UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

KEN WIWA, et al., Plaintiffs, -against- SHELL PETROLEUM DEVELOPMENT COMPANY OF NIGERIA LIMITED, Defendant.	04 Civ. 2665 (KMW)(HBP)
ESTHER KIOBEL, et al., Plaintiffs, -against- ROYAL DUTCH PETROLEUM COMPANY, et al., Defendants.	02 Civ. 7618 (KMW)(HBP)

DEFENDANT SHELL PETROLEUM DEVELOPMENT COMPANY OF NIGERIA LIMITED'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION, MOTION FOR JUDGMENT ON THE PLEADINGS AND MOTION TO STRIKE

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Date: January 30, 2007

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DOCUMENTATION:

"Aribido Declaration" or "Aribido Decl." is the Declaration of Babatunde Aribido, dated January 25, 2007.

"Ex. __" is to the Exhibits to the Declaration of Rory O. Millson, dated January 30, 2007.

"Nigerian Gov't Ltr." is the letter from Chief Kanu G. Agabi, S.A.N. Attorney General and Minister of Justice of the Federal Republic of Nigeria, to United States Attorney General John Ashcroft, attached as Ex. 12 to the Millson Decl.".

"12/22/06 Conf. Tr." is the Transcript of the December 22, 2006 Status Conference before Magistrate Judge Pitman in Wiwa, et al. v. Shell Petroleum Development Company of Nigeria Limited, 04 Civ. 2665.

"8/20/04 Conf. Tr." is the Transcript of the August 20, 2004 Conference before Judge Wood in Wiwa, et al., v. Shell Petroleum Development Company of Nigeria Limited, 04 Civ. 2665.

"Stipulation" is the Stipulation and Order Regarding Fourth Amended Complaint, dated December 4, 2006 in Wiwa, et al., v. Royal Dutch Petroleum Co., et al., 96 Civ. 8386.

"Wiwa Pltfs.' Obj." is the Wiwa Plaintiffs' Opposition to Defendants' Objections to the August 15, 2005 Report and Recommendation on Defendants' Motion to Dismiss, dated September 28, 2005.

"Defs.' Partial Summ. Jdgmt. Mot." is the Memorandum of Law in Support of Defendants' Motion for Partial Summary Judgment, dated May 20, 2004.

STATUTES:

"ATS" refers to the Alien Tort Statute, 28 U.S.C. § 1350.

"TVPA" refers to the Torture Victim Protection Act, 28 U.S.C. § 1350, Note.

"N.Y. EPTL" refers to the New York Estate Powers & Trusts Law.

ENTITIES:

"SPDC" is defendant Shell Petroleum Development Company of Nigeria Limited.

"Royal Dutch" is Royal Dutch Petroleum Company.

"Shell Transport" is The "Shell" Transport and Trading Company, p.l.c.

"SITCO" is Shell International Trading Company.

"Shell Oil" is Shell Oil Company.

"SPI" is Shell Petroleum Inc.

COMPLAINTS:

"Wiwa complaint" or "Wiwa Compl." is the Complaint in Wiwa, et al. v. Shell Petroleum Development Company of Nigeria Limited, 04 Civ. 2665, filed April 5, 2004.

"Kiobel Amended complaint" or "Kiobel Am. Compl." is the First Amended Complaint in Kiobel, et al., v. Royal Dutch Petroleum Co., et al., 02 Civ. 7618, filed May 17, 2004.

"Wiwa v. Royal Dutch Orig. Compl." is the Original Complaint in Wiwa, et al., v. Royal Dutch Petroleum Co., et al., 96 Civ. 8386, filed November 8, 1996.

"Wiwa v. Royal Dutch First Am. Compl." is the First Amended Complaint in Wiwa, et al. v. Royal Dutch Petroleum Co., et al., 96 Civ. 8386, filed April 29, 1997.

RELATED CASES:

"Wiwa cases" are Wiwa, et al., v. Royal Dutch Petroleum Company, 96 Civ. 8386, and Wiwa, et al., v. Brian Anderson, 01 Civ. 1909.

"Kiobel case" is Kiobel, et al., v. Royal Dutch Petroleum Company, et al., 02 Civ. 7618.

"Wiwa I" is Wiwa v. Royal Dutch Petroleum Company, 226 F.3d 88 (2d Cir. 2000).

"Wiwa II" is Wiwa v. Royal Dutch Shell Petroleum Company, 2002 WL 319887 (S.D.N.Y. Feb. 28, 2002).

"Kiobel" is Kiobel v. Royal Dutch Petroleum Company, 456 F. Supp. 2d 457 (S.D.N.Y. 2006).

Preliminary Statement

In 2004, the Wiwa and Kiobel plaintiffs filed suit against SPDC on the same claims that have been pending in this Court since 1996. Those two belated complaints should be dismissed. This Court does not have jurisdiction over SPDC, a Nigerian corporation that does not conduct business in the United States. See Part I, infra. In any event, SPDC is entitled to judgment on the pleadings.[1] The Court has previously dismissed several of the claims; the remainder fail to survive the Supreme Court's decision in Sosa v. Alvarez-Machain, 542 U.S. 692 (2004), or fail to state a claim under the TVPA.[2] See Part II.A-C, infra. Moreover, plaintiffs' claims are time-barred (see Part II.D, infra) and plaintiffs lack standing to bring any third-party claims (see Part II.E, infra). Plaintiffs' claims are also barred by the Act of State of Doctrine and comity. See Part II.F, infra. And the Court should strike the concededly false Wiwa allegations. See Part III, infra.

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[1] For a listing of the bases upon which judgment on the pleadings should be granted on each count in plaintiffs' complaints, we have attached Exhibit A hereto.

[2] Plaintiffs assert that their "causes of action arise under" the ATS, the TVPA, "Customary international law", "the Common law of the United States of America" and five international treaties. See Wiwa Compl. ¶ 118; Kiobel Am. Comp. ¶¶ 89, 93, 97, 101, 106, 111, 115. In reality, plaintiffs assert claims arising under federal common law and claims arising under the TVPA. As the Supreme Court held in Sosa, claims do not arise under the ATS, but under federal common law. Thus, the "federal common law" claims constitute the ATS, "customary international law" and "Common law" claims. Moreover, this Court has previously stated that it does not interpret plaintiffs "to assert claims directly under these [five] treaties". Wiwa II, 2002 WL 319887, at *2 n.2. The Wiwa Plaintiffs also assert claims under "the common law of New York". See Wiwa Compl. ¶¶ 122, 126, 130, 134, 140, 150. Under standard conflict of law principles, plaintiffs obviously cannot state a claim under New York common law. See, e.g., White v. ABCO Eng'g Corp., 221 F.3d 293, 301 (2d Cir. 2000). And the Court will not have jurisdiction over any state law claims once the federal claims are dismissed because there is no diversity jurisdiction. Corporación Venezolana de Fomento v. Vintero Sales Corp., 629 F.2d 786, 789-90 (2d Cir. 1980).

Statement of Facts About Jurisdiction[3]

SPDC is a Nigerian corporation doing business in Nigeria. See Aribido Decl. ¶ 2. SPDC is the operator of a venture involving the Nigerian National Petroleum Corporation and two other Nigerian corporations, which is in the business of exploration and production of oil and gas in Nigeria. See id. ¶ 3. SPDC does not conduct any business in the United States. See id. ¶¶ 2-4. SPDC has not conducted activities covered by Landoil Res. Corp. v. Alexander & Alexander Servs., Inc., 918 F.2d 1039 (2d Cir. 1990), in the United States, including in the State of New York.[4] See Aribido Decl. ¶ 7. Plaintiffs do not allege to the contrary, although they allege that SPDC oil ends up in the United States. See Wiwa Compl. ¶ 19; see also Kiobel Am. Compl. ¶¶ 25, 30-31. Plaintiffs, however, do not allege that SPDC sells oil in the United States. Nor could they. SPDC does not sell oil in or to the United States. See Aribido Decl. ¶ 4. SPDC sells its equity share of crude oil produced in Nigeria to SITCO (or its successor) through direct arm's-length commercial sales transactions. See id. SPDC plays no part in determining to whom SITCO sells the crude oil or the location to which the crude oil is shipped. See id.; see also Defendants' Responses and Objections to All Plaintiffs' Requests for Admission, dated June 24, 2004, No. 23 (Ex. 5).[5]

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[3] "Matters outside the pleadings . . . may . . . be considered in resolving a motion to dismiss for lack of personal jurisdiction pursuant to Fed. R. Civ. P. 12(b)(2) without converting it into one for summary judgment." Bensusan Rest. Corp. v. King, 937 F. Supp. 295, 298 (S.D.N.Y. 1996).

[4] Courts have focused on whether the defendant (1) has an office, (2) solicits business, (3) has bank accounts or other property or (4) has employees or agents. See Landoil Res. Corp., 918 F.2d at 1043 (2d Cir. 1990).

[5] Indeed, plaintiffs found this out in discovery when they took the depositions of two former managing directors of SPDC. Brian Anderson testified:

When plaintiffs filed their complaints, Royal Dutch and Shell Transport together owned, either directly or indirectly, investments in the various affiliated companies known as the Royal Dutch/Shell Group of Companies, including SPDC and Shell Oil, a Delaware company. See id. ¶ 5; see also Wiwa I, 226 F.3d at 92. SPDC is a corporation separate and distinct from Royal Dutch and Shell Transport and the other companies in the Royal Dutch/Shell Group of Companies (including Shell Oil). See Aribido Decl. ¶ 6. SPDC has its own Board of Directors, who direct the business and affairs of SPDC; officers; capital, including operating capital; corporate structure; facilities; work forces; business records; bank accounts; tax returns; financial statements; budgets; and corporate reports. See id.

Plaintiffs have already taken 13 depositions of current or former SPDC employees.[6] In addition, approximately half of the documents produced in discovery

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> "Q. Does—did SPDC during the time that you were their Managing Director export—strike that. Did SPDC export its crude oil through SITCO?
> "A. It did.
> "Q. Did SPDC sell the crude to SITCO?
> "A. Yes." 2/13/03 Brian Anderson Tr. at 19:1-6 (Ex. 6).

And Sir Philip Watts testified:

> "Q. Did SITCO itself purchase the crude from SPDC?
>
> ***
>
> "A. As I said, to my knowledge, SITCO bought the crude and, when it left, they were the owners.
> "Q. Fine. They were not just brokers that were brokering SPDC's crude? They were the actual owners of the crude when it left? There's a difference.
> "A. There is a difference and, to my knowledge, they became the owner and, of course, they would sell it to whoever." 4/17/04 Sir Philip Watts Tr. at 189:16-190:10 (Ex. 7).

[6] Emeka Achebe (general manager relations); Brian Anderson (managing director); Olawale Animachaun (legal advisor and a 30(b)(6) witness for SPDC); T.M.G. Cloughy

came from the files of SPDC, and plaintiffs propounded requests for admission and interrogatories on SPDC's corporate structure and business.[7] Not even plaintiffs claim that most of this discovery (including on SPDC oil) gave them any argument that SPDC was subject to this Court's jurisdiction. Plaintiffs' counsel claim that "it wasn't until depositions from the earlier part of [2004] that we understood that SPDC came, or representatives of SPDC came regularly to the United States, to attend various oil company or oil industry meetings".[8] 8/20/04 Conf. Tr. at 4:4-9 (Ex. 11). However, that statement was false as it regards "regular" trips to the United States. This discovery showed only that a few former or current SPDC employees occasionally attended the annual conferences and exhibits of a few trade groups.[9]

(general manager of operations); Egbert Imomoh (deputy managing director); Dozie Okonkwo (manager for health, safety and environment, security and community affairs in the western division); Precious Omuku (director of external affairs); Joshua Udofia (deputy managing director); Osunde Osazee (human resources); Victor Oteri (security advisor); George Ukpong (corporate logistics manager); Philip Watts (managing director); and Nick Wood (communications advisor).

[7] See Defendants' Objections and Responses to (the Kiobel) Plaintiffs' First Set of Interrogatories, dated December 20, 2002, Nos. 5-6 (Ex. 2); Defendants' Objections and Responses to Information Requested (by the Wiwa Plaintiffs) Pursuant to Fed. R. Civ. P. 30(b)(6), dated September 3, 2003, Nos. 2-3, 5-6, 34 (Ex. 3); Defendants' Responses and Objections to Wiwa Plaintiffs' Requests for Admission, dated June 24, 2004, Nos. 1, 4 (Ex. 4); Defendants' Responses and Objections to All Plaintiffs' Requests for Admission, dated June 24, 2004, Nos. 23-25, 27, 58, 81, 83-85, 92, 101-10, 126 (Ex. 5).

[8] Although Wiwa counsel also told the Court that "representatives of SPDC came regularly to the United States . . . to deal specifically with the issues involved in the complaint" (8/20/04 Conf. Tr. at 4:4-9 (Ex. 11)), counsel subsequently have conceded that plaintiffs are not relying on specific jurisdiction. See 12/22/06 Conf. Tr. at 14:20-24, 15:8-16 (Ex. 1). The Kiobel complaint also deals solely with events in Nigeria and does not allege claims arising out of the transaction of business in the United States.

[9] SPDC employee Egbert Imomoh traveled to the United States almost yearly to attend the Offshore Technology Conference in Houston and the Society of Petroleum Engineers throughout the 1990s until his retirement in 2002. See 2/24/04 Egbert Imomoh Tr. at 196:3-198:22 (Ex. 8). He also attended a conference by the Corporate Counsel for Africa held in Houston in May 1999. See id. 211:9-212:22. SPDC employee George Ukpong attended the annual seminars and exhibitions of the American Society for

Argument

I. THE COURT LACKS PERSONAL JURISDICTION OVER SPDC

Because plaintiffs invoke general jurisdiction pursuant to Fed. R. Civ. P. Rule 4(k)(2), they must show that SPDC has "continuous and systematic general business contacts" with the United States in the aggregate sufficient to satisfy the constitutional due process requirements. See Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414-16 & nn. 8-9 (1984).[10] Plaintiffs cannot meet "the 'minimum contacts' inquiry and the 'reasonableness inquiry'". Metro. Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d 560, 567 (2d Cir.), cert. denied, 519 U.S. 1007 (1996).

The minimum contacts inquiry requires plaintiffs to demonstrate that SPDC's continuous and systematic general business contacts are "such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice". See Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). Plaintiffs have the burden of making a "prima facie showing" by pleading facts that, if true, are sufficient to demonstrate that the Court has jurisdiction. See Jazini v. Nissan Motor Co., Ltd., 148 F.3d 181, 184 (2d Cir. 1998); Bellepointe, Inc. v. Kohl's Dep't Stores, Inc., 975 F. Supp.

Industrial Security in the United States from approximately 1996/1997 through 2004. See 3/24/2004 George Ukpong Tr. at 308-09, 438-40 (Ex. 9). Former SPDC employee Victor Oteri attended the annual seminars and exhibitions of the American Society for Industrial Security in the United States from approximately 1988 to 1995, when he retired. See 1/19/05 Victor Oteri Tr. at 14:21-15:24, 124:8-129:6 (Ex. 10). Mr. Oteri attended a "short course in the National Crime Prevention Institute in the University of Louisville" sometime between 1987 and 1990 before becoming the Security Advisor for SPDC. Id. at 10:24-11:9, 12:12-20, 126:13-19.

[10] The Court must determine whether SPDC's total contacts with the United States as a whole are sufficient to confer jurisdiction over SPDC without offending due process. See Aerogroup Int'l, Inc. v. Marlboro Footworks, Ltd., 956 F. Supp. 427, 434 (S.D.N.Y.), aff'd, 1998 WL 169251 (Fed. Cir. 1998). The Court looks at only the contacts within a reasonable period before the suit was filed. See Metro. Life Ins. Co., 84 F.3d at 569-570.

562, 564 (S.D.N.Y. 1997). Following discovery, plaintiffs' showing must be factually supported by an averment of facts that, if credited by the trier of fact, would suffice to establish jurisdiction. See Ball v. Metallurgie Hoboken-Over-Pelt, S.A., 902 F.2d 194, 197 (2d Cir. 1990). Plaintiffs' jurisdictional allegations are insufficient under either test. See Part I.A, infra (Wiwa); Part I.B, infra (Kiobel). In any event, the exercise of jurisdiction over SPDC would be unreasonable. See Part I.C, infra.

A. The *Wiwa* Plaintiffs Fail to Allege Sufficient Forum Contacts[11]

1. Allegations Regarding SPDC Employee Visits Are Insufficient

SPDC's business is the exploration and production of oil in Nigeria; SPDC does not regularly conduct business in the United States. See Aribido Decl. ¶¶ 2,7. Moreover, the few visits to the United States by SPDC personnel are insufficient to establish the continuous and systematic general business contacts necessary to satisfy the minimum contacts inquiry. See Landoil Res. Corp., 918 F.2d at 1045-46 (13 business trips made by the defendant's employees, which were of short duration, made by different employees, and "occurred sporadically over a period of eighteen months" insufficient to establish a systematic and continuous presence in the forum). Further,

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[11] The Wiwa plaintiffs make only the following "jurisdictional" allegations against SPDC:

- "[A]t all times herein material, Defendant's employees and agents came to the United States as part of the conduct of Defendant's business and also specifically in connection with its campaign against Ken Saro-Wiwa and MOSOP." Wiwa Compl. ¶ 20.
- "Large quantities of the oil produced through the operation of defendant SPDC was and is presently imported into the United States." Wiwa Compl. ¶ 19.
- "SPDC operates as part of the Royal Dutch/Shell Group. [Royal Dutch and Shell Transport] wholly own[] Shell Petroleum, Inc., . . . which in turn wholly owns Shell Oil Company . . . , a corporation incorporated in Delaware with offices in Houston, Texas, and doing business in New York, New York." Wiwa Compl. ¶ 21.

attendance at trade shows is not the conduct of SPDC business. Even if it were, "[o]ccasional visits by [a defendant] to [forum] trade shows . . . are not sufficient contacts to support jurisdiction". Loria & Weinhaus, Inc. v. H.R. Kaminsky & Sons, Inc., 495 F. Supp. 253, 257 (S.D.N.Y. 1980); see also Helicopteros Nacionales de Colombia, S.A., 466 U.S. at 418.[12]

2. SPDC's Sale of Oil in Nigeria Does Not Confer Jurisdiction

The Wiwa plaintiffs chose not to sue SPDC in 1996, even though they alleged that a large percentage of SPDC oil was imported into the United States. See Wiwa v. Royal Dutch Orig. Compl. ¶¶ 29-30. Plaintiffs' counsel did not believe that SPDC's sale of oil could form the basis of jurisdiction; indeed, they stated in the Hearing on August 20, 2004, that they "initially didn't bring a claim against SPDC because [they] didn't believe there was personal jurisdiction over SPDC". 8/20/04 Conf. Tr. at 4:2-4 (Ex. 11). That conclusion was right. SPDC sells its oil in Nigeria to SITCO, which determines, without any input from SPDC, to whom that oil is sold.[13]

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[12] See also Jacobs v. Felix Bloch Erben Verlag Fur Buhne Film und Funk KG, 160 F. Supp. 2d 722, 731-34 (S.D.N.Y. 2001) (defendants' "viewing theater productions, negotiating for rights to plays, casting and hiring talent for their productions in Germany, and purchasing supplies" insufficient); PHLCORP, Inc. v. Wichita Mortg. Corp., 1991 WL 12328, at *3 (S.D.N.Y. Jan. 18, 1991) (ten business trips in 14-month period by defendant's vice-presidents insufficient).

[13] The fact that oil produced and sold by SPDC in Nigeria may eventually end up in the United States is an insufficient basis for general jurisdiction. See Oceanic Exploration Co. v. ConocoPhilips, Inc., 2006 WL 2711527, at *14 (D.D.C. Sept. 21, 2006) (under a Rule 4(k)(2) analysis, unsubstantiated allegation that oil from foreign defendants' oil production activities in the Timor Sea is sold to the United States is an insufficient basis for exercising jurisdiction over defendants with little or no connection to the United States); see generally Jazini, 148 F.3d at 184 (foreign car manufacturer is not "present" in New York simply by virtue of the fact that it sells cars through a New York distributor); Loria & Weinhaus, Inc., 495 F. Supp. at 257 ("The mere shipment of goods into New York does not constitute 'doing business'.").

3. SPDC Is Not Subject to Jurisdiction Through the Forum Contacts of Other Entities

Shell Oil is irrelevant to SPDC's forum contacts. "By itself, 'the presence of a local corporation does not create jurisdiction over a related, but independently managed foreign corporation'." Giar v. Centea, 2003 WL 1900836, at *1 (S.D.N.Y. Apr. 16, 2003). Instead, the local corporation must be either a "mere department"[14] or an "agent"[15] of the foreign defendant. See Jazini, 148 F.3d at 184. In Jazini, the Court of Appeals held that the plaintiffs' conclusory allegations that a U.S.-based distributor of the defendant foreign car manufacturer was an "agent" or a "mere department" of the latter "does not constitute a prima facie showing of agency" and "lacked the factual specificity necessary" to meet their burden on the "mere department" theory. Id. at 184-85. Here, the Wiwa plaintiffs do not allege any facts supporting the allegations that Shell Oil, Royal Dutch or Shell Transport is a "mere department" or an "agent" of SPDC. In addition, these conclusory allegations are false. See Aribido Decl. ¶ 6. SPDC is separate and independent from Shell Oil. See id. Thus, jurisdiction does not, and cannot, exist over SPDC on either a "mere department" or "agency" theory. See Mareno v. Rowe, 910 F.2d 1043, 1046 (2d Cir. 1990). Indeed, the Wiwa plaintiffs included this allegation in

[14] To determine whether a subsidiary is a "mere department", courts consider (1) whether the parent and subsidiary have common ownership; (2) the degree of the subsidiary's financial dependence on the parent; (3) the degree to which the parent interferes in the selection and assignment of the subsidiary's executive personnel and fails to observe corporate formalities; and (4) the degree of control the parent exercises over the subsidiary's marketing and operational policies. See Jazini, 148 F.3d at 184-85.

[15] A plaintiff must allege that the agent took actions for the benefit of and with the knowledge and consent of the defendant and that the defendant exercised some element of control over the agent. See H. Heller & Co., Inc. v. Novacar Chems. Ltd., 726 F. Supp. 49, 55-56 (S.D.N.Y.), aff'd, 875 F.2d 856 (2d Cir. 1989).

their original complaint, yet they "did not believe there was jurisdiction over SPDC". 8/20/04 Conf. Tr. at 4:2-4 (Ex. 11).

B. The *Kiobel* Plaintiffs Fail to Allege Sufficient Forum Contacts[16]

The Kiobel plaintiffs' allegations regarding the sale of oil (¶¶ 25, 30-31) and other entities being a "mere department" or an "agent" of SPDC (id. ¶¶ 23-25) fail for the same reasons. Indeed, the Kiobel plaintiffs included these allegations in their complaint filed in September 20, 2002, yet they did not then sue SPDC.

C. The Exercise of Jurisdiction Over SPDC Would Be Unreasonable

Even if plaintiffs could show—which they cannot—that SPDC had continuous and systematic contacts, the "exercise of personal jurisdiction would be decidedly unreasonable".[17] Metro. Life Ins. Co., 84 F.3d at 575. The five factors for determining "reasonableness" under Metropolitan Life Insurance Co. v. Robertson-Ceco Corp. weigh in favor of dismissal.

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[16] The Kiobel plaintiffs make only the following "jurisdictional" allegations against SPDC:

- "Since operations began in Nigeria in 1958, [Royal Dutch and Shell Transport] ha[ve] dominated and controlled SPDC." Kiobel Am. Compl. ¶ 25.
- "SPDC is responsible for approximately one-half of Nigeria's total oil output"; "Nigeria produces approximately 1.7 to 1.8 million barrels per day of oil. Approximately 90% of this yield is produced in the area of the Niger Delta, which includes Ogoniland"; and "[a]pproximately 40% of Nigeria's oil production is exported to the United States." Kiobel Am. Compl. ¶¶ 25, 30, 31.

[17] The "reasonableness" component asks whether, despite a showing of minimum contacts, "some other considerations would render jurisdiction unreasonable". Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477 (1985). "The weaker the plaintiff's showing [on minimum contacts], the less a defendant need show in terms of unreasonableness to defeat jurisdiction." Ticketmaster-New York, Inc. v. Alioto, 26 F.3d 201, 210 (1st Cir. 1994) (cited with approval in Metro. Life. Ins. Co., 84 F.3d at 569).

First, the burden on SPDC to litigate in this forum is great because it is a Nigerian company with no forum contacts. SPDC operates only in Nigeria, has no physical presence in or connections with this forum, and has not previously litigated in this forum. Accordingly, this factor, which is accorded significant weight in this analysis, weighs in favor of dismissal. See Asahi Metal Indus. Co., Ltd. v. Superior Court, 480 U.S. 102, 114 (1987).

Second, the forum has no particular interest in the dispute. This case will not confer any benefit upon forum citizens as a whole. The Supreme Court has recognized that where the litigation has little, if any, practical import to the citizens of the forum, this factor weighs in favor of dismissal. See Asahi, 480 U.S. at 114-15.

Third, in evaluating how the plaintiff's interest in obtaining relief was furthered by its choice of forum, the Court of Appeals in Metro. Life Ins. Co. focused on whether the plaintiff was a citizen and whether "any witnesses or other evidence [was] more convenient to [the] forum". 84 F.3d at 574. Here, only one out of the twenty-two plaintiffs is alleged to be a citizen of the United States,[18] while the convenience of the witnesses clearly does not favor the United States.

Fourth, the interstate judicial system's interest in obtaining the most efficient resolution of a controversy weighs in favor of dismissal. "In evaluating this factor, courts generally consider where witnesses and evidence are likely to be located." Metro. Life Ins. Co., 84 F.3d at 574. Indeed, "[t]he site where the injury occurred and where the evidence is located usually will be the most efficient forum." Amoco Egypt

[18] Twelve others reside in, but are not citizens of, the United States. See Kiobel Am. Compl. ¶¶ 6-17. The remaining nine plaintiffs are citizens and residents of other countries. See Wiwa Compl. ¶¶ 7-16.

Oil Co. v. Leonis Nav. Co., Inc., 1 F.3d 848, 852 (9th Cir. 1993). Plaintiffs have identified no one with personal knowledge of the material allegations in the complaint, let alone anyone with such knowledge in the United States. Defense witnesses are located outside the United States.

Fifth, in considering the advancement of substantive policies, courts must "consider the procedural and substantive policies of other nations whose interests are affected by the assertion of jurisdiction" in the forum. Asahi, 480 U.S. at 115. Moreover, when "the defendant is from a foreign nation rather than another state, the sovereignty barrier is higher and undermines the reasonableness of personal jurisdiction". Amoco Egypt Oil Co., 1 F.3d at 852 (holding "international context" of dispute between two foreign corporations relating to an accident in Egyptian waters "militates" in favor of dismissal). Indeed, the Nigerian Government has previously stated that this litigation could place "under strain the cordial relations that exist with the Government of the United States of America". See Nigerian Gov't Ltr. (Ex. 12).

II. THE COURT SHOULD ENTER JUDGMENT ON THE PLEADINGS

A. The Court Should Enter Judgment on the Previously Dismissed Claims

This Court previously dismissed counts I, V, VI and VII of the Kiobel complaint, holding that they are not cognizable claims under Sosa. See Kiobel, 456 F. Supp. 2d at 465-67. SPDC is entitled to judgment on the pleadings on those same counts in the Kiobel complaint against it. Moreover, the Court should dismiss Wiwa counts I and VI on the same reasoning. Because the Court held that it was "unpersuaded that there is a well-defined customary international law that prohibits the conduct [the Kiobel] Plaintiffs allege to be extrajudicial killing" (Kiobel, 456 F. Supp. 2d at 465), judgment on the pleadings should be granted for SPDC on Wiwa count I. Likewise, since the Court

held that "[t]here is no particular or universal understanding of the civil and political rights covered by [the Kiobel] Plaintiffs' claims, and thus, pursuant to Sosa, these 'rights' are not actionable under the ATS" (Kiobel, 456 F. Supp. 2d at 467), judgment on the pleadings should be granted for SPDC on Wiwa count VI.

B. Plaintiffs' Remaining Federal Common Law Claims Fail Under *Sosa*[19]

Plaintiffs' remaining claims (Wiwa counts II, III, IV and V and Kiobel counts II, III and IV) are not cognizable under Sosa because they do not rest on a norm that is universally accepted and defined with a specificity comparable to Blackstone's three paradigmatic international law violations. See Sosa, 542 U.S. at 724-25.[20]

[19] This Court has previously held that Kiobel counts II, III and IV survive Sosa. See Kiobel, 456 F. Supp. 2d at 465 & n.11, 466-67. This ruling is on appeal to the Court of Appeals. Moreover, when the Court denied the motion to dismiss with "respect to [the Kiobel] Plaintiffs' claim for torture" (count III), it did not address whether a claim for cruel, inhuman and degrading treatment survived Sosa. 456. F. Supp. 2d at 465 n.11. Kiobel count III is discussed further in Parts II.B.1 and II.B.2, infra.

[20] Plaintiffs' claims "are essentially claims for secondary liability". Kiobel, 456 F. Supp. 2d at 463. Such claims lack the specificity required by Sosa. There is no clear, specific norm under international law to support civil aiding and abetting liability with the specificity and "restrained conception" required by Sosa. See In re South African Apartheid Litig., 346 F. Supp. 2d 538, 549-50 (S.D.N.Y. 2004) (holding "aiding and abetting international law violations" are not violations of the law of nations); Doe I v. Exxon Mobil Corp., 393 F. Supp. 2d 20, 26 (D.D.C. 2005) (holding "liability for 'aiding and abetting' violations of international law [is] not itself actionable under the Alien Tort Statute"). The historical and substantive uncertainty of civil accessorial liability as recognized by the Supreme Court in Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 181-82, 188 (2004) precludes reliance on the federal common law to state a cause of action for aiding and abetting liability for claims brought by way of the ATS. SPDC recognizes that in what was characterized as "a close question", this Court has already held that "where a cause of action for violation of an international norm is viable under the ATS, claims for aiding and abetting that violation are viable as well". Kiobel, 456 F. Supp. at 463-64. This ruling is on appeal to the Court of Appeals.

1. *Wiwa* Count IV and *Kiobel* Count III ("Cruel, Inhuman and Degrading Treatment")

The Court has recognized "the lack of clarity concerning the status of claims for 'cruel, inhuman, or degrading treatment' under the [ATS]". Wiwa II, 2002 WL 319887, at *8. Sosa does not permit such "lack of clarity".[21] 542 U.S. at 724-25. Even before Sosa, there was no "evidence of universal consensus regarding the right to be free from cruel, inhuman and degrading treatment" and "lacking the requisite elements of universality and definability, this proposed tort cannot qualify as a violation of the law of nations". Forti v. Suarez-Mason, 672 F. Supp. 1531, 1543 (N.D. Cal. 1987). This is not a close question after Sosa. See Aldana v. Del Monte Fresh Produce, N.A., Inc., 416 F.3d 1242, 1247 (11 Cir. 2005) (finding "no basis in law to recognize Plaintiffs' claim for cruel, inhuman, degrading treatment or punishment" under Sosa).

[21] The materials referred to by the Court with respect to the cruel, inhuman or degrading treatment claims (Wiwa II, 2002 WL 319887 at *7-9) have been found not to be appropriate sources for determining the scope of international law claims in Sosa. 542 U.S. at 734. Thus, the Universal Declaration of Human Rights "does not of its own force impose obligations as a matter of international law", and the International Covenant on Civil and Political Rights was ratified by the United States "on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts". Id. Similarly, Article 16 of the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment, upon which the Court also relied (see Wiwa II, 2002 WL 319887, at *7), is not self-executing, and thus did not itself create obligations enforceable in the federal courts. See 136 Cong. Rec. S17486-01; Sosa, 542 U.S. at 728.

2. *Wiwa* Count III and *Kiobel* Count III ("Torture")[22]

Wiwa count III and Kiobel count III fail because plaintiffs do not allege that the acts were "perpetrated in the course of genocide or war crimes". See Kadic v. Karadzic, 70 F.3d 232, 243 (2d Cir. 1995) ("[T]orture and summary execution—when not perpetrated in the course of genocide or war crimes—are proscribed by international law only when committed by state officials or under color of law."). Not only is SPDC a private actor, but after Sosa, SPDC cannot be held liable under a "joint action" or "color of law" analysis. See Doe I, 393 F. Supp. 2d at 26.

3. *Wiwa* Count II and *Kiobel* Count II ("Crimes Against Humanity")

Wiwa count II and Kiobel count II, which are compilations of the same alleged acts that form the basis for plaintiffs' other claims, lack the specific and definite content required under Sosa. 542 U.S. at 724-25. Moreover, these claims should be dismissed because plaintiffs do not allege competent sources to support such claims. See Abdullahi v. Pfizer, Inc., 2005 WL 1870811, at *11 (S.D.N.Y. Aug. 9, 2005).[23]

4. *Wiwa* Count V and *Kiobel* Count IV ("Arbitrary Arrest And Detention")

Sosa held that any viable claim for arbitrary arrest and detention would require at a minimum a "state policy" of "prolonged" detentions and recognized that it

[22] The TVPA preempts Wiwa count III and Kiobel count III. See Enaharo v. Abubakar, 408 F.3d 877, 884-85 (7th Cir. 2005) (holding that the TVPA "occup[ies] the field" for claims for torture and extrajudicial killing and recognizing that "[i]f it did not, [the TVPA] would be meaningless"). SPDC recognizes that the Court has previously held that these claims are not preempted. Kiobel, 456 F. Supp. at 465 n.10. This ruling is also on appeal to the Court of Appeals. The same argument applies to the Kiobel plaintiffs' dismissed count I and the Wiwa plaintiffs' count I.

[23] Plaintiffs' reliance on the Nuremberg Military Tribunals and the International Criminal Tribunal for the Former Yugoslavia (Wiwa Pltfs.' Obj. at 8-10) is unavailing. Under Flores v. Southern Peru Copper Corp., 414 F.3d 233, 263-64 (2d Cir. 2003), decisions from international tribunals are not competent sources for international law.

may be difficult to identify which detention policies are unlawful "with the certainty afforded by Blackstone's three common law offenses". Sosa, 542 U.S. at 737. Absent such certainty, Sosa prohibits a federal court from recognizing claims for arbitrary arrest and detention. Indeed, the plaintiffs' definitions of "arbitrary arrest and detention" are more generalized than the one rejected in Sosa. Id. at 736. And plaintiffs have not provided any basis to determine whether the alleged "arbitrary detentions are so bad that those who enforce them become enemies of the human race" (id. at 737) and their allegations do not establish a "state policy" of "prolonged" detentions.[24]

C. Judgment Is Appropriate on *Wiwa* Counts I and III Under the TVPA

The TVPA provides a cause of action against an "individual who . . . (1) subjects an individual to torture . . . or (2) subjects an individual to extrajudicial killing . . .". TVPA § 2(a). Corporations are not proper defendants under the TVPA.[25] Thus, SPDC, a corporation, is entitled to judgment on the TVPA claims.

D. Plaintiffs' Claims Are Time-Barred

"A cause of action accrues when a plaintiff knows or has reason to know the injury upon which the claim is premised." Merchant v. Levy, 92 F.3d 51, 56 (2d Cir.), cert. denied, 519 U.S. 1108 (1997). This Court has previously held that "plaintiffs'

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[24] Most plaintiffs allege that they were arrested or detained only once. With the exception of Ken-Saro Wiwa, Dr. Barinem Kiobel, Michael Tema Vizor, Felix Nuate, and Clement Tusima, who were charged with complicity in the murder of four Ogoni leaders, no plaintiff alleges a detention of more than two months. Kiobel Am. Compl. ¶¶ 6(b), 7-8, 10-14, 15, 17; Wiwa Compl. ¶¶ 2-3, 51, 62, 66, 70, 78-80, 82, 86, 95.

[25] See In re Terrorist Attacks on Sept. 11, 2001, 349 F. Supp. 2d 765, 828 (S.D.N.Y. 2005) ("Only individuals may be sued under the TVPA."); Mujica v. Occidental Petroleum Corp., 381 F. Supp. 2d 1164, 1176 (C.D. Cal. 2005) ("[C]orporations are not 'individuals' under the TVPA based on its reading of the plain language of the statute."). Indeed, the Wiwa plaintiffs previously dropped the TVPA in their First Amended Complaint against Royal Dutch and Shell Transport. Compare Wiwa v. Royal Dutch Orig. Compl. ¶¶ 95, 103 with Wiwa v. Royal Dutch First Am. Compl. ¶¶ 102, 110.

[ATS] claims" are subject to a ten-year statute of limitations. See Wiwa II, 2002 WL 319887, at *18-19. Even if a ten-year statute of limitations were applicable to such claims after Sosa,[26] all the claims of Wiwa plaintiffs Karalolo Kogbara and James N-nah (including those purportedly brought "on behalf of" Uebari N-nah) are time-barred.[27]

E. Plaintiffs Lack Standing to Bring Third-Party Claims

Nine plaintiffs purport to bring third-party claims on behalf of a decedent.[28] Because these plaintiffs have not alleged that they are administrators of a decedent's estate, as required to maintain third-party claims, they lack standing.[29]

There is no federal statutory standing provision for plaintiffs' third-party claims arising under federal common law. Consequently, the Court looks to analogous

[26] Sosa undermined the application of the TVPA's statute of limitations to plaintiffs' claims brought by way of the ATS. Pursuant to Sosa, plaintiffs' claims arise under federal common law, not the ATS. See Sosa, 542 U.S. at 713-14, 724-25. Thus, the narrow exception by which courts applied the TVPA's limitations period is no longer applicable. There are no national policies that would be frustrated by the application of "the most closely analogous statute of limitations under state law". See generally DelCostello v. Int'l Bhd. of Teamsters, 462 U.S. 151, 158, 172 (1983). The most analogous state limitations period here is New York's one-year limitations period for actions for assault, battery and false imprisonment, or the three-year limitations period for other personal injuries. See N.Y. C.P.L.R. §§ 214(5); 215; see also N.Y. C.P.L.R. § 210 (one-year limitations period for claims brought in a representative capacity). Therefore, all plaintiffs' claims brought under the federal common law are time-barred because they do not allege acts within three years of 2004. See Wiwa Compl. ¶¶ 1, 7, 69, 85, 102, 103; Kiobel Am. Compl. ¶ 7.

[27] Karalolo Kogbara, James N-nah and Uebari N-nah do not allege any events giving rise to their claims subsequent to November 1993. See Wiwa Compl. ¶¶ 3, 49, 61, 62. The complaints against SPDC were filed in 2004.

[28] Plaintiffs do not allege that they are the administrators or executors of a decedent's estate. Ken Wiwa Jr., Blessing Kpuinen, Lucky Doobee, Friday Nuate, Monday Gbokoo and James N-nah purport to bring claims "on behalf of" a decedent. See Wiwa Compl. ¶¶ 7, 9, 12, 13, 14, 16. David Kiobel purports to bring claims "on behalf of" siblings and a decedent. See id. ¶ 15. Esther Kiobel and Kpobari Tusima purport to bring claims "on behalf of" a decedent. See Kiobel Am. Compl. ¶¶ 6, 17.

[29] Royal Dutch, Shell Transport and Brian Anderson have moved for partial summary judgment on this issue in the Wiwa cases and the Kiobel case. See Defs.' Partial Summ. Jdgmt. Mot.

state law on who may sue (unless application of that state law would defeat the purpose of the federal statute at issue or there is a special need for uniformity). See, e.g., Beanal v. Freeport-McMoRan, Inc., 969 F. Supp. 362, 368 (E.D. La.), aff'd, 197 F.3d 161 (5th Cir. 1999). Therefore, the plaintiffs can only assert third-party federal common law claims only if they can bring a claim under New York's wrongful death statute (as the most analogous state law). This Court has held that a wrongful death claim "may only be brought by the personal representative of a decedent who has received letters of administration". Report and Recommendation, dated March 31, 2006, at 16, adopted by the District Court in its Opinion and Order, dated September 29, 2006, at 3; see also N.Y. EPTL § 5-4.1(1) (2006). Because the plaintiffs purporting to bring third-party claims are not administrators, they do not satisfy this personal representative requirement.[30]

Plaintiffs have argued previously that the Court should consider standing under Nigerian Law. Plaintiffs are wrong. Plaintiffs' cases have erroneously looked at standing under the ATS rather than the federal common law as the basis for their claims. See, e.g., Bowoto v. Chevron Corp., 2006 WL 2455761, at *11 (N.D. Cal. Aug. 22, 2006); Doe v. Rafael Saravia, 348 F. Supp. 2d 1112, 1145-46 (E.D. Cal. 2004). The ATS does not create any cause of action. Sosa, 542 U.S. at 713-14. Moreover, because reliance on foreign standing principles would result in inconsistent results, the Court

[30] Although the Wiwa plaintiffs now claim that one plaintiff, Blessing Kpuinen, will receive limited letters of administration for the estate of her late husband (see Reply Memorandum in Support of Plaintiffs' Motion to Amend Complaint in Wiwa v. Royal Dutch Petroleum Co., 96 Civ. 8386, at 4 & n.1), that is irrelevant. Plaintiffs had to have standing, at the latest, in 2004 when this case was commenced, based upon "factually inaccurate allegations". See Carrick v. Cent. Gen. Hosp., 51 N.Y.2d 242, 249-50 n.2 (Ct. App. 1980) ("It is well established that the existence of a qualified administrator is essential to the maintenance of the [wrongful death] action and that the statutory right to recover does not even arise until an administrator has been named through the issuance of letters of administration.") (citing cases).

should apply New York law's "personal representative" requirement. Here, Esther Kiobel and David Kiobel both purport to sue "on behalf of" Dr. Barinem Kiobel, Esther Kiobel in the Kiobel case and David Kiobel in the Wiwa case. Although plaintiffs have not provided any basis for deciding who may bring such third-party claims, New York law does provide an answer—only Dr. Barinem Kiobel's "personal representative" may sue. And no such suit has been filed.

Similarly, plaintiffs cannot establish standing under the TVPA,[31] which gives standing to only (i) a decedent's "legal representative" and (ii) "any person who may be a claimant in an action brought for wrongful death". TVPA § 2(a)(2). A "legal representative" is "the executor or executrix of the decedent's estate". S. Rep. No. 102-249 (1991), at 7; see also Xuncax v. Gramajo, 886 F. Supp. 162, 191 (D. Mass 1995). And the term "any person who may be a claimant in an action for wrongful death" includes only those people who are entitled to bring a state wrongful death action. See, e.g., Estate of Cabello v. Fernandez-Larios, 157 F. Supp. 2d 1345, 1356-57 (S.D. Fla. 2001) (relatives of decedents who could not commence a wrongful death action under state law did not have standing to sue under the TVPA); see also H.R. Rep. No. 102-367, at 4 (1991) ("Courts may look to state law for guidance as to which parties would be proper wrongful death claimants."). The plaintiffs bringing third-party TVPA claims cannot satisfy either of these requirements.

[31] Wiwa plaintiffs Ken Wiwa, Blessing Kpuinen, Lucky Doobee, Friday Nuate, Monday Gbokoo, David Kiobel, and Uebari N-nah assert TVPA claims in counts I and III. See Wiwa Compl. ¶¶ 120-123, 128-131.

F. The Complaints Should Be Dismissed Pursuant to the Act of State Doctrine and International Comity[32]

The act of state doctrine "precludes the courts of this country from inquiring into the validity of the public acts of a recognized foreign sovereign power committed within its own territory". Wiwa II, 2002 WL 319887, at *28 (citing Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 401 (1964)). The Court should also "consider whether resolution of the case will 'likely impact on international relations' or 'embarrass or hinder the executive in the realm of foreign relations'". Id. (quoting Allied Bank Int'l v. Banco Credito Aaicola de Cartago, 757 F.2d 516, 520-21 (2d Cir. 1985)). Considerations of international comity counsel deference to acts or official proceedings of another nation "whenever a court's decision will have ramifications beyond its territorial jurisdiction and into that of another nation". United Feature Syndicate, Inc. v. Miller Features Syndicate, Inc., 216 F. Supp. 2d 198, 209 (S.D.N.Y. 2002).

By challenging the legality of the Nigerian Government's arrest, detention, trial, sentencing and execution of Ken Saro-Wiwa and others before the Ogoni Civil Disturbances Special Tribunal as well as acts by the Nigerian Government, plaintiffs challenge the administration of criminal justice and the exercise of police and military power by a foreign sovereign. Those are quintessentially sovereign functions to which the courts of this country owe deference, regardless of whether those functions were lawfully exercised. See Sabbatino, 376 U.S. at 431 (stating that "the act of state doctrine is applicable even if international law has been violated"). Moreover, because

[32] SPDC recognizes that this Court has already rejected those arguments. See Kiobel, 456 F. Supp. 2d at 459; Wiwa II, 2002 WL 319887, at *27-28. SPDC wishes to preserve the arguments for appeal.

plaintiffs' claims regarding summary execution/extrajudicial killing require this Court to pass judgment on the validity of the trials of Ken Saro-Wiwa and others, adjudication of those claims would require the Court to invalidate a Nigerian statute.[33] This is expressly prohibited by the act of state doctrine. See Braka v. Bancomer, S.A., 589 F. Supp. 1465, 1470 (S.D.N.Y.), aff'd, 762 F.2d 222 (2d Cir. 1985) ("[T]he act of state doctrine shields the foreign sovereign's internal laws from intrusive scrutiny").

Indeed, the Nigerian Government has stated that proceedings in this Court will "definitely jeopardize" Nigeria's ongoing reconciliation process with the Ogoni people because continued adjudication in this Court will "adversely impact" the Nigerian Government's ability "to find a peaceful and satisfactory solution" to the problems of all Nigeria's ethnic groups, including the Ogoni. See Nigerian Gov't Ltr. (Ex. 12). In fact, if an American court were to pass judgment on the validity of Nigeria's response to the events alleged in the complaint, which occurred wholly within its own borders, this would hinder U.S.-Nigeria relations. See Bi v. Union Carbide Chems. and Plastics Co., Inc., 984 F.2d 582, 586 (2d Cir.), cert. denied, 510 U.S. 862 (1993) (recognizing that if the court were to "pass judgment on the validity of India's response to a disaster that

[33] Section 1(2) of the Federal Military Government (Supremacy and Enforcement of Powers) Decree 1994 provides that "no civil proceedings" shall lie or be instituted "on account of or in respect of any act, matter or thing done or purported to be done under or pursuant to any Decree or Edict". Federal Military Government (Supremacy and Enforcement of Powers) Decree 1994, Sec. 1(2). This lawsuit, which challenges proceedings before the Special Tribunal, squarely falls within the ambit of civil proceedings prohibited by Section 1(2) because the Special Tribunal was created by, and took all of its actions pursuant to, the Civil Disturbances (Special Tribunal) Decree No. 2 of 1987. Because this lawsuit was instituted "on account of or in respect of any act, matter or thing done . . . under or pursuant to any Decree or Edict", the Court must either dismiss this lawsuit pursuant to Section 1(2) or proceed with the lawsuit and invalidate Section 1(2), an outcome that the act of state and international comity doctrines prohibit. To the extent Section 1(2) is construed to abrogate plaintiffs' (or other Nigerian citizens') civil rights (see, e.g., Kiobel Am. Compl. ¶ 6(b); Wiwa Compl. ¶ 87), this Court should not be the entity to invalidate that statute.

occurred within its borders, it would disrupt our relations with that country"). The Nigerian Government has said that it "considers these proceedings as capable of gravely undermining its sovereignty and placing under strain the cordial relations that exist with the Government of the United States of America". See Nigerian Gov't Ltr. (Ex. 12).

III. THE COURT SHOULD STRIKE THE CONCEDEDLY FALSE ALLEGATIONS

The Wiwa plaintiffs have conceded the falsities of several allegations—that Michael Tema Vizor was "beaten" in April 1993 (Wiwa Compl. ¶¶ 3, 51); that Owens Wiwa was "beaten" during his alleged detention from December 26, 1993, to January 4, 1994 (Wiwa Compl. ¶ 67); that Owens Wiwa was "arrested and held for 8 hours for possession of letters written by Ken Saro-Wiwa" in August 1995 (Wiwa Compl. ¶ 95); and that Uebari N-nah "was peacefully demonstrating against the actions of Defendants" at the time of his alleged killing (Wiwa Compl. ¶ 148). See Stipulation at 2-3 (Ex. 13). These false allegations should all be stricken. See Cerruti 1881 S.A. v. Cerruti, Inc., 169 F.R.D. 573, 574, 582-84 (S.D.N.Y. 1996) (striking counterclaims under federal court's inherent power to sanction a party for reliance on knowingly false documents and testimony). Indeed, Uebari N-nah's false allegations regarding his participation in "peaceful demonstrations" form the entire factual basis for his count IV claim ("violations of the rights to life, liberty, and security of person and peaceful assembly"). See Wiwa Compl. ¶ 148.

Conclusion

SPDC respectfully requests that the Court grant its motion to dismiss, motion for judgment on the pleadings and motion to strike.

January 30, 2007

CRAVATH, SWAINE & MOORE LLP,

by _____

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EXHIBIT A

Wiwa, et al. v. Shell Petroleum Development Co. of Nigeria Ltd., 04 Civ. 2665

COUNT	BASES FOR JUDGMENT ON THE PLEADINGS (unless otherwise noted, applies to all plaintiffs who assert such claims)
Count I ("Summary Execution")	• Previously dismissed by the Court. See Part II.A. • Preempted by the TVPA. See Part II.B n.22. • Fails under the TVPA. See Part II.C. • Time barred by 3-year limitations period. See Part II.D n.26. • Time barred by 10-year limitations period (Karalolo Kogbara, James N-nah & Uebari-N-nah). See Part II.D. • No standing to bring third-party claims (Ken Wiwa, Blessing Kpuinen, Lucky Doobee, Friday Nuate, Monday Gbokoo, David Kiobel and James N-nah). See Part II.E.
Count II ("Crimes Against Humanity")	• Fails under Sosa. See Part II.B.3 & n.20. • Time barred by 3-year limitations period. See Part II.D n.26. • Time barred by 10-year limitations period (Karalolo Kogbara, James N-nah & Uebari-N-nah). See Part II.D. • No standing to bring third-party claims (Ken Wiwa, Blessing Kpuinen, Lucky Doobee, Friday Nuate, Monday Gbokoo, David Kiobel and James N-nah). See Part II.E.
Count III ("Torture")	• Fails under Sosa. See Part II.B.2 & n.20. • Preempted by the TVPA. See Part II.B n.22. • Fails under the TVPA. See Part II.C. • Time barred by 3-year limitations period. See Part II.D n.26. • Time barred by 10-year limitations period (Karalolo Kogbara, James N-nah & Uebari-N-nah). See Part II.D. • No standing to bring third-party claims (Ken Wiwa, Blessing Kpuinen, Lucky Doobee, Friday Nuate, Monday Gbokoo, David Kiobel and James N-nah). See Part II.E.
Count IV ("Cruel, Inhuman or Degrading Treatment")	• Fails under Sosa. See Part II.B.1 & n.20. • Time barred by 3-year limitations period. See Part II.D n.26. • Time barred by 10-year limitations period (Karalolo Kogbara, James N-nah & Uebari-N-nah). See Part II.D. • No standing to bring third-party claims (Ken Wiwa, Blessing Kpuinen, Lucky Doobee, Friday Nuate, Monday Gbokoo, David Kiobel and James N-nah). See Part II.E.

COUNT	BASES FOR JUDGMENT ON THE PLEADINGS (unless otherwise noted, applies to all plaintiffs who assert such claims)
Count V ("Arbitrary Arrest and Detention")	• Fails under Sosa. See Part II.B.4 & n.20. • Time barred by 3-year limitations period. See Part II.D n.26. • Time barred by 10-year limitations period (Karalolo Kogbara, James N-nah & Uebari-N-nah). See Part II.D. • No standing to bring third-party claims (Ken Wiwa, Blessing Kpuinen, Lucky Doobee, Friday Nuate, Monday Gbokoo and David Kiobel). See Part II.E.
Count VI ("Violation to the Rights to Life, Liberty, and Security of Person and Peaceful Assembly and Association")	• Previously dismissed by the Court. See Part II.A. • Time barred by 3-year limitations period. See Part II.D n.26. • Time barred by 10-year limitations period (Karalolo Kogbara, James N-nah & Uebari-N-nah). See Part II.D. • No standing to bring third-party claims (Ken Wiwa, Blessing Kpuinen, Lucky Doobee, Friday Nuate, Monday Gbokoo, David Kiobel and James N-nah). See Part II.E. • Based on concededly false allegations that should be stricken (Uebari N-nah). See Part III.

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COUNT	BASES FOR JUDGMENT ON THE PLEADINGS (unless otherwise noted, applies to all plaintiffs who assert such claims)
Count I ("Extrajudicial Killings")	• Previously dismissed by the Court. See Part II.A. • Preempted by the TVPA. See Part II.B. n.22. • Time barred by 3-year limitations period. See Part II.D n.26. • No standing to bring third-party claims (Esther Kiobel). See Part II.E.
Count II ("Crimes Against Humanity")	• Fails under Sosa. See Part II.B.3 & n.20. • Time barred by 3-year limitations period. See Part II.D n.26. • No standing to bring third-party claims (Esther Kiobel & Kpobari Tusima). See Part II.E.
Count III ("Torture/Cruel, Inhuman and Degrading Treatment")	• Torture claim fails under Sosa. See Part II.B.2 & n.20. • Torture claim preempted by the TVPA. See Part II.B. n.22. • Cruel, Inhuman and Degrading Treatment claim fails under Sosa. See Part II.B.1 & n.20. • Time barred by 3-year limitations period. See Part II.D n.26. • No standing to bring third-party claims (Esther Kiobel & Kpobari Tusima). See Part II.E.

d. had or been required to have a designated agent for service of process in the United States, including in the State of New York;

e. owned, used or possessed any real property in the United States, including in the State of New York;

f. contracted to supply any goods or services in the United States, including in the State of New York;

g. had any agents assigned to work for it on a regular basis in the United States, including in the State of New York;

h. maintained any bank accounts or other property in the United States, including in the State of New York;

i. had any of its stock listed on any stock exchange in the United States, including in the State of New York; or

j. advertised in the United States, including in the State of New York.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed in PORTHARCOURT, NIGERIA

on 25 day of January, 2007