UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KEN WIWA, et al., Plaintiffs, v. ROYAL DUTCH PETROLEUM COMPANY, et al., Defendants.	96 Civ. 8386 (KMW)(HBP)
KEN WIWA, et al., Plaintiffs, v. BRIAN ANDERSON, Defendant.	01 Civ. 1909 (KMW)(HBP)

PLAINTIFFS' REPLY TO DEFENDANTS' MEMORANDUM OF LAW ON ISSUES OF INTERNATIONAL LAW

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INTRODUCTION

At a hearing on October 7, 2008, the Court asked the parties to submit briefs and expert declarations on the content and constraints of international law, indicating that such briefing would assist the Court and the parties in defining the legal issues likely to arise at trial. Plaintiffs filed a Brief on International Law Norms ("Pl. Br.") on November 21, 2008, along with declarations from two international law experts, demonstrating that each of their claims constitutes a violation of a clearly defined, widely accepted international law norm and thus satisfies the requirements of the Alien Tort Statute, 28 U.S.C. § 1350, as interpreted by the Supreme Court and the Second Circuit.

Defendants responded with their Memorandum of Law on Issues of International Law ("Def. Br."), filed on December 12, 2008. Pursuant to the Court's subsequent instructions, Plaintiffs are not responding to substantial portions of Defendants' brief.[1] On the specific questions of international law that are appropriately addressed, however, defendants make several legal errors.

First, Defendants' brief misapprehends the structure and sources of international law. Defendants' argument that international law must specify not only the modes of liability for a substantive wrong but also enumerate the specific conduct that leads to liability has no support in any precedent, and ignores the general distinction between substantive claims and rules of

[1] Defendants devoted a good portion of their brief and dozens of exhibits to arguments about the evidentiary support for Plaintiffs' claims. Plaintiffs then asked the Court to strike the exhibits and the portions of the brief that went beyond the Court-ordered briefing. In its December 23, 2008, Order, the Court stated that it would disregard arguments involving the application of international law to facts, and instructed the Plaintiffs to "confine their Reply to arguments about the substance of international law, not its application to the facts of this case." In response to a December 31 follow-up letter from Plaintiffs asking for clarification about which of the issues raised in Defendants' Memorandum should be answered, the Court further instructed Plaintiffs to brief choice of law issues, as well as the substance of international law.

liability in tort law and the rule that international law leaves specific methods of enforcement to individual states. Defendants' argument about sources ignores that the Second Circuit and other courts evaluating ATS claims have looked to a broad range of international law sources to determine the content of customary international law, which is created not by binding, self-executing treaties but by the practice of the global community.

Second, Plaintiffs have demonstrated that each of their claims falls within the standards set by *Sosa* and the case law of this Circuit. Indeed, most of these claims have already been recognized by this Court and need not be addressed again in detail.

Third, Defendants make inconsistent arguments concerning theories of indirect liability. They appear to concede that uniform rules of liability are necessary for issues such as aiding and abetting and conspiracy, but argue that these rules are not established in international law; this is mistaken both because federal common law, not international law, is the primary source for secondary liability rules, and because international law in fact does support these theories. In contrast, they argue that uniform rules are *not* necessary for liability based on agency or piercing the corporate veil; moreover, they do not dispute that these two forms of liability are well-founded in international law, and instead argue that they should be determined according to a patchwork of state and foreign legal rules—an approach that ignores that the basic foundation of the ATS is universal, not local. Nonetheless, regardless of what body of law the Court applies, corporate defendants may be held liable under each theory of complicity or vicarious liability presented by Plaintiffs.

ARGUMENT

I. DEFENDANTS MISAPPREHEND THE STRUCTURE AND SOURCES OF INTERNATIONAL LAW.

A. Defendants' argument regarding the interplay between norms of conduct and rules of liability misunderstands the structure of international law, tort law, and the ATS.

Defendants argue that Plaintiffs fail to meet the standard the Supreme Court developed in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), because they do not show that their theories of liability constitute universal, obligatory, and definable norms of customary international law. Def. Br. at 3–5. This is incorrect in two ways: first, because Plaintiffs *have* shown that the theories of liability at issue are well-founded in international law, *see* Pl. Br. at 49–60 & *infra* Part IX; second, because theories of liability are generally governed by federal common law, Plaintiffs *need not* make this showing.[2] Defendants' entire argument that customary international law controls the analysis is based upon their mischaracterization of a single footnote in *Sosa*. Def. Br. at 3–5, *citing* 542 U.S. at 732 n.20. That footnote, however, noted that the question of whether a given norm requires that the *perpetrator be a state actor* is one of international law; it did not consider what body of law controls secondary liability. *Sosa*, 542 U.S. at 732 n.20.

Defendants' brief also seems to make the unprecedented argument that, in order to show that a claim is actionable under the ATS, Plaintiffs must show that international law explicitly prohibits the specific acts that Defendants allegedly committed. In Defendants' view, it is apparently not enough that international law prohibits summary execution and that international or federal law makes abettors responsible for summary executions; the law must independently prohibit the *specific acts of aiding and abetting* (such as bribery) at issue in this case. *See, e.g.*, Def. Br. at 34–35, 35–37, 50, 57, 61–62. They argue, in effect, that the particular acts by which a

[2] Even if this were not the case, there is no motion pending that could result in the dismissal of any claim or theory.

defendant aids, abets or otherwise contributes to a violation are *elements* of the international law violation that must satisfy *Sosa*'s clearly defined, widely accepted standard. But neither international law nor tort law attempts to identify the multitude of acts by which a violator or tortfeasor can assist in the commission of an actionable wrong. To the contrary, whether a particular act constitutes sufficient support so as to satisfy the legal requirement for liability is a matter of fact to be determined by the jury.

For each claim asserted by Plaintiffs, Defendants offer the misleading response that no international law norm prohibits the exact conduct in which they engaged. According to Defendants, for example, Plaintiffs' allegation that Shell bribed at least two witnesses in exchange for false testimony is not actionable because "bribery of witnesses is not a violation of a specific and universal norm of customary international law." Def. Br. at 24. Plaintiffs, however, do not assert a *claim* for bribery, as they do for extrajudicial killing. Instead, Plaintiffs assert that the bribery at issue is actionable under well-established ATS *liability* theories. For example, Plaintiffs have shown that the ATS recognizes aiding and abetting and conspiracy liability. The question, then, is whether Shell's participation in bribing witnesses to facilitate convictions and to lend a patina of legitimacy to the sham trial meets the standards for aiding and abetting or conspiracy liability.

Defendants' argument simply misapprehends the basic structure of both tort law and international law. Tort law defines the elements of particular torts and separately establishes a standard governing when one person can be held liable for another person's tortious conduct. *See* Restatement (Second) of Torts § 876 (defining standards of liability for the tortious conduct of others). There is no separate body of rules governing abetting battery as opposed to abetting false imprisonment, for example.

Defendants' argument is also fundamentally at odds with the relationship of international law and domestic legal systems. As the Supreme Court recognized long ago, domestic courts implement international law through their own legal systems. *See Ross v. Rittenhouse*, 2 U.S. (2 Dall.) 160, 162 (1792); *Khulumani v. Barclay Nat. Bank Ltd*., 504 F.3d 254, 286 (2d Cir. 2007) (Hall, J. concurring); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 777–78 (D.C. Cir. 1984) (Edwards., J. concurring); *Xuncax v. Gramajo*, 886 F. Supp. 162, 180 (D. Mass. 1995); *Filartiga v. Peña-Irala ("Filartiga II")*, 577 F. Supp. 860, 863 (E.D.N.Y. 1984) (on remand). The ATS provides federal jurisdiction over violations of international law, but leaves to the federal courts the development of federal common law doctrines to implement international norms.

Defendants do not cite a single case in support of their extreme interpretation of *Sosa* as requiring a clearly defined, widely accepted prohibition of the *exact level of assistance* that each defendant gave to the international law violation. Moreover, the caselaw from this Court and this Circuit makes clear that aiding and abetting liability is not tied to particular violations, much less to particular actions, but rather is a general rule applicable to all ATS claims. In *Kiobel*, this Court held that aiding and abetting liability is generally available under the ATS; that is, its availability does not vary depending upon the underlying violation. *Kiobel v. Royal Dutch Petroleum Co*., 456 F. Supp. 2d 457, 464 n.9 (S.D.N.Y. 2006). Likewise, in *Khulumani*, the two concurring judges explicitly rejected Defendants' argument. Judge Katzmann said so directly:

> Because aiding and abetting is a generally applicable means of identifying who should be held responsible for a particular act, rather than a necessary element of the act itself, it is more reasonable to consider whether the theory is accepted as a general principle of customary international law than to ask whether each substantive norm that proscribes a specific conduct encompasses liability for aiding and abetting.

504 F.3d at 281. Judge Hall, who concluded that federal common law should govern accessory liability under the ATS, also looked to general principles of liability, rather than asking whether

the definition of a particular tort encompassed such liability:

> Following the lead of the *Halberstam* Court [*Halberstam v. Welch,* 705 F.2d 472 (D.C. Cir.1983)], I believe that § 876 [of the Restatement (Second) of Torts] provides the proper standard under which to assess whether a particular defendant may be held liable for aiding and abetting a primary violation of international law.

Id. at 288 (footnote omitted).[3] *See also Flores v. Southern Peru Copper Corp. ("Flores I")*, 253 F. Supp. 2d 510, 525 (S.D.N.Y. 2002) ("[I]t is not necessary for nations to identify with specificity every factual scenario that violates a particular prohibition under international law.").

B. Defendants distort the law of *Sosa* and the Second Circuit as to the source of international law.

Plaintiffs have cited a wealth of sources showing that their claims are based upon well-established international norms. In numerous places, Defendants seek to undermine this showing by claiming that sources Plaintiffs cite should not be considered. *E.g.*, Def. Br. at 14–18, 22–23, 41 & n.27, 45–46, 54. This Court, however, has already accepted and relied upon the kinds of sources, and in many instances, the specific sources, that Defendants challenge. *Wiwa v. Royal Dutch Petroleum Corp.*, 2002 U.S. Dist. LEXIS 3293, *17–37 (S.D.N.Y. Feb. 28, 2002).[4] Since

[3] The Eleventh Circuit in *Cabello v. Fernandez-Larios*, 402 F.3d 1148 (11th Cir. 2005), also relied on generally applicable standards of accomplice liability in finding that the defendant could be held liable for human rights violations. The court held that the ATS "permit[s] claims based on direct and indirect theories of liability," without analyzing the application of such liability as a part of the element of each claim. *Id*. at 1157-58. *See also Aldana v. Del Monte Fresh Produce, N.A., Inc*., 416 F.3d 1242, 1247–48 (11th Cir. 2005) (relying on "principles of agency law" and other U.S. domestic law doctrines to conclude that "a claim for state-sponsored torture under the Alien Tort Act . . . may be based on indirect liability as well as direct liability.").

[4] In its 2002 decision, this Court relied upon sources such as the Universal Declaration of Human Rights (UDHR), G.A. Res. 217A, U.N. Doc. A/811 (1948); unratified and/or non-self-executing treaties including the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 39 U.N. GAOR Supp., No. 51, at 197, U.N. Doc. A/39/51 (1984); the International Covenant on Civil and Political Rights (ICCPR), 21 U.N. GAOR Supp., No. 16, at 52, U.N. Doc. A/6316 (1966); and the American Convention on Human Rights, 9 I.L.M. 101, art. 20, 22 (1970); decisions of international tribunals such as the European Court of Human Rights and the International Criminal Tribunal for the Former Yugoslavia; and an affidavit filed by international law scholars.

the Court has not directed the parties to revisit this issue, it need not be considered here. *See* Court's Endorsed Letter (Dec. 31, 2008). Nonetheless, since it is directly relevant to the substance of international law, Plaintiffs explain why Defendants' arguments about the proper sources of international law are mistaken.

Defendants' entire argument is based on a misreading of *Sosa* and the ATS itself, which allows suits for torts "in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. In *Sosa*, the Supreme Court first considered whether there was any "treaty of the United States" that could form the basis for the plaintiff's arbitrary detention claim. The Court determined that neither the Universal Declaration of Human Rights (UDHR) nor the International Covenant on Civil and Political Rights (ICCPR) qualified *under the treaty prong*, because neither was a self-executing treaty that gave rise to a cause of action. 542 U.S. at 735. The Court then turned to the question of whether the "prohibition of arbitrary arrest has attained the status of binding customary international law." *Id.* Thus, when the Court was discussing the UDHR and the ICCPR—and non-self-executing treaties in general—it was in the context of determining whether they gave rise to a cause of action *directly* under the treaty prong, not whether they contributed to the development of customary international law. *See id.* (noting that these sources did not "themselves establish the relevant and applicable rule of international law"). The Court's subsequent discussion of customary international law does not indicate that it discounted any of the sources cited to it, but rather that the sources cited did not establish "a rule so broad" as "a general prohibition of 'arbitrary' detention defined as officially sanctioned action exceeding positive authorization to detain." *Id.* at 736.

Defendants' insistence on sources that *create* binding norms—such as self-executing treaties—thus misses the mark entirely. Plaintiffs are not proceeding under the treaty prong, but

pursuant to norms of customary international law. All the sources cited have long been recognized as evidence of the content of international law, *see* Declaration of Naomi Roht-Arriaza ("Roht-Arriaza Decl.") ¶¶ 4–8, and have formed the basis for most if not all ATS claims that courts have accepted. Nowhere in *Sosa* does the Court suggest that the traditional evidence of customary international law is incompetent; indeed, it suggests just the opposite. *See* 542 U.S. at 733 (finding that ATS claims "must . . . look[] to those sources we have long, albeit cautiously, recognized"). These sources of law, the Court explained, are "*the customs and usages of civilized nations.*" *Id*. at 734 (quoting *The Paquete Habana*, 175 U.S. 677, 700 (1900) (emphasis added)). U.N. Resolutions, regional human rights conventions, decisions of international tribunals, and widely-ratified treaties all provide cumulative evidence of the "customs and usages of civilized nations." Roht-Arriaza Decl. ¶¶ 4–8. Indeed, if Defendants' argument were correct, *Filartiga v. Peña-Irala ("Filartiga I")*, 630 F.2d 876 (2d Cir. 1980)—decided before the Convention Against Torture was drafted, ratified, or implemented—would have been wrongly decided; to the contrary, it was cited approvingly by *Sosa*. 542 U.S. at 732.

This multiple-source approach is fully consistent with the Second Circuit's approach in *Flores v. Southern Peru Copper Corp. ("Flores II")*, 414 F.3d 233 (2d Cir. 2003), which held that "[c]ustomary international law is discerned from myriad decisions made in numerous and varied international and domestic arenas." *Id*. at 247. *Flores II* adopted the standard list of the major sources of international law found in the Statute of the International Court of Justice (ICJ): treaties, "international custom," the "general principles of law recognized by civilized nations," "judicial decisions," and scholarly writings. *Id*. at 251 (stating that article 38 of the ICJ Statute "embodies the understanding of States as to what sources offer competent proof of the content of

customary international law."); *see also Filartiga I*, 630 F.2d at 881 & n.8. Indeed, *Sosa* (as with numerous other Supreme Court cases) relies on the Restatement (Third) of the Foreign Relations Law of the United States, *see* 542 U.S. at 737, which incorporates a nearly identical list of sources. *See* Restatement § 103 (noting also that "substantial weight" is given to the opinions of "international" and "national judicial tribunals," the "writings of scholars," and "pronouncements by states" concerning international law). Each of the sources relied upon here remains valid.

Treaties: Defendants argue that *Flores II* "rejected" the relevance of treaties such as the American Convention and the International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. 3, 6 I.L.M. 36 (1966). Def. Br. at 17–18. In fact, *Flores II* did no such thing; it clearly held that *all* treaties "provide some evidence of the custom and practice of nations," and only considered their ratification status or execution in determining the "evidentiary weight" to be afforded. 414 F.3d at 256. This accords with other caselaw considering all relevant treaties, whether or not ratified or self-executing. *See Khulumani*, 504 F.3d at 276 n.9 (Katzmann, J., concurring) (noting that the Rome Statute of the International Criminal Court ("Rome Statute"), July 17, 1998, 2187 U.N.T.S. 90, is relevant despite lack of U.S. ratification, because nations often do not ratify treaties that contain principles they agree with); *Kadic v. Karadzic,* 70 F.3d 232, 242–43 (2d Cir. 1995) (discussing history of norm against genocide and making no distinction between self-executing and non-self-executing treaties, such as the Convention on the Prevention and Punishment of the Crime of Genocide); *Filartiga I*, 630 F.2d at 883–84 (relying on treaties not ratified by the U.S. in finding customary norm prohibiting torture); *Presbyterian Church of Sudan v. Talisman Energy, Inc.* (*"Talisman III")*, 374 F. Supp. 2d 331, 339 (S.D.N.Y. 2005) (holding that it is appropriate to consider an unratified treaty to help determine the content of customary law and stating that "all that [the defendant] can safely claim on this issue is that

the Rome Statute *on its own* may not constitute sufficient proof of a given norm") (emphasis in original); *Estate of Rodriquez v. Drummond Co.*, 256 F. Supp. 1250, 1263 (N.D. Ala. 2003); *Doe v. Liu Qi*, 349 F. Supp. 2d 1258, 1322–23, 1328 (N.D. Cal. 2004); *see also Roper v. Simmons*, 543 U.S. 551, 576 (2005) (relying upon an unratified treaty).

Non-binding declarations and U.N. documents: As this Court has correctly held, international declarations, though non-binding, may be of evidentiary value.[5] This accords with the Second Circuit's holdings in *Filartiga I* and *Flores II*; in *Flores II*, the Second Circuit approved *Filartiga I*'s holding that non-binding United Nations documents such as the UDHR "create[] an expectation of adherence," and evidence of binding customary international law insofar as the expectation is justified by state practice. 414 F.3d at 261 (citing *Filartiga I*, 630 F.2d at 883).[6] Plaintiffs do not argue that any declarations are binding in and of themselves. Thus, Defendants' citations to *Sosa*'s observation that "the [UDHR] does not of its *own force* impose obligations as a matter of international law," and to a like quote from *Flores II* indicating that certain declarations are not binding, are inapposite. Def. Br. at 17 (quoting 542 U.S. at 734 & 414 F.3d at 259). Indeed, Defendants omit *Sosa*'s comment that the UDHR "has nevertheless had substantial indirect effect on international law." *Sosa*, 542 U.S. at 734, n. 23. And they mischaracterize *Flores II* through the creative use of ellipses to suggest General Assembly

[5] *Wiwa,* 2002 U.S. Dist. LEXIS 3293 at *17 (holding that "torture, summary execution, and arbitrary detention constitute fully recognized violations of international law," because they are inconsistent with the "inherent dignity and the equal and inalienable rights of all members of the human family" as stated in the UDHR (internal citations omitted)).

[6] *See also Kessler v. Grand Cent. Dist. Mgmt. Ass'n, Inc.* 158 F.3d 92, 118 (2d. Cir. 1998) (relying on UDHR); *Kadic,* 70 F.3d at 241 (citing General Assembly resolutions); *Presbyterian Church of Sudan v. Talisman Energy, Inc. ("Talisman I")*, 244 F. Supp. 2d 289, 317 (S.D.N.Y. 2003) (stating that parts of the UDHR "have become part of customary international law"); *Nicholson v. Williams*, 203 F. Supp. 2d 153, 234 (E.D.N.Y. 2002) (stating the UDHR "has been used extensively by United States courts in determining the scope of internationally guaranteed rights"); *Sanchez v. Dankert*, No. 00-CV-01143, 2002 WL 529503, *11 (S.D.N.Y. Feb. 22, 2002) (UDHR "may provide insight into the 'law of nations'").

documents are irrelevant. Def. Br. at 15 (quoting *Flores II*, 414 F.3d at 261).[7]

International courts: The statutes and rulings of international courts and tribunals are indicative of customary international law. *See Hamdi v. Rumsfeld,* 542 U.S. 507, 518 (2004) (citing *Ex. Parte Quirin*, 317 U.S. 1 (1942), which quoted a decision of the Nuremberg Tribunal); *First Nat'l City Bank (FNCB) v. Banco Para El Comercio*, 462 U.S. 611, 629 n.20 (1983) (relying on ICJ decision); *United States v. Yousef*, 327 F.3d 56, 101 (2d Cir. 2003) (relying on ICJ opinion and ICJ statute); *see also Doe v. Liu Qi,* 349 F. Supp. 2d at 1322 (citing U.N. Human Rights Commission and regional human rights cases in analyzing the universality of a norm). *Flores II*, citing Article 38 of the ICJ Statute, acknowledged judicial decisions as evidence of international law. 414 F.3d at 265. Additionally, the Supreme Court has looked to jurisprudence of regional human rights tribunals to establish standards under U.S. law.[8] In particular, and contrary to Defendants' claim, Def. Br. at 46, the Nuremberg precedents and decisions of the International Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR) are relevant to determine the content of customary international law. Numerous ATS cases have relied on these sources, including Justice Breyer's concurrence in *Sosa* itself, 542 U.S. at 762, as well as post-*Sosa* cases from the Second Circuit and elsewhere.[9] Indeed, the court in *Talisman III* held that the ICTY and ICTR "occupy a special role in enunciating the current

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[7] The actual quote, with the language Defendants omit in bold, is "Because General Assembly documents are at best merely advisory, they do not, **on their own and without proof of uniform state practice, *see* notes 22 and 26, *ante*, evidence an intent by member States to be legally bound by their principles,** and **thus** cannot give rise to rules of customary international law." 414 F.3d at 261.

[8] *Lawrence v. Texas*, 539 U.S. 558, 573, 576 (2003) (citing several European Court of Human Rights decisions).

[9] *See Vietnam Ass'n for Victims of Agent Orange v. Dow Chemical Co.*, 517 F.3d 104, 123 (2d Cir. 2008); *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1180 (C.D. Cal. 2005); *Presbyterian Church of Sudan v. Talisman Energy, Inc. ("Talisman II"),* 226 F.R.D. 456, 478 n.21 (S.D.N.Y. 2005); *Doe v. Saravia,* 348 F. Supp. 2d 1112, 1155 (E.D. Cal. 2004).

content of customary international law norms" and that this holding agrees "with the overwhelming majority of courts that have had occasion to turn to ICTY and ICTR opinions in ATS cases, both before and after [*Sosa*] and *Flores*." 374 F. Supp. 2d at 338, 339 n.11.[10]

Expert declarations: Courts have also recognized expert affidavits as evidence of customary international law. *Sosa*, 542 U.S. at 734 (noting that "'the works of jurists and commentators'" are evidence of "'the customs and usages of civilized nations'") (quoting *The Paquete Habana*, 175 U.S. 677, 700 (1900)); *United States v. Smith,* 18 U.S. (5 Wheat.) 153, 160–61 (1820); *Flores II*, 414 F.3d at 239[11] *Kadic* 70 F.3d at 238; *Filartiga I,* 630 F.2d at 888; *see also Mujica*, 381 F. Supp. 2d at 1179 n.14 ("[I]n order to determine what is an international law norm, the Court may properly consider the opinion of experts in the field.").

Last, in addition to their general attack on the "competence" of various sources, Defendants note that some relevant sources address criminal, not civil, liability. Def. Br. at 18, 46. Defendants cannot find a single case that follows this distinction. This is because, to date, international bodies have only directly concerned themselves with individual liability for international crimes, while the enforcement of individual civil liability is left to domestic legal systems. *See, e.g.*, *Khulumani*, 504 F.3d at 286 (Hall, J. concurring); *Tel-Oren*, 726 F.2d at 778 (Edwards, J., concurring); *see also Khulumani*, 504 F.3d at 273 (Katzmann, J., concurring)

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[10] Plaintiffs do not claim, as Defendants suggest, that international tribunals are empowered to "create binding norms of customary international law," Def. Br. at 46; instead, the decisions of the ICTY and other tribunals *reflect* customary international law and are evidence of such norms. The ICTY, for example, is limited to applying the "rules of international humanitarian law which are beyond any doubt part of customary law." *See* Report of the Secretary-General Pursuant to Para. 2 of Security Council Resolution 808 (1993) on the Establishment of the ICTY, U.N. Doc. S/25704, para. 34.

[11] *Flores II* noted that courts need not consider "personal viewpoints" expressed in scholars' affidavits, but that "scholars may provide accurate descriptions of the *actual* customs and practices and legal obligations of States." 414 F.3d at 265 (emphasis in original). Plaintiffs' experts here have done exactly that.

(relying on international criminal law sources). Likewise, *Sosa* understood that the norms that provided the basis of claims recognized when the ATS was enacted—such as piracy—were criminal in origin. 542 U.S. at 719. Any refusal to apply criminal law precedent to ATS claims would directly contradict *Sosa*'s analysis of the origins of the ATS.

II. SUMMARY EXECUTION VIOLATES A NORM OF INTERNATIONAL LAW ACTIONABLE UNDER THE ATS AS INTERPRETED BY *SOSA*.

A. Plaintiffs' summary execution claims have "definite content" as *Sosa* requires.

Defendants do not appear to contest that the killing of Uebari N-Nah is actionable as an extrajudicial killing; rather, rather they assert that claims based on the same facts pleaded in *Kiobel*, *i.e.*, the executions ordered by the Special Tribunal, do not implicate a well-defined international norm. Def. Br. at 19–20. Defendants are mistaken.

Congress has already determined that international law contains a specific, actionable definition of summary execution, and it enshrined that definition in the Torture Victim Protection Act. Pl. Br. at 13.[12] International law requires that a criminal court that sentences a defendant to death must be regularly constituted; independent and impartial; afford a right to appeal; respect the right to counsel; and afford a fair hearing. Pl. Br. at 16–26. An execution lacking these well-defined fair trial norms violates international law. Pl. Br. at 17.

Defendants cite the Court's decision in *Kiobel*, but that decision was based on the fact that the *Kiobel* Plaintiffs "ha[d] not directed the Court" to international authority establishing the

[12] Defendants claim that the TVPA does not support the holding that summary execution claims satisfy the *Sosa* standard. Def. Br. at 26. The assertion is specious. *See, e.g.*, *Wiwa v. Royal Dutch Petroleum Corp.*, 226 F.3d 88, 105 (2d Cir. 2000) (TVPA recognizes that international law prohibiting extrajudicial killing is incorporated into U.S. law); *Mujica*, 381 F. Supp. 2d at 1178–79 (finding extrajudicial killing actionable and collecting cases noting that statutes like the TVPA reflecting international law are particularly useful evidence of customary international law because they demonstrate legislative and executive agreement on the content of international law).

elements of their claim for the execution of Mr. Kiobel. 456 F. Supp. 2d at 465. Here, by contrast, Plaintiffs have provided voluminous authority establishing the elements of their claims. Pl. Br. at 14–17. The *Wiwa* Plaintiffs cannot be penalized because the *Kiobel* Plaintiffs did not do so, particularly since the Supreme Court's holding in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), that international law prohibits executions not carried out by regularly constituted courts, was not briefed or considered in *Kiobel*. Pl. Br. at 3–4.[13] *Kiobel* is not the law of this case.

Defendants' efforts to refute the *Wiwa* Plaintiffs' showing is unavailing. Defendants argue that "many" of the fundamental judicial guarantees Plaintiffs rely on, such as the rights to an independent and impartial tribunal, counsel, appeal, a fair hearing, and fundamental due process guarantees, are merely protections found in the domestic law of particular states, not customary international law. Def. Br. at 21–22. They do not identify the guarantees to which they so object. Regardless, the claim is refuted by the voluminous international law authority upon which Plaintiffs rely, and the plurality opinion in *Hamdan*. Pl. Br. at 20–26. Defendants' argument is based *solely* on the fact that Plaintiffs also cite U.S. cases affording the same

[13] Defendants' attempts to distinguish *Hamdan* are unpersuasive. Def. Br. at 21 n.10. First, they claim that even if the Special Tribunal was not a regularly constituted court, this alone would not establish the existence of a definite norm prohibiting summary execution. *Hamdan* says no such thing. Regardless, the argument is irrelevant, because the Tribunal violated well-defined international norms in a myriad of additional ways. Pl. Br. at 20–26. Second, Defendants claim that *Hamdan* is inapposite because it discussed Common Article 3 of the Geneva Convention Relative to the Treatment of Prisoners of War [1955] 6 U.S.T. 3316, T.I.A.S. No. 3364 (Aug. 12, 1949), which applies only to a "conflict not of an international character." Common Article 3, however, reflects minimum standards applicable during war as well as peace; indeed the TVPA uses the exact same "regularly constituted court" language, demonstrating Congress' understanding that international law requires such courts in peacetime. Pl. Br. at 18. Third, Defendants claim that the term "regularly constituted court" itself is not "specifically defined." Congress thought otherwise; there is no serious argument the TVPA is too vague to be applied. Defendants disingenuously cite *Hamdam*'s observation that the term "regularly constituted court" is not "specifically defined" in Common Article 3, Def. Br. at 21 n.10, without mentioning that the Supreme Court held the term specific enough to apply because "other sources disclose its core meaning." 548 U.S. at 632.

protections. Pl. Br. at 24, 25 n.23. The fact that U.S. law protects these rights obviously supports Plaintiffs' claims.[14]

Defendants' attack on the sources cited by Plaintiffs, *see* Def. Br. at 22, fails for the reasons noted in Part I(B), above. Defendants purport to rely on *Kiobel* for their claim that Plaintiffs' sources do not provide a specific definition, Def. Br. at 22–23, but that decision did not evaluate any sources. 456 F. Supp. 2d at 462.

Defendants focus on two sources Plaintiffs cite, a Human Rights Committee General Comment and Reports by the U.N. Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions, and argue they do not establish a definable norm. Def. Br. at 22–23. To the contrary, while these sources may not create the norm, they provide strong evidence of the existence of the norm and its content.[15] Even if these sources were not persuasive, however, this would not refute the rest of the overwhelming authority Plaintiffs cite.[16]

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[14] This is evidence of state practice relevant to a finding of customary international law. *See Xuncax*, 886 F. Supp. at 187 ("Where American constitutional law and international law overlap, the voice of this country as part of the consensus rendering the proposition in question a rule of international law is simply embodied in domestic constitutional directives."); *see also Filartiga I*, 630 F.2d at 884 (looking to domestic laws, including that of the United States, to conclude torture has been universally renounced).

[15] In fact, the Special Rapporteur's original mandate was given by the U.N. Economic and Social Council because the U.N. recognized that such killings are universally condemned. *See, e.g.*, Summary or Arbitary Executions, U.N. Doc. E/RES/1982/35 (May 7, 1982). Defendants object that General Comment 13 does not specifically address the norm against summary execution, but rather concerns fair hearing requirements. Def. Br. at 23. Not surprisingly, however, such requirements apply with maximum force in death penalty cases. *See, e.g.,* Pl. Br. at 24, 25.

[16] The widespread international condemnation of the executions of the Ogoni Nine also constitutes evidence of state practice supporting the existence of a customary norm. Pl. Br. at 27–28. Defendants' contrary argument misstates *Military & Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, ¶ 184 (June 27, 1986). Def. Br. at 21 n.9. There, the ICJ held that it was not sufficient to prove customary international law that the *parties to the suit* agreed as to the content of customary international law; instead the court had to satisfy itself of those rules by looking to state practice. Defendants, in the second passage they quote, misleadingly replace the word "Parties" used by the Court, with the word "States." Nothing in Paragraph 184 suggests that widespread condemnation of a particular group of executions is not evidence of state

B. Neither the factual sufficiency of Plaintiffs' claims nor the applicability of the TVPA is at issue in this brief.

With respect to this and every other ATS claim at issue, Defendants claim that "there is no well-defined norm of customary international law that prohibits the types of conduct" that Defendants allegedly committed. Def. Br. at 24. In particular, Shell argues that its ownership of SPDC does not render it liable for summary execution, Def. Br. at 33–35, and that there is "no norm of customary international law that would hold a company's parent liable for the acts of its subsidiary," Def. Br. at 34. Because the Court has directed Plaintiffs not to brief the facts in this context, Plaintiffs do not respond to this argument except to make the following brief points. First, Plaintiffs do not contend that international law makes a parent liable solely by virtue of ownership of a subsidiary, without more; rather, the acts and structure of Shell in this case render Defendants liable under well-established theories of agency, alter ego, aiding and abetting, conspiracy, and other forms of liability. Second, as noted in Part I(A) and in Part VIII(A), these rules of liability are established by federal common law. Third, even if customary international law applies, there is no support for Defendants' claim that international law must explicitly prohibit the precise conduct at issue.

Defendants also argue that the Torture Victim Protection Act (TVPA), 28 U.S.C. § 1350 note, preempts all ATS claims for extrajudicial execution. Again, however, Plaintiffs decline to address this issue, both because it is not an issue of international law and because the Court has already decided the issue and has not directed the parties to revisit it.[17] *See* 2002 U.S. Dist.

practice. Here too, however, even if Defendants were correct, this would not undermine Plaintiffs' showing, which is based on a multitude of other sources.

[17] Defendants' argument that the TVPA preempts other claims as well, *see* Def. Br. at 25 n.13, 44–45, is not addressed here for the same reasons.

LEXIS 3293 at *11–13; *accord Kiobel*, 456 F. Supp. 2d at 465 n.10.[18]

III. TORTURE VIOLATES A NORM OF INTERNATIONAL LAW ACTIONABLE UNDER THE ATS AS INTERPRETED BY *SOSA*.

Defendants cannot and do not argue that there is no customary law norm prohibiting torture. Rather, Defendants argue that, under customary international law, they cannot be held liable for torture. They seem to assert that they cannot be liable because no representative of the Defendants personally engaged in torture or was present when the torture occurred. Def. Br. at 35–37. Plaintiffs understand this argument to be the erroneous claim that torture under international law only extends liability to the direct perpetrator and precludes secondary liability, an argument refuted *infra* Part IX.

Even if the general rules providing secondary liability were not sufficient, international law sources explicitly establish secondary liability for torture. The Torture Convention prohibits "an act by any person which constitutes *complicity* or participation in torture." Torture Convention, art. 4(1) (emphasis added)[19]; *see Khulumani*, 504 F.3d at 273 (Katzmann, J., concurring) (citing this provision as an example of "international treaties" that reflect "the individual criminal responsibility of those who aid and abet violations of international law"). Congress recognized this rule in adopting the TVPA; the Senate report cites to this same article of the Torture Convention for the proposition that responsibility for torture and summary execution "extends beyond the person or persons who actually committed those acts," S. Rep. No 102-249, at 9 & n.16; *see also id.* at 8 (noting that the TVPA covers "lawsuits against persons who ordered, *abetted, or assisted* in the torture" (emphasis added)).

[18] This is also the law of this Circuit: "The scope of Alien Tort Act remains undiminished by enactment of the Torture Victim Act." *Kadic,* 70 F.3d at 241; *see also Flores II*, 414 F.3d at 247 (recognizing that "the TVPA reaches conduct that may also be covered by the ATCA").

[19] The Torture Convention was adopted with the strong support of the U.S. Government and was signed by the U.S. on April 18, 1988 and ratified by the Senate on October 27, 1990.

Secondary liability for *private parties* who aid in the commission of torture has been recognized by federal courts and is the law of the Second Circuit.[20] *See Khulumani*, 504 F.3d at 260 (reversing *In re South African Apartheid Litig.*, 346 F. Supp. 2d 538 (S.D.N.Y. 2004)). In its *per curiam* order, the Second Circuit held that "a plaintiff may plead a theory of aiding and abetting liability under the ATCA" and vacated the dismissal of aiding and abetting claims against private corporations for various human rights violations, including at least some that require state action. *Id.* at * 3–4 & n.1, 9; *see also Apartheid*, 346 F. Supp. 2d at 548 (noting that plaintiffs asserted claims for, among other things, torture, unlawful detention, and extrajudicial killing). Similarly, the Ninth Circuit held that Ferdinand Marcos's daughter Imee Marcos—a civilian—could be held liable for aiding and abetting the torture and extrajudicial killing of a Philippine civilian by Philippine military intelligence officials. *In re Estate of Marcos Human Rights Litig.*, 978 F.2d 493, 498 & n.10 (9th Cir. 1992); *see also Aldana*, 416 F.3d at 1247–48. In *Talisman I*, the court specifically found that the plaintiffs had "properly alleged that Talisman aided and abetted or conspired with Sudan to commit various violations of the law of nations," including, for example, extrajudicial killing and rape amounting to torture. 244 F. Supp. 2d at 296, 324–29. The court subsequently reaffirmed its holding that secondary liability was available for these claims after *Sosa*. *Talisman III*, 374 F. Supp. 2d at 337–41.

Thus, international law prohibits private actors from aiding and abetting state officials in committing abuses, such as torture, that require state action. Defendants' argument cannot be

[20] Other international human rights agreements mirror the Torture Convention in recognizing the responsibility of private actors complicit with public officials in abuses that require state action. *See* Inter-American Convention to Prevent and Punish Torture, O.A.S. Treaty Ser. No. 67, 25 I.L.M. 519 art. 3(b) (Dec. 9, 1985) (person "who at the instigation of a public servant . . . is an accomplice" to torture is guilty thereof); Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N.G.A. Res. 3452, arts. 1, 7, 8 (Dec. 9, 1975) (prohibiting complicity in torture committed "by or at the instigation of a public official").

reconciled with international law or with Congress' understanding of that law.

IV. CRIMES AGAINST HUMANITY VIOLATE A NORM OF INTERNATIONAL LAW ACTIONABLE UNDER THE ATS AS INTERPRETED BY *SOSA*.

The issue of the viability of claims of crimes against humanity (CAH) has previously been decided by the Court, and the Court has not directed Plaintiffs to address this issue. Plaintiffs therefore make only a few specific points that may aid the Court.

Defendants complain that this Court's prior rulings relied, in part, on the Rome Statute and cases of the ICTY and ICTR. Def. Br. at 45.[21] As noted above, however, all of these sources remain relevant following *Sosa*. *See supra* Part I(B).

Defendants' second argument, that there is no agreement on the content of CAH, *see* Def. Br. at 46–48, has been rejected by this Court[22] and is simply incorrect. While there are slight differences in the way that various instruments define the norm, most of these differences are due to jurisdictional restrictions on particular tribunals rather than reflective of differing views on customary international law, and there is broad agreement about the core elements of the norm.

All modern sources agree that certain enumerated crimes—including murder, torture, and arbitrary detention—committed within the context of a widespread or systematic attack on a civilian population constitute CAH, in violation of international law. Defendants selectively quote a few commentators to suggest controversy where none exists; for example, Cherif

[21] Defendants say that the Court relied on "cases decided by the International Criminal Court." Def. Br. at 45. Defendants presumably mean cases decided by the ICTY and ICTR, which is what the Court actually relied on; at the time of the Court's decision in February 2002 the International Criminal Court did not yet exist.

[22] Defendants argue that one of the numerous supporting cases cited by Plaintiffs, *Aldana v. Del Monte*, does not support the actionability of crimes against humanity. To the contrary, while *Aldana* does not go into detail, it does restate the holding of *Cabello*, 402 F.3d at 1161, that crimes against humanity requires "a widespread or systematic attack directed against any civilian population." *See Aldana*, 416 F.3d at 1247. Moreover, *Cabello* also held that the prohibition on CAH has long "been a part of the United States and international law." 402 F.3d at 1154.

Bassiouni, whose works Defendants repeatedly cite in support of their argument, *see* Def. Br. at 46–47 & n.31, recently signed an *amicus* brief to the Second Circuit arguing that the "core elements" of crimes against humanity—"the commission of a heinous crime as part of a widespread or systematic attack on a civilian population"—are actionable under the ATS. *See Kiobel v. Royal Dutch Petroleum Co.*, No. 06-4876, Brief of *Amici Curiae* Int'l Law Scholars Cherif Bassiouni, et al. in Support of Pls.-Appellants-Cross-Appellees and in Support of Affirmance (2d Cir. July 17, 2007) at 16.

Defendants point to alleged discrepancies between four sources—the Nuremberg Charter, the Statute of the International Criminal Tribunal for Former Yugoslavia (ICTY) (May 25, 1993), the Statute of the International Criminal Tribunal for Rwanda (ICTR) (Nov. 8, 1994), and the Rome Statute. While the definition of crimes against humanity has evolved since Nuremberg, *see, e.g.*, *Talisman II*, 226 F.R.D. at 479–80, the three modern sources all show broad agreement on the above definition. Defendants point out that the ICTY statute requires a nexus to armed conflict and the ICTR statute requires discriminatory intent, Def. Br. at 48, but both of these requirements are jurisdictional limitations of these tribunals rather than part of the definition itself. *See, e.g.*, *Talisman II*, 226 F.R.D. at 481 n.27 ("The ICTY Statute's requirement that the crimes be 'committed in armed conflict' . . . is merely a 'jurisdictional element' that must be satisfied for the ICTY to assume jurisdiction over a case.") (citing *Prosecutor v. Tadic*, No. IT-94-1-A, Judgment ¶ 249 (ICTY App. Chamber July 15, 1999); *see also Tadic* ¶ 141; *Prosecutor v. Kamuhanda*, No. ICTR-95-54A-T, Judgment ¶ 671 (ICTR Trial Chamber Jan. 22, 2004) (discriminatory motive element is "not intended to alter the definition of Crimes against Humanity in international law").[23] Defendants also note that the Rome Statute contains

[23] The question of discrimination was left open by the Court's 2002 decision. *See* 2002 U.S. Dist. LEXIS 3293 at *30 n.10 ("It is unclear whether discriminatory treatment is a necessary

additional crimes, including disappearance and apartheid, that do not appear in the ad-hoc tribunal statutes. This is immaterial, since the ICTY and ICTR statutes do not purport to specify all forms of crimes against humanity; neither disappearance nor apartheid was a hallmark of the particular conflicts at issue. Moreover, even if there were disagreement as to whether those particular abuses are crimes against humanity, those abuses are not at issue here.

Defendants fail to cite any source that suggests that crimes against humanity do not violate international law, or that refutes the conclusion that, for example, murder and torture committed in the context of a widespread or systematic attack on a civilian population fall squarely within the core prohibition recognized by the international community. There is no basis to question this Court's previous rulings.

V. ARBITRARY ARREST AND DETENTION VIOLATES A NORM OF INTERNATIONAL LAW ACTIONABLE UNDER THE ATS AS INTERPRETED BY *SOSA*.

Defendants' attack on Plaintiffs' claim for arbitrary arrest and detention is based on a failure to recognize this Court's prior decision, a misreading of the *Sosa* decision, and a refusal to acknowledge the multiple sources cited by the Plaintiffs and their expert.

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element of an allegation of a crime against humanity."). The Court cited the case *Prosecutor v. Ruggiu*, No. ICTR-97-32-I (ICTR Trial Chamber, June 1, 2000), which noted the discriminatory requirement of the crimes under the ICTR's jurisdiction but did not discuss this requirement as a matter of customary international law, and also cited *Tadic*, in which the ICTY had expressly found that discriminatory motive is required only for "various types of persecution," not for "all crimes against humanity." *Tadic* ¶ 305.

Subsequent to the Court's opinion, the ICTR Appeals Chamber resolved this question in *Prosecutor v. Akayesu*, No. ICTR-96-4 (ICTR Appeal Chamber June 1, 2001). The ICTR agreed that "except in the case of persecution, a discriminatory intent is not required by international humanitarian law as a legal ingredient for all crimes against humanity," and thus "endorse[d] the general conclusion and review contained in *Tadic*." *Id.* ¶ 464; *see also id.* ¶ 466. Although the U.N. Security Council limited the ICTR's jurisdiction over CAH "solely to cases . . . committed on discriminatory grounds," *id.*, by doing so it did not "change the legal ingredients required under international humanitarian law with respect to crimes against humanity," *id.* ¶ 465. Thus, to the extent that the ICTR statute's limitation to discriminatory crimes introduced any doubt about the elements of CAH under international law, that doubt has now been resolved.

Defendants fail to challenge this Court's prior ruling in *Kiobel*, which analyzed *Sosa* and held valid the arbitrary arrest and detention claims of the *Kiobel* plaintiffs. 456 F. Supp. 2d at 461, 465-466; *see also* Pl. Br. at 44. Defendants criticize this decision in a footnote, Def. Br. at 56–57 n.36, but ignore its implications for this case.

Even if this Court were to revisit its prior decision, Defendants' analysis of *Sosa* on arbitrary detention, Def. Br. at 52–56, is inaccurate and misleading. First, the Supreme Court did not preclude the existence of a customary norm on arbitrary detention; rather, it confined its holding to the "particular claim" raised in that case, stating that "any credible invocation of a principle against arbitrary detention that the civilized world accepts as binding customary international law requires a factual basis beyond relatively brief detention in excess of positive authority." 542 U.S. at 737; *see* Pl. Br. at 44. Indeed, the *Sosa* Court acknowledged that some arbitrary detentions "are so bad that those who enforce them become enemies of the human race," *id*., and simply did not reach the question of which arbitrary arrests and detention reached the level of "certainty afforded by Blackstone's three common-law offenses." *Id*.

Defendants criticize the definition of arbitrary arrest and detention in a vacuum, without addressing the cases that provide detail to the definition. *See* Roht-Arriaza Decl. ¶¶ 62–64. While arguing that the terms are not sufficiently defined, Defendants, without explanation, ignore the many U.S. and international cases and reports cited by Plaintiffs that find such a customary international norm and define the core of the violation. *See* Pl. Br. at 44–45.

Professor Roht Arriaza's declaration, for example, cites the 1997 report of the Working Group on Arbitrary Detention which explains three categories of cases of arbitrary detention – "(1) when there is no legal basis justifying deprivation of liberty; (2) when the deprivation of liberty results from the exercise of fundamental rights or freedoms; and (3) when the non-

observance of fair trial norms gives the deprivation of liberty an arbitrary character." Roht-Arraza Decl. ¶ 63. Professor Roht-Arriaza goes on to cite decisions analyzing these factors. *See, e.g.*, *Durdykuliyev v. Turkmenistan*, Opinion No. 31/2005, U.N. Doc. E/CN.4/2006/7/Add.1 at 83 (2005) (finding that "detention motivated by the exercise of freedom of expression and which did not follow the observance of minimal procedural standards constituted arbitrary detention"). Other decisions cited emphasized factors such as detention without charge, without presentation before a judicial authority and without assistance of counsel. *Id.* Similarly, Professor Roht-Arriaza cites to decisions by other international institutions such as the Inter-American Court of Human Rights (determining that detention without access to counsel constituted arbitrary detention) and the European Court of Human Rights (arbitrary detention included failure to comply with legal procedures or detention without lawful basis). *Id*. at ¶ 64. Thus, these sources have provided specific content to the norm against arbitrary detention.

VI. CRUEL, INHUMAN AND DEGRADING TREATMENT VIOLATES A NORM OF INTERNATIONAL LAW ACTIONABLE UNDER THE ATS AS INTERPRETED BY *SOSA*.

This Court has already ruled that claims for cruel, inhuman or degrading treatment (CIDT) are actionable. *Wiwa*, 2002 U.S. Dist. LEXIS 3293, at *21–27.[24] Plaintiffs therefore need not address Defendants' argument to the contrary, but do wish to make a few points. In short, Defendants' argument relies on a few unrepresentative cases and ignores the great weight

[24] Defendants argue that the Court's 2002 opinion, which relied in part on *Xuncax v. Gramajo*, can be discounted, because they claim *Xuncax* was disapproved by *Sosa*. Def. Br. at 38 n.23. This is highly misleading; *Sosa* does not cite *Xuncax* at all. The Supreme Court simply said that, "to the extent it supports Alvarez's position" on the definition of arbitrary detention, the caselaw cited in one of Alvarez's briefs—which apparently included *Xuncax*—"reflects a more assertive view of federal judicial discretion" than the Court took. 542 U.S. at 736 n.27. This does not provide any clues as to what, if anything, the Supreme Court disapproved of in *Xuncax*; indeed, numerous courts have continued to rely on *Xuncax* in the wake of *Sosa*. *See, e.g.*, *Khulumani*, 504 F.3d at 286 (Katzmann, J., concurring).

of both pre- and post-*Sosa* authority supporting the actionability of CIDT.

A. The prohibition on CIDT is a specific and definable norm.

Defendants do not contest that the prohibition on CIDT is universal and obligatory, contending only that it fails to meet the "definable" aspect of the *Sosa* test. But Defendants cite only two cases that have rejected CIDT as an actionable norm: *Forti v. Suarez-Mason*, 694 F. Supp. 707 (N.D. Cal. 1988), now over 20 years old, and the Eleventh Circuit's decision in *Aldana*, 416 F.3d at 1247. Def. Br. at 38–39. Plaintiffs cited eight cases to the contrary, *see* Pl. Br. at 32–33, none of which concluded that the norm could not be adequately defined, and Defendants do not attempt to distinguish them. Indeed, when the same district court that decided *Forti* more recently reconsidered the question, it came to the opposite conclusion in *Bowoto v. Chevron Corp.*, 557 F. Supp. 2d 1080, 1093 (N.D. Cal. 2008), in an opinion that carefully considered *Aldana* and rejected its reasoning, finding the dissent from that case more persuasive.

While scholars may debate the outer boundaries of the prohibition against CIDT, there need not be any agreement on every aspect of a norm so long as the core violations are settled. Thus, in *Bowoto*, the court recognized that conduct that has been "universally condemned as cruel, inhuman, or degrading" is actionable under the ATS. 557 F. Supp. 2d at 1094 (citing *Doe v. Liu Qi*, 349 F. Supp. 2d at 1322). The appropriate question is whether the specific acts alleged clearly fall within the conduct proscribed. The *Sosa* Court engaged in exactly this analysis of the arbitrary detention claim at issue there; rather than determining whether "arbitrary detention" in the abstract is actionable, it identified types of arbitrary detention that were clearly prohibited under customary international law and found that in comparison, Alvarez's ordeal did not fall within the proscription. 542 U.S. at 735–37.[25]

[25] This is the same approach used by the court in *Eastman Kodak Co v. Kavlin*, 978 F. Supp. 1078 (S.D. Fla. 1997), which, although not a CIDT case, is cited by Defendants in support

Here, Plaintiffs have identified standards by which conduct can be judged to clearly fall within the prohibition against CIDT, including specific definitions of the terms "cruel," "inhuman," and "degrading." *See* Pl. Br. at 31; *see also* Roht-Arriaza Decl. ¶¶ 30–36. Defendants fail to rebut this consensus as to the definition, and they fail to acknowledge that cases have allowed CIDT claims to proceed only if the conduct at issue is clearly prohibited by the law of nations.[26]

B. Defendants' attack on the Roht-Arriaza declaration is unfounded.

Defendants make a series of unwarranted attacks on Professor Roht-Arriaza's declaration. None of them has merit.

Defendants point out that the declaration acknowledges that the dividing line between torture and CIDT is not always clear, Def. Br. at 40, but this strengthens, rather than undermines, the consensus for the norm against CIDT—international law has not seen a need to clearly differentiate between the two, since they both unquestionably violate the law. Defendants also complain that Professor Roht-Arriaza, as a scholar of international law, has, in places, summarized the authorities on CIDT in her own words. *See id*. This is what scholars do; the essential elements identified in the declaration are well-grounded in sources cited. *See* Roht-Arriaza Decl. at 10 nn.8–10. The declaration also describes conduct that falls unequivocally

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of their argument. Def. Br. at 38. *Eastman Kodak* recognized that the prohibition on "arbitrary detention" was difficult to define in all respects because "the nations of the world have reached no firm agreement on exactly what constitutes probable cause to arrest." 978 F. Supp. at 1092–93. Nonetheless, the court allowed the claim in that case to proceed because the conduct alleged—detention of the plaintiff "in inhumane conditions for a substantial period of time solely for the purpose of extorting from him a favorable economic settlement"—was clearly prohibited by the law of nations. *Id.* at 1094.

[26] This was also the case in *Tachiona v. Mugabe ("Tachiona II")*, 234 F. Supp. 2d 401 (S.D.N.Y. 2002). Although Defendants imply that this case found CIDT to be insufficiently definable, *Tachiona II* allowed CIDT claims to proceed because "wherever the nuances of conduct may blend at the frontiers that define the limits of [CIDT], this Court has no hesitation finding that the wrongs [at issue] fall well within the realm of the execrable." *Id.* at 438.

within the bounds of CIDT. *Id.* ¶¶ 34–36. This analysis precisely meets the requirements of *Sosa* and its progeny, as it sets out a general and universally agreed on definition and gives copious examples of conduct that various courts have found to constitute CIDT, for the sake of comparison to future cases. *See, e.g.*, *Tachiona II*, 234 F. Supp. 2d at 437 (noting that judicial decisions "may illuminate the meaning of particular standards" in international law).[27] Finally, defendants' attack on the sources cited, Def. Br. at 41, is addressed above. *See supra* Part I(B).

C. Defendants identify no problematic "practical consequences."

Defendants' argument regarding the "practical consequences" of recognizing the norm against CIDT fails to actually identify a single problematic consequence. The Second Circuit has suggested what kind of "practical consequences" might be relevant under this factor—that the courts should not recognize a norm that would have the practical effect of labeling "'the reckless policeman who botches his'" paperwork as an enemy of the human race. *Mora v. New York*, 524 F.3d 183, 209 (2d Cir. 2008) (quoting *Sosa*, 542 U.S. at 737). Defendants, by contrast, simply argue that if CIDT is recognized, "an array of different acts" might allow claims "based on a broad and diverse range of alleged misconduct." Def. Br. at 42–43. But they fail to identify what the practical problem with this would be, if all of the misconduct at issue rises to the level of internationally-condemned CIDT. This is simply unfounded hysteria.

[27] Defendants also make a scurrilous charge that Prof. Roht-Arriaza is biased. Def. Br. at 39 n.25. Their evidence is that Prof. Roht-Arriaza articulated the *same* views about CIDT to the Second Circuit in an *amicus* brief, which she signed as counsel for numerous other scholars. Defendants argue that it is somehow improper for an expert to consistently argue the same point, and as support cite a case in which a court called a retained expert biased because he "sought employment from the plaintiff's attorneys in this case." *Viterbo v. Dow Chemical Co.*, 646 F. Supp. 1420, 1425 (E.D. Tex. 1986). That is nothing like the situation here.

VII. VIOLATIONS OF THE RIGHT TO LIFE, LIBERTY AND SECURITY OF PERSON AND PEACEFUL ASSEMBLY AND ASSOCIATION VIOLATE INTERNATIONAL LAW NORMS ACTIONABLE UNDER THE ATS AS INTERPRETED BY *SOSA*.

The prohibitions of violations of the rights to life, liberty and security of person and peaceful assembly and association are well-established norms of customary international law. Defendants point out that several cases have rejected the actionability of these norms, but these cases all stated that the plaintiffs had not cited sufficient authority to support recognition of the claim. *See Bowoto*, 557 F. Supp. 2d at 1095–96; *Flores II*, 414 F.3d at 266; *Tachiona v. Mugabe ("Tachiona I")*, 216 F. Supp. 2d 262 (S.D.N.Y. 2002). By contrast, Plaintiffs here have provided ample support for a finding that a definite and universally accepted international norm protects the right to life, liberty and security of person as well as the right to association and expression and is actionable under the ATS. *See* Roht-Arriaza Decl. ¶¶ 40–58.

Plaintiffs properly rely on sources such as the Restatement, the UDHR, U.N. General Assembly resolutions, and the ICCPR, because these sources, together with federal cases, offer compelling evidence of a customary international law norm prohibiting violations to the right to life, liberty and security of person.

The decisions in *Bowoto* and *Flores II* are not as helpful to their case as Defendants might like. *E.g.*, Def. Br. at 58. Indeed, *Bowoto* found that "[t]he right to life, liberty and security of person are widely recognized as fundamental human rights." 557 F. Supp. 2d at 1095. *Bowoto* found the right insufficiently definite to support the claim asserted under the facts of that case; however, this marked a departure from the same opinion's approach to CIDT claims, in which the court examined not whether the norm was definable in all particulars but whether "the *conduct alleged* . . . has been 'universally condemned.'" *Id.* at 1094 (emphasis added). The same approach here should focus on whether the specific abuses alleged have been widely

condemned as violating international law, not whether the rights are definable in the abstract.

As for *Flores II*, Defendants argue that it demonstrates that there is no norm protecting the "right to life," Def. Br. at 58, but fail to note that case concerned people killed by pollution, rather than attacks on peaceful demonstrators and members of a peaceful political organization. *Flores II* construed the plaintiff's complaint as asserting a claim "under a more narrowly-defined customary international law rule against intra national pollution." 414 F.3d at 255.

The most relevant case which analyzed the standards remains *Tachiona II*, in which the Southern District of New York concluded, after careful analysis of customary international law, that at least some violations of these rights—"an affirmative campaign of systematic harassment, egregious organized violence and terror, and arbitrary invasions of individual life, liberty and privacy specifically intended to deprive its people of freedoms of political thought, conscience, opinion and expression"—were sufficiently well-recognized to support a cause of action. 234 F. Supp. 2d at 433. The analysis emphasized the standard set in *Filartiga I*, and is consistent with *Kadic* and *In re Estate of Marcos Human Rights Litigation*, 25 F.3d 1467 (9th Cir. 1994)—all of which were cited with approval in *Sosa*. *See* Pl. Br. at 34–36. Defendants' attack on *Tachiona II* suffers from the same flaws as the rest of their analyses of international law—they analyze each source of law individually and come to the unremarkable but legally irrelevant conclusion that no one source of law by itself proves the content of customary international law. Defendants consistently ignore the basic rule that international law norms rest upon the cumulative foundation of numerous, varied sources.

Multiple sources, analyzed together per the test articulated in *Tachiona* and consistent with *Sosa*, demonstrate that egregious violations of the right of life, liberty and security of person and peaceful assembly and association are sufficiently definite and universally condemned to be

actionable under the ATS. *See* Roht-Arriaza Decl. ¶¶ 5–8.

VIII. UNIFORM RULES OF INDIRECT LIABILITY ARE APPROPRIATE IN ATS CASES.

Defendants take different approaches to, on the one hand, Plaintiffs' theories of aiding and abetting, conspiracy, and joint tortfeasor liability, and, on the other hand, agency and corporate veil-piercing. Defendants do not dispute that the latter set of theories should be determined according to ordinary tort law rules, but argue that they should be subject to a state-law choice-of-law test, such that the law applied would be state or foreign law and would vary in every ATS case. As to the former set of theories, defendants do not dispute that they should be governed by uniform rules—not subject to a choice-of-law test—but they argue that they should be determined only according to international law, not general tort law principles. *Compare* Def. Br. at 66–80 *with id.* at 62–66. As set out in Plaintiffs' opening brief, Plaintiffs believe that a consistent approach to indirect liability should be applied in ATS cases, and that uniform rules (drawing on tort principles under federal common law) are necessary.

A. Substantive federal common law rules apply in ATS cases.

Sosa and other Supreme Court authority preclude Defendants' claim that New York choice of law rules or state substantive law apply. In finding that the ATS creates federal common law claims, *Sosa* relied on the recognition in *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981), that "'international disputes implicating . . . our relations with foreign nations' are one of the 'narrow areas' in which 'federal common law' continues to exist." *Sosa*, 542 U.S. at 730. *Texas Industries* itself held that "[i]n these instances, our federal system *does not permit* the controversy to be resolved under state law." 451 U.S. at 641 (emphasis added); *accord Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425–27 & n.25 (1964) (holding that act of state doctrine, which addresses "our relationships" with foreign

countries, must be determined according to federal law). The *Sabbatino* Court cited that the ATS in support of this conclusion because it "reflect[s] a concern for uniformity in this country's dealings with foreign nations." *Id*. at 427 n.25. Defendants err in suggesting that the Court should conduct any choice of law analysis. Federal substantive standards apply.

Contrary to Defendants' claim, Def. Br. at 68, New York choice of law rules do *not* determine the rules of liability for a federal cause of action. They rely upon *In re Gaston & Snow*, 243 F.3d 599, 601 (2d Cir. 2001), *see* Def. Br. at 68, 70, 77, but that case found state choice of law principles applicable to "claims that are *based upon state law* and *do not implicate federal policy*." 243 F.3d at 601 (emphasis added).[28] After *Sosa*, it is clear that questions of liability in ATS cases, whether determined by reference to international law or federal common law, are undoubtedly matters of federal law and implicate federal policy. Thus, state choice-of-law rules are inapplicable.

As noted above, no choice of law analysis is required here due to the unique federal interest in foreign relations and international law; federal law applies. Nonetheless, if any choice of law analysis were necessary, it would be the federal choice-of-law test previously applied by the Second Circuit to determine whether to apply uniform federal rules of liability to a federal cause of action, *New York v. Nat'l Serv. Indus., Inc.*, 460 F.3d 201, 208 (2d Cir. 2006), not the *Gaston & Snow* test.[29] Under the *New York* test, the court looks to "(1) whether the federal program, by its very nature, requires uniformity; (2) whether application of state law would

[28] Defendants also rely on Judge Cote's decision in *Presbyterian Church of Sudan v. Talisman Energy, Inc. ("Talisman IV")*, 453 F. Supp. 2d 633 (S.D.N.Y. 2006). *See* Def. Br. at 68. The *Talisman* decision, which is currently on appeal, likewise relied on *Gaston & Snow*, and suffers from the same errors as Defendants' analysis. *See id.* at 681–83.

[29] Unlike federal common law involving foreign relations, wherein courts do not conduct a choice of law analysis, *New York* involved federal common law interstitial lawmaking, wherein courts must assess whether to apply uniform federal rules or state rules. *Id.* at 207. Nonetheless, it is far more relevant here than *Gaston & Snow*.

frustrate specific objectives of the federal program; and (3) whether application of a uniform federal rule would disrupt existing commercial relationships based on state law." *Id.* (citing *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728–29 (1979)). These factors weigh heavily in favor of uniform federal rules of liability in ATS cases, rather than relying on a patchwork of state and foreign laws.

First, uniformity is desirable in ATS cases. *See Sabbatino*, 376 U.S. at 427 n.25. Indeed, "there is presumably an interest in uniform application" of federal causes of action, *New York*, 460 F.3d at 208, and this presumption is particularly appropriate in the ATS context. As noted in *Sosa*, the application of federal law in ATS cases is "consistent with the division of responsibilities between federal and state courts after *Erie*." 542 U.S. at 731 n.19. This is because customary international law is part of federal common law. *Id.* at 729. It makes little sense to allow claims for violations of universally-recognized international law norms and then not apply uniform standards to the determination of those claims. The application of a panoply of state and foreign law rules "would eventually lead in other cases to divergent measures of recovery for essentially identical claims against . . . defendants guilty of" violations of international law. *Wagner v. Islamic Republic of Iran*, 172 F. Supp. 2d 128, 135 (D.D.C. 2001).

Second, the application of state law rules of liability would frustrate the purpose of the ATS. Indeed, this factor refutes Defendants' claim that state law applies even under their own erroneous analysis. *See* Def. Br. at 68 (conceding state law only applies if there is "no significant conflict with a federal interest or policy"). Reflecting on the history of the statute, including "a program to assure the world that the new Republic would observe the law of nations," *Sosa*, 542 U.S. at 722 n.15, the Supreme Court held that "Congress intended the ATS to furnish jurisdiction for a relatively modest set of actions alleging violations of the law of nations." *Id.* at 720. The

ATS therefore reflects a federal policy of providing remedies for such international law violations. *Wiwa*, 226 F.3d at 105. There is no special exception to the need for uniformity with respect to issues of corporate and vicarious liability. Even though corporations are created by local law, "no State may endow its corporate creatures with the power to place themselves above the Congress of the United States and defeat . . . federal policy." *Anderson v. Abbott*, 321 U.S. 349, 365 (1944). The same conclusion holds true for foreign jurisdictions as well: no foreign jurisdiction can endow its corporations with the power to place themselves above international law. Plaintiffs previously noted, Pl. Br. at 59–60, that the Supreme Court has applied the federal common law and international law of veil-piercing—which it held to be the same—to an international law claim. *First Nat'l City Bank (FNCB) v. Banco Para El Comercial*, 462 U.S. at 622–23, 628–30. Defendants claim *FNCB* only refused to apply the veil-piercing law of the place of incorporation because the defendant in that case was established by the State. Def. Br. at 70. But that ignores *Anderson*, on which *FNCB* expressly relies, *see* 462 U.S. at 622 n.10, and it also ignores the distinction drawn by *FNCB* itself: that local law "normally determines issues relating to the *internal* affairs of a corporation," but that different principles apply "where the rights of third parties *external* to the corporation are at issue." *Id.* at 621 (citing Restatement (Second) of Conflict of Laws § 301, which applies generally to corporations). The latter situation obtains in tort cases such as this one. In fact, rather than crafting any special rules because the defendant was chartered by the Cuban government, the Court expressly held that the defendant should be held to the *same* standards as a private corporation. *See id.* at 630 (concluding that "similar equitable principles" to those applicable to private companies should apply to government-sponsored corporations).

Indeed, federal courts nearly always apply federal rules of corporate and vicarious

liability to give effect to federal causes of action, because "when Congress creates a tort action, it legislates against a legal background of ordinary tort-related vicarious liability rules and consequently intends its legislation to incorporate those rules." *Meyer v. Holley*, 537 U.S. 280, 285 (2003); *see, e.g.*, *Burlington Indus., Inc., v. Ellerth*, 524 U.S. 742, 754–55 (1998) (fashioning "a uniform and predictable standard" of vicarious liability in Title VII actions "as a matter of federal law"); *Thomas v. Peacock*, 39 F.3d 493, 503 (4th Cir. 1994) (holding that "the determination of whether to pierce the corporate veil in an ERISA action is made under federal law"), *rev'd on other grounds*, 516 U.S. 349, 353–54 (1996); *Davidson v. Enstar Corp.*, 848 F.2d 574, 577 (5th Cir. 1988) (applying federal joint venture test, distinct from Louisiana's idiosyncratic joint venture rules, to federal statutory claims).[30]

Third, uniform federal rules of liability would not disrupt commercial relationships, because the relationship between ATS plaintiffs and defendants is far from a commercial relationship; ordinary commercial disputes are not recognized as ATS claims. *See, e.g.*, *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975). Furthermore, applying uniform rules of liability to the tort claims of third parties does not affect the rights of the commercial partners between and among themselves—which may still be determined by local law. And, even if a particular business relationship were based on the expectation that the parties would be insulated from liability for the worst violations of international law, that expectation would not be reasonable, or consistent with the purposes of the ATS, nor should it outweigh the victims' expectations that they should not be subject to such abuses.

Thus, ATS claims require uniform rules of federal liability, including veil-piercing and

[30] *See also Intergen N.V. v. Grina*, 344 F.3d 134, 143–44 (1st Cir. 2003); *Moriarty v. Glueckert Funeral Home*, 155 F.3d 859, 865 n.15 (7th Cir. 1998); *Taylor v. Peoples Natural Gas Co.*, 49 F.3d 982, 988 (3d Cir. 1995); *Am. Bell, Inc. v. Fed'n of Tel. Workers*, 736 F.2d 879, 886 (3d. Cir. 1984); *Mayes v. Moore*, 419 F. Supp. 2d 775, 780 n.5 (M.D.N.C. 2006).

agency, rather than a choice among various state or foreign law rules.

B. Under Defendants' own choice of law analysis, New York, not Nigerian, agency law would apply.

Assuming *arguendo* that New York choice-of-law principles govern agency liability for Plaintiffs' ATS claims, those principles point to New York, not Nigerian, substantive law. As Defendants acknowledge, under New York law Defendants bear the burden to demonstrate a true conflict between Nigerian and New York law in order for the former to apply. Def. Br. at 79 n.53.[31] Defendants have mischaracterized the Nigerian agency law test, and cannot demonstrate a true conflict with New York law.[32]

Defendants claim that New York employs a "multi-factor test" to determine whether an agency relationship exists between a parent and subsidiary, and that Nigerian law on agency requires that the relationship/conduct of the parent and subsidiary fall within one of several categories. Def. Br. at 79 n.53. But even taking Nigerian law as Defendants describe it, this does not state a conflict; Defendants point to no actual difference in the standards, or to any relevant issue in this case that would be decided differently under the two bodies of law.

More importantly, however, Defendants have not accurately stated Nigerian law.

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[31] New York law requires "a party wishing to apply the law of a foreign state [to] show how that law differs from the forum state's law. Failure to do so results in the application of New York law." *Haywin Textile Prods., Inc., v. Int'l Fin. Inv. & Commerce Bank Ltd.*, 152 F. Supp. 2d 409, 413 (S.D.N.Y. 2001); *see also Loebig v. Larucci*, 572 F.2d 81, 85 (2d Cir. 1978) (noting that where "no evidence has been presented as to foreign law, New York courts have decided the cases in accordance with New York law").

[32] In a footnote, Defendants mention the *Talisman IV* court's finding, purportedly under New York choice of law rules, that because the plaintiffs did not provide evidence of the law of the various jurisdictions, their agency claims failed. Def. Br. at 77, n.51, *citing* 453 F. Supp. 2d at 681–83, 687–88. But New York choice of law principles do not apply, and even if they did, the absence of proof of foreign law should have led the district court to apply New York law. The *Talisman* court's approach would require a party to prove the viability of its legal theories under foreign law even though that party is not advocating the application of foreign law. Such an approach reverses the burden of proof and would be particularly destructive to ATS cases, in which the torts often arise in countries with poorly developed legal systems.

Defendants claims that Nigerian law differs from New York law in that "New York law employs a multi-factor test to determine whether an agency relationship exists . . . whereas Nigerian law asks whether the relationship/conduct of the parent and subsidiary fall within one of the categories listed above." Def. Br. at 79 n.53. That is simply not the case. Indeed, the basic rule in Nigerian law is the same as in New York: agency exists when the agent "has the authority to act on behalf of another called the principal and consents (expressly or by implication) so to act." *James v. Mid Motors (Nig.) Ltd.* [1986] 11 S.C. 31 (Nig. Supreme Ct.). Thus the question revolves around the issue of authority, and while "such authority will often derive from agreement between [the agent] and the principal, it may exists even in the absence of such an agreement." Kingsley Iken Igweike, *Nigerian Commercial Law: Agency* 38 (1993). A court "must examine the true nature of the relationship, the functions, rights and responsibilities *inter se*, before a conclusive finding can be made." *Id.* at 11. According to Igweike, "actual authority may be express or implied," *id.* at 10 (citing *Hely Hutchinson v. Brayhead Ltd. & Anor*. [1968] 1 Q.B. 549), and depends "on the nature of the actual agreement between the parties." Igweike at 10 (citing *Bamgboye v. University of Ilorin* [1991] 8 N.W.L.R. 1). Thus an agency relationship may be established "by word of mouth, by mere conduct or by writing and may be inferred from the circumstances of a particular case." Igweike at 36; *see also Logios v. Attorney General of Nigeria* [1938] 4 W.A.C.A. 16 (West African Ct. App.) (noting that "an agent may be appointed or his authority conferred by word of mouth").

While Defendants claim that Nigeria has three rigid categories of parent-subsidiary agency, none of the cases they cite limits agency to the circumstances cited. Rather, as Judge Nnamani notes in *Marina Nominees Ltd. v. Federal Board of Inland Revenue*, [1986] N.W.L.R. 48 (Nig. Supreme Ct.), whether or not there is an agency relationship must "depend on the facts

of each case" and "can be inferred from the surrounding circumstances." *Id.* at 63. Judge Nnamani referred to the English case of *Smith, Stone & Knight v. Birmingham Corp.* [1939] 4 All E.R. 116 (K.B.), in which the court considered a number of "relevant facts" to determine whether the relationship in question could be properly characterized as one of agency. Those factors included: whether profits of the principal were treated as profits of the parent; whether persons conducting the business were appointed by the parent; whether the company was the head and the brain of the trading venture; whether the company governed the venture, decided what should be done and what capital should have been embarked on the venture; whether the company made the profits by its skill and direction; and if the company was in effectual and constant control. *Id.* at 120. Judge Nnamani stated that these are the "sorts of facts" that "one must employ in determining the issue of agency." [1986] N.W.L.R. at 63. Thus, Nigerian law, like New York law, considers a variety of factors.

Defendants have pointed to no circumstances under which New York would find an agency relationship where Nigeria would not, which is the relevant question for establishing a true conflict. Thus, there is no basis to undertake a choice of law analysis. New York substantive standards would apply under Defendants' proposed choice of law methodology.

IX. PLAINTIFFS' INDIRECT LIABILITY THEORIES ARE SUPPORTED UNDER BOTH INTERNATIONAL AND DOMESTIC LAW.

As noted above, Defendants do not dispute that uniform rules apply to determine issues of aiding and abetting, conspiracy or joint criminal enterprise, and reckless disregard or joint tortfeasor liability. Instead—in clear defiance of controlling caselaw—Defendants argue that these theories are simply unfounded under international law.

Plaintiffs have already explained that general federal common law principles should be the primary source of rules of liability in ATS cases, *see* Pl. Br. at 46–47, so this argument misses

the mark from the outset. Defendants misleadingly claim that they are adopting "the methodology proposed by plaintiffs," but they argue that ATS requires "a generally available norm of secondary liability under international law." Def. Br. at 62. This is plainly not Plaintiffs' proposed methodology; the uniform rules of secondary liability for ATS claims are governed by federal common law, as proposed by Judge Hall's concurrence in *Khulumani*, *see* 504 F.3d at 286; and the primary source of this uniform law should be general common law principles. The position to which Defendants refer is that adopted by Judge Katzmann in his concurrence, *id.* at 269–70, not by Plaintiffs. Assuming *arguendo* that Defendants are correct that these theories need to be supported in international law, however, Plaintiffs have made that showing.

Defendants do not dispute Plaintiffs' showing that international law (including general principles) supports the imposition of liability based on agency or corporate veil-piercing. These are therefore unquestionably viable theories.[33] Furthermore, Defendants are incorrect to suggest that they can only be held vicariously liable for SPDC's acts, Def. Br. at 66–67; instead, they can be held directly liable for their own acts of aiding and abetting, conspiracy, and recklessness. *See* Pl. Br. at 49–55.

A. Aiding and abetting.

It is now settled that "a plaintiff may plead a theory of aiding and abetting liability under the ATCA." *Khulumani*, 504 F.3d at 260 (per curiam). Defendants' disregard for this rule is staggering. Simply because the judges in *Khulumani* did not agree on the proper approach to determining rules of secondary liability does not mean that Defendants can ignore the per curiam

[33] The same is true of Plaintiffs' claim that the military served as the agent of SPDC and/or Defendants. Pl. Br. at 56. Contrary to Defendants' claim, Def. Br. at 76, n.48, the Court held in its 2002 Order that it "does not decide at this time" whether Plaintiffs' claims rely on an agency relationship with the military. *Wiwa*, 2002 U.S. Dist. LEXIS 3293, at *77.

holding of the case, which is that, under *either* approach, a defendant may be held liable for aiding and abetting. Defendants' insistence on a "specific, universal, and obligatory norm of aiding and abetting liability," Def. Br. at 65, would apply only to Judge Katzmann's approach of looking to international law for the rules of secondary liability. If the Court determines that is the proper approach, there is nothing in Judge Hall's concurrence to suggest that international law does *not* provide a rule of aiding and abetting liability. Conversely, if the Court adopts Judge Hall's approach, then the "specific, universal, and obligatory" standard is irrelevant to the determination of rules of secondary liability. In either case, if there is anything that the panel agreed on, it is that aiding and abetting is actionable.

Despite the fact that *Khulumani* left the issue of the source of aiding and abetting law (and the precise standard) to "a future panel," 504 F.3d at 286 n.4 (Hall, J., concurring), and the fact that Defendants themselves acknowledge the distinctions between Judge Hall's approach and Judge Katzmann's approach, *see* Def. Br. at 65–66, Defendants fail to offer any rebuttal to Plaintiffs' argument that Judge Hall's approach is preferable. The Court should therefore conclude that, since aiding and abetting is actionable under *Khulumani*, Judge Hall's approach provides the better rule.

B. Common plan theories.

Defendants challenge Plaintiffs' common plan theories of liability—ordinarily labeled conspiracy in domestic law and joint criminal enterprise in international law—but they make a number of errors in doing so and conflate several key principles. It is important to distinguish conspiracy *as an inchoate offense* from conspiracy or common plan *as a mode of liability*. The former punishes the plan itself, while the latter punishes the conspirators for the abuses actually committed as part of their plan. In both civil tort law and international law, liability for the plan

as a separate offense is disfavored, but liability for the result of the plan is common. *See, e.g.*, *Beck v. Prupis*, 529 U.S. 494, 503 (2000) (civil conspiracy is not an independent wrong but rather "a means for establishing vicarious liability for the underlying tort"); *Hamdan v. Rumsfeld*, 548 U.S. 557, 610–11 & n.40 (2006). (In U.S. criminal law, by contrast, criminal conspiracy typically refers to an inchoate offense rather than a mode of liability.) Thus, *Hamdan* recognized that international law employs a "'joint criminal enterprise' theory of liability,'" which "is a species of liability for the substantive offense (akin to aiding and abetting), not a crime on its own," *id.* at 611 n.40; at the same time, only "conspiracy to commit genocide and common plan to wage aggressive war" are criminalized in international law as separate crimes. *Id.* at 610. The *Talisman IV* decision, however, on which Defendants rely, conflated these issues and concluded that, because conspiracy to commit crimes against humanity was not a *separate offense*, a defendant could not be held liable for crimes against humanity even if it had conspired to commit them. *See* 453 F. Supp. 2d at 664–65.

While the terminology is different, the elements of common plan liability in international law and in tort law are largely the same. In both tort-law civil conspiracy and international law joint criminal enterprise, a defendant who intentionally participates with others in a common plan to commit a wrongful act is responsible for abuses committed by other members of the plan in furtherance of that plan. *See* Pl. Br. at 52–53. Indeed, while the term "joint criminal enterprise" has been used by the modern international tribunals (primarily to distinguish the concept of conspiracy as an inchoate offense), this mode of liability dates back to the Nuremburg Charter, which provided that those who "participat[e] in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such a plan." Agreement for the Prosecution and Punishment of Major

War Criminals of the European Axis, and Establishing the Charter of the Int'l Military Tribunal, art. 6, 82 U.N.T.S. 279.

Defendants complain that *civil* conspiracy is unknown in international law while joint criminal enterprise is solely *criminal* liability, but, as discussed in Parts I(A) and I(B) above, this misunderstands the role of international law: customary international law provides normative rules, not labels as to whether these rules are civil or criminal or prescriptions for punishment. *See, e.g.*, *Tel-Oren*, 726 F.2d at 777–78 (Edwards, J., concurring). Defendants' other objections, *see* Def. Br. at 65, are unavailing. As to reliance on ICTY cases, as noted in Part I(B) above, these are relevant here because the ICTY's decisions reflect customary international law. While U.S. courts have not relied specifically on joint criminal enterprise, that is because they have adopted the theory of civil conspiracy from tort law; joint criminal enterprise is simply the international law analogue (in response to Defendants' own argument that only international law is relevant here). And the fact that the ICTY has identified several forms of joint criminal enterprise liability does not mean that this theory is not clearly defined, as Defendants charge.

C. Recklessness and joint tortfeasor liability.

Defendants fail to rebut Plaintiffs' showing that joint tortfeasor liability is recognized in international law. *Compare* Pl. Br. at 55 *with* Def. Br. at 66. Nor do Defendants dispute that, under Judge Hall's approach relying on general common law principles, a defendant may be held liable for abuses committed by another if the defendant recklessly disregarded the risk that those abuses would occur.

Defendants claim only that, if the Court adopts Judge Katzmann's approach of relying solely on international law principles, recklessness is not a recognized theory of liability under international law. But, in his concurrence in *Doe v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002),

Judge Reinhardt specifically noted that reckless disregard was a principle of liability found in admiralty cases and cases under the Warsaw Convention as well as domestic tort cases. *Id.* at 974–75; *see also* Joshua Kastenberg, "Enforcing Internationally Recognized Human Rights Violations under the Alien Tort Claims Act: An Analysis of the Ninth Circuit's Decision in *Doe v. Unocal Corp.*," 1 Pierce L. Rev. 133, 149 (2003) ("Judge Reinhardt found the theory of reckless disregard applicable and recognized it as a principle in both domestic and international law."). Indeed, the assignment of liability on the basis of reckless disregard dates back to World War II, in which the Tokyo Tribunal "charged various defendants with 'recklessly disregarding their legal duty to take adequate steps to rescue the observance and prevent breaches of the laws and customs of war.'" Matthew Lippman, "International Law and Human Rights Edition: Crimes Against Humanity, 17 B.C. Third World L.J. 171, 202 (1997) (quoting The Tokyo War Crimes Trial, *reprinted in* II The Law of War: A Documentary History 1029, 1033 (Leon Friedman ed., 1972)) (noting that this charge "presumably also constituted crimes against humanity").[34]

X. DEFENDANTS' ARGUMENT RE BLESSING KPUINEN IS NOT A MATTER OF INTERNATIONAL LAW.

Pursuant to the Court's endorsement of Plaintiffs' December 31, 2008, letter, Plaintiffs do not address Defendants' argument about Blessing Kpuinen's claims in this brief because it is not a question of international law.

[34] Notably, this Tokyo Tribunal case was *not* simply a case of military command responsibility; one of the defendants, Koki Hirota, was a civilian Foreign Minister with no command authority. *See* Kastenberg, *supra*, 17 B.C. Third World L.J. at 202.

CONCLUSION

Plaintiffs respectfully submit their views on the international law and closely related issues in this case, demonstrating that each claim and each theory of liability presented is well-founded in law.

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Respectfully submitted,

By: /s/
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CERTIFICATE OF SERVICE

Under penalty of perjury, I certify that today, January 9, 2008, I served a true and correct copy of the foregoing Plaintiffs' Reply to Defendants' Memorandum of Law on Issues of International Law in *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 Civ. 8386 (KMW), and *Wiwa v. Anderson*, No. 01 Civ. 1909 (KMW), via electronic filing and electronic mail to the following recipients:

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