No. 06-4876

In the United States Court of Appeals for the Second Circuit

ESTHER KIOBEL, individually and on behalf of her late husband, DR. BAR1NEM KIOBEL, BISHOP AUGUSTINE NUMENE JOHN-MILLER, CHARLES BARIDORN WIWA, ISRAEL NWIDOR, KENDRICKS DORLE NWIKPO, ANTHONY B. KOTE-WITAH, VICTOR B. WIFA, DUMLE J. KUNENU, BENSON MAGNUS IKARI, LEGBARA TONY IDIGIMA, PIUS NWINEE, KPOBARI TUSIMA, individually and on behalf of his late father CLEMENT TUSIMA,

Plaintiffs-Appellants-Cross-Appellees,

v.

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

Defendants-Appellees-Cross-Appellants.

On Appeal From the Judgment of the United States District Court
For the Southern District of New York

BRIEF OF *WIWA* PLAINTIFF AS AMICI CURIAE IN SUPPORT OF CROSS-APPELLEES AND IN SUPPORT OF AFFIRMANCE

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STATEMENT OF IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici are the same as those in the Brief for *Wiwa* Plaintiffs as *Amicus Curiae* in Support of Appellants, and present the same general interests as before. In this brief in support of the *Kiobel* plaintiffs' opposition to the Shell defendants' cross-appeal, the *Wiwa* plaintiffs are specifically interested in upholding the rulings of the district court in *Kiobel* that allow the plaintiffs to proceed on claims of aiding and abetting liability, crimes against humanity, torture, cruel, inhuman, and degrading treatment, and arbitrary arrest and detention against the Shell defendants. As in their previous brief, the *Wiwa* plaintiffs do not duplicate the arguments made in the *Kiobel* plaintiffs' principal brief in the cross-appeal.

STATEMENT OF ISSUES ADDRESSED BY *AMICI*

The *Wiwa* plaintiffs address the issues of aiding and abetting liability under the Alien Tort Statute (ATS); theories of secondary and corporate liability generally; the viability of claims for torture, crimes against humanity, cruel, inhuman, and degrading treatment, and arbitrary arrest and detention against the Shell defendants; and the interrelationship between the ATS and the Torture Victim Protection Act (TVPA).

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Because the Alien Tort Statute (ATS), 28 U.S.C. § 1350, creates federal common law claims for international law violations, these claims should be governed by a uniform set of federal rules. These rules are primarily drawn from existing federal common law doctrines, as well as general common law principles and international law. Contemporary sources of international law include the decisions of international tribunals, including criminal tribunals.

The *Kiobel* plaintiffs have adequately alleged that Shell was complicit in egregious violations of universally recognized human rights. Shell assisted the Nigerian military in brutally suppressing peaceful political opposition to Shell's environmentally and socially destructive extraction of oil in Ogoni communities. Acts of murder, torture, and other abuses as part of a widespread and systematic campaign against the Ogoni constitute crimes against humanity; abuses such as burning of houses, death threats, and violence against plaintiffs' family members, if they do not rise to the level of torture, certainly qualify as cruel, inhuman and degrading treatment. Plaintiffs have also suffered actionable arbitrary arrest and detention, because their detentions were prolonged, characterized by harsh conditions, and motivated by discrimination.

Defendants are liable for these acts under uniform principles of liability, including aiding and abetting, agency, conspiracy, and joint criminal enterprise.

In addition to being part of background federal common law tort principles, which are incorporated into the ATS, these liability theories have also long been recognized in international law. This provides further support for their recognition under federal common law in the ATS context, and renders plaintiffs' claims actionable even if the Court were to accept Shell's mistaken argument that ATS liability theories must be based solely on international law.

Finally, claims of torture against Shell are not barred by the TVPA. Congress did not intend to exclude corporations from liability under the TVPA; even if corporations were excluded, the TVPA does not bar ATS claims for torture because Congress intended the TVPA to duplicate, not replace, ATS causes of action.

ARGUMENT

I. The ATS Creates a Federal Common Law Claim to Vindicate Violations of Customary International Law.

In *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724 (2004), the Supreme Court held that the ATS grants jurisdiction over causes of action present in federal common law, which incorporates international law. Thus, "the common law" provides "a cause of action for the modest number of international law violations with a potential for personal liability." *Id.* Courts therefore look to international law to determine whether there has been a violation that would afford jurisdiction,

while federal common law governs questions of secondary and corporate responsibility.

A. Uniform federal rules apply to determine who is liable for ATS violations.

Sosa described the process of determining whether a claim is actionable under the ATS as whether a court should "recognize private claims under federal common law for violations of [an] international law norm." *Id.* at 732. More recently, the Ninth Circuit affirmed, "Courts applying the [ATS] draw on federal common law, and there are well-settled theories of vicarious liability under federal common law." *Sarei v. Rio Tinto PLC*, __ F.3d __, 2007 U.S. App. LEXIS 8430 at *18 (9th Cir. Apr. 12, 2007).

Liability rules adopted under the ATS must reflect the universal condemnation of the underlying violations. *Filartiga v. Peña-Irala*, 577 F. Supp. 860, 863 (S.D.N.Y. 1984); *Abebe-Jira v. Negewo*, 72 F.3d 844, 848 (11th Cir. 1996). Standard federal law liability theories applied in other contexts adequately effectuate the ATS's remedial purpose, so there is no general need to create a new body of liability law for ATS cases.

With respect to other issues that are not already well-settled in federal law, federal courts typically look to "general" common law. *See, e.g.*, *Burlington Indus., Inc., v. Ellerth*, 524 U.S. 742, 754 (1998) (relying "'on the general common

law of agency'" to establish uniform federal standards). And, due to the unique nature of ATS claims as federal common law claims incorporating international law, it may also be appropriate to consider international law principles. Certainly, the fact that a rule of liability is found in both international law and general common law supports its application in ATS cases, because international law is part of federal law. *Sosa*, 542 U.S. at 729; *see also Kadic v. Karadzic,* 70 F.3d 232, 246 (2d Cir. 1995) (noting that "federal common law incorporates international law"). Although international law may contain gaps that make it ill-suited as a primary source of liability rules,[1] if international law accords with established federal law, there can be little argument against its application in ATS cases. *See Sarei*, 2007 U.S. App. LEXIS 8430 at *19 (after concluding that federal vicarious liability doctrines apply, noting "the law of nations has long incorporated principles of vicarious liability").

B. Where international law is relevant, a variety of international sources may be consulted.

As this Court held in *Flores v. Southern Peru Copper Corp.*, 414 F.3d 233, (2d. Cir. 2003), the Statute of the International Court of Justice (ICJ) lists the major sources of international law: treaties, "international custom," the "general

[1] *See, e.g.*, *Doe v. Islamic Salvation Front*, 257 F. Supp. 2d 115, 121 n.12 (D.D.C. 2003) (suggesting that "[t]ort principles from federal common law may be more useful" than international law).

principles of law recognized by civilized nations," and "judicial decisions" and scholarly writings. *Id.* at 251; *see also Filartiga v. Pena- Irala,* 630 F.2d 876, 880, 881 & n. 8 (2d Cir. 1980).

Similarly, the Restatement (Third) of the Foreign Relations Law of the United States notes that "substantial weight" is given to the opinions of "international" and "national judicial tribunals," the "writings of scholars," and "pronouncements by states" concerning international law. *Id.* § 103(2). The Restatement has been repeatedly relied upon by the Supreme Court in determining the content of international law, including customary international law. *See, e.g., Sosa*, 542 U.S. at 737 (citing Restatement § 702 as evidence of human rights norms); *F. Hoffman-La Roche Ltd. v. Empagram S.A.*, 542 U.S. 155, 164 (2004).

Consistent with the Restatement and the ICJ Statute, this Court has properly relied upon diverse international sources to determine the content of customary international law, including international and regional treaties, opinions of the European Court of Human Rights and other regional human rights bodies, widely accepted declarations and U.N. resolutions declaring principles as international law, and states' universal domestic practice. *Filartiga*, 630 F.2d at 880, 882–84 & n.16; *Kadic*, 70 F.3d at 241. Nothing in *Sosa* suggests that some previously recognized sources of international law are inadmissible.

More specifically, the statutes and rulings of international courts and

tribunals are indicative of customary international law. *See, e.g., Hamdi v. Rumsfeld,* 542 U.S. 507, 518 (2004) (relying on a law review article "quoting decision of Nuremberg Military Tribunal"); *First Nat'l City Bank v. Banco Para El Comercio Exterior De Cuba*, 462 U.S. 611, 629 n.20 (1983) (citing ICJ decision for international law on corporate liability); *United States v. Yousef*, 327 F.3d 56, 101 (2d Cir. 2003) (citing ICJ opinion and analyzing ICJ statute to determine what are "true 'sources' of international law"); *see also Doe v. Liu Qi,* 349 F. Supp. 2d 1258, 1322 (N.D. Cal. 2004) (citing U.N. Human Rights Commission and regional human rights cases in analyzing the universality of a norm).

Contrary to defendants' suggestion, Brief of Appellees/Cross-Appellants ("Shell Br.") at 25, the Nuremberg precedents and decisions of the International Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR) are relevant to determine the content of customary international law. Numerous ATS cases have relied on these sources. *See Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 374 F. Supp. 2d 331, 338, 339 n.11 (S.D.N.Y. 2003) (ICTY and ICTR "occupy a special role in enunciating the current content of customary international law norms" and this holding agrees "with the overwhelming majority of courts that have had occasion to turn to ICTY and ICTR opinions in ATS cases, both before and after [*Sosa*] and *Flores*"); *accord In re "Agent Orange" Prod.*

Liab. Litig., 373 F. Supp. 2d 7, 134–37 (E.D.N.Y. 2005); *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1180 (C.D. Cal. 2005); *Doe v. Saravia,* 348 F. Supp. 2d 1112, 1155 (E.D. Cal. 2004).

II. The Abuses Alleged Here Fall Within Accepted Definitions of Crimes Against Humanity, Cruel, Inhuman, and Degrading Treatment, and Arbitrary Arrest and Detention.

In the main appeal, the *Kiobel* plaintiffs and *amici* demonstrated that the executions at issue violated the norm against extrajudicial killings. In this cross-appeal, *amici* show, as the district court correctly found, that the abuses alleged violated the norms prohibiting crimes against humanity, cruel, inhuman, and degrading treatment (CIDT), and arbitrary arrest and detention, whose definitions are set out by the *Kiobel* plaintiffs and other *amici*.

A. The alleged abuses constitute crimes against humanity.

The abuses alleged in the *Kiobel* complaint are recognized under customary international law as crimes against humanity. Reply Br. for Plaintiffs-Appellants-Cross-Appellees (*Kiobel* Reply Br.) at 48–51. The complaint's allegations reveal close cooperation and conspiracy between the Shell defendants, Shell Petroleum Development Company (SPDC) and the Nigerian Government in committing murder, extermination, displacement, detention, rape and other torture, and persecution of civilians as part of a widespread and systematic assault against

Ogoni civilians protesting oil development in Ogoni. J.A.0132–33 ¶¶ 44–47 (over 300,000 Ogonis participated in peaceful protests against Shell and SPDC's activities which destroyed their crops and farmlands); J.A.0135 ¶¶ 54–55 (Shell provided logistical and financial support for Nigerian military operations and planned to suppress protests); J.A.0140 ¶ 57 (memo detailing plans for military intervention to "sanitize" Ogoni); J.A.0136 ¶ 62 (nighttime raids conducted to "punish entire communities for their opposition; deliberate and repeated attacks on at least sixty civilian villages in Ogoni, during which "the military broke into homes, shooting or beating anyone in their path, including elderly, women, and children, raping, forcing villagers to pay . . . bribes and ransoms to secure their release, forcing villagers to flee and abandon their homes, and burning, destroying or looting property.").

The complaint alleges the murder of hundreds of Ogoni residents, as well as attacks on unarmed villagers. J.A.0133–34 ¶ 48 (deaths of over 800 Ogoni civilians, massive property destruction resulting in the displacement of more than 30,000 others); J.A.0134 ¶ 50 (shooting one plaintiff in the face); J.A.0137 ¶ 62 (60 villages attacked and 750 civilians killed). During the raids of Ogoni villages, there were beatings as well as rapes, threat of rapes, and arbitrary detainment. J.A.0137 ¶ 62. Ogoni were arrested and detained in extremely brutal detention facilities. J.A.0137 ¶ 63. Individuals targeted in these attacks, arrests and

detentions were forced to flee their homes. J.A.0118 ¶ 4; J.A.0126–27 ¶¶ 16–17; J.A.0137 ¶ 62. As noted in the *Kiobel* brief, all of these acts are well established in international law as crimes against humanity when committed, as here, as part of a widespread or systematic attack on a civilian population.

B. The alleged abuses amount to CIDT.

Regardless of any doubt over the outer limits of cruel, inhuman, and degrading treatment prohibited by customary international law, the complaint alleges numerous abuses that unquestionably amount to proscribed CIDT (as well as torture). These abuses reveal a disturbing trend of abuse ultimately resulting in the forcible relocation of the plaintiffs.

The abuse began long before any of the plaintiffs were detained in prisons and military camps; in addition to torture, they were forced to pay bribes and ransoms to protect their and their families' lives. J.A.0137 ¶ 62. Plaintiffs were also subjected to looting, burning, ransacking, and destruction of their homes. J.A.0119–27 ¶¶ 6–17. In detention, they were whipped, stripped, threatened, held incommunicado, deprived of adequate food, water, and medical care; detained in overcrowded facilities; and sprayed and injected with chemical agents, which caused serious health problems. *Id.* Following repeated beatings and death threats, Nigerian military officials forced the plaintiffs to sign pledges not to participate in protests in Ogoni. J.A.0122–24 ¶¶ 10–13. Ultimately, the

proliferation of abuses and threats forced the plaintiffs to abandon their homes, flee Nigeria, and relocate in other countries. J.A.0119–27 ¶¶ 6–17.

Much of this abuse—such as the brutal whipping of plaintiff Israel Pyakene Nwidor with a high-tension wire whip, J.A.0122 ¶ 9—is unquestionably torture. But practices such as forcing plaintiffs to lie exposed in the sun, *id.*, beating their family members, J.A.0123 ¶ 11, and ransacking and burning their homes, J.A.0126–27 ¶¶ 16–17, regardless of whether they constitute torture, clearly amount to cruel, inhuman, and degrading treatment prohibited by customary international law.

C. The alleged abuses violate norms against arbitrary arrests and detentions.

Detention is arbitrary "if it is not pursuant to law," or "if it is incompatible with the principles of justice or with the dignity of the human person." Restatement (Third) of the Foreign Relations Law of the United States § 702 cmt. h. The complaint alleges facts which clearly fall within the norm. The plaintiffs 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." [2] *Kiobel* Reply Br. at 57. Several

[2] To the extent that duration is a factor in evaluating an arbitrary detention, almost all plaintiffs allege they were held for a minimum of 3 days. J.A.0119 ¶ 6(b); J.A.0120–22 ¶ 7–9; J.A.0124 ¶¶ 12–13; J.A.0125–26 ¶ 15.

plaintiffs were only freed after bribes were paid to secure their release. J.A.0122 ¶ 9; J.A.0126 ¶ 15.

In addition to prolonged duration and basic arbitrariness of their detention, the plaintiffs in detention also suffered physical abuse, death threats, and/or assaults upon their family members. *See supra* Part II(B) (discussion of CIDT); J.A.0119–20 ¶ 6(c) (sexual assault, beatings); J.A.0126 ¶ 17 (incommunicado detention without charges, death in detention from torture and inadequate medical care); J.A.0122 ¶ 9 (torture).

Furthermore, beyond simply being "in excess of positive authority," *Sosa*, 542 U.S. at 737, these arrests and detentions were made on the basis of the plaintiffs' Ogoni ethnicity and for the purpose of suppressing their political activity and speech in opposition to Shell's operations. For example, plaintiff Dumle J. Kunenu was detained without charges and released only after he signed a pledge to never again protest against Shell. J.A.0124 ¶ 13.

III. Federal and International Law Recognize Theories of Secondary and Corporate Liability in ATS Cases.

A. Aiding and abetting is actionable under the ATS.

The *Kiobel* brief amply demonstrates that aiding and abetting liability is well established in federal common law and international law and is therefore

actionable under the ATS. *Kiobel* Reply Br. at 15–28. The *Wiwa* plaintiffs wish to add a few brief points.

First, the abettor need not "share the *mens rea* of the perpetrator, in the sense of positive intention to commit the crime." *Prosecutor v. Furundzija*, No. IT-95-17/1, Trial Judgment ¶ 245 (ICTY Trial Chamber Dec. 10, 1998); *accord Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1356 (N.D. Ga 2002). Second, contrary to Shell's suggestion that plaintiffs must prove that the abettor's acts were specifically prohibited by customary international law, *see* Shell Br. at 16–17, the acts of assistance may otherwise be perfectly lawful; they become criminal when combined with the principal's unlawful conduct. *Furundzija* ¶ 243. In the *Zyklon B Case*, the defendants sold insecticide, an otherwise lawful act, with no intent to kill prisoners at Auschwitz. But they were nevertheless convicted because they knew that their customers intended to use their product for mass murder. *See Furundzija* ¶ 238 (citing *Trial of Bruno Tesch and Two Others*, 1 Law Reports of Trials of War Criminals 93 (Brit. Mil. Ct. 1946)). Third, the assistance "'need not constitute an indispensable element, that is, a *conditio sine qua non* for the acts of the principal,'" *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 324 (S.D.N.Y. 2003) [hereinafter "*Talisman I*"] (quoting *Furundzija* ¶ 209), nor need it have caused the act of the principal.

Furundzija ¶¶ 233–34; *Prosecutor v. Kunarac*, No. IT-96-23&23/1, Trial Judgment ¶ 391 (ICTY Trial Chamber Feb. 22, 2001).

Finally, the *Kiobel* brief correctly points out that *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164 (1994), does not preclude accessorial liability in ATS cases. *Kiobel* Reply Br. at 23. *Boim v. Quranic Literacy Institute,* 291 F.3d 1000 (7th Cir. 2002), demonstrates why *Central Bank* is inapplicable to ATS claims. In *Boim*, Congress did not specify aiding and abetting liability in the statute creating the cause of action. The government argued and the court agreed that the statute was intended to incorporate background common law tort principles, including aiding and abetting liability. *Id.* at 1010, 1019–20. Given that the ATS provides a federal common law tort cause of action, the same is true here.

B. General agency principles applicable in ATS cases allow principals, including corporations, to be held liable for acts of their agents.

As the *Kiobel* plaintiffs argue, general federal principles of corporate and agency liability apply in ATS cases. Under these principles Shell and/or SPDC can be held liable for the acts of the Nigerian military serving as their agents, wholly apart from aiding and abetting or conspiracy liability. *See Sarei*, 2007 LEXIS 8430 at *18–19. Additionally, all of SPDC's liability is attributable to

Shell, since SPDC was Shell's alter ego or agent; the doctrine of corporate veil-piercing is applicable under both federal and international law. *See Kiobel* Reply Br. at 46–47. The *Kiobel* brief likewise demonstrates that Shell can be held liable for SPDC's actions on an agency theory, independently of alter ego liability. *See Kiobel* Reply Br. at 44; *see also Phoenix Can. Oil Co. v. Texaco, Inc.*, 842 F.2d 1466, 1477 (3d Cir. 1988).

A survey of jurisdictions around the world demonstrates that the basic principles of agency liability form part of international law as "general principles of law recognized by civilized nations." *Flores*, 414 F.3d at 251. Courts in common law (and pluralistic) jurisdictions regularly hold that an employer may be liable for the acts of its agent, including intentional torts. *See, e.g., Lister v.a Hesley Hall, Ltd.*, [2002] 1 A.C. 215 (H.L.) (school liable for sexual abuse by warden); *B.C. Ferry Corp. v. Invicta Sec. Serv. Corp.*, No. CA023277, 84 A.C.W.S. (3d) 195 (B.C. Ct. App. Nov. 11, 1998) (employer liable for arson committed by its security personnel); *Chairman, Ry. Bd. v. Das*, [2000] 2 L.R.I. 273 (India) (railway liable for rape by employees).[3] In some jurisdictions,

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[3] *See also Johnson & Johnson (Ir.) Ltd. v. CP Sec. Ltd.*, [1986] I.R. 362 (H.Ct.) (Ir.); *NK v. Minister of Safety & Sec.*, 2005 (9) B.C.L.R. 835 (CC) (S. Afr.); *Carrington v. Attorney Gen.*, [1972] N.Z.L.R. 1106 (Auk. S. Ct.); *On v. Attorney Gen.*, [1987] H.K.L.R. 331 (C.A.) (H.K); *Bohjaraj A/L Kasinathan v. Nagarajan A/L Verappan & Annor,* [2001] 6 M.L.J. 497 (H.Ct. Temerloh) (Malay.).

especially civil law countries, agency principles are enshrined in statute.[4] *See, e.g.*, C. Civ. (Civil Code) art. 1384 (1994) (Fr.) (establishing liability for damages "caused by the act of persons for whom [one] is responsible"); § 831BGB (Civil Code) (1975) (F.R.G.) (person who employs another to do work is liable for damage which other unlawfully causes third party in performance of his work); Minpō (Civil Code) art. 715 (1997) (Japan) (same).[5]

The concept of ratification, *see Kiobel* Reply Br. at 46, is also found in international law. For example, the ICJ in *Nicaragua v. United States* applied recognized principles of ratification in ruling that the U.S. was responsible for certain activities undertaken by Central American operatives on its behalf, considering evidence that the U.S. government had made false denials of

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[4] *See e.g.* Hamilton, Harrison & Matthews Advocates, *Kenya*, *in* 2 *Int'l Agency & Distribution Law* [hereinafter *IADL*] § 9[2], KEN 21 (Dennis Campbell ed., 2001); Samuel Hong, *Malaysia*, *in* 2 *IADL*, *supra*, Part I (citing Contracts Act, 1950 (Act 136) § 179); Philip Sifrid A. Fortun, Mylene Marcia-Creencia, et al., *Philippines*, *in* 2 *IADL*, *supra*, Part I.

[5] *See also* C.C. (Civil Code) § 2049 (1991) (Italy) (masters and employers liable for damage caused by unlawful act of their servants and employees in exercise of functions to which they are assigned); Codigo Civil (Civil Code) art. 800 (1981) (Port.) (in case of negligence or default of agent, principal is jointly and severally responsible for damages to third parties); Juan Francisco Torres Landa & R. Barrera, *Mexico*, *in* 2 *IADL*, *supra*, § 2(6)(2), MEX 16 (where act is in agent's name but within his scope of authority, principal is ultimately liable); Leopoldo Olavarria Campagna, *Venezuela*, *in* 2 *IADL*, *supra*, § 9[2], VEN 39; Konstantin Obolensky & Akhmed Glashev, *Russia*, *in* 2 *IADL*, *supra*, Part I § 1[1] RUSS-4 (citing Civil Code Chapter 52); William E. Butler, *Russian Law* 389–91 (2d. ed. 2003).

involvement in the activities and had arranged for a Nicaraguan organization to issue false statements claiming responsibility for them. *Military & Paramilitary Activities In & Against Nicaragua (Nicaragua v. United States)*, 1986 I.C.J. 14 ¶¶ 77–78 (Judgment of June 27, 1986).

C. Federal and international law recognize conspiracy liability.

As the *Kiobel* brief notes, civil conspiracy is both part of the general background of federal rules of liability and found in international law, and therefore also applies to ATS causes of action. *See Kiobel* Reply Br. at 28–30. Unlike criminal conspiracy, but like agency or aiding and abetting liability, civil conspiracy is not an independent wrong but rather "a means for establishing vicarious liability for the underlying tort." *Beck v. Prupis*, 529 U.S. 494, 503 (2000). Thus, like agency and aiding and abetting, it makes sense to look to general principles of liability to determine who is civilly liable for conspiring to commit an ATS violation.

As the *Kiobel* brief notes, whether they look to federal or international law, all courts considering the question have ruled that conspiracy liability is available for ATS claims. *Kiobel* Reply Br. at 28–29.[6] Additionally, the *Kiobel* brief

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[6] In addition, see also *Talisman I*, 244 F. Supp. 2d at 311 ("liability for conspiracy or aiding and abetting is well-developed in international law"); *Burnett v. Al Baraka Inv. & Dev. Corp.*, 274 F. Supp. 2d 86, 100 (D.D.C. 2003) (proof that defendants were "accomplices, aiders and abetters, or co-conspirators would support a finding of liability under the [ATS]").

accurately sets forth the elements of civil conspiracy, drawn from general common law principles. *Id.* at 29. Unlike aiding and abetting liability, conspiracy does *not* require substantial assistance to the primary tortfeasor, but it *does* require that the co-conspirator intend to participate in the commission of some wrongful act.

Although the defendant must agree to participate in the conspiracy, liability may attach for all acts in furtherance of the conspiracy that are reasonably foreseeable, even if the defendant does not intend or know about the specific act. *See Halberstam v. Welch*, 705 F.2d 472, 487 (D.C. Cir. 1983) ("[A] conspirator can be liable even if he neither planned nor knew about the particular overt act that caused injury, so long as the purpose of the act was to advance the overall object of the conspiracy."); *see also Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1159 (11th Cir. 2005).

D. International law recognizes criminal liability for participation in a joint criminal enterprise, similar to civil conspiracy.

Although criminal conspiracy, as an inchoate offense, is less well-recognized under international law, international criminal law does recognize a theory of liability for participation in a joint criminal enterprise (JCE). JCE and civil conspiracy are closely related; each provides a form of liability for the underlying wrongdoing rather than presenting an offense unto itself. *See, e.g., Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2785 n. 40 (2006). The recognition of JCE

liability in international criminal law supports civil conspiracy and JCE liability under the ATS.

1. Joint criminal enterprise liability is established in customary international law.

The seminal case expounding JCE liability is *Prosecutor v. Tadic*, No. IT-94-1-A, Appeal Judgment (ICTY Appeals Chamber July 15, 1999). In *Tadic*, the ICTY Appeals Chamber concluded that the concept was well-established in customary international law, examining sources such as the post-World War II international criminal trials; treaties and conventions, including article 25(3)(d) of the Rome Statute of the International Criminal Court; and the laws of individual states. *Id.* ¶¶ 193–226.

Tadic's recognition of JCE liability has been followed in subsequent cases at the ICTR and indictments at the Special Court for Sierra Leone ("SCSL"). *See Rwamakuba v. Prosecutor*, No. ICTR-98-44-AR72.4, Decision ¶¶ 14–25 (ICTR Appeals Chamber Oct. 22, 2004); *Prosecutor v. Kayishema*, No. ICTR-95-1-T, Trial Judgment ¶¶ 203–04 (ICTR Trial Chamber May 21, 1999); *Prosecutor v. Taylor*, No. SCSL-2003-01-I, Amended Indictment ¶ 33 (SCSL Mar. 16, 2006). As a part of customary international law, this liability theory has been recognized to apply to ATS claims. *See Cabello v. Larios*, 205 F. Supp. 2d 1325, 1333 (S.D.

Fla. 2002) (citing *Tadic*'s discussion of "common design" approvingly as a basis for ATS liability); *aff'd* 402 F.3d 1148 (11th Cir. 2005).

2. The elements of joint criminal enterprise are similar to civil conspiracy.

Like civil conspiracy, JCE developed as a mode of liability for holding accountable participants in mass wrongdoing. As *Tadic* noted, many international offenses are "carried out by groups of individuals acting in pursuance of a common criminal design," in which "the participation and contribution of" those who do not directly commit the abuse "is often vital in facilitating the commission of the offence." *Tadic* ¶ 191. In such a case, "the moral gravity of such participation is often no less . . . from that of those actually carrying out the acts in question." *Id.*

The basic elements of JCE are that (1) a group of participants (2) share a common criminal design in which (3) the defendant participates in execution of the common plan. *Tadic* ¶227. The group need not be formally organized, and the existence of the plan may be inferred from the conduct of the group. *Id.* Although the defendant must take some action to further the plan, this participation "need not involve commission of a specific crime," *id.*; it need not be a substantial contribution to, or a necessary cause of, the offense. *Prosecutor v.*

Kvocka, No. IT-98-30/1-A, Appeal Judgment ¶¶ 97–99, 112 (ICTY Appeals Chamber Feb. 28, 2005).

Like civil conspiracy, JCE liability may extend beyond those acts specifically contemplated by the participant. The ICTY has noted several examples. Where the defendant intentionally participates in a "common concerted system of ill-treatment," such as in an abusive detention system, the defendant may be held liable for the system's abuses, regardless of specific knowledge. *Tadic* ¶¶ 202–03, 220, 228. Additionally, a defendant may be held liable for participation in "a common design to pursue one course of conduct where one of the perpetrators commits an act which, while outside the common design, was nevertheless a natural and foreseeable consequence of the effecting of that common purpose," *id.* ¶204, so long as the defendant willingly took the risk of such additional abuses, *id.* ¶ 228. *See also, e.g., Prosecutor v. Vasiljevic*, No. IT-98-32, Appeal Judgment ¶99 (ICTY Appeals Chamber Feb. 25, 2004) ("While murder may not have been explicitly acknowledged to be part of the common purpose, it was nevertheless foreseeable that the forced removal of civilians at gunpoint might well result in the deaths of . . . those civilians.").

Thus, if Shell and the Nigerian security forces engaged in a common design intended to suppress the plaintiffs' peaceful opposition to Shell's operations in Ogoni, and Shell participated in this design by providing material or logistical

support to the military, then Shell could be held liable for all injuries to plaintiffs which occurred as a natural and foreseeable consequence of this common plan.

IV. Corporations Are Not Exempt From Claims of Torture, Extrajudicial Execution, and CIDT.

Shell argues that the Torture Victim Protection Act (TVPA), 28 U.S.C. § 1350 note, both preempts all ATS claims for torture, extrajudicial execution, and cruel, inhuman, and degrading treatment (CIDT), and exempts corporations from liability. Shell Br. at 32–36. Each of these propositions is incorrect. Moreover, even under Shell's interpretation, it is impossible for them to both be correct: if the TVPA does not contemplate suits against corporations, it cannot preempt ATS suits that do so.[7]

A. Corporations may be held liable under the TVPA.

This Court need not address the issue of corporate liability under the TVPA because, although the *Wiwa* plaintiffs have pled such claims, the *Kiobel* plaintiffs have not. *See Kiobel* Reply Br. at 38 n.24. Nonetheless, none of the three sources

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[7] Defendants also suggest that a corporation cannot be sued under the ATS. Shell Br. at 30. *Sosa*, however, implicitly acknowledged that corporations can be sued, 542 U.S. at 732 n.20, as the *Agent Orange* court subsequently recognized: "A corporation is not immune from civil legal action based on international law. . . . [A]n ATS claim is a federal common law claim and it is a bedrock tenet of American law that corporations can be held liable for their torts." 373 F. Supp. 2d at 58–59.

cited by Shell—the statute's text, a fragment of legislative history, and one district court case—support its claim that corporations are immune under the TVPA.

1. The term "individual" may include corporations.

The TVPA applies against "individuals" who commit torture or extrajudicial execution, and Shell suggests that this term refers only to natural persons. Such a conclusion is inconsistent with *Clinton v. New York*, 524 U.S. 417 (1998), which held that the term "individual" in the Line Item Veto Act was intended "to be construed as synonymous with the word 'person'" and to include corporations. *Id.* at 428. Thus,"the ordinary meaning of 'individuals'. . . . does not necessarily exclude corporations," *United States v. Middleton*, 231 F.3d 1207, 1210 (9th Cir. 2000); courts have come to the same conclusion for over a century. *See, e.g.*, *State ex rel. Am. Union Tel. Co. v. Bell Tel. Co.*, 36 Ohio St. 296, 310 (1880); *see also* Black's Law Dictionary 772 (6th ed. 1990) (the word "individual . . . may, in proper cases, include artificial persons").

Congress is capable of using the unambiguous terms "human being" or "natural person" in order to expressly exclude corporations. *See, e.g.*, 18 U.S.C. § 1111 ("Murder is the unlawful killing of a human being with malice aforethought."); *see also* 15 U.S.C. § 1693a(5); *id.* § 6602(5); 28 U.S.C. § 1369(3). It did not do so in the TVPA.

2. Congress intended to exclude states, not corporations.

The very legislative history Shell quotes demonstrates that Congress used the term “individual” rather than “person” in order “to make crystal clear that foreign states or their entities cannot be sued under this bill.” S. Rep. No. 102-249, 1991 WL 258662, at *6 [hereinafter “S. Rep.”]; *see also* H.R. Rep. No. 102-367, 1991 WL 255964, at *4 [hereinafter “H.R. Rep.”] (same). This was necessary because the term “person” has been interpreted to include governmental entities. *See, e.g., Pfizer, Inc. v. Government of India*, 434 U.S. 308, 320 (1978) (holding that “any person” in antitrust laws applied to foreign states), *superseded by statute on other grounds as stated in Turicentro, S.A. v. Am. Airlines, Inc.*, 303 F.3d 293, 304 n.12 (3d Cir. 2002). Thus, the use of the word “individual” was not intended to exclude corporations.

This was the conclusion reached by *Sinaltrainal v. The Coca-Cola Co.*, 256 F. Supp. 2d 1345 (S.D. Fla. 2003), which held that corporations were liable under the TVPA. Pointing to the lack of evidence of intent to exclude corporations, the fact that the Senate Report explains that the TVPA allows suits “‘against *persons* who ordered, abetted, or assisted in torture,’” *id.* at 1359 (quoting S. Rep. at *9–10) (emphasis added), and the general equivalence of corporate and personal liability, the court held “that had Congress intended to exclude corporations from liability under the TVPA, it could and would have expressly stated so.” *Id.* at

1359; *accord Lacarno v. Drummond*, 256 F. Supp. 2d 1250, 1266 (N.D. Ala. 2003).

3. Excluding corporate liability produces absurd results.

As in *Clinton*, 524 U.S. at 429, "[t]here is no plausible reason why Congress" would have wanted to exempt corporations from liability for some of the worst violations of international law. Such an exemption would be especially absurd because the TVPA is the *sole* statutory means by which U.S. citizens may file suit for torture and, if the term "individual" includes only natural persons, suits against *any* organizational defendant would be barred. This is inconsistent with the legislative history of the TVPA, which advances at least two purposes for the statute: to deny "safe haven" in the U.S. to "torturers *and death squads*," and to "enhance" the remedies under the ATS by extending them "to U.S. citizens who may have been tortured abroad." S. Rep. at *3, *5 (emphasis added). "Death squads," of course, are organizational defendants, and it is inconceivable that Congress intended to "enhance" the remedies already available under the ATS by precluding U.S. citizens from suing precisely the kinds of defendants mentioned in the Senate Report.

4. The cases finding no corporate liability rest on faulty analysis.

Several district courts have come to different conclusions than *Sinaltrainal* and *Lacarno*. *See, e.g., Beanal v. Freeport-McMoRan, Inc.*, 969 F. Supp. 362

(E.D. La. 1997); *Arndt v. UBS AG*, 342 F. Supp. 2d 132 (E.D.N.Y. 2004). These opinions are not persuasive. *Beanal*, for example, was cited in *support* of the *Sinaltrainal* court's conclusion, because *Beanal* accurately observed that "congress does not appear to have had the intent to exclude private corporations from liability under the TVPA." 969 F. Supp. at 382. Nonetheless, without the benefit of the Supreme Court's decision in *Clinton v. New York*, *Beanal* mistakenly assumed that "the plain meaning of the term 'individual' does not ordinarily include a corporation." *Id.* And *Arndt*, the sole case cited by Shell, includes no analysis, merely citing an unpublished decision that relies on *Beanal*. 342 F. Supp. 2d at 141.[8]

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[8] *Agent Orange*, the only case following *Beanal* with substantial analysis, also rests on an error of interpretation. The court relied on the fact that the TVPA uses the term "individual" for both perpetrators and victims, supposing that such use must be consistent and that corporations were incapable of being tortured. *Id.* at 56. Congress, however, often uses the term "person" to describe both a perpetrator and a victim, where corporations could *not* be victims but are included in the set of potential perpetrators. *See, e.g.*, 18 U.S.C. § 2340(1) (criminal statute defining torture as "committed by a *person* . . . upon another *person*" (emphasis added)); *compare also, e.g.*, 18 U.S.C. § 229A (penalizing a "person" who kills "another person" by chemical weapons) *with id.* § 229F (defining "person" to include a "corporation"); 8 U.S.C. § 1324 (penalizing a "person" who commits various immigration crimes resulting "in the death of any person") *with id.* § 1101(b)(3) (defining "person" to include "an organization").

B. The TVPA does not preclude torture, extrajudicial execution, or CIDT claims against corporations.

As the *Kiobel* brief makes clear, *Kadic* forecloses any argument that the TVPA "occupies the field" with respect to claims for torture and extrajudicial execution. *See Kiobel* Reply Br. at 37–42. In *Kadic*, the plaintiffs had brought ATS claims for torture and extrajudicial execution as well as TVPA claims, and this Court specifically found that these "alleged atrocities are actionable under the [ATS]." 70 F.3d at 244. This should be the end of the analysis, as nothing in *Sosa* overruled this holding of *Kadic*.

In addition to the arguments advanced by the *Kiobel* plaintiffs, *amici* note two important points. First, the TVPA was enacted at a time when judicial acceptance of ATS claims was uncertain, and Congress intended its provisions to duplicate claims already recognized under the ATS. Second, even if the TVPA provides the sole vehicle for torture and extrajudicial execution claims against "individuals," it could not do so with respect to claims not covered by the TVPA, including CIDT claims and—if Shell's analysis is correct—claims against corporations.

1. Congress intended the TVPA to duplicate ATS remedies.

As the *Kiobel* plaintiffs argue, *Enahoro v. Abubakar*, 408 F.3d 877 (7th Cir. 2005), is incorrect in supposing that the TVPA would be "meaningless" if ATS claims for torture survived, because the TVPA has the important purpose of extending remedies to U.S. citizens. But *Enahoro*'s analysis also fails to appreciate that the TVPA was enacted to guard against what Congress considered an erroneous judicial interpretation of the ATS.

In 1991, when the TVPA was proposed, the fate of ATS torture suits was uncertain. This Court, in *Filartiga*, accepted such lawsuits, while the D.C. Circuit famously split, with Judge Bork disagreeing strenuously with *Filartiga*. *See Tel-Oren v. Libyan Arab Republic*, 725 F.2d 774, 819 (D.C. Cir. 1984) (Bork, J., concurring in the judgment).

This uncertainty coincided with the adoption of the Convention Against Torture, ratified by the Senate on October 27, 1990. Congress felt that its "obligation [under the Convention] [was] to provide means of civil redress to victims of torture." H.R. Rep. at *3; *see also* S. Rep. at *3 (same). With the viability of ATS torture claims in doubt, Congress acted to ensure that judicial interpretation of the ATS did not undermine the key causes of action that had been allowed in *Filartiga* and several district court cases: torture and extrajudicial execution. The legislative history explicitly recognizes the threat posed by Judge

Bork's opinion:

> [O]ne Federal judge . . . has questioned whether section 1350 can be used by victims of torture committed in foreign nations absent an explicit grant of a cause of action by Congress. . . . [I]n *Tel-Oren* . . . [Judge] Bork questioned the existence of a private right of action under the [ATS] . . . .

S. Rep. at *4–5; H.R. Rep. at *4–5. Without the TVPA, Congress was in danger of dereliction of its duties under the Torture Convention, because judges might restrict what was, at the time, the only civil remedy expressly available for torture.

Congress thus fully appreciated that TVPA claims duplicated causes of action *already* recognized under the ATS. Rather than supplanting the ATS, Congress intended to provide a backstop against erroneous judicial interpretations that might undermine the ATS, ensuring that civil actions for torture would survive even if other courts adopted Judge Bork's reasoning. Ultimately, of course, *Sosa* rejected Judge Bork's analysis, with the result that the TVPA continues to be partially duplicative of causes of action available under the ATS. But supposing that Congress *intended* to preempt ATS claims ignores the context in which the TVPA was adopted.

2. *ATS claims not covered by the TVPA could not be preempted under any interpretation.*

Incredibly, Shell argues that the TVPA precludes both suits for CIDT and suits against corporations for torture, even while arguing that such suits are not

permitted under the TVPA. This argument is unsupportable even under *Enahoro*, Shell's only supporting case.[9]

Shell relies on *Enahoro*'s characterization of *Kadic*, which suggested that *Kadic* means only that "[o]ther claims, in addition to torture and killing as provided for in the [TVPA], can still be recognized under the ATS as well." 408 F.3d at 885 n.2. Even if *Enahoro*'s interpretation of *Kadic*, is correct, however, this point refutes the notion that the TVPA could preempt either CIDT claims or claims against corporations. CIDT claims could not possibly be preempted by the TVPA if that statute still allows *other* claims to be recognized under the ATS, as *Enahoro* states. No court has adopted any theory of TVPA preemption that would apply to claims beyond torture and extrajudicial killing.

Likewise, if Shell is correct that the TVPA does not apply to corporations, then it cannot preempt suits against corporations. In that circumstance, a torture claim against a corporation would not be "provided for in the" TVPA, *Enahoro*, 408 F.3d at 885 n.2, because the TVPA simply would not cover such claims against corporations. Like CIDT claims, torture claims against corporations would fall to the residual ATS. While courts may differ as to whether the language of the TVPA was meant to cover corporations, no court has held, and no evidence

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[9] Other than *Enahoro*, only *Corrie v. Caterpillar*, 403 F. Supp. 2d. 1019, 1025 (W.D. Wash. 2005), has accepted TVPA preemption, and it adopts the reasoning of *Enahoro* without extending it in the manner Shell proposes.

supports, that the TVPA was meant to *immunize* organizational defendants from liability which they would otherwise be subjected to under the ATS.[10]

CONCLUSION

The *Wiwa* plaintiffs respectfully request that the Court affirm the district court's decisions appealed by Shell in their cross-appeal.

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Respectfully submitted,

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[10] If corporations are subject to the TVPA, and the "TVPA preemption" theory is accepted, then the courts should either simply construe ATS claims as TVPA claims, or allow amendment to plead TVPA claims. Indeed, as the TVPA is codified as a note to section 1350, any ATS claim could be fairly read to encompass applicable TVPA claims as well.

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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CERTIFICATE OF SERVICE

Under penalty of perjury, I hereby certify that today, July 17, 2007, I served two copies of the attached Amicus Curiae Brief of the Wiwa Plaintiffs in Support of Cross-Appellees and in Support of Affirmance and the Wiwa Plaintiffs Motion to File the attached Brief via first-class U.S. mail upon the following attorneys:

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