06-4800,
06-4876

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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

Plaintiffs-Appellants-Cross-Appellees,

----v.----

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

Defendants-Appellees-Cross-Appellants,

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

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS-CROSS-APPELLEES

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INTRODUCTION

Defendants[1] do not seriously contest that Plaintiffs' claims for extra-judicial execution and torture satisfy the Supreme Court's test for actionable international norms under the Alien Tort Statute ("ATS") set forth in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). Indeed, Shell concedes that Plaintiffs' claims of extra-judicial execution meet the *Sosa* test.

Shell contests the actionability of Plaintiffs' arbitrary arrest and detention claims based on *Sosa*; however, Plaintiffs' claims have long been recognized as actionable under the ATS. The same is true of Plaintiffs' crimes against humanity and cruel, inhuman and degrading treatment claims.

Shell's half-hearted efforts to claim that the egregious conduct of which Plaintiffs complain in this case falls outside established international human rights law are abortive. Plaintiffs' claims lie at the heart of the international community's system of human rights protection and clearly constitute violations of the "law of nations" within the meaning of the ATS.

Shell's efforts to distance itself from the human rights violations it facilitated are equally unavailing. In essence, Shell makes a policy argument that

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[1] Defendants and Appellees/Cross Appellants Royal Dutch Petroleum Co. and Shell Transport and Trading Company are referred to collectively as "Shell" or "Defendants" in this brief.

the ATS should not apply to corporations that actively assist in egregious human rights violations because this might be harmful to multinational corporations like Shell that do business with brutal dictatorships. This policy argument is based on a vast exaggeration of the reach of aiding and abetting liability, which does not reach corporations that merely do business in a country. The relevant standard under both federal and international law is knowingly providing practical assistance that has a substantial effect on the perpetration of human rights violations.

In *Sosa*, the Supreme Court suggested that the Administration and others seeking to restrict the scope of the ATS should direct such arguments to Congress.[2] To date, neither the Administration nor the corporate community has done so. The First Congress understood when it passed the ATS that aiding and abetting and conspiracy were part of the common law, and the courts in the modern era have generally been faithful to that understanding. There is no basis for the corporate immunity Shell seeks in this case.

The ATS was passed to enforce the "law of nations." Under the allegations in Plaintiffs' complaint, Shell conspired with and aided and abetted the prior

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[2] *Sosa v. Alvarez-Machain,* 2004 U.S. TRANS LEXIS 29, *8-9 (U.S.TRANS 2004).

Nigerian dictatorship in committing human rights violations that were condemned throughout the world. Now that Shell has conceded that Plaintiffs' extra-judicial execution claims meet the *Sosa* standard, the District Court's ruling allowing Plaintiffs' claims to proceed to trial should be affirmed.

I. SHELL MISAPPREHENDS *SOSA v. ALVAREZ-MACHAIN.*

Shell's highly selective citations to the *Sosa* decision ignore the fact that the *Sosa* Court endorsed the decisions in most ATS cases before 2004, including this Court's decisions in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), and *Kadic v. Karadzic,* 70 F.3d 232 (2d Cir. 1995). *Sosa,* 542 U.S. at 731 & 732 n.20.[3]

To be sure, the *Sosa* decision includes cautionary language but such caution does not preclude the enforcement of fundamental human rights norms prohibiting extra-judicial execution, torture, cruel, inhuman and degrading treatment, prolonged arbitrary detention and crimes against humanity. These norms are clearly actionable under the *Sosa* test.

Sosa does not require courts to find specific support in the law of nations for the exact manner in which such violations are committed. Shell's attempt to

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[3] The fact that the ATS is jurisdictional, Shell Brief ("SB") 12, is of no moment, because the *Sosa* Court found that the ATS authorized the federal courts to employ federal common law to enforce the "law of nations" and that nothing in the last two centuries had displaced this Congressional mandate. *Sosa*, 542 U.S. at 730-31.

transform ATS analysis into an exercise in definitional hair-splitting has no place in the enforcement of such universally accepted norms. Congress passed the ATS to give the federal courts full authority to enforce the law of nations through common law tort remedies and *Sosa* fully endorsed the contemporary application of this historical purpose.

A. The Norms Plaintiffs Seek to Enforce Are Universally Accepted.

In *Sosa*, the Supreme Court held that a claim under the "present-day law of nations" exists for "norm[s] of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized." 542 U.S. at 724. The language in *Sosa* that Shell quotes, SB 14, is the Court's explanation of why it created the historical paradigm test, a test easily satisfied by the norms relied upon by Plaintiffs in this case.

Indeed, Shell does not dispute that extra-judicial execution and torture satisfy this standard. Although Shell challenges whether cruel, inhuman and degrading treatment, crimes against humanity, and prolonged arbitrary arrest and detention satisfy the *Sosa* standard, their arguments are based on a flawed understanding of the sources of customary international law. Evidence of customary norms comes from many different sources, not all of which are directly binding on the United States. *See The Paquete Habana*, 175 U.S. 677, 700 (1900)

("[Courts look] to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators . . . .").

Moreover, contrary to Shell's position, cruel, inhuman and degrading treatment, crimes against humanity, and prolonged arbitrary arrest and detention have core definitions that are well established under international law and that satisfy the *Sosa* standard for norms actionable under the ATS. A plaintiff need only show that a norm has an identifiable core of prohibited behavior, even if there is diversity of definitions at the periphery of the norm. Appellant's Opening Brief 19-20 ("AOB"); Brief of *Wiwa* Plaintiffs as Amici Curiae in Support of Appellants ("*Wiwa Amicus*") at 15-16. While there may be differences at the periphery, there are well-established, core definitions of cruel, inhuman and degrading treatment, crimes against humanity, and prolonged arbitrary arrest and detention that fall squarely within the *Sosa* standard.

Each of the violations at issue in this appeal is actionable under *Sosa*, and Plaintiffs have set forth in their complaint facts sufficient to establish their claims under the ATS.

B. Under *Sosa*, the Cause of Action in ATS Cases is Rooted in the Federal Common Law.

The Supreme Court's *Sosa* decision settled the question of the source of applicable law in ATS cases. The Court ruled that the federal common law provided the cause of action for certain violations of international law. *Sosa*, 542 U.S. at 724.

Although *Sosa* instructs courts in ATS cases to look to international law when determining whether the threshold international norm is specific, universal, and obligatory, the Court made clear that the cause of action, which provides the remedy for violations of certain international norms, is derived from the federal common law. As the Court explained, "[t]he jurisdictional grant is best read as having been enacted on the understanding that *the common law* would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time." *Sosa*, 542 U.S. at 724 (emphasis added). The Court went on to reiterate this point, describing 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 (emphasis added).[4]

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[4] Even prior to the Supreme Court's decision in *Sosa*, courts understood that the federal common law provided the cause of action in ATS cases. *See Abebe-*

Shell's argument, that the "law of nations" itself has to define every aspect of this federal common law cause of action, would undermine the purpose of the ATS. "To require international accord on a right to sue, when in fact the law of nations relegates decisions on such questions to the states themselves, would be to effectively nullify the 'law of nations' portion of section 1350." *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 778 (D.C. Cir. 1984) (Edwards, J. concurring). This is because international law does not define the means of its domestic implementation, but leaves that determination to the domestic laws of the various states. *Id.*[5]

Jira v. Negewo, 72 F.3d 844, 848 (11th Cir. 1996) (ATS "establishes a federal forum where courts may fashion domestic common law remedies to give effect to violations of customary international law"); *Filartiga v. Pena-Irala*, 577 F. Supp. 860, 863 (E.D.N.Y. 1984) (with the ATS, Congress gave courts the power to develop federal remedies to effectuate the purposes of international law as incorporated into federal common law); *Xuncax v. Gramajo*, 886 F. Supp. 162, 180 (D. Mass. 1995) (same); *Doe v. Islamic Salvation Front*, 257 F. Supp. 2d 115, 121 n.12 (D.D.C. 2003) ("tort principles from federal common law may be more useful" than international law in determining secondary liability).

[5] Significantly, the *Sosa* Court cited to Judge Edwards's opinion in *Tel-Oren* and not to Judge Bork's concurring opinion. 542 U.S. at 732. Shell's arguments, that international law must supply all the rules governing ATS litigation, are the same type of arguments made by Judge Bork and which would hamstring the enforcement of international law under the ATS. Judge Edwards, on the other hand, recognized that the common law would supply the rules that would enable federal courts to implement the intent of Congress in enacting the ATS. *See Tel-Oren*, 726 F.2d at 777-778 (Edwards, J., concurring).

The drafters of the ATS expected the common law to supply the rules necessary to litigate claims so long as the plaintiff brought a claim for "tort committed in violation of the law of nations." As the Supreme Court recognized in *Sosa*, the "law of nations" has changed in the last two centuries and international human rights law is now well established. *Sosa*, 542 U.S. at 724-25, 732. *Sosa* affirmed this Court's central insight in *Filartiga* that after Nuremberg and the development of international human rights law, the "law of nations" was directly concerned with the way that all governments treated their own citizens and that individuals should be held responsible for such violations.

Shell's claim that these issues are decided by reference only to international law is based on its mischaracterization of footnote 20 in *Sosa*, SB 11-12, in which the Court stated that a "related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual." *Sosa*, 542 U.S. 733, n.20. The case citations and parentheticals accompanying this sentence make clear that the Court is discussing the distinction between acts that violate international law when committed by private actors (*e.g.* genocide) and those that

do so only when the individual acts under the color of state authority (*e.g.* torture).[6]

Footnote 20 does not, as Shell claims, support their argument that international law determines issues of aiding and abetting and conspiracy liability. Rather, footnote 20 is simply an affirmation of this Court's methodology in *Kadic*,[7] and has nothing to do with whether aiding and abetting liability is available under the ATS.

The "specificity" requirement discussed in *Sosa* concerned only the issue of whether the plaintiff's particular claim was supported adequately by international authorities. In *Sosa*, the plaintiff's claim failed to meet this requirement because the international authorities prohibiting arbitrary arrest and detention did not necessarily prohibit a detention of less than 24 hours without proper local

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[6] *Sosa*, 542 U.S. at 733 n.20 ("Compare *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 744, 774, 791-95 (D.C. Cir. 1984) (Edwards, J., concurring) (insufficient consensus in 1984 that torture by private actors violates international law), with *Kadic v. Karadzic*, 70 F.3d 232, 239-241 (2d Cir. 1995) (sufficient consensus in 1995 that genocide by private actors violates international law)").

[7] While Shell cites *Kadic* as an example of this Court's use of the law of nations to prove given violations, this Court in fact used federal common law rules to define the scope of liability under the ATS in *Kadic*, stating, for example, that "[t]he 'color of law' jurisprudence of 42 U.S.C. § 1983 is a relevant guide to whether a defendant has engaged in official action for purposes of jurisdiction under the [ATS]." *Kadic,* 70 F.3d at 245.

authority. 542 U.S. at 738. The Court was concerned about the practical consequences of finding that any short detention not supported by proper authority was a violation of the law of nations. However, the Court in no way rejected the existence of the well-established norm prohibiting prolonged arbitrary detention. *See, infra* § V.

The "specificity" requirement has nothing to do with the liability of private parties under international law, *see Kadic,* 70 F.3d at 239-45, or the availability of aiding and abetting liability under the ATS. In fact, the *Sosa* Court simply did not discuss aiding and abetting liability at all.

The ATS requires a tort committed in violation of the law of nations and *Sosa* directs that federal common law principles determine the other issues, including available theories of liability and defenses, required to implement the Congressional purpose behind the ATS. A court can, of course, look to international law principles as part of its federal common law analysis, but ultimately, the question is one of the federal common law. In any event, even if international law governs aiding and abetting or conspiracy, customary international law provides for such liability for fundamental human rights violations.

C. Shell Misstates The Customary Law of Piracy.

Shell's misstatement of the law of piracy is instructive. SB 18-19. Contrary to Shell's claim, the law of nations applied not to "the pirate only," but also to those who aided and abetted piracy. *See* William Blackstone, Commentaries on the Laws of England, Book IV, Chap. 5 (1769). Blackstone recognized that those who aided and abetted pirates were themselves liable as pirates. *Id.* In *Sosa*, the Court repeatedly relied on Blackstone as the authoritative statement of international law at the time the ATS was enacted. *Sosa*, 542 U.S. at 718 n.12, 722, 723, and 737.

Shell's claim, that aiding and abetting piracy could not have been barred by common law because it was barred by statute, SB 18-19, flies in the face of the *Sosa* Court's reasoning:

> The notion that it would have been absurd for the Continental Congress to recommend that States pass positive law to duplicate remedies already available at common law rests on a *misunderstanding of the relationship between common law and positive law in the late 18th century*, when positive law was frequently relied upon to reinforce and give standard expression to the "brooding omnipresence" of the common law then thought discoverable by reason. As Blackstone clarified the relation between positive law and the law of nations, "those acts of parliament, which have from time to time been made to enforce this universal law, or to facilitate the execution of [its] decisions, are not to be considered as introductive of any new rule, but merely as declaratory of the old

> fundamental constitutions of the kingdom; without which it must cease to be a part of the civilized world." 4 Commentaries 67.

Sosa, 542 U.S. at 722 (emphasis added) (footnote omitted).

Moreover, the act of piracy itself, which the *Sosa* Court recognized as one of the paradigmatic ATS violations, was barred by statute. Shell conveniently omits much of language of relevant passage from Blackstone, which makes clear that the statute criminalized piracy itself, not merely accessory to piracy:

> As, by statute 11 & 12 W.III. *c.7 if any natural born subject commits any act of hostility upon the high seas, against others of his majesty's subjects, under colour of a commission from any foreign power; this, though it would only be an act of war in an alien, shall be construed piracy in a subject. And farther, any commander, or other seafaring person, betraying his trust, and running away with* any ship, boat, ordinance, ammunition or goods; or yielding them up voluntarily to a pirate; or conspiring to do these acts . . . shall, for each of these offenses, be adjudged a pirate, felon, and robber, and shall suffer death, whether he be principal or accessory.

4 Blackstone, Ch. 5, at 72 (emphasis added). If Shell is correct, then piracy itself would not have been actionable under the ATS because it was also proscribed by statute. This simply cannot be squared with *Sosa*. 542 U.S. at 694.

II. THIS COURT SHOULD FIND PLAINTIFFS' EXTRA-JUDICIAL EXECUTION CLAIMS TO BE ACTIONABLE.

A. Extra-Judicial Execution Is Actionable Under the ATS.

The District Court found that the law of nations prohibits extra-judicial executions; however, it dismissed Plaintiffs' extra-judicial execution claim because Plaintiffs had not "directed the Court to any international authority establishing the elements of extra-judicial killing." J.A. 0015. The District Court stated that it was, thus, "unpersuaded that there is a well-defined customary international law that prohibits the conduct Plaintiffs allege to be extra-judicial killing." *Id.*

Plaintiffs, in their Opening Brief, have set forth the elements of an extra-judicial killing claim and the various ways in which Dr. Kiobel's execution violated the customary international norm prohibiting extra-judicial executions. *See* AOB 19-36, 50-54. Plaintiffs have alleged that the Special Tribunal responsible for Dr. Kiobel's execution was not, in actuality, a judicial court operating within the framework of Nigerian law. Rather, the Special Tribunal was a political body established by a military dictatorship in order to kill its political opponents. AOB 6-9. This is, in effect, no different than a government lining up its opponents and shooting them. Plaintiffs' AOB establishes that under

international law, executions ordered by "courts" such as these violate the specific, universal, and obligatory norm prohibiting extra-judicial executions.[8] In light of these irrefutable authorities, Shell does not defend the District Court's ruling in this Court. SB 21-22.

B. Shell Is Liable to Plaintiffs Under Aiding and Abetting and Conspiracy Theories of Liability.

Shell tries to re-frame the issue by arguing that "the question here is whether the alleged bribery of witnesses or hosting of a reception by someone who is not the killer (or torturer) rises to the level of a violation of the law of nations." SB 22. This, of course, is not the issue decided in Shell's favor below. The issue in this case is whether Shell provided practical assistance to the direct perpetrators of this crime which had a substantial effect on the perpetration of this crime. The District Court found that Plaintiffs' allegations were sufficient to establish aiding and abetting liability and its decision should be affirmed here.

Shell's main argument is that it may not be found liable unless the law of nations prohibits the specific acts of aiding and abetting Shell committed in connection with the deaths of Plaintiffs' family members. SB 21, 22, 28. This argument is not unlike an argument that a defendant cannot be found liable for

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[8] *See also* Brief of *Amici Curiae* International Law Professors in Support of Plaintiffs-Appellants.

torture if the defendant has devised an unusually effective but novel way to destroy the body or mind of his victim. Nothing in *Sosa* or any other case requires this Court to accept such a ludicrous principle. The issue is whether Plaintiffs have alleged sufficient facts to attribute liability to these defendants on either an aiding and abetting or a conspiracy theory of liability.

Plaintiffs' claims are not based merely on Shell "doing business" with a brutal regime. SB 22. Plaintiffs allege that Shell engaged in specific acts of assistance that contributed substantially to the human rights violations they suffered. J.A. 0132-0142, ¶¶ 44-80. These allegations are more than sufficient in this procedural posture.

1. Aiding and Abetting is Well Established in Federal Common Law and International Law.

The District Court was correct in finding, along with virtually every court to consider this issue, that aiding and abetting liability is available under the ATS. Under international and federal common law, aiding and abetting liability arises when a defendant provides knowing, practical assistance that has a substantial effect on the perpetration of the human rights violation. Both before and after *Sosa,* courts have overwhelmingly found aiding and abetting liability to be actionable under the ATS. *See, e.g., Cabello v. Ferandez-Larios,* 402 F.3d 1148,

1157 (11th Cir. 2005) ("[T]he ATCA and the TVPA are not limited to claims of direct liability. The courts that have addressed the issue have held that the ATCA reaches conspiracies and accomplice liability.").[9] Only three district court decisions have found that the ATS does not provide aiding and abetting liability.[10]

As the Ninth Circuit recently recognized, aiding and abetting liability has been part of the ATS from its inception. *Sarei v. Rio Tinto, PLC,* ___F.3d ___,

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[9] *Accord Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1248 (11th Cir. 2005) (ATS reaches conspiracies and accomplice liability for torture); *Hilao v. Estate of Marcos,* 103 F.3d 767, 776-77 (9th Cir. 1996) (affirming jury instruction allowing former Phillipine leader to be held liable upon finding that he "directed, ordered, conspired with, or aided and abetted the military in torture, summary execution, and 'disappearance'"); *Mehinovic v. Vuckovic,* 198 F. Supp. 2d 1322, 1355-56 (N.D. Ga. 2002) (liability for aiding and abetting torture and other rights violations); *Presbyterian Church of Sudan v. Talisman Energy Inc.*, 244 F. Supp. 2d 289, 321-24 (S.D.N.Y. 2003); *Doe v. Saravia,* 348 F. Supp. 2d 1112, 1148-49 (E.D. Cal. 2004); *In re Agent Orange Product Liability Litigation,* 373 F. Supp. 2d 7, 52-56 (E.D.N.Y.); *In re Terrorist Attacks on September 11, 2001,* 349 F. Supp. 2d 765, 826 (S.D.N.Y. 2005); *Carmichael v. United Tech. Corp.,* 835 F.2d 109, 113-14 (5th Cir. 1988); *Bowoto v. Chevron Texaco Corp.,* 312 F. Supp. 1229, 1247 (N.D. Cal. 2004); *Bodner v. Banque Paribas,* 114 F. Supp. 2d 117, 128 (E.D.N.Y. 2000); *Burnett v. al Baraka Inv. & Dev. Corp.,* 274 F. Supp. 2d 86, 100 (D.D.C. 2003).

[10] *See Doe v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20, 24 (D.D.C. 2005) and *Corrie v. Caterpillar Inc.*, 403 F. Supp. 2d 1019, 1027 (W.D. Wash. 2005), *appeal pending*, No. 36210 (9th Cir.), both of which merely follow the reasoning of *In re South Africa Apartheid Litigation*, 346 F. Supp. 2d 538, 549 (S.D.N.Y. 2004). The *Apartheid* decision was argued before this Court on January 24, 2006. It has not even been followed by other district judges in the Second Circuit. *See Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 374 F. Supp. 2d 331, 340-41 (S.D.N.Y. 2005).

2007 U.S. App. LEXIS 8430 at *18-19 (9th Cir. 2007) (citing *Breach of Neutrality*, 1 Op. Att'y Gen. 57, 59 (1795)). The influential 1795 opinion issued by Attorney General Bradford, relied on by the *Sosa* Court, 542 U.S. at 721, specifically states that individuals would be liable under the ATS for "committing, aiding, or abetting" violations of the laws of war. *Breach of Neutrality*, 1 Op. Att'y Gen. 57, 59 (1795). Significantly, this incident involved private actors, acting in concert with but certainly not controlling French naval vessels. *See id.* In short, the interpretation of the ATS and the Bradford Opinion accepted by the Supreme Court includes the venerable concept that those who aid and abet violations of international law are responsible for those violations. Nothing since 1789 has altered this concept.

Because the ATS is a civil tort statute providing a remedy in tort, the appropriate standard for aiding and abetting is the federal common law standard reflected in the Restatement (Second) of Torts § 876 (b),[11] which provides for aider and abettor liability where the defendant (a) "does a tortious act in concert with another," or (b) knows that the other's conduct constitutes a breach of duty

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[11] *See Project Hope v. M/ V IBN SINA*, 250 F.3d 67, 76 (2d Cir. 2001) (citing the Restatement (Second) of Torts as a source of federal common law). *Halberstam v. Welch*, 705 F.2d 472, 477-78 & n.6 (D.C. Cir. 1983) (affirming that aiding abetting and conspiracy are well within Restatement § 876).

and gives substantial assistance or encouragement"[12] In *Boim v. Quranic Literacy Institute*, 291 F.3d 1000 (7th Cir. 2000), the United States filed an *amicus* brief stating that the standard in Restatement § 876 (b) is the appropriate federal common law standard.[13] Shell does not even mention, much less attempt to refute, these authorities.

This standard is virtually identical to the standard found in international criminal law, as articulated by the International Criminal Tribunal for the Former Yugoslavia ("ICTY") in *Prosecutor v. Furundzija*, No. IT-95-17/1-T, ¶¶ 192-234 (Trial Chamber, Dec. 10, 1998), relying on a comprehensive analysis of international case law and international instruments.[14] Aiding and abetting under this standard requires as the *actus reus* "practical assistance, encouragement, or

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[12] The ATS is a civil, not a criminal, statute. It provides a civil remedy for violations of international law that involve criminal acts, just as a wrongful death statute provides a civil remedy for violations of state law that involve criminal acts. Indeed, Blackstone's three paradigmatic international law violations were also considered criminal, but the ATS was established to provide a civil cause of action for these crimes under the federal common law.

[13] Brief for the United States as *Amicus Curiae*, 2001 WL 34108081 at *10-*11.

[14] *Mehinovic*, 198 F. Supp. 2d at 1355-56 (finding that aiding and abetting liability is available under the ATS, relying on the Rome Statute; Nuremberg Tribunal Charter, art. 6; ICTY Statute, art. 7(1); ICTR Statute, art. 6(1) and TVPA).

moral support which has a substantial effect on the perpetration of the crime," *id.* at ¶ 235, and as the *mens rea* "knowledge that [the accomplice's] actions will assist the perpetrator in the commission of the crime." *Id.* at ¶ 245.

Indeed, courts both before and after *Sosa* have recognized this standard for aiding and abetting liability. *Mehinovic*, 198 F. Supp. 2d at 1356 (relying on *Furundzija*, No. IT-95-17/1-T at ¶¶ 192-249 in support of its definition of aiding and abetting as knowing, practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime); *accord Cabello*, 402 F.3d at 1158-59; *Presbyterian Church*, 244 F. Supp. 2d at 323-24; *In re Agent Orange*, 373 F. Supp. 2d at 54.

Shell makes no effort to respond to these established international authorities. Shell argues that the decisions from international criminal tribunals are not primary sources of international law. However, because the ICTY is "only empowered to apply" standards that are "beyond any doubt customary law," its judgments should be accorded substantial weight in determining the content of customary international law. *Prosecutor v. Tadic*, Case No. IT-94-1-T, ¶¶ 661-662 (Trial Chamber, May 7, 1997). Indeed, both U.S. courts and the International

Court of Justice regularly rely upon the statute and jurisprudence of the ICTY as evidence of international law.[15]

Shell's argument is based on a misunderstanding of customary international law itself. Evidence of customary norms comes from many different sources. *See The Paquete Habana*, 175 U.S. at 700 ("[Courts look] to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators[.]"). *Flores v. Southern Peru Copper Corp.*, 414 F.3d 239, 242-3 (2d Cir. 2003), did not overrule the methodology this Court established in *Filartiga* and *Kadic* (both of which considered non-binding sources in their analysis of customary international law) for ascertaining international law norms. *Sosa* itself reaffirmed this traditional approach to the analysis of customary international law. 542 U.S. at 734 (quoting *The Paquete Habana*, 175 U.S. at 700).

Shell is also wrong that the international criminal tribunals are inconsistent in their treatment of aiding and abetting liability. SB 25. The fact that the statutes of the tribunals have slight variations in language does not detract from the core definition of aiding and abetting liability that has been consistently recognized by

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[15] *See, e.g.*, *Presbyterian Church*, 244 F. Supp. 2d at 323-24; *Mehinovic*, 198 F. Supp. 2d at 1355-56; *Hilao,* 103 F.3d at 777; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.)* ¶¶ 403, 413 (I.C.J. Feb. 26, 2007).

ICTY and International Criminal Tribunal for Rwanda decisions. *Prosecutor v. Vasiljevic*, No. IT-98-32-A, ¶ 102 (Appeals Chamber, February 25, 2004); *Prosecutor v. Musema*, No. ICTR-96-13-A, ¶ 126, 179-182 (Trial Chamber, January 27, 2007).

Nor does the Rome Statute of the International Criminal Court assist Shell. The Rome Statute's "for the purpose of facilitating the commission of a crime" language is entirely consistent with the customary international law definition of aiding and abetting, under which the *mens rea* element is satisfied by knowledge that "the acts performed by the aider and abettor assist the commission of a specific crime of the principal." *Prosecutor v. Vasiljevic*, IT-98-32-A ¶ 102. "For the purpose of facilitating the commission of the crime" means only that the perpetrator be "aware that the consequence will occur in the ordinary course of events." Gerhard Werle, Principles of International Criminal Law, ¶¶ 306-307, 330. Moreover, nothing in that treaty is intended to alter customary international law, Rome Statute, Art. 22(3), and the ATS enforces customary international law, not the Rome Statute.

Since Nuremberg, defendants have been found liable when they gave substantial assistance with the knowledge that such assistance would facilitate the commission of the crimes. For instance, in *Flick*, the Nuremberg Tribunal found

Flick guilty based on his knowledge and approval of his employee's decision to increase the company's production quota knowing this would require forced labor. *U.S. v. Flick*, 6 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10. The Tribunal held Flick fully responsible although the slave labor program had its origin in the Nazi regime, and he did not "exert[] any influence or [take] any part in the formation, administration or furtherance of the slave-labor program." *Id.* at 1198. His role within the company was limited to general oversight. *See id.* at 814-17. Indeed, Flick testified that it was not his intent to use slave labor, and he denied that he had full knowledge that slave labor was being used until very late in the war. *Id.* at 806. Similarly, Flick's co-defendant, Steinbrinck was convicted "under settled legal principles" for "knowingly" contributing money to an organization committing widespread abuses, even though it was "unthinkable" he would "willingly be a party" to atrocities. *Id.* at 1217, 1222.

Similarly, in *Krauch*, the Tribunal found Krauch guilty although, as in *Flick*, he did not create the slave labor program or control the allotment process. Krauch simply made an affirmative decision to conduct business knowing that it would result in the use of forced labor. For this, the Tribunal found him guilty, stating, "Krauch was neither a moving party or an important participant in the

initial enslavement of workers . . . [but] in view of what he clearly must have known about the procurement of forced labor and the part he voluntarily played in its distribution and allocation, his activities . . . impel us to hold that he was a willing participant in the crime of enslavement." *United States v. Krauch*, 8 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council No. 10, at 1189.

Finally, Shell's reliance on *Central Bank of Denver N.A. v. First Interstate Bank of Denver, N.A.,* 511 U.S. 164 (1994), is misplaced. SB 24. *Central Bank* addressed whether aiding and abetting liability was available under federal securities law and held that this was a matter of legislative intent. There was no evidence of that intent in the securities statute at issue in *Central Bank. Id.* at 177-78. By contrast, as the *Sosa* Court found, the drafters of the ATS expected common law rules to apply to ATS litigation, 542 U.S. at 713, and aiding and abetting liability was a feature of the common law at that time, *see Sarei,* 2007 U.S. App. LEXIS 8430 at *18-19, and it has remained so since.[16]

Accordingly, a defendant can be held liable for aiding and abetting a violation of international law if that defendant knowingly provides practical

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[16]*See also Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1172 (C.D. Cal. 2005).

assistance that has a substantial effect on the perpetration of the crime. This is true under either federal common law or international law.

Shell argues that international law must prohibit the particular acts it undertook to aid and abet the extra-judicial executions at issue in this case. SB 20-21. Were Shell's argument correct, a defendant could never be liable for aiding and abetting violations of international law–even if it sold Zyklon B to the Nazis with the knowledge that it would be used to exterminate Jews or provided machetes to the Interhamwe during the Rwandan genocide with the knowledge that these would be used to massacre Tutsis–because no specific international norm prohibits the provision of Zyklon B or machetes to mass murderers. This is a caricature of aiding and abetting liability.

"[I]t is not necessary for nations to identify with specificity every factual scenario that violates a particular prohibition under international law." *Flores*, 253 F. Supp. 2d 510, 525 (S.D.N.Y. 2002), *aff'd* 414 F.3d 233 (2d Cir. 2003). Neither international law nor any other body of law ever regulates conduct with the level of specificity Shell would require. The facts of every case are different, and law does not anticipate and specify every conceivable way in which a rule can be violated. Instead, international law, like other law, sets out standards that courts must use to evaluate specific conduct. It is an issue for the jury whether

Shell's actions, as alleged by Plaintiffs, meet the well-established standard for aiding and abetting liability in federal common law.

Plaintiffs have alleged that Shell security personnel called in government troops to fire on crowds and handed over Plaintiffs to Nigerian authorities for the purpose of arbitrarily detaining them. J.A. 0128, ¶ 14. SPDC also called in the Mobile Police Force, popularly known as the "Kill and Go Mob," for committing massacres and other violations, to provide security for its camps; two days later the forces carried out scorched earth operations, massacring 80 villagers and destroying hundreds of homes. *Id.* at ¶ 41. Knowing of these violations, Shell and SPDC continued to use Nigerian military and police forces for security. *Id.* at ¶ 42. Shell and SPDC directed their contractor to begin construction of a pipeline which they knew or should have known would involve destruction of civilian property under the supervision of government forces. SPDC requested the "usual assistance to allow further work on the pipeline," which was followed by attacks on villagers, including a massacre of 750 civilians, during which Plaintiff Ikari was shot in the face. *Id.* at ¶¶ 45-48.

Moreover, Shell and SPDC provided logistical and financial support for the operations of the Rivers State Internal Security Task Force ("ISTF"), including transportation, food and ammunition, despite its engagement in repeated acts of

murder, torture, rape, cruel, inhuman and degrading treatment, crimes against humanity, and property destruction. *Id.* at ¶ 54. Shell and SPDC's financial support included cash to support ISTF operations and bribes to its commander. *Id.* SPDC, with the approval of Shell, also requested that the Nigerian Police Inspector General increase security by 1200 men to quell community disturbance, and Shell promised to provide logistical and financial support for this increased force, including salaries, housing, uniforms, weapons, riot gear, and vehicles. *Id.* at ¶ 51.

Shell and SPDC also imported arms for and made payments to Nigerian military, police, and security personnel whose sole function was to facilitate Shell and SPDC operations in the Niger Delta; they exchanged intelligence with these forces, provided transport, and participated in regular meetings, planning, and coordination of security operations, including raids and terror campaigns, with the Nigerian forces. *Id.* at ¶¶ 47-57, 80.

This support constituted practical assistance which not only had a substantial effect on the perpetration of the violations, but provided the motivation for the violations in the first place. Many of these operations would not have been carried out but for Shell and SPDC's desire to explore and extract oil without community opposition, and they certainly would not have been financially or

logistically feasible without Shell and SPDC's consistent backing and support.

Plaintiffs have alleged that Shell knew or should have known[17] that Dr. Kiobel was being tried by a kangaroo court that lacked procedural protections, and was rife with false testimony, corruption, and bribery. J.A. 0139 at ¶ 70. Despite this knowledge, Shell provided substantial assistance and encouragement by, *inter alia*, bribing witnesses, preparing witnesses to give false testimony, and sending representatives to a reception for witnesses and to the trial. *Id* .

In the end, Shell attempts to minimize its participation in these violations by casting its actions as merely "doing business" with the Nigerian government. "Doing business" does not require corporate complicity in gross human rights violations. Plaintiffs do not seek to hold Shell liable for having done business with an indisputably brutal regime. Rather, Plaintiffs seek to hold Shell liable for specific, concrete acts of substantially assisting that regime in committing

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[17] Constructive knowledge is the appropriate standard here. *See Mehinovic*, 198 F. Supp. 2d at 1354 n.50 ("International law provides that an actor is responsible if he knew or should have known that his conduct would contribute to a widespread or systematic attack against civilians.") (citing *Prosecutor v. Kayeshima*, No. ICTR-95-1-T, ¶ 133 (Trial Chamber, May 21, 1999) (noting that defendant must have "actual or constructive knowledge" of a widespread or systematic attack) and *Prosecutor v. Kordic*, No. IT-95-14/2, ¶ 185 (Trial Chamber, Feb. 26, 2001) (same)).

universally recognized human rights abuses against these particular Plaintiffs.[18]

Finally, that the Nuremberg Tribunal acquitted Karl Rasche of war crimes and crimes against humanity for making loans to the German government is irrelevant. SB 25-26. Shell is not being sued for simply doing business or making loans to the Nigerian government, but for specific, concrete, substantial acts of assisting the Nigerian government to commit well-established violations of international law.

2. Conspiracy Liability for Human Rights Violations is Well Established in Federal Common Law and International Law.

Shell offers no argument, nor does it provide any authority, refuting the existence of conspiracy liability in international law or federal common law. Thus, Shell has essentially waived any claim that conspiracy liability is not applicable here. Every federal court to address the issue has found that liability for ATS claims extends to conspiracies. *See, e.g., Cabello*, 402 F.3d 1148 (recognizing conspiracy liability for a number of international law violations,

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[18] Additionally, Shell's argument that it is the province of the Executive Branch to forbid companies from dealing with brutal governments does not apply to this case. SB 23 n.8. Plaintiffs do not aruge that Shell cannot do business in Nigeria. The ATS does not prohibit corporations from conducting business with brutal governments, but rather imposes liability for assisting brutal governments to conduct serious human rights violations of the kind Plaintiffs suffered here.

including torture, extra-judicial killing, cruel and unusual punishment, and crimes against humanity); *In re Terrorist Attacks on September 11, 2001*, 392 F. Supp. 2d at 565 (conspiracy claim for aircraft hijacking); *Hilao*, 103 F.3d at 776 (affirming jury instructions permitting conspiracy liability for torture, summary execution, and disappearance); *Eastman Kodak Co. v. Kavlin*, 978 F. Supp. 1078, 1090-92 (S.D. Fla. 1997) (recognizing conspiracy liability for unlawful arbitrary detention).

To sustain a claim for conspiracy, Plaintiffs must prove that "(1) two or more persons agreed to commit a wrongful act, (2) [the defendant] joined the conspiracy knowing of at least one of the goals of the conspiracy and intending to help accomplish it, and (3) one or more of the violations was committed by someone who was a member of the conspiracy and acted in furtherance of the conspiracy." *Cabello v. Fernandez-Larios*, 402 F.3d at 1159 (citing *Halberstam*, 705 F.2d at 481, 487, a case involving a civil conspiracy claim)). Plaintiffs have done so here. *See* J.A. 0128,¶¶ 1-4, 26, 27, 37-80.

International law also provides for conspiracy liability. Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal, art. 6, 82 U.N.T.S. 279 ("leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the

foregoing crimes are responsible for all acts performed by any persons in execution of such a plan"); *see also Prosecutor v. Tadic*, No IT-94-1-A, ¶¶ 204, 205-19 (Appeals Chamber, July 15, 1999).

Thus, whether this court looks to federal common law or to international law, it is clear that individuals who conspire to commit human rights violations are liable under the ATS.

C. Plaintiffs Have Adequately Pleaded the State Action Requirement.

Shell argues that Plaintiffs have failed to establish that Shell is a state actor, and claim that, therefore, it cannot be found liable for extra-judicial killing, torture, or cruel, inhuman and degrading treatment, because these violations require state action. SB 41.[19] This argument fails for several reasons. First, Plaintiffs are not required to prove that Shell itself was a state actor; the issue is whether state action is present in the violation. *Kadic*, 70 F.3d at 245. Plaintiffs' complaint makes clear that the Nigerian government was the direct perpetrator of Plaintiffs' violations, thereby satisfying the requirement that the underlying abuse be committed by a state actor. J.A. 0145-0149, ¶ 94, 98, 102, 107, 112, and 116.

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[19]Shell also mischaracterizes the International Law Professors' Amicus Brief, SB 27 n.10. Amici argue that the international norm prohibiting extra-judicial killing meets the *Sosa* standard, and nowhere suggest that private parties cannot be held liable for violating this norm.

See Aldana, 416 F.3d at 1249-50 (allegation that Mayor participated in events was sufficient to allege state action in ATS torture claim against corporation and noting that claim for state-sponsored torture under the ATS may be based on indirect liability as well as direct liability). Plaintiffs' claims against Shell are for aiding and abetting and conspiring with the Nigerian government to commit these crimes. Shell cites to no principle of domestic or international law that would require aiders and abettors to act "under color of law," once it is established that a violation of international law has been committed by a state actor.

Second, even if that were not the case, Plaintiffs have set forth a claim for crimes against humanity based on the pattern of violations described in this complaint. *See infra* § III. Shell does not contest that crimes against humanity are prohibited when committed by private individuals. Because the discrete violations alleged in this complaint were undertaken in furtherance of the Nigerian government's sustained campaign of crimes against humanity, Plaintiffs are not required to prove state action for their claims of extra-judicial execution, torture, and cruel, inhuman and degrading treatment. *See Kadic*, 70 F.3d at 244 (finding that private individuals can be held liable for violations normally requiring state action when they are committed in pursuit of crimes such as genocide, war crimes, and crimes against humanity, which do not require state action); *accord*

Presbyterian Church of Sudan, 244 F. Supp. 2d at 296, 328.[20]

Third, even if this Court finds that Plaintiffs' violations were not undertaken in furtherance of widespread or systematic attacks against a civilian population, Plaintiffs' have still sufficiently alleged that Shell's acts qualify as state action under this Court's decision in *Kadic*. This court concluded in *Kadic* that state-action violations such as summary execution are violations of international law when committed by individuals acting "under color of law" as well as by formal state actors. 70 F.3d at 243-45.

Furthermore, *Kadic* advised that "[t]he 'color of law' jurisprudence of 42 U.S.C. § 1983 is a relevant guide to whether a defendant has engaged in official action for purposes of jurisdiction under the Alien Tort Act." *Id.* at 244; *see also Estate of Rodriquez v. Drummond Co. Inc.*, 256 F. Supp. 2d 1250, 1264 (N.D. Ala. 2003). Both *Kadic* and the relevant § 1983 jurisprudence confirm that the requirement is not that the defendant be a state *actor*, but that private actors may be responsible for customary international law violations provided there is

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[20] Despite Shell's misleading quotation, SB 27-28, *Flores* also endorsed the established principle that action under color of law is established when a private actor acts jointly or with significant aid from a state actor. 414 F.3d at 244 (citing color-of-law analysis in *Kadic*, 70 F.3d at 245. Plaintiffs have set forth the many ways in which Shell has acted jointly with state actors. *See* § II(C). Nothing in *Flores* overrules *Kadic's* state action analysis.

sufficient of state *action* involved.

Section 1983 jurisprudence provides that the state action requirement is met when the private actor is a willful participant in a joint action with the state or its agents to deprive another of his or her rights. The *Kadic* court found that the defendant had "acted under color of law insofar as . . . he acted in concert with the former Yugoslavia. . . . A private individual acts under color of law within the meaning of section 1983 when he acts together with state officials or with significant state aid."). *Kadic*, 70 F.3d at 245.

The act of aiding and abetting or conspiring with a state actor is sufficient joint action under the § 1983 tests so as to put the aider and abettor's actions under color of law. *See, e.g., Kadic*, 70 F.3d at 245 (finding that appellants "sufficiently alleged that [defendant] acted under color of law insofar as they claimed that he acted in concert with the former Yugoslavia . . ."); *Spear v. Town of West Hartford*, 954 F.2d 63, 68 (2d Cir. 1992); Restatement (Second) of Torts § 876 ("Persons Acting in Concert"). *See also Dennis v. Sparks*, 449 U.S. 24, 27-28 (1980) (finding that a private actor who conspired to bribe a judge was acting under color of law); *Fries v. Barnes*, 618 F.2d 988, 991 (2d Cir. 1980) (holding that allegations that private individuals conspired with and aided and abetted police were sufficient to meet § 1983's color of law requirement and avoid

dismissal).

Plaintiffs' allegations of aiding and abetting establish a sufficient nexus with the state to afford liability under international law and domestic law. Although the TVPA included the term "color of foreign law," the Senate noted that it covered "lawsuits against persons who ordered, abetted, or assisted in the torture." S. Rep. No. 102-249, at 8 (1991). Indeed, the Senate specifically recognized that "[u]nder international law, responsibility for torture, summary execution or disappearances extends beyond the person or persons who actually committed those acts." *Id.* at 9 and n.16. Congress specifically quoted Article 4(1) of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which prohibits "*an act by any person which constitutes complicity or participation in torture.*" *Id.* (italics in original). Given that torture requires state action, recognition of aiding and abetting liability in the TVPA demonstrates that such liability extends to private parties who aid and abet government torts even if the tort requires state action.

A number of ATS cases have relied on § 1983 jurisprudence to determine that private parties, including companies, were acting under color of law. *See, e.g., Presbyterian Church,* 244 F. Supp. 2d at 328 (state action where the defendant company, knowing of the Sudanese government's unlawful acts, paid

for protection, purchased military equipment, assisted in strategic planning, and allowed military use of its facilities); *Rodriquez*, 256 F. Supp. 2d 1250, 1261 (state action where paramilitaries were acting on behalf of a defendant mining company); *Mujica*, 381 F. Supp. 2d at 1175 (state action where military was acting in furtherance of private interests of oil company in carrying out the bombing of a village).

The state action requirement is met in this case, as Shell and SPDC are alleged to be acting under color of law by jointly participating with state actors[21] in facilitating the execution of Dr. Kiobel and the rest of the Ogoni Nine by bribing witnesses to make false statements, participating in witness preparation sessions where witnesses were told what to say, and otherwise cooperating with the Special Tribunal. J.A. 0128, ¶¶ 3, 65-70. SPDC also specifically requested the assistance of mobile state police forces for security protection, which were known to commit massacres and other human rights violations; provided food, payments, and logistical support to the Nigerian military; imported arms for the military and police whose main function was to facilitate Shell operations in Nigeria; exchanged intelligence with said military and police; and participated in the

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[21] Shell confirms that "Major Okuntimo and the Special Tribunal are state actors." SB 27.

planning and coordination of security operations by local security forces. J.A. 0128, ¶¶ 37-80. These actions were taken in conjunction with torture, arbitrary arrest and detention, and cruel, inhuman, and degrading treatment to constitute a multi-pronged terror and intimidation campaign against civilians in order to protect Shell property and SPDC's business security in extracting oil in the region. Shell and SPDC willfully conspired with the government and Nigerian military to enact this campaign and facilitated it, including the extra-judicial execution of Dr. Kiobel.

Plaintiffs further allege that Shell was acting "under color of law" to commit torture and cruel, inhuman and degrading treatment when they bribed and cajoled witnesses to provide false testimony during the extra-judicial process. J.A. 0139-0140, ¶¶ 70. 76. Plaintiffs also allege that these actions were taken jointly with state actors as part of the overall extra-judicial execution process. J.A. 0144, ¶¶ 88-91. Thus, Plaintiffs have sufficiently stated claims of extra-judicial execution for which Shell can be held liable as a private actor acting under color of law. Additionally, Plaintiffs allege that Shell was acting under color of law when they detained individuals, handed these individuals over to the Nigerian officials, and otherwise acted jointly with state actors to select individuals who would be tortured or otherwise detained in violation of CIDT. J.A. 0119-0127, ¶¶ 6-17, and

J.A. 0140, ¶ 76.

D. The Torture Victim Protection Act Does Not Preclude Plaintiffs' Claims Under the ATS.

Plaintiffs' ATS claims are in no way restricted by the TVPA. The law in this Circuit could not be more clear: "The scope of Alien Tort Act remains undiminished by enactment of the Torture Victim Act." *Kadic*, 70 F.3d at 241.[22] Shell's heroic attempts to avoid this holding are fruitless.

With the exception of two outlier cases,[23] no court since the enactment of the TVPA in 1991 has ever adopted the argument Shell makes here: that the TVPA occupies the field with respect to claims for extra-judicial killing, torture, and cruel, inhuman and degrading treatment, and precludes Plaintiffs from bringing

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[22] *See also Flores v. S. Peru Copper Corp.*, 343 F.3d 140, 153 (2d Cir. 2003) (recognizing that "the TVPA reaches conduct that may also be covered by the ATCA"); *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 168-69 (5th Cir. 1999) (considering separately claims under the ATCA and TVPA that are "essentially predicated on the same claims of individual human rights violations"); *Abebe-Jira*, 72 F.3d at 848 (citing the TVPA as confirmation that the ATCA itself confers a private right of action); *Hilao*, 103 F.3d at 778 (noting that the TVPA codifies the cause of action recognized to exist in the ATCA).

[23] *Corrie v. Caterpillar Inc.*, 403 F. Supp. 2d 1019 (W.D. Wash. 2005) relies on the reasoning of *Enahoro v. Abubakar*, 408 F.3d 877 (7th Cir. 2005), and is currently on appeal.

these claims under the ATS.[24] If the TVPA was designed to preempt ATS claims in this area, it would have done so from 1991 on.

Enahoro v. Abubakar, 408 F.3d 877 (7th Cir. 2005), the first decision to find that the TVPA pre-empted the ATS with respect to extra-judicial killings and torture, based its decision on faulty reasoning surmising that the TVPA would be "meaningless" if it did not preempt the' ATS, when in fact the TVPA had the very explicit purpose of extending the ATS to permit U.S. citizens to bring certain ATS claims in federal court.[25] While the ATS provides jurisdiction over torts brought

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[24] Plaintiffs have not alleged claims arising under the TVPA. Therefore, Shell's argument that the TVPA does not apply to corporations is not properly before this Court. Moreover, there is nothing in the structure or history of the TVPA that suggests that Congress intended to exclude corporations from liability for torture or extra-judicial killings under the statute. *See* 137 Cong. Rec. S1369-01, 1991 WL 9635, at *1379. Congress intended the TVPA and its terms to be read in the broadest, rather than more restrictive sense, to allow for the vindication of a broad range of human rights violations committed by a broad range of potential wrongdoers. Indeed, courts have found that corporations can be held liable under the TVPA. *See Sinaltrainal v. Coca-Cola Co.*, 256 F. Supp. 2d 1345, 1358-59 (S.D. Fla. 2003); *Estate of Rodriquez v. Drummond*, 256 F. Supp. 2d 1250, 1266-67 (N.D. Ala. 2003); *but see Mujica*, 381 F. Supp. 2d at 1175-76 (appeal pending). In any event, whether the TVPA applies to corporations or not does not affect the preemption issue raised by Shell.

[25] The particular example the TVPA was based on was the case of Jaime Piopongco, who was one of the plaintiffs in the *Marcos* litigation. He had been tortured and subjected to arbitrary detention during the Marcos regime but by the time of the litigation he had escaped to the United States and taken U.S. citizenship, thus preventing him from making a claim under the ATS. *See Hilao*, 103 F.3d at 791-92.

by aliens only, Congress enacted the TVPA in 1991 specifically to provide a cause of action for American nationals subject to torture or extra-judicial killing in foreign countries. Thus, the entire premise underlying *Enahoro* is faulty. More importantly, *Enahoro* and Shell ignore the overwhelming and explicit evidence that Congress did not intend the TVPA to restrict the ATS in *any* respect.

The TVPA's legislative history demonstrates that Congress' intent was not to limit, but to "enhance the remedy already available" under the ATS by extending it to U.S. citizens. S. Rep. No. 102-249, at 5. The House Report specifically addresses any ambiguity between the two statutes, stating:

> The TVPA would provide such a grant [of an express cause of action], and would also enhance the remedy already available under Section 1350 in an important respect: While the [ATS] provides a remedy to aliens only, the TVPA would extend a civil remedy also to U.S. citizens who may have been tortured abroad. Official torture and summary executions merit special attention in a statute expressly addressed to those practices. At the same time, claims based on torture or summary executions do not exhaust the list of actions that may appropriately be covered [by] section 1350. That statute should remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law.

H.R. Rep. No. 102-376 (I), at 4. The Senate Report on the TVPA virtually mirrors this language. S. Rep. No. 102-249, at 5.

Prior to *Sosa*, courts hearing both ATS and TVPA claims, without

exception, allowed both claims to proceed.[26] Nothing in *Sosa* suggests that the TVPA was intended to eradicate claims under the ATS.[27] Indeed, the *Sosa* Court itself recognized that Congress had not taken any action since the passage of the ATS that "in any relevant way amended § 1350 or limited civil common law power by another statute." *See Sosa*, 542 U.S. at 725. Had the TVPA stripped the ATS of any jurisdiction, the *Sosa* Court would surely have noted this development. Moreover, the *Sosa* Court cited *Filartiga*, a case based on torture and extra-judicial killing, approvingly. 542 U.S. at 731. Under Shell's argument, ATS claims of the type alleged in *Filartiga* – which are the paradigmatic examples of international norms that satisfy the specific, universal and obligatory standard – would not be permitted to proceed. As the dissent in *Enahoro* correctly

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[26] *See, e.g., Hilao*, 103 F.3d at 777-78; *Doe v. Islamic Salvation Front*, 993 F. Supp. at 7-9; *Flores v. S. Peru Copper Corp.*, 343 F.3d 140, 153 (2d Cir. 2003); *Kadic*, 70 F.3d at 246.

[27] There is absolutely nothing in the text or legislative history of the TVPA which indicates that the TVPA was intended to foreclose claims brought under the ATS. Defendants are in effect arguing that the ATS has, at least in part, been repealed. However, it is well-settled that repeals by implication are disfavored. As the Supreme Court has noted, "[w]here there are two acts upon the same subject, effect should be given to both if possible . . .the intention of the legislature to repeal must be clear and manifest; otherwise, at least as a general thing, the later act is to be construed as a continuation of, and not a substitute for, the first act." *Posadas v. Nat'l City Bank of New York*, 296 U.S. 497, 503 (1936). *See also Branch v. Smith*, 538 U.S. 254, 273 (2003).

concluded, "The majority . . . stands *Sosa* on its head." 408 F.3d at 889 (Cudahy, J., dissenting).

Courts after *Sosa* have continued to permit plaintiffs who are bringing both ATS and TVPA claims to proceed on both claims. *See, e.g., Aldana*, 416 F.3d at 1251 (in the absence of "clear and manifest" intent that Congress intended to amend the ATS with the TVPA, the court refused to find that the TVPA provided the exclusive remedy for torture); *Mujica*, 381 F. Supp. 2d at 1179 n.13, *appeal argued* April 19, 2007; *Doe v. Saravia*, 348 F. Supp. 2d at 1144-45; *Chavez v. Carranza*, 413 F. Supp. 2d 891, 899 (W.D. Tenn. 2005). Accordingly, the TVPA in no way precludes plaintiffs from bringing claims for extra-judicial execution or torture under the ATS.

Moreover, Shell's argument that the TVPA also precludes a separate cause of action based on cruel, inhuman and degrading treatment, because Congress did not include CIDT in the language of the TVPA, is similarly without merit. Shell can cite nothing in the statutory language or legislative history indicating Congressional disapproval for an ATS claim based on CIDT. Indeed, as this Court has noted, "claims based on torture and summary executions do not exhaust the list of actions that may appropriately be covered [by the Alien Tort Act]. That statute should remain intact to permit suits based on other norms that already exist

or may ripen in the future into rules of customary international law." *Kadic*, 70 F.3d at 241, quoting H.R. Rep. No. 102-367, at 4.[28]

E. Shell is Liable For the Actions of Its Wholly-Owned Subsidiary, SPDC, Under Theories of Agency and Alter Ego Liability.

Shell's argument that they cannot be held liable for SPDC's actions involves disputed factual issues that cannot be resolved in the first instance on appeal. The issues of whether Shell is liable for the actions of its subsidiary based on agency and alter ago theories of liability are not pure legal questions, but factual questions which cannot be decided on the basis of the pleadings. *Cumis Ins. Soc., Inc. v. Peters*, 983 F. Supp. 787, 796 (N.D. Ill. 1997) (agency is question of fact that must survive motion to dismiss if sufficiently pleaded); *Flentye v. Kathrein*, 485 F. Supp. 2d 903, 913 (N.D. Ill. 2007) (motion to dismiss will be denied if complaint fairly alleges facts in support of alter ego theory). These issues were not raised in Shell's petition for permission to appeal and the District Court did not address them in its ruling which was certified for interlocutory appeal. Thus, this Court should not address them in the first instance.

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[28] Shell misinterprets *Oliva v U.S. Dep't of Justice*. SB 33. *Oliva* only applies where "a statute makes plain Congress's intent" to supersede customary international law. 433 F.3d 229, 233-34 (2d Cir. 2005). Shell's claim that the TVPA is a "controlling legislative act" is undermined by Congress's intent not to restrict the ATS when it enacted the TVPA.

Shell is incorrect in claiming that the issue of its liability for the conduct of SPDC is somehow determinative of subject matter jurisdiction in this case. SB 28-29. The ATS gives the federal courts subject matter jurisdiction "so long as plaintiffs alleged a nonfrivolous claim by an alien for a tort in violation of international law." *Sarei v. Rio Tinto, PLC*, 2007 U.S. App. LEXIS 8430, *4 (9th Cir. 2007). Shell's misleading characterization of Sosa's footnote 20 would lead to the absurd conclusion that whether Plaintiffs have alleged a tort at all depends on whether Plaintiffs succeed in piercing the corporate veil or establishing agency. On the contrary, the plain meaning of footnote 20 taken in context is merely that international law has some norms that apply only to state actors, and other norms that also reach private actors – a fact that has no bearing whatsoever on whether Shell can be held liable for SPDC's conduct. That question is not determinative of subject matter jurisdiction under the ATS.

Shell's claim that it "[has] never conducted any business in Nigeria" is a disputed factual issue and adjudication is improper in this procedural context, where no evidence of the relationship between Shell and its subsidiaries is before the court. Federal common law agency and veil-piercing rules both provide ample grounds for holding Shell is liable for the acts of its wholly-owned subsidiary, SPDC.

Plaintiffs have sufficiently alleged facts indicating that Shell used SPDC as its agent during the period of SPDC's operations in Nigeria, rendering it liable for SPDC's actions. J.A. 0127-0128, 0143. Amended Complaint ¶¶ 18-25, 83. "It is well established that traditional vicarious liability rules ordinarily make principals . . . vicariously liable for acts of their agents . . . in the scope of their authority." *Meyer v. Holley*, 537 U.S. 280, 285 (2003); *see also* Restatement (Second) of Agency § 219. In addition, the principal may be liable for the agent's torts even though the agent's conduct is unauthorized, as long as it is within the scope of the relationship.[29] Restatement (Second) of Agency § 216; *see id.* §§ 228-236; *see, e.g., Cantrell v. Forest City Publ'g Co.*, 419 U.S. 245, 253 (1974). The Ninth Circuit recently stated that "federal common law agency liability principles" apply in ATS cases involving corporate defendants. *Sarei v. Rio Tinto, PLC*, 2007 LEXIS 8430 at *19 (9th Cir. 2007), *superseding* 456 F.3d 1069, 1078 (9th Cir. 2006).[30] These rules of federal law are consistent with international law,

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[29] Because the ATS is a federal statute providing liability for violations of international law as incorporated into federal law, uniform federal law should determine the appropriate rules of liability, including the traditional rules of agency and the federal common law test for piercing the corporate veil. *See supra* § I (B) (federal common law provides the cause of action in ATS cases).

[30] Moreover, the federal common law standards applicable here are also reflected in international law; the concept of agency liability is common to virtually every legal system. *See generally Int'l Agency & Distribution Law*

providing an additional basis for their application in ATS cases.[31]

Under an agency theory of liability, the principal and agent may be related corporations, or a parent and subsidiary. *See* Restatement (Second) of Agency reporter's note §14M. In this case, SPDC's employment of Nigerian security forces renders those forces agents not only of SPDC, but also of Shell. J.A. 128, 143. The court in *Bowoto v. Chevron Texaco Corp.*, 312 F. Supp. 2d 1229, 1238 (N.D. Cal. 2004), an ATS case also involving claims for human rights violations occurring in the Niger Delta, properly held that, independently of whether the corporate veil may be pierced, "[a] parent corporation can be held vicariously liable for the acts of a subsidiary corporation if an agency relationship exists

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(Dennis Campbell ed.) (2001).

[31] Shell incorrectly claims that "the law of nations does not attach civil liability to corporations under any circumstances." SB 30. In support of this, Shell cites to the founding documents of three entities that apply international *criminal* law. No court has ever accepted the argument that corporations cannot be held liable in ATS suits. "[S]uch a result should hardly be surprising. A private corporation is a juridical person and has no *per se* immunity under U.S. domestic or international law. . . . Given that private individuals are liable for violations of international law in some circumstances, there is no logical reason why corporations should not be held liable." *Presbyterian Church*, 244 F. Supp. 2d at 319 (surveying international precedents); *In re Agent Orange Product Liability Litigation*, 373 F. Supp. 2d 7, 58 (E.D.N.Y. 2005). Additionally, Shell's claim that the Rome Statute requires that an individual cannot be held civilly liable until they have been held criminally liable, SB 31, is simply a provision of that particular treaty and has no basis in customary international law.

between the parent and the subsidiary."

Furthermore, under "[c]ommon law agency principles," a principal is also "liable if it ratifie[s] the illegal acts" of its agent. *Phelan v. Local 305, United Ass'n of Journeymen*, 973 F.2d 1050, 1062 (2d Cir. 1992); *see also Bowoto*, 312 F. Supp. 2d at 1247-48. An intent to ratify a transaction may be inferred, for example, from "a failure to repudiate" an "unauthorized transaction," Restatement (Second) of Agency § 94, or from "acceptance by the principal of benefits of an agent's acts, with full knowledge of the facts." *Monarch Ins. Co. v. Ins. Corp. of Ir., Ltd.*, 835 F.2d 32, 36 (2d Cir. 1987). In the same vein, a principal who defends or covers up the misconduct of an alleged agent embraces that conduct as his own and, thus, ratifies the misconduct. *Seymour v. Summa Vista Cinema, Inc.*, 809 F.2d 1385, 1388 (9th Cir. 1987); *Bowoto*, 312 F. Supp. 2d at 1247-48.

In addition to the agency theory, Shell is also liable for the acts of SPDC under an alter ego theory of liability. Plaintiffs have sufficiently alleged that Shell dominated and controlled SPDC, providing a legal basis for veil-piercing. *Id.* ¶ 25. Shell wrongly claims that Plaintiffs' allegation of domination and control is merely conclusory. Indeed, the complaint contains numerous specific allegations indicating that Shell acted through SPDC in Nigeria. *See, e.g.*, ¶¶ 22, 33-36, 45-54, 70, 80.

Moreover, federal law "is not bound by the strict standards of the common law alter ego doctrine." *Bhd. of Locomotive Eng'rs v. Springfield Terminal Ry.*, 210 F.3d 18, 26 (1st Cir. 2000). "Nor is there any litmus test[.]" *Id.* Instead, "a corporate entity may be disregarded in the interests of public convenience, fairness and equity." *Id.* In *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 629 (1983) ("*FNBC*"), the Supreme Court held that federal law recognizes a "broad[] equitable principle that the doctrine of corporate entity, recognized generally and for most purposes, will not be regarded when to do so would work fraud or injustice. . . .In particular, the Court has consistently refused to give effect to the corporate form where it is interposed to defeat legislative policies," *id.* at 629-30, irrespective of "whether that was the aim or only the result" of incorporation. *Anderson v. Abbott*, 321 U.S. 349, 363 (1944). The *FNBC* Court also found the same principles in international law, noting that they have been adopted by "courts in the United States and abroad," *FNBC*, 462 U.S. at 628, and quoting an International Court of Justice decision holding that "'lifting the corporate veil'" is appropriate "'to prevent the misuse of the privileges of legal personality . . .to protect third persons . . .or to prevent the evasion of legal requirements or obligations.'" *Id.* at 628 n.20 (quoting *The Barcelona Traction, Light & Power Co. (Belg. v. Spain)*, 1970 I.C.J. 3, 38-39 (Feb. 5, 1970)).

The Supreme Court held in *Sosa* that, the ATS "was enacted on the congressional understanding that courts would exercise jurisdiction by entertaining some common law claims derived from the law of nations," 542 U.S. at 731 n.19. As Justice Breyer noted, those claims include "torture, genocide, crimes against humanity, and war crimes." *Id.* at 762 (Breyer, J., concurring). Permitting Shell to evade liability for its complicity in violations of international law by refusing to pierce the corporate veil would undermine the very purpose of the ATS to provide a remedy in federal courts for egregious human rights violations of the kind suffered by Plaintiffs here.

III. CRIMES AGAINST HUMANITY CLAIMS ARE ACTIONABLE.

Shell argues that Plaintiffs' claims for crimes against humanity fail to meet the *Sosa* standard for actionable norms, despite the fact that every court to consider the issue after *Sosa* has found that crimes against humanity remain actionable claims under the ATS. *See Sarei v. Rio Tinto, PLC*, 2007 LEXIS 8430, *17-18 (9th Cir. 2007); *Cabello*, 402 F.3d at 1154; *Aldana*, 416 F.3d at 1247; *Mujica*, 381 F. Supp. 2d at 1183; *Presbyterian Church*, 374 F. Supp. 2d at 333-34; *Chavez v. Carranza*, 2006 U.S. Dist. LEXIS 63257, *22 (D. Tenn. 2006).[32]

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[32] Prior to *Sosa*, several courts found crimes against humanity actionable under the ATS under the "specific, universal, and obligatory" standard. *See, e.g., Mehinovic,* 198 F. Supp. 2d at 1344; *Wiwa v. Royal Dutch Petroleum Co.*, 2002

Shell claims that "'crimes against humanity' lacks well-defined content under international law," SB 44, but this argument flies in the face of copious international authorities. All of the international authorities agree that at its core, crimes against humanity requires the commission of specific abuses as part of a "widespread or systematic attack against a civilian population,"[33] which is precisely what Plaintiffs have alleged here. *See, e.g, Cabello,* 402 F.3d at 1161; *Aldana,* 416 F.3d at 1247.[34]

U.S. Dist. LEXIS 3293, *27-28 (S.D.N.Y. 2002). Although Restatement (Third) of Foreign Relations Law § 702 does not list crimes against humanity on its list of violations of customary international law, this is because § 702 deals specifically with violations committed by *states*, and each of the predicate acts of crime against humanity (such as torture or murder) are, as noted in § 702, independent violations of international law when committed by states. *See also id.* § 702 reporter's note 1 (stating that the list of violations in this section has as its origin the "crimes against humanity" listed in the Nuremberg Charter).

[33] Shell's attempt to create inconsistent standards by pointing to missing words in the tribunal statutes is disingenuous. While the ICTY may not use the words "widespread or systematic" in its statute, ICTY decisions have consistently recognized this requirement. *See, e.g., Prosecutor v. Tadic,* No. IT-94-1 ¶ 248 (Nov. 30, 2005) (finding that "the acts of the accused must comprise part of a pattern of widespread or systematic crimes directed at a civilian population"). Shell can point to no contrary decision.

[34] Indeed, Shell's own authority recognizes that crimes against humanity is part of customary international law and states that a comparison between the definitions evidences only "slight differences between them." M. Cherif Bassiouni, *The Normative Framework of International Humanitarian Law: Overlaps, Gaps and Ambiguities*, 8 Transnat'l L. & Contemp. Probs. 199, 212 (1998).

Plaintiffs were subjected to acts including extra-judicial executions, arbitrary arrests and detentions, rape, torture, and cruel, inhuman and degrading treatment under color of law, all as part of a widespread and systematic assault by the Nigerian government and its co-conspirators and accomplices, Shell and SPDC, against the civilian population of the Niger Delta. J.A. 0128, ¶¶ 90-94. Plaintiffs, as civilians opposed to Shell and SPDC's abysmal human rights and environmental abuses in the region, constitute an identifiable civilian population. Shell and SPDC cooperated with, conspired with, and aided and abetted Nigerian security forces and the Special Tribunal in carrying out this widespread and systematic attack over a period of several years throughout Rivers State, including the massacre, torture, arbitrary arrest, and administration of extra-judicial punishments on hundreds of people who were allegedly threats to public order. J.A. 0128, ¶¶ 3, 90-94.

Shell's attempt to use various international authorities to create the appearance of varying definitions of crimes against humanity fails. SB 45-46. International tribunals have not adopted varying definitions of crimes against humanity. The fact that some additional jurisdictional requirements have been added to some statutes proscribing crimes against humanity, such as ensuring that the crime was committed on "national, political ethnic, racial, or religious

grounds" (ICTR) or requiring that the crime be committed in the course of "armed conflict" (ICTY) does not detract from the core customary law definition of crimes against humanity. *See, e.g., Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 226 F.R.D. 456, 479-82 (S.D.N.Y. 2005) (holding that "[t]he ICTY Statute's requirement that the crimes be 'committed in armed conflict' . . . is merely a 'jurisdictional element' that must be satisfied for the ICTY to assume jurisdiction over a case") (citing *Prosecutor v. Tadic*, No. IT-94-1-A, ¶ 249 (Appeals Chamber, July 15, 1999)); *Prosecutor v. Kamuhanda*, No. ICTR-95-54A-T, ¶ 671 (Trial Chamber, Jan. 22, 2004) (noting that the jurisdictional element of requiring that crimes be committed on "national, political, ethnic, and racial or religious grounds," is "not intended to alter the definition of Crimes against Humanity in international law").[35]

These jurisdictional elements have no bearing on the core definition of crimes against humanity. *Prosecutor v. Krajisnik*, No. IT-00-39-T, ¶ 704 (Trial Chamber, Sept. 27, 2006); *Kamuhanda*, No. ICTR-95-54A-T, at ¶ 671.

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[35] Additionally, that the ICTY and the ICTR do not include "enforced disappearance of persons" and the "crime of apartheid" among their enumerated underlying offenses is not, as Shell claims, evidence of an inconsistent standard; these particular crimes were simply not at issue in the Rwandan and Yugoslav conflicts, nor are they relevant here.

IV. CRUEL, INHUMAN AND DEGRADING TREATMENT CLAIMS ARE ACTIONABLE.

Shell does not contest that the District Court correctly found that torture satisfies the Sosa standard for norms actionable under the ATS, nor can they. J.A. 0015-0016.[36] Shell does, however, attempt to argue that the prohibition against CIDT does not satisfy the *Sosa* standard. SB 38 n.15. This argument should not be accepted.

"[C]ruel, inhuman, or degrading treatment includes acts which inflict mental or physical suffering, anguish, humiliation, fear and debasement, which do not rise to the level of 'torture' or do not serve the same purpose as 'torture.'" *Mehinovic*, 198 F. Supp. 2d at 1348; *see also* Restatement (Third) of Foreign Relations Law § 702, reporters' note 5 (1987).[37]

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[36] As this Court stated in *Filartiga v. Pena-Irala*, "While the ultimate scope of [internationally protected human] rights will be a subject for continuing refinement and elaboration, we hold that the right to be free from torture is now among them. . . . Indeed, for purposes of civil liability, the torturer has become like the pirate and slave trader before him *hostis humani generis*, an enemy of all mankind." 630 F.2d at 885, 890. *See also Kadic,* 70 F.3d at 244 (holding that torture constitutes universally recognized peremptory norm of international law).

[37] Indeed, all of the world's omnibus human rights instruments prohibit cruel, inhuman or degrading treatment. *See, e.g.*, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment, art. 16, June 26, 1987, 1465 U.N.T.S. 85; International Covenant on Civil and Political Rights, art. 7, Mar. 23, 1976, 999 U.N.T.S. 171; American Convention on Human Rights, art. 5 (2), July 18, 1978, 1144 U.N.T.S. 123. In addition to the numerous international

Courts have routinely recognized cruel, inhuman, or degrading treatment as a discrete and well-recognized violation of customary international law and have, thus, found it to be a separate ground for liability under the ATS. *See Abebe-Jira*, 72 F.3d at 846-47; *Doe v. Liu Qi*, 349 F. Supp. 2d 1258, 1325 (N.D. Cal. 2004); *Mehinovic,* 198 F. Supp. 2d at 1347-49; *Tachiona v. Mugabe*, 234 F. Supp. 2d 401, 437-38 (S.D.N.Y. 2002); *Estate Cabello v. Fernandez-Larios*, 157 F. Supp. 2d 1345, 1361 (S.D. Fla. 2001); *Xuncax*, 886 F. Supp. at 186.[38]

Plaintiffs here suffered clubbing, horsewhipping, denial of food, water, and

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legal instruments codifying the universal prohibition against cruel, inhuman and degrading treatment, this conduct is further proscribed by the major international criminal tribunals under the laws of war, including the International Criminal Court, Rome Statute of the International Criminal Court, 37 I.L.M. 999, 1006-09 (1998), arts. 8(2)(a)(ii), 8(2)(b)(xxi); the International Criminal Tribunal for the Former Yugoslavia, Statute of the International Criminal Tribunal for Yugoslavia, art. 2, SC Res. 827 (May 25, 1993); and the International Criminal Tribunal for Rwanda, Statute for the International Criminal Tribunal for Rwanda, art. 4, SC Res. 955 (Nov. 8, 1994) each of which provide for prosecution of cruel, inhuman and degrading treatment as a violation of international law.

[38] *Aldana* however, declined to find that CIDT claims were actionable under the ATS and rejected the reasoning of *Mehinovic* and *Cabello* because they both relied on the ICCPR and the ICCPR, which the court found did not "create obligations enforceable in the federal courts." 416 F.3d at 1447 (quoting *Sosa*'s statement that the ICCPR "did not 'create obligations enforceable in the federal court.'" *Sosa*, 542 U.S. at 735). The *Aldana* court appears to have misunderstood the relevance of the ICCPR, not as binding international law, but as evidence that a prohibition constitutes a customary international law norm and commands widespread acceptance.

medical attention, injection of life-threatening chemicals, threats to the lives of family members, and the raping, beating, and killing of family members, all of which constitute torture and cruel, inhuman, and degrading treatment ("CIDT") under customary international law. J.A. 0128, ¶ 6-15, 62-64. Plaintiffs were subjected to such treatment both in and outside of detention, and some were submitted to torture and CIDT in detention until they signed (or for not signing) documents pledging they would no longer participate in protests against Shell and SPDC operations in Ogoni. J.A. 0128, ¶¶ 10-13. Some members of the plaintiff class were subjected to torture and CIDT to the point that the treatment led to their death. J.A. 0128, ¶ 10. The Restatement (Third) of Foreign Relations Law makes clear that the prohibition against CIDT is a norm of customary international law. *See* § 702(d) ("A state violates international law if, as a matter of state policy, it practices, encourages, or condones . . . torture or other cruel, inhuman, or degrading treatment or punishment."). These allegations adequately state CIDT claims.

The District Court correctly found that Plaintiffs' allegations were sufficient to state a claim for torture and that it was, therefore, unnecessary to reach the issue of CIDT. J.A. 0016 n.11. However, to the extent that Plaintiffs' allegations do not rise to the level of torture, they certainly establish physical

suffering, anguish, humiliation, fear and debasement, thereby bringing Plaintiffs' claims squarely within the core definition of CIDT. *See Xuncax,* 886 F. Supp. at 187 ("It is not necessary that every aspect of what might comprise a standard such as 'cruel, inhuman or degrading treatment' be fully defined and universally agreed upon before a given action meriting the label is clearly proscribed under international law. . . ."); *see also Liu Qi*, 349 F. Supp. 2d at 1322 (affirming the *Xuncax* approach and finding it to be "entirely consistent with *Sosa.*").

V. ARBITRARY ARREST AND DETENTION CLAIMS ARE ACTIONABLE.

The prohibition of prolonged arbitrary detention is one of the most fundamental of all human rights.[39] The Universal Declaration of Human Rights states that "[n]o one shall be subjected to arbitrary arrest [or] detention" G.A. Res. 2/7A (III) UN Doc. A/810, art. 9 (1948). The International Covenant on Civil and Political Rights also affirms that "[n]o one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law." Dec. 19, 1966, 999 U.N.T.S. 171, art. 9 (1) (entered into force Mar. 23, 1976); *see also* African Charter on Human and Peoples' Rights, art. 6; American Convention on Human

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[39] Restatement (Third) of Foreign Relations, § 702, note 11 ("Not all human rights norms are *jus cogens*, but [arbitrary detention has] that quality.").

Rights, art. 7(3); European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 5; *Hostages Case* (U.S. v. Iran), 1979 I.C.J. 7, 42 ("Wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights."); *Winterwerp Case*, 33 Eur. Ct. H.R., (ser. A) ¶ 39 (1979) ("[N]o detention that is arbitrary can ever be regarded as 'lawful.'").

Contrary to Shell's claim, a claim for arbitrary arrest and detention does not "fall well short of the level of specificity required by *Sosa*." SB 49. The Court's holding in *Sosa* was limited to the detention claim in that case: "It is enough to hold that a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to support the creation of a federal remedy." 542 U.S. at 738. Indeed, post-*Sosa*, courts have found that arbitrary detention claims are actionable under the ATS. *See, e.g., Liu Qi,* 349 F. Supp. 2d at 1326 (finding that plaintiffs who were detained for three or more days without an opportunity to see a family member or lawyer and were tortured met the definition of arbitrary detention).

The Amended Complaint establishes that ten Plaintiffs were subjected to arbitrary arrest and detention, and all but one of them suffered arbitrary detention of more than one day. J.A. 0128, ¶¶ 6-15. Additionally, unlike Dr. Alvarez in *Sosa*, they were never formally charged with a crime, were never formally arraigned, and were incarcerated without food, water, or medical attention, often in military detention camps without access to lawyers. *Id.* Moreover, these detentions and arrests were specifically intended to suppress dissent and violate individual rights. Most of these Plaintiffs were tortured and detained under degrading conditions for days, weeks, months, and years.[40] J.A. 0128, ¶¶ 6-15, 62-64. Prolonged arbitrary detention such as this has been recognized as a norm which meets the "specific, universal and obligatory" standard endorsed by the *Sosa* Court. *See Hilao*, 103 F.3d at 794; *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1541 (N.D. Cal. 1987).

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[40] Shell's argument that Plaintiffs have not alleged a state policy or "referred to any settled definition of 'prolonged' arbitrary detention" is frivolous. SB 49. Plaintiffs have clearly alleged that the Nigerian government committed these violations pursuant to a policy of securing the oil fields. *See, e.g.*, J.A. 0117, 0120-121, 0125-126. Moreover, the length of detention, particularly here, where Plaintiffs endured torture and other degrading treatment, clearly satisfies the prohibition against arbitrary detention. *See also* Restatement (Third) of Foreign Relations, § 702, cmt. h ("Detention is arbitrary if . . . 'it is incompatible with the principles of justice or with the dignity of the human person.'")

CONCLUSION

For all of the foregoing reasons, the District Court's Order dismissing Plaintiffs' extra-judicial execution claims should be reversed and the other decisions in the Order before this Court should be affirmed. Plaintiffs' claims should be remanded to the District Court for trial.

Dated: July 6, 2007

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