06-4800

United States Court of Appeals
For the
Second Circuit

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

(For Continuation of Caption See Next Page)

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

BRIEF OF AMICI CURIAE INTERNATIONAL LAW PROFESSORS IN SUPPORT OF THE PLAINTIFFS-APPELLANTS

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ROYAL DUTCH PETROLEUM COMPANY; SHELL TRANSPORT AND TRADING COMPANY, PLC,
Defendants-Appellees-Cross-Appellants,
and

SHELL PETROLEUM DEVELOPMENT COMPANY OF NIGERIA, LTD.,
Defendant.

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- Richard J. Wilson, Professor of Law, American University, Washington College of Law

INTEREST OF AMICI

Amici are international law professors and scholars who are committed to the protection of human rights under international law. *Amici* are concerned about the far-reaching, adverse implications for the protection of human rights of the District Court's ruling that there is not a well-defined norm of international law that prohibits the conduct plaintiffs alleged to be extrajudicial killing—executions accomplished through the use of a special military court which violated fundamental, indispensable judicial guarantees. In fact, customary international law clearly defines and prohibits such extrajudicial killing as one of its fundamental tenets. *Amici* will present in this brief a survey of the wide array of sources including commentary, global and regional human rights treaties and conventions, and decisions of human rights tribunals which establish this specific, obligatory and universal norm of customary international law prohibiting extrajudicial killing.

RULE 29(a)

All parties have consented to the filing of this brief.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES

STATUTES

INTERNATIONAL SOURCES

REPORTS AND MISCELLANEOUS

SUMMARY OF THE ARGUMENT

In dismissing the claim for extrajudicial killing, the district court acknowledged that "some forms of extrajudicial killings 'may be so bad that those who enforce them become enemies of the human race.'" (J.A. 113) at 15 (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004)). Nonetheless, the court dismissed the plaintiffs' extrajudicial killing claim because the court was not aware of "international authority establishing the elements of extrajudicial killing" and, as a result, could not determine that the plaintiffs had stated a cognizable ATS claim. *Id*. (explaining that the court was "unpersuaded that there is a well-defined customary international law that prohibits the conduct [p]laintiffs alleged to be extrajudicial killing.")

The survey of international law sources presented in this brief shows that there is, in fact, a very well-defined customary international law norm against extrajudicial killing which is "specific, universal and obligatory" in nature, *Sosa*, 542 U.S. at 732, and which prohibits the conduct alleged in this case: executions which were accomplished through the use of a specially constituted military court which violated fundamental judicial guarantees.

The core set of norms against extrajudicial killing include the prohibition against "a deliberated killing not authorized by a previous judgment pronounced by

a *regularly constituted court* affording *all the judicial guarantees* which are recognized as indispensable by civilized peoples." Torture Victim Protection Act of 1991, Pub. L. 102-256, Mar. 12, 1992, 106 Stat. 73 (1992) (codified at 28 U.S.C. §1350 note) (emphasis added). These norms have been codified in a broad array of international sources, including widely accepted global and regional human rights treaties, and have been adjudicated and affirmed in numerous decisions of global and regional human rights tribunals, further evidencing their wide acceptance as customary international law. These sources establish that military tribunals which are specially constituted to administer extraordinary punishment against targeted political opponents of a military government are not "regularly constituted" courts. Moreover, they establish that the norm against extrajudicial killing requires that minimum judicial guarantees be provided to the defendant, such as: (1) prompt notification of charges and adjudication of those charges without undue delay; (2) freedom from retroactive judgment and penalty; (3) trial before a tribunal that is independent, impartial and competent; (4) the right to an adequate defense, including the ability to choose defense counsel and counsel's access to resources that are adequate for the preparation of the defense; and (5) a meaningful right to an appeal. These guarantees become of paramount importance where, as in the instant case, the accused faces the penalty of death.

The allegations of the Amended Complaint fit squarely within the scope of this well-defined violation of customary international law.[1] As described by the district court, the plaintiffs alleged, *inter alia*, that the special military tribunal "allowed and authorized: (a) the death penalty for acts committed before the Special Tribunal was formed; (b) [e]xecution of sentences, including the death penalty, before review by a higher court or authority; (c) [m]eetings between the accused and their counsel only with the permission of and in the presence of a military officer; (d) [t]rial without representation by counsel. (J.A. 113) at 14. In addition, the plaintiffs alleged that the defense counsel for the accused was "subjected to actual or threat and beatings or other physical harm" and that defendants bribed witnesses to give false testimony. *Id*. at 15. The Amended Complaint also included allegations that: the military tribunal was specially formed to supervise and administer extrajudicial punishments on plaintiffs by the military government; plaintiffs were detained for a lengthy period of time without charges; they were denied adequate food and medical care; and they were routinely tortured in detention during the trial. (J.A. 116) at ¶¶ 3, 61, 63, 69, 72.

[1] The issue is whether the plaintiffs alleged a cognizable claim. The plaintiffs will obviously have to prove the allegations at trial but, on this review of the grant of the motion to dismiss for failure to state a claim, the complaint's factual allegations are accepted as true, all inferences are drawn in plaintiffs' favor, the complaint is liberally construed, and the complaint should not be dismissed unless it appears beyond a reasonable doubt that plaintiffs can prove no set of facts entitling them to relief. *DeMuria v. Hawkes*, 328 F.3d 704, 706 (2d Cir. 2003).

ARGUMENT

The prohibition against extrajudicial killing is a well-established norm of customary international law, clearly meeting the *Sosa* standard of a norm having "[no] less definite content and acceptance" among nations than the "historical paradigms" at the time the Alien Text Statute (ATS), 28 U.S.C. § 1350, was adopted and being in line with the "custom and usages" of nations. *Sosa*, 542 U.S. at 732. The specific content of the norm was clearly articulated in the Torture Victim Protection Act, in which Congress intended to codify what it viewed as customary international law. *See* S. Rep. No. 102-249, at 3, 6 (1991); H.R. Rep. No. 102-367, at 2-3 (1991). Various instruments of international human rights law and the decisions of their corresponding adjudicatory bodies have further refined the specific content of the norms against extrajudicial killing.

I. The Prohibition on Extrajudicial Killing Is Historically Well-Established in "Custom and Usages" in Line with the *Sosa* Standard.

Jurists and commentators on international law have long condemned extrajudicial killing. Blackstone, writing in 1765, observed that life, as the "immediate donation of the Great Creator," could not "legally be disposed of or destroyed by any individual . . . merely upon their own authority." William Blackstone, 1 *Commentaries on the Laws of England* 133. States whose constitutions "vest[ed] in any man, or body of men, a power of destroying at pleasure, without the direction of laws, the lives or members of the subject" were

to be considered "in the highest degree tyrannical." *Id.* In England, in contrast, "the constitution [was] an utter stranger to any arbitrary power of killing or maiming the subject without express warrant of law," and no man could be put to death "without being brought to answer by due process of law." *Id.* at 133-34. *See also* Henry Wheaton, *Elements of International Law* 250 (1836); Emer de Vattel, *The Law of Nations* 416 (1758).

In the Nuremberg trials following World War II, there was a recognition that it was the responsibility of a state to refrain from arbitrary killing not just of citizens of enemy states but also of its own citizens, and that international law required that a person not be executed without the provision of fair trial rights by an independent, impartial judiciary. After World War II, the Allied Powers listed among those crimes triable at Nuremberg "crimes against humanity," which included "murder . . . committed against any civilian population, before or during the war, . . . whether or not in violation of the domestic law of the country where perpetrated." Charter of the International Military Tribunal, Aug. 8, 1945, 82 U.N.T.S. 279, 59 Stat. 1544, Art. 6(c) (1945); *see also* Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Humanity, Dec. 20, 1945, 3 Official Gazette Control Council for Germany 50-55, Art. II(1)(c) (1946). Unlike the definition of "war crimes," the definition of "crimes against humanity" included no qualification that "civilian populations" be

"from occupied territories," *see* Charter of the International Military Tribunal, Art. 6(b), and provided that acts could be considered crimes "whether or not in violation of the domestic laws of the country where perpetrated," thus making it clear that acts of German officials against German citizens could be prosecuted. *See U.S.A. v. Alstoetter*, 3 T.W.C. 1, 6 L.R.T.W.C. 1, 14 Ann. Dig. 278 (1948). The tribunal at Nuremberg viewed the Charter as "the expression of international law existing at the time of its creation." 22 *Trial of the Major War Criminals before the International Military Tribunal* 461 (1949), quoted in M. Bassiouni, *Crimes Against Humanity in International Criminal Law* 120 (1992). Hence, in *Alstoetter*, a tribunal found several former judges under the Nazi government guilty of crimes against humanity based on the lack of sufficient judicial guarantees provided during the course of trials which had resulted in executions, and thus found the judges complicit in murder and other atrocities.[2] Among those basic precepts considered part of customary international law that the Nazi court

[2] This can be seen in the actions of the Nazi Peoples Court (Volkgerichtshof, VGH) which was established in 1934 after four Communist defendants were acquitted in the Reichstag fire trial. The VGH was a "special court" staffed by a majority of lay judges who were members of the Nazi Party and Wehrmacht. It was formed after the suspension of constitutional protections of civil liberties and imposition of a death-penalty law made retroactive so one Reichstag fire defendant could be executed. The VGH was set up so that indictments could be quickly drawn up, sentences passed and executions promptly carried out. No appeals were allowed and its jurisprudence was based on Hitler's demand that "not the individual, but the Volk should be the center of legal concern." H.W. Koch, *In the Name of the Volk: Political Justice in Hitler's Germany* 47, 49 (1989).

proceedings failed to provide were judicial independence and meaningful appeal (given that all final judgment rested in the person of Hitler, the self-described "supreme law lord of the German people").[3]

II. The Modern Prohibition on Extrajudicial Killing has Been Codified with the Level of Definiteness Necessary To Meet the *Sosa* Standard.

A. The Norms against Extrajudicial Killing are Recognized in Widely Accepted Global Human Rights Instruments.

The principle recognized during the Nuremburg trials – that the absence of critical judicial guarantees followed by executions constitutes extrajudicial killing under international law—has been incorporated in widely accepted international human rights instruments. In 1948 the U.N. General Assembly adopted the Universal Declaration of Human rights (Universal Declaration),[4] which provides a worldwide definition of the human rights obligations undertaken by all U.N. member States pursuant to Articles 55 and 56 of the U.N. Charter, including several provisions relating to the right to life and the administration of justice. For example, Article 3 of the Universal Declaration states, "Everyone has the right to life, liberty and security of person." Article 10 states, "Everyone is entitled in full

[3] 3 T.W.C. at 1010-1027.

[4] Universal Declaration of Human Rights, Dec. 10, 1948, U.N.G.A. Res. 217A (III) (1948). The Supreme Court noted in *Sosa* that although the Declaration does not of its own force impose obligations as a matter of international law it "has nevertheless had substantial indirect effect on international law." 542 U.S. at 735 n. 23.

equality to a fair and public hearing by an independent tribunal, in the determination of his rights and obligations and of any criminal charge against him." Article 11 provides for the presumption of innocence, the right to a public trial, "all guarantees necessary for [one's] defence," and the right to be free from retroactive punishment or penalties.

The International Covenant on Civil and Political Rights (Civil and Political Covenant or Covenant), Dec. 16, 1996, 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976, guarantees that one's right to life "shall be protected by law" and that "[n]o one shall be arbitrarily deprived of his life."[5] *Id.*, Art. 6(1). Minimum

[5] In *Sosa* the plaintiffs sought to establish that there was a norm of customary international law prohibiting a single day of "arbitrary detention," defined as "officially sanctioned action exceeding positive authorization to detain under the domestic law of some government, regardless of the circumstances." 542 U.S. at 736. The Supreme Court commented that the Covenant and the Universal Declaration of Human Rights could not, "themselves," be used to establish such an obligatory norm. *Id.* at 735. The Court observed that the Senate "ratified the Covenant on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts." *Id.* The specific, universal, and obligatory nature of the norm against extrajudicial killing is, however, established by the wide panoply of international law sources referenced herein, including commentary, treaties, authoritative interpretations, international courts, and regional courts. Although it may not, by itself, establish the obligatory nature of this norm, the Covenant (which has been ratified by 160 countries in the world, including the United States) is one of the useful reference points to determine whether a tort has been "committed in violation of the law of nations" under the ATS – or to use more modern terminology – customary international law. *See e.g. Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2797 n.66 (2006) (plurality op.) (referencing the Covenant as source for fundamental trial protections recognized by customary international law).

international standards for a fair trial are articulated in Articles 14 and 15 of the Civil and Political Covenant. Fair trial guarantees under Article 14 include: trial before a "competent, independent and impartial tribunal established by law;" the right of the accused to be informed promptly of the charges against him; the right to "have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;" the right to cross-examine witnesses against him and call his own witnesses; and the right to have a sentence "reviewed by a higher tribunal according to law." *Id.* art. 14. Article 15 provides that "[n]o one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed." Articles 14 and 15 provide a definitional framework to determine whether life has been "protected by law" or "arbitrarily" taken under Article 6. The prohibition on extrajudicial killing is fully obligatory, as it is listed among those norms that are non-derogable, even in exceptional circumstances under Civil and Political Covenant Article 4(2).[6]

[6] That the protections against extrajudicial killing are guaranteed even in times of armed conflict highlights their obligatory nature when there is no conflict. For example, in addition to protections to enemy combatants and prisoners of war in situations of international armed conflict, the Geneva Conventions of 1949 also prohibit the "passing of sentences and the carrying out of executions without previous judgment pronounced by a *regularly constituted court*, affording *all the judicial guarantees* which are recognized as indispensable by civilized peoples" in situations of "armed conflict not of an international character." Geneva Convention Relative to the Protection of Civilian Persons in Time of War (IV),

The Human Rights Committee, the treaty-monitoring body charged with interpreting the Civil and Political Covenant, has articulated the need for exacting stringent fair-trial standards when a conviction might result in the death penalty.[7] Accordingly, a trial violates the Covenant when it imposes a death sentence but does not provide the "right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defense, and the right

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Aug. 12, 1949, 75 U.N.T.S. 287, Art. 3, *entered into force* Oct. 21, 1950. Article 75 of Additional Protocol I to the Geneva Conventions of 1949 provides further detail of the required "judicial guarantees" including, among others, the right to be charged without delay of the particulars of the offense, all "necessary rights and means of defence," the application of no heavier penalty than that applicable at the time of commission of the offense, and the right to be informed of subsequent judicial remedies. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3, Art. 75(4), *entered into force* Dec. 7, 1978. Even though Protocol I has not been ratified by the United States, the requirements set forth in Article 75 have been recognized by the U.S. Supreme Court as representing "the barest of those trial protections that have been recognized by customary international law." *Hamdan*, 126 S. Ct. at 2797.

[7] The Human Rights Committee is the body established by Article 40 of the Civil and Political Covenant to monitor and interpret state compliance with that treaty, and is authorized to issue "such general comments as it may consider appropriate." Those general comments are addressed to all states parties and are intended, among other things, "to draw the attention of the States parties to matters relating to the improvement of…the implementation of the Covenant" and to "stimulate activities of States parties…in the promotion and protection of human rights." Human Rights Committee, Statement on the Duties of the Human Rights Committee under Article 40 of the Covenant, U.N. Doc. CCPR/C/18 (1980). Accordingly, such comments are an important interpretive guide to a state party's obligations under the treaty.

to review by a higher tribunal."[8] Human Rights Committee, General Comment No. 6, 16th Session, U.N. Doc. CCPR/C/21/Add.1, para. 7 (1982).

The Committee has also explained that the Covenant's guarantees of a "right to a fair and public hearing by a competent, independent and impartial tribunal established by law," apply "to all courts and tribunals . . . whether ordinary or specialized." Human Rights Committee, General Comment 13, Twenty-first Session, U.N. Doc. HRI/GEN/1/Rev.1, para. 1 (1994). Hence, while the Covenant does not expressly prohibit military or special courts, "nevertheless the conditions which it lays down clearly indicate that the trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in article 14." *Id.*, para. 4.

[8] These same core principles have been recognized in the mandate of the U.N. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions. The Special Rapporteur intervenes in circumstances where the death penalty is imposed in violation of international law, including where the death penalty is imposed retroactively, "the accused is denied his or her right to appeal or seek pardon or commutation of a death sentence," the "death sentence is imposed following a trial where international standards of impartiality, competence, objectivity and independence of the judiciary were not met," or where "[t]he legal system does not conform to minimum fair trial standards." Civil and Political Rights, Including Questions of: Disappearances and Summary Executions, U.N. Doc. E/CN.4/2002/74, paras. 8-9 (2002). Notably, the Special Rapporteur's mandate extends to all U.N. member states, irrespective of whether the state has ratified the Civil and Political Covenant.

As for the Covenant's requirement that the accused "have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing," the Committee has noted that the "facilities must include access to documents and other evidence which the accused requires to prepare his case, as well as the opportunity to engage and communicate with counsel," and that "[l]awyers should be able to counsel and to represent their clients in accordance with their established professional standards and judgement without any restrictions, influences, pressures or undue interference from any quarter." *Id.*, para. 9.

As one prominent commentator has noted, taken together, the Universal Declaration of Human Rights and the Civil and Political Covenant, are "strongly suggestive of the proposition that, not only is the right to life a treaty rule binding on parties to the relevant treaties, but also, like the prohibition against torture and other ill-treatment . . . it is a rule of general international law binding on all states." Nigel Rodley, *The Treatment of Prisoners Under International Law* 178 (2d ed. 1995). Further, "[i]t may safely be concluded that the Covenant imposes on states parties to it a requirement in capital cases for a fair trial," and that to the extent that the Covenant's guarantee of the right not to be arbitrarily deprived of life reflects general international law, "in light of the repeated statements of the General Assembly and other UN bodies, it may well be that the right to a fair trial in capital

cases is one that must be respected by all states," regardless of whether they are parties to the Civil and Political Covenant.[9] *Id.* at 228-229.

B. The Norms against Extrajudicial Killing are also Recognized in Regional Human Rights Instruments.

Article 4 of the African Charter on Human and Peoples' Rights provides: "Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right."[10] Like the Civil and Political Covenant, the African Charter establishes basic fair trial rights. Article 7 provides every individual "the right to be presumed innocent until proved guilty by a competent court or tribunal"; "the right to be tried within a reasonable time by an impartial court or tribunal"; "the right to defence, including the right to be defended by counsel of his choice"; and "the right to an appeal to competent national organs." Further, the Charter provides that "[n]o one may be condemned for an act or omission which did not constitute a legally

[9] It obviously follows that a killing by the state without any judicial process violates the customary international law norm against extrajudicial killing. *See* Restatement (Third) of Foreign Relations Law of the United States §702, comments f and n; Human Rights Committee, *Vicente et al. v. Colombia*, Comm. No. 612/1995, para. 8.3 (1997); *Free Legal Assistance Group and Others v. Zaire*, African Comm'n on Hum. & Peoples' Rights, Comm. No. 25/89, 47/90, 56/91, 100/93, para. 43 (1995); I/A Court H.R., *Case of Myrna Mack Chang*, Judgment of Nov. 25, 2003, Series C, No. 101; *Khashiyev and Akayeva v. Russia*, nos. 57942/00 and 57945/00, 24 Feb. 2005, [2005] ECHR 132.

[10] African [Banjul] Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986.

punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed." *Id.*; *see also* African Commission, Resolution on the Right to Recourse and Fair Trial, ACHPR /Res.4(XI) (1992).

Similarly, Article 4 of the American Convention on Human Rights guarantees that the right to life "shall be protected by law" and that "[n]o one shall be arbitrarily deprived of his life."[11] Article 8 of the American Convention includes the following "minimum" fair-trial guarantees: "adequate time and means for the preparation of his defense"; the right "to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel"; and "the right to appeal the judgment to a higher court."

The European Convention on Human Rights stipulates in Article 2 that the right to life "shall be protected by law" and provides: "No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law."[12] Article 6 of the Convention provides corresponding fair-trial guarantees, which include the

[11] American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123, *entered into force* July 18, 1978.

[12] European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222, *entered into force* Sept. 3, 1953, as amended by Protocols Nos 3, 5, 8 and 11, *entered into force* Sept. 21, 1970, Dec. 20, 1971, Jan. 1, 1990, and Nov. 1, 1998 respectively.

following "minimum rights": the right "to have adequate time and facilities for the preparation of his defence"; the right "to defend himself in person or through legal assistance of his own choosing." Article 7 of the Convention adds that "[n]o one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."

III. The Prohibition on Extrajudicial Killing has Been Recognized and Enforced by Global and Regional Human Rights Tribunals.

A. The Norms against Extrajudicial Killing have been Adjudicated and Affirmed by the Human Rights Committee.

In the jurisprudence of the Human Rights Committee, the presence of core fair-trial standards determines whether an execution is, on the one hand, legitimate, or on the other hand, a violation of international law. Accordingly, the Human Rights Committee has found violations of the Civil and Political Covenant when a defendant was not allowed to meet confidentially with his lawyer of choice in order to prepare a defense. *Sirageva v. Uzbekistan*, Human Rights Committee, Comm. No. 907/2000, U.N. Doc. CCPR/C/85/D/907/2000 (2005). In *Marais v. Madagascar*, the Committee found that the accused was not provided with conditions that allowed him to exercise his right to counsel effectively when he was allowed only brief visits with his attorney and the attorney was harassed,

detained and expelled from Madagascar. Human Rights Committee, Comm. No. 49/1979, U.N. Doc. A/38/40 (1983).

The Committee has also found that trials that which are unduly delayed or with no right to appellate review violate the Civil and Political Covenant when they result in the imposition of the death penalty. Hence, in *Brown v. Jamaica*, the Committee concluded that undue delay in bringing a case in which the death penalty was imposed resulted in a violation of the Covenant. Human Rights Committee, Comm. No. 775/1997, U.N. Doc. CCPR/C/65/D/775/1997 (1999). In *Sirageva v. Uzbekistan*, the Committee found a violation of the Civil and Political Covenant when "no further appeal against the death sentence [was] possible" after a trial that had not complied with core fair-trial requirements. Human Rights Committee, Comm. No. 907/2000, U.N. Doc. CPR/C/85/D/907 /2000, para. 6.4 (2005). In *Cariboni v. Uruguay*, the defendant's fair-trial rights were violated when he was tried by the Uruguayan Supreme Military Tribunal, which lacked a sufficient appellate review mechanism. Human Rights Committee, Comm. No. 159/83), U.N. Doc. A/39/40 (1990). Similarly, in *Aliboeva v. Tajikistan*, a violation of Article 14(5) of the ICCPR occurred when the defendant could not appeal his sentence to a higher tribunal. Human Rights Committee, Comm. No. 985/2001, U.N.Doc. CCPR/C/85/D/985/2001 (2005).

The Committee's jurisprudence also recognizes the problems inherent to special tribunals. In *Polay Campos v. Peru*, the Committee found that Peruvian special tribunals contravened the Covenant because the anonymous judges could have been members of the military. Human Rights Committee, Comm. No. 577/1994, U.N. Doc. CCPR/C/61/D/577/1994 (1998).

B. The Norms against Extrajudicial Killing have also been Adjudicated and Affirmed by the Regional Human Rights Tribunals.

1. *The African Commission on Human and Peoples' Rights*

The core fair-trial right to an adequate defense has received extensive attention by the African Commission on Human and Peoples' Rights. The Commission has construed this right broadly, finding executions to be extrajudicial when they follow "summary and arbitrary trials." *Amnesty International and Others v. Sudan*, African Comm'n Hum. & Peoples' Rights, Comm. No. 48/90, 50/91, 52/91, 89/93 (1999). Indeed, when a tribunal does not meet the fair-trial guarantees of Article 7 of the African Charter, "any" death sentence that follows from that trial constitutes a violation of the African Charter. *See International Pen and Others (on behalf of Ken Saro-Wiwa, Jr.) v. Nigeria*, African Comm'n Hum. & Peoples' Rights, Comm. Nos. 137/94, 139/94, 154/96 and 161/97 (1998), para. 103 (finding a violation of the right to life when the death penalty was imposed after a trial that did not provide the protections necessary to a fair trial).

As for the right to counsel, the Commission has found violations when a court has so harassed the defense counsel that it interferes with his ability to represent his client. *See Constitutional Rights Project (on behalf of Lekwot) v. Nigeria*, African Comm'n Hum. & Peoples' Rights, Comm. No. 87/93 (1995) (finding a violation of Article 7 when counsel was harassed and intimidated to such a degree that he was forced to withdraw).

The African Commission has also found routinely that military and special tribunals fail to satisfy the African Charter's core fair-trial provisions. *See Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project v. Nigeria*, African Comm'n Hum. & Peoples' Rights, Comm. No. 218/98 (1998), para. 44 (holding that while "a military tribunal *per se* is not offensive to the rights in the Charter nor does it imply an unfair or unjust process," such a tribunal "must be subject to the same requirements of fairness, openness, and justice, independence, and due process as any other process"); *see also Constitutional Rights Project (on behalf of Akamu) v. Nigeria*, African Comm'n Hum. & Peoples' Rights, Comm. No. 60/91 (1995) (finding violations of Article 7 when tribunal was composed of persons belonging to the executive branch of government); *Constitutional Rights Project (on behalf of Lekwot) v. Nigeria*, African Comm'n Hum. & Peoples' Rights, Comm. No. 87/93 (1995) (same).

In addition, the Commission has also held that a death penalty defendant was deprived of his rights under the Charter when he was not permitted an appeal to a lawfully constituted court of higher jurisdiction. *See Civil Liberties Organisation*, Comm. No. 218/98. In another case, the Commission concluded that 24 defendants were denied their right to a fair trial under the African Charter when they were convicted by a military court and executed without being accorded the right to appeal to competent national organs. *Forum of Conscience v. Sierra Leone*, African Comm'n Human and Peoples' Rights, Comm. No. 223/98 (2000).

2. *The Inter-American Court of Human Rights and the Inter-American Commission*

The Inter-American Court of Human Rights routinely finds that military tribunals fail to guarantee necessary fair-trial rights. For example, in *Castillo Petruzzi et al. v. Peru*, the court found an infringement of those rights under the American Convention when the defendant, who was charged with treason, was tried in a military court. I/A Court H.R., Merits May 30, 1999, Ser. C, No. 52. The court found violations because, *inter alia*, the trial occurred on a military base, the military prosecuted the case before a military judge, and the military judge was anonymous. *Id.*

Castillo Petruzzi et al. also highlights the Inter-American Court's recognition of a defendant's right to present a proper defense. The accused's rights were violated because the defendant was denied the right to confer with his

attorneys in private, the defense attorneys did not have access to the case file until one day prior to the first ruling, and the "conditions under which the defense attorneys had to operate where wholly inadequate for a proper defense." *Id.*, para. 141, 221. In a similar case, *Loayza Tomayo*, violations of the American Convention were found when a Peruvian military court limited a defense attorney's power to "intervene in all stages of the proceeding" and denied him access to private meetings with the defendant. I/A Court H.R., Merits, Judgment of September 17, 1997, Ser. C, No. 33, para. 62.

The Inter-American Court on Human Rights has interpreted these and the other fair-trial guarantees enshrined in the American Convention in conjunction with that treaty's guarantee of the right to life. Accordingly, in its advisory opinion on *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, the court explained that imposing the death penalty without "rigorous enforcement of judicial guarantees" would result in the arbitrary deprivation of life. I/A Court H.R., Advisory Opinion OC-16/99 of October 1, 1999, Series A, No. 16, para. 136. In *Juan Humberto Sanchez v. Honduras*, the court again noted the relationship between fair trial rights and extrajudicial killing, finding that Sanchez's killing was "executed extra-legally by agents of the state, with the attendant violation of the right to a fair trial." I/A

Court H.R., Judgment of June 7, 2003, Series C, No. 99, para.125 (citation omitted).

The Inter-American Commission on Human Rights has come to similar conclusions regarding the particular importance of due process rights in the death-penalty context. In *Graham v. United States*, the Commission determined that an execution violated the right to life where it "lacked the juridical basis demanded by the strict standard of due process applicable in capital cases." I/A Court H.R., Merits Case 11.193, December 29, 2003, Report No. 97/03, para. 55. *See also* I/A Court H.R., *Hilaire, Constantine and Benjamin et al. v. Trinidad y Tobago*, Judgment of June 21, 2002, Series C, No. 94, para. 148 (opining that the "exceptionally serious and irreparable nature of the death penalty" makes strict adherence to fair trial "all the more important when human life is at stake").

3. *The European Court of Human Rights*

Like the African Commission and American Commission and Court, the European Court of Human Rights has found that special tribunals violate the European Convention because they lack independence and impartiality. It has taken particular issue with military influence over a trial's proceedings or outcome, or when military judges sit on a tribunal. In *Findlay v. United Kingdom*, the European Court explained that a trial must meet be free of "personal prejudice or bias" and "offer sufficient guarantees to exclude any legitimate doubt in this

respect." App. no. 22107/93, §73, 25 February 1997, ECHR 1997-I. The court further explained that impartiality may depend on the process of appointing the members of a trial, the length of their terms, including procedures that guarantee independence from "outside pressures," and the "appearance of independence." *Id.* In the *Findlay* case, all members of a court martial board were subordinate to the convening officer, several were directly subordinate to him, he had the power to ratify and adjust the sentence, and he could terminate the proceedings at any point before or during the trial. *Id.*, §76. The European Court concluded that this level of influence over the tribunal violated the core fair-trial guarantees of the European Convention because the military's ultimate authority to terminate the proceedings and adjust sentences made the tribunal subject to bias and prejudice, and neither the presence of a judge advocate nor the requirement that judges take an oath was a sufficient safeguard to permit a different conclusion. *Id.*, §78.

Several claims brought against Turkey further illustrate the European Court's recognition of the problems inherent in allowing special tribunals which include military judges to adjudicate claims. In *Incal v. Turkey*, the European Court held that the constitutionally-established National Security Court did not satisfy the Convention's requirement for a fair trial because the court included a military judge. App. no. 22678/93, 9 June 1998, ECHR 1998-IV. The military judge was directly accountable to the executive, was susceptible to military

discipline, and served a short term of office of four years. *Id.*, §67. In *Gerger v. Turkey*, the court similarly held that a National Security Court lacked the independence and impartiality necessary to provide the right to a fair trial required by the European Convention. App. no. 24919/94, 8 July 1999, [1999] ECHR 46.

CONCLUSION

As the survey of international sources in this brief shows, there is a customary international law rule against extrajudicial killing which is specific, universal and obligatory. Indeed, the rule of international law against extrajudicial killing is a *jus cogens* norm, meaning that it is "accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by subsequent norm of general international law having the same character." *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 714 (9th Cir. 1992) (quoting Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 332, 8 I.L.M. 679); *see also Sampson v. Federal Republic of Germany*, 250 F.3d 1145, 1149-1150 (7th Cir. 2001); *In re Estate of Ferdinand Marcos, Human Rights Litigation*, 25 F.3d 1467, 1475 (9th Cir. 1994). This well-defined customary international law prohibits the conduct plaintiffs alleged to be extrajudicial killing: executions accomplished through the use of a specially constituted military court which violated

fundamental judicial guarantees. Hence, the test for an actionable Alien Tort Statute claim articulated in *Sosa* was satisfied in this case.

Respectfully submitted,

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Dated: May 15, 2007

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