UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KEN WIWA, et al Plaintiffs, v. ROYAL DUTCH PETROLEUM COMPANY and SHELL TRANSPORT AND TRADING COMPANY, p.l.c. Defendants.	96 Civ.8386 (KMW)(HBP)
KEN WIWA, et al, Plaintiffs, v. BRIAN ANDERSON Defendant.	01 Civ. 1909 (KMW)(HBP)

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS FOR LACK OF SUBJECT MATTER [1]

Marco Simons
Rick Herz
Jonathan G. Kaufman
EarthRights International
1612 K Street NW #401
Washington, DC 20006
(202) 466-5188

Anthony DiCaprio
Ratner, DiCaprio, and Chomsky, LLP
64 Purchase Street
Rye, NY 10580
(914) 468-7016

Judith Brown Chomsky
Jennifer M. Green
Beth Stephens
Maria LaHood
Center for Constitutional Rights
666 Broadway, 7th Floor
New York, NY 10012
(212) 614-6431

[1] Defendants improperly caption their post-answer motion as a Rule 12(b)(1) motion; by its own terms, that rule only applies to motions made before a responsive pleading is filed.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

FEDERAL STATUTES

RESTATEMENTS

INTERNATIONAL CASES

INTRODUCTION

Plaintiffs have alleged violations of the law of nations that establish subject matter jurisdiction under the Alien Tort Statute, 28 U.S.C. §1350 (1988) ("ATS").[2] Plaintiffs are entitled to have a jury decide their claims. As plaintiffs will prove at trial, defendants were deeply concerned that Ken Saro-Wiwa's campaign would interfere with their operations in Nigeria and tarnish their image. Acting both directly and through their agent, Shell Petroleum Development Corporation ("SPDC"), defendants sought to eliminate that threat, through a systematic campaign of human rights violations.

The central argument in defendants' Memorandum of Law ("Memo.") in support of their motion to dismiss is that the Court does not have subject matter jurisdiction because there is no evidence that they are liable for the violence unleashed by SPDC and the Nigerian military against plaintiffs and others who dared to protest against defendants' misconduct. However, the sufficiency of the evidence of defendants' liability is not before the Court in this motion, which is limited to the issue of subject matter jurisdiction. *See* Dec. 23 Order at 2-3. Only a jury may determine the merits of plaintiffs' claims.[3] In any event, plaintiffs in this brief present evidence that amply supports the Court's jurisdiction to hear their claims.

Defendants claim that Defendants Royal Dutch Petroleum Company and Shell Transport and Trading, and their successors Royal Dutch Shell, P.l.c., Shell Petroleum, N.V., and Shell Transport and Trading Company, Ltd, cannot be held liable because they were not, as a matter of fact, involved in any actions in Nigeria and that their corporate forms insulate them from any liability for the devastation unleashed by their agents imposed on plaintiffs. Defendants' corporate charters do not immunize them from responsibility for the human rights violations at issue in this case. Defendants are responsible for the actions of SPDC, their agent in Nigeria, and for their own concerted activities with the Nigerian military government. Though these issues are for a jury to decide, Plaintiffs present evidence that SPDC aided and

---

[2] The well-established Sosa-qualifying nature of these international norms is discussed at length in recent briefing. *See* Pls.' Br. on Int'l Law Norms at 10-46 ("IL Br."); Pls.' Reply Br. to Defs.' Memo. on Int'l Law at 13-29 ("IL Reply").

[3] The only contention raised in defendants' motion that actually addresses subject matter jurisdiction is defendants' footnoted argument that Blessing Kpuinen cannot sue under the ATS. Memo. at 9 n.6. That claim is refuted below. *See infra* at Part VI.

abetted the violations committed against plaintiffs by their joint venturer, the Nigerian military government; SPDC was the agent of Defendants; the corporate Defendants are liable for the misconduct of their agent SPDC and SPDC Managing Director Brian Anderson and he is liable for the his role in SPDC's misconduct; and all defendants are liable for the abuses alleged by Plaintiffs under additional theories of liability. *See* IL Br. at 52-61; IL Reply at 38-41 (discussing standards of liability). These well-established theories of liability do not depend on disregarding Defendants' corporate form under traditional veil-piercing theories. Corporations are liable for the consequences when they employ agents and joint venturers to facilitate human rights violations in furtherance of their corporate interests, as defendants did in this case. A jury must decide whether they will be held to account for these violations.

I. DEFENDANTS' MERITS-BASED CHALLENGE TO LIABILITY CANNOT DEFEAT SUBJECT MATTER JURISDICTION AND RELIES ON AN ERRONEOUS EVIDENTIARY STANDARD

A. The Court should not entertain Defendants' merit-based challenges

Defendants do not contest plaintiffs' claims that they suffered international law violations; they argue instead that plaintiffs cannot prove defendants' liability. This is not a jurisdictional question. Defendants provide no support for their argument that the ATS triggers a *sui generis* pre-trial requirement that courts undertake a full-blown factual analysis of the *merits* in order to determine jurisdiction.

Defendants distort *Kadic*'s holding that the ATS requires a "more searching review of the merits" than claims under 28 U.S.C. § 1331. Memo. at 8 (quoting *Kadic v. Karadzic*, 70 F.3d 232, 238 (2d Cir. 1995)). *Kadic* held that, at the pleading stage, ATS plaintiffs must allege abuses that are actually violations of the law of nations, rather than merely "colorable" claims. *Id.* at 238-39. *Kadic* looked only at whether the abuses alleged in the complaint constituted international law violations, and considered as jurisdictional only the question of whether abuses by a non-state-actor violated international law. *See id.* at 239 (noting Karadzic's argument that plaintiffs "have not alleged violations of the norms of international law").[4] Defendants similarly mischaracterize a footnote in *Sosa*, Memo. at 8–9 (citing 542

[4] As *Sosa v. Alvarez-Machain* held, "[t]he [ATS] *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

U.S. at 732 n.20), which noted that whether a given norm requires that the *perpetrator be a state actor* is governed by international law. Neither court even remotely suggested that issues of vicarious liability are jurisdictional.[5] Once plaintiffs establish a violation of international law, the question of whether the defendant can be held liable is distinct from subject matter jurisdiction.[6] Defendants do not dispute the jurisdiction question—that plaintiffs suffered violations of international law.

B. Defendants ask this court to apply the wrong evidentiary standard

Defendants erroneously suggest that plaintiffs must prove allegedly jurisdictional facts "by a preponderance of the evidence." Defs. Mem. at 10. The facts challenged by defendants are identical to the facts necessary to prove the merits of plaintiffs' claims. Even if these facts were jurisdictional, when those facts overlap with the merits, factual disputes cannot be resolved until trial. *See Europe & Overseas Commodity Traders, S.A. v. Banque Paribas London*, 147 F.3d 118, 121, n.1 (2d Cir. 1998) ("In a close case, the factual basis for a court's subject matter jurisdiction may remain an issue through trial . . . ." (citation omitted)).[7]

---

number of international law violations with a potential for personal liability at the time." 542 U.S. 692, 724 (2004) (emphasis added). Thus, the analysis of jurisdiction is distinct from the merits analysis of whether the common law provides a cause of action against particular defendants.

[5] Defendants rely on *Flores v. S. Peru Copper Corp.*, 414 F.3d 233 (2d Cir. 2003), but that case looked to factual submissions only to determine the one issue relevant to subject matter jurisdiction: whether the rights to life and health are customary international law norms. *Id.* at 255 n.30.

[6] For example, *Jama v. INS*, 22 F. Supp. 2d 353 (D.N.J 1998), relying on *Kadic*, first determined it had jurisdiction because the abuses violated international law. *Id.* at 363. *Jama* then noted that the next "step in the ATCA analysis is to determine whether the various defendants are subject to suit." *Id.* at 364. The Second Circuit's recent caselaw reflects a similar analysis. *See Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co.*, 517 F.3d 104, 123 (2d Cir. 2008) (in case involving corporate complicity in governmental abuses, treating aiding and abetting liability as a "secondary argument" to be addressed only after establishing violations of sufficiently specific, universal norms for ATS jurisdiction); *Abdullahi v. Pfizer, Inc.*, ___F.3d___, 2009 WL 214649, *17-18 (2d Cir. Jan. 30, 2009) (finding jurisdiction because involuntary medical experimentation violated international law, and then turning to the question of whether defendant could be held liable as a state actor); *cf. Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 260 (2d Cir. 2007) (not deciding whether theories of liability are jurisdictional).

[7] *See also Itoba Ltd. v. Lep Group PLC*, 54 F.3d 118, 125 (2d Cir. 1995) ("A plaintiff . . . should not be deprived of its day in . . . court by a Rule 12(b)(1) order based on erroneous facts and questionable law . . . . [T]he issues now before us best can be resolved by a trial on the merits in which the facts relevant to jurisdiction may be more fully developed.") (citation omitted). If "the

If the Court does decide to resolve the overlapping factual disputes raised in defendants' motion at this procedural stage, it should apply a more lenient standard than would apply at trial. *See CNA v. United States*, 535 F.3d 132, 144 (3d Cir. 2008) ("[W]hen faced with a jurisdictional issue that is intertwined with the merits of a claim, district courts must demand 'less in the way of jurisdictional proof than would be appropriate at a trial stage'" (citation omitted)).[8]

Thus, even if this Court decides that jurisdiction depends on a showing that these particular defendants are liable for the violations of international law at issue, the Court should deny the motion because those issues are intertwined with the merits. Regardless, as explained below, plaintiffs present more than sufficient evidence to demonstrate jurisdiction under any standard, even the erroneous evidentiary standard proposed by defendants.

II. THE COURT SHOULD NOT ENTERTAIN DEFENDANTS' CHALLENGE TO AIDING AND ABETTING LIABILITY.

This Court should summarily reject defendants' attack on aiding and abetting liability. First, this is not a jurisdictional question. *Agent Orange*, 517 F.3d at 123. Second, even if it were, the Second Circuit has held unequivocally that "in this Circuit, a plaintiff may plead a theory of aiding and abetting liability

---

overlap in the evidence is such that fact-finding on the jurisdictional issue will adjudicate factual issues required by the Seventh Amendment to be resolved by a jury, *then the Court must leave the jurisdictional issue for the trial.*" *Alliance for Envtl. Renewal, Inc. v. Pyramid Crossgates Co.*, 436 F.3d 82, 88 (2d Cir. 2006) (emphasis added); *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.* 513 U.S. 527, 537-38 and n.3 (1995) (distinguishing the "comparatively summary procedure before a judge alone" used to determine jurisdictional facts from "litigation of the same fact issue as an element of the cause of action," and stating that "the Constitution does not require that the plaintiff offer . . . proof [of jurisdictional facts] as a threshold matter in order to invoke . . . jurisdiction" (citations omitted)).

[8] Defendants' citation to *Makarova v. United States,* 201 F.3d 110, 113 (2d Cir. 2000), for the proposition that Plaintiffs must prove the facts challenged in their memorandum "by a preponderance of the evidence" is misplaced. *Makarova* addressed scope of employment, a jurisdictional prerequisite of the Federal Tort Claims Act. *See Hamm v. United States*, 483 F.3d 135, 137 (2d Cir. 2007). *Makarova* has no bearing on defendants' merits-based challenge to facts that are *identical* with the merits. Defendants' other cases are also inapposite. In *Shipping Financial Services Corp. v. Drakos*, 140 F.3d 129, 134 (2d Cir. 1998), the Second Circuit resolved a *facial* challenge to subject matter jurisdiction "tak[ing] as true the facts alleged in plaintiff's complaint." In *Malik v. Meissner*, 82 F.3d 560, 562 (2d Cir. 1996), the court found subject matter jurisdiction to be lacking where the plaintiff "failed to allege any facts supporting his claim."

under the [ATS]." *Khulumani*, 504 F.3d at 260; *see also Abdullahi*, 2009 WL 214649 at *6.

III. THE EVIDENCE SUPPORTS PLAINTIFFS' ALLEGATIONS OF HUMAN RIGHTS ABUSES THAT VIOLATE CUSTOMARY INTERNATIONAL LAW

As explained in Section I, the jurisdictional inquiry for ATS cases properly focuses on whether plaintiffs alleged human rights abuses that are violations of customary international law. Plaintiffs allege human rights violations actionable under the ATS which are supported by ample evidence.

A. The killing of Uebari N-nah was an extrajudicial killing; the arbitrary detention and torture of James N-nah violated customary international law[9]

SPDC intended to restart its operations in Ogoni in the fall of 1993. Millson 2d Ex. 31 at C004764. In late October, 1993, a "Joint Location Visit by SPDC and Armed Forces Personnel to Ogoni Area Fields" was arranged to "ascertain the type and mode of security needed for SPDC to commence operations" and to "ascertain the possibility of SPDC to commence operations in the area." Ex. 1 (DEF0023845-51) at 845. On October 25, 1993, when the inspections were completed, SPDC insisted that security forces come to Korokoro to investigate an incident involving missing Shell vehicles. Ex. 2 (Osunde Dep.) at 81:6-84:17. SPDC transported the security forces to Korokoro. *Id.* When the security forces arrived in Korokoro, they announced that Shell had sent them and then attacked the villagers. Ex. 3 (James N-nah Dep.) at 26:9-10, 40:21-41:4, 80:15-81:8. Uebari N-Nah was walking home from the market when he was deliberately killed by Major Paul Okuntimo, the head of the joint task force, who shot him in the head. *Id.* 49:19-22, 54:21-56:23. The troops involved in the incident were paid "field allowances" by SPDC and praised by SPDC for their restraint. Ex. 4 (C0002292-94) at 94.[10] After the

[9] *See* IL Br. at 11-28; IL Reply at 13-16 (defining norm against extrajudicial killing); IL Br. at 30-33; IL Reply at 19-21 (demonstrating that abuse of James N-Nah, Owens Wiwa, Michael Vizor and the Ogoni 9 constituted cruel inhuman and degrading treatment or punishment); IL Br. at 28-29; IL Reply at 17-19 (defining norm against torture); IL Br. at 44-46; IL Reply at 21-23 (defining norm against arbitrary detention).

[10] Defendants' description of the death of security personnel on Oct. 25, 1994 relies on lurid, false deposition testimony by an SPDC employee, Osazee Osunde, whose previous, contemporaneous statements contradict that account. Ex. 4 (describing injuries to armed forces and stating that they provided lunch and an honorarium to the same persons who, according to his deposition testimony, were dead). Defendants' current description is contradicted by their written accounts, which do not mention the death of a soldier. *See* Ex. 1; Ex. 5 (C003607-16); Ex. 6 (C002045); Ex. 7 (C000770-

murder of Uebari N-nah, security forces returned to Korokoro, where they arrested James N-nah and other villagers, held them without charges for several months, and tortured them. Ex. 3 at 92.2-21.

B. The shooting of Karalolo Kogbara and her subsequent torture violated customary international law

On March 18, 1993, SPDC opposed the stated intention of the Rivers State Governor not to use the military to support the construction of SPDC's Trans Niger Pipeline (TNP) through Ogoni by SPDC's contractor, Willbros. SPDC "suggested that the military be allowed to give adequate protection to personnel." Ex. 9 (C002119-21) at C0021120. SPDC then went directly to the military commander to request that he "reinforce the serious security implications associated with the withdrawal of [the military] from the TNP."[11] *Id.* at 121.[12]

On April 29, 1993, Willbros entered the village of Biara accompanied by the military and bulldozed crops. The military shot Plaintiff Karalolo Kogbara as she was mourning her destroyed crops. Ex. 10 (Karalolo Kogbara Dep.) at 50:11-51:6. Shell vehicles and personnel were present during the incident. *Id.* at 105:2-6, 150:22-151:13. After shooting her, the military kept her bleeding body in the sun so long that the skin on her back peeled off. *Id.* at 55:2-3. The Military took her to an SPDC hospital and then to a military hospital, detaining her there without adequate medical care or contact with her family. *Id.* at 57:15-58:13, 60:16-25, 66:10-70:8, 74:19-75:6. After the military released her, she was taken by Dr. Owens Wiwa to a civilian hospital, where her arm had to be amputated. *Id.* at 76:24-25, 81:21-24.

---

71); Ex. 8 (A000955).

[11] Defendants' explanation for the presence of the military simply ignores SPDC's role in ensuring the military's involvement. Memo. at 13. As SPDC's own document makes clear, the request by Willbros for military protection related to a previous phase of pipeline construction *outside* of Ogoni, where Willbros had met violent opposition from those communities. Ex. 9 at C002119-20.

[12] Contrary to defendants' arguments, Memo. at 14, SPDC's message to defendants on May 28, 1993 does not contain information about the events in Biara when plaintiff Kogbara was shot. Millson 2d Ex. 31, C004763-64. However, it does indicate how closely defendants followed Ken Saro-Wiwa and MOSOP and the level of hostility based on their "drumming up international support using scurrilous tactics" – tactics which are not specified but do not include any mention of violence by Ken Saro-Wiwa or MOSOP. SPDC doubted "whether in the current environment we will obtain the necessary political support for military protection." *Id.* at C004763. SPDC's message to defendants also indicates that it will "direct Willbros to withdraw its equipment," in contrast to defendants' assertion that Willbros decided to withdraw because of violence. Memo. at 13.

Defendants' argument about Biara, which begins the day after this shooting, *see* Memo. at 13-14, is inapposite.

C. The torture and hanging of Ken Saro-Wiwa and the other Ogoni 9 violated the customary international law norms prohibiting extrajudicial killing and torture

On or about May 22, 1994, Ken Saro-Wiwa, John Kpuinen and Dr. Barinem Kiobel were arrested and detained without charges by the Nigerian military, and the Rivers State military administration ordered the arrest of the entire MOSOP leadership. Ex. 11 (A003200-03); Ex. 12 (K00596-630) at K00604. The detainees were eventually arraigned before a Magistrate in a regularly constituted Nigerian court. Oronto Douglas Declaration at 2. In November 1994, General Sani Abacha issued a special decree creating a three-man tribunal, the Civil Disturbances Special Tribunal ("CDST"), to try Ken Saro-Wiwa and the other Ogoni for the murder of four Ogoni tribal leaders. Ex. 13 (E-MB02586-628) at E-MB02610. They were formally charged on January 28, 1995. Ex. 12 at K00607. On March 28, 1995, the CDST assumed jurisdiction over the cases of ten additional Ogoni, including Saturday Doobee, Felix Nuate, Daniel Gbokoo, and Michael Tema Vizor, who were formally charged with the same murders on April 7, 1995. Ex. 13 at E-MB02610. Plaintiffs have already demonstrated that the trial and execution of the Ogoni 9 violated international law. *See* ILBr. at 11-28; IL Reply at 13-16, which are augmented below.

The CDST members who presided over the proceedings were appointed by General Sani Abacha, and the panel's proceedings were controlled by the military government. One member, Lt. Col. Hammed Ibrahim Ali, was a Nigerian military officer who was neither a lawyer nor a judge and was appointed Military Administrator of Kadina State shortly after the nine Ogoni defendants were executed. Douglas Dec. at 2. On December 14, 1994 a newspaper reported that Col. Komo, then Military Administrator of Rivers State "has spoken of the need for justice in the trial of suspects" of the murder of the four Ogoni Chiefs and that he exchanged "views with the visiting members of the [CDST] set up to try the suspects." Ex. 15 (K10643).

The military interfered with the right to counsel by the presence of Lt. Col. Paul Okuntimo, whenever counsel communicated with their clients. Okuntino was also present at the Tribunal proceedings

and consulted with the prosecutor. Oronto Douglas, one of Ken Saro-Wiwa's lawyers, observed that the detainees had been beaten; Ken Saro-Wiwa also told him that he had been tortured. Daniel Gbokoo was beaten so severely that he was immobilized. Douglas Dec. at 3-4. During the trial, members of the legal defense team were threatened and jailed arbitrarily; Femi Falana, another defense lawyer, was assaulted on the first day of the proceedings by a soldier. *Id.* at 4.

Counsel were precluded from submitting exculpatory evidence, including declarations by key prosecution witnesses stating that they had been bribed. They attempted to introduce a copy of a videotaped press conference held the day after the murders by Major Komo. The tape included Major Komo's statement that Ken Saro-Wiwa was guilty and revealed statements by one of the prosecution's key witnesses that materially conflicted with testimony adduced by the prosecution. The Tribunal rejected the tape on evidentiary grounds; when counsel tried to obtain the original through a subpoena issued to the Nigerian government, the government replied that the tape had been destroyed. *Id.* at 4.

The Provisional Ruling Council (PRC), the body charged with reviewing and confirming the verdict, did so perfunctorily. Although the decree under which the Ogoni 9 were convicted and sentenced to death required transmission of the record of proceedings to the PRC before the verdict could be confirmed, the PRC confirmed the judgment and sentence before the record was available. *Id.* at 4.

Ken Saro-Wiwa, John Kpuinen, Saturday Doobee, Felix Nuate, Daniel Gbokoo, and Dr. Barinem Kiobel were hanged on November 10, 1995. *Id.* at 5.

D. The arbitrary detentions, torture and forced exile of Michael Vizor violated international norms

On April 30, 1993, Plaintiff Michael Tema Vizor was arrested and detained for four days without charge for participating in a peaceful demonstration against Shell protesting the bulldozing of crops and the shootings in Biara. Ex. 16 (Vizor Dep.) at 106:3-12, 108:13-16; 181:18. During his detention, Nigerian military personnel repeatedly told him that he was under arrest for opposing Shell, that Shell would kill him, and that the military would do anything Shell asked. *Id.* at 48:22-49:15. He was also told by Shell contractors and employees that he would be paid in return for withdrawing his support for Ken Saro-

Wiwa and stopping protests by the National Youth Council of the Ogoni People (NYCOP) against Shell. *Id.* 21:8-28:23. In July 1994, soldiers came to Mr. Vizor's home, beat him in the presence of his children, and took him away. *Id.* 136:25-137:2, 139:10-25. While he was in detention, Mr. Vizor's daughter was kidnapped and raped. Ex. 17 (Expert Report of Dr. Hawthorne Smith) at 3-4.

Michael Vizor was charged with murder before the CDST on January 28, 1995. When he refused to confess, he was tortured repeatedly. The abuse included suspension from the ceiling, severe beatings, and death threats. Ex. 16 at 203:23-204:5, 142:7-19, 147:21-148:18, 201:22-202:13; Ex. 17 at 4; Ex. 18 (Expert Report of Dr. Allen Keller) at 6-8, 12. While in jail, Mr. Vizor was denied medical assistance for his injuries. Ex. 18 at 4. He was detained in various locations until October 30, 1995. Ex. 16 at 139:22-140:24, 141:19-142:6, 143:4-23, 147:4-20, 151:3-14.

E. The arbitrary detentions, torture and cruel, inhuman, and degrading treatment and punishment of Owens Wiwa violated international norms

Plaintiff Owens Wiwa was detained without charges from December 26, 1993, to the night of January 4, 1994, to prevent him from organizing and participating in a planned demonstration protesting, *inter alia*, Shell's despoliation of the Ogoni environment. Ex. 19 (Owens Wiwa Dep.) at 370:25-371:3, 374:20-22, 380:8-382:7. He was moved through various villages, eventually spending several days under armed guard at an abandoned building in Port Harcourt before being freed. *Id.* 370:25-374:22. He was detained again from April 6-20, 1994. *Id.* at 428:8-14, 433:10-14, 439:12-440:4, 441:3-442:2. When they were arrested, Owens Wiwa and his fellow arrestee, Noble Obani-Nwibari, were told to face the woods and guns were put to their heads. *Id.* 433:6-14. Owens Wiwa was also beaten in detention. *Id.* 442:4-22.

In late May 1994, Ken Saro-Wiwa, the leader of the international campaign against defendants' destructive Ogoni operations, was arrested and detained on fabricated criminal charges along with other activists. Defendants' agent Brian Anderson, the Managing Director of SPDC, tried to extort Owens Wiwa's promise to have Ken Saro-Wiwa and MOSOP end the international campaign against defendants and drop their demands in exchange for Ken Saro-Wiwa's release from prison. *Id.* at 247:14-248:4.

In October 1994, Plaintiff Owens Wiwa was arrested and held for eight hours for possessing

letters written by Ken Saro-Wiwa. *Id.* at 448:16-449:15, 455:8-11. He was arrested again without being charged in August 1995 and held for 5-6 hours for having the foreign telephone numbers of human rights groups around the world in his possession. *Id.* 456:15-458:20, 459:8-14. On November 13, 1995, Owens Wiwa fled Nigeria because he feared further arbitrary arrest, torture and death. *Id.* at 16:4-12. The repeated detentions without recourse to judicial authority physical and mental abuse, forced exile, and attempted extortion constitute arbitrary detention, torture and cruel, inhuman, and degrading treatment.

F. The abuses at issue here constitute crimes against humanity

Plaintiffs have previously set out the elements of crimes against humanity. *See* IL Br. at 37-43; IL Reply at 27-29. The acts of violence described above were part of a persistent course of conduct, dating back at least to 1990 and involving thousands of individuals and at least hundreds of deaths, in which the defendants worked with the Nigerian security forces to target those who protested against them.

On Oct. 29, 1990, SPDC demanded that the Nigerian government send security protection ("preferably the Mobile Police Force") in anticipation of a demonstration at SPDC facilities near Umuechem. Ex. 20 (C004465). On Nov. 1, 1990, the Nigerian forces killed approximately 13 villagers, damaged property, and committed arson. Ex. 21 (C003459-71) at C003469. This conduct was later condemned by a government investigation into the incident. *Id.* at C003468-69.

In August and September 1993, the Rivers State Internal Security Task Force, with the combined forces of MOPOL, the Navy and the Army, attacked Ogoni villages close to the Andoni border, including Kaa. They disguised their incursions as invasions of Ogoni by the Andoni tribe. In August, the military entered the Ogoni village of Kaa and shot many villagers. Ex. 19 at 154:24-155:13. In September, multiple Ogoni were killed in the attack and burning of the village of Kpaen by the military. Ex. 22 (Victor Wifa Dep.) at 241:12-19; 238:10-14. Monday Witah was murdered by soldiers during an attack on the village of Kewigbara in the Bane area in 1993, along with other people. Ex. 23 (Anthony Kote-Witah Dep.) at 178:17-179:21; Ex. 24 (Israel Nwidor Dep.) at 108:18-109:4. That same month, the military shot at villagers in the Ogoni village of Eeken, injuring Benson Magnus Ikari and killing a man named Shob along with several others. Ex. 25 (Benson Ikari Dep.) at 25:3-21.

These attacks were conducted with the substantial assistance of SPDC in retaliation for Ogoni opposition to Shell's operations in Ogoni. Ex. 26 (Ebu Jackson Nwiyon Dep.) at 26:4-28:17; Ex. 27 (Vincent Nwidoh Dep.) at 10:2-12:1; Ex. 25 at 20:12-17; Ex. 28 (Bishop Augustine John-Miller Dep.) at 131:19-132:13. Helicopters and boats contracted by SPDC transported MOPOL and brought them food. Ex. 26 at 12:17-18, 14:16-15:2. SPDC routinely transported MOPOL with loaded weapons on Shell helicopters. Ex. 27 at 111:3-20.

In August 1993, SPDC flew MOPOL and regular military police to the scene of an anti-Shell protest in Bonny, where these forces killed Omosa Brown. *Id.* at 13:11-16:20, 84:16-85:18. In 1994, Nigerian security forces in police uniforms pursued people from the village of Afam to Loko, where Friday Nuate was living. When they arrived, they fired gunshots and began burning houses. Ms. Nuate's house was among the houses that were destroyed. Ex. 29 (Friday Nuate Dep.) at 22:5-6, 71:22-73:25.

These attacks were widespread and systematic. The Nigerian government's own Human Rights Violations Investigations Commission (the "Oputa Commission") found that, "during the dark period of military rule in the country," the military government's actions to protect the "interests" of the oil industry "led to the systematic and generalized violations and abuses . . . in the Niger-Delta." Ex. 30 (Human Rights Violations Investigation Commission, *HRVIC Report* (May 2002) ("Oputa Report"), Vols. 1 and 3), Vol. 1 at §1.50. In particular, the Oputa Commission concluded that "the Ogoni people have suffered immensely from killings, torture, arbitrary arrests and detention, rape, destruction of property, and a general atmosphere of siege and militarism by state security forces." *Id.*,Vol. 3 at §2.44.

The attacks against plaintiffs formed part of a wider campaign of attacks on the civilian population. The Nigerian government, SPDC, and defendants were aware that the attacks against plaintiffs constituted part of the wider pattern of attacks against the population. It was common knowledge that the military repeatedly targeted individuals and communities associated with opposition to oil companies and their practices. The extrajudicial killing of the Ogoni Nine was clearly related to the overall Ogoni campaign. Shell's offer to trade Ken Saro-Wiwa's life in exchange for a commitment to end the protests against Shell is ample proof of this. *See infra* at 15. Similarly, the Shell-supported attacks on Ogoni

villages were part of the Nigerian military government's ongoing attempts to suppress Ogoni opposition.[13]

IV. SPDC WAS COMPLICIT IN THE ABUSES COMMITTED BY THE NIGERIAN MILITARY AGAINST PLAINTIFFS; DEFENDANTS ARE LIABLE FOR THE VIOLATIONS OF CUSTOMARY INTERNATIONAL LAW ALLEGED THROUGH THEIR RESPONSIBILITY FOR AND INVOLVEMENT IN SPDC'S MISCONDUCT

Although it is not appropriate for the Court to consider the sufficiency of the evidence on the merits at this stage, Plaintiffs provide ample evidence to support their contentions that 1) SPDC was complicit in the abuses committed by the Nigerian military, and 2) that defendants are liable for those abuses under various theories of liability.

Plaintiffs first demonstrate that SPDC bears liability the violations of the law of nations as described above. SPDC aided and abetted, acted jointly with, and conspired with the Nigerian military to commit these abuses in an attempt to suppress Ogoni opposition, prevent its spread to other Nigerian oil producing communities, and clear the way for SPDC's return to Ogoni.

Next, Plaintiffs present evidence to support their claims that the corporate defendants are liable for SPDC's wrongful actions under several theories of liability. SPDC acted as defendants' agents in connection with violations alleged by plaintiffs and SPDC's actions fell within the scope of that agency relationship. Moreover, Defendants ratified SPDC's misconduct as it occurred and after the fact, thereby certifying that SPDC's conduct fell within the scope of its authority as agent. This and other facts also

---

[13] The evidence summarized above establishes that the violent attacks on peaceful protestors and other abuses were an attempt to silence or punish political protest and therefore violated the rights to life, liberty, security of the person and peaceful assembly and expression. *See* IL Br. at 34-37; IL Reply at 27-29 (defining those rights). Such acts are violations of clearly defined, widely accepted international law norms. Plaintiffs were subjected to deadly force in retaliation for their protest activities. Plaintiffs' rights of freedom of association were violated by the same conduct. The security forces specifically announced that the attacks on villagers – including plaintiffs – as well as their torture and detention were aimed at the association of the victims with Ogoni opposition to Shell's operations.

The rights of Plaintiffs Karalolo Kogbara and Friday Nuate to freedom of association were violated despite the fact that they were not personally involved in protests against Shell at the time of the human rights abuses. It is a settled principle of tort law that a person who commits an intentional tort – such as assault – that is directed at another but in fact causes the intended injury to a third person is liable for the tort. *See* Restatement (Second) of Torts (1997) §16(2) and cmt. *b*. The abuses suffered by Ms. Kogbara and Ms. Nuate are analogous: security personnel, acting with the

show that SPDC acted as the alter-ego of defendants; that the corporate defendants conspired with SPDC, Defendant Anderson, and the Nigerian military; and that defendants acted in reckless disregard of the likelihood that their conduct would lead to the violations alleged.

A. SPDC was a joint venturer with the military government and conspired in and aided and abetted the commission of violations of customary international law[14]

Defendants' arguments regarding Korokoro and Biara relate solely to their own direct involvement in those incidents. They do not and cannot claim that SPDC did not participate in, conspire in, or aid and abet the abuses committed at those locations, or that SPDC is not otherwise liable. In fact, SPDC was a joint venturer with, aided and abetted, and conspired with the Nigerian military government to commit acts of violence against villagers at Biara and Korokoro; attack Ogoni villages under the guise of an Ogoni-Andoni civil war; and orchestrate the sham trial, detention, and torture of Ogoni leaders and execution of the Ogoni Nine.

1. SPDC aided and abetted, jointly participated with, and conspired with Nigerian military forces to attack Ogoni villages under the guise of an Ogoni-Andoni civil war.

The evidence establishes SPDC's responsibility for the presence of Nigerian security forces throughout the relevant period. SPDC routinely paid, supplied, transported, and housed MOPOL and other Nigerian armed forces in Ogoni – beyond the supernumerary SPY police – to patrol its facilities. Ex. 26 at 35:5-17, 46:18-47:11, 49:4-60:1, 138:16-142:21, 148:5-12, 219:24-222:20. During at least one of these patrols, Major Paul Okuntimo ordered troops to use violent or even lethal force on any troublemakers. *Id.* at 35:6-12, 35:24-36:3. The attacks of August and September 1993 were conducted with the substantial assistance of SPDC in retaliation for Ogoni opposition to Shell's Ogoniland operations. *Id.* at 26:4-28:17; Ex. 25 at 20:12-17; Ex. 27 at 10:2-12:19; Ex. 27 at 131:19-132:13. During the invasions, helicopters and

---

intent to injure people exercising their right to freedom of association, in fact injured them.

[14] Plaintiffs have demonstrated that aiding and abetting, joint tortfeasor liability and conspiracy are well established principles of both international law and federal common law. *See* IL Br. at 49-55. Furthermore, joint venturers can be characterized as partners for a limited purpose. Such people thus constitute mutual agents whose acts bind the joint venture, *see* Restatement (Third) of Agency at §3.03, cmt. *e*(2) (2006), and who are liable for each other's acts under traditional agency principles. *See infra* at Part IV.B.1 for further discussion of agency.

boats contracted by SPDC transported MOPOL with loaded weapons and brought them food. Ex. 26 at 12:17-18, 14:16-15:2; Ex. 27 at 13:11-16:20, 84:16-85:18, 111:3-20.[15]

2. Nigerian military forces carried out violent acts against villagers at Biara and Korokoro in furtherance of their joint venture with SPDC

SPDC was a joint venturer with the Nigerian military government in the exploration and exploitation of oil (Ex. 31 (C002737-38)), and the military's efforts to suppress opposition to Shell's operations were taken on behalf of that joint venture, as the security forces indicated. *See, e.g.*, Ex. 22 at 133:19-134:18; Ex. 24 at 199:15-200:5; Ex. 28 at 204:15-205:9; Ex. 32 (Blessing Israel Dep.) at 36:21-37:6; Ex. 33 (Freddie Idamkue Dep.) at 257:21-25, 259:24. It was in this context that the military shot Plaintiff Kogbara and took her into custody and tortured her. *See supra* at 5. SPDC insisted that the security forces come to Korokoro and provided transportation for the forces, who then killed plaintiffs' decedent Uebari N-nah and wounded two other villagers. SPDC paid them for their services and praised them for their "restraint." *See supra* at 6.

3. SPDC aided and abetted, conspired with, and jointly participated with the Nigerian military government in the orchestration of the CDST proceedings against the Ogoni Nine and other Ogoni leaders

SPDC, through their outside counsel, participated in the bribery of witnesses to give false testimony to support the summary executions of Ken Saro-Wiwa and the other Ogoni 9. Naayone Nkpah was abducted by security forces after writing a statement that he was unaware of who had killed the four Ogoni leaders and refusing instructions to accuse the Ogoni 9. Ex. 34 (Naayone Nkpah Dep.) at 102:24-103:12, 105:3-109:20. While in detention, he was given a statement accusing Ken Saro-Wiwa and the Ogoni 9 of the murders and induced to sign it; at this meeting, he was introduced to Shell's lawyer, Mr. Okocha, who witnessed the entire proceedings. *Id.* at 110:15-116:16. Charles Danwi signed a written declaration that he had been bribed to falsely accuse the Ogoni 9 of the murders. Ex. 35 (E-MB02045); Ex. 36 (K00658-783) at 752. Both men's false testimony was entered into evidence against the Ogoni 9

[15] In one incident, eight MOPOL and one inspector were assembled at the Shell helipad in Port Harcourt, transported with arms and ammunition to Andoni and paid from an envelope given to the inspector by Shell staff. Ex. 26 at 16:19-17:8, 17:23-18:12, 20:5-8, 23:11-14.

while SPDC's legal representative was present. Ex. 37 (K03862).

SPDC's representative was present throughout the CDST proceedings and reported back to SPDC. Defendants have offered varying explanations of the presence of their representative (*compare* Ex. 38 (DEF001266-81) at 74 (SPDC sent an attorney to represent its interest at the Tribunal for a single day under the misapprehension that the Tribunal would deal generally with civil disturbances) *with* Ex. 39 (DEF075589-90, 610-11) at 610-11 (attorney Okocha attended the proceedings in his "capacity as the chairman of the Rivers State Bar Association."). In their current motion, defendants rely on yet a different version of Okocha's role in the Tribunal. Millson 2d Ex. 35. Defendants' various statements are both internally inconsistent and contradicted by other evidence. When SPDC retained Okocha and his firm, it understood that the Tribunal "would try some people suspected to be involved in the civil disturbances." Ex. 37. Someone from Okocha's chambers appeared at the tribunal on behalf of SPDC on approximately 100 occasions. Ex. 40 (Defendants' Supplemental Interrogatory Responses of 12.17.08, exhibit A1). *See also* Ex. 41 (K02945) (showing fees paid by SPDC). Defendants' Privilege Log indicates that SPDC had repeated communications with its legal counsel concerning the proceedings over an extended period of time. See Ex. 42 (Privilege Log) ## 89-94, 97, 98, 100-105, 124-211.[16] Okocha's current claim that in his declaration he held a "watching brief "on behalf of SPDC, constitutes an admission that SPDC did have an interest in the proceedings: a watching brief requires that counsel represent a party with an interest in the outcome of the proceedings. Douglas Dec. at 5.

Plaintiff Owens Wiwa met with Defendant Anderson to request his help in securing Ken Saro-Wiwa's release. Anderson responded, "it is difficult but not impossible, you will have to show goodwill." Ex. 19 at 548:3-6. He then demanded that Owens Wiwa issue a statement published in Nigeria admitting that there was no environmental devastation in Ogoni, call off the campaign against Shell and the government, and withdraw a documentary to be aired in London critical of Shell. *Id.* at 247:12-248:6. Anderson's offer is an admission of SPDC's power to obtain Ken Saro-Wiwa's release. Moreover, his insistence on the withdrawal of a documentary to be aired in London indicates that he was speaking on

[16] For a discussion of defendants' assertion of privilege, see below at 21 and n.29.

behalf of defendants as well as SPDC, which would have little interest in something shown in London.

B. Defendants are liable for the alleged violations of customary international law[17]

Under *Sosa* and other ATS cases, a uniform body of federal common law applies to questions of indirect or secondary liability.[18] *See* IL Br. at 46-47; IL Reply at 29-34. For the purposes of ATS cases, federal common law may incorporate international law. IL Br. at 46-48.

1. SPDC acted as the agent of the Defendants.

As detailed below, at all relevant times, SPDC acted as the defendants' agent and its misconduct fell within the scope of its authority as agent. Defendants controlled SPDC's financial, employment, and security policies; kept themselves closely informed of all SPDC's actions with regard to the Ogoni, about whom they were deeply concerned; and directly engaged in a smear campaign against Ken Saro-Wiwa while the fate of the Ogoni Nine and other Ogoni leaders was being decided. Furthermore, defendants ratified SPDC's misconduct by concealing it, failing to stop it, and launching a publicity campaign to influence public opinion and cover up the misconduct.

a. Defendants are liable for SPDC's misconduct because SPDC was acting as an agent within the scope of its authority.

i. A parent corporation can be held liable for the torts of its subsidiary if an agency relationship exists between the two and the subsidiary's acts fall within its authority

Defendants are liable for the misconduct of SPDC through the basic principles of agency. Both federal common law and international law include agency principles. IL Br. at 55-59. Defendants do not contest this. Thus, agency is actionable whether federal common law or international law applies to this

---

[17] Defendants' misleading insistence that plaintiffs' case will fail for lack of witnesses with firsthand knowledge of defendants' involvement in the human rights violations, Memo. at 1 n.1, ignores the multiple admissions that will be admissible under Fed. R. Evid. 801.

[18] Defendants provide vague arguments but no actual support for their contention that "secondary liability should be addressed on a norm by norm basis." Memo. at 23 n.18 (citing Def. Int'l Br. at 62-66). In fact, the general applicability of theories of liability under the ATS is a firmly established principle in this Circuit. *See* IL Reply at 5-6 (citing *Kiobel v. Royal Dutch Petroleum Co.*, 456 F. Supp. 2d 457, 464 n.9 (S.D.N.Y. 2006); *Khulumani*, 504 F.3d at 281, 288; and *Flores v. S. Peru Copper Corp.*, 253 F. Supp. 2d 510, 525 (S.D.N.Y. 2002)).

issue.[19] "It is well established that traditional vicarious liability rules ordinarily make principals or employers vicariously liable for acts of their agents or employees in the scope of their authority or employment." *Meyer v. Holly*, 537 U.S. 280, 285 (2003) (citations omitted); *see also* Restatement (Second) of Agency ["Restatement"] § 219 (1958). The principal may be liable for the agent's torts even though the agent's conduct is unauthorized. Restatement § 216; *see id.* §§ 228–236; *see, e.g.*, *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245, 253 (1974). A number of factors may be considered, *see* Restatement § 220, but the primary question is whether the principal controls or has "'the right to control'" the agent. *Clackamas Gastroenterology Assocs., P.C., v. Wells*, 538 U.S. 440, 448 (2003) (quoting Restatement §§ 2, 220).

Liability for an agency relationship attaches even where the principal and agent are related corporations or a parent and a subsidiary. *See* IL Br. at 57 n.61 (collecting cases).[20] Thus, in *Bowoto v. Chevron Corp.*, the District Court properly held that under the ATS, independently of whether the

[19] The same is true of veil piercing, *see infra* at Part IV.B.2.b; IL Br. at 59-60, and of plaintiffs' claim that the military served as the agent of SPDC and/or defendants. IL Br. at 56, 59. Contrary to Defendants' claim, Memo. at 24-25 n.20, the Court held in its 2002 Order that it "does not decide at this time" whether Plaintiffs' claims rely on an agency relationship between defendants and the military. *Wiwa v. Royal Dutch Petroleum Co.*, 2002 U.S. Dist. LEXIS 3293 at *77 n.30 (S.D.N.Y. Feb. 28, 2002). Defendants wrongly claim there is no evidence that they ever met with the military. Memo. at 24-25, n.20. *See, e.g.*, Ex. 9 at 121. Moreover, a meeting is not required to establish direct agency between the military and the defendants. Regardless, the agent of an agent is the agent of the principal. *In re Parmalat Securities Litigation*, 474 F. Supp.2d 547, 553-54 (S.D.N.Y. 2007) ("The Restatement states with pristine clarity that "[t]he rules applicable to the liability of a principal for the acts of agents, are applicable to his liability for subservants and other subagents insofar as their conduct has relation to the principal's affairs. Cases to the same effect are legion.") (citing Restatement §255 and several cases in n. 29). *See also* Restatement §14M, Reporter's Note. Agency liability is established here by the fact that SPDC, defendants' agent, was responsible for the military's acts because the military was the agent of SPDC, as well as a joint venturer and co-conspirator.

[20] Defendants ignore this principle and conflate agency and alter-ego liability, suggesting that under an agency theory, Plaintiffs must establish "extraordinary circumstances for *ignoring the corporate form*" and show that the "separate legal statuses of Royal Dutch and Shell Transport should be disregarded." Memo. at 23 & n.18. Agency, however, affirms the separate existence of the subsidiary, whereas veil-piercing treats the parent and subsidiary as one entity. Thus, unlike alter-ego liability, agency liability does not require the court to disregard the corporate form. *Bowoto*, 312 F. Supp. 2d at 1238; *accord Phoenix Canada Oil Co. v. Texaco, Inc.*, 842 F.2d 1466, 1477 (3d Cir. 1988) ("general alter ego criteria need not be proven") (citing Restatement §14M cmt

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 between the parent and the subsidiary." 312 F. Supp. 2d 1229, 1238 (N.D. Cal. 2004). Agency liability arises when the subsidiary acts on the parent's behalf or at its direction. *See Royal Indus. v. Kraft Foods*, 926 F. Supp. 407, 412-13 (S.D.N.Y. 1996).[21]

In *Bowoto*, 312 F. Supp. 2d at 1243, the Court found sufficient plaintiffs' allegations that a subsidiary acted as its parent companies' agent based on: (1) communications between the subsidiary and the parents, particularly during the incidents at issue; (2) the degree to which the parents set or participated in setting policy, particularly security policy, for the subsidiary; (3) officers and directors the parents and its subsidiary had in common; (4) reliance on the subsidiary for revenue production and acknowledgment of the importance of the subsidiary and other international operations to the parents' overall success; and (5) the extent to which the subsidiary, if acting as the parents' agent, was acting within the scope of its authority during the events at issue. For all the factors listed above, the Plaintiffs adduce sufficient evidence to show that SPDC acted as the agent of the corporate Defendants.[22]

---

a). *See also* Restatement §14M, Reporter's Notes.

[21] The cases cited by defendants are completely inapposite to the agency question presented here. *See United States v. Bestfoods*, 524 U.S. 51, 61-64 (1998) (noting general principle that parent is not automatically liable for acts of its subsidiary and discussing piercing the veil between parent and subsidiary); *Jazini v. Nissan Motor Co.*, 148 F.3d 181, 184-85 (2d Cir. 1998) (internal quotation omitted) (when applying New York standards for personal jurisdiction, in order to establish that a subsidiary is an agent of the parent, "the plaintiff must show that the subsidiary does all the business which [the parent corporation] could do were it here by its own officials."); *Kingston Dry Dock Co. v. Lake Champlain Transp. Co.*, 31 F.2d 265, 267 (2d Cir. 1929) (stating that agency is consensual); *Berkey v. Third Avenue Ry. Co.*, 244 N.Y. 84 (1926) (analyzing requirements to pierce corporate veil). *Maung Ng We v. Merrill Lynch & Co.*, No. 99 Civ. 9687, 2000 WL 1159835, at *7 (S.D.N.Y. Aug. 15, 2000) actually supports plaintiffs' analysis, recognizing that the essential element of an agency relationship is that "the principal has the power to control the agent".

[22] Nigerian agency law cited by defendants has no application to ATS claims. The rights of human rights abuse victims do not vary according to the happenstance of where they were abused. IL Reply at 29-34. Moreover, Defendants misstate Nigerian law. *See* IL Reply at 35-36. And, even under their own recitation of Nigerian law, SPDC is the agent of defendants because it was created to carry out their objectives. Memo. at 23; *see supra* at Part IV.B.1.a.ii.1.

ii. The facts support a finding that SPDC acted as the corporate defendants' agent

1. The corporate defendants controlled SPDC's financial, employment, and security policies

Far from being the detached investors portrayed in their brief, defendants were intimately involved in events relating to SPDC's operation in Nigeria. SPDC was created to conduct defendants' business in Nigeria with the sole purpose to generate profits for the benefit of defendants. Ex. 43 (B000923-27) at B000923. *See also* Ex. 44 (Jennings Dep.) at 94:19-95:7. Defendants headed a highly centralized operation in which they exercised significant control over operating companies, including SPDC. *See* Dr. Jordan Siegel Dec. at para. 14; *see also* Ex. 45 (DEF0010192-204). Defendants controlled the manner in which its subsidiaries treated the communities in which they operated. See Ex. 46 (A000869-76) at 871 ("All Shell companies operate within the Royal Dutch/Shell Group's *Statement of General Business Principles* and Policy guidelines on Health, Safety and the Environment."). *See also* Ex. 47 (C004130-32). Defendants were kept regularly informed by and advised SPDC on critical aspects of its operations, including its relationship with the police and military, its communications with government officials and problems in Ogoni.[23]

The Managing Director of SPDC was chosen and appointed by defendants. *See, e.g.*, Ex. 74 (DEF055854) (Jan. 10, 1994 Van Broek letter to Anderson informing him of his appointment); Ex. 75 (DEF055853) (Jan. 11, 1994 telex on behalf of the CMD directing that Anderson's appointment "be proposed to the SPDC Board of Directors by the CMD"); Ex. 76 (DEF055382) (letter from P.B. Watts at SPDC announcing Anderson appointment as SPDC Managing Director on Jan. 11, 1994); Ex. 77 (DEF051072) (SIPC Ltd document on Anderson's appointment notes that "Parent Function" is Exploration and Production).[24]

---

[23] *See, e.g.*, Ex. 48 (A000001-06); Ex. 49 (A000013-16); Ex. 50 (A000074-83); Ex. 51 (A000279-80); Ex. 52 (A001343-44); Ex. 53 (A002909-17); Ex. 54 (A002940-44); Ex. 55 (A002945-47); Ex. 56 (A002982); Ex. 57 (A003003); Ex. 58 (A003224); Ex. 59 (C004420-21); Ex. 60 (C004769-71); Ex. 61 (C004788-90); Ex. 62 (C004791-94); Ex. 63 (C004797-98); Ex. 64 (C004799-805); Ex. 65 (C004811-14); Ex. 66 (C004819-24); Ex. 67 (C004825-33); Ex. 68 (C004834-37); Ex. 69 (C004849-54); Ex. 70 (DEF005425-30); Ex. 71 (DEF009976); Ex. 72 (DEF009987-91B); Ex. 73 (DEF010109-13).

[24] Defendants also controlled the appointment of other SPDC management. *See, e.g.*, Ex. 78

Defendants also set the remuneration and benefits packages for SPDC employees. In 1995 and 1996, during the height and in the aftermath of the human rights crisis in Ogoni, the parent companies gave Brian Anderson raises and stock options.[25]

2. The corporate Defendants were concerned about developments in Ogoni and involved themselves in and kept themselves informed about SPDC's handling of the issues

Defendants were deeply involved in the Ogoni crisis. In 1992, Ken Saro-Wiwa wrote "Genocide in Nigeria," a direct attack on Shell for its environmental practices. As early as 1992, Defendants were concerned about the organized nature of the opposition presented by Ken Saro-Wiwa and MOSOP, the popular grassroots and international support the movement received, and the possibility that it would spread to other communities. Ex. 88 (C000954-57); Ex. 89 (A000289-307); Ex. 90 (A001592-97); Ex. 91 (A000040-59) at 58; Ex. 92 (A00100-112); Ex. 93 (A000117-22); Ex. 94 (Philip Watts Dep.) at 117:1-118:18; 328:10-24. Their demands and the organized nature of their protests challenged SPDC's manner of operation and defendants' international position. Meeting these demands would have cost money for, among other things, environmental remediation and compensation to the community for past losses. Ex. 95 (C002151-53) at C002153, items 1 and 4.[26]

As a result, the Managing Directors of SPDC regularly consulted with and sent information to defendants. Phillip Watts sent several cables and letters to defendants describing political and security-related developments.[27] Brian Anderson sent memos to the corporate defendants under the title "Nigeria

---

(DEF057189) (SIPC assigned Nick Wood as Senior Editor in Nigeria); Ex. 79 (DEF057302) (noting that Wood was part of the Public Affairs Crisis Response Team); Ex. 80 (DEF057564) (SIPM hired Bopp van Dessel as an environmental specialist to be based in Port Harcourt; Ex. 81 (DEF057565) (his salary was reviewed annually, presumably in the Netherlands). In 1994, after Mr. Van Dessel resigned because of SPDC's lack of progress on environmental issues, R.C. de Veer and Daman Williams conducted an exit interview after an interview by SPDC. Ex. 82 (DEF057557).

[25] Ex. 83 (DEF055843) (July 20, 1994 letter to Van Den Broek detailing Anderson's raise); Ex. 84 (DEF055829-32) (Sept. 22, 1995 Van den Broek letter re Anderson bonus); Ex. 85 (DEF055827) (Dec. 14, 1995 re Anderson stock option); Ex. 86 (DEF055826) (July 1, 1996 re Anderson pay raise); Ex. 87 (DEF055825) (Van Den Bergh stationary approving raise for Anderson).

[26] Defendants admit that the cost of gas flaring was high and that undertaking remediation would have substantially affected their production costs. Ex. 96 (DEF020231-53) at DEF020238.

[27] *See, e.g.*, Ex. 60; Ex. 88; Ex. 89; Ex. 90; Ex. 91 at A000058; Ex. 92; Ex. 97 (C004758-60); Ex.

Update" describing every major issue and decision facing SPDC; these memos almost always discussed the problems in Ogoni.[28] This enabled Defendants to take an active role managing SPDC's responses.

Defendants took a particular interest in the imprisonment of the Ogoni 9 and the proceedings of the CTSD; Defendant Anderson's Nigeria Updates and Shell officers' correspondence reveal that defendants were deeply involved in SPDC's actions involving the trial. *See, e.g.,* Ex. 101; Ex. 103 (A002973-75), Ex. 104 (C000044-45), Ex. 105 (C000738-44). Furthermore, defendants' privilege log reveals that defendants regularly received communication about the CDST from the SPDC representative. Ex. 42 ##89-94,97,98,100-105,124,199-206. Defendants' claim of privilege over communications from SPDC's legal representatives to the CDST is inconsistent with the assertion that SPDC was acting independently of defendants.[29]

Defendants had advance knowledge of the timing and outcome of the CDST verdict. As early as July 1995, Defendant Anderson reported that, based on his conversations with Nigerian Head of State General Sani Abacha, he understood that Ken Saro-Wiwa would be convicted. Ex. 53. Anderson reported to defendants that he explained to Abacha that Shell was under pressure and had to publicly tread lightly on the Ogoni issue, but that Shell was trying to get the public "to better understand what the real facts were" with regard to the Ogoni issue. *Id.* Defendants anticipated that the verdict would be announced on Oct. 31 and were preparing "comprehensive Qs&As on this subject" to be made available to the operating companies "before the verdict date." Ex. 129 (A001529-30) at 30.

3. Defendants publicly smeared and attacked the Ogoni Nine, rather than appealing for clemency or asserting their right to a fair trial.

Defendants attempt to deny liability for the fate of the Ogoni Nine by asserting that they appealed for clemency and publicly announced that Ken Saro-Wiwa should receive a fair trial. However, aside from

---

98 (C003641).

[28] *See* Ex. 49-49; Ex. 52; Ex. 53; Ex. 55; Ex. 60-62; Ex. 64-70; Ex. 72; Ex. 99 (A002488); Ex. 100 (A002902-05); Ex. 101 (C004424-36); Ex. 102 (C004838-40).

[29] Defendants' reliance on a declaration by attorney Okocha, unsupported by any contemporaneous documents, about the nature of his representation of SPDC at the tribunal, defendants' understanding of the nature of the tribunal, or the reasons his status at the CDST changed, should not be permitted while defendants hide behind the privilege.

defendants' own claims, there is no evidence to support this contention.

Defendants claim that the CMD chairman "recommended that a letter be written appealing for clemency" on behalf of defendants. Memo. at 19. However, according to minutes dated November 8, 1995, the issue "had been considered over a long period of time" and Anderson would not request clemency. Ex. 106 (A004268-71) at A004269. It was agreed at that meeting that a letter from the chair should issue "before the Commonwealth Conference" began. The letter discussed on November 8 was backdated to November 7. *Id.* at A004271. Although defendants and SPDC issued press releases on November 8 describing the chair's personal appeal to Abacha, defendants' letter was not delivered in Nigeria and defendants do not know whether it was ever delivered to Abacha. Ex. 40 at 9.

Defendants contend that they exercised "quiet diplomacy," and Defendant Anderson claims that he attempted repeatedly to meet with Abacha to advocate for leniency for the detainees. However, the only contemporaneous evidence of such "attempts" undermines their claims. On October 26, 1995, Anderson reported to his superiors at Shell that Nigerian officials had told him the verdict would come on October 31; the report did not mention any attempt to appeal for clemency. Ex. 100. Rather, he spoke with a SPDC board member to arrange a meeting with Abacha on November 17 or 18—after the executions had been carried out (Ex. 99)—and sent SPDC employee Achebe to attempt to convince Abacha to postpone the trial decision until after SPDC could conclude a long-running negotiation on a natural gas development contract. Ex. 101 at C004431. He did not use "quiet diplomacy" or make any effort to obtain a fair trial or clemency on behalf of the Ogoni 9. Despite frequent reports to defendants about the content or conversations with various Nigerian officials, not a single one contains any request by representatives of defendants or SPDC on the issue of a "fair trial" for the Ogoni 9 or reflects "quiet diplomacy."

Defendants' other claims about their public positions on Ken Saro-Wiwa's right to a "fair trial" are belied by the evidence on which they rely. Def Br. at 15. The "public letters" were not public. Each was addressed to specific individuals and none supported the right to a "fair trial." *See* Millson Ex. 20 (addressed to Jakob von Uexkull), Millson Ex. 21 (addressed to Gordon Rudnick); Millson Ex. 22 (addressed to Anthony Lovins). The Briefing Note, Millson Ex. 23, which defendants argue called for a

"fair trial," did not do so. However, it did level accusations at Ken Saro-Wiwa and MOSOP, claiming that they had "attacked Shell unfairly" only for "leverage" against the Nigerian government and implied that MOSOP's program involved the use of violence. Millson Ex. 23.[30] Defendants also wrote that Saro-Wiwa's violent campaign caused the government to detain him in prison, Ex. 108 (A001302-16) at A001308; Saro-Wiwa used Shell as "cannon fodder," Ex. 109 (A001599); and Saro-Wiwa and MOSOP were "using Shell and environmental accusations to obtain political concessions from the government." Ex. 46 at A000869. On Nov. 8, 1995, defendants directed the Group of companies to issue releases condemning protests about the death sentences for the Ogoni 9, stating, "We are concerned that certain protests against the Government of Nigeria at this point could actually precipitate the kind of developments we want to avoid." Ex. 110 (A002510-14) at A002511. Following the execution of the other Ogoni 9, defendants publicly campaigned against the imposition of sanctions on Nigeria. Ex. 111 (A002536-37).

b. Defendants are liable for SPDC's misconduct because they ratified SPDC's acts.

i. A principal may become liable even for acts of its agent that are outside the scope of authority if it ratifies the acts

Defendants do not deny that they can be held liable for the misconduct of their agent, SPDC, through ratification. Ratification is recognized under the ATS, *Bowoto*, 312 F. Supp.2d at 1247-48, and an established principle of both federal common law and international law. IL Br. at 57-59. Ratification involves the principle's knowing acceptance of an agent's acts after the fact. *Bowoto*, 312 F. Supp.2d at 1247; accord *Phelan v. Local 305*, 973 F.2d 1050, 1062 (2d Cir. 1992). An intent to ratify may be inferred from "a failure to repudiate" an "unauthorized transaction," Restatement § 94, or "acceptance by the principal of the 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). Failure to fully investigate misconduct of a purported agent and to punish or otherwise disavow the services of such person is a ratifying act. Restatement

[30] Defendants claimed that the appeal related to the sentence and they "would not and could not comment on the trial or any other aspect of Nigeria's legal or political affairs." Ex. 107 (C002026-30) at C002027.

(Third) of Agency § 4.01 cmts *d*, *f* (2006). 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. *Bowoto*, 312 F. Supp. 2d at 1247–48.

ii. Defendants ratified SPDC's misconduct by knowingly covering up SPDC's involvement in abuses against the Ogoni plantiffs and by promoting Watts and rewarding Anderson

Defendants ratified the conduct of their agent, SPDC, as well as of SPDC's agent, the Nigerian military. They rewarded Anderson with raises and bonuses. See supra at 19. Watts was promoted and ultimately became a member of the CMD. Ex. 94 at 6:17-23. Defendants became involved in the public affairs aspect of the Ogoni issue as early as December 1992. Ex. 112 (C000254). As noted above, defendants were kept informed of the events in Ogoni as they happened. *See also* Ex. 113 (A000511) (describing the spill at Korokoro the day after the incident). However, they publicly obscured the events at Biara. Ex. 114 (A000728-33) at A000731 ¶8 (claiming that "Willbros army escort was not involved in any incident that caused injury to or the death of any third party"); Ex. 115 (A001150-54) at A001153 (falsely implying SPDC had no role in ensuring presence of military and ignoring shooting of plaintiff Kogbara). *See, e.g.*, Ex. 116 (DEF047393-448) at 415; Ex. 117 (A000127-36) at A000131. Defendants also circulated false statements about the Korokoro event in order to cover up SPDC's role in bringing in the military as well as the fact that the military shot indiscriminately, injuring villagers. *See, e.g.*, Ex. 118 (A000589-95) at A000594, ¶ 14. *See also* Ex. 119 (A001274-81) at A001280. Defendants knew or should have known of the killing of Uebari N-Nah but repeatedly made statements indicating that "no villagers were injured." Ex. 117 at A000132; Ex. 115 at A001534.[31] Defendants also covered up the extent to which SPDC relied on the military in contradiction to its own public statements. *See* Ex. 118 (falsely claiming that the incidents at Korokoro and Biara were the only occasions when the military was associated with SPDC when defendants were aware that SPDC used the military to protect the TNP operation prior to the incident at Biara); Ex. 122 (A001654-57) at 55.

Defendants cite documentary support for the unremarkable point that they did not know of the

[31] By 1995, defendants were also aware that Owens Wiwa had performed an autopsy on Uebari N-

specific incidents in Biara and Korokoro *before* they happened. However, the relevant point is that they were or should have been aware of the likelihood that abuses did occur in both incidents, given their close coordination with SPDC on security issues and reports by human rights organizations. *See, e.g.*, Ex. 116 at DEF047415; Ex. 91; Ex. 122 (C003461-71). Moreover, defendants' own documents show that they were well aware of the likely consequences of SPDC's alliance with the military. In his notes on a meeting with an Ogoni group in London, Shell's Alan Detheridge quoted a Shell representative as saying that "when a community incident occurred sometimes the police took matters into their own and escalated the situation." Ex. 123 (A001522-28) at 23. Indeed, following the mobile police attacks on Umuechem, defendants stated that they had learned from the incident and made it "publicly clear that ...[SPDC] will not operate under security force protection." Ex. 124 (A002750). *See also* Ex. 121(DEF047235-69); Ex. 117; Ex. 14 (DEF047192-234) for examples of widespread knowledge about human rights abuses.

Defendants also participated directly in the response to the Ogoni situation by managing the public relations campaign to refute Ken Saro-Wiwa and MOSOP's complaints and cover up SPDC's involvement in the trial. In March 1995, without any employees of SPDC present, defendants met with the Nigerian High Commissioner and Nigerian military to discuss how to counteract Ken Saro-Wiwa's international campaign. Ex. 125 (K03914-23); Ex. 126 (C000225-26). In February 1995, they set up a Nigeria Issue Contact Group to coordinate a press and public relations strategy, emphasizing that defendants would have ultimate authority over communications on the issue worldwide and received weekly updates on events inside and outside Nigeria. Ex. 89. Defendants also attempted to negotiate directly with Ogoni organizations in England about their operations in Nigeria. Ex. 127 (B000408-12).

As noted above, it was defendants and not SPDC who decided that Brian Anderson would not attempt to intercede in the trial and who orchestrated a publicity campaign around an alleged plea for clemency that never actually existed.[32] *See supra* at Part IV.B.1.a.ii.3. The plea for clemency was simply a

---

nah, and that the film "Delta Force" showed Mr. N-nah's grave. Ex. 118 at A000594.

[32] In fact, there is sufficient evidence to suggest that Defendant Anderson acted as the agent of the corporate defendants, and that defendants can thus be held liable for his personal acts. Defendants made the decision to hire Anderson, they were responsible for evaluating his performance he

public relations activity without a serious attempt to reach Abacha in a timely manner. As early as March 1995, defendants were planning to release statements at the conclusion of the "trial" in part to deny their involvement in anti-MOSOP activity. Ex. 128 (A001450-51). As noted above, defendants knew that Ken Saro-Wiwa would be found guilty months earlier, *see supra* at 21, and their Nigeria Issue Contact Group discussed the possible responses to the anticipated verdict. Ex. 129 (A001529-30).

After the execution of Ken Saro-Wiwa, defendants' level of control over the whitewashing campaign intensified. In 1996, Phil Watts, former managing director of SPDC who was then working at headquarters in London, stressed a few "iron rules," emphasizing that it was the responsibility of the group crisis team to manage, not simply coordinate, the group's response on Nigeria. He ordered: "We must all sing from the same hymn sheet." Ex. 130 (DEF0014815-22) at 16. He also dispatched several people, including a doctor, a "friendly" journalist, and an "independent" filmmaker, to Nigeria to develop materials that could be used to counter "Owens Wiwa's extravagant medical claims" and other aspects of plaintiffs' assertions. Ex. 131 (C004572-81); Ex. 132 (C002728-30). Indeed, when public commentary appears over the signature of SPDC's representatives it was approved or even written by defendants.[33]

2. Defendants may be held liable under alternate theories

a. Defendants can be held liable for the acts of SPDC and the Nigerian military through conspiracy liability or for participation in a joint criminal enterprise

Defendants are also liable for the acts of SPDC and the Nigerian military because they engaged in a conspiracy to commit the abuses of which they stand accused. *See* IL Br. at 52-54. Federal common law would hold Defendant responsible for the acts of a conspiracy if "(1) two or more persons agreed to commit a wrongful act; (2) [defendants] joined the conspiracy knowing of at least one of the goals of the conspiracy and intending to help accomplish it, and (3) one of more of the violations was committed by someone who was a member of the conspiracy and acted in furtherance of the conspiracy." IL Br. at 52

---

reported regularly to them, and they made the decision to give him a pay raise in 1995 and 1996. *See supra* at 19-20. Furthermore, during his attempted extortion of Owens Wiwa, one of his demands was that MOSOP withdraw the Channel 4 documentary, a demand that was clearly made on behalf of defendants rather than his own employer, SPDC. Ex. 19 at 247:12-248:6.

[33] *See, e.g.*, Ex. 133 (A002047-50) at 47 (authored by Defendants but to be signed by SPDC's

(citing *Cabello v. Fernadez-Larios*, 402 F.2d , 1158-59 (11th Cir. 2005)).[34]

The same facts that support agency liability also support liability based on conspiracy or joint criminal enterprise. Plaintiffs' allegations, along with the evidence adduced, are sufficient for a jury to find that the corporate defendants, Defendant Anderson, SPDC, and the Nigerian military had the common purpose of using military violence to suppress opposition to Shell operations, that defendants participated in that design by ordering and/or providing advice and by covering up wrongdoing through a concerted public relations campaign, and that the abuses were committed in furtherance of the wrongful aim. This Court therefore has jurisdiction over Plaintiffs' claims by virtue of conspiracy liability.

b. Defendants can be held liable for acts of SPDC based on veil piercing and reckless disregard.

Although not necessary to plaintiffs' claims, veil piercing and recklessness are applicable to ATS claims. IL Br. at 54-55, 59-60. Under international and federal common law, courts pierce the veil where necessary to prevent injustice, protect third persons, or to preclude a party from evading legal obligations, and refuse to give effect to the corporate form where it will defeat legislative purposes. IL Br. at 59-60.[35]

Defendants also acted with reckless disregard in their role in SPDC's security arrangements with the military and their involvement in SPDC's handling of the CDST proceedings and its management of

---

Emeka Achebe).

[34] The standard for joint criminal enterprise – the equivalent of conspiracy under customary international law – requires a plurality of persons, the existence of a common plan or purpose which involves the commission of a crime, and the participation of the defendant in the common design, which may take the form of assistance in the execution of the plan and therefore need not involve actual commission o f a crime. IL Br. at 53 (citing *Prosecutor v. Tadic*, Judgement, Case No. IT-94-1-A (ICTY App. Chamber, July 15, 1999) ¶ 227.

[35] Federal law is "not bound by the strict standards of the common law alter ego doctrine." *Bd. of Locomotive Eng'rs v. Springfield Terminal Ry. Co.*, 210 F.3d 18, 26 (1st Cir. 2000) (citation omitted). "Nor is there any litmus test." *Id.* (internal quotation omitted). Instead, "a corporate entity may be disregarded in the interests of public convenience, fairness and equity." *Id.* (citation omitted). Defendants fail to even cite *First Nat'l City Bank (FNCB) v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 622-23, 628-30 (1983). Moreover, they cite *Bestfoods* without noting that it recognized the "fundamental principle. . . that the corporate veil may be pierced and the shareholder held liable for the corporation's conduct" in certain circumstances. 524 U.S. at 62-63. Since *FNCB* is directly on point–applying the federal common law and international law of veil piercing to an international law claim–that case provides the applicable standard. As noted above, Nigerian and English veil-piercing law is irrelevant.

the whitewashing campaign to cover up SPDC's wrongdoing. In the context of their knowledge (or, indeed, willful ignorance) of the human rights situation in Ogoni and Nigeria, these acts constitute wrongful action "in the face of an unjustifiably high risk of harm that is either known or so obvious that is should be known." IL Br. at 54 (citing *Farmer v. Brennan*, 511 U.S. 825, 836 (1994)). Defendants' conduct thus rises to the level of reckless disregard, even if no agency or conspiracy relationship exists with SPDC, Brian Anderson, or the Nigerian military.

V. DEFENDANT ANDERSON IS LIABLE FOR HIS ROLE IN THE ACTS OF SPDC

Defendant Brian Anderson is liable for his involvement in SPDC's misconduct. It is a well-settled principle of both federal common law and New York state law that a corporate officer can be held liable for torts of the corporation if the officer has been personally involved in the tort. *See, e.g., P&G v. Xetal, Inc.*, 2006 U.S. Dist. LEXIS 24342 (E.D.N.Y March 23, 2006) ("[A] corporate officer who commits or participates in a tort, even if it is in the course of his duties on behalf of the corporation, may be held individually liable."); *United States v. Pollution Abatement Services of Oswego, Inc.*, 763 F.2d 133, 135 (2d Cir. 1985) (existence of corporate liability does not shield corporate officers from personal liability when they were "personally involved in or directly responsible for statutorily proscribed activity"); *see also, Delong Equipment Co. v. Washington Mills Abrasive Co.*, 840 F.2d 843, 851 (11th Cir. 1988) (accord); *United States v. Sutton*, 795 F.2d 1040 (Temp. Emer. Ct. App. 1987).[36] International precedent also permits holding a corporate officer liable for his involvement in corporate misconduct.[37]

There is ample evidence to support the claim that Defendant Anderson, in his role as Managing Director of SPDC and as the central figure in SPDC's response to the "Ogoni issue," is personally liable for the arbitrary detention, torture, extrajudicial killing, and cruel, inhuman and degrading treatment of the

[36] In certain contexts, corporate officers can be liable for violations by the omission to carry out their duties, even if they have not actively participated in misconduct. *See United States v. Park*, 421 U.S. 658 (1975) (finding, in the criminal context, that a corporate officer can be held liable for certain corporate violations regardless of whether he was personally involved).

[37] *See, e.g., U.S. v. Krauch*, 8 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law no. 10, 1081, 1169–1172 (1952); *U.S. v. Friederich Flick*, 6 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law no. 10, 1, 1216–1223 (1949); *In re Tesch*, 13 Int'l L. Rep. 250 (Br. Mil. Ct. 1946).

Ogoni 9, as well as the arbitrary detention, torture, and/or cruel, inhuman and degrading treatment of Michael Vizor and some of the continued attacks that constituted crimes against humanity. He coordinated SPDC's relationship with security forces, *see, e.g.,* Ex. 134 (A002979-81); Ex. 135 (C001604); Ex. 136 (C003188), and is thus responsible for the abuses suffered by Owens Wiwa, Ex. 19 at 16:4-12, 247:14-248:4, 442:4-22, 448:16-449:15, 455:8-11, 456:15-458:20, 459:8-14, and for the arrest and torture of Lucky Doobee, Ex. 137 (Lucky Doobee Dep.) at 6:17-7:3, 7:5-9, 7:12-14.

Anderson maintained regular contact with the military regime and Gen. Abacha, and managed SPDC's strategy for dealing with the Ogoni 9 trial, meeting on several occasions with General Abacha during the CDST's proceedings and, on at least one occasion, dispatching an employee to Abuja to attempt to postpone the verdict until after a key natural gas deal with the Nigerian government was completed. *See, e.g.,* Ex.53 at A002909; Ex. 101; Ex. 138 (A002883-84); Ex. 139 (A002885-90) at A002886; Ex. 140 (A002896-97); Ex. 141 (A002986-87); Ex. 142 (C000090). On his watch, SPDC's lawyer, who had been retained specifically for the purpose of attending the CDST proceedings, oversaw the bribery of tribunal witnesses, Ex. 34 at 102:24-103:11, 105:3-109:19, 110:15-116:16, Ex. 35, Ex. 36 at K00752, and regularly sent communications to him throughout the trial. Ex. 42 ## 89-94,97,98,100-105,124, 199-206. Mr. Anderson was aware several months before the verdict that Ken Saro-Wiwa would be executed. Ex. 53. In a meeting with Owens Wiwa, he admitted that he had the ability to obtain the release of Ken Saro-Wiwa and attempted to extort a promise to end MOSOP's campaigns against Shell and cancellation of a documentary scheduled to be shown in England in exchange for Ken Saro-Wiwa's freedom. Ex. 19 at 247:14-248:4. And, after the executions had been carried out, he collaborated with his superiors at Shell to cover up SPDC's involvement in both the trial and the ongoing violent repression of Ogoni opposition. *See supra* at Part IV.B.1.b.ii. He is therefore liable for the extrajudicial killing, torture and/or arbitrary detention of Ken Saro-Wiwa, John Kpuinen, Saturday Doobee, Felix Nuate, Daniel Gbokoo, Dr. Barinem Kiobel, and Michael Vizor.

VI. THIS COURT HAS SUBJECT MATTER JURISDICTION OVER BLESSING KPUINEN'S CLAIMS

Blessing Kpuinen can bring ATS claims because she was an alien when she initially filed suit, notwithstanding the fact that she subsequently became a U.S. citizen. The general rule for over 150 years has been that, "[w]hen there is no change of the parties . . . a jurisdiction depending on the condition of the parties, is governed by that condition as it was at the commencement of the suit." *Conolly v. Taylor*, 27 U.S. 556, 564 (1829). Thus, "if an alien becomes a citizen pending the suit, the jurisdiction which was once vested is not divested." *Id.* at 565; *see also Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567, 574 (2004) ("To our knowledge, the Court has never approved a deviation from [this] rule.").[38]

CONCLUSION

For all of the above reasons, defendants' motion to dismiss for lack of subject matter jurisdiction should be denied.

February 6, 2009
New York, NY

Respectfully submitted,

Judith Brown Chomsky

Judith Brown Chomsky
Attorney for Plaintiffs

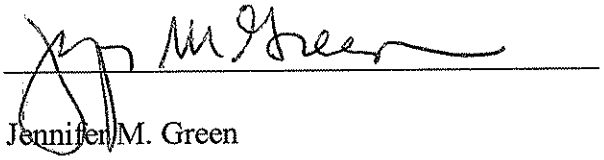
[38] Defendants cite to no caselaw, but the cases cited in their previous brief concern a distinctly different rule for federal question jurisdiction when the claims are changed during litigation. *See, e.g., New Rock Asset Partners, L.P. v. Preferred Entity Advancements*, 101 F.3d 1492, 1503-04 (3d Cir. 1996) (explaining distinction between these rules). Even if Ms. Kpuinen were unable to assert claims under the ATS, she could bring the same claims under 28 U.S.C. § 1331, which provides jurisdiction over federal common law claims even in the absence of statutory authority. *See Illinois v. City of Milwaukee*, 406 U.S. 91, 99-100 (1972). This rule applies here because ATS claims are federal common law claims. *See Sosa*, 542 U.S. at 728-30; *see also Filartiga v. Pena-Irala*, 630 F.2d 876, 887 n.22 (2d Cir. 1980); *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117, 127 (E.D.N.Y. 2000).

CERTIFICATE OF SERVICE

Under penalty of perjury, I hereby certify that today, February 6, 2009, I served a true and correct copy of the foregoing *Wiwa* Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss, and the Declarations of Oronto Douglas, Jordan Siegel and Jennifer Green in *Wiwa et al. v. Royal Dutch Petroleum*, 96 Civ. 8386 (KMW), and *Wiwa et al v. Anderson*, 01 Civ. 1909 (KMW), via ECF to the following recipients:

Rory Millson
CRAVATH, SWAINE & MOORE
825 Eighth Avenue
New York, NY 10019
rmillson@cravath.com

Carey D'Avino
Laddy Montague
BERGER & MONTAGUE
1622 Locust Street
Philadelphia, PA 19103-6365
cdavino@bm.net



Jennifer M. Green