06-4876

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,

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BRIEF OF *AMICI CURIAE*
INTERNATIONAL LAW SCHOLARS
IN SUPPORT OF PLAINTIFFS-APPELLANTS-CROSS-APPELLEES
AND IN SUPPORT OF AFFIRMANCE

(Caption continued)

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DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER ENTITIES WITH A DIRECT FINANCIAL INTEREST IN LITIGATION

Pursuant to Fed. R. App. P. 26.1, the *Amici* make the following disclosure:

1. Is the party a publicly held corporation or other publicly held entity?

NO.

2. Is the party a parent, subsidiary, or affiliate of, or a trade association representing, a publicly held corporation, or other publicly held entity?

NO.

3. Is there any other publicly held corporation, or other publicly held entity, that has a direct financial interest in the outcome of the litigation?

NO.

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INTEREST OF AMICI CURIAE

This Brief of *Amici Curiae* International Law Scholars is respectfully submitted pursuant to Federal Rule of Appellate Procedure 29 in support of the Plaintiffs-Appellants-Cross-Appellees' Reply Brief to Defendants' Cross-Appeal.

Amici are legal experts in the fields of international law and human rights. While they pursue a wide variety of legal interests, they all share a deep commitment to the rule of law and respect for human rights. *Amici* believe this case raises important issues concerning international law and human rights law. Accordingly, *Amici* seek to provide this Court with an additional perspective on these issues, and they believe this submission will assist the Court in its deliberations.[1]

SUMMARY OF ARGUMENT

In *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), the Supreme Court held that a cause of action under the Alien Tort Statute (ATS) is a creature of the common law, not the law of nations *per se*. But while federal common law provides the cause of action, international law remains highly relevant in ATS litigation.

[1] *Amici* do not address every issue raised in the Defendants' cross-appeal. They take no position with respect to any other issue not raised in this brief.

As a threshold matter, there must be a violation of international law to trigger federal jurisdiction under the ATS. In *Sosa v. Alvarez-Machain*, 542 U.S. at 749, the Supreme Court held that federal courts may assert jurisdiction over common law claims for international law violations as to which there is an international consensus and a clear definition. To recognize an ATS claim, therefore, *Sosa* requires the existence of an international norm that is: universal (accepted by the international community); specific (clear and articulable content); and obligatory (establishing binding obligations).

Once the jurisdictional threshold is met, courts apply federal common law to define the claim, including, for example, rules of secondary liability. While federal common law provides the cause of action, international law remains relevant to this analysis. Indeed, courts engaged in federal common law analysis must look to various sources, including international law, to discern the applicable norms.

Applying these standards, the Second Circuit should reject the Defendants' assertions that neither cruel, inhuman, or degrading treatment nor arbitrary arrest and detention constitute actionable claims under the ATS. These norms are well established under international law as the courts within this and other Circuits have recognized on many occasions. And, they meet the standards set forth by the Supreme Court in *Sosa v. Alvarez-Machain*. Likewise, the Second Circuit should be mindful of

the role that international law plays in establishing the viability of secondary liability, including aiding and abetting, and should reference international law's longstanding recognition of liability in such cases.

ARGUMENT

I. IN *SOSA V. ALVAREZ-MACHAIN*, THE SUPREME COURT ESTABLISHED THAT THE COMMON LAW, AND NOT INTERNATIONAL LAW *PER SE*, DEFINES THE CAUSE OF ACTION UNDER THE ALIEN TORT STATUTE

The Alien Tort Statute (ATS) provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. In *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), the Supreme Court established that the ATS does not itself create a cause of action but that courts can recognize a cause of action, derived from the common law, for certain violations of international law.

> [A]lthough the ATS is a jurisdictional statute creating no new causes of action, the reasonable inference from the historical materials is that the statute was intended to have practical effect the moment it became law. The jurisdictional grant is best read as having been enacted on the understanding that *the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time*.

Id. at 724 (emphasis added). In other words, the ATS requires that the tort be "committed" in violation of international law and not that international law itself

recognizes a right to sue or defines the scope of liability or offers other rules of decision.

That the cause of action would be derived from the common law and not by the law of nations *per se* is entirely consistent with the hornbook principle that international law does not specify the means for its domestic enforcement. It can define the underlying conduct as wrongful. But international law "never has been perceived to create or define the civil actions to be made available by each member of the community of nations; by consensus, the states leave that determination to their respective municipal laws." *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 778 (D.C. Cir. 1984) (Edwards, J., concurring). Given this, "to require international accord on a right to sue, when in fact the law of nations relegates decisions on such questions to the states themselves, would be to effectively nullify the 'law of nations' portion of section 1350." *Id.*

In *Sosa v. Alvarez-Machain*, 542 U.S. at 715, the Supreme Court indicated that when Congress enacted the ATS in 1789, only three torts were recognized under the common law as being violations of the law of nations with a potential for personal liability: violation of safe conducts, infringement of the rights of ambassadors, and piracy. The Court added, however, that international law was not static and the

development of international law was not frozen in time.[2]

> We assume, too, that no development in the two centuries from the enactment of § 1350 to the birth of the modern line of cases beginning with *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), has categorically precluded federal courts from recognizing a claim under the law of nations as an element of common law; Congress has not in any relevant way amended § 1350 or limited civil common law power by another statute.

Id. at 724-725. Furthermore, the ability of federal courts to establish a cause of action under the common law is limited to situations in which the "present-day law of nations" recognizes 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 725.

Thus, courts should establish whether claims are specific, universal, and obligatory. In fact, this cautious approach "is generally consistent with the reasoning of many of the courts and judges who faced the issue before it reached" the Supreme Court.[3] *Id*. at 732. *See, e.g.*, *Flores v. Southern Peru Copper Corp.*, 343 F.3d 140 (2d Cir. 2003); *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995); *Filartiga v. Pena-Irala*, 630

[2] As the Second Circuit has aptly observed, "courts ascertaining the content of the law of nations 'must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today.'" *Kadic v. Karadzic*, 70 F.3d 232, 238 (2d Cir. 1994) (*quoting Filartiga v. Pena-Irala*, 630 F.2d 876, 881 (2d Cir. 1980)).

F.2d 876 (2d Cir. 1980). *See also Papa v. United States*, 281 F.3d 1004, 1013 (9th Cir. 2002); *Martinez v. City of Los Angeles*, 141 F.3d 1373, 1383 (9th Cir. 1998). The Supreme Court presented this standard – definite content and widespread acceptance – as a stringent test intended to prevent litigation of claims for lesser, more parochial, or idiosyncratic abuses.[4] To recognize ATS claims, therefore, *Sosa* requires the existence of international norms that are: universal (accepted by the international community); specific (clear and articulable content); and obligatory (establishing binding obligations).

The essence of *Sosa v. Alvarez-Machain* is that the ATS authorizes federal courts to develop a cause of action where the underlying abuse violates international norms that are specific, universal, and obligatory.[5] This is precisely what the lower

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[3] Justice Scalia's dissent in *Sosa* correctly recognized that the majority opinion endorsed the same standard espoused and applied by many lower courts. *Sosa v. Alvarez-Machain*, 542 U.S. at 749.

[4] In *Sosa*, the Court offered *United States v. Smith*, 18 U.S. 153 (1820), as a model for illustrating how to determine the status of customary international law. The Court in *Smith* looked to scholarship, customary practice, and domestic judicial opinions. "What the law of nations on this subject is, may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law." *Id*. at 160-161.

[5] Significantly, the lower courts have routinely dismissed claims that did not clear this high hurdle. In *Flores v. Southern Peru Copper Corp.*, 343 F.3d 140 (2d Cir. 2003), for example, the Second Circuit affirmed that ATS claimants are required to allege a violation of "specific, universal, and obligatory" norms. Without calling into question its analysis in *Filartiga* or *Karadzic*, the Second Circuit concluded that environmental

courts have done and *Sosa* noted with approval. *See Sosa v. Alvarez-Machain*, 542 U.S. at 732. *See also Filartiga v. Pena-Irala* 630 F.2d 876, 880-885 (2d Cir. 1980); *In re Estate of Marcos Human Rights Litigation*, 25 F.3d 1467, 1475 (9th Cir. 1994); *Kadic v. Karadzic*, 70 F.3d 232, 236 (2d Cir. 1995). In *Sosa*, the Supreme Court did not question a single case in which this high standard had been satisfied. That is because the lower courts have consistently sustained jurisdiction under the ATS only for certain egregious violations of international human rights law. *See e.g.*, *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322 (N.D. Ga. 2002) (war crimes); *Kadic v. Karadzic*, 70 F.3d at 242 (genocide); *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996) (cruel, inhuman, or degrading treatment); and *Cabello v. Fernandez-Larios,* 402 F.3d 1148 (11th Cir. 2005) (crimes against humanity).

In summary, the ATS requires that the tort be "committed" in violation of international law and not that international law itself recognizes a right to sue or defines the scope of liability or sets forth other rules of decision. Of course, international law is also relevant in federal common law analysis.[6] Once the

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torts did not violate international law. *See also Hamid v. Price Waterhouse*, 51 F.3d 1411, 1418 (9th Cir. 1995) (fraud does not violate the law of nations); *Maugein v. Newmont Mining Corp.*, 298 F. Supp. 2d 1124, 1130 (D. Colo. 2004) (defamation does not violate the law of nations); *Guinto v. Marcos*, 654 F. Supp. 276, 281 (S.D. Cal. 1986) (First Amendment has no counterpart in the law of nations).

[6] In *Sarei v. Rio Tinto, PLC*, 2007 U.S. App. LEXIS 8430 (9th Cir. 2007), the Ninth

jurisdictional threshold is met, courts apply federal common law to define the claim, including rules of secondary liability. While federal common law provides the cause of action, international law remains relevant to this analysis. Indeed, courts engaged in federal common law analysis must look to various sources, including international law, to discern the applicable norms.

II. THE PROHIBITIONS AGAINST CRUEL, INHUMAN, OR DEGRADING TREATMENT AND ARBITRARY ARREST AND DETENTION ARE SPECIFIC, UNIVERSAL, AND OBLIGATORY NORMS UNDER INTERNATIONAL LAW AND, THEREFORE, FALL WITHIN THE STANDARD SET FORTH IN *SOSA V. ALVAREZ-MACHAIN*

International law thus remains highly relevant in the federal common law analysis that is required to determine the existence of viable claims under the ATS. Indeed, it is necessary to reference the applicable international norms with respect to the substantive claims raised by the Plaintiffs. Contrary to the Defendants' arguments, cruel, inhuman, or degrading treatment as well as arbitrary arrest and detention do, in fact, constitute actionable claims under *Sosa*. These norms are well established under

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Circuit referenced both federal common law and international law in considering claims of secondary liability. According to the Ninth Circuit, "[c]ourts applying the ATCA draw on federal common law and there are well-settled theories of vicarious liability under federal common law. Authorities contemporaneous to the ATCA's passage also suggest that the law of nations has long incorporated principles of vicarious liability." *Id*. at *18-19 (citations omitted).

international law as the courts in this and other Circuits have recognized on many occasions.[7] They are specific, universal, and obligatory norms.

A. The Prohibition against Cruel, Inhuman, or Degrading Treatment is a Specific, Universal, and Obligatory Norm

The prohibition against cruel, inhuman, or degrading treatment is recognized in all major multilateral and human rights instruments.[8] *See* Universal Declaration of Human Rights, art. 5, G.A. Res. 217A (III), at 71, U.N. Doc. A/810 (Dec. 10, 1948) ("No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment"); International Covenant on Civil and Political Rights, art. 7, March 23, 1976, 999 U.N.T.S. 171;[9] Convention against Torture and Other Cruel, Inhuman or

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[7] In this case, the District Court found that claims of torture may provide a basis for actionable claims under the ATS. *Kiobel v. Royal Dutch Petroleum Company*, 456 F. Supp. 2d 457, 465 (S.D.N.Y. 2006). Because the court determined that Plaintiffs' torture claim was viable, it declined to "determine whether a claim for cruel, inhuman, and degrading treatment would be viable in the alternative." *Id.*

[8] Treaties and other international instruments are relevant sources for determining the status of customary international law. *See, e.g.*, *Flores v. Southern Peru Copper Corp.*, 343 F.3d at 163, 168; *Kadic v. Karadzic*, 70 F.3d at 242-243; *Filartiga v. Pena-Irala*, 630 F.2d at 881. The fact that a treaty is non-self-executing is not relevant to the broader question of whether a particular norm enunciated in that treaty has widespread international consensus and a clear definition.

[9] As of July 6, 2007, there are 144 States Parties to the International Covenant on Civil and Political Rights. The United States has ratified this treaty.

Degrading Treatment or Punishment, art. 16, June 26, 1987, 1465 U.N.T.S. 85;[10] American Convention on Human Rights, art. 5(2), July 18, 1978, 1144 U.N.T.S. 123; European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 3, Sept. 3, 1953, 213 U.N.T.S. 221; African Charter on Human and Peoples' Rights, art. 5, Oct. 21, 1986, OAU Doc. CAB/LEG/67/3/Rev. 5.

Numerous examples of cruel, inhuman, or degrading treatment have been documented by international institutions. *See, e.g.*, **U.N. Human Rights Committee**: *Henry v. Trinidad and Tobago*, Communication No. 752/1997, U.N. Doc. CCPR/C/64/D/752/1997 (1999) (beating a detainee on the head constitutes cruel, inhuman, or degrading treatment); *Tshishimbi v. Zaire*, Communication No. 542/1993, U.N. Doc. CCPR/C/53/D/542/1993 (1996) (abduction and incommunicado detention constitute cruel, inhuman, or degrading treatment); *Valentini de Bazzano v. Uruguay*, Communication No. 5/1977, U.N. Doc. CCPR/C/OP/1 at 40 (1984) (detention of prisoner in conditions that pose a threat to his health constitute cruel, inhuman, or degrading treatment). **Inter-American Court of Human Rights**: *Cantoral Benavides v. Peru*, Inter-Am. Ct. H.R. (ser. C) No. 69 (2000) (poor conditions of confinement and inadequate medical treatment constitute cruel, inhuman, or degrading treatment);

[10] As of July 6, 2007, there are 160 States Parties to the Convention against Torture. The United States has ratified this treaty.

Suarez-Rosero v. Ecuador, Inter-Am. Ct. H.R. (ser. C) No. 35 (1997) (detention for more than 36 days during which the victim was deprived of communication with the outside world constitutes cruel, inhuman, or degrading treatment); *Velasquez-Rodriguez v. Honduras*, Inter-Am. Ct. H.R. (ser. C) No. 4 (1988) (prolonged isolation and deprivation of communication constitute cruel and inhuman treatment). **European Court of Human Rights**: *Elci and Others v. Turkey*, (2003) ECHR 23145/93 (dire conditions of detention, including inadequate bedding and unsanitary food and bathroom facilities, constitutes inhuman or degrading treatment); *Kalashnikov v. Russia*, 36 E.H.R.R. 34 (2002) (sleep deprivation, overcrowding, and unsanitary conditions are factors in determining the existence of inhuman or degrading treatment); *Ribitsch v. Austria*, 21 E.H.R.R. 573 (1996) (beatings and abuse administered by police constitutes inhuman and degrading treatment). These examples do not offer a complete survey of every act found to constitute cruel, inhuman, or degrading treatment in international law. Regrettably, history reveals too many forms of abuse to permit such enumeration by *Amici*. Rather, these examples reveal the wide range of conduct that can give rise to a viable claim of cruel, inhuman, or degrading treatment under international law.

The United States has recognized the prohibition against cruel, inhuman, or degrading treatment in various legislative pronouncements. For example, Congress has

adopted legislation that recognizes the prohibition against cruel, inhuman, or degrading treatment as a human right, and has specifically precluded various forms of aid to countries that engage in such practices. *See, e.g.*, 7 U.S.C. § 1733 (prohibiting agricultural assistance); 22 U.S.C § 2151n (prohibiting development assistance); 22 U.S.C. § 2304 (prohibiting security assistance). Most recently, Congress acknowledged the prohibition against cruel, inhuman, or degrading treatment in the Detainee Treatment Act of 2005. In so doing, Congress defined cruel, inhuman, or degrading treatment by reference to the U.S. Constitution. "In this section, the term 'cruel, inhuman, or degrading treatment or punishment' means the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States, as defined in the United States Reservations, Declarations and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment . . . ." 42 U.S.C. § 2000dd(d).[11]

[11] Federal courts should certainly recognize claims of cruel, inhuman, or degrading treatment to the extent that the conduct at issue would also be prohibited by the U.S. Constitution. *See Mehinovic v. Vuckovic*, 198 F. Supp. 2d at 1348; *Xuncax v. Gramajo*, 886 F. Supp. at 187. In some circumstances, the international law prohibition on cruel, inhuman, or degrading treatment may be more protective than U.S. constitutional law. *Amici* do not suggest that cruel, inhuman, or degrading treatment claims under the ATS should be limited only to those abuses that violate U.S. constitutional law. The Second Circuit, however, need not consider this issue because both bodies of law prohibit the conduct at issue here.

Finally, federal courts have found that cruel, inhuman, or degrading treatment violates international law. In *Xuncax v. Gramajo*, 886 F. Supp. 162, 186 (D. Mass. 1995), for example, the district court found that "[t]he international prohibition against such treatment appears to be no less universal than the proscriptions of official torture, summary execution, disappearance and arbitrary detention. Indeed, most of the major international human rights instruments conjoin in the same sentence the prohibitions against torture and against cruel, inhuman or degrading treatment." *See also Wiwa v. Royal Dutch Petroleum Co.*, 2002 WL 319887, at *7-9 (S.D.N.Y. 2002); *Tachiona v. Mugabe*, 234 F. Supp. 2d 401, 437-38 (S.D.N.Y. 2002); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d at 1347-49; *Estate of Cabello v. Fernandez-Larios*, 157 F. Supp. 2d 1345, 1361 (S.D. Fla. 2001); *Jama v. United States Immigration and Naturalization Service*, 22 F. Supp. 2d 353 (D.N.J. 1998); *Abebe-Jira v. Negewo*, 72 F.3d at 847; *Najarro de Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1385, 1397 (5th Cir. 1985).

A more recent case, *Doe v. Qi*, 349 F. Supp. 2d 1258 (N.D. Cal. 2004), is particularly instructive because it was decided following the 2004 *Sosa* decision. In *Doe v. Qi*, the district court engaged in a comprehensive review of international jurisprudence – including decisions of the U.N. Human Rights Committee, the Inter-American Commission on Human Rights, and the European Court of Human Rights. It found that severe beatings, sexual abuse, deplorable detention conditions, and

deprivation of food and water constitute cruel, inhuman, or degrading treatment. *Id*. at 1322-1324.

Sosa v. Alvarez-Machain requires ATS claims to be based on specific, universal, and obligatory norms. "The inquiry turns on the specific facts of each case and is not precluded simply because there are questions at the margins." *Doe v. Qi*, 349 F. Supp. 2d. at 1322; *Xuncax v. Gramajo*, 886 F. Supp. at 187. In *Kiobel v. Royal Dutch Petroleum Company*, the Plaintiffs are alleging that they suffered "clubbing, horsewhipping, denial of food, water and medical attention, injection of life-threatening chemicals, threats to the lives of family members, and the raping, beating and killing of family members . . . ." Reply Brief for Plaintiffs at 53-54. This is precisely the kind of conduct explicitly proscribed under international law by the prohibition against cruel, inhuman, or degrading treatment.

B. The Prohibition against Arbitrary Arrest and Detention is a Specific, Universal, and Obligatory Norm

The prohibition against arbitrary detention is recognized by virtually every multilateral and regional human rights instrument of the twentieth century. *See, e.g.*, Universal Declaration of Human Rights, *supra*, at art. 9 ("No one shall be subjected to arbitrary arrest, detention or exile."); International Covenant on Civil and Political Rights, *supra*, at Article 9; European Convention for the Protection of Human Rights

and Fundamental Freedoms, *supra*, at art. 5; American Convention on Human Rights, *supra*, at art. 7; African Charter on Human and Peoples' Rights, *supra*, at art. 6.

Particularly relevant is the work of the U.N. Working Group on Arbitrary Detention, which was established by the United Nations to investigate cases of detention imposed arbitrarily or otherwise inconsistently with relevant international standards.[12] *See* U.N. Commission on Human Rights, Res. 1991/42 (1991). The Working Group has established the following three categories for considering cases of arbitrary detention: (1) when there is no legal basis justifying deprivation of liberty; (2) when the deprivation of liberty results from the exercise of fundamental rights or freedoms; and (3) when the non-observance of fair trial norms gives the deprivation of liberty an arbitrary character. Report of the Working Group on Arbitrary Detention, U.N. Doc. E/CN.4/1998/44 (1997).[13] *See, e.g.*, *Durdykuliyev v. Turkmenistan*, Opinion No. 31/2005, U.N. Doc. E/CN.4/2006/7/Add.1 at 83 (2005) (detention motivated by the exercise of the freedom of expression and that did not follow the observance of minimal procedural safeguards constitutes arbitrary detention); *al-Qadasi, et al. v. Yemen*, Opinion No. 47/2005, U.N. Doc. A/HRC/4/40/Add.1 (2005) (detention without

[12] *See also* Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, G.A. Res. 173, U.N. GAOR, 43rd Sess., Supp. No. 49, at 298, U.N. Doc A/43/49 (Dec. 9, 1988).

charge, without presentation before any judicial authority, and in the absence of any legal procedures constitutes arbitrary detention); *al-Jubairi v. Saudi Arabia*, Opinion No. 9/2006, U.N. Doc. A/HRC/4/40/Add.1 (2007) (detention without charge, without presentation before any judicial authority, and without assistance of counsel constitutes arbitrary detention).

Numerous examples of arbitrary detention have been documented by other international institutions. *See, e.g.* **U.N. Human Rights Committee**: *Jaona v. Madagascar*, Opinion 132/1982, U.N. Doc. CCPR/C/OP/2 at 161 (1990) (detention solely on account of political opinions constitutes arbitrary detention); **Inter-American Court of Human Rights:** *Tibi v. Ecuador*, Inter.-Am. Ct. H.R. (ser. C) No. 114 (2004) (detention without proper notification of charges and without access to counsel constitutes arbitrary detention); *Sanchez v. Honduras*, Inter.-Am. Ct. H.R. (ser C) No. 99 (2003) (detention without a court order and no charges constitutes arbitrary detention). **European Court of Human Rights**: *Pantea v. Romania*, 40 E.H.R.R. 26 (2005) (failure to comply with legal procedures in detention constitutes arbitrary detention); *Denizci and Others v. Cyprus*, (2001) ECHR 25316/94, 25321/94, and 27207/95 (detention without lawful basis constitutes arbitrary detention).

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[13] *See generally* Reed Brody, *The United Nations Creates a Working Group on Arbitrary Detention*, 85 Am. J. Int'l L. 709 (1991).

The Restatement (Third) of the Foreign Relations Law of the United States (1987) is also instructive in its description of arbitrary detention. According to the Restatement (Third), detention is arbitrary "if it is not pursuant to law; it may be arbitrary also if 'it is incompatible with the principles of justice or with the dignity of the human person.'" *Id*. at § 702 cmt. (h) (*quoting* Statement of U.S. Delegation, 13 GAOR, U.N. Doc. A/C.3/SR.863 at 137 (1958)). The Restatement (Third) then offers several examples of arbitrary detention. "[D]etention is arbitrary if it is supported only by a general warrant, or is not accompanied by notice of charges; if the person detained is not given early opportunity to communicate with family or to consult counsel; or is not brought to trial within a reasonable time." *Id*. In addition, a detention is arbitrary "if it is unlawful or unjust." *Id*. at § 702, Reporters' Note 6.

In *Sosa v. Alvarez-Machain*, 542 U.S. at 736-737, the Supreme Court considered a claim of arbitrary detention.[14] It rejected the claim because the detention at issue in the case – characterized as a "relatively brief detention in excess of positive authority,"

[14] Federal courts have repeatedly held that arbitrary arrest and detention violates international law and gives rise to an actionable claim under the ATS. *See, e.g.*, *Doe v. Qi*, 349 F. Supp. 2d at 1325-1326; *Mehinovic v. Vuckovic*, 198 F. Supp. 2d at 1339-1350; *Martinez v. City of Los Angeles*, 141 F.3d 1373, 1384 (9th Cir. 1998); *Hilao v. Estate of Marcos*, 103 F.3d 789, 795 (9th Cir. 1996); *Xuncax v. Gramajo*, 886 F. Supp. at 184-185; *Paul v. Avril*, 901 F. Supp. 330, 335 (S.D. Fla. 1994); *Siderman de Blake v. Argentina*, 965 F.2d 699, 717 (9th Cir. 1992); *Committee of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 940 (D.C. Cir. 1988); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1541 (N.D. Cal. 1987).

– did not rise to a sufficient level of severity. *Id*. at 737. "[A] single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to support the creation of a federal remedy." *Id*. at 738. But the Court recognized that "some policies of prolonged arbitrary detentions are so bad that those who enforce them become enemies of the human race." *Id*. at 737. The Court's opinion thus offers some guidance in determining the acceptable parameters of such a claim under the ATS.

Following *Sosa* and consistent with international law, it seems clear that at least two broad categories of detentions qualify as arbitrary: prolonged detentions that do not follow procedural standards and fair trial norms, and detentions (of any length) for which there is no reasonable legal basis that could justify the deprivation of liberty, particularly when the purpose of the detention constitutes persecution or is intended to prevent the detainee from exercising recognized human rights.

In *Kiobel v. Royal Dutch Petroleum Company*, the Plaintiffs are alleging that "they were never formally charged with a crime, were never formally arraigned, and were incarcerated without food, water, or medical attention, often in military detention camps without access to lawyers." Reply Brief for Plaintiffs at 57. They further allege that their arrest and detentions "were specifically intended to suppress dissent and

violate individual rights" and that they "were tortured and detained under degrading conditions for days, weeks, months, and years." *Id*. Following *Sosa* and consistent with international law, such treatment falls within the categories of detention that qualify as arbitrary: they were prolonged detentions that did not follow procedural standards and fair trial norms, and they were discriminatory and designed to persecute the Plaintiffs.

In sum, these two norms – cruel, inhuman, or degrading treatment and arbitrary arrest and detention – are clearly defined by the international community, obligatory in nature, and have achieved universal consensus. Each of these international law norms fall within the reach of the ATS, which affords federal jurisdiction over violations of the law of nations that have an international consensus and a clear definition. *Sosa v. Alvarez-Machain*, 542 U.S. at 748-749. As with many international norms, it is neither possible nor necessary to define all acts that may constitute cruel, inhuman, or degrading treatment or arbitrary arrest and detention in order to recognize that such conduct is actionable. *Xuncax v. Gramajo*, 886 F. Supp. at 187. Determinations of whether specified acts fall within these prohibited norms require an assessment of all the circumstances in the case, including the form of mistreatment, its duration, and the reasons for such action.

III. INTERNATIONAL LAW IS ALSO RELEVANT FOR REVIEWING CLAIMS OF SECONDARY LIABILITY, INCLUDING AIDING AND ABETTING

From the Nuremberg tribunals to the recent case law of the International Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR), the notion of individual responsibility for violations of international law and the various kinds of conduct that can give rise to such responsibility are well-established. A wide spectrum of conduct may give rise to individual responsibility under international law, including planning, instigating, ordering, committing or otherwise aiding or abetting in the planning, preparation, or execution of a crime. Indeed, the focus of international criminal law has been on those individuals who assist the actual perpetrators in committing their crimes.[15] Secondary liability is essential to the enforcement of international law because it ensures that individuals who facilitate the commission of a crime are held accountable.

> Although only some members of the group may physically perpetrate the criminal act (murder, extermination, wanton destruction of cities, towns or village, etc.), the participation and contribution of the other members of the group is often vital in facilitating the commission of the offence in

[15] *See* William A. Schabas, *Enforcing International Humanitarian Law: Catching the Accomplices*, 83 Int'l Rev. Red Cross 439, 440 (2001) ("International penal repression, dating from its early manifestations at Nuremberg and Tokyo to the contemporary tribunals, has focused not so much on the 'principal' perpetrator – that is, the concentration camp torturer or front-line executioner – as on the leaders who are, technically speaking, 'mere' accomplices.").

> question. It follows that the moral gravity of such participation is often no less – or indeed no different – from that of those actually carrying out the acts in question.

Prosecutor v. Tadic, Case No. IT-94-1-A, ¶191 (ICTY Appeals Chamber July 15, 1999). This obligation to refrain from knowingly assisting the commission of crimes against humanity and the other abuses at issue in this case applies to all members of society, including private individuals, government officials, and corporations.

At the end of World War II, the Allied Powers adopted Control Council Law No. 10, which authorized the prosecution of persons guilty of war crimes, crimes against peace, and crimes against humanity. Control Council Law No. 10, 3 Official Gazette Control Council for Germany 50 (1946). The law imposed liability on any person who was: (a) a principal; (b) an accessory to the commission of any crime or ordered or abetted the same; or (c) took a consenting part; or (d) was connected with plans or enterprises involving its commission; or (e) was a member of any organization or group connected with the commission of any such crime. *Id*. at art. II(2).

Several decisions issued by the U.S. Military Tribunals, established pursuant to Control Council Law No. 10, held individuals liable for aiding and abetting violations of international law.[16] In *United States v. Krauch*, for example, the Military Tribunal

[16] *See also The Zyklon B Case (Trial of Bruno Tesch and Two Others)*, I Law Reports of Trials of War Criminals 93 (Brit. Mil. Ct. 1946) (imposing liability on German industrialists for supplying Zyklon B poison gas to Nazi concentration camps); *The*

indicated that personal criminal liability for war crimes is not limited exclusively to active participation. *United States v. Krauch*, 8 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10 at 1081 (1952). Rather, liability could be established in several ways, including abetting illegal activities. *Id.* at 1137. The *Krauch* decision is significant because it emphasized that the corporate structure cannot be used as a mechanism for avoiding liability. "[O]ne may not utilize the corporate structure to achieve an immunity from criminal responsibility for illegal acts which he directs, counsels, aids, orders, or abets." *Id.* at 1153. *See also United States v. Flick*, 6 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10 1202 (1952).

More recently, the Statutes of the International Criminal Tribunals for the former Yugoslavia and Rwanda have established that a variety of conduct may give rise to individual responsibility, including planning, instigating, ordering, committing or otherwise aiding or abetting in the planning, preparation, or execution of a crime. *See* ICTY Statute, at art. 7(1); ICTR Statute, at art. 6(1).

Cases decided by the ICTY and ICTR have elaborated on the various forms of secondary liability, including aiding and abetting. In *Prosecutor v. Furundzija*, Case

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Dachau Concentration Camp Trial, XI Law Reports of Trials of War Criminals 5, 13 (U.S. Mil. Ct. 1945) (imposing liability on the staff of the Dachau Concentration Camp for aiding, abetting, and participating in the mistreatment of prisoners).

No. IT-95-17/1-PT (ICTY Dec. 10, 1998), for example, the ICTY Trial Chamber indicated that "not only the commission of rape or serious sexual assault, but also the planning, ordering or instigating of such acts, as well as aiding and abetting in the perpetration, are prohibited."[17] *Id.* at ¶187. After surveying international law, the Trial Chamber indicated that "the clear requirement in the vast majority of the cases is for the accomplice to have knowledge that his actions will assist the perpetrator in the commission of the crime. . . . Moreover, it is not necessary that the aider and abettor should know the precise crime that was intended and which in the event was committed. If he is aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed, he has intended to facilitate the commission of that crime, and is guilty as an aider and abettor." *Id.* at ¶246.

> In sum, the Trial Chamber holds the legal ingredients of aiding and abetting in international criminal law to be the following: the actus reus consists of practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime. The mens rea required is the knowledge that these acts assist the commission of the offence.

Id. at ¶249. As the Trial Chamber emphasized, *quis per alium facit per se ipsum facere*

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[17] *See also Prosecutor v. Tadic*, at ¶229 (To be liable as an aider and abettor, one must "carr[y] out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime . . . and this support [must have] a substantial effect upon the perpetration of the crime."); *Prosecutor v. Galic*, Case No. IT-98-29 (ICTY Dec. 5, 2003); *Prosecutor v. Krnojelac*, Case No. IT-97-25 (ICTY Sept. 17, 2003).

videtur – he who acts through others is regarded as acting himself. *Id.* at ¶256.

In *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T (Sept. 2, 1998), the ICTR Trial Chamber held that an individual "can be held responsible for the criminal acts of others where he plans with them, instigates them, orders them or aids and abets them to commit those acts.[18] *Id.* at ¶472. As in *Furundzija*, the Trial Chamber in *Akayesu* provided a detailed analysis of aiding and abetting. The Trial Chamber emphasized that the accomplice need not even wish that the principal offense be committed. "[A]nyone who knowing of another's criminal purpose, voluntarily aids him or her in it, can be convicted of complicity even though he regretted the outcome of the offence." *Id.* at ¶539.

The Rome Statute of the International Criminal Court contains similar provisions that establish individual responsibility for various forms of participation, including aiding and abetting. Article 25(c), for example, provides that a person shall be criminally responsible if that person aids, abets, or otherwise assists in the commission or attempted commission of a crime within the Court's jurisdiction. Like the case law of the international tribunals, Article 25 makes clear that aiding and abetting is a well-established form of individual liability. *See generally* The Rome Statute of the International Criminal Court: A Commentary 798-801 (Antonio Cassese,

[18] *See also Prosecutor v. Rutaganda*, Case No. ICTR-96-3-I (ICTR Dec. 6, 1999).

et al., eds., 2002); Commentary on the Rome Statute of the International Criminal Court 481-483 (Otto Triffter ed., 1999).

U.S. courts have long recognized that individuals may be held civilly liable for tortious violations of international law even if they did not direct or actively participate in such acts.[19] Recent ATS cases have emphasized the notion of individual liability for violations of international law. In *Mehinovic v. Vuckovic*, 198 F. Supp. 2d at 1329, for example, the district court for the Northern District of Georgia awarded compensatory and punitive damages to four refugees from Bosnia-Herzegovina who sued a former Bosnian Serb soldier under the ATS. The court found that the defendant was directly responsible for torturing and arbitrarily detaining each of the plaintiffs. *Id.* at 1345-46, 1349-50. Additionally, the court found the defendant liable for aiding and abetting the human rights violations committed by other Serb military and political forces. *Id.* at 1356. The court noted that "[p]rinciples of accomplice liability are well-established under international law." *Id.* at 1355. It found: "Vuckovic both provided assistance and encouragement to those who directly perpetrated acts of torture and abuse against plaintiffs, and . . . he knew that his own participation in and encouragement of these actions would assist others in committing these acts." *Id.* at 1356. Therefore, he was

[19] *See also The Amiable Nancy*, 16 U.S. 546, 559 (1818); *Harmony v. United States*, 43 U.S. 210, 234-35 (1844).

held liable for aiding and abetting torture.

In *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 296 (S.D.N.Y. 2003), Sudanese residents sued a Canadian energy company under the ATS, claiming that the company "collaborated with Sudan in 'ethnically cleansing' civilian populations surrounding oil concessions located in southern Sudan in order to facilitate oil exploration and extraction activities." Talisman moved to dismiss, contending that aiding and abetting is not an actionable legal theory under international law. *Id.* at 320. The district court disagreed, stating that "the concept of complicit liability for conspiracy or aiding and abetting is well-developed in international law, especially in the specific context of genocide, war crimes, and the like." *Id.* at 322. Additionally, "U.S. courts have consistently permitted ATCA suits to proceed based on theories of conspiracy and aiding and abetting." *Id.* at 321. In 2005, Talisman filed a motion for judgment on the pleadings, claiming again that "secondary liability under international law is not supported by sufficient evidence and is not sufficiently defined in international law to support an [ATCA] claim . . . ." *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 2005 WL 1385326, at *5 (S.D.N.Y. June 13, 2005). The district court restated the reasoning from the 2003 opinion to find that aider and abettor liability is sufficiently precise in international law to support an ATS claim, thus denying Talisman's motion. *Id.* at *5-8.

In *Burnett v. Al Baraka Investment and Development Corp.*, 274 F. Supp. 2d 86, 91 (D.D.C. 2003), family members and representatives of victims of the 9/11 terrorist attacks sued nearly two hundred persons and entities that funded and supported al Qaeda, alleging that each of them "directly or indirectly, provided material support, aided and abetted, or conspired with the terrorists who perpetrated the attacks." The defendants moved to dismiss, claiming, among other things, that the plaintiffs had failed to plead a cognizable claim under the ATS. *Id.* at 99. The district court denied the motion, holding that the complaint sufficiently alleged an ATS claim. *Id.* at 91-92, 111. The court stated: "Although no defendant in this case is sued as a direct perpetrator of a tort committed in violation of the law of nations, proof that they were accomplices, aiders and abettors, or co-conspirators would support a finding of liability under the ATCA." *Id.* at 100 (citing *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d at 321; *Mehinovic v. Vuckovic*, 198 F. Supp. 2d at 1355; *Eastman Kodak Co. v. Kavlin*, 978 F. Supp. 1078, 1091-92 (S.D. Fla. 1997). *See also In re "Agent Orange" Product Liability Litigation*, 2005 WL 729177, at *38 (E.D.N.Y. Mar. 28, 2005); *Cabello v. Fernández-Larios*, 402 F.3d 1148, 1151, 1158 (11th Cir. 2005); *Bodner v. Banque Paribas,* 114 F. Supp. 2d 117, 128 (E.D.N.Y. 2000); *Carmichael v. United Technologies Corp.*, 835 F.2d 109, 113 (5th Cir. 1988).

In sum, it is simply beyond dispute that secondary liability, including aiding and

abetting, is firmly established in international law. It is equally beyond dispute that secondary liability is necessary to ensure compliance with international human rights norms and to ensure accountability for violations thereof.

CONCLUSION

In *Sosa v. Alvarez-Machain*, the Supreme Court offered a careful methodology for analyzing ATS claims. While courts must look to federal common law for the cause of action in ATS litigation, international law is relevant in this federal common law analysis. Thus, the Second Circuit must look to international law to reject the Defendants' assertions that neither cruel, inhuman, or degrading treatment nor arbitrary arrest and detention constitute actionable claims. It should also look to international law as it considers the status of secondary liability.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

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Jose Luis Fuentes, being duly sworn, deposes and says that the deponent is not a party to the action, is over 18 years of age, and resides at the address of 499 14th Street, Suite 220, Oakland, California 94612.

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