Directly Involved in the Oil Project

a. Talisman Was Directly Involved in Security Operations

Talisman provided direct financing for the "security" operations that led to Plaintiffs' human rights violations. Significantly, Talisman made direct payments to the GOS-sponsored militias. Gatduel Dep. Tr. Vol. I, at 117-119.[36] It was Talisman, *not* TGNBV or its immediate subsidiaries, that financed the expansion of the Heglig and Unity airstrips from which the attacks that injured Plaintiffs were launched.

As noted above, Talisman directly participated in the funding of critical improvements to the Heglig and Unity airstrips which greatly added to their military value and their increased use as bases for bomber and gunships attacks. To effectuate its control over the security situation, and to monitor

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[35] J.A.___. *Whinston*, Exh. 127, at 10:13-17.

[36] The Gatduel deposition testimony was inadvertently omitted from Plaintiffs' Exhibits to the summary judgment motion and is the subject of an accompanying Rule 10(e) motion.

developments, Talisman established a Sudan Steering Committee. J.A.___. *D'Avino,* Exh. 30, at 94-95.

Talisman also employed two former soldiers, Mark Dingley (its worldwide head of security)[37] and Mark Reading to be its eyes and ears on the ground in Sudan. J.A.___. *Whinston,* Exh. 118, at 4:8-20; *D'Avino*, Exh. 71 (TE0089725). They traveled throughout the concession and even outside the concession to assess the security situation and wrote detailed reports that were circulated to top officials in Calgary. J.A.___. *D'Avino,* Exh. 114, at 83:16-86:11. Dingley and Reading were also Talisman's liaison with Mohammed Mokhtar, a former Sudanese Army colonel who served as head of GNPOC security. Mokhtar, in turn, sat on the Special Security Council, which included several Sudanese cabinet level officials, and which exercised control over the Sudanese military activities in the concession and surrounding areas. J.A.___. *D'Avino*, Exhs. 38, at 112:19-22; 101.042, at TE0160943-44; 101.156, at TE0550798-99; 102.011. Talisman's security personnel kept in close contact with Mokhtar. J.A.___. *Id.*, at 114, at 56:17-58:4; 118, at 4:9-25.

b. Technical Services Agreements

Talisman also maintained control over its international operations through

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[37] Mark Dingley also acted as the head of Talisman's "Community Development" team, and was instrumental in assisting the GOS and GNPOC directly in implementing security strategies for the concession area. *See* Letter from Talisman Counsel to Court, dated Nov. 14, 2003; Docket No. 423, Exh. A.

the use of its Technical Services Agreement ("TASA"),[38] which effectively outsourced all of the substantive work of the international subsidiaries to Talisman in Canada. In accordance with TASA, the work performed by TGNBV on the Sudan project with respect to identifying the location of promising new exploration and drilling sites and the most suitable technology to use for each location, was actually performed by Talisman Energy personnel in Canada.

On a daily basis, Capeling sought and received direction, advice and recommendations regarding the TASA services through Rod Wade or from his staff in Calgary, who were responsible for coordinating the TASA requests for the Sudan project. J.A.___. *D'Avino*, Exh. 127, at 10-15, 22-23. In addition, Wade received written reports from Talisman secondees at GNPOC in Sudan dealing with operational and business matters, including oil exploration, facilities and other aspects of the operations and business within Sudan.[39]

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[38] The TASA agreement covered advisory services, geological, geophysical, and engineering services; marketing services, commercial services, accounting, internal audit and administrative services, budgeting and planning, treasury services including banking, financing and investments. *D'Avino*, Exh. 107, at 95-96.

[39] J.A.___. *D'Avino*, Exhs. 127, at 10-16, 22-23, 33-37; 111, at 22, 27; 38, at 15-16, 35, 51-54; 29, at 29-36; 36 at 170-71.

4. Talisman Had Knowledge of the Human Rights Violations Committed by the GOS in and Near the Concession Area.

a. Talisman Had Knowledge of the "Cordon Sanitaire" Strategy and Associated Human Rights Violations.

Talisman knew about the abuses at the heart of this action before it entered this joint venture and during its time in Sudan. This knowledge started with its due diligence activities in connection with its acquisition of Arakis in 1998. Talisman commissioned reports from two consulting firms specializing in security-related issues. J.A.__. *D'Avino,* Exhs. 45, 46 and 47.

These reports advised Talisman that there had been a longstanding internal conflict in Sudan and that would likely continue, *D'Avino,* Exh. 45, at 953, and that protection for the oil fields was provided by "Paulino Matiep, who is the local warlord in Unity State." J.A.__. *D'Avino*, Exh. 46, at 009. The Control Risks report provided detailed information about the way in which the GOS used local militias for its own purposes, J.A.___. *D'Avino,* Exh. 46 (TE0169009-10),[40] including the strategy for protecting the GNPOC concession entailed a zone of protection "dominated" by Sudanese military forces. J.A. ____. *Id.*, Exh. 47 (TE0298977, TE0298988).

Talisman was also provided with information from other sources indicating clearly what would happen if it joined this joint venture. Talisman executives

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[40] The Court gave short shrift to these reports and failed to mention the role of the militias. *Talisman III*, 453 F. Supp.2d at 648.

were warned that the GOS was systematically violating the rights of its non-Muslim, African population, that it was displacing civilians to explore for oil and that Talisman's investment would materially assist the Government in its military oppression of Southern Sudan. J.A.___. *D'Avino,* Exhs. 103, at ¶¶12, 13; 30, at 70:22-71:10; 20, at ¶¶3-8; 103. Indeed, Arakis' own head of security informed Nigel Hares that civilians were routinely displaced by the military prior to Talisman's acquisition of Arakis. J.A.___. *D'Avino,* Exh. 28, at ¶¶ 3-10.

Talisman officials were also informed that the government had secured political and military alliances with rival African warlords, including Riek Machar, in command of certain militia groups in the concession area as a central feature of their security strategy. J.A. ___. *D'Avino,* Exh. 46, at TE0169009. Talisman knew that the Paulino Matiep's militia was part of the GOS security forces protecting the oil concession and knew that Matiep was appointed as a General in the Sudanese Army, J.A. ___ *Id.*, Exh. 101.157, TE0550802, and 27.

After Talisman acquired Arakis, Plaintiffs produced evidence that General Matiep was instructed by Sudan's Minister of Defense to clear areas of the oil concession of all civilian inhabitants to create safe zones for oil development. J.A. ___. *Whinston*, Exh. at 9. *See also*, J.A. ___ *D'Avino,* Exhs. 89; 101.132 TE0520997. Talisman was also informed by Dingley that GNPOC's military strategy to create buffer zones "inside which no local settlements or commerce is allowed" was sound. J.A.___. *D'Avino,* Exh. 101.042 (Rapport Report TE0160944, TE0160948. Indeed, Talisman CEO Jim Buckee admitted in a July

1999 interview that 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. J.A.___. *D'Avino,* Exh. 30, at 2-3.

Talisman CEO Jim Buckee also admitted that Talisman stayed in "frequent, indirect" contact with militia leaders in the concession area, including Matiep. J.A. ___. *D'Avino,* Exh. 30; Exh. 101.104 (Pl. Exh. 512, TE0349265-270).[41]

Indeed, Talisman's contemporaneous knowledge of the ongoing military activities in the concession is evidenced by numerous internal reports. J.A. ___. Exhs. 101.156, at TE0550797-807; 101.156, at TE0550806 (exploration operations in the concession area would not be feasible without the military *cordon*); 101.156, at TE0550800; 101.094, at TE0340438, TE0340439, and TE0340454; 101.135 at TE0521032-33; 102.001: and 102.008.

The Court acknowledged the existence of the buffer zone strategy on a small scale but failed to give Plaintiffs the benefit of the inference of all of the evidence establishing that the strategy was employed throughout the concession area. *Talisman III,* 453 F. Supp. 2d 651.

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[41] Dingley states succinctly: "The militias do without question, form part of the overall security in the areas where conflict is usual- the fact that these areas border and incorporate oil field operations, links this strategy to the security strategy for the protection of the oil fields. . . .Militia activity includes protection of key points such as the rig road built by IPC [Lundin] defensive patrolling and offensive action." J.A.___. *D'Avino,* Exh. 101.156, at TE0550802 (emphasis supplied).

5. Talisman Provided Substantial Assistance

Talisman, acting through its agents, corporate and individuals, provided sustained logistical support and infrastructure, which substantially enhanced the effectiveness of the GOS military in the concession area. It did this by upgrading and maintaining air strips for military aircraft, providing a reliable source of clean fuel for helicopter gunships and Antonov bombers and air traffic control, creating all-weather roads for rapid deployment of troops, providing modern communications facilities for Petroleum Security intelligence officers, assisting with troop and military transport on GNPOC aircraft, and providing a location to store ordinance. Talisman, acting through its agents, corporate and individual, provided sustained financial assistance, establishing an account to provide aid to the Sudanese military. J.A.___. *D'Avino*, Exh. 101.104, at TE0349267. Additional financial assistance was provided via oil revenues from the export of crude oil which was used by the GOS to finance the purchase of armaments, arms factories, and helicopter gunships. Given the increased strength of the GOS forces as a result of Talisman's assistance, Plaintiffs, who lived in close proximity to the concession area, had no choice but to flee in order to escape near certain death at the hands of Talisman's agents.

a. Heglig and Unity Airfields

There were two airstrips in the GNPOC concession area that were "controlled and maintained by GNPOC," *Talisman III*, 453 F. Supp.2d at 651, which served as the launching platforms for the aerial attacks. The Heglig airstrip

"was used extensively by the military. As of 2000, a dozen military flights came into the Heglig airstrip each week." *Id.* at 652.[42] In addition, it was used as a "staging area for [Government] combat operations" and as a base for bombing runs." *Id.* An official Canadian government investigating team also confirmed that Heglig was used by the Government to load and refuel bombers and helicopter gunships, which would engage in missions to attack civilians. *Id.*[43]

Talisman military adviser Mark Reading reported to Talisman executives his own observations of seeing 500 pound bombs being loaded on the GOS' Antonov bombers at Heglig field and "round the clock" bombing sorties against targets in the south. J.A.___. *D'Avino,* Exh. 114, at 149:1-151:23. Reading concluded that "[t]he bottom line is that they are using the GNPOC runway, the GNPOC fuel, and the GNPOC air traffic control to wage war in the South. That is how it would be perceived and it would be difficult to defend." J.A.___. *D'Avino,* Exhs.114, at 151:18-23; 101.054. Talisman CEO Buckee acknowledged that the Antonov bombers at Heglig served "no defensive purpose[]" and should never be at "our airstrips." J.A.___. *D'Avino*, Exh. 31, at 257:20-258:19.

Talisman employees witnessed and reported to Talisman management that

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[42]Talisman's military advisor stated that the airfield at Heglig was corporate property. J.A.___. *D'Avino*, Exh. 101.127, at TE0520908.

[43] GNPOC and military aircraft operating at the airstrips shared the same fuel tanks. Garth Butcher, a Talisman employee seconded to GNPOC who worked at Heglig, testified that GNPOC employees routinely refueled military aircraft with GNPOC fuel. Butcher also testified that GNPOC never refused to give the military fuel. GNPOC even supplied the military with fuel when the military's fuel ran out. J.A.___. *D'Avino*, Exhs. 98, 89:20-90:11; 91:13-92:2; 146:25-147:14.

GNPOC personnel were fueling Sudanese military aircraft at Heglig and Unity, which enabled the military aircraft to conduct "more sorties."[44] J.A. ___. *D'Avino* Exhs. 98, at 85-89; 93:1-95:2; 132:20-134:13; 145:7-19; 101.054 (TE0235433-34) (stating that the military prefers Unity to Rubkona); and 102.021 (TE0123158-159). In addition, Larry O'Sullivan, a Talisman secondee to GNPOC, stated, "I have watched the government attack helicopters refuel at GNPOC fuel tanks and as far as I can figure Talisman owns 25% of that fuel." J.A. ___. *D'Avino,* Exh. 101.106 (TE0349316); *Whinston,* Exh. 10. O'Sullivan reported his observations to Talisman management in November 1999. He also reported that he saw soldiers "going to the battle" being transported in GNPOC trucks. J.A.___. *D'Avino,* Exh. 101.161 (TE0577409). O'Sullivan testified that he reported the forced displacement of civilians to Talisman management after seeing truckloads of unarmed southern Sudanese civilians being transported north under armed guard. J.A.___. *D'Avino,* Exhs. 39, at 103:2-108:22; 301:25-302:9.

Heglig became even more valuable to the Government after it was upgraded.[45] Among other things, the improvements allowed heavier planes to land and provided a hanger for the helicopters. J.A. ___. *Whinston Class Cert,* Exh.

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[44] J.A.___. *See D'Avino*, Exhs. 114, at 149:16-24; 167:16-18; 436:19-437:7); 101.064 (Pl. Ex. 304, TE0250279-292); 101.104 at TE0349266; 39, at 83:11-17; 183:11-15; 101.161 (Pl Ex 940, TE0577409); 101.106 (Pl Ex 941, TE0349316); 101.159 (Pl. Ex. 951, TE0577318); 101.158 (Pl Ex 952, TE0577317); 30, at 263:9-11; 101.126 (Def. Exh. No. 197, TE0520904).

[45] An officer of "Talisman Energy, Inc." approved the expenditure of $837,000 to upgrade Heglig. J.A.___. *Whinston Class Cert. Decl.* Exh. 25, at TE0112608.

25, at TE0112608.[46]

The Unity airstrip was also a site of significant military activity.[47] *Talisman III*, 453 F. Supp. 2d at 653. Although not discussed by the Court, Talisman's military advisors reported regularly on the extensive use of Unity field by Government helicopter gunships. J.A.___. *D'Avino,* Exhs. 114, at 149:16-24; 167:16-18; 436:19-437:7; 101.064 (Pl. Ex. 304) (TE0250279-292); 101.104 TE0349266; 101.126 (TE0520904). Unity airstrip was upgraded in 1999 to provide needed services during the period when Heglig was shut down while improvements were being made there. J.A.___. *D'Avino*, Exh. 98, at 147:12-25. "Talisman Energy, Inc." was assessed over $75,000 for this work and Rod Wade approved this allocation on behalf of "Talisman Energy, Inc." J.A. ___. *Whinston,* Exh. 25, at TE0150159.

The Court erred in stating that Plaintiffs "have not pointed to any AFE form addressed to improvements of the airstrips. In any event, TGNBV, and not Talisman, was a member of GNPOC." *Talisman III*, 453 F. Supp.2d at 673 n. 81. AFEs for the improvements on these airstrips were indeed submitted and were described in the accompanying declaration as "Authorizations for Expenditures

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[46] "The Harker Report describes the use of the Heglig airstrip by military aircraft: "flights clearly linked to the oil war have been a regular feature of life at Heglig airstrip." The report contends that the facility had been used by "helicopter gunships & Antonov bombers of the [Government]. These have armed and re-fueled [sic] at Heglig and from there attacked civilians." *Talisman III*, 453 F. Supp. 2d at 652.

[47] J.A.___. *D'Avino,* Exh. 101.144; 101.033; 101.094; 101.098; 101.131; 101.132; 101.146; 101.148, 101.153; *Whinston*, Exhs. 15, 18, 19, 28.

(AFEs) where *Talisman* approved funding of expenditures to improve and upgrade the Heglig and Unity airfields." J.A. ___. *Whinston Class Decl.* Exh 25, at TE0112608 (emphasis added). In addition, these AFEs list Talisman Energy, Inc., *not* TGNBV, or any other Talisman subsidiary, as the party whose approval was sought and obtained for these improvements. *Id.*

Talisman purposefully expanded these bases and supported the military's use of the bases to increase the GOS military capacity at the same time Talisman knew that the military was committing war crimes against the civilian population of the concession area. J.A.___. *D'Avino,* Exhs. 25, at 12-24; 101.110 (TE0427762-763); 101.054 (Pl. Ex. 307, TE0235433-34). In a hand written note Talisman's highest ranking secondee in Sudan proposed that the military relocate its base of operation to Unity Field after GNPOC improved the airfield. He admitted that he wanted to establish a military base at Unity camp to establish a stronger presence for the Sudan military "further south." J.A.___. *D'Avino,* Exh. 101.110, at TE0427762-3. Talisman and its joint venture partners subsequently improved Unity airfield and handed it over to the GOS to use as a base for helicopter gunships; J.A.___. *D'Avino,* Exhs. 102.021 (ETE0123158-159); 101.104 (TE0349265-68); 114, at 149:16-24; 167:16-18; 436:19-437:7. Talisman CEO Buckee was informed that the GOS military preferred to use Unity field as a helicopter gunship base because it offered an unlimited supply of free, clean fuel. J.A.___. *D'Avino,* Exh. 102.021.

Buckee knew that air attacks against civilians were continuing and that they

were not all related to the civil war. J.A.___. *D'Avino*, Exh. 101.109, at TE0423042-43. As he wrote to Major General Bakri Hassan Saleh, Sudanese Minister of National Defense, on February 12, 2001, whatever "the military objectives may be, the bombings are universally construed as violations of international humanitarian law." However, nine months later, Capeling advised Government officials that "we support having the helicopter gunships on GNPOC facilities." J.A.___. *Whinston,* Exh. 28; *D'Avino*, Exh. 38, at 65:16-G7:14. Capeling got what he wished for. The gunships became a regular presence at Unity. J.A.___. *D'Avino,* Exh. 101.098 ("almost permanently based at Unity"); "101.033 (describing Unity as "more or less a military airstrip."); 101.105, at TE0349266-68.

b. Other Logistical Support

Prior to Talisman's arrival in Sudan, the Sudan military was ill-equipped and under-funded and lacked the vehicles, tanks and aircraft to win a decisive victory over the rebels in the south. J.A.___. *D'Avino,* Exh. 101.156, TE0550800; 45 at TE0298953. Talisman management was cognizant of the importance of improving logistics and infrastructure for the Army if it was to be an effective security force for the oil concession operation. J.A. ___. *D'Avino,* Exh. 101, 110, at TE0427763; and 101.157, TE0555762.

Seasonal flooding and the lack of paved roads rendered the concession area inaccessible to the oil consortium and the Sudanese military. Talisman and its partners commenced an extensive construction program to build elevated all-

weather roads throughout the oil concession area for the stated purpose of improving access of these areas by Sudanese security forces.[48] Army garrisons were built every few miles along these raised all weather roads and local villages within miles of the road construction were systematically and forcibly cleared by bombers, helicopter gunships and ground troops. J.A.___. *D'Avino*, Exh 25 (*Hutchinson*), at 22 attached maps H009-H013. Docket No. 226, Declaration of Sharon Hutchinson. The final decisions whether to authorize these road construction projects were made in Canada by senior management in Talisman's Calgary headquarters.[49] J.A. ___.

The Court noted that in May 1999, GNPOC and the government constructed two all-weather roads linking the army base at Rubkona and the army base at Paryiang to GNPOC's oil operation at El Toor (Athonj). *Talisman III*, 453 F. Supp. 2d 650; J.A.___. *D'Avino,* Exh. 101.114 (GNPOC AFE). Many of the Plaintiffs testified that oil roads were being constructed in the vicinity of the villages from which they were eventually displaced. J.A.___. *D'Avino*, Exh. 13, at 30-31, 86-88; 20, at ¶2-7; 6, at 121; 9, at 139:25-140:25; 11, at 113-114, 121; 119; 120, at 64-65.

In addition to the building of roads, in October 2000, Talisman's worldwide

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[48] J.A.___. *D'Avino*, Exh. 102.008 (ETE0014901 at 903); 102.014 (ETE0031823) at 24; 101.065 (TE0250314 at 316); 101.097 (TE0340500 at 501); 101.098 (TE0340508 at 509); 101.144 (TE0500422), 39, at 101:3-15.

[49] J.A. ___. *D'Avino,* Exh. 101.068 (TE0264886-88); 125, at 254-258, 264-265.

head of security documented all of the ways that GNPOC provided support for and assistance to the Sudanese security forces in the concession area. J.A.___. *D'Avino,* Exh. 101.156, at TE0550797-807. Talisman admitted that GNPOC provided air transportation for Sudanese troops, military cargo, ground transportation, communications facilities (radios, fax), accommodations at GNPOC rig and facility sites and at checkpoints in the concession area, repairs to non-combat vehicles, and medical treatment for soldiers at consortium built medical clinics. J.A.___. *Id; D'Avino*, 101.104, at TE0349267.

Taban Deng Gai, the Governor of Unity State testified that when he visited GNPOC's base camp at Heglig, he observed that Sudanese Petroleum Security officers, seconded to the oil companies by the Sudanese Intelligence Agency, shared the same offices, computer systems, communications networks and administrative services with GNPOC management. J.A.___. *D'Avino,* Exh. 31, at 134:6-137:8; Danhier, head of military intelligence for the SSIM militia, "frequently met and talked to Petroleum Security officers and was told by a Petroleum Security officer seconded to Talisman that if [he] ever needed anything from the oil company, e.g., use of a company helicopter, that he would arrange it with Talisman." J.A.___. *D'Avino,* Exh. 27, at ¶9; 39, at 97:11-98:10.

c. Talisman Initiated Plans to Explore For Oil In Areas Outside of Government Control.

Talisman also played a key role in instigating military actions in new areas needed for oil exploration. Exploration outside the small well-defended blocks

designated Heglig 2B and Unity 1B were solely within the discretion of the joint venture. J.A.___. *D'Avino,* Exhs. 38, at 141:13-16; 101.111 (TE0431470-480), at TE0431476; 75 (TE0193213, EPSA). In an effort to maximize profits, the joint venture partners decided to explore for oil and drill for oil outside of the small blocks designated Heglig 2B and Unity 1B.[50] Exploration decisions were based upon technical analysis of geological formations performed by Talisman employees in Calgary. J.A.___. *D'Avino*, Exh. 81 and 82 (TE0154927-932).

GNPOC security established the policy that exploration and production outside the small blocks designated Heglig 2B and Unity 1B required Sudanese military forces to clear the designated work area to protect oil workers and oil installations. J.A. __. *D'Avino,* Exhs. 28, at ¶¶ 4-9; 39, at 39:5-6; 83:11-84-2; 98, at 63:1-5. Talisman management pushed the need to explore in areas of Block 4 outside of government control ("south of the river") to retain rights to those areas under the ESPA. J.A.___. *Id.*; *D'Avino,* Exhs. 102.018 (Pl. Ex. 574, ETE0113454); 38 at 385:18-386:18.

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. J.A.___. *Whinston,* Exh. 54; *D'Avino*, Exhs. 30, at 352:4-6; 28; 31, at 157:18-158:8); 94, at 10-11, 15.

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[50]AFEs: J.A.___. *D'Avino,* Exhs. 101.003 (TE0038555-64); 101.002 (TE0011055-69); 101.023 (TE0115476-79); 101.026 (TE0126909); 101.027 (TE0126915); 101.028 (TE0126923); 101.029 (TE0126968); Exh. 101.030 (TE0126973); 101.031 (TE0127019); 100, Exh. 4.

Talisman's CEO was notified by the Vice President of Sudan that oil development had resulted in the displacement of 400,000 inhabitants of the GNPOC concession area by Sudanese security forces. J.A.___. *D'Avino,* Exh. 102.026 (ETE0166534-535).

d. Talisman's Acts of Ratification

Talisman continued to participate in GNPOC's, plan to explore in areas of the concession outside of government control and provide substantial assistance in the concession area and reap the substantial profits of this joint venture, while publicly denying that forced displacement and human rights violations were taking place in the concession area. J.A.___. *D'Avino,* Exhs. 30, at 352:4-6; 34, at 14:8-23; 102.026 (ETE0166534-535); 101.115 (TE0511134). "In the five years of operation, [Talisman] staff in the field have not seen any evidence of forced displacement or relocation in our area of operations [...] We have diligently investigated these allegations and have found them to have no basis in fact." J.A.___. *D'Avino,* Exh. 101.116 (TE0511135); 102.015 (ETE0053675).

When the Canadian Assessment team (Harker) published evidence of forced displacement in Block 1, Talisman's reaction was to commission a report entitled "Heglig History" by a Sudanese scholar. J.A.___. *D'Avino,* Exh. 101.014 (TE0101375); 42 (Pl. Ex. 202, Revised Heglig History Report authored by Mark Dingley); 102.005 (ETE0011740-163); Exh. 102.005 (Pl. Ex. 202, ETE0011740-0011763), at ETE0011741; 30, at 304:5-305-3. When that report confirmed that forced displacement of civilians had taken place in Block 1 in 1999, Talisman's

general manager in Sudan wrote the words "No Displacement" on the front cover and commissioned a revised report by one of Talisman's military advisers. *Id.* The military adviser's report contained no mention of displacement by government security forces and falsely attributed fighting in Block 1 to "inter-tribal" fighting. J.A.___. *D'Avino,* Exh. 29, at 72.

D. Summary of Argument

The District Court did not seriously question the fact that the Plaintiffs had suffered war crimes, crimes against humanity or genocide at the hands of the GOS. *See* § II, *infra.* Based on the Plaintiffs' testimony alone, disregarding the voluminous evidence of the gross pattern of human rights violations committed by the GOS for years in the concession area, no other conclusion is possible.

At its essence, Plaintiffs' argument is that the District Court ignored, for reasons only partially explained in its opinion, a mountain of evidence submitted by Plaintiffs in support of every element of their ATS claims. The Court excluded enormous amounts of evidence, much of which is based on Talisman's own documents and the admissions of its agents and employees. The Court then compounded this error by refusing to give Plaintiffs the benefit of every reasonable inference based on all of the evidence they introduced in opposition to the motion as required by Rule 56.

The apparent reason for these massive errors was the District Court's erroneous belief that Talisman could insulate itself from liability by creating a chain of subsidiary corporations, including a proxy (*i.e.* TGNBV) to "hold" its

interest in this joint venture project, and by calling the employees it assigned ("seconded") and supervised on this joint venture the employees of these corporations. The Court believed that only if Plaintiffs could pierce the corporate veil of all of the corporations in Talisman's long corporate chain could they recover in this action. This view is completely contrary to the essential purposes of international human rights law and of the Alien Tort Statute. Talisman remains liable for its own actions and the actions of its partners, agents and employees on this project.

Plaintiffs introduced substantial evidence that Talisman Energy Inc, the defendant, itself was the participant in this joint venture using various subsidiaries and "seconded" employees and agents to do Talisman's bidding on every aspect of the project, including the crucial area of security for all of the operations in and near the concession area. The District Court simply refused to acknowledge or address the legal significance of this evidence and, in fact, wrongly excluded evidence based on corporate structures that were routinely circumvented or ignored by Talisman during its time in Sudan. Indeed, the Court refused to acknowledge the evidence of the direct participation of key Talisman executives in the project, especially concerning security issues.

Plaintiffs' evidence shows that it was Talisman, using the joint venture and the joint venture's agent GNPOC, which knowingly providing substantial assistance and encouragement to the GOS campaign of indiscriminate attacks on civilian villages in the concession area in connection with the joint venture's oil

exploration and development activities in the concession area. This is a sufficient showing for aiding and abetting liability under the ATS. *See* § III (B) and (E), *infra*.

Plaintiffs' evidence shows that it was Talisman which became a co-conspirator with the GOS to engage in this *cordon sanitaire* strategy in and near the concession area and which engaged in many acts in furtherance of the conspiracy. *See* § III (C), *infra*.

Plaintiffs' evidence shows that Talisman entered into a joint venture with the GOS for oil exploration and development in and around the concession area, using a proxy, TGNBV, to "hold" its formal interest in the venture. The reality of this joint venture is not defined exclusively by the consortium documents relied on by the District Court. Moreover, GNPOC was not the joint venture, as the District Court seemed to believe; it was created to do the bidding of the joint venture partners, including Talisman. Under federal common law principles of joint venture liability, Talisman can be found liable for the torts committed by the joint venture and its agents, including GNPOC.

Plaintiffs' evidence also supports Talisman's liability on an agency theory because Talisman and the joint venture utilized agents, both corporations like TBNBV and GNPOC and employees, to provide the direction and assistance to the GOS and its campaign of indiscriminate attacks on civilian villages that is at the heart of this lawsuit.

Plaintiffs' evidence was also a sufficient basis upon which to pierce the

corporate veils of the intermediate corporations Talisman used to implement its participation in this Project. *See* § III (E), *infra*.

The District Court refused to consider Plaintiffs' agency, joint venture or alter ego theories of liability on the ground that they were not specifically pleaded in Plaintiffs' complaint. The Court also denied Plaintiffs' motion to amend their complaint on the ground that the amendment was "futile." *See* § IV (A) and (B), *infra*. The District Court was wrong on both counts. Plaintiffs were entitled to have all of the theories arising out of the evidence introduced in this action considered by the Court.

Finally, the District Court twice declined to certify a class or sub-classes or issues. The Court's finding of "important common issues to be resolved at trial," 226 F.R.D. at 482, renders denial of class treatment of such issues error under this Court's decision in *Strip Search Cases*, 461 F. 3d 219, 229-231 (2d Cir. 2006).

Given the widespread and systematic attacks on civilians at the core of the Plaintiffs' case, this case cries out for class treatment so that the tens of thousands of villagers harmed by Talisman's complicity in the GOS' human rights violations may obtain the collective remedy commensurate with the *jus cogens* violations they have suffered.

STANDARD OF REVIEW

A grant of summary judgment is reviewed *de novo*. *See, e.g., Times Mirror Magazines, Inc. v. Field & Stream Licenses Co.*, 294 F.3d 383, 390 (2d Cir 2002).

Summary judgment is appropriate where there exists no genuine issue of material fact and, based on the undisputed facts, the moving party is entitled to judgment as a matter of law." *Beth Isr. Med. Ctr. v. Horizon Blue Cross & Blue Shield of N.J., Inc.*, 448 F.3d 573, 579 (2d Cir. 2006). In determining whether there is a genuine issue of material fact, a court must resolve all ambiguities, and draw all inferences, against the moving party. *Id.* Where circumstantial evidence is presented, if there is any controversy as to the inferences to be drawn from the evidentiary facts, summary judgment must be denied. *See Scwabenbauer v. Board of Ed. of City School Dist. of City of Olean*, 667 F.2d 305, 313 (2d Cir. 1981).

The standard of review for the denial of a motion for leave to amend is abuse of discretion. *Jin v. Metropolitan Life Ins. Co.*, 310 F.3d 84 at 101 (2d Cir. 2002). An abuse of discretion is established absent evidence of undue delay, bad faith, undue prejudice to the opposing party, or futility. *See Monahan v. New York City Dept. of Corrections*, 214 F.3d 275, 283 (2d Cir. 2000).

ARGUMENT

I. THE DISTRICT COURT ERRED BY DENYING PLAINTIFFS THE BENEFIT OF EVERY EVIDENTIARY INFERENCE, EXCLUDING ADMISSIBLE EVIDENCE, AND SYSTEMATICALLY FAILING TO APPLY ESTABLISHED SUMMARY JUDGMENT STANDARDS.

The Court departed from standard Rule 56 practice throughout its opinion both by denying Plaintiffs the benefit of every evidentiary inference and by excluding admissible evidence on a wholesale basis. The Court made broad statements that Plaintiffs had failed to provide admissible evidence in support of

their claims, without ever ruling on the specific evidence presented by Plaintiffs or indicating why Plaintiffs' evidence was deemed inadmissible. Given space limitations, Plaintiffs are able only to provide the most prominent examples of the Court's errors.

A. The District Court Failed to Give Plaintiffs The Benefit of All Favorable Inferences and Improperly Gave Talisman the Benefit of Inferences.

The Court violated the "fundamental maxim" that "on a motion for summary judgment a court cannot try issues of fact; it can only determine whether there are issues to be tried." *Donahue v. Windsor Locks Bd. of Fire Com'rs*, 834 F.2d 54, 58 (2d Cir. 1987). Here, the Court failed to give Plaintiffs the benefit of all favorable inferences as required by Rule 56. *Rounseville v. Zahl,* 13 F.3d 625, 630 (2d Cir. 1994).

For example, the Court erroneously limited its inference–that air attacks which injured Plaintiffs originated at the Heglig or Unity airstrip–to those Plaintiffs who were attacked within the boundaries of the concession. As to Plaintiffs attacked outside these boundaries, the Court drew its own inference, favorable to Talisman, that such attacks may have originated from the Rubkona airstrip. *Talisman III*, 453 F. Supp. 2d at 678.

In so doing, the Court ignored Plaintiffs' evidence that, contrary to the Court's finding, GOS aerial attacks on villages in Block 5A originated from Heglig or Unity. Indeed, this evidence comes from the mouths and pens of

Talisman employees. J.A.___. *D'Avino*, Exh. 101.131 ("Gunships have been active in Block 5A, operating from Unity Airstrip."); *Whinston,* Exh. 19 ("reasonable to assume" that gunships which attacked the food distribution cite at Bieh in Block 5A operated out of Unity).[51] Plaintiffs were entitled to the inference that the attacks at issue originated at Heglig or Unity. Instead, the Court improperly conferred this inference on Talisman.[52]

Additionally, the District Court erred by failing to accord Plaintiffs the inference that its attacks against them were committed by Government soldiers or Government-sponsored militias. The Plaintiffs each testified that their attackers were Government forces,[53] J.A.___, and that they were not aware of any armed

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[51] The Court discounted the eyewitness testimony of Plaintiff Rev. James Koung Ninrew due to a date discrepancy, 453 F. Supp. 2d at 655 n.29, but the significance of such discrepancies is for the jury to decide. Here, given the consistent nature of Rev. Ninrew's eyewitness account and the information contained in the report of Talisman's military adviser about the Bieh attack, Plaintiffs are entitled to the inference that Rev. Ninrew was a witness to the same Bieh attack that killed Mr. Makuac.

[52] Another example of the Court's inappropriate resolution of disputed facts in Talisman's favor is the Court's conclusion that Talisman invested in Sudan "during a period of hope created by the Khartoum Agreement." *Talisman III*, 453 F. Supp. 2d at 647. Plaintiffs' expert provided evidence to counter this proposition, concluding that "[t]he Khartoum Peace Agreement of 1997 was widely regarded by Sudanese as a sham and Talisman should have been aware of this." J.A.___. *Johnson Report* at 6.

[53] J.A.___. *D'Avino*. Exhs 13 (Luka Ayuol) at 45-49; 147-149; 12 (Luka Ayuol), at ¶15,17, 19; 20 (Chief Peter) at ¶2-8; 32 (Pui) at 249:2-252:14; 8 (Stephen Kuina) at ¶4; 8, (Stephen Kuina) at ¶2-4, 7;11 (Chief Tunguar) at 53, 172, 226; 8 (Stephen Kuina) at ¶4, 5; 9 (Stephen Kuina) at 154-157; 3 (Rev. James Kuong Ninrew) at ¶¶2-5; 1 (Rev. Matthew Mathiang Deang) at ¶5; 12 (Rev. Matthew) at 249-251; 4 (Rev. James) at 28-29, 51, 68-69, at 109-110; 121 (Riak Dep. Tr.) at 50:18-52-14; 55:9-56:3;11(Chief Tunguar) at 53, 145-147, 153,

rebel groups in the area of the attacks.[54] J.A. ___. It is apparent from their declarations and other record evidence that each of the Plaintiffs lived in the middle of a war zone and had a sufficient basis to make these statements. There was no evidence that any other group was involved in such attacks. A Court is not permitted to disregard Plaintiffs' sworn testimony that they were attacked by Government forces. This is a credibility determination to be made only by the jury. *See, e.g., Jaegly v. Couch*, 439 F.3d 149, 151 (2d Cir. 2006).

B. The District Court Erred by Excluding Whole Categories of Admissible Evidence.

In declaring that Plaintiffs lacked "admissible" evidence in support of their claims, the District Court erred in two ways: (1) it erred by utilizing an improper procedure for handling evidentiary issues; and (2) it erred in holding inadmissible, evidence that was in fact admissible. The procedural issue is one of law that is reviewable *de novo*. The second issue, whether a piece of evidence is admissible, is reviewed to determine whether it is "manifestly erroneous." *Raskin v. Wyatt*

172, 226; 10 (Chief Tunguar) at ¶¶2-5; 22 (Chief Chiek Jang) at ¶5 and 8-9; 14 (Chief Thomas Malual Kap) at ¶2-3, 7; 18 (Chief Patai) at ¶2-5; 16 (Puok Bol) at ¶4; (Puok Bol) at 57, 63, 74, 75-78, 80, 92); 7 (Stephen Hoth) at 209; 2 (Rev. Matthew) at 25, 173-75, 251, 460-61; 120 (Chief Malual) at 10-11, 26-31, 37-38, 40-42, 64-65, 79 103-105; (Chief Malual) ¶12-13; 104 (Chief Mading) at ¶¶2-3, 6-12; 5 (Fatuma Nyawang) at 75-77; 94-95.

[54] J.A.___. *D'Avino* Exhs. 13 (Luka Ayuol) at 34:25-35:3; 66:10-22; 12 (Luka Ayuol) at ¶26; 20 (Chief Peter) at 113, 114; 4 (Rev. James) at 146-151; 11 (Chief Tunguar) at 147-48; 8 (Stephen Kuina) ¶7; 22 (Chief Gatluak) at ¶14; 14 (Chief Thomas) at ¶10; 18 (Chief Patai) ¶6-7; 19 (Chief Patai) at 229; 16 (Puok Bol) at ¶5; 104 (Chief Mading) at ¶12; 5 (Fatuma Nyawang) at 75:13-76:8; 27 (Kwong Danhier) at ¶11.

Company, 125 F. 3d 55, 65-66 (2d Cir. 1997). This standard is usually applied when analyzing a district court's ruling as to specific, identified pieces of evidence; for example, in *Raskin*, this standard was used to review the district court's exclusion of a specific report of an expert. *Id.* Here, as explained more fully below, the Court made sweeping statements that Plaintiffs presented no admissible evidence in support of their claims, and these statements were manifestly erroneous – both if applied to specific pieces of Plaintiffs' evidence (as should have occurred), and if applied on a wholesale basis to entire, unspecified portions of Plaintiffs' evidence (as actually did occur).

1. The Erroneous Exclusion of Entire Categories of Evidence Based Only on Talisman's Broad Sweeping Evidentiary Objections Denied Plaintiffs the Opportunity to Adequately Contest the Objections.

Talisman's objections to the admissibility of Plaintiffs' evidence lack the specificity required by the Federal Rules of Evidence. Such broad sweeping contentions leave Plaintiffs unable to ascertain or respond to the grounds upon which these objections are made. The Court committed plain error in excluding Plaintiffs' evidence in its summary judgment analysis, instead of viewing Talisman's general objections as a waiver. To illustrate, each of Talisman's evidentiary objections, with very few exceptions, are supported by nothing further than the contention that "[t]here is no admissible evidence . . . ."[55] Although

[55] Such sweeping evidentiary objections appear, without any further support or specificity, in Talisman's Memorandum in Support of its Motion for Summary Judgment (Docket No. 304) at 25, 29-31, 34, 35, 37-42, 44, 46-49, 56, 57, 61, 62.

Plaintiffs produced an enormous body of evidence in opposition to the motion, Talisman simply never proffered specific evidentiary objections explaining why the evidence Plaintiff relies upon is inadmissible.[56] In the absence of specific objections, Plaintiffs' evidence should have been admitted. *United States v. McDermott,* 245 F.3d 133, 141 (2d Cir.2001) ("Under Rule 103(a)(1) of the Federal Rules of Evidence, a party must make a timely and specific objection to a ruling of evidence."); *United States v. Carson*, 52 F.3d 1173, 1187 (2d. Cir. 1995).

This error was particularly harmful to Plaintiffs in this case because of both the volume of the evidence presented and the fact that there were many responses available to Plaintiffs, including exceptions to the hearsay rule, had specific objections been made.

In deciding the motion, the Court simply accepted Talisman's claim that none of Plaintiffs' evidence was admissible without identifying the specific pieces of evidence being challenged and any specific objections thereto. The Court did not issue specific rulings on evidentiary objections and provided no procedural opportunity for the Plaintiffs to refute specific objections. Thus, Plaintiffs were denied the opportunity to demonstrate that there were grounds for admissibility (*e.g.*, exceptions to the hearsay rule).

To be sure, the evidentiary issues in this case are voluminous and complex.

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[56] Talisman did move to prevent Plaintiffs' experts from testifying in accordance with their reports, but the Court never ruled on these motions, or on Plaintiffs' motions to exclude Talisman's experts.

However, this made the necessity of some procedure for the consideration of specific objections and responses necessary. Courts have recognized that making complex evidentiary rulings may be problematic in the context of a summary judgment motion, especially where there is no hearing, and the witnesses do not actually appear. *See, e.g., Halbrook v. Reichold Chemicals, Inc.*, 735 F. Supp. 121, 128 (S.D.N.Y. 1990) (complex evidentiary rulings involving exceptions to the hearsay rule best resolved on a full record, not on summary judgment).

2. The District Court Erred in Finding Admissions of a Party Opponent to Be Inadmissable Hearsay.

The Court commented 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." *Talisman III*, 453 F. Supp. 2d at 673 n.80. This statement is erroneous and reveals the categorical error the Court made in considering Talisman's internal documents. Generally speaking, the security reports contain two types of information, both of which are admissible.

First, the security reports contain the first hand eyewitness descriptions of what the authors observed. The primary evidence in this category relates to the usage of Heglig and Unity Airstrips by Sudanese military forces and military aircraft, including high-altitude bombers and helicopter gunships. These statements are clearly admissible. The second category of information is what the authors learned based on their investigations and were presented to their readers as factual. J.A.___. *D'Avino,* Exh. 101.131, at TE0520993 ("It is stressed that our

reports state only what we know and no conjecture."). As discussed later in this brief, the authors of this report are employees or agents of Talisman. Therefore, their reports are admissible under Rule 801 (d)(2)(D), whether or not they had personal knowledge of the matters contained in the reports. *Blackburn v. United Parcel Service, Inc.*, 179 F.3d 81, 96 (3d Cir. 1999).

There is considerable evidence supporting Plaintiffs' claims contained in documents generated by Talisman's officers, agents, and employees, in writings done before litigation commenced, as well as in deposition testimony. In particular, these documents, especially security reports, contained admissions that the GOS was systematically bombing civilians in the concession area and that Talisman was providing assistance to this effort, including the use of the joint venture's air fields at Heglig and Unity. SOF, § (C)(4). Plaintiffs were entitled to present to a jury these and other admissions in the security reports and to have the jury assess, in the context of the entire evidentiary picture, what inferences to draw from these statements.

For example, Talisman secondee Ralph Capeling[57] proposed that the Heglig airstrip be upgraded and used for military purposes:

> proposing that military relocate the main base of operations to Unity after strip is upgraded to facilitate paving of Heglig strip. Also propose that we turn over some surplus (ex CPEEC) camp facilities at

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[57] Capeling served as the General Manager of TGNBV in Khartoum. J.A.___. *D'Avino*, Exh 38, at 51:4-8.

Unity over to GOS Army with a view to establishing a stronger presence further south with better infrastructure and support – they need a better base.

J.A.___. *D'Avino*, Exh. 101.110, at TE0427763. Capeling's statement was made during the time that he was an agent and secondee of Talisman and involved matters--operational activities within the concession area--clearly within the scope of his employment or agency. The statements, reports, and other materials generated by employees seconded from the parent Talisman, or generated by TGNBV, or other agents, including GNPOC, are admissions admissible under Fed. R. Evid. 801(d)(2)(D).

3. The District Court Erred in Finding Official and Other Public Documents Inadmissible.

Plaintiffs also relied on documents and statements in documents that were admissible under the hearsay exception for reports of public agencies. Fed. R. Evid. 803(8)(c). Under this rule, the proffered evidence is presumed to be admissible so long as the evidence "(1) contain[s] factual findings, and (2) is based upon an investigation made pursuant to legal authority." *Bridgeway Corp. v. Citibank*, 201 F.3d 134, 143 (2d Cir. 2000). The Court erred by excluding these official reports, including the Congressional findings contained in the Sudan Peace Act, 50 U.S.C. § 1701.

The Sudan Peace Act, as well as its factual findings, is admissible under Rule 803(8)(c) to establish that a genocide was occurring in Sudan. J.A.___.

D'Avino, 28 (Norton Decl.); 103 (Middleton Decl.); 57 (Sudan Peace Act, Section 2(10)); 116 (Mezhoud Expert Report at 8-9). In *Aircraft Corp., v. Rainey*, 488 U.S. 153, 170 (1988), the Supreme Court held that Rule 803 includes both "factual findings" and the "opinions" that accompany these findings. *See also Gentile v. County of Suffolk*, 926 F.2d 142, 148 (2d Cir. 1991) (the "prevailing law" on the question of admissibility of governmental reports, "indicates that admissibility of evidence of this sort is generally favored").

The Harker Report is also admissible under this exception, as the investigation was made pursuant to a legal mandate between the Sudanese Minister of Foreign Affairs and the Canadian Minister of Foreign Affairs, Lloyd Axworthy, which provided that each country would initiate an Assessment Mission that would independently investigate the human rights situation in Sudan. J.A.___. *D'Avino*, Exh. 94, at 1. The resulting Report contains factual findings regarding the human rights situation in Sudan and should have been found admissible. *See, e.g., Jama v. INS*, 334 F. Supp. 2d 662, 678 (D.N.J. 2004).

4. The District Court Erred in Ignoring Expert Reports

The District Court ignored the expert reports submitted by Plaintiffs all of which presented evidence of Talisman's connection to the human rights violations Plaintiffs suffered.[58]

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[58] Although there were various *Daubert* challenges to Plaintiffs' experts, the Court did not rule on these motions. These expert reports should have been considered in support of Plaintiffs' claims below.

For example, the Goldberg report contained Plaintiffs' expert opinion regarding the financial relationship between oil revenues and military expansion. The report cites data that the Court deemed inadmissible hearsay. However, the Second Circuit has "repeatedly held that expert testimony... can, under certain conditions, be based on hearsay and evidence not admitted at trial." *United States. v. Feliciano*, 223 F.3d 102, 121 (2d Cir. 2000). Expert witnesses can testify to opinions based on hearsay or other inadmissible evidence, if experts in the field reasonably rely on such evidence in forming their opinions." *United States v. Locascio*, 6 F.3d 924, 938 (2d Cir.1993). There is little question that expert testimony as to facts and circumstances in a conflict ridden region routinely and reasonably rely upon NGO and interest group reports in the course of their duties.

Moreover, even if the expert "opinion is not evidence of the [financial] relationship," as the District Court opined, expert opinion can raise a material issue of fact if it is backed up by specific facts. *Cummiskey v. Chandris,*719 F.Supp 1183, 1189 (S.D.N.Y. 1989). Indeed, "the fact that [the expert witness] relied upon inadmissible evidence is . . . less an issue of admissibility [of the expert testimony] for the court, than an issue of credibility for the jury." *Locascio*, 6 F.3d at 938.

Finally, the opinion raised in the expert report goes to evidence of Defendants' intent, and issues of motive and intent are usually inappropriate for disposition on summary judgment. *Litton Industries, Inc. v. Lehman Bros. Kuhn* Loeb, Inc, 976 F.2d 742, 751 (2d Cir. 1984). The District Court should have taken

into account all of the evidence and opinions presented in Plaintiffs' expert reports in deciding the summary judgment motion.

5. The Exclusion of the Norton Declaration.

The District Court also erred in excluding the declaration of Robert Norton. Norton served as the head of security for Arakis in the Sudan from 1994 to 1998. In excluding his declaration the Court stated that a witness may not use a later declaration to contradict deposition testimony in an effort to defeat a motion for summary judgment. *Talisman III*, 453 F. Supp. 2d. at 647 n.11. However, in this case, Norton's declaration did not contradict his substantive testimony about his conversation with Talisman Vice President Nigel Hares and should have been admitted.

Norton's declaration asserts that he explained to Hares that before any oil development work was done in a new area, the Sudanese military "cleared" the proposed work area of inhabitants to create a "safety zone." At his deposition, Norton had stated that he did not "specifically recall" the conversation with Hares and denied having personal knowledge of the Sudanese military committing human rights violations against civilians. This was not the kind of inconsistency permitting the Court to exclude this declaration. *Rollins v. TechSouth*, Inc., 833 F.2d 1525, 1530 (11th Cir. 1987) (every failure of memory or variance in testimony cannot be used to exclude testimony). Moreover, neither Norton, a disinterested witness, nor Plaintiffs had any opportunity to address the alleged inconsistency the District Court perceived. *See Hayes v. New York City Dept. of*

Corrections, 84 F.3d 614, 620 (2d Cir. 1996).

II. PLAINTIFFS SUFFERED WAR CRIMES, CRIMES AGAINST HUMANITY, AND GENOCIDE AT THE HANDS OF THE GOVERNMENT OF SUDAN.

A. Introduction

The District Court's opinion does not appear to dispute that there is ample evidence in the record supporting Plaintiffs' claims that the GOS subjected them to war crimes, crimes against humanity, and genocide. In the event that there is doubt about that, the record evidence set forth in the Statement of Facts about the attacks on Plaintiffs' supports all three claims made by Plaintiffs in this case. SOF, §§ (B)(2).

B. Plaintiffs Were Victims of War Crimes.

1. The Elements of War Crimes

As the Court recognized, it is uncontested that the Government of Sudan's attacks on civilians in undefended villages constitute war crimes. *Talisman III*, 453 F. Supp. 2 at 677. There is liability for such attacks when the attack: (1) is committed within the context of an armed conflict; (2) has a close connection to the armed conflict; and (3) is committed against persons taking no active part in hostilities. *See Prosecutor v. Tadic*, Case No. IT-94-1-T, para. 614 (Trial Chamber, May 7, 1997).

2. Plaintiffs' Evidence.

a. Attacks on Civilians

As noted, the District Court recognized that it is uncontested "that the Government's military attacks on civilians in undefended villages constitute war crimes." *Talisman III*, 453 F. Supp. 2d at 671. The record in this case is replete with evidence of widespread attacks on civilians in and adjacent to the concession area. *See* SOF, § (B)(2).[59]

b. Connection to Armed Conflict

While "there is no necessary correlation between the area where the fighting is taking place and the geographical reach of the laws of war,"[60] Plaintiffs have introduced evidence establishing that armed conflict was occurring in and around the concession area at the relevant times. *D'Avino,* Exh. ___.

c. Committed Against Persons Taking No Part in Hostilities

It is undisputed that each of the individual Plaintiffs was a civilian who had taken no part in hostilities. J.A. ___. *Whinston*, Exhs. 11; 15; 17; 19; 21; 25.

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[59] Plaintiffs do not have to prove that an attack was directed at civilians. All Plaintiffs need to establish is that they were injured in the course of indiscriminate attacks. *See Prosecutor v. Galic*, IT-98-29-T, ¶57 (Trial Chamber, Dec. 5, 2003) ("[I]ndiscriminate attacks, that is to say, attacks which strike civilians or civilian objects and military objectives without distinction, may qualify as direct attacks against civilians.").

[60] *Kunarac, Kovac, and Vokovic*, IT-96-23 & 2311 ¶ 57 (Appeals Chamber) (June 12, 2002).

3. The GOS Caused Plaintiffs' Injuries.

The evidence in the record makes clear that it was the GOS military and GOS-controlled militias that were attacking civilian villages in and near the concession area. There is no evidence that some other party was engaging in these attacks. Plaintiffs were entitled to the inference from all of the evidence in the record that the GOS was responsible for the attacks on them.

The Court erred when it decided that some Plaintiffs had not introduced proof that the GOS was responsible for the attacks on them. As set forth in § I, *supra*, the District Court ignored the admissibility of Plaintiffs' own testimony that they were attacked by GOS controlled forces and it discounted the mountain of circumstantial evidence about the pattern of GOS attacks in the concession area. This evidence was sufficient to allow a jury to decide this issue. The same causation analysis applies to Plaintiffs crimes against humanity and genocide claims. *See* §§ II (C) and (D), *infra*.

C. Plaintiffs Were Victims of Crimes Against Humanity

1. The Elements of Crimes Against Humanity

Plaintiffs must demonstrate: (1) a violation of one of the enumerated acts (including murder, torture, and forced displacement); (2) committed as part of a widespread *or* systematic attack;[61] (3) directed against a civilian population; and

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[61] The Court misstated the definition of crimes against humanity, defining it as acts that are committed as part of a "widespread *and* systematic" attack against a civilian population. *Talisman III*, 453 F. Supp. 2d at 670 (emphasis added). The

(4) committed with knowledge of the attack. *See Wiwa v. Royal Dutch Petroleum Co.*, 2002 U.S. Dist. LEXIS 3293 (S.D.N.Y. 2002); *Doe v. Saravia*, 348 F. Supp. 2d. 1112, 1156 (E.D. Cal. 2004).

2. Plaintiffs Evidence.

a. Enumerated Acts

Plaintiffs in this case were victims of a number of violations of international law, each committed in the course of a widespread or systematic attack against the non-Muslim African population of Southern Sudan. These violations include forcible displacement, extrajudicial killing, and torture,[62] all of which are well-established violations giving rise to claims for crimes against humanity.

b. Widespread or Systematic Attacks

The GOS's attacks against civilians in the concession area were

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correct definition of crimes against humanity is acts that are committed as part of a "widespread *or* systematic" attack against a civilian population. *See Prosecutor v. Akayesu*, ICTR-96-4-T, ¶ 579 (Trial Chamber, Sept. 2, 1998) ("The act can be part of a widespread or systematic attack and need not be a part of both."). Plaintiffs provided sufficient evidence that the GOS' attacks were both. The Court did not appear to dispute that Plaintiffs' evidence meets its more restrictive test. 453 F. Supp. 2d at 639-40.

[62] J.A.___. *D'Avino,* Exhs. 13 (Luka Ayuol); 12 (Luka Ayuol); 20 (Chief Peter); 32 (Pui); 21 (Chief Peter); 6 (Nyot Tot ; 8 (Stephen Kuina); 9 (Stephen Kuina); 3 (Rev. James Kuong Ninrew); 1 (Rev. Matthew Mathiang Deang); 12 (Rev. Matthew); 121 (Riak); 11 (Chief Tunguar); 10 (Chief Tunguar); 22 (Chief Chiek Jang);(Chief Thomas Malual Kap); 14 (Chief Thomas May 9, 2006 Decl.); 4 (Rev. James); 14 (Chief Thomas);18 (Chief Patai); 19 (Chief Patai); 16 (Puok Bol); 17 (Puok Bol); 7 (Stephen Hoth); 4 (Rev. James); 104 (Chief Mading); 5 (Fatuma Nyawang); 32 (James Pui);41 (Gatduel) .

indisputably widespread.[63] "A crime may be widespread [where there is a] cumulative effect of a series of inhumane acts." *Kordic/Cerkez*, IT-95-14/2-T at ¶ 179; *see also Talisman III*, 453 F. Supp. 2d 670 ("A widespread attack is one conducted on a large scale against many people."). During Talisman's tenure in Sudan, between 250,000 and 400,000 Dinka and Nuer people were forcibly displaced during Talisman's tenure as a result of these attacks. SOF § (5)(C).

The attacks were also "systematic" in that they targeted the non-Muslim civilian population in the south. "Systematic" refers to "the organized nature of the acts of violence and the improbability of their random occurrence." *Kordic/ Cerkez*, No. IT-95-14/2-A , ¶ 94 (Appeals Chamber, Dec. 17, 2004); *see also Talisman III*, 453 F. Supp. 2d at 670 ("[A] systematic attack is an organized effort to engage in the violence."). The evidence in the record is that the GOS systematically targeted civilian villages in areas in and around the concession area and forcibly displaced hundreds of thousands of civilians and razed dozens of villages to the ground. SOF, § (B)(2).[64]

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[63] The Court erroneously limited Plaintiffs' crimes against humanity claims to "targeted attacks by the military on civilians." *Talisman III*, 453 F. Supp. 2d at 639. However, Plaintiffs have always contended that these attacks were carried out by both the military and government-sponsored militias and there was evidence that Talisman knew that the GOS used militias in carrying out its operations in the concession area. SOF, §§ (B)(2)(b) and (C)(4).

[64] The Court erred in finding that "while one plaintiff has alleged torture, the plaintiffs have submitted no evidence to permit a finding that the torture was part of a widespread, systematic campaign." *Talisman III*, 453 F. Supp. 2d at 670. Once Plaintiffs establish the existence of widespread or systematic attacks, as they have done in this case, the perpetrators are liable even for a single act of torture or wrongful death if it was committed in the course of a widespread or systematic

c. Directed at a Civilian Population

The term "civilian population" has been interpreted broadly.[65] Indisputably, Plaintiffs were part of a "civilian population."

d. Knowledge of the Attack

The record evidence is that the GOS committed these acts with knowledge of the widespread or systematic attacks. Docket No. 362, Biro Expert Report, Docket No. 365, Johnson Expert Report, J.A.___. *D'Avino,* Exh. 31. In fact, the evidence is that these attacks were a part of a plan to clear the concession area for the purpose of oil exploration and development. *See* SOF, § (C)(4).

D. Plaintiffs Were Victims of Genocide.

1. The Elements of Genocide

A claim for genocide is characterized by the commission of one or more of the enumerated acts (*e.g.* murder or other serious bodily or mental harm), committed with the specific intent to destroy, in whole or in part, a national, ethnical, racial, or religious group. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, art. 2, 102 Stat. 3045, 3045, 78 U.N.T.S.

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attacks. *See Limaj,* ICTY-03-66-T, para. 189 (Nov. 30, 2005) ("Only the attack, not the individual acts of the accused, must be widespread or systematic.").

[65] *See* Gueneal Mettraux, *Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda,* 43 Harv. Int'l L.J. 237, 254 (2002) (emphasis added).

77, 280.[66]

Congress made a finding of an ongoing genocide in Sudan in the Sudan Peace Act, 50 U.S.C. § 1701. The Court erred by holding that the Congressional finding was inadmissable, *see* § I, and that plaintiffs' claims were somehow dependent on an official finding of genocide. *Talismam III*, 453 F. Supp. 2d at 670.

No ATS case has required an official finding of genocide. *See, e.g., Kadic v. Karadzic,* 70 F.3d 232 (2d Cir. 1995). There are many reasons why governments are reluctant to label human rights violations as genocide, not the least of which is a reluctance to act on such a finding.

The Court also erred by failing to recognize forcible displacement as an act of genocide, when it concluded that "plaintiffs have not pointed to evidence that Talisman knew or should have understood . . . that the Government was engaged in genocide, *as opposed to the forcible displacement of a population*," *Talisman III*, 453 F. Supp. 2d at 669-670. Forcible displacement is both a method of a group's destruction giving rise to a direct claim for genocide and, as described below, evidence of genocidal intent. Forcible displacement of the population, when it involves the separation of its members, has been recognized as leading to the physical and biological destruction of the group. *Prosecutor v. Blagojevic/Jokic*, IT-02-60¶ 666 (Trial Chamber, Jan, 17, 2005).

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[66] The law set out in the [Genocide] Convention reflects customary international law. *Kadic v. Karadzic*, 70 F.3d 232, 241 (2d Cir. 1995).

Plaintiffs submitted evidence to establish that their forced displacement occurred in conjunction with extrajudicial killing, rape, kidnaping, enslavement,[67] thereby establishing that the forcible displacement provided the GOS with, yet, "an additional means" of effectuating its genocidal policies. *Prosecutor v. Krstic*, IT-98-33 ¶ 31 (Appeals Chamber, April 19, 2004) (Forcible displacement is "an additional means by which to ensure the physical destruction of [a group of people].").

2. Plaintiffs' Evidence

a. Genocidal Acts

There is sufficient evidence in the record that Plaintiffs were the victims of genocide.[68] J.A. __. All of the acts committed against Plaintiffs fit squarely within the definition of genocide. The GOS's killing and forced displacement of thousands of villagers is the most obvious act of genocide. This was part of the GOS strategy to rid the area of all non-Muslim African population and re-settle the area with Muslims from the North to deprive the non-Muslim, African population of access to and any right to the oil revenue permanently.

b. Genocidal Intent

Plaintiffs also established the requisite genocidal intent. "[Genocidal intent may] be inferred from a number of facts and circumstances, such as the general

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[67] *See*, note 63, *supra*.

[68] *See* note 64, *supra*.

context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership of a particular group, or the repetition of destructive and discriminatory acts." *Talisman Class I*, 226 F.R.D. at 479 quoting *Prosecutor v. Jelisec*, No. IT-95-10-A, para. 101 (ICTY Appeals Chamber, July 5, 2001. The GOS's continuous, widespread and systematic targeting of the non-Muslims in the South is sufficient to infer genocidal intent in this procedural context. J.A.___. *D'Avino,* Exh. 45, at TE0298956 ("the government has sought to promote a new Islamic revival and play down the old sectarian identities. It has called the civil war a *Jihad* and declared that those who are killed achieve immediate martyrdom.")

In addition, while "the existence of a plan or policy is not a legal ingredient of the crime of genocide[,] . . . the existence of such a plan may help to establish that the accused possessed the requisite genocidal intent." 226 F.R.D. at 479. During the relevant period, 1997-2003, the Government of Sudan prosecuted a "jihad" aimed at the forced Islamization of non-Muslims in Southern Sudan. J.A. ___. The forcible transfer of a population also provides important evidence of genocidal intent. *See Prosecutor v. Krstic*, IT-98-33 ¶¶ 31, 33 (Appeals Chamber, Apr. 19, 2004).

III. THE RECORD EVIDENCE CREATED GENUINE ISSUES OF MATERIAL FACT ABOUT TALISMAN'S LIABILITY TO PLAINTIFFS ON SEVERAL THEORIES.

The heart of the District Court's order was a rejection of Plaintiffs' theories of liability connecting Talisman to the human rights violations Plaintiffs' suffered at the hands of the GOS military and militias in large part because the Court refused to attribute the acts of Talisman's agents, including its subsidiaries and GNPOC, and employees to Talisman. While Plaintiffs have already produced evidence establishing that Talisman directly conspired to commit and aided and abetted the GOS' in committing human rights violations,[69] Talisman is also vicariously liable for the acts of many agents and sub-agents, as well as its employees under various theories of liability.

In this section, Plaintiffs address the legal errors in the District Court's analysis and demonstrate why the record evidence supports each of Plaintiffs' theories of liability against Talisman.

Before addressing their theories of liability, Plaintiffs set forth the reasons why the District Court erred by refusing to employ a federal common law analysis to determine the availability and scope of Plaintiffs' theories of liability. After

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[69] Contrary to the District Court's statement, *Talisman III*, 453 F. Supp. 2d at 662, Plaintiffs never waived their direct liability claims and have always contended that Talisman is directly responsible for its actions in aiding and abetting and conspiring to commit the human rights violations in this case. To the extent then that aiding and abetting and conspiracy may be considered direct liability claims, Plaintiffs have not waived their direct liability claims.

Sosa, federal common law analysis, which is not limited to international law, should govern the theories of liability and other issues in ATS cases.

The District Court erred by refusing to consider Plaintiffs' agency, joint venture and alter ego theories. Under notice pleading rules, Plaintiffs were not required to plead these theories of liability as separate claims. Plaintiffs were entitled to go to trial based on any legal theory arising out of the facts pleaded in the complaint and certainly any facts uncovered by the extensive discovery in this case. *See Caputo v. Pfizer, Inc.*, 367 F.3d 181, 191 (2d Cir. 2001). By refusing to consider agency, joint venture or alter ego theories, the District Court imposed limitations on the Plaintiffs not contemplated by the notice pleading required of the federal rules.

A. The District Court Erred in Failing to Apply the Federal Common Law to Plaintiffs' ATS Claims.

The District Court found that all aspects of Plaintiffs' ATS claims were governed by international law alone. As a result, the Court determined issues like the availability and scope of aiding and abetting and conspiracy liability under international law solely. *Talisman III*, 453 F. Supp. 2d at 666. Other issues like the scope and availability of joint venture and agency liability were determined under a traditional choice of law analysis without giving adequate attention to the national and international interests taken into account in a federal common law analysis. *Id.*, at 681-83.

The Court's approach is inconsistent with Sosa. The Supreme Court in *Sosa*

held that the ATS "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.

After *Sosa*, courts are required to engage in a bifurcated analysis to determine whether Plaintiffs have established a claim under the ATS. First, courts are required to look to international law for the elements for the "law of nations" violations actionable under the ATS (*e.g.*, the elements of genocide). Second, courts are required to look to the federal common law to find the rules governing the other aspects of ATS cases.[70]

Several of the Court's errors in this case stem from its rejection of a federal common law analysis. For example, the Court dismissed Plaintiffs' aiding and abetting claims after imposing an intent requirement not recognized in the federal common law (or international law for that matter). The Court also found that conspiracy liability is not available for crimes against humanity or war crimes, based solely on its analysis of international law, despite the fact that conspiracy liability for ATS claims is well-established. Yet another example is the District Court's refusal to apply federal common law principles to Plaintiffs' joint venture, agency, and alter ego theories of liability. Instead, the district court erroneously engaged in a state law choice of law analysis and, as a result, incorrectly

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[70] Even before *Sosa*, the courts employed federal common law to determine many issues in ATS cases. *See, e.g., Abebe-Jira v. Negewo,* 72 F.3d 844, 848 (11th Cir. 1996); *Filartiga v. Pena-Irala*, 577 F. Supp. 860, 863 (E.D.N.Y. 1984).

concluded that Plaintiffs' theories were "futile."

Under a federal common law approach, courts are required to do more than simply look to international law. Courts are to consider to a variety of sources, ranging from historical application to established tort principles.[71] This is the general approach under federal statutes where standards of liability are not specifically provided. *See, e.g., Meyer v. Holley*, 537 U.S. 280, 285 (2003) (principles of vicarious liability apply under Fair Housing Act though the Act "says nothing about vicarious liability.")

Courts engaging in a federal common law inquiry also consider the text and legislative history of analogous statutes[72] or applicable Restatements of law.[73] In this case, the district court considered neither. A federal common law inquiry also properly draws on principles of customary international law from the international tribunals[74] and general principles of law common to all legal systems but it is not based exclusively on international law, nor must such theories meet the historical

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[71] *See, e.g., Mujica v. Occidental Petroleum*, 381 F. Supp. 2d 1164, 1174, n. 6 (C.D. Cal. 2005).

[72] *Doe v. Saravia*, 348 F. Supp. 2d 1112 at 1149.

[73] *See Sarei v. Rio Tinto*, 456 F.3d 1069, 1078 (9th Cir. 2006) (Restatement (Second) of Agency).

[74] *See Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1158-59 (11th Cir. 2005); *Mehinovic*, 198 F. Supp. 2d at 1356 (relying on *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, ¶¶ 192-249 (Dec. 10, 1998) in support its definition of aiding and abetting as knowing, practical assistance or encouragement which has a substantial effect on the perpetration of the crime).

paradigm test set forth in the *Sosa* decision.[75] The District Court's reliance on international law as the sole source of law for the relevant issues in this case is inconsistent with *Sosa* and requires reversal.

B. Plaintiffs' Evidence Created a Genuine Issue of Material Fact Concerning Talisman's Liability For Aiding and Abetting.

1. Introduction

Plaintiffs presented a plethora of admissible evidence that Talisman, acting directly and through its agents and employees, provided knowing, practical assistance or encouragement to the GOS and GOS-controlled militias who committed the human rights violations Plaintiffs suffered. *See* SOF, §§ (C)(4) and (5). This was all Plaintiffs were required to do in order to defeat Talisman's motion.

The District Court made a series of errors in rejecting this theory of liability. First, the Court improperly failed to take into account a wide range of acts of assistance because it found that they were ordinary activities that an oil company might engage in without any necessary criminal content. There is no such exclusion from civil aiding and abetting liability. Even otherwise ordinary activities constitute aiding and abetting when a defendant knows that this

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[75] Restatement (Third) of Foreign Relations § 102 (1) (c) (providing that [a] rule of international law is one that has been accepted as such by the international community of states . . . by derivation from general principles common to the major legal systems of the world.").

assistance is contributing to human rights violations. Talisman was not simply "doing business" in Sudan; it's acts were directly and substantially contributing to the human rights violations that destroyed thousands of lives.

Second, the Court erred by imposing a specific intent requirement for aiding and abetting. There is no such requirement under federal common law or in international law. All that is required is that the defendant know that its activities are providing substantial assistance to the perpetrators.

2. The District Court Erred in Importing a Specific Intent Requirement for Aiding and Abetting Liability Not Found in Either the Federal Common Law or International Law.

There is no specific intent element for aiding and abetting liability under federal common law or international law. The *mens rea* requirement is knowledge and not specific intent. This standard is reflected in Section 876 (b) of the Restatement (Second) of Torts, which provides for aider and abettor liability where the defendant (a) "does a tortious act in concert with another . . .", or (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement . . ." or (c) "gives substantial assistance to the other in accomplishing a tortious result. . . ." *See, Halberstam v. Welch*, 705 F.2d 432, 477-78 (D.C. Cir. 1983).

This standard is also virtually identical to the standard articulated by the ICTY in *Prosecutor v. Furundzija*, IT-95-17/1-T, ¶¶ 192-234 (Dec. 10, 1998), which was developed in the wake of a comprehensive analysis of international

case law and international instruments. Aiding and abetting under this standard requires as the *actus reus* "practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime," *Id.* at ¶ 235, and as the *mens rea* "knowledge that [the accomplice's] actions will assist the perpetrator in the commission of the crime." *Id.* at ¶ 245. *See also Mehinovic v. Vuckovic*, 198 F. Supp. 2d at 1356.

The District Court erred in requiring Plaintiffs to establish 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." *Talisman III*, 453 F. Supp. 2d at 668.

This new "intent" requirement is at odds with established law. Indeed, Judge Schwartz applied the accepted definition of aiding and abetting liability at the beginning of this case. *Talisman I*, 244 F. Supp. 2d 323, citing *United States v. Krauch*, 8 Tr. War Crim. 1169 (1948); *Prosecutor v. Tadic* (Case No. IT-94-1-T), Opinion and Judgment, May 7, 1997, at ¶ 677. The sources the Court relied on in creating this new standard simply don't support such a radical departure from existing law. The ICTY case the Court relied on is actually explicit that the *mens rea* requirement for aiding and abetting is knowledge. *Prosecutor v .Vasiljevic,* No. IT-98-32-A at ¶ 102; *See also Prosecutor v. Furundjiza*, ¶ 245 (Trial Chamber) (Dec. 10, 1998) ("[I]t is not necessary for the accomplice to share the *mens rea* of the perpetrator, in the sense of positive intention to commit the crime.").

The Court relied on language in *Vasiljevic*, which stated that the acts at issue must be "specifically directed" toward assisting the crime, gave rise to an intent requirement. *See Talisman III*, 453 F. Supp. 2d at 668. However, this language refers to the actus reus of aiding and abetting, not a mens rea element of specific intent. Indeed, a subsequent ICTY case confirms that the *Vasiljevic* judgment held that "knowledge on the part of the aider and abettor that his acts assist in the commission of the principal perpetrator's crime suffices for the *mens rea* requirement." *Prosecutor v. Blaskic*, No IT-95-14-A at date: Jul. 29, 2004 ¶ 49.

The District Court also relied on the Rome Statute establishing the International Criminal Court for its new element. *See Talisman III*, 453 F. Supp. 2d at 666.[76] However, the Rome Statute adopted this requirement for its purposes without any intent of altering customary international law on this subject. Indeed, the Rome Statute, by its very terms makes clear that the definitions in the Rome Statute "shall not affect the characterization of any conduct as criminal under international law independently of this statute," *Rome Statute,* art. 22(3). Thus, the Rome Statute does not alter established federal common law or international law

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[76] The Rome Statute of the International Criminal Court, UN Doc. A/CONF. 183/9; 37ILM 1002) (1998); 2187 UNTS 90, Art. 30 ("Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime . . . only if the material elements are committed with intent and knowledge."). The ICC has yet to adjudicate any cases, so it is unknown whether the "intent' language in Article 30 will be interpreted as a specific intent requirement or a general intent requirement.

requirements for aiding and abetting.

Finally, the Court relied on federal criminal law for its specific intent requirement. *Talisman III*, 453 F. Supp. 2d at 668. However, the ATS is a civil, not a criminal, statute. It provides a civil remedy for violations of the law of nations that many involve criminal acts, just as a wrongful death statute provides a civil remedy for violations of state law that involve criminal acts, but this does not call for an alteration of accepted principles of civil aiding and abetting liability.

Since Nuremberg, individuals have been found liable for aiding and abetting when they knew, but did not intend, that their actions assisted in the violation of international law.[77] With the exception of the District Court here, no court to date has altered the well-established aiding and abetting standard in ATS cases to include an "intent" element and this Court should not be the first to do so. Under the correct standard–that a defendant will be liable if he provides knowing,[78] practical assistance or encouragement, which has a substantial effect on the perpetration of the crime.

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[77] *See United States v. Ohlendorf*, 4 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10 ("Tr. War Crim.") 1, 569 (1949); *United States v. Flick*, 6 Tr. War Crim., 1217, 1222 (1952).

[78] Furthermore, Plaintiffs need only prove that Defendants had constructive knowledge that their actions would assist in the specific violations. *Talisman I*, 244 F. Supp. 2d at 324; *Mehinovic v. Vuckovic*, 198 F. Supp. 2d at 1354 n. 50, citing *Prosecutor v. Kayeshima*, No. ICTR-95-1-T, ¶ 133 (Trial Chamber, May 21, 1999).

3. The District Court Erred by Requiring Talisman's "Acts of Substantial Assistance" to be Inherently Criminal.

In addition to imposing erroneous specific intent and knowledge requirements the District Court also imposed a requirement that the acts of "substantial assistance" have to be inherently criminal. *See Talisman III*, 453 F. Supp. 2d at 672 ("The activities which the plaintiffs identify as assisting the Government in committing crimes against humanity and war crimes generally accompany any natural resource development business or the creation of any industry.").

The District Court's finding that otherwise ordinary development activities cannot constitute aiding and abetting–is deeply flawed. Acts of substantial assistance need not be wrongful in themselves.[79] Perfectly normal business activities may become wrongful once a defendant knows that the activities provide substantial assistance to the perpetrators of war crimes, crimes against humanity or genocide.[80] Otherwise, normal business activities (*i.e.* expanding a corporate airstrip) take on a different character if the corporation knows that expanding its

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[79] *See, e.g., JP Morgan Chase Bank v. Winnick*, 406 F. Supp. 2d 247, 257 (S.D.N.Y. 2005) ("The critical test is not . . . whether the alleged aiding and abetting conduct was routine, but whether it made a substantial contribution to the perpetration of the [crime].").

[80] *See, e.g., Zyklon-B Case* (Trial of Bruno Tesch and Two Others), 1 Law Reports of Trials of War Criminals 93, 101 (Brit. Mil. Ct. 1946) (finding defendant liable for selling Zyklon B, an insecticide which could legitimately be used for delousing, to the Nazis knowing that it would be used to kill Jews and others in gas chambers.). Many ATS cases involve the basic form of legitimate business ventures. *See*, e.g., *Sarei v. Rio Tinto, PLC*, 456 F.3d 1069 (9th Cir. 2006).

airstrip will assist a government to annihilate its own citizens.

Thus, Talisman aided and abetted these violations by providing financial and other assistance to the GOS with knowledge that such funds would be used to further their wide-scale violations of international law. *See United States v. Flick*, 6 Trials of War Criminals 1220 (1947) (finding that the defendants could not "reasonably believe" that all of the money they contributed went to the stated purpose of supporting cultural endeavors). This case fits the *Flick* model because Talisman knew that the money it was pouring into security was not needed for legitimate security operations. Talisman knew it was providing financial support for war crimes.[81]

4. Plaintiffs' Evidence.

Plaintiffs provided extensive evidence establishing that Talisman provided knowing, practical assistance or encouragement that had a substantial effect on the perpetration of the abuses Plaintiffs suffered. *See generally,* SOF, §§ (C)(4) and (5).

It was access to the Heglig and Unity airstrips and in related support that permitted the Sudanese military to conduct bombing and helicopter gunship raids on civilian villages in and near the concession area, including plaintiffs' villages. There is no question that Talisman knew that these forces would use their bombers

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[81] *See* J.A.___.Larry O'Sullivan Declaration. *Whinson,* Exh. 22. The Court mistakenly identified Larry O'Sullivan as a GNPOC contractor. *Talisman III*, 453 F. Supp. 2d at 650.

and helicopter gunships to commit human rights violations designed to create a buffer zone for the oil operations in the concession area. Instead of putting a stop to this, Talisman simply continued to provide access to the airfields, all-weather roads, fuel and other logistical support. Allowing the GOS to use these consortium facilities and providing additional logistical assistance to the GOS' bombing campaign is more than enough to constitute an aiding and abetting liability under the ATS.

Plaintiffs introduced sufficient evidence of Talisman's knowledge of the ongoing human rights violations in and near the concession area, SOF, § (C)(4), and of Talisman's responsibility for many acts of substantial assistance to the GOS in connection with these violations, SOF § (C)(5) to have a jury decide Talisman's responsibility for aiding and abetting these violations against them.

5. The District Court's Flawed "Causation" Analysis.

The District Court's "causation" analysis is based on the flawed premise that Plaintiffs have the burden of providing specific proof that Talisman's specific acts of assistance contributed directly to the particular acts that caused their injuries. This theory of causation is wholly unsupported and is inconsistent with basic tort principles.

First, aiding and abetting does not require any showing of causation. The assistance need not be the sole or proximate cause of the perpetrator's actions for liability. *Prosecutor v. Furundzija* Trial Judgment, ¶ 233; *Prosecutor v. Kunarac, et.al.,* IT-96-23 and IT-96-23/1, Trial Judgment (Feb. 22, 2001), ¶ 391.

Rather, it is sufficient that it has a "direct and substantial effect" on the commission of the offense. *Celibici* Judgment, para 345, citing *Prosecutor v. Tadic* Trial Judgment, ¶ 692.

A "direct and substantial effect" will be found where a different course of conduct could have been pursued that would have mitigated or prevented the offense. In the *Einsatzgruppen* Case, for example, the U.S. Military Tribunal at Nuremberg convicted a military officer of aiding and abetting summary executions because he had the power to object to these offenses, yet "chose to let the injustice go uncorrected." *Trial of Otto Ohlendorf and Others (Einsatzgruppen Case)*, 4 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, 1, 572 (1949), in *Prosecutor v. Furundizija,* ¶ 217.

Similarly, in the *Zyklon B Case,* official of a chemical manufacturer were charged with selling poison gas to Aushwitz knowing that the gas would be used to kill prisoners. The British Military Tribual convicted the owner and the second-in-command of the company because they were in a position to influence the sale. *Trial of Bruno Tesch and Two Others (Zyklon B Case),* 1 British Mil. Court, Hamburg, Law Reports, at 93 (1946), cited in *Furundzija,* ¶¶ 222-23. *See also Celibici,* at ¶ 685. *See Talisman I*, 244 F. Supp. 2d at 324.

In its order, the District Court conceded that "three plaintiffs have shown that they were displaced by Government attacks to which GNPOC arguably provided assistance: Yol, Mut, and Chief Tut." *Talisman III,* 453 F. Supp. 2d at 658. Talisman substantially assisted an entire campaign of genocide, crimes

against humanity and war crimes. The Plaintiffs were the victims of that campaign. Talisman knew it was assisting the campaign in significant ways. This is all Plaintiffs needed to show. The District Court's finding that some Plaintiffs have not presented sufficient evidence to find Talisman liable for specific violations is irrelevant, because Plaintiffs have established that Talisman assisted the GOS in committing attacks on civilians in a number of other ways. *See* SOF § (C)(5). Plaintiffs are not required to establish the exact airstrip from which their attacks originated, as the District Court erroneously concluded.

C. The Evidence Created a Genuine Issue of Material Fact About Talisman's Liability for Conspiracy to Commit Human Rights Violations Against Plaintiffs.

1. Conspiracy Liability is Available Under the ATS

As Judge Schwartz found early in this case "[c]oncepts of conspiracy and aiding and abetting are commonplace with respect to . . . allegations . . . such as genocide and war crimes." *Talisman I*, 244 F. Supp. 2d at 321. Here, the District Court erred in finding that international law limits conspiracy liability to genocide and the waging of aggressive wars, thus, limiting Plaintiffs' ATS claims accordingly. *Talisman III,* 453 F. Supp. 2d at 663-66. To the contrary, every federal court to address the issue has found that liability for ATS claims extends to conspiracies, and not one of them has limited such claims to genocide and aggressive warfare. *See Cabello v. Fernanzes-Larios*, 402 F.3d 1148 (11th Cir. 2005) (recognizing conspiracy liability for torture, extra-judicial killing, and

crimes against humanity);[82] *In re Terrorist Attacks on September 11*, 2001, 392 F. Supp. 2d 539, 565 (S.D.N.Y. 2005) (aircraft hijacking); *Hilao v. Estate of Marcos*, 103 F.3d 767, 776 (9th Cir. 1996) (torture, summary execution, and disappearance); *Eastman Kodak Co. v. Kavlin*, 978 F. Supp. 1078, 1091-92 (unlawful arbitrary detention).[83]

Although federal common law governs the availability of civil conspiracy liability under the ATS, the concept of responsibility for violations arising out of a course of agreed-upon conduct is also well-accepted in international law. In international law, defendants may be found liable in "cases involving a common

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[82] The District Court's refusal to follow *Cabello* is based on its incorrect understanding that international law, not federal common law, governs the accomplice liability standards in ATS cases. *Talisman III*, 453 F. Supp. 2d at 665 n.64.

[83] *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006) is not controlling for ATS claims. The issue in *Hamdan* was whether conspiracy to commit crimes against humanity and war crimes constituted *war crimes* for the purpose of providing military commissions with jurisdiction over the defendant. Here, the question is not whether a theory of liability is applicable in a war crimes prosecution, but whether it is appropriate for a civil suit alleging human rights violations. The Supreme Court has specifically rejected reliance on criminal precedents in its analysis of civil conspiracy claims. In *Beck v. Prupis*, 529 U.S. 494, 501, n.6 (2000) the Court rejected the use of criminal conspiracy principles to interpret civil liability under a federal statute. The criminal law was an appropriate source for determining the meaning of the criminal provision but not for understanding "the meaning of a civil cause of action for private injury by reason of such a violation". *Id.* "The obvious source in the common law for the combined meaning of the [substantive offenses and conspiracy liability] is the law of civil conspiracy." *Id. 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 most pertinent authority. The District Court relied on *Hamdan* for its conclusion without the benefit of briefing or argument from the parties, as the decision came down after briefing was completed.

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.[84] Thus, even if this Court accepts that international law must provide the theory of conspiracy liability, the District Court still erred in finding that the principle underlying the Pinkerton Doctrine, that defendants are responsible for the foreseeable consequences of their unlawful agreement, is not found in international law.

This theory of joint criminal enterprise liability is well-established under the jurisprudence of the ICTY, which affirmed the viability of the theory by drawing on long established general principles of international criminal law.[85] Here, Plaintiffs have alleged that Talisman and the GOS engaged in a common design to remove, and indeed did remove, Plaintiffs from their lands. J.A.___. *Whinston,* Exhs. 1, 2, 3,4, 6, 8, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27.

2. Plaintiffs Did Not Waive Their Conspiracy to Commit Genocide Claims.

The District Court mistakenly found that Plaintiffs had waived or

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[84] *See, e.g., Prosecutor v. Tadic*, at 204, 205-19; *Prosecutor v. Vasiljevic*, ¶ 99 (Appeals Chamber) (Feb. 25, 2004) ("While murder may not have been explicitly acknowledged to be part of the common purpose, it was nevertheless foreseeable that the forcible removal of civilians at gunpoint might well result in the deaths of one or more of those civilians.").

[85] *See Tadic*, Case No. IT-94-1-A, at ¶¶ 204, 205-19) (collecting international authority)).

abandoned their conspiracy to commit genocide claims. *Talisman III*, 453 F. Supp. 2d at 665. However, Plaintiffs addressed this argument directly, *see Pls' Opp. Brf*, Section VI (C) and argued specifically that Judge Schwartz had already found that "the concept of complicit liability for conspiracy . . . is well-developed in international law, especially in the specific context of genocide." *Talisman I*, 244 F. Supp. 2d at 322.

There is absolutely nothing in Plaintiffs' opposition papers that would provide any basis for the District Court's finding of waiver. Thus, at a minimum, Plaintiff are entitled to have this claim decided by the District Court. *Talisman III*, 453 F. Supp. 2d at 663 (recognizing conspiracy to commit genocide claims as viable under the ATS).

3. Plaintiffs' Evidence

Plaintiffs need only prove 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,[86] and (3) one of more of the violations was committed by someone who was a member of the conspiracy and acted in furtherance of the conspiracy." *Cabello v. Fernandez-*

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[86] "Genocidal intent" may be inferred from a number of facts and circumstances, such as the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership of a particular group, or the repetition of destructive and discriminatory acts." *Talisman I*, 226 F.R.D. at 479 (quoting *Prosecutor v. Jelisec*, No. IT-95-10-A, ¶ 101 (ICTY Appeals Chamber, July 5, 2001).

Larios, 402 F.3d at 1159, citing *Halberstam v. Welch*, 705 F.2d at 481, 487.

a. The Agreement

The conspiratorial agreement in this case was the agreement to create a buffer zone or *condon sanitaire* to protect the joint venture's oil operations. *See* SOF, § (4)(a). This agreement was made initially between the GOS and Talisman's predecessors and it continued in effect during Talisman's involvement in this project.

b. Talisman Joined the Conspiracy With Knowledge

Talisman joined the conspiracy knowing of at least one of the goals of the conspiracy, the forcible displacement of thousands of civilians from the oil concession area. As set forth in the SOF, § (C)(4), Talisman was fully aware of this buffer zone strategy of clearing out the villagers in the concession area by force and violence. J.A.___. *D'Avino,* Exhs. 28, 29, 30, 36, 37, 102.013, and 103.

Not only did Talisman have knowledge that the agreement provided for the forcible displacement of thousands of non-Muslim Sudanese, but Talisman also helped accomplish this. SOF, § (C)(5). Talisman officials embraced the military strategy for protecting oil fields and kept in close contact with the local warlords assigned to clear the area for development. *Id.*, § (C)(4) and (5).

c. Numerous Acts In Furtherance of the Conspiracy Were Committed By the GOS and By Talisman.

All of the acts described in SOF, § (C)(5) are acts committed in furtherance

of the conspiracy, and resulted in the egregious human rights violations at issue in this case.

D. The Record Evidence Establishes a Prima Facie Case of Agency Liability.

1. Introduction

Talisman deployed many agents to operate and manage its operations in Sudan. Talisman used both subsidiary corporations and its own employees as its agents, while technically "seconding" these employees to proxies.[87] In addition, Talisman, alone and in conjunction with its other joint venture partners used the GNPOC and the GOS military to provide security for these operations. SOF, §§(C)(4) and (5). Plaintiffs' evidence, when viewed under the proper federal common law standard, establishes that Talisman is both directly and indirectly liable for the human rights violations committed against Plaintiffs based on the acts of its agents.

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[87] "In the absence of evidence to the contrary, there is an inference that the actor remains in his general employment so long as, by the service rendered another, he is performing the business entrusted to him by the general employer." Restatement (Second) of Agency § 227, comment (b) (1958). "[T]he question of who has control over the employee and the work he is performing, has been considered the central [factor to determine whether the lending employer is responsible for the employee]." *Am. Stevedoring Ltd. v. Marinelli*, 248 F.3d 54, 64 (2d Cir. 2001) (citations omitted). *See* SOF, § (C)(2) for evidence of Talisman's control over its "seconded employees." Plaintiffs are entitled to the inference that Talisman maintained this control over its "seconded" employees and wholly-owned subsidiaries based on this record.

2. The District Court Erred in Refusing to Consider Agency Liability in This Case.

The District Court erred in holding that Plaintiffs were not permitted to proceed with their claims based on an agency theory of liability. Plaintiffs have always sought to hold Talisman liable for the acts of its agents. As early as February 2002, Plaintiffs alleged in their Amended Class Action Complaint that "Talisman operates its wholly owned subsidiaries as departments or *agents of Talisman*." Docket No. 6, ¶ 5 (emphasis added). Docket No. 75, Second Amended Class Action Complaint, August 15, 2003, ¶ 5.

Plaintiffs continued to argue in two separate motions to dismiss, both pre- and post-*Sosa*, that Talisman was liable for the acts of its employees. *See* Docket No. 23, *Pl. Memo. in Opp. to Talisman's Motion to Dismiss*, at 8 (June 27, 2002) ("The Complaint sets forth four separate theories of liability for violation of international law: conspiracy, aiding and abetting, joint tortfeasor liability, and respondeat superior liability. . . ."); Docket No. 143, *Memo. of Law in Support of Motion of Def. Talisman for Judgment on the Pleadings*, at 12 (Dec. 7, 2004) ("[A] corporation may be convicted for the culpable conduct of any employee acting within the scope of his or her employment. . . .").

Plaintiffs also made these arguments in their motion for class certification. Specifically, Plaintiffs argued that key common issues of fact include "[w]hether Talisman is legally responsible for the acts and omissions of its officers, directors, and employees in Sudan." *See* Docket No. 257, *Plf. Memo. In Supp. of their*

Motion for Class Cert., at 21 (June 10, 2005). Any attempt to characterize this as a newly pleaded theory of liability is flatly contradicted by the record in this case.

Moreover, Plaintiffs are not required to plead an agency theory of liability. *See White's Farm Dairy, Inc. v. De Laval Separator Co.*, 433 F.2d 63, 66 (1st Cir. 1970). Plaintiffs have provided evidence establishing the agency relationship between Talisman and the subsidiary corporations and employees acting on Talisman's behalf. SOF, §(C)(2). Similar evidence was presented as to Talisman's relationship with GNPOC. SOF, § (C)(2)(b).

Finally, to the extent that the District Court did consider Plaintiffs' agency claims, the Court incorrectly found that "Plaintiffs [had] failed to address the choice of law analysis that should guide the selection of the substantive law of agency that applies to Talisman's relationship with TGNBV." *Talisman III*, 453 F. Supp. 2d at 687. In fact, Plaintiffs argued for the application of federal common law standards, *see* Docket No. ___, *Plf. Opp. Brf.* at 61, but then acknowledged that there was "no substantive difference between New York agency law and federal common law principles, [since] both draw on the Restatement (Second) of Agency. *Id.* at 63.[88]

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[88] Courts regularly rely on federal common law agency principles in cases involving federal causes of action. *See, e.g., Burlington Indus. v. Ellerth*, 524 U.S. 742, 754–55 (1998) (Title VII); *Moriarty v. Glueckert Funeral Home*, 155 F.3d 859, 865 n.15 (7th Cir. 1998) (ERISA and the LMRA); *Taylor v. Peoples Natural Gas Co.*, 49 F.3d 982, 988 (3d Cir. 1995) (ERISA); *Intergen N.V. v. Grina*, 344 F.3d 134, 143–44 (1st Cir. 2003) (Federal Arbitration Act).

3. The Federal Common Law Standard for Agency Liability

To determine an ATS claim based on agency liability, courts draw on the federal common law for its "well-settled theories of vicarious liability." *Sarei v. Rio Tinto*, 456 F.3d at 1078 (9th Cir. 2006). While not elucidating the specific standards for vicarious liability, the Ninth Circuit held that such standards should be derived from the Restatement of Agency and cases applying the principles codified in the Restatement.[89]

The Restatement (Second) of Agency defines an agency relationship as "the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other to act." Restatement (Second) of Agency § 1 (1957); *See also Cabrera v. Jakabovitz*, 24 F.3d 372, 386 (2d Cir. 1994). Importantly, "[u]nlike liability under the alter-ego or veil piercing test, agency liability does not require the court to disregard the corporate form." *Bowoto v. Chevron Texaco Corp.*, 312 F. Supp. 2d at 1238.

It is well-settled that a principle is liable for the acts of its agent acting within the scope of the agent's authority. *See Karibian v. Columbia University*, 14

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[89] *Id.* at 1078, citing *Moriarty v. Glueckert Funeral Home, Ltd.*, 155 F.3d 859, 866 n. 15 (7th Cir. 1998). *See also Kolstad v. American Dental Ass'n*, 527 U.S. 526, 542 (1999) (The Restatement of Agency provides a "useful starting point for defining this general common law" of vicarious liability.). *Bowoto v. Chevron Texaco Corp.*, 312 F. Supp. 2d 1229 at 1243 (finding that a common law agency is actionable under the ATS).

F.3d 773, 780 (2d Cir. 1994).[90] This liability even extends to "intentional and criminal acts" when those acts "in some way further the interests of the employer, and [do] not solely benefit the employee." *In re Ivan F. Boesky Securities Litigation*, 36 F.3d 255, 265 (2d Cir. 1994).

Moreover, "[a] principal's liability for the acts of its agent's employees–its subagents–is normally the same as its liability for the acts of agents themselves." *See* Restatement (2d) Agency § 225. Thus, to the extent that Talisman's agent, TGNBV, uses GNPOC as its agent, and GNPOC aids and abets human rights violations, Talisman is liable for those human rights violations. Similarly, when GNPOC then employs Sudanese military to "provide security" for the concession area, Talisman is also liable for the acts of the Sudanese military under this theory. *See also, Doxsee Sea Clam Co., Inc. v. Brown*, 13 F.3d 550, 554 (2d Cir. 1994) (finding that "authorization of sub-agency [is] inferred if agent is business organization . . . and principal has reason to know that agent employs sub-agents.").

Finally, under federal common law, a principal may be responsible for an unauthorized act of another that was done or purportedly done on the principal's behalf, where the subsequent conduct of the principal establishes the existence of an agency as if it had been authorized from the start. *See Prudential Lines, Inc. v. Exxon Corp.*, 704 F.2d 59, 78 (2d Cir. 1983).

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[90]"Normally, whether an employee is acting within the scope of employment is a question 'to be resolved by the jury from all surrounding circumstances.'" *Gallose v. Long Island R. Co.*, 878 F.2d 80, 83 (2d Cir. 1989).

4. Plaintiffs' Evidence.

Plaintiffs have presented evidence of an agency relationship between Talisman and the seconded employees employed with its various subsidiaries, especially TGNBV,[91] and between the joint venture and GNPOC. *See* SOF, §§ (C)(1),(2), and (3) and of Talisman's control over its agents. *Id.* Talisman controlled the activities of its subsidiary and employees and GNPOC through its agents and employees. *Id.*

Talisman also created an agency relationship with both GOS security forces and GNPOC through ratification when it accepted the benefits of the cordon sanitaire "security" policy that GNPOC and GOS undertook on its behalf.[92] *See* Restatement (Second) of Agency § 82. There is no question that Talisman had full knowledge of the circumstances under which its oil interests were being secured. *See*, SOF, § (C)(4). Talisman's professed concern about these violations to the GOS does not preclude it from being held vicariously liabile in this case when it

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[91] The Court completely ignored these facts, claiming incorrectly that Plaintiffs relied only on the overlap between directors and Talisman's "close monitor[ing]" of TGNBV. 453 F. Supp.2d at 687 (as to TGNBV) and 689 (as to English subsidiaries). Plaintiffs evidence was that Talisman controlled and dominated every aspect of TGNBV's actions in connection with this project.

[92] In a public statement in 2001 Sudan's Foreign Minister made the unequivocal statement that "[S]ecurity measures in the area where these [oil] companies are operating, are being provided according to the request of these companies to provide security for the establishments and employees at Heglig oil field." J.A.___. *D'Avino,* Exh. 101.039 (Pl. Ex 487, TE0155328).

retained the benefits conferred on it by the GOS and GNPOC.[93] *Prudential Lines, Inc., v. Exxon Corp.*, 704 F.2d 59, 78 (2d Cir. 1983) ("No matter how much the transaction and the agent be disaffirmed or disavowed, if the principal retains the benefits of the transaction, this is ratification of the transaction and of the agent's authority."). Moreover, Talisman's public statements denying that human rights abuses were occurring in the concession area is simply further evidence of this agency relationship. *See Bowoto v. Chevron Texaco Corp.*, 312 F. Supp. at 1248 (recognizing a principal's attempts to cover up another's alleged misconduct as evidence of ratification).

E. The Record Evidence Created Genuine Issues of Material Fact For Joint Venture Liability.

The District Court erred in refusing to apply federal common law principles of joint venture liability. Thus, as an initial matter, this claim should be remanded so that the District Court may evaluate Plaintiffs' evidence under the correct standard.

1. The District Court Erred in Rejecting Joint Venture Liability in This Case.

The District Court erred by refusing to consider Plaintiffs' joint venture liability claims given that joint venture liability was understood to be a viable theory of the case as early as 2003. In 2003, the District Court in this case has

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[93] Talisman knew that the GOS would tolerate public complaints about human rights violations as long as the protests "took no active form." J.A.___. *D'Avino,* Exh. 101.047.

recognized that "[t]o the extent that the Amended Complaint alleges acts by GNPOC, Talisman may potentially be held liable for the acts of other GNPOC members under a theory of joint venture liability." *Talisman I*, 244 F.R.D. at 352, n.50.[94] Plaintiffs amended their complaint in August 2003, and in it, they stated again that "Talisman and the Government worked together to devise a plan for the security of the oil fields and related facilities." *See Second Amended Class Action Complaint*, Aug. 15, 2003, at ¶¶ 27, 28, 32. Plaintiffs continued to argue for joint venture liability throughout the briefing for judgment on the pleadings. *See* Docket No. ___, *Pls. Memo. of Law in Opp. To Def. Talisman's Mot for Judgment on the Pleadings,* 15-16, 20-21 (Feb. 11, 2005).

Had Plaintiffs never attempted to amend their complaint, joint venture liability would still be a viable theory of liability in this case. *See Marbury Management, Inc., v. Kohn*, 629 F.2d 705, 712 n.4 (2d Cir. 1980) ("Generally a complaint that gives full notice of the circumstances giving rise to the plaintiff's claim for relief need not also correctly plead the legal theory of theories and statutory basis supporting the claim."). Plaintiffs should, therefore, not be penalized and placed in a worse position merely for attempting to amend their complaint to accord with the theories actually litigated in the case.

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[94] *See also*, J.A.___. Discovery Order (permitting plaintiffs discovery to ascertain the connections between Talisman and the GNPOC).

2. The Federal Common Law Standard for Joint Venture Liability.

A defendant may be held liable under a joint venture theory of liability under federal common law where (1) parties intended to form a joint venture; (2) parties share a common interest in the subject matter of the venture; and (3) the parties share the profits and losses of the venture; and (4) the parties have joint control or the joint right of control over the venture. *See Davison v. Enstar Corp.*, 848 F.2d 574, 577 (5th Cir. 1988); Restatement (Second) of Torts § 491 cmt. c (1965); W. Keeton, Prosser & Keeton on Torts, § 72 at 518 (5th ed. 1984).

Under federal common law principles, it is well-established that a member of a joint venture is liable for the acts of its co-venturers and agents of the joint venture. *See Mallis v. Bankers Trust Co.*, 717 F.2d 683, 689, n.9 (2d Cir. 1983) (citing Restatement (Second) of Agency § 272 (1958)).

3. Plaintiffs' Evidence.

The joint venture in this case is the one between defendant Talisman, the GOS[95] and the other oil companies. The joint venture created GNPOC to manage the operations but the joint venture simply uses GNPOC as its agent for these

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[95] The District Court erred in finding that "[I]n order for [the GOS] to be viewed as one of the joint venturers, Sudapet's corporate form would have to be disregarded." *Talisman III*, 453 F. Supp. 2d at 684 n.102. Sudapet is a state-owned oil company which is an *agent* of the GOS. SOF, § (C)(1). Moreover, the Court's statement is belied by the evidence of the GOS' direct participation in every aspect of this venture. SOF, §§ (C)(1) and (3).

purposes while maintaining complete control over the operations and GNPOC.[96]

a. Partners Intended to Form a Joint Venture

Plaintiffs have provided sufficient record evidence to establish that the parties intended to form a joint venture. The District Court erred in disregarding this evidence after finding that "[t]he [P]laintiffs have failed to point to any language in any of the agreements executed by the Consortium Members to support a finding of [the] intent [to establish a joint venture]." *Talisman III*, 453 F. Supp. 2d at 686.

This erroneous finding is based on the Court's faulty premise that the state law test, which requires that the "agreement evinces their intent to be joint venturers," applies to the determination of joint venture liability in this ATS case. *Talisman III*, 453 F. Supp. 2d 684. The federal common law test does not require that evidence of intent to establish a joint venture be present in the agreement. Indeed, "an agreement to create a joint venture may be implied based upon the conduct of the parties." *Albina Engine and Machine Works, Inc. v. Abel,* 305 F.2d 77 (10th Cir. 1962) ("[A] disinclination to assume the burdens of a joint venture does not necessarily preclude the creation of that relationship, since the substance of the legal intent rather than the actual intent may be controlling . . . . The status

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[96] The District Court erroneously found that "New York law requires the corporate form [of GNPOC] to be respected and prevents suit by third parties under a joint venture theory," *Talisman III*, 453 F. Supp. 2d at 685, because, *inter alia*, it failed to consider Plaintiffs argument that GNPOC was, in fact, merely an agent of the joint venture.

may be inferred from the purpose of the enterprise and the acts and conduct of the parties in relation to the engagement, which in some cases may speak above the expressed declarations.") Plaintiffs' evidence establishes that, regardless of their expressed writings, Talisman, the GOS, and the other oil companies intended to enter into a joint venture to develop the oil pipeline. *See* SOF, §§ (C)(1-5).

b. The Partners Share a Common Interest in the Subject Matter of the Venture.

Plaintiffs have provided sufficient record evidence to establish that the parties to this joint venture shared a common interest in the subject matter of the venture. SOF, §§ (C)(1) and (5). The common purposes of the joint venture partners are beyond dispute here.

c. The Partners Share the Profits and Losses of the Venture

Plaintiffs have provided sufficient record evidence to establish that the parties share the profits and losses of the venture. SOF, § (C)(1).

d. The Partners Have Joint Control or the Joint Right of Control Over the Venture.

Finally, Plaintiffs have provided sufficient record evidence to establish that the parties have joint control or the joint right of control over the venture. Each of the parties to the joint venture owned the rights to produce and explore for oil, the oil pipeline, the marine terminal, and all oil revenues. SOF, §§ (C)(1) and (3).

As a member of the joint venture between Talisman, the GOS and two additional state-owned oil companies, Talisman is vicariously liable for GOS's

war crimes, crimes against humanity, and acts of genocide on a joint venture theory of liability. *See Mallis*, 717 F.2d at 689. Additionally, because GNPOC was an agent of the joint venture, Talisman is vicariously liable for the acts of the GNPOC in aiding and abetting the GOS to commit war crimes, crimes against humanity, and acts of genocide.

F. The Record Evidence Created Genuine Issues of Material Fact For Alter Ego Liability.

1. Introduction

The District Court erred in applying state law choice of law rather than the federal common law doctrine of alter ego liability. Thus, as an initial matter, this claim should be remanded so that the District Court may evaluate Plaintiffs' evidence under the correct standard.

2. The District Court Erred in Rejecting Alter Ego Liability in This Case.

The District Court erred in finding that Plaintiffs could not proceed on an alter ego theory of liability. In their Second Amended Complaint, Plaintiffs stated that they were suing Talisman for its "own actions and omissions as well as in its capacity as successor in interest to Arakis Energy Corporation and as a member of the Greater Nile Petroleum Operating Corporation ("GNPOC")." *Plf. Second Amended Complaint* at ¶ 3. Plaintiffs are not required to formally plead an alter ego theory of liability. *In re Alstom SA*, 454 F. Supp. 2d 187, 213-15 (2006) (permitting the plaintiffs to proceed on a veil piercing theory of liability not

formally pled when the facts in the complaint supported the theory); *Accord Marbury Management, Inc. v. Kohn*, 629 F.2d 705, 712 (2d Cir. 1980). Plaintiffs, in their Proposed Third Amended Complaint, attempted only to clarify the theories of liability in the case, and the district court's denial of Plaintiffs' motion to amend in no way void their right to proceed on an alter ego theory of liability, when the facts of the complaint support such a claim.

3. The Federal Common Law Standard for Alter Ego Liability

As the Supreme Court has made clear, "[a]lthough a corporation and its shareholders are deemed separate entities for most purposes, the corporate form may be disregarded in the interests of justice where it is used to defeat an overriding public policy. . . ." *First Nat'l City Bank v. Banco Para El Comercio Exterior De Cuba*, 462 U.S. 611, 630 (U.S. 1983) (internal quotations excluded)[97] Plaintiffs, therefore, are able to establish a prima facie case for piercing the corporate veils of Talisman's subsidiaries simply by establishing that failing to pierce in this instance would result in injustice and defeat an overriding public policy interest.

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[97] Plaintiffs also meet the standard set forth in *Holborn Oil Trading, Ltd. v. Interpetroi Bermuda, Ltd.*, 774 F. Supp. 840, 844 (S.D.N.Y. 1991) (quoting *Kirno Hill Corp. v. Holt*, 618 F.2d 982, 985 (2d Cir. 1980) ("the party sought to be charged must have used its alter ego 'to perpetuate a fraud *or* have so dominated and disregarded [its alter ego's] corporate form' that the alter ego was actually carrying on the controlling party's business instead of its own."))) *See*, SOF § (C)(2) (showing Talisman's domination over its subsidiaries).

4. Plaintiffs' Evidence

The equitable principle set forth in *First Nat'l City Bank* applies here, where failing to disregard the corporate form would permit Talisman to evade responsibility for its complicity in the egregious human rights violations suffered by Plaintiffs, merely by setting up a corporate shell in a state such as Maritius, where there are no laws that allow for corporate veil piercing or the Netherlands, where the corporate veil may only be pierced in limited circumstances not relevant to this litigation. *See Talisman III*, 453 F. Supp. 2d at 683, 687-88.

In cases such as this, where there is a string of wholly owned subsidiaries, whose every action relating to the operation of this oil development project is strictly controlled by a parent corporation, failure to disregard the separate nature of the corporate entities would result in injustice to the Plaintiffs whose lives have been destroyed by the actions of this elaborate and carefully crafted corporate structure and would undermine the essential policy purposes of the ATS, which was created to enforce the most important prohibitions in the "law of nations."

V. THE DISTRICT COURT ERRED IN REFUSING TO CONSIDER PLAINTIFFS' PROPOSED THIRD AMENDED CLASS ACTION COMPLAINT.

A. The District Court Incorrectly Concluded Plaintiffs' Proposed Amendments Were Futile.

From the earliest stages of this case, Plaintiffs have consistently argued that Talisman was responsible for Plaintiffs' injuries through the actions of its

subsidiaries and agents and based on its participation in the joint venture set forth in SOF §(C)(1). Plaintiffs filed their motion to amend in order to clarify the theories of liability already at issue in this case at the end of expert discovery. Docket No. 296. The proposed amendments should have been treated as a simple housekeeping matter.

Nevertheless, the District Court rejected Plaintiffs' proposed amended complaint based on an incorrect application of the law. Determinations of futility are made by the same standards that govern Rule12(b)6 motions to dismiss, *Nettis v. Levitt*, 241 F.3d 186, 194 n.4 (2d Cir. 2001) (citing *Ricciuti v. N.Y.C. Transit Auth.*, 941 F.2d 119 (2d 1991), rather than by the summary judgment standard applied by the District Court. *Talisman III*, 453 F. Supp. 2d at n. 98. A court should only dismiss a complaint for failure to state a claim when "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief," *Conley v. Gibson*, 355 U.S. 41, 45-47 (1957), and Plaintiffs' proposed amendment proffers theories of liability, supported by extensive discovery, which have already survived numerous rounds of briefing below. *See Talisman I* and *Talisman II*, *supra*.

B. The District Court's Erred in Finding that Plaintiffs Failed to Establish Good Cause to Amend their Complaint.

Plaintiffs diligently moved to amend their complaint without undue delay and with good cause.

First, as set forth above, Plaintiffs had no duty to amend at an earlier date

because there is no specified pleading requirement for these theories of liability.

Second, Plaintiffs' proposed amendment was based on that fact and expert discovery was finally completed in early 2006. Plaintiffs neither expanded nor transformed the scope of the case in making their request, nor did Plaintiffs seek any additional discovery. The amendment would not have effected the January 2007 trial date set in the case.

Finally, the cases cited by the District Court concerning motions after the dates set in a scheduling order are inapposite because Plaintiffs sought to introduce no new theory into the case. Plaintiffs have shown that their amendment raised theories of liability fairly presented by their existing pleading, and that the Court committed error in finding that Plaintiffs' amendment claims were futile and were not brought in good faith.

VI. THE DISTRICT COURT ERRED IN DENYING CLASS CERTIFICATION.

A. Standard of Review

Denials of class certification are reviewed for abuse of discretion, *In re: Nassau County Strip Search Cases*, 461 F.3d 219, 224 (2d Cir. 2006). The conclusions of law informing such decisions are reviewed *de novo*. *Id.* This Court is noticeably less deferential when the district court has denied class status than when it has certified a class. *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 162 (2d Cir. 2001) *cert. denied*, 535 U.S. 951 (2002); *Strip Search, id.* at 225.

In twice denying Rule 23(b)(2), 23(b)(3) and 23(c)(4)(A) class certification on incorrect legal principles, *first*, by conducting the all-or-nothing analysis which this Court decisively rejected in *Strip Search Cases*, 461 F.3d at 226-231; and *second*, by basing its decisions on assumption and analogy, rather than determination of the disputed facts that bear on the class certification requirements, *see, In re: Initial Public Offering Securities Litigation*, 471 F.3d 24 (2d Cir. 2006) ("*IPO*") the District Court abused its discretion under Second Circuit standards. *See Zervos v. Verizon N.Y. Inc.*, 252 F. 3d 16, 168-69 (2d Cir 2001); *Strip Search, id.* at 225, 230.

B. Class Certification Denial Was Reversible Error.

The appeal of class certification denial comes to this Court in an unusual posture. Since Plaintiffs presented their Rule 23 motions to the District Court, and subsequently petitioned this Court for Rule 23(f) review,[98] this Court has announced new standards governing the manner in which facts touching upon class certification are to be evaluated, *IPO*, 471 F.3d at 39-42, and has held that a single common issue may require class certification under Rule 23(c)(4)(A). *Strip Search*, 461 F.3d at 226-230.

The District Court erred: First, by transforming the predominance requirement of Rule 23(b)(3) into a requirement that there be *no* individual issues; second, by rejecting Rule 23(c)(4)(A) issue class certification; and finally, by

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[98] *See* Plaintiffs' Rule 23(f) Petition, J.A. ___. (Docket No. 383)

denying Rule 23(b)(2) certification to Plaintiffs' equitable unjust enrichment/disgorgement claim.

Thus, reversal of the summary judgment must be accompanied by a renewed class certification determination under this Court's prevailing standards. On remand, the Rule 23(b)(3) class certification exercise will need to consider and resolve the many "factual disputes relevant to each Rule 23 requirement," *IPO id.* at 41, including the factual matters laid out in this brief and the record below.[99] Common issues will emerge predominant. Moreover, under *Strip Search*, each significant common issue of fact or law emerging from that exercise will become a candidate for Rule 23(c)(4)(A) certification, regardless of whether the entire action, or any entire claim, qualifies for Rule 23(b)(2) or 23(b)(3) certification. *Strip Search* at 230.

1. The District Court Erred in Denying 23(b)(2) Certification to Plaintiffs' Equitable Claims.

The District Court's error began with its dismissive attitude toward Rule 23(b)(2) certification of Plaintiffs' equitable claims for unjust enrichment/disgorgement. *Talisman Class I*, 226 F.R.D. at 467-468. These claims are of tremendous practical and principled significance to the Class, far better designed than damages to restore equity and achieve justice under the

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[99] The District Court did make *IPO*-consistent determinations on all Rule 23(a) elements in *Talisman Class I*, 226 F.R.D. at 466, 476. The District Court's opinions as to Rule 23(b)(2) and 23(b)(3), however, derived from assumption and analogy, rather than objective determination of the class-pertinent facts before it.

circumstances of this case. Docket Nos. 114, 168, and 191. These equity claims held little value or significance for the District Court, and received short shrift. The Class plea, that the people of South Sudan would most equitably benefit from a constructive trust on the fortune Talisman had extracted from the region, was wrongly disparaged by the District Court as an ill-disguised claim for damages, 226 F.R.D. at 468.

This error in turn framed the District Court's strained and erroneous analysis of this case as a mass tort, a category of cases that, in the District Court's mistaken view, was also barred from Rule 23(b)(3) certification. 226 F.R.D. at 483; 2005 U.S. Dist. LEXIS 20414, *12. The District Court's unsupported presumption that in mass torts, plaintiffs may say they want equity, but really only want money for themselves, was applied, without evidentiary basis (and hence contrary to *IPO*), to the Plaintiffs herein (including a church and church leaders), and poisoned the predominance and superiority analyses.

2. The District Court's Erroneous Rule 23(b)(3) Predominance Analysis Conflicts with Second Circuit Authority.

The District Court in this case deployed the same defective predominance analysis rejected in *Strip Search*. The District Court's own catalog of common issues of fact and law, for which 23(b)(3)/(c)(4)(A) certification was sought, 2005 U.S. Dist. LEXIS 20414, *15, n.4, demonstrates the weight and significance of these common issues, and belies the dismissive conclusion that "a general determination" of a genocidal campaign and of Talisman's participation therein "is

insufficiently tethered" to Talisman's liability to class members to "have value." *Id.* These common issues have the absolute value of necessity: each member would be required to prove them; and, once proved, as in *Strip Search*, or any class action, only the individual issue of damages would remain. On the claim that Talisman disgorge its $1.5 billion Sudan profits to be held in constructive trust, not even the damages issue is individualized. As in *Strip Search*, this Court should remand to the District Court with instructions to certify a class as to liability and consider certifying a damages class as well, under Rule 23(b)(3).

Strip Search, 461 F.3d at 230.

The District Court erroneously determined that individual damages issues outweighed common liability issues to defeat Rule 23(b)(3) predominance. Under *Strip Search*, this Court need not even recognize the overwhelming predominance of the acknowledged common issues (*e.g.*, as to Talisman's knowledge, intent, conduct, duty, agreement, assistance, and participation in the GOS campaign) that the District Court itself identified, in order to direct Rule 23(c)(4)(A) class certification on remand. The Court found that all of the Rule 23(a) requirements

(numerosity,[100] commonality of issues,[101] typicality of claims,[102] and adequacy of representation)[103] was met, and further acknowledged that "[t]here are certainly important common issues to be resolved at trial," 226 F.R.D. at 482. This finding alone warrants the class certification and trial of these liability issues under this Court's *Strip Search* standards.

3. The District Court's Erroneous Predominance Analysis Proceeded From a Flawed Mass Torts Analogy

The District Court rejected Plaintiffs' analogy to civil rights cases, in which, as here, the aggrieved group must prove a pattern and practice of discrimination, a collective harm, before the individual issues of group membership, and resulting discriminatory harm, arise. *Metro-North*, 267 F.3d 147. Simply because (as is the way with genocide) Plaintiffs' claims included "physical abuse," the court concluded mass tort cases were thus "more analogous," focused on toxic tort, product liability, and mass accident cases, distinguished the unavoidable examples

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[100] It is uncontested that more than 100,000 people are putative class members. 226 F.R.D. 456, 466.

[101] *Id.* ("Plaintiffs have identified numerous common questions of law and fact" including "whether Talisman and the Government jointly planned a military strategy to displace tribal groups forcibly from oil exploration areas and whether Talisman provided tactical, logistical, technical and financial support for the Government's military campaigns against civilian targets.)"

[102] *Id.* at 476. ('The claims of the named plaintiffs arise from [a sweeping and coordinated campagin of violence against civilians that is] typical of the claims of the Class.").

[103] *Id.* ("[Plaintiffs'] attorneys are qualified, experienced, and able to conduct complex litigation.").

of class certification of such cases, and concluded that Plaintiffs' claims, branded as mass tort litigation, face "an insuperable barrier" to class certification. *Talisman Class I*, 226 F.R.D. at 483.[104]

The District Court's categorization of Plaintiffs' genocide claims as mass torts produced this tautology: (1) this case, despite its ATS claims and genocidal context, is really just a mass tort and nothing more; (2) mass tort cases are categorically barred from class certification, therefore: (3) this case can never be certified, in whole or part.

Proof of genocide or crimes against humanity does not proceed from proof of individual injury upward. If it did, the ultimate genocide, the Holocaust itself, demoted to "mass tort" status, would be undemonstratable: a Holocaust denier's dream. The District Court of course did not intend to take that tack; elsewhere, the importance of common issues and the group nature of their proof are clearly acknowledged. 226 F.R.D. at 466-467. However, a misconceived emphasis on the damages phase of the proceedings, at the expense of the significant benefit of

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[104] Of course, *Amchem Prods v. Windsor*, 521 U.S. 591, 625 (1997) imposes no categorical bars, finding that mass tort cases arising from a common cause may satisfy the predominance requirement. A "common cause" can include long-term harm, such as from recurring toxic contamination. *See Sterling v. Velsicol*, 855 F.2d 1188 (6th Cir. 1988) (certifying general causation questions, and reserving specific proximate causation for individualized proof), or, as here, multiple aerial attacks with a common purpose. *Strip Search* cites *Valentino v. Carter-Wallace*, 97 F.3d 1227, 1234 (9th Cir. 1996) (in pharmaceutical products liability cases, courts may "isolate the common issues under Rule 23(c)(4)(A) and proceed with class treatment of these particular issues."), and common issues arising from long term or multiple incident mass tort claims have been certified by a number of courts under Rule 23(b)(3) and/or 23(c)(4)(A). *Mullen v. Treasure Chest Casino LLC*, 186 F.3d 620 (5th Cir. 1999).

collective adjudication of the prerequisite (and predominant) liability issues, precluded the District Court from recognizing, as this Court itself did later in *Strip Search*, the availability of Rule 23(c)(4)(A) issue certification as an independent solution to predominance analyses that otherwise collapse in upon themselves, denying the advantages of common issues adjudication in cases in which the litigants, the courts, and society itself would greatly benefit from collective adjudication of inherently group harm.

This Court's *IPO* decision likewise teaches that class certification error derives from assumption that the placement of a claim within a particular substantive category predetermines its prospects for class treatment. In securities cases, a relatively uninformed investing public typically relies upon an efficient securities market to correctly value stocks. Material information, intentionally withheld from or misrepresented to the market, causes loss when the correct information comes to light. Hence, class certification in securities cases is virtually routine. But *IPO* was not typical. As this Court found, many of the investors were themselves insiders, and there was no efficient market. Class certification was thus required to be considered on the particular facts of the case, not upon categorical assumptions. 471 F.3d at 42-44. Ironically, the same error that resulted in class certification reversal in *IPO*, caused error in class denial here.

Mass torts are usually accidents, with recklessness, not purposeful

annihilation, at the high end of the intent scale.[105] Here, despite its recognition that "[c]ommon questions of law include whether Talisman's conduct to the Class rises to the level of a violation of the law of nations," 226 F.R.D. at 466, the District Court's attempt to portray this case as a mass tort case was fatal to an appreciation of its own facts. Plaintiffs are victims of systemic and widespread human rights violations, claims much more in common with the systematic civil rights violations in *Strip Search* than in any mass torts the District Court referenced.

4. The Class Should Be Certified On Specific Issues Under 23(c)(4)(A) Regardless Of Whether The Entire Claim Or Entire Action Satisfies Rule 23(b)(3).

The District Court's conclusions in twice denying class certification cannot square with this Court's prevailing rule that applies Rule 23(c)(4)(A) to certify a class on a particular issue even if the action or claim as a whole does not satisfy Rule 23(b)(3) predominance. *Strip Search*, 461 F.3d at 225, 230. *Strip Search* arose out of a sheriff's department policy that strip-searched all misdemeanor detainees. Class actions were filed on behalf of misdemeanor arrestees strip-searched, allegedly without individualized suspicion. 461 F.3d 219, 222. The *Strip Search* district court, employing reasoning strikingly similar to the District Court's reasoning here, determined that individualized issues predominated, for

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[105] *See In re The Exxon Valdez*, 472 F.3d 600 (9th Cir. 2006) (finding that reckless disregard justified imposition of classwide punitive damages of $2.5 billion).

example, whether there was reasonable suspicion to search each individual.[106] This Court reversed, finding "that, contrary to the District Court's reservations, a court may employ Rule 23(c)(4)(A) to certify a class on a particular issue even if the action as a whole does not satisfy Rule 23(b)(3) predominance requirement." *Strip Search,* 461 F.3d at 225. The same analysis should apply here. The common factual and legal issues identified by the District Court at 226 F.R.D. 457, 466 and 2005 U.S. Dist. LEXIS 20414, *15 n.4., predominated over individual questions. They should, at the least, be remanded for classwide trial under Rule 23(c)(4)(A), with the direction by this Court, as in *Strip Search*, that the District Court revisit the 23(b)(3) certification of the class as to the rest of Plaintiffs' claims. *Id.* at 231.

In *Strip Search*, this Court rejected the view of Rule 23(b)(3) predominance that characterizes Rule 23(c)(4)(A) as a housekeeping rule subordinate to Rule 23(b)(3). As *Strip Search* explains, a district court must first identify the issues potentially appropriate for certification, and then apply the other provisions of the Rule, i.e., subsection (b)(3). This sequence is, in the language of *Gunnells v. Healthplan Servs.*, 348 F.3d 417, 439 (4th Cir. 2003), an express command that courts have no discretion to ignore.

As *Strip Search* recognizes, the class character of a case may endure only

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[106] Like the District Court here, the *Strip Search* district court relied erroneously on *Castano v. American Tobacco*, 84 F.3d 734 (5th Cir. 1996), for the proposition that courts may not employ Rule 23(c)(4)(A) to certify liability issues unless the entire case satisfies Rule 23(b)(3)'s predominance requirement. 461 F.3d at 223.

through the adjudication of liability to the class. The members of the class may thereafter be required to come forward individually and prove their respective claims. 461 F.3d at 226. The District Court wrongly concluded such issues disallowed class treatment of any and all issues here. As appellate decisions approving the class certification of common liability and general causation issues have recognized, the individualized prove-up of class member damages includes, in a personal injury tort context, specific causation of such injuries. *Sterling v. Velsicol*, 855 F.2d 1188, 1200 (6th Cir. 1988).

The District Court did not have the benefit of the *Strip Search* analysis and holding; it instead followed the erroneous *Castano* path, despite its own acknowledgement of the existence and importance of common liability issues, which would have enabled the trier of fact to decide all aspects of the liability case on a classwide basis, leaving,[107] at most, only the prove-up of specific injury causation and damages for individualized treatment.

As *Strip Search* holds, the Rule 23(b)(3) predominance analysis tests whether the class is sufficiently cohesive to warrant adjudication by representation. 461 F.3d at 219-226, 227. As a result, all factual or legal issues that are common to the class inform the [predominance] analysis. 461 F.3d at 226.

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[107] Under the refined class definition rejected by the District Court in *Talisman Class II*, even specific causation (proximate causation of individual class members' injuries) was susceptible to classwide proof, because the class consisted only of members whose deaths or injuries occurred in specified and documented Antonov and Hind attacks.

The *Strip Search* district court sanguinely predicted that, notwithstanding class certification denial, the inmates' individual claims were sufficiently valuable that many of them would find a way, and a lawyer, to pursue their cases. *Id.* at 224. The District Court made similarly optimistic statements herein, with respect to the benefit of collateral estoppel.[108] But collateral estoppel is speculative, dependent upon the independent decision of later courts. *Res judicata*, by contrast, while available only to a certified class, is a certainty: an important factor in the superiority equation.[109]

As this Court pointed out in *Strip Search*, absent class certification and its attendant classwide notice procedures, the members of a class seeking to vindicate human rights will not vindicate those rights and may lack an effective remedy altogether. 461 F.3d at 229. As the Supreme Court observed in *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 329 (1980), and again in *Amchem*, 521 U.S. at 617, in cases involving unsophisticated litigants or small-damages claims, aggrieved persons may be without any effective redress, or access to the courts at

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[108] *9/16/05 Rep. Tr.*, at 25-26

[109] The superiority of classwide liability issues adjudication, even if the class is decertified for individual injury causation/damages (and even in the "mass tort" context) is demonstrated by *Engle v. Liggett Group*, 945 So.2d 1246, 2006 Fla. LEXIS 2952 (Fla. 2006), which, in affirming the post-trial decertification of an injured smokers class, confirmed to its members the substantial benefit of *res judicata* on specified class trial findings: they would *not* be required to re-prove these issues in their individual cases. *Id.* at *52. This demonstrates the superiority of certification certainty over the District Court's speculation that somehow non-parties might, without class certification, derive some collateral estoppel benefit from a non-class trial.

all, without the class action. This unfortunate outcome is virtually assured here. The aggrieved persons are rural villagers, without any access to legal redress in a country controlled by a regime engaged in widespread human rights violations against them.

The superiority factor cuts against certification of mass torts when claimants are assumed to prefer, and have ready access to, the alternative of individual representation. *Amchem*, 521 U.S. at 616-617. No such choices exist here. Absent class certification, access to justice is a cruel fantasy. Even if class members were willing to risk the exposure of naming themselves and confronting defendants in individual suits, the District Court found that the legal system of the Sudan is hostile to them, *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F.Supp.2d 289, 336 (S.D.N.Y. 2003). Instead, the few who are able to access this system as named plaintiffs must stand up for the many who cannot. This fact alone sharply distinguishes this case from the mass tort cases to which the District Court mistakenly equated it, and squares it with the Supreme Court's declaration of the "dominant" purpose of class actions, in whose service determinations of predominance and superiority must be made: "vindication of the rights of groups of people who individually would be without effective strength to bring their opponents into court at all." *Amchem*, 521 U.S. at 616.

5. Plaintiffs' Refined Class Definitions and Trial Plan Are Superior Procedural Alternatives to Fragmentary Litigation or Non-Adjudication, Should Have Been Adopted Below, and May Be Directed by This Court.

To address the District Court's concerns, articulated in *Talisman Class I*, Plaintiffs refined the class definition to include: "All non-Muslim, African Sudanese civilian inhabitants of blocks 1, 2 or 4 or [sic] 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 that utilized Antonov bombers or Hind helicopter gunships during the period January 1, 1999 through March 30, 2003 (the "Class Period");[110] and specified an "Antonov/Hind Villages Class" limited to the villages hit by documented Antonov/Hind attacks." 2005 U.S. Dist. LEXIS 20414, *5. Docket 257 Antonov/Hind Plaintiffs' Memorandum of Law in Support of their Motion for Class Cert, at 1-2 (June 10, 2005).

These proposed definitions limit the class to victims of aerial attacks that could only have been carried out by the Government, the only party with access to airplanes and helicopters, and thus to those harmed in attacks that could only have been conducted by GOS with Talisman assistance. The plaintiffs submitted a list of 142 villages subjected to aerial attacks, derived from discovery responses, witness deposition testimony, and reports by governmental and non-governmental agencies. *Whinston*, Exh. 23 to Docket 257. The plaintiffs also identified a small

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[110] The Class Area encompasses the entire GNPOC concession plus the adjoining areas of Block 5a. The Class Period encompasses the time from shortly after Talisman acquired Arakis until shortly before it sold its interest in GNPOC.

fraction (1,601) of the individuals killed or injured in these attacks, including each victim's name, and the witness to their death or injury. *Id.*

Notwithstanding this virtual elimination of individual issues, the District Court's class certification denial decisions remained unduly influenced by its disdain for the class certification, trial, and appellate decisions in *In re: Marcos Human Rights Litigation*, 910 F.Supp. 1460 (D. Hawai`i 1995); *affirmed sub nom Hilao v. State of Marcos*, 103 F.3d 767 (9th Cir. 1996). The District Court found fault with the *Marcos* majority, and adopted instead the posture of the dissent. *See* 226 F.R.D. at 472-474.

Leaving aside that the successful class action prosecution of human rights violations in *Marcos* inspired, in turn, the Holocaust class action litigation that restored billions of dollars to Holocaust survivors and their families around the world,[111] even a rejection of the class action methodology and trial structure in the *Marcos* litigation did not justify certification denial in this case. Class certification must, as a matter of law, be informed by the facts and circumstances of each case, not simply by reference to trends in other courts, or analogy to other cases. *IPO.*

This action is materially simpler than was the *Marcos* litigation: the class period here spans 4 years, not 20, as in *Marcos*; the victims of the Marcos regime

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[111] *See, e.g. In re: Holocaust Victims Assets Litig.*, 105 F.Supp.2d 139 (E.D.N.Y. 2000); *In re: Nazi-Era Cases Against German Defendants Litig.*, 198 F.R.D. 429 (D.N.J. 2000).

were singled out based on individual political activities or perceived threats to the regime. The Marcos regime, unlike Defendants in this case, did not target an entire race, religion, or region. The *Marcos* litigation sounded exclusively in compensatory and punitive damages, and did not feature the significant claims for equitable relief, disgorgement, and restitution which Plaintiffs have emphasized herein, which separately warrant Rule 23(b)(2) certification.

The District Court's second class certification denial rejected class definitions that eliminated individual proof problems, which focused the case on the core of violent activities in which Talisman was implicated; and discounted Plaintiffs' proffered trial plan, which proceeded logically and efficiently from the Phase I trial of common liability issues and the equitable relief claim, to more individualized issues of injury and damages. The District Court was dissatisfied with Plaintiffs' refined class definitions, although these and inexorably tethered Talisman's conduct to the victims of the specific aerial attacks it assisted and facilitated. Once the refined class definitions cemented a direct relationship between GOS' attacks and their victims, the predominance of the liability issues leading to the determination of Talisman's ultimate liability (and accountability) for the campaign it assisted and through which it was enriched (as detailed throughout this brief) overwhelmed individual questions. They became not only "important," as the District Court conceded: they became predominant.

The District Court appears to have preferred separate classes or subclasses for each village, or each attack. This, of course, could have been done: even the

designation of a large number of subclasses is superior to the complete fragmentation of the litigation through the denial of any form of class treatment, on any claim, or any issue. As this Court has repeatedly instructed, most recently in *Strip Search*, "the district court should bear in mind the number of management tools available to a district court to address individualized damages issues, such as bifurcation . . . alteration of the class definition, the creation of subclasses, or even decertification after a finding of liability." 461 F.3d at 231.

6. The District Court Erred Under IPO in Accepting Defendants' Unproved Contentions as a Pivotal Factor in Denying Class Certification.

The *IPO* decision demonstrates the certification error that arises from failure to grapple with the actual facts of the case for fear of prejudging the merits. Such an aversion can lead the court to adopt one side's – or the other's – characterization of what the facts will be, rather than the actual evidence as it emerges. Thus, in *IPO*, it was this Court's task to reveal that the impossibility of establishing an efficient market eliminated the legal inferences that justify class treatment. 471 F.3d at 42-43. Here, the District Court, in an assumption pivotal to its denial of class certification, accepted the Defendants' premise, insistently briefed in opposition to certification but absent from the evidence at summary judgment – that the aerial attacks on class members' villages may have been directed at, or conducted by "rebel forces" or "some private actor," not by the Government at all. 226 F.R.D. 456, 484; 2005 U.S. Dist. LEXIS 20414, **12-15. The spectre of such individual defenses (e.g. the suggestion that some attacks may

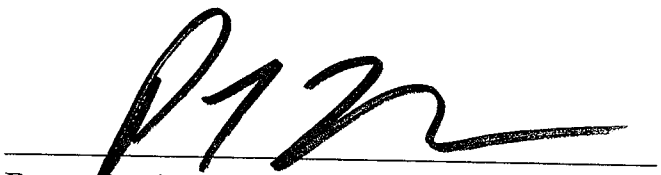
have had legitimate military objectives) raised to defeat class certification, was notable only for its absence at the summary judgment stage. An *IPO* analysis would have prevented this error.

Ironically, it was after denying class certification that the District Court engaged in *IPO* class certification-type analyses of the factual issues, in its summary judgment opinion. For example, it concluded that each plaintiff attacked by air was entitled to the inference that the attacker was GOS; it concluded that for each plaintiff attacked by air, the inference was that the attacking plane originated from Heglig/Unity airstrips. If these presumptions apply to 13 plaintiffs, they should logically apply to each and every one who was subjected to such air attacks.

CONCLUSION

For all of these reasons, the District Court's orders granting summary judgment and denying Plaintiffs' motion to amend the complaint and denying class certification should be reversed. Plaintiffs are entitled to an order denying Talisman's motion for summary judgment motion. At a minimum, the case should be remanded so that these motions are evaluated under the correct principles.

Date: February 26, 2007



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CERTIFICATE OF COMPLIANCE

This brief complies with the type volume limitation of Fed. R. App. P.32(a)(7)(B) because the brief contains 29,475words, excluding parts of the brief exempted by Fed. R. 32 (a)(7)(B)(iii).

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ACKNOWLEDGMENT OF SERVICE

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Menaka N. Fernando, being duly sworn, deposes and says that the deponent is not a party to the action, is over 18 years of age, and resides at the address shown above, or

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That on the 26th day of February, 2007, deponent served ten copies of within Opening Brief for Plaintiffs-Appellants, to the Clerk of the Court, United States Court of Appeal, Second Circuit, 40 Foley Square, Room 1803, New York, New York via U.S. Mail. I further certify that I served two copies of the said Brief via mail upon the following attorneys:

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I certify that the foregoing statements made by me are true. I am aware that if any of the statements made by me are willfully false, I am subject to punishment.

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