No. 07-0016

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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

Plaintiffs/Appellants,

v.

TALISMAN ENERGY INC.,

Defendant/Appellee,

and

REPUBLIC OF THE SUDAN,

Defendant.

On Appeal from the United States District Court for the Southern District of New York

BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT/APPELLEE, URGING AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Page(s)

Statutes:

Page(s)

Miscellaneous:

BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT/APPELLEE, URGING AFFIRMANCE

IDENTITY AND INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a public interest law and policy center with supporters in all 50 states. WLF regularly appears before federal and state courts to promote economic liberty, free enterprise, and a limited and accountable government.

In particular, WLF has devoted substantial resources over the years to opposing litigation designed to create private rights of action under the Alien Tort Statute (ATS), 28 U.S.C. § 1350, because such litigation generally seeks (inappropriately, in WLF's view) to incorporate large swaths of allegedly customary international law into the domestic law of the United States. WLF has regularly appeared in federal court proceedings raising ATS issues. *See*, *e.g.*, *Sosa v. Alvarez-Machain,* 542 U.S. 692 (2004); *Doe v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002), *rehearing en banc granted*, 395 F.3d 978 (9th Cir. 2003). WLF is concerned that an overly expansive interpretation of the ATS would threaten to undermine American foreign and domestic policy interests.

The Allied Educational Foundation (AEF) is a non-profit charitable foundation based in Englewood, New Jersey. Founded in 1964, AEF is

dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

Although this case eventually was dismissed on summary judgment when, despite years of discovery, Appellants were unable to produce evidence to support their allegations, *amici* believe that the case never should have gotten that far. *Amici* are filing this brief to urge the Court to hold that the case should have been dismissed on the pleadings; otherwise, similarly situated defendants will continue to be forced to expend huge amounts of time and financial resources in defending similarly nonmeritorious ATS suits.

Amici are particularly concerned that the ATS is being used to assert jurisdiction over parties and disputes that have little or no connection to the U.S. and that are more appropriately addressed in connection with proceedings in other nations. It simply is not true, as the district court asserted, that the United States has a "compelling" interest in allowing its courts to be used to press human rights claims arising anywhere in the world. Where, as here, the parties and the dispute have little connection with this country, *amici* believe that comity requires U.S. courts to abstain in favor of the courts of nations that have a closer connection to the parties and that object to interference from our courts.

WLF and AEF address the following issues only: (1) whether dismissal of this case is appropriate under the doctrine of international comity; and (2) whether the ATS authorizes federal courts to recognize a cause of action based on allegations that the defendant aided and abetted others' violations of the law of nations. They are filing this brief with the consent of all parties.

STATEMENT OF THE CASE

This case arises from claims by Appellants, citizens of Sudan, that their human rights were violated by the Sudanese government during the decades-long armed conflict in the southern Sudan. Appellants seek to recover damages under the ATS from a Canadian corporation (Appellee Talisman Energy Inc.) based on allegations that Talisman (through its indirect investment in a related entity that was itself an investor in a corporation conducting oil operations in Sudan until 2003) conspired with the Sudanese government to commit the human rights violations, and also aided and abetted those violations.

Talisman itself does not conduct business in the United States. Nonetheless, the district court ruled that it could exercise personal jurisdiction over Talisman mainly on the basis of the activities within New York of a Talisman subsidiary, Fortuna U.S.A. Inc. *Presbyterian Church of Sudan v. Talisman Energy, Inc.* ["*Talisman II*"], 2004 U.S. Dist. LEXIS 17030 (Aug. 30, 2004).

In 2002, Talisman filed a motion to dismiss the complaint, based *inter alia* on assertions that: (1) dismissal was appropriate under the doctrine of international comity; and (2) a claim that a corporation aided and abetted others' violations of customary international law is not actionable under the ATS. The district court denied the motion. *Presbyterian Church of Sudan v. Talisman Energy, Inc.* ["*Talisman I*"], 244 F. Supp. 2d 289 (S.D.N.Y. 2003). The court held that "international comity" was inapplicable because whatever interests Canada had in resolving allegations against a Canadian corporation were not "especially compelling," and because Talisman had not demonstrated how permitting the suit to go forward would undermine Canada's policy of "engagement" toward the Sudanese government. *Id.* at 341-44. The court also held that aiding and abetting allegations were actionable under the ATS. *Id.* at 321-24.

Talisman later moved for judgment on the pleadings, asserting that the Supreme Court's decision in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), and this Court's decision in *Flores v. Southern Peru Copper Corp.*, 406 F.3d 65 (2d Cir. 2003), had significantly changed the landscape of law governing ATS lawsuits. Judge Cote (to whom the case had been reassigned following the death of Judge Schwartz) denied the motion, explicitly reaffirming Judge Schwartz's

earlier ruling regarding aiding and abetting liability and rejecting Talisman's claim that the customary international law standards for affixing such liability were insufficiently specific to meet *Sosa*'s requirements. *Presbyterian Church of Sudan v. Talisman Energy, Inc.* ["*Talisman III*"], 374 F. Supp. 2d 331, 337-41 (S.D.N.Y. 2005).

Judge Cote also rejected Talisman's renewed effort to dismiss the case on the basis of international comity, an effort that was supported by a letter from the U.S. State Department and a diplomatic note from Canada to the State Department. *Presbyterian Church of Sudan v. Talisman Energy, Inc.* ["*Talisman IV*"], 2005 U.S. Dist. LEXIS 18399 (S.D.N.Y. 2005). The diplomatic note stated: (1) the lawsuit interfered with Canadian foreign policy by undermining Canada's ability to offer trade support services to the Sudanese government as an inducement to resolve Sudan's internal disputes, because Canadian corporations would be unwilling to cooperate with the provision of such services if doing so could subject them to suits in U.S. courts; and (2) Canada objected to American courts exercising jurisdiction over the activities of Canadian corporations that take place entirely outside the United States. The district court disagreed with Canada's assertion that the suit would interfere with its foreign policy, stating that Canada's constructive engagement policy did not condone Canadian

corporations "act[ing] outside the bounds of customary international law while doing business in Sudan." *Id.* at *18-*19. Asserting that "the United States and the international community retain a compelling interest in the application of the international law proscribing atrocities such as genocide and crimes against humanity," the court held:

> [W]hile a court may decline to hear a lawsuit that may interfere with a State's foreign policy, particularly when that foreign policy is designed to promote peace and reduce suffering, dismissal is only warranted as a matter of international comity where the nexus between the lawsuit and that foreign policy is sufficiently apparent and the relevant foreign policy outweighs the public's interest in vindicating the values advanced by the lawsuit.

Id. at *25. The court also held that the willingness of Canadian courts to hear any common law tort claims that Appellants might assert against Talisman did not tip the balance in favor of dismissal based on international comity, because "Canadian courts are not able to entertain civil suits for violations of the law of nations." *Id.* at *26.

Following extensive discovery, Talisman moved for summary judgment. The district court granted the motion, finding that Appellants' conspiracy allegations were deficient as a matter of law and that they had failed to introduce sufficient factual evidence to support their other claims, including their aiding and abetting claim. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*

["*Talisman V*"], 453 F. Supp. 2d 633, 679 (S.D.N.Y. 2006). Appellants have appealed from that dismissal.

SUMMARY OF ARGUMENT

The doctrine of international comity is designed to reduce conflicts among nations regarding whose courts should hear a dispute over which both sets of courts could exercise jurisdiction. When a federal court recognizes that its interests in a pending controversy pales in comparison to the interests of a foreign country, it is often appropriate for the court to abstain from hearing the case and allow it to be heard instead before a foreign tribunal.

The doctrine is fully applicable in this case; the Court should affirm the district court's dismissal of the complaint – on the ground that international comity required the court to abstain from hearing this case. Appellants are all citizens of Sudan who raise claims based on events that occurred in Sudan. Appellee is a Canadian corporation that conducted oil operations in Sudan until 2003 and has virtually no contacts with the United States. Under those circumstances, the courts of Canada are a far more appropriate forum for adjudicating Appellants' claims. Moreover, although Appellants may not be permitted to include in their Canadian filings a cause of action based on alleged violations of human rights law, such proceedings would be a more-than-adequate

forum: Canada permits Appellants to plead common law tort actions that would be the functional equivalent of an ATS action alleging violations of international law. As this Court has explained, "The availability of an adequate alternative forum does not depend on the existence of the identical cause of action in the other forum, nor on identical remedies." *Norex Petroleum Ltd. v. Access Indus., Inc*., 416 F.3d 146, 158 (2d Cir. 2005), *cert. denied,* 126 S. Ct. 2320 (2006).

Abstention is particularly appropriate when, as here, the Canadian government has protested the suit, and its continued prosecution threatens to disrupt relations between the U.S. and Canada. In declining to abstain, the district court determined that going forward with the suit would not (as asserted by Canada) interfere with Canadian foreign policy. Such judicial second-guessing was wholly inappropriate; a federal court operates well beyond the bounds of its competence when it declines to abstain based on its conclusion that a foreign nation's diplomatic policy determinations are not sound.

The district court's dismissal of the action should be upheld for the additional reason that the ATS does not provide a cause of action based on claims that the defendant aided and abetted others' violations of the law of nations. Appellants' arguments to the contrary are based on a fundamental misunderstanding of the nature of the ATS causes of action contemplated by

Sosa. *Sosa* made clear that the ATS is solely a jurisdictional statute; it flatly rejected the notion that the ATS also created a private right of action by aliens alleging that they have been injured as a result of violations of the law of nations.

While the Supreme Court in *Sosa* said it was unwilling to "shut the door to the law of nations entirely," 542 U.S. at 731, it warned that federal courts should exercise "great caution" in recognizing (under federal common law) *any* new private rights of action under the ATS. *Sosa* established the following *minimum* prerequisite: "federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was adopted" – *i.e.*, violation of safe conducts, infringement of the rights of ambassadors, and piracy. *Id.* at 732. Applying that standard, the Court should refrain from creating an aiding and abetting cause of action under the ATS; there simply is no widespread international acceptance of civil liability for aiding and abetting others' violations of customary international law.

ARGUMENT

I. THE COURTS SHOULD ABSTAIN FROM EXERCISING JURISDICTION OVER THIS CASE UNDER PRINCIPLES OF INTERNATIONAL COMITY

The issues raised in the complaint – a corporation's alleged complicity in the violation of the rights of a large number of Sudanese citizens – are issues of grave concern. However, Plaintiffs have available to them a far more appropriate forum within which to raise those concerns: the courts of Canada, the country in which the corporation is located and conducts much of its business. None of the events giving rise to this suit occurred in the United States, none of the plaintiffs claims any meaningful contact with the United States,[1] and Talisman has virtually no contact with the United States.[2] Under those circumstances, it makes no sense for the federal courts – from their vantage point half-way around the world – to address issues that could and more appropriately should be addressed by Canadian courts. That is particularly true where, as here, the foreign government which has made available the alternative

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[1] One of the initial Plaintiffs, Nuer Community Development Services in U.S.A. ("Nuer"), is a U.S. citizen by virtue of its incorporation in this country. However, Nuer is no longer a party. The district court dismissed Nuer's claims on the grounds that Nuer is not an alien and only aliens are permitted to sue under the ATS. *Talisman V*, 453 F. Supp. 2d at 661.

[2] Talisman conducts virtually no business in the United States. The district court upheld personal jurisdiction over Talisman based principally on a finding that: (1) Fortuna, a Talisman subsidiary, conducts some business in New York; and (2) Fortuna's separate corporate identity need not be respected because, the district court found, Talisman exercises extensive control over Fortuna's operational and marketing policies. *Talisman II*, 2004 U.S. Dist. LEXIS 17030 at *7.

forum has stated unequivocally that it objects to U.S. supervision of the overseas activities of its corporations, and also objects to what it perceives as U.S. interference with its foreign policies. A decent level of respect for the rights of a foreign nation to address issues over which it has a far greater interest suggests that the federal courts should abstain from hearing those issues, under the international comity doctrine.

"Comity" in this sense refers to "the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states." *Societe Nationale Industrielle Aerospatiale v. U.S. District Court*, 482 U.S. 522, 544 n.27 (1987). Its primary purpose is to "maintain[] amicable working relationships between nations." *JP Morgan Chase Bank v. Altos Hornos De Mexico, S.A. de C.V.*, 412 F.3d 418, 423 (2d Cir. 2005). Comity is "'shorthand for good neighborliness, common courtesy and mutual respect between those who labour in adjoining judicial vineyards.'" *Id.* (quoting *British Airways Bd. v. Laker Airways Ltd.*, E.C.C. 36, 41 (Eng. C.A. 1984)). As the Supreme Court explained:

> "Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is a recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or

of other persons who are under the protection of its laws.

Hilton v. Guyot, 159 U.S. 113 (1895).

A. The Court Has Identified Four Factors Relevant in Determining Whether Abstention Is Proper Under International Comity

There are no hard-and-fast rules regarding when abstention is appropriate under the international comity doctrine. As this Court has recognized:

> The doctrine has never been well-defined, leading one scholar to pronounce it "an amorphous never-never land whose borders are marked by fuzzy lines of politics, courtesy, and good faith." Harold G. Maier, Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law, 76 *Am. J. Int'l L.* 280, 281 (1982).

JP Morgan Chase Bank, 412 F.3d at 423.

Nonetheless, this Court has identified a number of factors that weigh heavily on any abstention decision:

(1) ***Strength of the Foreign Government's Interest.*** In determining whether abstention is appropriate, this Court routinely looks to the strength of a foreign government's interest in the issues raised in the complaint. Such interests exist if the events giving rise to the cause of action occurred in the foreign jurisdiction and/or if any parties to the suit are citizens of that nation. *See, e.g., Bigio v. Coca-Cola Co.* ["*Bigio I*"], 239 F.3d 440, 454 (2d Cir. 2000). When a foreign government has such an interest in the litigation, that interest is

deemed particularly strong when the government has formally objected to continuation of the litigation. *See, e.g., Jota v. Texaco Inc.*, 157 F.3d 153, 160 (2d Cir. 1998) ("inherent in the concept of comity is the desirability of having the courts of one nation accord deference to the official position of a foreign state"); *Bigio v. Coca-Cola Co.* ["*Bigio II*"], 448 F.3d 176, 178 (2d Cir. 2006), *cert denied*, 2007 U.S. LEXIS 3078 (Mar. 19, 2007) (district court abused discretion by dismissing case on grounds of international comity, particularly where Egypt, the nation in which the events giving rise to the suit against an American corporation occurred, "never raised the slightest objection to adjudication of the instant controversy by United States courts.").

Of course, because the strength of the foreign government's interests depends solely on the extent of its ties to the parties and the cause of action, the strength of those interests does not vary based on a court's assessment of the soundness of the foreign government's stated reasons for its objections. Nor do courts generally possess the expertise to undertake such assessments. *See Sarei v. Rio Tinto, PLC*, ___ F.3d ___, 2007 U.S. App. LEXIS 8387 (9th Cir. Apr. 12, 2007) (Brief of U.S. in Support of Affirmance at 14) (A "court in the United States is not well-positioned to evaluate what effects adjudication of claims . . . may have on a foreign sovereign's efforts to resolve conflicts.").

(2) ***Strength of the U.S. Government's Interests.*** In evaluating the appropriateness of abstention in favor of proceedings in another nation, courts generally balance the foreign government's interests in the controversy against those of the United States. American courts have an interest in upholding the rights of U.S. citizens and others under the protection of our laws and thus should hesitate to abstain if doing so might jeopardize the rights of such individuals. *Societe Nationale*, 482 U.S. at 544 n.27 (comity should be applied with due regard to "'the rights of [a nation's] own citizens or of other persons who are under the protection of its laws'") (quoting *Hilton*, 159 U.S. at 164). Noncitizens "under the protection of American law" have generally been deemed to include resident aliens and some others physically present in the United States. *Johnson v. Eisentrager*, 339 U.S. 763 (1950). This Court has been extremely reluctant to exercise jurisdiction over conduct that occurs outside of American territory and has no effect on U.S. citizens, sovereignty, or security. *United States v. Yousef*, 327 F.3d 56, 103 (2d Cir. 2003).

(3) ***Effect of Suit on U.S. Relations with Foreign Government.*** The Court has recognized that an important factor in any abstention determination is the effect that continuation of the U.S. lawsuit is likely to have on relations between the United States and a foreign government with an interest in the underlying

controversy. *See, e.g., JP Morgan Chase Bank*, 412 F.3d at 423 ("international comity is clearly concerned with maintaining amicable working relationships between nations"); *Bigio II*, 448 U.S. at 178 ("the only issue of international comity properly raised here is whether adjudication of the case would offend amicable working relationships with Egypt"). One good indication that continuation of a lawsuit might upset U.S. foreign relations is that the foreign government has formally objected to its continuation. *Id.* at 178; *Jota*, 157 F.3d at 160. The Supreme Court has suggested that, in determining whether to permit an ATS lawsuit to proceed, federal courts should give "serious weight" to the views of the Executive Branch regarding the effect of the lawsuit on U.S. foreign relations. *Sosa*, 542 U.S. at 733.

(4) ***Adequacy of the Forum*****.** This Court has held that the adequacy of the forum provided to the plaintiff by the foreign nation is an important consideration in any comity analysis:

> When a court dismisses on the ground of comity, it should normally consider whether an adequate forum exists in the objecting nation and whether the defendant sought to be sued in the United States forum is subject to or has consented to the assertion of jurisdiction against it in the foreign forum.

Jota, 157 F.3d at 160. The alternative forum can qualify as "adequate" even if it does not allow the same cause of action, with the same range of remedies, that

the plaintiff seeks in U.S. courts. *Norex Petroleum*, 416 F.3d at 158 ("[T]he availability of an adequate alternative forum does not depend on the existence of the identical cause of action in the other forum, nor on identical remedies."). *See also Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1239 (11th Cir. 2004). Moreover, the alternative forum can qualify as "adequate" for purposes of applying international comity even when the same alternative forum would be *inadequate* for purposes of dismissal based on *forum non conveniens*. *Norex*, 416 F.3d at 159. *Norex* held that dismissal based on *forum non conveniens* is improper if the plaintiff's cause of action would be procedurally barred in the foreign forum, even if it would have been open to the plaintiff if timely filed; but the Court held that under those circumstances dismissal based on international comity was still open to the defendant. *Id.*

In addition, the "adequacy" of the foreign forum is to be judged not by the result likely to be achieved therein but by its fairness. *JP Morgan Chase Bank*, 412 F.3d at 424 ("deference to the foreign court is appropriate so long as the foreign proceedings are *procedurally fair* and . . . do not contravene the laws or public policy of the United States.") (emphasis added). As the United States recently explained in urging abstention in another pending ATS case:

[A] U.S. court considers whether the foreign proceedings are "consistent

> with civilized jurisprudence and U.S. public policy." *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1238 (11th Cir. 2002). A foreign forum is not rendered fundamentally unfair simply because the plaintiffs' claims would be barred under a neutral principle of law.

Mujica v. Occidental Petroleum Corp., Nos. 05-56175, 05-56178, 05-56056 (9th Cir., dec. pending) (Brief of United States in Support of Affirmance, filed March 17, 2006).

B. All Four Factors Point Strongly in Favor of Abstention

All four factors relevant in determining the applicability of international comity strongly support abstention in favor of Canadian courts. Accordingly, the Court should affirm, on the basis of international comity, the district court's dismissal of this action.

(1) ***Canada Has a Strong Interest in the Issues Raised Herein.*** Appellee Talisman is incorporated in Canada and has its principal place of business there. Because of Talisman's citizenship, Canada has a strong interest in adjudicating allegations of misconduct by Talisman. *See, e.g., Bigio I*, 239 F.3d at 454.

The strength of Canada's interest in the issues raised herein is confirmed by the diplomatic note sent by Canada to the U.S. State Department, objecting to continuation of the suit. The diplomatic note stated, *inter alia*, that the lawsuit interfered with Canadian foreign policy by undermining Canada's ability to offer

trade support services to the Sudanese government as an inducement to resolve Sudan's internal disputes, because Canadian corporations would be unwilling to cooperate with the provision of such services if doing so could subject them to suits in U.S. courts. This Court has made clear that abstention based on international comity is particularly appropriate when, as here, a foreign state with an interest in the issues raised by a lawsuit has filed formal objections to the suit. *Jota*, 157 F.3d at 160; *Bigio II*, 448 F.3d at 178.

The district court acted inappropriately in ignoring Canada's protests. The court said that this lawsuit would not interfere with Canada's foreign policy of "constructive engagement" with the Sudanese government because any federal court judgment would do no more than punish a Canadian corporation for acting "outside the bounds of customary international law while doing business in Sudan." *Talisman IV*, 2005 U.S. Dist. LEXIS 18399 at *18-*19. The court reasoned that the suit should be unobjectionable to Canada because it did not challenge the "constructive engagement" policy and because Canada could not possibly believe that violations of international law by Canadian corporations were an acceptable part of that policy. *Id.* The court concluded that Canada's objection that the suit could interfere with the "constructive engagement" policy "suggest[ed] a lack of understanding about the nature of the claims in the ATS

litigation." *Id.* at *21-22.

With respect, *amici* believe that it was the district court that displayed a lack of understanding of the nature of Canada's objections. Canada's concern was that the mere cost of defending ATS suits of this nature might cause Canadian corporations to cease doing business in Sudan and thereby limit Canada's ability to bargain with the Sudanese government. As this suit demonstrates, such costs are incurred without regard to whether a Canadian corporation has acted outside the bounds of international law. Indeed, there is every reason to believe that the pendency of this lawsuit played a role in Talisman's 2003 decision to pull out of Sudan – a decision that has decreased Canada's leverage with Sudan.

Moreover, because the strength of Canada's interest in the issues raised herein is based on its interest in adjudicating claims involving its own citizens, the district court acted inappropriately in conducting *any* assessment of the soundness of Canada's rationale for objecting. Even if the district court were correct in its assessment, Canada's interest in adjudicating claims involving Canadian corporations would be undiminished. Once the strength of that interest is established (by means of a diplomatic protest), the only appropriate inquiry is whether competing interests (*i.e.*, those supporting exercise of federal court

jurisdiction) outweigh the acknowledged interest of a nation in the activity of its own citizens. A federal court operates well beyond the bounds of its competence when it dissects the soundness of a foreign nation's diplomatic policies and, if it determines that the policies are unsound, discounts that nation's interests in adjudicating claims involving its own citizens.

(2) ***The U.S. Has Little Interest in the Issues Raised Herein.*** In contrast to Canada's strong interest in the issues raised herein, the United States has little or no interest. The events giving rise to Appellants' claims have no connection to the United States, and none of the parties is a U.S. citizen or resident alien.

In ruling that the U.S.'s interests in deciding this case are strong, the district court stated that United States has a "compelling interest" in the application of "the international law proscribing atrocities such as genocide and crimes against humanity," even when neither the parties nor the cause of action have meaningful connections with this country. *Talisman IV*, 2005 U.S. Dist. LEXIS 18399 at *25. The district court provided no citation for its "compelling interest" claim, and there is none. To the contrary, the Supreme Court made clear in *Sosa* that the federal courts should exercise "great caution" in recognizing *any* ATS rights of action based on alleged violations of international law (beyond the three limited causes of action recognized in 1789). *Sosa*, 542 U.S.

at 728. The district court's "compelling interest" claim is contrary to this Court's admonition that courts should be reluctant to exercise jurisdiction over conduct that occurs outside of American territory and has no effect on U.S. citizens, sovereignty, or security. *United States v. Yousef*, 327 F.3d at 103. Indeed, the Supreme Court has held repeatedly that nonresident aliens are not entitled to protection under the U.S. Constitution. *See, e.g., Johnson v. Eisentrager*, 339 U.S. 763 (1950). Given that Sudanese citizens with minimal or nonexistent U.S. ties are entitled to few if any basic constitutional protections, the United States has little interest in adjudicating their claims that the actions of other noncitizens violated their as-yet undefined federal common law rights.[3]

(3) ***The Suit Is Likely To Have a Negative Effect on U.S.-Canadian Relations.*** Canada has objected to an American court exercising jurisdiction over the activities of a Canadian corporation that took place entirely outside the United States, yet the court continued to exercise jurisdiction for five years before

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[3] If anything, the interests of the United States weigh *against* exercise of extraterritorial jurisdiction in this case. *Amici* note that the U.S. government has taken exception to efforts by prosecutors in Germany and elsewhere to investigate potential criminal charges against former Secretary of Defense Donald Rumsfeld and other senior U.S. officials for alleged crimes based on the conduct of U.S. foreign policy. It would be difficult for the U.S. government to maintain that opposition while simultaneously tolerating ATS suits in U.S. courts against foreign corporations and officials for conduct lacking any connection with the U.S.

ultimately issuing a merits-based determination on the propriety of those activities. The suit has been enough of an irritant to cause Canada to file a formal protest, and the failure of American courts to heed that protest cannot help but have some adverse effects on U.S.-Canadian relations. *See Bigio II*, 448 U.S. at 178; *Jota*, 157 F.3d at 160.

Justice Breyer is among the many jurists who have pointed out that the ATS was intended to open federal courts for the purpose of promoting harmony among nations, not to undermine it, and thus that comity principles should be applied whenever needed "to ensure that ATS litigation does not undermine the very harmony it was intended to promote." *Sosa*, 542 U.S. at 761 (Breyer, J., concurring). The obvious potential for this suit to create conflict between the two countries counsels strongly in favor of abstention.

4. *Canadian Courts Are an Adequate Forum*. The district court recognized that Canada's judiciary was "equipped to consider claims such as those raised here." *Talisman IV*, 2005 U.S. LEXIS 18399 at *25. It nonetheless held that the courts of Canadian provided an inadequate forum for Appellants because Canada does not recognize "civil suits for violations of the law of nations," *id.* at 26, and thus any Canadian suit would have to be based on common law claims.

That ruling was erroneous as a matter of law.[4] As noted above, the unavailability of a cause of action based on customary international law violations does not render an alternative forum "inadequate," so long as the alternative forum (as is true here) provides the plaintiffs an opportunity to seek meaningful relief for their alleged injuries. *See Norex*, 416 F.3d at 158. The plaintiffs accuse Talisman of complicity in genocide and war crimes. Any number of common law causes of action – from wrongful death to assault to trespass – could be asserted in Canadian courts based on the factual allegations contained in the complaint. Moreover, Appellants make no allegation that the Canadian courts would treat their claims in a procedurally unfair manner. Under those circumstances, the courts of Canada must be deemed an adequate alternative forum as a matter of law. *JP Morgan Chase Bank*, 412 F.3d at 424.

II. THE ATS DOES NOT AUTHORIZE FEDERAL COURTS TO RECOGNIZE A CAUSE OF ACTION BASED ON ALLEGATIONS THAT THE DEFENDANTS AIDED AND ABETTED OTHERS' VIOLATIONS OF THE LAW OF NATIONS

The district court's dismissal of the action should be upheld for the additional reason that the ATS does not provide a cause of action based on claims

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[4] *Amici* do not profess expertise in Canadian law and thus take no position regarding whether Canadian law provides a cause of action for violations of customary international law. We understand that some legal experts assert that Canada does, in fact, recognize such a cause of action.

that the defendant aided and abetted others' violations of the law of nations. Appellants' arguments to the contrary are based on a fundamental misunderstanding of the nature of the ATS causes of action contemplated by *Sosa*.

A. The District Court's Pre- and Post-*Sosa* Understandings of ATS Causes of Action

In March 2003, the district court denied Talisman's motion to dismiss, ruling *inter alia* that Appellants' aiding and abetting allegations stated a cause of action against Talisman under the ATS. *Talisman I*, 244 F. Supp. 2d at 321-22. The court adopted the pre-*Sosa* understanding of the ATS: that it "provides a cause of action for breaches of international law," *id.* at 320, and thus that whether Appellants' aiding and abetting allegations stated a cause of action rested entirely on whether such alleged activities constituted a breach of international law. *Id*. at 320-21. The court held, "An examination of international law reveals that the concepts of aiding and abetting are commonplace with respect to the types of allegations contained in the Amended Complaint." *Id.* at 321.

Sosa rejected that understanding of the ATS. First, *Sosa* made clear that the ATS is *solely* a jurisdictional statute; it flatly rejected the view of the Ninth

Circuit [5] that the ATS not only granted federal courts jurisdiction to hear claims by aliens sounding in tort and alleging violations of the law of nations, but also created a federal private right of action by aliens alleging injury as a result of such violations. *Sosa,* 542 U.S. at 713. *Sosa* also rejected the position of other federal courts that customary international law is fully incorporated into a federal common law – a position that renders all violations of customary international law actionable in federal court. Instead, while holding open the possibility that there might exist additional federal common law rights of action over which courts may exercise ATS jurisdiction (in addition to the three actions recognized in 1789), *Sosa* held that federal courts should exercise "great caution" in recognizing *any* such rights. *Id.* at 728. In other words, *Sosa* made clear that customary international law is, at most, partially incorporated into federal common law; the latter is but a subset of the former. *See* Curtis A. Bradley, Jack L. Goldsmith and David H. Moore, *Sosa, Customary International Law, and the Continuing Relevance of Erie*, 120 HARV. L. REV. 869, 904-07 (2007).

In light of *Sosa* and this Court's decision in *Flores*, Talisman in 2004

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[5] *See, e.g., Hilao v. Estate of Marcos*, 25 F.3d 1467, 1475-76 (9th Cir. 1994) (ATS "creates a cause of action for violations of specific, universal and obligatory international human rights standards"), *cert. denied*, 513 U.S. 1126 (1995).

raised anew its claim that Appellants' aiding and abetting allegations were not actionable under the ATS. The district court disagreed, rejecting Talisman's argument that *Sosa* and *Flores* had fundamentally "changed the landscape of law governing ATS lawsuits." *Talisman III*, 374 F.3d at 334.

B. Appellants Improperly Seek to Broaden the ATS by Incorporating Elements from General Common Law

By adhering to its view that all customary international law is federal law and thus that the ATS grants federal courts jurisdiction to hear all claimed violations of customary international law, *Talisman III* ignored *Sosa*'s clear holding to the contrary. But to its credit, the district court recognized that any ATS cause of action must have its origins in U.S. treaties or customary international law – after all, Congress limited ATS jurisdiction to civil actions alleging a tort "committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350.

Appellants, on the other hand, seek recognition of ATS causes of action completely untethered from those international law moorings. To support their view of aiding and abetting liability, Appellants ask the Court to adopt a smorgasbord of *general* common law principles that, while they may be part of the domestic law of the various States, have nothing to do with international law.

See, e.g., Opening Brief of Plaintiffs-Appellants ("Pl. Br.") at 64-68. Nothing in *Sosa* supports such an approach. Indeed, *Sosa* repeatedly noted that ever since *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), the Supreme Court has repudiated the existence of a federal "general" common law. *Sosa*, 542 U.S. at 726. While *Sosa* recognized that the ATS authorizes the federal court to recognize a very limited number of civil causes of action for violation of the clearest and most strictly enforced provisions of international law, the decision could not be clearer that federal courts are to look to international law – not the general common law principles discussed by Appellants in their brief – in determining the scope of this federal common law.

C. The Principles Set Forth in *Sosa* Require Rejection of Aiding and Abetting Liability Under the ATS

While the Supreme Court in *Sosa* said it was unwilling to "shut the door to the law of nations entirely," *id.* at 731, the Court's expressed caution in recognizing *any* new private rights of action under the ATS makes clear its rejection of the view that customary international law is federal law. *See, e.g.*, *id. at* 729 ("[T]he judicial power should be exercised on the understanding that the door is still ajar *subject to vigilant doorkeeping*, and thus open to a *narrow class*

of international norms today.") (emphasis added).[6] *Sosa*'s rejection of that view is further confirmed by its rejection of the position that 28 U.S.C. § 1331 (which provides jurisdiction over cases arising under the "laws of the United States") creates jurisdiction for suits by *citizens* alleging violations of international law. *Id.* at 731 n.19.

While not confirming the existence of *any* additional federal common law causes of action under the ATS, *Sosa* established the following *minimum* pre-requisite: "federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was adopted" – *i.e.*, violation of safe conducts, infringement of the rights of ambassadors, and piracy. *Id.* at 732. *Sosa* articulated a number of factors that federal courts must take into account before recognizing federal common law rights of action under the ATS, including whether the plaintiff has exhausted remedies in the courts of the country in which the injury occurred, and

[6] The only federal common law private cause of action under the ATS even arguably embraced by *Sosa* is one for violation of customary international law against official torture. *Id.* at 732 (quoting this Court's observation that "for purposes of civil liability, the torturer has become – like the pirate and slave trader before him – *hostis humani generis*, an enemy of all mankind.").

"the practical consequences" of such recognition. *Id.* at 732-33 & n.21.[7] The Court thereby made clear that federal common law private rights of action based on alleged violations of customary international law are not nearly as broad as was suggested by prior ATS decisions.

Appellants' disagreement with the district court regarding the elements of "aiding and abetting" liability serves to illustrate the absence of any widespread international acceptance of civil liability for a well-defined tort of the sort Appellants ask this Court to accept as actionable under the ATS. The district court provided numerous international law citations to support its holding that aiding and abetting liability under the ATS requires a showing that the defendant *intended* to assist another in violating an international law of which the defendant was aware. *Talisman V,* 453 F. Supp. 2d at 666-668. Appellants cited numerous other authorities in support of their argument that the district court adopted an inappropriately restrictive definition of what constitutes actionable "aiding and abetting." Pl. Br. 68-77. As we see it, this debate only serves to illustrate the

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[7] *Sosa* also directed courts to consider whether "deference to the political branches" requires nonrecognition of a right of action. *Id.* at 733. When the political branches explicitly tell a court that recognition of an ATS right of action would undermine U.S. foreign policy interests, the case for nonrecognition of a right of action is overwhelming. *See, e.g., In Re South African Apartheid Litigation*, 346 F. Supp. 2d 538 (S.D.N.Y. 2004), on appeal, No. 05-2326 (2d Cir., dec. pending).

absence of any widespread international consensus regarding when and/or if to impose liability on those who aid or abet others' violations of international law. In the absence of a widespread consensus of that sort, *Sosa* dictates that no federal common law right of action be recognized.

The "practical consequences" of recognizing an ATS aiding and abetting cause of action, *Sosa* at 732-33, also counsel against recognizing such a cause of action. As a practical matter, multi-national corporations cannot undertake resource development projects in an impoverished nation without the active cooperation of that nation's government. It is a regrettable but undeniable fact that the governments in many such nations do not respect the human rights of their citizens. *See, e.g.*, Human Rights Watch, *World Report 2007* (Jan. 2007) (documenting human rights abuses in 70 countries). If multi-national corporations find themselves targeted by ATS suits every time they cooperate (during the course of a development project) with a local government with a spotty human rights record, then they likely will desist from participating in such projects in the future.[8] Yet, such development projects often provide the only

[8] The *Sosa* decision has done little to deter plaintiffs' lawyers from filing an ever-increasing number of ATS claims against multi-national corporations based on their overseas conduct. *See, e.g.*, Joseph G. Finnerty III and John Merrigan, *Legal Imperialism: The Tort Lawyers Take on Foreign Policy*, Wall Street Journal (Feb. 28, 2007).

realistic means by which citizens of impoverished nations can hope to improve their living standards – they allow Western countries to put in place "constructive engagement" policies designed to eliminate human rights abuses, and they provide the developing country with new economic resources. Accordingly, recognition of an "aiding and abetting" ATS cause of action might well have the "practical consequences" of decreased Western economic aid and decreased means of persuading government leaders to improve their human rights records.

CONCLUSION

The Washington Legal Foundation and the Allied Educational Foundation respectfully requests that the Court affirm the decision of the district court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed.R.App.P. 32(a)(7)(C), I hereby certify that the foregoing brief of WLF is in 14-point proportionately spaced CG Times type. According to the word processing system used to prepare this brief (WordPerfect 12.0), the word count of the brief is 6,989, not including the corporate disclosure statement, table of contents, table of authorities, certificate of service, and this certificate of compliance.

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CERTIFICATE OF SERVICE

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