

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
TUNGUARKUEIGWONGRAT, 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

Paul L. Hoffman
Adrienne J. Quarry
Schonbrun DeSimone Seplow
Harris & Hoffman
723 Ocean Front Walk
Venice, California 90291
Telephone: (310) 396-0731

Lawrence Kill
John O'Connor
Stanley Bowker
Anderson Kill & Olick, P.C.
1251 Avenue of the Americas
New York, New York 10020
Telephone: (212) 278-1000

Carey D'Avino
Stephen Whinston
Keino Robinson
Berger & Montague, P.C.
1622 Locust Street
Philadelphia, Pennsylvania 19103
Telephone: (215) 875-3088

Richard Heinmann
Elizabeth Cabraser
Daniel E. Seltz
Steven E. Fineman
Rachel Geman
Lieff, Cabraser, Heimann &
Bernstein, LLP
780 Third Avenue, 48th Floor
New York, New York 10017
Telephone: (212) 355-9500

Attorneys 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 area¹ 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

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

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 specific 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 IP*").

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 Facts³

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 Plaintiffs⁶ and

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-who-who (phonetic), this air rush of these bombs falling through the air. And that was absolutely terrifying.

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

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

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

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 reconnaissance. 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

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

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.

Committee (“JOC”) and the Downstream Operating Committee (“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,

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.

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 executives²⁸ 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

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 being 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

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

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 throughout 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

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

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

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

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.

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