06-4800

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ESTHER KIOBEL, individually and on behalf of her late husband, DR. BARINEM KIOBEL, BISHOP AUGUSTINE NUMENE JOHN-MILLER, CHARLES BARIDORN WIWA, ISRAEL PYAKENE NWIDOR, KENDRICKS DORLE NWIKPO, ANTHONY B. KOTE-WITAH, VICTOR B. WIFA, DUMLE J. KUNENU, BENSON MAGNUS IKARI, LEGBARA TONY IDIGIMA, PIUS NWINEE, KPOBARI TUSIMA, individually and on behalf of his late father CLEMENT TUSIMA,

Plaintiffs-Appellants-Cross-Appellees,

v.

ROYAL DUTCH PETROLEUM COMPANY; SHELL TRANSPORT AND TRADING COMPANY, PLC,

Defendants-Appellees-Cross-Appellants,

and

SHELL PETROLEUM DEVELOPMENT COMPANY OF NIGERIA, LTD.,

Defendant.

ON APPEAL FROM THE DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF *WIWA* PLAINTIFFS AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS AND URGING REVERSAL

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I. STATEMENT OF IDENTITY AND INTEREST OF AMICI CURIAE

Like the *Kiobel* plaintiffs in the pending appeal, *amici* are victims or heirs of victims of egregious human rights abuses committed as part of the ruthless suppression of a non-violent movement opposed to Royal Dutch Petroleum Company and Shell Transport and Trading Co., plc.'s (defendants or Royal Dutch/Shell) exploitation of oil in the Ogoni region of Nigeria. These abuses include the sham trial and ultimate execution of Ken Saro-Wiwa and other leaders of that movement. In 1996, *amici*, family members of Saro-Wiwa and other Nigerian nationals (*Wiwa* plaintiffs) brought an action under the Alien Tort Statute (ATS), 28 U.S.C. 1350, against defendants for their participation and complicity in these abuses. That case is ongoing.

In 2000, this Court reversed and remanded the district court opinion dismissing the *Wiwa* complaint. *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000). Harking back to *Filartiga v. Pena- Irala*, 630 F.2d 876 (2d Cir. 1980) and cognizant of the passage of Torture Victim Protection Act (TVPA), *Wiwa* held that torture and summary execution "committed under color of law of a foreign nation in violation of international law is 'our business,' as such conduct not only violates the standards of international law but also as a consequence violates our domestic law." 226 F.3d at 105 n.11, 106. Now this Court is called

upon to decide whether summary execution is actionable under the ATS.

The issue is presented to this Court by a decision in *Kiobel* which dismissed the summary execution claim of Dr. Barinem Kiobel who was tried and hanged together with Ken Saro-Wiwa and seven others. Many of the *Wiwa* plaintiffs are victims of the same violation of the law of nations to be considered in the pending appeal. The *Wiwa* plaintiffs also include an individual intentionally killed during a joint patrol by defendants' Nigerian subsidiary and the Nigerian security forces. *Amici* seek to clarify that this claim is actionable irrespective of how the Court rules in *Kiobel.*

II. STATEMENT OF ISSUE ADDRESSED BY *AMICI*

The *Wiwa* plaintiffs address the issue noted in the statement of issues presented for review in the Opening Brief for Plaintiffs-Appellants in the *Kiobel* appeal (hereafter "AOB"). In addition, *amici* demonstrate that summary execution committed without any legal process is a violation of international law actionable under the ATS.

III. STATEMENT OF THE CASE

Family members of Ken Saro-Wiwa and other Nigerian nationals filed an action against Royal Dutch Petroleum Co. and Shell Transport and Trading Co., plc. on November 8, 1996, pursuant to the Alien Tort Statute (ATS), 28 U.S.C. § 1350, and other laws. The *Wiwa* plaintiffs' operative Third Amended Complaint was filed on September 12, 2003.[1] Special Appendix filed concurrently (S.A.) at 1.

On September 25, 1998, the District Court denied defendants' motion to dismiss for lack of personal jurisdiction but dismissed the action based on *forum non conveniens*. This Court reversed dismissal and remanded. *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000).

On March 5, 2001, the *Wiwa* plaintiffs filed a complaint against Brian Anderson, former managing director of defendants' Nigerian subsidiary, Shell Petroleum Development Company (SPDC). The defendants moved to dismiss both actions under Rule 12(b)(6). On February 28, 2002, the District Court denied the 12b(6) motion in all pertinent respects, finding that summary execution claims were actionable under the ATS and not preempted by the Torture Victim Protection Act (TVPA), 28 U.S.C. § 1350 note. *Wiwa v. Royal Dutch Petroleum Co.,* No.

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[1]A Fourth Amended Complaint is pending before the District Court.

96-cv-8386, 2002 WL 319887, at *4 (S.D.N.Y. Feb. 28, 2002).[2]

On June 16, 2003, *Wiwa* plaintiffs filed amended complaints in both actions adding additional plaintiffs. On December 2, 2003, defendants moved to dismiss the state law claims of the new *Wiwa* plaintiffs but did not challenge the ATS claims. By Order dated September 29, 2006, the District Court held that the state law claims of the new *Wiwa* plaintiffs were time-barred and that the act of state doctrine did not preclude litigation. On May 20, 2004, defendants moved for partial summary judgment but did not argue that *Wiwa* plaintiffs' extrajudicial killing claims were not cognizable under the ATS. That motion is still pending.

On April 5, 2004, the *Wiwa* plaintiffs filed a complaint against SPDC, Docket # 04 Civ. 2665, as a related case. SPDC moved to dismiss based, in part, on the September 29, 2006 decision in *Kiobel,* which is the subject of this appeal. Briefing of that motion is not yet complete in the district court.

With regard to the procedural history of the *Kiobel* case, the *Wiwa* plaintiffs adopt the statement of the case set forth in the brief of the *Kiobel* plaintiffs. AOB 4-5. On March 16, 2007, the *Wiwa* plaintiffs moved to intervene in the *Kiobel* appeal. That motion was denied by Order dated May 4, 2007.

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[2]The District Court dismissed Owens Wiwa's right to life, liberty and security of the person and arbitrary arrest and detention claims, and granted leave to amend.

IV. STATEMENT OF FACTS

The *Kiobel* Complaint alleges that Dr. Barinem Kiobel was imprisoned, tortured and killed by the Nigerian government in violation of the law of nations at the instigation of the defendants, in reprisal for his political opposition to the defendants' oil exploration activities. J.A. 117, 130. *See also* Third Amended Complaint (TAC) in *Wiwa v. Royal Dutch Petroleum Company* and the parallel allegations concerning the *Wiwa* plaintiffs. S.A. 1. As alleged in the complaints, defendants' Nigerian subsidiary, SPDC, coercively appropriated land for oil development without adequate compensation, and caused substantial pollution of the air and water in the homeland of the Ogoni people. J.A. 117; S.A. 7. A protest movement arose among the Ogoni headed by Ken Saro-Wiwa, who was the President of the Movement for the Survival of the Ogoni People (MOSOP). J.A. 118; S.A. 2.

In April 1993, plaintiff Karalolo Kogbara was shot during peaceful demonstrations against Shell's efforts to bulldoze farmland for the construction of a Shell pipeline. *Wiwa* Plaintiff Michael Tema Vizor was detained for four days without charge for participating in the same demonstration. S.A. 10-11. On October 24, 1993, SPDC called the military police into the area near the Korokoro flow line; the military police arrived in vehicles supplied by Royal Dutch/Shell;

and Royal Dutch/Shell staff were present. The military police shot a seventy-four-year-old man and two youths, killing one, *Wiwa* plaintiff Uebari N-Nah. S.A. 13.

On or about May 22, 1994, Ken Saro-Wiwa and Dr. Barinem Kiobel were arrested and detained without charges by the Nigerian military and the arrest of the entire MOSOP leadership was ordered by the Rivers State military administration. J.A. 137; S.A. 15. No charges were filed against them for eight months after their arrest and detention. S.A. *id.* When Plaintiff Michael Tema Vizor refused to confess to the murder of four Ogoni tribal leaders who were killed on May 21, he was tortured. S.A. *id.*

In November, 1994, a three-man tribunal ("Civil Disturbances Special Tribunal") was created and specially appointed by the Nigerian military regime to try Ken Saro-Wiwa and the other Ogoni for the murder of the four Ogoni tribal leaders. J.A. 138; S.A. 15. Ken Saro-Wiwa and the other detainees were formally charged on January 28, 1995. S.A. *id.* On March 28, 1995, the Civil Disturbances Special Tribunal assumed jurisdiction over the cases of ten additional Ogoni, including Saturday Doobee, Felix Nuate, Daniel Gbokoo, and Michael Tema Vizor, who were formally charged with the same murders on April 7, 1995. S.A. 16. As alleged in the TAC, Ken Saro-Wiwa, John Kpuinen, Michael Tema Vizor, Saturday Doobee, Felix Nuate, Daniel Gbokoo, Dr. Barinem Kiobel and others were arrested

and charged because of their non-violent opposition to the activities of defendants and the Nigerian military. J.A. 117; S.A. 16.

The *Kiobel* complaint and the *Wiwa* TAC also alleged that the edict creating the Civil Disturbances Special Tribunal provided: the Tribunal's judgment was not subject to review by a higher court; the accused were permitted to meet with their counsel only with the permission of and in the presence of a military officer; key witnesses were bribed; and Brian Anderson, the Managing Director of SPDC, met with Owens Wiwa and offered to trade Ken Saro-Wiwa's freedom for an end to the international protests against defendants. J.A. 138-39; *see also* S.A. 17. In addition, the circumstances surrounding the trial included the fact that threats were made against the defense counsel who ultimately withdrew from the case; that Ken Saro-Wiwa's 74-year-old mother as well as other family members were beaten when attending the Tribunal hearing; and that the accused were tortured and denied adequate food and medical care. J.A. 138-39; *see also* S.A. 16-17.

On or about October 30 and 31, 1995, Saro-Wiwa, Kpuinen, Doobee, Nuate, Gbokoo, Kiobel and other Ogoni activists were condemned to death by the military-appointed special tribunal, in violation of international law and the laws of Nigeria. Vizor was released. J.A. 140; *see also* S.A. 17-18. Saro-Wiwa, Kpuinen, Doobee, Nuate, Gbokoo, Kiobel and the others scheduled for execution were

tortured and denied adequate food and medical care. S.A. 18; *see also* J.A. 139. On November 10, 1995, Saro-Wiwa, Kpuinen, Doobee, Nuate, Gbokoo, and Kiobel were hanged. S.A. *id*; *see also* J.A. 140.

Plaintiff Owens Wiwa was detained without charges, from December 26, 1993 to January 4, 1994 to prevent him from organizing for and participating in a planned demonstration to protest, among other things, defendants' despoilation of the Ogoni environment. S.A. 13. Owens Wiwa was detained from on or about April 6, 1994 to April 20, 1994 on false charges of murder. He was assaulted during his detention. Owens Wiwa and his fellow arrestee, Noble Obani-Nwibari, were taken out of prison, told to face the woods and guns were put to their heads. S.A. 14.

On November 13, 1995, plaintiff Owens Wiwa fled Nigeria because he feared arbitrary arrest, torture and death. S.A. 18. On January 5, 1996, soldiers came to the home of plaintiff Michael Tema Vizor in Ogoni with the purpose of killing him, and they looted and destroyed his house. Vizor was forced to flee Nigeria. S.A. 18.

According to the *Kiobel* Complaint and the TAC, defendants were complicit in the human rights violations in that they made payments to the military and police who committed abuses against critics of Shell; shared surveillance with and provided logistical support to the Nigerian police and military including the

provision of transportation and monies to those involved at the incidents at Korokoro; participated in the planning and coordination of "security operations" including raids and terror campaigns conducted in Ogoni and the Niger Delta, through regular meetings between Royal Dutch/Shell, their agents, co-conspirators, and officials of the local security forces; hired Nigerian police and military to implement these operations; engaged in a campaign to arrest and execute Ken Saro-Wiwa on fabricated murder charges, including the bribery of two witnesses to give false testimony against Saro-Wiwa; and offered Ken Saro-Wiwa's freedom in exchange for an end to the international campaign against defendants' Nigerian operations. J.A. 116–18, 139, 141–44; S.A. 8–9. In addition, defendants engaged in a coordinated media and public relations campaign with the Nigerian government to discredit MOSOP leaders, falsely attributing to MOSOP and Saro-Wiwa crimes of airplane hijacking, kidnaping, and other acts of violence. S.A. 9.

V. SUMMARY OF ARGUMENT

Sosa v. Alvarez-Machain, 542 U.S. 692, 728 (2004), requires that a norm actionable under the ATS must be definable, universal and obligatory. *Sosa* recognized that this Court's decision in *Filartiga,* 630 F.2d at 890, applied the correct standard as did "many of the courts and judges who faced the issue before it reached the Supreme Court." 542 U.S. at 732. To meet this standard, *Sosa* requires only that a plaintiff demonstrate consensus that the specific conduct alleged violates international law, even if some ambiguity remains regarding other aspects of the norm. The facts alleged violate the customary norm against extrajudicial killing.

As recognized by Congress in the text of the TVPA, the norm against extrajudicial killing prohibits executions pursuant to the judgments of courts that are not regularly constituted, and that do not afford the internationally-recognized guarantees of a fair trial. The Special Tribunal was not a "regularly constituted" court, in that it (a) was specially created solely for the purpose of trying defendants for the events of one day in one town, and (b) was entitled to change its procedural rules at any time. The structure of the Special Tribunal also failed to respect international fair-trial norms. In particular, the Special Tribunal was not independent and impartial: (a) it was constituted of members selected by the

president of a military government and (b) its verdicts needed to be confirmed by the military. Additionally, the Special Tribunal afforded no right of appeal, and specifically prohibited any regular court from inquiring as to the validity of its proceedings.

Moreover, the manner in which the trial was conducted also violated international law in that the accused were not afforded the full right to counsel, because (a) they were not allowed to communicate with counsel outside the presence of the military and (b) their counsel was ultimately harassed into resigning from the case; and the accused were not given a fair hearing in that they were (a) tortured and threatened before and during the trial proceedings, and (b) convicted pursuant to false testimony secured by bribery.

The level of international and U.S. condemnation of the executions of Dr. Barinem Kiobel, Ken Saro-Wiwa, and the other Ogoni is evidence that the international community considered the executions at issue here to be violations of customary international law.

Further, if this Court considers the full scope of the norm against extrajudicial killings, intentional killings by government agents without any judicial proceedings—such as the killing of Uebari N-Nah—also fall with in the prohibition. This is clearly demonstrated by cases interpreting the ATS, the TVPA

and the "state sponsors of terrorism" exception to the Foreign Sovereign Immunities Act (FSIA).

VI. ARGUMENT

A. THE SOSA STANDARD

In *Sosa*, the Supreme Court detailed the standard for determining which claims are actionable under the ATS. The *Sosa* standard is discussed in the AOB at 14, 19–23. *Wiwa* plaintiffs stress two critical points. First, *Sosa* recognized that this standard is "generally consistent with the reasoning of many of the courts and judges who faced the issue before it reached this Court." *Sosa,* 542 U.S. at 732, citing three examples. The first was this Court's decision in *Filartiga*, 630 F.2d at 890. The second was Judge Edwards' concurrence in *Tel-Oren v. Libyan Arab Republic*, "suggesting that the 'limits of section 1350's reach' be defined by a 'handful of heinous actions – each of which violates definable, universal and obligatory norms'" *Sosa,* 542 U.S. at 732, *quoting Tel-Oren*, 726 F.2d 774, 781 (D.C. Cir. 1984). The third was the holding in *In re Estate of Marcos Human Rights Litigation*, that "[a]ctionable violations of international law must be of a norm that is specific, universal, and obligatory." *Sosa*, 542 U.S. at 732, *quoting Marcos* 25 F.3d 1467, 1475 (9th Cir. 1994).

The specific (or definable), universal, and obligatory standard affirmed by *Sosa* is firmly grounded in this Court's jurisprudence. *See Marcos*, 25 F.3d at 1475-76, *citing Filartiga*, 630 F.2d at 881, 885-87. Moreover, it has been

expressly applied by the district courts of this Circuit, including in *Wiwa v. Royal Dutch Petroleum Co.*, No. 96-cv-8386, 2002 WL 319887 at **5-7 (S.D.N.Y. Feb. 28, 2002), and *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 306, n.18 (S.D.N.Y. 2003). Thus, pre-*Sosa* cases from this and other Circuits applying this standard or a similar formulation remain good law. *Doe v. Saravia,* 348 F. Supp. 2d 1112, 1144, 1153-54 (E.D. Cal. 2004) (applying this standard based on *Sosa*).

Second, *Sosa* requires only that a plaintiff demonstrate consensus that the specific conduct alleged violates international law, even if some ambiguity remains regarding other aspects of the norm. It does not require that the broadest reach of the norm be defined as black letter law. AOB 19-20; *accord Forti v. Suarez-Mason*, 694 F. Supp. 707, 709 (N.D. Cal. 1998) (reinstating claim after plaintiff demonstrated international prohibition of a specific practice).

Although *Sosa* rejected the arbitrary detention claim in that case, it followed this approach. 542 U.S. 738 ("It is enough to hold that a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to support the creation of a federal remedy."). Accordingly, this is the analysis courts have conducted post-*Sosa.* For example, *Almog v. Arab Bank, PLC*

considered whether certain acts of terrorism are actionable under the ATS. The court correctly noted that "there is no need to resolve any definitional disputes as to the scope of the word 'terrorism"'; instead "the pertinent issue here is only whether the acts as alleged by plaintiffs violate a norm of international law, however labeled. *See Sosa,* 542 U.S. at 738 (examining whether the specific conduct alleged by plaintiff violated a norm of international law)." 471 F. Supp. 2d 257, 280-81 (E.D.N.Y. 2007). Likewise, *Presbyterian Church of Sudan v. Talisman Energy* found that "disagreement...regarding the fringes of international legal norms....does not, however, impugn the core principles that form the foundation of customary international legal norms – principles about which there is no disagreement." 374 F. Supp. 2d 331, 340-41 (S.D.N.Y. 2005).

There is no question that the specific conduct alleged violates the definable, universal, and obligatory norm prohibiting extrajudicial execution.

B. EXTRAJUDICIAL KILLING IS ACTIONABLE UNDER THE ATS.

From the outset of modern ATS jurisprudence, extrajudicial killing has been recognized as an international norm which was specific, universal and obligatory. As Judge Edwards pointed out in *Tel-Oren*, "commentators have begun to identify a handful of heinous actions – each of which violates definable, universal and obligatory norms," including, at a minimum, bans on governmental "torture,

summary execution, genocide, and slavery." 726 F.2d at 791 n.20 (Edwards, J., concurring).

Similarly, in *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995), this Court recognized that "summary execution – when not perpetrated in the course of genocide or war crimes – [is] proscribed by international law . . . when committed by state officials or under color of law." *Id.* at 243; s*ee also Alejandre v. Republic of Cuba*, 996 F. Supp. 1239, 1252 (S.D. Fla. 1997) ("Like the torture in *Filartiga,* the practice of summary execution has been consistently condemned by the world community.").

Courts have consistently held that summary execution is an actionable norm under the ATS, both post-*Sosa*, *see, e.g.*, *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1157 (11th Cir. 2005); *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1178-79 (C.D. Cal. 2005); *Saravia,* 348 F. Supp. 2d at 1144, and in pre-*Sosa* cases applying the universal, obligatory and definable standard endorsed in *Sosa. See, e.g., Marcos,* 25 F.3d at 1475; *Xuncax v. Gramajo*, 886 F. Supp. 162, 185 (D. Mass. 1995); *Forti,* 672 F. Supp. at 1542. *See also* AOB at 25-26.

Two statutes, the Torture Victim Protection Act (TVPA), 28 U.S.C. § 1350 (note), and the "state sponsors of terrorism" exception to the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1605(a)(7), provide a definition of

extrajudicial killing which was intended by Congress to codify the customary law norm prohibiting summary execution. *See* AOB 23-25. Section 3(a) of the TVPA states:

> For the purposes of this Act, the term "extrajudicial killing" means a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. Such term, however, does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation.

The FSIA exception explicitly incorporates the TVPA definition of extrajudicial killing. 28 U.S.C. § 1605(e)(1).

Because Congress intended this definition to codify international law, killing that meets this definition would be actionable under the ATS as well. *See Mujica*, 381 F. Supp. 2d at 1178-79. In *Wiwa*, this Court indicated that the TVPA was intended to create substantive rights for violation of the norms against summary execution and torture which were also actionable under the ATS. 226 F.3d at 105 & n. 11. This Court looked to the TVPA despite the fact that in *Wiwa*, only ATS claims were presented at that time. Indeed this Court noted that plaintiffs were pursuing claims under the ATS. *Id.* at 91.

C. THE HANGING OF THE OGONI NINE VIOLATED THE NORM AGAINST EXTRAJUDICIAL EXECUTION.

The norm against extrajudicial killing prohibits executions pursuant to the

judgments of not regularly constituted courts, and that do not afford the internationally-recognized guarantees of a fair trial. AOB 36-38; *see also Xuncax*, 886 F. Supp. at 185 (international law recognizes right to due process as protecting right to life). Numerous violations of these provisions occurred in the formation and structure of the Special Tribunal as provided by the military government Decree governing Special Tribunals generally and the instrument creating this tribunal in particular, and in the manner in which the trial of the Ogoni Nine before the Special Tribunal was conducted. JA 138-39; S.A. 15-18.

Based on the structural flaws alone, without even considering the proceedings in the trial of the Ogoni Nine, this Court should conclude that any death sentence from the Special Tribunal contravenes customary international law. If the Court also considers the proceedings that led to these executions, the international law violations become all the more apparent.

As detailed above, plaintiffs need only show that specific conduct alleged violates international law. Accordingly, this Court could only uphold the district court's Rule 12 dismissal if it were to conclude that an execution pursuant to a trial that violates *all* of these guarantees regarding fair trial structures and proceedings does not violate international law. While international law supports the position that a violation of any one of these fundamental rights would render

these executions illegitimate, the Court need not consider that question.

These are not minor procedural flaws, but deficiencies so egregious that they led to a unanimous chorus of condemnation from the United States, the United Nations, and the international community. *See infra* Part VI § C.

1. The formation and structure of the Tribunal violated international law.

a. The Special Tribunal was irregularly constituted.

Under customary international law, as reflected in the express language of both common article 3 of the Geneva Conventions and the Torture Victim Protection Act, permissible executions may only be ordered by a "regularly constituted court." AOB 21–29, 36-38, 50-51. The Special Tribunal in this case was not "regularly constituted." First, the tribunal existed only to try a single case – the "disturbances which occurred on 21st May, 1994 at Giokoo, Gokana Local Government Area of Rivers State." S.A. 37, Corrigendum to Decree No. 2 (Sept. 1994); J.A. 138; S.A. 15 (TAC ¶ 84) (Special Tribunal "was created and specially appointed by the Nigerian military regime to try Ken Saro-Wiwa, John Kpuinen, Dr. Barinem Kiobel, and other Ogoni leaders for the May 21, 1994 murder of four Ogoni tribal leaders."). As the plurality noted in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2796-97 (2006), citing Commentary to the Fourth Geneva Convention 340),

the term "regularly constituted" "definitely exclud[e][s] all special tribunals." Second, under the Civil Disturbances (Special Tribunals) Decree, which was promulgated by Nigeria's military government in 1987 and created the authority for establishing a special tribunal, the procedural rules of the tribunal were subject to change. The Decree provided that "the provisions of the Criminal Procedure Code or . . . the Criminal Procedure Act shall, *with such modifications as the circumstances may require*, apply to the trial of offences generally." S.A. 43 (Civil Disturbances (Special Tribunals) Decree 1987, Mar. 18, 1987 (Nig. Fed. Military Gov't), schedule II ¶ 17) (emphasis added). There were no restrictions on the tribunal's ability to modify these procedural protections; as the Supreme Court noted in *Hamdan*, "the fact that its rules and procedures are subject to change midtrial" is "evidence of [a] tribunal's irregular constitution." 126 S. Ct. at 2797 n.65.

b. The Special Tribunal was neither independent nor impartial.

The requirement that a tribunal ordering a death sentence be independent and impartial is likewise shown by the authorities cited in the *Kiobel* Brief. AOB 31, 39–43, 45, 48–52. The Special Tribunal lacked independence and impartiality in at least two ways. First, the members of the Special Tribunal were selected directly by the President of Nigeria's military government. *See* S.A. 15 (TAC ¶

84); S.A. 37 (1994 Corrigendum); S.A. 39 (1987 Decree, part II, § 2(1)) (providing that the "President . . . is hereby empowered to constitute civil disturbance special tribunal[s]"). The President likewise had the power to determine how many people would sit on such a tribunal; although the Special Tribunal here had only three members, *see* S.A. 15, the President could have selected up to seven members. *See* S.A. 37. This procedure resulted in a tribunal that was securely a creation of the executive, divorced from any independent court system, whose members were hand-picked for a particular trial. *See* S.A. 44 (*International Pen and Others v. Nigeria*, African Commission on Human and Peoples' Rights, Comm. Nos. 137/94, 139/94, 154/96 and 161/97 ¶ 86 (1998)) (reviewing the Ogoni Nine trial). There can be little question of insulation from political pressure under such circumstances. *Id.*; *see also Hamdan*, 126 S. Ct. at 2800 (Kennedy, J., concurring) (noting that a tribunal's standards must be chosen "under a system where the single power of the Executive is checked by other constitutional mechanisms"); *accord id.* at 2804 (noting that "an acceptable degree of independence from the Executive is necessary . . . . any suggestion of Executive power to interfere with an ongoing judicial process raises concerns about the proceedings' fairness").

Second, even if the tribunal itself were independent, its verdicts would not

be: the tribunal's judgments and sentences were subject to "confirmation" by the "Armed Forces Ruling Council," which had the authority to "confirm or vary the sentence of the tribunal." S.A. 40 (1987 Decree Part III § 7). Far from being independent, the Armed Forces Ruling Council, succeeded by the Provisional Ruling Council, was the governing body of Nigeria's military regime, *see, e.g.*, S.A. 59; it embodied the executive, rather than providing any check on executive power. *See* S.A. 54-55 (*International Pen* ¶¶ 91, 93, 95) (holding that "it is not safe to view the Provisional Ruling Council as impartial or independent").

c. The Special Tribunal violated the right of appeal.

The executions of the Ogoni Nine violated international law because the accused had no right to appeal their convictions or death sentences. Even a regularly constituted court must provide the basic procedural protections afforded by customary international law. *Hamdan*, 126 S.Ct. at 2797 (plurality opinion). These include the right to appeal.

The *Hamdan* plurality found international law's fundamental procedural protections to be enshrined in Article 14 of the International Covenant on Civil and Political Rights (ICCPR) and Article 75 of Additional Protocol I to the Geneva Conventions of 1949. *Id.* at 2797–98. Article 14(5) of the ICCPR expressly states that "[e]veryone convicted of a crime shall have the right to his

conviction and sentence being reviewed by a higher tribunal according to law. " Likewise, Article 75 (4)(j) of Additional Protocol I states: "A convicted person shall be advised on conviction of his judicial and other remedies and of the time-limits within which they may be exercised." This provision clearly contemplates appellate review. As noted in the AOB, the right to appeal is also supported by other sources of international law, including the American Convention, *see* AOB at 43, the African Charter, *id.* at 44–46, 52 n.15, and the ICCPR, *id.* at 48.

As also noted in the AOB at 27, wartime protections are considered international law minimums. Even a foreign power occupying another country during wartime must afford persons convicted of a crime the right to appeal. Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), Article 73 (1949); *see Hamdan*, 126 S.Ct. at 2796-97. The right is particularly fundamental where, as here, the sentence was death. U.N. Economic and Social Council resolution 1984/50, "Safeguards guaranteeing protection of the rights of those facing the death penalty" ¶6 (25 May 1984) ("S.C. Res. 1984/50") ("Anyone sentenced to death shall have the right to appeal to a court of higher jurisdiction.").

The decree creating the authority for establishing the Special Tribunal precludes appellate review, barring the Nigerian judiciary from reviewing the

decisions of the Tribunal. Part IV § 8(1) provides:

> The validity of any decision, sentence, judgment, confirmation, direction, notice or order given or made, as the case may be, or any other thing whatsoever done under this Decree shall not be inquired into any in court of law.

S.A. 40. There are no other provisions in the decree for appeal.

As the African Commission noted, "Section 8(1) effectively ousts all possibility of appeal to the ordinary courts. Thus, the accused persons had no possibility of appeal to a competent national organ, and the Commission finds a violation of Article 7.1(a) [of the African Charter on Human and Peoples' Rights]." S.A. 44, *International Pen* ¶ 93; *accord* S.A. 52, *id.* ¶ 75; S.A. 77, *The Constitutional Rights Project v. Nigeria*, African Commission on Human and Peoples' Rights, Comm. No. 87/93 ¶ 11 (1995) (earlier African Commission decision finding Section 8(1) violates Article 7.1(a) of the African Charter).

As noted, the decree provides that sentences were to be "confirmed" by the Armed Forces Ruling Council. This, however, is not a right to appeal, as the African Commission concluded, finding that the Council could not be considered impartial or independent. S.A. 55, *International Pen* ¶ 93. Indeed, as noted above, the Ruling Council was not a court at all but rather the governing body of the military government. The decree did not require the Council to consider

arguments made by the accused, examine the facts or trial, or give reasons for its decisions; nor did it even afford an explicit power to quash conviction. S.A. 40, Part III § 7. As the African Commission concluded, the Ruling Council's power to confirm "is a discretionary, extraordinary remedy of a nonjudicial nature. The object of the remedy is to obtain a favour and not to vindicate a right . . . [The Council] does not operate impartially and ha[s] no obligation to decide according to legal principles." S.A. 78, *The Constitutional Rights Project* ¶ 8.

Moreover, the Ruling Council confirmed the death sentences of the Ogoni Nine without the records of the trial, even though section 7 of the Civil Disturbances (Special Tribunals) Decree No. 2 required the Council to receive such records before confirmation was possible. S.A. 46, *International Pen* ¶ 10. In deciding without reviewing the trial record, the Ruling Council was not functioning as an appellate court. *Report on the Situation of Human Rights in the Republic of Nicaragua*, Inter-American Commission of Human Rights (IACHR) OEA/Ser.L/V/II.53 doc. 25 ¶ 21 (30 June 1981) (*available at* www.cidh.oas.org) (holding that "the existence of a higher tribunal necessarily implies a re-examination of the facts presented in the lower court" and lack of opportunity for such appeal deprives defendant of due process); *see generally United States v. Weisser*, 417 F.3d 336, 343(2d Cir. 2005) (right to appeal illusory where appellate

record is so deficient that it is impossible for appellate court to determine if trial court committed reversible error); *see also Hamdan*, 126 S.Ct. at 2807 (Kennedy, J. concurring) (defects in tribunal procedures not cured by opportunity for judicial review where scope of review is limited).

2. The conduct of the trial violated international law.

a. The proceedings violated the defendants' right to counsel.

Under international law, a criminal defendant has the right "[t]o have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing." ICCPR Article 14(3)(b); AOB 52 n.16. In particular, a person may be executed only after legal process that affords safeguards "at least equal to those contained in article 14 of the [ICCPR], including the right . . . to adequate legal assistance at all stages of the proceedings." S.A. 79, S.C. Res. 1984/50 ¶5; *see generally Gideon v. Wainwright*, 372 U.S. 335, 342 (1963) (right to counsel is "fundamental and essential to a fair trial").

Here, the accused were permitted to meet with their counsel only with the permission of and in the presence of a military officer. Even during wartime occupation, "[a]ccused persons . . . shall have the right to be assisted by a qualified advocate or counsel of their own choice, who shall be able to visit them freely. . .

." Geneva Convention (IV) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, [1956] 6 U.S.T. 3516, T.I.A.S. No. 3365 ("Fourth Geneva Convention"), Article 72; *see also* American Convention on Human Rights, Art. 8(2)(d) (recognizing right of defendant "to communicate freely and privately with his counsel"); S.A. 80, HRC General Comment 13 ¶ 9, U.N. Doc. HRI\GEN\1\Rev.1 (1994) ("HRC General Comment 13") (noting that the right to communicate with counsel "requires counsel to communicate with the accused in conditions giving full respect for the confidentiality of their communications"). The limits here clearly violated international law. AOB 41, 43, 44.

In addition, counsel for the defendants were threatened, assaulted, arrested and/or otherwise harassed, and as a result, ultimately withdrew from the case during the trial. J.A. 138; S.A. 55, *International Pen* ¶¶ 97-98. Thus, the African Commission found that the trial violated the defendants' right to counsel. *Id.*, 101; *see also* S.A. 78, *The Constitutional Rights Project* ¶ 12 (finding that trial before a Special Tribunal, in which defendants were sentenced to death despite harassment and intimidation to the extent of defense counsel's withdrawal, violated right to counsel under African Charter); S.A. 81 (HRC General Comment 13 ¶ 9) (noting that, pursuant to the right to counsel, legal counsel must be able to represent the accused "without any restrictions, influences, pressures or undue interference from

any quarter"); *see also* AOB 44.

b. The accused were not given a fair hearing.

The right to a fair hearing is fundamental in any criminal proceeding, and is especially important if the punishment may be death. *See, e.g.*, S. A. 79, S.C. Res. 1984/50 ¶ 5 (expressing the view of the international community that executions should only be carried out "after legal process which gives all possible safeguards to ensure a fair trial"). Several core elements of the international law guarantee of a fair trial were violated by the tribunal. First, the accused were tortured before and during the trial. *See* J.A. 139; S.A. 17. Freedom from torture is unquestionably protected by international law. *See, e.g.*, *Filartiga*, 630 F.2d at 880. Torture of a defendant during trial also implicates the fairness of that trial, because it compromises the defendant's ability to assist in his defense. U.S. courts have found, for example, that the use of "stun belts" during trial instills fear that vigorously defending oneself may lead to physical pain as well as distracts the accused from his defense, and this conclusion can only be more applicable where the accused faces torture far more severe than a shock from a stun belt. *See generally Hawkins v. Comparet-Cassani*, 251 F.3d 1230, 1239–40 (9th Cir. 2001) (requiring defendant to wear stun belt during hearing "obviously prejudices a defendant's Sixth Amendment's guarantee of a fair trial" because defendants

might refrain from participating in their own defense out of fear; Court upholds preliminary injunction barring practice except where necessary for security); *United States v. Durham*, 287 F.3d 1297, 1306 (11th Cir. 2002) (defendant wearing stun belt is likely to concentrate on preventing belt from being activated, and is thus less likely to participate fully in his defense at trial).

Second, the military government and Royal Dutch/Shell conspired to bribe witnesses to give false testimony against the accused. *See* S.A. 17; J.A. 139. While international law sources typically do not mention a specific prohibition on the government conspiring to bribe witnesses or otherwise procure false testimony against the accused, this is inherent in any definition of a "fair hearing."

Last, the accused were denied access to evidence in the possession of the prosecution. *See* S.A.55-56, *International Pen* ¶¶ 99–101 (concluding that the tribunal had withheld evidence from the defense); S.A. 65, U.S. Dept. of State, Nigeria Human Rights Practices, 1995 (March 1996) § 1(e) (U.S. State Department noting that the military government "refused to comply with a tribunal order to produce a videotape" that showed a military governor judging Saro-Wiwa to be guilty long before his trial). International law as well as elementary principles of fairness requires that the defense have access to potentially exculpatory evidence in the possession of the prosecution. The African

Commission, for example, found that "the right to defense" in Article 7.1(c) of the African Charter was violated by withholding evidence. S.A. 53, 56, *International Pen* ¶¶ 85, 101. Similarly, the Human Rights Committee has noted that the right to adequate facilities for the preparation of one's defense, ICCPR art. 14(3)(b), "must include access to documents and other evidence which the accused requires to prepare his case." S.A. 81-82, HRC General Comment 13 ¶ 9.

3. International condemnation of the executions reflects the violation of universally recognized standards.

At the most fundamental level, customary international law is determined by the conduct of the international community – the practice of states that demonstrate legal principles. *See, e.g., United States v. Yousef*, 327 F.3d 56, 91 n.24 (2d Cir. 2003), *citing* Ian Brownlie, *Principles of Public International Law* 5–7 (5th ed. 1999). Among the primary evidence of such practice is "diplomatic correspondence, policy statements, press releases," and "the practice of international organs." Brownlie, *Principles of Public International Law* 5. Consequently, the fact that the international community and international organizations uniformly condemned the executions as violative of international law confirms that they did indeed violate customary international law.

The trial and execution of Barinem Kiobel and the other Ogoni Nine,

including Ken Saro-Wiwa, were the subjects of public statements and sanctions by the U.S. government, governments around the world, the United Nations and regional governmental bodies such as the European Union.

Immediately after the execution, President Clinton stated that "these executions demonstrate to the world the Abacha regime's flaunting [sic] of even the most basic international norms and universal standards of human rights....The United States deplores the gravely flawed process by which Mr. Saro-Wiwa and his associates were convicted and executed. They were condemned outside the traditional judicial system and without regard for due process." The same statement detailed the sanctions issued by the President including the recall of the U.S. Ambassador to Nigeria. On November 17, 1995, this statement was transmitted to the U.N. Security Council. *Letter dated 17 November 1995 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General*, U.N. GAOR SCOR, 50th Sess., Agenda Item 112(b), U.N. Doc. A/50/765-S/1995/967 (1995), *available at* http://www.un.org/documents/ga/docs/50/plenary/a50-765.htm. Madeleine Albright, U.S. Ambassador to the United Nations, added, "Their conviction was stunning in its absence of any modicum of the due process under law. The unseemly haste of this reported step contravenes all values of the civilized world."

McNeil Lehrer Newshour, Nov. 10, 1995, *available at* http://www.pbs.org/newshour/bb/africa/africa_11-10b.html.

Condemnation of the Special Tribunal procedures and the execution led to Nigeria being the first country whose membership was suspended by the Commonwealth of Nations (the former British Commonwealth). Press release by the Secretariat of the Commonwealth (Nov. 13, 1995), *available at* http://www.thecommonwealth.org/document/34293/35232/152035/150847/the_auckland_communiqu.htm. In advocating for Nigeria's suspension, then British Prime Minister John Major called the executions "judicial murder" which followed a "fraudulent trial." BBC: On This Day, "1995: Nigeria Hangs Human Rights Activists," *available at* http://news.bbc.co.uk/onthisday/hi/dates/stories/november/10/newsid_2539000/2539561.stm. The British Foreign office stated, "The executions violate Nigeria's commitments under international law to provide for a fair trial and right of appeal." Foreign and Commonwealth Office, *Execution of Ken Saro-Wiwa and His Co-Defendants,* COI'S HERMES, Nov. 10, 1995.

Within two days after the executions, at least seventeen countries announced they would recall their ambassadors, including the United States,

Britain, Germany, France, Italy and South Africa. Bob Drogin, *Nigeria Feels Wrath of World After Executions*, Los Angeles Times (Nov. 12, 1995) at A1.

The European Parliament passed a resolution condemning the executions and imposing sanctions. *See* Declaration by the European Union on the Execution of Ken Saro-Wiwa and His Co-Defendants, *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=PRES/95/316&format=HTML&aged=0&language=EN&guiLanguage=en; Summary of the 2011th European Council Meeting, June 2-3, 1997, *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=PRES/97/177&format=HTML&aged=0&language=EN&guiLanguage=en.

The United Nations General Assembly passed a resolution on December 22, 1995, which condemned among other things the "arbitrary execution after a flawed judicial process." A/RES/50/199 (1996) (*available at* http://daccessdds.un.org/doc/UNDOC/GEN/N96/771/19/PDF/N9677119.pdf?OpenElement). A year later, the General Assembly again noted the "grave violations of human rights, including extrajudicial, summary or arbitrary executions . . ." and noted "the arbitrary execution of Ken Saro-Wiwa and his associates " G.A. Res. A/RES/51/109 (*available at* http://daccessdds.un.org/doc/UNDOC/GEN/N97/771/07/PDF/N9777107.pdf?Ope

nElement). On December 12, 1997, the General Assembly adopted another resolution which expressed its deep concern that "additional persons among those detained in Nigeria are to be tried by the same flawed judicial process which led to the arbitrary execution of Ken Saro-Wiwa and his associates . . . ." G.A. Res. A/RES/52/144 (dated March 6, 1998) (*available at* http://documents-dds-ny.un.org/doc/UNDOC/GEN/N98/771/31/PDF/N9877131.pdf?OpenElement).

These statements by the world's governments, both individually and through bodies such as the European Union and the United Nations, demonstrate condemnation of the trial and executions of Dr. Kiobel and the *Wiwa* plaintiffs as well as a recognition that these abuses violated international law. Such actions by the international community form an important element of customary international law.

D. THE NORM AGAINST EXTRAJUDICIAL KILLING PROHIBITS A DELIBERATE KILLING NOT AUTHORIZED BY A PREVIOUS JUDGMENT.

The *Kiobel* case presents the issue of whether the norm against extrajudicial killings encompasses execution based on judicial proceedings which do not meet internationally recognized standards. Therefore, the Court need not address the full scope of the customary law norm. However, there can be no question that the

norm prohibits intentional killings by state agents without *any* judicial process, such as the death of Ueberi N-Nah alleged in the *Wiwa* complaint. This claim is actionable irrespective of how the Court rules in *Kiobel*, and whatever decision this Court renders should account for this fact.

Because the TVPA and the FSIA both incorporate the language of the customary law norm against extrajudicial killings, determinations by U.S. courts finding violations of the TVPA and the FSIA, as well as the ATS, are useful in exploring the contours of the tort. Courts have found the norm against extrajudicial killing violated by both targeted and indiscriminate killings carried out by agents of a government. Thus, in *Xuncax*, 886 F. Supp. at 169–170, 198, the court found the defendant liable under the ATS for the murders of three Guatemalan villagers in separate incidents. In *Saravia,* 348 F. Supp. 2d at 1154, the court found the defendant liable under the ATS and the TVPA for his participation in the assassination of Archbishop Romero in El Salvador. In *Cabello*, 402 F.3d 1148, the court found that military officers violated international law when they drove prisoners outside of town and executed each by gunfire or by stabbing. In *Forti*, 672 F. Supp. at 1537, military personnel were liable for abducting the plaintiff's seventeen-year-old brother and returning his body the following day. In *Elahi v. Islamic Republic of Iran*, 124 F. Supp. 2d 97,

107 (D.D.C. 2000), the court ruled that the murder satisfied the definition of "extrajudicial killing" under the FSIA based on evidence that the assassination was a deliberate act and the victim was not afforded judicial process.

Applying the definition of an extrajudicial killing contained in the TVPA, *Stern v. Islamic Republic of Iran*, 271 F. Supp. 2d 286 (D.D.C. 2003), held that a bombing attack constituted an act of extrajudicial killing. Likewise, *Owens v. Republic of Sudan*, 412 F. Supp. 2d 99, 105 (D.D.C. 2006), upheld claims for victims of U.S. embassy bombings in Tanzania and Kenya as extrajudicial executions. In *Peterson v. Islamic Republic of Iran*, 264 F. Supp. 2d 46, 61 (D.D.C. 2003), the court concluded that the October 23, 1983 truck bombing of a U.S. Marine barracks in Lebanon, which killed 241 peacekeeping American servicemen, satisfied the FSIA's definition of an "extrajudicial killing." In *Eisenfeld v. Islamic Republic of Iran*, 172 F. Supp. 2d 1, 7 (D.D.C. 2000), the court found Iran liable for sponsoring a terrorist suicide bombing on an Israeli passenger bus.

The decisions of international bodies have been consistent with the holdings of U.S. courts that intentional killings by state actors in the absence of any judicial process violate international law. The Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions regularly examines and condemns instances of

killings absent any judicial process, including deaths due to the use of force by law enforcement officials. *See, e.g.*, Report by the Special Rapporteur, Extrajudicial, Summary or Arbitrary Executions ¶¶ 64-61, U.N. Doc. E/CN.4/1993/46 (Dec. 23, 1992); Report by the Special Rapporteur, Extrajudicial, Summary or Arbitrary Executions ¶¶ 54-67, U.N. Doc. E/CN.4/1993/46 (Dec. 23, 1992) (discussed in AOB 33, 50-51). The Special Rapporteur has consistently found violations of the prohibition on extrajudicial killings in cases in which individuals were killed by state agents with no judicial proceedings whatsoever. *See, e.g.*, *Vicente et al. v. Colombia* (Communication No 612/1995) [United Nations Human Rights Committee] 29/7/97, ¶ 8.3 (decision by The Human Rights Committee, the treaty-monitoring body of the ICCPR). The African Commission has explicitly held that extrajudicial executions violate Article 4 of the African Charter on Human and Peoples' Rights. June 27, 1981, 1520 U.N.T.S. 217, 21 I.L.M. 58. *See, e.g.*, *Free Legal Assistance Group and Others v. Zaire*, African Commission on Human and Peoples' Rights, Comm. No. 25/89, 47/90, 56/91, 100/93 (1995), ¶ 43. The Inter-American Court on Human Rights has found that killings by state agents occurring outside the bounds of the judicial process violate the right to life. In *Myrna Mack Chang v. Guatemala*, 2003 Inter-Am. Ct. H.R. (ser. C) No. 101, the court deemed an assassination conducted by state agents an "extra-legal execution" that violated

the right to life. *Id.* ¶¶ 138–58. The European Court of Human Rights (E.C.H.R.) has likewise found violations of Article 2 of the European Convention on Human Rights' "right to life" guarantee in cases of killings by state agents absent any judicial process. For example, in *Khashiyev v. Russia*, [2005] E.C.H.R. 132, the Court held that Russia was guilty of a right to life violation for the killing of civilians at or near their homes by Russian soldiers. *See id.* ¶ 147; *see also Estamirov and Others v. Russia*, [2006] E.C.H.R. 860, ¶ 114 (finding an Article 2 violation stemming from an attack by Russian soldiers of a family in its home). The intentional killing of the *Wiwa* plaintiff Uebari N-Nah by the military police, as alleged in the *Wiwa* TAC at ¶ 64, S.A. 12-13, clearly falls within the conduct recognized as an actionable extrajudicial execution.

VII. CONCLUSION

The *Wiwa* plaintiffs respectfully request that the Court reverse the decision of the district court dismissing the claim for summary execution.

Dated: May 15, 2007

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned certifies this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B).

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Dated: May 15, 2007

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Under penalty of perjury, I hereby certify that today, May 15, 2007, I caused to be served by mail true and correct copies of the foregoing BRIEF OF *WIWA* PLAINTIFFS AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS AND URGING REVERSAL and the supporting SPECIAL APPENDIX TO BRIEF OF *WIWA* PLAINTIFFS AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS AND URGING REVERSAL to the following addresses:

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