06-4800

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 PYAKENE NWIDOR, KENDRICKS DORLE NWIKPO, ANTHONY B. KOTE-WITAH, VICTOR B. WIFA, DUMLE J. KUNENU, BENSON MAGNUS IKARI, LEGBARA TONY IDIGIMA, PIUS NW1NEE, KPOBARI TUSIMA, individually and on behalf of his late father CLEMENT TUSIMA,
Plaintfs-Appellants-Cross-Appellees,

---V---

ROYAL DUTCH PETROLEUM COMPANY; 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

OPENING BRIEF FOR PLAINTIFFS-APPELLANTS

TABLE OF CONTENTS

Page(s)

I. Statement of Jurisdiction 1

II. Statement of Issue Presented For Review 2

III. Statement of the Case 3

IV. Statement of Facts 6

V. Summary of Argument 14

VI. Standard of Review 18

VII. Argument 19

A. The Prohibition on Extrajudicial Killing Meets the Sosa Standard for an Actionable ATS Claim 19

1. The Sosa Court and the TVPA Explicitly Recognize Extrajudicial Killing as a Clearly Actionable Norm Under ATS 21

2. The TVPA Codifies the Internationally Recognized Definition of "Extrajudicial Killings", Which Includes Killings in the Absence of "Judicial Guarantees Before a "Regularly Constituted Court 23

3. U.S. Jurisprudence Recognizes the Prohibition on Extrajudicial Killing as Customary International Law Actionable Under the ATS 25

4. International Legal Sources Demonstrate the Clearly Established Prohibition on Extrajudicial Killing And Confirm the Definition as Provided in the TVPA 32

B. Killings Violate International Law When They Result From Sentences Imposed by Tribunals Like the CDST That Are Not Regularly Constituted and That Deny Fundamental Judicial Guarantees 36

C. International Jurisprudence Recognizes That Special Tribunals Fail to Meet the "Core" Fair Trial Characteristics of Regularly Constituted Courts 38

1. European Court of Human Rights 39

2. Inter-American Court of Human Rights 42

3. African Commission 44

4. United Nations Human Rights Committee and the United Nations High Commissioner for Human Rights Special Rapporteur for Extrajudicial, Summary or Arbitrary Executions 46

a. Human Rights Committee Has Found Killings To Be Extrajudicial When They Fail to Satisfy Article 14 of the ICCPR 46

b. The Reports of the U.N. Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions Requires Core Fair Trial Protections in Order For a Tribunal to Impose a Death Sentence Lawfully 48

D. Dr. Kiobel Was a Victim of an Extrajudicial Killing By a Court That Was Not Regularly Constituted and Did Not Provide Core Judicial Guarantees Required By International Law 50

VIII. CONCLUSION 55

TABLE OF AUTHORITIES

CASES **PAGES**

Application of Yamashita,
327 U.S. 1 (1946) 28

Cabello v. Fernandez-Larios,
402 F.3d 1148 (11th Cir. 2005) 25

Crawford v. Washington,
541 U.S. 36 (2004) 30

DeMuria v. Hawkes,
328 F.3d 704 (2d Cir. 2003) 18

Diaz v. United States,
223 U.S. 442 (1912) 31

Doe v. Rafael Savaria,
348 F. Supp. 2d 1112 (E.D. Ca. 2004) 22, 26

Doe v. Unocal Corp.,
395 F.3d 932 (9th Cir. 2002) 28

In re Estate of Ferdinand Marcos, Human Rights Litigation,
25 F.3d 1467 (9th Cir. 1994) 25

Filartiga v. Pena-Irala,
630 F.2d 876 (2d Cir. 1980) 20, 23

Flores v. Southern Peru Copper Corp.,
253 F. Supp. 2d 510 (S.D.N.Y. 2002) 20

Forti v. Suarez-Mason,
672 F. Supp. 1531 (N.D. Cal. 1987) 26

Hamdan v. Rumsfeld,
126 S. Ct. 2749 (2006) 16, 26, 30, 31

Kadic v. Karadzic,
70 F.3d 232 (2d Cir. 1995) 20, 22, 25

Mehinovic v. Vuckovic,
198 F. Supp. 2d 1322 (N.D. Ga. 2002) 26

Siderman de Blake v. Republic of Argentina,
965 F.2d 699 (9th Cir. 1992) 20

Sosa v. Alvarez-Machain,
542 U.S. 692 (2004) 14, 19, 21, 22, 26

State v. Webb,
1794 WL 98 (Super L. & Eq. 1794) 31

Taveras v. Taveraz,
477 F.3d 767 (6th Cir. 2007) 26

The Paquete Habana,
175 U.S. 677 (1900) 19

United States v. Smith,
18 U.S. 153 (1820) 19

Xuncax v. Gramajo,
886 F. Supp. 162 (D. Mass. 1995) 20, 26

STATUTES & RULES

28 U.S.C. §1292(b) 1, 5

28 U.S.C. §1350 . . . . 1, 3, 15, 22, 37

U.S. Const. Art. I, § 8 25

F.R.C.P. 8(a) 53

<ins>INTERNATIONAL SOURCES</ins>

Aliboeva v. Tajikistan,
U.N. GAOR Human Rights Committee Communication No. 985/2001 (Oct. 18, 2005) 48

In re Alstoetter, *et. al.,*
14 Ann. Dig. 278 (1948) 29

Bazarov v. Uzbekistan,
U.N. GAOR Human Rights Committee Communication No. 959/2000 (July 14, 2006) 48

Case of Hilaire, Constantine and Benjamin et al. v. Trinidad y Tobago,
2002 Inter-Am. Ct. H.R. (Ser. C) No. 94, ¶148 (June 21, 2002) 42

Castillo Petruzzi et al. v. Peru,
Judgment of May 30, 1999, Inter-Am.C.H.R., *(Series C)*, No. 52 44

Corfu Channel Case, (U.K. v. Alb.),
1949 I.C.J. Rep. 4 27

Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project v. Nigeria, African Commission on Human and Peoples' Rights,
Comm. No. 218/98 (1998) 45, 46

Constitutional Rights Project (on behalf of Lekwot) v. Nigeria, African Commission on Human and Peoples' Rights,
Comm. No. 87/93 (1995) 46

Constitutional Rights Project (on behalf of Akamu) v. Nigeria, African Commission on Human and Peoples' Rights,
Comm. No. 60/91 (1995) 45

Findlay v. United Kingdom,
App. No. 22107/93, 24 Eur. H.R. Rep. 221 (1997) 40, 41

Forum of Conscience v. Sierra Leone, African Commission on Human and Peoples' Rights,
Comm. No. 223/98 (2000) 52

Gerger v. Turkey,
App. No. 24919/94, 1999 Eur. Ct. H.R. 46 41

Incal v. Turkey,
App. No. 41/1997/825/1031, 1998-IV Eur. Ct. H.R. 1547 41

International Pen and Others (on behalf of Ken Saro-Wiwa, Jr.) v. Nigeria, African Commission on Human and Peoples' Rights,
Comm. Nos. 137/94, 139/94, 154/96 and 161/97 (1998) 46, 53

Juan Humberto Sanchez v. Honduras,
2003 Inter-Am. Ct. H.R. (Ser. C) No. 99 (2003) 43

Sirageva v. Uzbekistan,
U.N. GAOR Human Rights Committee, Communication No. 907/2000 (Nov. 1, 2005), U.N. Doc. CCPR/C/85/D/907/2000 (2005) 47

Common Article 3 of the Geneva Convention 23, 27, 28

Additional Protocol I of the Genva Conventions of 1949,
Article 75 . . . . 16, 23, 31

Article 3 of the Universal Declaration of Human Rights 32

International Covenant on Civil and Political Rights (ICCPR),
Article 4 . . . . 28, 33

International Covenant on Civil and Political Rights (ICCPR),
Article 6 . . . . 32, 33

International Covenant on Civil and Political Rights (ICCPR),
Article 14 . . . . 16, 31, 32, 33, 47, 52

International Covenant on Civil and Political Rights (ICCPR),
Article 15 . . . . 32, 33

Restatement (Third) of Foreign Relations (1987) § 702 23

The Right to Information on Consular Assistance In the Framework of the Guarantees of the Due Process of Law, Advisory Opinion, 1999
Inter-Am. Ct. H.R. (ser. A) No. 16, ¶¶ 134-36 (Oct. 1, 1999) 42

Loayza Tamayo, Merits, Judgment, Inter-Am. Ct. H.R. (sec. C) no. 33,
(1997) 44

African Charter on Human and Peoples' Rights, Article 4 34

African Charter on Human and Peoples' Rights (1986), Article 7 . . . . 34, 45

American Convention on Human Rights, Article 4 34

American Convention on Human Rights, Article 8 . . . . 43, 52

European Convention on Human Rights, Article 2 34

European Convention on Human Rights, Article 6 . . . . . . 34, 39, 40, 42, 52

ECOSOC Resolution No. 1989/65, UN Doc. E/1989/INF/
(May 24, 1989) 35

Int'l Comm. of Red Cross, 1 Customary International Humanitarian Law
355) (2005) 29

Civil Disturbances (Special Tribunal) Decree No. 2 of 1987 51

Yugoslavia Statute, Article 20(4)(b) 52

Rwanda Statute, Article 20(4)(b) 52

Article 67(1)(d) of the ICC Statute 52

African Commission Resolution, ¶2(E)(1) 52

REPORTS & MISCELLANEOUS

Annual Report of the Inter-American Commission, 1985-1986, OEA/Ser.L/V/II.68, doc. 8 rev. 1, 1986 52

M. Birnbaum, Nigeria, Fundamental Rights Denied: Report of the Trial of Ken Saro-Wiwa and Others, June 1995, Article 19 in association with the Bar Human Rights Committee of England and Wales and the Law Society of England and Wales 38

Commission on Human Rights, Summary or Arbitrary Executions, U.N. Doc. No. E/CN-4/RES/1982/29 36

General Assembly, Extrajudicial, Summary or Arbitrary Executions, U.N. Doc. No. A/RES/53/147 36

Civil Liberties Organisation, Comm. No. 218/98 52

Georgia, UN Doc. CCPR/C/79/Add.74, 9 April 1997 52

S. Rep. No. 102-249 (1991) 15, 22, 24

H.R. Rep. No. 102-367 (1991) 22, 24, 25

Universal Human Rights, Vol. 2, No. 2 (Apr.-Jun., 1980) 30

Report by the Special Rapporteur, Extrajudicial, Summary or Arbitrary Executions ¶ 45, U.N. Doc. E/CN.4/1993/46 (Dec. 23, 1992) 33, 25

Report by the Special Rapporteur, Extrajudicial, Summary or Arbitrary Executions, U.N. Doc. No. A/51/457 (Oct. 7, 1996) 32, 51

Report by the Special Rapporteur, Extrajudicial, Summary or Arbitrary Executions, U.N. Doc. No. A/51/538 (1996) 50

Extrajudicial, Summary or Arbitrary Executions: Report of the Special Rapporteur, U.N. Doc. E/CN.4/2002/74 (2002) 49

Extrajudicial, Summary or Arbitrary Executions: Report of the Special Rapporteur, Mission to Nigeria,
U.N. Doc. E/CN.4/2006/53/Add.4 (2006) 49

U.S. Department of State, *Nigeria Country Report on Human Rights Practices for 1996* 54

Reuters, *Commonwealth Suspends Nigeria Over Executions*, N.Y. Times, November 12, 1995 54

Reuters, *World Condemns Hangings*, The Evening Post (Wellington), November 11, 1995 54

I. STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. §1292(b) in that: a) the District Court in its Order of September 29, 2006, certified its ruling of the same date dismissing Count I of the Complaint for interlocutory appeal; b) Appellants timely served and filed an application with this Court to allow an interlocutory appeal of the District Court's order of September 29, 2006; and c) this Court, in its Order of December 27, 2006, granted Appellants' motion and accepted this case for interlocutory review.

The District Court had subject matter jurisdiction of this case under 28 U.S.C. §1350.

II. STATEMENT OF ISSUE PRESENTED FOR REVIEW

Whether the District Court erred by ruling that Dr. Barinem Kiobel's summary execution by the Nigerian Military Government's Civil Disturbances Special Tribunal is not cognizable as a violation of the customary international law norm of extrajudicial killing under the Alien Tort Statute.

III. STATEMENT OF THE CASE

Appellants are twelve (12) current or former residents of Ogoni, an area of the Niger delta in Nigeria. They have sued Defendants Royal Dutch Petroleum Company, Shell Transport and Trading, p.l.c., and their Nigerian subsidiary, Shell Petroleum Development Company of Nigeria, Ltd.[1] under the Alien Tort Statute, 28 U.S.C. §1350, for their complicity with the former military dictatorship in Nigeria in widespread violations of international law, including extrajudicial killing, torture, arbitrary arrest and detention, and crimes against humanity.

Appellants filed their original complaint on September 20, 2002. (J.A. 98) (Dkt. No. 1). The case was assigned to Hon. Kimba Wood as being related to, and was consolidated for discovery purposes with, *Wiwa v. Royal Dutch Petroleum Company, et al.*, 96 Civ.8386, and *Wiwa v. Anderson*, 01 Civ. 1909 (collectively, the "*Wiwa* cases"). All three cases were assigned for pretrial purposes to Hon. Henry B. Pitman, United States Magistrate Judge. (J.A. 100) (Dkt. No. 27).

Shell moved to dismiss this action pursuant to a wide ranging motion under Rule 12(b)(6), F. R. Civ. P., on March 18, 2003. (J.A. 97) (Dkt. No. 7). Judge Pitman issued a Report and Recommendation dated March 11, 2004,

---

[1]Royal Dutch Petroleum Company and Shell Transport and Trading Company, p.l.c. will be referred to collectively as "Shell." The Shell Petroleum Development Company of Nigeria, Ltd., will be referred to as "SPDC ." All three defendants will be referred to collectively as "Defendants."

recommending that the motion be denied in its entirety. (J.A. 103) (Dkt. No. 51). Shell filed a timely objection.

Prior to any ruling on the objection by the District Court, Appellants filed their Amended Complaint on May 17, 2004. (J.A. 104) (Dkt. No. 69). The Amended Compliant dropped several plaintiffs and added SPDC as a defendant. The Defendants then filed a motion to strike or dismiss the Amended Complaint on July 15, 2004. (J.A. 107) (Dkt. No. 93). In their reply brief in support of this motion, Defendants raised for the first time the argument that the decision in *Sosa*, 542 U.S. 692 (2004), required dismissal. *Id*. (Dkt. No. 95).

Judge Pitman issued a Report and Recommendation dated August 15, 2005, recommending that the motion be denied in all respects. (J.A. 111) (Dkt. No. 135). He declined to consider Defendants' *Sosa* argument on its merits because it was raised only in the reply brief and because the argument was made "in a perfunctory manner that is of little assistance to the court." (J.A. 162).[2] Defendants again filed a timely appeal. (J.A. 111) (Dkt. No. 137).

On January 3, 2006, the District Court entered an order affirming Judge Pitman's disposition of the motion to strike the amended complaint but requested

---

[2] Defendants' entire *Sosa* argument encompassed the last three (3) pages of their nine (9) page reply brief. *Sosa* was decided by the Supreme Court on June 29, 2004. Although this predated the filing of Defendants' motion, Defendants did not raise *Sosa* in their opening brief.

supplemental briefing on the *Sosa* argument. On September 29, 2006, the District Court entered an Order which: a) affirmed Judge Pitman's March 11 recommendation that Defendants' act of state and international comity arguments be rejected; b) rejected Defendants' arguments that claims of aiding and abetting could not be asserted under the ATS; c) granted Defendants' motion as it related to claims of property destruction, forced exile, extrajudicial killing and rights to life, liberty, security and association; d) denied Defendants' motion with regard to claims of torture, arbitrary detention and crimes against humanity; and e) certified its entire order under 28 U.S.C. §1292(b) for interlocutory appeal. (J.A. 113) (Dkt. No. 156).

Appellants filed a timely petition with this Court for leave to appeal with regard to the District Court's ruling on the claim of extrajudicial killing, (JA 24) and Defendants filed a timely cross-petition. (JA 56). This Court granted the petition and cross-petition on December 27, 2006. (JA 97).

IV. STATEMENT OF FACTS

Oil was discovered in Ogoniland in 1956 and SPDC began oil production in that area in or about 1958. (J.A. 116) at ¶ 32. Shell and SPDC's exploration and extraction methods in Ogoni failed to comply with the most basic environmental standards. *Id*. at ¶ 36. Shell's practices had catastrophic effects on the Ogoni environment, causing persistent air, water, and noise pollution, reducing agricultural yields and killing marine life. *Id*. at ¶ 37. The Movement for Survival of Ogoni People ("MOSOP") organized non-violent protests to bring attention to the environmental plight of Ogoniland. *Id*. at ¶ 3. In November of 1992, MOSOP issued a demand for Shell and SPDC to pay royalties to the Ogoni people and compensate the Ogoni people for the environmental damage caused by SPDC's operation. *Id*. at ¶ 43. By 1993, at least 300,000 Ogonis, more than half the population of Ogoni, participated in MOSOP protests against Shell. *Id*. at ¶ 44.

In November 1993, General Sani Abacha seized power in a military coup and established a corrupt and repressive military dictatorship in Nigeria. *Id*. at ¶ 28. In April 1994, Dr. Barinem Kiobel, a member of the Rivers State Executive Council,[3] attended a meeting of the Council to discuss plans for a proposed

[3] Rivers State, a political subdivision of Nigeria, encompasses an area within the Niger River delta and includes Ogoni.

Constitutional Convention. *Id*. at ¶ 55. At this meeting members of the Executive Council stated that Shell was prepared to resume oil extraction[4] operations in Ogoni if and when local protests against Shell were suppressed, by violence, if necessary. *Id*. They unveiled a plan at the meeting entitled "Operation Restore Order in Ogoniland." *Id*. Dr. Kiobel broke ranks with the officials proposing the plan and objected to the use of violence in Ogoni. *Id*. Later that month federal security forces supported attacks on eight Ogoni villages and burned two of them to the ground. *Id*. at ¶ 56.

On April 21, 1994, Lieutenant Colonel Komo, the Military Administrator of Rivers State ordered the head of a new "Rivers State Internal Security Task Force," ("ISTF") composed of federal Army, Navy, and intelligence units, to implement "Operation Restore Order in Ogoniland" by imposing martial law in Ogoni and conducting operations to "sanitize" Ogoni in order to ensure that those "carrying on business ventures...within Ogoniland are not molested." *Id*. at ¶ 57. The memo clearly referred to the commercial operations of Shell and SPDC. *Id*.

Shortly thereafter, in May 1994, Dr. Kiobel received a letter from the United States Congressional Human Rights Caucus stating in pertinent part, "We

---

[4] Eventually, SPDC's oil fields in Ogoni automatically shut off depriving Shell and the Government of Nigeria of a significant source of revenue. J.A. 116 at ¶ 45.

understand that the Rivers State Commissioner of Police issued a memo on April 21, 1994, outlining a plan for the Nigerian Army, Air Force, Navy, and Police to occupy the Ogoni territory to 'restore and maintain law and order in Ogoniland and apprehend intruders who may wish to use the period to ferment further disturbances.' We are concerned about the safety of the Ogoni people especially unarmed civilians... We ask you to do everything in your power to bring an end to human rights violations against the Ogoni people." *Id*. at ¶ 60. He forwarded the letter to the Rivers State Military Administrator. *Id*.

On May 9, 1994, Dr. Kiobel, as a member of the Executive Council, attended a special oil seminar presented by SPDC to the Military Administrator of Rivers State, the Rivers State Executive Council and various Nigerian military officials. *Id*. at ¶ 58. At the meeting, Dr. Kiobel asked SPDC officials how they would respond to demands published by the Movement for the Survival of the Ogoni People ("MOSOP") for compensation for decades of environmental degredation to their community. *Id*.

On May 12, 1994, Maj. Paul Okuntimo, the commander of the ISTF, sent a "restricted" memo to the Military Administrator declaring that "Shell operations still impossible unless ruthless military operations are undertaken for smooth economic activities to commence." *Id*. at ¶59. The memo stated that the ISTF

would conduct "wasting operations during MOSOP and other gatherings making constant military presence justifiable; wasting targets cutting across communities and leadership cadres especially vocal individuals in various groups; wasting operations coupled with psychological tactics of displacement; wasting as noted above." *Id*. Maj. Okuntimo also suggested that pressure be exerted on Shell for "prompt regular inputs" to support ISTF operations. *Id*.

Approximately two weeks after Dr. Kiobel forwarded the letter from the U.S. Congressional Human Rights Caucus to the Military Administrator of Rivers State, he was invited to attend a meeting in the village of Giokoo, in Rivers State, on May 21, 1994, to raise local awareness for the upcoming Constitutional Convention. *Id*. at ¶ 60. Dr. Kiobel agreed to attend. When he arrived in Giokoo on the morning of May 21, 1994, the scheduled meeting had not yet convened and many participants had not arrived, so he left Giokoo to take care of other business. *Id*. at 61. He returned to Giokoo later in the day and found chaos at the meeting place with young people angrily shouting at his car. *Id*. He drove away to report the disturbance and later learned that four Ogoni elders had been killed at the meeting which he did not attend. *Id*. The following day, Dr. Kiobel and eight others, including Ken Saro-Wiwa, were arrested and detained. *Id*. They were held without charge and tortured. *Id*. at ¶ 69.

Immediately after Dr. Kiobel was arrested and the MOSOP leadership was detained, the ISTF commenced its ruthless plan to "restore order" in Ogoni. *Id*. at ¶¶ 61- 62. In the period May through August 1994, the ISTF mounted numerous nighttime raids on at least sixty towns and villages in Ogoni to punish the community and suppress protests against Shell and SPDC. *Id*. During these raids, the military broke into homes, shooting or beating anyone in their path, including the elderly, women and children, raping, forcing villagers to pay "settlement fees," bribes and ransoms to secure their release, forcing villagers to flee and abandon their homes, and burning, destroying or looting property. *Id*. At least fifty Ogoni were killed and several thousand were arrested and detained at ISTF detention facilities. *Id*. The conditions of detention were extremely brutal. *Id*. at 63. Ogoni women were beaten and men were flogged. *Id*. Medical care, food and sanitary facilities were below any minimal standards of decency. *Id*. Since no formal charges were typically filed and no civilian court system existed for the detainees, there was no established way to secure release other than the payment of bribes to ISTF officials. *Id*.

During the months that "order" was being restored by the brutality of the ISTF, Dr. Kiobel languished in detention, where he was routinely tortured, without charges being filed against him. *Id*. at ¶¶ 61, 63, 72. Finally, in November 1994,

General Sani Abacha issued a special decree creating the Civil Disturbances Special Tribunal ("CDST") to supervise and administer extrajudicial punishments on individuals in Ogoni deemed by the military government to be threats to public order. *Id*. at ¶ 3.

Dr. Kiobel was convicted of murder by the CDST and executed by the federal military government on November 10, 1995, in Port Harcourt, Nigeria.[5] *Id*. at ¶74. His arrest, conviction and execution were in retaliation for his outspoken objection within policy making circles in the Nigerian government to "Operation Restore Order in Ogoniland," the plan to support Shell and SPDC's operations in Ogoni by means of violent military suppression of the popular opposition and to prevent him from revealing to the public Shell's conspiracy and cooperation with the Nigerian government in the acts set forth herein. *Id*. at ¶ 6(b).

The CDST summarily tried and executed Dr. Kiobel and the Ogoni Nine in a sham trial utterly lacking in due process safeguards:

1. The CDST was not independent or impartial, *Id*. at ¶¶ 3, 65, 67, 68;

2. The CDST was not a regularly constituted Nigerian court, *Id*. at ¶¶ 3, 65, 66;

[5] Dr. Kiobel was tried and convicted by the CDST along with MOSOP President Ken-Saro Wiwa and seven other Ogoni leaders. They are referred to herein as the "Ogoni Nine."

3. Dr. Kiobel and others were detained without charges, *Id*. at ¶ 61;

4. Meetings between the accused and their counsel were controlled by the military government and the meetings were required to held in the presence of a military officer, *Id*. at ¶ 67;

5. Defense counsel were routinely harassed by the ISTF and subjected to threats of physical harm, *Id*. at ¶ 68;

6. The accused were denied adequate food and medical care and were routinely tortured in detention by military personnel, *Id*. at ¶ 69;

7. The accused were denied access to witnesses and prosecution witnesses were bribed to give false testimony against the defendants, *Id*. at ¶¶ 6(b), 70(a); and

8. There was no right to appeal the CDST's verdict or any aspect of the CDST proceedings, *Id*. at ¶ 67.

The convictions and executions caused an international uproar and in the U.S. State Department's report, "Nigeria Human Rights Practices, 1995," the State Department concluded:

> Minority rights and environmental activist Ken Saro-Wiwa and eight others [including Dr. Kiobel] were executed on November 10 after their conviction by a tribunal which, although legally constituted, did not conform to the internationally accepted norms for a fair trial.

See (J.A. 98) (Dkt. No. 62) p.8.

In 1998, the United Nations Commission on Human Rights concluded that the Nigerian judiciary lacked independence and that its orders were ignored, delayed, or disobeyed by the Abacha Military Government. (J.A. 116) at ¶ 78. Indeed, General Abacha issued a decree ousting the jurisdiction of the regular Nigerian courts for claims seeking redress against the Federal Military Government for human rights abuses. *Id*. On May 22, 2002, the African Commission on Human and Peoples' Rights concluded that the Abacha's Federal Military Government had violated the African Charter on Human and Peoples' Rights in its acts and treatment of the Ogoni people during the time that the Ogoni Nine were arrested, tortured, tried and executed. *Id*.

V. SUMMARY OF ARGUMENT

The District Court erred in dismissing Appellants' claim for extrajudicial killing raised under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350. Extrajudicial killing is a "specific, universal, and obligatory" *jus cogens* norm of international law and thus meets the Supreme Court's standard for an actionable claim under the ATS as set forth in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). The well-established international prohibition against extrajudicial killings is prototypical of a violation that has "[no] less definite content and acceptance" among nations than the "historical paradigms" of violations at the time the ATS was adopted. *Sosa*, 542 U.S. at 732. Indeed, the *Sosa* Court explicitly cited extrajudicial killing as an example of a norm of international law, further stating that Congress has provided a "clear mandate" of its recognition via its inclusion in the Torture Victim Protection Act of 1991 ("TVPA"), 28 U.S.C. ¶ 1350 note. 542 U.S. at 728. The TVPA provides explicit evidence of the prohibition on extrajudicial killings' status as customary international law and actionability in U.S. courts. The Senate report on the TVPA specifies that the Act "incorporates into U.S. law the definition of extrajudicial killing found in customary international law," S. Rep. No. 102-249, at 6 (1991). Both before and after the TVPA's passage,

U.S. courts have found claims for extrajudicial killings actionable pursuant to the ATS. International treaties and jurisprudence have confirmed the prohibition.

The TVPA defines extrajudicial killing as "a deliberated killing not authorized by a previous judgment pronounced by a *regularly constituted court affording all the judicial guarantees* which are recognized as indispensable by civilized peoples." 28 U.S.C. § 1350 note (emphasis added). Extrajudicial executions that follow *irregular proceedings*—such as sham trials—that do not meet established international fair trial standards are prohibited and actionable under the ATS.

These are customary international law norms that have been widely accepted by civilized nations and are clearly set forth in the federal Torture Victim Protection Act, Article 75 of Additional Protocol I to the Geneva Conventions, Article 14 of the International Covenant on Civil and Political Rights and in decisions of the U.S. Supreme Court, the European Court of Human Rights, the Inter-American Court of Human Rights, The African Commission on Human and Peoples' Rights and the United Nations Commission on Human Rights.

The determination of whether an extrajudicial killing has occurred is thus linked to the presence of a "regularly constituted court" and "all judicial guarantees" recognized by international law—in other words, to the elements of a

fair trial under customary international law. The CDST was a special tribunal established by Nigeria's military dictator that executed Dr. Kiobel and the other Ogoni Nine co-defendants in flagrant disregard of international law. The CDST was not a "regularly constituted court," because it explicitly operated outside of the Nigerian judicial system and included a military officer as one of its members.

The complaint sets forth a litany of facts which sufficiently plead that the CDST proceedings denied Dr. Kiobel the core judicial guarantees necessary to satisfy fair trial standards under international law. Whether considered individually or in combination, these violations of basic rights, particularly in the context of a capital case, are sufficient to state a claim. The Supreme Court recently recognized the definite content of the first element of extrajudicial murder requirements under international law in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006). The Court held that the term "regularly constituted court" has a "core meaning" under international law—a meaning that excludes all "special tribunals" such as that used in the "trial" of Dr. Kiobel. *Id.* at 2796. International sources, including regional human rights courts, the Human Rights Committee General Comments and adjudications, and reports of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, echo this determination in the specific context of extrajudicial killings.

Appellants' argument as to the absence of judicial guarantees focuses on the right to a fair and impartial tribunal operating within the framework of established law, right to prompt notice of charges, right to access to counsel to prepare a defense, right to access witnesses, right to appeal and the right to conduct a defense without interference from the military. Appellants alleged sufficient facts to meet the definition of extrajudicial killing.

Finally, multiple international sources since the end of the Second World War confirm extrajudicial killing's status as a clear violation of customary international law and define its contours. the international community, through both General Assembly resolutions and unilateral comments from national governments, has regularly condemned executions that occur pursuant to judgments from courts that do not provide internationally recognized due process guarantees; such condemnation is aimed most particularly at special and other non-standard tribunals, like the one that sentenced Dr. Kiobel. Indeed, heavy and widespread international condemnation followed the trial and execution of Dr. Kiobel and the rest of the Ogoni Nine, stating that the killings were violations of international law. Thus, the District Court erred when it found that claims arising from these executions did not meet the *Sosa* standard.

VI. STANDARD OF REVIEW

The Second Circuit Court of Appeals "appl[ies] a *de novo* standard of review to the grant of a motion to dismiss on the pleadings, accepting as true the complaint's factual allegations and drawing all inferences in the plaintiff's favor." DeMuria v. Hawkes, 328 F.3d 704, 706 (2d Cir. 2003) (citing Scutti Enters. v. Park Place Entm't Corp., 322 F.3d 211, 214 (2d Cir. 2003)). Under this standard, "[t]he court may not dismiss a complaint unless it appears beyond doubt, even when the complaint is liberally construed, that the plaintiff can prove no set of facts which would entitle him to relief." DeMuria, 328 F.3d at 706 (citing Jaghory v. New York State Dep't of Educ., 131 F.3d 326, 329 (2d Cir. 1997).

VII. ARGUMENT

A. The Prohibition on Extrajudicial Killing Meets the *Sosa* Standard For an Actionable ATS Claim

The U.S. Supreme Court established in *Sosa* that ATS claims must have "[no] less definite content and acceptance" among nations than the "historical paradigms" at the time the ATS was adopted. *Sosa*, 542 U.S. at 732. The Supreme Court urged caution when recognizing such norms, *Sosa*, 542 U.S. at 734, stating they should be in line with the "custom and usages" of nations. *Id.* (citing *The Paquete Habana*, 175 U.S. 677, 700 (1900)).

In *Sosa,* the Court cited *United States v. Smith*, 18 U.S. (5 Wheat) 153, 163-80 (1820), to demonstrate the level of specificity with which the law of nations defined piracy – one of the "historical paradigms familiar when § 1350 was enacted." 542 U.S. at 732. In *Smith*, the Court expressly acknowledged the diversity of definitions of piracy, but held that despite that diversity, there existed certain core aspects of piracy that everyone could agree upon, for instance, that robbery or forcible depredations upon the sea constituted piracy. *See Smith,* 18 U.S. at 160-62.

Smith is consistent with modern ATS authority that considers whether the conduct at issue is clearly within the norm, not whether every aspect of what might comprise the norm is fully defined and universally agreed upon. *Xuncax v.*

Gramajo, 886 F. Supp. 162, 187 (D. Mass. 1995). Thus, in *Kadic v. Karadzic*, this Court held that courts must consider whether "the defendant's alleged conduct violates well-established, universally recognized norms of international law." 70 F.3d 232, 239 (2d Cir. 1995) (internal quotations omitted); *accord Filartiga v. Pena-Irala*, 630 F.2d 876, 880 (2d Cir. 1980) (threshold question is whether conduct alleged violates international law); *Flores v. Southern Peru Copper Corp.*, 253 F. Supp. 2d 510, 525 (S.D.N.Y. 2002), *aff'd* 343 F.3d 140 (2d Cir. 2003) ("While it is not necessary for nations to identify with specificity every factual scenario that violates a particular prohibition under international law, a rule of customary international law must nevertheless be 'sufficiently determinate' to make it clear that particular conduct is prohibited. *Filartiga,* 630 F.2d at 880.").

The prohibition on extrajudicial killing easily meets the *Sosa* standard. In *Siderman de Blake v. Republic of Argentina*, 965 F.2d. 699, 714 (9th Cir. 1992), the Ninth Circuit identified extrajudcial killing as a *jus cogens* norm of international law "from which no derogation is permitted", and in *Sosa,* the Supreme Court acknowledged that extrajudicial killing was among those international law violations that were clearly actionable under the ATS. 542 U.S. at 728. Congress identified the current norm for extrajudicial killing in the TVPA. The Second Circuit has held the prohibition on extrajudicial killing to be an

actionable norm under the ATS, as have numerous courts in other circuits. The prohibition on extrajudicial killing has a long historical pedigree, confirming its position in the "custom and usage" of nations. International legal sources overwhelmingly support the specific, universal, and obligatory nature of the prohibition on extrajudicial killings.

1. The *Sosa* Court and the TVPA Explicitly Recognize Extrajudicial Killing as a Clearly Actionable Norm Under ATS.

In *Sosa,* the Supreme Court recognized that in the process of identifying customary international law norms cognizable under the ATS, the courts should be guided by legislative action with respect to specific violations:

> And although we have even assumed competence to make judicial rules of decision of particular importance to foreign relations, such as the act of state doctrine, see, *Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 389 (1964), the general practice has been to look for legislative guidance before exercising innovative authority over substantive law.

542 U.S. at 732.

In *Sosa*, the Court explicitly cited the inclusion of extrajudicial killing in the TVPA as an example of a norm of customary international law for which Congress has provided a "clear mandate" for recognition by the federal courts under the ATS. *Id.* at 728. The TVPA defines extrajudicial killing as:

> a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial

guarantees which are recognized as indispensable by civilized peoples."

28 U.S.C. § 1350 note. *See Doe v. Rafael Savaria*, 348 Supp. 2d 1112, 1145 (E.D. Ca. 2004) (post-*Sosa* case holding that extrajudicial killing is recognized under ATCA).

Senate and House reports on the TVPA confirm the Court's understanding that Congress recognized and codified in U.S. law the "universal consensus condemning" extrajudicial killing and torture which had already "assumed the status of customary international law" and to ensure that such claims could be brought under the ATS. S. Rep. No. 102-249, at 3 (1991); H.R. Rep. No. 102-367, at 2-3 (1991).[6] The Court went on to affirm that the TVPA "'establish[es] an unambiguous and modern basis for' federal claims of torture and extrajudicial killing." *Sosa*, 542 U.S. 728 (alteration in original) (quoting H.R. Rep. No. 102-367, at 3 (1991)). The TVPA, the Court emphasized, acts as an "affirmative authority" to cover this "specific subject matter." *Id.* The Court thus contrasted such norms as torture and extrajudicial killing with other "new and debatable violations of the law of nations" that might require "judicial creativity" for the courts to "seek out and define" them, the former being actionable under the ATS,

---

[6] Well before the *Sosa* decision, the Second Circuit explained in *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995), that the TVPA's primary purpose was to codify this Circuit's result in *Filartiga* while leaving open the possibilities of other claims under the ATS. *See id.* at 241.

the latter not. *Id.* The Court read the TVPA as a symbol of congressional approval for the judiciary's use of the ATS to adjudicate cases based on certain causes of action, with extrajudicial killing solidly among them. *See id.* at 732 (suggesting that the TVPA evidences congressional support for the decision in *Filartiga*, *supra*. Thus, the *Sosa* Court's endorsement alongside the TVPA demonstrates that the prohibition on extrajudicial killings is among the most clearly actionable norms under the ATS.

2. The TVPA Codifies the Internationally Recognized Definition of "Extrajudicial Killings," Which Includes Killings in the Absence of "Judicial Guarantees" Before a "Regularly Constituted Court."

The TVPA codifies internationally recognized prohibitions and confirms that extrajudicial killing is an actionable norm under the ATS.[7] The TVPA illustrates how the District Court in this case erred in two ways: First, the TVPA provides a clear definition, and second, it states that the definition flows from preexisting international law.

---

[7] Common Article 3 of the Geneva Conventions prohibits the "passing of sentences and carrying out of executions without previous judgment pronounced by a *regularly constituted court* affording *all* the *judicial guarantees*" recognized by international law. 6 U.S.T at 3318. Article 75 of Additional Protocol I to the Geneva Conventions of 1949**.** Also, Section 702 of the Restatement (Third) of Foreign Relations states that "[a] state violates international law if, as a matter of state policy, it practices, encourages, or condones . . . the murder or causing the disappearance of individuals." Restatement (Third) Foreign Relations § 702 (1987). The commentary on the Restatement of Foreign Relations confirms that this norm falls among those that have attained the status of *jus cogens* such that "any international agreement that violates [the norm] is void. *Id.*, Comment.

The TVPA explicitly connects its prohibition on extrajudicial killings to international law norms. Both Senate and House reports on the TVPA open their discussion with a proclamation: "Official torture and summary execution violate standards accepted by virtually every nation. This universal consensus condemning these practices has assumed the status of customary international law." S. Rep. No. 102-249, at 3 (1991); H.R. Rep. No. 102-367, at 2-3 (1991). The Senate report on the TVPA indicates that Congress considered the TVPA's definition to "incorporate[] into U.S. law the definition of extrajudicial killing found in customary international law." S. Rep. No. 102-249, at 6 (1991). The report discusses the definition's sources:

> This definition conforms with that found in the Geneva Convention for the Amelioration of the Wounded and Sick in Armed Forces in the Field (1949). This definition further excludes killings that are lawful under international law—such as killings by armed forces during declared wars which do not violate the Geneva Convention and killings necessary to effect a lawful arrest or prevent the escape of a person lawfully detained. Thus, only killings which are truly extrajudicial in nature and which violate international law are actionable under the TVPA.

Id. (footnotes omitted).

In addition to the Geneva Conventions, the Senate cited the European Convention on Human Rights in support of the TVPA definition. *See id.* at 6 nn.

The House of Representatives' report on the TVPA also notes that the definition of extrajudicial killing was "derived from" Common Article 3 of the Geneva Conventions. H.R. Rep. No. H.R. 102-367(I), at 87. The Senate report cites Congress' ability to "define and punish offenses against the law of nations," *id.* at 5-6; U.S. Const. Art. I, § 8, as the source of congressional authority to legislate on this issue, further confirming its view that extrajudicial killings constitute such an offense against international law. Both the Senate and the House reports thus recognized the prohibition on extrajudicial killing's preexistence in international law; the TVPA is merely "incorporating" a definition "found" in customary international law, not creating a new offence.

3. <u>U.S. Jurisprudence Recognizes the Prohibition on Extrajudicial Killing as Customary International Law Actionable Under the ATS.</u>

Courts of the Second Circuit hearing ATS cases both before and after the enactment of the TVPA have recognized claims for extrajudicial killing to be actionable. *See Kadic v. Karadzic*, 70 F.3d 232, 241 (2d Cir. 1995). This conforms to the reading of virtually all courts of other circuits that have faced the question. *See, e.g.*, *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1157–58 (11th Cir. 2005); *In re Estate of Ferdinand Marcos, Human Rights Litigation*, 25 F.3d 1467, 1475 (9th Cir. 1994) ("The prohibition against summary execution…is

similarly universal, definable, and obligatory."); *Doe v. Rafael Savaria*, 348 Supp. 2d 1112, 1145 (E.D. Ca. 2004) (post-*Sosa* case holding that extrajudicial killing is recognized under ATCA); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1325 n.24 (N.D. Ga. 2002) ("Official torture and summary execution violate standards accepted by virtually every nation. This universal consensus condemning these practices has assumed the status of customary international law." (quoting S. Rep. No. 249-102, at 3 (1991)) (internal quotation marks omitted); *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1542-43 (N.D. Cal. 1987).

In fact, customary international law so clearly prohibits extrajudicial killing that courts often use the norm as a measuring stick for evaluating whether other norms are sufficiently specific, universal, and obligatory. The *Sosa* Court itself used the example of extrajudicial killing in this way. *See Sosa*, 542 U.S. at 728. In the lower courts, the prohibition on extrajudicial killings has been raised as a clearly actionable comparative example in cases considering, *inter alia*, whether parent child abduction is a violation of the law of nations, *see Taveras v. Taveraz*, 477 F.3d 767 (6th Cir. 2007).

The Supreme Court recently affirmed the definite content of the term "regularly constituted court" in *Hamdan v. Rumsfeld.* 126 S.Ct. 2749 (2006). In

Hamdan, the Court recognized that the term "definitely exclud[es] all special tribunals." *Id.* at 2796-97 (quoting Geneva Convention-IV, Commentary 340). The Court held that the military commissions used to try the detainees at Guantanamo Bay violated Common Article 3 of the Geneva Conventions.

Although the Geneva Conventions govern the law of armed conflict, there can be no doubt that *Hamdan* applies here, in the absence of an armed conflict. The relevant language of the TVPA, a civil statute, is not merely drawn from Common Article 3 of the Geneva Conventions, it uses the *exact* same language as that in Common Article 3 and applied in *Hamdan.* That is, Common Article 3, like the TVPA, prohibits executions without a "previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by a civilized peoples." *Id.* at 2796 (quoting 6 U.S.T. at 3318).

Moreover, the Geneva Conventions, and thus *Hamdan*, are also on point because wartime protections usually can be considered the minimum protections international law affords. *Corfu Channel Case, (U.K. v. Alb.),* 1949 I.C.J. Rep. 4, 22-23 ("elementary considerations of humanity [are] more exacting in peace than in war."); *see also* ICCPR, Art. 4 (certain emergencies, such as war, may justify restricting some rights). Thus, the Ninth Circuit relied on the fact that a given act

was barred during war as evidence that the act violated a *jus cogens* international norm applicable during peacetime.[8] *Doe v. Unocal Corp.,* 395 F.3d 932, 945 (9th Cir. 2002), *vacated by grant of en banc review*, 395 F.3d 978 (2003).

In *Hamdan*, the Court held that although the Geneva Conventions do not specifically define the term "regularly constituted court" "other sources disclose its core meaning." *Id*. at 2796. The Court further held that special tribunals "definitely" do not fall within that "core meaning." *Id.* In so holding, the Court cited favorably Justice's Rutledge's dissenting opinion in *Application of Yamashita*, 327 U.S. 1, 44 (1946), for the proposition that regularly constituted courts do not include military commissions "specially constituted for a particular trial." When a tribunal is not "regularly constituted" according to this "core meaning," any killing imposed by it constitutes extrajudicial killing.[9] Since special

[8] The Court recognized that Common Article 3 applies in "armed conflicts not of an international character." 126 S.Ct. at 2795 (quoting 6 U.S.T. 3318). Common Article 3 acts as a "minimum" level of protection during conflicts that are not covered by the other Convention provisions, in particular those that do not occur between two signatory states. *Id.* The Conventions are "requirements," though they are intended to allow some measure of "flexibility" during armed conflict situations, due to the particular demands associated with such situations. *Id.* at 2798. Outside of armed conflicts, the expected "requirements" should impose a no less demanding standard for a fair trial. Thus, in the case here, the required "minimum" level of protections should if anything be stricter than those provided in Common Article 3. Therefore, if the facts here reveal violations of Common Article 3, they would certainly also be deemed violations in a non-conflict context.

[9] In the "Judges" trial at Nuremeberg the Tribunal addressed the issue whether international law supersedes the *domestic* law of a repressive autocratic regime: [Germany] abolished the courts of the occupied lands and set up courts manned by members of the Nazi totalitarian regime and system. These laws of occupation were cruel and extreme beyond belief, and were enforced by

tribunals "definitely" fall outside this "core," the killing carried out pursuant to their orders undeniably violates international law.

Similarly, the Court relied upon a Red Cross treatise that defines "regularly constituted court" as a court "established and organized in accordance with the laws and procedures *already* in force in a country." *Id*. (citing Int'l Comm. of Red Cross, 1 Customary International Humanitarian Law 355) (2005) (emphasis added). The CDST proceeding denied Dr. Kiobel and the other Ogoni Nine defendants fundamental rights "already in force" in the country and guaranteed by the 1979 Nigerian Constitution.[10]

---

the Nazi totalitarian courts in a cruel and ruthless manner against inhabitants of the occupied territories, resulting in grave outrages against humanity, against human rights and morality and religion, and against international law, and against the law as declared by Control Council Law No. 10, by authority of which this Court exercises jurisdiction in this case. *In re Alstoetter*, *et. al.,* 14 Ann. Dig. 278, 289 (1948).

[10] The right to trial by and independent impartial tribunal was guaranteed by Article 4(8) prohibiting the enactment of "any law that ousts or purports to oust the jurisdiction of a court of law or of a judicial tribunal established by law," and by Article 33(4): "Whenever any person is charge with a criminal offence, he shall unless the charge is withdrawn be entitled to a fair hearing within a reasonable time by a court or a tribunal." The right to be promptly informed of the grounds for detention was guaranteed by Article 32(3): "Any person who is arrested and detained shall be informed in writing within 24 hours of the (and in a language he understands) of the facts and grounds for his arrest and detention." Article 33(6)(b) guaranteed the right for the accused in a criminal trial to be given "adequate time and facilities for the preparation of his defence.."Article 33(6)(c) guaranteed the right for the accused in a criminal trial to be represented by counsel of his choice. Article 42(1) guaranteed the right to appeal to the Nigerian High Court to "[A]ny person who alleges that any of the provisions of this Chapter has been, is being or likely to be contravened in any State in relation to him." *See Universal Human Rights*, Vol. 2, No. 2 (Apr. - Jun., 1980), pp. 23-41.

Hamdan also demonstrates that the term "all the judicial guarantees which are recognized as indispensable by civilized peoples" has a core meaning. Again, although the Geneva Conventions do not define the term, the Court found that it could apply this standard because of the wealth of international law sources that provide evidence of its meaning. *See id.* at 2797 (discussing the basic trial protections described in other international law sources).

The standards "*must* be understood to incorporate the barest of those trial protections that have been recognized by customary international law." *Id.* at 2979. For example, the Court noted that the military commissions used to adjudicate the cases of detainees at Guantanamo Bay violated this "core meaning" because they did not, at a minimum, allow the accused to be present at his trial and confront the evidence introduced against him. *Id.* at 2798.

To make this determination, the Court relied on both domestic and international law to elucidate the definite content of "regularly constituted courts" that provide all indispensable "judicial guarantees." U.S. law has long recognized the importance of these protections in providing the necessary components of a fair trial. *Hamdan*, 126 S.Ct. at 2798 n.67 (citing several Supreme Court cases, such as those that follow, as evidence of judicial recognition of certain core fair trial norms); *Crawford v. Washington*, 541 U.S. 36, 49 (2004) ("It is a rule of the

common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not the liberty to cross examine" (quoting *State v. Webb*, 1794 WL 98 (Super L. & Eq. 1794) (per curiam) (internal quotation marks omitted); *Diaz v. United States,* 223 U.S. 442, 455 (1912) (stating that an accused's right to attend a trial is "scarcely less important to the accused than the right of trial itself"). Taken as a whole, these cases emphasize that flaws in the "character" or "procedures" of a court cannot be overcome by assurances that judges will act fairly. *Hamdan*, at 2798 n.67.

The Court turned to Article 75 of Additional Protocol I to the Geneva Conventions of 1949 and Article 14 of the ICCPR, both discussed above, to outline the fair trial protections provided by international law. *See supra* at p.19. The Court opinion described Article 75 as being "indisputably part of the customary international law," *Hamdan*, 126 S.Ct. at 2797, and Article 14 as providing "the same basic protections," *id.* at 2797 n.66. Article 75 includes a non-exhaustive list of procedural fair trial protections, including informing an accused "without delay of the particulars of the offense against him" and giving the accused "all necessary rights and means of defense" both before and after his trial. Article 75(4)(a). Article 14 affords similar fair trial protections, such as trial by a "competent, independent, and impartial tribunal established by law," "adequate time and

facilities" to allow the accused to prepare his defense and to "communicate with counsel of his own choosing," and the right to have a conviction and sentence reviewed by a higher tribunal. Article 14(1), (3)(b), (5).

4. International Legal Sources Demonstrate the Clearly Established Prohibition on Extrajudicial Killing and Confirm the Definition as Provided in the TVPA.

After the Nuremberg trials, the primary legal framework at the international level for extrajudicial killings, as articulated by Commission on Human Rights Resolution 1992/72 and General Assembly Resolution 45/162, was established by Article 3 of the Universal Declaration of Human Rights ("UDHR"), and Articles 6, 14, and 15 of the International Covenant on Civil and Political Rights ("ICCPR"), Dec. 16, 1966, 999 U.N.T.S. 171. *See* Report by the Special Rapporteur, Extrajudicial, Summary or Arbitrary Executions ¶ 14, U.N. Doc. No. A/51/457 (Oct. 7, 1996) [hereinafter 1996 S.R. Report]. Whereas Article 3 of the UDHR established the general right to life, the ICCPR guaranteed that one's right to life "shall be protected by law" and that "[n]o one shall be arbitrarily deprived of his life." *Id.* Art. 6(1).

Articles 14 and 15 of the ICCPR articulate the minimum international standards for a fair trial and thus provide the framework for assessing whether life has been "protected by law" or, to the contrary, "arbitrarily" taken under Article 6;

combined, the articles provide a clear definitional basis for the prohibition on extrajudicial killings in international law. Moreover, this prohibition on extrajudicial killings is fully obligatory. Article 6's protection of the right to life is among those essential human rights for which, under ICCPR Article 4(2), "exceptional circumstances such as internal political instability or any other public emergency may not be invoked to justify any derogation." Report by the Special Rapporteur, Extrajudicial, Summary or Arbitrary Executions ¶ 45, U.N. Doc. E/CN.4/1993/46 (Dec. 23, 1992) [hereinafter 1992 S.R. Report]; *see generally id.* ¶¶ 42-68. The ICCPR, with its 160 state parties,[11] not only provides a clear legal framework for assessing violations of the prohibition on extrajudicial killings, but also offers powerful evidence of the norm's universal acceptance.

Regional human rights instruments provide a framework similar to that of the ICCPR in prohibiting extrajudicial killings. Article 4 of the African Charter on Human and Peoples' Rights provides: "Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right."

---

[11] For the most recent ratification numbers, see Office of the United Nations High Commissioner for Human Rights, Ratifications and Reservations, http://www.ohchr.org/english/countries/ratification/index.htm (last visited Mar. 11, 2007).

Article 7 establishes basic fair trial rights, thus providing content to assess whether any deprivation of life is "arbitrary." Article 4 of the American Convention on Human Rights, similarly guarantees that the right to life "shall be protected by law" and that "[n]o one shall be arbitrarily deprived of his life," and Article 8 provides fair trial guarantees. ACHR, Art. 4 (1969).

Article 2 of the European Convention on Human Rights stipulates that the right to life "shall be protected by law." It continues: "No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law." Article 6 provides corresponding fair trial rights. The implementing bodies of all three instruments have recognized instances of extrajudicial killings as violations of the right to life, often in connection with violations of the right to a fair trial.

In 1989, the U.N. Economic and Social Council adopted and the General Assembly endorsed the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions [hereinafter "Principles"], *see* ECOSOC Resolution No. 1989/65, UN Doc. E/1989/INF/ (May 24, 1989), which declares that governments shall outlaw "all extra-legal, arbitrary and summary

executions.[12] *Id.* The prohibition is obligatory upon states, demonstrated by its non-derogable nature:

> Exceptional circumstances including a state of war or threat of war, internal political instability or any other public emergency may not be invoked as a justification of such executions. Such executions shall not be carried out under any circumstances including, but not limited to, situations of internal armed conflict, excessive or illegal use of force by a public official or other person acting in an official capacity or by a person acting at the instigation, or with the consent or acquiescence of such person, and situations in which deaths occur in custody. This prohibition shall prevail over decrees issued by governmental authority.

Id. Principle 1.

Moreover, since 1983, the Commission on Human Rights has appointed and regularly renewed the mandate of a Special Rapporteur specifically devoted to monitoring instances of extrajudicial, summary, or arbitrary executions, and the General Assembly has frequently requested and considered reports from the Special Rapporteur. *See, e.g.*, Commission on Human Rights, Summary or

---

[12] Although concepts of extra-legal executions, arbitrary executions, and summary executions historically have different connotations, the drafters of the Principles sought to incorporate all three of these right-to-life violations under the rubric of the ban reflected in the Principles. *See* Weissbrodt, *supra*, at 590. The expansion of the Special Rapporteur's mandate to include "extrajudicial" as well as "summary or arbitrary" executions in 1992 further confirms the shift to "a broad approach" to the issue of executions that "encompasses all violations of the right to life as guaranteed by a large number of international human rights instruments." *See* 1992 S.R. Report, *supra*, ¶ 7.

Arbitrary Executions, U.N. Doc. No. E/CN-4/RES/1982/29; General Assembly, Extrajudicial, Summary or Arbitrary Executions, U.N. Doc. No. A/RES/53/147. The cumulative body of evidence undeniably demonstrates the consensus that there is a clearly established prohibition on extrajudicial killings.

B. Killings Violate International Law When They Result From Sentences Imposed By Tribunals Like The CDST That are not Regularly Constituted and That Deny Fundamental Judicial Guarantees.

A state does not satisfy its obligation to prohibit extrajudicial killing simply by leading a victim into a courtroom before he is killed. U.S. and international statutes, treaties, and case law affirm that an execution may violate international law when it results from an order by a tribunal that is not "regularly constituted" and does not provide *all* the provisions that customary international law recognizes as essential to a fair trial. In other words, a killing may be "extrajudicial" even if it occurs pursuant to a sentence imposed by a court and even if that court provides some of the provisions normally associated with a fair trial. Any execution conducted pursuant to such a trial violates the prohibition against extrajudicial execution. This section demonstrates international law has clearly defined: a) the standards by which to ascertain whether a court is "regularly constituted" and that special tribunals fall outside these standards; b) "core fair trial obligations; c) death sentence cases require the application of such core protections; and d) Dr. Kiobel's

“trial” clearly failed to meet international core standards for fair trial standards in death sentence cases.

U.S. and international law clearly link extrajudicial execution to fair trial provisions. As noted above, the TVPA’s definition of extrajudicial killing is drawn from customary international law. That does not require that a killing occur outside of *any* judicial process. Instead, the TVPA defines extrajudicial killing as any “deliberated” killing that occurs without a “previous judgment pronounced by a regularly constituted court affording *all* the judicial guarantees which are recognized as indispensable” by civilized peoples. 28 U.S.C. § 1350 note (emphasis added).

Here, Dr. Kiobel was a victim of extrajudicial killings because he was executed pursuant to a trial before a tribunal that was not regularly constituted, and because that trial lacked several of the provisions that customary international law recognizes as indispensable components of a fair trial. The trials lacked “core” aspects of a fair trial, such as a fair and impartial tribunal operating within the framework of Nigerian law, the right to appeal, the right to consult with an attorney in private and in time to prepare an adequate defense, and protection from interference by the Military Government. The CDST “trial” so egregiously departed from the core norms of a fair trial that the international community

responded with outrage.[13] The international community's contemporaneous response underscores that a settled understanding of core fair trial norms exists and that certain tribunals clearly do not satisfy them. Because the irregular judicial proceedings they received were not sufficient to meet basic fair trial standards, the execution of Dr. Kiobel constituted an extrajudicial execution according to domestic and international law.

C. International Jurisprudence Recognizes That Special Tribunals Fail To Meet the "Core" Fair Trial Characteristics of Regularly Constituted Courts

International sources have repeatedly found that a court violates international law if it does not conform to "core" fair trial norms. Because special tribunals fail to meet these norms, international courts have routinely found that

[13] Michael Birnbaum, Q.C., a senior English trial lawyer was sent to Nigeria to attend the Special Tribunal proceedings against Dr. Kiobel and the other defendants as an accredited representative of the Law Society of England and Wales and the Bar Human Rights Committee of England and Wales. Birnbaum was sent to monitor the proceedings and to "assess the extent to which the trial had been held in accordance with internationally recognized standards and the rules of Nigerian law relating to fair trial." The Birnbaum Report published by the Law Society of England and Wales and the Bar Human Rights Committee of England and Wales in June 1995 concluded that: "[T]he tribunal established to hear the case is neither independent nor impartial: it has handed down rulings which are blatantly unfair and militate against any prospect of the accused receiving a fair trial, as required by international law. The Federal Military Government's decision that this case should be heard by a special tribunal, rather than the ordinary courts, undermines the normal rights of defense enshrined in Nigeria's own Constitution and in international human rights instruments to which Nigeria is a party. It is also suggested that the government's actions may be politically motivated and intended to silence one of its most outspoken critics." M. Birnbaum, *Nigeria, Fundamental Rights Denied: Report of the Trial of Ken Saro-Wiwa and Others*, published June 1995 by Article 19 in association with the Bar Human Rights Committee of England and Wales and the Law Society of England and Wales.

killings imposed by special tribunals violate customary international law. Nearly all the regional human rights courts and commissions of the world have reached this result, including (1) the European Court of Human Rights, (2) the Inter-American Court of Human Rights, and (3) the African Commission on Human Rights.

1. European Court of Human Rights

In adjudicating claims based on the European Convention on Human Rights, the European Court of Human Rights has recognized that a court must conform to "core" fair trial norms in order to be regularly constituted. The European Convention on Human Rights states several protections that constitute a fair trial, and a special tribunals clearly fall outside the terms of the Convention. Article 6 describes the right to "a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law" (Art. 6 ¶ 1), the right "to be informed promptly . . . of the nature and cause of the accusation" (Art. 6 ¶ 3(a), the right "to have adequate time and facilities for the preparation of his defence" (Art. 6 ¶ 3(b), and the right to defense "through legal assistance of [one's] own choosing" (Art. 6 ¶ 3(c)).

In adjudicating case claims based on these rights, the European Court of Human Rights has found that special tribunals violate the Convention, particularly

when the tribunals use military judges or are influenced by pressure from the military. A trial must meet subjective and objective standards to establish its impartiality. The subjective prong requires a tribunal to be free of "personal prejudice or bias," while the objective one dictates that it "offer sufficient guarantees to exclude any legitimate doubt in this respect." *Findlay v. United Kingdom*, App. No. 22107/93, 24 Eur. H.R. Rep. 221 (1997). Impartiality may also depend on the process of appointing the members of a trial, the length of the their terms, including procedures that guarantee independence from "outside pressures," and the "appearance of independence." *Id.* at ¶ 73. In *Findlay v. United Kingdom*, the court-martial military board did not provide a sufficiently impartial tribunal because all members of the board were subordinate to the convening officer, several were directly subordinate to him, he had the power to "ratif[y]" and adjust the sentence, and he could terminate the proceedings at any point before or during the trial. *Id.* at ¶¶ 75-77. Neither the presence of judge advocate or the requirement that judges take an oath was a sufficient safeguard to permit the court to reach a different conclusion. *Id*. at ¶ 79.

In a series of cases brought against Turkey, the Court found that special military tribunals, such as the CDST, were not sufficiently objective to be considered fair trials. In *Incal v. Turkey*, the impartiality of a constitutionally-

established National Security Court, which like the CDST here, had two civilian judges and one military judge, was called into question. App. No. 41/1997/825/1031,1998-IV Eur. Ct. H.R. 1547. In spite of the fact that military judges had the "same professional training as their civilian counterparts," "enjoy[ed] constitutional safeguards identical to those of civilian judges," and the Constitution required that "no public authority may give them instructions concerning their judicial activities," the court held that the judges did not satisfy the Convention's requirement for a fair trial. *Id.* at ¶ 67. The judges' impartiality was questionable because of their status as military employees, their short terms of office (four years), and their direct accountability to the executive and susceptibility to military discipline. *Id.* at ¶ 68.; *see also, e.g., Gerger v. Turkey,* App. No. 24919/94, 1999 Eur. Ct. H.R. 46, ¶ 61 (finding that there was objective reason to fear that a National Security Court lacked independence and impartiality and thus violated Article 6).

In a prominent case in this line of decisions, the Court determined that a State Security Court's interference in the right of a defendant to confidential communications with counsel violated fair trial rights under Article 6(3)(c) of the Convention. *See Öcalan v. Turkey*, No. 46221/99 at ¶ 151. The composition and

procedures adopted by the CDST suffer from the same deficiencies cited by the European Court.

2. Inter-American Court of Human Rights

Like its counterpart in Europe, the Inter-American Court of Human Rights recognizes that regularly constituted courts must provide a core set of judicial guarantees. The Inter-American Court on Human Rights has connected fair trial rights to extrajudicial killing by viewing the imposition of the death penalty after an unfair trial as a violation of the American Convention on Human Rights. *See The Right to Information on Consular Assistance In the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion, 1999 Inter-Am. Ct. H.R. (ser. A) No. 16, ¶¶ 134–36 (Oct. 1, 1999) (recalling that imposing the death penalty without "rigorous enforcement of judicial guarantees" would cause human life to be "arbitrarily taken as a result").

The Court has found the requirement of a fair trial to be especially important in cases where a death penalty is imposed. *See, e.g.*, *Case of Hilaire, Constantine and Benjamin et al. v. Trinidad y Tobago*, 2002 Inter-Am. Ct. H.R. (Series C) No. 94, ¶ 148 (June 21, 2002) ("Taking into account the exceptionally serious and irreparable nature of the death penalty, the observance of due process, with its bundle of rights and guarantees, becomes all the more important when human life

is at stake.”). In *Juan Humberto Sanchez v. Honduras*, the court noted the relationship between fair trial rights and the prohibition on extrajudicial killing, pointing out that Sanchez’s killing was “executed extra-legally by agents of the state, with the attendant violation of the right to a fair trial.” 2003 Inter-Am. Ct. H.R. (ser. C) No. 99, ¶125 (2003) (citation omitted).

In the American Convention on Human Rights, Article 8 guarantees the right to a fair trial, which includes the “right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal” (Art. 8 ¶ 1), the right to “prior notification in detail . . . of the charges,” (Art. 8 ¶ 2(b)), the right to “adequate time and means for the preparation of [the] defense” (Art 8 ¶ 2(c)), the right to “be assisted by legal counsel . . . and to communicate freely and privately . . . with counsel” (Art. 8. ¶ 2(g)), and the right to an appeal (Art. 8 ¶ 2 (h)).

As with the European Court, in adjudicating its human rights convention, the Inter-American Court of Human Rights (IACHR) has found that military tribunals do not guarantee the rights required by a fair trial. For example, in *Castillo Petruzzi et al. Case*, the defendant was charged with treason and tried in a military court. *Castillo Petruzzi et al. case v. Peru*, Judgment of May 30, 1999, Inter-Am.C.H.R., (Series C) No. 52. The IACHR held that the impartiality of the military judge was

weakened by the fact that the military prosecuted the case (¶ 130). The defendant's right to a proper defense was violated because the defense attorneys did not have access to the case file until one day prior to the first ruling, the "conditions under which the defense attorneys had to operate where wholly inadequate for a proper defense." *Id.* ¶ 141. The state also violated the defendant's right to confer with his lawyers in private. *Id.* ¶¶ 148-149; *see also Loayza Tamayo*, Merits, Judgment, Inter-Am. Ct. H.R. (Series C) No. 33, (1997), ¶ 62 (finding that international fair rial standards were violated by a Peruvian military court where, inter alia, the defense attorney's power was curtailed and ability to meet freely with the defendant was not provided). These same violations exist here.

3. African Commission

Finally, African judicial institutions have also found that regularly constituted courts must provide a core set of fair trial rights. The African Charter on Human and Peoples' Rights (Charter) mandates that fair trials include core components, making it impossible for a special tribunal to be considered a fair trial. The Charter's Article 7 requires that fair trials include "the right to an appeal to competent national organs against acts of violating his fundamental rights," "the right to defense, including the right to be defended by counsel of his choice," and

"the right to be tried within a reasonable time by an impartial court or tribunal." ACHPR, Art. 7 (1986).

The African Commission has concluded that special tribunals composed of persons belonging to the executive branch of government and whose members do not possess legal expertise cannot be considered impartial and thus violate Article 7. *See Constitutional Rights Project (on behalf of Akamu) v. Nigeria*, African Commission on Human and Peoples' Rights, Comm. No. 60/91 (1995). Though the Commission has stated that "a military tribunal *per se* is not offensive to the rights in the Charter nor does it imply an unfair or unjust process," such a tribunal "must be subject to the same requirements of fairness, openness, and justice, independence, and due process as any other process." *Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project v. Nigeria*, African Commission on Human and Peoples' Rights, Comm. No. 218/98 (1998), ¶ 44. In another case finding that a special tribunal violated Article 7 because it was chiefly composed of members of the executive branch, the Commission held that the harassment and intimidation of counsel to the point that they were forced to withdraw violated the right to counsel in Article 7. *See The Constitutional Rights Project (on behalf of Lekwot) v. Nigeria*, African Commission on Human and Peoples' Rights, Comm. No. 87/93 (1995), ¶¶ 10–14. Another case found a

violation of Article 7 where a death penalty defendant was not permitted an appeal to a court of higher jurisdiction. *See Civil Liberties Organisation*, Comm. No. 218/98, ¶ 33. The Commission drew an explicit connection between Article 4, protecting individuals from being arbitrarily deprived of their right to life, and Article 7, guaranteeing fair trial rights in its decision concerning the instant trial of the Ogoni Nine: "Given that the trial which ordered the executions itself violates Article 7, any subsequent implementation of sentences renders the resulting deprivation of life arbitrary and in violation" of the right to life. *International Pen and Others (on behalf of Ken Saro-Wiwa, Jr.) v. Nigeria*, African Commission on Human and Peoples' Rights, Comm. Nos. 137/94, 139/94, 154/96 and 161/97 (1998), ¶ 103. The jurisprudence of African human rights institutions therefore establishes a core set of minimum rights that are essential to a fair trial. The composition and procedures of the CDST that tried and executed Dr. Kiobel clearly falls below this minimum standard.

4. United Nations Human Rights Committee and the United Nations High Commissioner for Human Rights Special Rapporteur for Extrajudicial, Summary or Arbitrary Executions

a. Human Rights Committee has Found Killings to be Extrajudicial When They Fail to Satisfy Article 14 of the ICCPR.

In several of its decisions, the United Nations Human Rights Committee ("Committee") has found executions to be extrajudicial when they follow trials that disregard the minimum fair trial standards recognized by international law. The Committee views the right to a fair trial under Article 14 of the ICCPR as the critical factor in determining whether a killing is extrajudicial. In *Sirageva v. Uzbekistan*, the Committee found a violation of Article 14(3)(b), the right to have adequate time to prepare a defense with the accused's choice of counsel, when a defendant was prevented from seeing his lawyer confidentially. U.N. GAOR Human Rights Committee, Communication No. 907/2000 (Nov. 1, 2005), U.N. Doc. CCPR/C/85/D/907/2000 (2005), ¶ 6.3.

The standards necessary to guarantee a fair trial may be even more stringent when the death penalty results. When a sentence of death is imposed, the Committee has held that there are ICCPR violations if the accused is not provided with the "right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defense, and the right to review by a higher tribunal." U.N. GAOR Human Rights Committee, General Comment No. 6, 16th session, ¶ 7, U.N. Doc. CCPR/C/21/Add.1 (1982).

A trial may violate the ICCPR when it imposes a death sentence based on evidence obtained through torture, *Bazarov v. Uzbekistan*, U.N. GAOR Human

Rights Committee, Communication No. 959/2000 (July 14, 2006), U.N. Doc. CCPR/C/87/D/959/2000 (2006), ¶¶ 8.3–8.4, or when "no further appeal against the death sentence is possible," U.N. GAOR Human Rights Committee, General Comment No. 6, 16th session, ¶ 6.4, U.N. Doc. CCPR/C/21/Add.1 (1982); *Aliboeva v. Tajikistan*, U.N. GAOR Human Rights Committee Communication No. 985/2001 (Oct. 18, 2005), U.N. Doc. CCPR/C/85/D/985/2001 (2005), ¶¶ 6.5–6.6. In the jurisprudence of the Human Rights Committee, the presence of core fair trial standards determines whether a killing is extrajudicial.

b. <u>The Reports of the U.N. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions Requires Core Fair Trial Protections in Order for a Tribunal to Impose a Death Sentence Lawfully</u>.

Likewise, the U.N. Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions (Special Rapporteur) has found that extrajudicial killing violations when a death penalty is imposed after a trial that follows irregular proceedings and that lacks "all the judicial guarantees" provided by international law. The prohibition on extrajudicial killing is violated when a court imposes a death sentence without allowing any recourse to appeal, pardon, or commutation of the sentence; when judges are not impartial and competent; and when the court lacks objectivity and independence. Extrajudicial, Summary or Arbitrary

Executions: Report of the Special Rapporteur, U.N. Doc. E/CN.4/2002/74 (2002), ¶ 9.

Notably, the Special Rapporteur singled out as violations executions based on convictions by "special courts," "military tribunals," and "revolutionary courts" that lacked procedural protections. *Id.* ¶ 75. More recently, the Special Rapporteur expressed concern about individuals sentenced to death in proceedings suffering from procedural irregularities in Nigeria during the military regime. *See Extrajudicial, Summary or Arbitrary Executions: Report of the Special Rapporteur*, Mission to Nigeria, U.N. Doc. E/CN.4/2006/53/Add.4 (2006), ¶¶ 26–29. Particularly problematic were "capital trials … conducted by military tribunals." *Id.* at ¶ 29. The Special Rapporteur emphasized that the trial during this regime deprived the accused of "constitutional rights" and compromised the "procedural probity" of the trial. *Id.*

In addition, contemporaneous to the killing of Dr. Kiobel and the other Ogoni Nine co-defendants, the United Nations Special Rapporteur for Extrajudicial, Summary or Arbitrary Executions noted his concern regarding the fairness of trials before the Civil Disturbances Special Tribunals in general and in the Ogoni Nine case in particular. *See Extrajudicial, Summary or Arbitrary Executions: Report of the Special Rapporteur*, Mission to Nigeria, U.N. Doc.

A/51/538 (1996), ¶¶ 35–37. The Special Rapporteur emphasized concerns about the independence of the judges and lawyers; inherent problems with using military courts to try civilians; and the "complete lack of the right of appeal." *Id.* at 36.

D. Dr. Kiobel Was a Victim of an Extrajudicial Killing by a Court That Was Not Regularly Constituted and Did Not Provide Core Judicial Guarantees Required by International Law.

Dr. Kiobel was a victim of an extrajudicial killing by a tribunal formed and controlled by the corrupt Abacha military regime. The CDST was not regularly constituted, did not operate within the framework of Nigerian law and did not provide the core judicial guarantees required by international law. The court was not "regularly constituted" because it was a special tribunal appointed by the military regime to circumvent the regular court system. The special tribunal was established by a decree, signed by General Abacha, which explicitly ousted the jurisdiction of the regular Nigerian judiciary to review decisions of the special tribunal or the proceedings before the special tribunal. Section 8 sub-section 1 of the decree provides:

> "The validity of any decision, sentences, judgment, confirmation, direction, notice or order given or made, as the case may be, or any other thing whatsoever done under this Decree shall not be inquired into any in court of law."

Civil Disturbances (Special Tribunal) Decree No. 2 of 1987.

A judicial proceeding by a regularly constituted court implies a process governed by the rule of law. The special tribunal in this case was not a regularly constituted court and explicitly operated outside the law. Not surprisingly, the United Nations Special Rapporteur on Summary or Arbitrary Executions concluded that the CDST that tried and convicted Dr. Kiobel was not impartial.[14]

The CDST also adopted procedures which lacked the core fair trial guarantees required by international law. In this case, Dr. Kiobel was executed after a sham trial. The trial lacked "core" components of a fair trial, such as a fair

---

[14] U.N. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Mr. Bacre Waly Ndiaye, recognized the Nigerian Special Tribunal's fundamental lack of independence in his Interim Report, U.N. Doc. A/51/457 (1996) at ¶¶112-113.

> 112. The Special Rapporteur is particularly concerned about impositions of the death penalty by special jurisdictions. These jurisdictions are often set up as a response to acts of violence committed by armed opposition groups or in situations of civil unrest, in order to speed up proceedings leading to capital punishment. Such special courts often lack independence, since sometimes the judges are accountable to the executive, or are military officers on active duty. Time limits, which are sometimes set for the conclusion of the different trial stages before such special jurisdictions, gravely affect the defendant's right to an adequate defence. The Special Rapporteur also expressed concern about limitations regarding the right to appeal in the context of special jurisdictions. This is particularly worrying as these special jurisdictions are generally established in situations where rampant human rights violations are already exist. During the period under review, reports in this regard included the following countries: Algeria, Egypt, Kuwait, Malawi, Nigeria, Pakistan and Syrian Arab Republic.
>
> 113. The case of Ken Saro-Wiwa, writer, environmentalist and the President of the Movement for the Survival of the Ogoni People (MOSOP), and eight other Ogonis, sentenced to death allegedly after an unfair trial by the Civil Disturbances Special Tribunal in Port Harcourt, Rivers State, is a clear example. The members of the Tribunal were, reportedly, appointed by the Government, among which was a member of the armed forces.

and impartial tribunal operating within the framework of Nigerian law, the right to appeal,[15] the right to consult with an attorney in order to prepare a defense,[16] and protection from interference by the Military regime. The amended complaint avers these facts in a "short and plain statement" in accord with F.R.C.P. 8(a). (J.A. 116) at ¶¶3, 6(b), (c), 67-70.

---

[15] *See* Civil Liberties Organisation, Comm. No. 218/98, ¶ 33 (finding violation of Article 7 where death penalty defendant was not permitted appeal to court of higher jurisdiction).
Forum of Conscience v. Sierra Leone, African Commission on Human and Peoples' Rights, Comm. No. 223/98 (2000), ¶¶ 17–19 (finding arbitrary deprivation of life in violation of Charter where 24 defendants were convicted by Military Court and executed without being accorded right to appeal).

[16] The Human Rights Committee has stated that "all persons arrested must have immediate access to counsel". Concluding Observations of the HRC: Georgia, UN Doc. CCPR/C/79/Add.74, 9 April 1997, ¶ 28. The Inter-American Commission has stated that the right to defend oneself requires that an accused person be permitted to obtain legal assistance when first detained. It concluded that a law which prohibited a detainee from access to counsel during detention and investigation could seriously impinge upon defence rights. Annual Report of the Inter-American Commission, 1985-1986, OEA/Ser.L/V/II.68, doc. 8 rev. 1, 1986, p. 154, El Salvador.

In order to ensure that the right to defense is meaningful, anyone accused of a criminal offence and their lawyer, if any, must have adequate time and facilities to prepare the defence. Article 14(3)(b) of the ICCPR, Article 8(2)(c) of the American Convention, Article 6(3)(b) of the European Convention, ¶ 2(E)(1) of the African Commission Resolution, Article 21(4)(b) of the Yugoslavia Statute, Article 20(4)(b) of the Rwanda Statute, Article 67(1)(d) of the ICC Statute.

Article 14(3)(b) of the ICCPR provides:

"In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: ...

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;"

Finally, the international community's contemporaneous condemnations of the executions reflect a widespread international consensus that the trials contravened the most basic fair trial guarantees.[17] The international community affirmed that the special tribunal was not a regularly constituted court providing the protections necessary for a fair trial. The General Assembly voted 79 to 15 to support a resolution condemning the "flawed judicial process" used to try Dr. Kiobel and the other members of the Ogoni Nine. General Assembly, A/C.3/52/L.70 (1997). The General Assembly's urged Nigeria to "ensure that all trials are held fairly and promptly and in strict conformity with international human rights standards." *Id.*

The United States also condemned the execution of Dr. Kiobel and the other Ogoni leaders for flagrantly deviating from the expected characteristics of a fair trial. The State Department's *Nigeria Country Report on Human Rights Practices for 1996* explicitly found that the tribunals that imposed death sentences on the

---

[17] The African Commission on Human and People's Rights found that the CDST proceeding violated international norms prohibiting extrajudicial killing which require states to provide trials consistent with internationally-recognized due process standards. The Commission drew an explicit connection between Article 4, protecting individuals from being arbitrarily deprived of their right to life, and Article 7, guaranteeing fair trial rights in its decision concerning the instant trial of the Ogoni Nine: "Given that the trial which ordered the executions itself violates Article 7, any subsequent implementation of sentences renders the resulting deprivation of life arbitrary and in violation" of the right to life. *International Pen and Others (on behalf of Ken Saro-Wiwa, Jr.) v. Nigeria*, African Commission on Human and Peoples' Rights, Comm. Nos. 137/94, 139/94, 154/96 and 161/97 (1998), ¶ 103.

Ogoni Nine "den[ied] defendants due process." U.S. Department of State, *Nigeria Country Report on Human Rights Practices for 1996*, available at http://www.state.gov/www/global/human_rights/1996_hrp_report/nigeria.html. This tribunal failed to provide defendants with the core rights associated with a fair trial because, *inter alia*, it "operate[d] outside the constitutional court system" denied judicial review to the defendants. *Id.*

In addition, the Commonwealth suspended Nigeria and threatened the country with expulsion. Reuters, *Commonwealth Suspends Nigeria Over Executions*, N.Y. Times, November 12, 1995, at Sec. 1 p.18. The International Finance Corporation (IFC), a World Bank agency, withdrew an investment project in the wake of the killings. Reuters, *World condemns hangings*, The Evening Post (Wellington), November 11, 1995, at p.1.

VIII. CONCLUSION

The dictator of Nigeria's repressive Federal Military Government created the CDST to convict and execute the leadership of the Ogoni protests against Shell in order to "restore order in Ogoniland" and entice Shell to resume operations there. No case cited has presented a court with such a flagrant violation of international fair trial standards.

Dr. Kiobel and the other Ogoni Nine defendants were victims of extrajudicial killing, under color of state authority, in violation of *jus cogens* principles of international law recognized by the Supreme Court in *Sosa*. The District Court's order should be reversed and remanded for further proceedings consistent with the established norms of customary international law set forth herein.

Dated: April 3, 2007

414791

Stephen A. Whinston
Carey R. D'Avino (CD2973)
Keino R. Robinson
1622 Locust Street
Philadelphia, PA 19103
Tel: (215) 875-3000
Fax: (215) 875-4604

Attorneys for Plaintiffs-Appellants

No. 06-4800

IN THE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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

Plaintiffs-Appellants-Cross-Appellees,

v.

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

Defendants-Appellees-Cross Appellants,

and

SHELL PETROLEUM DEVELOPMENT COMPANY OF NIGERIA, LTD.,

Defendant.

VIRUS PROTECTION CERTIFICATE

I, Anne Ebbesen, hereby certify that the PDF file of the Opening Brief for Plaintiffs-Appellants has been scanned for viruses and no viruses have been detected.

Dated: April 3, 2007

____

Anne Ebbesen