Nos. 09-7125 (lead case), 09-7127, 09-7134, 09-7135

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOHN DOE VIII, *et al.*,
Plaintiffs-Appellants-Cross-Appellees,
v.
EXXON MOBIL CORP., *et al.*,
Defendants-Appellees-Cross-Appellants.

JOHN DOE I, *et al.*,
Plaintiffs-Appellants-Cross-Appellees,
v.
EXXON MOBIL CORP., *et al.*,
Defendants-Appellees-Cross-Appellants.

On Appeal from the U.S. District Court for the District of Columbia
(D.D.C. Case Nos. 1:07-cv-01022 (*Doe-VIII*) & 1:01-cv-01357 (*Doe-I*))

BRIEF OF PLAINTIFFS-APPELLANTS-CROSS-APPELLEES
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August 25, 2010

ORAL ARGUMENT NOT YET SCHEDULED

CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel for Plaintiffs-Appellants-Cross-Appellees certify as follows:

A. Parties and *Amici Curiae*

1. *Doe-I*

Plaintiffs-Appellants-Cross-Appellees in this matter are John Doe II, John Doe IV, John Doe V, John Doe VI, John Doe VII, Jane Doe I, Jane Doe II, Jane Doe III, Jane Doe IV, Jane Doe V, and Jane Doe VI. Defendants-Appellees-Cross-Appellants in this matter are Exxon Mobil Corporation, Mobil Corporation, Mobil Oil Corporation, and ExxonMobil Oil Indonesia, Inc.

Additional parties and intervenors that appeared before the district court in this matter include John Doe I (deceased and replaced in this litigation by Jane Doe V by court order) and John Doe III (deceased and replaced in this litigation by Jane Doe VI by court order).

Amici curiae appearing before this Court on behalf of Plaintiffs-Appellants-Cross-Appellees are: Professors of Civil Procedure Erwin Chemerinsky, et al.; International Law Scholars Ralph Steinhardt, et al.; EarthRights International; and the University of Minnesota Law School International Human Rights Clinic. *See* Order, Doc. 1248571 (June 8, 2010)(permitting *amici curiae* to file separate briefs).

Amici curiae appearing on behalf of Defendants-Appellees-Cross-Appellants are: Chamber of Commerce of the United States; National Foreign Trade Council & USA*Engage; and Washington Legal Foundation. *See id.*

The United States appeared as *amicus curiae* in the district court, but not before this Court in *Doe v. Exxon Mobil Corporation*, No. 05-7162. When ExxonMobil petitioned for certiorari in 2007, the Supreme Court requested the views of the United States. The Solicitor General recommended that certiorari be denied. *Exxon Mobil Corp. v. Doe*, No. 07-81 (U.S. May 2008), JA1162.

2. *Doe-VIII*

Plaintiffs-Appellants-Cross-Appellees in this matter are John Doe VIII, John Doe IX, John Doe X, and John Doe XI. Defendants-Appellees-Cross-Appellants in this matter are Exxon Mobil Corporation, Mobil Corporation, Mobil Oil Corporation, and ExxonMobil Oil Indonesia, Inc.

Amici curiae appearing before this Court on behalf of Plaintiffs-Appellants-Cross-Appellees are: Professors of Civil Procedure Erwin Chemerinsky, et al.; and EarthRights International. *See* Order, Doc. 1248571 (June 8, 2010).

Amici curiae appearing on behalf of Defendants-Appellees-Cross-Appellants are: Chamber of Commerce of the United States; National Foreign Trade Council & USA*Engage; and Washington Legal Foundation. *See id.*

There were no *amici curiae* below. The United States did not appear in the district court in *Doe VIII*.

B. Rulings Under Review

Doe-I

1. Order & Memorandum Opinion Granting in Part and Denying in Part Defendants' Motion to Dismiss, entered October 14, 2005. *Doe v. Exxon Mobil Corp*., 393 F. Supp. 2d 20 (D.D.C. 2005) (Oberdorfer, J.), JA0643-61.

2. Order Granting Defendants' Motion to Dismiss, entered September 30, 2009. *Doe v. Exxon Mobil Corp*., No. 01-cv-1357, Dkt. No. 412 (D.D.C. Sept. 30, 2009), JA1278, incorporating by reference Memorandum Opinion Dismissing Plaintiffs' Complaint with Prejudice, *Doe VIII v. Exxon Mobil Corp*., 658 F. Supp. 2d 131 (D.D.C. 2009) (Lamberth, J.), JA0183.

Doe-VIII

1. Order & Memorandum Opinion Dismissing Plaintiffs' Complaint with Prejudice, entered September 30, 2009. *Doe VIII v. Exxon Mobil Corp*., 658 F. Supp. 2d 131 (D.D.C. 2009) (Lamberth, J.), JA0183-89.

C. Related Cases

Doe-I was previously before this Court as *Doe v. Exxon Mobil Corporation*, No. 05-7162 (notice of appeal filed Nov. 10, 2005). This Court found it lacked jurisdiction over ExxonMobil's interlocutory appeal, rejected ExxonMobil's petition for mandamus, and remanded for a decision on the merits. *Doe v. Exxon Mobil Corp.*, 473 F.3d 345 (D.C. Cir. 2007), JA0946. ExxonMobil's petition for panel rehearing was also denied. *See* Per Curiam Order Denying Petition for

Rehearing, *Doe v. Exxon Mobil Corp.*, No. 05-7162, Doc. 1024106 (D.C. Cir. Feb 21, 2007).

Doe-VIII has not been before this Court on any previous occasion.

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ATS	Alien Tort Statute
Defendants	Defendants-Appellees-Cross-Appellants Exxon Mobil Corporation and ExxonMobil Oil Indonesia, Inc., and their predecessors
Doe-I	*Doe I v. Exxon Mobil Corporation*, No. 1:01-cv-01357 (D.D.C.)
Doe-VIII	*Doe VIII v. Exxon Mobil Corporation*, No. 1:07-cv-01022 (D.D.C.)
EMC	Exxon Mobil Corporation and its predecessor, Mobil Corporation
EMOI	ExxonMobil Oil Indonesia, Inc. and its predecessor, Mobil Oil Indonesia, Inc.
ExxonMobil	Exxon Mobil Corporation, ExxonMobil Oil Indonesia, Inc., and their predecessors
FSIA	Foreign Sovereign Immunities Act
GAM	*Gerakan Aceh Merdeka* (Free Aceh Movement)
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IMT	Trial of the Major War Criminals Before the International Military Tribunal
MOI	Mobil Oil Indonesia, Inc. (predecessor to ExxonMobil Oil Indonesia, Inc.)

NMT	Trials of War Criminals before the Nuremberg Military Tribunals
Pertamina	*Perusahaan Tambang Minyak Negara*, Indonesian state-owned oil and gas company
Plaintiffs	Plaintiffs-Appellants-Cross-Appellees John Does I through XI, and Jane Does I through VI
S.S.	*Schutzstaffel*, Nazi Party security forces
TVPA	Torture Victim Protection Act of 1991

JURISDICTIONAL STATEMENT

The district court had jurisdiction over these matters pursuant to: (a) 28 U.S.C. §1332(a)(2), alienage jurisdiction, as the amount in controversy for each Plaintiff exceeds $75,000 and the action is between citizens of a State and citizens of a foreign state and (b) for *Doe-I*, JA0284, only, 28 U.S.C. §1350, the Alien Tort Statute ("ATS"); 28 U.S.C. §1331, federal question jurisdiction; and 28 U.S.C. §1367, supplemental jurisdiction.

This Court has jurisdiction pursuant to 28 U.S.C. §1291, as these are appeals of final orders dismissing the cases with prejudice on September 30, 2009. *See* JA0189; JA1278 (Orders). Notices of appeal were timely filed on October 22, 2009, in accordance with Federal Rule of Appellate Procedure 4.

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes are set forth in an addendum following the body of the brief.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

For *Doe-I* and *Doe-VIII*:

1. Whether the district court erred in holding that non-resident aliens lack standing to sue in U.S. courts. JA0189; JA1278.

For *Doe-I*:

2. Whether the district court erred in dismissing Plaintiffs' claims of extrajudicial killing, torture, and prolonged

arbitrary detention under the ATS, 28 U.S.C. §1350. JA0660.

3. Whether the district court erred in dismissing Plaintiffs' claims under the Torture Victim Protection Act ("TVPA"), 28 U.S.C. §1350, note. JA0660.

STATEMENT OF FACTS

In these two cases, fifteen Indonesian villagers seek to hold ExxonMobil responsible for injuries they suffered at the hands of military security personnel working exclusively for, and controlled, directed, and paid by ExxonMobil pursuant to contract.

Doe-I

Before his resignation, District Judge Oberdorfer ruled on ExxonMobil's motion for summary judgment, concluding that Plaintiffs had presented sufficient evidence to permit them to proceed to a jury trial on the question of *respondeat superior* liability for torts, including wrongful death, assault, and battery, as well as direct liability for negligent hiring and negligent supervision. JA1221-50. The district court supported its conclusion with findings of fact based on a review of over 440 summary judgment exhibits including deposition testimony and internal ExxonMobil documents. Specifically, the district court found that ExxonMobil Oil Indonesia ("EMOI") contracted for military security personnel to be provided upon request by Pertamina, an Indonesian government-owned oil and gas corporation, JA1223; JA1234 (citing Production Sharing Contract providing for security "as

may be requested by [EMOI]"), and that EMOI paid the military security personnel directly, JA1234 (citing internal documents). The district court further found that the "security personnel were 'dedicated exclusively to providing security for [EMOI's] operations'" and "they did 'not perform a broader role with respect to military activities within the region.'" JA1234 (citing Plaintiffs' Exhibits 332 and 166). In addition, the district court found EMOI's own civilian security personnel worked alongside the military security personnel. JA1234-35 (citing Plaintiffs' Exhibits 201, internal EMOI e-mail stating that "both military and MOI security guards are on duty at the main gate," and 197, e-mail stating "soldiers will take over from MOI security guards to man the inner gate").

The district court further found that EMOI had the "right to control its paid security forces" and that a reasonable finder of fact could conclude that the violent acts alleged fell within the scope of employment. JA1231-37. The district court relied on such evidence as the deposition testimony of ExxonMobil employees, JA1232-33 (citing deposition testimony that security advisor would take "business requirements" to military security leadership and say "this is what we'd like to do over the next week or over the next ten days, can you take the appropriate steps to make sure that that's done") and internal documents, JA1233. The district court cited, in particular, an internal e-mail with the subject "DEPLOYMENT OF MILITARY RESOURCES" that stated:

> Point A: 40 soldiers inclusive of 15 to handle military escorts for employee travels . . . . Soldiers will take over from MOI security guards to man the 2nd Gate.

JA1233. The district court also pointed to documents showing that EMOI asked its military security to stop village youths from sneaking into ExxonMobil's mess hall for free meals and compared those documents with the facts of *Safeway Stores, Inc. v. Kelly*, 448 A.2d 856, 859 (D.C. Ct. App. 1982), where the manager instructed the security guard to "keep juveniles out of the doorway" and look out for shoplifters. JA1232.

The district court further found there was sufficient evidence that EMOI should have known that the military security personnel posed an undue risk to local villagers. This evidence included deposition testimony of Exxon Mobil Corporation's ("EMC") Global Security Manager that he felt the soldiers "were not adequately trained to be doing the jobs they were being asked to do;" internal reports warning that the military security personnel "were undisciplined," that some acted "as information brokers, thieves, extortionists and intimidators," and that their "preference to remain secure, inside the wire results in a number of problems (boredom, harassment, improper conduct);" and e-mails discussing the military security personnel's "predilection" for rogue operations. JA1239-40.

The district court also held that a reasonable trier of fact could conclude that EMOI acted as EMC's agent with regard to the military security, finding sufficient

evidence that EMC exerted "significant control over EMOI's security." JA1243-45. The district court relied on documents illustrating that EMOI did not implement various security procedures without EMC's significant guidance and participation. JA1244.

The district court noted that ExxonMobil did not contest that Plaintiffs had suffered the alleged injuries and that, in light of the limited discovery, Plaintiffs had sufficiently demonstrated that EMOI's paid security forces committed the alleged torts. JA1228-29. Several Plaintiffs alleged that they were injured by military security personnel stationed on ExxonMobil's property.

In order to prevail, Plaintiffs will have to prove they were injured by ExxonMobil security personnel, not other troops or police present in Aceh.[1]

In addition to the evidence cited by the district court, Plaintiffs submitted evidence that:

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[1] The district court noted that Aceh was experiencing civil conflict from a separatist struggle led by GAM, JA1223, but correctly recognized that such conflict does not preclude tort claims against a private party. JA1228. The conflict in Aceh has now been resolved, *see* JA0097, and a GAM leader elected Governor of Aceh. *See* JA0115.

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Doe-VIII

Doe-VIII contains similar allegations to *Doe-I*, but is based exclusively on common law tort claims and involves more recent injuries. *Compare* JA0007-41 *with* JA0241-83.

Procedural History

Doe-I

Doe-I Plaintiffs filed suit in June 2001, seeking relief under the ATS, TVPA, and common law tort. JA0284. In October 2005, after four years of extensive briefing and consideration of the views submitted by the United States, the district court dismissed Plaintiffs' ATS and TVPA claims. JA0660. The district court granted Plaintiffs leave to amend their complaint, denying ExxonMobil's renewed motion to dismiss the state law claims. JA0784. ExxonMobil then filed several sequential stay applications in the district court and this Court, which were denied, as well as an interlocutory appeal and a petition for mandamus before this Court, which held it lacked jurisdiction over the appeal and denied the petition. JA0200; JA0946-67.

A full procedural history of *Doe-I*, including a history of the United States' Statements of Interest and the district court's response to the U.S. concerns, is set out in this Court's opinion of January 12, 2007. *Doe v. Exxon Mobil Corp.*, 473 F.3d 345 (D.C. Cir. 2007), JA0946-50.

After this Court issued its opinion, ExxonMobil filed a petition for certiorari and its fifth application for a stay. That application for a stay, like the others, was denied, JA1067, and the Supreme Court invited the Solicitor General to express the views of the United States.

While ExxonMobil's appeals were pending, discovery proceeded in the district court. At ExxonMobil's request, the district court limited discovery to:

> (1) Personal jurisdiction over EMOI; and
>
> (2) Acts or omissions in the United States by the U.S.-based Defendants or regarding knowledge on the part of U.S.-based Defendants of tortious conduct by any Defendant in Indonesia.

JA0831-32. Documents located within Indonesia were excluded from production, except that ExxonMobil was ordered to produce documents located there that it reasonably anticipated it would use in its defense after any necessary authorization by the Government of Indonesia. *Id.* ExxonMobil's counsel represented that he understood both the Indonesian government and the State Department to be "comfortable" with the discovery contemplated by the district court. JA0850-51. Discovery disputes were referred to Magistrate Judge Kay. *See* JA1483-84

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In May 2008, the Solicitor General, in a brief also signed by the Legal Advisor to the State Department, recommended that ExxonMobil's petition for certiorari be denied. JA1167. In that brief, the United States explained that:

> In light of [this case's] procedural history and ***the absence of a request by the United States that the case be dismissed in its entirety***, the court of appeals reasonably regarded petitioners' interlocutory appeal as one from the denial of a motion to dismiss state-law tort claims based on an assertion by private defendants, not by the Executive, that the litigation itself would have adverse consequences for the Nation's foreign policy interests . . . .
>
> [T]he majority's discussion of the mandamus issue indicates that, if it had believed the circumstances of this case to be as petitioners paint them, petitioners would have been granted the relief they seek, albeit under the procedural heading of mandamus rather than appeal as of right.

JA1174, JA1185 (internal citations omitted and emphasis added). The Supreme Court denied ExxonMobil's petition on June 16, 2008. JA1187.

In its opinion, this Court emphasized that if the State Department had additional concerns about the litigation or if this Court had misinterpreted the State Department's position, the United States was "free to file further letters or briefs

with the district court expressing its views," *Exxon*, 473 F.3d at 354, JA0962, but the United States did not raise any further concerns with the district court.

Discovery as permitted by the district court was completed without additional comment from the State Department. Following the close of discovery, the district court considered and granted in part and denied in part Defendants' motion for summary judgment. JA1251; *supra* pp.2-7. The district court also denied EMOI's motion to dismiss for lack of personal jurisdiction. JA1189. The district court then ordered the parties to submit statements regarding "whether the matter is ripe for trial or if additional discovery is necessary." JA1251A. The parties submitted competing plans that were never ruled upon. No additional discovery took place.

In September 2008, *Doe-I* was reassigned from Judge Oberdorfer to Judge Lamberth. JA1252. After reassignment, ExxonMobil filed a renewed motion to dismiss on political question grounds or, in the alternative, for judgment on the pleadings, or for summary judgment. JA0236. The district court denied the motion in the same order in which it *sua sponte* dismissed Plaintiffs' claims for lack of standing. JA1278.

Doe-VIII

Doe-VIII, which contains only common law tort claims, was filed in 2007. JA0001. The United States did not file a Statement of Interest in *Doe-VIII*. On

September 17, 2007, ExxonMobil moved to dismiss the case arguing eight grounds for dismissal, including that the *Doe-VIII* Plaintiffs, as non-resident aliens, lack standing to sue a U.S. company in the federal courts. JA0003. This ground for dismissal was never argued in *Doe-I*. On September 30, 2009, the district court granted ExxonMobil's motion on standing grounds. JA0183-89.

The Orders on Appeal

All Plaintiffs appeal the 2009 Orders, JA0189 and JA1278, in their entirety.

Doe-I Plaintiffs also appeal part, but not all, of the October 2005 Order, JA0660. Specifically, *Doe-I* Plaintiffs do not appeal the dismissal of PT Arun LNG Co., a company partially owned by the Indonesian government, as a defendant, or the dismissal of their ATS claims based on genocide or crimes against humanity. *Doe-I* Plaintiffs do appeal the dismissal of the ATS claims based on extrajudicial killing, torture, and prolonged arbitrary detention, and the dismissal of their TVPA claims.

SUMMARY OF ARGUMENT

This Court should permit Plaintiffs' claims to proceed. The evidence obtained during three years of discovery substantiated Plaintiffs' allegations and persuaded the district court (Judge Oberdorfer) that Plaintiffs were entitled to proceed to a jury trial on their state law tort claims.

Upon transfer, a new district court (Judge Lamberth) dismissed Plaintiffs' claims for lack of standing, holding that a "lesser known" prudential rule bars non-resident aliens from bringing claims in U.S. courts, even where the Defendant is a U.S. citizen. The district court's proposed prudential rule conflicts with historical practice, statute, and precedent. Indeed, the First Judiciary Act demonstrates the Founders' intent to provide non-resident aliens with access to U.S. courts. This Court should reverse and remand the state law claims for a trial on the merits.

In addition to state law claims for, *inter alia*, wrongful death, assault, and battery, *Doe-I* also raised claims under the ATS and TVPA for extrajudicial killing, torture, and (under the ATS only) prolonged arbitrary detention.[2] The district court's holding that aiding and abetting is not available under the ATS rests on a now-overturned decision and stands alone against the weight of authority holding that aiding and abetting liability is indeed available. In light of this intervening authority, this Court should reverse the October 14, 2005 decision and, if it chooses to reach this question, hold, consistent with the Supreme Court's decision in *Sosa v. Alvarez-Machain* and Judge Edwards' opinion in *Tel-Oren v. Libyan Arab Republic*, that domestic common law, not international law, creates

[2] Plaintiffs do not appeal the dismissal of the remaining ATS claims that were originally pled. *Supra* p.11.

and defines the civil actions to be made available under the ATS, including the standard for aiding and abetting liability.

The district court recognized that Defendants could, in the alternative, be directly liable for the alleged torts under the "color of law" doctrine, but concluded, wrongly, that "color of law" jurisprudence was not available under the ATS. Circuits to reach this question uniformly hold that private parties acting under color of law may be held liable under the ATS for violations of international law that require state action. Thus, the October 14, 2005 decision on "color of law" should be reversed. Because evidence uncovered in discovery demonstrates that ExxonMobil meets several of the applicable tests for state action, this Court should remand for the district court to undertake this fact-intensive analysis.

Plaintiffs' TVPA claims were dismissed because the court found (1) corporations could not be liable under the TVPA and (2) determining whether the torture and killing were committed under "color of law" as explicitly required by the text of the statute posed nonjusticiability concerns (a conclusion that would also apply to the ATS claims). The text, context, and purpose of the TVPA indicate that corporations are, contrary to the district court's conclusion, directly liable under the statute. Alternatively, corporations can be liable as aiders and abettors.

Finally, determining whether a private party acted under "color of foreign law" does not impermissibly require adjudication of another country's actions. Such a reading renders the TVPA a nullity, as the text of that statute expressly renders liable ***only*** those individuals acting under color of foreign law and is equally erroneous when applied to the ATS. Individual actions taken in violation of a country's laws and unratified by its government do not implicate the official actions or policies of that government. Nonetheless, consistent with decades of authority, such conduct can be under "color of law." No justiciability concerns are posed, particularly where, as here, the military security personnel were dedicated exclusively to providing security for EMOI, did not perform general law and order duties, and acted under ExxonMobil's direction and control. The narrow question of whether ExxonMobil can be considered to have acted "under color of law" is even further removed from the separation of powers concerns that animate the act of state and political question doctrines.

The decisions below should be reversed and the cases remanded for consideration of the merits.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews the district court's dismissal of these cases for lack of standing *de novo*. *Muir v. Navy Fed. Credit Union*, 529 F.3d 1100, 1105 (D.C.

Cir. 2008). All material allegations in the complaint must be accepted as true and the complaint construed in the light most favorable to the plaintiff. *Id.* at 1105. Courts must assume plaintiffs state a valid claim and would be successful on the merits. *Id.*; *see also Info. Handling Servs. v. Defense Automated Printing Servs.*, 338 F.3d 1024, 1029 (D.C. Cir. 2003).

Dismissals for lack of subject matter jurisdiction or for failure to state a claim are also reviewed *de novo*. *Munsell v. Dep't of Agriculture*, 509 F.3d 572, 578 (D.C. Cir. 2007); *Muir*, 529 F.3d at 1108. A complaint's factual allegations—including mixed questions of law and fact—must be treated as true and all reasonable inferences drawn in the plaintiff's favor. *Erickson v. Pardus*, 127 S. Ct. 2197, 2200 (2007). A motion to dismiss may be granted only if the complaint cannot be supported by "any set of facts consistent with the allegations in the complaint." *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1969 (2007); *accord Erickson*, 127 S. Ct. at 2200.

II. PLAINTIFFS HAVE STANDING

The district court found and ExxonMobil concedes that Plaintiffs have Article III standing to bring their claims of negligent hiring, negligent supervision, assault, battery, and related torts against ExxonMobil for the conduct of its paid security personnel. JA0186. That is, Plaintiffs (1) have suffered an injury in fact; (2) there is a causal connection between the injury and conduct complained of; and

(3) the injury can be redressed by a favorable decision. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Indeed, *Doe-I* proceeded through eight years of litigation before the original district court, including a motion for summary judgment; a hearing in this Court; and a petition for certiorari and application for a stay to the Supreme Court, without any doubts being raised about Plaintiffs' standing. Nonetheless, relying on what it described as "a lesser known prudential limitation," the district court[3] dismissed Plaintiffs' claims in both *Doe-I* and *Doe-VIII* pursuant to "the general rule that non-resident aliens have no standing to sue in United States courts." JA0186; JA1278.

To reach this conclusion, the district court interpreted *Berlin Democratic Club v. Rumsfeld*, 410 F. Supp. 144, 152 (D.D.C. 1976), a case concerning whether the Fourth and Sixth Amendments to the U.S. Constitution protect an Austrian citizen in Berlin from wiretapping, as announcing a general rule that non-resident aliens cannot sue in U.S. courts. JA0186-87. The district court identified three exceptions to the general rule (where the *res* is in the United States; the statutory scheme allows suits by non-resident aliens; or the non-resident alien is seized abroad and transported back to the United States for prosecution), but held that because none of these "established exceptions" applied and there was no need to

[3] The cases were reassigned from Judge Oberdorfer to Judge Lamberth in September 2008. JA0136; JA1252.

create a new exception, Plaintiffs lacked standing. *Id*. The district court erred. Unlike *Berlin*, Plaintiffs here do not bring any Constitutional claims against the United States. *Berlin* has never been cited, until the decision below, as establishing a general rule that non-resident aliens lack standing to bring common law tort claims. To the contrary, since the founding of the Republic, non-resident aliens have been permitted to bring tort, contract, and other common law claims in state court and, where appropriate, in federal court against U.S. citizen defendants. The district court's prudential rule is inconsistent with historical practice, statute, and precedent. And, as *amici* will describe, the district court's proposed rule is not supported by the principles of judicial self-restraint embodied in the prudential standing doctrine. Moreover, to the extent a "statutory scheme" is required to enable plaintiffs to bring state common law claims in district court, the alienage jurisdiction statute, like the ATS and Foreign Sovereign Immunities Act ("FSIA"), is such a scheme and both federal and state courts traditionally permit such claims.

A. Since the Founding of the Republic, Non-Resident Aliens Have Been Permitted to Bring Suit in State and Federal Court

The Supreme Court has repeatedly emphasized that "alien citizens, by the policy and practice of the courts of this country, are ordinarily permitted to resort to the courts for the redress of wrongs and the protection of their rights." *Disconto Gesellschaft v. Umbreit*, 208 U.S. 570, 578 (1908); *see also Rasul v. Bush*, 542 U.S. 466, 484 (2004)("United States courts have traditionally been open to

nonresident aliens"); *Pfizer v. Gov't of India*, 434 U.S. 308, 318-19 (1978); *Bridget & McGovern v. Philadelphia & Reading Ry. Co*., 235 U.S. 389 (1914); *The Sapphire*, 78 U.S. 164, 167 (1870)("A foreign sovereign, as well as any other foreign person, who has a demand of a civil nature against any person here, may prosecute it in our courts."); *McKenna v. Fisk*, 42 U.S. 241, 248 (1843)(courts are open to non-resident aliens); *accord Cardenas v. Smith*, 733 F.2d 909, 913 (D.C. Cir. 1984); *Constructores Civiles de Centroamerica, S.A. v. Hannah*, 459 F.2d 1183, 1190 (D.C. Cir. 1972)(non-resident aliens have standing under Administrative Procedure Act: a person may be just as "affected or aggrieved" by agency action "if he is a non-resident alien as if he were a resident alien"); Dag Ytreberg, 3 C.J.S. *Aliens* §168 (Supp. 2007). Indeed, far from recognizing a general rule barring suits by aliens, the Supreme Court has held that "the privilege of suit has been denied only to governments at war with the United States, or to those not recognized by this country." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 409 (1964)(internal citations omitted); *accord, e.g., Watts, Watts & Co. v. Unione Austriaca Di Navigazione*, 248 U.S. 9 (1918); *Farbenfabriken Bayer AG v. Sterling Drug*, 251 F.2d 300 (3d Cir. 1958); *Japanese Gov't v. Commercial Cas. Ins. Co*., 101 F. Supp. 243 (S.D.N.Y. 1951).

The Constitution provides that the judicial power of the United States extends to controversies between citizens of a U.S. State and foreign citizens. U.S.

Const., art. iii, §2, cl.1. In the Federalist papers, Alexander Hamilton explained that the "federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned . . . . So great a proportion of the cases in which foreigners are parties, involve national questions, that it is by far most safe and most expedient to refer all those in which they are concerned to the national tribunals." The Federalist No. 80, at 406-07.

In the First Judiciary Act, the first Congress authorized federal court jurisdiction over "all suits of a civil nature at common law or in equity," where "an alien is a party." The Judiciary Act of 1789, 1 Stat. 73 §11 (Sept. 24, 1789). The alienage jurisdiction statute was subsequently amended to provide that the suit must be between a citizen of a U.S. State and a foreign citizen, and codified at 28 U.S.C. §1332(a)(2). Section 1332(a) also provides that an alien admitted to the United States for permanent residence is deemed a citizen of the State in which the alien is domiciled, making clear that the alienage provision applies to non-resident aliens. As the State Department pointed out when asked to comment on a bill that would have abolished diversity jurisdiction (but retained alienage jurisdiction), "federal courts have exercised jurisdiction in cases involving aliens since the first Judiciary Act in 1789 . . . . [W]hile the Department has great confidence in the competence, integrity and impartiality of the State court systems, the availability of civil jurisdiction in Federal courts under a single nationwide system of rules tends

to provide a useful reassurance to foreign governments and their citizens." Marian Nash Leich, *Aliens*, 77 Am. J. Int'l L. 135 (1983)(quoting letter from Powell A. Moore, Assistant Secretary for Congressional Relations, U.S. State Dep't, to Congressman Kastenmeier, Aug. 9, 1982).

In early cases interpreting the First Judiciary Act, the Supreme Court heard several cases brought by non-resident alien plaintiffs, and held that the citizenship of the defendants must be properly alleged for jurisdiction to lie. *See Hodgson v. Bowerbank*, 5 Cranch 303, 9 U.S. 303, 1809 WL 1627 (1809); *Jackson v. Twentyman*, 27 U.S. 136 (1829); *see also Commercial Bank v. Green*, 6 F. Cas. 219 (D. Mich 1878)("the clear import of the act of congress is to give to an alien the right to sue a citizen of any state of the Union in the circuit court of any district, where the defendant is found and served"). These cases were not dismissed for lack of standing. To the contrary, federal courts, including this Court, have heard alienage jurisdiction cases brought by non-resident aliens for over 200 years. In addition to *Exxon*, 473 F.3d 345, a non-exhaustive sample of recent cases brought by non-resident aliens under §1332(a)(2) follows. All fall outside the "three exceptions" to the general bar identified by the district court:

- *Janovic v. Int'l Crisis Group*, 494 F.3d 1080 (D.C. Cir. 2007)(tort claims for harm suffered in Serbia);
- *Friends for All Children v. Lockheed Aircraft Corp.*, 746 F.2d 816, 824 (D.C. Cir. 1984)(tort claims);

- *Ilan-Gat Eng'rs, Ltd. v. Antigua Int'l Bank*, 659 F.2d 234 (D.C. Cir. 1981)(contract claims concerning sewage work in West Indies);

- *Bano v. Union Carbide Corp*., 361 F.3d 696 (2d Cir. 2004)(organization lacked standing but individual non-resident alien plaintiffs could proceed with state common law claims);

- *Bigio v. Coca-Cola Co.*, 239 F.3d 440 (2d Cir. 2000)(common law conversion claims concerning property in Egypt);

- *Iraola & CIA, S.A. v. Kimberly-Clark Corp*., 232 F.3d 854 (11th Cir. 2000)(tortious interference claims concerning distribution of products in Argentina);

- *Lony v. E.I. DuPont de Nemours & Co.* 935 F.2d 604 (3d Cir. 1991)(tortious misrepresentation and common-law fraud);

- *Kontoulas v. A.H. Robins Co*., 745 F.2d 312 (4th Cir. 1984)(personal injury claims);

- *Pasco Int'l (London) Ltd. v. Stenograph Corp*., 637 F.2d 496 (7th Cir. 1980)(tortious interference with contracts in Nigeria);

- *DeVries v. Starr*, 393 F.2d 9 (10th Cir. 1968)(appeal by non-resident alien of trial verdict on tort and contract claims relating to misuse of trade secrets);

- *Gov't of Rwanda v. Rwanda Working Group*, 150 F. Supp. 2d 1 (D.D.C. 2001)(contract claims);

- *Films by Jove v. Berov*, 154 F. Supp. 2d 432, 447 (E.D.N.Y. 2001)(foreign company has standing);

- *In Re Paris Air Crash*, 69 F.R.D. 310 (C.D. Cal. 1975)(tort claims).

The cases do not all address standing explicitly. Mindful of the district court's admonition that cases in which jurisdiction is assumed are not precedent for the

existence of jurisdiction, JA0185, Plaintiffs point to this history of litigation to illustrate that, as courts have a duty to assure themselves that plaintiffs have standing, *sua sponte* if need be at the outset of the litigation, *see, e.g., Friends of the Earth v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 180 (2000); *De Jesus Ramirez v. Reich*, 156 F.3d 1273, 1276 (D.C. Cir. 1998), this long line of cases at the very least presents some evidence that a general rule barring non-resident aliens from U.S. courts is not widely recognized or applied. In *Doe-I*, this Court found it lacked jurisdiction over ExxonMobil's interlocutory appeal, but the opinion assumed the case would proceed in the district court. *Exxon*, 473 F.3d at 354, JA0960-61. Presumably, if Plaintiffs lacked standing, this Court would have dismissed the appeal, and the case, on that ground three years ago.

The alienage jurisdiction statute, §1332(a)(2), is a subject matter jurisdictional statute analogous to 28 U.S.C. §1350 and 28 U.S.C. §1602, providing for jurisdiction in federal court if the plaintiff has a cause of action under a separate statute or common law. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 721-25 (2004)(ATS provides jurisdiction over certain suits by aliens where the common law provides a cause of action); *Oveissi v. Islamic Republic of Iran*, 573 F.3d 835, 841 (D.C. Cir. 2009)(FSIA "operates as a 'pass-through' to state law principles")(internal citation omitted). Many cases have been brought by non-resident aliens pursuant to the jurisdictional grants of the ATS and FSIA, further

illustrating that there is no prudential bar. *E.g.*, *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 491 (1983)(common law contract claims concerning purchase of cement in Nigeria; jurisdiction premised on FSIA); *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163 (2d Cir. 2009), *cert. denied*, 2010 WL 2571888 (U.S. June 29, 2010)(state law and ATS claims);[4] *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000)(common law and ATS claims); *al-Quraishi v. Nakhla*, No. 08-cv-1696, 2010 WL 3001986, at *3-6 (D. Md. July 29, 2010)(nonresident aliens have standing to bring state law tort claims); *Arias v. Dyncorp*, 517 F. Supp. 2d 221, 226 (D.D.C. 2007); *Bowoto v. Chevron*, No. 99-cv-02506, 2007 WL 2349341 (N.D. Cal. Aug. 14, 2007).

State practice also provides no support for the district court's holding. State courts have long recognized that "[a]n alien can maintain in our courts an action to enforce rights cognizable at common law" and that no specific legislation is required to entitle an alien to maintain such an action. *Bonthron v. Phoenix Light & Fuel Co.*, 71 P. 941, 943-44 (Sup. Ct. Ariz. Terr. 1903); *see also Berger v. Stevens*, 148 S.E. 244, 245 (Sup. Ct. N.C. 1929)("Can a nonresident alien sue in the courts of this state? We think a resident of any friendly nation can sue."); *Edwards v. Schillinger*, 91 N.E. 1048, 245 Ill. 231 (Sup. Ct. Ill. 1910); *Kaneko v.*

[4] Standing must be demonstrated for each claim. *DaimlerChrysler v. Cuno*, 547 U.S. 332, 353-54 (2006).

Atchison, T. & S.F. Ry. Co., 164 F. 263 (S.D. Cal. 1908); *Peabody v. Hamilton*, 106 Mass. 217, 220 (Sup. Ct. Mass. 1870)(not necessary for foreign plaintiff to be within jurisdiction in order to institute an action). Under general survival and wrongful death statutes, non-resident aliens are recognized to have standing to bring claims in state court, particularly negligence claims. *See, e.g.*, *Saveljich v. Lytle Logging & Mercantile Co.*, 173 F. 277 (9th Cir. 1909); *Patek v. Am. Smelting & Refining Co.*, 154 F. 190 (8th Cir. 1907); *Vetaloro v. Perkins*, 101 F. 393 (D. Mass. 1900); *Lykiardopoulo v. New Orleans & C.R., Light & Power Co.*, 53 So. 575 (Sup. Ct. La. 1910); *Mascitelli v. Union Carbide Co.*, 115 N.W. 721 (Sup. Ct. Mich. 1908); *Low Moor Iron Co. v. La Bianca's Adm'r*, 55 S.E. 532 (Sup. Ct. App. Va. 1906); *Romano v. Capital City Brick & Pipe Co*., 101 N.W. 437, 438 (Sup. Ct. Iowa 1904)("a nonresident alien may maintain suits in the courts without any special statutory authority"); *Szymanski v. Blumenthal*, 52 A. 347 (Super. Ct. Del. 1902); *Kellyville Coal v. Petraytis*, 63 N.E. 94, 95 (Sup. Ct. Ill. 1902)("neither citizenship nor residence is a requisite to entitle a person to sue in the courts of Illinois"); *Cetofonte v. Camden Coke Co*., 75 A. 913 (Ct. Err. & App. N.J. 1910); *see also Davidsson v. Hill*, 1901 WL 11591, 2 K.B. 606 (King's Bench Division June 19, 1901)(non-resident alien can maintain suit against Briton for negligence causing death on the high seas); *The Explorer*, 1869 WL 10248 (High Ct. Adm.

Nov. 22, 1870); Laura Dietz, et al., *Death*, 22A Am. Jur. 2d Death §107 (generally, non-resident aliens may recover for death of a relative).[5]

In addition, over 200 years ago, under English common law, non-resident aliens were recognized to have standing to sue for torts committed outside the jurisdiction: "if A becomes indebted to B, or commits a tort upon his person or upon his personal property in Paris, an action in either case may be maintained against A in England, if he is there found." *McKenna*, 42 U.S. at 248 (citing *Mostyn v. Fabrigas*, 1 Cowp. 161 (1774)). Relying on *Mostyn*, the Supreme Court concluded that the courts in England have been open "to foreigners as well as to subjects" and that the courts in the United States would likewise be open. *McKenna*, 42 U.S. at 249; *see also Taxier v. Sweet*, 2 U.S. 81 (1766)(transitory actions triable anywhere); *Dennick v. Railroad Co*., 103 U.S. 11 (1880); *Blake v. Capitol Greyhound Lines*, 222 F.2d 25, 26 (D.C. Cir. 1955); *White v. Pepsico*, 568 So.2d 886, 888 (Sup. Ct. Fla. 1990); Thomas Muskus, et al, 21 C.J.S. *Courts* §29 (2010). A review of these cases indicates no bar to non-resident aliens, or any limitations akin to those described by the district court.

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[5] State law claims brought by non-resident aliens may be removed to federal court pursuant to 28 U.S.C. §1441. *See, e.g.*, Notice of Removal, *Acosta Orellana v. Croplife International*, No. 08-cv-01790 (D.D.C. Oct. 21, 2008); *Rastall v. CSX Transp., Inc.*, 697 A.2d 46 (D.C. Ct. App. 1997)(trying state contract claims brought by non-resident alien after removal and subsequent remand).

The district court drew its general rule from *Berlin*, but this case, unlike *Berlin*, involves no Constitutional claims against the United States and thus *Berlin*'s holding has limited relevance here. *Cf. DKT Mem'l Fund v. Agency for Int'l Dev.*, 887 F.2d 275 (D.C. Cir. 1989)(affirming decision that aliens had standing on statutory claims but not for Constitutional claims); *Constructores*, 459 F.2d at 1189-90. The district court cited no case applying *Berlin*'s framework to common law tort claims. Moreover, citing *Boumediene v. Bush*, 128 S. Ct. 2229, 2262 (2008), the district court conceded that courts have recently "allowed non-resident aliens to bring certain constitutional challenges." JA0187. Indeed, this Circuit holds "[i]t is beyond peradventure that a foreign nonresident, non-hostile alien may, under some circumstances, enjoy the benefits of certain constitutional limitations imposed on United States actions. In more and more circumstances, federal courts have recognized the standing of nonresident aliens to invoke the protections afforded by the United States Constitution." *Cardenas*, 733 F.2d at 915 (citing cases); *see also, e.g., U.S. v. Demanett*, 629 F.2d 862, 866 (3d Cir. 1980)(4th Amendment protects Colombian nationals on high seas); *In Re Aircrash in Bali, Indonesia*, 684 F.2d 1301, 1308 n.6 (9th Cir. 1982)(Australian plaintiffs have standing). But whether or not *Berlin*'s rule has "beyond peradventure" been relaxed as to Constitutional claims against the United States, it is clear that no prudential rule bars tort suits by non-resident aliens against private U.S. citizen

defendants. The common law has for 200 years permitted such suits, particularly where, as here, the defendant resides in the relevant jurisdiction.

B. The District Court's Case-by-Case Analysis Was Flawed

The district court, citing *Cardenas*, also undertook, in the alternative, a "case by case" analysis in *Doe-VIII*. JA0188. The district court did not conduct such an analysis in *Doe-I*, but simply stated that it was dismissing the claims for the reasons set forth in its *Doe-VIII* opinion. JA1278. Putting aside whether a "case by case" analysis is appropriate, the district court's analysis misapprehends both the record in these cases and appears to reach the merits of Plaintiffs' claims. Neither of the two factors considered by the district court revokes Plaintiffs' standing.

First, the lower court's finding "that the alleged torts were committed during a period of martial law" is simply incorrect. The district court relied on a submission by *Doe-VIII* Defendants of a declaration of martial law dated May 18, 2003. JA0188. But *Doe-I* was ***filed*** in 2001, well before the declaration of martial law in 2003. JA0190. Thus, this factor is facially inapplicable to *Doe-I*. The declaration is also inapplicable to *Doe-VIII* Plaintiffs, who were all injured in June and October 2004, after the period of martial law ended. JA0060.[6] *No* Plaintiffs,

[6] On its face, the cited exhibit provides that the period of martial law was to last for six months, until November 2003, unless extended. Plaintiffs' Exhibit U, JA0127, which was not cited by the district court, is a Presidential Declaration

in either case, were injured during a period of martial law. Moreover, even if accurate, this factor does not preclude a tort claim against a private party, as the prior district court (Judge Oberdorfer) recognized at summary judgment. *See* JA1228-29; *see also Linder v. Portocarrero*, 963 F.2d 332, 336 (11th Cir. 1992)("there is no foreign civil war exception to the right to sue for tortious conduct").

Second, although the district court recognized that Plaintiffs' claims meet the Article III requirements of causation and redressability, JA0186, it found the allegation that "members of the Indonesian military committed the torts" weighed against standing. JA0188. The district court did not elaborate on its reasoning, but standing is distinct from whether plaintiffs have a viable claim for relief. *DKT Mem'l Fund*, 887 F.2d at 287 n.6; *Women's Equity Action League v. Cavazos*, 879 F.2d 880, 886 (D.C. Cir. 1989)(citing *Warth v. Seldin*, 422 U.S. 490 (1975)). As Judge Oberdorfer explained at summary judgment, "the question, then, is whether Defendants may be liable for the security force's conduct." JA1229. Plaintiffs presented sufficient evidence at summary judgment to proceed to a jury on several theories of liability, including *respondeat superior*. JA1229-41. The district court (Judge Lamberth) appears to have concluded that even if Plaintiffs can prove that

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indicating that martial law was lifted in May 2004, before Plaintiffs were injured and control reverted to the Governor of Aceh in a state of civil emergency.

the military security personnel who inflicted their injuries were ExxonMobil's servants acting within the scope of their employment, Plaintiffs cannot bring their claims before a court within the Defendants' home jurisdiction. The district court's decision should be reversed.

III. *DOE-I*'S ATS & TVPA CLAIMS SHOULD PROCEED

The ATS provides jurisdiction over civil actions by aliens for violations of the law of nations, provided that the abuse violates a "norm of international character accepted by the civilized world," *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004). The TVPA provides a statutory cause of action for torture and summary execution. 28 U.S.C. §1350, note. Because Plaintiffs' claims under both statutes were well pled and are consistent with overwhelming authority, this Court should reverse the decision below and remand for consideration on the merits.

A. Plaintiffs State a Claim Under the ATS

1. Torture, Extra-Judicial Execution, and Prolonged Arbitrary Detention Are *Sosa*-Qualifying Violations

Torture, extra-judicial execution,[7] and prolonged arbitrary detention[8] are indisputably actionable under the ATS pursuant to the "historical paradigm" test set forth in *Sosa*, 542 U.S. at 724-25.[9] There is no contrary authority.

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[7] *See, e.g., Comm. of U. S. Citizens Living in Nicar. v. Reagan*, 859 F.2d 929, 940 (D.C. Cir. 1988)(quoting the Restatement (Third) of Foreign Relations Law ("Restatement") §702 & cmt. n (1987)); *Doe v. Constant*, 354 Fed. App'x 543, 544 n.1 (2d Cir. 2009); *Chavez v. Carranza*, 559 F.3d 486, 490 (6th Cir. 2009); *Cabello*

2. Aiding and Abetting Liability Is Clearly Established Under the ATS

The district court relied on the now superseded decision in *In re S. Afr. Apartheid Litig.*, 346 F. Supp. 2d 538, 549-51 (S.D.N.Y. 2004), to hold that the ATS did not permit aiding and abetting liability. That decision was overruled in *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 260 (2d Cir. 2007), which explicitly provided that aiding and abetting liability is available under the ATS. *See also Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 256 (2d Cir. 2009)(*cert. pending*)("Talisman").

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v. Fernandez-Larios, 402 F.3d 1148, 1157-58 (11th Cir. 2005); *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 249 (2d Cir. 2003).

[8] *See Comm. of U.S. Citizens*, 859 F.2d at 940; *Jean v. Dorelien*, 431 F.3d 776 (11th Cir. 2005); *Hilao v. Estate of Marcos*, 103 F.3d 767, 795 n.9 (9th Cir. 1996); *Wiwa v. Royal Dutch Petroleum Co.*, 626 F. Supp. 2d 377, 382 n.4 (S.D.N.Y. 2009); *Xuncax v. Gramajo*, 886 F. Supp. 162, 184 (D. Mass. 1995); *accord Sosa*, 542 U.S. at 737 (quoting Restatement §702).

[9] Plaintiffs' allegations satisfy each claim. The physical abuse—including the loss of a hand and eye (JA0266 ¶67), brutal beatings with instruments (JA0266 ¶68), and three gunshot wounds in the leg, smashed skull and kneecap, cigarette burns, among other abuse (JA0267 ¶69)—constitutes torture. 28 U.S.C. §1350, note §3(b); *see Price v. Socialist People's Libyan Arab Jamahiriya*, 389 F.3d 192, 195 (D.C. Cir. 2004). The killings alleged (JA0269-70 ¶¶75-77) were not judicially authorized, satisfying all elements of extrajudicial execution. 28 U.S.C. §1350, note §3(a); *see Cabello*, 402 F.3d at 1157-58. Plaintiffs were detained and abused for periods ranging from several weeks to several months (JA0302-0305 ¶¶ 49-51, 53), amounting to prolonged arbitrary detention. *E.g., Kiobel v. Royal Dutch Petroleum Co.*, 456 F. Supp. 2d 457, 466 (S.D.N.Y. 2006).

Virtually every decision, other than the decision below, has affirmed the availability of aiding and abetting liability under the ATS, both before[10] and after[11] *Sosa*. The main issue that has divided the lower courts since *Sosa* is not whether aiding and abetting liability is available, but whether the proper standard for such liability is derived from federal common law or international law.[12] Indeed, aiding and abetting liability was recognized shortly after the enactment of the ATS in an opinion by then Attorney General William Bradford. *See Breach of Neutrality*, 1 Op. Att'y Gen. 57, 59 (1795)(ATS action available against those who "aided and abetted" an attack on the British colony in Sierra Leone). *Sosa* relied on the

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[10] *See, e.g.*, *Hilao*, 103 F.3d at 779; *Abebe-Jira v. Negewo*, 72 F.3d 844, 845-48 (11th Cir. 1996); *Burnett v. Al Baraka Inv. & Dev. Corp.*, 274 F. Supp. 2d 86, 100 (D.D.C. 2003) (proof that defendants were aiders and abettors would support liability under ATS); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1355-56 (N.D. Ga. 2002), *abrogated in part on other grounds by Aldana v. Del Monte Fresh Produce*, 416 F.3d 1242 (11th Cir. 2005); *Tachiona v. Mugabe*, 169 F. Supp. 2d 259, 312 (S.D.N.Y. 2001), *rev'd on other grounds*, 386 F.3d 205 (2d Cir. 2004); *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117, 127-28 (E.D.N.Y. 2000).

[11] *See, e.g., Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1258 (11th Cir. 2009); *Romero v. Drummond Co.*, 552 F.3d 1303, 1315 (11th Cir. 2008); *Aldana v. Del Monte Fresh Produce, N.A.*, 416 F.3d 1242, 1248 (11th Cir. 2005); *Cabello*, 402 F.3d at 1157-58; *Lizarbe v. Rondon*, 642 F. Supp. 2d 473, 491 (D. Md. 2009); *Bowoto*, 557 F. Supp. 2d at 1090; *Almog v. Arab Bank, PLC*, 471 F. Supp. 2d 257, 285-86 (E.D.N.Y. 2007); *Kiobel*, 456 F. Supp. 2d at 463-64; *In re Agent Orange Prod. Liab. Litig.*, 373 F. Supp. 2d 7, 52 (E.D.N.Y. 2005); *Doe v. Qi*, 349 F. Supp. 2d 1258, 1332 (N.D. Cal. 2004); *Doe v. Saravia*, 348 F. Supp. 2d 1112, 1148-49 (E.D. Cal. 2004).

[12] There is a split between the Second and Eleventh Circuits concerning whether federal common law or international law provides the standard for aiding and abetting liability under the ATS.

Bradford opinion in its analysis of the history and purpose of the ATS. 542 U.S. at 721.

U.S. courts have recognized secondary liability for violations of international law since the founding of the Republic. *See, e.g., Talbot v. Jansen*, 3 U.S. (3 Dall) 133, 167-68 (1795); *Heinfield's Case*, 11 F. Cas. 1099, 1103, No. 6360 (C.C.D. Pa. 1793)(future Chief Justice John Jay, C.J.)(noting liability "under the law of nations, by committing, aiding or abetting hostilities"); *The Amiable Nancy*, 1 F. Cas. 765, 768, No. 331 (C.C.D.N.Y. 1817)("owners of a privateer are liable for torts committed by captains whom they may employ"). Secondary liability was also a common feature of Founding-era statutes addressing international offenses. *See* Congress's Act of April 30, 1790, Ch. 9, §10, 1 Stat. 114 (1790)(deeming "an accessary [sic] to . . . piracies" anyone who "knowingly and willingly aid[ed]" piracy).

Given the district court's erroneous refusal to recognize aiding and abetting liability under the ATS, this Court need only reverse and remand this issue to the district court to consider the proper standard for aiding and abetting liability. In the event this Court decides to reach this question, Plaintiffs address it. The application of the standard to the evidence in this case should first be decided by the district court. Nonetheless, Plaintiffs' allegations satisfy any standard.

a. *Sosa* Provides for Federal Common Law Tort Principles To Be Used in ATS Cases

Under *Sosa*, customary international law norms satisfying the historical paradigm test (that is, where the abuse violates a norm that is "specific, universal, and obligatory") provide the basis for subject matter jurisdiction, while federal common law provides the cause of action. 542 U.S. at 724 (ATS "jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action"); *see also Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 777-78 (D.C. Cir. 1984)(Edwards, J. concurring)("the law of nations never has been perceived to create or define the civil actions to be made available … states leave that determination to their respective municipal laws").[13]

The application of domestic common law standards is essential because international law does not ordinarily provide for the means of its own enforcement in domestic courts. This was the main point of disagreement between Judge Edwards and Judge Bork in *Tel-Oren*, 726 F.2d 774. *Compare id.* at 777-82 (Edwards, J. concurring) *with id.* at 810-16 (Bork, J. concurring). In *Sosa*, the

[13] *See* Br. for U.S. as *Amicus Curiae* at 20, *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163 (2d Cir. 2009)(No. 09-34)("the validity of a federal common-law claim under *Sosa* should generally be treated as a merits question, with the ATS conferring subject-matter jurisdiction so long as the allegations of a violation of customary international law are not plainly insubstantial").

Supreme Court endorsed Judge Edwards' view that domestic rules govern the litigation of ATS claims in U.S. courts. *Sosa*, 542 U.S. at 731.

In reaching this conclusion, the Supreme Court conducted an extensive review of the Founders' understanding of the common law and the history of the ATS, which demonstrates that the Founders expected federal common law to supply the rules in ATS cases. When the ATS was enacted, no clear distinction between common law and customary international law existed. *See* Br. of Professors of Federal Jurisdiction and Legal History as *Amici Curiae* in Support of Respondents, *Sosa*, 542 U.S. 692 (2004)(No. 03-339). Courts routinely treated causes of action arising under international law as they did other common law torts—by applying general common law principles. *See, e.g.*, *Talbot*, 3 U.S. at 156-58; *U.S. v. Benner*, 24 F. Cas. 1084, 1087, No. 14,568 (C.C.E.D. Pa. 1830).[14] The application of common law rules to ATS cases is consistent with the way in which federal courts implement other federal statutes. *See, e.g., U.S. v. Kimbell Foods, Inc.*, 440 U.S. 715, 727 (1979); *see also Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981)(courts should apply the federal common

[14] *See* Beth Stephens, *Sosa v. Alvarez-Machain: "The Door Is Still Ajar" for Human Rights Litigation in U.S. Courts*, 70 Brook. L. Rev. 533, 558 (2004)("*Sosa* does not require that every ancillary rule applied in an ATS case meet the level of international consensus required for the definition of the underlying violation. As in any case in which the federal courts exercise discretion to recognize federal common law, the courts will fashion rules to fill gaps, borrowing from the most analogous body of law.").

law "in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations"). Moreover, "when international law and domestic law speak on the same doctrine, domestic courts should choose the latter." *Khulumani*, 504 F.3d at 287 (Hall, J., concurring).

Consistent with *Sosa*, the Eleventh Circuit applies federal common law standards in ATS cases. *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1258 (11th Cir. 2009); *Romero v. Drummond*, 552 F.3d 1303, 1315 (11th Cir. 2008); *Aldana v. Del Monte Fresh Produce*, 416 F.3d 1242, 1247-48 (11th Cir. 2005); *Cabello*, 402 F.3d 1148, 1157-60; *Abebe-Jira v. Negewo*, 72 F.3d 844, 848 (11th Cir. 1996)(utilizing Restatement (Second) of Torts §876 standard for civil aiding and abetting and conspiracy liability for ATS claims);[15] *see also, e.g.*, *Doe v. Islamic Salvation Front*, 257 F. Supp. 2d 115, 120 n.12 (D.D.C. 2003)(considering that "tort principles from federal common law may be more useful" in ATS cases); *Xuncax*, 886 F. Supp. at 182-83.

[15] A similar result was reached by a Ninth Circuit panel before the case was taken *en banc* to address another issue. *See Sarei v. Rio Tinto*, 487 F.3d 1193, 1202 (9th Cir. 2007), *vacated by grant of reh'g en banc*, 499 F.3d 923 (9th Cir. 2007), *limited remand on other grounds*, 550 F.3d 822 (9th Cir. 2008) (courts considering ATS claims "draw on federal common law").

b. The Federal Common Law Standard for Aiding and Abetting Is Knowing Assistance that has a Substantial Effect on the Commission of the Human Rights Violation

In its seminal opinion, *Halberstam v. Welsh*, this Circuit defined the scope of aiding and abetting tort liability in the civil context:

> (1) the party whom the defendant aids must perform a wrongful act that causes an injury; (2) the defendant must be generally aware of his role as part of an overall illegal or tortious activity at the time that he provides the assistance; [and] (3) the defendant must knowingly and substantially assist the principal violation.

705 F.2d 472, 477 (D.C. Cir. 1983)(citing Restatement §876(b)). This standard is well-established and decisions interpreting its meaning[16] can provide guidance to courts considering secondary liability under the ATS.

c. The Standard for Aiding and Abetting Under Customary International Law Is Identical to the Federal Common Law

Even if this Court were to find that international aiding and abetting standards govern ATS cases, the standard under customary international law is essentially the same as that of federal common law.[17] In particular, the decisions

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[16] *See, e.g., In re First Alliance Mortgage Co.*, 471 F.3d 977, 993 (9th Cir. 2006); *Aetna Cas. & Sur. Co. v. Leahey Constr. Co.*, 219 F.3d 519, 535-37 (6th Cir. 2000); *In re Temporomandibular Joint (TMJ) Implants Prods. Liab. Litig.*, 113 F.3d 1484, 1496 (8th Cir. 1997); *Rochez Bros., Inc. v. Rhoades*, 527 F.2d 880, 886 (3d Cir. 1975).

[17] International law has long recognized aiding and abetting liability for serious violations of international human rights norms. For example, the Nuremburg-era

of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") and International Criminal Tribunal for Rwanda ("ICTR") have given extensive consideration to the issue of aiding and abetting liability under international customary law.[18]

In analyzing the customary international law standard for aiding and abetting liability, the ICTY found that:

> the actus reus consists of practical assistance, encouragement, or moral support which has a ***substantial effect on the perpetration of the crime***. The mens rea required is the ***knowledge that these acts assist the commission of the offence***. This notion of aiding and abetting is to be distinguished from the notion of common design, where the actus reus consists of participation in a joint criminal enterprise and the mens rea required is intent to participate.

Tribunals recognized liability for aiding and abetting the commission of unlawful acts. *See, e.g.*, *U.S. v. Krauch*, 8 Tr. War Crim. 1081, 1132-33 (1952)(convicting corporate officials); *U.S. of America v. Krupp*, 9 Tr. War Crim. 1327 (1950) (convicting industrialists); *U.S. v. Goering*, 6 F.R.D. 69, 112 (Nuremberg Tribunal 1947); *U.S. v. Flick*, 6 Tr. War Crim. 1187, 1198 (1947)(convicting industrialist).

[18] The ICTY and ICTR are mandated to apply customary international law. *See Prosecutor v. Tadic*, Case No. IT-94-1-T, Decision on Defence Motion on Jurisdiction, ¶¶ 50-51, 60 (Aug. 15, 2001); U.N. Secretary-General, *Report of the Commission of Experts Established Pursuant to Paragraph 2 of Security Council Resolution 808*, ¶ 34, U.N. Doc. S/25704 (May 3, 1993).

Both Tribunals have been endorsed by the United States. *See Tachiona*, 169 F. Supp. 2d at 280 (Tribunals "have been legitimized" by the U.S., citing Pub. L. No. 104-106, Judicial Assistance to the ICTY and ICTR); *Mehinovic*, 198 F. Supp. 2d 1322 (ICTY and ICTR have been "explicitly endorsed" by the U.S.).

Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgement, ¶ 249 (Dec. 10, 1998)(emphasis added)(noting at ¶ 245 that "the clear requirement in the vast majority of the [Nuremberg-era] cases is for the accomplice to have knowledge that his actions will assist the perpetrator in the commission of the crime."); *see also Prosecutor v. Delalic*, Case No. IT-96-21-T, Judgement, ¶¶ 321, 326-29 (Nov. 16, 1998)(holding, based on a "detailed investigation" of post-World War II case law, that knowledge was the accepted mens rea for aiding and abetting liability).

The *Furundzija* tribunal held that an aider and abettor did not need to know the particular crime that the perpetrator intends to commit; instead, he need only be "aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed . . . ." *Furundzija*, Judgement, ¶246. Under such circumstances, the aider and abettor is deemed to have "intended to facilitate the commission of that crime, and is guilty as an aider and abettor." *Id.* ¶ 246. In other words, the accomplice need not share the *mens rea* of the principal (i.e., have the same purpose) to have a culpable mental state; actual or constructive knowledge that his or her actions would aid in the commission of the offense is sufficient for liability to attach.

The comprehensive discussion of the customary international law standard for aiding and abetting liability in *Furundzija* is instructive and has been followed by the ICTY and ICTR for the last decade. *See, e.g., Prosecutor v. Ntakirutimana,*

Case Nos. ICTR-96-10-A & ICTR-96-17-A, Judgement, ¶ 501 (Dec. 13, 2004); *Tadic*, Judgement, ¶ 229 (July 15, 1999). The adoption of the Rome Statute[19] did not alter the standard. *See, e.g.*, *Prosecutor v. Milutinovic*, Case No. IT-05-87-T, Judgement, ¶ 94 (Feb. 26, 2009)("[T]he accused must have knowledge that his acts or omissions assist the principal perpetrator or intermediary perpetrator in the commission of the crime or underlying offense.").

This standard is consistent with decades of customary international law dating back to Nuremberg that establish knowledge, not purpose, as the *mens rea* for criminal aiding and abetting liability under international law. For example, in the International Military Tribunal ("IMT") *Zyklon B Case*, officials of a firm that supplied the poison gas for Nazi gas chambers were convicted for their assistance because they "knew that the gas was to be used for the purpose of killing human beings." *Trial of Bruno Tesch and Two Others (The Zyklon B Case)*, 1 Law Reports of Tr. War Crim. 93, 101 (Brit. Mil. Ct., Hamburg, Mar. 1-8, 1946). The *mens rea* for aiding and abetting was knowledge, not purpose, in the subsequent Nuremberg Military Tribunals ("NMT") held by the United States. In *U.S. v. Flick*, the NMT convicted two industrialists because they contributed financial support to the S.S. with knowledge of the crimes the S.S. committed, even though they did

[19] Rome Statute of the International Criminal Court ("ICC"), opened for ratification July 17, 1998, 2187 U.N.T.S. 90.

not condone those crimes. 6 Tr. War. Crim. at 1217-22. The NMT held that "[o]ne who knowingly by his influence and money contributes to the support [of a violation of international law] thereof must, under settled legal principles, be deemed to be, if not a principal, certainly an accessory to such crimes." *Id.* at 1222.[20] Nuremberg-era tribunals establish that knowingly providing substantial assistance is the appropriate standard.

d. The Rome Statute Does Not Provide the Standard for Aiding and Abetting

In *Talisman*, the Second Circuit held that international law provides the standard for aiding and abetting liability and that an ATS plaintiff must show that the aider and abettor acted with an improper "purpose." *Talisman*, 582 F.3d at 259. The Second Circuit was wrong on both points.[21] As demonstrated above, even if international law supplies the standard for aiding and abetting liability, the

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[20] *See also U.S. v. Ohlendorf (The Einsatzgruppen Case)*, 4 Tr. War Crim. 411, 569 (1948)(defendant held liable "as an accessory" because "in locating, evaluating and turning over lists of Communist party functionaries … he was aware that the people listed would be executed when found.").

[21] The Second Circuit's decision to apply international law to this issue is based on its erroneous interpretation of footnote 20 in *Sosa*. 542 U.S. at 732 n.20. That footnote raises the issue of which primary violations of customary international law require state action to be actionable under the ATS. The Court did not address whether international or federal common law governs aiding and abetting liability, much less reach any holding.

international law standard is essentially the same as this Circuit's *Halberstam* standard.[22]

The Second Circuit relied on the language of Article 25(3)(c) of the Rome Statute for the "purpose" standard. *Khulumani*, 504 F.3d at 275-77 (Katzmann, J. concurring)(cited with approval by *Talisman*, 582 F.3d at 259). However, the Rome Statute was not intended to supplant established customary international law standards and, unlike the ICTR and ICTY, the ICC is not mandated to apply customary international law.[23] There is no reason to apply an idiosyncratic treaty definition to supplant applicable domestic law standards where, under *Sosa*, 542 U.S. at 724, customary international law, not the Rome Statute, defines the violations while federal common law supplies the cause of action. Moreover, the provisions of the Rome Statute have yet to be interpreted by the ICC. Article 25(3)(d)(ii) of the Rome Statute specifies a *knowledge mens rea* for those assisting crimes committed by a group acting with a common purpose and Article 30

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[22] The proper standard was extensively briefed earlier this year in the context of the petition for certiorari in *Presbyterian Church of Sudan v. Talisman Energy, Inc*, No. 09-1262. *See* International Commission of Jurists and the American Association for the International Commission of Jurists as *Amicus Curiae* Supporting Petitioners, *Talisman*, No. 09-1262 (May 19, 2010).

[23] *See* Br. for David Sheffer as *Amicus Curiae* Supporting Petitioners, *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, No. 09-1262 (May 20, 2010). Ambassador David Scheffer, the U.S. representative to the Rome Conference who participated in the negotiations, explained that the Rome Treaty was not intended to reflect customary international law on this issue.

contains a general *mens rea* provision defining "intent" and "knowledge." The ICC has not yet interpreted the provision the Second Circuit relied on, nor has the relationship between this provision and Article 25(3)(d)(ii) or Article 30 been established. Thus, the precise *mens rea* for aiding and abetting liability in the Rome Statue is at best uncertain. *Talisman* should not be followed by this Court.

e. Plaintiffs Meet the Standard Regardless of Which Test the Court Employs

Plaintiffs meet the aiding and abetting standard set out in both domestic and international law. *Supra* pp.36-40. ExxonMobil does not dispute that Plaintiffs were injured. JA1229. Plaintiffs alleged that their injuries were inflicted by military security personnel employed by ExxonMobil "with the sole and specific purpose of providing security for ExxonMobil." JA0258, JA0266-70. Plaintiffs also alleged that ExxonMobil knew of the ongoing abuses. JA0262-65. In fact, long before Plaintiffs were injured, ExxonMobil was aware that its military security personnel were dangerous and violent, or to use ExxonMobil's own words, "a threat," "intimidators," prone to "harassment, improper conduct," and with a "poor reputation" "especially in the area of respecting human rights and in their predilection for 'rogue'/clandestine operations." JA1239. Indeed, these military security personnel committed a series of violent acts known to and documented by ExxonMobil staff. *Id*. Despite this knowledge, ExxonMobil provided substantial assistance to those personnel in the form of equipment,

facilities, training, housing, and regular financial support and stationed them at various locations. JA0260; JA0265. This assistance put Plaintiffs' attackers in contact with their victims and enabled them to carry out their attacks, in some cases within ExxonMobil's compound. Plaintiffs' allegations show that ExxonMobil provided substantial assistance to the military security personnel despite knowing that the injuries to Plaintiffs were the "natural and foreseeable consequences" of its actions. *See Halberstam*, 705 F.2d at 488.

Plaintiffs can also satisfy the *Talisman* "purpose" standard and should be remanded to the district court for an opportunity to amend their pleadings to meet this recently-adopted standard if this Court finds it applies. *See Cody v. Cox*, 509 F.3d 606, 609 n.1 (D.C. Cir. 2007); *Harris v. Secretary, U.S. Dep't of Veterans' Affairs*, 126 F.3d 339, 345 (D.C. Cir. 1997).

This case is not like *Talisman*, where the district court granted summary judgment because the plaintiffs had presented almost no evidence in support of their claims. *Talisman*, 582 F.3d at 265 (plaintiffs repeatedly claimed "Talisman" had taken actions that evidence revealed another entity had performed).[24] The

[24] The *Talisman* allegations consisted of: upgrading airstrips; designating areas for oil exploration; paying royalties to the government; and general logistical support for the Sudanese military. For all these allegations, the Second Circuit agreed that there was no evidence of Talisman's involvement or, in the case of the royalties payment, considered it insufficient for liability. *See Talisman*, 582 F.3d at 253.

Second Circuit observed that "intent must often be demonstrated by the circumstances" and could, in appropriate cases, be inferred. *Id.* at 264.[25] But the Second Circuit affirmed the district court's holding that evidence that a consortium (in which Talisman's indirect subsidiary had a 25% share) coordinated with the military to build roads was plainly insufficient to give rise to an inference that Talisman had the requisite intent. *Talisman*, 582 F.3d at 261-62. The court of appeals also observed that none of Talisman's conduct in that case was wrongful. *Id.* at 261.

Here, in contrast, Plaintiffs presented sufficient evidence on agency to reach a trier of fact and presented enough liability evidence to defeat EMC and EMOI's motion for summary judgment. JA1221-50. Plaintiffs presented evidence that EMC and EMOI (and not an intermediary) did much more than "coordinate" with the military to build roads. *Supra* pp.2-7. Plaintiffs should be permitted to marshal the evidence uncovered in discovery in order to meet this standard.

3. Private Parties Acting Under "Color of Law" Are Liable Under the ATS

Even if aiding and betting liability were not available, ExxonMobil can be directly liable for the alleged torts if it can be shown that ExxonMobil acted "under color of law." This Circuit has indicated, but not squarely decided, that private

[25] Indeed, intent is a question of fact for the jury. *U.S. v. Williams*, 553 U.S. 285, 306 (2008); *Serafyn v. F.C.C.*, 149 F.3d 1213, 1220-24 (D.C. Cir. 1998).

parties acting under color of law may be held liable under the ATS for violations of international law that require state action. *Saleh v. Titan Corp.*, 580 F.3d 1, 15-16 (D.C. Cir. 2009).[26] In *Saleh*, this Court observed that

> it is asserted that defendants, while private parties, acted under the color of law. Although we have not held either way on this variation, in *Tel-Oren*, Judge Edwards' concurring opinion, while not a court holding, suggests that the ATS extends that far. 726 F.2d at 793. And the Supreme Court in *Sosa* implied that it might be significant for Sosa to establish that Alvarez was acting "on behalf of a government." 542 U.S. at [737].

Id.; *see also Tel-Oren*, 726 F.2d at 793 (Edwards, J. concurring)("'individual liability' denotes two distinct forms of liability. The first, now well-implanted in the law of nations, refers to individuals acting under color of state law. Commentators routinely place the origin of this development at the Nuremberg Trials …"). Following the Supreme Court in recognizing "Congress' superior legitimacy in creating causes of action," this Court looked to the TVPA for guidance in ATS cases. *Saleh*, 580 F.3d at 16. The TVPA expressly requires that the conduct be "under color of [foreign] law" to be actionable. 28 U.S.C. §1350, note §2(a).[27]

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[26] The violations alleged here, torture, extrajudicial killing, and prolonged arbitrary detention, are among those that require state action. *E.g.*, *Kadic v. Karadzic*, 70 F.3d 232, 243 (2d Cir. 1995).

[27] Congress explicitly directed courts addressing TVPA claims to "look to 42 U.S.C. §1983 in construing 'color of law,'" H.R. Rep. No. 102-367(I), 102d Cong.

Circuits to reach this question uniformly hold that private actors may be held directly liable under the ATS for violations of international law that require state action, if plaintiffs can show that defendants acted under "color of law." *See, e.g.*, *Abdullahi v. Pfizer*, 562 F.3d 163, 188 (2d Cir. 2009)(*cert. denied* 2010); *Aldana*, 416 F.3d 1242; *Kadic*, 70 F.3d 232, 245. The district courts have, with the exception of the decision below, reached the same conclusion. *See Arias v. Dyncorp*, 517 F. Supp. 2d 221, 228 (D.D.C. 2007)(corporations acting under color of law may be held liable under the ATS); *see also Bowoto v. Chevron*, 557 F. Supp. 2d 1080, 1092 (N.D. Cal. 2008); *Chavez v. Carranza*, 413 F. Supp. 2d 891, 899 (W.D. Tenn. 2005); *Doe v. Saravia*, 348 F. Supp. 2d 1112, 1150 (E.D. Cal. 2004); *Doe v. Unocal*, 963 F. Supp. 880, 892 (C.D. Cal. 1997).[28]

The district court felt compelled by *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985), to hold that the ATS does not extend to private action "under color of law," JA0651, but *Sanchez-Espinoza* does not require that conclusion.

(1991), JA0339; *accord* S. Rep. No. 102-249, 102d Cong. (1991), JA0394, and courts have consistently done so. *E.g.*, *Sinaltrainal*, 578 F.3d at 1264; *Kadic*, 70 F.3d at 245; *Doe v. Saravia*, 348 F. Supp. 2d 1112, 1149-50 (E.D. Cal. 2004).

[28] Contrary to the lower court's suggestion that the "color of law" rule is unfair to corporations operating in states with problematic human rights records, this standard requires participation in a violation of international law; liability cannot attach on the basis of mere operation in such a state or even by the employment of state security personnel without more. *Atchinson v. District of Columbia*, 73 F.3d 418, 420 (D.C. Cir. 1996).

Sanchez-Espinoza, like *Saleh*, rejected an attempt to assert that the same conduct was under color of law for jurisdiction purposes, but purely private for immunity purposes. 770 F.2d at 207. *Sanchez-Espinoza* explicitly did not hold that "color of law" liability could not be available in the appropriate case. To the contrary, *Sanchez-Espinoza*, *id*. at n.5, stated that because foreign sovereign immunity was "quite distinct" doctrinally from domestic sovereign immunity, nothing in the decision necessarily conflicted with the holding in *Filartiga v. Pena-Irala*, 630 F.2d 876, 878 (2d Cir. 1980), that "deliberate torture perpetrated under color of official authority" states a claim under the ATS.

a. "Color of Law" Liability Was Pled and Is Further Supported by Evidence Uncovered in Discovery

Concluding that it would be a "doctrinal flaw" to apply 42 U.S.C. §1983 jurisprudence to the "color of law" element of ATS and TVPA claims, the district court performed an abbreviated analysis of Plaintiffs' allegations and erroneously held that Plaintiffs did not adequately plead "state action." JA0652-54.

Where state action is an element of an ATS claim, courts turn to 42 U.S.C. §1983 jurisprudence for guidance. *Kadic*, 70 F.3d at 245; *see also Abdullahi*, 562 F.3d at 188; *Aldana*, 416 F.3d at 1249; *supra* n.27. *Kadic* explained that an action is taken under color of law when a private individual "acts together with state officials or with significant state aid." 70 F.3d at 245 (citing *Lugar v. Edmondson*

Oil Co., 457 U.S. 922, 937 (1982)).[29] At the pleading stage, an allegation of the existence of a policy, practice, or custom and its causal link to the deprivation satisfies this element. *Maniaci v. Georgetown Univ.*, 510 F. Supp. 2d 50, 64 (D.D.C. 2007); *see also Pickrel v. City of Springfield*, 45 F.3d 1115 (7th Cir. 1995). However, it is "well-settled that the existence of state action is a highly fact-based inquiry." *Brug v. Nat'l Coalition for the Homeless*, 45 F. Supp. 2d 33, 43 (D.D.C. 1999)(citing *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 726 (1961)); *see also Lugar*, 457 U.S. at 939. Dismissal on the pleadings is premature when state action has been plausibly alleged and its determination involves questions of fact. *Abbott v. Latshaw*, 164 F.3d 141, 148 (3d Cir. 1998); *Adams v. Bain*, 697 F.2d 1213, 1217-18 (4th Cir. 1982); *Fulton v. Emerson Elec. Co.*, 420 F.2d 527, 529-30 (5th Cir. 1969). Given the evidence uncovered in discovery, remand is appropriate so that the lower court can perform this fact-intensive analysis and permit Plaintiffs to replead if necessary. *See Steele v. Schafer*, 535 F.3d 689, 696 (D.C. Cir. 2008).

The tests for state action "lack rigid simplicity" such that "no one fact can function as a necessary condition across the board for finding state action; nor is any set of circumstances absolutely sufficient." *Brentwood Acad. v. Tenn.*

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[29] *Kadic* properly relied on federal common law standards to answer this question. *See* 70 F.3d at 245.

Secondary Sch. Athletic Assoc., 531 U.S. 288, 295-96 (2001). In addition to the two tests mentioned by the district court (joint action and proximate cause), courts have employed the nexus, entwinement, symbiotic relationship, state compulsion, and public function tests, sometimes relying on a combination of tests. *E.g.*, *Lugar*, 457 U.S. at 939; *Jackson v. Metropolitan Edison*, 419 U.S. 345, 352 (1974). Circumstances the Supreme Court has found sufficient to show state action include: a private corporation leasing property in a public building and entering into a "symbiotic" commercial relationship with a state agency (*Burton*, 365 U.S. at 725); a private person contracting with the state to provide medical services to inmates at a state prison (*West v. Atkins*, 487 U.S. 42, 56 (1988)); an entity whose failure to supervise and train security personnel amounted to deliberate indifference toward the rights of persons with whom the personnel come into contact (*City of Canton v. Harris*, 489 U.S. 378 (1989)); and a deputy sheriff subject to the control and direction of a private park (*Griffin v. Maryland*, 378 U.S. 130 (1964)).

This jurisdiction in particular has recognized that a failure to adequately train or supervise employees, including security personnel under a defendant's direction and control, constitutes a "policy or custom" sufficient for §1983 liability when the failure amounts to "deliberate indifference." *Daskalea v. D.C.*, 227 F.3d 433, 441 (D.C. Cir. 2000); *Atchinson*, 73 F.3d at 420-22; *Amons v. D.C.*, 231 F.

Supp. 2d 109 (D.D.C. 2002). Supervisors are more likely to be liable if, as here, they ignore repeated offenses or refuse to investigate. *Maniaci*, 510 F. Supp. 2d at 66; *Amons*, 231 F. Supp. 2d at 115. In addition, courts routinely look to facts such as whether an off-duty officer was wearing his or her uniform or was armed, and the character of the authority exercised, even if "the particular action which he took was not authorized by state law."[30] *Griffin*, 378 U.S. at 135; *see also Williams v. U.S.*, 341 U.S. 97 (1951); *Pickrel*, 45 F.3d at 1118; *Traver v. Meshriy*, 627 F.2d 934 (9th Cir. 1980); *Woods v. Clay*, No. 01-cv-6618, 2005 WL 43239, at *24 (N.D. Ill. Jan. 10, 2005); *Groom v. Safeway, Inc.*, 973 F. Supp. 987 (W.D. Wash. 1997).

Here, Plaintiffs allege that ExxonMobil contracted with Indonesia to develop its natural resources. JA0256. That contract provided for the provision of military security at EMOI's request, and EMOI's subsequent letter agreement provided that any of EMOI's management of "security affairs" would be "considered a service that Mobil provides *on behalf of Pertamina*." JA1235 (emphasis in original). The military security personnel were paid, supervised, and directed by ExxonMobil but wore their military uniforms, carried military-issued weapons, and wielded the apparent authority of the state to detain civilians. *E.g.*, JA0258-60; JA2879-80.

[30] The district court's conclusion that the defendant had to control official conduct or state policy is thus incorrect. *See also infra* pp.59-60.

MATERIAL UNDER SEAL DELETED

These facts satisfy the public function, symbiotic relationship, and entwinement tests. ExxonMobil civilian security employees worked and were stationed with military security

satisfying the joint action test. Despite unmistakable recurring evidence of abuses, ExxonMobil, acting with deliberate indifference, refused to investigate or improve its supervision or training of the security personnel, or cease relying on them, JA0260-65, satisfying the tests set out in *City of Canton*, 489 U.S. 378, *Griffin*, 378 U.S. 130, and *Daskalea*, 227 F.3d 433.

Thus, Plaintiffs adequately alleged state action under several of the applicable tests.

B. The District Court Erred in Dismissing Plaintiffs' TVPA Claims

This Court should permit Plaintiffs' TVPA claims to proceed. First, the text, context, and purpose of the statute support its application to legal persons. Second, secondary liability is available under the TVPA regardless of whether a corporation can be sued as a principal.

1. The TVPA Applies to Corporations

The only circuit to have reached the question of whether the TVPA applies to corporations holds that it does. *See Sinaltrainal*, 578 F.3d at 1264 n.13; *Romero v. Drummond Co.*, 552 F.3d 1303, 1315 (11th Cir. 2008); *Aldana*, 416 F.3d 1242. The Eleventh Circuit's holding is supported by fundamental principles of statutory

construction and adheres to the purpose and intent of the statute. Thus, it should be followed by this Court.

"In interpreting a statute, we look first to the plain language of the statute, construing the provisions of the entire law, including its object and policy, to ascertain the intent of Congress." *U.S. v. Mohrbacher*, 182 F.3d 1041, 1048 (9th Cir. 1999). Where a statutory term is undefined, courts endeavor to give that term its ordinary meaning. *Id*. However, the Supreme Court has cautioned that courts should avoid an interpretation that produces "an absurd and unjust result which Congress could not have intended." *Clinton v. City of New York*, 524 U.S. 417, 429 (1998).

The TVPA does not define "individual." *See* 18 U.S.C. §1350, note. The plain meaning of this term does not exclude corporations. *U.S. v. Middleton*, 231 F.3d 1207, 1210 (9th Cir. 2000). Moreover, both the Supreme Court and this Court have held that "individual" is synonymous with "person" and encompasses corporations in certain contexts. *See Clinton*, 524 U.S. at 428 (concluding that "individual" in Line Item Veto Act included corporations); *U.S. v. Perry*, 479 F.3d 885, 894 n.10 (D.C. Cir. 2007)("both 'individual' and 'person' are often defined more broadly in statutes"); *see also Middleton*, 231 F.3d at 1210-11 ("individual" in criminal statute includes corporations); *In re Atl. Bus. and Cmty. Corp*., 901 F.2d 325, 329 (3d Cir. 1990)("individual" includes corporate debtor).

The TVPA was enacted to "enhance the remedy" available under the ATS by extending "a civil remedy also to U.S. citizens who may have been tortured abroad." S. Rep. No. 102-249, JA0392, quoted in *Sinaltrainal*, 578 F.3d at 1263-64. This purpose to extend the reach of the ATS to U.S. citizens would be thwarted if the district court's narrow reading of the TVPA as excluding liability of corporations were allowed to stand. It would result in the anomaly of aliens under the ATS, but not U.S. citizens under the TVPA, being allowed to sue for certain acts of torture perpetrated by corporate defendants. *See Ali Shafi v. Palestinian Authority*, 686 F. Supp. 2d 23, 28-29 (D.D.C. 2010)("Ali is free to plead a cause of action under the ATS for torture by non-natural persons.")(*citing Kadic*, 70 F.3d at 241); *see also Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 438 (1989)(noting that the ATS "does not distinguish among classes of defendants . . . .").

Moreover, exempting corporations from TVPA liability would violate the "general rule of substantive law" that corporations are liable for their torts, *White v. Cent. Dispensary and Emergency Hosp.*, 99 F.2d 355, 358 (D.C. Cir. 1938), the backdrop against which the TVPA is interpreted. *U.S. v. Texas*, 507 U.S. 529, 534 (1993)("In order to abrogate a common-law principle, the statute must speak directly to the question addressed by the common law")(internal quotation marks omitted); *Summers v. Dep't of Justice*, 569 F.3d 500, 504 (D.C. Cir. 2009).

"[W]hen Congress creates a tort action, it legislates against a legal background of ordinary tort-related vicarious liability rules and consequently intends its legislation to incorporate those rules." *Meyer v. Holley*, 537 U.S. 280, 286 (2003).

The rule that corporations are liable in tort has been firmly established for at least 150 years: corporations' liability in tort for the actions of their servants "is so well settled as not to require the citation of any authorities in its support." *Baltimore & P.R. Co. v. Fifth Baptist Church*, 108 U.S. 317, 330 (1883). Such liability extends to violent conduct. *See Daniels v. Tearney*, 102 U.S. 415, 420 (1880); *Lyon v. Carey*, 533 F.2d 649, 652-53 (D.C. Cir. 1976)(corporate liability for rape); *Safeway Stores, Inc. v. Kelly*, 448 A.2d 856 (D.C. Ct. App. 1982)(corporate liability for assault and battery committed by independent contractor). Furthermore, exempting corporations from tort liability would have the perverse effect of encouraging suits against corporate officers and directors, undermining the fundamental tenet of corporate law that "it is the corporation, not its owner or officer, who is the principal or employer, and thus subject to vicarious liability for torts committed by its employees or agents." *Meyer*, 537 U.S. at 286.

The use of the term "individual" twice in the TVPA—once to refer to the perpetrator and once to refer to the victim—does not militate toward a finding that the statute only applies to natural persons. "It is not unusual for the same word to be used with different meanings in the same act, and there is no rule of statutory

construction which precludes the courts from giving to the word the meaning which the Legislature intended it should have in each instance." *Atl. Cleaners & Dyers, Inc. v. U.S.*, 286 U.S. 427, 433 (1932); *see also Envtl. Defense v. Duke Energy Corp.*, 549 U.S. 561, 574-75 (2007); *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 595-97 (2004); *Robinson v. Shell Oil Co.*, 519 U.S. 337, 342-43 (1997)(term "employees" has two distinct meanings within Title VII of Civil Rights Act). Numerous statutes with corporate liability use the same term to refer to the offender (human or corporate) and a victim who can only be human. *See, e.g.*, 18 U.S.C. §§229A & 229F; 8 U.S.C. §§1324 & 1101(b)(3); 33 U.S.C. §1319; 42 U.S.C. §7413; *see also, e.g., U.S. v. Weintraub*, 27 Fed. App'x 54 (2d Cir. 2001)(interpreting 42 U.S.C. §7413 to cover corporate defendants).

The TVPA has a long legislative history, as drafts were considered by three separate Congresses and numerous committees and sub-committees before the final text was enacted in 1992. This history is ambiguous as to why the term "individual" was used. The only contemporaneous statement on this issue is found in the Senate Committee Report accompanying the bill's passage. The Report states that Congress used "individual" to exclude liability of foreign states, not private corporations: "[t]he legislation uses the term 'individual' to make crystal clear that foreign states or their entities cannot be sued under this bill under any circumstances" as "the TVPA is not meant to override the Foreign Sovereign

Immunities Act (FSIA) of 1976." S. Rep. No. 102-249, JA0393. The section of the Report entitled "Who Can Be Sued" likewise evinces no intent to exclude legal persons. Indeed, the Report uses the terms "individual" and "person" interchangeably. *E.g.*, *id*., JA0394 ("The legislation is limited to lawsuits against *persons* who ordered, abetted, or assisted in the torture.")(emphasis added); *see also* Report of the Activities of the Committee on the Judiciary During the 101st Congress, S. Rep. No. 102-17, 1991 WL 57381 at *50 (1991)(describing the TVPA as "A bill to establish clearly a Federal right of action by aliens and United States citizens against *persons* engaging in torture or extrajudicial killings, and for other purposes")(emphasis added).[31] Because the legislators who "read those statements presumably voted with that understanding," *District of Columbia v. Heller*, 128 S. Ct. 2783, 2805 (2008); *Cannon v. Univ. of Chicago*, 441 U.S. 677, 716 (1979), the Senate Reports reveal Congress's intent to exclude states, not individual legal persons, from liability.

[31] Other than the district court opinion in this case, the district courts in this Circuit that have held that the TVPA applies only to human beings have relied on cases holding that the TVPA was not meant to apply to foreign states, *e.g.*, *Mohamad v. Rajoub*, 664 F. Supp. 2d 20, 22 (D.D.C. 2009), or on dicta in this Court's opinion in *Saleh v. Titan Corp.*, 580 F.3d 1, 12 n.9 (D.C. Cir. 2009), in which no TVPA claims were pled. One district court has misconstrued this dicta to say that all private U.S. persons (even human beings acting under color of foreign law) are exempt from TVPA liability. *Estate of Manook v. Research Triangle Institute*, 693 F. Supp. 2d 4, 20 (D.D.C. 2010). A correct reading, however, is that persons acting under color of *U.S. law* are exempt, while persons of any nationality acting under color of *foreign law* can be liable.

The plain meaning, context, and policy of the TVPA support corporate liability under the statute. This Court should join the Eleventh Circuit in so holding.

2. Corporations Can Be Liable Under the TVPA for Aiding and Abetting Torture

"The TVPA permits aiding and abetting liability." *Sinaltrainal*, 578 F.3d at 1258 n.5; *Chavez*, 559 F.3d at 499; *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1157 (11th Cir. 2005); *Hilao v. Estate of Marcos*, 103 F.3d 767, 779 (9th Cir. 1996); *accord* S. Rep. No. 102-249, JA0394 (the TVPA permits "lawsuits against persons who ordered, abetted, or assisted in the torture"). Defendants did not dispute the availability of secondary liability under the TVPA and Plaintiffs know of no contrary authority.

"The law is well settled that one may be found guilty of aiding and abetting another individual in his violation of a statute that the aider and abettor could not be charged personally with violating." *In re Nofziger*, 956 F.2d 287, 290 (D.C. Cir. 1992). Indeed, the accomplice liability provision of the U.S. Code, 18 U.S.C. §2(a), was amended "to eliminate all doubt" that, in the case of offenses whose prohibition is directed at members of specified classes, a person who is not himself a member of that class may nonetheless be punished as a principal if he aids and abets a person in that class to violate the prohibition. *Standefer v. U.S.*, 447 U.S.

10, 18 n.11 (1980), *cited in Bowoto*, 2007 WL 2349341, at *3 (applying analysis to ATS and TVPA).

Accordingly, even if ExxonMobil cannot be sued as a principal under the TVPA, Plaintiffs' allegations that ExxonMobil aided and abetted its military security personnel's acts of torture and extrajudicial killing state a claim for secondary liability under the TVPA, and these claims should not have been dismissed.

C. Determining Whether a Private Defendant Acted "Under Color of Foreign Law" Does Not Pose Justiciability Concerns

The district court found that Plaintiffs' common law tort claims (including wrongful death, arbitrary detention, assault, and battery) against ExxonMobil did not pose justiciability concerns. ExxonMobil challenged that decision before this Court and in a petition for certiorari. *Supra* pp.8-11.

This Court held that ExxonMobil failed to meet the requirements for interlocutory review and rejected ExxonMobil's petition for mandamus. *Exxon*, 473 F.3d 345. In so doing, this Court noted that "several other circuits have refused to invoke the political question doctrine to dismiss claims that were very similar to those in the instant case," indicating ExxonMobil could not demonstrate an entitlement to mandamus relief. *Id.* at 354 (citing cases).

On behalf of the United States, Solicitor General Paul Clement recommended that the Supreme Court deny ExxonMobil's certiorari petition,

JA1175, and although this Court invited the State Department to submit additional views if it had concerns about this litigation, *Exxon*, 473 F.3d at 354, the United States filed no further statements in any court as the litigation proceeded through discovery, summary judgment, and to consideration of a possible trial date, despite queries by the district court, *e.g.*, JA0721.

Just as it did not dismiss Plaintiffs' state tort claims as nonjusticiable, the district court did not dismiss the ATS claims involving actions by individuals—torture, prolonged arbitrary detention, and extrajudicial killing—on justiciability grounds. The district court carefully differentiated between claims that would have "required the court to evaluate the policy or practice of the foreign state," and claims that are "targeted to actions by individuals," dismissing only the former as nonjusticiable. JA0650; JA0663. Claims involving wrongdoing by individual security providers for ExxonMobil, rather than claims involving official actions of the Government of Indonesia, "were explicitly not dismissed on justiciability grounds." JA0663 (emphasis in original).

However, the district court concluded that determining whether a party acted under "color of law" would pose justiciability concerns because the accepted tests "impermissibly require[] adjudication of another country's actions." JA0655. In this portion of its decision, the district court erred.

Determining whether a private party acted under "color of law" does not require an impermissible adjudication of another country's actions. The actions of a rogue state employee, taken in violation of that country's laws and unratified by that nation's government, do not implicate the official actions or policies of that government; nonetheless, such conduct can be under "color of law." *E.g.*, *In Re Estate of Marcos*, 25 F.3d 1467, 1472 (9th Cir. 1994)(dictator's illegal acts are not acts of state); *Kadic*, 70 F.3d at 250; *Filartiga*, 630 F.2d at 889-90; *Jimenez v. Aristeguieta*, 311 F.2d 547, 557-58 (5th Cir. 1962); *Bowoto*, 557 F. Supp. 2d at 1092 (plaintiffs need not prove torture was committed in accordance with official Nigerian policy, but rather that torture was committed by an official or under color of law); *accord West v. Atkins*, 487 U.S. 42, 50 (1988)(firmly established that defendant acts under color of law when he abuses the position given him by State); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152 (1970)(§1983 satisfied "whether or not the actions of the police were officially authorized, or lawful"); *Monroe v. Pape*, 365 U.S. 167, 172 (1961)(§1983 can be used against those who carry a badge of state authority, "whether they act in accordance with their authority or misuse it"). Plaintiffs do not challenge any official policies of the Government of Indonesia, but allege only that the torts were committed by individual soldiers while those soldiers were under contract to ExxonMobil. JA0944. Indeed, the acts committed violated Indonesian law.

Even more troubling is the district court's dismissal of the TVPA claims on the grounds that determining whether an individual acted under color of law is impermissible. The TVPA, as enacted by Congress and signed into law by the President, expressly renders liable ***only*** those individuals acting under the authority or color of law of a foreign nation. 28 U.S.C §1350 note §2(a); *see also, e.g.*, *Doe v. Constant*, 354 Fed. App'x 543, 546 (2d Cir. 2009). The district court's holding renders the statute a nullity, contrary to basic principles of statutory construction. *E.g.*, *F.T.C. v. Fred Meyer, Inc.*, 390 U.S. 341, 349 (1968); *U.S. v. Barnes*, 295 F.3d 1354, 1364 (D.C. Cir. 2002)(statute should ordinarily be read to effectuate its purposes rather than frustrate them); *see also Wiwa*, 226 F.3d at 105-06 (TVPA "expresses a policy favoring receptivity by our courts to such suits"). This portion of the district court's decision must be overturned.

1. The Political Question Doctrine Is Not Implicated by the "Color Of Law" Analysis in this Case

The political question doctrine is a narrow body of law rooted in separation of powers principles. *See Baker v. Carr*, 369 U.S. 186, 217 (1962); *Powell v. McCormack*, 395 U.S. 486, 512 (1969); *Tel-Oren*, 726 F.2d at 798 (Edwards, J. concurring)(doctrine "a very limited basis for nonjusticiability"). An evaluation of the *Baker* factors confirms that a "color of law" analysis poses no political question.

Baker established a six-part test for identifying separation of powers concerns, holding that "unless one of these formulations are inextricable from the case at bar, there should be no dismissal for non-justiciability":

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; [2] a lack of judicially-discoverable and manageable standards for resolving it; [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; [5] an unusual need for unquestioning adherence to a political decision already made; [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

369 U.S. at 217; *see also Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004)(factors listed in "descending order of both importance and certainty"); *Harbury v. Hayden*, 522 F.3d 413, 393 (D.C. Cir. 2008)(first two factors most important). The determination of whether a dispute poses a political question turns on a careful inquiry into the facts and circumstances. *E.g.*, *Baker*, 369 U.S. at 210-11. Although "[t]here are sweeping statements to the effect that all questions touching foreign relations are political questions[,] . . . it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." *Id*. at 211; *see also Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 229-30 (1986); Charles Alan Wright, Fed. Prac. & Proc. §3534.2.

The first *Baker* factor, which authorizes an Article III court to decline to adjudicate a case only when that task has been demonstrably textually assigned by the Constitution to another branch, *Baker*, 369 U.S. at 217, is not present here. Determining whether Defendants acted under color of law when committing certain torts "falls within the traditional role of courts to interpret the law." *Powell*, 395 U.S. at 548; *Japan Whaling*, 478 U.S. at 230 ("it goes without saying that interpreting congressional legislation is a recurring and accepted task for the federal courts"); *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 49 (2d Cir. 1991); *Tel-Oren*, 726 F.2d at 798 (Edwards, J. concurring)(tort suit arising out of terrorist acts presents no clash between branches of government).

Nor does this action implicate the second *Baker* factor. *See U.S. v. Munoz-Flores*, 495 U.S. 385, 395-96 (1990)(second factor not applicable where general nature of inquiry is familiar to courts); *Larsen v. Senate of Pa*., 152 F.3d 240, 247 (3d Cir. 1998); *Klinghoffer*, 937 F.2d at 49. There is no lack of judicially discoverable and manageable standards here; courts routinely evaluate whether an action was under "color of law." *See, e.g.*, *Abdullahi*, 563 F.3d at 163; *Sinaltrainal*, 578 F.3d at 1264; *Aldana*, 416 F.3d at 1247; *Kadic*, 70 F.3d at 245; *see also, e.g.*, *U.S. v. Price*, 383 U.S. 787 (1966); *Griffin v. State of Md*., 378 U.S. 130, 135 (1964); *Groom v. Safeway, Inc*., 973 F. Supp. 987, 991-92 (W.D. Wash. 1997); *supra* pp.47-51(citing cases).

None of the last four, prudential, *Baker* factors apply here. *See Baker*, 369 U.S. at 217. No initial policy determination need be made to resolve whether Defendants were acting under color of law. Nor will this determination express a lack of respect to a coordinate branch and there is no possibility of multifarious pronouncements or a need for adherence to a prior decision, as the United States has not taken a position on the merits or engaged in a diplomatic resolution of the claims. *See Linder*, 963 F.2d at 337 (no political question where "complaint challenges neither the legitimacy of the United States foreign policy toward the contras, nor does it require the court to pronounce who was right and who was wrong in the Nicaraguan civil war"); *DKT Mem'l Fund v. Agency for Int'l Dev.*, 810 F.2d 1236, 1238 (D.C. Cir. 1987)(no political question where plaintiffs did not seek to litigate wisdom of foreign policy); *Population Inst. v. McPherson*, 797 F.2d 1062, 1068-70 (D.C. Cir. 1986).

The United States expressed concerns about this litigation and the district court took those concerns into account, dismissing the claims that would have required analysis of any official policy or practice of Indonesia, dismissing the Indonesian defendant, and limiting discovery. *Supra* pp.7-10. Since the denial of certiorari and during the pendency of discovery on the state law claims, the United States has not expressed any concerns to the district court about its handling of the case or the impact on U.S. national interests. The discovery revealed that

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ExxonMobil contracted for and paid military security personnel who were "dedicated exclusively" to providing security for ExxonMobil's operations and did "not perform a broader role with respect to military activities within the region." *Supra* pp.2-3, 6; JA1223; JA1234 (citing summary judgment exhibits). The discovery further revealed that EMOI's own civilian security personnel at times worked alongside the military security personnel who were stationed at the "main gate," the "inner gate," and

Supra pp.3, 6. The district court concluded that Plaintiffs had put forward sufficient evidence to demonstrate that EMOI had the "right to control its paid security forces." JA1231-37. Plaintiffs also demonstrated that ExxonMobil's own documents and testimony described the military security personnel as "undisciplined," "extortionists and intimidators," with a "predilection for rogue operations." *Supra* p.4; JA1239-40.

Under these circumstances, the narrow question of whether ExxonMobil can be considered to have acted "under color of law" pursuant to one of the established tests for "state action," see *supra* pp.47-50, does not pose a political question.

2. There Is No Act of State in this Case

The act of state doctrine is a narrow one, precluding courts from declaring "invalid the official act of a foreign sovereign" in its own territory. *W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp.*, 493 U.S. 400, 405 (1990); *see also*

Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964). The party that invokes the doctrine bears the burden of proving its applicability. *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 691 (1976). In *Kirkpatrick*, a unanimous Supreme Court held that although the facts necessary to establish the respondent's claim would also establish that Nigerian officials violated the law, that "still does not suffice" to trigger application of the doctrine. 493 U.S. at 406. Here, too, although Plaintiffs must establish that individual soldiers violated the law, "the factual predicate for application of the act of state doctrine does not exist": nothing in the present suit requires the Court to declare invalid an official act. *Id*. at 405; *see also Abu Ali v. Ashcroft*, 350 F. Supp. 2d 28 (D.D.C. 2004). Individual acts of torture, extrajudicial killing, and arbitrary detention are not the official acts of the Indonesian government: first, the acts were committed by individuals without the authority to bind the state and second, torture, extrajudicial killing, and arbitrary detention are not acts of state. *See, e.g.*, *Kadic*, 70 F.3d at 250 (doubting that rape could ever be "the officially approved policy of a state"); *In Re Estate of Marcos*, 25 F.3d at 1471; *Jimenez*, 311 F.2d at 558 (common crimes are not acts of state); *Bowoto*, 2007 WL 2349345, at *3-*9; *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1, 24 (D.D.C. 1998)(extrajudicial killing not an "act of state"); *accord* JA0394 (Senate Report on TVPA explaining that because no state commits torture as matter of public policy, act of state doctrine cannot

shield former officials from liability under TVPA).[32] ExxonMobil's conduct, even where it meets the test for "state action," is even more plainly not an act of state.

Finally, even if the act of state doctrine were to apply, its proper application would require a balancing of interests. *Kirkpatrick*, 493 U.S. at 400; *Sabbatino*, 376 U.S. at 428. A key factor is whether a court is called upon to apply well-established legal principles; where unambiguous legal principles govern, the act of state doctrine should not be invoked. *E.g.*, *Sabbatino*, 376 U.S. at 428; *U.S. v. Labs of Va., Inc.*, 272 F. Supp. 2d 764, 772 (N.D. Ill. 2003). This case requires no more than the application of long-established "color of law" jurisprudence to the facts. Thus, the act of state doctrine should not be invoked here. *Kirkpatrick*, 493 U.S. at 409.

IV. EXXONMOBIL'S CROSS-APPEAL SHOULD BE DISMISSED

ExxonMobil's cross-appeal should be dismissed because the district court granted the relief ExxonMobil requested: dismissal with prejudice. A party lacks standing to and may not appeal a judgment in its favor. *E.g.*, *Singh v. George Washington Univ. Sch. of Med. & Health Scis.*, 508 F.3d 1097, 1099-1100 (D.C. Cir. 2007); *Wyo. Outdoor Council v. U.S. Forest Service*, No. 97-cv-5317, 1998 WL 202274, at *1 (D.C. Cir. March 11, 1998); *In re Reporters Comm. for*

[32] An act can be "under color of law" but not an "act of state." *Supra* pp.59-61; *see also Filartiga*, 630 F.2d at 889-90 (acts of official in violation of Paraguay law are not acts of state, but can still be "under color of governmental authority").

Freedom of the Press, 773 F.2d 1325, 1328 (D.C. Cir. 1985); *see also U.S. v. Raines*, 362 U.S. 17, 27 n.7 (1960)(adverse interlocutory orders not grounds for cross-appeal). Additionally, the vagueness of ExxonMobil's "otherwise preempted" and "other" cross-appeal grounds make them inappropriate for the Court's consideration. *See Chameleon Radio Corp. v. F.C.C.*, 30 Fed. App'x, 9, 10 (D.C. Cir. 2002).

Finally, ExxonMobil failed to plead that Plaintiffs' claims were "otherwise preempted" and abandoned its comity defense in *Doe-I*. To the extent ExxonMobil raises arguments that were waived or abandoned below, this should be disallowed under any vehicle. *Meijer, Inc. v. Biovail Corp.*, 533 F.3d 857, 867 (D.C. Cir. 2008).

CONCLUSION

For the above reasons, the decisions below should be reversed and the cases remanded for consideration of the merits.

Dated: August 25, 2010

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of 16,500 words set by Order of this Court on June 8, 2010 (Doc. No. 1248571) because this brief contains 16,498 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(a)(1).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 in 14-point Times New Roman font.

Dated: August 25, 2010

Maureen E. McOwen
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CERTIFICATE OF SERVICE

I, Maureen E. McOwen, hereby certify that on August 25, 2010, I caused to be served:

1. True and correct copies of the public Brief of Plaintiffs-Appellants-Cross-Appellees (Sealed Material Deleted) and the parties' public Joint Appendix (Sealed Material Deleted) via the Court's CM/ECF electronic filing system.

2. True and correct copies of the sealed Brief of Plaintiffs-Appellants-Cross-Appellees (Under Seal) and the parties' sealed Joint Appendix (Under Seal) by hand delivery upon the Court and the following persons entitled to receive the material under seal:

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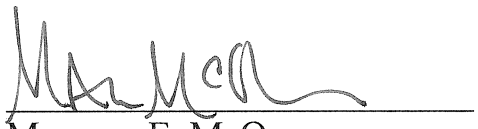

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STATUTES AND REGULATIONS

The statutes pertinent to this appeal are set forth below.

28 U.S.C. § 1332(a)-(c)

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—
>
> (1) citizens of different States;
> (2) citizens of a State and citizens or subjects of a foreign state;
> (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and
> (4) a foreign state, defined in section 1603 (a) of this title, as plaintiff and citizens of a State or of different States.
>
> For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.
>
> (b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $75,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.
>
> (c) For the purposes of this section and section 1441 of this title—

(1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business; and

(2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

28 U.S.C. § 1350

The district courts shall have 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 (note)

SECTION 1. SHORT TITLE.
This Act may be cited as the ‘Torture Victim Protection Act of 1991’.

SEC. 2. ESTABLISHMENT OF CIVIL ACTION.

(a) Liability.—An individual who, under actual or apparent authority, or color of law, of any foreign nation—

(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or

(2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual’s legal representative, or to any person who may be a claimant in an action for wrongful death.

(b) Exhaustion of Remedies.—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.

(c) Statute of Limitations.—No action shall be maintained under this section unless it is commenced within 10 years after the cause of action arose.

SEC. 3. DEFINITIONS.

(a) Extrajudicial Killing.—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.

(b) Torture.—For the purposes of this Act—

(1) the term 'torture' means any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind; and

(2) mental pain or suffering refers to prolonged mental harm caused by or resulting from—

(A) the intentional infliction or threatened infliction of severe physical pain or suffering;

(B) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(C) the threat of imminent death; or

(D) the threat that another individual will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.