

apply.<sup>53</sup>

Therefore, this court reverses the decision to dismiss the plaintiff's complaint and remands the case for further proceedings consistent with the opinion of this court.<sup>54</sup>

*Rebecca E. Hill*

#### IV. THE ALIEN TORT CLAIMS ACT AND SUBJECT MATTER JURISDICTION

##### *Presbyterian Church of Sudan v. Talisman Energy*

###### *A. Introduction*

In *Presbyterian Church of Sudan v. Talisman Energy*, the District Court for the Southern District of New York held that there was subject matter jurisdiction under the Alien Tort Claims Act [hereinafter ATCA], and that the Court could assert personal jurisdiction over a foreign corporation under New York law.<sup>55</sup> The Court treated Talisman Energy [hereinafter Talisman], a Canadian corporation, as a state actor for ATCA purposes and further found that Talisman's acts constituted *jus cogens* violations.<sup>56</sup>

This Court's ruling reaffirmed Second Circuit and international treaty precedent, which holds that corporations may be held liable for *jus cogens* violations under the ATCA.<sup>57</sup> However, the District Court's ruling expanded the Court's subject matter jurisdiction under the ATCA. First, the Court reaffirmed that a corporation engaging in genocide need not act under color of state law in order to be subject to *jus cogens* violations under the ATCA.<sup>58</sup> Secondly, the Court determined that even if a corporation were not acting directly under color of state law, demonstration of a "substantial degree of cooperation" between a corporation and a state is sufficient to treat the corporation as a state actor under the ATCA.<sup>59</sup>

53. *Abrams*, 332 F.3d at 186.

54. *Id.* at 188.

55. *Presbyterian Church of Sudan v. Talisman Energy*, 244 F. Supp. 2d 289, 319,331 (S.D.N.Y. 2003) [hereinafter *Presbyterian Church*].

56. *Id.* at 328–29; *See id.* at 306.

57. *See id.* at 308–14, 316–17.

58. *Presbyterian Church*, 244 F. Supp. 2d at 328.

59. *Id.* at 328–29.

*B. Background and Summary of Arguments*

Talisman Energy, Inc., the largest independent oil producer in Canada, conducts commercial activities all over the world.<sup>60</sup> Talisman owns several subsidiaries within the United States.<sup>61</sup> Through a consortium of oil companies called the Greater Nile Petroleum Operating Company Ltd. [hereinafter GNPOC], Talisman explores and produces oil in certain areas of southern Sudan which are inhabited by local populations.<sup>62</sup>

The plaintiffs, as current and former residents of the Republic of Sudan, are victims of Talisman's alleged genocidal acts.<sup>63</sup> The Sudanese Presbyterian Church, an unincorporated association of Presbyterians, claims that Sudanese government forces bombed and destroyed its churches for religious reasons and because of the church's close proximity to oil fields.<sup>64</sup> The group of plaintiffs, which includes several individuals and a non-profit corporation of Sudanese refugees, claim that they were injured when the Sudanese government launched its "ethnic cleansing" campaign.<sup>65</sup>

The plaintiffs initiated a class action suit on behalf of all non-Muslim, African Sudanese residents who live within fifty miles of the southern Sudan oil concessions.<sup>66</sup> The plaintiffs sued Talisman for its violations of international law while pursuing oil exploration in the region.<sup>67</sup> Plaintiffs claimed that Talisman collaborated with the Sudanese government in ethnically cleansing the civilian populations in southern Sudan.<sup>68</sup> The ethnic cleansing involved extrajudicial killings, forced displacements, military attacks on civilians with infantry units and heavy bombers, destruction of property, kidnappings, rape, and civilian enslavement.<sup>69</sup>

The plaintiffs contended that the Sudanese government had made arrangements with Talisman to exploit oil reserves in southern Sudan because the government was unable to successfully exploit the oil without outside aid, and the government saw the oil reserves as a

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60. *Presbyterian Church*, 244 F. Supp. 2d at 299–300.

61. *Id.* at 300.

62. *Id.*

63. *Id.* at 302.

64. *Presbyterian Church*, 244 F. Supp. 2d at 302.

65. *Id.* at 302–03.

66. *Id.* at 302.

67. *Id.* at 303.

68. *Id.* at 296.

69. *Presbyterian Church*, 244 F. Supp. 2d at 296, 302–03.

potential source of funding to intensify the *jihad* (holy war) against the southern population.<sup>70</sup> In the arrangement, the Sudanese government agreed to remove the local southern population located near the oil fields in exchange for oil concessions.<sup>71</sup> Talisman further agreed to invest in Sudan's infrastructure to support further exploration; the government, in turn, used that infrastructure to increase security around Talisman's oil explorations and to enhance the government's genocidal military campaign against the southern population.<sup>72</sup>

The plaintiffs filed their suit with the Southern District of New York on November 11, 2001.<sup>73</sup> In their complaint, the plaintiffs sought a declaration that the defendants violated international law, an injunction to restrain defendants from continuing ethnic cleansing of non-Muslim Sudanese, and compensatory damages from defendants.<sup>74</sup> Talisman moved to dismiss the action for lack of subject matter jurisdiction and lack of personal jurisdiction.<sup>75</sup> The District Court denied the motion to dismiss.<sup>76</sup>

### C. Discussion

The Court's jurisdiction is primarily asserted under 28 U.S.C. § 1350, otherwise known as the ATCA.<sup>77</sup> The ATCA provides district courts with "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."<sup>78</sup> Thus, the defendant's conduct must violate universally recognized norms of international law for the plaintiffs to have a cause of action under the ATCA.<sup>79</sup> However, a violation need not be strictly a *jus cogens* violation in order to be actionable under the ATCA; rather, any violation of a universal or obligatory international norm is actionable.<sup>80</sup> Examples of *jus cogens* violations include acts of genocide, war crimes, torture, slavery, and extrajudicial killings, which

70. *Presbyterian Church*, 244 F. Supp.2d at 299.

71. *Id.*

72. *Id.*

73. *Id.* at 303.

74. *Id.* (citing 28 U.S.C. § 1350).

75. *Presbyterian Church*, 244 F. Supp.2d at 303.

76. *Id.* at 296.

77. *Id.* at 303.

78. *Id.*; Alien Tort Claims Act, 28 U.S.C. § 1350.

79. *Id.* at 304 (citing *Kadic v. Karadzic*, 70 F.3d 232, 239 (2d Cir. 1995)(quoting *Filatirta v. Pena-Irala*, 630 F.2d 876, 888 (2d Cir. 1980)).

80. *Presbyterian Church*, 244 F. Supp.2d at 306 n.18.

violate universally-recognized norms of international law.<sup>81</sup> *Jus cogens* violations are the same as crimes of “universal concern” and have historically been applied to individuals, such as pirates and aircraft hijackers.<sup>82</sup> In fact, states and individuals may be held liable for merely encouraging or condoning *jus cogens* violations.<sup>83</sup> States have the right to exercise universal jurisdiction over those who violate *jus cogens*.<sup>84</sup>

### *Subject Matter Jurisdiction*

Talisman moved to dismiss the complaint for lack of subject matter jurisdiction.<sup>85</sup> The plaintiffs, on the other hand, claimed that the District Court for the Southern District of New York had jurisdiction pursuant to the ATCA under 28 U.S.C. § 1350.<sup>86</sup> The Court disagreed with Talisman’s contention that the Court lacked subject matter jurisdiction and argument that Talisman, as a corporation, was incapable of violating the laws of nations.<sup>87</sup> The Court found that both United States and international precedent allowed corporations to be held liable for *jus cogens* violations.<sup>88</sup>

Under the Second Circuit’s precedent, corporations can be liable under the ATCA for violations of international law.<sup>89</sup> Furthermore, the Court noted that the Second Circuit has held United Nations documents and the Genocide Convention apply equally to both state and non-state actors.<sup>90</sup> Other circuits, such as the Ninth and Fifth Circuits, have also agreed that corporations can be sued under the ATCA for international law violations.<sup>91</sup>

As a corporation, Talisman is also liable for *jus cogens* violations under international treaty precedent.<sup>92</sup> Although several of the major conventions protecting human rights, including the Genocide Convention and Geneva Convention, do not specifically implicate corporations, the conventions may still reach the corporations’ conduct

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81. *Presbyterian Church*, 244 F. Supp. 2d at 305–06 (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 702 (1987)).

82. *Id.* at 310.

83. *Id.* at 305.

84. *Id.* at 306.

85. *Id.* at 305.

86. *Presbyterian Church*, 244 F. Supp. 2d at 306–07.

87. *Id.* at 319.

88. *Id.*

89. *Id.* at 309.

90. *Id.* at 310.

91. *Presbyterian Church*, 244 F. Supp. 2d at 314.

92. *Id.* at 316–17.

as violative of customary international law.<sup>93</sup> International treaties and the practice of several international organizations, including the United Nations, impose duties and liabilities on corporations under international law, especially for gross human rights violations.<sup>94</sup> Talisman's status as a corporation did not entitle it to *per se* immunity under U.S. domestic or international law.<sup>95</sup> Therefore, the Court established that subject matter jurisdiction existed under the ATCA, despite the fact that Talisman was a corporation.<sup>96</sup>

### *Talisman's Arguments*

Talisman moved to dismiss the action, claiming that the plaintiffs inadequately alleged violations against Talisman.<sup>97</sup> Talisman first argued that claims of aiding and abetting do not fall within the realm of the ATCA, and that international law does not address claims for aiding and abetting.<sup>98</sup>

The Court responded that aiding and abetting are in fact actionable under the ATCA.<sup>99</sup> Courts must look to international law to determine whether or not aiding and abetting are actionable under the ATCA, as well as whether corporations are liable for aiding and abetting genocide.<sup>100</sup> The Court found the idea of "complicit liability" for conspiracy or aiding and abetting in acts of genocide were well-developed in international law and cited the prosecution of Nazi war criminals as examples.<sup>101</sup> Specifically, the Court determined that complicity can include corporate liability.<sup>102</sup> Further, the Court noted that Talisman significantly contributed to the commission of the crime by providing material support to Sudan with knowledge that their support would be used to carry out unlawful acts.<sup>103</sup>

Talisman similarly denied benefiting from slave labor.<sup>104</sup> However, determining that Talisman's participation in Sudan's ethnic cleansing included a policy of enslavement, the Court barred dismissal

93. *Presbyterian Church*, 244 F. Supp. 2d at 316–17.

94. *Id.* at 317–18.

95. *Id.* at 319.

96. *Id.*

97. *Id.*

98. *Presbyterian Church*, 244 F. Supp.2d at 320–21.

99. *Id.*

100. *Id.*

101. *Id.* at 322.

102. *Id.*

103. *Presbyterian Church*, 244 F. Supp.2d at 324.

104. *Id.* at 326.

of the complaint.<sup>105</sup> Talisman also argued they did not commit war crimes because their actions were specifically aimed at advancing oil operations.<sup>106</sup> Nevertheless, the mere fact that Talisman's acts generated oil revenue did not exclude the acts from being classified as war crimes.<sup>107</sup>

Talisman further contended its treatment of ethnic and religious minorities did not constitute genocide because the Genocide Convention did not list "non-Muslim, African Sudanese minority" as a protected group.<sup>108</sup> The Court disagreed, interpreting "non-Muslim" to be shorthand for "Christian and animist," a group that was listed in the Genocide Convention.<sup>109</sup>

Finally, Talisman argued that international law did not reach private individuals unless the individuals acted under the color of state law or perpetrated an offense of universal concern.<sup>110</sup> However, even Talisman concedes that war crimes and genocide are crimes of universal concern.<sup>111</sup> Since the plaintiffs allege that Talisman committed acts of genocide, Talisman allegedly perpetuated crimes of universal concern.<sup>112</sup> Secondly, the Court found that no demonstration of state action was necessary for any of the claims in the plaintiffs' complaint because each plaintiff had implicated Talisman as a co-conspirator with the state.<sup>113</sup> Nevertheless, the Court determined Talisman did act under color of law because the company paid Sudan for protection, permitted the Sudanese military to use Talisman's equipment in launching military attacks against civilians, and also helped the Sudanese government plan their ethnic cleansing strategy.<sup>114</sup> Based on the foregoing analysis, the Southern District of New York found that questions of law existed and therefore denied Talisman's motion to dismiss.<sup>115</sup>

#### D. Conclusion

In *Presbyterian Church*, the District Court for the Southern District

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105. *Presbyterian Church*, 244 F. Supp.2d at 326.

106. *Id.* at 327.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Presbyterian Church*, 244 F. Supp.2d at 327.

111. *Id.* at 327–28.

112. *Id.* at 298.

113. *Id.* at 328.

114. *Id.* at 328–29.

115. *Presbyterian Church*, 244 F. Supp.2d at 353–54.

of New York found both subject matter jurisdiction under the ATCA and personal jurisdiction over Talisman as a foreign corporation doing business in New York.<sup>116</sup> Reaffirming United States and international treaty precedent, the Court determined that Talisman could be treated as a state actor under the ATCA.<sup>117</sup> The Court expanded subject matter jurisdiction under the ATCA by finding that Talisman's cooperation with the Sudanese government and Talisman's role as a co-conspirator in the genocidal acts committed by the Sudanese government against the southern Sudanese populations around oil concessions amounted to acts under color of state law for purposes of liability under the ATCA.<sup>118</sup>

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## V. RECOGNITION OF FOREIGN JUDGMENTS

### *Films By Jove, Inc. v. Berov*

#### *A. Introduction*

In *Films By Jove, Inc. v. Berov*, the United States District Court for the Eastern District of New York recognized the sovereignty and independence of the United States judiciary in the international arena.<sup>119</sup> In its decision, the Court acknowledged the pervasive corruption in the Russian legal system and revealed an interest in protecting United States business interests.<sup>120</sup> In disregarding the decision of the High Arbitrazh Court of the Russian Federation, Russia's court of last resort, the Court discounted international principles of comity.<sup>121</sup> In doing so, the Court conveyed intolerance for corruption.<sup>122</sup> Future opinions will therefore rely on this decision in order to promote United States interests in the international realm and to justify non-recognition of foreign judgments.

116. *Presbyterian Church*, 244 F. Supp.2d at 319, 331.

117. *See id.* at 308–17, 328–29.

118. *Id.* at 328.

119. *Films By Jove, Inc. v. Berov*, 250 F. Supp.2d 156, 158 (E.D.N.Y. 2003)[hereinafter *Films By Jove*].

120. *Id.*

121. *Id.*

122. *Id.*