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

REPLY BRIEF OF APPELLEES/CROSS-APPELLANTS

(*Caption continued*)

July 24, 2007

RORY O. MILLSON
ROWAN D. WILSON
THOMAS G. RAFFERTY
MICHAEL T. REYNOLDS
CRAVATH, SWAINE & MOORE LLP
825 Eighth Avenue
New York, NY 10019-7475
(212) 474-1000

Attorneys for Defendants-Appellees/Cross-Appellants Shell Petroleum N.V. (successor to Royal Dutch Petroleum Company) and the Shell Transport and Trading Company, Ltd. (formerly known as Shell Transport and Trading Company, p.l.c.)

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Page(s)

Statutes

Other Authorities

PRELIMINARY STATEMENT

Kiobel would limit *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) to the proposition that detentions of less than a day do not violate the law of nations. *Sosa* stands for much more. *First*, *Sosa* holds that the ATS is jurisdictional only, and that no jurisdiction exists unless a "claim based on the present-day law of nations [rests] on a norm 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 724, 725. *Second*, if the defendant "is a private actor such as a corporation", the international norm must specifically "extend[] the scope of liability" to such an actor. *Id*. at 732 n.20. *Third*, ATS jurisdiction reaches a "very limited category" of claims; is limited to a "narrow set of violations . . . threatening serious consequences in international affairs"; must be subject to "a restrained conception of the discretion of a federal court" and "judicial caution when considering the kinds of individual claims that might implement the jurisdiction conferred" by the ATS; is subject to a "high bar" for any expansion; and has "no congressional mandate . . . [for] greater judicial creativity" for any expansion. *Id*. at 713, 715, 725, 727, 728.

Although Kiobel asserts the claims against the Shell Parties "easily satisf[y]" *Sosa*, no specific, universally accepted norm of customary

international law exists that would condemn the Shell Parties' alleged acts. The issue is not whether Kiobel can maintain an action in federal court against Nigerian military officers; that case would be like *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) or *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995). *Sosa* does not permit courts to ask that question and then turn to general rules of secondary liability drawn from domestic or international law to impose secondary liability on private actors.

ARGUMENT

I. KIOBEL TRIVIALIZES *SOSA* AND MISCONSTRUES THE SHELL PARTIES' ARGUMENT.

Kiobel skirts the Shell Parties' principal argument: unless specific, universally accepted norms of the law of nations extend liability to the actions the Shell Parties have allegedly committed, the ATS provides no jurisdiction. Kiobel continues to press a different theory: general principles of United States or foreign domestic law concerning secondary liability hold the Shell Parties liable for the acts of the Nigerian government. *Sosa* forecloses that argument.

A. *Sosa* Requires that the Law of Nations Contain a Specific Norm Reaching the Conduct of a Defendant.

Relying on the "case citations and parentheticals accompanying" footnote 20 of *Sosa*, Kiobel attempts to sweep away the Court's directive, saying that it concerns only the difference between state

actors and private actors, and asserting that the footnote affirms *Kadic*'s reliance on Section 1983 jurisprudence as relevant to "state action" liability under the law of nations. That interpretation is not intelligible, let alone plausible.

First, footnote 20 is part of the Court's holding that the law of nations determines what acts and actors may be held liable under the ATS:

> "And the determination whether a norm is sufficiently definite to support a cause of action[20] . . .
> [20] A related consideration is whether *international law* extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual."

Sosa, 542 U.S. at 732 & n.20 (emphasis added). That directive is not limited by a "*compare*" giving two cases as an example.

Second, *Sosa* noted that unless "Sosa was acting on behalf of a government when he made the arrest, . . . he would need a rule broader still". 542 U.S. at 737. The "rule" referred to would have to constitute "a binding *customary norm* today". *Id.* at 736 (emphasis added). Kiobel also ignores Justice Breyer's concurrence, which reemphasized the Court's directive: "The norm must extend liability to the type of perpetrator (*e.g.*, a private actor) the plaintiff seeks to sue." *Id*. at 760.

Third, Kiobel's distinction is meaningless. The law of nations principally concerns the relationship of nations to each other, *Flores v. S.*

Peru Copper Corp., 414 F.3d 233, 249-50 (2d Cir. 2003), and reaches private actors for only a "narrow set of violations". *Sosa*, 542 U.S at 715. Extending ATS jurisdiction to reach claims beyond the paradigmatic three offenses against a corporation or individual necessarily raises the question of state action, but in the context of the rule set out by *Sosa*: the law of nations governs both the "what" and the "who".

Fourth, *Sosa* does not "reaffirm" *Kadic*'s use of Section 1983 jurisprudence, it rejects it by requiring that international law determine whether liability extends "to the perpetrator being sued". *Id*. at 732 n.20. The sole case cited by *Kadic* relying on Section 1983 was *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1546 (N.D. Cal. 1987)—a case explicitly denounced by *Sosa*. *See Sosa*, 542 U.S. at 736 n.27. Although Kiobel relies on *Kadic* for the proposition that "the 'specificity' requirement has nothing to do with the liability of private parties under international law", *Kadic* contains no such statement. *Id*. at 240.

Kiobel also argues that the Shell Parties' position would bar all causes of action unless, for example, a norm prevented the precise means of torture used. (Reply Brief for Plaintiffs-Appellants-Cross-Appellees ("KRB") 14-15.) That is not our argument. The Shell Parties ask simply what the Supreme Court has directed: if the Shell Parties are to be held

liable for SPDC's alleged provision of munitions to Nigeria, there must be a specific, universally accepted norm in the law of nations that prohibits the Shell Parties' alleged conduct. That norm would not need to specify the model numbers of rifles.

B. Kiobel Misunderstands Federal Common Law.

Kiobel relies on *Sosa*'s references to the common law "provid[ing] a cause of action for the modest number of international law violations with a potential for personal liability at the time", KRB 6-7 (quoting *Sosa*, 542 U.S. at 724), and leaps to the conclusion that "*Sosa* directs that federal common law principles determine the other issues, including available theories of liability and defenses . . .". (KRB 10.) Nothing in *Sosa* supports that conclusion.

First, *Sosa*'s holding that the ATS is jurisdictional only, followed by its conclusion that Congress "enacted [it] on the understanding that the common law would provide a cause of action", *Sosa*, 542 U.S. at 724, does not imply that the substantive elements of the claims or defenses are provided by federal common law rather than the law of nations. *Sosa* says the opposite when, although agreeing with the dissent's observation that the conception of federal common law has changed substantially in the last 200 years, it rests its holding on the ability of the courts to recognize

"enforceable *international* norms" subject to "vigilant doorkeeping". 542 U.S. at 729-30 (emphasis added). *Sosa* allows courts to "derive some substantive law in a common law way" because "the domestic law of the United States recognizes the law of nations". *Id.* at 729. *Sosa* contains no suggestion that claims or defenses actionable under the ATS may refer to substantive domestic law.

Second, *Sosa* looked exclusively at customary international law to determine whether Alvarez himself committed acts that violated the law of nations. (Brief of Appellees/Cross-Appellants ("SB") 11-19.) When this Court has considered a claim brought under the ATS against individuals and not states, it has assessed the alleged conduct of those individuals in light of defined international norms. (*Id.*) If a "core" of the law of nations condemns torture, KRB 52 n.36, that "core" does not establish a norm prohibiting the subsidiary of a corporation from, for example, requesting police assistance or paying for it if the police are engaged in torture.

Third, quoting Judge Edwards's concurrence in *Tel-Oren*, Kiobel argues that *Sosa* does not require, as a predicate to suit under the ATS, that there be "international accord on a right to sue". (KRB 7.) Although that question remains open after *Sosa*, *see* 542 U.S. at 762 (Breyer, J., concurring), the Shell Parties have not made that argument; here,

we have argued only that the specific, universally accepted norm must reach the defendants' alleged acts.

II. NO SUBJECT-MATTER JURISDICTION EXISTS OVER KIOBEL'S CLAIMS.

No definite, uniformly agreed-upon norm of the law of nations would hold the Shell Parties liable for the alleged acts of SPDC. Therefore, the ATS does not confer jurisdiction over Kiobel's claims. Kiobel begins by ignoring controlling law from this Court, continues by claiming that facts determining subject-matter jurisdiction cannot be considered on appeal, and concludes that domestic veil-piercing and alter ego law should be incorporated into the law of nations to avoid "undermin[ing] the very purpose of the ATS". (KRB 48.) Those propositions are groundless.

A. Kiobel Ignores Controlling Law.

Kiobel relies on *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1200-01 (9th Cir. 2007), for the proposition that "[t]he ATS gives the federal courts subject matter jurisdiction 'so long as plaintiffs alleged a nonfrivolous claim'". (KRB 43.) However, this Court rejected that standard in *Kadic* and *Filartiga*. (*See* SB 3.) In *Kadic*, the Court held that the ATS "requires a more searching review of the merits to establish jurisdiction . . . . [I]t is not a sufficient basis of jurisdiction to plead merely a colorable violation of the law of nations." *Kadic*, 70 F.3d at 238. Kiobel likewise complains that

whether the Shell Parties (as opposed to SPDC) have ever taken any action in Nigeria "is a disputed factual issue and adjudication is improper in this procedural context". (KRB 43.) Kiobel's assertion directly contradicts *Flores*'s holding that "reference to evidence outside the pleadings" is proper. (*See* SB 3-4.) Kiobel has completed discovery, and has no evidence contradicting the affidavits submitted by the Shell Parties stating that they have never taken any actions in Nigeria. (*See* SB 1-3.)

B. The Law of Nations Contains No Norm Reaching the Shell Parties' Conduct.

To state a claim against the Shell Parties, Kiobel must identify some specific, universally accepted norm of customary international law that would extend liability "to the perpetrator being sued". *Sosa*, 542 U.S. at 732 n.20. Veil piercing and agency liability go to the heart of "who" can be held liable for a violation of the law of nations, and thus must be determined by the law of nations. *See id.* United States domestic veil-piercing law and agency law are irrelevant.[1]

---

[1] *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 308-19 (S.D.N.Y. 2003), and the cases it cites suggesting that corporations may be held liable under the ATS all predate *Sosa*. *Bowoto v. Chevron Texaco Corp.*, 312 F. Supp. 2d 1229, 1236 (N.D. Cal. 2004), which also predates *Sosa*, expresses uncertainty about whether corporate liability would be determined by state or federal law, when *Sosa*'s answer is "neither". *In re Agent Orange Prod. Liab. Litig.* recognized "there is

Subject-matter jurisdiction exists only if the law of nations extends liability to the Shell Parties for the alleged acts of SPDC that occurred solely in Nigeria, where the Shell Parties have no operations. (*See* SB 1-2, 28-29.) It does not. Putting aside the allegations indiscriminately pleading that the Shell Parties "and/or SPDC" took actions in Nigeria, the only relevant allegations in the Amended Complaint are:

> The Shell Parties, "through [their] wholly owned subsidiaries, including SPDC, [are] major investor[s] in Nigeria and explore[] for, produce[] and sell[] energy products derived from Nigerian oil and natural gas", JA 0127, ¶ 22; *see also* JA 0130, ¶ 35;
>
> "Since operations began in Nigeria in 1958, [the Shell Parties have] dominated and controlled SPDC", JA 0128, ¶ 25; and
>
> "On or about February 15, 1993 through February 18, 1993, [the Shell Parties] and SPDC officials met in the Netherlands and England to formulate a strategy to suppress MOSOP and to return to Ogoniland", JA 0132, ¶ 45.

---

substantial support" for the argument that corporations cannot be liable under international law. 373 F. Supp. 2d 7, 54-55 (S.D.N.Y. 2005). In the face of such "substantial support", *Sosa* does not permit "close questions" to be resolved in favor of finding a new norm of the law of nations. *See* 542 U.S. at 724-25. None of the cases cited by Kiobel examined the consistent "customs and practices of states", *Flores*, 414 F.3d at 250, to determine whether civil corporate liability may exist for the types of acts alleged here.

Kiobel has cited no specific, well-settled norm of the law of nations that would impose liability on the Shell Parties based on those allegations.[2] Instead, Kiobel attempts to transfer the burden onto the Shell Parties, arguing that the international law consensus refusing to impose criminal liability on corporations is not dispositive of the question of civil liability.

C. Subject-Matter Jurisdiction Would Be Absent Even Were Domestic Law Relevant.

Although *Sosa* requires that the Shell Parties' liability be determined solely by international norms, no subject-matter jurisdiction would exist even if domestic law pertained. "It is a general principle of corporate law deeply ingrained in our economic and legal systems that a parent corporation . . . is not liable for the acts of its subsidiaries." *United States v. Bestfoods*, 524 U.S. 51, 61 (1998). Allegations like Paragraph 25 of the Amended Complaint, which merely repeat the legal standard for agency, are insufficient. *See Jazini v. Nissan Motor Co.*, 148 F.3d 181, 184 (2d Cir. 1998). The agency cases cited by Kiobel, KRB 44-46, do not support a finding of an agency relationship under the facts Kiobel has

---

[2] Even if "the concept of agency liability is common to virtually every legal system", KRB 44 n.30, that would not establish a specific, universally accepted norm sufficient to hold the Shell Parties liable through SPDC. For example, "many nations recognize a norm against arbitrary detention, *but that consensus is at a high level of generality*". *Sosa*, 542 U.S. at 736 n.27 (emphasis added).

pleaded.[3] Indeed, an "essential characteristic of an agency relationship"—that SPDC acted pursuant to the Shell Parties' "direction and control" in the conduct complained of—is not present in Kiobel's factual allegations. *See In re Schulman Transport Enter., Inc.*, 744 F.2d 293, 295 (2d Cir. 1984).

As to the alter ego doctrine, there are no allegations sufficient to support such a theory. Corporate separateness is presumed to have "substantial weight" in an alter ego analysis. *See Am. Protein Corp. v. AB Volvo*, 844 F.2d 56, 60 (2d Cir. 1988). Contrary to Kiobel's assertions, KRB 47-48, the "very purpose" of the ATS had nothing to do with indirect corporate liability, or even any of the "egregious human rights violations" of which Kiobel complains. Unless the Shell Parties have violated a specific, universally recognized norm of the law of nations, no "fraud or injustice" would create subject-matter jurisdiction where it otherwise would not exist through the alter ego doctrine or otherwise.

---

[3] *See, e.g., Meyer v. Holley*, 537 U.S. 280, 286 (2003) (finding no agency relationship); *Cantrell v. Forest City Publ'g Co.*, 419 U.S. 245, 253 (1974) (publishing company vicariously liable for libel by employee acting within the scope of employment); *Bowoto*, 312 F. Supp. 2d at 1242-46 (plaintiffs' "laundry list" of allegations regarding parent's control of subsidiary, including overlapping officers and directors, integrated monitoring team, and extraordinarily close relationship, sufficient to withstand motion to dismiss).

III. KIOBEL'S EXTRAJUDICIAL KILLING, TORTURE AND CRUEL, INHUMAN AND DEGRADING TREATMENT CLAIMS DO NOT SURVIVE THE TVPA.

Kiobel argues that the TVPA did not impliedly repeal the ATS. That is true but irrelevant. Kiobel ignores *Sosa*'s holding that the ATS "is a jurisdictional statute creating no new causes of action". 542 U.S. at 724. The cases Kiobel cites, such as *Posadas v. National City Bank of New York*, 296 U.S. 497, 503 (1936), concern the implied repeal of one legislative act by another "upon the same subject". The law of implied repeals is not relevant here, because the ATS creates no rights; it is jurisdictional only, "enabl[ing] federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law". *Sosa*, 542 U.S. at 712.

As explained in our opening brief, the courts do not look to customary international law when Congress "speaks to" an issue (or when a treaty is in force). (SB 32-33.) The TVPA provides a statutory cause of action for adjudication of claims for torture and extrajudicial killing. Indeed, Kiobel's response to the line of authority beginning with *The Nereide*, 13 U.S. 388 (1815) and continuing on to *The Paquete Habana*, 175 U.S. 677 (1900) and *Oliva v. United States Department of Justice*, 433 F.3d 229 (2d Cir. 2005)—that "*Oliva* only applies where 'a statute makes plain

Congress' intent' to supersede customary international law", KRB 42 n.28—is a sheer fabrication. Kiobel has added the words "to supersede customary international law" although none of those cases says that. Instead, those cases hold that the courts may resort to the law of nations only when no statute "speaks to" an issue. Those cases impose no requirement that Congress intended to supersede customary international law, or even knew that it was doing so.[4]

Kiobel's other arguments are likewise meritless. *First*, the very portion of the House Report cited by Kiobel and by the Shell Parties states that "claims based on torture or summary executions do not exhaust the list of actions that may appropriately be 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". H.R.

---

[4] Kiobel relies on *Sosa*'s statement that Congress has not "amended § 1350 or limited civil common law power by another statute" to argue that the TVPA did not "impliedly repeal" the ATS. (KRB 40.) *Sosa* did not address whether torture or extrajudicial killing claims could be brought under the ATS after the adoption of the TVPA; in the quoted language, the Court explained that Congress had not "categorically precluded federal courts from recognizing a claim under the law of nations as an element of common law". *Id*. at 725; *see also id*. at 731. The TVPA's enactment automatically eliminated the covered claims from ATS jurisdiction without any amendment to Section 1350 or statutory limitation of the courts' common law power. (*See* SB 32-33.)

Rep. No. 102-367, at *4 (1991), *as reprinted in* 1992 U.S.C.C.A.N. 84 (emphasis added); *see* SB 35; KRB 39. Congress stated that the ATS would remain intact to cover "other norms", *i.e.*, norms concerning claims not "based on torture or summary executions". *See also* S. Rep. No. 102-249, at *4 (1991) ("[The ATS] has *other* important uses and should not be replaced" (emphasis added)).

Second, Kiobel relies on snippets of *dicta* taken from *Flores* and *Kadic* while disregarding the holdings of those cases and the context of the *dicta*. *Flores* did not involve claims of torture, extrajudicial killing or cruel, inhuman and degrading treatment. The language from *Flores* on which Kiobel relies ("The TVPA reaches conduct that may also be covered by the [ATS]") is part of this Court's explanation that the TVPA "codified" *Filartiga* and statutorily extended its remedy to U.S. citizens. 414 F.3d at 246-247. That language contains no suggestion that after the TVPA's adoption, claims for torture may nevertheless be brought under customary international law instead of or in addition to claims under the TVPA.[5] In

[5] Kiobel similarly argues that *Sosa*'s approving citation of *Filartiga* means that the TVPA does not displace actions for torture or extrajudicial killing under the law of nations. (KRB at 40.) However, *Sosa*'s citation of *Filartiga* is for the proposition that in passing the TVPA, Congress agreed with *Filartiga* that the "proper exercise of judicial power" can extend to

Kadic, no argument was made that the TVPA's enactment barred claims for torture under the ATS; instead, Karadzic argued that the TVPA's adoption demonstrated that Congress intended to graft a state-action requirement onto *all* ATS claims, which argument this Court rejected, concluding with the language relied on by Kiobel ("The scope of the Alien Tort Act remains undiminished by the enactment of the [TVPA]"). 70 F.3d at 241. The immediately preceding discussion is of the House Report, rejecting Karadzic's argument because of the "other norms" language in that Report. *Id.*

Third, the other cases upon which Kiobel relies are equally unconvincing. (KRB 37 n.22, 40 n.26.) In *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161 (5th Cir. 1999), *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996),[6] and *Hilao v. Estate of Marcos*, 103 F.3d 767 (9th Cir.

---

torture occurring in foreign countries, and that the TVPA "supplement[ed] the judicial determination in some detail". 542 U.S. at 731.

[6] *Abebe*'s conclusion that "the [ATS] confers both a forum and a private right of action", 72 F.3d at 848, does not survive *Sosa*. *Abebe* rests on several cases holding that "all that the statute requires is that an alien plaintiff allege that a 'tort' was committed 'in violation' of international law or treaty of the United States'", *id.* at 847; *Sosa* expressly denounced several of those cases as "reflect[ing] a more assertive view of federal judicial discretion". 542 U.S. at 736 n.27.

1996),[7] the courts never considered whether ATS claims for torture were displaced by the TVPA. Kiobel cites *Doe v. Islamic Salvation Front*, 993 F. Supp. 3 (D.D.C. 1998), as "allow[ing] both [ATS and TVPA] claims to proceed", KRB at 39-40; in a subsequent decision, the court held that the TVPA "is clearly inapplicable here", *Doe v. Islamic Salvation Front*, 257 F. Supp. 2d 115, 121 n.11 (D.D.C. 2003).

Finally, Kiobel ignores the problem that its position requires belief in an absurd Congressional intent. (*See* SB 36.) Congress cannot have intended that United States citizens must first attempt foreign remedies while aliens need not. In a nonsequitur, Kiobel asserts that "the TVPA had the very explicit purpose of extending the ATS to permit U.S. citizens to bring certain ATS claims in federal court". (KRB 38.) But the TVPA does not "extend" the ATS; instead, it is a statute permitting any individual — alien or citizen — to sue in the United States courts, provided that the plaintiff has met the various requirements set out in the Act, including the requirement of exhaustion. Under well-settled Supreme Court decisions dating back to Chief Justice Marshall, because the TVPA "speaks to" the

---

[7] *Hilao*'s statement that the TVPA "codif[ied]" judicial decisions finding torture actionable under the law of nations does not address whether that codification supplanted the law of nations as to the TVPA's subject matter.

subject, the courts may not resort to the law of nations for claims of torture or extrajudicial killing.[8]

IV. KIOBEL HAS NOT SATISFIED THE STATE ACTION REQUIREMENT.

Kiobel has not met the state action requirement for those claims requiring it (torture, extrajudicial killing, and cruel, inhuman and degrading treatment). (*See* SB 26-28, 41.) The Shell Parties are not state actors. Kiobel argues that the state action requirement is unnecessary, KRB 31-32; satisfied because the Nigerian government actually perpetrated the alleged harms, relying on *Kadic* and *Aldana v. Del Monte Fresh Produce, N.A. Inc*., 416 F.3d 1242 (11th Cir. 2005), KRB 30-31; or met because the Shell Parties acted under "color of law", KRB 32-37. Those arguments are unavailing.

---

[8] Kiobel contends that the TVPA's legislative history contains no "Congressional disapproval for an ATS claim based on CIDT". (KRB 41.) That is not so. "By creating a private right of action for victims of official torture, the TVPA 'executed' *in part* the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment". *Flores*, 414 F.3d at 246 n.20 (emphasis added). The TVPA's legislative history shows that Congress reviewed the Convention and decided to prohibit only torture and extrajudicial killing, and rejected a cause of action for other cruel, inhuman or degrading acts. Congress can "explicitly[ ] or implicitly" "shut the door to the law of nations". *Sosa*, 542 U.S. at 731. Kiobel's argument would mean that Congress intended aliens to be able to sue aliens in United States courts for cruel, inhuman and degrading treatment occurring in foreign countries, but concluded that United States citizens should not be able to sue aliens in United States courts for those very same acts.

A. State Action Is Required Because Kiobel Has Not Alleged Genocide or War Crimes.

Kiobel claims that plaintiffs "are not required to prove state action" based on *Kadic*. (KRB 31). *Kadic* does not support that proposition; rather, it eliminates the state action requirement for torture and summary execution only when "perpetrated in the course of genocide or war crimes"— neither of which is alleged here. (*See* SB 26-28.)

B. The Acts of the Nigerian Government Do Not Satisfy the State Action Requirement.

Citing *Kadic*, Kiobel also argues that "Plaintiffs are not required to prove that Shell itself was a state actor; the issue is whether state action is present in the violation". (KRB 30.) However, *Kadic* contains no such statement; the portion of *Kadic* Kiobel cites says that "the 'Bosnian-Serb entity' headed by Karadzic" might be a "state" for the purposes of the state action requirement, and that Karadzic might have acted under the aegis of the state of Yugoslavia. *Kadic*, 70 F.3d at 244. *Kadic* did not disassociate state action from the defendant. The defendant, Karadzic, who was "President of the self-proclaimed Bosnian-Serb republic", "possess[ed] ultimate command authority over the Bosnian-Serb military forces" that committed "various atrocities . . . in the course of the Bosnian civil war", and was himself a state actor. *Id.* at 236-37, 245. *See also Bigio v. Coca-*

Cola Co., 239 F.3d 440, 448 (2d Cir. 2001) (asking "whether [the defendant] was a state actor"). Kiobel's reliance on *Aldana* is likewise misplaced. In *Aldana*, a private security force allegedly tortured the plaintiffs; the question was whether the Mayor's alleged personal participation in the torture converted the private torture into state action, not whether a company's provision of funds or supplies to a state actor converted those private actions into state action. *Id.* at 1245, 1249-50.

C. Domestic "Color of Law" Jurisprudence Is Irrelevant to the Liability of the Shell Parties, and Would Not Support Their Liability Even if Relevant.

As discussed *supra* § I.A., *Sosa* requires that the question of "who" can be held liable for a violation of the law of nations must be determined by the law of nations. *Kadic* is of no assistance to Kiobel on this issue for two reasons. *First*, *Kadic*'s statement[9] on this issue is that Karadzic could be a state actor when he ordered human rights violations if he received assistance from the state of Yugoslavia in so doing—not the other way around. *See Kadic*, 70 F.3d at 245.

---

[9] This statement from *Kadic* is not a holding, because *Kadic* first concluded that Karadzic, as the head of the unrecognized state of Spraska, was a state actor subject to international norms against torture. *See* 70 F.3d at 245. When a court rests its decision on two alternative grounds, neither has precedential value. *See Olin Corp. v. Ins. Co. of North America*, 221 F.3d 307, 317 (2d Cir. 2000).

Second, *Kadic*'s statement that "[t]he 'color of law' jurisprudence of 42 U.S.C. § 1983 is a relevant guide to whether a defendant has engaged in official action for the purpose of jurisdiction under the Alien Tort Act", *id.*, does not survive *Sosa*. *See supra* § I.A.

None of the cases cited by Kiobel, KRB 32-36, suggests that international law has adopted Section 1983 jurisprudence. Although a few ATS cases reference Section 1983 jurisprudence post-*Sosa*, none of those considered *Sosa*'s impact on that practice.[10] *See, e.g.*, *Aldana*, 416 F.3d at 1247-48 (applying "color of law" jurisprudence, relying on *Kadic*); *see also In re Sinaltrainal Litig.*, 474 F. Supp. 2d 1273, 1292 n.26 (S.D. Fla. 2006) ("[T]he Eleventh Circuit has not squarely addressed" whether "color of law" jurisprudence is a sufficiently well-developed norm of international law). Courts considering *Sosa*'s application to the state action requirement have found it inappropriate to import Section 1983 "color of law" jurisprudence. *See, e.g.*, *Saleh v. Titan Corp.*, 436 F. Supp. 2d 55, 57-58 (D.D.C. 2006);

[10] Besides *Aldana*, Kiobel cites only one post-*Sosa* ATS case as having applied "color of law" jurisprudence: *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164 (C.D. Cal. 2005). *Mujica*, however, concerned "the 'color of law' requirement of the TVPA", not the existence of that doctrine as a settled norm of the law of nations. *Id*. at 1174-75.

accord, *Doe v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20, 25-26 (D.D.C. 2005).

D. The Shell Parties Did Not Act Under "Color of Law".

Even were Section 1983 "color of law" jurisprudence relevant, Kiobel has failed to plead facts demonstrating that the Shell Parties acted under "color of law". (*See* SB 27, 41.) There is nothing the Shell Parties are alleged to have done that would cloak them in state authority.[11]

Under Section 1983, "the party charged with the deprivation must be the person who may fairly be said to be the state actor". *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). Kiobel admits that "the Nigerian government was the direct perpetrator" of the alleged violations. Kiobel does not allege that the Shell Parties controlled the Nigerian government or that Nigeria failed to exercise independent judgment, which

[11] The cases cited by Kiobel regarding aiding and abetting or conspiring with a state actor, KRB 33-34, are inapposite either because they involve situations in which the state actor and private actor acted together in directly perpetrating the plaintiffs' alleged harm, *see Dennis v. Sparks*, 449 U.S. 24, 27-28 (1980); *Fries v. Barnes*, 618 F.2d 988, 991 (2d Cir. 1980); *Mujica*, 381 F. Supp. 2d at 1174-75; *Estate of Rodriquez v. Drummond*, 256 F. Supp. 2d 1250, 1264-50 (N.D. Ala. 2003), or because no state action requirement was necessary, *see Talisman*, 244 F. Supp. 2d at 327-28. And in *Spear v. Town of West Hartford*, this Court held that a meeting between attorneys for the town of West Hartford, Connecticut and attorneys for an abortion clinic did not demonstrate that the abortion clinic acted in concert with the town. 954 F.2d 63, 65, 68 (2d Cir. 1992).

would be necessary to deem the Shell Parties state actors. *See Ginsberg v. Healey Car & Truck Leasing, Inc.*, 189 F.3d 268, 272 (2d Cir. 1999); *Arnold v. I.B.M.*, 637 F.2d 1350, 1356-57 (9th Cir. 1981). Merely benefiting from the state actor's tortious conduct or engaging in a business venture with the state actor is insufficient. *See Ginsberg*, 189 F.3d at 273; *Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442, 1455 (10th Cir. 1995).

V. KIOBEL'S CRUEL, INHUMAN AND DEGRADING TREATMENT CLAIM SHOULD BE DISMISSED.

Kiobel rests the cruel, inhuman and degrading treatment claim on (1) noncontrolling federal caselaw; (2) the Restatement (Third) of the Foreign Relations Law; and (3) various international materials. (KRB 52-55.) Those sources do not evidence a "norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms". *Sosa*, 542 U.S. at 725.

Most of the federal court decisions relied upon by Kiobel predate *Sosa*. (KRB 53, 55.) The post-*Sosa* cases undercut Kiobel's position. For example, Kiobel relies on *Aldana* for the proposition that "crimes against humanity remain actionable claims under the ATS". (KRB 48.) *Aldana* holds just the opposite: "Based largely on our reading of *Sosa*, we agree with the district court's dismissal of Plaintiffs' non-torture

claims under the Alien Tort Act. We see no basis in law to recognize Plaintiffs' claim for cruel, inhuman, degrading treatment or punishment". 416 F.3d at 1247. *Aldana* then overruled two district court cases relied on by Kiobel, *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322 (N.D. Ga. 2002) and *Estate of Cabello v. Fernandez-Larios*, 157 F. Supp. 2d 1245 (S.D. Fla. 2001), noting that their reasoning was incompatible with *Sosa*. *Aldana*, 416 F.3d at 1247.

Another post-*Sosa* case relied on by Kiobel, *Cabello v. Fernandez-Larios*, 402 F.3d 1148 (11th Cir. 2005), does not address whether claims for cruel, inhuman and degrading treatment are actionable after *Sosa*. *Abebe*, to the extent it would have supported a claim for cruel, inhuman and degrading treatment, does not survive *Sosa* and *Aldana*.

Perhaps the clearest illustration that Kiobel's position is at odds with *Sosa* lies in Kiobel's repeated citation to *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995), for the propositions that "cruel, inhuman, or degrading treatment . . . [is] a separate ground for liability under the ATS" and that "allegations [that] do not rise to the level of torture . . . fall squarely within the core definition of CIDT". (KRB 53, 55.) The Supreme Court in *Sosa* expressly disapproved of *Xuncax* (and a number of similar cases) as "reflect[ing] a more assertive view of federal judicial discretion over claims

based on customary international law than the position we take today". 542 U.S. at 737 n.27 (referring to federal court decisions cited in the Brief for Respondent Alvarez-Machain 49, n.50, which includes *Xuncax*). *Doe v. Liu Qi*, 349 F. Supp. 2d 1258, 1322 (N.D. Cal. 2004), also relied on by Kiobel, made the questionable judgment of affirming the *Xuncax* approach and finding it to be "entirely consistent with *Sosa*", although *Sosa* itself rejected *Xuncax*.

Kiobel fares no better in relying on the Restatement (Third) of Foreign Relations Law. "[C]ourts must be vigilant and careful in adopting the statements of the Restatement (Third) as evidence of the customs, practices, or laws of the United States and/or evidence of customary international law". *United States v. Yousef*, 327 F.3d 56, 99-100 & n.31 (2d Cir. 2003). Moreover, even were the Restatement competent evidence, it extends liability to state actors only, not to private individuals or corporations. *See id.*, § 702(d) ("A *state* violates international law, as a matter of state policy, if it practices, encourages, or condones . . . torture or other cruel, inhuman, or degrading treatment or punishment") (emphasis added).

Finally, the international materials cited by Kiobel, KRB 52-53 n.37, cannot establish that cruel, inhuman and degrading

treatment has attained the status of customary international law. Those sources condemn cruel, inhuman and degrading treatment "without setting forth specific rules", making "it impossible for courts to discern or apply in any rigorous, systematic, or legal manner". *Flores*, 414 F.3d at 252. For example, the American Convention on Human Rights ("ACHR") states that "[n]o one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment", *id.*, art. 5(2), Nov. 22, 1969, 9 I.L.M. 673, but "utterly fails to specify what conduct would fall within or outside of the law", *Flores*, 414 F.3d at 255.

Moreover, in rejecting the ACHR as evidence of customary international law, this Court observed that "the United States has declined to ratify the [ACHR] for more than three decades". *Flores*, 414 F.3d at 258. Likewise, although the United States ratified The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment ("CAT") and the International Covenant on Civil and Political Rights ("ICCPR"), they are not self-executing. *Accord Sosa*, 542 U.S. at 735 (the ICCPR was ratified "on the express understanding that it was not self-executing"); 136 Cong. Rec. S17486-01 (1990) (the CAT was ratified subject to Article 16—the provision condemning cruel, inhuman and degrading treatment—not being self-executing). Indeed, as explained *supra* § III, the TVPA represents

Congress' decision not to execute the portions of the CAT concerning cruel, inhuman and degrading treatment. Thus, the ACHR, ICCPR and CAT have "little utility". *Sosa*, 542 U.S. 734-35. Additionally, the charters establishing the ICTY, ICTR and ICC, KRB 52-53 n.37, are not appropriate sources in the present context, for the same reasons set forth in our opening brief. (SB 24-26.)

VI. KIOBEL'S "CRIMES AGAINST HUMANITY" CLAIM SHOULD BE DISMISSED.

Kiobel claims that "Shell does not contest that crimes against humanity are prohibited when committed by private individuals". (KRB 31.) That is incorrect. Shell contests that "crimes against humanity" are actionable under the ATS *at all* post-*Sosa*, regardless of whether offenses are alleged to have been committed by private individuals *or* state actors, because "crimes against humanity" fails *Sosa*'s specificity test. (*See* SB 44-47.) Indeed, as Kiobel appears to define it, "crimes against humanity" is a catch-all that redundantly includes "massacre, torture, arbitrary arrest, and administration of extra-judicial punishments". (KRB 50.) Kiobel offers no evidence of a well-settled, universally accepted norm of customary international law that would prohibit those actions by someone other than a state actor, particularly because each of the individual

offenses does not violate the law of nations if committed by a private actor. *See Kadic,* 70 F.3d at 243.

Kiobel argues that there is a stable "core" customary law definition of "crimes against humanity", but does not say what specific, universally accepted elements constitute that alleged "core". (KRB 49, 51.) Kiobel argues that the varying definitions in the ICTY and ICTR statutes excluding such elements as "enforced disappearance of persons" and the "crime of apartheid" are not evidence of ambiguity in the ostensible norm, KRB 51 n.35, but the ability to add and subtract elements based on political circumstances does not suggest the existence of a norm sufficient to meet *Sosa*'s standard. By way of comparison, Kiobel could provide no evidence that the offenses of piracy, violation of safe conducts, and offenses against ambassadors were similarly malleable in the 18th Century. "Crimes against humanity" therefore cannot meet *Sosa*'s requirement of definite content.[12]

---

[12] *See* Diane F. Orentlicher, *Settling Accounts*, 100 Yale L.J. 2537, 2585-86 (1991) ("the meaning of [crimes against humanity] is shrouded in ambiguity. . . . [E]fforts to enlarge the scope of the crime have generated more controversy than consensus."); Payam Akhavan, *Contributions of the International Criminal Tribunals for the Former Yugoslavia and Rwanda to Development of Definitions of Crimes Against Humanity and Genocide*, 94 Am. Soc'y Int'l L. Proc. 279, 280 (2000) (["D]efining crimes against humanity is in practice difficult, and is highly dependent on particular factual contexts.")

In response to our argument that the Restatement (Third) of Foreign Relations Law § 702 omits "crimes against humanity", Kiobel asserts that "crimes against humanity" is omitted because "each of the predicate acts of crime[s] against humanity (such as torture or murder) are, as noted in § 702, independent violations of international law when committed by states". (KRB 48 n.32.) However, Kiobel's explanation is unavailing: if "crimes against humanity" adds something to the underlying predicate offenses, then the Restatement should list it as a standard in its own right. If "crimes against humanity" adds nothing, its exclusion from the Restatement is understandable, but then it is a purely generic catch-all term, and Count II of the Amended Complaint should be dismissed.

VII. KIOBEL'S "ARBITRARY ARREST AND DETENTION" CLAIM SHOULD BE DISMISSED.

In our opening brief, we raised three defects in Kiobel's claim for arbitrary arrest and detention: (1) Kiobel's international sources, defining "arbitrary arrest and detention", "had little utility under the standard set out" by *Sosa*, SB 48-49; (2) Kiobel did not meet *Sosa*'s observation that the Restatement requires both (i) a "state policy" of detention and (ii) a definition of "prolonged and arbitrary" detention; and (3) the district court made no attempt to examine any particular factual allegation of detention against a specific, universally accepted standard under international law.

Kiobel addresses the first point by citing the same sources rejected by *Sosa*: the UDHR and the ICCPR. 542 U.S. at 734-35. Kiobel's citation of additional declarations (the African Charter, the ACHR and the European Convention) does not surmount *Sosa's* objection. Likewise, *Sosa* specifically rejected as incompetent evidence the U.S.-Iran hostages case from the International Court of Justice cited by Kiobel.[13] *See* 542 U.S. at 736 n.27 (rejecting *United States v. Iran*, 1980 I.C.J. 3, 42 (May 24)). *United States v. Iran* relies only on the UDHR, *see id.* at 42, and therefore adds nothing to Kiobel's argument.

Unable to demonstrate that "arbitrary arrest and detention" is of comparable specificity and acceptance as the three 18th-Century paradigm offenses, Kiobel argues: "The Court's holding in *Sosa* was limited to the detention claim in that case . . . 'a single illegal detention of less than a day . . . '". (KRB 56.) *Sosa*, however, cannot be so limited: it carefully sets out the framework for determining whether the ATS reaches challenged conduct, and rejects the precise sources.

Kiobel terms our second argument "frivolous", but cannot point to any state policy of arbitrary arrest or detention, and instead asserts "a

---

[13] The language quoted by Kiobel, KRB 56, comes from 1980 I.C.J. 3, as Kiobel's pincite makes clear, not 1979 I.C.J. 7.

policy of securing the oil fields". (KRB 57 n.40.) Kiobel's argument that haphazard arrests and detentions varying widely in condition and duration occurred as a result of an oil-field-protection policy does not establish a state policy of detention in violation of a settled norm of the law of nations. Kiobel also fails to produce any competent sources showing any norm imparting a universally understood meaning to "arbitrary" or "prolonged". Kiobel concludes by stating that "[d]etention is arbitrary if . . . 'it is incompatible with the principles of justice or with the dignity of the human person'". (KRB 57 n.40 (citing Restatement (Third) of Foreign Relations § 702, cmt. h).) However, the "practical consequences", *Sosa*, 542 U.S. at 732-33, of making a cause of action available for confinement that is "incompatible . . . with the dignity of the human person" would permit the federal courts to adjudicate prison conditions in foreign countries, and vice versa—a result at least as "breathtaking" as the definition rejected by *Sosa*.

Kiobel does not respond at all to our third argument. The district court failed to do what *Sosa* requires: the specifics of Kiobel's "detention claim must be gauged against the current state of international law . . . ". 542 U.S. at 734.

CONCLUSION

For the foregoing reasons, Kiobel's complaint should be dismissed.

Dated: July 24, 2007

Respectfully submitted,

CRAVATH, SWAINE & MOORE LLP,

by

_____

Rory O. Millson
Rowan D. Wilson
Thomas G. Rafferty
Michael T. Reynolds

825 Eighth Avenue
New York, NY 10019-7475
(212) 474-1000

Attorneys for Appellees/Cross-Appellants

Certificate of Compliance

1. This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2)(C) because this brief contains 6,990 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.

_____

Rowan D. Wilson
Attorney for Appellees/ Cross-Appellants

July 24, 2007