06-4800,
06-4876

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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

Plaintiffs-Appellants-Cross-Appellees,

v.

ROYAL DUTCH PETROLEUM CO., SHELL TRANSPORT AND TRADING COMPANY PLC,

Defendants-Appellees-Cross-Appellants,

and

SHELL PETROLEUM DEVELOPMENT COMPANY OF NIGERIA, LTD.

Defendant.

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

BRIEF OF APPELLEES/CROSS-APPELLANTS

(*Caption continued*)

June 6, 2007

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure:

1. Appellee/Cross-Appellant Shell Petroleum N.V., successor to Royal Dutch Petroleum Company, is a wholly owned subsidiary of Royal Dutch Shell, p.l.c.

2. Appellee/Cross-Appellant the Shell Transport and Trading Company, Ltd., formerly known as Shell Transport and Trading Company, p.l.c., is a wholly owned subsidiary of co-Appellee/Cross-Appellant Shell Petroleum N.V., except for one share which is held by a dividend access trust for the benefit of one of Royal Dutch Shell, p.l.c.'s classes of ordinary shares.

3. Royal Dutch Shell, p.l.c. is a publicly traded company. No publicly traded company has a ten percent or greater stock ownership in Royal Dutch Shell, p.l.c.

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STATEMENT OF FACTS[1]

Defendants Shell Petroleum N.V. and the Shell Transport and Trading Company, Ltd. ("Shell Transport") (collectively, the "Shell Parties"), who are Cross-Appellants in No. 06-4876 and Appellees in No. 06-4800, are foreign holding companies.[2] (*Wiwa, et al. v. Royal Dutch Petroleum Co.*, No. 96 Civ. 8386 (S.D.N.Y.) ("*Wiwa*") Docket Entry No. 4, at 3 (van der Vlist Decl. ¶¶ 2-3), (Munsiff Decl. ¶¶ 2-3).) Shell Petroleum N.V. is a Dutch company with its principal and only place of business in The Hague, The Netherlands. (*Wiwa* Docket Entry No. 4, at 3 (van der Vlist Decl. ¶ 2).) Shell Transport is a U.K. company with its principal and only place of business in London, England. (*Wiwa* Docket Entry No. 4, at 3 (Munsiff Decl. ¶ 2).) Shell Petroleum N.V. and Shell Transport are solely investment vehicles. (*Wiwa* Docket Entry No. 4, at 3 (van der Vlist Decl. ¶ 3), (Munsiff Decl. ¶ 3).) They are holding companies which own together, directly or indirectly, investments in various companies located

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[1] Other than disputed issues going to jurisdictional facts, for the purpose of this appeal only, we treat the facts pleaded as true, even though discovery has shown many of them to be false.

[2] The Kiobel Plaintiffs sued Royal Dutch Petroleum Company and Shell Transport and Trading Company, p.l.c. The Amended Complaint still names those companies as defendants. Because of changes in corporate form (unrelated to the allegations in this lawsuit) the successors to those companies are Shell Petroleum N.V. and Shell Transport and Trading Company, Ltd., respectively. (*Kiobel v. Royal Dutch Petroleum Co.*, No. 02 Civ. 7618 (S.D.N.Y.) ("*Kiobel*") Docket Entry No. 158, at 1 n.1.)

throughout the world. (*Wiwa* Docket Entry No. 4, at 3 (van der Vlist Decl. ¶ 3), (Munsiff Decl. ¶ 3).). They do not engage in operational activities in Nigeria or elsewhere, and derive the whole of their income, except for interest income on cash flow balances or short-term investments, from their shareholding investments. (*Wiwa* Docket Entry No. 4, at 3 (van der Vlist Decl. ¶ 3), (Munsiff Decl. ¶ 3).)

Shell Petroleum Development Company of Nigeria, Ltd. ("SPDC") is also a named defendant in the district court, but did not join in the Shell Parties' motion to dismiss, was not a party to the order on review, and consequently is not a party to the present appeal. Starting in 1958, SPDC operated oil production facilities in Nigeria, and has had employees located in Nigeria. (JA 0129, ¶ 32.) SPDC ceased oil production operations in Ogoniland in 1993. SPDC is a corporation separate and distinct from the Shell Parties. (*Kiobel* Un-numbered Docket Entry between Nos. 167-68, at 3 (SPDC's Memorandum of Law in support of its motion to dismiss, Arbido Decl. ¶ 6).) It has its own: (1) Board of Directors, who direct the business and affairs of SPDC; (2) officers; (3) capital, including operating capital; (4) corporate structure; (5) facilities; (6) work forces; (7) business records; (8) bank accounts; (9) tax returns; (10) financial statements; (11) budgets; and (12) corporate reports. (*Id*.)

Plaintiffs Esther Kiobel, et al., who are Appellants in No. 06-4800 and Cross-Appellees in No. 06-4876 (the "Kiobel Plaintiffs"), are Nigerians who

allege, on behalf of themselves and a putative class of similarly situated persons, that they were victims of human rights violations perpetrated by the Nigerian government with the assistance, cooperation, facilitation, etc. of SPDC and the Shell Parties. (JA 0116-17, ¶ 1.) The Kiobel Plaintiffs contend that those violations were the result of a strategy to depopulate the areas of an oil concession area in the Niger Delta to facilitate the oil exploration and development activities of SPDC. (JA 0117, ¶ 1.) The Kiobel Plaintiffs' allegations forming the basis of defendants' liability stem from actions that SPDC, not the Shell Parties, allegedly took in connection with SPDC's oil production business.

JURISDICTIONAL STATEMENT

None of the alleged actions taken by the Shell Parties constitutes a violation of the law of nations. Accordingly, the federal courts lack subject matter jurisdiction over this lawsuit. As this Court has previously explained:

> Because the Alien Tort Act requires that plaintiffs plead a "violation of the law of nations" at the jurisdictional threshold, this statute requires a more searching review of the merits to establish jurisdiction than is required under the more flexible "arising under" formula of section 1331. *See Filartiga v. Pena-Irala*, 630 F.2d 876, 887-88 (2d Cir. 1980). Thus, it is not a sufficient basis for jurisdiction to plead merely a colorable violation of the law of nations. There is no federal subject-matter jurisdiction under the Alien Tort Act unless the complaint adequately pleads a violation of the law of nations (or treaty of the United States).

Kadic v. Karadzic, 70 F.3d 232, 238 (2d Cir. 1995). "'[O]n a challeng[e] [to] the district court's subject matter jurisdiction, the court may resolve disputed

jurisdictional fact issues by reference to evidence outside the pleadings.'" *Flores v. Southern Peru Copper Corp.*, 414 F.3d 233, 255 n.30 (2d Cir. 2003) (quoting *Filetech S.A. v. France Telecom S.A.*, 157 F.3d 922, 932 (2d Cir. 1998)). Lack of subject matter jurisdiction may be raised at any time. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 126 S. Ct. 1235, 1240 (2006); Fed. R. Civ. P. 12(h)(3).

Pursuant to 28 U.S.C. § 1292(b), this Court has appellate jurisdiction to review the district court's order denying in part the Shell Parties' motion to dismiss.

STATEMENT OF ISSUES AND STANDARD OF REVIEW

1. Whether the district court correctly held that the allegations in Count I concerning "extrajudicial killing" fail to state a cause of action under *Sosa*.

2. Whether the district court incorrectly held that the allegations in Count III concerning "torture/cruel, inhuman and degrading treatment" state a cause of action under *Sosa*.

3. Whether the district court incorrectly held that the allegations in Count II concerning "crimes against humanity" state a cause of action under *Sosa*.

4. Whether the district court incorrectly held that the allegations in Count IV concerning "arbitrary arrest and detention" state a cause of action under *Sosa*.

5. Whether the federal courts lack subject matter jurisdiction because the Kiobel Plaintiffs have not pleaded any well-defined violation of the law of nations sufficient to vest the federal courts with subject matter jurisdiction under the Alien Tort Statute, 28 U.S.C. § 1350 ("ATS").

The standard of review for each of these issues is *de novo*. *See Flores*, 414 F.3d at 241.

STATEMENT OF THE CASE

On September 20, 2002, the Kiobel Plaintiffs filed a complaint against the Shell Parties that was patterned after the complaint filed approximately six years earlier in *Wiwa*. (*Compare* JA 0116-51 *with Wiwa* Docket Entry No. 1.) Because the allegations in *Wiwa* and *Kiobel* were so similar, the district court consolidated the two cases for discovery purposes one month later. (*See Kiobel* Un-numbered Docket Entry between Nos. 4 and 5 (Stipulation and Order).)

The consolidated discovery taken by the Kiobel and Wiwa Plaintiffs was quite substantial. Discovery closed in May 2004.[3] On May 17, 2004, shortly before the close of discovery, the Kiobel Plaintiffs filed their Amended Complaint. That Amended Complaint contains two important differences from the original Kiobel complaint. *First*, recognizing that all the evidence showed that the Shell Parties were purely holding companies with no activities in Nigeria, the

[3] There remain some outstanding discovery disputes pending before the Magistrate Judge.

Kiobel Plaintiffs amended to add SPDC as a party. (*Compare* Kiobel Docket Entry No. 1 *with* JA 0116-17.)

Second, in refusing to dismiss the *Wiwa* complaint, the district court relied heavily on an allegation that the Shell Parties and Nigerian government officials met "in London and the Netherlands concerning MOSOP, and coordination at the anti-MOSOP campaign." *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 Civ. 8386 (KMW), 2002 WL 319887, at *13 n.14 (S.D.N.Y. Feb. 28, 2002). The Kiobel Plaintiffs, in their original complaint, had copied that allegation from the *Wiwa* complaint, alleging:

> Shell's cessation of operations deprived both Shell and the Government of a significant source of revenue. They therefore determined to develop a plan to provide the civil tranquility that would allow Shell to restart its Ogoniland operations. On or about February 15, 1993 through February 18, 1993, Shell met with Nigerian officials in the Netherlands and England to formulate a strategy to suppress MOSOP. Nigerian officials made clear to Shell their interest in effectuating Shell's return to Ogoniland. Based on past behavior, Shell knew that the means used in that endeavor would include military violence against Ogoni civilians.

(*Kiobel* Docket Entry No. 1, ¶ 4.) In their original complaint, the Kiobel Plaintiffs also alleged:

> On or about March 16, 1995, top executives of Shell International Petroleum Company, Ltd. ("SIPC") met in Shell Centre, London with the Nigerian High Commissioner and top Nigerian military officers to discuss common strategy regarding the Ogoni campaign including a joint media campaign and other action.

(*Id.*, ¶ 61.)

Because, after years of discovery, the Wiwa and Kiobel Plaintiffs had learned that no such meetings took place, the Kiobel Plaintiffs, when amending their complaint, deleted the allegations that the Shell Parties met with the Nigerian government. (*Compare* Kiobel Docket No. 1, ¶ 41 *with* JA 0132, ¶ 45; *compare* Kiobel Docket No. 1, ¶ 61 *with* JA 0116-51.) The district court later compelled the Wiwa Plaintiffs to also amend their complaint by deleting similar allegations. (*Wiwa* Docket No. 202, 6-7.)

The Kiobel Plaintiffs' claims are based on alleged violations of the law of nations. Under the ATS, Congress granted the federal courts 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. The Shell Parties moved to dismiss all the Kiobel Plaintiffs' causes of action for failure to state a claim. Before the district court decided the Shell Parties' motion to dismiss,[4] the Supreme Court handed down its first decision in a case brought under the

[4] The Kiobel Plaintiffs state that "[a]lthough [the *Sosa* decision] predated the filing of Defendants' motion, Defendants did not raise *Sosa* in their opening brief." Opening Brief for Plaintiffs-Appellants, at 4 n.2. The Shell Parties served their opening brief on June 1, 2004, twenty-eight days *before* the Supreme Court decided *Sosa*. The Shell Parties did not file that brief until July 15, 2004, because the Magistrate's local rules state that "[n]o motion papers shall be filed until the motion has been fully briefed." *See* Individual Practices of Mag. Judge Henry Pittman, dated July 15, 1998, § 2D. As the district court found, "*Sosa* was decided four weeks after Defendants' motion to dismiss was served . . . . [T]herefore [the Shell Parties' *Sosa*] argument is not procedurally barred." (JA 0170-71.)

ATS: *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). The *Sosa* decision significantly changed the landscape for actions brought under the ATS, holding that the ATS was "only jurisdictional," *id.* at 712, and "enabled federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law." *Id.* The Supreme Court held that, to state a cause of action cognizable under the ATS for a violation of the law of nations, the norm for which recovery is sought must be "of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized." *Id.* at 725. Only a "narrow class of international norms" would satisfy *Sosa*'s "high bar." *Id.* at 727, 729.

In light of *Sosa*, the Shell Parties argued that the Amended Complaint must be dismissed in its entirety. The district court, holding that "Plaintiffs' claims are essentially claims for secondary liability," concluded that "[i]t is a close question whether, following *Sosa*, private individuals can be held liable under the ATS for aiding and abetting violations of international law." (Order, September 29, 2006 ("District Court Order") (JA 0011-12).) However, the district court did not resolve that "close question" by examining each claim brought by the Kiobel Plaintiffs against the Shell Parties and asking whether the conduct alleged violated a well-defined and universally accepted international norm, comparable in specificity and acceptance to the 18th-century paradigms identified in *Sosa*.

Instead, the district court rejected four of the Kiobel Plaintiffs' causes of action as having no well-settled definition or universal acceptance in the abstract, and held that, for the three counts as to which the ATS might grant jurisdiction as to a claim against someone "where a cause of action for violation of an international norm is viable under the ATS, claims for aiding and abetting that violation are viable as well." (JA 0012.) Thus, the district court dismissed four of the Kiobel Plaintiffs' seven causes of action for failure to state a claim, but refused to dismiss the three remaining causes of action, holding that they stated claims for aiding and abetting violations of customary international law.[5] (JA 0012-21, 23.) The district court, *sua sponte*, certified its order for immediate appeal under 28 U.S.C. § 1292(b). (JA 0021-23.)

[5] The Kiobel Plaintiffs asserted seven causes of action: (I) extrajudicial killings; (II) crimes against humanity; (III) torture/cruel, inhuman and degrading treatment; (IV) arbitrary arrest and detention; (V) rights to life, liberty, security and association; (VI) forced exile; and (VII) property destruction. (JA 0144-49.) The district court dismissed Counts I, V, VI and VII, but refused to dismiss Counts II, III and IV. (JA 0012-21, 23.)

Both the Kiobel Plaintiffs and the Shell Parties petitioned for interlocutory review.[6] This Court granted those petitions on December 27, 2006. (JA 0097.) The appeal and cross-appeal in *Kiobel* have been recommended for tandem consideration with another case raising similar issues: *Presbyterian Church of Sudan v. Talisman Energy Inc.*, No. 07-0016. In that case, the United States, as *amicus curiae*, has submitted a brief urging this Court to reject all claims for civil secondary liability under the ATS for any violations of the law of nations, and has stated:

> This Court has ordered the appeal in *Kiobel v. Royal Dutch Petroleum Corp.*, Nos. 06-4800, 06-4876, to be heard in tandem with this case. Although the United States will not file an amicus brief in the *Kiobel* case, we note that our arguments here are equally applicable to the *Kiobel* district court's determination that claims for aiding and abetting liability are available under the ATS.

Brief of the United States as amicus curiae, at 5 n.1, *Presbyterian Church of Sudan v. Talisman Energy Inc.*, No. 07-0016 (2d Cir. May 15, 2007).

SUMMARY OF ARGUMENT

The Kiobel Plaintiffs' claims are "essentially claims for secondary liability." (JA 0011.) The Kiobel Plaintiffs allege that the Nigerian government

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[6] In No. 06-4800, the Kiobel Plaintiffs appeal the dismissal of Count I only; in No. 06-4876, the Shell Parties appeal the district court's refusal to dismiss the Amended Complaint in its entirety (*i.e.*, Counts II, III and IV). The Kiobel Plaintiffs have not appealed the district court's dismissal of Counts V (right to life, liberty, security and association), VI (forced exile) or VII (property destruction).

engaged in extrajudicial killing, torture, cruel, inhuman and degrading treatment, crimes against humanity and arbitrary arrest and detention. There is no allegation that the Shell Parties committed any of those acts. Instead, the Kiobel Plaintiffs allege that the Shell Parties, either knowingly or recklessly, encouraged or assisted those acts by requesting police protection or providing supplies, arms and ammunition and information to the Nigerian government.

The pertinent question, under *Sosa*, is not whether there is (or should be) a general rule against aiding and abetting or conspiracy under the law of nations. Instead, *Sosa* dictates that "federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted." 542 U.S. at 732. Relevant to that inquiry is "whether international law extends the scope of liability *for a violation of a given norm to the perpetrator being sued*." *Id.* at 732 n.20 (emphasis added). Likewise, in *Kadic*, this Court held:

> In order to determine whether the offenses alleged by the appellants in this litigation are violations of the law of nations that may be the subject of Alien Tort Act claims against a private individual, we must make a particularized examination of these offenses, mindful of the important precept that "evolving standards of international law govern who is within the [Alien Tort Act's] jurisdictional grant."

70 F.3d at 241 (quoting *Amerada Hess Shipping Corp. v. Argentine Republic*, 830 F.2d 421, 425 (2d Cir. 1987)).

Here, a particularized examination of each of the counts of the Amended Complaint at issue (Counts I-IV) demonstrates that there exists no norm meeting *Sosa*'s standard that would support a colorable claim against the Shell Parties themselves for violation of the law of nations. Accordingly, not only have the Kiobel Plaintiffs failed to state any claim against the Shell Parties, but they have not stated a claim sufficient to invoke the jurisdiction of the federal courts under the ATS.

ARGUMENT

I. *SOSA* CONTROLS THE EVALUATION OF ATS CLAIMS.

In *Sosa*, a Mexican national sued under the ATS to redress his alleged arrest and detention by other Mexican nationals at the behest of the United States Drug Enforcement Administration. 542 U.S. at 697-98. The Supreme Court dismissed the plaintiff's ATS claim, holding that the alleged arrest and detention did not violate a "norm of customary international law so well defined as to support the creation of a federal remedy." *Id.* at 738.

Based on its consideration of the history surrounding the ATS, the Court concluded that the ATS "is a jurisdictional statute creating no new causes of action," *id.* at 724, and that its grant of jurisdiction originally enabled federal courts to entertain suits by aliens based on the "handful of international *cum* common law claims understood in 1789 . . . ," *id.* at 712. Those "modest set of

actions" consisted of: "offenses against ambassadors, violations of safe conduct . . . and individual actions arising out of prize captures and piracy . . . . " *Id.* at 720 (citation omitted). The Court found "no basis to suspect Congress had any examples in mind beyond those torts . . . . " *Id.* at 724.

A. *Sosa* Restricts ATS Claims to Universally Accepted and Concretely Defined Violations of the Law of Nations.

Although the Court left the door "still ajar" to actions brought under the ATS for violations not cognizable in 1789, it did so "subject to vigilant doorkeeping, and thus open to a narrow class of international norms today." *Sosa*, 542 U.S. at 729. The Court established a three-part test for recognizing such new claims. The stringency of that test cannot be overstated. "[C]ourts should require any claim based on the present-day law of nations to rest on a norm of [i] international character [ii] accepted by the civilized world and [iii] defined with a specificity comparable to the features of the 18th-century paradigms we have recognized." *Id.* at 725. Conversely, "federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted." *Id.* at 732.

The Court instructed federal courts to exercise "caution" when considering whether to create a new cause of action, and it provided five reasons for that caution:

> *First*, the prevailing conception of the common law has changed since 1789 in a way that counsels restraint in judicially applying internationally generated norms . . . .
>
> *Second*, along with, and in part driven by, that conceptual development in understanding common law has come an equally significant rethinking of the role of the federal courts in making it . . . . [T]he general practice has been to look for legislative guidance before exercising innovative authority over substantive law. It would be remarkable to take a more aggressive role in exercising a jurisdiction that remained largely in shadow for much of the prior two centuries.
>
> *Third*, this Court has recently and repeatedly said that a decision to create a private right of action is one better left to legislative judgment in the great majority of cases . . . . [T]he possible collateral consequences of making international rules privately actionable argue for judicial caution.
>
> *Fourth*, the subject of those collateral consequences is itself a reason for a high bar to new private causes of action for violating international law, for the potential implications for the foreign relations of the United States of recognizing such causes should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs. It is one thing for American courts to enforce constitutional limits on our own State and Federal Governments' power, but quite another to consider suits under rules that would go so far as to claim a limit on the power of foreign governments over their own citizens, and to hold that a foreign government or its agent has transgressed those limits . . . .
>
> The fifth reason is particularly important in light of the first four. We have no congressional mandate to seek out and define new and debatable violations of the law of nations, and modern indications of congressional

> understanding of the judicial role in the field have not affirmatively encouraged greater judicial creativity.

Id. at 725-28 (citations omitted).

B. *Sosa* Requires Courts to Determine Whether the Specific Acts of Defendants Violate Definite Norms Accepted Among Civilized Nations, Not Whether Defendants Conspired With, or Aided or Abetted the Violations of, Others.

As the district court stated, "Plaintiffs' claims are essentially claims for secondary liability, *i.e.*, claims that Defendants 'facilitated,' 'conspired with,' 'participated in,' 'aided and abetted,' or 'cooperated with,' government actors or government activity in violation of international law." (JA 0011.) However, the court then asked and answered the wrong question: whether "following *Sosa*, private individuals can be held liable under the ATS for aiding and abetting violations of international law." (JA 0011-12.) *Sosa* does not suggest that courts may first ask whether someone other than the defendant committed a violation of the law of nations, and then ask whether, as a general matter, the law of nations recognizes aiding and abetting or conspiratorial liability.

To the contrary, *Sosa* requires that, as part of "the determination whether a norm is sufficiently definite to support a cause of action," one considers:

> whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual.
> *Compare Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 791-795 (D.C. Cir. 1984) (Edwards, J., concurring) (insufficient consensus in

> 1984 that torture by private actors violates international law), *with Kadic v. Karadzic*, 70 F.3d 232, 239-241 (2d Cir. 1995) (sufficient consensus in 1995 that genocide by private actors violates international law).

542 U.S. 732 & n.20; *see also id.* at 760 ("The norm must extend liability to the type of perpetrator (*e.g.*, a private actor) the plaintiff seeks to sue.") (Breyer, J., concurring).

In *Sosa*, the Court evaluated the specific conduct of Alvarez—his abduction and one-day detention of Sosa—against international norms, and concluded that Alvarez's conduct was not proscribed by any well-defined and uniformly accepted norm under the law of nations. *Id.* at 731-38. Likewise, whenever this Court has considered an ATS claim brought against an individual, it has measured the alleged (or proven) conduct of that individual against defined international norms. For example, in *Filartiga*, this Court examined the conduct of Pena—a Paraguayan government official who personally tortured Filartiga—against international norms concerning torture. 630 F.2d at 878, 880-85. In *Kadic*, the defendant, Karadzic, "in his capacity as President . . . [directed] a pattern of systematic human rights violations"; this Court measured Karadzic's own conduct against the law of nations. 70 F.3d at 237, 241-45.

Here, the district court did not examine each of the acts allegedly committed by the Shell Parties and ask whether those acts violated an international

norm with at least as "definite content and acceptance among civilized nations [as] the historical paradigms familiar when § 1350 was enacted." *Sosa*, 542 U.S. at 732. Instead, the district court concluded that the Kiobel Plaintiffs had sufficiently pleaded that the Nigerian government had violated the law of nations, and although it was a "close question," concluded that a general international rule of aiding and abetting, or conspiratorial, liability existed. (JA 0011-12, 0015-20.)

That approach is forbidden by *Sosa* and this Court's precedents. It also conflicts with *Sosa*'s instruction that the courts exercise "great caution in adapting the law of nations to private rights." 542 U.S. at 728. Blanket recognition of private liability for aiding and abetting or conspiracy would render all those who do business in foreign countries liable for the acts of those governments, so long as a plaintiff alleged some cooperation between the government and a private defendant. Far from confining the ATS liability to the circumstance of *United States v. Smith*, 18 U.S. (5 Wheat.) 153 (1820), in which the Supreme Court concluded that piracy was sufficiently well-defined and universally accepted in international law to permit the execution of a pirate, *see Sosa*, 542 U.S. at 732, recognition of a general international norm of aiding and abetting, or conspiratorial, liability for private persons would extend the pirate's liability to his financiers, his munitions suppliers, the boat builder, and perhaps even those who advised him of weather conditions.

Indeed, as to the paradigmatic case of piracy, the law of nations condemned the pirate only, not his accessories or abettors. Therefore, England enacted two statutes to extend criminal liability for piracy to certain forms of secondary conduct:

> As, by statute 11 & 12 W.III. c.7 . . . any ship, boat, ordinance, ammunition or goods; or yielding them up voluntarily to a pirate; or conspiring to do these acts . . . shall, for each of these offenses, be adjudged a pirate, felon, and robber, and shall suffer death, whether he be principal or accessory. By the statue 8 Geo. I. c.24 the trading with known pirates, or furnishing them with stores or ammunition, or fitting out any vessel for that purpose, or in any way consulting, combining, confederating, or corresponding with them . . . shall be deemed piracy: and all accessories to piracy, are declared to be principal pirates, and felons without benefit of clergy . . . .
>
> These are the principal case, in which the statute law of England interposes, to aid and enforce the law of nations, as a part of the common law; inflicting an adequate punishment upon offenses against the universal law, committed by private persons.

4 William Blackstone, *Commentaries on the Laws of England* 72 (1769). Likewise, in 1790 the United States passed domestic legislation providing criminal liability for those who aided or abetted piracy. *See* Act of April 30, 1790, ch. 9, § 10, 1 Stat. 114 (1790) (one who did "knowingly and wittingly aid" piracy was deemed an "accessory to such piracies").

Thus, even for piracy, Parliament and Congress—not the courts—determined whether and to what extent to proscribe criminal secondary liability. That history squares with *Sosa*'s repeated admonitions that any such

extension of liability: "argue[s] for judicial caution"; "is one better left to legislative judgment"; must be subjected to a "high bar" to avoid "impinging on the discretion of the Legislative and Executive Branches"; and must take into account that Congress has "not affirmatively encouraged greater judicial creativity." *Sosa*, 542 U.S. at 725, 727, 728.

II. THIS COURT SHOULD AFFIRM THE DISTRICT COURT'S DISMISSAL OF THE KIOBEL PLAINTIFFS' EXTRAJUDICIAL KILLING CLAIM.

A. The Amended Complaint Does Not State a Tort in Violation of the Law of Nations.

Of the twelve plaintiffs, only one, Esther Kiobel, purportedly "on her own behalf and on behalf of her late husband, Dr. Barinem Kiobel,"[7] has brought a claim for extrajudicial killing. (JA 0119-20, ¶ 6(a).) The Amended Complaint alleges that Dr. Kiobel was "convicted of murder and executed by the Nigerian government on November 10, 1995." (JA 0119, ¶ 6(b).) It does not allege that the Shell Parties (or SPDC) tried or executed Dr. Kiobel. Instead, the specific acts alleged in the Amended Complaint concerning the Shell Parties' relationship to

[7] Mrs. Kiobel affirmatively pleads that she is *not* the executor of her late husband's estate. (JA 0120, ¶ 6(d).) Thus, she lacks standing to bring the extrajudicial killing claim on behalf of her husband. To the extent she seeks to bring it on her own behalf, *e.g.*, for loss of consortium, there is absolutely no customary international law suggesting that such a tort is cognizable under the law of nations. Mrs. Kiobel also alleges that she herself was beaten and detained by the Nigerian military, but those allegations do not pertain to the extrajudicial killing claim.

Dr. Kiobel's execution are: (a) Alhaji M. Kobani, allegedly an agent of the Shell Parties and SPDC, "bribed witnesses to give false testimony;" (b) the Shell Parties and SPDC "participated in various witness preparation sessions in which witnesses were instructed on what to say;" (c) the Shell Parties and SPDC "participated in a reception for the witnesses shortly before trial;" and (d) "[a]n official SPDC representative attended the trial." (JA 0139, ¶ 70.)

No definite and uniformly agreed-upon norm of the law of nations prohibits any of these alleged acts. Although bribery of witnesses is illegal in many countries, it is not a concern of the law of nations. As this Court held in *IIT v. Vencap, Ltd.*, 519 F.2d 1001 (2d Cir. 1975):

> The reference to the law of nations must be narrowly read if the [Alien Tort Statute] is to be kept within the confines of Article III. We cannot subscribe to plaintiffs' view that the Eighth Commandment "Thou shalt not steal" is part of the law of nations. While every civilized nation doubtless has this as a part of its legal system, a violation of the law of nations arises only when there has been "a violation by one or more individuals of those standards, rules or customs (a) affecting the relationship between states or between an individual and a foreign state, and (b) used by those states for their common good and/or in dealings *inter se*."

Id. at 1015; *see also Flores*, 414 F.3d at 249 ("Even if certain conduct is universally proscribed by States in their domestic law, that fact is not necessarily significant or relevant for purposes of customary international law . . . . Therefore, for example, murder of one private party by another, universally proscribed by the domestic law of all countries (subject to varying definitions), is not actionable

under the [ATS] as a violation of customary international law because the 'nations of the world' have not demonstrated that this wrong is 'of mutual, and not merely several, concern'") (quoting *Filartiga*, 630 F.2d at 888). The Kiobel Plaintiffs have never even suggested, much less supported, the proposition that the alleged bribery is a violation of the law of nations. A fortiori, participation in witness preparation sessions, hosting receptions and trial observation do not rise to the level of violations of the law of nations, and most often do not even violate domestic law.

The Kiobel Plaintiffs' opening brief entirely misses the mark. The issue is not whether Major Okuntimo or members of the Special Tribunal could be held liable for extrajudicial killing. An action against those defendants, had it been brought, would follow the formula of *Filartiga*, *Kadic*, and several other decisions from other courts of appeals permitting extrajudicial killing claims to proceed against the actual killer. The question here is whether the alleged bribery of witnesses or hosting of a reception by someone who is not the killer (or torturer) rises to the level of a violation of the law of nations. It does not.

The Kiobel Plaintiffs will likely argue that the host of unfounded allegations concerning, *inter alia*, environmental damage, rape and murder by Nigerian police, and suppression of peaceful protests, are relevant to demonstrate the Shell Parties' responsibility under the law of nations for Dr. Kiobel's

execution. However, those allegations, even if proved, would not establish any extrajudicial killing by the Shell Parties. For example, the Kiobel Plaintiffs allege: "the Federal Republic of Nigeria was ruled by a succession of corrupt and brutal military dictatorships," (JA 0128, ¶ 28); "the Government gave Shell a green light to conduct its activities as if the Ogoni did not exist," (JA 0129, ¶ 32); "[t]he Government permitted, and Shell and SPDC accepted, a near total absence of environmental controls," (JA 0130, ¶ 33); "the local population began to express their displeasure in an increasingly public and organized manner," (JA 0131, ¶ 37); "SPDC claimed that there would be an attack on . . . its camp site at Umuechem and requested that the Rivers State Commissioner of Police provide the Mobile Police Force for security protection," (JA 0131, ¶ 39); "acting on SPDC's request, the Mobile Police Force carried out massive scorched earth operations . . . resulting in the massacre of 80 villagers and the destruction of over 495 houses," (JA 0131, ¶ 41).

Those allegations amount to the claim that the Shell Parties knew that they were doing business with a "corrupt and brutal" government, sought police protection from that government, and continued to do business in Nigeria (although not in Ogoniland) even after the Nigerian police massacred civilians, which led to further protests, further violent suppression by the government, and eventually the summary execution of Dr. Kiobel. The proposition that the

Kiobel Plaintiffs would like to establish, as a norm of customary international law, is that someone who conducts business with a brutal government is responsible for that government's actions, at least insofar as those actions protect the government's shared commercial interest with the private party. There is no such norm. All the "evidence" of customary international law concerning extrajudicial killing to which the Kiobel Plaintiff's point would hold the killer liable; none of it suggests that the law of nations prohibits companies from doing business in countries governed by "corrupt and brutal" governments, or would hold them liable for the acts of those governments.[8]

[8] Whether companies should be forbidden from dealing with brutal or corrupt foreign governments is peculiarly the province of the Executive and Legislative branches of government. *See*, *e.g.*, U.S. Const. art. I, § 8 (Congressional power to regulate commerce with foreign nations); U.S. Const. art. II, § 2 (Presidential power to make treaties); § 307 of the Tariff Act of 1930, 19 U.S.C. § 1307 (2000) (prohibiting importation of goods produced using convict labor); Exec. Order No. 12,543, 51 Fed. Reg. 875 (Jan. 7, 1986) (imposing an embargo against Libya); Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, § 207, 100 Stat. 1086 (1986) (repealed) (mandating human rights code of conduct for U.S. entities employing 25 or more people in South Africa); Cuban Assets Control Regulations, 31 C.F.R. Part 515 (prohibiting trade with Cuba); The Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, 22 U.S.C. § 6082 (1996) (creating private cause of action against foreign companies who traffic in property that was owned by a United States national and confiscated by the Republic of Cuba). *Sosa*'s concern that the judiciary not permit expansion of the ATS to impinge on activities more suited to those branches is particularly powerful here. *See Sosa*, 542 U.S. at 727-28.

In the district court, the Kiobel Plaintiffs relied on decisions from international criminal tribunals, arguing that because those tribunals imposed criminal liability on secondary violators in some cases, civil secondary liability should be recognized under the law of nations. However, *Sosa* emphasized the differences between criminal and civil procedure as yet another reason "for a restrained conception of the discretion a federal court should exercise in considering a new cause of action" for violation of international law: "[t]he creation of a private right of action raises issues beyond the mere consideration whether underlying primary conduct should be allowed or not, entailing, for example, a decision to permit enforcement without the check imposed by prosecutorial discretion." 542 U.S. at 725, 727. As the Supreme Court has noted, "[a]iding and abetting is an ancient criminal law doctrine," but in civil actions it "has been at best uncertain in its application." *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 181 (1994). Even under United States law, "the rules for determining aiding and abetting liability are unclear," *id*. at 188; when United States law provides for criminal aiding and abetting liability, "it does not follow that a private civil aiding and abetting cause of action must also exist. We have been quite reluctant to infer a private right of action from a criminal prohibition alone." *Id.* at 190. Thus, the fact that aiding and abetting liability may exist in the criminal context for certain violations of the

law of nations does not provide evidence that civil secondary liability exists for those same violations, much less for any others.[9]

If there is anything to be learned from the decisions of the international criminal tribunals, which "are not primary sources of customary international law," *Flores*, 414 F.3d at 264, it is that those tribunals reject the general theory of secondary liability advanced here. For example, charges were filed against Karl Rasche, an executive of a large German bank, in the Nuremberg Military Tribunal. *See United States v. von Weizsacker (Ministries Case)*,

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[9] For whatever they are worth, the charters of international criminal tribunals are themselves inconsistent in their treatment of aiding and abetting liability, thus failing *Sosa*'s "definite content" requirement. For example, the Rome Statute of the International Criminal Court ("Rome Statute") defines the *actus reus* as "aid[ing], abet[ting] or otherwise assist[ing]" the commission or attempted commission of the crime. Rome Statute, art. 25(3)(c), 37 I.L.M. 1002, 1016 (1998). The Statute of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") and International Criminal Tribunal for Rwanda ("ICTR") require only that the aider and abettor "assist, encourage or *lend moral support* to the perpetration of a specific crime." *Prosecutor v. Vasiljevic*, Case No. ICTY-98-32-A, Judgment, ¶ 102 (ICTY App. Chamber, Feb. 25, 2004) (emphasis added); *see also Prosecutor v. Musema*, Case No. ICTR-96-13-A, Judgment and Sentence, ¶ 126 (ICTR Trial Chamber, Jan. 27, 2000). Likewise, the *mens rea* element has a different requirement: the Rome Statute demands that the conduct be committed "[f]or the purpose of facilitating the commission of such a crime," Rome Statute, art. 25(3)(c), 37 I.L.M. at 1016, whereas the ICTY and ICTR merely require "knowledge that the acts performed by the aider and abettor assist the commission of a specific crime of the principal," *Vasiljevic*, IC-98-32-A, ¶ 102. *See generally* Albin Eser, *Individual Criminal Responsibility, in The Rome Statute of the Int'l Criminal Court: A Commentary* 801 (Antonio Cassese, Paola Gaeta & John R.W.D. Jones eds., 2002).

14 Trials of War Criminals Before the Nuernberg Military Tribunals 621, 621-22 (Military Tribunal IV A 1949). Mr. Rasche was charged with, *inter alia*, "War Crimes and Crimes against Humanity" by participating in loans to "various SS enterprises which employed slave labor." *Id.* at 622. The Tribunal acquitted Mr. Rasche on this charge (while convicting him on others), stating:

> The real question is, is it a crime to make a loan, knowing or having good reason to believe that the borrower will use the funds in financing enterprises which are employed in using labor in violation of either national or international law? Does he stand in any different position than one who sells supplies or raw materials to a builder building a house, knowing that the structure will be used for an unlawful purpose? A bank sells money or credit in the same manner as the merchandiser of any other commodity. It does not become a partner in enterprise, and the interest charged is merely the gross profit which the bank realizes from the transaction, out of which it must deduct its business costs, and from which it hopes to realize a net profit. Loans or sale of commodities to be used in an unlawful enterprise may well be condemned from a moral standpoint and reflect no credit on the part of the lender or seller in either case, but the transaction can hardly be said to be a crime.

Id. at 622. The Tribunal went on to hold that by doing business with the German government, the defendant "did not thereby become a criminal partner" with the German government. *Id.* at 854-56.

B. The Kiobel Plaintiffs' Extrajudicial Killing Claim Is Defective Because the Shell Parties Are Not State Actors.

Under *Kadic*, "torture and summary execution—when not perpetrated in the course of genocide or war crimes—are proscribed by international law only when committed by state officials or under color of law." *Kadic*, 70 F.3d at 243;

see Flores, 414 F.3d at 244. Here, there are no allegations of genocide or war crimes. Although the Amended Complaint barely alleges that the Shell Parties acted under "color of law," the facts pleaded belie that assertion. In allegedly paying bribes for false testimony, participating in witness preparation, hosting a reception for witnesses and attending trial, there is nothing that would constitute state action by the Shell Parties.

The state action requirement arises from the fact that "customary international law addresses only those 'wrong[s]' that are 'of mutual, and not merely several, concern' to States." *Flores*, 414 F.3d at 249 (quoting *Filartiga*, 630 F.2d at 888). Major Okuntimo and the Special Tribunal are state actors.[10] The Shell Parties are not. It is quite clear from this Court's precedents that if an employee of the Shell Parties had murdered Dr. Kiobel, neither that employee nor

[10] Indeed, perusal of the Amicus brief of the International Law Professors (in support of the Kiobel Plaintiffs) is replete with references suggesting that States and their actors are the ones who may be held liable for extrajudicial killing. Brief of Amici Curiae Int'l Law Professors in Support of the Plaintiffs-Appellants, No. 06-4800 (2d Cir. May 15, 2007); *see, e.g.*, *id.* at 5 ("it was the responsibility of a state"); 6 ("acts of German officials against German citizens could be prosecuted"), ("several former judges under the Nazi government [were found] guilty"); 7 ("the human rights obligations undertaken by all U.N. member States"); 12 ("the right to life . . . like the prohibition against torture and other ill-treatment . . . is a rule of general international law binding on all states"), ("the Covenant imposes on states"); 13 ("must be respected by all states"). It is devoid of any suggestion that a private party bribing a witness to testify falsely has violated a well-defined norm of the law of nations.

the Shell Parties itself could be sued under the ATS (or TVPA) for extrajudicial killing. *See, e.g.*, *Flores*, 414 F.3d at 249. There is no support in the law of nations—much less a clearly defined and universally accepted rule—that would hold the Shell Parties liable for suborning perjury that led to an execution conducted by a state actor.

C. The Shell Parties' Ownership of SPDC Does Not Render Them Liable for the Tort of Extrajudicial Killing.

A further, and insurmountable, problem for the Kiobel Plaintiffs is that the Shell Parties did not take any of the actions described in the Amended Complaint. The pleading in the Amended Complaint is haphazard, sometimes alleging that the Shell Parties "and/or" SPDC engaged in acts in Nigeria, sometimes alleging that the Shell Parties "and" SPDC engaged in acts in Nigeria, and sometimes alleging that only SPDC engaged in such acts.

SPDC conducts, and has conducted, business in Nigeria, although it has conducted none in Ogoniland since 1993. It is not a party to this appeal; the proceedings against it in the district court are continuing. The Shell Parties, who are the parties to this appeal, have never conducted any business in Nigeria, and have no presence there. Therefore, they cannot have committed any extrajudicial killing in violation of the law of nations. Indeed, the Kiobel Plaintiffs amended their Complaint to delete an allegation that the Shell Parties and Nigerian government had meetings in the Netherlands and England to develop a concerted

plan. *See supra* at 6-7. Because the ATS is jurisdictional and the identity of "the perpetrator being sued" is essential to the determination of whether the law of nations has been violated, *Sosa*, 542 U.S. at 732 n.20, this Court should go beyond the pleadings and rely on the uncontroverted evidence that the Shell Parties are purely investment holding companies with no operations in Nigeria. The federal courts, therefore, lack subject matter jurisdiction over claims that the Shell Parties are responsible for the alleged extrajudicial killing of Dr. Kiobel, because they took no actions whatsoever in Nigeria.

The Kiobel Plaintiffs will likely rely on paragraph 25 of their Complaint, which alleges that "Shell has dominated and controlled SPDC." (JA 0128, ¶ 25.) However, that allegation is conclusory, untrue and irrelevant. The uncontroverted record evidence—reviewable by this Court because it goes to subject matter jurisdiction—is that SPDC is an independent corporation with all the attributes of a separate and distinct legal entity, and is not "dominated and controlled" by the Shell Parties. (*Kiobel* Un-numbered Docket Entry between Nos. 167-168, at 3 (Arbido Decl. ¶ 6).) Despite years of discovery, the Kiobel Plaintiffs have no evidence to the contrary.

More importantly, that allegation is irrelevant. The potential liability of the Shell Parties does not turn on allegations that might, if proved, satisfy U.S. domestic veil-piercing law. Again, the question is whether the specific conduct

attributed to the Shell Parties constitutes a tort in violation of the law of nations. There is no well-defined, uniformly accepted norm of customary international law that would hold the Shell Parties liable for the alleged extrajudicial killing of Dr. Kiobel through their "domination" of SPDC's affairs. There is no evidence of the "usage and practice of States—as opposed to judicial decisions or the works of scholars," *Flores*, 414 F.3d at 250, to show the existence of a well-defined norm that would hold the Shell Parties liable for the alleged conduct of SPDC in Nigeria.

Indeed, although there is no competent source of customary international law that would suggest that the Shell Parties, as "dominating" owners of SPDC, could be held liable for extrajudicial killing, even the incompetent evidence suggests that the law of nations does not attach civil liability to corporations under any circumstance. For example, in the criminal context, the Rome Statute and the charters governing the ICTY and ICTR restrict the jurisdiction of those tribunals to "natural persons" only, excluding corporations from their coverage. The Statute of the ICTY, art. 6, 32 I.L.M. at 1194 ("[t]he International Tribunal shall have jurisdiction over *natural persons*") (emphasis added); The Statute of the ICTR, art. 5, 33 I.L.M. at 1604 (same); Rome Statute, art. 25, 37 I.L.M. at 1016 (same). Moreover, the drafters of the Rome Statute explicitly considered and declined to recognize corporate liability. *See* Draft Statute for the International Criminal Court, art. 23, at 5-6 & n.3, U.N. Doc.

A/Conf. 183/2/Add.l (1998) (noting proposal); United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, at 133-36, ¶¶ 32-66, U.N. Doc. A/Conf. 183/13 (Vol. II) (1998) (recording debate on proposal); *id.* 275, ¶ 10 (noting deletion of corporate liability); *see also* Kai Ambos, *Article 25: Individual criminal responsibility*, *in Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* 478 (Otto Triffterer ed., 1999) (Rome conference omitted corporate liability because, even among domestic laws "there are not yet universally recognized common standards for corporate liability").

As to civil liability, the Rome Statute requires that individuals (not corporations, which cannot be held criminally liable) cannot be held civilly liable unless they have first been held criminally liable, Rome Statute, art. 75, 37 I.L.M. at 1045-46, under the proof "beyond [a] reasonable doubt" standard, *id.*, art. 66(3), 37 I.L.M. at 1040. Thus, the Rome Statute bars civil liability for natural persons under a "preponderance of the evidence" standard. From this, it would be impossible to conclude that corporations can be held liable for extrajudicial killing under a "preponderance of the evidence" standard, which is what the Kiobel Plaintiffs advocate. Similarly, when Congress enacted the TVPA, it excluded the possibility of corporate liability for extrajudicial killing (and torture). *See* § II.D *infra*.

D. The Kiobel Plaintiffs' Extrajudicial Killing Claim Does Not Survive the TVPA.

The Kiobel Plaintiffs have not sued the Shell Parties under the Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 note, ("TVPA"), and cannot do so because corporations cannot be liable under the TVPA. Only an "individual" may be sued under the statute. *See* 28 U.S.C. § 1350 note Sec. 2(a) ("An *individual* who . . . subjects an individual to torture shall . . . be liable for damages to that individual") (emphasis added). Congress "use[d] the term 'individual' to make crystal clear that foreign states or their entities cannot be sued under this bill under any circumstances: *only individuals may be sued*." S. Rep. No. 102-249, at 7 (1991) (emphasis added). *See, e.g.*, *Arndt v. UBS AG*, 342 F. Supp. 2d 132, 141 (E.D.N.Y. 2004) (defendant, being a corporation, could not be sued under the TVPA).

Claims for extrajudicial killing (and torture) under the ATS do not survive the adoption of the TVPA. As *Sosa* explains: "[W]here there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations . . . . " 542 U.S. at 734 (quoting *The Paquete Habana*, 175 U.S. 677, 700 (1900)); *see also Filartiga*, 630 F.2d at 880 (same). This Court recently explained more fully that if a treaty or domestic law addresses the issue, no resort to customary international law is available:

> [T]he [*Sosa*] Court cautioned that resort to customary international law is appropriate only "where there is no treaty and no controlling executive or legislative act or judicial decision" that speaks to the issue in dispute. In *United States v. Yousef*, 327 F.3d 56, 93 (2d Cir. 2003), this court traced the long lineage of this limiting principle, beginning with *The Nereide*, in which Chief Justice Marshall wrote that while courts are "bound by the law of nations which is a part of the law of the land," Congress may apply a different rule by passing an act for the purpose." *Yousef* itself stated that, "[i]f a statute makes plain Congress's intent . . . , then Article III courts . . . must enforce the intent of Congress irrespective of whether the statute conforms to customary international law."

Olivia v. United States Dep't of Justice, 433 F.3d 229, 233 (2d Cir. 2005) (citation omitted).

The TVPA, adopted in 1991, is a "controlling legislative act." Accordingly, no claim for extrajudicial killing remains by way of the ATS's reference to the law of nations, because reference to the law of nations is a last resort, available only when no treaty or controlling legislative act exists.[11]

[11] *Smith*, 18 U.S. (5 Wheat.) 153, to which *Sosa* points for elaboration of the specificity and universality with which torts against the law of nations must be defined and accepted, *Sosa*, 542 U.S. at 732, is somewhat instructive on this point. Although the Supreme Court in *Smith* concluded that the customary international law against piracy had been specifically defined and widely accepted for centuries, Smith was not prosecuted under customary international law via the Alien Tort Statute. *Smith*, 18 U.S. (5 Wheat.) at 161-63. Instead, Congress had, on March 3, 1819, passed a statute punishing "piracy, as defined by the law of nations" with death. *Id*. at 157. Smith was prosecuted under that controlling federal statute, not under customary international law. *Id*.

The Court of Appeals for the Seventh Circuit addressed this question in *Enahoro v. Abubakar*, 408 F.3d 877 (7th Cir. 2005). *Enahoro* holds that the TVPA "occup[ies] the field . . . [i]f it did not, it would be meaningless [because] [n]o one would plead a cause of action under the [TVPA] and subject himself to its requirements if he could simply plead under international law."[12] *Id*. at 884-85.[13]

In the district court, the Kiobel Plaintiffs asserted that *Enahoro* conflicts with *Flores* and *Kadic*.[14] However, neither *Kadic* nor *Flores* reached the question of whether an ATS-based claim for extrajudicial killing (or torture) survived the TVPA's adoption. In *Flores*, the plaintiffs asserted environmental torts in violation of the "right to life," "right to health" and right to "sustainable development." *Id.* at 237. The TVPA concerns torture and extrajudicial killing

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[12] The TVPA requires courts to "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." *Id*. § 2(b).

[13] *But see Aldana v. Del Monte Fresh Produce, N.A.*, 416 F.3d 1242 (11th Cir. 2005). *Aldana* permitted the plaintiff simultaneously to proceed with torture claims under the ATS and TVPA. 416 F.3d at 1250-51. However, *Aldana* made the fatal error of concluding that *Sosa* held that the ATS provided a cause of action, and was not merely a jurisdictional grant. *Id*. at 1246 & n.4. It then relied on its own precedents concerning implied Congressional repeals of prior legislation, *id.* at 1251, instead of relying on *The Paquete Habana*'s holding, followed by this Court on several occasions, that customary international law is displaced by treaty or legislative action.

[14] The Court of Appeals for the Seventh Circuit very carefully explained why its decision in *Enahoro* did not conflict with this Court's decisions in *Kadic* or *Flores*. *See Enahoro*, 408 F.3d at 885 n.2.

only, so as to whatever other torts in violation of the law of nations were actionable under the ATS before the TVPA, those remain unaffected by the TVPA's adoption. *See* H.R. Rep. No. 102-367 (I), at 4 (1991), *as reprinted in* 1992 U.S.C.C.A.N. 84, 87 ("[C]laims based on torture and summary executions do not exhaust the list of actions that may be appropriately covered [by the ATS]. That statute should remain intact to permit suits based on *other norms* that already exist or may ripen in the future into rules of customary international law.") (emphasis added).

Kadic is entirely consistent with *Enahoro*. In *Kadic*, the defendant, Karadzic, argued "that Congress intended the state-action requirement of the Torture Victim Act to apply to actions under the Alien Tort Act." 70 F.3d at 241. Karadzic argued that the TVPA's state action requirement should be grafted onto *all* ATS claims—not just those covered by the TVPA. *Id.* This Court rejected that argument, noting that "Congress indicated that the Alien Tort Act 'has other important uses and should not be replaced,'" citing the portion of the House Report quoted immediately above. *Id.* Further, this Court held that, unless committed "in the course of genocide or war crimes," claims for summary execution and torture "are proscribed by international law only when committed by state officials or under color of law." *Id.* at 243. Thus, it is clear that Karadzic's argument, rejected by this Court, is that the TVPA's state action requirement should be grafted onto

all ATS claims. As to claims for extrajudicial killing and torture, the TVPA's state action requirement was merely a codification of customary international law. This Court's statement that the "scope of the Alien Tort Act remains undiminished by the enactment of the Torture Victim Act," *id.* at 241, in context, means simply that the TVPA did not affect ATS claims other than those involving extrajudicial killing or torture, and as to those claims, the state action requirement was unchanged by the TVPA.

Finally, the Kiobel Plaintiffs' position would produce an unfathomable result. If ATS-based claims for extrajudicial killing and torture survive the TVPA, United States citizens who are victims of torture or extrajudicial killing by foreign nationals in a foreign country must first exhaust the legal systems of other countries before seeking relief from their own courts, but aliens tortured by aliens in foreign countries may seek immediate redress in the courts of the United States. "It is hard to imagine that the *Sosa* Court would approve of common law claims based on torture and extrajudicial killing when Congress has specifically provided a cause of action for those violations and has set out how those claims must proceed." *Enahoro,* 408 F.3d at 886. It would be even harder to imagine the interpretation the Kiobel Plaintiffs propose.

III. THIS COURT SHOULD ORDER THE DISMISSAL OF THE KIOBEL PLAINTIFFS' TORTURE/CRUEL, INHUMAN AND DEGRADING TREATMENT CLAIM.

A. The Amended Complaint Does Not State a Tort in Violation of the Law of Nations.

The Amended Complaint contains many allegations that the Kiobel Plaintiffs were beaten and abused by the Nigerian military. (*See, e.g.*, JA 0119-26, ¶¶ 6-17.) The Amended Complaint does not, however, contain any allegation that the Shell Parties (or even SPDC) conducted any of those beatings or directly caused any injury to the Kiobel Plaintiffs. Moreover, although the allegations contain many specific dates on which particular beatings or injuries occurred, they do not suggest that any representative of the Shell Parties: (a) was present; (b) requested or encouraged the particular beating or injury; or even (c) knew that the alleged beating had occurred.

For example, the Amended Complaint alleges that plaintiff John-Miller was beaten on October 28, 1995, when he arrived for a meeting "with Government officials in an effort to negotiate a peaceful resolution of Ogoni grievances relating to the impact of oil exploration." (JA 0120, ¶ 7.) However, there is no suggestion that the Shell Parties had anything to do with the meeting, much less the alleged beating of plaintiff John-Miller when he arrived. Similarly, as to plaintiff Nwidor, the Amended Complaint alleges that "Shell viewed him as an enemy. On May 25, 1994, [Rivers State Internal Security Task

Force ("ISTF")] troops arrested him . . . . Nwidor was brutally beaten on the spot with a 'koboko' whip." (JA 0122, ¶ 9.) The Amended Complaint further alleges that "Major Okuntimo [of the ISTF] visited the cell daily and threatened to kill [Nwidor] for not allowing Shell to resume operations in Ogoniland." (JA 0122, ¶ 9.) However, there is no allegation that the Shell Parties participated in or requested Nwidor's alleged beating and confinement; there is not even an allegation that they knew of it.

These allegations, and the balance like them, are insufficient to allege that the Shell Parties violated any definite and universally recognized proscription of the law of nations sufficient to meet *Sosa*'s standard. The question of whether certain Nigerian military officials could be prosecuted for torture is not the issue here. Just as with the extrajudicial killing claim, *see* § II.A *supra,* the Kiobel Plaintiffs' claim for torture and cruel, inhuman and degrading treatment fails, because, even if the Nigerian military violated customary international law, the Shell Parties did not.[15]

[15] Putting torture aside, cruel, inhuman and degrading treatment does not meet *Sosa*'s standard requiring a "norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms." 542 U.S. at 725. In the district court, the Kiobel Plaintiffs rested their claim for cruel, inhuman and degrading treatment (as distinct from torture) on judicial decisions from the European Court of Human Rights ("ECHR"). However, the ECHR is not "empowered to create binding norms of customary international law." *Flores*, 414 F.3d at 263-64. "[T]he

The Amended Complaint does contain allegations about the relationship between SPDC or the Shell Parties and the Nigerian government. Putting aside the purely conclusory allegations, those allegations are as follows:

> (1) "Shell and SPDC financially supported the operations of these military units directly and indirectly, including the purchase of ammunition for the Police" (JA 0118, ¶ 2);
>
> (2) "Shell personnel called in government troops" to respond to a protest (JA 0125, ¶ 14);
>
> (3) "Shell and SPDC's close relationships with the Nigerian government and the local Rivers State government were strengthened by their 'revolving door' employment policy" (JA 0130, ¶ 34);
>
> (4) When MOSOP demanded that SPDC pay royalties to the Ogoni people, "SPDC's officials convened meetings with the Governor of Rivers State and representatives of the Nigerian Police, Nigerian Army, Nigerian Navy and State Security Services" (JA 0132, ¶ 43);
>
> (5) "Shell and SPDC knew, or were reckless in not knowing, that the pipeline construction would involve the bulldozing of crops and farmlands under supervision of Government armed forces" (JA 0133, ¶ 46);

[ECHR] is only empowered to 'interpret[]' and 'apply' the rules set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature*, Apr. 11, 1950, 213 U.N.T.S. 221, E.T.S. No. 5—an instrument applicable only to its regional States parties—not to create new rules of customary international law." *Id.* Under *Sosa*, those judicial decisions have "little utility" and cannot prove the existence of a norm of customary international law. *See Sosa*, 542 U.S. at 734. The only federal appellate court to address this issue after *Sosa* held that a claim for cruel, inhuman and degrading treatment "has no basis in law." *Aldana*, 416 F.3d at 1247; *see Flores*, 414 F.3d at 252 ("customs or practices based on social and moral norms, rather than international legal obligation, are not appropriate sources of customary international law").

(6) "Rather than disassociating itself with the chronically brutal actions of the Nigerian military, SPDC's divisional manager wrote to the Governor of Rivers State, a former SPDC employee, requesting 'the usual assistance' to allow further work on the pipeline to continue" (JA 0133, ¶ 47);

(7) "SPDC Managing Director Philip B. Watts, with the approval of Shell, requested the Nigerian Police Inspector General to increase SPDC's security including the immediate deployment of a new 1,200 man police force, known as the Oil Production Area Police Command, to deter and quell community disturbances. In exchange, Shell and SPDC promised to provide complete logistical and welfare support to the Nigerian forces, including salary, housing, uniforms, automatic weapons, riot gear and vehicles" (JA 0134, ¶ 51);

(8) "Shell and SPDC provided logistical and financial support for the operations of the ISTF, including transportation, food and ammunition despite its engagement in repeated acts of murder, torture, rape, cruel, inhuman and degrading treatment, crimes against humanity and property destruction. Shell and SPDC's financial support included cash to support ISTF operations and bribes to its commander" (JA 0135, ¶ 54);

(9) "SPDC officials frequently visited the ISTF detention facility at AFAM and regularly provided food and logistical support for the soldiers" (JA 0138, ¶ 64).

Even were those allegations true, which they are not, they would not establish that the Shell Parties violated any well-defined and uniformly recognized norm of customary international law. There is no such norm holding a corporation liable for torture conducted by a foreign government's police or military because the corporation: requests police protection; pays for that protection; provides information to the police or military; employs former military or police personnel; purchases equipment for the police or military; or visits detention facilities. As

with the extrajudicial killing claim, *see*§ II.A *supra*, the law of nations does not contain any well-defined rule that a private business that requests assistance from and contributes money to a foreign nation's police or military is liable for torture or cruel and inhuman acts committed by the police or military.

B. The Kiobel Plaintiffs' Torture/Cruel, Inhuman and Degrading Treatment Claim Is Defective Because the Shell Parties Are Not State Actors.

"[W]hen not perpetrated in the course of genocide or war crimes," torture, like summary execution, violates the law of nations "only when committed by state officials or under color of law." *Kadic*, 70 F.3d at 243. The allegations of the Amended Complaint concerning the actions of the Shell Parties do not, and could not, suggest that the Shell Parties are state actors. For the reasons set forth in Section II.B *supra*, this claim cannot proceed against the Shell Parties because they are not state actors.

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

Several of the acts allegedly taken to assist or aid the Nigerian government in its torture or inhumane treatment of the Kiobel Plaintiffs are acts alleged as to SPDC only. SPDC is not a party to this appeal, nor was it the subject of the order underlying this appeal. Consequently, acts alleged as to SPDC, such as the request to create a new police force, (JA 0134, ¶ 51), or the visits to the

detention facilities, (JA 0138, ¶ 64), are not the conduct of the Shell Parties, and are therefore immaterial to the viability of any claim against them.

As to the balance of the allegations, although they are of the form "Shell and SPDC" took some action, as explained in Section II.C, there is no evidence whatsoever that the Shell Parties took any action in Nigeria; the uncontroverted evidence is that the Shell Parties are investment holding companies that have no oil production operations in Nigeria or anywhere in the world, and have no presence in Nigeria whatsoever. Furthermore, as explained in Section II.C *supra* in connection with the extrajudicial killing claim, there is no settled norm of customary international law that would render a corporation civilly liable for torture or cruel, inhuman and degrading treatment, much less for acts allegedly committed by its wholly-owned subsidiary.

D. The Kiobel Plaintiffs' Torture/Cruel, Inhuman and Degrading Treatment Claim Does Not Survive the TVPA.

As its name indicates, the Torture Victim Protection Act provides a statutory remedy for victims of torture, not just summary execution. For the same reasons the Kiobel Plaintiffs' extrajudicial killing claim does not survive the TVPA, the Kiobel Plaintiffs' torture claims do not survive the TVPA. *See* Section II.D *supra*.

In addition, the TVPA precludes recognition of a separate cause of action based on cruel, inhuman and degrading treatment. The TVPA was enacted

to "carry out the intent of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment." S. Rep. No. 102-249, at 3 (1991). In implementing the Convention, Congress decided to make enforceable the Convention's norms proscribing torture and extrajudicial killing only—not those concerning cruel, inhuman and degrading treatment. *See* 28 U.S.C. § 1350 note, § 2(a). A judicial decision to expand the reach of the ATS to areas Congress considered and rejected would run afoul of *Sosa*'s several cautions.

IV. THIS COURT SHOULD ORDER THE DISMISSAL OF THE KIOBEL PLAINTIFFS' CRIMES AGAINST HUMANITY CLAIM.

A. The Amended Complaint Does Not State a Tort in Violation of the Law of Nations.

The Kiobel Plaintiffs' allegation that the Shell Parties committed "crimes against humanity" merely recapitulates their claims for extrajudicial killing, torture and cruel, inhuman and degrading treatment, with the added claim that those acts were committed as part of an allegedly "systematic assault against an identifiable population group." (*See* JA 0145, ¶ 93.) As explained *supra* at 3, 5-6, the Kiobel Plaintiffs do not allege that the Shell Parties committed any of those acts of killing, torture, or cruel, inhuman and degrading treatment, and there is no well-defined norm of customary international law that would proscribe any of the conduct the Shell Parties (or SPDC) allegedly committed. Thus, for the same

reasons the Kiobel Plaintiffs cannot maintain Counts I and III, they cannot maintain Count II.

B. "Crimes Against Humanity" Does Not Meet *Sosa*'s Requirement of "Definite Content."

As a separate matter, "crimes against humanity" lacks well-defined content under international law. "Crimes against humanity" is a broad, descriptive genus of criminal offenses susceptible to competing definitions of varying scope, and its meaning cannot be delimited with a specificity comparable to that of the 18th-century paradigms of violation of safe conducts, infringement of the rights of ambassadors, or piracy, as required to be actionable post-*Sosa*.

"'[C]rimes against humanity' is far from having the benefit of international and national legislation which provides it with the *necessary legal specificity and particularity* which exists in common crimes." M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* xvii (2d rev. ed., Kluwer Law Int'l, 1999) (emphasis added); *see also* M. Cherif Bassiouni, *The Normative Framework of International Humanitarian Law: Overlaps, Gaps and Ambiguities*, 8 Transnat'l L. & Contemp. Probs. 199, 212 (1998) ("crimes against humanity" presents "a mixed baggage of certainty as to some of its elements, and uncertainty as to others and to their applicability to non-state actors"); Darryl Robinson, *Defining "Crimes Against Humanity" at the Rome Conference*, 93 Am. J. Int'l L. 43, 44 (1999) ("*The evolution of the concept of crimes against humanity in*

customary international law has not been orderly. A definition was first articulated in the Nuremberg Charter in 1945; but whether this was a legislative act creating a new crime or whether it simply articulated a crime already embedded in the fabric of customary international law remains controversial.") (emphasis added); Sharon A. Healey, *Prosecuting Rape Under the Statute of the War Crimes Tribunal for the Former Yugoslavia*, 21 Brook. J. Int'l L. 327, 352 (1995) (definition of "crimes against humanity" is "unclear"). Notably, "crimes against humanity" does not even appear in the list of violations of customary international law in the Restatement (Third) of the Foreign Relations Law of the United States § 702 (1986), entitled "Customary International Law of Human Rights."

In the district court, the Kiobel Plaintiffs relied on the decisions of international tribunals such as the Nuremberg Military Tribunals and the International Criminal Tribunal for the Former Yugoslavia as sources of evidence of customary norms of international law. Although the decisions of those tribunals are not competent sources of customary international law, *see Flores*, 414 F.3d at 263-64, their charters evidence the lack of agreement on the definition of "crimes against humanity." For example, the statute of the ICTY requires that the enumerated acts constituting "crimes against humanity" be "committed in armed conflict," but the Rome Statute does not. *Compare* The Statute of the ICTY, art. 5, 32 I.L.M. at 1193-94 *with* Rome Statute, art. 7, 37 I.L.M. at 1004-05. Similarly,

the statute of the ICTR requires that enumerated acts be carried out with discriminatory motive, but the Rome Statute does not.[16] *Compare* The Statute of the ICTR, art. 3, 33 I.L.M. at 1603 *with* Rome Statute, art. 7, ¶ 1, 37 I.L.M. at 1004. There has also been considerable disagreement as to whether an act must be committed as part of an attack against a civilian population that is "widespread" and/or "systematic" to qualify as a crime against humanity. The statute of the ICTR requires an enumerated act to be "committed as part of a *widespread or systematic* attack against any civilian population," but the statute of the ICTY contains no such requirement. *Compare* The Statute of the ICTR, art. 3, 33 I.L.M. at 1603 *with* The Statute of the ICTY, art. 5, 32 I.L.M. at 1193-94. Unlike the ICTR and ICTY Statutes, the Rome Statute defines "crimes against humanity" to include the "[e]nforced disappearance of persons" and "the crime of apartheid" in addition to the catch-all category "[o]ther inhumane acts," which all three of these statutes contain. *Compare* Rome Statute, art. 7, 37 I.L.M. at 1004-05 *with* The Statute of the ICTR, art 3, 33 I.L.M. at 1603 and The Statute of the ICTY, art. 5, 32 I.L.M. at 1193-94.

[16] The Kiobel Plaintiffs do not plead any discriminatory motive on the part of the Shell Parties; the Amended Complaint suggests no motive other than financial profit.

Thus, quite apart from the fact that there exists no well-established norm of the law of nations that prohibits, as "crimes against humanity", any of the conduct allegedly committed by the Shell Parties, "crimes against humanity" lacks the "definite content" required by *Sosa*.

C. The Shell Parties' Ownership of SPDC Does Not Render Them Liable for the Tort of Crimes Against Humanity.

The law of nations contains no well-defined proscription holding corporations liable for crimes against humanity by virtue of actions taken by their wholly owned subsidiaries. Therefore, for the same reasons set forth in Sections II.C and III.C *supra*, the Kiobel Plaintiffs have failed to state a claim for crimes against humanity against the Shell Parties.

V. THIS COURT SHOULD ORDER THE DISMISSAL OF THE KIOBEL PLAINTIFFS' ARBITRARY ARREST AND DETENTION CLAIM.

A. The Amended Complaint Does Not State a Claim in Violation of the Law of Nations.

Ten of the Kiobel Plaintiffs have brought claims for unlawful arrest and detention. (JA 0146.) None of them alleges that the Shell Parties arrested or detained them. The only allegation concerning the Shell Parties' participation in any arrest or detention concerns plaintiff Idigma, who alleges:

> During his incarceration at Kpor, he was brought into a room with a Shell executive who was asked to identify Plaintiff Idigma as one of the Ogoni who had prevented Shell from working in Ogoniland. Plaintiff Idigma avoided execution only because the Shell executive could not positively identify him.

(JA 0126, ¶ 15.) Surely, there is no norm of international law that would hold the Shell Parties liable for Mr. Idigma's arrest and detention when the only allegation is that a "Shell executive" refused to identify Mr. Idigma.

As with the Kiobel Plaintiffs' other claims, *see* §§ II.A and III.A *supra*, there is no well-defined international norm that would hold the Shell Parties liable for the arbitrary arrests and detentions allegedly committed by the Nigerian army or police forces. Even if the Shell Parties provided food, ammunition, supplies and information to the Nigerian army and police, and even if the Shell Parties requested the police to quell protests, there is no well-defined standard of customary international law that would hold the Shell Parties liable for the Nigerian government's arrests and detentions of the Kiobel Plaintiffs.

B. "Arbitrary Arrest and Detention" Is Not Well-Defined Under the Law of Nations.

In *Sosa*, the Court rejected Alvarez's claim that customary international law concretely defined a claim for arbitrary arrest and detention. 542 U.S. at 738. Alvarez relied on "two well-known international agreements that, despite their moral authority, have little utility under the standard set out" by the Court: the Universal Declaration of Human Rights ("UDHR") and the International Covenant on Civil and Political Rights ("ICCPR"). *Sosa*, 542 U.S. at 734. The Kiobel Plaintiffs have not proffered a more specific or

concrete definition of "arbitrary arrest and detention" than the definition rejected by the Supreme Court in *Sosa*, nor did the district court provide such a definition in denying the motion to dismiss this Count. The cause of action as defined falls well short of the level of specificity required by *Sosa*.

Sosa noted that the Restatement (Third) of the Foreign Relations Law of the United States states that a "*state* violates international law if, as a matter of *state policy*, it practices, encourages, or condones . . . *prolonged* arbitrary detention." 542 U.S. at 737 (emphasis added) (quoting Restatement (Third) of the Foreign Relations Law of the United States § 702). Here, the Kiobel Plaintiffs have not pleaded the existence of a "state policy" or referred to any settled definition of "prolonged" arbitrary detention.[17] The district court appeared to

[17] The allegations pleaded as to those plaintiffs asserting claims for arbitrary arrest and detention do not suggest any coherent standard. Dr. Kiobel was allegedly charged with murder and detained in connection with that charge. (JA 0119, ¶ 6(b).) John-Miller was allegedly detained for a month for allowing his church to be used for MOSOP meetings. (JA 0120, ¶ 7.) Wiwa was detained "for five days," "formally charged before the Magistrate Court . . . with unlawful assembly," and released on bail. (JA 0121, ¶ 8.) Nwidor was detained for an unspecified period of time and then "released after his family paid bribes." (JA 0122, ¶ 9.) Nwikpo "was detained for 9 hours." (JA 0122-23, ¶ 10.) Kote-Witah was detained for an unspecified time and escaped. (JA 0123, ¶ 11.) Wifa was detained for an unspecified time and released. (JA 0124, ¶ 12.) Kunenu was detained for an unspecified time and released. (JA 0124, ¶ 13.) Idigima was detained for eight weeks, and is the plaintiff whom a "Shell executive" did not identify as involved in "prevent[ing] Shell from working in Ogoniland." (JA 0125-26, ¶ 15.) Tusima was not detained, but alleges that his father was

accept that these were indeed required elements of a claim actionable under the ATS. (*See* JA 0018.) However, the district court did not then apply those requirements to the individual allegations in the Amended Complaint.

The district court made no attempt to determine whether any alleged conduct of the Shell Parties as to any particular arrest or detention violated a well-settled norm of the law of nations. Indeed, the district court made no effort to determine whether there exists any well-settled definition, under customary international law, of what constitutes a "prolonged" detention or an "arbitrary" arrest. Instead, the district court simply stated that "a number of Plaintiffs plead arbitrary detention in excess of *one day*, and at least three plead detention of four weeks or more," and then concluded that such detentions might qualify for a "state policy of prolonged arbitrary detention." (*Id.* (emphasis added).) However, the district court provided no basis for its assessment that anything over a day, or even four weeks, is considered a "prolonged detention" under well-defined standards of customary international law, (*id.*), much less that any alleged conduct of the Shell Parties would violate such a norm if proved. The fact that the *Sosa* Court found that a detention of *less* than a day did *not* violate a norm of customary international

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detained for approximately 15 months; however, he does not allege that he is the executor of his father's estate. (JA 0126-27, ¶ 17.) The extraordinary variety of these allegations strongly suggests that the Kiobel Plaintiffs do not themselves even have in mind any well-settled definition of "arbitrary arrest and detention," much less that one exists under the law of nations.

law so well defined as to support the creation of a federal remedy certainly does not imply the converse—*i.e.*, that detentions of more than a day *do* violate such norms. *See* 542 U.S. at 738.

Sosa itself suggests that no well-defined standard exists: "it may be harder to say which policies cross that line with the certainty afforded by Blackstone's three common law offenses." *Id.* at 737; *see also* *id.* at 734-37 & n.27 (rejecting, as insufficient to show a clearly-defined standard for arbitrary arrest and detention: the UDHR; the ICCPR; Bassiouni's survey of national constitutions; a decision by the International Court of Justice and several federal court decisions.) In the absence of a well-defined common understanding of "arbitrary arrest and detention," that claim cannot provide a basis for the invocation of jurisdiction under the ATS.

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

As explained in Sections II.C and III.C *supra*, the Shell Parties have never taken any actions in Nigeria; they are merely holding companies. There is no well-defined standard of international law that would hold them responsible for arrests or detentions conducted by the Nigerian government simply because they own a subsidiary that allegedly provided ammunition, food or information to the Nigerian military or police.

CONCLUSION

For the foregoing reasons, the Shell Parties respectfully request that this Court dismiss this action for lack of subject matter jurisdiction or direct the district of court to dismiss the Amended Complaint in its entirety.

Dated: June 6, 2007

Respectfully submitted,

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2)(B)(i) and this Court's May 4, 2007 Order (denying the Wiwa Plaintiffs' motion to intervene) because this brief contains 13,306 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2002 in 14 point Times New Roman.

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