UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KEN WIWA, *et al.*, Plaintiffs, v. ROYAL DUTCH PETROLEUM COMPANY, *et al.*, Defendant.	96 Civ. 8386 (KMW)(HBP)
KEN WIWA, *et al.*, Plaintiffs, v. BRIAN ANDERSON, Defendant.	01 Civ. 1909 (KMW)(HBP)
ESTHER KIOBEL, *et al.*, Plaintiffs, v. ROYAL DUTCH PETROLEUM COMPANY, *et al.*, Defendants.	02 Civ. 7618 (KMW)(HBP)

DEFENDANTS' MEMORANDUM OF LAW ON ISSUES OF INTERNATIONAL LAW PURSUANT TO THE COURT'S ORDER OF OCTOBER 7, 2008

Rory O. Millson
Rowan D. Wilson
Thomas G. Rafferty

CRAVATH, SWAINE & MOORE LLP
825 Eighth Avenue
New York, NY 10019
212-474-1000

Attorneys for defendants

Date: December 12, 2008

TABLE OF CONTENTS

TABLE OF ABBREVIATIONS AND CITATION CONVENTIONS

Abbreviation	Description
Alston Decl.	November 21, 2008 Declaration of Philip Alston (*Wiwa* Docket No. 297)
Anderson Am. Compl., Mar. 27, 2002	Amended Complaint against Brian Anderson, dated March 27, 2002 (*Anderson* Docket No. 16)
Aug. 31, 1997 Pls.' Mem. of Law in Opp'n to Defs.' MTD	Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss the Amended Complaint, filed August 31, 1997 (*Wiwa* Docket No. 14/*Wiwa* Docket No. 15)
Compl.	Fourth Amended Complaint, dated October 7, 2007 (*Wiwa* Docket No. 220)
Feb. 22, 2002 Ord.	February 22, 2002 Order (*Wiwa* Docket No. 54)
First Am. Compl., Apr. 29, 1997	First Amended Complaint, dated April 29, 1997 (*Wiwa* Docket No. 6)
Herkströter Dep.	Transcript of April 14, 2004 Deposition of Cornelius Herkstroter
Idamkue Dep.	Transcript of March 12, 2004 Deposition of Freddie Idamkue
Idigima Dep.	Transcript of November 20, 2003 Deposition of Legbara Tony Idigima
Ikari Dep.	Transcript of July 28, 2003 Deposition of Benson Ikari
Kiobel Am. Class Action Compl.	*Kiobel* Amended Class Action Complaint, dated May 14, 2004 (*Kiobel* Docket No. 69)
Kiobel Dep.	Transcript of February 25, 2004 Deposition of David Kiobel
Kpuinen Dep.	Transcript of August 13, 2003 Deposition of Blessing Kpuinen
Kogbara Dep.	Transcript of October 15, 2003 Deposition of Karalolo Kogbara
Mar. 16, 2001 Pls.' Opp'n to Defs.' MTD	Plaintiffs' Opposition to Defendants' Motion to Dismiss, filed March 16, 2001 (*Wiwa* Docket No. 47)
Mar. 31, 1998 Rep.	March 31, 1998 Report and Recommendation of Magistrate Judge Pitman (*Wiwa* Docket No. 24)
Mar. 31, 2006 Rep.	March 31, 2006 Report and Recommendations of Magistrate Judge Pitman (*Wiwa* Docket No. 183)
Millson Decl.	Declaration of Rory O. Millson in Support of Defendants' Memorandum of Law on Issues of International Law Pursuant to the Court's Order of October 7, 2008
Moody-Stuart Dep.	Transcript of April 15, 2004 Deposition of Sir Mark Moody-Stuart, KCMG
Munsiff Decl.	March 24, 1997 Declaration of Jyoti Munsiff (*Wiwa* Docket No. 7)
Munsiff Dep.	Transcript of July 11, 1997 Deposition of Jyoti Munsiff
Nov. 8, 1996 Compl.	Complaint, dated November 8, 1996 (*Wiwa* Docket No. 1)
Oct. 7, 2008 Tr.	Transcript of October 7, 2008 Hearing
Osunde Dep.	Transcript of October 22, 2003 Deposition of Osazee Osunde

Pl. Int'l Br.	Plaintiffs' Brief on International Law Norms Pursuant to Order of October 7, 2008 (*Wiwa* Docket No. 296)
Revised Objections to Royal Dutch/Shell's First Set of Interrogatories	Revised Plaintiffs' Objections and Responses to First Set of Interrogatories of Royal Dutch Petroleum Company to the Wiwa Plaintiffs, submitted May 5, 2003
Roht-Arriaza Decl.	November 21, 2008 Declaration of Naomi Roht-Arriaza (*Wiwa* Docket No. 298)
Royal Dutch	Royal Dutch Petroleum Company, succeeded by Shell Petroleum N.V.
Second Am. Compl., Mar. 27, 2002	Second Amended Complaint, dated March 27, 2002 (*Wiwa* Docket No. 58)
Sept. 29, 2006 Ord.	September 29, 2006 Order (*Wiwa* Docket No. 202)
Shell Transport	The "Shell" Transport and Trading Company, p.l.c., now known as Shell Transport and Trading Limited
SPDC	Shell Petroleum Development Company of Nigeria Limited
Third Am. Compl., Sept. 9, 2003	Third Amended Complaint, dated September 9, 2003
Van der Vlist Decl.	March 25, 1997 Declaration of Robbert Van der Vlist (*Wiwa* Docket No. 7)
Vizor Dep.	Transcript of May 28, 2004 Deposition of Michael Vizor
Wiwa Dep.	Transcript of December 17, 2003 Deposition of Ken Wiwa Jr.

Preliminary Statement

Defendants respond to the Court's request for briefing "on what the constraints of international law are" for ATS claims. (Oct. 7. 2008 Tr. 64:11-13, Millson Decl. Ex. 1.) *Sosa* lays out those constraints.

Accordingly, first, we address the *Sosa* standard. *Sosa* requires that plaintiffs prove that defendants violated an international norm of the "character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized". *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004). This means the Court must look to international law on a claim-by-claim basis to determine whether there is a definite norm that proscribes the defendants' conduct—the conduct of the "*perpetrator being sued*". *Id.* at 732 n.20 (emphasis added). This also means that plaintiffs' approach of combining a purported norm of international law applicable to the Nigerian Government with general "theories of liability" under "federal common law" is wrong. (*See infra* Part I.A.)

Second, we set forth two guiding principles under *Sosa's* jurisdictional standard: (i) the Court must undertake a "more searching review of the merits" to determine if plaintiffs have met *Sosa*'s requirements (*see infra* Part I.B); and (ii) the Court may *not* rely on the "sources" that *Sosa* and this Circuit have held are inappropriate (*see infra* Part I.C).

Third, we apply the *Sosa* standard and demonstrate how *each* of plaintiffs' claims fails to establish ATS jurisdiction under *Sosa's* strict jurisdictional requirements. (*See infra* Parts II-VIII.)

We conclude by alerting the Court and plaintiffs to certain choice of law analyses that must be conducted should the Court ignore *Sosa's* mandates and decide to pursue plaintiffs' improper approach to their ATS claims. (*See infra* Part IX.)

Argument

I. *SOSA* REQUIRES A VIOLATION OF THE LAW OF NATIONS AS ACCEPTED BY THE CIVILIZED WORLD AND AS SPECIFICALLY DEFINED AS OFFENSES AGAINST AMBASSADORS, VIOLATIONS OF SAFE CONDUCT, AND PIRACY WERE.

In *Sosa*, the Supreme Court held that the ATS gave federal courts subject-matter jurisdiction to adjudicate a "narrow class" of violations of international law. 542 U.S. at 729. The Court held that the eighteenth century paradigms, "violation of safe conducts, infringement of the rights of ambassadors, and piracy", "are principally incident to whole states or nations and not individuals seeking relief in court". *Id.* at 715, 720 (citations and internal quotation marks omitted). This ATS jurisdiction is limited to norms of "international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms". *Id.* at 725. "[F]ederal 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 [the ATS] was enacted". *Id.* at 732 (emphasis added).

Sosa defeats the plaintiffs' claims in at least three ways.

First, plaintiffs' methodology is just wrong. Plaintiffs claim that this Court has jurisdiction over periphery elements, which relate to defendants, if the court has jurisdiction over core elements, which relate to the Nigerian Government. (Pl. Int'l Br. at 9.) *Sosa*, however, does not allow jurisdiction over a vague periphery to be added to a core norm. It requires the assertion of a norm applicable to the conduct of the *defendants*—the alleged perpetrators being sued—that is *as* definite and widely accepted as offenses against ambassadors, violations of safe conduct and piracy were. (*See infra* Part I.A.)

Plaintiffs do not even try to meet that standard. Indeed, on the very first page of their brief, they draw a distinction between a norm "that is actionable under the standard articulated in *Sosa*", which relates to the Nigerian Government, and "a variety of theories of liability . . . recognized under the ATS", which relate to defendants for their alleged "complicity". (Pl. Int'l Br. at 1.)

Second, plaintiffs ignore their burden to provide evidence showing that *Sosa's* jurisdictional requirements have been met. The Court does not have subject-matter jurisdiction over plaintiffs' claims. (*See infra* Part I.B.)

Third, plaintiffs rely on incompetent sources—*i.e.*, sources incapable of establishing norms of "international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms" as required by *Sosa*. (*See infra* Part I.C.)

A. *Sosa* Restricts ATS Claims to Universally Accepted and Specifically Defined Violations of Customary International Law.

The scope of ATS claims is not co-extensive with the entire corpus of international law—only a "modest number" of customary international law torts are cognizable under the ATS. *Sosa*, 542 U.S. at 724.

Plaintiffs must show that the *defendants'* conduct is proscribed by specific norms that are universally condemned by states out of a sense of legal obligation and mutual concern. As *Sosa* made clear, jurisdiction under the ATS is lacking unless "*international* law extends the scope of liability for a violation of a given norm *to the perpetrator being sued*, if the defendant is a private actor such as a corporation or individual". *Id.* at 732 n.20 (emphasis added). In other words, "[t]he norm must extend liability to the type of perpetrator (*e.g.*, a private actor) the plaintiff seeks to sue". *Id.* at 760 (Breyer, J., concurring).

Instead, plaintiffs propose a two-step process whereby this Court would ask whether the Nigerian Government violated specific and universal norms of the law of nations, and then ask separately whether there is one or more "theories of liability" under "federal common law" that could impose liability upon the defendants here. (*See* Pl. Int'l Br. at 1, 46-47.) That approach ignores *Sosa's* requirement that the international law norm in question "extend[] the scope of liability for a violation of a given norm *to the perpetrator being sued*". *See Sosa*, 542 U.S. at 732 n.20.

Plaintiffs have not cited a single specific, universal and obligatory norm of international law that would proscribe the corporate defendants' conduct—ownership of SPDC—or Mr. Anderson's conduct,[1] or even the conduct of SPDC. Plaintiffs ignore the actual issue—namely whether there is a universal, specific and obligatory norm of international law that establishes private civil liability for *defendants*' actual conduct. Their approach is foreclosed by *Sosa*.

Instead, plaintiffs fail to address the actual issue of each of their claims. For example, plaintiffs state that "the conduct at issue clearly violates international law norms that are specific, obligatory, and universal. This is especially clear for state-sponsored extrajudicial

[1] The complaint filed against Brian Anderson sets forth almost identical allegations as the *Wiwa* complaint. *See Anderson* Am. Compl., Mar. 27, 2002. The complaint, alleging that Mr. Anderson was managing director of SPDC, is governed by the same law as discussed throughout this brief, and lacks any factual basis that would establish subject-matter jurisdiction over Mr. Anderson under the ATS. Just as plaintiffs, after years of discovery, have yet to put forward any evidence against the corporate defendants that would establish jurisdiction under the ATS, plaintiffs cannot point to any evidence against Mr. Anderson. *See, e.g.*, Wiwa Dep. 172-73; Kpunien Dep. 119-20. Because this Court is required to look outside plaintiffs' complaint to establish jurisdiction under the "more searching review" of the ATS, the Court does not have jurisdiction over Mr. Anderson because *Wiwa* plaintiffs' claims do not meet the *Sosa* standard. *Kadic v. Karadzic*, 70 F.3d 232, 238 (2d Cir. 1995); *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 255 n.30 (2d Cir. 2003).

killing". (Pl. Int'l Br. at 9; *see also id.* at 17.) That is wrong. Plaintiffs must do more than that—they must show that specific conduct *of the defendants Royal Dutch Petroleum Co. and/or Shell Transport and Trading Co., p.l.c. and/or Brian Anderson* violated a norm of customary international law against their conduct with respect to the alleged extrajudicial killing whose definition is as firmly agreed upon as the three paradigmatic cases underlying the ATS. Plaintiffs must plead not just the "what", but the "who", in order to satisfy the Court that international law extends liability to the defendants' conduct. *See Sosa*, 542 U.S. at 732 & n.20.

Similarly, during their discussion of their claims for violations of the right to life, liberty, and security of person, and peaceful assembly and association, plaintiffs state, "plaintiffs need only show that the specific conduct at issue violates international law". (Pl. Int'l Br. at 35 (emphasis omitted).) That too is wrong. Plaintiffs must show that the specific conduct of the defendants before this Court—not of SPDC, not of the Nigerian Government—violates international law. This they have not done, and cannot do. Indeed, plaintiffs take pains to avoid stating *who* committed the alleged acts for every claim. For example, plaintiffs state: "[w]hile detained, plaintiffs were beaten and subjected to other torture and CIDT" (*id.* at 45); "the torture of these plaintiffs contravened these standards" (*id.* at 29); "the treatment in custody of [certain plaintiffs] and the forced exile of Michael Vizor . . . constitute CIDT" (*id.* at 33); and "[t]he abuses at issue here constitute crimes against humanity" (*id.* at 38). Plaintiffs do not allege—because they cannot allege—that defendants committed any of these acts.

The impropriety of plaintiffs' "mix and match" approach is underscored by their contention that "federal common law"—not the international law required by *Sosa*—should provide the standard by which it is determined whether the defendants could be held liable under the ATS. Plaintiffs contend that:

> "The substantive elements of ATS claims, (such as torture or summary execution) are supplied by international law. With respect to the rules of liability and other subsidiary questions, however, ATS claims incorporate federal common law rules. While this federal common law may incorporate international law where appropriate, the primary source for rules of liability is well-established rules of federal common law." (Pl. Int'l Br. at 46.)

In other words, plaintiffs' "theories of liability" are not the norms of "international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms" recognized by *Sosa*. 542 U.S. at 725.

B. The ATS Requires a More Searching Review of the Merits to Establish Jurisdiction Than Is Required Under the "Arising Under" Test of 28 U.S.C. § 1331.

The "Alien Tort Act requires that plaintiffs plead a 'violation of the law of nations' at the jurisdictional threshold". *Kadic v. Karadzic*, 70 F.3d 232, 238 (2d Cir. 1995) (quoting 28 U.S.C. § 1350). A merely "colorable violation of the law of nations" is not enough to establish jurisdiction under the ATS. *Id.* Unlike general federal question jurisdiction, which is "not defeated by the possibility that the averments in the complaint may fail to state a cause of action", the pleading requirement in ATS litigation is jurisdictional. *Filartiga v. Pena-Irala*, 630 F.2d 876, 887-88 (2d Cir. 1980) (citing *Bell v. Hood*, 327 U.S. 678 (1946)).

Courts inquiring into their jurisdiction under the ATS must undertake a "more searching review of the merits" of the case than would otherwise be required "under the more flexible 'arising under' formula" set forth in 28 U.S.C. § 1331. *Kadic*, 70 F.3d at 238.

Accordingly, the Court must look to evidence outside the complaint to establish jurisdictional facts. *See Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 255 n.30 (2d Cir. 2003).

When jurisdiction is contested, as it is here, the plaintiff "bears the burden of showing by a preponderance of the evidence that subject matter jurisdiction exists", *APWU v. Potter*, 343 F.3d 619, 623 (2d Cir. 2003) (citing reference omitted); *see also Aurecchione v. Schoolman Transp. Sys.*, 426 F.3d 635, 639 (2d Cir. 2005). When determining whether it has jurisdiction, a court must examine evidence outside of the pleadings to make that assessment. *See Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000). "Jurisdiction must be shown affirmatively, and that showing is not made *by drawing from the pleadings inferences favorable to the party asserting it*." *Potter*, 343 F.3d at 623 (emphasis added) (quoting *Shopping Fin. Servs. Corp v. Drakos*, 140 F.3d 129, 131 (2d Cir. 1998)). This Court should not, therefore, simply treat the allegations in the Complaint as established for present purposes.

After *twelve* years of litigation, plaintiffs do not have any facts to support the allegations in their Complaint that defendants made payments to the Nigerian military, purchased weapons for the military, provided transportation and logistical support to the Nigerian authorities, and the like. Over the past twelve years, plaintiffs have had the opportunity to substantiate those allegations—and the others set forth in their Complaint—through interrogatories, requests for admission, and deposition testimony—but plaintiffs have failed to do so.

Although discovery is now concluded, and trial is less than two months away, plaintiffs offer only a "general overview of the facts relevant to each claim . . . largely drawn from the complaint", stating that this overview is not "intended to be a conclusive demonstration

that the facts alleged satisfy the elements of each claim". (*Id.* at 2 n.2.) Nor do plaintiffs even allege that they have such facts.

Plaintiffs' reliance on their Complaint is especially problematic because plaintiffs' own witnesses have already demonstrated certain allegations to be patently untrue or incapable of confirmation.

The crux of plaintiffs' claim is that SPDC ordered the Nigerian Government to execute Mr. Saro-Wiwa and the rest of the Ogoni Nine. (Compl. ¶ 2 (alleging that the "executions of Ken Saro-Wiwa, John Kpuinen, Saturday Doobee, Felix Nuate, Daniel Gbokoo and Dr. Barinem Kiobel . . . were carried out with the . . . support" of defendants).)[2] This claim is without merit.

The only factual allegation that plaintiffs make to support this claim is that "key witnesses were bribed" to offer testimony in the trial against Ken Saro-Wiwa and the rest of the Ogoni Nine. (Pl. Int'l Br. at 7.) That allegation is just untrue. In response to an interrogatory, plaintiffs identified Michael Vizor as a person that has personal knowledge that the defendants "bribed or attempted to bribe any witness to give false testimony against Ken Saro-Wiwa". (Revised Objections to Royal Dutch/Shell's First Set of Interrogatories at 32-33, Millson Decl. Ex. 2.) In his deposition, however, Mr. Vizor testified that he never spoke with either of the two witnesses accused of perjury, and that his basis for believing that a witness was bribed by "Shell

[2] This Court already dismissed four of *Kiobel* plaintiffs' causes of action for failure to state a claim under the ATS, including extrajudicial killing (Count I), and violation of the right to life, liberty, security and association (Count V), because *Kiobel* plaintiffs failed to set forth any well-settled definition or universal acceptance sufficient to establish federal subject matter jurisdiction under the ATS. *See Kiobel v. Royal Dutch Petro. Co.*, 456 F. Supp. 2d 457, 464-65, 467 (S.D.N.Y. 2006). *Wiwa* plaintiffs' claims for summary execution (First Claim for Relief), and violation of the right to life, liberty, security and association (Sixth Claim for Relief), suffer from the same flaws. The only *Wiwa* plaintiff whose underlying facts differ from those in *Kiobel* is Uebari N-nah, who plaintiffs allege was shot by the military police "without *any* judicial process". (*See* Compl. ¶ 64; Pl. Int'l Br. at 14.)

or SPDC" is that he "believe[s] that very strongly" and, although Mr. Vizor has no relationship with any Shell party, he believes it "is their practice". (Vizor Dep. 56:12 - 63:12, Millson Decl. Ex. 3.)

In addition, their entire "theory" is false. Plaintiffs allege the "executions of Ken Saro-Wiwa . . . and the imprisonment and torture of Michael Tema Vizor by the Nigerian military junta and the campaign to falsely accuse them" and the shooting of plaintiff Karalolo Kogbara was "part of a pattern of collaboration and/or conspiracy between Defendants and the military junta of Nigeria to violently and ruthlessly suppress any opposition to Royal Dutch/Shell's conduct in its *exploitation of oil and natural gas resources in Ogoni*". (Compl. ¶ 2 (emphasis added).) In fact, SPDC was forced to leave Ogoniland in January 1993 as a result of violence and attacks against its staff. On January 4, 1993, Ken Saro-Wiwa made a speech at a large rally in which he declared SPDC "persona non grata" in Ogoniland. (*See, e.g.*, Idamkue Dep. 186:6 - 187:11, Millson Decl. Ex. 4; Ikari Dep. 42:16 - 44:9, Millson Decl. Ex. 5.)[3] Following that pronouncement, incidents of violence against SPDC in Ogoniland increased. For example, an SPDC employee and his wife who were shopping for produce in Ogoniland were assaulted by Ogoni youths, stripped of their clothes and left naked by the side of the road. (*See* Osunde Dep. 56:3-25, Millson Decl. Ex. 7.) On January 18, 1993, SPDC driver Henry Mogbolu was ambushed and severely beaten in Ogoniland. The Ogoni who attacked him asked him

[3] On November 30, 1992, MOSOP sent a letter demanding, among other things, that SPDC (1) pay $10 billion to the "people of Ogoni" and (2) "initiate immediate and high-level talks with representatives of the Ogoni people with a view to reaching meaningful and acceptable terms for the further and continued exploration and exploitation of oil from Ogoni land". (C 002153, Millson Decl. Ex. 6.) The letter stated that "if within 30 days from the date hereof you fail, refuse and/or neglect to comply with any and all of the aforementioned demands, it shall be clearly understood that you have decided to cease all operations thereat and to quit Ogoni land" and "the Ogoni people shall be at liberty to take all lawful means to protect their lands and people".

whether he knew that SPDC had been told not to come into Ogoniland. (*See, e.g.*, C 000910-11, Millson Decl. Ex. 8; C 003935-36, Millson Decl. Ex. 8; DEF 0011679, Millson Decl. Ex. 8.) SPDC therefore declared Ogoniland a "no go" area. (C 000910-11, Millson Decl. Ex. 8.)

SPDC tried to have discussions with Ken Saro-Wiwa without success. For example, at a meeting between Joshua Udofia and Precious Omuku of SPDC and Ken Saro-Wiwa in Port Harcourt in February 1993, Ken Saro-Wiwa stated that MOSOP would continue to prevent SPDC from operating in Ogoniland until MOSOP's demands were met and that escalating the issue to violence was part of his strategy. (*See, e.g.*, Udofia Dep. 260:8 - 261:13, 306:2 - 307:9, Millson Decl. Ex. 9; Omuku Dep. 182:11 - 183:11, Millson Decl. Ex. 10.) At a subsequent meeting between Joshua Udofia, Precious Omuku, Steve Lawson-Jack and Sylvester Menegbo of SPDC and Ken Saro-Wiwa on May 15, 1993, Ken Saro-Wiwa stated, among other things, that he would not permit continued work on the replacement of the Trans-Niger Pipeline in Ogoniland unless MOSOP's demands were met and that MOSOP would do everything it could to provoke a major crisis. (*See, e.g.*, C 002114-15, Millson Decl. Ex. 11; C 002116-18, Millson Decl. Ex. 12; Udofia Dep. 307:10 - 319:13, 371:1 - 374:22.) At a meeting between Emeka Achebe of SPDC and Ken Saro-Wiwa in June 1993, Ken Saro-Wiwa stated, among other things: he sought greater political and economic independence for the Ogoni; he would attempt to embarrass SPDC if SPDC did not support his goals; he would not permit SPDC to continue work on the replacement of the Trans-Niger Pipeline in Ogoniland until MOSOP's demands were met; SPDC did not deserve the exaggerated claims that he had made against it, but that making such claims was necessary to attract attention and put pressure on SPDC. (*See, e.g.*, A

001126-30, Millson Decl. Ex. 13; 2/6/2003 Achebe Dep. 32:17 - 37:19, 110:5 -115:4, Millson Decl. Ex. 14.)

In October 1993, following the signing of the Ogoni/Andoni accord, the civilian Governor of River State met with Egbert Imomoh, then General Manager of SPDC, and asked SPDC to resume operations in Ogoniland. (Imomoh Dep. 69:3 - 71:20, Millson Decl. Ex. 15.) At that meeting, Mr. Imomoh told the Governor that "we are not in a hurry to go back to Ogoni. I told him that I was not prepared to risk one drop of blood, one drop of blood either side for a million barrels, I wasn't prepared to risk it". (*Id.* at 70:18-23.)

There *was* an army in Ogoni, but not at SPDC's request—Mr. Saro-Wiwa "begged" General Abacha to send in the army. Plaintiffs' own witnesses demonstrate that the Nigerian military was not in Ogoniland "in support" of defendants but rather that they were there *at the request of Ken Saro-Wiwa* himself. (*See, e.g.*, Idigima Dep. 350:4 - 351:8 (stating that Ken Saro-Wiwa and MOSOP invited the state military governor to Ogoni to observe destruction caused by inter-communal violence), Millson Decl. Ex. 16.)[4] Moreover, at the June 7, 1993 meeting between Emeka Achebe of SPDC and Ken Saro-Wiwa, Ken Saro-Wiwa stated, among other things, that it was a good thing the Nigerian military had entered Ogoniland because it would draw additional attention to the situation, and that he "goaded" the Nigerian military so that they would "massacre" people to draw attention to his cause—he "goaded" the Nigerian military so that there would be "blood" as evidence that the Ogoni were being victimized. (*See*,

[4] This testimony is confirmed by a letter of Ken Saro-Wiwa to Nigeria's then-Head of State in November 1993, stating that he "went to General Abacha and appealed for help. He promised to send federal troops". As a result, General Abacha set up the so-called River's State Internal Security Task Force. (Wiwa Dep. 105:24 - 107:21.)

e.g., A 001126-30, Millson Decl. Ex. 13; 2/6/03 Achebe Dep. 32-37, 110-15, Millson Decl. Ex. 14.)

The presence of the army in Ogoniland at Ken Saro-Wiwa's request is enough to defeat plaintiffs' claims. As Magistrate Judge Pitman held, "[i]n order to establish defendants' liability, plaintiffs would have to prove that each attack occurred and that each attack was the product of 'joint action' by the defendants and the Nigerian government, *i.e.*, that there was 'a substantial degree of cooperative action between corporate defendants and the Nigerian government in the alleged violations of international law.'" (Mar. 31, 2004 Rep. at 25-26 (quoting *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 Civ. 8386, 2002 U.S. Dist. LEXIS 3293, at *41 (S.D.N.Y. Feb. 28, 2002).) "[T]he mere allegation (or even proof) of a common plan here does not eliminate the need . . . to prove the overt acts that caused the injuries claimed and that the overt acts were in furtherance of the alleged conspiracy or joint venture". (*Id.* at 30-31.) Thus, "whether the individual at issue suffered one of the enumerated injuries at the hands of officials of the Nigerian government acting 'in support of defendants . . . require[s] analysis of the circumstances under which the individual suffered his or her injury'" and whether he or she sustained injuries "while the member of the security forces was working 'in support of' defendants". (*Id.* at 13-14.)

Plaintiffs simply have no evidence of this crucial "in support of" element. Plaintiffs have no evidence that could show that "SPDC called the military police into the area near the Korokoro flow line" and that defendants themselves, among other things:

- "made payments to the military and police",
- "participated in the planning and coordination of 'security operations' including raids and terror campaigns", and
- provided "transportation and monies to those involved at the incidents at Korokoro". (Pl. Int'l Br. at 8.)

For example, plaintiffs refer to Ms. Kogbara's being "shot during peaceful demonstrations against Shell's efforts to bulldoze farmland for the construction of a Shell pipeline" (Pl. Int'l Br. at 6), but Ms. Kogbara has already testified under oath that she was picking crops at the time she was allegedly shot, and that the person who shot her said *nothing* to her about Shell, any protest or demonstration that she may have taken part in or anything else.[5] (Kogbara Dep. 50:9-51:25, Millson Dep. Ex. 18.) And so on.[6]

Moreover, plaintiffs simply ignore what the defendants did to try to help Mr. Saro-Wiwa. For example, on November 30, 1994 and again on May 15, 1995 and October 10, 1995, Sir John Jennings, a director of Shell Transport, sent letters urging that Ken Saro-Wiwa have access to a fair trial, proper legal services and proper health care. (*E.g.*, C 004932-34, Millson Decl. Ex. 20; A 001388-90, Millson Decl. Ex. 21; A 001409-11, Millson Decl. Ex. 22.) SPDC released a Briefing Note urging the same. (A 000191-94, Millson Decl. Ex. 23.) In addition, Emeka Achebe went to Abuja, Nigeria's capital, to request that the Nigerian

[5] Nor has any other witness plaintiffs have identified concerning this allegation provided any personal knowledge of involvement by SPDC or defendants. For example, Benson Ikari—identified by plaintiffs as having such personal knowledge—testified only that "information reached me and some of my friends back then in Bori that peasant farmers were shot by the military". (Ikari Dep. 50:17-19, Millson Decl. Ex. 4.)

[6] Plaintiffs' citation to one piece of "evidence" beyond their Complaint indicates that they have no facts. They cite a memorandum dated April 21, 1994 (Pl. Int'l Br. at 6)—the so-called "Facts Sheet" memo—which is a forgery. The Federal Government of Nigeria has "categorically state[d] that the Okuntimo memo is a blatant piece of clumsy forgery" and has pointed out that even a "casual scrutiny of the two-page memo reveals several obvious flaws". (DEF 0015453-59, Millson Decl. Ex. 19.) For example, the memo contains a line below the coat of arms, which does not appear on genuine Nigerian Government stationery; confidential marks are never typed on a document, much less six times, as they are on the memo; fact sheets in Nigeria, which the memo claims to be, are never classified; dates and references on Nigerian Government stationery are written at the top of the page, not below the signature line as in the memo; and the memo's reference (RSIS/MILAD/LOO/94004) is obviously false since it indicates a single file with over 94,000 pages without a volume number. (DEF 0015453-59, Millson Decl. Ex. 19.) And in any event, the document is irrelevant—it provides no indication that SPDC was complicit in the Internal Security Task Force's operations in Ogoni.

Government not execute Ken Saro-Wiwa. (Achebe Dep. 41:18-42:16, Millson Decl. Ex. 14.) And, Cor Herkströter, a director of Royal Dutch, sent a letter to General Sani Abacha requesting that the Nigerian Government grant clemency to Ken Saro-Wiwa. In addition, on November 8, 1995, Brian Anderson publicly stated in a press release issued by SPDC that Mr. Herkströter had sent General Abacha such a letter. (C 004700, Millson Decl. Ex. 24.) On November 8, 1995, Shell International Petroleum Company Limited also issued a press release describing Mr. Herkströter's letter. (A 001673, Millson Decl. Ex. 25.)

C. Plaintiffs May Not Establish Universally Accepted and Definite Norms of International Law by Citing Incompetent Sources.

The Supreme Court in *Sosa* directed courts evaluating claimed norms of customary international law to gauge the universal, definite and mandatory character of such norms by reference to "those sources we have long, albeit cautiously, recognized". 542 U.S. at 733-34 (citing *The Paquete Habana*, 175 U.S. 677, 700 (1900)). In looking at such "sources", the Court of Appeals has made clear that courts should "look primarily to the formal lawmaking and official actions of States". *Flores*, 414 F.3d at 250 (quoting *United States v. Yousef*, 327 F.3d 56, 103 (2d Cir. 2003)). Certain sources cannot create enforceable international law obligations and are entitled to little weight as evidence of international norms sought to be enforced under the ATS: (1) treaties that have not been ratified by the United States or are non-self-executing and have not been implemented through domestic litigation; (2) United Nations General Assembly resolutions; (3) decisions of some multinational tribunals; and (4) "academic advocacy" prepared for litigation. *Sosa*, 542 U.S. at 734-35; *Flores*, 414 F.3d at 252, 256-66.

Thus, in *Sosa*, the Supreme Court expressly rejected the Universal Declaration of Human Rights ("UDHR") and the International Covenant on Civil and Political Rights ("ICCPR") as potential sources of customary international law enforceable under the ATS. 542

U.S. at 734-35. As this Court recognized in its 2006 decision in *Kiobel v. Royal Dutch Petroleum Co.*, "[t]he Court rejected . . . the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, stating they have 'little utility'". 456 F. Supp. 2d 457, 462 (S.D.N.Y. 2006) (quoting *Sosa*, 542 U.S. at 734-35). Those sources have "little utility" because the UDHR does not "of its own force impose obligations as a matter of international law" and "the United States ratified the Covenant on the express understanding that it was not self-executing". *Sosa*, 456 U.S. at 734-35; *see also Flores*, 414 F.3d at 261 ("Because General Assembly documents are at best merely advisory, they do not . . . and . . . cannot give rise to rules of customary international law.") and (quoting J.L. Brierly, The Law of Nations 110 (Sir Humphrey Waldock ed., 6th ed. 1963) ("[T]he General Assembly . . . cannot *act* on behalf of all the members, as the Security Council does, and its decisions *are not directions telling the member states what they are or are not to do*" (first emphasis in original; second emphasis added by Cabranes, J.).).

Likewise, the Rome Statute of the International Criminal Court is also incapable of establishing international law norms binding under the ATS. The United States has never ratified the Rome Statute, "does not intend to become a party to the treaty", has disclaimed any "legal obligations arising from" the Rome Statute, and has withdrawn its support for the International Criminal Court (which was created by the Rome Statute). (*See* Letter from United States Under Secretary of State for Arms Control and Int'l Security John R. Bolton to U.N. Secretary General Kofi Annan, dated May 6, 2002.) The United States, therefore, is not bound

by the treaty or the decisions of the International Criminal Court, nor can such sources form the basis of norms enforceable in U.S. courts.[7]

Similarly, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT") is not a competent source to establish the existence of an international norm actionable under the ATS. Although the Senate has ratified CAT, it did so subject to the express condition that many of CAT's provisions, including Article 16 (upon which this Court relied in its 2002 opinion with respect to plaintiffs' cruel, inhuman or degrading treatment claims) are *not* self-executing. *See* 136 Cong. Rec. S17486-01 (1990); *Wiwa*, No. 96 Civ. 8386, U.S. Dist. LEXIS 3293, at *22. Just as the ICCPR was rejected by the *Sosa* Court because it is not self-executing, provisions of CAT that plaintiffs cite do not create obligations enforceable in the courts of the United States.

In addition, the Court of Appeals rejected as competent sources the American Convention on Human Rights ("ACHR"); the International Covenant on Economic, Social and Cultural Rights ("ICESCR"); the United Nations Convention on the Rights of the Child; the American Declaration of the Rights and Duties of Man; the Rio Declaration; the European Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention"), and the decisions of the European Court of Human Rights (which is empowered only to interpret the European Convention). *Flores*, 414 F.3d at 258-65.

[7] Moreover, the Rome Statute was not written until 1998 and explicitly states that its terms are *not* to be given retroactive effect. Rome Statute of the International Criminal Court, art. 24(1), July 17, 1998, 37 I.L.M. 999 ("No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute."). All the events alleged in the amended complaint occurred prior to 1998. Thus, even if the Rome Statute were sufficient to establish norms actionable under the ATS—and it is not—it could not be relied upon as evidence of international law at the time of the alleged events in this case.

The Court of Appeals also expressed doubt about the utility of scholars' affidavits submitted in the course of litigation as evidence of customary international law. *Id.* at 264; *cf. Yousef*, 327 F.3d at 102 ("In a system governed by the rule of law, no private person—or group of men and women such as comprise the body of international law scholars—*creates* the law. Accordingly, instead of relying primarily on the works of scholars for a statement of customary international law, we look primarily to the formal lawmaking and official actions of States and only secondarily to the work of scholars as evidence of the established practice of States.").

Plaintiffs have ignored all of this law. Plaintiffs seek repeatedly to establish various norms by referring to sources of international law that the Supreme Court and this Circuit have deemed incompetent. For example, plaintiffs and their declarants, Professors Naomi Roht-Arriaza and Philip Alston, rely upon:

- The UDHR (s*ee* Pl. Int'l Br. at 30, 36; Roht-Arriaza Decl. ¶¶ 39, 42, 53, 61; Alston Decl. ¶¶ 114, 121, 133). *Sosa* held that "the Declaration does not of its own force impose obligations as a matter of international law". 542 U.S. at 734. Likewise, *Flores* held with respect to UN resolutions that "[t]hese documents are not proper sources of customary international law because they are merely aspirational and were never intended to be binding on member States of the United Nations". 414 F.3d at 259. Plaintiffs also rely on other non-binding United Nations materials. (*See* Pl. Int'l Br. at 15, 27, 28, 36; Roht-Arriaza Decl. ¶¶ 14, 34, 46-50, 54, 62, 63; Alston Decl. ¶¶ 18, 20, 38, 58-67, 99-121, 126-30.)

- The ICCPR (*see* Pl. Int'l Br. at 20-22, 24, 30, 35, 36; Roht-Arriaza Decl. ¶¶ 39, 42, 53, 55, 61, 62; Alston Decl. ¶¶ 17-22, 24, 58, 61, 67, 109, 126). *Sosa* and this Court's 2006 decision in *Kiobel* rejected the ICCPR as a competent source of binding norms. *See Sosa*, 542 U.S. at 734; *Kiobel*, 456 F. Supp. 2d at 462.

- The ACHR and decisions of the Inter-American Court of Human Rights, which incorporates the ACHR. (*See* Pl. Int'l Br. at 22, 24, 35, 36; Roht-Arriaza Decl. ¶¶ 39, 42, 53, 61; Alston Decl. ¶¶ 28, 30, 48-52.) The ACHR was rejected as a competent source in *Flores*. *See* 414 F.3d at 258.

- The European Convention and decisions of the European Court of Human Rights (*see* Pl. Int'l Br. at 15, 16, 31, 35, 36; Roht-Arriaza Decl. ¶¶ 30 n.9,

31-32, 34, 36, 39, 42, 43, 53, 56, 64; Alston Decl. ¶¶ 25-27, 53-57, 74, 75). These were rejected as competent sources in *Flores*. *See* 414 F.3d at 263-64.

- The ICESCR (*see* Roht-Arriaza Decl. ¶ 55). This was rejected as a competent source in *Flores*. *See* 414 F.3d at 258.

- CAT (*see* Pl. Int'l Br. at 29 n.31, 30; Roht-Arriaza Decl. ¶¶ 27, 29, 35). As set forth above, the Senate gave its consent with reservations.

- The Rome Statute (*see* Pl. Int'l Br. at 51; Roht-Arriaza Decl. ¶¶ 12, 16-17, 19, 23-24; Alston Decl. ¶ 20). As set forth above, this has not been ratified, has been expressly disclaimed by the State Department, and, in any event, would not by its own terms apply to the conduct alleged in this case.

None of these sources can establish a rule of customary international law, let alone a rule meeting *Sosa's* strict standard.

Notably, a number of these sources—including CAT and decisions of the ICTY and Nuremberg Tribunals—address only *criminal* liability, and do not articulate any norm that reaches *secondary civil* liability. The possible "collateral consequences" of allowing causes of action against accessories to alleged criminal violations across the globe are more modest than in the civil context, due to constraints such as prosecutorial discretion and proof "beyond a reasonable doubt" (as versus the more liberal "preponderance of the evidence" standard in civil cases). *Sosa*, 542 U.S. at 727 ("The creation of a private right of action raises issues beyond the mere consideration whether underlying primary conduct should be allowed or not, entailing, for example, a decision to permit enforcement without the check imposed by prosecutorial discretion."); *see also id.* at 732-33 ("[T]he determination whether a norm is sufficiently definite to support a cause of action should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts.").

II. PLAINTIFFS' CLAIMS FOR SUMMARY EXECUTION (COUNT ONE) DO NOT MEET *SOSA*'S REQUIREMENTS.

A. Plaintiffs' "Summary Execution" (or "Extrajudicial Killing") Claims Do Not Have "Definite Content" as Required By *Sosa.*

This Court has already held in *Kiobel* that allegations of extrajudicial killing based on the same facts pleaded in this action did not implicate a well-defined international norm so as to be actionable under the ATS. *Kiobel*, 456 F. Supp. 2d at 464-65 ("The Court is thus unpersuaded that there is a well-defined customary international law that prohibits the conduct Plaintiffs allege to be extrajudicial killing.").[8] This Court held that *Sosa* provided that "'the

---

[8] Plaintiffs allege the exact same conduct in this case that the plaintiffs alleged in *Kiobel.* In *Kiobel*, plaintiffs claimed that:

> "[T]he Special Tribunal allowed and authorized: a. the death penalty for acts committed before the Special Tribunal was formed; b. [e]xecution of sentences, including the death penalty, before review by a higher court or authority; c. [m]eetings between the accused and their counsel only with the permission of and in the presence of a military officer; [and] d. [t]rial without representation by counsel." (*Kiobel* Am. Class Action Compl. ¶ 67.)

Plaintiffs also alleged that defense counsel for the accused were "subjected to actual or threatened beatings or other physical harm" and that defendants bribed witnesses to give false testimony. (*Id*. ¶¶ 68, 70.)

In this case, plaintiffs claim that the Special Tribunal violated customary international law because:

> "a. [a]n edict creating the Civil Disturbances Special Tribunal and providing the death penalty was [to be] given retroactive effect; b. the Civil Disturbances Special Tribunal's judgment was not subject to review by a higher court; c. the accused met with their counsel only with the permission of and in the presence of a military officer[; and] [d]efense counsel for the accused were subjected to threats of beatings and . . . other family members[] were beaten when attending the . . . hearing." (Compl. ¶¶ 88-89.)

Although the summary execution claim in *Kiobel* refers to only one plaintiff—Dr. Barinem Kiobel—as opposed to the seven plaintiffs in this case (including Dr. Barinem Kiobel), the alleged factual predicates underlying plaintiffs' summary execution claims in both cases are identical.

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 enacted'". *Kiobel*, 456 F. Supp. 2d at 461 (quoting *Sosa*, 542 U.S. at 731). Indeed, when finding that there is not a well-defined norm of customary international law that prohibits the conduct alleged by the *Kiobel* plaintiffs in their extrajudicial killing claims—and by the *Wiwa* plaintiffs in their parallel claims—this Court measured plaintiffs' claims against those paradigmatic and well-defined eighteenth century norms. *Id.* at 465. The Court stated: "This Court recognizes that some forms of extrajudicial killing may be 'so bad that those who enforce them become enemies of the human race.' However, just as the Supreme Court stated with regard to arbitrary detention, 'it may be harder to say which policies cross that line with the certainty afforded by Blackstone's three common law offenses'." *Id.* (quoting *Sosa*, 542 U.S. at 737). Thus, plaintiffs' summary execution claims should be dismissed consistent with this Court's decision in *Kiobel*.

In *Kiobel*, this Court stated that it was not aware of a single "international authority establishing the elements of extrajudicial killing". *Id.* Although the Supreme Court in *Sosa* did not preclude the recognition of new norms of customary international law that are specific, universal and obligatory, summary execution has not been defined with a "specificity" that approaches the eighteenth century paradigms of piracy, violations of safe conduct, and infringement of the rights of ambassadors. 542 U.S. at 725, 732. Even plaintiffs' own brief cannot make out a "sufficiently definite" norm, *id.* at 732, that would constitute one of the

"handful of heinous actions" recognized under the ATS. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 (D.C. Cir. 1984) (Edwards, J., concurring).[9]

To support their argument that there is a definite norm of customary international law against summary execution, plaintiffs refer to a host of "fundamental judicial guarantees" (Pl. Int'l Br. at 16-25), the aggregation of which is supposedly recognized as a single, specific norm against summary execution. Those "guarantees" include the right to counsel, right to appeal, right to a fair hearing, and "all fundamental due process guarantees". (*Id.* at 20-25; Alston Decl. ¶ 7.)[10] Many of those "guarantees", however, are protections under the domestic

[9] Despite the lack of a clear definition under customary international law for summary execution, plaintiffs contend that the "international community's condemnation of the executions" demonstrates a violation of customary international law and that the public statements of a limited number of countries do not "simply represent a consensus of opinion", but rather constitute evidence of state practice that, in turn, demonstrates the recognition of a norm of customary international law. (Pl. Int'l Br. at 26.) That is wrong. First, even if those statements demonstrated a norm of customary international law, they would not necessarily demonstrate the existence of a specific norm that satisfies the *Sosa* standard. Second, even if those statements constituted state practice—and they do not—they do not demonstrate a universally-recognized norm of customary international law because the *opinio juris* of states is "inferred from the constancy and uniformity of state conduct". Hans Kelsen, *Principles of International Law* 450-52 (2d ed. R. Tucker 1996). A norm cannot be inferred from a single instance of several states making public statements on a given topic. Third, contrary to plaintiffs' contention, those statements do not amount to state practice. "The mere fact that States declare their recognition of certain rules is not sufficient for the [I.C.J.] to consider these [rules] as being part of customary international law". *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, ¶ 184 (June 27). As the I.C.J. further stated, "the shared view of the [States] as to the content of what they regard as the rule is not enough. The [I.C.J.] must satisfy itself that the existence of the rule in the *opinio juris* of States is confirmed by practice". *Id.*

[10] Plaintiffs rely heavily on *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), for the proposition that the Special Tribunal was not a "regularly constituted court". First, even if the Special Tribunal was not a regularly constituted court, that fact alone would not establish the existence of a definite norm prohibiting summary execution under customary international law. Second, *Hamdan* is inapposite because the Court discussed the requirement that a court be regularly constituted within the context of Common Article 3 of the Geneva Conventions. *Id.* at 629-30. Common Article 3 applies only to a "conflict not of an international character", *id.*, and there is no "conflict" here. Third, plaintiffs are relying on a term that lacks specific content to support the recognition of a norm that also lacks that same specificity. As the Supreme Court acknowledged, "regularly constituted court" is not even "specifically defined" in Common Article 3—the source from which it originates. *Id.* at 632.

law of individual states, not under customary international law. (*See, e.g.*, Pl. Int'l Br. at 24, 25 n.23 (citing to case law dealing with U.S. constitutional guarantees).) Surveying domestic law for conduct that is widely proscribed does not turn that conduct into a specific norm of customary international law. *See Flores*, 343 F.3d at 155 ("Even if certain conduct is universally proscribed by States in their domestic law, that fact is not necessarily significant or relevant for purposes of customary international law."); *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975) ("We cannot subscribe to plaintiffs' view that the Eighth Commandment 'Thou shalt not steal' is part of the law of nations [even though] every civilized nation doubtless has this as a part of its legal system."). Furthermore, many of those guarantees are not clearly defined even under domestic law. Plaintiffs cannot use legal guarantees from domestic law to search the penumbras of customary international law in order to turn ill-defined norms into norms that satisfy the *Sosa* standard.

Moreover, plaintiffs cite a variety of non-binding international sources—ranging from a U.N. Human Rights Committee General Comment (Pl. Int'l Br. at 24) to a report by the U.N. Special Rapporteur (*id.* at 15).[11] Those sources cannot show that the prohibition against summary execution has reached the level of binding customary international law, or that it can meet the more stringent *Sosa* standard. (*See supra* Part I.C.) *Cf. Sosa*, 542 U.S. at 734-35 (finding that the UDHR and ICCPR have "little utility" under the *Sosa* standard); *see also Flores*, 343 F.3d at 165-68. Moreover, even if those sources were binding, they do not "describe the actual customs and practices of States". *Flores*, 343 F.3d at 168; *see also Filartiga*, 630 F.2d at 883. None of plaintiffs' sources offers this Court a specific definition or explicit guidance as

[11] Plaintiffs also rely on other non-binding sources, such as decisions from the African Commission, the Inter-American Court on Human Rights, and the European Court of Human Rights. (*See, e.g.*, Pl. Int'l Br. at 15-26.)

to whether the prohibition against summary execution is universally recognized. *See Kiobel*, 456 F. Supp. 2d at 462.

For example, plaintiffs' statement that the Special Rapporteur "regularly examines and condemns instances of killings" (Pl. Int'l Br. at 15) is irrelevant. The fact that the Special Rapporteur examines instances of killings, as part of his mandate entrusted to him by the U.N. Commission on Human Rights, is not relevant as to whether there is universal consensus on any prohibition against summary execution.[12] The Special Rapporteur's Report explicitly states that the observations of the report are nothing more than his "personal remarks" made to "enhance understanding" among states, not a categorical pronouncement on a prohibition against summary execution that meets the *Sosa* standard. *See* U.N. Commission on Human Rights, *Report by the Special Rapporteur, Extrajudicial, Summary or Arbitrary Executions* ¶ 6, U.N. Doc. E/CN.4/1993/46 (Dec. 23, 1992). Plaintiffs' reliance upon HRC General Comment 13 (Pl. Int'l Br. at 24) is similarly unavailing. It does not deal specifically with a norm against summary execution. (Pl. Int'l Br. at 24.) Rather, like many of the documents to which plaintiffs cite, it deals with one of plaintiffs' "guarantees"—*i.e.*, a fair hearing—not the broader prohibition against summary execution. *See* HRC General Comment 13, U.N. Doc. HR1\GEN\1\Rev.1 (1984).

What plaintiffs are asking this Court to do is use its "innovative authority", *Sosa*, 542 U.S. at 726, to create a norm of customary international law out of non-binding international law sources—as well as domestic law—that deal with a plethora of "judicial guarantees", all of

[12] Indeed, equating the Special Rapporteur's opinions with a "universal consensus" would have wide-reaching consequences for the United States and its courts. On the first page of his declaration, the Special Rapporteur refers to his recent concerns with the death penalty in the United States. (Alston Decl. ¶ 4.)

which are supposed to fit neatly into a definite norm against summary execution. Such an endeavor would run afoul of *Sosa*.

B. Plaintiffs' Claims Also Fail Because Their Allegations Do Not Constitute Viable ATS Claims Against Defendants.

Even if plaintiffs could establish a well-defined norm prohibiting summary execution under customary international law by way of certain "fundamental judicial guarantees", plaintiffs' allegations do not constitute a viable ATS claim for summary execution *against the defendants*. There is no well-defined norm of customary international law that prohibits the types of conduct alleged by plaintiffs.

For example, plaintiffs allege that the defendants promised bribes to at least two witnesses in exchange for false testimony. (Compl. ¶ 91.) Although that allegation is false, bribery of witnesses is not a violation of a specific and universal norm of customary international law, despite it being illegal in many countries. *See Flores*, 414 F.3d at 249 ("It is only where the nations of the world have demonstrated that the wrong is of mutual, and not merely several, concern."). Likewise, plaintiffs' only other allegation related to these claims involving the defendants is that they met with the Nigerian military to "discuss strategies concerning the unlawful execution" of Mr. Saro-Wiwa. (*Id.* ¶ 96.) Plaintiffs' conclusory allegation that "strategies" were discussed, the contents of which remain a mystery to the defendants as well as this Court, is not sufficient to state a viable claim. More importantly, even if there were evidence that the defendants held these meetings with the Nigerian military to discuss the execution of Mr. Saro-Wiwa, there is likewise no well-established norm prohibiting meetings to discuss "strategies".

Plaintiffs simply cannot prove a violation of a norm of customary international law that meets the *Sosa* standard against the defendants.

C. The TVPA Has Displaced Plaintiffs' Extrajudicial Killing—or Summary Execution—Claims Under the ATS.[13]

Sosa imposes a "high bar to new private causes of action" under the ATS, given federal courts' responsibility to look for "legislative guidance before exercising innovative authority over substantive law". *Sosa*, 542 U.S. at 726-27. Decisions regarding new private rights of action should generally be left to the legislature, and courts should be particularly careful not to impinge on the "discretion of the Legislative and Executive Branches in managing foreign affairs". *Id.* at 727. Federal courts have no mandate from Congress to "seek out and define new and debatable violations of the law of nations", *id.* at 728, and the practical "collateral consequences of making international rules privately actionable argue for judicial caution" *id.* at 727. For example, *Sosa* held that a general prohibition of "arbitrary detention" is not actionable under the ATS. *Id.* at 736. "Whatever may be said for the broad principle [the plaintiff] advances", the *Sosa* Court concluded, "in the present, imperfect world, it expresses an aspiration that exceeds any binding customary rule having the specificity we require. Creating a private cause of action to further that aspiration would go beyond any residual common law discretion we think it appropriate to exercise." *Id.* at 738.[14]

---

[13] The TVPA also displaces plaintiffs' torture claims under the ATS for the same reasons as discussed in this section.

[14] This Court previously found that the TVPA does not displace extrajudicial killing claims brought under the ATS, based upon the "same reasons" as those upon which it relied in its 2002 decision. *Kiobel*, 456 F. Supp. 2d at 465 n.10; *see Wiwa v. Royal Dutch Petroleum Co.*, No. 96 Civ. 8386, 2002 U.S. Dist. LEXIS 3292, at *11-13 (S.D.N.Y. Feb. 28, 2002). In that 2002 decision, this Court relied primarily on *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995). The *Kadic* court, however, never reached the question of whether an ATS claim for extrajudicial killing, or torture, survives the TVPA. Instead, the *Kadic* court addressed the question of whether the TVPA's state action requirement applied to *all* actions under the ATS, including the plaintiffs' genocide and war crimes claims. *See* 70 F.3d at 241-43. The court rejected that argument, noting that "Congress indicated that the [ATS] 'has other important uses and should not be replaced'". *Id.* at 241 (*citing* H.R. Rep. No. 102-367, at 4 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 85-86). Thus, the "scope of the [ATS] remains undiminished" only insofar as the TVPA does not affect ATS claims other than those involving extrajudicial killing or torture.

Contrary to plaintiffs' argument that the Supreme Court recognized that summary execution is actionable under the ATS (Pl. Int'l Br. at 11), the Court acknowledged that a statutory cause of action for extrajudicial killing exists under the TVPA. *Sosa*, 542 U.S. at 728. Congress gave federal courts a "clear mandate" with respect to extrajudicial killing claims under the TVPA, not the ATS. *Id.* Thus, the TVPA in and of itself does not serve as an indicium of whether plaintiffs' summary execution claims "easily" satisfy the *Sosa* standard. (Pl. Int'l Br. at 11.)

Congress passed the TVPA in 1991 in order to implement, through domestic legislation, U.S. obligations under CAT, *see* H.R. Rep. No. 367, at 3-4 (1991); *see also* S. Rep. No. 102-249, at 4-5 (1991). Specifically, Congress sought to provide victims of torture a means of civil redress. *Id*. Moreover, Congress passed the TVPA to moot the question of whether a private right of action exists under the ATS for extrajudicial killing and torture—"new international norms" that were not part of Congress's understanding of the "law of nations" in 1789. *See Tel-Oren*, 726 F.2d at 816 (Bork, J., concurring). The TVPA responded to this concern that federal courts may be "act[ing] in the dark", *id.* at 815, by providing courts with "an explicit—and preferably contemporary—grant" of a private right of action for torture and extrajudicial killing claims. *See* H.R. Rep. No. 102-367, at 4.

In passing the TVPA, Congress provided courts with an "unambiguous" basis upon which to adjudicate federal claims for extrajudicial killings. *Sosa*, 542 U.S. at 728 (*quoting*

Id. And in light of *Sosa*—decided after this Court's 2002 decision—where the Supreme Court stated that federal courts should "look for legislative guidance before exercising innovative authority over substantive law", 546 U.S. at 726—this Court should revisit the question of whether the TVPA displaces an ATS claim for extrajudicial killing. Using *Sosa*'s guidance, an appellate court has found that the TVPA does displace ATS claims for extrajudicial killing and torture. *See Enahoro v. Abubakar*, 408 F.3d 877, 885 (7th Cir. 2005). (That issue is raised in the appeal pending from this Court's interlocutory certification of its Order of September 29, 2006. *Kiobel*, 456 F. Supp. 2d at 468, *appeal docketed*, Nos. 06-4800, 06-4876 (2d Cir. Jan. 3, 2007).).

H.R. Rep. No. 102-367, at 3), *see also* S. Rep. No. 102-249, at 4. This clear, detailed, and "modern" articulation of the will of Congress displaces any extrajudicial killing claim brought pursuant to customary international law. *See id.* Thus, courts should only turn to customary international law as a last resort. *See Oliva v. U.S. Dep't of Justice*, 433 F.3d 229, 233 (2d Cir. 2005).[15] As the Supreme Court stated more than a century ago, and reiterated in *Sosa*:

> "[W]here there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is." *The Paquete Habana*, 175 U.S. at 700; *see also Sosa*, 542 U.S. at 733-34.

The TVPA is a "controlling legislative act" that displaces any resort to customary international law under the ATS. Congress has spoken on this issue through the enactment of the TVPA, which has displaced customary international law.

---

[15] In *Sosa*, 542 U.S. at 726, the Supreme Court also noted its unwillingness to expand "federal common law":

> "*Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), was the watershed in which we denied the existence of any federal 'general' common law, *id*., at 78, which largely withdrew to havens of specialty, some of them defined by express congressional authorization to devise a body of law directly, *e.g.*, *Textile Workers v. Lincoln Mills of Ala.*, 353 U.S. 448 (1957) (interpretation of collective bargaining agreements); Fed. Rule Evid. 501 (evidentiary privileges in federal-question cases). Elsewhere, this Court has thought it was in order to create federal common law rules in interstitial areas of particular federal interest. *E.g.*, *United States v. Kimbell Foods, Inc*., 440 U.S. 715, 726-727 (1979). And although we have even assumed competence to make judicial rules of decision of particular importance to foreign relations, such as the act of state doctrine, *see Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 (1964), the general practice has been to look for legislative guidance before exercising innovative authority over substantive law. It would be remarkable to take a more aggressive role in exercising a jurisdiction that remained largely in shadow for much of the prior two centuries" (internal parallel citations omitted).

This "explicit [statutory] grant" of a private right of action serves to displace any ATS claim for extrajudicial killing. *Enahoro*, 408 F.3d at 884-85. This principle of displacement announced in *The Paquete Habana* is not peculiar to international law; rather, it is a well-settled proposition in American jurisprudence. Although "general liability created by statute without a remedy may be enforced by an appropriate common-law action", where "the provision for the liability is coupled with a provision for a special remedy, that remedy, and that *alone*, must be employed". *Pollard v. Bailey*, 87 U.S. 520, 527 (1874) (emphasis added); *see also Whitman v. Nat'l Bank of Oxford*, 83 F. 288, 291 (2d Cir. 1897).

As the court in *Enahoro* noted, "[i]t is hard to imagine that the *Sosa* court would approve of common law claims based on torture and extrajudicial killing when Congress has specifically provided a cause of action for those violations and has set out how those claims must proceed". 408 F.3d at 886. Under plaintiffs' reasoning that their TVPA claims are "independent" of their ATS claims (Pl. Int'l Br. at 28-29), the ATS would become nothing more than a means to circumvent an explicit congressional mandate. This understanding of the TVPA would render it "meaningless". *Enahoro*, 408 F.3d at 885.

Furthermore, under plaintiffs' interpretation of this interaction between the ATS and TVPA—or lack thereof (given that plaintiffs contend that the two statutes are "independent of" each other)—aliens and U.S. citizens would be subject to different standards and requirements for an *identical* torture or extrajudicial killing claim. The TVPA sought to "enhance" the remedy available under the ATS in one "important respect": it provides a remedy not only to an "alien" but to any "individual", including U.S. citizens. *See* Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992), *codified at* 28 U.S.C. § 1350, note; *see also* H.R. Rep. 102-367, at 4. Indeed, because the TVPA requires that plaintiffs

exhaust domestic remedies, no alien would ever "plead a cause of action under the [TVPA] and subject himself to its requirements", if he or she could "simply plead under international law". *Enahoro*, 408 F.3d at 885.

The fact that the legislative history of the TVPA notes that the ATS "should remain intact", H.R. Rep. 102-367, at 4, and "should not be replaced", *id.* at 3, does not compel a different conclusion. That legislative language indicates that Congress sought to keep the ATS intact to serve as a basis for different claims based on other violations of customary international law. Congress determined that the ATS "should not be replaced" because it "has *other* important uses", and that it "should remain intact" to allow for "suits based on *other* norms that already exist or may ripen in the future into rules of customary international law". *Id.* at 3-4 (emphasis added). There are not now "two routes [for aliens] for claims based on torture and killing". *Enahoro*, 408 F.3d at 886 n.2.

D. Plaintiffs Do Not Have a TVPA Claim.

Plaintiffs are not suing defendants for extrajudicial killing (or torture) under the TVPA. Plaintiffs have pleaded their claims solely under the ATS, not the TVPA.

Plaintiffs declare in their brief that their extrajudicial killing claims under the ATS are also actionable under the TVPA because the TVPA's definition of extrajudicial killing "reflects" international law. (Pl. Int'l Br. at 12-13, 28.) But plaintiffs have dropped the TVPA claims that they asserted in their initial complaint on November 6, 1996. (*See* Nov. 8, 1996 Compl. ¶¶ 91(b), 93-96.) Since then, they have filed *four* amended complaints, none of which raises the TVPA as a basis upon which their claims arise.[16] Similarly, although plaintiffs

[16] *See* First Am. Compl., Apr. 29, 1997, ¶¶ 98, 100-03; Second Am. Compl., Mar. 27, 2002, ¶¶ 105, 107-10; Third Am. Compl., Sept. 9, 2003, ¶¶ 119, 121-24; Compl., ¶¶ 119, 121-24.

invoked the TVPA in their initial complaint against Brian Anderson (*Anderson* Compl., Mar. 5, 2001, ¶ 61(a)), plaintiffs dropped their TVPA claims in their First Amended Complaint against Mr. Anderson filed in 2002 (*Anderson* Am. Compl., Mar. 27, 2002, ¶ 67(a)).

"[A]n amended complaint ordinarily supersedes the original, and renders it of no legal effect." *Shields v. Citytrust Bancorp, Inc.*, 25 F.3d 1124, 1128 (2d Cir. 1994) (quoting *Int'l Controls Corp. v. Vesco*, 556 F.2d 665, 668 (2d Cir. 1977)). "[I]t makes perfect sense to hold that a party who seeks to file an amended pleading that omits a claim intends to abandon the claim". *Austin v. Ford Models, Inc.*, 149 F.3d 148, 155 (2d Cir. 1998). Plaintiffs clearly intended to abandon their extrajudicial killing claims under the TVPA.[17] Plaintiffs cannot be permitted to assert claims under the TVPA two and a half months before trial after abandoning such claims over six years ago. *See Jones v. Marriott Hotel Servs., Inc.*, No. 05-CV-5206, 2008 U.S. Dist. LEXIS 60568, at *18-19 (N.D. Ill. July 25, 2008) (based on plaintiffs' "conscious decision" to amend their complaint, the case having been pending for three years, and a trial date having been set, the court "comfortably" concluded that plaintiffs intended to abandon their claims).

Even if this Court were to entertain plaintiffs' claims for summary execution under the TVPA, plaintiffs cannot meet the statute's requirements. Plaintiffs have not exhausted their available remedies in Nigerian courts as required by the TVPA. The TVPA provides that "[a] court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred". 28 U.S.C. § 1350, note, § 2(b); *cf. Sosa*, 542 U.S. at 733 n.21 (noting that exhaustion of remedies in the domestic legal system—and perhaps international claims tribunals—is a

[17] *See also Anderson* Am. Compl., Mar. 27, 2002, ¶ 67 (plaintiffs abandoned TVPA claims).

principle that the Court would consider in limiting the availability of relief in U.S. federal courts for violations of customary international law). In explaining the inclusion of an exhaustion requirement, Congress noted that "[the] requirement ensures that U.S. courts will not intrude into cases more appropriately handled by courts where the alleged torture or killing occurred. It will also avoid exposing U.S. courts to unnecessary burdens, and can be expected to encourage the development of meaningful remedies in other countries." H.R. Rep. 102-367, at 5.[18]

In addition, corporations cannot be sued under the TVPA. The TVPA makes clear that only an "individual", not a corporation, can be held liable for extrajudicial killing. 28 U.S.C. § 1350, note, § 2(a); *see also Leocal v. Ashcroft*, 543 U.S. 1, 8 (2004) (noting that statutory interpretation "begins with the language of the statute"). Furthermore, the statutory language as a whole also indicates that a corporation cannot be liable under the TVPA. The statute uses the term "individual" for both the offender and the victim of a killing. *See* 28 U.S.C. § 1350, note; *see also Leocal*, 543 U.S. at 9 (stating that, when interpreting an "elastic" word in a

[18] Plaintiffs have neither alleged nor established that they have ever attempted to pursue any remedies in Nigeria. Instead, they contend that "[t]here is no independent functioning judiciary in Nigeria", and as such, that any lawsuit against the defendants in Nigeria would be "futile". (Compl. ¶ 120.) This characterization of the Nigerian judiciary, however, is belied by plaintiffs' own assertions with respect to the Special Tribunal. Plaintiffs contend that the Special Tribunal "lacked independence and impartiality" (Pl. Int'l Br. at 21), and that the executions of the Ogoni Nine were handed down in a "sham trial" (*id.* at 7). The implication is that, had the Special Tribunal been operating "within the framework of Nigerian law" (*id.* at 16), and not "divorced from any independent court system" (*id.* at 21), the Nigerian government would not have violated any norm of customary international law. *See also Kiobel v. Royal Dutch Petroleum Co.*, No. 06-4800-cv, Opening Brief for Plaintiffs-Appellants, Apr. 4, 2007, at 29 & n.10 (arguing that the Special Tribunal proceedings denied the Ogoni Nine fundamental rights "already in force" in Nigeria that are guaranteed by the 1979 Nigerian Constitution), Millson Decl. Ex. 26. In order to circumvent the TVPA's exhaustion requirement, plaintiffs have asserted that there is no independent functioning judiciary in Nigeria; yet, at the same time, in order to bolster their summary execution claims, they have compared the Special Tribunal with the independent Nigerian court system. Thus, based upon plaintiffs' own allegations, it cannot be that there is "*no* independent functioning judiciary in Nigeria"; plaintiffs have therefore failed to exhaust all "adequate and available" remedies in Nigeria, as required under the TVPA.

statute, courts should look not just at the word itself, but also its context and the terms surrounding it).

The TVPA provides that "an individual" is liable for damages if he subjects another "individual" to extrajudicial killing. 28 U.S.C. § 1350, note, § 2(a)(2). A corporation cannot be killed. *See Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1176 (C.D. Cal. 2005) (noting that the only way to avoid an "absurd result" under the TVPA is by excluding corporations from the scope of the statute's liability). In addition, under the definitions section of the TVPA, torture is defined as "any act, directed against an *individual* . . . by which severe pain or suffering . . . is intentionally inflicted on that *individual*". 28 U.S.C. § 1350, note, § 3(b)(1) (emphases added). In drafting the TVPA, Congress could have used different terms to differentiate those who may be held liable for committing torture or an extrajudicial killing from those who are subjected to either offense.[19] It chose not to do so. Accordingly, only natural persons may be held liable for committing an extrajudicial killing. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 101 (2003) ("Absent some congressional indication to the contrary, [courts] decline to give the same term in the same Act a different meaning depending on whether the rights of the plaintiff or the defendant are at issue.").

Further, the legislative history states unequivocally that the term "individual" was used to make "crystal clear" that "*only* individuals may be sued". S. Rep. No. 102-249, at 7 (emphasis added). Indeed, several courts in this Circuit have found that corporations cannot be held liable under the TVPA. *See, e.g., In re Terrorist Attacks on Sept. 11, 2001*, 349 F. Supp. 2d

[19] *See* 1 U.S.C. § 1 (defining the word "person" to include both "corporations" as well as "individuals"). Congress could have used the term "person" in the TVPA instead of "individual" if it intended the TVPA to reach corporations as well as natural persons.

765, 828 (S.D.N.Y. 2005); *In re Agent Orange*, 373 F. Supp. 2d 7, 55-56 (E.D.N.Y. 2005); *Arndt v. UBS AG*, 342 F. Supp. 2d 132, 141 (E.D.N.Y. 2004).[20]

E. The Shell Parties' Ownership of SPDC Does Not Render Them Liable for Summary Execution.

The Shell Parties have not engaged in any activities in Nigeria. Plaintiffs' Complaint obscures who they allege engaged in the activities in Nigeria during the period in question. At various points throughout the Fourth Amended Complaint, plaintiffs list as actors "Royal Dutch/Shell" (*e.g.*, Compl. ¶¶ 65, 91), "SPDC, acting at all times as the agent of Royal Dutch/Shell" (*e.g.*, *id.* ¶ 41), "SPDC" (*e.g.*, *id.* ¶¶ 42, 47), and "Royal Dutch/Shell, acting through SPDC" (*e.g.*, *id.* ¶ 64). Plaintiffs attempt to tie the alleged actions of SPDC to the Shell Parties through such conclusory language as "Royal/Dutch Shell dominated and controlled SPDC". (*Id.* ¶ 27.) Regardless of how plaintiffs depict the actions of SPDC in Nigeria during the period in question, however—either as acting independently or as the "agent of Royal Dutch/Shell"—the Shell Parties have never conducted business in Nigeria and have no presence there. SPDC is a separate entity from the Shell Parties that operates its business separately and makes decisions independently from the Shell Parties.[21]

Indeed, despite plaintiffs' burden to set forth evidence to establish that subject-matter jurisdiction exists over their claims, *see supra* Part I.B, plaintiffs have not provided *any* evidence to suggest that the Shell Parties have engaged in *any* kind of activity in Nigeria. That is

[20] Other district courts have also found that there is no liability for corporations under the TVPA. *See, e.g., Bowoto v. Chevron Corp.*, No. C 99-02506 SI, 2006 U.S. Dist. LEXIS 63208, at *17-18 (N.D. Cal. Aug. 22, 2006); *Doe v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20, 28 (D.D.C. 2005); *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1176 (C.D. Cal. 2005); *Beanal v. Freeport-McMoRan, Inc.*, 969 F. Supp. 362, 382 (E.D. La. 1997).

[21] SPDC is not a party to this case and it has not conducted business in Ogoniland since 1993.

because the evidence demonstrates the opposite. The Shell Parties consist of an English and Dutch corporation that have not engaged in operations in Nigeria, or anywhere—they are holding companies that are "solely . . . investment vehicle[s]". (Van der Vlist Decl. ¶ 3; Munsiff Decl. ¶ 3.) In fact, at all relevant times, Shell Transport had no employees (Munsiff Dep. 12, Millson Decl. Ex. 27), and Royal Dutch had virtually none (Herkströter Dep. 118, Millson Decl. Ex. 28). Further, this Court ordered that plaintiffs remove from their Complaint false allegations about the Shell Parties having met with Nigerian officials outside of Nigeria. (Sept. 29, 2006 Order at 2, 6-7; Mar. 31, 2006 Rep. at 30-31.)

Further, there is nothing in the Complaint that ties the Shell Parties or SPDC to any of the alleged violations of the prohibition against summary execution. The Shell Parties did not set up the Special Tribunal and had no hand in writing the decree creating the authority for establishing the Tribunal. As plaintiffs point out, the Tribunal "was created and specially appointed by the Nigerian military regime" (Compl. ¶ 84), not the Shell Parties. It had jurisdiction over plaintiffs' cases, and it alone handed down their sentences. (*See id*. ¶¶ 86, 98.) The Shell Parties had no power to ensure that plaintiffs were given the right to appeal or the right to counsel outside the presence of the Nigerian military. Nor did they have any authority as private entities to affect the structure of the Tribunal—a governmental body. Furthermore, the Shell Parties did not cause the executions. It is undisputed that each of these men was charged with and tried for murder, convicted and condemned to death by a government-approved tribunal, and executed by the Nigerian Government.

But even if SPDC could be held liable for the alleged misconduct of the Nigerian Government—which it cannot—there is no norm of customary international law that would hold a company's parent liable for the acts of its subsidiary, a separate and independent entity. The

Shell Parties thus cannot be held liable based on an unfounded allegation that they dominated and controlled an independent entity, an entity which itself did not take any of the alleged actions that would amount to a violation of the prohibition against summary execution—a cause of action that is not cognizable under *Sosa*.

III. PLAINTIFFS' CLAIMS FOR TORTURE (COUNT THREE) DO NOT MEET *SOSA*'S REQUIREMENTS.

Putting aside the fact that the TVPA has displaced any cause of action for torture or extrajudicial killing under customary international law—even under customary international law, plaintiffs have not met their burden to show that defendants' conduct violates a norm meeting *Sosa's* standard.

A. Plaintiffs' Claims for "Torture" Do Not Allege A Violation of Customary International Law by Defendants.

Plaintiffs' Complaint contains a host of allegations that the Nigerian military beat and abused plaintiffs. (*See, e.g.*, Compl. ¶¶ 78, 81, 93, 100.) Not one of plaintiffs' allegations suggests that the Shell Parties conducted those alleged beatings. Not one of plaintiffs' allegations suggests that a representative of the Shell Parties was present during the beatings, requested or encouraged a particular beating, or even knew about a particular beating.[22] Based on plaintiffs' own allegations, there is no specific norm of customary international law that would capture the types of conduct alleged against the Shell Parties.

The only allegations *about the Shell Parties* that plaintiffs make in an attempt to bring claims for "torture" against them are that they (through SPDC): provided logistical support

[22] The only allegation that links the Shell Parties to the alleged beatings is that "Royal Dutch/Shell private police cooperated in the arrests, beatings and torture of some of the [additional] twenty [Ogonis] arrested". (Compl. ¶ 111.) While this conclusory allegation is false, none of these "additional twenty Ogonis" who were charged by the Special Tribunal is a party to this case.

to the Nigerian military or police (*id.* ¶ 39(d)); purchased equipment for the military or police (*id.* ¶ 39(b), (d)); made payments to the military or police for protection (*id.* ¶ 39(a)); provided information to the military or police (*id.* ¶ 39(c)); employed former military or police personnel (*id.* ¶ 39(f)); engaged in a media campaign with the Nigerian Government to "discredit" MOSOP leaders (*id.* ¶¶ 39(h), 85); or bribed witnesses for false testimony (*id.* ¶¶ 39(g), 91). While none of those allegations is true, even if any were, plaintiffs do not demonstrate—because they cannot—how such conduct violates a "specific, universal, and obligatory" norm of customary international law. *Sosa*, 542 U.S. at 732. There is no "definite" norm of customary international law that holds corporations liable for acts of torture committed by a foreign government based on the types of activities plaintiffs allege as to the Shell Parties.

Plaintiffs do not allege that SPDC or the Shell Parties engaged in torture. While some plaintiffs allege that the Nigerian Government beat and tortured them, there is no suggestion that the Shell Parties knew of, encouraged and/or participated in these alleged acts of torture. For example, plaintiffs allege that those individuals who were incarcerated by the Nigerian Government were tortured as a result of a January 4, 1995 protest of "Royal Dutch/Shell's operation" that was dispersed by the Nigerian military. (*See* Compl. ¶¶ 92-93.) Nowhere do plaintiffs allege, however, that the Nigerian Government tortured those who were incarcerated based on a demand from the Shell Parties, or that the Shell Parties knew those individuals were being tortured in response to the protest. Likewise, the allegation that Shell executives met with Nigerian officials to discuss a "common strategy" and "joint media campaign" regarding the Ogoni campaign (*id.* ¶ 85), does not suggest that the parties discussed torture as part of this "common strategy". None of these alleged actions—standing alone or taken together—constitutes a violation of a well-defined norm of customary international law.

Prior to *Sosa's* direction to determine "whether international law extends the scope of liability for a violation of a given norm *to the perpetrator being sued*", 542 U.S. at 732 n.20 (emphasis added), this Court allowed plaintiffs' claims for torture to move forward. *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 Civ. 8386, 2002 U.S. Dist. LEXIS 3293 (S.D.N.Y. Feb. 28, 2002). In *Kiobel*, 456 F. Supp. 2d at 465, this Court acknowledged that it is still unclear what conduct is included within "torture", but noted that "dictum in *Sosa* suggests that at least some forms of torture" are actionable. On that basis, this Court found that "the 'physical and psychological punishment' *administered by Defendants*" would allow *Kiobel* plaintiffs to escape dismissal of their torture claims. *Id.* (emphasis added). Although the paragraph in the *Kiobel* Amended Complaint that this Court cited to stated "physical and psychological punishment *administered to* Plaintiffs" (*Kiobel* Am. Compl., May 14, 2004, ¶ 97 (emphasis added)), and that Complaint nowhere alleges that any defendants (which include SPDC in that Complaint) "administered" or committed torture, this Court should reaffirm *Sosa's* distinction between the person who allegedly administered the torture and the alleged "perpetrator being sued".

B. The Shell Parties' Ownership of SPDC Does Not Render Them Liable for Torture.

As noted in Part II.E *supra*, the Shell Parties have not engaged in any activities in Nigeria. Plaintiffs have offered *no* evidence that would give this Court jurisdiction over plaintiffs' claims. Even assuming that plaintiffs' allegations regarding the actions of SPDC are true, there is no definite and universal norm of customary international law that would hold the defendants liable for torture simply because their subsidiary allegedly engaged in conduct such as making payments to the military and police, or undertook a coordinated media and public relations campaign.

IV. PLAINTIFFS' CLAIMS FOR CRUEL, INHUMAN, OR DEGRADING TREATMENT (COUNT FOUR) DO NOT MEET *SOSA*'S REQUIREMENTS.

A. Plaintiffs' Claims for Cruel, Inhuman or Degrading Treatment Are Not Actionable under *Sosa*.

Even prior to *Sosa*, courts have recognized that the "problem of definability" is an impediment to a cognizable cruel, inhuman, or degrading treatment ("CIDT") claim under the ATS. *Forti v. Suarez-Mason*, 694 F. Supp. 707, 712 (N.D. Cal. 1988) ("Absent some definition of what constitutes [CIDT] this Court has no way of determining what alleged treatment is actionable, and what is not."). Without "readily ascertainable parameters, it is unclear what behavior falls within the proscription" against CIDT. *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1543 (N.D. Cal. 1987). And without a universal consensus as to what treatment is cruel, inhuman or degrading, plaintiffs' CIDT claims cannot survive. *See Eastman Kodak Co. v. Kavlin*, 978 F. Supp. 1078, 1093 (S.D. Fla. 1997). Indeed, this Court noted CIDT claims' "lack of clarity". *Wiwa*, 2002 U.S. Dist. LEXIS 3293, at *23. While this Court let plaintiffs' CIDT claims move forward in its 2002 Order, the Court did so prior to the Supreme Court's admonition that federal courts should not recognize claims under the ATS with "less definite content" than the historical paradigms of the eighteenth century. *Sosa*, 542 U.S. at 732.[23]

[23] This Court relied on *Xuncax v. Gramajo*, 886 F. Supp. 162, 186-87 (D. Mass. 1995), a case that the Supreme Court expressly disapproved as "reflect[ing] a more assertive view of federal judicial discretion over claims based on customary international law than the position we take today". *Sosa*, 542 U.S. at 736 n.27. In *Kiobel*, this Court did not rule on plaintiffs' CIDT claims. Instead, the Court stated that it "need not determine whether a claim for cruel, inhuman, and degrading treatment would be viable". 456 F. Supp. 2d at 465. The Court did not decide the issue whether plaintiffs' CIDT claims were viable, because it determined that plaintiffs had alleged a viable torture claim, despite "*Sosa* leav[ing] unclear what conduct is included within 'torture'". *Id.* at 465. Even if, *arguendo*, there were widespread agreement that "torture [was] at the extreme end of cruel, inhuman and degrading treatment", *Wiwa*, 2002 U.S. Dist. LEXIS 3293, at *22 (*citing* Convention Against Torture, S. Exec. Rep. 30, 101st Cong., 2d Sess. 13 (1990)), it still would not follow that, because a court recognized a torture claim under the *Sosa* standard, a CIDT claim would also be cognizable under the same standard. *See infra* Part IV.A.

The only appellate court that has ruled on CIDT claims post-*Sosa* found that there was "no basis in law to recognize Plaintiffs' claim for cruel, inhuman, degrading treatment or punishment". *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1247 (11th Cir. 2005). That is unsurprising, given that there is "no widespread consensus" as to what constitutes CIDT. *Bowoto v. Chevron Corp.*, 557 F. Supp. 2d 1080, 1093 (N.D. Cal. 2008). Because of the "conceptual difficulties" courts have confronted in devising a well-defined norm against CIDT, courts have refused to recognize such a cause of action under the ATS.[24]

Plaintiffs cannot allege that a cause of action for CIDT exists under the ATS simply on the basis of an abstract principle against CIDT being recognized by the international community. *Sosa* requires more than that. For a claim to be actionable under the ATS, "the proposed tort must be characterized by universal consensus in the international community as to its binding status *and its content*". *Forti*, 694 F. Supp. at 712.

B. The Views of Professor Roht-Arriaza Do Not Meet *Sosa*'s Standard.

Combining torture and CIDT claims under the same analysis, plaintiffs' expert[25] Professor Roht-Arriaza states that the prohibition against torture and CIDT is a "clearly defined norm of customary international law". (Roht-Arriaza Decl. ¶ 26.) Having set out the definition

[24] *See Tachiona v. Mugabe*, 234 F. Supp. 2d 401, 436 (S.D.N.Y. 2002) ("Grounds for doubts as to the scope of the consensus and definitional content of the prohibition against the cruel, inhuman or degrading treatment arise by reason of ambiguous evidence of what unlawful conduct falls within the ascertainable contours of the action.").

[25] Professor Roht-Arriaza is the lawyer who represents amici in the *Kiobel* appeal. *See* Brief of Amici Curiae International Law Scholars Cherif Bassiouni, et al in Support of Plaintiffs-Appellants-Cross-Appellees and in Support of Affirmance, 06-4800-cv(L), July 17, 2007. "[W]here an expert becomes an advocate for a cause, he therefore departs from the ranks of an objective expert witness, and any resulting testimony would be unfairly prejudicial and misleading". *Viterbo v. The Dow Chemical Co.*, 646 F. Supp. 1420, 1425 (E.D. Tex. 1986); *see also Brink v. Union Carbide Corp.*, 41 F. Supp. 2d 402, 405 n.8 (S.D.N.Y. 1997) (noting that one of plaintiff's experts had an "obvious bias in favor of the plaintiff's case"); *Stachniak v. Hayes*, 989 F.2d 914, 925 (7th Cir. 1993).

for torture—not CIDT—under CAT, Professor Roht-Arriaza notes that "the exact boundaries between 'torture' and other forms of 'cruel, inhuman or degrading treatment' are often difficult to identify". (*Id.* ¶ 28.) "Difficult to identify" is not a *Sosa* concept. Nonetheless, Professor Roht-Arriaza continues—she reduces CIDT to its "essential elements". (*Id.* ¶ 30.) However, those "essential elements" are not derived from any case law, treaty or even a non-binding source of international law. Rather, Professor Roht-Arriaza distills her "essential elements" from her own reasoning, citing to no sources that list such "essential elements" of a well-established prohibition against CIDT. (*See id.*)

That reasoning is fatally flawed. The *Sosa* standard is stringent—it applies only to claims that are specific, and that "threaten[] serious consequences in international affairs". 542 U.S. at 715. Even if plaintiffs' allegations made out a viable claim for torture under the *Sosa* standard—and they do not, *see supra* Part III.A—that would not mean that there is a clearly established prohibition against CIDT.[26] The greater may contain elements of the lesser, but those elements *standing alone* would not necessarily constitute a "sufficiently definite" norm of customary international law. *Id.* at 732. *Cf. Tachiona*, 234 F. Supp. 2d at 436 ("[W]hile most international declarations and covenants that proscribe torture also extend by conjunction to cruel, inhuman or degrading treatment or punishment, those instruments contain specific definitions of torture but not of cruel, inhuman or degrading treatment.").

[26] Professor Roht-Arriaza cites to a decision of the European Court of Human Rights for the proposition that "certain acts which were classified in the past as 'inhuman and degrading treatment' as opposed to 'torture' *could* be classified differently in the future". (Roht-Arriaza Decl. ¶ 32 (emphasis added).) That something *could* be classified in a different manner in the future does not speak to the definiteness of a norm, nor whether there is any "essential elements" that overlap between two prohibitions.

Applying the rationale of plaintiffs and Professor Roht-Arriaza to the well-established norm against piracy—which is defined as "murder or robbery committed on the high seas", *see Sosa*, 542 U.S. at 719—a prohibition against assault committed on the high seas should also amount to a clearly defined and well-established norm of customary international law. Such a prohibition, however, is clearly not of "mutual concern" to states. *Flores*, 343 F.3d at 150.

In addition, the non-binding sources of law to which Professor Roht-Arriaza cites contradict her own assertion that there is a clearly defined prohibition against CIDT.[27] Listing a wide range of crimes, from the burning of houses to forced disappearances, Professor Roht-Arriaza remarks that, "[i]n *some* circumstances", "*some* courts" have recognized that certain acts constitute CIDT. (Roht-Arriaza Decl. ¶¶ 35-36 (emphases added).) Those assertions cannot serve as evidence of a well-established norm for CIDT.

C. The "Practical Consequences" of Recognizing Cruel, Inhuman or Degrading Treatment Counsel Judicial Restraint.

In *Sosa*, the Supreme Court cautioned lower courts that "the determination whether a norm is sufficiently definite to support a cause of action should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts". 542 U.S. at 732-33; *see also De Los Santos Mora v. New York*, 524 F.3d 183, 209 (2d Cir. 2008); *Abagninin v. AMVAC Chem. Corp.*, 545 F.3d 733, 737 (9th Cir. 2008). Just as Professor Roht-Arriaza cites to numerous acts that might

[27] Professor Roht-Arriaza cites to, *inter alia*, the European Commission of Human Rights, the European Court of Human Rights, the U.N. Human Rights Committee, the Inter-American Court of Human Rights, the Commentaries on the Geneva Conventions, as well as both the UDHR and ICCPR. While these sources may have "moral authority", they are non-binding on U.S. courts and have "little utility under the [*Sosa*] standard". *Sosa*, 542 U.S. at 734; *see also Flores*, 343 F.3d at 165-68.

constitute CIDT in "some courts" under "some circumstances", plaintiffs' CIDT claims are premised on an array of different acts, ranging from Owens Wiwa going into exile (Compl. ¶ 102), to the shooting of Karalolo Kogbara and the damage of her property (*id.* ¶ 48).[28] (Roht-Arriaza Decl. ¶¶ 35-36.) All these acts allegedly fit under plaintiffs' claims for CIDT, because there is no clear definition of what constitutes a prohibition against CIDT. *See Forti*, 694 F. Supp. at 712 (noting that plaintiffs' amended complaint is evidence of the "problem of definability" as the complaint alleged "a wide range of discrete acts").

In fact, the proposed prohibition against CIDT is such an amorphous rule that plaintiffs' own allegations do not clearly set forth what actions "forc[ed] them to act against their will and conscience", what actions "incit[ed] fear and anguish", and what actions "[broke] physical or moral resistance". (Compl. ¶ 134.) That ambiguity could lead to this Court adjudicating the lawfulness of conduct that is not barred by customary international law. As the *Sosa* court warned, "[i]t is one thing for American courts to enforce constitutional limits on our own State and Federal Governments' power, but quite another to consider suits under rules that would go so far as to claim a limit on the power of foreign governments over their own citizens, and to hold that a foreign government or its agent has transgressed those limits". 542 U.S. at 727; *see also Tel-Oren*, 726 F.2d at 813 (doubting whether "our courts [should] sit in judgment of the conduct of foreign officials in their own countries with respect to their own citizens."). If this Court were to recognize plaintiffs' vague CIDT claims, it would have "breathtaking" consequences for federal litigation under the ATS. *Sosa*, 542 U.S. at 736. Creating a cause of

[28] In fact, this Court in *Kiobel* dismissed plaintiffs' claim for forced exile, one of the alleged actions that plaintiffs in this case contend is a sufficient factual predicate for a CIDT claim. *See Kiobel*, 456 F. Supp. 2d at 464 ("The Court is unaware of any federal court decision in which a court has considered, much less allowed, a claim for forced exile pursuant to the ATS.").

action for CIDT under the ATS would result in a mass of claims in federal courts based on a broad and diverse range of alleged misconduct. *Cf. Taveras v. Taveraz*, 477 F.3d 767, 782 (6th Cir. 2007).

D. The Shell Parties' Ownership of SPDC Does Not Render Them Liable for Cruel, Inhuman or Degrading Treatment.

As noted in Part II.E *supra*, the Shell Parties have not engaged in any activities in Nigeria. Plaintiffs have put forward *no* evidence that would give this Court jurisdiction over plaintiffs' claims.

Even if plaintiffs could hold the Shell Parties liable for the alleged actions of SPDC, plaintiffs cannot point to any specific, universal or obligatory norm violated by SPDC's alleged conduct—and there is no norm that would hold a parent company liable for such conduct. It is difficult to discern from the Complaint what alleged actions plaintiffs even contend form the basis of their CIDT claims. In their brief, plaintiffs say that forcing Owens Wiwa into exile, attacking Karalolo Kogbara and destroying her property, and offering Owens Wiwa his brother's freedom in exchange for an end to the protests, constituted CIDT. (Pl. Int'l Br. at 30.) According to plaintiffs' allegations, Owens Wiwa fled Nigeria because "he feared arbitrary arrest, torture and death". (Compl. ¶ 102.)

There is no evidence, nor even any allegation, that SPDC drove Owens Wiwa to flee Nigeria, nor can plaintiffs show that customary international law would reach harassment precipitating a decision to flee.[29] Plaintiffs allege that Karalolo Kogbara was shot "by the government troops", not by SPDC (*id.* ¶ 48.), but cannot show SPDC's involvement nor any standard of customary international law condemning police shootings or destruction of property.

[29] *See Kiobel*, 456 F. Supp. 2d at 464 ("The Court is unaware of any federal court decision in which a court has considered, much less allowed, a claim for forced exile pursuant to the ATS.").

Plaintiffs' third allegation, regarding the Managing Director of SPDC, is false. Even if the Shell Parties could be held liable for the alleged actions of an SPDC director—and they cannot—plaintiffs can point to no norm of customary international law that would condemn an offer to attempt to intercede conditioned upon promises relating to future conduct. For these reasons, plaintiffs' CIDT claims must fail.

Plaintiffs also maintain that "all plaintiffs living in Ogoni suffered from the reign of terror imposed between 1993 and [1996] and suffered mistreatment which constitutes at least CIDT". (Pl. Int'l Br. at 33.) This vague assertion speaks to the open-ended nature of a CIDT claim, and why it cannot be cognizable under the ATS. Plaintiffs are asking this Court to look at all events over a three-year period and to pick and choose any alleged action that might have been part of a "reign of terror". Whatever the plaintiffs define this "reign of terror" to be, it is undisputed that the Shell Parties did not conduct any activities in Nigeria—and SPDC has conducted none in Ogoniland since 1993—and thus cannot be held liable under the ATS for an indeterminate and all-encompassing range of actions allegedly committed by the Nigerian Government during this period.

E. The TVPA's History Compels Rejection of Plaintiffs' CIDT Claims.

When Congress adopted the TVPA, it only executed *in part* the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85, 23 I.L.M. 1027 (1984), *as modified*, 24 I.L.M. 535 (1985), to which the Senate gave its consent on October 27, 1990. S. Treaty Doc. No. 100-20 (1990). Congress chose to create a remedy for torture and extrajudicial killing only, and chose not to create a remedy for CIDT, another subject of the Convention. The TVPA "borrows extensively" from Article 1 of CAT, *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 91-93 (D.C. Cir. 2002), but does not incorporate Article 16 of CAT. Article 16 states that "[e]ach State Party

shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I". CAT art. 16; *see also* U.S. reservations, declarations, and understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 136 Cong. Rec. S17486-01 (Oct. 27, 1990) ("That the United States considers itself bound by the obligation under Article 16 to prevent 'cruel, inhuman or degrading treatment or punishment', only insofar as the term 'cruel, inhuman or degrading treatment or punishment' means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.").

Thus, the "legislative guidance" here counsels strongly against any exercise of "innovative authority" to recognize CIDT claims under the ATS.

V. PLAINTIFFS' CLAIMS FOR CRIMES AGAINST HUMANITY (COUNT TWO) DO NOT MEET *SOSA*'S REQUIREMENTS.

A. "Crimes Against Humanity" Does Not Have "Definite Content" as Required under *Sosa*.

This Court based its 2002 ruling regarding "crimes against humanity" on the Rome Statute of the International Criminal Court and cases decided by the International Criminal Court. *See Wiwa*, U.S. Dist. LEXIS 3293, at *27-32 (citing *Prosecutor v. Tadic*, Judgment, Case No. IT-94-1-T (Trial Chamber May 7, 1997) and *Prosecutor v. Rutaganda*, Judgment, Case No. ICTR-96-3-T (Trial Chamber Dec. 6, 1999)). As set forth in Part I.C., *supra*, however, after *Sosa*, those sources are not competent to establish a cause of action for "crimes against humanity" under the ATS. [30] Similarly, plaintiffs rely on decisions from the Nuremberg Military

[30] In *Kiobel*, this Court based its allowance of claims for "crimes against humanity" on its 2002 decision in this case. 456 F. Supp. 2d at 467 ("This Court has defined crimes against humanity as any of a certain number of acts, including rape, torture, and arbitrary detention,

Tribunals and the International Criminal Tribunal for the Former Yugoslavia ("ICTY") for their claim that "crimes against humanity" meets the standard set out for violations of customary international law under *Sosa*. (Pl. Int'l Br. at 39-44.) Those sources do not create binding norms of customary international law actionable under *Sosa*. *See Flores*, 414 F.3d at 263-64. Those tribunals were established under charters that authorized criminal prosecution for offenses tied to regional crises involving ethnic cleansing, *not civil* causes of action by individuals claiming particular injuries. *See* The Charter of the International Military Tribunal, Aug. 8, 1945, 82 U.N.T.S. 279, 288 art. 6(c) ("Nuremburg Charter"); The Statute of the ICTY, art. 5, May 3, 1993, 32 I.L.M. 1159.

"Crimes against humanity" lacks the "definite content" of the 18th-century paradigms of piracy, offenses against ambassadors and violations of safe conduct. Indeed, there is no agreement on the content of any such norm. Scholars who contend that some form of "crimes against humanity" is recognized by sources of international law acknowledge that it can be difficult to delimit the concept:

> "The term 'crimes against humanity' is almost as much a part of worldwide popular usage as murder. Yet, unlike murder, 'crimes against humanity' is far from having the benefit of international and national legislation which provides it with the necessary legal specificity and particularity which exists in common crimes. In fact, only a handful of countries have embodied 'crimes against humanity' in their national legislation—and that in itself is a tragic neglect. But, worse yet, enforcement of the international proscriptive norm has been significantly lacking."[31]

'committed as part of a widespread or systematic attack directed against any civilian population'. *Wiwa*, 2002 U.S. Dist. LEXIS 3293, at *28 (citing Rome Statute of the International Criminal Court).") This Court did not, then, revisit the utility of the Rome Statute after *Sosa* as a basis for that decision. *See id.*

[31] Of course, "murder" *simpliciter* is not cognizable under the ATS. *See Flores*, 414 F.3d at 249 ("[M]urder of one private party by another, universally proscribed by the domestic law of all countries (subject to varying definitions), is not actionable under the [ATS] as a violation of customary international law because the "nations of the world" have not demonstrated that this

M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* xvii (2d rev. ed., Kluwer Law Int'l 1999); *see also* M. Cherif Bassiouni, *The Normative Framework of International Humanitarian Law: Overlaps, Gaps and Ambiguities*, 8 Transnat'l L. & Contemp. Probs. 199, 212 (1998) ("crimes against humanity" presents "a mixed baggage of certainty as to some of its elements, and uncertainty as to others and to their applicability to non-state actors"); Darryl Robinson, *Defining "Crimes Against Humanity" at the Rome Conference*, 93 Am. J. Int'l L. 43, 44 (1999) ("The evolution of the concept of crimes against humanity in customary international law has not been orderly. A definition was first articulated in the Nuremberg Charter in 1945; but whether this was a legislative act creating a new crime or whether it simply articulated a crime already embedded in the fabric of customary international law remains controversial."); Sharon A. Healey, *Prosecuting Rape Under the Statute of the War Crimes Tribunal for the Former Yugoslavia*, 21 Brook. J. Int'l L. 327, 352 (1995) (definition of "crimes against humanity" is "unclear").[32]

A comparison of sources—such as the charters for the tribunals upon whose decisions plaintiffs rely and the Rome Statute relied upon by this Court prior to *Sosa*—further

---

wrong is "of mutual, and not merely several, concern." (citing *Vencap*, 519 F.2d at 1015)). Further, the law of nations is determined by the "general usage and practice of nations", *see Filartiga*, 630 F.2d at 880. The law of nations is "comprised of those practices and customs that States view as obligatory and that are engaged in or otherwise acceded to *by a preponderance of States in a uniform and consistent fashion*." *Yousef*, 327 F.3d at 91 n.24, *cert. denied*, 540 U.S. 933 (2003) (emphasis added) (citing Ian Brownlie, *Principles of Public International Law* 5-7 (5th ed. 1999)). Mr. Bassiouni's quotation indicates that states do not adhere in practice to any norm of "crimes against humanity" in such a uniform or consistent fashion.

[32] *See also* Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 Yale L.J. 2537, 2585-86 (1991) ("[T]he meaning of [crimes against humanity] is shrouded in ambiguity . . . efforts to enlarge the scope of the crime have generated more controversy than consensus."); Payam Akhavan, *Contributions of the International Criminal Tribunals for the Former Yugoslavia and Rwanda to Development of Definitions of Crimes Against Humanity and Genocide*, 94 Am. Soc'y Int'l L. Proc. 279, 280 (2000) ("[D]efining crimes against humanity is in practice difficult, and is highly dependent on particular factual contexts.")

demonstrates the lack of agreement on what constitutes "crimes against humanity". Article 6(c) of the Nuremberg Charter, for example, defines crimes against humanity as "murder, extermination, enslavement, deportation, and other inhumane acts committed against civilian populations, *before or during the war*; or persecutions on political, racial or religious grounds in execution of or in connection with any crime *within the jurisdiction of the Tribunal . . . ". Id.* (emphasis added).[33] While the Nuremberg Charter and the Statute of the ICTY require that the enumerated acts constituting "crimes against humanity" be "committed in armed conflict", the Rome Statute does not. *Compare* Nuremberg Charter art. 6c (1946) *and* The Statute of the ICTY, art. 5, May 3, 1993, 32 I.L.M. 1159, 1193-94 *with* Rome Statute, art. 7, 37 I.L.M. 999, 1004-05.

Similarly, the statute of the ICTR requires that enumerated acts be carried out with discriminatory motive, but the Rome Statute does not. *Compare* The Statute of the ICTR, art. 3, Nov. 8, 1994, 33 I.L.M. 1598, 1603, *with* Rome Statute, art. 7, ¶ 1, 37 I.L.M. at 1004. Moreover, the statute of the ICTR requires an enumerated act to be "committed as part of a *widespread or systematic* attack against any civilian population," but the statute of the ICTY contains no such requirement. *Compare* The Statute of the ICTR, art. 3, 33 I.L.M. at 1603, *with* The Statute of the ICTY, art. 5, 32 I.L.M. at 1193-94 (emphasis added). Unlike the ICTR and ICTY Statutes, the Rome Statute defines "crimes against humanity" to include the "[e]nforced disappearance of persons" and "the crime of apartheid" in addition to the broad category of "[o]ther inhumane acts," which all three of these statutes contain. *Compare* Rome Statute, art. 7, 37 I.L.M. at 1004-05 *with* The Statute of the ICTR, art 3, 33 I.L.M. at 1603 *and* The Statute of the ICTY, art. 5, 32 I.L.M. at 1193-94. "Crimes against humanity" does not even appear in the

[33] Notably, the Nuremberg definition is tied to that Tribunal's jurisdiction.

list of violations of customary international law in the Restatement (Third) of the Foreign Relations Law of the United States § 702 (1986), entitled "Customary International Law of Human Rights".

Plaintiffs claim that *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1148, 1154 (11th Cir. 2005) "found that [crimes against humanity] remains actionable under the ATS" (Pl. Int'l Br. at 38). *Aldana* made no such finding. The trial court in *Aldana* dismissed the ATS claim alleging crimes against humanity, and the Eleventh Circuit—relying upon *Sosa*—affirmed. *See* 416 F. 3d at 1247. Although the Eleventh Circuit did not need to reach the status of "crimes against humanity" because the plaintiffs had not expressly pleaded it, the court focused on the specific conduct alleged and stated that "alleged systematic and widespread efforts against organized labor in Guatemala is too tenuous to establish a prima facie case, especially in the light of *Sosa*'s demand for vigilant doorkeeping". *Id.*

B. Plaintiffs' Allegations Do Not Meet Any Definition of "Crimes Against Humanity".

Plaintiffs' brief does not describe how defendants themselves violated any proposed norm of "crimes against humanity"—let alone a sufficiently accepted and definite norm of customary international law, as required by *Sosa*. (Pl. Int'l Br. at 37-43.)

For example, plaintiffs claim that the following allegations—drawn only from their Complaint—establish jurisdiction under the ATS for claims *against defendants* for "crimes against humanity":

> "the forced exile of Owens Wiwa and the beating of Karalolo Kogbara . . . the forced exile of Michael Vizor . . . the killing of Uebari N-Nah, the burning of villages in which Friday Nuate lived, the arbitrary arrest without charges of James N-nah as well as the arrests, the torture of Lucky Doobee, the shootings in Korokoro, and the raids on towns, the destruction of villages and murder of their inhabitants." (Pl. Int'l Br. at 38.)

Plaintiffs do *not*, however, allege any overt acts knowingly or intentionally taken by defendants that caused, contributed to, or furthered a conspiracy to cause those particular occurrences—let alone claim that those overt acts would be universally condemned by civilized nations as a matter of mutual (and not merely several) concern. Notably, the Supreme Court has found that international law recognizes conspiracy only in the specific contexts of conspiracy to commit genocide and to wage aggressive war—which are not at issue here. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 610 (2006) (stating that post-World War II military tribunals did not recognize conspiracy to commit crimes against humanity as an offense).

Plaintiffs have not pleaded that the alleged actions of the Shell Parties took place as part of an "armed conflict". Nor that the Shell Parties acted out of some "discriminatory motive" against the Ogoni. Nor have plaintiffs given this Court a basis for determining whether such allegations are required elements of "crimes against humanity", the absence of which would defeat their claims.

Even if the proposed norm of "crimes against humanity" *were* well-defined and universally accepted—and it is not—there are no authorities suggesting that liability for crimes against humanity would extend to such conduct as plaintiffs allege against defendants in this case—*i.e.*, owning a subsidiary that allegedly made payments or provided equipment or information to the military or police, or planned security operations with the military, or employed former police personnel to provide security, or engaged in some sort of media campaign with the government to discredit the leaders of MOSOP, or attempted to bribe witnesses. (*See* Compl. ¶ 39.)

Further, as this Court's subject-matter jurisdiction is contested, this Court may not simply accept plaintiffs' allegations against SPDC as true, but instead must go beyond the

Complaint to determine jurisdictional facts—and plaintiffs have no competent or admissible evidence that SPDC even engaged in this alleged conduct. (*See supra* Part I.B.)

Moreover, several plaintiffs who have asserted claims for crimes against humanity have not even alleged an injury to themselves, let alone a connection between an injury and the actions of defendants. Monday Gbokoo and Friday Nuate, for example, have neither alleged nor testified about any such conduct directed toward them personally. David Kiobel has likewise alleged no actions taken against himself personally, and, in fact, has testified that he has never even been to Nigeria. (*See id.*; Kiobel Dep. 9:18-19, Millson Decl. Ex. 29.) Similarly, Ken Wiwa, Jr. testified that the only injuries he suffered were those that resulted from conduct directed toward his father. (Wiwa Dep. 12:23-13:18, Millson Decl. Ex. 17.)

Plaintiffs also attempt to bring their claims for forced exile (for Owens Wiwa and Michael Vizor) and property destruction within the ambit of the ATS by claiming that those alleged injuries occurred in the context of a widespread attack. (Pl. Int'l Br. at 38.) This Court has already found, however, that claims for forced exile and property destruction—not alleged to have been committed as part of genocide or war crimes, as here—are not actionable under the ATS, based on the very same facts, *see Kiobel*, 456 F. Supp. 2d at 464. Plaintiffs fail to explain why conduct as to which no specific, universal, and obligatory norm exists can become actionable by lumping it into a more amorphous claim.

C. Ownership of SPDC Cannot Make the Shell Parties Liable for Crimes Against Humanity.

Defendants may not be held liable for crimes against humanity based upon their ownership of SPDC. *See supra* Part II.E.

Even assuming, contrary to fact, plaintiffs' allegations regarding overt acts of SPDC were true—or based upon admissible evidence—plaintiffs never even claim that one may

be held liable for crimes against humanity by simply owning an entity that allegedly engaged in such conduct as: making payments to, and providing logistical support for, police and security forces; participating in the planning of security operations; attempting to bribe witnesses; engaging in a coordinated media and public relations campaign to discredit MOSOP leaders; and making false claims about Saro-Wiwa. (Pl. Int'l Br. at 38-39.) None of the authorities cited by plaintiffs regarding crimes against humanity involve similar conduct, establish that one may be found liable for crimes against humanity for actions of this kind, or involve findings of crimes against humanity against passive investment companies that took no actions themselves in the region in question.

VI. PLAINTIFFS' CLAIMS FOR "ARBITRARY ARREST AND DETENTION" (COUNT FIVE) DO NOT MEET *SOSA*'S REQUIREMENTS.

A. Plaintiffs' "Arbitrary Arrest and Detention" Claims Are Not Well-Defined Under Customary International Law.

This Court previously found that arbitrary detention constituted a recognized violation of international law, relying upon the standards set forth in the UDHR and the ICCPR. *Wiwa*, 2002 U.S. Dist. LEXIS 3293, at *17-20. In *Sosa*, the Court rejected a claim that customary international law concretely defined a claim for arbitrary arrest and detention. 542 U.S. at 738. In so doing, the Court rejected the very sources relied upon by this Court, finding that while the UDHR and ICCPR might have had some moral authority, they "[had] little utility under the standard set out" by the Court for evaluating claims under the ATS. *Id.* at 734.

The Supreme Court in *Sosa* dealt directly with a claim for arbitrary arrest and detention, and decided that the plaintiff had demonstrated "no norm of customary international law so well defined as to support the creation of a federal remedy". *Id.* at 738. The Court found that any consensus concerning arbitrary arrest and detention as an international norm was "at a high level of generality" only. *Id.* at 736 n.27. The Court also stated that it might be difficult to

identify which detention policies would be unlawful "with the certainty afforded by Blackstone's three common law offenses", *id.* at 737—*i.e.*, the applicable standard for determining jurisdiction over violations of customary international law under the ATS. *See id.* at 734-37 (rejecting, as insufficient to show a clearly defined standard for arbitrary arrest and detention: the UDHR; the ICCPR; C. Bassiouni's survey of national constitutions; a decision by the International Court of Justice, and several federal court decisions).

Absent such certainty, *Sosa* prohibits federal courts from recognizing such a claim. The cause of action for arbitrary arrest and detention proposed by Alvarez, the Supreme Court concluded, was based upon "an aspiration that exceeds any binding customary rule having the specificity we require". *Id.* at 738. For a court to create such a cause of action would go "beyond any residual common law discretion we think it appropriate to exercise". *Id.* The *Sosa* Court pointed out that the practical implications of recognizing the prohibition of arbitrary arrest and detention, defined by Alvarez as "officially sanctioned action exceeding positive authorization to detain under the domestic law of some government", as a binding customary international norm would be "breathtaking". *Id.* at 736. Such a rule, the Court stated, "would support a cause of action in federal court for any arrest, anywhere in the world, unauthorized by the law of the jurisdiction in which it took place" and "would create an action in federal court for arrests by state officers who simply exceed their authority and for the violation of any limit that the law of any country might place on the authority of its own officers to arrest". *Id.* at 737. Such concerns are especially relevant here.

Plaintiffs have not suggested a more specific or concrete definition of "arbitrary arrest and detention" than the definition rejected by the Supreme Court in *Sosa*. The Restatement (Third) of the Foreign Relations Law of the United States states that a "state

violates international law if, as a matter of state policy, it practices, encourages, or condones . . . prolonged arbitrary detention". 542 U.S. at 737 (quoting Restatement (Third) of the Foreign Relations Law of the United States § 702 (1986)). Plaintiffs have not pleaded the existence of a "state policy" or referred to any settled definition of "prolonged" arbitrary detention.

There is no certainty in international law approaching "Blackstone's three common law offenses" as to what should be considered a "prolonged" detention. In the absence of a well-defined common understanding of "arbitrary arrest and detention", plaintiffs' claims cannot provide a basis for the invocation of jurisdiction under the ATS.

Plaintiffs also fail to produce any competent sources showing any norm imparting a universally understood meaning to the concept "arbitrary". Plaintiffs state that "[d]etention is arbitrary if . . . 'it is incompatible with the principles of justice or with the dignity of the human person'". (Pl. Int'l Br. at 45 (citing Restatement (Third) of Foreign Relations § 702, cmt. h).) However, the "practical consequences", *Sosa*, 542 U.S. at 732, of making a cause of action available for any confinement that could be conceived as being "incompatible . . . with the dignity of the human person" would permit the federal courts to adjudicate prison conditions in foreign countries, and vice versa—a result at least as "breathtaking" in its jurisdictional scope as the definition rejected by *Sosa*.[34] "Prolonged detention incompatible with the dignity of the human person" simply lacks the specificity and universally understood meaning of "murder or robbery at sea". *See Sosa*, 542 U.S. at 719.

[34] Professor Roht-Arriaza repeats this standard in her declaration, stating that "detention may be arbitrary if it is incompatible with the principles of justice or the dignity of the human person", but she provides no further guidance as to what limitations would exist under this conception for challenges to *any* detention, given the open-textured nature of terms as "the principles of justice" or the "dignity of the human person". (Roht-Arriaza Decl. ¶ 59.)

The norm described by plaintiffs' declarant Professor Roht-Arriaza is similarly inconsistent with the statement in *Sosa* that only a "modest number" of customary international law torts are cognizable under the ATS, and that the door to violations of international law beyond piracy, violation of safe conducts, and offenses against ambassadors is only ajar subject to "vigilant doorkeeping". *Id.* at 724, 729. For example, Professor Roht-Arriaza states that "[d]etention can be arbitrary even though it is lawful in the place where it occurs. Arbitrariness includes elements of inappropriateness, injustice and lack of predictability and involves an assessment of what is reasonable and necessary in all the circumstances." (Roht-Arriaza Decl. ¶ 62.) The "practical consequences" of making available to litigants in the federal courts a cause of action for any detention that could somehow be deemed "inappropriate" by anyone, or somehow lacking in "predictability", or not "reasonable . . . in all the circumstances", *id.*, would be a mass of claims challenging the bases and conditions of confinement all over the world, based upon amorphous elements. *Sosa*, 542 U.S. at 732-33.[35]

Further, plaintiffs identify no "specific, universal, and obligatory" norm that would hold the Shell Parties responsible for the arrests and detentions alleged, even if, *arguendo*, plaintiffs could establish that SPDC provided payments, ammunition, supplies and information to the Nigerian army and police, or requested police assistance. This Court did not previously determine whether any alleged conduct of the Shell Parties as to any particular arrest or detention violated a well-settled norm of customary international law, as it must now do under *Sosa*, and

[35] Plaintiffs also suggest that subjection to CIDT should be considered a basis for the arbitrariness of a detention. (Pl. Int'l Br. at 45.) However, as noted *infra* Part IV, CIDT is itself not a well-defined norm of customary international law, and so can provide no source of determinacy as a constituent of any other proposed composite norm.

no such violation is cognizable. *See Sosa*, 542 U.S. at 733 (the specifics of plaintiffs' detention claim "must be gauged against the current state of international law").

Claims for arbitrary arrest and detention are asserted by plaintiffs Ken Wiwa (on behalf of Ken Saro-Wiwa), Blessing Kpuinen (on behalf of John Kpuinen), Lucky Doobee (on behalf of Saturday Doobee), Friday Nuate (on behalf of Felix Nuate), Monday Gbokoo (on behalf of Daniel Gbokoo), David Kiobel (on behalf of Barinem Kiobel), Owens Wiwa, and Michael Tema Vizor. (*See* Compl. ¶¶ 49, 69, 72, 79-81, 87, 90, 93, 99-101.) In none of their averments do these individual plaintiffs claim that the Shell Parties detained them or sought their arrest.

The only overt action plaintiffs allege that the Shell Parties took in these paragraphs of their Complaint is as follows: "[D]uring Saro-Wiwa's detention, Royal Dutch/Shell issued a press statement accusing Saro-Wiwa of organizing a secessionist movement and attacked his environmental protests as being a pretext used to build his political movement." (Compl. ¶ 55.) Plaintiffs do not contend that this press release had any causal connection to Saro-Wiwa's arrest or detention at all, nor that it affected that detention in any way—nor that the press release was untrue. There is no norm of international law that would hold the Shell Parties liable in any way for the arrest and detention of Mr. Saro-Wiwa when the only allegation regarding the actions of Shell is that it sent out a press release about Mr. Saro-Wiwa during his detention.[36]

[36] This Court also denied a motion to dismiss claims of arbitrary arrest and detention in *Kiobel*, but, there as well, focused on the conduct alleged of the state actors, and did not indicate what conduct alleged of the defendants themselves would violate the law of nations. *See* 456 F. Supp. 2d at 466. There, the Court stated, "[P]laintiffs allege that their detention was a result of state policy to detain Ogonis who opposed the pipeline. If these allegations are true (and for the purpose of considering Defendants' Second Motion to Dismiss, the Court must assume that they are), *Defendants'* activities constitute a state policy of prolonged arbitrary detention." *Id.* (emphasis added). Even if, *arguendo*, it were correct that plaintiffs in *Kiobel* had adequately

B. The Shell Parties' Ownership of SPDC Does Not Render Them Liable for Arbitrary Arrest and Detention.

As noted in Part II.E *supra*, the Shell Parties have never taken any actions in Nigeria, and there exists no standard of international law that is "specific, universal, and obligatory" that would hold them responsible for arrests or detentions effected by the Nigerian government because they own a subsidiary that allegedly provided payments, ammunition, or information to the Nigerian military or police.

VII. PLAINTIFFS' CLAIMS FOR "VIOLATION OF THE RIGHTS TO LIFE, LIBERTY, AND SECURITY OF PERSON, AND PEACEFUL ASSEMBLY AND ASSOCIATION" (COUNT SIX) DO NOT MEET *SOSA*'S REQUIREMENTS.

A. This Court Already Dismissed Plaintiffs' Claims for "Violation of the Rights to Life, Liberty, and Security of Person, and Peaceful Assembly and Association", and Plaintiffs Still Cannot Prove the Existence of a Well-Defined Norm for Such Claims.

In *Kiobel*, this Court granted the defendants' motion to dismiss Plaintiffs' claim for violation of the rights to life, liberty, security, and association. 456 F. Supp. 2d at 467. This Court held that "'[t]here is no particular or universal understanding of the civil and political rights' covered by Plaintiffs' claim, and thus, pursuant to *Sosa*, these 'rights' are not actionable under the ATS". *Id.*

Plaintiffs in this case allege the exact same conduct by Nigerian military personnel, and contend that the exact same civil and political rights were violated by such conduct. *Compare Kiobel*, 456 F. Supp. 2d at 467 ("beatings, shooting, arrests and detention of Plaintiffs by military personnel during peaceful demonstrations [and arrest, detention, and

---

alleged the existence of a state policy of arbitrary arrest and detention, it does not follow that the actions alleged of the *non-state* actor defendants constituted such a state policy, or otherwise furthered such a policy, or actually caused arbitrary arrests or detentions. Nor does it follow that, under *Sosa*, the alleged conduct of those private individuals would be proscribed by any well-defined and universally accepted norms of international law.

executions of Ken Saro-Wiwa and John Kpuinen] . . . constitute violations of the right to life, liberty and security of person and her [sic] rights to peaceful assembly and association") *with* Compl. ¶¶ 144-49 ("shooting . . . arrest, detention and torture . . . [and] executions . . . constitute violations of Plaintiffs' rights to life, liberty and security of person, and to peaceful assembly and association").

Plaintiffs' claims based on an amalgamation of civil and political rights are not "sufficiently definite" under the standard set forth in *Sosa* to support a cause of action under the ATS. 542 U.S. at 732 ("[F]ederal 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 enacted."). Given that there is no universal understanding of the civil and political rights covered by plaintiffs' claims, and given that these asserted rights are of "several" and not "mutual" concern, *Flores*, 414 F.3d at 244 (emphasis omitted), plaintiffs' claims express aspirations that exceed "any binding customary rule having the specificity [the Supreme Court] require[s]", *Sosa*, 542 U.S. at 738.

The alleged cause of action—violations of the rights to life, liberty and security of person—is *not* well-established under customary international law. *See Flores*, 414 F.3d at 254 (holding that "the asserted 'right to life'" was "insufficiently definite to constitute [a] rule[] of customary international law"); *Bowoto*, 557 F. Supp. 2d at 1095-96 (finding that plaintiffs' "liberty and security claims asserted are not yet definite enough to meet *Sosa*'s standards" and "there is not sufficient jurisprudence recognizing a violation of right to life, liberty, security of person and peaceful assembly to compare to this case and determine whether the alleged conduct has been universally condemned as violating this right").

Plaintiffs base their argument for the recognition of a definite norm for violations of these civil and political rights largely on one case, *Tachiona v. Mugabe*, 234 F. Supp. 2d 401 (S.D.N.Y. 2002). (Pl. Int'l Br. at 34-35). The *Tachiona* court itself noted, however, that the Restatement "does not *specifically* enumerate denial of civil and political rights among the distinct state policies or practices that violate customary international human rights law". 234 F. Supp. 2d at 426 (emphasis added).[37] Lacking the Supreme Court's guidance that judicial power should be exercised with "great caution" and that courts should open their doors only to a "narrow class of international norms", *Sosa*, 542 U.S. at 728-29, the *Tachiona* court undertook an exercise in "judicial creativity" by creating a norm out of a set of rights that lack both "particularized expression" and "precise contours". 234 F. Supp. 2d at 425. This analysis by the *Tachiona* court does not survive *Sosa*.

Further, in *Tachiona*, the court's finding was based principally on three sources: the Restatement of Foreign Relations, the UDHR, and the ICCPR. None of those sources, however, is sufficient to establish norms of customary international law that are of universal character. *See supra* Part I.C; *see also Sosa*, 542 U.S. at 734-35. In *Sosa*, the Court stated emphatically that "despite their moral authority", the UDHR and the ICCPR have "little utility under the [*Sosa*] standard" because the UDHR "does not of its own force impose obligations as a matter of international law" and the ICCPR is "not self-executing and so did not itself create obligations enforceable in the federal courts". 542 U.S. at 734-35. And despite the *Tachiona* court's use of these non-binding sources of law, it acknowledged that neither of those sources "offers a particular definition or explicit guidance as to whether and to what extent universal

[37] *See also Yousef*, 327 F.3d at 99-100 (noting that the Restatement is not a primary source of authority upon which "courts may rely for propositions of customary international law").

consensus exists concerning the kinds of deprivations of political rights that are cognizable as violations of customary international law". 234 F. Supp. 2d at 424-25.

In addition to these non-binding sources of law, plaintiffs and their declarant Professor Roht-Arriaza rely on a U.N. General Assembly resolution and a U.N. conference document—the U.N. Code of Conduct for Law Enforcement Officials and the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials—as evidence of a well-established norm against violations of the right to life and security. (*See* Pl. Int'l Br. at 36-37; Roht-Arriaza Decl. ¶ 46.) Those sources, however, are "soft law", which is non-binding even in international courts. *See* W.Michael Reisman, *The Supervisory Jurisdiction of the International Court of Justice*, 258 Recueil des Cours 9, 180 (1996) (defining soft law as "international law-making that is designed, in whole or part, not to be enforceable"). The court in *Flores* stated that such U.N. materials are "not proper sources of customary international law", because they are "merely aspirational and were never intended to be binding on member States of the United Nations". 414 F.3d at 259.[38] Professor Roht-Arriaza claims that a clearly defined and widely accepted international norm is violated whenever law enforcement operations are planned without "adequately ensuring" that unnecessary force will not be used, or that firearms will not be used where "not strictly necessary to protect life". (Roht-Arriaza Decl. ¶ 51.) Oversight over the planning of all law enforcement operations, however, could hardly be thought to be consistent with *Sosa*'s holding that the ATS be reserved for a "modest number" of violations of international law, subject to "vigilant doorkeeping". 542 U.S. at 724, 729.

[38] The U.N. Charter does not confer any power on the General Assembly to enact binding resolutions or decisions. *Flores*, 414 F.3d at 260. Additionally, Article 38 of the I.C.J. Statute does not mention resolutions or decisions of international bodies as a primary source of international law—or even as a "subsidiary means" of its determination. *See* Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1055, 1060.

Plaintiffs' allegations would put this Court in the position of having to define the contours of plaintiffs' political and civil rights, and then determining if the Nigerian Government violated those rights. *See Sosa*, 542 U.S. at 727 ("It is one thing for American courts to enforce constitutional limits on our own State and Federal Governments' power, but quite another to consider suits under rules that would go so far as to claim a limit on the power of foreign governments over their own citizens, and to hold that a foreign government or its agent has transgressed those limits."). Plaintiffs' claims for violations of the rights to life, liberty and security of person, and peaceful assembly and association do not state a tort in violation of customary international law under *Sosa*.

B. The Shell Parties' Ownership of SPDC Does Not Render Them Liable for Violations of the Rights to Life, Liberty, Security of Person and Peaceful Assembly and Association.

As noted in Part II.E *supra*, the Shell Parties have not engaged in any activities in Nigeria and there is *no* evidence that would give this Court jurisdiction over plaintiffs' claims.

Moreover, plaintiffs cannot come forward with any evidence that shows a violation of a well-established norm of customary international law whereby a parent could be held liable for the types of conduct in this Complaint allegedly committed by its subsidiary.

Plaintiffs contend that their rights of freedom of association were violated by the "killing of their family members and the torture and other mistreatment of themselves and their deceased family members". (Pl. Int'l Br. at 34.)[39] The vast majority of plaintiffs' allegations that they list as part of these claims do not allege that the Shell Parties or SPDC knew,

[39] Plaintiffs allege as part of this claim that plaintiffs, and their decedents, were shot (Compl. ¶¶ 48, 64, 144, 147), arrested and detained (*id.* ¶¶ 49, 54, 68-69, 71, 79, 95, 145-46, 148), tortured (*id.* ¶ 90, 145), or executed (*id.* ¶ 101, 146). Thus, all of plaintiffs' claims for violations of ill-defined rights to life, liberty, and security of person, and peaceful assembly and expression, are derivative of other claims. The vast majority of plaintiffs' claims for violations of these civil and political rights fall within the scope of their claims for arbitrary arrest and detention.

participated in, and/or encouraged the alleged misconduct. (*See* Compl. ¶¶ 48-49, 53-54, 57-59, 63, 68-69, 71-73, 79-83, 87, 89-90, 95, 100-01.) And none of these allegations rise to the level of a specific norm of customary international law recognized by *Sosa*. There are only two allegations that place SPDC employees at the protests. (*See* Compl. ¶¶ 47, 64.) Merely being "present" at a protest, however, is insufficient to constitute a violation of a definite norm of customary international law.[40] Thus, the Shell Parties cannot be held liable for the alleged acts of the Nigerian Government based on an unfounded allegation that it dominated and controlled an independent entity, an entity which itself did not take any of the alleged actions that would amount to an inchoate and imprecise cause of action unrecognizable under the *Sosa* standard.

VIII. THERE IS NO WELL-DEFINED AND UNIVERSALLY ACCEPTED NORM OF CIVIL SECONDARY LIABILITY UNDER INTERNATIONAL LAW.

Even if this Court were to follow the methodology proposed by plaintiffs, whereby the Court would first assess whether the particular conduct of the Nigerian military was proscribed by a norm of customary international law, and then, without deciding whether that norm of international law reached the conduct of the defendants actually being sued, only looked to the existence of a generally available norm of secondary liability under international law, plaintiffs' allegations would still fail to state a claim. Civil secondary liability is not a norm that is definite or universally accepted within the civilized world, and thus is not cognizable under the standard set forth in *Sosa*.

[40] As noted in Part VII.A *supra*, plaintiffs' claims do not meet the *Sosa* standard. However, even if they did, plaintiffs' claims would fail, because the evidence shows that plaintiffs were not protesting at the time of the alleged misconduct. *See Wiwa*, 2002 U.S. Dist. LEXIS 3293, at *33 ("The right to peaceful assembly and expression include the right not to be subjected to the use of force or violence by police or military while engaged in peaceful protest.") The only individual who is alleged to have been protesting at the time of the alleged misconduct is Karalolo Kogbara. (*See* Compl. ¶¶ 48, 144.) She testified, however, that she has never been involved in any protest or demonstration. (*See* Kogbara Dep. 87:9-23.)

There is no customary international law, for example, that ascribes civil liability for "aiding and abetting", "participating", "facilitating", or "conspiring in" commission of a tort. *See, e.g., Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 181 (1994) ("[a]iding and abetting is an ancient criminal law doctrine", but civil secondary liability "has been at best uncertain in application", even under domestic law (emphasis added)). There is no international treaty, accord, or convention that endorses civil secondary liability or creates a cause of action for the imposition of civil secondary liability, and plaintiffs can cite to none. Plaintiffs fail to cite to evidence of the actual and consistent practices of states regarding the imposition of liability against private actors for accessorial liability in civil actions. *See Flores*, 343 F.3d at 82-84. Civil accessorial liability is neither definite nor universally accepted by civilized nations, and does not qualify under *Sosa* for causes of action allowed under the ATS.

Thus, there is no well-defined norm of civil conspiracy under customary international law for the types of claims plaintiffs allege in this case. Liability for conspiracy must be tied to a substantive cause of action—in this case, those arising under the ATS. *Burnett v. Al Baraka Inv. & Dev. Corp.*, 274 F. Supp. 2d 86, 106 (D.D.C. 2003). To determine whether civil conspiracy exists with respect to plaintiffs' individual claims, this Court must look to international law. *See Filartiga*, 630 F.2d at 889; *Presbyterian Church of Sudan v. Talisman Energy*, 244 F. Supp. 2d 289, 320 (S.D.N.Y. 2003). The *Sosa* court explicitly stated that "[a] related consideration is whether *international law* extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or an individual". 542 U.S. at 732 n.20 (emphasis added). Plaintiffs support their "mix and match" theory by citing to federal cases that found conspiracy to be actionable under the ATS under federal common law, not international law. (*See* Pl. Int'l Br. 52.) This approach

flies in the face of the Supreme Court's explicit directive that a defendant's liability should be discerned from international law. *See Sosa*, 542 U.S. at 732 n.20.

The only case cited by plaintiffs in which a court found that conspiracy existed under international law is a pre-*Sosa* decision, *Talisman*, 244 F. Supp. 2d at 321. In its 2003 decision, decided prior to *Sosa*, the *Talisman* court found that courts have allowed ATS suits to proceed on theories of conspiracy. 244 F. Supp. 2d at 321. After *Sosa*, however, the *Talisman* court held that "[t]he starting point for [any conspiracy] discussion must be *Sosa*". The court found that "international law applies the charge of conspiracy in *only* two circumstances: 'a conspiracy to commit genocide and common plan to wage aggressive war'". *Presbyterian Church of Sudan v. Talisman Energy*, 453 F. Supp. 2d 633, 663 (S.D.N.Y. 2006) (emphasis added).[41] After finding that liability for participation in a conspiracy only attaches to defendants where the goal of the conspiracy was to commit genocide or to wage aggressive war, the court found that an alleged conspiracy to commit crimes against humanity was *not* actionable under the ATS, and granted defendants' motion for summary judgment on the conspiracy claim. *Id*. at 664-65.[42]

[41] In *Kiobel*, this Court found that, while it was "a close question" whether ATS lawsuits based on theories of secondary liability were viable, plaintiffs' claims for aiding and abetting could proceed under the ATS. *See* 456 F. Supp. 2d at 463-64. This Court, however, relied on the 2003 *Talisman* decision, 244 F. Supp. 2d 289 (S.D.N.Y. 2003), without the benefit of the 2006 decision, 453 F. Supp. 2d 633 (S.D.N.Y. 2006). Furthermore, this Court noted that "*Sosa* potentially implies that courts should consider secondary liability on a case by case basis, taking into account the specific primary violation at issue rather than secondary liability more generally". 456 F. Supp. 2d at 464.

[42] The court also noted that conspiracy under international law does not recognize the same scope of liability as the domestic law of conspiracy—*i.e.*, the "*Pinkerton* doctrine". *Talisman*, 453 F. Supp. 2d at 663 (noting that, under that doctrine, a "defendant who does not directly commit a substantive offense may nevertheless be liable if the commission of the offense by a co-conspirator in furtherance of the conspiracy was reasonably foreseeable to the defendant as a consequence of their criminal agreement"). Thus, the court avoided the application of domestic law in determining whether conspiratorial liability exists under the ATS.

Citing to decisions from the ICTY, plaintiffs also contend that joint criminal enterprise (JCE), which is "akin" to civil conspiracy liability, provides a basis for liability under the ATS. (Pl. Int'l Br. at 53.) Plaintiffs' argument is flawed in several respects. *First*, the ICTY decisions are non-binding sources of law under a *Sosa* analysis. *See infra* Part I.C. *Second*, plaintiffs do not cite to a single decision from a U.S. court where JCE is specifically discussed as a basis for liability under the ATS. *Third*, JCE applies with respect to international criminal law, not civil law. *See, e.g., Prosecutor v. Tadic*, Judgment, Case No. IT-94-1-A, ¶ 226 (ICTY App. Chamber, July 15, 1999). *Fourth*, contrary to plaintiffs' suggestions (*see* Pl. Int'l Br. at 53), JCE is not clearly defined under customary international law. The ICTY itself has grappled with the elements of JCE, recognizing "three distinct categories of collective criminality" in its attempts to define JCE. *Tadic*, Judgment, Case No. IT-94-1-A, ¶ 195. While all three categories have the same *actus reus*, they each have distinct *mens rea* requirements. *See id.*

Similarly, there is no specific, universal, and obligatory norm of aiding and abetting liability that meets the requirements of *Sosa*. Contrary to plaintiffs' assertion that it is now "settled" that defendants may be held liable for aiding and abetting under the ATS (Pl. Int'l Br. at 49), there is no universal consensus—nor even a consensus in U.S. courts—as to what specific standard governs the adjudication of claims for aiding and abetting. The *Khulumani* decision does not "settle" the question of whether a private actor may be held liable for the types of misconduct alleged of the government actors by plaintiffs here. *See* 504 F.3d 254, 260-61 (2d Cir. 2007). The judges in *Khulumani* disagreed as to the source of aiding and abetting liability under the ATS (*i.e.*, whether it derived from international law or federal common law), *compare id.* at 270, 277 (Katzmann, J., concurring) *with id.* at 284 (Hall, J., concurring), as well as to the elements of aiding and abetting liability (*i.e.*, whether a mental state of "knowledge" or

"purpose" was required), *compare id.* at 287-88 (Hall, J., concurring) *with id.* at 275-76 (Katzmann, J., concurring). The court in *Khulumani* "decline[d] to determine whether the plaintiffs [had] adequately pled a violation of international law sufficient to avail themselves of jurisdiction under the [ATS]", and remanded to the district to make that determination in the first instance. *Khulumani v. Barclay Nat. Bank Ltd.*, 504 F.3d 254, 260-61 (2d Cir. 2007).

Likewise, there is plainly no well-defined norm of international law corresponding to "reckless disregard", as plaintiffs claim. Even though plaintiffs claim that "federal common law" should apply to their "theories of liability", plaintiffs repeatedly argue that a similar "theory of liability" exists under international law. (Pl. Int'l Br. at 49-54, 59-60.) Plaintiffs do not even attempt to substantiate their claim with case law—domestic or international—that applies a theory of "reckless disregard" under international law. No such norm exists.

IX. IF THE COURT WERE TO TAKE PLAINTIFFS' IMPROPER APPROACH, PLAINTIFFS' "VEIL PIERCING" AND "AGENCY" THEORIES WOULD REQUIRE A CHOICE OF LAW ANALYSIS.

As explained in Part I.A., *supra*, under *Sosa*, this Court must ask "whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual". 542 U.S. 732 n.20.

Plaintiffs have advanced an approach incompatible with *Sosa*, asking first whether a norm prohibiting an act such as torture exists, and second whether an omnibus rule allowing secondary liability exists. But even were plaintiffs' approach not foreclosed by *Sosa*, that approach would get them only so far as to permit a finding of liability against SPDC. Under plaintiffs' approach, they would still require a legal rule rendering the Shell Parties liable for

SPDC's conduct, which they attempt to provide by reference to veil piercing and agency law. Neither of those would render the Shell Parties liable even were one to disregard *Sosa*.

A. Were The Court To Ignore *Sosa's* Mandates And Apply Plaintiffs' Approach, Nigerian and English Law Would Govern Any "Veil Piercing" Analysis.

Plaintiffs allege that corporate defendants "dominated and controlled SPDC and each was the alter ego of the other". (Compl. ¶ 27.) Plaintiffs' "alter ego", or "veil piercing", theory thus asks whether any liability that SPDC would have incurred may be assigned to its shareholder and parent, Shell Petroleum Company Limited ("SPCo."), and in turn, whether any such liability may then be assigned to SPCo.'s shareholders and parents, corporate defendants Royal Dutch and Shell Transport. Accordingly, for defendants to be held liable under plaintiffs' veil piercing theory, plaintiffs must first demonstrate that SPDC could be held liable for its conduct were it a defendant.

If this Court were to ignore *Sosa's* mandate, pursue plaintiffs' search for general norms of conduct and couple those with general standards of secondary liability—and find that SPDC would be found liable for its alleged accessorial conduct were it a defendant—the Court would then have to engage in an additional step to determine whether SPDC's liability could be imposed upon corporate *defendants* by piercing the corporate veil. To determine that question, the Court would have to engage in a choice of law analysis to determine what law governs whether the corporate veil may be pierced.

1. Under Plaintiffs' Improper Approach, Any Veil Piercing Analysis Must Be Conducted Under the Laws of the State of Incorporation of the Entity Whose Shareholders Are Sought To Be Held Liable.

Under New York choice of law rules, the test for whether a corporation's veil may be pierced—and liability for its actions thereby assigned to the corporation's shareholder(s)—is conducted under the laws of the jurisdiction in which the corporation was

incorporated. *See, e.g.*, *Fletcher v. Atex, Inc.*, 68 F.3d 1451, 1456 (2d Cir. 1995); *Kalb, Voorhis & Co. v. American Fin. Corp.*, 8 F.3d 130, 132-33 (2d Cir. 1993). New York choice of law rules dictate the law to be applied to the veil piercing analysis here because New York is the forum state, *Kalb, Voorhis & Co.*, 8 F.3d at 132, and no significant conflict with a federal interest or policy mandates displacement of state law for federal choice of law rules. *Talisman*, 453 F. Supp. 2d at 682-83 (citing *Atherton v. FDIC*, 519 U.S. 213, 218 (1997)); *see also In re Gaston & Snow*, 243 F.3d 599, 606 (2d Cir. 2001). Indeed, in *Talisman*, Judge Cote concluded that:

> "[i]t is unlikely that any conflict could be identified. Since choice of law rules seek to insure that a case will be resolved under the same rules of conduct whatever the forum, and that rights of foreign sovereigns will be respected, it is difficult to believe that federal choice of law rules would not require the application of the law of the state of incorporation to a determination of whether to ignore the corporate form".

453 F. Supp. 2d at 683 n.101 (internal citation omitted).

Because plaintiffs seek to pierce the corporate veil of SPDC, organized under Nigerian law, to transfer liability to its sole shareholder, SPCo., Nigerian law must be applied to that veil piercing analysis. Moreover, because plaintiffs then seek to pierce the corporate veil of SPCo., organized under English law, to reach SPCo.'s two shareholders, Royal Dutch and Shell Transport, English law must be applied to that veil piercing analysis.[43]

[43] In this Court's September 25, 1998, Order concerning defendants' motion to dismiss, the Court cited to Magistrate Judge Pitman's statement that: "the case raises the issue of whether the actions of Shell Transport's indirectly-owned Nigerian subsidiary can be attributed to Shell Transport. Since Shell Transport is an English corporation, questions concerning its potential liability for the conduct of its subsidiaries is a question of English law, in which English courts have primary interest". (Mar. 31 1998 Rep. at 52 (internal citation omitted), *cited in Wiwa v. Royal Dutch Petroleum Co.*, No. 96 Civ. 8386, 1998 U.S. Dist. LEXIS 23064, at *17-18 (S.D.N.Y. Sept. 25, 1998).) Relying on that passage, this Court stated that "the conduct at issue was engaged in by an English corporation, in a nation formerly part of the Commonwealth of Nations, under a liability standard determined by English law. (*See* Report at 50-53.)." *Wiwa*, 1998 U.S. Dist. LEXIS 23064, at *18. Although New York considers the state of incorporation as the state with the primary interest in a veil piercing analysis, *see, e.g.*, *Fletcher*, 68 F.3d at 1456 ; *Kalb, Voorhis & Co.*, 8 F.3d at 132-33, this Court nevertheless recognized the need to

2. Plaintiffs' Latest Position That The "Federal Common Law" of Veil Piercing Should Apply Is Wrong.

Plaintiffs' position on what law should govern a veil piercing analysis in this action has changed over time. In 1997, in opposing defendants' motion to dismiss, plaintiffs took the approach of "assuming but not conceding that Nigerian law applies". (Aug. 31, 1997 Pls.' Mem. in Opp'n to Defs.' MTD ¶¶ 101-03.) Subsequently, plaintiffs relied upon general principles of alter ego liability drawn from multiple sources of law from the Supreme Court interpreting Michigan law to the Northern District of California collecting cases from across the country. (*See, e.g.*, March 16, 2001 Pls.' Opp'n to Defs.' MTD ¶¶ 4-8.) Recently, in Plaintiffs' Brief on International Law Norms Pursuant to Order of October 7, 2008, plaintiffs argue that "federal common law" principles of veil piercing (which plaintiffs claim are akin to general international law standards for veil piercing) should apply—and that those standards allow veil piercing generally "to prevent injustice, protect third persons, or to preclude a party from evading legal obligations" and to prevent "defeat of legislative purposes". (Pl. Int'l Br. at 59-60.)

Plaintiffs fail to engage in any analysis as to what choice of law rules would govern a veil piercing analysis in this action. Instead, plaintiffs assert that the "federal common law" of veil piercing should apply "in the context of an international law claim" (*id.* at 59), without directing this Court to any federal policy (or conflict with federal law) that would even sanction the use of any variety of "federal common law" despite the Supreme Court's

---

look—when conducting a veil piercing analysis separate and apart from international law norms—not to principles of federal common law, but to the law of the state with the greatest interest in a decision concerning whether to nullify a corporation's limited liability. *Wiwa*, 1998 U.S. Dist. LEXIS 23064, at *17-18. Although the Court of Appeals reversed the dismissal granted on forum non conveniens grounds in that September 1998 Order, it did not dispute this Court's approach of looking to the law of the state it presumed to have the greatest interest in a determination of a corporation's liability. *See Wiwa v. Royal Dutch Petroleum Corp.*, 226 F.3d 88, 107 (2d Cir. 2000).

admonitions against it. *See In re Gaston & Snow*, 243 F.3d at 606 ("Once it is recognized that federal choice of law rules are a species of federal common law, the framework the Supreme Court has established for determining whether the creation of federal common law is appropriate must be utilized. The ability of the federal courts to create federal common law and displace state created rules is severely limited.").

Instead, plaintiffs cite to *First National City Bank v. Banco Para El Comercio Exterior*, 462 U.S. 611 (1983), which refused to apply the law of the state of incorporation—and applied federal law instead—because the state of incorporation was, in that case, the very party whose liability was being determined. *Id.* at 621-22. The corporate entity in question was not merely a private corporation set up by civilian shareholders, but rather a "government instrumentality" created by the Cuban Government—the very government who would determine the laws dictating its own liability (or lack thereof) if the law of the state of incorporation of that government instrumentality were applied. *Id.* The Court explained: "To give conclusive effect to the law of the chartering state in determining whether the separate juridical status of its instrumentality should be respected would permit the state to violate with impunity the rights of third parties under international law while effectively insulating itself from liability in foreign courts." *Id.* [44]

No such conflict exists here. SPCo. is not the Nigerian state. It is therefore not capable of determining the Nigerian law that defines its own liability as a shareholder of a

[44] The Court further emphasized the fact that the case before it involved the question of liability of a *foreign state* for its *instrumentality* when it limited its holding to the narrow facts before it: "Our decision today announces no mechanical formula for determining the circumstances under which the normally separate juridical status of a government instrumentality is to be disregarded. Instead, it is the product of the application of internationally recognized equitable principles to avoid the injustice that would result from permitting a *foreign state* to reap the benefits of our courts while avoiding the obligations of international law." *Id.* at 633-34 (emphasis added).

Nigerian corporation. Similarly, Shell Transport and Royal Dutch are not the English state capable of determining the parameters of its own liability as a shareholder of an English corporation.

Plaintiffs also argue that the "federal common law" of veil piercing should be applied because the *Sosa* Court determined that the ATS was enacted to provide a forum for certain specific "common law claims derived from the law of nations", and that upholding the limited liability of corporations would defeat that legislative purpose. (Pl. Int'l Br. at 60.) Notwithstanding the lack of logical nexus between those two propositions, Judge Cote specifically disavowed this theory in *Talisman*: "Pointing to a federal policy interest in providing a forum, however, is not a substitute for the identification of a conflict requiring displacement of state law." 453 F. Supp. 2d at 683.

Notably, Judge Cote's analysis highlighted a deficiency common to the argument of the plaintiffs in *Talisman* and the plaintiffs here: "As a result of [plaintiffs'] truncated analysis", Judge Cote noted, "the plaintiffs propose that federal common law provide not just the choice of law rule but also the substantive law for issues such as piercing the corporate veil and agency". *Id.* at 682. That is, even if plaintiffs could demonstrate that "federal common law" should apply—which they cannot—plaintiffs skip over the question of what federal choice of law common law principles would apply to a veil-piercing analysis. As Judge Cote, concluded, "it is difficult to believe that federal choice of law rules would not require the application of the law of the state of incorporation to a determination of whether to ignore the corporate form". *Talisman*, 453 F. Supp. 2d at 683 n.101.

3. Nigerian Law Permits Piercing of The Corporate Veil Only When A Corporation Is Used As A Sham To Avoid Existing Obligations.

Under Nigerian law, the principle that an incorporated subsidiary is a "separate legal entity" from its parent company is "fundamental". *Marina Nominees Ltd. v. Fed. Bd. of Inland Revenue*, [1986] N.W.L.R. 48, 55, 57, 59 (S.C.). Nigerian law will disregard the separate legal existence and pierce the corporate veil only where the purpose of the parent company is to use the subsidiary as a sham or façade to avoid existing obligations. *See id.* at 57; *see also Union Beverages Ltd. v. Pepsicola Int'l Ltd.*, [1994] 3 N.W.L.R. 1, 16 (S.C.); *Int'l Offshore Construction Lt.d v. S.L.N. Ltd.*, [2003] 16 N.W.L.R. 157, 179E-180B (C.A.) (piercing the corporate veil where subsidiary used as a smokescreen to avoid proven obligations); *Musa v. Ehidiamhen*, [1994] 3 N.W.L.R. 544, 557 (C.A.) ("Even if GBO is a wholly owned subsidiary of the UAC, it still retains its legal personality which is quite distinct, separate and independent of the UAC. A holding company, in this case UAC, cannot be held responsible for the action of its subsidiaries."). Notably, Nigerian law does not employ a factor test in its veil piercing analysis. For example, in *Marina Nominees*, the Supreme Court of Nigeria refused to pierce the veil of an accounting firm's wholly owned subsidiary even though the accounting firm parent provided all employees for the subsidiary, paid its bills, and retained all of its income. [1986] N.W.L.R. at 58. The Supreme Court of Nigeria would not pierce the subsidiary's corporate veil because it was "neither incorporated as a sham or a stratagem nor as an instrument of fraud, but as a limited liability Company charged with the duties inter alia of acting as Secretaries to clients of [the accounting firm]". *Id.*[45]

[45] The difference between the law of New York (the forum state) and Nigeria concerning veil piercing creates a true conflict that requires this Court to engage in a choice of law analysis. *See Globalnet Financial.com v. Frank Crystal & Co.*, 449 F.3d 377, 384 (2d Cir. 2006); *Stichting Ter Behartiging Van De Belangen Van Oudaandeelhouders in Het Kapitaal Van*

4. English Law Permits Piercing the Corporate Veil Only When the Corporate Form Is Employed As A Façade To Avoid Existing Obligations.

The separate legal status of a corporation and its shareholder(s) is described in the 1897 House of Lords case of *Salomon v. A. Salomon & Co.*, [1897] A.C. 22 (H.L.). The test employed by English courts for disregarding their separate status is strict and results in veil piercing only very rarely. Notably, of the small number of veil piercing cases under English law, a few arose because the court sought to confer a benefit on the parent company, rather than impose liability upon it. *See, e.g., Smith, Stone & Knight Ltd. v. Lord Mayor, Alderman* [1939] 4 All E.R. 116 (K.B.).

Under English law, a court will pierce the corporate veil only where "special circumstances" exist indicating that the relationship of one corporation to another is a mere "façade concealing the true facts". *Woolfson v. Strathclyde Reg'l Council*, [1978] 38 P. & C.R. 521. Piercing the veil "is not intended as a form of punishment" and can only be done when realities demand it, regardless of whether the result of not piercing the corporate veil is "unfair or even absurd". *Graphical Paper & Media Union v. Derry Print Ltd.*, [2002] I.R.L.R. 380. English courts look to the defendant's purpose in forming the company, and typically pierce the corporate veil only when the defendant creates the company "as a device, a stratagem, in order to mask" liability. *Gilford Motor Co. v. Horne*, [1933] All E.R. 109 (A.C.).[46]

Saybolt Int'l B.V. v. Schreiber, 407 F.3d 34, 46 (2d Cir. 2005). Unlike Nigerian law, New York law asks the Court (1) to conduct a multi-factor test to determine whether the subsidiary is the "mere instrumentality" of the parent corporation and (2) to assess whether the subsidiary is being used by the parent corporation in order to commit or conceal a fraud. *See Kashfi v. Phibro-Salomon, Inc.*, 628 F. Supp. 727, 733 (S.D.N.Y. 1986).

[46] The difference between the law of New York (the forum state) and England concerning veil piercing creates a true conflict that requires this Court to engage in a choice of law analysis. *See Globalnet Financial.com*, 449 F.3d at 382; *Schreiber*, 407 F.3d at 46. Unlike English law, New York law asks the Court (1) to conduct a multi-factor test to determine whether the

In *Gilford*, for example, the defendant established a company with the sole purpose of avoiding liability that he would incur when he breached a restrictive covenant that he signed with his former employer. *Id.* The Court of Appeal held that the company was a "sham", and pierced the veil of incorporation. *Id.* Similarly, in *Adams v. Cape Industries Plc.*, [1990] Ch. 433 (A.C.), the Court of Appeal explained that it would pierce the corporate veil when a defendant created the corporation to avoid existing, but not future obligations:

> "The purpose of the operation was in substance that Cape would have the practical benefit of the group's asbestos trade in the United States of America without the risks of tortious liability. This may be so. However, in our judgment Cape was in law entitled to organise the group's affairs in that manner and . . . to expect that the Court would apply the principle in Salomon v. A. Salomon & Co . . . . in the ordinary way." *Id.*

In both cases, the Court of Appeal acknowledged its reluctance to pierce the corporate veil, and explained that it is only justified when the defendant used the subsidiary as a sham to avoid known liabilities.[47]

---

subsidiary is the "mere instrumentality" of the parent corporation and (2) to assess whether the subsidiary "is being used by the parent corporation in order to commit or conceal a fraud". *See Kashfi*, 628 F. Supp. at 733 (S.D.N.Y. 1986) (internal quotation marks omitted). Indeed, "[u]nlike American law, English case law does not provide an enumerated set of factors that a court can evaluate in deciding whether to lift the corporate veil. Rather, English courts will lift the corporate veil of limited liability only when the corporate form is employed for the purposes of fraud or as a device to evade contractual or other legal obligations." *United Trade Assocs. Ltd. v. Dickens & Matson (USA) Ltd.*, 848 F. Supp. 751, 760 (E.D. Mich. 1994).

[47] In *Talisman*, Judge Cote interpreted English law on veil piercing. 453 F. Supp. 2d at 689. Judge Cote stated that "English courts will pierce the corporate veil to hold a parent liable when the subsidiary is so totally under the control of the parent that it cannot be said to be carrying out its own business. In order to succeed on this theory there must be evidence of something more than supervision or control by the parent of the subsidiary." *Id.* Judge Cote, however, did not cite any authority to support that proposition. *See id.* Although some English cases have discussed a "control" theory, *Wallersteiner v. Moir*, [1974] 3 All E.R. 217 (A.C.); *DHN Food Distribs. Ltd. v. London Borough of Tower Hamlets*, [1976] 3 All E.R. 462 (A.C.), it has been spoken of unfavorably by the House of Lords. *Woolfson v. Strathclyde Reg'l Council*, [1978] 38 P. & C.R. 521; *see also Adams v. Cape Indus. Plc.*, [1990] Ch. 433 (A.C.) (Court of Appeal discusses and then dismisses the control theory); Karen Vandekerckhove, *Piercing the Corporate Veil* 72 (2007). Indeed, the House of Lords refused to pierce the corporate veil in the *Salomon* case, notwithstanding the defendants' control over the entity in question.

5. Plaintiffs Have Not Even Pleaded That SPDC or SPCo. Were Used As A Sham or Façade.

Plaintiffs allege that "Defendants Royal Dutch/Shell dominated and controlled SPDC and each was the alter ego of the other". (Compl. ¶ 27.) Plaintiffs have not put forth a single fact even to suggest that the corporate form of either SPDC or SPCo. was abused as a sham or façade such that their corporate veils should be pierced under Nigerian and English law, respectively.

Indeed, SPDC is a separate corporation that has been operating in Nigeria since 1938 (and under the name SPDC since 1979). It exists for the purpose of engaging in the business of exploration, development, production, purchase, refining, and marketing of petroleum, natural gas, and oil and chemical products. SPDC's managers and board of directors have broad discretion to manage its affairs. For example, the decision to discontinue operations in Ogoni was made solely by SPDC (*see* DEF 000227, Millson Decl. Ex. 30; Moody-Stuart Dep. 158:24 - 159:5, Millson Decl. Ex. 31; Herkströter Dep. 97:12 - 99:10, Millson Decl. Ex. 28.)

Similarly, SPCo. is a distinct holding company duly organized under the laws of England. (Van der Vlist Decl. ¶ 5.) Like all holding companies, SPCo.'s function is to hold shares in one or more subsidiaries. As such, SPCo. holds shares in multiple operating companies in many countries, one of these companies being SPDC. (*See id.*)

B. Were The Court To Ignore Sosa's Mandates And Apply Plaintiffs' Approach, Nigerian Law Must Govern Any "Agency" Analysis.

Plaintiffs allege that SPDC acted as the agent of defendants (Compl. ¶¶ 4, 41, 97).[48] Just as with plaintiffs' veil piercing theory, for corporate defendants to be held liable

[48] Plaintiffs also allege that "the Nigerian military was acting as the agent of, and/or working in concert with [the corporate defendants], and was acting within the course and scope of such agency, employment and/or concerted activity". (Compl. ¶ 26.) Although the First Amended

under plaintiffs' agency theory, plaintiffs must first demonstrate that SPDC could be held liable under international law. Then, even if this Court were to find that SPDC could be found liable for accessorial conduct by adopting plaintiffs' improper two-step approach, the Court would then have to engage in an additional step to determine whether that liability could be transferred to the Shell Parties merely by virtue of an agency relationship. Again, should the Court refuse to evaluate *defendants'* conduct against international law norms—and instead seek to determine whether defendants' relationship to SPDC warrants assigning liability to defendants—the Court is no longer asking a question of international law under *Sosa* and must engage in a choice of law analysis to determine what law should govern whether an "agency" relationship exists such that defendants can be held vicariously liable.[49]

Complaint contained the exact same language (First Am. Compl. ¶ 20), in this Court's 2002 decision on Defendants' motion to dismiss that First Amended Complaint, the Court stated: "Defendants repeatedly state that plaintiffs have alleged that the Nigerian military functioned as corporate defendants' 'agent.' The Court finds, however, that plaintiffs have not relied on that characterization to support their ATCA claims". *Wiwa*, 2002 U.S. Dist. LEXIS 3293, at *77 n.30. Indeed, Plaintiffs have provided *no* evidence to suggest that the Nigerian military was the agent of corporate defendants, and, in fact, the record is replete with evidence to the contrary. At no time did defendants engage in any operations in Nigeria—indeed, neither defendant engaged in any operational activities anywhere. (Van der Vlist Decl. ¶ 3; Munsiff Decl. ¶ 3.) Rather, defendants are holding companies which are "solely . . . investment vehicle[s]". (Van der List Decl. ¶ 3; Munsiff Decl. ¶ 3.)

[49] Plaintiffs attempt to introduce "joint venture liability" through one footnote in their brief that states, in its entirety: "Joint venture liability is a variation of agency liability. The Shell Petroleum Development Company was the operator of a joint venture with the military government of Nigeria. As such, SPDC is liable for the acts of the military taken in furtherance of the joint venture." (Pl. Int'l Br. at 48 n.48.) Plaintiffs' attempt to introduce this "theory of liability" is untimely and inapposite. Plaintiffs provide absolutely no basis in law for the application of "joint venture liability"—indeed they cite to no authority whatsoever in their footnote. Even if a theory of "joint venture liability" could apply, plaintiffs have alleged no conduct on the part of any entity with whom SPDC has engaged in joint venture operations. Plaintiffs are incorrect when they state that SPDC "was the operator of a joint venture with the military government of Nigeria". SPDC has entered into joint venture operations with Nigerian National Petroleum Corporation (NNPC), but plaintiffs allege no conduct on the part of NNPC. The Shell Parties are also not engaged in joint venture operations with SPDC (or the Nigerian military)—and indeed, plaintiffs make no suggestion to the contrary.

Plaintiffs' two-sentence attempt to allege "joint tortfeasor liability" in their brief is

New York choice of law rules would apply to an agency analysis—as they would to a veil piercing analysis—because New York is the forum state, *see Kalb, Voorhis & Co.*, 8 F.3d at 132, and no significant conflict with a federal interest or policy mandates displacement of state law for federal choice of law rules, *see In re Gaston & Snow*, 243 F.3d at 606. Plaintiffs have identified no actual, significant conflict with a federal policy or interest that requires application of the federal common law—neither federal common law choice of law rules or the federal common law of agency. (*See generally* Pl. Int'l Br.)[50]

Under New York choice of law rules, the law of the jurisdiction with the greatest interest in seeing its law applied to the matter at issue governs the agency determination with respect to those claims. *Talisman*, 453 F. Supp. 2d at 688 n.109[51]; *see also Globalnet Financial.com*, 449 F.3d at 384. "Under New York law, an attempt to use agency principles to

---

similarly untimely and inapposite. (*See* Pl. Int'l Br. at 55 n.55.) According to plaintiffs' own definition of "joint tortfeasor liability", it is not a basis for liability under the ATS or any other statute or common law—it is merely a means of apportioning damages amongst tortfeasors who have already been found liable. (*See id.* ("joint tortfeasors are jointly and severally liable in both the common and civil law traditions").) Plaintiffs provide absolutely no support for their contention that because, as plaintiffs contend, "such liability is a well-accepted feature of U.S. common law, and indeed both of the common law and civil law tradition[,] [i]t therefore is part of international law as a general principle of law common to the world's legal systems". (*Id.* at 55.)

[50] When considering the question of agency at the pleadings stage, this Court did not identify what law applied. *Wiwa*, 2002 U.S. Dist. LEXIS 3293, at *41 & n.14.

[51] Although Judge Cote in *Talisman* determined that New York choice of law rules would govern an agency analysis, she did not ultimately choose which law of agency should be applied. 453 F. Supp. 2d at 681-83, 687-88. Judge Cote refused to conduct the agency analysis because plaintiffs chose "to assert an agency theory [on] the eve of summary judgment practice", then "failed to address the choice of law analysis that should guide the selection of the substantive law of agency that applies" (which Judge Cote considered "particularly problematic because resolving the choice of law question under New York law would require, at a minimum, evidence of the law of two foreign jurisdictions"), and did not "provide[] evidence of the law of agency from [the two foreign jurisdictions that might have been chosen under New York choice of law rules]". *Id.* at 687-88. Notably, plaintiffs here have failed to "address the choice of law analysis" and to "provide evidence of the law of agency" from the potential foreign jurisdictions required to engage in that choice of law analysis.

hold a party liable for the tort of another is properly characterized as a question of vicarious liability." *Talisman*, 453 F. Supp. 2d at 688 n.109. In that "agency" context of assigning vicarious tort liability, the principles of *Neumeier v. Kuehner*, 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972), guide the court as to which law to apply. *Schreiber*, 407 F.3d at 50; *Talisman*, 453 F. Supp. 2d at 688.

The Court of Appeals has explained the *Neumeier* rules as follows:

> "The first applies when the parties share a domicile; the second applies when the parties are domiciled in different states and the law of each state is favorable to its respective litigant; and the third is applicable to all other split-domicile cases. . . . Pursuant to [the third] rule, the law of the place of the tort will apply, unless displacing it 'will advance the relevant substantive law purposes without impairing the smooth working of the multi-state system or producing great uncertainty for litigants'."

Schreiber, 407 F.3d at 50. Because the parties are domiciled in many different jurisdictions, the third prong of *Neumeier* should apply. Accordingly, Nigerian law—the place of the alleged tort—should apply to any analysis whereby plaintiffs seek to impose liability on defendants for the alleged actions of SPDC as a purported "agent".

1. Plaintiffs' Application of the "Federal Common Law" of Agency Is Improper.

Plaintiffs claim that the "federal common law" of agency—the principles of which plaintiffs claim are also "reflected in international law"—should apply to the determination of whether an agency relationship exists such that defendants may be held vicariously liable. (Pl. Int'l Br. at 55-59.) Again, however, plaintiffs do not direct the Court to any conflict with federal law or policy that could sanction the application of either "federal common law" choice of law rules or the application of the "federal common law" of agency to this agency analysis. Plaintiffs instead cite to the vacated Ninth Circuit case of *Sarei v. Rio*

Tinto, 487 F.3d 1193 (9th Cir.), *vacated for reh'g en banc*, 499 F.3d 923 (9th Cir. 2007),[52] which itself engages in no choice of law analysis. *Rio Tinto* states in conclusory fashion: "Courts applying the [ATS] draw on federal common law, and there are well-settled theories of vicarious liability under federal common law." 487 F.3d at 1202. *Rio Tinto*, however, cites to no ATS case applying federal common law principles of agency nor any ATS case even applying federal choice of law rules.

2. Nigerian Law Permits Vicarious "Agency" Liability Only for the Torts of Another In Specific Circumstances.

Under Nigerian law, a parent and a subsidiary each has a separate and distinct legal existence. *Marina Nominees Ltd. v. Federal Board of Inland Revenue*, [1986] N.W.L.R. 48, 55, 57, 59 (S.C.). An agency relationship is not created between them unless: (1) the parent and subsidiary enter into a contract to establish an agency relationship, *Musa v. Ehidiamhen*, [1994] 3 N.W.L.R. 544, 557 (C.A.); (2) the parent and subsidiary are for "all intent and purposes one", *Union Beverages Ltd. v. Pepsicola Int'l Ltd.*, [1994] 3 N.W.L.R. 1, 16 (S.C.); or (3) the subsidiary is set up to carry out the objectives of the parent company, "so much so that it can control every movement of the subsidiaries", *id.* (citation omitted).[53]

[52] The Order vacating the panel decision and granting rehearing en banc explicitly states: "The three judge panel opinion shall not be cited as precedent by or to this court or any district court of the Ninth Circuit, except to the extent adopted by the en banc court". *Sarei v. Rio Tinto*, 499 F.3d 923 (9th Cir. 2007).

[53] The difference between the law of New York (the forum state) and Nigeria concerning "agency" in the vicarious liability context creates a true conflict that requires this Court to engage in a choice of law analysis. New York law employs a multi-factor test to determine whether an agency relationship exists between a parent and subsidiary such that liability can be imposed upon the parent, *see Fidenas AG v. Honeywell Inc.*, 501 F. Supp. 1029, 1037 (S.D.N.Y. 1980), whereas Nigerian law asks whether the relationship/conduct of the parent and subsidiary fall within one of the categories listed above.

3. Plaintiffs Have Not Even Alleged Facts to Suggest That An Agency Relationship for Purposes of Vicarious Liability Can Be Found.

Plaintiffs have adduced no evidence, and in fact have not even alleged facts, suggesting that an agency relationship between corporate defendants and SPDC exists. Plaintiffs have not alleged—because they cannot allege—that corporate defendants and SPDC entered into any contract creating an agency relationship. Plaintiffs have not alleged—because they cannot allege—that they operate *for all intents and purposes* as one. Plaintiffs have not alleged—because they cannot allege—that SPDC was set up to carry out the objectives of corporate defendants such that corporate defendants could control every movement SPDC makes. Indeed, SPDC cannot be said to be a "tool or simulacrum" of its parent, because corporate defendants, as holding companies, did not direct or control every activity of SPDC. At all times, SPDC operated as a separate corporation with the distinct goal of oil exploration and production in Nigeria.

X. PLAINTIFF BLESSING KPUINEN'S CLAIMS DO NOT MEET THE REQUIREMENTS OF THE ATS.

Plaintiff Blessing Kpuinen became a United States citizen on March 19, 2004 (Compl. ¶ 9), and, consequently, cannot maintain an action under the ATS. Section 1350 gives the district courts "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", 28 U.S.C. § 1350 (emphasis added), and the Court of Appeals in *Flores* recognized that the ATS "provides a remedy to aliens only". 343 F.3d at 53 (internal quotation marks omitted).

Lack of subject-matter jurisdiction can be raised at any time. Fed. R. Civ. P. 12(h)(3). Although federal courts assessing their diversity jurisdiction under § 1332 follow the "time-of-filing rule", under which "[c]itizenship is determined as of the date of commencement of an action", *ConnectU LLC v. Zuckerberg*, 522 F.3d 82, 91 (1st Cir. 2008), that rule is

inapposite with respect to ATS jurisdiction under § 1350.[54] The Supreme Court recently held that "when a plaintiff files a complaint in federal court and then voluntarily amends the complaint, courts look to the amended complaint to determine jurisdiction". *Rockwell Int'll Corp. v. United States*, 127 S. Ct. 1397, 1409 (2007). In the instant case, although Ms. Kpuinen was an alien at the time of the filing of plaintiffs' original complaint, she relinquished that status in favor of United States citizenship prior to the filing of plaintiffs' Fourth Amended Complaint. As in *Rockwell*, the withdrawal of original allegations necessary to establish jurisdiction, where those allegations are not "replaced by others that establish jurisdiction" operates to "defeat jurisdiction". *Id.* at 1409.

Moreover, to the extent the ATS was intended to create a forum for the vindication of that "narrow set of violations of the law of nations, admitting of a judicial remedy and at the same time threatening serious consequences in international affairs", *Sosa*, 542 U.S. at 715, that policy is not engaged where the alleged victim is a United States citizen. There, Sections 1331, 1332, and 1367 of Title 28 provide a federal forum, hence § 1350's limitation to actions maintained "by an alien". 28 U.S.C. § 1350. Thus, because plaintiffs' Fourth Amended Complaint "is the controlling document to be considered by th[e] court", *United States v. Caremark*, 496 F.3d 730, 735 (7th Cir. 2007), and because plaintiff Blessing Kpuinen no longer

[54] The First Circuit has recognized that the time-of-filing rule is actuated by "concerns about forum shopping and strategic behavior", which, while acute in diversity cases, are absent in "the mine-run of federal question cases". *ConnectU*, 522 F.3d at 92. Those concerns are likewise absent in the ATS context.

alleges a fact indispensable to the invocation of ATS jurisdiction—namely, that she is an alien—her claims under § 1350 fail as a matter of law.

December 12, 2008

Respectfully submitted,

CRAVATH, SWAINE & MOORE LLP,

by _____

Rory O. Millson (RM-6160)
Rowan D. Wilson (RD-8556)
Thomas G. Rafferty (TR-3336)

825 Eighth Avenue
New York, NY 10019
(212) 474-1000

Attorneys for defendants Shell Petroleum, N. V., as successor to the Royal Dutch Petroleum Company; Shell Transport and Trading Company, Ltd., formerly The "Shell" Transport and Trading Company, p.I.e.; and Brian Anderson.