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' BRIEF ON INTERNATIONAL LAW NORMS PURSUANT TO ORDER OF OCTOBER 7, 2008

Marco Simons
Rick Herz
Jonathan G. Kaufman
EarthRights International
1612 K Street NW #401
Washington, DC 20006
(202) 466-51888

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL STATUTES AND LEGISLATIVE HISTORY

INTERNATIONAL CASES

INTERNATIONAL STATUTES AND DOCUMENTS

OTHER AUTHORITIES

INTRODUCTION

Plaintiffs are victims or family members of victims of egregious human rights abuses committed in Ogoni, an area of the Niger Delta in Nigeria. In these two actions, they have sued Defendants Royal Dutch Petroleum Company, Shell Transport and Trading, p.l.c.,[1] and Brian Anderson, former managing director of defendants' Nigerian subsidiary, Shell Petroleum Development Company (SPDC) (collectively "Shell"), under the Alien Tort Statute, 28 U.S.C. §1350, for their complicity with the former military dictatorship in Nigeria in widespread violations of international law, including extrajudicial killing, torture, arbitrary arrest and detention, and crimes against humanity.

At the October 7, 2008 hearing, the Court asked the parties to brief their views "on what the constraints of international law are," addressing the relevant international law norms and submitting one or more expert declarations on the content of those norms. In this brief, plaintiffs analyze the elements of each of the international law violations applicable to their claims, demonstrating that summary execution; crimes against humanity; torture; cruel, inhuman and degrading treatment or punishment; arbitrary detention; violation of the right to life, liberty and personal security; and violation of the right to peaceful assembly and expression constitute torts in violation of universal, obligatory and definable norms of customary international law that are actionable under the standard articulated by the Supreme Court in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). Plaintiffs also demonstrate that a variety of theories of liability are recognized under the ATS. In describing these claims and theories, plaintiffs briefly review the

---

[1]Defendants have asserted that, "[o]n July 20, 2005, defendants Royal Dutch [Petroleum Company] and Shell Transport [and Trading Company, p.l.c.] were acquired by Royal Dutch Shell, p.l.c. ("Royal Dutch Shell"). On December 21, 2005, Royal Dutch merged with its subsidiary Shell Petroleum N.V., with Shell Petroleum N.V. as the survivor. Subsequent to its acquisition by Royal Dutch Shell, Shell Transport changed its legal form and is now known as the Shell Transport and Trading Company, Ltd." Answer to Amended Class Action Complaint filed on October 16, 2006 in *Kiobel v. Royal Dutch Petroleum Company, et al.*, 02 Civ. 7618 (KMW) (HBP), fn 1 (attaching as Exhibit A an excerpt from Royal Dutch Shell's Annual Report on Form 20-F for the year ending December 31, 2005, describing this transaction, also available at http://www.annualreportand form20fshell.com.

facts likely to develop at trial to show how those facts relate to the requirements of each claim.[2] For the convenience of the court, rather than submitting separate briefs on each violation, plaintiffs have combined all of the international law issues into one brief. Plaintiffs refer to the attached declarations of experts in international law on these issues. Expert Declaration of Naomi Roht-Arriaza, ("Roht-Arriaza Decl."); Expert Declaration of Philip Alston, ("Alston Decl.").

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Prior Rulings in *Wiwa* and *Kiobel*.

This Court has previously considered these issues in this case. Early on, Defendants moved to dismiss both actions under Rule 12(b)(6). On February 28, 2002, this Court denied their motion in all pertinent respects. Applying the same "specific, universal and obligatory" standard later endorsed by *Sosa*, this Court found that Plaintiffs' claims of summary execution; torture; arbitrary detention; cruel, inhuman or degrading treatment; crimes against humanity; violation of the right to life, liberty and personal security; and violation of the right to peaceful assembly and expression all involved violations of norms of customary international law and were therefore actionable under the ATS. *Wiwa v. Royal Dutch Petroleum Co.*, No. 96-cv-8386, 2002 U.S. Dist. Lexis 3293 at *15, 17-37 (S.D.N.Y. Feb. 28, 2002).[3] The Court further found that Plaintiffs' ATS summary execution and torture claims were not preempted by the Torture Victim Protection Act (TVPA), 28 U.S.C. § 1350 note. *Id.* at *11-12.

---

[2] Plaintiffs' general overview of the facts relevant to each claim is largely drawn from the complaint and is not intended as a formal offer of proof or pre-trial statement of facts. Nor is it intended to be a conclusive demonstration that the facts alleged satisfy the elements of each claim, given the current procedural posture of the case: no motion to dismiss or for summary judgment is pending and no further motion will be permitted. Plaintiffs reserve the right to modify their presentation of the facts in the pre-trial papers due to be filed at a later date as well as at trial.

[3] The Court dismissed several of Owens Wiwa's claims, but granted leave to amend. 2002 U.S. Dist. LEXIS 3293 at *101. Plaintiffs' Fourth Amended Complaint (FAC) in *Wiwa v. Royal Dutch Petroleum Company* contains a series of allegations which form the basis of these claims by Owens Wiwa. FAC ¶¶ 67-68, 71-72, 83 & 95.

In its September 29, 2006 order in the related case of *Kiobel v. Royal Dutch Petroleum Co.*, this Court rejected defendants' arguments that claims of aiding and abetting could not be asserted under the ATS; granted defendants' motion to dismiss claims for property destruction, forced exile, violation of the rights to life, liberty, security and association, as well as claims that the execution of Dr. Barinem Kiobel pursuant to his conviction by a special military tribunal was an actionable extrajudicial killing under the ATS; denied defendants' motion to dismiss with regard to torture, arbitrary detention and crimes against humanity claims; and certified its order for interlocutory appeal. *See Kiobel v. Royal Dutch Petroleum Co.*, 456 F. Supp. 2d 457 (S.D.N.Y. 2006). On December 27, 2006, the Second Circuit granted petitions by both the *Kiobel* plaintiffs and defendants for leave to appeal aspects of the ruling. The appeal and cross-appeal remain pending.

This Court's ruling in *Kiobel* does not control the claims in this case, in which Uebari N-nah, Ken Saro-Wiwa, John Kpuinen, Saturday Doobee, Felix Nuate, Daniel Gbokoo, and Barinem Kiobel[4] suffered summary execution or extrajudicial killing in violation of customary international law. In *Kiobel*, this Court specifically recognized that some forms of killing may be actionable under *Sosa*, and its opinion was limited to the claim in *Kiobel*, which was based on an execution after proceedings of the Nigerian Military Government's Civil Disturbances Special Tribunal. *Kiobel*, 456 F. Supp. 2d at 464-65. This holding and the appeal in *Kiobel* have no bearing on claims for the killing of Uebari N-nah, who, on October 24, 1993, was murdered by government security forces who arrived at his village in vehicles supplied by SPDC and, with SPDC staff present, simply shot him in the head without any judicial process.

The remaining *Wiwa* decedents were executed pursuant to the same military tribunal as in *Kiobel*, but their claims are nonetheless not precluded by the *Kiobel* ruling. There, the Court dismissed the extrajudicial killing claim because the *Kiobel* "[p]laintiffs ha[d] not directed the Court to any international authority establishing the elements of extrajudicial killing, and the

[4] David Kiobel does not bring claims on behalf of the estate of Barinem Kiobel.

Court [wa]s aware of none." 456 F. Supp. 2d at 465.[5] The *Wiwa* plaintiffs, however, have already prevailed on this issue. If the Court is inclined to reconsider the earlier *Wiwa* ruling, Plaintiffs must be given the opportunity to brief this issue, which they do herein.[6]

This is especially critical here, since, after briefing in *Kiobel* (but before this Court ruled), the U.S. Supreme Court decided *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), in which the majority concluded that international law prohibits executions not carried out by regularly constituted courts, which would "'definitely exclud[e] all special tribunals.'" *Id.* at 632 (alteration in original). The Court did not consider *Hamdan* in its *Kiobel* order. Moreover, on appeal, defendants essentially conceded the *Kiobel* plaintiffs' showing that they had adequately alleged that the executions violated international law. Brief of Appellees/Cross-Appellants, *Kiobel v. Royal Dutch Petroleum Co.*, 06-4800, 06-4876 at 21 (June 6, 2007) ("An action against [members of the Special Tribunal], had it been brought, would follow the formula of *Filartiga*, *Kadic*, and several other decisions from other courts of appeals permitting extrajudicial killing claims to proceed against the actual killer.")

---

[5] The *Kiobel* plaintiffs argued that it was not necessary for the Court to review international authority because the Second Circuit had already held, in *Wiwa* and *Kadic*, and this Court had already held in *Wiwa*, that extrajudicial killing was an actionable norm under the ATS, *Kiobel* Plaintiffs' Supplemental Memorandum of Law in Opposition to Defendants' Motion to Dismiss, at 8-9 (January 20, 2006) *citing Wiwa* 226 F.3d 88; *Kadic* 70 F.3d 232 (2d Cir. 1995); *Wiwa*, 2002 U.S. Dist. LEXIS at *17-18, and that the norm was defined. *Id.* at n.6, *citing Wiwa* 226 F.3d at 105, n.11. This Court had also previously held that the norm is "well defined." *Wiwa*, 2002 U.S. Dist. LEXIS at *18.

[6] The *Wiwa* plaintiffs filed an *amicus* brief in this Court in *Kiobel*, but they were not parties; indeed the Second Circuit denied the *Wiwa* plaintiffs' motion to intervene in the *Kiobel* appeal. Second Circuit Order of May 4, 2007. Critically, there was no reason for the *Wiwa* plaintiffs to fully brief the international law definition of extrajudicial killing, since, as noted above, they had already prevailed in their own case on the issue of whether this norm is defined, *Wiwa*, 2002 U.S. Dist LEXIS at *18, and defendants did not challenge the international norm. Instead, the *Wiwa* plaintiffs' extrajudicial killing argument in their *amicus* focused on the issues defendants focused on: whether the ATS is preempted by the TVPA and whether there is state action in this case. Pl. Jan. 2006 Br. at 15-16. The *Wiwa* plaintiffs also demonstrated that the international authorities this Court previously relied on in finding the *Wiwa* plaintiffs' claims to be actionable, including extrajudicial killing, were proper evidence of customary international law. *Id.* at 4; *citing Wiwa*, 2002 U.S. Dist. LEXIS 3293 at *17-37.

Likewise, this Court correctly held that *Wiwa* should not be stayed pending resolution of the *Kiobel* appeal, noting that even a proposed January 5, 2009 argument date in the Second Circuit did not justify staying *Wiwa*. Oct. 24, 2008 Order at 6, n.4. The Court did not stay the *Wiwa* extrajudicial killing claims relating to the special tribunal, despite defendants' argument for the contrary. *Id.* at 6, n.3. Implicit in this ruling is the assumption that the Court would consider the *Wiwa* plaintiffs' claims based upon arguments made in *this* case. This makes perfect sense; because the *Wiwa* plaintiffs are not parties to the *Kiobel* appeal, the potential precedential effect of *Kiobel* on *Wiwa* is like that of any other case pending before the Second Circuit. The mere fact that an issue may be decided in a pending appeal in another case does not require a district court to avoid deciding related issues in the interim.

Last, *Kiobel* only addressed extrajudicial killing claims under the ATS. This case, however, also involves such claims under the TVPA. *Wiwa*, 2002 U.S. Dist. LEXIS 3293 at *8. The TVPA itself defines extrajudicial killing, and its definition would include the killings at issue here. While plaintiffs believe that the TVPA's definition also applies to ATS claims, even if it does not, the ruling in *Kiobel*—that the plaintiffs had not established the definition of extrajudicial killing under the ATS—can have no application to plaintiffs' TVPA claims.

B. Facts at Issue.

Ken Saro-Wiwa, John Kpuinen, Saturday Doobee, Felix Nuate, Daniel Gbokoo and Dr. Barinem Kiobel were arrested, imprisoned, tortured and killed by the Nigerian government in violation of the law of nations at the instigation of the defendants, in reprisal for political opposition to the defendants' oil exploration activities. FAC ¶¶ 122, 126, 130, 139-142. As alleged in the complaints, defendants' Nigerian subsidiary, SPDC, coercively appropriated land for oil development without adequate compensation, and caused substantial pollution of the air and water in the homeland of the Ogoni people. FAC ¶¶33-35. The Movement for Survival of Ogoni People ("MOSOP"), headed by Ken Saro-Wiwa, organized massive, non-violent protests to bring attention to the environmental plight of Ogoni (sometimes called "Ogoniland"). *Id.* at ¶ 44.

In April 1993, plaintiff Karalolo Kogbara was shot during peaceful demonstrations against Shell's efforts to bulldoze farmland for the construction of a Shell pipeline. Plaintiff Michael Tema Vizor was detained for four days without charge when he demonstrated against the bulldozing. FAC ¶ 49. On October 24, 1993, SPDC called the military police into the area near the Korokoro flow line; the Government Security Forces arrived in vehicles supplied by Royal Dutch/Shell; and Royal Dutch/Shell staff were present. The Government Security Forces shot a seventy-four-year-old man and two youths, killing one, plaintiff Uebari N-Nah. FAC ¶64. Mr. N-Nah was killed by the leader of the force, who simply shot him in the head.

On or about April 21, 1994, the Military Administrator of Rivers State sent a memo to the head of the "Rivers State Internal Security Task Force, ("ISTF") detailing an extensive military presence and policy of military intervention in Ogoni, in order to ensure that those "carrying out business ventures...within Ogoniland are not molested." *Id.* at ¶75.

On or about May 22, 1994, Ken Saro-Wiwa and Dr. Barinem Kiobel were arrested and detained without charges by the Nigerian military and the arrest of the entire MOSOP leadership was ordered by the Rivers State military administration. FAC ¶79. No charges were filed against them for eight months after their arrest and detention. FAC ¶80. When Plaintiff Michael Tema Vizor refused to confess to the murder of four Ogoni tribal leaders who were killed on May 21, he was tortured. FAC ¶81.

In the period May through August 1994, the ISTF mounted numerous nighttime raids on at least sixty towns in Ogoni to punish the community and suppress protests against Shell and SPDC. FAC ¶ 77. Several hundred young Ogoni men were arrested, detained and flogged on a daily basis because of their real or imagined affiliation with MOSOP. FAC ¶ 78.[7]

During the time that Ken Saro-Wiwa and Dr. Kiobel languished in detention, they were routinely tortured. FAC ¶ 90.

---

[7]Plaintiffs intend to present evidence that during these raids, the military broke into homes, shooting or beating villagers, including the elderly, women and children, forcing villagers to pay "settlement fees," bribes and ransoms to secure their release, forcing villagers to flee and abandon their homes, and burning, destroying or looting property. At least fifty Ogoni were killed and several thousand were arrested.

Finally, 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 the four Ogoni tribal leaders. FAC ¶84. Ken Saro-Wiwa and the other detainees were formally charged on January 28, 1995. FAC ¶84. On March 28, 1995, the Civil Disturbances Special Tribunal 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. FAC ¶86. Ken Saro-Wiwa, John Kpuinen, Michael Tema Vizor, Saturday Doobee, Felix Nuate, Daniel Gbokoo, Dr. Barinem Kiobel and others were arrested and charged because of their non-violent opposition to the activities of defendants and the Nigerian military. FAC ¶87.

The CDST summarily tried and executed the Ogoni Nine in a sham trial utterly lacking in due process safeguards. The CDST was not independent or impartial, and was not a regularly constituted Nigerian court. FAC ¶¶1, 123. The edict creating the CDST provided that the Tribunal's judgment was not subject to review by a higher court. *Id.* at ¶88. The accused were permitted to meet with their counsel only with the permission of and in the presence of a military officer; key witnesses were bribed; and Brian Anderson, the Managing Director of SPDC, met with Owens Wiwa and offered to trade Ken Saro-Wiwa's freedom for an end to the international protests against defendants. *Id.* at ¶97.

During the trial, threats were made against the defense counsel who ultimately withdrew from the case; Ken Saro-Wiwa's 74-year-old mother as well as other family members were beaten when attending the Tribunal hearing; and the accused were tortured and denied adequate food and medical care. FAC ¶90.

On or about October 30 and 31, 1995, Saro-Wiwa, Kpuinen, Doobee, Nuate, Gbokoo, Kiobel and other Ogoni activists were condemned to death by the special tribunal, in violation of international law and the laws of Nigeria. Vizor was released. FAC ¶¶98-99. Saro-Wiwa, Kpuinen, Doobee, Nuate, Gbokoo, Kiobel and the others scheduled for execution were tortured and denied adequate food and medical care. FAC ¶92. On November 10, 1995, Saro-Wiwa,

Kpuinen, Doobee, Nuate, Gbokoo, and Kiobel were hanged. FAC ¶101. The convictions and executions was widely condemned by the international community.

Their arrest, conviction and execution were in retaliation for their objection to the Shell's environmental devastation and to the military's violent support for Shell's operations in Ogoni. FAC ¶2.

Plaintiff Owens Wiwa was detained without charges, from December 26, 1993 to January 4, 1994, to prevent him from organizing and participating in a planned demonstration to protest, among other things, defendants' despoilation of the Ogoni environment. FAC ¶68. Owens Wiwa was also detained from on or about April 6, 1994 to April 20, 1994 on false charges of murder. He was assaulted during his detention. Dr. Wiwa and his fellow arrestee, Noble Obani-Nwibari, were taken out of prison, told to face the woods and guns were put to their heads. FAC ¶72.

On November 13, 1995, plaintiff Owens Wiwa fled Nigeria because he feared arbitrary arrest, torture and death. FAC ¶ 102. On January 5, 1996, soldiers came to the home of plaintiff Michael Tema Vizor in Ogoni with the purpose of killing him, and they looted and destroyed his house. Vizor was forced to flee Nigeria. FAC ¶ 103.

Defendants were complicit in the human rights violations in that they made payments to the military and police who committed abuses against critics of Shell, FAC ¶39a; shared surveillance with and provided logistical support to the Nigerian police and military including the provision of transportation and monies to those involved at the incidents at Korokoro, FAC ¶39c; participated in the planning and coordination of "security operations" including raids and terror campaigns conducted in Ogoni and the Niger Delta, through regular meetings between Royal Dutch/Shell, their agents, co-conspirators, and officials of the local security forces, FAC ¶39c; hired Nigerian police and military to implement these operations; engaged in a campaign to arrest and execute Ken Saro-Wiwa on fabricated murder charges, including the bribery of two witnesses to give false testimony against Saro-Wiwa, FAC ¶39(h); and offered Ken Saro-Wiwa's freedom in exchange for an end to the international campaign against defendants' Nigerian operations. FAC ¶ 97. In addition, defendants engaged in a coordinated media and public

relations campaign with the Nigerian government to discredit MOSOP leaders, falsely attributing to MOSOP and Saro-Wiwa crimes of airplane hijacking, kidnaping, and other acts of violence. FAC ¶39h.

II. SUMMARY OF ARGUMENT

Plaintiffs in this case raise claims for Defendants' complicity in a number of violations of universally recognized human rights norms that are actionable under the ATS. These include extrajudicial killing; crimes against humanity; torture; arbitrary detention; cruel, inhuman or degrading treatment; right to life, liberty and personal security; and right to peaceful assembly and expression claims.

Plaintiffs demonstrate below that, in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), the Supreme Court confirmed that the Second Circuit's standard for recognition of actionable norms of international law under the ATS, that of a specific, universal, and obligatory norm, is the appropriate standard. *Sosa* also requires only that a plaintiff demonstrate consensus that the specific conduct alleged violates international law, even if some ambiguity remains regarding other aspects of the norm.

Plaintiffs further demonstrate that each of their claims meets this standard, in that the conduct at issue clearly violates international law norms that are specific, obligatory, and universal. This is especially clear for state-sponsored extrajudicial killing and torture, which Congress recognized as violations of international law when it passed the TVPA.

Finally, plaintiffs demonstrate that there are a number of theories of liability under the ATS under which defendants may be held directly or indirectly liable for the abuses at issue. While federal common law should be the general source of law for such rules of liability, both federal common law and international law recognize liability for aiding and abetting, agency, and conspiracy, among others.

III. ARGUMENT

A. Under *Sosa*, the conduct at issue must violate a norm that is specific, obligatory, and universal in order to be actionable under the ATS.

The Supreme Court in *Sosa* established that violations of norms of international law with "[no] less definite content and acceptance" among nations than the "historical paradigms" such as piracy, that were familiar at the time the statute was enacted, are actionable under the ATS. 542 U.S. at 732. *Sosa* explained that this standard was "generally consistent with the reasoning of" *Filartiga* as well as cases that articulated a "specific [definable], universal, and obligatory" test. *Id.* (citing *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 (D.C. Cir. 1984) (Edwards, J, concurring), and *In re Estate of Marcos Human Rights Litigation*, 25 F.3d 1467, 1475 (9th Cir. 1994)). This is the same standard that was generally applied prior to *Sosa*, both by this Court and others. *See, e.g., Wiwa*, 2002 U.S. Dist. Lexis 3293 at *15; *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 306 n.18 (S.D.N.Y. 2003); *see also Doe v. Saravia*, 348 F. Supp. 2d 1112, 1144, 1153-54 (E.D. Cal. 2004) (applying this standard based on *Sosa*).

In determining whether a particular norm is actionable, pre-*Sosa* ATS cases generally considered whether the conduct at issue was clearly within the norm, not whether every aspect of what might comprise the norm was fully defined and universally agreed upon. *See, e.g., Xuncax v. Gramajo*, 886 F. Supp. 162, 187 (D. Mass. 1995); *accord Forti v. Suarez-Mason*, 694 F. Supp. 707, 709 (N.D. Cal. 1998). Thus, in *Kadic v. Karadzic*, the Second Circuit held that courts must consider whether "the defendant's alleged conduct violates well-established, universally recognized norms of international law." 70 F.3d 232, 239 (2d Cir. 1995) (internal quotations omitted); *accord Filartiga v. Pena-Irala*, 630 F.2d 876, 880 (2d Cir. 1980) (threshold question is whether conduct alleged violates international law); *Flores v. Southern Peru Copper Corp.*, 253 F. Supp. 2d 510, 525 (S.D.N.Y. 2002), *aff'd* 343 F.3d 140 (2d Cir. 2003) ("While it is not necessary for nations to identify with specificity every factual scenario that violates a particular prohibition under international law, a rule of customary international law must nevertheless be 'sufficiently determinate' to make it clear that particular conduct is prohibited.").

Although *Sosa* rejected the arbitrary detention claim in that case, it followed this approach. 542 U.S. at 738 ("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.").[8] Accordingly, courts have continued to perform this analysis post-*Sosa*. For example, in *Almog v. Arab Bank, PLC*, 471 F. Supp. 2d 257 (E.D.N.Y. 2007), the court cited *Sosa* in determining whether acts of terrorism were actionable, noting that "there is no need to resolve any definitional disputes as to the scope of the word 'terrorism;'" instead, "the pertinent issue here is only whether the acts as alleged by plaintiffs violate a norm of international law, however labeled." *Id.* at 280–81; *see also Presbyterian Church of Sudan v. Talisman Energy*, 374 F. Supp. 2d 331, 340–41 (S.D.N.Y. 2005) (holding that "disagreement . . . regarding the fringes of international legal norms" does not "impugn the core principles that form the foundation of customary international legal norms—principles about which there is no disagreement").

B. Plaintiffs' summary execution or extrajudicial killing claims are actionable.

1. The prohibition on extrajudicial killing meets the *Sosa* standard for an actionable ATS claim.

The prohibition on extrajudicial killing easily meets the *Sosa* standard; indeed, the *Sosa* Court acknowledged that extrajudicial killing was clearly actionable under the ATS. 542 U.S. at 728. The Second Circuit has found state-sponsored extrajudicial killings to be actionable under the ATS, as have numerous courts in other circuits. International legal sources overwhelmingly support the specific, universal, and obligatory nature of the prohibition on extrajudicial killings, and Congress also recognized this in passing the TVPA.

---

[8] *Sosa* also cites to *United States v. Smith*, 18 U.S. (5 Wheat) 153, 163-80 (1820), to demonstrate the specificity with which the law of nations defined piracy—one of the "historical paradigms familiar when § 1350 was enacted." *Sosa*, 542 U.S. at 732. In *Smith*, the Court expressly acknowledged the diversity of definitions of piracy, but held that this diversity did not defeat a prosecution for piracy because there existed certain core aspects of the norm that everyone could agree upon. *See Smith*, 18 U.S. at 160–62.

a. U.S. jurisprudence recognizes the prohibition on extrajudicial killing as customary international law actionable under the ATS.

Courts, including the Second Circuit, have consistently held that state-sponsored extrajudicial killing or summary execution is an actionable norm under the ATS. Thus, in *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995), the Court of Appeals recognized that, outside the context of genocide or war crimes, "summary execution" is "proscribed by international law . . . when committed by state officials or under color of law." *Id.* at 243. This conforms to the reading of virtually all other U.S. courts that have faced the question, both post-*Sosa*[9] and in pre-*Sosa* cases applying the universal, obligatory and definable standard endorsed in *Sosa*.[10]

b. *Sosa* and the TVPA make clear that extrajudicial killing, as defined in the TVPA, is an actionable norm under ATS.

Sosa recognized that in the process of identifying customary international law norms cognizable under the ATS, courts should be guided by legislative action with respect to specific violations. 542 U.S. at 732. The Court explicitly cited the inclusion of extrajudicial killing in the TVPA as an example of a norm of customary international law for which Congress has provided a "clear mandate" for recognition by the federal courts under the ATS. *Id.* at 728. *Sosa* affirmed that the TVPA "'establish[es] an unambiguous and modern basis for' federal claims of

---

[9] *E.g.*, *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1157 (11th Cir. 2005); *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1178-79 (C.D. Cal. 2005); *Doe v. Saravia*, 348 Supp. 2d 1112, 1145 (E.D. Ca. 2004).

[10] *E.g., In re Estate of Ferdinand Marcos Human Rights Litigation*, 25 F.3d 1467, 1475 (9th Cir. 1994) ("The prohibition against summary execution...is similarly universal, definable, and obligatory."); *Xuncax v. Gramajo*, 886 F. Supp. 162, 185 (D. Mass. 1995); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1542-43 (N.D. Cal. 1987); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1325 n.24 (N.D. Ga. 2002) ("Official torture and summary execution violate standards accepted by virtually every nation. This universal consensus condemning these practices has assumed the status of customary international law." (quoting S. Rep. No. 249-102, at 3 (1991)) (internal quotation marks omitted); *see also Alejandre v. Republic of Cuba*, 996 F. Supp. 1239, 1252 (S.D. Fla. 1997) ("Like the torture in *Filartiga,* the practice of summary execution has been consistently condemned by the world community."); *Tel-Oren*, 726 F.2d at 791 n.20 (Edwards, J., concurring)("commentators have begun to identify a handful of heinous actions – each of which violates definable, universal and obligatory norms," including, at a minimum, bans on governmental "torture, summary execution, genocide, and slavery."). In *Siderman de Blake v. Republic of Argentina*, 965 F.2d. 699, 714 (9th Cir. 1992), the Ninth Circuit identified extrajudicial killing as a *jus cogens* norm of international law "from which no derogation is permitted."

torture and extrajudicial killing." *Id.* (alteration in original) (quoting H.R. Rep. No. 102-367, at 3 (1991)). The TVPA, the Court emphasized, acts as an "affirmative authority" to cover this "specific subject matter." *Id.* The Court read the TVPA as congressional approval for the use of the ATS to adjudicate cases based on certain causes of action, including extrajudicial killing. *See id.* at 732 (suggesting that the TVPA evidences congressional support for the decision in *Filartiga, supra.*) Section 3(a) of the TVPA defines extrajudicial killing as:

> a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. Such term, however, does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation.

28 U.S.C. § 1350 note.

Critically, the TVPA definition of extrajudicial killing reflects that found in customary international law. Both the Senate and House reports confirm that Congress codified in U.S. law the "universal consensus condemning" extrajudicial killing and torture which had already "assumed the status of customary international law." S. Rep. No. 102-249, at 3 (1991); H.R. Rep. No. 102-367, at 2-3 (1991).[11] That is, Congress considered the TVPA to "incorporate[] into U.S. law the definition of extrajudicial killing found in customary international law." S. Rep. No. 102-249, at 6 (1991).[12] Both the Senate and the House reports thus recognized that the TVPA incorporates a definition found in customary international law; it did not create a new offence.

The Senate report discusses the definition's sources:

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

---

[11] Well before *Sosa*, the Second Circuit explained in *Kadic* that the TVPA's primary purpose was to codify this Circuit's result in *Filartiga* while leaving open the possibilities of other claims under the ATS. 70 F.3d at 241; *accord Wiwa*, 2002 U.S. Dist. LEXIS at *11-12.

[12] The same is true of "state sponsors of terrorism" exception to the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1605(a)(7), which explicitly incorporates the TVPA definition of extrajudicial killing. 28 U.S.C. § 1605(e)(1).

> a person lawfully detained. Thus, only killings which are truly extrajudicial in nature and which violate international law are actionable under the TVPA.

Id. (footnotes omitted).[13]

The House report also notes that the definition of extrajudicial killing was "derived from" Common Article 3 of the Geneva Conventions. H.R. Rep. No. H.R. 102-367(I), at 87. Common Article 3 prohibits executions without "previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." 6 U.S.T at 3318. This exact language is used in the TVPA.

Thus, given *Sosa*'s endorsement, and the fact that the TVPA provides a clear definition that codifies preexisting international law, killing that meets this definition would be actionable under the ATS as well. *See Mujica*, 381 F. Supp. 2d at 1178-79. Indeed, in *Wiwa*, the Second Circuit indicated that the TVPA was intended to create substantive rights for violation of the norms against summary execution and torture which were also actionable under the ATS. 226 F.3d at 105 & n. 11.

2. The norm against extrajudicial killing prohibits a deliberate killing not authorized by any previous judgment like that of Ueberi N-Nah.

Plaintiffs allege that Ueberi N-Nah simply was shot in the head by military who arrived in his village in vehicles supplied by SPDC and, with SPDC staff present. FAC ¶64. There can be no question that the norm prohibits intentional killings by state agents without *any* judicial process.

Because the TVPA and the FSIA both incorporate the language of the customary law norm against extrajudicial killings, determinations by U.S. courts finding violations of the TVPA and the FSIA, as well as the ATS, are relevant in defining the tort. Courts have found the norm against extrajudicial killing violated by both targeted and indiscriminate killings carried out by agents of a government. *See, e.g.*, *Xuncax*, 886 F. Supp. at 169–170, 198 (finding ATS ability for three separate murders of Guatemalan villagers); *Saravia,* 348 F. Supp. 2d at 1154 (finding ATS and TVPA liability for assassination of Archbishop Romero in El Salvador); *Cabello*, 402 F.3d at

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

1154 (finding a violation of international law where military officers drove prisoners outside of town and executed each); *Forti*, 672 F. Supp. at 1537 (finding ATS liability for abduction and death by military personnel). *See also* Alston Decl. ¶¶ 9, 80.

The decisions of international bodies have been consistent with the holdings of U.S. courts that intentional killings by state actors in the absence of any judicial process violate international law. The Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions regularly examines and condemns instances of killings absent any judicial process, including deaths due to the use of force by law enforcement officials. *See, e.g.*, Report by the Special Rapporteur, Extrajudicial, Summary or Arbitrary Executions ¶¶ 64-61, U.N. Doc. E/CN.4/1993/46 (Dec. 23, 1992); Report by the Special Rapporteur, Extrajudicial, Summary or Arbitrary Executions ¶¶ 54-67, U.N. Doc. E/CN.4/1993/46 (Dec. 23, 1992). The Special Rapporteur has consistently found violations of the prohibition on extrajudicial killings in cases in which individuals were killed by state agents with no judicial proceedings whatsoever. *See, e.g.*, *Vicente et al. v. Colombia* (Communication No 612/1995) [United Nations Human Rights Committee] 29/7/97, ¶ 8.3 (decision by The Human Rights Committee, the treaty-monitoring body of the ICCPR). The African Commission has explicitly held that extrajudicial executions violate Article 4 of the African Charter on Human and Peoples' Rights. June 27, 1981, 1520 U.N.T.S. 217, 21 I.L.M. 58. *See, e.g.*, *Free Legal Assistance Group and Others v. Zaire*, African Commission on Human and Peoples' Rights, Comm. No. 25/89, 47/90, 56/91, 100/93 (1995), ¶ 43. The Inter-American Court on Human Rights has found that killings by state agents occurring outside the bounds of the judicial process violate the right to life. In *Myrna Mack Chang v. Guatemala*, 2003 Inter-Am. Ct. H.R. (ser. C) No. 101, the court deemed an assassination conducted by state agents an "extra-legal execution" that violated the right to life. *Id.* ¶¶ 138–58. The European Court of Human Rights (E.C.H.R.) has likewise found violations of Article 2 of the European Convention on Human Rights' "right to life" guarantee in cases of killings by state agents absent any judicial process. For example, in *Khashiyev v. Russia*, [2005] E.C.H.R. 132, the Court held that Russia was guilty of a right to life violation for the killing of civilians at or

near their homes by Russian soldiers. *See id.* ¶ 147; *see also Estamirov and Others v. Russia*, [2006] E.C.H.R. 860, ¶ 114 (finding an Article 2 violation stemming from an attack by Russian soldiers of a family in its home).

The intentional killing of Uebari N-Nah by the military police clearly falls within the conduct recognized as an actionable extrajudicial execution.

3. The killings of Saro-Wiwa, Kpuinen, Doobee, Nuate, Gbokoo and Kiobel violated the established international law norm against summary execution since they resulted from sentences imposed by a tribunal that was not regularly constituted and that denied fundamental judicial guarantees.

A state does not satisfy its obligation to prohibit extrajudicial killing or summary execution simply by leading a victim into a courtroom before he is killed. U.S. and international statutes, treaties, and case law affirm that an execution violates international law when it results from an order by a tribunal that is not "regularly constituted" and does not provide *all* the provisions that customary international law recognizes as essential to a fair trial. International law a) has clearly defined the standards governing whether a court is "regularly constituted," and, in particular, has made clear that special tribunals fall outside these standards; b) has clearly defined "core fair trial obligations"; and c) has made clear that death sentence cases require the application of such core protections.

In this case, the structural flaws in the CDST alone render its verdicts in violation of international law; furthermore, the procedure lacked several of the provisions that customary international law recognizes as indispensable components of a fair trial, such as a fair and impartial tribunal operating within the framework of Nigerian law, the right to appeal, the right to consult with an attorney in private and in time to prepare an adequate defense, and protection from interference by the Military Government. For this reason, the African Commission on Human and People's Rights found that the CDST proceeding violated international norms prohibiting extrajudicial killing which require states to provide trials consistent with internationally-recognized due process standards. *Int'l Pen (on behalf of Ken Saro-Wiwa, Jr.) v. Nigeria*, African Comm'n on Human and Peoples' Rights, Comm. Nos. 137/94, 139/94, 154/96

and 161/97 (1998), ¶ 103.[14] Indeed, the CDST "trial" so egregiously departed from the core norms of a fair trial that it led to a chorus of condemnation from the United States, the United Nations, and the international community.[15]

As detailed above, plaintiffs need only show that specific conduct alleged violates international law. While international law supports the position that a violation of any one of these fundamental rights would render these executions illegitimate, the Court need not even consider that question.

a. The Tribunal was not a regularly constituted court.

Under customary international law, as reflected in the express language of both Common Article 3 of the Geneva Conventions, *see* Alston Decl., ¶ 23, and the TVPA, permissible executions may only be ordered by a "regularly constituted court." The CDST did not meet this standard.

---

[14] Similarly, the United Nations Special Rapporteur for Extrajudicial, Summary or Arbitrary Executions noted his concern regarding the fairness of trials before the Civil Disturbances Special Tribunals in general and in the Ogoni Nine case in particular. *See Extrajudicial, Summary or Arbitrary Executions: Report of the Special Rapporteur*, Mission to Nigeria, U.N. Doc. A/51/538 (1996), ¶¶ 35–37. The Special Rapporteur emphasized concerns about the independence of the judges and lawyers; inherent problems with using military courts to try civilians; and the "complete lack of the right of appeal." *Id.* at 36.

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

Although the Geneva Conventions govern the law of armed conflict, there can be no doubt that the same standard applies here. The relevant portion of the TVPA, which reflects Congress' understanding of customary international law, uses *exactly* the same language as that in Common Article 3. That is, Common Article 3, like the TVPA, prohibits executions without a "'previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.'" *Hamdan* , 548 U.S. at 630 (quoting 6 U.S.T. at 3320). Moreover, wartime protections usually can be considered the minimum protections international law affords. *Corfu Channel Case, (U.K. v. Alb.),* 1949 I.C.J. Rep. 4, 22-23 ("elementary considerations of humanity [are] more exacting in peace than in war."); *see also* ICCPR, Art. 4 (certain emergencies, such as war, may justify restricting some rights)Alston Decl., ¶ 126.[1616] Thus, there can be no doubt that the "regularly constituted tribunal" requirement of Common Article 3 and the TVPA reflects the customary international law standard.

The CDST in this case was not "regularly constituted." The Supreme Court recently affirmed the definite content of the term "regularly constituted court" in *Hamdan*, noting that this term would "'definitely exclud[e] all special tribunals.'" 548 U.S. at 632 (quoting Geneva Convention-IV, Commentary 340) (alteration in original).[17] *See also* Alston Decl., ¶¶ 83, 85. Indeed, the Court determined that even the original military commissions at Guantanamo Bay, which were established with far more care than the CDST, were not "regularly constituted."

---

[16] *Hamdan* recognized that Common Article 3 applies in "armed conflicts not of an international character." 548 U.S. at 630 (quoting 6 U.S.T. 3318). Common Article 3 acts as a "minimum" level of protection during conflicts that are not covered by the other Convention provisions, in particular those that do not occur between two signatory states. *Id.* The Conventions are "requirements," though they are intended to allow some measure of "flexibility" during armed conflict situations, due to the particular demands associated with such situations. *Id.* at 2798. Outside of armed conflicts, the expected "requirements" should impose a no less demanding standard for a fair trial. Thus, in the case here, the required "minimum" level of protections should if anything be stricter than those provided in Common Article 3. Therefore, violations of Common Article 3 would certainly also be deemed violations in a non-conflict context.

[17] The Supreme Court noted that, while the Geneva Conventions themselves do not define "regularly constituted court," sources such as the accompanying commentary "disclose its core meaning." 548 U.S. at 632.

Id. at 632–33. The Court favorably cited Justice's Rutledge's dissenting opinion in *Application of Yamashita*, 327 U.S. 1, 44 (1946), for the proposition that regularly constituted courts do not include military commissions "'specially constituted for a particular trial.'" 548 U.S. at 632. Similarly, the Court relied upon a Red Cross treatise that defines "regularly constituted court" as a court "'established and organized in accordance with the laws and procedures *already* in force in a country.'" *Id.* (quoting Int'l Comm. of Red Cross, 1 Customary Int'l Humanitarian Law 355) (2005) (emphasis added).

The CDST was not "regularly constituted" under any of the above standards. It was created to try only a single case—the "disturbances which occurred on 21st May, 1994 at Giokoo, Gokana Local Government Area of Rivers State." Corrigendum to Decree No. 2 (Sept. 1994); *see also* FAC ¶ 84. It was also created outside of the ordinary court system, established pursuant to a decree that explicitly ousted the jurisdiction of the regular Nigerian judiciary to review decisions of the special tribunal or the proceedings before the special tribunal. Section 8 sub-section 1 of the decree provides:

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

Civil Disturbances (Special Tribunal) Decree No. 2 of 1987. Nor was the tribunal governed by then-existing procedures; under the decree authorizing the creation of special tribunals, the rules of such tribunals were subject to change. *See* Civil Disturbances (Special Tribunals) Decree 1987, Mar. 18, 1987 (Nig. Fed. Military Gov't), schedule II ¶ 17 ("[T]he provisions of the Criminal Procedure Code or . . . the Criminal Procedure Act shall, *with such modifications as the circumstances may require*, apply to the trial of offences generally." (emphasis added)). There were no restrictions on the tribunal's ability to modify these procedural protections; as the Supreme Court noted in *Hamdan*, "the fact that its rules and procedures are subject to change midtrial" is "evidence of [a] tribunal's irregular constitution." 548 U.S. at 633 n.65.

When a tribunal is not "regularly constituted," any killing imposed by it constitutes extrajudicial killing.[18] Since, according to *Hamdan*, special tribunals "definitely" fall outside this definition, an execution carried out pursuant to their orders undeniably violates international law. Here, the CDST was not regularly constituted and did not operate within the framework of Nigerian law; therefore Ken Saro-Wiwa, John Kpuinen, Saturday Doobee, Felix Nuate, Daniel Gbokoo and Barinem Kiobel were victims of extrajudicial killing by a tribunal formed and controlled by the military regime.

b. The Ogoni Nine "trial" lacked judicial guarantees recognized as indispensable by international law.

Even if a court pronouncing a death sentence is "regularly constituted," according to the TVPA and Common Article 3, it must also provide "all the judicial guarantees which are recognized as indispensable by civilized peoples." In *Hamdan*, a plurality found that it could apply this standard because of the wealth of international law sources that provide evidence of its meaning, concluding that this phrase "*must* be understood to incorporate the barest of those trial protections that have been recognized by customary international law." 548 U.S. at 633 (plurality op.).[19] In numerous ways, the CDST fails to incorporate those protections.

The *Hamdan* plurality looked to Article 75 of Additional Protocol I to the Geneva Conventions of 1949 and Article 14 of the International Covenant on Civil and Political Rightsto outline the fair trial protections provided by international law. The plurality described Article 75 as being "indisputably part of the customary international law," *id.* at 634, and Article 14 as providing "the same basic protections," *id.* at 633 n.66. *See also* Alston Decl., ¶ 24. Article 75 includes a non-exhaustive list of procedural fair trial protections, including informing an accused "without delay of the particulars of the offense against him" and giving the accused "all necessary rights and means of defense" both before and after his trial. Article 75(4)(a). Article

[18] In the "Judges" trial at Nuremberg, judges who had presided over trials lacking in judicial guarantees and resulting in executions were convicted of complicity in murder. Alston Decl. at ¶ 43, citing *U.S.A. v. Alstoetter*, 3 T.W.C. 1, 6 L.R.T.W.C. 1, 14 Ann. Dig. 278 (1948).

[19] Justice Kennedy did not join this particular section of Justice Stevens's opinion because, after concluding that the commissions were irregularly constituted, he found "no need to consider" the particular guarantees of a fair trial. *See* 548 U.S. at 653–54 (Kennedy, J., concurring).

14 affords similar fair trial protections, such as trial by a "competent, independent, and impartial tribunal established by law," "adequate time and facilities" to allow the accused to prepare his defense and to "communicate with counsel of his own choosing," and the right to have a conviction and sentence reviewed by a higher tribunal. ICCPR, art. 14(1), 14(3)(b), 14(5).

The CDST's procedures far more flagrantly violated these core fair trial guarantees, such as a fair and impartial tribunal operating within the framework of Nigerian law, the right to appeal, the right to consult with an attorney in order to prepare a defense, and protection from interference by the military regime.

i. The Special Tribunal was neither independent nor impartial.

The CDST lacked independence and impartiality in at least two ways. First, its members were selected directly by the President of Nigeria's military government. *See* FAC ¶ 84; 1994 Corrigendum; 1987 Decree, part II, § 2(1) (providing that the "President . . . is hereby empowered to constitute civil disturbance special tribunal[s]"). The President likewise had the power to determine how many people would sit on such a tribunal; although the Special Tribunal here had only three members, the President could have selected up to seven members. *See* (Corrigendum to Civil Disturbances (Special Tribunal) Decree 1987 (Sept. 1994)). This procedure resulted in a tribunal that was securely a creation of the executive, divorced from any independent court system, whose members were hand-picked for a particular trial. *See Int'l Pen v. Nigeria*, African Comm'n on Human and Peoples' Rights, Comm. Nos. 137/94, 139/94, 154/96 & 161/97 ¶ 86 (1998)) (reviewing the Ogoni Nine trial). There can be little question of independence under such circumstances. *Id.*; *see also Hamdan*, 548 U.S. at 637 (Kennedy, J., concurring) (noting that a tribunal's standards must be chosen "under a system where the single power of the Executive is checked by other constitutional mechanisms"); *accord id.* at 645 (noting that "an acceptable degree of independence from the Executive is necessary . . . . any suggestion of Executive power to interfere with an ongoing judicial process raises concerns about the proceedings' fairness"). *See also* sources cited in Alston Decl., ¶50 (requirement of independence and impartiality in the Inter-American Court of Human Rights), ¶ 60 (recognition

by the Human Rights Committee that independence of the Executive is particularly important for a judicial proceeding), ¶ 151 (citing forty-six countries whose constitutions explicitly enshrine the right to counsel).

Second, even if the tribunal itself were independent, its verdicts would not be: the tribunal's judgments and sentences were subject to "confirmation" by the "Armed Forces Ruling Council," which had the authority to "confirm or vary the sentence of the tribunal." 1987 Decree Part III § 7. The Armed Forces Ruling Council, succeeded by the Provisional Ruling Council, was the governing body of Nigeria's military regime, *see, e.g.*, S.A. 59 (excerpted from U.S. Dept. of State, Nigeria Human Rights Practices, 1995 (Mar. 1995); it embodied the executive, rather than providing any check on executive power. *See Int'l Pen* ¶¶ 91, 93, 95 (holding that "it is not safe to view the Provisional Ruling Council as impartial or independent").

ii. The Special Tribunal violated the right of appeal.

The executions also violated international law because the accused had no right to appeal their convictions or death sentences, which is one of the basic procedural protections afforded by customary international law. As noted above, the *Hamdan* plurality relied upon ICCPR Article 14 and Article 75 of Additional Protocol I. Article 14(5) states that "[e]veryone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law." Likewise, Article 75(4)(j) states: "A convicted person shall be advised on conviction of his judicial and other remedies," which clearly contemplates appellate review. The right to appeal is also supported by other sources of international law, including the American Convention on Human Rights, the African Charter, and the ICCPR. *See* Alston Declaration, ¶¶ 18, 30, 31, 32, 52, 66, 72. Moreover, as also noted above, wartime protections are considered international law minimums, and in wartime an occupying power must afford persons convicted of a crime the right to appeal. Geneva Convention (IV) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, [1956] 6 U.S.T. 3516, T.I.A.S. No. 3365 ("Fourth Geneva Convention"), art. 73. The right to appeal is particularly fundamental where, as here, the sentence was death. *See. e.g.*, Alston Decl., ¶ 115.

The decree creating the authority for establishing the Special Tribunal precludes appellate review, barring the Nigerian judiciary from reviewing the decisions of the Tribunal. Part IV § 8(1) provides:

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

There are no other provisions in the decree for appeal. As the African Commission noted, "Section 8(1) effectively ousts all possibility of appeal to the ordinary courts. Thus, the accused persons had no possibility of appeal to a competent national organ, and the Commission finds a violation of Article 7.1(a) [of the African Charter on Human and Peoples' Rights]." *Int'l Pen* ¶ 93; *accord The Constitutional Rights Project v. Nigeria*, African Comm'n on Human and Peoples' Rights, Comm. No. 87/93 ¶ 11 (1995) (earlier African Commission decision finding Section 8(1) violates Article 7.1(a) of the African Charter).

As noted, the decree provides that sentences were to be "confirmed" by the Armed Forces Ruling Council. This, however, is not a right to appeal, as the African Commission concluded, because the Council—as the governing body of the military government—could not be considered impartial or independent. *Int'l Pen* ¶ 93.[20] Moreover, the Ruling Council confirmed the death sentences of the Ogoni Nine without the records of the trial, even though section 7 of the Civil Disturbances (Special Tribunals) Decree No. 2 required the Council to receive such records before confirmation was possible. *Int'l Pen* ¶ 10. In deciding without reviewing the trial record, the Ruling Council was not functioning as an appellate court.[21]

---

[20] The decree did not require the Council to consider arguments made by the accused, examine the facts or trial, or give reasons for its decisions; nor did it even afford an explicit power to quash conviction. Part III § 7. As the African Commission concluded, the Ruling Council's power to confirm "is a discretionary, extraordinary remedy of a nonjudicial nature. The object of the remedy is to obtain a favour and not to vindicate a right . . . [The Council] does not operate impartially and ha[s] no obligation to decide according to legal principles." *The Constitutional Rights Project* ¶ 8.

[21] *See, e.g.*, *Report on the Situation of Human Rights in the Republic of Nicaragua*, Inter-American Commission of Human Rights (IACHR) OEA/Ser.L/V/II.53 doc. 25 ¶ 21 (30 June 1981) (*available at* www.cidh.oas.org) (holding that "the existence of a higher tribunal necessarily implies a re-examination of the facts presented in the lower court" and lack of opportunity for such appeal deprives defendant of due process); *see generally United States v.*

iii. The proceedings violated the defendants' right to counsel.

Under international law, a criminal defendant has the right "[t]o have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing." ICCPR Article 14(3)(b).[22] *See also* sources cited in Alston Decl., ¶¶ 20, 30, 31, 32, 36, 51, 57, 63152 In particular, a person may be executed only after legal process that affords safeguards "at least equal to those contained in article 14 of the [ICCPR], including the right . . . to adequate legal assistance at all stages of the proceedings." S.C. Res. 1984/50 ¶5; *see generally Gideon v. Wainwright*, 372 U.S. 335, 342 (1963) (right to counsel is "fundamental and essential to a fair trial").

Here, the accused were permitted to meet with their counsel only with the permission of and in the presence of a military officer. Even during wartime occupation, "[a]ccused persons . . . shall have the right to be assisted by a qualified advocate or counsel of their own choice, who shall be able to visit them freely. . . ." Fourth Geneva Convention art. 72. *See also* American Convention on Human Rights, art. 8(2)(d) (recognizing right of defendant "to communicate freely and privately with his counsel"); HRC General Comment 13 ¶ 9, U.N. Doc. HRI\GEN\1\Rev.1 (1994) ("HRC General Comment 13") (noting that the right to counsel requires respect for "the confidentiality of their communications"). The limits here clearly violated international law.

Weisser, 417 F.3d 336, 343 (2d Cir. 2005) (right to appeal illusory where appellate record is so deficient that appellate court cannot determine if trial court committed reversible error); *see also Hamdan*, 548 U.S. at 650 (Kennedy, J. concurring) (defects in tribunal procedures not cured by opportunity for judicial review where "scope of review is limited").

[22] *See also* Article 8(2)(c) of the American Convention; Article 6(3)(b) of the European Convention; ¶ 2(E)(1) of the African Commission Resolution; Article 21(4)(b) of the Yugoslavia Statute; Article 20(4)(b) of the Rwanda Statute; Article 67(1)(d) of the ICC Statute. The Human Rights Committee has stated that "all persons arrested must have immediate access to counsel." Concluding Observations of the HRC: Georgia, UN Doc. CCPR/C/79/Add.74, 9 April 1997, ¶ 28. The Inter-American Commission has stated that the right to defend oneself requires that an accused person be permitted to obtain legal assistance when first detained. It concluded that a law which prohibited a detainee from access to counsel during detention and investigation could seriously impinge upon defense rights. Annual Report of the Inter-American Commission, 1985-1986, OEA/Ser.L/V/II.68, doc. 8 rev. 1, 1986, p. 154, El Salvador.

In addition, counsel for the defendants were threatened, assaulted, arrested and otherwise harassed, and as a result, ultimately withdrew from the case during the trial. *Int'l Pen* ¶¶ 97–98. Thus, the African Commission found that the trial violated the defendants' right to counsel. *Id.*, 101; *see also The Constitutional Rights Project* ¶ 12 (finding that trial before a Special Tribunal, in which defendants were sentenced to death despite harassment and intimidation to the extent of defense counsel's withdrawal, violated right to counsel under African Charter); HRC General Comment 13 ¶ 9 (noting that, pursuant to the right to counsel, legal counsel must be able to represent the accused "without any restrictions, influences, pressures or undue interference from any quarter").

iv. The accused were not given a fair hearing.

The right to a fair hearing is fundamental in any criminal proceeding, and is especially important if the punishment may be death. *See, e.g.*, S.C. Res. 1984/50 ¶ 5 (expressing the view of the international community that executions should only be carried out "after legal process which gives all possible safeguards to ensure a fair trial"). *See also* Alston Decl., ¶¶ 18, 150. Several core elements of the international law guarantee of a fair trial were violated here. First, the accused were tortured before and during the trial. *See* FAC ¶90, 130. Freedom from torture is unquestionably protected by international law. *See, e.g.*, *Filartiga*, 630 F.2d at 880. Torture of a defendant during trial implicates the fairness of that trial, because it compromises the defendant's ability to assist in his defense. U.S. courts have found, for example, that the use of "stun belts" during trial instills fear that vigorously defending oneself may lead to physical pain and distracts the accused from his defense, and this conclusion can only be more applicable where the accused faces torture far more severe than a shock from a stun belt.[23]

---

[23] *See generally Hawkins v. Comparet-Cassani*, 251 F.3d 1230, 1239–40 (9th Cir. 2001) (requiring defendant to wear stun belt during hearing "obviously prejudices a defendant's Sixth Amendment's guarantee of a fair trial" because defendants might refrain from participating in their own defense out of fear; Court upholds preliminary injunction barring practice except where necessary for security); *United States v. Durham*, 287 F.3d 1297, 1306 (11th Cir. 2002) (defendant wearing stun belt is likely to concentrate on preventing belt from being activated, and is thus less likely to participate fully in his defense at trial).

Second, the military government and Shell conspired to bribe witnesses to give false testimony against the accused. *See* FAC ¶39g. While international law sources typically do not mention a specific prohibition on the government conspiring to bribe witnesses or otherwise procure false testimony against the accused, it should be obvious that such a prohibition is inherent in any definition of a "fair hearing."

Last, the accused were denied access to evidence in the possession of the prosecution. *See Int'l Pen* ¶¶ 99–101 (concluding that the tribunal had withheld evidence from the defense); U.S. Dept. of State, Nigeria Human Rights Practices, 1995 (March 1996) § 1(e) (U.S. State Department noting that the military government "refused to comply with a tribunal order to produce a videotape" that showed a military governor judging Saro-Wiwa to be guilty long before his trial). International law requires that the defense have access to potentially exculpatory evidence in the possession of the prosecution. The African Commission, for example, found that "the right to defense" in Article 7.1(c) of the African Charter was violated by withholding evidence. *Int'l Pen* ¶¶ 85, 101. Similarly, the Human Rights Committee has noted that the right to adequate facilities for the preparation of one's defense, ICCPR art. 14(3)(b), "must include access to documents and other evidence which the accused requires to prepare his case." HRC General Comment 13 ¶ 9.

c. International condemnation of the executions reflects the violation of universally recognized standards.

The international community's condemnation of the executions demonstrates that they violated customary international law. This condemnation does not simply represent a consensus of opinion; because customary international law is *created* by the practice of states demonstrating legal principles, *see, e.g.*, *United States v. Yousef*, 327 F.3d 56, 91 n.24 (2d Cir. 2003) (citing Ian Brownlie, *Principles of Public International Law* 5–7 (5th ed. 1999)), these expressions of outrage are primary evidence of a violation of an international law norm.

State practice includes "diplomatic correspondence, policy statements, press releases." Brownlie, *Principles of Public International Law* 5. Here, the public statements of numerous

countries expressed condemnation of the executions, including the United States, both through President Clinton himself[24] and the U.S. State Department[25]; the United Kingdom[26]; as well as Germany, France, Italy, South Africa, and eleven other nations who recalled their ambassadors.[27]

State practice also includes "the practice of international organs." Brownlie at 5. This practice was likewise overwhelmingly condemnatory of the executions. The Commonwealth of Nations (the former British Commonwealth) suspended Nigeria as a member, the first time this had ever been done,[28] and the European Parliament passed a resolution condemning the executions and imposing sanctions.[29] Most importantly, the United Nations General Assembly

---

[24] In a statement transmitted to the U.N. Security Council, Clinton stated that "these executions demonstrate to the world the Abacha regime's flaunting [sic] of even the most basic international norms and universal standards of human rights . . . . The United States deplores the gravely flawed process by which Mr. Saro-Wiwa and his associates were convicted and executed. They were condemned outside the traditional judicial system and without regard for due process." The statement also detailed sanctions issued by the President including the recall of the U.S. Ambassador to Nigeria. *Letter dated 17 November 1995 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General*, U.N. GAOR SCOR, 50th Sess., Agenda Item 112(b), U.N. Doc. A/50/765-S/1995/967 (1995), *available at* http://www.un.org/documents/ga/docs/50/plenary/a50-765.htm.

[25] The State Department found that the CDST "den[ied] defendants due process." U.S. Dep't of State, *Nigeria Country Report on Human Rights Practices for 1996*, available at http://www.state.gov/www/global/human_rights/1996_hrp_report/nigeria.html. The tribunal failed to provide defendants with a fair trial because, *inter alia*, it "operate[d] outside the constitutional court system" and denied judicial review to the defendants. *Id.*

[26] Prime Minister John Major called the executions "judicial murder" which followed a "fraudulent trial." BBC: On This Day, "1995: Nigeria Hangs Human Rights Activists," *available at* http://news.bbc.co.uk/onthisday/hi/dates/stories/november/10/newsid_2539000/2539561.stm. The British Foreign office stated, "The executions violate Nigeria's commitments under international law to provide for a fair trial and right of appeal." Foreign and Commonwealth Office, *Execution of Ken Saro-Wiwa and His Co-Defendants,* COI'S HERMES, Nov. 10, 1995; *see also* Reuters, *Commonwealth Suspends Nigeria Over Executions*, N.Y. Times, November 12, 1995, at Sec. 1 p.18.

[27] Bob Drogin, *Nigeria Feels Wrath of World After Executions*, Los Angeles Times (Nov. 12, 1995) at A1.

[28] Press release by the Secretariat of the Commonwealth (Nov. 13, 1995), *available at* http://www.thecommonwealth.org/document/34293/35232/152035/150847/the_auckland_communiqu.htm.

[29] *See* Declaration by the European Union on the Execution of Ken Saro-Wiwa and His Co-Defendants, *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=PRES/95/316&format=HTML&aged=

passed a resolution condemning the "arbitrary execution after a flawed judicial process," A/RES/50/199 (1996) (*available at* http://daccessdds.un.org/doc/UNDOC/GEN/N96/771/19/PDF/N9677119.pdf?OpenElement), and in subsequent sessions continued to object to the executions.[30]

These statements by the world's governments, both individually and through bodies such as the European Union and the United Nations, demonstrate condemnation of the trial and executions as well as a recognition that these abuses violated international law. Such actions by the international community form an important element of customary international law.

4. Plaintiffs' claims of extrajudicial killing are actionable under the TVPA.

Plaintiffs also assert TVPA claims for extrajudicial killing. As noted above, the TVPA's definition of extrajudicial killing reflects international law. Nonetheless, the TVPA claims are independent of the ATS claims, and even if the Court determines that extrajudicial killing is not actionable under the ATS, there is no question that it is actionable under the TVPA. As noted above, the killings here contravened these standards.

C. Plaintiffs' torture claims are actionable.

1. Plaintiffs' torture claims are actionable under the ATS.

There has never been any dispute that state-sponsored torture is actionable under the ATS; indeed, it was the original international law violation at issue in *Filartiga*, which was cited with approval by *Sosa*. *See* 542 U.S. at 732. This Court has already held torture is well defined and actionable under the ATS. *Wiwa*, 2002 U.S. Dist. LEXIS 3293 at **17-18; *see also Kiobel*,

---

0&language=EN&guiLanguage=en; Summary of the 2011th European Council Meeting, June 2-3, 1997, *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=PRES/97/177&format=HTML&aged=0&language=EN&guiLanguage=en.

[30] In the following year, the General Assembly again noted "the arbitrary execution of Ken Saro-Wiwa and his associates." G.A. Res. A/RES/51/109 (*available at* http://daccessdds.un.org/doc/UNDOC/GEN/N97/771/07/PDF/N9777107.pdf?OpenElement). The year after that, the General Assembly again condemned the "flawed judicial process" used to try the Ogoni Nine. G.A.Res. A/C.3/52/L.70 (1997).

456 F. Supp. 2d at 465. At a minimum, the international law definition of torture prohibits at least that conduct that is actionable under the TVPA, detailed below.[31]

2. Plaintiffs' torture claims are actionable under the TVPA.

Plaintiffs also bring torture claims pursuant to the TVPA; again, these claims are in addition to, and independent of, claims under the ATS.

Under the TVPA:

> (1) the term "torture" means any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on a discrimination of any kind; and
>
> (2) mental pain or suffering refers to prolonged mental harm caused by or resulting from--
>
> (A) the intentional infliction or threatened infliction of severe physical pain or suffering;
>
> (B) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
>
> (C) the threat of imminent death;
>
> (D) the threat that another individual will imminently be subjected to death, severe physical pain or suffering or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

The torture of these plaintiffs contravened these standards. This Court has already so held with respect to the shooting of Karalolo Kogbara. *Wiwa*, 2002 U.S. Dist. LEXIS 3293 at **17-18; *see also* FAC ¶ 48. The same conclusion applies to the mistreatment of other plaintiffs in custody. *E.g.* FAC ¶¶ 49, 69, 72, 81, 82, 90, 92, 100, 130.

---

[31] This Court previously accepted the definition in the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, noting that an act constitutes torture if it (1) inflicts severe pain and suffering (either mental or physical); (2) is inflicted by or at the instigation of a public official; and (3) is inflicted for a purpose such as punishing the victim, or intimidating the victim or a third person. 2002 U.S. Dist. LEXIS 3293 at **18-19, *citing* Convention Against Torture and Degrading Treatment, art. 1, 39 U.N. GAOR Supp., No. 51, at 197, U.N. Doc. A/39/51 (1984).

D. Plaintiffs' claims for cruel, inhuman, and degrading treatment are actionable.

This Court previously held in this case that cruel, inhuman, or degrading treatment (CIDT) is actionable under the ATS. *Wiwa*, 2002 U.S. Dist. LEXIS 3293 at *21-27.[32] The Court properly concluded that several abuses constituted CIDT, including targeting Dr. Owens Wiwa and forcing him into exile under credible fear of arbitrary arrest, torture and death; trying to extort Dr. Wiwa to take certain actions to save his brother's life; and, attacking Karalolo Kogbara and destroying her property. *Id.* The Court's conclusion as to CIDT applied the same standard confirmed by *Sosa*, and remains sound.

1. The prohibition against CIDT is unquestionably part of international law.

CIDT is prohibited by all of the omnibus international human rights agreements. Roht-Arriaza Decl. ¶ 39. *See, e.g.*, Universal Declaration of Human Rights ("Universal Declaration") art. 5, Dec. 10, 1948, G.A. Res. 217A(III), U.N. Doc. A/810; Torture Convention art. 16; ICCPR art. 7; African (Banjul) Charter on Human and Peoples' Rights, art. 5, June 27, 1981, 1520 U.N.T.S. 217, 21 I.L.M. 58. The ICCPR, for example, states, "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." ICCPR art.7. Whereas torture is aggravated and deliberate mistreatment, causing very serious and cruel suffering, CIDT generally includes less severe inflictions of suffering. As the Senate stated when ratifying the Torture Convention, "'torture is at the extreme end of cruel, inhuman and degrading treatment.'" *Xuncax*, 886 F. Supp. at 189 (quoting S. Exec. Rep. No. 101-30, at 13 (1990)).[33]

International agreements do not attempt to enumerate every form of conduct that would violate the norm; that new forms of atrocities arise precludes such an enumeration. *See* Roht-Arriaza Decl. ¶ 30-37. Nevertheless, the norm against CIDT is well-defined: Although the particular acts encompassed will vary with the circumstances of each case, international criminal tribunals have had no trouble finding the norm specific and definable enough to impose judgment and sentence, and human rights bodies have used it to find legal responsibility. Acts are

---

[32] The Court did not reach the issue in *Kiobel*, finding it unnecessary to do so since the plaintiffs had adequately alleged torture. 456 F. Supp. 2d at 22, n.11.

[33] *See* Roht-Arriaza Decl., fn. 10.

considered cruel if they "cause[] serious mental or physical suffering or injury or constitute[] a serious attack on human dignity."[34] The term "inhuman treatment covers at least such treatment as deliberately causes severe suffering, mental or physical, which, in the particular situation, is unjustifiable," *The Greek Case*, 12 (Suppl.) Y.B. Eur. Conv. on H.R. 186 (Eur. Comm'n H.R. 1969),[35] or conduct which "constitutes a serious attack on human dignity." *Prosecutor v. Delalic*, IT-96-21 ¶ 543 (ICTY Trial Chamber Nov. 16, 1998). Degrading treatment includes actions meant "to arouse in their victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance," *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) 65–67, ¶ 167 (Jan. 18, 1978), as well as that which grossly humiliates a person before others or forces the person to act against his/her will or conscience. *The Greek Case*, 12 (Suppl.) Y.B. Eur. Conv. on H.R. 186.

Whether treatment is cruel, inhuman, or degrading depends upon an assessment of the facts of a concrete case, including the specific conditions and duration, the goals of the perpetrators, and the effects on the victim.[36] In general, however, CIDT does not require actual physical harmMilitary attacks on villages have been found to constitute cruel, inhuman or degrading treatment. In the case of *Ayder v. Turkey*, Turkish troops attacked a village, ransacking and destroying houses and terrorizing villagers. App. No. 23656/94 ¶¶ 108–110 (Eur. Ct. H.R. 2004). The European Court of Human Rights found inhuman treatment. The Court wrote:

> The Court notes that the applicants' homes and possessions were burned before the eyes of some of the applicants as well as of members of their families. The destruction of their property deprived the applicants and their families of shelter and it also deprived two of the applicants of their livelihood. In addition, it

---

[34] *Prosecutor v. Kordic,* IT-95-14/2 ¶ 265 (ICTY Trial Chamber Feb. 26, 2001); *Prosecutor v. Blaskic*, IT-95-14-T ¶¶ 186, 700 (ICTY Trial Chamber Mar. 3, 2000); *Prosecutor v. Jelisic*, IT-95-10 ¶¶ 34, 41 (ICTY Trial Chamber Dec. 14, 1999).

[35] *See also Ireland v. United Kingdom* ¶¶ 96–104, 106–107, 168; *Prosecutor v. Delalic*, IT-96-21 ¶ 543 (ICTY Trial Chamber Nov. 16, 1998).

[36] *See, e.g., Tyrer v. United Kingdom*, 26 Eur. Ct. H.R. (ser. A) 15 ¶ 30 (1978) (distinctive element of degradation is degree of humiliation adjudged according to circumstances of individual case); *Ireland v. United Kingdom* ¶¶ 166–68 (minimum level of severity required to determine violation depends on circumstances of particular case including duration of treatment and physical and mental effects).

> obliged them to leave the place where they had been living and to build up new lives elsewhere.
>
> The Court considers that the destruction of the applicants' homes and possessions, as well as the anguish and distress suffered by members of their family, must have caused them suffering of sufficient severity for the acts of the security forces to be categorised as inhuman treatment within the meaning of Article 3. Even assuming that the motive behind the actions of the security forces was to punish the applicants and their relatives for their alleged involvement in, or support of, the PKK, that would not, in the opinion of the Court, provide a justification for such ill-treatment.

Id. *See also* Roht-Arriaza Decl. ¶ 32.

The infliction of severe mental anguish through the commission of heinous offenses against the victim's immediate relatives has also been recognized as a form of cruel, inhuman or degrading treatment. The European Court of Human Rights has held that the mental anguish suffered by the relatives of "disappeared" persons amounted to inhuman or degrading treatment. *See* Roht-Arriaza Decl., ¶ 36.

2. U.S. caselaw recognizes that CIDT meets the *Sosa* standard.

Most courts to consider the question have determined that CIDT violates the law of nations and is actionable under the ATS. While a few courts have questioned whether CIDT is part of international law or whether the norm is sufficiently well-defined, the weight of authority, and the better argument, answers these questions in the affirmative.

The weight of pre-*Sosa* authority supports the actionability of CIDT claims. *See Tachiona v. Mugabe*, 216 F. Supp. 2d 262, 281 (S.D.N.Y. 2002), *rev'd on other grounds*, 386 F.3d 205 (2d Cir. 2004) (finding CIDT claims actionable under the ATS); *Jama v. I.N.S.*, 22 F. Supp. 2d 353, 363 (D.N.J. 1998) (same); *Xuncax*, 886 F. Supp. at 187–89 (finding that causing plaintiffs to witness the torture or severe mistreatment of an immediate relative and to watch soldiers ransack their homes and threaten their families; bombing them from the air; and throwing a grenade at them all constituted CIDT); *see also Abebe-Jira v. Negewo*, 72 F.3d 844, 847–48 (11th Cir. 1996) (finding CIDT claims actionable without specifying the violative acts); *Paul v. Avril*, 812 F. Supp. 207, 212 (S.D. Fla. 1993) (same).

Courts considering the issue post-*Sosa* have generally agreed that CIDT violates the law of nations. *See Bowoto v. Chevron Corp.*, 557 F. Supp. 2d 1080, 1093–95 (N.D. Cal. 2008);

Mujica v. Occidental Petroleum Corp., 381 F. Supp. 2d 1164, 1181 (C.D. Cal. 2005). (recognizing that there is a customary international law norm prohibiting CIDT); *Doe v. Liu Qi*, 349 F. Supp. 2d at 1321 (finding CIDT claims actionable). The sole exception is *Aldana*, whose analysis is highly cursory. In that case, the Eleventh Circuit observed that CIDT claims were supported by the ICCPR, and noted that *Sosa* found the ICCPR to be an insufficient source of customary international law norms. 416 F.3d at 1247. As Judge Barkett's dissenting opinion and the subsequent opinion in *Bowoto* both note, this ignores the variety of sources of international law prohibiting CIDT, "including restatements, declarations, treaties, jurisprudence from international and regional human rights courts, U.S. law and international policy." *Bowoto*, 557 F. Supp. 2d at 1093; *see also Aldana*, 452 F.3d 1284 (11th Cir. 2006) (Barkett, J., dissenting from denial of rehearing *en banc*).

Additionally, the opinion in *Mujica*, while recognizing that CIDT violates international law, found that the conduct at issue in that case could not support a claim. 381 F. Supp. 2d at 1183. Critically, however, the court did not suggest that CIDT claims could never be recognized; to the contrary, the court cited *Doe v. Liu Qi* favorably, noting that its opinion should not be "taken to indicate that claims of cruel, inhuman, and degrading treatment should not be recognized when they arise out of more severe situations." *Id.*

3. Plaintiffs' claims fall within the prohibition against CIDT.

As this Court previously held, Owens Wiwa and Karalolo Kogbara have stated claims for CIDT. Defendants did not contest, and the Court did not previously address, the CIDT claims of other plaintiffs. It is clear however, that the treatment in custody of Ken Saro-Wiwa, John Kpuinen, Monday Doobee, Felix Nuate, Daniel Gbokoo and Barinem Kiobel and the forced exile of Michael Vizor and his treatment in custody constitute CIDT. In addition, all plaintiffs living in Ogoni suffered from the reign of terror imposed between 1993 and 19968 and suffered mistreatment which constitutes at least CIDT. For example, after Kogbara was shot, she was put in a truck so hot that she had burns over her body, she was kept in deplorable conditions in a military hospital and denied medical care so that after her release part of her arm had to be

amputated; while he was in mourning for his brother, James N-Nah was arrested without charge; Friday Nuate's village was burned and she was forced to flee; Lucky Doobee was detained and tortured; and Monday Gbokoo was terrorized. While most, if not all, of these injuries constitute torture, anything that does not rise to the level of torture is unquestionably cruel, inhuman, or degrading treatment.

E. Plaintiffs' claims alleging violent attacks on peaceful protestors and abuses committed to silence or in retribution for political protest state actionable claims for violations of the rights to life, liberty, security of the person and peaceful assembly and expression.

All of the abuses in this case involve attempts to suppress or punish the peaceful expression of political opposition to Shell's activities. Plaintiffs asserted that exercising their rights of freedom of association through their political activities were violated by defendants' complicity in the violent suppression of those rights, including the killing of their family members and the torture and other mistreatment of themselves and their deceased family members. FAC, ¶¶47- 49, 53-54, 57-59, 63-64, 68-69, 71-73, 79-83, 87, 89-90, 95, 100-101.

Previously in this case, this Court specifically held that the right to life, liberty, and personal security and the right to peaceful assembly and expression are valid grounds for relief under the ATS. *Wiwa*, 2002 U.S. Dist. LEXIS 3293 at 33-36, *citing* various international authorities. The Court noted that "the right to peaceful assembly and expression include the right not to be subjected to the use of force or violence by police or military while engaged in peaceful protest." *Id.* at 33. In *Kiobel*, this Court dismissed similar claims on grounds that the plaintiffs had not demonstrated the norms are sufficiently defined. 456 F. Supp. 2d at 467. The *Wiwa* plaintiffs do so herein.

Other courts have recognized that the violent suppression of the right to association and expression is a customary international law violation justiciable in U.S. courts. In *Estate of Rodriguez*, 256 F. Supp. 2d at 1262-64, the court found that a trade union and the estates of union leaders allegedly killed for their union activities could proceed with claims for the right to associate and organize. Similarly, *Tachiona v. Mugabe* found that international authorities recognize:

> three essential principles that define and embody the specific content of these [political] rights: (1) that the right to enjoy and exercise these freedoms is a fundamental and obligatory international norm; (2) that any interference with the exercise of these rights may be justified only (a) when provided by law, (b) when the restraint is necessary to protect essential rights of others or to further vital public purposes grounded on national security, public order, safety, health or morals, and (c) when the interference is proportionate to the legitimate aims pursued; and (3) that violation of these standards is actionable and compensable in damages to the victims.

234 F. Supp. 2d 401, 430-31 (S.D.N.Y. 2002). The Court further noted the relevance of allegations that abuses of political rights were part of a consistent pattern of similar abuses:

> a systematic campaign of terror and violence conceived and arbitrarily waged by state agents arising not from any legitimate response to a demonstrable need related to the protection of public order, health or safety or other imperative purpose, but rather hatched and calculated to suppress political opinion and expression, is neither provided by law, necessary to safeguard other vital rights or public purposes, nor proportionate to any justifiable state aims pursued.

Id. at 432. The court reached this conclusion after a careful analysis of customary international law, emphasizing the standards set in *Filartiga*. *See Id.* at 423-432. The *Tachiona* court continued that, "When accompanied by extreme deprivations of life and liberty and unwarranted invasions of privacy as the instruments employed to achieve these repressive ends, the state's actions present unique dimensions that should qualify under a standard requiring a consistent pattern of gross violations of internationally recognized human rights." 234 F. Supp. 2d at 232.[37]

The inclusion of the right to assembly and association in significant international human rights instruments demonstrates its status as customary international law. The rights to peaceful assembly and association are widely accepted norms of customary international law. See Roht-Arriaza Decl., ¶¶ 54-60 (citing Universal Declaration art. 20; ICCPR arts. 19, 21; African Charter art. 11;ECHR, art. 10, 11; ACHR, art. 16). Killing, assaulting or shooting at non-violent protesters, even those engaged in illegal protests, violates this internationally protected right. *Id.*

As noted above, plaintiffs need only show that the *specific conduct* at issue violates international law. In combination, these norms, at a minimum, stand for the proposition that

---

[37] The Restatement (Third) §702 includes a consistent pattern of human rights violations as one of the recognized violations of customary international law. *See also Tel-Oren,* 728 F.2d at 782 (Edwards, J., concurring) (citing to Restatement "for guidance" as to "current norms of international law" and listing a "consistent pattern of gross violations" as one of those rights).

certain definable acts exceed international limits on the amount of force that can permissibly be used against peaceful demonstrators. These acts include the use of force that is not strictly necessary – in particular, potentially lethal force – against people like Owens Wiwa and Michael Vizor who were engaged in a peaceful demonstration. The prohibition also clearly extends to violent retaliation against those who have engaged in such peaceful protest or expression.

The rights to life, liberty, and security of person are among the most fundamental of all human rights, and are recognized in virtually every treaty dealing with civil and political human rights. *See* Roht-Arriaza Decl. ¶ 40-42 (citing UDHR art. 3 (guaranteeing "life, liberty and security of person"); ICCPR arts. 6, 9; African Charter on Human and Peoples' Rights art. 4 (guaranteeing "respect for his life and integrity of his person," and prohibiting arbitrary deprivation of that right); ECHR art. 2; ACHR art. 6).

The right to life and personal security includes definable, widely accepted limits on the permissible use of force by law enforcement officers. The use of lethal force by the police is prohibited unless "necessary under exigent circumstances, for example . . . in defense of [the officer] or other innocent persons, or to prevent serious crime." Restatement § 702 cmt. f. Thus, international law prohibits the use of force against non-violent, unarmed protestors. *Wiwa*, 2002 U.S. Dist. LEXIS 3293 at *33-34. *See* Roht-Arriaza Decl. ¶ 45-53. This widely accepted norm is further defined by Principle 9 of the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials:

> Law enforcement officials shall not use firearms against persons except in self-defense or defense of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.

Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, 8th U.N. Congress on the Prevention of Crime and the Treatment of Offenders, principle 9, U.N. Doc. A/CONF. 144/28/Rev.1, at 112 (1990). These customary international law norms limiting the use of force fully apply when law enforcement officers seek to suppress non-violent assemblies.

Principle 13 of the Basic Principles, for instance, states that force must be avoided or used only to the minimum extent necessary when dispersing assemblies. Even if—unlike here—the assembly were violent, firearms may be only be used when "less dangerous means are not practicable and only to the minimum extent necessary." *Id.* principle 13. This Court specifically relied on these principles in *Wiwa*, 2002 U.S. Dist. LEXIS 3293 at *33-34.

Moreover, international tribunals consider this right to be a fundamental component of customary international law. In instances where this right is denied by use of excessive force, the right to life is also implicated, specifically when the use of force arbitrarily deprives demonstrators of their right to life. *See* Roht-Arriaza Decl., ¶¶ 64-65.

In short, the violent dispersal of peaceful protestors, even where the protest violates local law, is a violation of clearly defined, widely accepted international law norms. The same is true of violent retaliation against those suspected of taking part in such protests or expressing political views. As shown above, the plaintiffs were subjected to potentially deadly force—and some were actually executed—in retaliation for their protest activities.

F. Plaintiffs' claims for crimes against humanity are actionable.

This Court has previously found that crimes against humanity (CAH) is actionable under the ATS, and that plaintiffs had adequately alleged violations of that universally recognized and well-defined norm. *Wiwa*, 2002 U.S. Dist. LEXIS 3293 at *27-33. In *Kiobel*, the Court reiterated that CAH is actionable. 456 F. Supp. 2d at 467-468.

1. The definition of crimes against humanity is widely accepted.

This Court previously held that, under international law, crimes against humanity will be found where abuses such as murder, imprisonment, torture or persecution of a political, racial or other group are committed in the context of a widespread or systematic attack against a civilian population, with knowledge of the attack. *Wiwa*, 2002 U.S. Dist. LEXIS 3293 at *27-29, 31.[38]

[38] The Court also held that it is "unclear" whether discriminatory treatment is an element of CAH, but that it did not matter here because one established form of discrimination is political persecution, which plaintiffs plead. *Id.* at *30, n.10. While the Court was correct that plaintiffs have adequately pled political persecution, plaintiffs need not do so. International law differentiates between two types of CAH: persecution on political, racial or religious grounds,

Every court to consider the issue post-*Sosa* has found that CAH remains actionable under the ATS. *See Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1154 (11th Cir. 2005); *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242,1247 (11th Cir. 2005); *Doe v. Saravia*, 348 F. Supp. 2d 1112, 1154-1157 (E.D. Cal. 2004); *Doe v. Liu Qi*, 349 F. Supp. 2d 1258, 1308 (N.D. Cal. 2004); *Mujica*, 381 F. Supp. 2d at1183 .[39] The courts are in agreement on the core definition recognized by this Court in *Wiwa. E.g., Saravia*, 348 F. Supp. 2d at 1156 ; *Liu Qi*, 349 F. Supp. at 1308; *Cabello*, 402 F.3d at 1161; *Aldana*, 416 F.3d at 1247; *see also* sources cited in Roht-Arriaza Decl., ¶ 20.. Federal courts have proven to be quite capable of adjudicating crimes against humanity claims. *See, e.g., Saravia*, 348 F. Supp. 2d 1112; *Chavez*, 2006 U.S. Dist. LEXIS 63257.

2. The abuses at issue here constitute crimes against humanity.

Wiwa held that the forced exile of Owens Wiwa and the beating of Karalolo Kogbara as part of an intentional systematic attack against a particular civilian population, violated the norm prohibiting CAH. *Wiwa*, 2002 U.S. Dist. LEXIS 3293 at *32. *Kiobel* held likewise with respect to torture and arbitrary detention committed as part of a systematic attack. 456 F. Supp. 2d at 467. The same is true of the forced exile of Michael Vizor, of the killing of UebariN-Nah, the burning of the villages in which Friday Nuate lived, the arbitrary arrest without charges of James N-nah as well as the arrests, the torture of Lucky Doobee, the shootings in Korokoro, and the raids on towns, the destruction of villages and murder of their inhabitants. *See*, FAC ¶¶ 60, 62, 64, and 77.

The acts of violence at issue here were part of a much broader campaign of repression by the military against individuals and communities who protested against oil companies in Ogoni

---

and other abuses directed at a civilian population. *See* Roht-Arriaza Decl. at ¶15-17.

[39] *See also Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 2006 U.S. Dist. LEXIS 64579, *92-94 (S.D.N.Y. 2006); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 374 F. Supp. 2d 331, 333-34 (S.D.N.Y. 2005); *Doe v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20, 25 (D.D.C. 2005); *Hereros v. Deutsche Afrika-Linien Gmblt & Co.*, 2006 U.S. Dist. LEXIS 2761, 33-34 (D.N.J. 2006); *Chavez v. Carranza*, 2006 U.S. Dist. LEXIS 63257, *22 (W.D. Tenn. 2006). Prior to *Sosa*, several courts found crimes against humanity to be actionable under the ATS under the same "specific, universal, and obligatory" standard *Sosa* subsequently adopted. *E.g., Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1344 (N.D. Ga 2002).

or were associated with opposition to petroleum development, a campaign that has gone on for years and has claimed many lives as well as destroyed multiple communities.[40]

a. The military government's abuses constitute an "attack."

"'Attack' in the context of a crime against humanity can be defined as a course of conduct involving the commission of acts of violence." *Prosecutor v. Blagojevic/Jokic*, No. IT-02-60-T, ¶ 543 (ICTY Trial Chamber, Jan. 17, 2005); *see also Limaj et al*, No. IT-03-66-T at ¶ 182. This has been construed broadly to "encompass *any mistreatment* of the civilian population. . . ." *Prosecutor v. Simic, Tadic, and Zaric*, IT-95-9-T ¶39 (ICTY Trial Chamber, Oct. 17, 2003) (emphasis added); *Prosecutor v. Vasiljevic*, No. IT-97-25-T, ¶ 29 (ICTY Trial Judgment, Nov. 29, 2002); *Prosecutor v. Brdjanin*, No. IT-99-36-T, ¶ 131 (ICTY Trial Chamber, Sept. 1, 2004).

In this case, plaintiffs will show that multiple acts of violence were committed by the Nigerian military government against civilians in the Niger Delta, including especially the Ogoni

---

[40] This Court has held that CAH claims involving such abuses as torture or summary execution require a showing of state action. *Wiwa*, 2002 U.S. Dist. LEXIS 3293 at *38-39. This conclusion is immaterial, since all of the abuses at issue were committed by the military and therefore all involve state action. Nonetheless, plaintiffs submit that CAH does not, in fact, have a state action requirement. *Kadic*, 70 F.3d at 236, 242 ("Karadzic may be found liable for . . .crimes against humanity in his private capacity and for other violations in his capacity as a state actor"); *accord id.* at 239-40 (agreeing with U.S. government that private persons may be found liable under the ATS for violations of international humanitarian law). That is, atrocities that if committed individually would require state action do not so require when they are committed as part of a CAH, because the widespread or systematic nature of the abuse, rather than the participation of a state, renders the abuse of international concern. This has been clear since Nuremberg. *See* Control Council Law No. 10, art. II(2)(prohibition against CAH applied to "[a]ny person, without regard to. . . the capacity in which he acted.") In *Flick*, for example, industrialists charged with crimes against humanity argued that "individuals holding no public offices and not representing the State" could not be held responsible. 6 Trials at 1192. The Tribunal explicitly rejected that contention, holding that "[a]cts adjudged criminal when done by an officer of the government are criminal also when done by a private individual." *Id.* Although defendants "were not officially connected with the Nazi government," they were nonetheless convicted of crimes against humanity. *Id.* at 1191, 1202; *accord Tadic*, Case No. IT-94-1-T at ¶¶654-55 (ICTY holding that CAH can be committed by "*any* organization or group, which may or may not be affiliated with a Government," and is "imputable to private persons or agents of a State."(emphasis in original)). Similarly, the U.S. government and the international community correctly consider the terrorist acts of Al Qaeda on September 11th to be a crime against humanity. *See, e.g.*, "Joint Statement on Counterterrorism by the President of the United States and the President of Russia," October 21, 2001, available at http://www.whitehouse.gov/news/releases/2001/10/20011022-11.html.

people. These acts of violence were part of a long-running course of conduct in which the military repeatedly targeted those who protested against oil companies and fit into a pattern dating back at least to 1990 and involving thousands of individuals and at least hundreds of deaths. Indeed, after the transition back to civilian rule, the official report of 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....." Human Rights Violations Investigation Commision, HRVIC Report: Conclusions and Recommendations (Nigeria, May 2002)(hereafter "Oputa Commission Report"), ¶ 1.50. With respect to the Ogoni 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.*, at ¶ 2.44.

b. The attack was widespread, systematic, or both.

The attack necessary for CAH must be widespread *or* systematic, it need not be both widespread *and* systematic. *See Aldana*, 416 F.3d at 1247; *Kordic/Cerkez*, No. IT-95-14-2-T, ¶178 (ICTY Trial Chamber, Feb. 26, 2001) ("The requirement that the occurrence of crimes be widespread or systematic is a disjunctive one.") Although the attacks here were both widespread and systematic, plaintiffs need only establish one or the other.

i. *The attack was widespread.*

"A crime may be widespread [where there is a] cumulative effect of a series of inhumane acts." *Kordic/Cerkez*, IT-95-14/2-T at ¶ 179; *see also Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 226 F.R.D. at 479-80 ("A widespread attack is one conducted on a large scale against many people."). Although plaintiffs will show that the crimes at issue here were, in fact, directed at thousands of individuals, an attack of this scale is not necessary to satisfy the widespread requirement.

Plaintiffs will show that since at least 1990, Nigerian security forces engaged in a series

of well-documented, inhumane acts against those protesting or perceived to be opposing the oil industry. The attacks against plaintiffs occurred in the context of large-scale attacks against oil protesters in the Delta, which targeted thousands of people and killed at least hundreds. Indeed, as the Oputa Commission found, the government's campaign to suppress protests against the oil industry resulted in the militarization of the entire Niger Delta region, a vast swath of land inhabited by millions of people: "an army of occupation is stationed" in "virtually all parts of the Niger-Delta." Oputa Commission Report, ¶ 2.32(5).

Under customary international law, it is not the individual acts of defendants that must be widespread or systematic, but the attack itself. *Limaj,et al.*, No. IT-03-66-T at ¶ 189 ("Only the attack, not the individual acts of the accused, must be widespread or systematic."). Thus, even an act of violence against a single person may constitute a crime against humanity when it forms part of a widespread attack.[41] *Saravia*, 348 F. Supp at 1156-57 (citing *Prosecutor v. Msksic*, Case No. IT-95-13-R61, (Apr. 3, 1996), and applying the principle to the murder of one man in a larger campaign of violence and inhumane acts).

ii. *The attack was systematic.*

International criminal tribunals have routinely defined "systematic" to refer to "the organized nature of the acts of violence and the improbability of their random occurrence." *Kordic/ Cerkez*, No. IT-95-14/2-A , ¶ 94 (Appeals Chamber, Dec. 17, 2004); *see also Presbyterian Church of Sudan*, 226 F.R.D. at 479-80 ("[A] systematic attack is an organized effort to engage in the violence."). Plaintiffs adequately allege the systematic nature of targeting civilians engaged in oil protests in the Delta. The acts of violence against oil protestors were coordinated and directed by higher military officials, as shown by the repeated nature of the attacks and statements from officials that suggest that their practice was to commit abuses against those who opposed petroleum development. The Oputa Commission stated as much, finding that

[41] *See Prosecutor v. Musema*, No. ICTR-96-13-A, ¶¶ 966-7 (Trial Chamber, Jan. 27, 2000) (convicting defendant of committing a crime against humanity for the rape of a Tutsi woman); *Prosecutor v. Tadic*, No. IT 94-1-T, ¶ 649 (ICTY Trial Chamber, May 7, 1997); *Saravia*, 348 F. Supp. 2d at 1156.

"the protection given to oil companies" ultimately resulted in "systematic and generalized violations and abuses" in the Niger Delta under military rule. *Id.*, ¶¶ 79, 170.

"Patterns of crimes, in the sense of the non-accidental repetition of similar conduct on a regular basis, are a common expression of such systematic occurrence." *Kordic/Cerkez*, No. IT-95-14/2-A at ¶ 94. In incident after incident, Nigerian military and police engaged in a predictable pattern of violent suppression of protestors including, arrest, torture, and extrajudicial killing.

c. The attack was committed against a civilian population.

The term "civilian population" has been interpreted broadly by the international tribunals. *Kordic/Cerkez*, No. IT-95-14/2-A at ¶ 97 ("In determining the scope of the term 'civilian population,' the Appeals Chamber recalls its obligation to ascertain the state of customary law in force at the time the crimes were committed."); *see also, Prosecutor v. Jelisic*, No. IT-95-10, ¶ 54 (ICTY Trial Chamber, Dec. 14, 1999) ("It follows from the letter and the spirit of Article 5 that the term 'civilian population' must be interpreted broadly."); *Limaj* et al., No. IT-03-66-T at ¶ 186 (same).

"The term 'any' means crimes against humanity can be committed against *any civilian group*, regardless of nationality, ethnicity, or *any other distinguishing feature*."[42] Here, plaintiffs and others were targeted because they protested the harm wrought by Shell's oil extraction activities on their land. These civilians were specifically targeted in order to send a message to others who would engage in similar activities.

Moreover, the "population" targeted here was everyone and every community associated with opposition to petroleum development in Ogoni. Certainly, the thousands of individuals who protested meet this criteria; they are a large number that can be grouped together as a result of their common struggle against the petroleum industry. Indeed, the Oputa Commission did just that, grouping together multiple incidents of violence against oil protestors.

---

[42] *See* Gueneal Mettraux, *Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda*, 43 Harv. Int'l L.J. 237, 254 (2002) (emphasis added).

There can be no doubt here that, as a result of their protesting, plaintiffs "were targeted in such a way" as to establish "that the attack was in fact directed against a civilian population rather than against a limited and randomly selected number of individuals." *Kordic/Cerkez*, No. IT-95-14/2-T at ¶ 97.

d. The acts at issue were a part of the attack.

Plaintiffs only need prove that "the crimes were *related* to the attack on a civilian population." *Tadic*, No. IT-94-1-A at ¶ 271 (emphasis added). Here, the abuses at bar, including the murder, torture, and persecution of civilians, were related to, and in fact occurred in the course of, the wide-scale attack on civilians protesting oil development in Ogoni. The military repeatedly targeted individuals and communities associated with opposition to oil companies and their practices. FAC ¶¶2, 4, 47, 55, 60, 61, 62, , 64, 68, 75, 92, 103, and 108. An obvious example of this is the execution of the Ogoni Nine by the CDST, which was the most notorious abuse against the Ogoni people during this period. It was obviously related to the overall Ogoni campaign, as demonstrated by the fact that Shell offered to trade Ken Saro-Wiwa's life in exchange for a commitment to end the protests against Shell.

e. The perpetrators knew or should have known that their acts constituted part of a pattern of widespread or systematic crimes against a civilian population.

The perpetrator must be aware that there is an attack on the civilian population and that the underlying crime forms part of that attack. *Kordic/Cerkez*, No. IT-95-14/2-A, ¶ 99 (Appeals Chamber, Dec. 17. 2004); *Blaskic*, No. IT- 95-14-A at ¶ 124. A court is entitled to infer that the perpetrator was aware of the broader attack, even in the absence of direct evidence. *See Prosecutor v. Krnojelac*, No. IT-97-25-T, ¶ 62 (ICTY Trial Chamber, Mar. 15, 2002) (inferring knowledge of attack from Defendant's presence at and position as warden of the place where crimes were committed, his contact with the military, and general knowledge among Serbs about situation of non-Serb population at the time).

Plaintiffs need only show that the perpetrators understood "the overall context in which [their] acts took place," not that they knew all of the details of each other act of violence. *Limaj*,

et al. No. IT-03-66-T, ¶ 190. Constructive knowledge is all that is required.[43]

There can be no doubt that the CDST and the military that committed the other abuses at issue knew, or should have known, of the broader attack against oil protestors in Ogoni. It is not an overstatement to say that virtually everyone in Ogoni in the 1990s would have been aware of the military's campaign against oil protestors.

G. Plaintiffs' arbitrary arrest and prolonged arbitrary detention claims are actionable.

This Court has already ruled that arbitrary detention claims constitute "fully recognized violations of international law." *Wiwa*, 2002 U.S. Dist. LEXIS 3293 at *17 (*citing Xuncax*, 886 F. Supp. at 184-85), and that plaintiffs' claims for arbitrary arrest and detention are valid. *Id.* at *18. In *Kiobel*, this Court reiterated its earlier holding after considering the *Sosa* Court's opinion 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.'" 456 F. Supp. 2d at 461 (quoting 542 U.S. at 738).[44]

The Court was clearly correct in holding that the kind of prolonged arbitrary detentions at issue here have been recognized as a violation of a norm of customary international law that meets the "specific, universal and obligatory" standard adopted by *Sosa*, both before and after the Supreme Court's decision.[45] *See, e.g., Hilao v. Estate of Marcos*, 103 F.3d 789, 794-95 (9th Cir. 1996); *Doe v. Liu Qi*, 349 F. Supp. 2d at 1325 (finding that the Supreme Court in *Sosa*

---

[43] *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1354 (N.D. Ga. 2002) ("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 (ICTY Trial Chamber, Feb. 26, 2001) (same)).

[44] In *Aldana v. Del Monte Fresh Produce*, 416 F.3d at 1247, which involved an 8 hour detention, the Eleventh Circuit stated that it was dismissing plaintiffs' claims because of the length of the detention and also commented that it was the length of time of the detention which had led to the dismissal of Plaintiff's claims in *Sosa*; the Appellate Court stated that it was not ruling that the violation itself is not actionable.

[45] The customary international law norm prohibiting arbitrary arrest and detention is well-established. *See* Roht-Arriaza Decl., ¶62-68.

"acknowledged that under some circumstances, prolonged arbitrary detention violates customary international law clearly enough to support a claim under the ATCA"); *Martinez,* 141 F.3d at 1384 ("there is a clear international prohibition against arbitrary arrest and detention") (cited with approval in *Qi*, 349 F. Supp. 2d at 1325)[46]; *Kadic,* 70 F. 3d at 242 ("arbitrary detention... [has] long been recognized as [a] violation of the law of war"); *see also Eastman Kodak v. Kavlin,* 978 F. Supp. 1078, 1092-94 (S.D. Fla. 1997) (8-10 day arbitrary detention violates the law of nations); *Paul v. Avril*, 901 F. Supp. 335 (S.D. Fla. 1994); *Forti v. Suarez-Mason,* 672 F. Supp. 1531, 1541 (N.D. Cal.1987). The "international consensus is especially clear on the illegality of 'prolonged' arbitrary detentions." *Liu Qi*, 349 F. Supp. 2d at 1326. Here, Saro-Wiwa, Kiobel, Kpuinen, Doobee, Nuate, Gbokoo, and Vizor, were detained for about a year and a half before they were executed (except for Vizor, who was acquitted). FAC ¶¶ 79, 80, 87, 99-101.

As to the arbitrary aspect of detention, courts have followed the formulation of the Restatement (Third) of the Foreign Relations Law of the United States, which examine whether the detention was "'incompatible with the principles of justice or with the dignity of the human person.'" *Id.* at 1326 (quoting *Martinez,* 141 F.3d at 1384, in turn quoting Restatement § 702 cmt. h). Indeed, *Sosa* itself cites the Restatement's treatment of prolonged arbitrary detention with approval. 542 U.S. at 697. Factors to consider include a "failure to notify detainee of charges, permit an early opportunity to communicate with family or consult with counsel." *Liu Qi*, 349 F. Supp. 2d at 1326 (citing Restatement§ 702 cmt. h).

Another factor to consider in determining arbitrariness is the conditions of confinement of the detention; where the detainee is subject to torture or CIDT, courts have upheld claims of arbitrary detention. *Id.* ("Where the detainee is subject to torture, courts have found the detention arbitrary"); *Avril,* 901 F. Supp. at 335; *Eastman Kodak*, 978 F. Supp. at 1094.

While detained, plaintiffs were beaten and subjected to other torture and CIDT, including being denied adequate food and medical care. FAC ¶¶49, 69, 72, 81, 90, 93, 100. Some

[46] *Martinez* held that there is "a clear international prohibition against arbitrary arrest and detention" but ruled that it was inapplicable to the plaintiff since he was arrested pursuant to a valid Mexican arrest warrant, brought before a judge within 72 hours of his arrest, saw a judge every two to three days and had access to an attorney and a hearing. 141 F.3d at 1384.

plaintiffs suffered an arbitrary, threatening and intimidating pattern of repeated arrests and detentions, including Ken Saro-Wiwa, Michael Vizor, and Owens Wiwa. Owens Wiwa was arbitrarily detained on four occasions, once for over a week, and once for over two weeks, and was similarly beaten, humiliated and threatened, including having a gun put to his head. *See* FAC, ¶¶ 49, 54-56, 68, 69, 71-2, 79-83, 93, 95, 98-102.

H. The ATS permits liability under a variety of legal theories.

1. ATS claims are federal common law claims, and incorporate federal common law rules of liability.

The substantive elements of ATS claims, (such as torture or summary execution) are supplied by international law. With respect to the rules of liability and other subsidiary questions, however, ATS claims incorporate federal common law rules. While this federal common law may incorporate international law where appropriate, the primary source for rules of liability is well-established rules of federal common law.

The Second Circuit addressed this source of law question in *Khulumani v. Barclays National Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007), but the panel could not reach a consensus. In the court's *per curiam* opinion, two members of the panel, Judge Katzmann and Judge Hall, held that "a plaintiff may plead a theory of aiding and abetting liability under the ATCA." *Id.* at 260. Nonetheless, the two judges in the majority differed on the appropriate source of law. Judge Hall concluded that with respect to "standard[s] of accessorial liability . . . a federal court should consult the federal common law." *Id.* at 284. Judge Hall noted that "'international law does not specify the means of its domestic enforcement,'" *id.* at 286, and that, where a statute such as the ATS is silent the applicable law for ancillary issues, "federal courts look to the federal common law to fill such an interstice." *Id.* at 287.

Judge Katzmann, however, opined in his concurrence that the court should look to "whether international law specifically recognizes liability for aiding and abetting violations of the law of nations." *Id.* at 269. The standard for aiding and abetting liability, in Judge Katzmann's view, needs to be derived from international law instruments, not federal common law. Recognizing this difference, Judge Hall noted, "It is thus left to a future panel of this Court

to determine whether international or domestic federal common law is the exclusive source from which to derive the applicable standard." *Id.* at 286 n.4.

Judge Hall's view is the better one and should be followed by this Court, largely for the reasons put forth in Judge Hall's concurring opinion. Moreover, it is consistent with *Sosa*, in which the Supreme Court noted that under the ATS "the common law" provides "a cause of action for the modest number of international law violations with a potential for personal liability." 542 U.S. at 724. The Court described the process of determining whether a claim is actionable under the ATS as whether a court should "recognize private claims under federal common law for violations of [an] international law norm." *Id.* at 732. Because ATS claims are common law claims, courts may apply common law liability rules while drawing on international principles. Indeed, as Judge Edwards recognized in *Tel-Oren*, 726 F.2d at 778 "the law of nations never has been perceived to create or define the civil actions to be made available by each member of the community of nations; by consensus, the states leave that determination to their respective municipal laws."

Several other courts have suggested that "liability standards applicable to international law violations" should be developed "through the generation of federal common law," an approach that is "consistent with the statute's intent in conferring federal court jurisdiction over such actions in the first place." *Xuncax v. Gramajo*, 886 F. Supp. 162, 182–83 (D. Mass. 1995).[47]

---

[47] *See also Abebe-Jira v. Negewo*, 72 F.3d 844, 848 (11th Cir. 1996) (holding that courts may "fashion domestic common law remedies to give effect to violations of customary international law"); *Doe v. Islamic Salvation Front*, 257 F. Supp. 2d 115, 120 n.12 (D.D.C. 2003) (considering the possibility that "[t]ort principles from federal common law" are appropriately applied to determine liability in ATS cases); *Doe v. Unocal Corp.*, 395 F.3d 932, 966 (9th Cir. 2002), *vacated by grant of en banc review*, 395 F.3d 978 (2003) (Reinhardt, J., concurring) (arguing that federal common law applies in ATS cases "in order to fashion a remedy with respect to the direct or indirect involvement of third parties in the commission of the underlying tort"); *Eastman Kodak Co. v. Kavlin*, 978 F. Supp. 1078, 1094 (S.D. Fla. 1997) (finding liability under the ATS where, "under ordinary principles of tort law [the defendant] would be liable for the foreseeable effects of her actions").

2. Federal common law rules of ATS liability may incorporate general principles of common law liability as well as international law, where appropriate.

The ATS is "highly remedial," *Forti v Suarez-Mason*, 672 F. Supp. 1531, 1548 (N.D. Cal. 1987), and liability rules adopted under it must reflect the universal condemnation of the underlying violations. *Filartiga v. Peña-Irala*, 577 F. Supp. 860, 863 (S.D.N.Y. 1984); *Abebe-Jira*, 72 F.3d at 848. Numerous cases have, however, already discussed federal law theories of liability that adequately give effect to the remedial purpose of the ATS, and there is therefore no general need to create a new body of liability law for ATS cases.

With respect to issues that are not already well-settled in federal law, federal courts typically look to "general" common law. *See, e.g.*, *Burlington Indus.*, 524 U.S. at 754 (relying "'on the general common law of agency'" to establish uniform federal standards).[48] And, due to the unique nature of ATS claims as federal common law claims incorporating international law, it may also be appropriate to consider the application of international law principles. Certainly, the fact that a rule of liability is found in international law as well as established federal law and general principles of liability supports its application in ATS cases, because international law is part of federal law. *Sosa*, 542 U.S. at 729. The relevant sources of international law include treaties, "international custom," "general principles of law recognized by civilized nations," and "judicial decisions." *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 251 (2d Cir. 2003); Article 38.I(c) of the Statute of the International Court of Justice, 59 Stat. 1031, T.S. No. 993 (1945). International law may contain gaps that make it inappropriate as the primary or exclusive source of rules of liability; for example, there are currently no international tribunals with civil jurisdiction over private individuals and corporations, so there are fewer opportunities to articulate international law principles in these areas. However, if international law accords with established federal law, there can be little argument against its application in ATS cases.

---

[48] Joint venture liability is a variation of agency liability. The Shell Petroleum Development Company was the operator of a joint venture with the military government of Nigeria. As such, SPDC is liable for the acts of the military taken in furtherance of the joint venture.

3. Aiding and abetting liability is actionable under the ATS.

After *Khulumani*, it is settled that defendants may be held liable for aiding and abetting under the ATS, but the precise standard of liability is unclear. Although this Court in *Kiobel* correctly held that aiding and abetting is an actionable theory of liability, it did not consider the proper standard to apply. 456 F. Supp. 2d at 464.[49]

In *Khulumani*, Judge Hall held that Section 876(b) of the Restatement (Second) of Torts reflects federal common law and therefore provides the proper aiding and abetting standard under the ATS. 504 F.3d at 287-288. Under that standard, a defendant is liable if he "knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself." The Eleventh Circuit has adopted an indistinguishable standard, without reference to international law. *Cabello*, 402 F.3d at 1158 (person who provides substantial assistance and knows that his or her actions assist in wrongful activity aids and abets).

In fact, however, whether aiding and abetting liability is controlled by international or federal common law should be of little import, because both apply the same aiding and abetting standard: that one *knowingly* provide substantial assistance to a person committing a tort.

The ICTY, for example, after conducting an exhaustive analysis of the jurisprudence of the post-World War II tribunals, held that the "actus reus consists of practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime," while the "mens rea required is the knowledge that these acts assist the commission of the offence." *Prosecutor v. Furundzija*, case no IT-95-17/1/T, judgment (Dec. 10, 1998), ¶¶ 195-97, 200-25, 235-49. *accord Prosecutor v. Delalic*, I.T. - 96-21 (Nov. 16, 1998), at ¶ 321, 326-27 (reiterating this standard and noting it is customary international law).[50]

As *Furundzija* made clear, this standard dates back to Nuremburg. For example, defendant Steinbrinck was convicted "under settled legal principles" for "knowingly"

---

[49]As this Court held, the TVPA contemplates liability for anyone who abets torture or summary execution. *Wiwa*, 2002 U.S. Dist. LEXIS 3293 *49-52, *citing* S. Rep. No. 249, and Restatement (Second) of Torts, section 876.

[50]The ICTY was "only empowered to apply" standards that are "beyond any doubt customary law." *Tadic*, Case No. IT-94-1-T at ¶¶ 661-662.

contributing money to an organization committing widespread abuses, even though it was "unthinkable" he would "willingly be a party" to atrocities. *U.S. v. Flick*, 6 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, 1217, 1222 (1952). Similarly, in *In re Tesch*, industrialists were convicted for sending poison gas to a concentration camp, knowing that it would be used to kill. 13 I.L.R. 250. In *United States v. Ohlendorf,* 4 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, 1, 569 (1949), a defendant could be convicted "as an accessory" because he turned over lists of communists knowing that "the people listed would be killed when found."

Clearly, customary international law provides a "specific, universal and obligatory" norm against aiding and abetting. Thus, ATS cases that have looked to international authorities have applied the standard recognized in *Furundzija*. *See, e.g. Mehinovic*, 198 F. Supp. 2d at 1356; *Talisman*, 244 F. Supp. 2d at 323-24; *In re Agent Orange Prod. Liab. Litig.*, 373 F. Supp. 2d 7, 54 (S.D.N.Y. 2005). This is the same standard recognized in our domestic jurisprudence.

Critically, the accomplice need not "share the mens rea of the perpetrator, in the sense of positive intention to commit the crime." *Furundzija*, ¶ 245. Plaintiffs need only prove that defendants had knowledge that their acts would assist in the commission of the crime. *Mehinovic*, 198 F. Supp.2d at 1356; *see also Vasiljevic*, No. IT-98-32-A, ¶ 102 (ICTY Appeals Chamber, Feb. 25, 2004).[51] Moreover, knowledge can be actual or constructive. *Presbyterian Church*, 244 F. Supp. 2d at 324.[52] Similarly, "it is not necessary that the aider and abettor . . .

---

[51] *Vasiljevic* convicted a defendant of aiding and abetting despite expressly finding that there was insufficient evidence of intent, *see Vasiljevic*, No. IT-98-32-A at ¶¶ 133-34. A subsequent ICTY case confirms that the *Vasiljevic* judgment held that "knowledge on the part of the aider and abettor that his acts assist in the commission of the principal perpetrator's crime suffices for the *mens rea* requirement." *Blaskic*, No IT-95-14-A at ¶ 49.

[52] Since Nuremberg, international law has recognized that individuals can be found liable for aiding and abetting based on constructive knowledge. *See United States v. Flick*, 6 Trials of War Criminals at 1220 (defendants convicted because they could not "reasonably believe" that all of the money they contributed went to the stated purpose of supporting cultural endeavors); *Mauthausen Concentration Camp Trial*, 6 Trials 88-89 (1949) (convicting defendants of complicity based on the presumption that they possessed knowledge of the abuses); *In re Altostotter*, 6 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10 at 88-89 (1949)(defendants convicted based on presumption they had knowledge of abuses). The ICTY has also held that constructive knowledge is sufficient under

know the precise crime that was intended and which in the event was committed. If he is aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed, he has intended to facilitate the commission of that crime, and is guilty as an aider and abettor." *Blaskic*, No. IT-95-14-A at ¶ 50.[53]

Judge Katzmann, in his concurrence in *Khulumani*, looked to the Rome Statute of the International Criminal Court and asserted that aiding and abetting under the ATS requires that the defendant have the "purpose" of facilitating the crime. 504 F.3d at 275. The Rome Statute, however, provides no basis for declining to apply customary international law's "knowledge" standard. First, the Rome Statute is, by design, narrower than customary international law. The Statute defines the crimes actionable by that particular tribunal; it is not intended to define the contours of customary international law. Indeed, the Statute is explicit that its definitions "shall not affect the characterization of any conduct as criminal under international law independently of this statute." Rome Statue, art. 22(3). Second, as Judge Katzmann recognized, the Rome Statute itself provides a "knowledge" standard where the defendant assists the commission of a crime by a group of persons acting with a common purpose–which is true of all of the abuses here. 504 F.3d at 275. Third, Judge Katzmann recognized that the ICTY was only empowered to apply customary international law, *Id.*, and that its jurisprudence supported a "knowledge" standard. *Id. at* 278, *citing Vasiljevic*, *Furundzija*,and *Tadic*. For these reasons, this Court should follow the great weight of international and ATS authority and find that the *mens rea* of aiding and abetting is "knowledge." Nonetheless, plaintiffs have alleged purpose.

Here, plaintiffs allege that Shell supported, conspired in and consented to wide-scale abuses, including the false accusations against and executions of the Ogoni Nine and the abuses suffered by the other plaintiffs, as part of a pattern of collaboration and/or conspiracy between

---

customary international law. *See Furundjiza*, No. ICTY 95-17/1-T at ¶245 (must show that aider and abettor "would have reasonably known"); *Prosecutor v. Delalic*, No. IT-96-21, ¶ 328 (ICTY Trial Chamber, Nov. 16, 1998).

[53] *See also Limaj et al.*, No. IT-03-66-T at ¶ 518; *Prosecutor v. Strugar*, No. IT-01-42-T, ¶ 350 (ICTY Trial Chamber, Jan. 31, 2005); *Brdjanin*, No. IT-99-36-T at ¶ 272; *Prosecutor v. Kvocka et al.*, No. IT-98-30/1, ¶ 255 (ICTY Trial Chamber, Nov. 2, 2001); *Furundzija*, No. IT-95-17/1-T, ¶ 246.

Defendants and the military junta to violently suppress opposition to Shell's conduct in its exploitation of oil and natural gas in Ogoni. *See, e..g.,* FAC ¶¶ 2-4, 26, 28, 39, 46-49, 51-52, 54, 64-66, 68-69, 71-75, 77-79, 96-97, 108-111, 117. Plaintiffs allege *inter alia* that defendants paid the military assigned to Shell installations, bought weapons for and provided logistical support including vehicles and ammunition to the military, participated in the planning and coordination of "security operations" including raids and terror campaigns conducted in Ogoni, attempted to bribe two witnesses to give false testimony against Saro-Wiwa, and coordinated with the junta on a public relations campaign to discredit MOSOP leaders, attributing to MOSOP and Saro-Wiwa acts of violence. FAC ¶¶39, 55, 61-62, 64-66, 74, 85. Defendants did these things even after the notoriously brutal military committed abuses on Shell's behalf. FAC ¶¶40-44.

4. Conspiracy liability is actionable under the ATS.

This Court has already recognized that defendants' liability may be based upon the existence of a conspiracy with the military. *Wiwa*, 2002 U.S. Dist. LEXIS 3293 *43; *see also Talisman*, 244 F. Supp. 2d 289, 320-21. . Conspiracy is well-recognized in both federal law and international law. Accordingly, it has been consistently accepted by courts as a basis for ATS liability.[54] Plaintiffs are unaware of any ATS case to reject conspiracy liability.

In *Cabello*, for example, the Eleventh Circuit held that a defendant can be found liable under a conspiracy theory if the plaintiff shows that "(1) two or more persons agreed to commit a wrongful act, (2) [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." 402 F.3d at 1158-59. The Court reached this decision under federal common law. *See id., citing Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983).

Here again, however, the same conclusion obtains if the Court applies customary

[54]*E.g. Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1158–60 (11th Cir. 2005); *Aldana*, 416 F.3d at 1248; *Hilao v. Estate of Marcos*, 103 F.3d 767, 776 (9th Cir. 1996); *In re Agent Orange Prod. Liab. Litig.* 373 F. Supp. 2d 7, 52-54 (E.D.N.Y. 2005); *In re Terrorist Attacks on September 11, 2001*, 392 F. Supp. 2d 539, 565 (S.D.N.Y. 2005); *Eastman Kodak Co.*, 978 F. Supp. at 1091–92 (recognizing conspiracy liability for arbitrary detention).

international law. Joint criminal enterprise (JCE) liability in international law is akin to civil conspiracy liability. In *Hamdan*, a plurality of Supreme Court cited with approval JCE liability under international law. 126 S. Ct. 2749, 2785, n.40 (2006) (plurality opinion of Stevens, J.). The ICTY cases which the plurality cited, *Prosecutor v. Tadic* and *Prosecutor v. Milutinovićc*, make clear that joint criminal enterprise is recognized in customary international law. *Prosecutor v. Tadic*, Judgment, Case No. IT-94-1-A (ICTY App. Chamber, July 15, 1999) at ¶¶220, 226; *see also id.* at ¶¶ 186-220 (collecting authorities); *Milutinovićc*, Decision on Dragoljub Ojdanićc's Motion Challenging Jurisdiction—Joint Criminal Enterprise, Case No. It–99–37–ar72, ¶¶ 28–30 (ICTY App. Chamber, May 21, 2003).[55]

Under customary international law, the *actus reas* of JCE 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 of a crime. *Tadic* at ¶227. The *mens rea* requirement may involve shared intent to perpetrate a certain crime. *Id.* at ¶228. JCE liability also exists where the defendant intends to participate in the criminal purpose of the group and one of the perpetrators commits a kind of crime which, while outside the common design, was nevertheless foreseeable, and the defendant willingly took that risk. *Id.*[56]

---

[55] *See also Cabello*, 205 F. Supp. 2d at 1325 (S.D. Fla. 2002)(endorsing JCE, "agree[ing] that principles of . . . accomplice liability are well established in customary international law."); Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States, Between 1 January 1994 and 31 December 1994, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., art. 2, U.N. Doc. S/RES/955 (1994) ("ICTR Statute"); Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., art. 4, U.N. Doc. S/RES/827 (1993) ("ICTY Statute")

[56] *Accord Vasiljevic*, ¶ 99 (ICTY Appeals Chamber) (Feb. 25, 2004) ("While murder may not have been explicitly acknowledged to be part of the common purpose, it was nevertheless foreseeable that the forced removal of civilians at gunpoint might well result in the deaths of one or more of those civilians."); *see* also Tarek F. Maassarani, *Four Counts of Corporate Complicity: Alternative Forms of Accomplice Liability Under the Alien Tort Claims Act*, 38 N.Y.U. J. Int'l L. & Pol. 39, 54-55 (2005).

Here, plaintiffs have alleged that defendants shared the common aim to use military violence to quell protests against the Shell operations. The same allegations that support aiding and abetting liability noted above also support conspiracy liability.

5. Reckless disregard and joint tortfeasor liability are actionable under the ATS.

The *Sosa* federal common law analysis also compels the conclusion that the ATS recognizes reckless disregard as an actionable theory of liability. The concept that one party may be held liable for the reckless disregard of the welfare of another pervades federal common law and has been applied in a variety of contexts.[57]

Taking action "in the face of an unjustifiably high risk of harm that is either known or so obvious that it should be known" constitutes reckless disregard. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994) (citing W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on Law of Torts* § 34, pp. 213-214 (5th ed. 1984); Restatement (Second) of Torts § 500 (1965)). Under the common law, a defendant may be liable for injury caused by an entity or instrumentality it negligently uses, even if no *respondeat superior* or agency relationship exists. *Bennett v. United States*, 803 F.2d 1502, 1505 (9th Cir. 1986); *Van Ort v. Stanewich*, 92 F.3d 831, 837 (9th Cir. 1996).[58]

Likewise, intentional torts, which require a higher level of *mens rea* than recklessness, are also basic features of U.S. tort law and ought to be recognized under the ATS. Intent is broader

---

[57] *Youell v. Exxon Corp.*, 48 F.3d 105, 110-11 (2d Cir. 1995), *vacated on other grounds*, 516 U.S. 801 (1995)(admiralty); *Saba v. Compagnie Nationale Air France*, 78 F.3d 664, 668-69 (D.C. Cir. 1995)(the Warsaw Convention); *Medina v. City of Denver*, 960 F.2d 1493, 1496 (10th Cir. 1992)(constitutional tort cases brought pursuant to 42 U.S.C. § 1983); *see also Farmer v. Brennan*, 511 U.S. 825, 836 (1994) (stating "acting or failing to act with deliberate indifference to a substantial risk of serious harm to a prisoner is the equivalent of recklessly disregarding that risk" and adopting subjective recklessness standard for Eighth Amendment purposes); *Monroe v. Pape*, 365 U.S. 167, 187 (1961) (Section 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions") *overruled on other grounds by Monell v. Dept. of Social. Serv.*, 436 U.S. 658 (1978).

[58] These principles have their counterparts in international law. In that context, a superior will be held liable for the conduct of a subordinate where he has notice that the subordinate has committed or is committing abuses, but fails to take steps to prevent those abuses. *Bagilishema*, ICTR-95-1A-T at ¶¶ 44-50.

than a desire or purpose to bring about physical results. It extends to those consequences which the actor believes are substantially certain to follow from what the actor does. Restatement (Second) of Torts, §§8A, 870 (1965); Prosser & Keeton, *supra* at 34.

The same is true of joint tortfeasor liability. Such liability is a well-accepted feature of U.S. common law, and indeed of both the common law and civil law tradition.[59] It therefore is part of international law as a general principle of law common to the world's legal systems.

As the aiding and abetting discussion demonstrates, defendants knew or should have known of the ongoing pattern of abuses being committed by the military and acted in reckless disregard of this knowledge. Shell was also directly and thus jointly involved in the military attacks and executions at issue.

6. Agency liability is actionable under the ATS.

This Court correctly ruled that, in a claim under the ATS, plaintiffs may proceed on an agency theory. *Wiwa*, 2002 U.S. Dist LEXIS 3293 at *41 n.14 (Plaintiffs adequately alleged that SPDC was agent of defendants). Other courts have likewise held that common law agency theories of liability are actionable under the ATS. *Bowoto v. ChevronTexaco Corp.*, 312 F. Supp. 2d 1229, 1247-48 (N.D Cal. 2004); *see also Aldana,* 416 F.3d at 1247-48. In *Sarei*, the Ninth Circuit noted that courts applying the ATS draw on federal common law, and specifically referenced federal common law agency liability principles. 487 F.3d 1193, 1202 (9th Cir. 2007); *rehearing en banc granted* 499 F.3d 923. Such principles, which may be drawn from sources such as the Restatement on Agency[60], and cases applying the principles codified in the Restatement, provide that corporations may be held vicariously liable for the acts of their agents.

Moreover, the federal common law standards applicable here are also reflected in international law; concepts of vicarious liability are general principles of law common to

---

[59] *See* John E. Noyes & Brian D. Smith, *State Responsibility and the Principle of Joint and Several Liability*, 13 Yale J. Int'l L. 225, 251-52 (1998) (joint tortfeasors are jointly and severally liable in both the common and civil law traditions).

[60] *See id. citing Moriarty v. Glueckert Funeral Home, Ltd.*, 155 F.3d 859, 866 n. 15 (7th Cir. 1998). *See also Kolstad v. American Dental Ass'n*, 527 U.S. 526, 542 (1999) (The Restatement of Agency provides a "useful starting point" for defining general common law of vicarious liability.).

virtually every legal system. The principles are, thus, part of the body of international law by virtue of their status as general principles of law. Regardless of whether the Court looks to federal common law or solely to international law, there can be no question that the agency principles described below are actionable under the ATS. These principles allow SPDC to be held accountable for the acts of the military, and allow defendants to be held liable for the acts of both the military and of SPDC.

A defendant will be held liable for the tortious conduct of another under a *respondeat superior* theory when the tortfeasor is the "servant" of the party against whom liability is sought. Prosser and Keeton on Torts § 70 (5th ed. 1984); Restatement (Second) of Agency § 219 (1958). Relying on the guidelines set forth in the Restatement on Agency, federal courts regularly apply common law standards for determining whether an employment relationship exists between a worker and the principal to whom he or she provides services. *Clackamas Gastroenterology Associates, P. C. v. Deborah Wells*, 538 U.S. 440, 448 (2003); *Torres-Lopez v. May*, 111 F.3d 633, 639-640 (9th Cir. 1997).

"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*, 537 U.S. at 285; *see also* Restatement (Second) of Agency § 219. 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. Restatement § 216; *see id.* §§ 228–236; *see, e.g.*, *Cantrell v. Forest City Publ'g Co.*, 419 U.S. 245, 253 (1974). A number of factors may be considered in determining whether one actor is the servant of another, *see* Restatement § 220, but the primary question is whether the principal has "'the right to control'" the agent. *Clackamas Gastroenterology Assocs.*, 538 U.S. at 448 (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* Restatement § 14M reporters note (distinguishing "situations in which liability is imposed on a parent because of the existence of the agency relation, in our common-law understanding of that relation, from cases in which the

corporate veil of the subsidiary is pierced").[61] In the ATS case *Bowoto*, the district court properly concluded 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 between the parent and the subsidiary." 312 F. Supp. 2d at 1238.

Under "[c]ommon law agency principles," a principal is also "liable if it ratifie[s] the illegal acts" of the agent after the fact. *Phelan v. Local 305, United Ass'n of Journeymen*, 973 F.2d 1050, 1062 (2d Cir. 1992); *accord Bowoto*, 312 F. Supp. 2d at 1247–48. A principal is responsible for an unauthorized act that was done or purportedly done on the principal's behalf, where the principal's subsequent conduct establishes an agency relationship as if it had been authorized from the start. *Daynard v. Ness, Motley, Loadholt, Richardson & Poole, P.A.*, 290 F.3d 42, 59 (1st Cir. 2002) (citing Restatement § 82). Thus, *Bowoto* held that common law subsequent ratification is a viable theory of ATS liability. 312 F. Supp. 2d at 1247-48.

"Ratification occurs when the principal, having knowledge of the material facts involved in a transaction, evidences an intention to ratify it." *Phelan*, 973 F.2d at 1062 (internal punctuation omitted). An intent to ratify may be inferred, for example, from "a failure to repudiate" an "unauthorized transaction," Restatement § 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). Payment for services rendered, with knowledge of alleged misconduct, demonstrates a principal's acceptance of a purported agency, since compensation for services performed is inconsistent with any intention other than adopting those services. *Ballard*, 138 Cal. at 597. Similarly, the failure to fully investigate misconduct of a purported agent or employee and to punish, discharge or otherwise disavow the services of such person constitutes a ratifying act. Restat. 3d Agency § 4.01, comments (d), (f).. Likewise, a principal who defends or covers up the misconduct of an alleged agent embraces that conduct as his own. *Seymour v. Summa Vista Cinema, Inc.*, 809 F.2d 1385, 1388 (9th Cir. 1987); *Bowoto*,

[61] *See also Phoenix Can. Oil Co. v. Texaco, Inc.*, 842 F.2d 1466, 1477 (3d Cir. 1988); *Ronald A. Katz Tech. Licensing, L.P. v. Verizon Communications, Inc.*, 2002 U.S. Dist. LEXIS 19691, *9–10 (E.D. Pa. 2002); *C.R. Bard Inc. v. Guidant Corp.*, 997 F. Supp. 556, 560 (D. Del. 1998); *Joiner v. Ryder Sys. Inc.*, 966 F. Supp. 1478, 1487 n.19 (C.D. Ill. 1996).

312 F. Supp. 2d at 1247–48.

Agency principles are firmly established in the world's legal systems, in both common law jurisdictions and in civil code countries, and have become part of international law as "general principles of law recognized by civilized nations" as well as "judicial decisions." Courts in common law (and pluralistic or mixed) jurisdictions regularly acknowledge that a principal may be held liable for the acts of its agent, including intentional torts.[62] In some jurisdictions agency principles are also enshrined in statute.[63] This is especially the case in civil law countries.[64]

---

[62] *See, e.g., Lister v. Hesley Hall, Ltd.*, [2002] 1 A.C. 215 (H.L.) (holding school liable for sexual abuse by warden); *B.C. Ferry Corp. v. Invicta Sec. Serv. Corp.*, No. CA023277, 84 A.C.W.S. (3d) 195 (B.C. Ct. App. Nov. 11, 1998) (holding employer liable for arson committed by its security personnel); *Chairman, Ry. Bd. v. Das*, [2000] 2 L.R.I. 273 (India) (holding railway liable for rape by railway employees); P.S. Atiyah, Vicarious Liability in the Law of Torts (1967); *Bazley v. Curry* ([1999] 2 S.C.R. 534, 1999 S.C.R. LEXIS 134 (1999) (Canada's Supreme Court holding a foundation liable for the sexual abuse caused by their employee); *Kimmy Suen King-on v. Attorney General*, Civ. App. No. 100 of 1986, [1987] HKLR 331 (1987) (holding the Hong Kong police department liable for the illegal arrest and imprisonment conducted by a Hong Kong constable); *Johnson & Johnson (Ireland) Ltd. v. CP Security Ltd*, [1986] ILRM 559 (1986) (Irish High Court holding a security company responsible for the thefts perpetrated by the company's security personnel); *NK v. Minister of Safety & Sec.*, 2005 (9) B.C.L.R. 835 (CC) (S. Afr.); *Carrington v. Attorney Gen.*, [1972] N.Z.L.R. 1106 (Auk. S. Ct.); *On v. Attorney Gen.*, [1987] H.K.L.R. 331 (C.A.) (H.K); *Bohjaraj A/L Kasinathan v. Nagarajan A/L Verappan & Annor*, [2001] 6 M.L.J. 497 (H.Ct. Temerloh) (Malay.).

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

[64] *See, e.g.*, C. Civ. (Civil Code) art. 1384 (1994) (Fr.) (establishing liability for damages "caused by the act of persons for whom [one] is responsible"); Civil Code of Germany, Sec. 831 (1975) (person who employs another to do work is bound to compensate for damage which the other unlawfully causes to third party in the performance of the work.); Minpō (Civil Code) art. 715 (1997) (Japan) (same); C.C. (Civil Code) § 2049 (1991) (Italy) ("Masters and employers are liable for the damage cause by an unlawful act of their servants and employees in the exercise of functions to which they are assigned."); Codigo Civil (Civil Code) art. 800 (1981) (Port.) ("In the case of negligence or default of the agent, the principal is jointly and severally responsible for damages caused to third parties."); Juan Francisco Torres Landa & R. Barrera, *Mexico*, *in* 2 *IADL*, *supra*, § 2(6)(2), MEX 16 ("Where [an] act is in the name of the agent but within his scope of authority, the principal is ultimately liable . . . ."); Leopoldo Olavarria Campagna, *Venezuela*, *in* 2 *IADL*, *supra*, § 9[2], VEN 39; Konstantin Obolensky & Akhmed Glashev, *Russia*, *in* 2 *IADL*, *supra*, Part I § 1[1] RUSS-4 (citing Civil Code Chapter 52); William E.

The concept of ratification is also found in international law. For example, the International Court of Justice in *Nicaragua v. United States* applied recognized principles of ratification in ruling that the U.S. was responsible for activities undertaken by Central American operatives on its behalf, considering evidence that the U.S. government had made false denials of involvement in the activities and had arranged for a Nicaraguan organization to issue false statements claiming responsibility for them. *Military & Paramilitary Activities In & Against Nicaragua (Nicaragua v. United States)*, 1986 I.C.J. 14 ¶¶ 77–78 (Judgment of June 27, 1986).

Here, as this Court already held, plaintiffs have adequately alleged that SPDC is the agent of defendants, and therefore defendants can be held liable for SPDC's acts. *Wiwa*, 2002 U.S. Dist LEXIS 3293 at *41 n.14; *e.g.* FAC ¶¶ 27, 41, 46. Moreover, plaintiffs have alleged that the military that was acting as the agent of SPDC and/or defendants. *E.g.* FAC ¶¶ 26, 39, 74. Last, plaintiffs have alleged that SPDC and/or defendants ratified the abuses at issue after the fact, FAC ¶¶ 26, 117, including by, for example, continuing to pay and use the GSF, even after learning of abuses committed on Shell's behalf or for its benefit. *E.g.* FAC ¶¶ 39, 40-44, 74.

7. Alter-ego liability is actionable under the ATS.

This Court correctly ruled that plaintiffs had adequately alleged that SPDC was the alter-ego of the defendants such that the defendants can be held liable for SPDC's actions. *Wiwa*, 2002 U.S. Dist LEXIS 3293 at *41 n.14; *see also* FAC ¶27.

The uniform federal standard for piercing the corporate veil is consistent with international law. In *First Nat. City Bank v. Banco Para El Comercial,* 462 U.S. 611 (1983), the Court considered what law should apply to alter ego analysis in the context of an international law claim.

> The expropriation claim against which Bancec seeks to interpose its separate juridical status arises under international law, which, as we have frequently reiterated, "is part of our law . . . ." The Paquete Habana, 175 U.S. 677, 700 (1900). ... [T]he [alter-ego] principles governing this case are common to both international law and federal common law, which in these circumstances is necessarily informed both by international law principles and by articulated congressional policies.

462 U.S. at 622-23. The Court held that under both international law and federal common law,

---

Butler, *Russian Law* 389–91 (2d. ed. 2003).

courts pierce the veil where necessary to prevent injustice, protect third persons, or to preclude a party from evading legal obligations. *Id.* at 628-30. Courts refuse to give effect to the corporate form where it will defeat legislative purposes. *Id.* at 629-30.[65]

Because of the nature and history of the ATS, rigid deference to the corporate form would be inconsistent with the statute's purposes. As the Supreme Court held in *Sosa*, 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, and, as Justice Breyer noted, those claims include "torture, genocide, crimes against humanity, and war crimes." *Id.* at 762 (Breyer, J., concurring). Under the federal veil-piercing test, courts refuse to give effect to the corporate form where it will defeat legislative purposes, *FNCB*, 462 U.S. at 629–30, irrespective of whether defeating a legislative policy was the reason for incorporation. *Anderson*, 321 U.S. at 363. Thus, under federal law, the corporate veil may be lifted in ATS cases where it presents a barrier to the enforcement of international law. This conclusion makes particular sense both in light of the fact that the ATS was originally passed in 1789, long before the acceptance of the legal fiction of separate corporate personhood, and given the remedial nature of the ATS and the gravity of the violations it addresses.

Thus, whether the Court follows the customary international law approach or the proper *Sosa* federal common law approach to determining ancillary liability rules, alter-ego is a viable liability theory under the ATS. In ATS cases, federal courts should disregard corporate separateness where it would result in injustice or defeat the policy of enforcing key norms of international law, including the fundamental human rights at issue here.

---

[65] 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.*

CONCLUSION

Ken Saro-Wiwa and the other Ogoni Nine, and Uebari N-nah were victims of extrajudicial killing, under color of state authority, in violation of principles of international law recognized by the Supreme Court in *Sosa*. Likewise, all of the plaintiffs suffered human rights abuses that violate universal, obligatory and definable international norms cognizable under the ATS after *Sosa*. Defendants can be held liable under a variety of theories of liability recognized in both federal common law and customary international law.

November 21, 2008
New York, NY

Respectfully submitted,

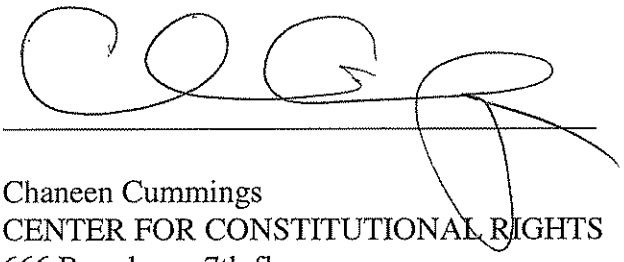
Judith Brown Chomsky

CERTIFICATE OF SERVICE

Under penalty of perjury, I hereby certify that today, November 21, 2008, I served a true and correct copy of the foregoing *Wiwa* Plaintiffs' Brief on International Law Norms Pursuant to Order of October 7, 2008 in *Wiwa et al. v. Royal Dutch Petroleum*, 96 Civ. 8386 (KMW), and *Wiwa et al v. Anderson*, 01 Civ. 1909 (KMW), via US Postal Service First Class and email to the following recipients:

Rory Millson
Douglas Dixon
Rowan Wilson
CRAVATH, SWAINE & MOORE
825 Eighth Avenue
New York, NY 10019
rmillson@cravath.com
ddixon@cravath.com
rwilson@cravath.com

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



Chaneen Cummings
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th floor
New York, NY 10012