

EXHIBIT C
DEFENDANTS’ PROPOSED INSTRUCTIONS
FOR VIOLATIONS OF NORMS OF INTERNATIONAL LAW

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I. PLAINTIFFS' CLAIMS AGAINST ROYAL DUTCH PETROLEUM COMPANY AND THE "SHELL" TRANSPORT AND TRADING COMPANY, P.L.C. FOR VIOLATIONS OF NORMS OF INTERNATIONAL LAW¹

Plaintiffs bring six claims against each of the corporate defendants under a statute called the Alien Tort Statute ("ATS"). The ATS allows an alien to sue in a United States court for certain alleged violations of customary norms of international law.

In this case, plaintiffs do not claim that the Royal Dutch Petroleum Company and The "Shell" Transport and Trading Company, p.l.c. directly violated any norm of international law. Nor do plaintiffs claim that SPDC directly violated any norm of international law.

Plaintiffs claim that Shell Petroleum Development Company of Nigeria ("SPDC"), through participation with the Nigerian Government indirectly violated norms of international law and that the corporate defendants, as the shareholders of a holding company that owns all of SPDC's shares, are liable for SPDC's indirect participation with the Nigerian Government in the violations of international law plaintiffs allege here.

Plaintiffs claim that the Nigerian Government violated a norm of international law, and that SPDC willfully participated in that particular conduct of the Nigerian Government in one of nine ways that plaintiffs claim SPDC can be legally responsible for the conduct of another that I will describe to you later. Plaintiffs further claim that Royal Dutch and Shell Transport willfully participated in SPDC's alleged participation in the Nigerian Government's violation of the norm of international law in

¹ (See Defs.' R&O Stmt. Part I.A.)

one of six ways that plaintiffs claim defendants can be legally responsible for the conduct of another that I will describe to you later.

In order to prove that each of the defendants may be held liable, plaintiffs must show that each defendant's specific conduct, not that of the Nigerian Government or even of SPDC, was a violation of a norm of international law. Under international law, it is not enough for plaintiffs to prove that a violation occurred, but rather plaintiffs must prove that it was the specific defendant's conduct itself that violated a norm of international law.

I will now give you instructions on how to determine whether these defendants willfully participated in each of the six alleged violations of norms of international law.

First, you must determine whether the Nigerian Government committed a violation of the norm of international law against each of these plaintiffs. If you find that plaintiffs have failed to satisfy their burden of proving by a preponderance of the evidence that the Nigerian Government violated a norm of international law, you must find in favor of defendants.

Second, if you find, however, that plaintiffs have met their burden of proof to show that the Nigerian Government violated a norm of international law, you must then determine whether SPDC willfully participated in that particular unlawful conduct of the Nigerian Government. Plaintiffs must prove by a preponderance of the evidence each element of at least one of nine theories I will instruct you about later. If you find that plaintiffs have failed to prove by a preponderance of the evidence that SPDC

willfully participated in that particular unlawful conduct of the Nigerian Government under one of those theories, you must find in favor of defendants.

Third, if you find, however, that plaintiffs have met their burden of proof to show that SPDC willfully participated in that particular unlawful conduct of the Nigerian Government, you must then decide if each defendant willfully participated in the conduct of SPDC under one of the six theories I will instruct you about later. If you find that plaintiffs have failed to prove that defendants willfully participated in SPDC's participation in the Nigerian Government's unlawful conduct, you must find in favor of defendants.

You must look at each of the six ATS claims separately. For each claim, you should carefully follow the steps laid out in these instructions to determine whether each defendant willfully participated in the violation of a norm of international law under each of plaintiffs' theories. If you find that plaintiffs have failed to prove each of the elements of any part of the instructions for a given claim, then you must find in favor of defendant for that claim.

SOURCES: 28 U.S.C. § 1350; *Sosa v. Alvarez-Machain*, 542 U.S. 692, 715, 720, 725, 729, 732 & n.20 (2004); *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 252 (2d Cir. 2003); *Filartiga v. Pena-Irala*, 630 F.2d 876, 888 (2d Cir. 1980); *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 181 (2004).

Plaintiffs' General Objections to Defendants' ATS Claims Instructions

In this section, plaintiffs object to various language defendants use throughout their proposed ATS instructions. Because the objectionable language is ubiquitous, Plaintiffs object here rather than repeat these objections over and over. These objections are hereby incorporated by reference into plaintiffs' objections to each of defendants' proposed instructions in which the below noted language appears.

1. Plaintiffs object to the use of the legalese "individually and on behalf of." The only information relevant for the jury is who the victims are, not who brings the claims. This terminology could confuse the jury; it is sufficient to state, for example, "Plaintiffs

contend that defendants are liable for assault against Ken Saro-Wiwa, Blessing Kpuinen, and John Kpuinen,” rather than “Ken Wiwa, on behalf of Ken Saro-Wiwa, contends that defendants are liable for assault against Ken Saro Wiwa, and Blessing Kpuinen, individually and on behalf of John Kpuinen, contends that defendants are liable for assault against her and John Kpuinen.”

2. Defendants erroneously suggest that plaintiffs need to show “willful participation” for every theory of liability, including vicarious liability theories. Plaintiffs object to the notion that SPDC or Brian Anderson must have “willfully participated” in the military’s conduct, or that the corporate defendants must have “willfully participated” in SPDC’s conduct, and thus to the use of the term “willfully participated” wherever it appears. “Willful participation” is not defined, and is so vague, it could only serve to mislead. Nonetheless, under any definition it is not an element of many of the theories of liability applicable here. For example, plaintiffs’ vicarious liability theories do not require any participation whatsoever. Plaintiffs asked defendants to provide support for their claim that all theories of liability require “willful participation” by both SPDC and defendants but received no response.

Throughout the instructions “willful participation” should be replaced with the notion that SPDC is responsible for the military’s conduct and that defendants are liable for SPDC’s conduct. *E.g.*, instead of the following: “*Third*, if you find, however, that plaintiffs have met their burden of proof to show that SPDC **willfully participated in** that particular unlawful conduct of the Nigerian Government, you must then decide if each defendant **willfully participated in** the conduct of SPDC under one of the five theories I will instruct you about later,” the more appropriate instruction (aside from any other objections) would be, “*Third*, if you find, however, that plaintiffs have met their burden of proof to show that SPDC **is responsible for** the particular unlawful conduct of the Nigerian Government, you must then decide if each defendant **is liable for** the conduct of SPDC under one of the five theories I will instruct you about later.” In short, the elements of each theory of liability should be described in the instruction for that theory of liability. There is no warrant for defendants’ attempt to add an additional element to *all* of the claims. There can be no question the term is inapplicable to vicarious liability theories. For other theories, the parties may dispute its applicability, but the Court need not resolve that dispute—if defendants are correct that “willful participation” is required, the term is redundant of the elements; if plaintiffs are correct, the term is legal error.

3. Plaintiffs object to the term “the Nigerian Government.” Many of the acts at issue were carried out by members of the Nigerian military, and may or may not have been authorized by the Nigerian government. They need not be acts of the government in order to be actionable. Additionally, this term is vague.

4. Plaintiffs object to the use of the term “plaintiffs” for the victims of the torts. Some of the victims are decedents and this may confuse the jury. Plaintiffs propose using the term “victims” or simply using the names of the victims.

5. Plaintiffs object to the phrasing of the paragraph following the elements of each claim, which states: “You may find that the Nigerian Government committed [*claim*] only if plaintiffs have proven all of the elements listed above. If they have not proven all of the elements of this claim, their claim for [*claim*] must fail and you must find in favor of defendants.” Both sentences are slanted toward defendants’ case, and neither suggests what should be done if the jury finds these elements. Plaintiffs suggest that a more neutral phrasing would be: “If you find that plaintiffs have proven all of the elements listed above as to any victim, you must consider whether defendants are liable under any of the following theories of liability. If plaintiffs have not proven all of the elements of this claim, you must find in favor of defendants. If they have, you must find for the plaintiffs.” Likewise, defendants repeatedly instruct that: “If plaintiffs failed to prove any one of those elements you must find in favor of defendants on plaintiffs’ claim for violation of the norm of international law.” The Court should add “If they have proven these elements, you must find for the plaintiffs.”

6. In every place that Defendants indicate “REPEAT” for instructing on their theories of liability (see e.g. I.B.2.a) Plaintiffs hereby incorporate by reference Plaintiffs’ corresponding objections.

Plaintiffs’ Objections to Defendants’ Proposed Instruction I-- Plaintiffs’ Claims Against Royal Dutch Petroleum Company and The “Shell” Transport and Trading Company, p.l.c. for Violations of Norms of International Law

Defendants misstate plaintiffs’ claims in their proposed instruction that: “Plaintiffs claim . . . that the corporate defendants, *as the shareholders of a holding company that owns all of SPDC’s shares*, are liable for SPDC’s indirect participation with the Nigerian Government in the violations of international law plaintiffs allege here.” (emphasis added). As is abundantly clear from plaintiffs’ proposed instructions, this is not the basis upon which plaintiffs allege the corporate defendants can be held liable. Plaintiffs’ Proposed Instruction 7.1.

Defendants’ instruction would essentially tell the jury they cannot find for the plaintiffs. First, they would instruct the jury that “plaintiffs do not claim that the [corporate defendants] directly violated any norm of international law.” Then they would instruct the jury that “plaintiffs must show that each defendant’s specific conduct, not that of the Nigerian Government or even of SPDC, was a violation of a norm of international law. Under international law, it is not enough for plaintiffs to prove that a violation occurred, but rather plaintiffs must prove that it was the specific defendant’s conduct itself that violated a norm of international law.” Taken together, the jury could conclude it must find for the defendants no matter what the evidence shows. Nor does this instruction give the jury any tools it needs to determine what the norms of international law are, if that were even the jury’s role.

Moreover, both quotes are wrong. As to the first, plaintiffs claim *inter alia* that defendants were involved in a conspiracy, which is prohibited by international law. International Law Br. at 53; Plaintiffs’ Proposed Jury Instruction No. 6.6A and

supporting sources. The second quote clearly misstates the law. As plaintiffs have explained in their international law briefing, theories of liability in ATS cases are controlled by federal common law, not international law. International Law Br. at 46-47; International Law Reply Br. at 29-34. Regardless, the instruction is irrelevant, prejudicial and misleading, and should not be given. The jury's task is to apply the elements of the various theories of liability to the evidence it hears. This instruction does not assist the jury in applying the elements, and may mislead the jury into believing it must find something in addition to the elements required for each theory of liability.

Plaintiffs also object to defendants' characterization of their theories of liability as "ways that plaintiffs claim SPDC can be legally responsible" and "ways that plaintiffs claim defendants can be legally responsible for the conduct of another". Although the substance of instructions regarding liability are in dispute, once the Court resolves the dispute, they instructions represent the Court's view of the law, not "ways that plaintiffs claim" liability ensues.

The last sentence of the instruction is skewed toward defendants. Another sentence should be added that states that: "If you find that plaintiffs have proved each of the elements with respect to any claim, then you must find in favor of plaintiffs on that claim."

A. Summary Execution²

Ken Wiwa, on behalf of Ken Saro-Wiwa, Blessing Kpuinen, on behalf of John Kpuinen, Lucky Doobee, on behalf of Saturday Doobee, Friday Nuate, on behalf of Felix Nuate, Monday Gbokoo, on behalf of Daniel Gbokoo, and James B. N-nah, on behalf of Uebari N-nah contend that defendants are liable for the deaths of Ken Saro-Wiwa, John Kpuinen, Saturday Doobee, Felix Nuate, Daniel Gbokoo and Uebari N-nah because (1) the Nigerian Government deliberately and unlawfully caused those deaths, (2) SPDC willfully participated in the unlawful execution of those individuals by the Nigerian Government, and (3) defendants willfully participated in SPDC's alleged participation in the unlawful executions.

² (See Defs.' R&O Stmt. Part I.B.1.)

In order to prove this claim against defendants, plaintiffs must prove each of the following elements:

First, plaintiffs must prove that the Nigerian Government deliberately caused the deaths of Ken Saro-Wiwa, John Kpuinen, Saturday Doobee, Felix Nuate, Daniel Gbokoo and Uebari N-nah. If plaintiffs cannot prove that the Nigerian Government unlawfully caused those deaths, you must find in favor of defendants.

Second, if you find, however, that plaintiffs have met their burden of proving that the Nigerian Government unlawfully caused the deaths of those individuals, you must then decide, under one or more of the legal theories I will describe below in the section entitled “SPDC’s Alleged Willful Participation in the Nigerian Government’s Conduct”, whether SPDC willfully participated in the unlawful execution of those individuals by the Nigerian Government. If you find that SPDC did not willfully participate in the unlawful executions by the Nigerian Government under any of those theories, you must find in favor of defendants.

Third, if you find, however, that SPDC did willfully participate in the unlawful executions by the Nigerian Government, you must then decide if each defendant willfully participated in SPDC’s alleged participation in the unlawful executions under one or more of the legal theories I will describe below in the section entitled “Defendants’ Alleged Willful Participation in SPDC’s Conduct”. If you find that defendants did not willfully participate in SPDC’s alleged participation, you must find in favor of defendants.

Plaintiffs’ Objections to Defendants’ Proposed Instruction I.A. Summary Execution (Count I of Plaintiffs’ Complaint)

The introductory paragraphs to each claim are largely the same except for the name of the claim and these objections apply throughout.

Defendants' proposed instruction fails to reflect the fact that defendants can be held liable for their own participation in a conspiracy with members of the Nigerian military. The instruction should be amended to include the bold: "Second, if you find, however, that plaintiffs have met their burden of proving that the Nigerian Government [*committed the abuse at issue*], you must then decide, whether defendants are liable either because they directly conspired with members of the Nigerian military or the Nigerian military government, or because they are liable for the responsibility of SPDC. Defendants, however, can be held liable for their own conspiracy irrespective of whether they can be held liable for the responsibility of SPDC. I will instruct you on the standards for conspiracy below. If you find that a defendant conspired, that defendant is liable. As for plaintiffs' separate claim that defendants are liable for the responsibility of SPDC, you must consider whether, under one or more of the legal theories I will describe below. . . you must find in favor of defendants on plaintiffs' theory that defendants are liable for the responsibility of SPDC. . . ". If you find that defendants did not willfully participate in SPDC's alleged participation, you must find in favor of defendants on plaintiffs' theory that defendants are liable for the responsibility of SPDC."

The last sentence of the instruction is skewed toward defendants. Another sentence should be added that states that: "If you find that a defendant is liable for SPDC's responsibility under any of these theories, then you must find in favor of the plaintiffs against that defendants."

1. The Nigerian Government's Conduct

In order for you to find that the Nigerian Government violated the prohibition against summary execution, plaintiffs must prove each of the following elements separately with respect to each individual plaintiff:

First, the killing was deliberate.

Second, the killing was not authorized by a previous judgment pronounced by a lawfully constituted court.

Third, he or she was not afforded all the judicial guarantees recognized as indispensable by civilized peoples.

If you find that any of the killings that plaintiffs allege constitute summary execution were carried out under the lawful authority of the Nigerian Government, then plaintiffs cannot prevail on their claims.

You may find that the Nigerian Government committed summary execution only if plaintiffs have proven all of the elements listed above. If they have not proven all of the elements of this claim, their claim for summary execution must fail and you must find in favor of defendants.

Plaintiffs' Objections to Defendants' Proposed Instruction I.A.1. The Nigerian Government's Conduct

Plaintiffs object to the use of the term "summary execution" as "summary" implies that an execution is actionable only if it is carried out after no process whatsoever, when in fact, an execution is actionable whereas here it is carried out after a process that is contrary to universal, obligatory and definable international norms.

Plaintiffs object to the use of the term "lawfully constituted court." International law requires a "*regularly* constituted court," specifically to exclude special tribunals, no matter what their status under domestic law. *See* Plaintiffs' Proposed Jury Instruction No. 2.2: Extrajudicial Killing and supporting sources. Defendants' attempt to change the accepted international law definition has no support.

Similarly, Defendants erroneously seek to instruct the jury that: "If you find that any of the killings that plaintiffs allege constitute summary execution were carried out under the lawful authority of the Nigerian Government, then plaintiffs cannot prevail on their claims." The proposed instruction misstates the law, and is unsupported, prejudicial and likely to mislead the jury. The relevant question is whether a killing was committed in violation of international law. It is irrelevant whether the killing was legal under Nigerian law, since Nigeria cannot repeal international law. Thus, the TVPA, which reflects international law, notes that extrajudicial execution "does not include any such killing that, **under international law**, is lawfully carried out under the authority of a foreign nation." 28. U.S.C. § 1350, note (emphasis added).

Defendants' "Third" is ambiguous in that it can be read to suggest a plaintiff must show he was denied *all* such guarantees, when in fact, denial of any such guarantee is sufficient. "Second" and "Third" should be combined to state: "such killing was 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." Defendants make no attempt to define these judicial guarantees. Without definition, such term is incomprehensible to the jury and invites the erroneous conclusion that *any* process is sufficient. Moreover, without such definition, plaintiffs would be forced to prove the content of international law to the jury, even though that is manifestly not the province of a jury to decide. Plaintiffs' Proposed Jury Instruction No. 2.2, by contrast, specifically details the guarantees required under international law.

2. SPDC's Alleged Willful Participation in the Nigerian Government's Conduct³

If you find that one or more plaintiffs have proven all of the above elements of their claim with respect to the Nigerian Government, you must then decide whether SPDC willfully participated in that unlawful conduct of the Nigerian Government under one or more of plaintiffs' nine theories presented below.

Plaintiffs' Objections to Defendants' Proposed Instruction I.A.2. SPDC's Alleged Willful Participation in the Nigerian Government's Conduct.

Plaintiffs object to the use of the term "willfully participated" in the heading and in defendants' proposed instruction that "you must then decide whether SPDC willfully participated in that unlawful conduct of the Nigerian Government under one or more of plaintiffs' nine theories presented below." Putting aside the question of whether any of plaintiffs' theories of liability require "willful participation" in wrongful conduct, there can be no dispute that vicarious liability theories, which require no fault, do not require this element. "Willful participation" should be replaced with more neutral language, i.e. "you must then decide whether SPDC is **responsible for** that unlawful conduct . . ."

a. Plaintiffs' Theory of Aiding and Abetting

In order to prove SPDC willfully participated in the Nigerian Government's violation of the norm of international law under plaintiffs' aiding and abetting theory, each plaintiff must prove each of the following elements:

First, SPDC intended that the Nigerian Government violate the norm of international law. If you find that SPDC only had knowledge that the Nigerian Government was going to violate the norm of international law and it failed to prevent that violation, you may not conclude that SPDC aided and abetted the Nigerian Government.

³ (See Defs.' R&O Stmt. Part I.C.)

Second, in furtherance of the Nigerian Government's unlawful conduct, SPDC provided practical assistance to the Nigerian Government in violating the norm of international law. In order to constitute practical assistance, SPDC's acts must have been substantial and made a significant difference in violating the norm of international law.

Third, SPDC's practical assistance had a substantial effect in violating the norm of international law. For practical assistance to have a substantial effect, it is not enough that the assistance was directed in some way toward violating the norm of international law. SPDC's acts had a substantial effect only if the violation of the norm of international law most probably would not have occurred in the same way without SPDC's practical assistance.

Fourth, SPDC had effective control over the Nigerian Government's alleged conduct that caused the violation of the norm of international law.

If you find that plaintiffs have failed to prove any of the above elements, you must find in favor of defendants on this theory.

Plaintiffs' Objections to Defendants' Proposed Instruction I.A.2.a. Plaintiffs' Theory of Aiding and Abetting.

Defendants misstate the elements of aiding and abetting. Defendants' proposed instruction that plaintiffs must show "SPDC intended that the Nigerian Government violate the norm of international law" is wrong. An abettor need not share any intent to commit the wrongful acts; the *mens rea* is that the abettor knew or should have known that the wrongful acts would be committed. *See* Plaintiffs' Proposed Jury Instruction No. 6.5 and supporting sources. Moreover, SPDC need not have had knowledge (let alone intent) that the wrongful act would violate international law; the *mens rea* relates solely to the commission of the *act*, not that the act is prohibited by international law.

Defendants proposed instruction that "in order to constitute practical assistance, SPDC's acts must have been substantial and made a significant difference in violating the norm of international law" is wrong and otherwise redundant. It is wrong because SPDC's *acts* need not be substantial; indeed, the assistance need not have been tangible. Assistance of any kind, including providing moral or psychological support, can establish aiding and abetting. *See* Plaintiffs' Proposed Jury Instruction No. 6.5 and supporting sources. The

proposed instruction is further misleading or redundant, in that Defendants' "Third" states that "SPDC's practical assistance had a substantial effect in violating the norm of international law." The "significant difference" language will likely mislead the jury into erroneously assuming something else is required in addition to "substantial effect." And even if it does not, it is redundant.

Defendants' proposed instruction that "SPDC's practical assistance had a substantial effect in violating the norm of international law" is confusing. The "substantial effect" required is on the perpetration of the wrongful acts. Defendants' formulation of an "effect in violating the norm of international law" is indecipherable. Defendants' proposed instruction is also one sided, in that it fails to instruct the jury that the effect need not have been indispensable to the wrongful acts, nor need it have caused those acts, nor does it instruct the jury that all types of assistance taken together may be considered in determining whether the assistance had a "substantial effect." See Plaintiffs' Proposed Jury Instruction No. 6.5 and supporting sources.

Defendants' proposed instruction that plaintiff must show: "the assistance was directed in some way toward violating the norm of international law" is misleading, because "directed" erroneously implies the abettor must have intent that the abuse occur. See Plaintiffs' Proposed Jury Instruction No. 6.5 and supporting sources. The paragraph labeled "Third" should be changed such that the first sentence reads: "SPDC's practical assistance had a substantial effect on the killing." The second sentence should be deleted.

There is no requirement that "SPDC had effective control over the Nigerian Government's alleged conduct." Liability for aiding and abetting is based on the assistance provided, not control, which would provide a wholly independent basis for liability. Defendants' proposed "control" requirement finds no support in either the federal common law of aiding and abetting, see *Restatement (Second) of Torts* § 876(b) (1979), or in international aiding and abetting jurisprudence. To cite just one example of the latter, in *U.S. v. Flick*, 6 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, 1217, 1222 (1952), Steinbrinck was convicted "under settled legal principles" for "knowingly" contributing money to an organization committing widespread abuses, even though it was "unthinkable" he would "willingly be a party" to atrocities. Steinbrinck obviously had no control over the Nazis, yet he was convicted of complicity. Plaintiffs asked defendants to provide support for their claim that aiding and abetting requires control but received no response.

Defendants purport to rely on the ICC's Rome Statute to support their aiding and abetting instruction. Even assuming customary international law rather than federal common law controls liability standards under the ATS, the Rome Statute, is a treaty and the drafters of a treaty are permitted to adopt language for a treaty without any concern as to whether it reflects customary international law. Indeed, the Rome Statute, by its very terms makes clear that its definitions "shall not affect the characterization of any conduct as criminal under international law independently of this statute." Rome Statute, art. 22(3). Regardless, aiding and abetting under the Rome Statute does not require that the assistance cause the abuse, nor does it require that the abettor control the primary perpetrator. *Id.*, Art. 25. Moreover, the Rome Statute does not require that the abettor intend the abuse in all circumstances. Art. 25(3)(d). If, contrary to art. 22(3), this Court

were to nonetheless conclude the Rome Statute controls, the Court should change defendants' proposed instruction "*First*" to "*First*, SPDC intended for the Nigerian Government to cause the killing or knew of the intention of a group acting with a common purpose to commit the crime." Art. 25(3)(d)(ii). Plaintiffs' other objections to hold no matter what the source of law applied.

b. Plaintiffs' Theory of Agency

In order to prove SPDC willfully participated in the Nigerian Government's violation of the norm of international law under plaintiffs' agency theory, each plaintiff must prove each of the following elements:

First, SPDC and the Nigerian Government entered into an agreement that intended that SPDC would substantially assist the Nigerian Government in violating the norm of international law.

Second, SPDC and the Nigerian Government acted for all intents and purposes as one in violating the norm of international law, or that SPDC controlled every action of the Nigerian Government in violating the norm of international law.

If you find that plaintiffs have failed to prove any of the above elements, you must find in favor of defendants on this theory.

c. Plaintiffs' Theory of Conspiracy

Plaintiffs allege that defendants conspired indirectly, through SPDC, and directly, with the Nigerian Government to violate the norm of international law.

Plaintiffs' Objections to Defendants' Proposed Instruction I.A.2.b. Plaintiffs' Theory of Agency.

Defendants' proposed instruction misstates the elements of agency. The basis for plaintiffs' objections are detailed in Plaintiffs' Proposed Jury Instruction No. 6.2, 7.3, 7.5 and the supporting sources.

Plaintiffs need not show that "SPDC and the Nigerian Government entered into an agreement that intended that SPDC would substantially assist the Nigerian Government in violating the norm of international law." There need not be any agreement to commit a

wrongful act. Instead the wrongful act must only be within the scope of the agency. Defendants utterly ignore the fact that agency liability is vicarious. Liability based on an agreement to commit a wrongful act is conspiracy liability; such agreement is not an element of agency. Plaintiffs asked defendants to provide support for their claim that agency liability requires wrongful purpose but received no response.

Plaintiffs also need not show that “SPDC and the Nigerian Government acted for all intents and purposes as one in violating the norm of international law, or that SPDC controlled every action of the Nigerian Government in violating the norm of international law.” SPDC need not have acted at all, let alone have acted “as one” with members of the Nigerian military. A principal is liable for the acts of the agent within the scope of the agency, even if the act violates a principal’s policy. As for control, agency involves control or right to control the manner and means of performing the services. The principal need not actually exercise control over the agent, even in performing the specific work contemplated by the agency. It certainly need not exercise control over torts committed in the scope of the agency. Defendants again ignore the fact that agency liability is vicarious.

(1) Plaintiffs’ Indirect Theory of Conspiracy

With respect to plaintiffs’ indirect theory of conspiracy, plaintiffs contend that SPDC conspired with the Nigerian Government to violate the norm of international law.

In order to prove that SPDC willfully participated in the Nigerian Government’s violation of the norm of international law under plaintiffs’ conspiracy theory, each plaintiff must prove each of the following elements:

First, SPDC had the intent to participate in a conspiracy with the Nigerian Government to violate the norm of international law.

Second, SPDC and the Nigerian Government both intended, or had a common purpose, to violate the norm of international law. For a common purpose to exist, there must have been an understanding or arrangement between defendants and the Nigerian Government amounting to an agreement that they would violate the norm of international law.

Third, SPDC participated, either directly or indirectly, in violating the norm of international law. For defendants to have participated in the conspiracy, it must have at least performed acts that were directed toward furthering the conspiracy to violate the norm of international law.

If you find that plaintiffs have failed to prove any of the above elements, you must find in favor of defendants on this theory. If, however, you find that SPDC conspired with the Nigerian Government to violate a norm of international law, you must then decide if defendants are liable for SPDC's alleged unlawful conduct under one of plaintiffs' six theories below in the section entitled "Defendants' Alleged Willful Participation in SPDC's Conduct".

Plaintiffs' Objections to Defendants' Proposed Instruction I.A.2.c.(1) Plaintiffs' Indirect Theory of Conspiracy.

Defendants misstate the law when they propose to instruct the jury that plaintiffs must show that SPDC intended or agreed that members of the Nigerian military would "violate the norm of international law." It is also sufficient that the acts that harmed plaintiffs were acts done in furtherance of the purpose of the conspiracy and were the natural and foreseeable consequence of the conspiracy. Thus, plaintiffs need not show SPDC had any intent the military commit the specific violation at issue. 20 N.Y. Jur.2d Conspiracy– Civil Aspects §10. (If party joined conspiracy, then it is responsible for all acts done as part of the conspiracy, as long as those acts were done in furtherance of the purpose of the conspiracy); Prosecutor v. Tadic, IT-94-1-A ¶ 204 (ICTY Appeals Chamber July 15, 1999)(liability exists in "cases involving a common design to pursue one course of conduct where one of the perpetrators commits an act which, while outside the common design, was nevertheless a natural and foreseeable consequence of the effecting of that common purpose."); see also Plaintiffs' Proposed Jury Instruction No. 6.6: Responsibility of Royal Dutch Petroleum Co., Shell Transport and Trading Co., Shell Nigeria and/or Brian Anderson for acts of the military - Conspiracy (All Claims) and supporting sources.

Defendants also err in suggesting plaintiffs must prove: "SPDC participated, either directly or indirectly, in violating the norm of international law. For defendants to have participated in the conspiracy, it must have at least performed acts that were directed toward furthering the conspiracy to violate the norm of international law." This is wrong. See *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1159 (11th Cir. 2005) (describing elements of conspiracy under ATS without requiring the defendant to have performed

acts directed toward furthering the conspiracy). Plaintiffs are not required to prove that any defendant personally committed any act.

In the second sentences of “Second”, and of “Third,” the word “defendants” should be “SPDC.”

(2) Plaintiffs’ Direct Theory of Conspiracy

With respect to plaintiffs’ direct theory of conspiracy, plaintiffs contend that defendants directly conspired with the Nigerian Government to violate a norm of international law.

In order to prove that defendants willfully participated in the Nigerian Government’s violation of the norm of international law under plaintiffs’ conspiracy theory, each plaintiff must prove each of the following elements:

First, defendants had the intent to participate in a conspiracy with the Nigerian Government to violate the norm of international law.

Second, defendants and the Nigerian Government both intended, or had a common purpose, to violate the norm of international law. For a common purpose to exist, there must have been an understanding or arrangement between defendants and the Nigerian Government amounting to an agreement that they would violate the norm of international law.

Third, defendants participated, either directly or indirectly, in violating the norm of international law. For defendants to have participated in the conspiracy, it must have at least performed acts that were directed toward furthering the conspiracy to violate the norm of international law.

If you find that plaintiffs have failed to prove any of the above elements, you must find in favor of defendants on this theory.

Plaintiffs' Objections to Defendants' Proposed Instruction I.A.2.c.(2) Plaintiffs' Direct Theory of Conspiracy

Plaintiffs incorporate by reference Plaintiffs' Objections to Defendants' Proposed Instruction I.A.2.c.(1) Plaintiffs' Indirect Theory of Conspiracy.

The last sentence should make clear that "Conversely, if you find that plaintiffs have proven the above elements, then you must hold defendants liable for all acts that either the co-conspirators agreed to, or that were done in furtherance of the purpose of the conspiracy and that were the natural and foreseeable consequence of the conspiracy."

d. Plaintiffs' Theory of Ratification

In order to prove SPDC willfully participated in the Nigerian Government's violation of the norm of international law under plaintiffs' ratification theory, each plaintiff must prove each of the following elements:

First, the Nigerian Government was acting on behalf of SPDC in violating the norm of international law. If the Nigerian Government was acting on its own behalf, or on behalf of anyone other than SPDC, SPDC cannot be liable for the Nigerian Government's unlawful conduct.

Second, SPDC knew about the Nigerian Government's unlawful conduct. SPDC must have had full knowledge of all the material circumstances surrounding the Nigerian Government's conduct in violating the norm of international law.

Third, SPDC ratified the Nigerian Government's unlawful conduct. Ratification here means that SPDC willingly affirmed the prior act of the Nigerian Government. There can be no ratification unless SPDC could have authorized the Nigerian Government to do the act in the first instance.

If you find that plaintiffs have failed to prove any of the above elements, you must find in favor of defendants on this theory.

Plaintiffs' Objections to Defendants' Proposed Instruction I.A.2.d. Plaintiffs'

Theory of Ratification

"Willful participation" makes no sense in the context of ratification, both because it is vicarious liability and because it arises after the act in question occurs.

Defendants' "First" paragraph misstates the law. Plaintiffs need not show "the Nigerian Government was acting on behalf of SPDC in violating the norm of international law." As the Court recognized in the ATS context in *Bowoto v. Chevron Texaco Corp.*, a subsequent ratification theory involves the creation of an agency after the incident in question. 312 F. Supp. 2d 1229, 1247 (N.D. Cal. 2004) ("even if plaintiffs' theory that CNL was conducting itself as defendants' agent during the incidents fails, plaintiffs have an independent claim under their ratification theory that their subsequent ratification of CNL's actions created an agency.")

Defendants' proposed instruction that "There can be no ratification unless SPDC could have authorized the Nigerian Government to do the act in the first instance" is impermissibly vague and circular, with respect to the phrase "could have authorized." As noted above, members of the military need not have been agents of SPDC at the time of the incident in question. Accordingly, it makes no sense to require that the acts "could have authorized" by SPDC.

e. Plaintiffs' Theory of Joint Venture

In order to prove SPDC willfully participated in the Nigerian Government's violation of the norm of international law under plaintiffs' joint venture theory, each plaintiff must prove each of the following elements:

First, SPDC and the Nigerian Government entered into a specific agreement to carry on an enterprise whose purpose was to violate the norm of international law, from which they sought to profit.

Second, SPDC and the Nigerian Government each intended to be joint venturers in a venture intended for violating the norm of international law.

Third, SPDC and the Nigerian Government each contributed either property, financing, skill, knowledge or effort to violate the norm of international law.

Fourth, both SPDC and the Nigerian Government each had a degree of joint control over the venture for violating the norm of international law.

Fifth, SPDC and the Nigerian Government shared in both the profits and losses of the venture through the violation of the norm of international law.

If you find that plaintiffs have failed to prove any of the above elements, you must find in favor of defendants on this theory.

Plaintiffs’ Objections to Defendants’ Proposed Instruction I.A.2.e. Plaintiffs’ Theory of Joint Venture

Defendants utterly ignore the fact that joint venture liability is vicarious. Joint venture is sometimes described as requiring a “specific agreement to carry on an enterprise for profit.” *Toporoff Engineers, P.C. v Fireman’s Fund Ins. Co.*, 371 F.3d 105 (2d Cir. 2004) (emphasis added). Defendants mimic this language, but simply invent from whole cloth a new requirement that the enterprise have a wrongful purpose, and then repeat that erroneous purpose requirement throughout the instruction. There is no requirement that the purpose or intent of the venture was to commit any wrongful act, nor that SPDC contribute anything to an “effort to violate” international law. A joint venturer is liable for the acts of its partner without fault, so long as the act is committed within the scope of the joint venture or is in furtherance of the joint venture business. See Plaintiffs’ Proposed Jury Instruction No. 6.7: Responsibility of Shell Nigeria for acts of the Nigerian military—Joint Venture and supporting sources. In claiming that there must be an agreement to commit a wrongful act, Defendants have described conspiracy liability, not joint venture liability. Plaintiffs asked defendants to provide support for their claim that joint venture requires a purpose to violate the law but received no response.

f. Plaintiffs’ Theory of Instigation or Inducement of Wrongful Acts

In order to prove SPDC willfully participated in the Nigerian Government’s violation of the norm of international law under plaintiffs’ instigation or inducement of wrongful acts theory, each plaintiff must prove each of the following elements:

First, SPDC intentionally induced the Nigerian Government to violate the norm of international law.

Second, SPDC used wrongful means to induce the Nigerian Government to violate the norm of international law. Wrongful means includes physical violence, fraud or misrepresentation, or economic pressure.

Third, but for SPDC's inducement, the Nigerian Government would not have violated the norm of international law.

If you find that plaintiffs have failed to prove any of the above elements, you must find in favor of defendants on this theory.

Plaintiffs' Objections to Defendants' Proposed Instruction I.A.2.f. Plaintiffs' Theory of Instigation or Inducement of Wrongful Acts

Defendants err in asserting that to be liable, a party must "intentionally induce[]" another to commit an abuse. "The required *mens rea* is that the accused intended to provoke or induce the commission of the crime, or was aware of the substantial likelihood that the commission of a crime would be a probable consequence of his acts." *Prosecutor v. Kvočka*, ICTY Case No. IT-98-30/1-T ¶252 (2 November 2001).

Defendants also err in asserting the instigator must use wrongful means to induce the abuse. "The *actus reus* required for 'instigating' a crime is *any* conduct by the accused prompting another person to act in a particular way." *Id.* (emphasis added). Last, plaintiffs need not show that "but for" the inducement, the direct perpetrator would not have committed the act. Instead, plaintiffs need only show that "the conduct of the accused was a clear contributing factor to the conduct of the other person(s). It is not necessary to demonstrate that the crime would not have occurred without the accused's involvement." *Id.*

See generally Bowoto v. Chevron Texaco, CV-99-2506 SI, Instructions to Jury Final as amended, 11-25-08 at 42 (N.D.Cal. 2008) ("To show that CNL is responsible for the conduct of the Nigerian security forces on the basis of instigation or inducement, plaintiffs must prove: 1. That CNL instigated, induced, or invited the Nigerian security forces to commit wrongful acts; 2. That it was foreseeable that these wrongful acts would cause harm to [a plaintiff]; and 3. These wrongful acts caused harm to [a plaintiff]."

Defendants cite *Perkins Sch. for the Blind v. Maxi-Aids, Inc.*, 274 F. Supp. 2d 319, 328 (E.D.N.Y. 2003) for their erroneous claim that SPDC must have intentionally induced abuses and that inducement must involve wrongful means, which includes physical violence, fraud or misrepresentation, or economic pressure. The case is irrelevant, however, as it addresses the elements of tortious interference with contract, which is not at issue. Defendants cite *Perkins and NYC Mgmt. Group Inc. v. Brown-Miller*, No. 03 Civ. 2617, 2004 U.S. Dist. LEXIS 8652, at *23 (S.D.N.Y. May 13, 2004) for their erroneous claim that plaintiffs must prove that but for SPDC's inducement, the Nigerian Government would not have violated the norm of international law. But *NYC Mgmt. Group Inc.* also addresses the elements of tortious interference with contract.

g. Plaintiffs' Theory of Reckless Disregard

In order to prove SPDC willfully participated in the Nigerian Government's violation of the norm of international law under plaintiffs' reckless disregard theory, each plaintiff must prove each of the following elements:

First, SPDC either (a) acted to facilitate the Nigerian Government's violation of the norm of international law, or (b) intentionally failed to act to prevent the violation of the norm of international law where SPDC had a duty to plaintiffs to prevent such violations.

Second, SPDC's conduct created an unjustifiably high risk of violating the norm of international law.

Third, this risk of violating the norm of international law was either known or so obvious that it should have been known to SPDC.

If you find that plaintiffs have failed to prove any of the above elements, you must find in favor of defendants on this theory.

Plaintiffs' Objections to Defendants' Proposed Instruction I.A.2.g. Plaintiffs' Theory of Reckless Disregard

Plaintiffs object that the first element here improperly incorporates intentionality, which is obviously distinct from recklessness; if SPDC acted to intentionally facilitate these violations, then it is liable under other theories. The phrase "acted to facilitate" is ambiguous as to whether this is intentional facilitation; it should be replaced simply with "facilitated." The phrase "intentionally failed to act" is likewise ambiguous, and the word "intentional" should be removed. The standard is recklessness, not intentionality. *See Farmer v. Brennan*, 511 U.S. 825, 836 (1994).

Plaintiffs object to the second element as misstating the test by requiring that SPDC "created" the risk. Reckless disregard applies when the defendant acts or fails to act "in the face of an unjustifiably high risk of harm." *Id.* This should be rephrased to state "SPDC acted or failed to act despite an unjustifiably high risk that a norm of international law would be violated."

h. Plaintiffs' Theory of Joint Enterprise

In order to prove SPDC willfully participated in the Nigerian Government's violation of the norm of international law under plaintiffs' joint enterprise theory, each plaintiff must prove each of the following elements:

First, SPDC and the Nigerian Government united to achieve a common purpose in violating the norm of international law.

Second, SPDC and the Nigerian Government both had express or implied authority to act for all with respect to the control of the means or agencies employed to execute the plan of violating the norm of international law. Essential to the finding of a joint enterprise is the equal right of each member to direct or control the other in violating the norm of international law.

If you find that plaintiffs have failed to prove any of the above elements, you must find in favor of defendants on this theory.

Plaintiffs' Objections to Defendants' Proposed Instruction I.A.2.h. Plaintiffs' Theory of Joint Enterprise

Defendants utterly ignore the fact that joint enterprise liability is vicarious. Defendants simply invent from whole cloth a new requirement that the enterprise have a wrongful purpose to violate international law, and then repeat that erroneous requirement throughout the instruction. There is no requirement that the purpose of the enterprise was to commit any wrongful act. A participant in a joint enterprise is liable for the acts of its partner without fault, so long as the act is committed within the scope of the enterprise. *See* Plaintiffs' Proposed Jury Instruction No. 6.8: Responsibility of Shell Nigeria for acts of members of the military—Joint Enterprise and supporting sources. In claiming that there must be an agreement to commit a wrongful act, Defendants have described conspiracy liability, not joint venture liability. Plaintiffs asked defendants to provide support for their claim that joint enterprise liability requires wrongful purpose but received no response.

See generally *Bowoto v. Chevron Texaco*, CV-99-2506 SI, Instructions to Jury Final as amended, 11-25-08 at 41 (N.D.Cal. 2008) ("To show that CNL is responsible for the conduct of the Nigerian security forces on the basis of joint enterprise, plaintiffs must prove: 1. That CNL was engaged in concerted action with the Nigerian security forces with a common end or joint purpose; and 2. That the Nigerian security forces committed wrongful acts in the course of executing that common end or joint purpose. The common

end or joint purpose need not be wrongful or illegal. A joint enterprise need not be a business venture.”)

i. Plaintiffs’ Theory of Inherent Danger

In order to prove SPDC willfully participated in the Nigerian Government’s violation of the norm of international law under plaintiffs’ inherent danger theory, each plaintiff must prove each of the following elements:

First, SPDC hired the Nigerian Government as an independent contractor to violate the norm of international law.

Second, the Nigerian Government engaged in inherently dangerous activities for SPDC that SPDC knew or had reason to know would be part of the Nigerian Government’s work to violate the norm of international law.

Third, SPDC failed to take reasonable precautions against such danger and in avoiding a violation of the norm of international law.

Fourth, the Nigerian Government’s activities in violating the norm of international law for SPDC must have been on public property, not private premises.

If you find that plaintiffs have failed to prove any of the above elements, you must find in favor of defendants on this theory.

Plaintiffs’ Objections to Defendants’ Proposed Instruction I.A.2.i. Plaintiffs’ Theory of Inherent Danger

Defendants here again utterly ignore the fact that this type of liability is vicarious. Defendants simply invent from whole cloth a new requirement that the employer hire the contractor for the purpose of violating the law, and then they repeat that erroneous requirement throughout the instruction. Instead, the employer is vicariously liable without fault where the employer had reason to know the work to be performed is inherently dangerous to others. *See* Plaintiffs’ Proposed Jury Instruction No. 6.3: Responsibility of Shell Nigeria for acts of members of the military—Inherent Danger to Others and supporting sources. Plaintiffs asked defendants to provide support for their claim that inherent danger liability requires wrongful purpose but received no response.

There is no requirement that the work be illegal.

Defendants' also err in suggesting that plaintiffs must show that "SPDC failed to take reasonable precautions." In fact, this theory of liability holds the employer liable for the "for the independent contractor's failure to exercise reasonable care to take such precautions." N.Y. Pattern Jury Instr.--Civil 2:256 Vicarious Responsibility-Independent Contractor-Danger Inherent in the Work (Comment)

There is no requirement that the acts at issue "must have been on public property, not private premises."

* * *

If plaintiffs have not proven that SPDC willfully participated in the Nigerian Government's violation of a norm of international law by proving each element of at least one of plaintiffs' theories described above, you must find in favor of defendants on plaintiffs' claim for violation of the norm of international law.

Plaintiffs' Objections to Defendants' Proposed "Wrap-up" Instruction (Below *)**

This paragraph is not only skewed toward defendants, as detailed above. It also ignores the fact that plaintiffs need not prove anything with respect to SPDC if plaintiffs prevail on their claim that the defendants themselves were part of a conspiracy. See Defendants' Proposed Instruction I.A.2.c.(2) Plaintiffs' Direct Theory of Conspiracy.

3. Defendants' Alleged Willful Participation in SPDC's Conduct⁴

If you find that plaintiffs have proven that SPDC willfully participated in the Nigerian Government's violation of a norm of international law by proving each element of one of the above described plaintiffs' theories, you must now decide whether defendants willfully participated in SPDC's alleged participation in the Nigerian Government's violation of the norm of international law.

⁴ (See Defs.' R&O Stmt. Part I.C.)

Typically, a parent corporation is not liable for the acts of its subsidiaries. Only under extraordinary circumstances will a parent be held liable for the acts of its subsidiaries. Plaintiffs do not contend that defendants are liable for SPDC's conduct simply because of their ownership relationship to SPDC. An ownership relationship between two corporations neither establishes nor precludes liability. Thus, defendants cannot be held liable for SPDC's conduct unless plaintiffs can prove each of the elements of one of the following plaintiffs' legal theories.

Plaintiffs' Objections to Defendants' Proposed Instruction I.A.3. Defendants' Alleged Willful Participation in SPDC's Conduct

Plaintiffs object to Defendants' proposed instruction that "Typically, a parent corporation is not liable for the acts of its subsidiaries. Only under extraordinary circumstances will a parent be held liable for the acts of its subsidiaries." Such instruction is inherently prejudicial. Instead of simply applying the standards that control each of plaintiffs' theories of liability, defendants instruction would invite the jury to first assess whether the circumstances are "extraordinary" and only if it determines that they are, to then apply the relevant standards. There is no "extraordinary circumstances" element to liability. Moreover, the instruction erroneously suggests that it is harder to find a parent liable for the acts of a subsidiary on an aiding and abetting, conspiracy or agency theory than it is to find any party liable for the acts of any other party on these theories.

The entire paragraph is skewed toward suggesting to the jury that it should not find liability. If any paragraph is necessary, it should be neutrally crafted. Plaintiffs suggest: "A parent corporation is not automatically liable for the acts of its subsidiary simply because of its ownership of that subsidiary. Similarly, a parent is not automatically shielded from liability for the acts of its subsidiary. An ownership relationship between two corporations neither establishes nor precludes liability. Defendants can be held liable for Shell Nigeria's alleged conduct if plaintiffs prove each of the elements of one of the following theories of liability."

The first paragraph of defendants' proposed instruction should reflect the fact that: "If you find that defendants directly conspired with members of the Nigerian military or the Nigerian military government, defendants can be held liable for that conspiracy irrespective of whether these defendants can be held liable for the responsibility of SPDC.

a. Plaintiffs' Theory of Piercing the Corporate Veil

Plaintiffs' veil piercing legal theory amounts to a claim that SPDC and defendants should be treated as being one and the same entity under the law so that the separate corporate existence of SPDC should be disregarded and defendants should be held liable for SPDC's conduct.

The law allows corporations to organize for the purpose of isolating liability of related corporate entities, such as a parent and a subsidiary, or for other reasons. With respect to this claim, you are instructed that a corporation, generally, is a separate legal entity authorized under the law to do business in its own right and on its own credit as distinguished from the credit and assets of other persons and corporations. Also, the mere fact that one corporation owns the stock of another corporation, or that two corporations have common officers or directors, or both, does not mean that the parent corporation may be held liable for the conduct of its subsidiary. The legal presumption that defendants and SPDC are separate legal entities not responsible for each other's conduct may only be defeated in this case if plaintiffs can meet the following test:

In order to prove defendants willfully participated in SPDC's conduct under plaintiffs' veil piercing theory, plaintiff must prove each of the elements under the following two-step process:

First, plaintiffs must prove that the Shell Petroleum Company Limited, otherwise known as SPCo., willfully participated in SPDC's alleged unlawful conduct under Nigerian law. SPCo. is an English holding company that is the parent corporation of SPDC. If plaintiffs are unable to prove that SPCo. willfully participated in SPDC's alleged unlawful conduct, you must find in favor of defendants on this theory.

Second, if you find, however, that plaintiffs have proved that SPCo. did willfully participate in SPDC's alleged unlawful conduct under this theory, you must then determine if defendants willfully participated in SPCo.'s alleged unlawful conduct under English law. Defendants, the Royal Dutch Petroleum Company and The "Shell" Transport and Trading Company, p.l.c., are the parent corporations of SPCo. If plaintiffs cannot show that defendants willfully participated in SPCo.'s alleged unlawful conduct, you must find in favor of defendants on this theory.

Plaintiffs' Objections to Defendants' Proposed Instruction I.A.3.a Plaintiffs' Theory of Piercing the Corporate Veil.

Defendants seek to apply wrong standard. Federal law is "not bound by the strict standards of the common law alter ego doctrine." *Bhd. of Locomotive Eng'rs v. Springfield Terminal Ry.*, 210 F.3d 18, 26 (1st Cir. 2000). The U.S. Supreme Court has detailed the standard applicable under federal common law and international law, which it found to be the same. *First National City Bank (FNCB) v. Banco Para El Comercio Exterior De Cuba*, 462 U.S. 611, 629 (1983). That standard considers the interests of justice and whether respecting the corporate form would defeat public policy. *Id.* Accordingly, the standard must account for the purpose of the statute at issue, an inquiry that usually gives less respect to the corporate form than does the strict common law alter ego doctrine. *Bhd. of Locomotive Eng'rs*, 210 F.3d at 26-27. Defendants' standard is simply wrong. *See Bhd. of Locomotive Eng'rs*, 210 F.3d at 30 (veil can pierced even if related corporation is not a "sham" and was created for a legitimate purpose). Plaintiffs' in their Proposed Jury Instruction No. 6.9: Liability of Royal Dutch Petroleum Co. and Shell Transport and Trading Co. For Acts of Shell Nigeria—Alter-Ego (ATS Claims) and its supporting sources set forth the correct standard. There is no warrant to look to Nigerian or English veil-piercing law under the ATS. International Law Br. at 59-60; International Law Reply Br. at 29-34

Defendants also misstate the law in proposing to instruct the jury that plaintiffs must pierce the corporate veils of SPCo in addition to SPDC. Defendants cite no caselaw holding that to find a "grandparent" corporation liable for the acts of an indirect subsidiary, a plaintiff must pierce each intermediate corporation in turn. Instead, courts have repeatedly held that the alter ego test may be directly applied between a grandparent corporation and an indirect subsidiary. Indeed, *Bhd. of Locomotive Eng'rs*, so held, applying the federal common law of veil-piercing. 210 F.3d at 29 (holding equitable doctrine of veil piercing is not limited to parent-subsidiary relationship and instead applies to entities within the same corporate family)(collecting cases); for additional authority, *see also AT&T Global Info. Solutions Co. v. Union Tank Car Co.*, 29 F. Supp. 2d 857, 860, n.3, 864 (S.D. Ohio 1998) (holding that "the corporate veil of a grandparent

corporation should be pierced in the same manner as that of the parent” where plaintiffs had sued indirect subsidiary and corporate grandparent, but not the intermediate subsidiary); *Town of Oyster Bay v. Occidental Chem. Corp.*, 987 F. Supp. 182, 202-204 (E.D.N.Y. 1997)(analyzing whether corporation which owned second corporation through intermediate subsidiary could be held liable under alter ego theory, and finding that second company was first company’s alter-ego); *Maltz v. Union Carbide Chems. & Plastics Co.*, 992 F. Supp. 286, 301–302 (S.D.N.Y. 1997) (analyzing whether indirect subsidiary was alter ego of its corporate grandparent before considering whether subsidiary was alter ego of its corporate parent); *Nichols v. Pabtex, Inc.*, 151 F. Supp. 2d 772, 782–84 (E.D. Tex. 2001) (analyzing relationship between indirect subsidiary and its corporate great-grandparent and denying summary judgment without discussing piercing of any intermediate entities); *In re Oil Spill by the “Amoco Cadiz,”* 1984 AMC 2123, 1984 U.S. Dist. LEXIS 17480, (N.D. Ill. 1984), *aff’d*, 954 F.2d 1279 (7th Cir. 1992)((relying on fact that Standard Oil and its subsidiaries formed “an integrated multinational corporation” in holding that it was liable for the torts of its indirect subsidiary). *Id.* at *135–36; *see also id.* at *3 (noting that Transport “was a Liberian corporation all of whose stock was indirectly owned by Standard through a chain of wholly owned subsidiaries”).

Defendants proposed instruction that: “The law allows corporations to organize for the purpose of isolating liability of related corporate entities, such as a parent and a subsidiary, or for other reasons” is misleading and prejudicial; it suggests that a parent corporation should never be held liable ; and the term “other reasons” is so vague it could only invite speculation.

(1) Plaintiffs’ Theory of Piercing the Corporate Veil of SPDC

In order to prove that SPCo. willfully participated in SPDC’s alleged unlawful conduct under plaintiffs’ piercing the corporate veil theory, each plaintiff must prove each of the following elements under Nigerian law:

First, SPCo. created SPDC as a sham or façade for the purpose of substantially assisting the Nigerian Government in violating the norm of international law, and not for any legitimate business purpose. In determining whether SPCo. created SPDC for a legitimate business purpose, you should consider such factors as whether SPCo. and SPDC have separate directors and officers, whether the directors of SPDC exercise any independence in decision-making, whether SPCo. and SPDC have separate

financial records and books, whether SPDC is adequately capitalized, and whether SPDC hires its own employees.

Second, SPCo. exercised complete control over SPDC's actions in substantially assisting the Nigerian Government to violate the norm of international law.

If you find that plaintiffs have failed to prove any of the above elements, you must find in favor of defendants on this theory. If, however, you find that plaintiffs have proven both elements of this instruction, then you must decide whether defendants can be held liable for SPCo.'s alleged unlawful conduct.

Plaintiffs' Objections to Defendants' Proposed Instruction I.A.3.a.(1) Plaintiffs' Theory of Piercing the Corporate Veil of SPDC.

Plaintiffs incorporate by reference Plaintiffs' Objections to Defendants' Proposed Instruction I.A.3.a Plaintiffs' Theory of Piercing the Corporate Veil.

(2) Plaintiffs' Theory of Piercing the Corporate Veil of SPCo.

In order to prove that each of the defendants willfully participated in SPCo.'s alleged unlawful conduct under plaintiffs' piercing the corporate veil theory, each plaintiff must prove each of the following elements separately with respect to each defendant under English law:

First, defendants created SPCo. as a device, stratagem, or façade to violate the norm of international law, and not for a legitimate business purpose.

Second, defendants sought to use SPCo. for the purpose of substantially assisting SPDC's own assistance to the Nigerian Government in violating the norm of international law.

If you find that plaintiffs have failed to prove any of the above elements, you must find in favor of defendants on this theory.

Plaintiffs' Objections to Defendants' Proposed Instruction I.A.3.a.(2) Plaintiffs' Theory of Piercing the Corporate Veil of SPCo.

Plaintiffs incorporate by reference Plaintiffs' Objections to Defendants' Proposed Instruction I.A.3.a Plaintiffs' Theory of Piercing the Corporate Veil.

b. Plaintiffs' Theory of Aiding and Abetting

In order to prove that each of the defendants willfully participated in SPDC's alleged unlawful conduct under plaintiffs' aiding and abetting theory, each plaintiff must prove each of the following elements separately with respect to each defendant:

First, defendants intended that SPDC commit acts to substantially assist the Nigerian Government to violate the norm of international law. If you find that defendants only had knowledge that SPDC was going to violate the norm of international law and they failed to prevent that violation, you may not conclude that defendants aided and abetted SPDC.

Second, defendants provided practical assistance to SPDC's own assistance to the Nigerian Government in violating the norm of international law. In order to constitute practical assistance, defendants' acts must have made a significant difference in violating the norm of international law.

Third, defendants' substantial assistance to SPDC had a substantial effect on SPDC's own assistance to the Nigerian Government in violating the norm of international law. For practical assistance to have a substantial effect, it is not enough that the assistance was directed in some way toward violating the norm of international law. Defendants' acts can have a substantial effect only if the violation of the norm of international law most probably would not have occurred in the same way without defendants' practical assistance.

Fourth, defendants had effective control over SPDC's alleged conduct related to the violation of the norm of international law.

If you find that plaintiffs have failed to prove any of the above elements, you must find in favor of defendants on this theory.

Plaintiffs' Objections to Defendants' Proposed Instruction I.A.3.b.Plaintiffs' Theory of Aiding and Abetting

Plaintiffs incorporate by reference Plaintiffs' Objections to Defendants' Proposed Instruction I.A.2.a. Plaintiffs' Theory of Aiding and Abetting.

Defendants' instruction erroneously presumes that defendants can only be held liable for abetting SPDC's provision of substantial assistance to abuses. In fact, defendants' can be held liable for aiding and abetting any wrongful act by SPDC. See Plaintiffs' Proposed Jury Instruction No. 7.7: Liability of Royal Dutch Petroleum Co. , Shell Transport and Trading Co. and Brian Anderson For Acts of Shell Nigeria— Aiding and Abetting and supporting sources.

Defendants proposed instruction that "defendants' acts must have made a significant difference in violating the norm of international law." Should be changed to "... in SPDC's wrongful conduct."

The paragraph labeled "Third" should be changed such that the first sentence reads: "Defendants' practical assistance had a substantial effect on SPDC's wrongful acts." The second sentence should be deleted.

c. Plaintiffs' Theory of Agency

In order to prove that each of the defendants willfully participated in SPDC's alleged unlawful conduct under plaintiffs' agency theory, each plaintiff must prove each of the following elements separately with respect to each defendant:

First, defendants and SPDC entered into an agreement for SPDC to substantially assist the Nigerian Government in violating the norm of international law.

Second, defendants and SPDC acted for all intents and purposes as one in substantially assisting the Nigerian Government to violate the norm of international law,

or that defendants controlled every action of SPDC in substantially assisting the Nigerian Government to violate the norm of international law.

If you find that plaintiffs have failed to prove any of the above elements, you must find in favor of defendants on this theory.

Plaintiffs' Objections to Defendants' Proposed Instruction I.A.3.c. Plaintiffs' Theory of Agency

The basis for plaintiffs' objections are detailed in Plaintiffs' Proposed Jury Instruction No. 7.3 and 7.5 and the supporting sources.

Defendants' proposed instruction misstates the elements of agency. Plaintiffs need not show that "defendants and SPDC entered into an agreement for SPDC to substantially assist the Nigerian Government in violating the norm of international law." An agreement to serve as an agent can be implied. Moreover, there need not be *any* agreement to commit a wrongful act. Instead a wrongful act must only be within the scope of the agency. Defendants utterly ignore the fact that agency liability is vicarious. Liability based on an agreement to commit a wrongful act is conspiracy liability; such agreement is not an element of agency. In addition, Defendants' instruction erroneously presumes that defendants can only be held liable for SPDC's provision of substantial assistance to abuses. In fact, defendants' can be held liable any responsibility of SPDC. For example, an agent of an agent is an agent of the principal.

Plaintiffs also need not show that "defendants and SPDC acted for all intent and purposes as one in substantially assisting the Nigerian Government to violate the norm of international law." Defendants need not have acted at all, let alone have acted "as one" with SPDC. A principal is liable for the acts of the agent within the scope of the agency, even if the act violates a principal's company policy. Likewise, plaintiffs need not show defendants acted to assist the abuses. Such showing would allow defendant to be held directly liable for aiding and abetting, it is not required for agency liability. Defendants again ignore the fact that agency liability is vicarious. Moreover, this instruction again errs in assuming defendants can only be held liable for SPDC's substantial assistance.

Nor need plaintiffs show "that defendants controlled every action of SPDC in substantially assisting the Nigerian Government to violate the norm of international law." Agency involves control or right to control the manner and means of performing the services. The principal need not actually exercise control over the agent. Likewise, defendants need not have had any control over SPDC's wrongful acts. Liability is vicarious. The question is whether SPDC was acting within the scope of employment. Moreover, here again, defendants err in assuming defendants can only be held liable for SPDC's substantial assistance.

d. Plaintiffs' Theory of Conspiracy

In order to prove that each of the defendants willfully participated in SPDC's alleged unlawful conduct under plaintiffs' conspiracy theory, each plaintiff must prove each of the following elements separately with respect to each defendant:

First, defendants intended to participate in a conspiracy with SPDC to violate the norm of international law.

Second, defendants and SPDC both intended, or had a common purpose, to violate the norm of international law. For a common purpose to exist, there must have been an understanding or arrangement between defendants and SPDC amounting to an agreement that they would violate the norm of international law.

Third, defendants participated, either directly or indirectly, in violating the norm of international law. For defendants to have participated in the conspiracy, they at least must have performed acts that were directed toward furthering the conspiracy to violate the norm of international law.

If you find that plaintiffs have failed to prove any of the above elements, you must find in favor of defendants on this theory.

Plaintiffs' Objections to Defendants' Proposed Instruction I.A.3.d. Plaintiffs' Theory of Conspiracy

Plaintiffs incorporate by reference Plaintiffs' Objections to Defendants' Proposed Instruction I.A.2.c.(1) Plaintiffs' Indirect Theory of Conspiracy.

e. Plaintiffs' Theory of Ratification

In order to prove that each of the defendants willfully participated in SPDC's alleged unlawful conduct under plaintiffs' ratification theory, each plaintiff must prove each of the following elements separately with respect to each defendant:

First, SPDC was acting on behalf of one or both defendants in violating the norm of international law. If SPDC did not violate the norm of international law or was acting on its own behalf or on behalf of anyone other than defendants in violating the norm of international law, defendants cannot be liable for SPDC's alleged unlawful conduct.

Second, defendants knew about SPDC's alleged unlawful conduct. Defendants must have had full knowledge of all the material circumstances surrounding SPDC's conduct in violating the norm of international law.

Third, defendants ratified SPDC's unlawful conduct. Ratification here means that defendants willingly affirmed the prior acts of SPDC.

If you find that plaintiffs have failed to prove any of the above elements, you must find in favor of defendants on this theory.

Plaintiffs' Objections to Defendants' Proposed Instruction I.A.3.e. Plaintiffs' Theory of Ratification

Plaintiffs incorporate by reference Plaintiffs' Objections to Defendants' Proposed Instruction I.A.2.d. Plaintiffs' Theory of Ratification

Plaintiffs also need not show that "SPDC was acting on behalf of one or both defendants *in violating the norm of international law*." (emphasis added). Defendants can be held liable for ratifying any act or omission that would result in liability for SPDC. That act or omission itself need not constitute a violation of international law.

f. Plaintiffs' Theory of Joint Venture

In order to prove defendants willfully participated in SPDC's violation of the norm of international law under plaintiffs' joint venture theory, each plaintiff must prove each of the following elements:

First, defendants and SPDC entered into a specific agreement to carry on an enterprise whose purpose was to violate the norm of international law, from which they sought to profit.

Second, defendants and SPDC each intended to be joint venturers in a venture intended for violating the norm of international law.

Third, defendants and SPDC each contributed either property, financing, skill, knowledge or effort to violate the norm of international law.

Fourth, both defendants and SPDC each had a degree of joint control over the venture for violating the norm of international law.

Fifth, defendants and SPDC shared in both the profits and losses of the venture through the violation of the norm of international law.

If you find that plaintiffs have failed to prove any of the above elements, you must find in favor of defendants on this theory.

Plaintiffs' Objections to Defendants' Proposed Instruction I.A.3.f Plaintiffs' Theory of Joint Venture

Plaintiffs Incorporate by reference Plaintiffs' Objections to Defendants' Proposed Instruction I.A.2.e (Summary Execution) Plaintiffs' Theory of Joint Venture.

* * *

In summary, you may not find defendants liable unless plaintiffs have proven by a preponderance of the evidence each of the following elements:

First, the Nigerian Government violated a norm of international law;

Second, SPDC willfully participated in that particular unlawful conduct of the Nigerian Government under one of plaintiffs' nine legal theories I described in the section entitled "SPDC's Alleged Willful Participation in the Nigerian Government's Conduct" (Part ___); and

Third, defendants willfully participated in SPDC's alleged participation in the Nigerian Government's violation of the norm of international law under one of plaintiffs' six legal theories I described in the section entitled "Defendants' Alleged Willful Participation in SPDC's Conduct" (Part ____).

If plaintiffs failed to prove any one of those elements you must find in favor of defendants on plaintiffs' claim for violation of the norm of international law.

Plaintiffs' Objections to Defendants' Proposed "Wrap-up" Instruction (Below *)**

These paragraphs are not only skewed toward defendants, as detailed above. They also ignore the fact that plaintiffs need not prove anything with respect to SPDC if plaintiffs prevail on their claim that the defendants themselves were part of a conspiracy. See Defendants' Proposed Instruction I.A.2.c.(2) Plaintiffs' Direct Theory of Conspiracy.

DEFENDANTS SOURCES: Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992), *codified at* 28 U.S.C. § 1350, note, § 3(a); Rome Statute of the International Criminal Court, art. 25(3)(c)-(d), July 17, 1998, 37 I.L.M. 999; *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 275-77 (2d Cir. 2007) (Katzmann, J., concurring). *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Judgment, ¶ 233-34 (Dec. 10, 1998); *Prosecutor v. Vasiljevic*, Case No. IT-98-32-A, Judgment, ¶ 102 (Feb. 25, 2004); *Prosecutor v. Tadic*, ICTY-94-1, ¶ 688 (May 7, 1997); *Prosecutor v. Tadic*, Case No. IT-94-1-A, Judgment, ¶ 229 (July 15, 1999); *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, Judgment, 1986 I.C.J. REP. 392, June 27, 1986, ¶¶ 115-16; Sand et al., *Modern Federal Jury Instructions*, Vol. 4, Instr. 72-2; Restatement (Second) of Agency §§ 82, 84-85, 91; *Larsen Chelsey Realty Co. v. Larsen*, 232 Conn. 480, 505-06 (Ct. 1994); *Ansonia v. Cooper*, 64 Conn. 536, 544 (1894); *Prosecutor v. Tadic*, Case No. IT-94-1-A, Judgment, ¶¶ 31, 195-96, 227(iii) (July 15, 1999); *Prosecutor v. Blagojevic*, Case No. IT-02-60-T, Judgment, ¶ 703 (Jan. 17, 2005); *Prosecutor v. Krnojelac*, Case No. IT-97-25-T, Judgment, ¶ 80 (Mar. 15, 2002); *Flammia v. Mite Corp.*, 401 F. Supp. 1121, 1127 (E.D.N.Y. 1975), *aff'd without opinion*, 553 F.2d 93 (2d Cir. 1977); *ITEL Containers Int'l Corp. v. Atlantrafik Express Service, Ltd.*, 909 F.2d 698, 701 (2d Cir. 1990); *Int'l Equity Invs., Inc. v. Opportunity Equity Partners, Ltd.*, 472 F. Supp. 2d 544, 552 (S.D.N.Y. 2007); *Fairbairn v. State*, 107 A.D.2d 864, 864-65 (N.Y. App. Div. 1985); *NYC Mgmt. Group Inc. v. Brown-Miller*, No. 03 Civ. 2617, 2004 U.S. Dist. LEXIS 8652, at *23 (S.D.N.Y. May 13, 2004); *Perkins Sch. for the Blind v. Maxi-Aids, Inc.*, 274 F. Supp. 2d 319, 328 (E.D.N.Y. 2003); *Tropea v. Shell Oil Co.*, 307 F.2d 757, 771-72 (2d Cir. 1962); *Rosenberg v. Equitable Life Assurance Soc.*, 79 N.Y.2d 663, 668-69 (N.Y. 1992); Restatement [Second] of Torts § 427; *Farmer v. Brennan*, 511 U.S. 825, 836 (1994); Restatement (Second) of Torts § 500, p 587 (1963-1964); *Safeco*

Ins. Co. of Am. v. Burr, 551 U.S. 47 (2007); *Musa v. Ehidihamhen*, [1994] 3 N.W.L.R. 544, 557 (C.A.); *Marina Nominees Ltd. v. Fed. Bd. of Inland Revenue*, [1986] N.W.L.R. 48, 55-58 (S.C.); *Union Beverages Ltd. v. Pepsicola Int'l Ltd.*, [1994] 3 N.W.L.R. 1, 22 (S.C.) (Mohammed, J., concurring); *Woolfson v. Strathclyde Reg'l Council*, [1978] 38 P. & C.R. 521; *Gilford Motor Co. v. Horne*, [1933] All E.R. 109 (A.C.); *United States v. Bestfoods*, 542 U.S. 51, 61 (1998); *Kingston Dry Dock Co. v. Lake Champlain Transp. Co.*, 31 F.2d 265, 267 (2d Cir. 1929); O'Malley et al., Federal Jury Practice and Instructions §§ 103.13, 108.05.

B. Crimes Against Humanity⁵

Ken Wiwa, individually and on behalf of Ken Saro-Wiwa, Blessing Kpuinen, individually and on behalf of John Kpuinen, Owens Wiwa, Karalolo Kogbara, Michael Tema Vizer, Lucky Doobee, individually and on behalf of Saturday Doobee, Friday Nuate, individually and on behalf of Felix Nuate, Monday Gbokoo, individually and on behalf of Daniel Gbokoo, David Kiobel, and James B. N-nah, individually and on behalf of Uebari N-nah contend that defendants are liable for crimes against humanity against Ken Saro-Wiwa, Ken Wiwa, Blessing Kpuinen, John Kpuinen, Owens Wiwa, Karalolo Kogbara, Michael Tema Vizer, Lucky Doobee, Saturday Doobee, Friday Nuate, Felix Nuate, Monday Gbokoo, Daniel Gbokoo, David Kiobel, James B. N-nah and Uebari N-nah because (1) the Nigerian Government committed crimes against humanity against those individuals, (2) SPDC willfully participated in those crimes against humanity by the Nigerian Government, and (3) defendants willfully participated in SPDC's alleged participation in the crimes against humanity.

In order to prove this claim against defendants, plaintiffs must prove each of the following elements:

⁵ (See Defs.' R&O Stmt. Part I.B.2.)

First, plaintiffs must prove that the Nigerian Government committed crimes against humanity against Ken Saro-Wiwa, Ken Wiwa, Blessing Kpuinen, John Kpuinen, Owens Wiwa, Karalolo Kogbara, Michael Tema Vazor, Lucky Doobee, Saturday Doobee, Friday Nuate, Felix Nuate, Monday Gbokoo, Daniel Gbokoo, David Kiobel, James B. N-nah and Uebari N-nah. If plaintiffs cannot prove that the Nigerian Government committed crimes against humanity against these individuals, you must find in favor of defendants.

Second, if you find, however, that plaintiffs have met their burden of proving that the Nigerian Government committed crimes against humanity against one or more of these individuals, you must then decide, under one or more of the legal theories described in the section entitled “SPDC’s Alleged Willful Participation in the Nigerian Government’s Conduct” (Part __), whether SPDC willfully participated in crimes against humanity against these individuals by the Nigerian Government. If you find that SPDC did not willfully participate in crimes against humanity against these individuals by the Nigerian Government under any of those theories, you must find in favor of defendants.

Third, if you find, however, that SPDC did willfully participate in the crimes against humanity by the Nigerian Government, you must then decide if each defendant willfully participated in SPDC’s alleged participation in the crimes against humanity under one or more of the legal theories described in the section entitled “Defendants’ Alleged Willful Participation in SPDC’s Conduct”. If you find that defendants did not willfully participate in SPDC’s alleged participation, you must find in favor of defendants.

Plaintiffs' Objections to Defendants' Proposed Instruction I.B. Crimes Against Humanity (Count II of Plaintiffs' Complaint)

Plaintiffs incorporate by reference Plaintiffs' Objections to Defendants' Proposed Instruction I.A. Summary Execution (Count I of Plaintiffs' Complaint).

1. The Nigerian Government's Conduct

In order for you to find that the Nigerian Government committed crimes against humanity, plaintiffs must prove each of the following elements separately with respect to each individual plaintiff:

First, the Nigerian Government committed one of the following acts upon the plaintiff: murder; imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; torture; persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under international law; or other inhumane acts of a similar character intentionally causing great suffering or serious injury to body or mental or physical health.

Second, the Nigerian Government committed the above mentioned act or acts as part of a widespread or systematic attack against the Ogoni people. An act is committed as part of a widespread or systematic attack only if the attack was massive, frequent, large scale, and thoroughly organized. Furthermore, for one or more of the acts to have been committed against a civilian population, plaintiffs must prove that there was more than a single or isolated act. Simply because an act or acts could be a crime under United States law does not mean they necessarily constitute crimes against humanity. The act or acts must have been pursuant to or in furtherance of a state or organizational policy to commit such an attack. In determining whether the act or acts were committed against the Ogoni people, you should not look at the law in relation to each individual

plaintiff, but rather look at the collective of Ogoni people and determine whether they were targeted as a group.

Third, the Nigerian Government committed the above-mentioned act or acts knowingly, meaning the Nigerian Government knew the overall and broader context of the act or acts.

You may find that the Nigerian Government committed crimes against humanity only if plaintiffs have proven all of the elements listed above. If they have not proven all elements of this claim, their claim for crimes against humanity must fail and you must find in favor of defendants.

Plaintiffs' Objections to Defendants' Proposed Instruction I.B.1. The Nigerian Government's Conduct

Plaintiffs object to the language in bold in the following passage:

“the Nigerian Government committed one of the following acts upon the plaintiff: murder; imprisonment or other severe deprivation of physical liberty **in violation of fundamental rules of international law**; torture; persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds **that are universally recognized as impermissible under international law**; or other inhumane acts of a similar character intentionally causing great suffering or serious injury to body or mental or physical health.”

There is no requirement that crimes against humanity be committed by a government. Moreover, Plaintiffs do not have to prove the state of international law to the jury, nor does the jury decide what the law is. Whether a particular claim is actionable under the ATS is a legal matter decided by the Court. Defendants' instruction suggests otherwise, and serves no other purpose.

Plaintiffs object to defendants' proposed instruction that an attack is widespread or systematic “only if the attack was massive, frequent, large scale, and thoroughly organized.” As defendants' concede, plaintiffs need only prove a “widespread” **or** “systematic” attack. Defendants' definition, however, conflates the two, and is without support. As reflected in Plaintiffs' Proposed Jury Instruction No. 2.5: Crimes Against Humanity, “widespread” refers to the large scale nature of the attack and the number of victims, while “systematic” refers to the organized nature of the acts of violence and the

improbability of their random occurrence. *Prosecutor v. Limaj*, Judgment, No. ICTY- 03-66-T (Nov. 30, 2005) ¶ 183.

Plaintiffs need not show that “that the Ogoni people . . . were targeted as a group.” As detailed in Plaintiffs’ Proposed Jury Instruction No. 2.5: Crimes Against Humanity and accompanying sources, the entire population of the geographical entity in which the attack takes place need not have been subjected to the attack.

Defendants’ proposed instruction erroneously states there must be: “a state or organizational policy to commit such an attack.” There is no such requirement. Neither Article 5 of the ICTY Statute nor Article 3 of the ICTR Statute list any requirement of a plan or policy. See *Prosecutor v. Blaskic*, No. 95-14-A, ¶ 120 (ICTY Appeals Chamber, July 29, 2004) (“[N]either the attack nor the acts of the accused needs to be supported by any form of ‘policy’ or ‘plan’ There was nothing in . . . customary international law . . . which required proof of the existence of a plan or policy to commit these crimes.”); See also *Limaj et al*, IT-03-66-T, ¶ 212 (ICTY Trial Chamber, Nov. 30, 2005) (policy or plan is not a legal element of crimes against humanity); *Blagojevic/Jokic*, No. IT-02-60-T, ¶ 546 (ICTY Trial Chamber, Jan. 17, 2005) (same); *Brdjanin*, No. IT-99-36-T at ¶ 137 (ICTY Trial Chamber, Sept. 1, 2004) (same); *Prosecutor v. Galic*, No. IT-98-29-T, ¶ 147 (ICTY Trial Chamber, Dec. 5, 2003) (same); *Prosecutor v. Simic, Tadic, and Zaric*, No. IT-95-9-T at ¶ 44 (ICTY Trial Chamber, Oct. 17, 2003) (same). Here again, defendants seek to conflate “widespread” and “systematic”; since the former need not be organized, there is no basis for concluding it must be pursuant to a policy. See *Akayesu*, No. ICTR-96-4-T at ¶ 580 (“widespread” does not require any policy).

Defendants improperly rely on the ICC’s Rome Statute to support their argument that there is a policy requirement for CAH claims. ATS claims are based on customary international law. The Rome Statute, on the other hand, is a treaty and the drafters of a treaty are permitted to adopt language for a treaty without any concern as to whether it reflects customary international law. Indeed, the Rome Statute, by its very terms makes clear that its definitions “shall not affect the characterization of any conduct as criminal under international law independently of this statute.” Rome Statute, art. 22(3).

Defendants proposed policy requirement should also be rejected because, even if it existed, the instruction is unnecessary. Before the ICTY rejected the policy requirement entirely, the Trial Chamber stated: “such a policy need not be formalized and can be deduced from the way in which the acts occur. Notably, if the acts occur on a widespread or systematic basis that demonstrates a policy to commit those acts, whether formalized or not.” *Tadic*, No. IT-94-1-T at ¶ 653. Thus, any policy requirement would not add a separate element to the claim. If, however, the Court agrees with defendants, the Court should further instruct that “such a policy need not be formalized and can be deduced from the way in which the acts occur.”

2. SPDC's Alleged Willful Participation in the Nigerian Government's Conduct

[REPEAT Alleged Willful Participation in the Nigerian Government's Conduct instruction from Part ____.]

a. Plaintiffs' Theory of Aiding and Abetting

[REPEAT Aiding and Abetting instruction from Part ____.]

b. Plaintiffs' Theory of Agency

[REPEAT Agency instruction from Part ____.]

c. Plaintiffs' Theory of Conspiracy

[REPEAT Conspiracy instruction from Part ____.]

d. Plaintiffs' Theory of Ratification

[REPEAT Ratification instruction from Part ____.]

e. Plaintiffs' Theory of Joint Venture

[REPEAT Joint Venture instruction from Part ____.]

f. Plaintiffs' Theory of Instigation or Inducement of Wrongful Acts

[REPEAT Instigation or Inducement of Wrongful Acts instruction from Part ____.]

g. Plaintiffs' Theory of Reckless Disregard

[REPEAT Reckless Disregard instruction from Part ____.]

h. Plaintiffs' Theory of Joint Enterprise

[REPEAT Joint Enterprise instruction from Part ____.]

i. Plaintiffs' Theory of Inherent Danger

[REPEAT Inherent Danger instruction from Part ____.]

3. Defendants' Alleged Willful Participation in SPDC's Conduct

[REPEAT Defendants' Alleged Willful Participation in SPDC's Conduct instruction from Part ____.]

a. Plaintiffs' Theory of Piercing the Corporate Veil

[REPEAT Piercing the Corporate Veil instruction from Part ____.]

(1) Plaintiffs' Theory of Piercing the Corporate Veil of SPDC

[REPEAT Piercing the Corporate Veil of SPDC instruction from Part ____.]

(2) Plaintiffs' Theory of Piercing the Corporate Veil of SPCo.

[REPEAT Piercing the Corporate Veil of SPCo. instruction from Part ____.]

b. Plaintiffs' Theory of Aiding and Abetting

[REPEAT Aiding and Abetting instruction from Part ____.]

c. Plaintiffs' Theory of Agency

[REPEAT Agency instruction from Part ____.]

d. Plaintiffs' Theory of Conspiracy

[REPEAT Conspiracy instruction from Part ____.]

e. Plaintiffs' Theory of Ratification

[REPEAT Ratification instruction from Part ____.]

f. Plaintiffs' Theory of Joint Venture

[REPEAT Joint Venture instruction from Part ____.]

DEFENDANTS SOURCES: Rome Statute of the International Criminal Court, arts. 7, 25(3)(c)-(d), July 17, 1998, 37 I.L.M. 999; *Prosecutor v. Tadic*, Case No. IT-94-1-T, Judgment, ¶¶ 656-59 (May 7, 1997); *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 Civ. 8386 (KMW), 2002 WL 319887, at *9-10 (S.D.N.Y. Feb. 28, 2002).

C. Torture⁶

Ken Wiwa, on behalf of Ken Saro-Wiwa, Blessing Kpuinen, on behalf of John Kpuinen, Karalolo Kogbara, Michael Tema Vizer, Lucky Doobee, on behalf of Saturday Doobee, Friday Nuate, on behalf of Felix Nuate, Monday Gbokoo, on behalf of Daniel Gbokoo, and James B. N-nah, on behalf of Uebari N-nah contend that defendants are liable for the torture of Ken Saro-Wiwa, John Kpuinen, Karalolo Kogbara, Michael Tema Vizer, Saturday Doobee, Felix Nuate, Daniel Gbokoo and Uebari N-nah because (1) the Nigerian Government committed torture against each of these individuals, (2) SPDC willfully participated in the torture of each of these individuals by the Nigerian Government, and (3) defendants willfully participated in SPDC's alleged participation in the torture.

In order to prove this claim against defendants, plaintiffs must prove each of the following elements:

⁶ (See Defs.' R&O Stmt. Part I.B.3.)

First, plaintiffs must prove that the Nigerian Government committed torture against Ken Saro-Wiwa, John Kpuinen, Karalolo Kogbara, Michael Tema Vizor, Saturday Doobee, Felix Nuate, Daniel Gbokoo and Uebari N-nah. If plaintiffs cannot prove that the Nigerian Government committed torture against these individuals, you must find in favor of defendants.

Second, if you find, however, that plaintiffs have met their burden of proving that the Nigerian Government committed torture against these individuals, you must then decide, under one or more of the legal theories described in the section entitled “SPDC’s Alleged Willful Participation in the Nigerian Government’s Conduct” (Part __), whether SPDC willfully participated in torture against these individuals by the Nigerian Government. If you find that SPDC did not willfully participate in such torture by the Nigerian Government under any of those theories, you must find in favor of defendants.

Third, if you find, however, that SPDC did willfully participate in the torture by the Nigerian Government, you must then decide if each defendant willfully participated in SPDC’s alleged participation in the torture under one or more of the legal theories described in the section entitled “Defendants’ Alleged Willful Participation in SPDC’s Conduct”. If you find that defendants did not willfully participate in SPDC’s alleged participation, you must find in favor of defendants.

Plaintiffs’ Objections to Defendants’ Proposed Instruction I.C. Torture (Count III of Plaintiffs’ Complaint)

Plaintiffs incorporate by reference Plaintiffs’ Objections to Defendants’ Proposed Instruction I.A. Summary Execution (Count I of Plaintiffs’ Complaint).

1. The Nigerian Government's Conduct

In order for you to find that the Nigerian Government committed torture, plaintiffs must prove each of the following elements separately with respect to each individual plaintiff:

First, the Nigerian Government subjected him or her to severe pain and suffering, whether physical or mental. Torture may involve mental suffering but only if it is prolonged mental harm caused by or resulting from the intentional infliction or threatened infliction of severe physical pain or suffering, or the threat of imminent death.

Second, the Nigerian Government intentionally inflicted that pain or suffering on him or her for the purpose of obtaining information or a confession; for punishment, intimidation, or coercion; or for any reason based on discrimination; and

Third, the pain or suffering was inflicted on him or her by, or with the consent of, a public official or other person acting in an official capacity and while he or she was in the official's custody or under the official's control.

You may find that the Nigerian Government committed torture against one or more of these individuals only if plaintiffs can prove all of the elements listed above. If plaintiffs cannot prove even one of those elements, their claim for torture must fail and you must find in favor of defendants.

Plaintiffs' Objections to Defendants' Proposed Instruction I.C.1. The Nigerian Government's Conduct

A victim need only suffer "severe pain or suffering" not "severe pain and suffering" as defendants would instruct. Torture Convention, Art. 1.

Defendants erroneously contend that a torture victim must be "in the official's custody or under the official's control" at the time of the infliction of torture. No "custody or control" element appears on the face of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment or any other international instrument defining torture.

But even if torture has a custody or control element, the victim need not be under the custody or control of a public official. The parties agree that torture can be committed with the consent of, a public official or other person acting in an official capacity, (although the instruction should read “consent or acquiescence”.) There is no requirement that person must be physically present.

2. SPDC’s Alleged Willful Participation in the Nigerian Government’s Conduct

[REPEAT Alleged Willful Participation in the Nigerian Government’s Conduct instruction from Part ____.]

a. Plaintiffs’ Theory of Aiding and Abetting

[REPEAT Aiding and Abetting instruction from Part ____.]

b. Plaintiffs’ Theory of Agency

[REPEAT Agency instruction from Part ____.]

c. Plaintiffs’ Theory of Conspiracy

[REPEAT Conspiracy instruction from Part ____.]

d. Plaintiffs’ Theory of Ratification

[REPEAT Ratification instruction from Part ____.]

e. Plaintiffs’ Theory of Joint Venture

[REPEAT Joint Venture instruction from Part ____.]

f. Plaintiffs’ Theory of Instigation or Inducement of Wrongful Acts

[REPEAT Instigation or Inducement of Wrongful Acts instruction from Part ____.]

g. Plaintiffs’ Theory of Reckless Disregard

[REPEAT Reckless Disregard instruction from Part ____.]

h. Plaintiffs’ Theory of Joint Enterprise

[REPEAT Joint Enterprise instruction from Part ____.]

i. Plaintiffs' Theory of Inherent Danger

[REPEAT Inherent Danger instruction from Part ____.]

3. Defendants' Alleged Willful Participation in SPDC's Conduct

[REPEAT Defendants' Alleged Willful Participation in SPDC's Conduct instruction from Part ____.]

a. Plaintiffs' Theory of Piercing the Corporate Veil

[REPEAT Piercing the Corporate Veil instruction from Part ____.]

(1) Plaintiffs' Theory of Piercing the Corporate Veil of SPDC

[REPEAT Piercing the Corporate Veil of SPDC instruction from Part ____.]

(2) Plaintiffs' Theory of Piercing the Corporate Veil of SPCo.

[REPEAT Piercing the Corporate Veil of SPCo. instruction from Part ____.]

b. Plaintiffs' Theory of Aiding and Abetting

[REPEAT Aiding and Abetting instruction from Part ____.]

c. Plaintiffs' Theory of Agency

[REPEAT Agency instruction from Part ____.]

d. Plaintiffs' Theory of Conspiracy

[REPEAT Conspiracy instruction from Part ____.]

e. Plaintiffs' Theory of Ratification

[REPEAT Ratification instruction from Part ____.]

f. Plaintiffs' Theory of Joint Venture

[REPEAT Joint Venture instruction from Part ____.]

SOURCES: Convention Against Torture, and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Dec. 10, 1984, art. 1, 1465 U.N.T.S. 85, 23 I.L.M. 1027 (1984), *as modified* 24 I.L.M. 535 (1985); U.S. Reservations, Declarations, and Understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Cong. Rec. S17486-01 (daily ed., Oct. 27, 1990); Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992), *codified at* 28 U.S.C. § 1350, note, § 3(a); 8 C.F.R. § 208.18; Constitution of the Federal Republic of Nigeria, art. 31(1)(a) (1979).

D. Cruel, Inhuman or Degrading Treatment⁷

Ken Wiwa, on behalf of Ken Saro-Wiwa, Blessing Kpuinen, individually and on behalf of John Kpuinen, Owens Wiwa, Karalolo Kogbara, Michael Tema Vizer, Lucky Doobee, individually and on behalf of Saturday Doobee, Friday Nuate, individually and on behalf of Felix Nuate, Monday Gbokoo, individually and on behalf of Daniel Gbokoo, David Kiobel, and James B. N-nah, individually and on behalf of Uebari N-nah, contend that defendants are liable for the cruel, inhuman or degrading treatment of Ken Saro-Wiwa, Blessing Kpuinen, John Kpuinen, Owens Wiwa, Karalolo Kogbara, Michael Tema Vizer, Lucky Doobee, Saturday Doobee, Friday Nuate, Felix Nuate, Monday Gbokoo, Daniel Gbokoo, David Kiobel, James N-nah and Uebari N-nah because (1) the Nigerian Government subjected these plaintiffs to cruel, inhuman or degrading treatment, (2) SPDC willfully participated in that cruel, inhuman or degrading treatment by the Nigerian Government, and (3) defendants willfully participated in SPDC's alleged participation in the cruel, inhuman or degrading treatment.

⁷ (See Defs.' R&O Stmt. Part I.B.4.)

In order to prove this claim against defendants, plaintiffs must prove each of the following elements:

First, plaintiffs must prove that the Nigerian Government subjected Ken Saro-Wiwa, Blessing Kpuinen, John Kpuinen, Owens Wiwa, Karalolo Kogbara, Michael Tema Vizer, Lucky Doobee, Saturday Doobee, Friday Nuate, Felix Nuate, Monday Gbokoo, Daniel Gbokoo, David Kiobel, James N-nah and Uebari N-nah to cruel, inhuman or degrading treatment. If plaintiffs cannot prove that the Nigerian Government subjected them to cruel, inhuman or degrading treatment, you must find in favor of defendants.

Second, if you find, however, that plaintiffs have met their burden of proving that the Nigerian Government subjected each of them to cruel, inhuman or degrading treatment, you must then decide, under one or more of the legal theories described in the section entitled “SPDC’s Alleged Willful Participation in the Nigerian Government’s Conduct” (Part __), whether SPDC willfully participated in the cruel, inhuman or degrading treatment by the Nigerian Government. If you find that SPDC did not willfully participate in the cruel, inhuman or degrading treatment by the Nigerian Government under any of those theories, you must find in favor of defendants.

Third, if you find, however, that SPDC did willfully participate in the cruel, inhuman or degrading treatment of these plaintiffs by the Nigerian Government, you must then decide if each defendant willfully participated in SPDC’s alleged participation in the cruel, inhuman or degrading treatment under one or more of the legal theories described in the section entitled “Defendants’ Alleged Willful Participation in

SPDC's Conduct". If you find that defendants did not willfully participate in SPDC's alleged conduct, you must find in favor of defendants.

Plaintiffs' Objections to Defendants' Proposed Instruction I.D. Cruel, Inhuman or Degrading Treatment (Count IV of Plaintiffs' Complaint)

Plaintiffs incorporate by reference Plaintiffs' Objections to Defendants' Proposed Instruction I.A. Summary Execution (Count I of Plaintiffs' Complaint).

1. The Nigerian Government's Conduct

In order for you to find that the Nigerian Government subjected plaintiffs to cruel, inhuman or degrading treatment, plaintiffs must prove each of the following elements separately with respect to each individual plaintiff:

First, the Nigerian Government subjected him or her to mental or physical suffering, anguish, humiliation, fear or debasement.

Second, the Nigerian Government intended to cause suffering, anguish, humiliation, fear or debasement.

Third, this suffering, anguish, humiliation, fear or debasement was cruel, inhuman, or degrading.

Third, this suffering anguish, humiliation, fear or debasement was inflicted on him or her by or with the consent of, a public official or other person acting in an official capacity, and while he was in the official's custody or under the official's control.

In order to constitute cruel, inhuman or degrading treatment, the conduct in question must be egregious such that the it is contrary to the norms of the civilized world. You should look at the totality of the circumstances in determining whether the Nigerian Government intentionally caused plaintiffs to suffer cruel, inhuman, or degrading treatment. Whether treatment is cruel, inhuman or degrading depends upon an

assessment of all the particularities of the evidence before you, including the specific conditions at issue, duration of the measures imposed, the objectives pursued by the Nigerian Government, and the physical or mental effects on the person(s) involved.

If you find that the plaintiffs experienced any pain or suffering which arose from lawful sanctions, or if it was inherent or incident to such lawful sanctions, you cannot find defendants liable for cruel, inhuman, or degrading treatment. Lawful sanctions include law enforcement operations authorized by Nigerian law.

You may find that the Nigerian Government subjected one or more plaintiffs to cruel, inhuman or degrading treatment only if plaintiffs can prove all the elements listed above and the pain or suffering did not arise as incidental to lawful sanctions of the Nigerian Government. If plaintiffs cannot prove even one of those elements, their claim for cruel, inhuman or degrading treatment must fail and you must find in favor of defendants.

Plaintiffs' Objections to Defendants' Proposed Instruction I.D.1. The Nigerian Government's Conduct

The Court should reject Defendants' proposed instruction that: "The conduct in question, however, must be egregious such that it is contrary to the norms of the civilized world." Plaintiffs do not have to prove the state of international law to the jury, nor does the jury decide what the law is. Whether a particular claim is actionable under the ATS is a legal matter decided by the Court. Defendants' instruction suggests otherwise, and serves no other purpose.

The Court should delete the proposed statement that: "There is no defined set of acts that constitute cruel, inhuman or degrading treatment." This language seems calculated to prejudice the jury against the claim, and to support defendants' legal argument against the claim on appeal. The Court should instead instruct that "Cruel inhuman or degrading treatment includes conduct that falls short of torture."

Defendants err when they state that a victim of CIDT must be in a "public official's custody or under the official's control." Indeed, this Court has already held that several non-custodial abuses constituted CIDT, including targeting a particular plaintiff and forcing that plaintiff into exile under credible fear of arbitrary arrest, torture and death;

trying to extort a plaintiff to take certain actions to save his brother's life. *Wiwa v. Royal Dutch Petroleum Co.*, 2002 WL 319887 *7–9 (S.D.N.Y. Feb. 28, 2002). No “custody or control” element appears on the face of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment or any other international instrument prohibiting CIDT.

Other ATS and international caselaw has likewise never required this element. *See, e.g., Xuncax v. Gramajo*, 886 F. Supp. 162, 187–89 (D. Mass. 1995) (holding that the following acts constituted CIDT: causing plaintiffs to witness the torture or severe mistreatment of an immediate relative and to watch soldiers ransack their homes and threaten their families; bombing them from the air; and throwing a grenade at them); *Ayder v. Turkey*, App. No. 23656/94 ¶¶ 108–110 (Eur. Ct. H.R. 2004) (finding that military attacks on villages constitute CIDT); *Hajrizi Dzenajl v. Yugoslavia*, U.N. Doc. CAT/C/29/D/161/2000 ¶ 9.2 (Comm. Against Torture Nov. 21, 2002) (finding burning and destruction of houses to be CIDT); *Kurt v. Turkey*, App. No. 24276/94 ¶¶ 133–34 (Eur. Ct. H.R. 1998) (finding the mental anguish suffered by relatives of disappeared persons, who were not themselves in custody, to be CIDT); *Timurtas v. Turkey*, App. No. 23531/94 ¶¶ 91–98 (Eur. Ct. H.R. 2001) (same).

Moreover even if there were a custody or control requirement, the victim need not be under the custody or control of a public official. The parties agree that torture can be committed with the consent of, a public official or other person acting in an official capacity, (although the instruction should read “consent or acquiescence”.) There is no requirement that the official be present.

Plaintiffs object to Defendants proposed instruction that:

“If you find that the plaintiffs experienced any pain or suffering which arose from lawful sanctions, or if the pain or suffering was inherent or incident to such lawful sanctions, you cannot find defendants liable for cruel, inhuman, or degrading treatment. Lawful sanctions include law enforcement operations authorized by Nigerian law.”

A sanction can constitute CIDT even if it was “lawful” under Nigerian law. The first sentence is misleading in that it suggests otherwise. More importantly, the second sentence is simply wrong and clearly prejudicial. There can be no doubt that law enforcement officials can commit CIDT during course of otherwise valid operations. *See e.g. Ayder v. Turkey*, App. No. 23656/94 ¶¶ 108–110 (Eur. Ct. H.R. 2004). “Even assuming that the motive behind the actions of the security forces was to punish the applicants and their relatives for their alleged involvement in, or support of, the PKK, that would not, in the opinion of the Court, provide a justification for such ill-treatment.”

Defendants’ proposed instruction that “this suffering, anguish, humiliation, fear or debasement was cruel, inhuman, or degrading” should be rejected because it is circular. “Anguish” etc. is the definition of cruel, inhuman or degrading treatment. This proposed instruction could only confuse the jury.

2. SPDC's Alleged Willful Participation in the Nigerian Government's Conduct

[REPEAT Alleged Willful Participation in the Nigerian Government's Conduct instruction from Part ____.]

a. Plaintiffs' Theory of Aiding and Abetting

[REPEAT Aiding and Abetting instruction from Part ____.]

b. Plaintiffs' Theory of Agency

[REPEAT Agency instruction from Part ____.]

c. Plaintiffs' Theory of Conspiracy

[REPEAT Conspiracy instruction from Part ____.]

d. Plaintiffs' Theory of Ratification

[REPEAT Ratification instruction from Part ____.]

e. Plaintiffs' Theory of Joint Venture

[REPEAT Joint Venture instruction from Part ____.]

f. Plaintiffs' Theory of Instigation or Inducement of Wrongful Acts

[REPEAT Instigation or Inducement of Wrongful Acts instruction from Part ____.]

g. Plaintiffs' Theory of Reckless Disregard

[REPEAT Reckless Disregard instruction from Part ____.]

h. Plaintiffs' Theory of Joint Enterprise

[REPEAT Joint Enterprise instruction from Part ____.]

i. Plaintiffs' Theory of Inherent Danger

[REPEAT Inherent Danger instruction from Part ____.]

3. Defendants' Alleged Willful Participation in SPDC's Conduct

[REPEAT Defendants' Alleged Willful Participation in SPDC's Conduct instruction from Part ____.]

a. Plaintiffs' Theory of Piercing the Corporate Veil

[REPEAT Piercing the Corporate Veil instruction from Part ____.]

(1) Plaintiffs' Theory of Piercing the Corporate Veil of SPDC

[REPEAT Piercing the Corporate Veil of SPDC instruction from Part ____.]

(2) Plaintiffs' Theory of Piercing the Corporate Veil of SPCo.

[REPEAT Piercing the Corporate Veil of SPCo. instruction from Part ____.]

b. Plaintiffs' Theory of Aiding and Abetting

[REPEAT Aiding and Abetting instruction from Part ____.]

c. Plaintiffs' Theory of Agency

[REPEAT Agency instruction from Part ____.]

d. Plaintiffs' Theory of Conspiracy

[REPEAT Conspiracy instruction from Part ____.]

e. Plaintiffs' Theory of Ratification

[REPEAT Ratification instruction from Part ____.]

f. Plaintiffs' Theory of Joint Venture

[REPEAT Joint Venture instruction from Part ____.]

SOURCES: Convention Against Torture, and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Dec. 10, 1984, arts. 1, 16, 1465 U.N.T.S. 85, 23 I.L.M. 1027

(1984), *as modified* 24 I.L.M. 535 (1985). U.S. Reservations, Declarations, and Understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Cong. Rec. S17486-01 (daily ed., Oct. 27, 1990); *Harmelin v. Michigan*, 501 U.S. 957, 985 (1991); *The Greek Case*, [1969] Y.B. Eur. Conv. on H.R. 12A at 186; *Raninen v. Finland*, (1997) EHRR 563, 55; *Doe v. Qi*, 349 F. Supp. 2d 1258, 1320-25 (N.D. Cal. 2004).

Plaintiffs’ Objections to Defendants’ Proposed Instruction on Cruel, Inhuman or Degrading Treatment (Nigerian Government’s Conduct)

The Court should reject Defendants’ proposed instruction that: “The conduct in question, however, must be egregious such that it is contrary to the norms of the civilized world.” Plaintiffs do not have to prove the state of international law to the jury, nor does the jury decide what the law is. Whether a particular claim is actionable under the ATS is a legal matter decided by the Court. Defendants’ instruction suggests otherwise, and serves no other purpose.

The Court should delete the proposed statement that: “There is no defined set of acts that constitute cruel, inhuman or degrading treatment.” This language seems calculated to prejudice the jury against the claim, and to support defendants’ legal argument against the claim on appeal. The Court should instead instruct that “Cruel inhuman or degrading treatment includes conduct that falls short of torture.”

Defendants err when they state that a victim of CIDT must be in a “public official’s custody or under the official’s control.” Indeed, this Court has already held that several non-custodial abuses constituted CIDT, including targeting a particular plaintiff and forcing that plaintiff into exile under credible fear of arbitrary arrest, torture and death; trying to extort a plaintiff to take certain actions to save his brother’s life. *Wiwa v. Royal Dutch Petroleum Co.*, 2002 WL 319887 *7–9 (S.D.N.Y. Feb. 28, 2002). No “custody or control” element appears on the face of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment or any other international instrument prohibiting CIDT.

Other ATS and international caselaw has likewise never required this element. *See, e.g., Xuncax v. Gramajo*, 886 F. Supp. 162, 187-89 (D. Mass. 1995)(holding that the following acts constituted CIDT: causing plaintiffs to witness the torture or severe mistreatment of an immediate relative and to watch soldiers ransack their homes and threaten their families; bombing them from the air; and throwing a grenade at them); *Ayder v. Turkey*, App. No. 23656/94 ¶¶ 108–110 (Eur. Ct. H.R. 2004) (finding that military attacks on villages constitute CIDT); *Hajrizi Dzenajl v. Yugoslavia*, U.N. Doc. CAT/C/29/D/161/2000 ¶ 9.2 (Comm. Against Torture Nov. 21, 2002) (finding burning and destruction of houses to be CIDT); *Kurt v. Turkey*, App. No. 24276/94 ¶¶ 133–34 (Eur. Ct. H.R. 1998) (finding the mental anguish suffered by relatives of disappeared persons, who were not themselves in custody, to be CIDT); *Timurtas v. Turkey*, App. No. 23531/94 ¶¶ 91–98 (Eur. Ct. H.R. 2001) (same).

Moreover even if there were a custody or control requirement, the victim need not be under the custody or control of a public official. The parties agree that torture can be committed with the consent of, a public official or other person acting in an official capacity, (although the instruction should read “consent or acquiescence”.) There is no requirement that the official be present.

Plaintiffs object to Defendants proposed instruction that:

“If you find that the plaintiffs experienced any pain or suffering which arose from lawful sanctions, or if the pain or suffering was inherent or incident to such lawful sanctions, you cannot find defendants liable for cruel, inhuman, or degrading treatment. Lawful sanctions include law enforcement operations authorized by Nigerian law.”

A sanction can constitute CIDT even if it was “lawful” under Nigerian law. The first sentence is misleading in that it suggests otherwise. More importantly, the second sentence is simply wrong and clearly prejudicial. There can be no doubt that law enforcement officials can commit CIDT during course of otherwise valid operations. *See e.g. Ayder v. Turkey*, App. No. 23656/94 ¶¶ 108–110 (Eur. Ct. H.R. 2004). “Even assuming that the motive behind the actions of the security forces was to punish the applicants and their relatives for their alleged involvement in, or support of, the PKK, that would not, in the opinion of the Court, provide a justification for such ill-treatment.”

Defendants’ proposed instruction that “this suffering, anguish, humiliation, fear or debasement was cruel, inhuman, or degrading” should be rejected because it is circular. “Anguish” etc. is the definition of cruel, inhuman or degrading treatment. This proposed instruction could only confuse the jury.

E. Arbitrary Arrest and Detention⁸

Ken Wiwa, on behalf of Ken Saro-Wiwa, Blessing Kpuinen, on behalf of John Kpuinen, Owens Wiwa, Michael Tema Vzor, Lucky Doobee, on behalf of Saturday Doobee, Friday Nuate, on behalf of Felix Nuate, and Monday Gbokoo, on behalf of Daniel Gbokoo, contend that defendants are liable for the arbitrary arrest and detention of Ken Saro-Wiwa, John Kpuinen, Owens Wiwa, Michael Tema Vzor, Saturday Doobee, Felix Nuate, and Daniel Gbokoo because (1) the Nigerian Government arbitrarily arrested and detained plaintiffs, (2) SPDC willfully participated in each of those arbitrary arrests and detentions by the Nigerian Government, and (3) defendants willfully participated in SPDC's alleged participation in the arbitrary arrests and detentions.

In order to prove this claim against defendants, plaintiffs must prove each of the following elements:

First, plaintiffs must prove that the Nigerian Government arbitrarily arrested and detained Ken Saro-Wiwa, John Kpuinen, Owens Wiwa, Michael Tema Vzor, Saturday Doobee, Felix Nuate, and Daniel Gbokoo. If plaintiffs cannot prove that the Nigerian Government arbitrarily arrested and detained them, you must find in favor of defendants.

Second, if you find, however, that plaintiffs have met their burden of proving that the Nigerian Government arbitrarily arrested and detained them, you must then decide, under one or more of the legal theories described in the section entitled "SPDC's Alleged Willful Participation in the Nigerian Government's Conduct" (Part ___), whether SPDC willfully participated in those arbitrary arrests and detentions by the

⁸ (See Defs.' R&O Stmt. Part I.B.5.)

Nigerian Government. If you find that SPDC did not willfully participate in those arbitrary arrests and detentions by the Nigerian Government under any of those theories, you must find in favor of defendants.

Third, if you find, however, that SPDC did willfully participate in the arbitrary arrests and detentions by the Nigerian Government, you must then decide if each defendant willfully participated in SPDC's alleged participation in the arbitrary arrests and detentions under one or more of the legal theories described in the section entitled "Defendants' Alleged Willful Participation in SPDC's Conduct". If you find that defendants did not willfully participate in SPDC's alleged participation, you must find in favor of defendants.

Plaintiffs' Objections to Defendants' Proposed Instruction I.E. Arbitrary Arrest and Detention (Count V of Plaintiffs' Complaint)

Plaintiffs incorporate by reference Plaintiffs' Objections to Defendants' Proposed Instruction I.A. Summary Execution (Count I of Plaintiffs' Complaint).

1. The Nigerian Government's Conduct

In order for you to find that the Nigerian Government arbitrarily arrested and detained plaintiffs, plaintiffs must prove each of the following elements separately with respect to each individual plaintiff:

First, the Nigerian Government unlawfully detained him or her without warrant or articulable suspicion, and was not apprised of charges against him or her, and without being brought to trial.

Second, the arrest and detention was officially sanctioned action as part of a state policy that exceeded the Nigerian Government's authorization to detain under the domestic law of Nigeria.

Third, the detention was prolonged. In order to determine if the detention was prolonged under the circumstances, you should assess the specifics of each individual's arrest and detention and determine whether under all of the circumstances, the detention was so unduly lengthy such that all civilized countries of the world would condemn such detentions as unlawful.

You may find a violation of plaintiffs' rights to be free from arbitrary arrest and detention only if all of the elements listed above are satisfied. If plaintiffs cannot prove even one of these elements, their claim must fail and you must find in favor of defendants.

Plaintiffs' Objections to Defendants' Proposed Instruction I.E.1. The Nigerian Government's Conduct

Defendants would erroneously instruct that to be arbitrary, an arrest or detention must be "without warrant or articulable suspicion" and without apprising the individual of the charges against him or her, and without bringing him or her to trial. Defendants' list of requirements should be disjunctive, not conjunctive; there is no requirement that there be more than one arbitrary aspect of a detention, let alone that a plaintiff prove all of these elements. In addition, defendants' list fails to reflect the fact that torture during custody makes arrest or detention arbitrary.

Defendants propose to instruct that plaintiffs must show: "the arrest and detention was officially sanctioned action as part of a state policy that exceeded the Nigerian Government's authorization to detain under the domestic law of Nigeria." This misstates the law, and is unsupported, prejudicial and likely to mislead the jury. The relevant question is whether an arrest or detention violates international law, not whether it was legal under Nigerian law. Nigeria cannot repeal international law by officially sanctioning human rights abuses.

Arbitrary detention need not be prolonged. *See* Plaintiffs' Proposed Jury Instruction No. 2.6: Arbitrary Arrest and Detention and supporting sources.

Defendants ask the Court to instruct the jury that: “There is no clear definition of what constitutes prolonged detention.” This language seems calculated to prejudice the jury against the claim, and to support defendants’ legal argument against the claim on appeal.

Defendants would erroneously instruct the jury that they should determine whether “the detention was so unduly lengthy such that all civilized countries of the world would condemn such detentions as unlawful.” The relevant question, however, is whether detention was arbitrary, not whether it was “unduly lengthy.” Moreover, Plaintiffs do not have to prove the state of international law to the jury, nor does the jury decide what the law is. Defendants’ instruction suggests otherwise and is therefore prejudicial.

2. SPDC’s Alleged Willful Participation in the Nigerian Government’s Conduct

[REPEAT Alleged Willful Participation in the Nigerian Government’s Conduct instruction from Part ____.]

a. Plaintiffs’ Theory of Aiding and Abetting

[REPEAT Aiding and Abetting instruction from Part ____.]

b. Plaintiffs’ Theory of Agency

[REPEAT Agency instruction from Part ____.]

c. Plaintiffs’ Theory of Conspiracy

[REPEAT Conspiracy instruction from Part ____.]

d. Plaintiffs’ Theory of Ratification

[REPEAT Ratification instruction from Part ____.]

e. Plaintiffs’ Theory of Joint Venture

[REPEAT Joint Venture instruction from Part ____.]

f. Plaintiffs’ Theory of Instigation or Inducement of Wrongful Acts

[REPEAT Instigation or Inducement of Wrongful Acts instruction from Part ____.]

g. Plaintiffs' Theory of Reckless Disregard

[REPEAT Reckless Disregard instruction from Part ____.]

h. Plaintiffs' Theory of Joint Enterprise

[REPEAT Joint Enterprise instruction from Part ____.]

i. Plaintiffs' Theory of Inherent Danger

[REPEAT Inherent Danger instruction from Part ____.]

3. Defendants' Alleged Willful Participation in SPDC's Conduct

[REPEAT Defendants' Alleged Willful Participation in SPDC's Conduct instruction from Part ____.]

a. Plaintiffs' Theory of Piercing the Corporate Veil

[REPEAT Piercing the Corporate Veil instruction from Part ____.]

(1) Plaintiffs' Theory of Piercing the Corporate Veil of SPDC

[REPEAT Piercing the Corporate Veil of SPDC instruction from Part ____.]

(2) Plaintiffs' Theory of Piercing the Corporate Veil of SPCo.

[REPEAT Piercing the Corporate Veil of SPCo. instruction from Part ____.]

b. Plaintiffs' Theory of Aiding and Abetting

[REPEAT Aiding and Abetting instruction from Part ____.]

c. Plaintiffs' Theory of Agency

[REPEAT Agency instruction from Part ____.]

d. Plaintiffs' Theory of Conspiracy

[REPEAT Conspiracy instruction from Part ____.]

e. Plaintiffs' Theory of Ratification

[REPEAT Ratification instruction from Part ____.]

f. Plaintiffs' Theory of Joint Venture

[REPEAT Joint Venture instruction from Part ____.]

SOURCES: *Sosa v. Alvarez-Machain*, 542 U.S. 692, 736-38 (2004); Restatement (Third) of Foreign Relations Law of the United States § 702; International Covenant on Civil and Political Rights, pt. III, art. IX (1); *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 Civ. 8386 (KMW), 2002 WL 319887, at *6-7 (S.D.N.Y. Feb. 28, 2002); *see also Kiobel v. Royal Dutch Petroleum Co.*, 456 F. Supp. 2d 457, 465-66 (S.D.N.Y. 2006).

F. Violation of the Rights to Life, Liberty and Security of Person, and Peaceful Assembly and Association⁹

Ken Wiwa, on behalf of Ken Saro-Wiwa, Blessing Kpuinen, on behalf of John Kpuinen, Owens Wiwa, Karalolo Kogbara, Michael Tema Vizer, Lucky Doobee, on behalf of Saturday Doobee, Friday Nuate, on behalf of Felix Nuate, Monday Gbokoo, on behalf of Daniel Gbokoo, and James B. N-nah, on behalf of Uebari N-nah, contend that defendants are liable for violations of rights to life, liberty and security of person, and peaceful assembly and association against Ken Saro- Wiwa, John Kpuinen, Owens Wiwa, Karalolo Kogbara, Michael Tema Vizer, Saturday Doobee, Felix Nuate, Daniel Gbokoo and Uebari N-nah because (1) the Nigerian Government violated their rights to life, liberty and security of person, and peaceful assembly and association, (2) SPDC willfully participated in those violations of rights to life, liberty and security of person, and peaceful assembly and association by the Nigerian Government, and (3) defendants

⁹ (See Defs.' R&O Stmt. Part I.B.6.)

willfully participated in SPDC's alleged participation in those violations of rights to life, liberty and security of person, and peaceful assembly and association.

In order to prove this claim against defendants, plaintiffs must prove each of the following elements:

First, plaintiffs must prove that the Nigerian Government violated the rights to life, liberty and security of person, and peaceful assembly and association against Ken Saro-Wiwa, John Kpuien, Owens Wiwa, Karalolo Kogbara, Michael Tema Vizor, Saturday Doobee, Felix Nuate, Daniel Gbokoo and Uebari N-nah. If plaintiffs cannot prove that the Nigerian Government violated their rights to life, liberty and security of person, and peaceful assembly and association, you must find in favor of defendants.

Second, if you find, however, that plaintiffs have met their burden of proving that the Nigerian Government violated their rights to life, liberty and security of person, and peaceful assembly and association, you must then decide, under one or more of the legal theories described in the section entitled "SPDC's Alleged Willful Participation in the Nigerian Government's Conduct" (Part __), whether SPDC willfully participated in the violations of the rights to life, liberty and security of person, and peaceful assembly and association by the Nigerian Government. If you find that SPDC did not willfully participate in the violations of the rights to life, liberty and security of person, and peaceful assembly and association by the Nigerian Government under any of those theories, you must find in favor of defendants.

Third, if you find, however, that SPDC did willfully participate in the violations of the rights to life, liberty and security of person, and peaceful assembly and

association by the Nigerian Government, you must then decide if each defendant willfully participated in SPDC's alleged participation in the violations of the rights to life, liberty and security of person, and peaceful assembly and association under one or more of the legal theories described in the section entitled "Defendants' Alleged Willful Participation in SPDC's Conduct". If you find that defendants did not willfully participate in SPDC's alleged participation, you must find in favor of defendants.

Plaintiffs' Objections to Defendants' Proposed Instruction I.F. Violation of the Rights to Life, Liberty and Security of Person, and Peaceful Assembly and Association (Count VI of Plaintiffs' Complaint)

Plaintiffs incorporate by reference Plaintiffs' Objections to Defendants' Proposed Instruction I.A. Summary Execution (Count I of Plaintiffs' Complaint).

1. The Nigerian Government's Conduct

In order for you to find that the Nigerian Government violated plaintiffs' rights to life, liberty and security of person, and peaceful assembly and association, plaintiffs must prove each of the following elements separately with respect to each individual plaintiff:

First, the Nigerian Government interfered with his or her rights to life, liberty and security of person, and peaceful assembly and association. The interference with plaintiffs' rights must have been an extreme deprivation.

Second, the Nigerian Government's interference with the exercise of these rights was not justified either by Nigerian law or essential to protect rights of others or to further vital public purposes grounded on national security, public order, safety, health or morals.

Third, the interference was not proportionate to the legitimate aims pursued.

If the Nigerian Government's response was justified as a legitimate measure to further some public purpose in accordance with Nigerian law, then plaintiffs' claims must fail and you must find in favor of defendants.

You may find a violation of the plaintiffs' rights only if all the elements of this claim are satisfied. If plaintiffs cannot prove even one of these elements, their claim for violations of their rights to life, liberty, and security of person, and peaceful assembly and association must fail and you must find in favor of defendants.

Plaintiffs' Objections to Defendants' Proposed Instruction I.F.1. The Nigerian Government's Conduct

There is no requirement that "[t]he interference with plaintiffs' rights must have been an extreme deprivation." See Plaintiffs' Proposed Jury Instruction 2.7: Violations of the Rights to Life, Liberty and Security of the Person and Peaceful Assembly and Association and supporting sources.

Defendants would erroneously instruct the jury that plaintiffs must show the "the interference with the exercise of these rights was not justified either by Nigerian law or essential to protect rights of others or to further vital public purposes grounded on national security, public order, safety, health or morals." Nigerian law cannot excuse violations of fundamental human rights. The "rights of others" is impermissibly vague and misstates the law. One cannot, for example, shoot peaceful protestors even if they are trespassing. Likewise "vital public purposes grounded on national security, public order, safety, health or morals" is impermissibly vague and misstates of the law. Indeed, the "morals" provision would allow abuses specifically for the purpose of censorship— exactly the kind of abuses this norm forbids.

Defendants' "Third" provision also misstates the law. The norm does not provide for a balancing test. Moreover, defendants' proposed instruction that there can be no liability if the abuses were "justified as a legitimate measure to further some public purpose in accordance with Nigerian law" is wrong. Neither "some public purpose" nor Nigerian law can justify human rights abuses.

2. SPDC's Alleged Willful Participation in the Nigerian Government's Conduct

[REPEAT Alleged Willful Participation in the Nigerian Government's

Conduct instruction from Part ____.]

a. Plaintiffs' Theory of Aiding and Abetting

[REPEAT Aiding and Abetting instruction from Part ____.]

b. Plaintiffs' Theory of Agency

[REPEAT Agency instruction from Part ____.]

c. Plaintiffs' Theory of Conspiracy

[REPEAT Conspiracy instruction from Part ____.]

d. Plaintiffs' Theory of Ratification

[REPEAT Ratification instruction from Part ____.]

e. Plaintiffs' Theory of Joint Venture

[REPEAT Joint Venture instruction from Part ____.]

f. Plaintiffs' Theory of Instigation or Inducement of Wrongful Acts

[REPEAT Instigation or Inducement of Wrongful Acts instruction from Part ____.]

g. Plaintiffs' Theory of Reckless Disregard

[REPEAT Reckless Disregard instruction from Part ____.]

h. Plaintiffs' Theory of Joint Enterprise

[REPEAT Joint Enterprise instruction from Part ____.]

i. Plaintiffs' Theory of Inherent Danger

[REPEAT Inherent Danger instruction from Part ____.]

3. Defendants' Alleged Willful Participation in SPDC's Conduct

[REPEAT Defendants' Alleged Willful Participation in SPDC's Conduct instruction from Part ____.]

a. Plaintiffs' Theory of Piercing the Corporate Veil

[REPEAT Piercing the Corporate Veil instruction from Part ____.]

(1) Plaintiffs' Theory of Piercing the Corporate Veil of SPDC

[REPEAT Piercing the Corporate Veil of SPDC instruction from Part ____.]

(2) Plaintiffs' Theory of Piercing the Corporate Veil of SPCo.

[REPEAT Piercing the Corporate Veil of SPCo. instruction from Part ____.]

b. Plaintiffs' Theory of Aiding and Abetting

[REPEAT Aiding and Abetting instruction from Part ____.]

c. Plaintiffs' Theory of Agency

[REPEAT Agency instruction from Part ____.]

d. Plaintiffs' Theory of Conspiracy

[REPEAT Conspiracy instruction from Part ____.]

e. Plaintiffs' Theory of Ratification

[REPEAT Ratification instruction from Part ____.]

f. Plaintiffs' Theory of Joint Venture

[REPEAT Joint Venture instruction from Part ____.]

SOURCES: *Tachiona v. Mugabe*, 234 F. Supp. 2d 401, 430-31 (S.D.N.Y. 2002).

II. PLAINTIFFS' CLAIMS AGAINST MR. BRIAN ANDERSON FOR VIOLATION OF NORMS OF INTERNATIONAL LAW¹⁰

Plaintiffs bring six claims against Mr. Anderson under a statute called the Alien Tort Statute ("ATS"). The ATS allows an alien to sue in a United States court for certain alleged violations of customary international law.

Plaintiffs do not claim that Mr. Anderson directly committed any conduct that directly violated any norm of international law. Rather, plaintiffs claim that Mr. Anderson willfully participated in the alleged unlawful conduct of the Nigerian Government in one of four ways that plaintiffs claim Mr. Anderson can be legally responsible for the conduct of the Nigerian Government that I will describe to you later.

In order to prove that Mr. Anderson may be held liable, plaintiffs must show that Mr. Anderson's specific conduct, not that of the Nigerian Government, was a violation of a norm of international law. Under international law, it is not enough for plaintiffs to prove that a violation occurred, but rather plaintiffs must prove that it was Mr. Anderson's conduct itself that violated international law.

Mr. Anderson did not become managing director of SPDC until January 1994. Therefore, he cannot be held liable under international law for any of the alleged events at Biara or Korokoro because he was not present in Nigeria and had not begun his employment with SPDC at the time the events occurred. Therefore, when looking at plaintiffs' claims against Mr. Anderson brought pursuant to the ATS, if the underlying allegations that form the basis for a claim occurred before Mr. Anderson became

¹⁰ (See Defs.' R&O Stmt. Part I.A.)

managing director of SPDC in January 1994, plaintiffs' claim must fail and you must find in favor of Mr. Anderson.

I will now give you instructions on how to determine whether Mr. Anderson willfully participated in any of the six alleged international law violations.

First, you must determine whether the Nigerian Government committed a violation of the norm of international law. If you find that plaintiffs have failed to satisfy their burden of proving by a preponderance of the evidence that the Nigerian Government violated a norm of international law, you must find in favor of Mr. Anderson.

Second, if you find, however, that plaintiffs have met their burden of proof to show that the Nigerian Government violated a norm of international law, you must then determine whether Mr. Anderson willfully participated in the alleged unlawful conduct of the Nigerian Government. Plaintiffs must prove by a preponderance of the evidence each element of at least one of four theories I will instruct you about later. If you find that plaintiffs have failed to prove by a preponderance of the evidence that Mr. Anderson willfully participated in the alleged unlawful conduct of the Nigerian Government under one of those theories, you must find in favor of Mr. Anderson.

You must look at each of the six ATS claims separately. For each claim, you should carefully follow the steps laid out in these instructions to determine whether Mr. Anderson willfully participated in the violation of a norm of international law under each of plaintiffs' theories. If you find that plaintiffs have failed to prove each of the elements of any part of the instructions for a given claim, then you must find in favor of Mr. Anderson for that claim.

SOURCES: 28 U.S.C. § 1350; *Sosa v. Alvarez-Machain*, 542 U.S. 692, 715, 720, 725, 729, 732 & n.20 (2004); *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 252 (2d Cir.

2003); *Filartiga v. Pena-Irala*, 630 F.2d 876, 888 (2d Cir. 1980); *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 181 (2004).

Plaintiffs' Objections to Defendants' Proposed Instruction II. Plaintiffs' Claims Against Mr. Brian Anderson for Violation of Norms of International Law

Plaintiffs incorporate by reference Plaintiffs' Objections to Defendants' Proposed Instruction I-- Plaintiffs' Claims Against Royal Dutch Petroleum Company and The "Shell" Transport and Trading Company, p.l.c. for Violations of Norms of International Law.

Defendants' instruction that "Plaintiffs do not claim that Mr. Anderson directly committed any conduct that directly violated any norm of international law" is wrong. Plaintiffs claim inter alia that Anderson aided and abetted, was involved in a conspiracy, and induced wrongful conduct, all of which is prohibited by international law. International Law Br. at 53; Plaintiffs' Proposed Jury Instruction No. 6.5, 6.6, 6.9 and supporting sources.

Defendants' proposed instruction that Mr. Anderson "cannot be held liable under international law for any of the alleged events at Biara or Korokoro because he was not present in Nigeria and had not begun his employment with SPDC at the time the events occurred" is wrong. A person who joins a conspiracy is responsible for all acts done as part of the conspiracy, whether the acts occurred before or after the person joined, as long as those acts were done in furtherance of the purpose of the conspiracy. Plaintiffs' Proposed Jury Instruction No. 6.6 and supporting sources.

A. Summary Execution

Ken Wiwa, on behalf of Ken Saro-Wiwa, Blessing Kpuinen, on behalf of John Kpuinen, Lucky Doobee, on behalf of Saturday Doobee, Friday Nuate, on behalf of Felix Nuate, and Monday Gbokoo, on behalf of Daniel Gbokoo, contend that Mr. Anderson is liable for the deaths of Ken Saro-Wiwa, John Kpuinen, Saturday Doobee, Felix Nuate, and Daniel Gbokoo because (1) the Nigerian Government deliberately and unlawfully caused those deaths, and (2) Mr. Anderson willfully participated in the unlawful execution of those individuals by the Nigerian Government.

In order to prove this claim against Mr. Anderson, plaintiffs must prove each of the following elements:

First, plaintiffs must prove that the Nigerian Government deliberately and unlawfully caused the deaths of Ken Saro-Wiwa, John Kpuinen, Saturday Doobee, Felix Nuate, and Daniel Gbokoo. If plaintiffs cannot prove that the Nigerian Government unlawfully caused those deaths, you must find in favor of Mr. Anderson.

Second, if you find, however, that plaintiffs have met their burden of proving that the Nigerian Government unlawfully caused the deaths of those individuals, you must then decide, under one or more of the legal theories I will describe below in the section entitled “Mr. Anderson’s Alleged Willful Participation in the Nigerian Government’s Conduct”, whether Mr. Anderson willfully participated in the unlawful execution of those individuals by the Nigerian Government. If you find that Mr. Anderson did not willfully participate in the unlawful executions by the Nigerian Government under any of those theories, you must find in favor of Mr. Anderson.

Plaintiffs’ Objections to Defendants’ Proposed Instruction II.A. Summary Execution

Plaintiffs incorporate by reference Plaintiffs’ Objections to Defendants’ Proposed Instruction I.A.(Summary Execution)

1. The Nigerian Government’s Conduct

[REPEAT Summary Execution: The Nigerian Government’s Conduct instruction from Part ____]

2. Mr. Anderson’s Alleged Willful Participation in the Nigerian Government’s Conduct

If you find, however, that one or more plaintiffs have proven all of the above elements of their claim, you must then decide whether Mr. Anderson willfully participated in that particular conduct of the Nigerian Government conduct under one or more of plaintiffs’ four theories presented below.

a. Plaintiffs' Theory of Aiding and Abetting

In order to prove Mr. Anderson willfully participated in the Nigerian Government's violation of the norm of international law under plaintiffs' aiding and abetting theory, each plaintiff must prove each of the following elements:

First, Mr. Anderson intended that the Nigerian Government would violate the norm of international law. If you find that Mr. Anderson only had knowledge that the Nigerian Government had violated or was going to violate the norm of international law and he failed to prevent that violation, you may not conclude that Mr. Anderson aided and abetted the Nigerian Government.

Second, in furtherance of the Nigerian Government's unlawful conduct, Mr. Anderson provided practical assistance to the Nigerian Government designed to aid in the violation of the norm of international law by the Nigerian Government. In order to constitute practical assistance, Mr. Anderson's acts must have been substantial and made a significant difference in violating the norm of international law.

Third, Mr. Anderson's practical assistance had a substantial effect in violating the norm of international law. For practical assistance to have a substantial effect, it is not enough that the assistance was directed in some way toward violating the norm of international law. Mr. Anderson's acts had a substantial effect only if the violation of the norm of international law most probably would not have occurred without Mr. Anderson's practical assistance.

Fourth, Mr. Anderson had effective control over the Nigerian Government's alleged unlawful conduct that caused the violation of the norm of international law.

If you find that plaintiffs have failed to prove any of the above elements, you must find in favor of Mr. Anderson on this theory.

Plaintiffs' Objections to Defendants' Proposed Instruction II.A.2.a. Plaintiffs' Theory of Aiding and Abetting

Plaintiffs incorporate by reference Plaintiffs' Objections to Defendants' Proposed Instruction.

There is no requirement that the assistance be "designed to aid in the violation of the norm of international law."

b. Plaintiffs' Theory of Conspiracy

In order to prove Mr. Anderson willfully participated in the Nigerian Government's violation of the norm of international law under plaintiffs' conspiracy theory, each plaintiff must prove each of the following elements:

First, Mr. Anderson had the intent to participate in a conspiracy with the Nigerian Government to violate the norm of international law.

Second, Mr. Anderson and the Nigerian Government both intended, or had a common purpose, to violate the norm of international law. For a common purpose to exist, there must have been an understanding or arrangement between Mr. Anderson and the Nigerian Government amounting to an agreement that they would violate the norm of international law.

Third, Mr. Anderson participated, either directly or indirectly, in violating the norm of international law. For Mr. Anderson to have participated in the conspiracy, he must have at least performed acts that were directed toward furthering the conspiracy to violate the norm of international law.

If you find that plaintiffs have failed to prove any of the above elements, you must find in favor of Mr. Anderson on this theory.

Plaintiffs' Objections to Defendants' Proposed Instruction II.A.2.b. Plaintiffs' Theory of Conspiracy

Plaintiffs' incorporate by reference Plaintiffs' Objections to Defendants' Proposed Instruction I.A.2.c.(2) Plaintiffs' Direct Theory of Conspiracy.

c. Plaintiffs' Theory of Instigation or Inducement of Wrongful Acts

In order to prove Mr. Anderson willfully participated in the Nigerian Government's violation of the norm of international law under plaintiffs' instigation or inducement of wrongful acts theory, each plaintiff must prove each of the following elements:

First, Mr. Anderson intentionally induced the Nigerian Government to violate the norm of international law.

Second, Mr. Anderson used wrongful means to induce the Nigerian Government to violate the norm of international law. Wrongful means includes physical violence, fraud or misrepresentation, or economic pressure.

Third, but for Mr. Anderson's inducement, the Nigerian Government would not have violated the norm of international law.

If you find that plaintiffs have failed to prove any of the above elements, you must find in favor of Mr. Anderson on this theory.

Plaintiffs' Objections to Defendants' Proposed Instruction II.A.2.c. Plaintiffs' Theory of Instigation or Inducement of Wrongful Acts

Plaintiffs' incorporate by reference Plaintiffs' Objections to Defendants' Proposed Instruction I.A.2.f. Plaintiffs' Theory of Instigation or Inducement of Wrongful Acts

d. Plaintiffs' Theory of Reckless Disregard

In order to prove Mr. Anderson willfully participated in the Nigerian Government's violation of the norm of international law under plaintiffs' reckless disregard theory, each plaintiff must prove each of the following elements:

First, Mr. Anderson either (a) acted to facilitate the Nigerian Government's violation of the norm of international law, or (b) intentionally failed to act to prevent the violation of the norm of international law where Mr. Anderson had a duty to plaintiffs to prevent such violations.

Second, Mr. Anderson's conduct created an unjustifiably high risk of violating the norm of international law.

Third, this risk of violating the norm of international law was either known or so obvious that it should have been known to Mr. Anderson.

If you find that plaintiffs have failed to prove any of the above elements, you must find in favor of Mr. Anderson on this theory.

Plaintiffs' Objections to Defendants' Proposed Instruction II.A.2.d. Plaintiffs' Theory of Reckless Disregard

Plaintiffs' incorporate by reference Plaintiffs' Objections to Defendants' Proposed Instruction I.A.2.g. Plaintiffs' Theory of Reckless Disregard

* * *

If plaintiffs have not proven that Mr. Anderson willfully participated in the Nigerian Government's unlawful conduct by proving each element of at least one of the above described plaintiffs' theories, you must find in favor of Mr. Anderson on plaintiffs' claim for violation of the norm of international law.

Plaintiffs' Objections to Defendants' Proposed "Wrap-up" Instruction (Below *)**

Plaintiffs incorporate their objections Plaintiffs' Objections to Defendants' Proposed "Wrap-up" Instruction (Below ***) for Corporate Defendants.

DEFENDANTS SOURCES: Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992), *codified at* 28 U.S.C. § 1350, note, § 3(a); Rome Statute of the International Criminal Court, art. 25(3)(c)-(d), July 17, 1998, 37 I.L.M. 999; *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 275-77 (2d Cir. 2007) (Katzmann, J., concurring). *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Judgment, ¶ 233-34 (Dec. 10, 1998); *Prosecutor v. Vasiljevic*, Case No. IT-98-32-A, Judgment, ¶ 102 (Feb. 25, 2004); *Prosecutor v. Tadic*, ICTY-94-1, ¶ 688 (May 7, 1997); *Prosecutor v. Tadic*, Case No. IT-94-1-A, Judgment, ¶ 229 (July 15, 1999); *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, Judgment, 1986 I.C.J. REP. 392, June 27, 1986, ¶¶ 115-16; Sand et al., *Modern Federal Jury Instructions*, Vol. 4, Instr. 72-2; Restatement (Second) of Agency §§ 82, 84-85, 91; *Larsen Chelsey Realty Co. v. Larsen*, 232 Conn. 480, 505-06 (Ct. 1994); *Ansonia v. Cooper*, 64 Conn. 536, 544 (1894); *Prosecutor v. Tadic*, Case No. IT-94-1-A, Judgment, ¶¶ 31, 195-96, 227(iii) (July 15, 1999); *Prosecutor v. Blagojevic*, Case No. IT-02-60-T, Judgment, ¶ 703 (Jan. 17, 2005); *Prosecutor v. Krnojelac*, Case No. IT-97-25-T, Judgment, ¶ 80 (Mar. 15, 2002); *Flammia v. Mite Corp.*, 401 F. Supp. 1121, 1127 (E.D.N.Y. 1975), *aff'd without opinion*, 553 F.2d 93 (2d Cir. 1977); *ITEL Containers Int'l Corp. v. Atlantrafik Express Service, Ltd.*, 909 F.2d 698, 701 (2d Cir. 1990); *Int'l Equity Invs., Inc. v. Opportunity Equity Partners, Ltd.*, 472 F. Supp. 2d 544, 552 (S.D.N.Y. 2007); *Fairbairn v. State*, 107 A.D.2d 864, 864-65 (N.Y. App. Div. 1985); *NYC Mgmt. Group Inc. v. Brown-Miller*, No. 03 Civ. 2617, 2004 U.S. Dist. LEXIS 8652, at *23 (S.D.N.Y. May 13, 2004); *Perkins Sch. for the Blind v. Maxi-Aids, Inc.*, 274 F. Supp. 2d 319, 328 (E.D.N.Y. 2003); *Tropea v. Shell Oil Co.*, 307 F.2d 757, 771-72 (2d Cir. 1962); *Rosenberg v. Equitable Life Assurance Soc.*, 79 N.Y.2d 663, 668-69 (N.Y. 1992); Restatement [Second] of Torts § 427; *Farmer v. Brennan*, 511 U.S. 825, 836 (1994); Restatement (Second) of Torts § 500, p 587 (1963-1964); *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47 (2007); *Musa v. Ehidiamhen*, [1994] 3 N.W.L.R. 544, 557 (C.A.); *Marina Nominees Ltd. v. Fed. Bd. of Inland Revenue*, [1986] N.W.L.R. 48, 55-58 (S.C.); *Union Beverages Ltd. v. Pepsicola Int'l Ltd.*, [1994] 3 N.W.L.R. 1, 22 (S.C.) (Mohammed, J., concurring); *United States v. Bestfoods*, 542 U.S. 51, 61 (1998); *Kingston Dry Dock Co. v. Lake Champlain Transp. Co.*, 31 F.2d 265, 267 (2d Cir. 1929); O'Malley et al., *Federal Jury Practice and Instructions* §§ 103.13, 108.05.

B. Crimes Against Humanity

Ken Wiwa, individually and on behalf of Ken Saro-Wiwa, Blessing Kpuinen, individually and on behalf of John Kpuinen, Owens Wiwa, Michael Tema Vizer, Lucky Doobee, individually and on behalf of Saturday Doobee, Friday Nuate, individually and on behalf of Felix Nuate, Monday Gbokoo, individually and on behalf of Daniel Gbokoo, and David Kiobel, contend that Mr. Anderson is liable for crimes against humanity against Ken Saro-Wiwa, Ken Wiwa, Blessing Kpuinen, John Kpuinen, Owens Wiwa, Michael Tema Vizer, Lucky Doobee, Saturday Doobee, Friday Nuate, Felix Nuate, Monday Gbokoo, Daniel Gbokoo and David Kiobel because (1) the Nigerian Government committed crimes against humanity against those individuals, and (2) Mr. Anderson willfully participated in those crimes against humanity by the Nigerian Government.

In order to prove this claim against Mr. Anderson, plaintiffs must prove each of the following elements:

First, plaintiffs must prove that the Nigerian Government committed crimes against humanity against Ken Saro-Wiwa, Ken Wiwa, Blessing Kpuinen, John Kpuinen, Owens Wiwa, Michael Tema Vizer, Lucky Doobee, Saturday Doobee, Friday Nuate, Felix Nuate, Monday Gbokoo, Daniel Gbokoo and David Kiobel. If plaintiffs cannot prove that the Nigerian Government committed crimes against humanity against these individuals, you must find in favor of Mr. Anderson.

Second, if you find, however, that plaintiffs have met their burden of proving that the Nigerian Government committed crimes against humanity against one or more of these individuals, you must then decide, under one or more of the legal theories described in the section entitled “Mr. Anderson’s Alleged Willful Participation in the

Nigerian Government's Conduct", whether Mr. Anderson willfully participated in crimes against humanity against these individuals by the Nigerian Government. If you find that Mr. Anderson did not willfully participate in crimes against humanity against these individuals by the Nigerian Government under any of those theories, you must find in favor of Mr. Anderson.

Plaintiffs' Objections to Defendants' Proposed Instruction II.B.Crimes Against Humanity (Count II of Plaintiffs' Complaint)

The last sentence of the instruction is skewed toward defendants. Another sentence should be added that states that: "If you find that Mr. Anderson is responsible under any of these theories, then you must find in favor of the plaintiffs against Mr. Anderson."

1. The Nigerian Government's Conduct

[REPEAT Crimes Against Humanity: The Nigerian Government's Conduct instruction from Part ____].

2. Mr. Anderson's Alleged Willful Participation in the Nigerian Government's Conduct

[REPEAT Mr. Anderson's Alleged Willful Participation in the Nigerian Government's Conduct instruction from Part ____.]

a. Plaintiffs' Theory of Aiding and Abetting

[REPEAT Aiding and Abetting instruction from Part ____.]

b. Plaintiffs' Theory of Conspiracy

[REPEAT Conspiracy instruction from Part ____.]

c. Plaintiffs' Theory of Instigation or Inducement of Wrongful Acts

[REPEAT Instigation or Inducement of Wrongful Acts instruction from Part ____.]

d. Plaintiffs' Theory of Reckless Disregard

[REPEAT Reckless Disregard instruction from Part ____.]

SOURCES: Rome Statute of the International Criminal Court, arts. 7, 25(3)(c)-(d), July 17, 1998, 37 I.L.M. 999; *Prosecutor v. Tadic*, Case No. IT-94-1-T, Judgment, ¶¶ 656-59 (May 7, 1997); *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 Civ. 8386 (KMW), 2002 WL 319887, at *9-10 (S.D.N.Y. Feb. 28, 2002).

C. Torture

Ken Wiwa, on behalf of Ken Saro-Wiwa, Blessing Kpuinen, on behalf of John Kpuinen, Lucky Doobee, on behalf of Saturday Doobee, Friday Nuate, on behalf of Felix Nuate, and Monday Gbokoo, on behalf of Daniel Gbokoo, contend that Mr. Anderson is liable for the torture of Ken Saro-Wiwa, John Kpuinen, Saturday Doobee, Felix Nuate, and Daniel Gbokoo because (1) the Nigerian Government committed torture against each of these individuals, and (2) Mr. Anderson willfully participated in the torture of each of these individuals by the Nigerian Government.

In order to prove this claim against Mr. Anderson, plaintiffs must prove each of the following elements:

First, plaintiffs must prove that the Nigerian Government committed torture against Ken Saro-Wiwa, John Kpuinen, Saturday Doobee, Felix Nuate, and Daniel Gbokoo. If plaintiffs cannot prove that the Nigerian Government committed torture against these individuals, you must find in favor of Mr. Anderson.

Second, if you find, however, that plaintiffs have met their burden of proving that the Nigerian Government committed torture against these individuals, you must then decide, under one or more of the legal theories described in the section entitled "Mr. Anderson's Alleged Willful Participation in the Nigerian Government's Conduct", whether Mr. Anderson willfully participated in torture against these individuals by the

Nigerian Government. If you find that Mr. Anderson did not willfully participate in such torture by the Nigerian Government under any of those theories, you must find in favor of Mr. Anderson.

Plaintiffs' Objections to Defendants' Proposed Instruction II.C. Torture (Count III of Plaintiffs' Complaint)

The last sentence of the instruction is skewed toward defendants. Another sentence should be added that states that: "If you find that Mr. Anderson is responsible under any of these theories, then you must find in favor of the plaintiffs against Mr. Anderson."

1. The Nigerian Government's Conduct

[REPEAT Torture: The Nigerian Government's Conduct instruction from Part ____].

2. Mr. Anderson's Alleged Willful Participation in the Nigerian Government's Conduct

[REPEAT Mr. Anderson's Alleged Willful Participation in the Nigerian Government's Conduct instruction from Part ____.]

a. Plaintiffs' Theory of Aiding and Abetting

[REPEAT Aiding and Abetting instruction from Part ____.]

b. Plaintiffs' Theory of Conspiracy

[REPEAT Conspiracy instruction from Part ____.]

c. Plaintiffs' Theory of Instigation or Inducement of Wrongful Acts

[REPEAT Instigation or Inducement of Wrongful Acts instruction from Part ____.]

d. Plaintiffs' Theory of Reckless Disregard

[REPEAT Reckless Disregard instruction from Part ____.]

SOURCES: Convention Against Torture, and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Dec. 10, 1984, art. 1, 1465 U.N.T.S. 85, 23 I.L.M. 1027 (1984), *as modified* 24 I.L.M. 535 (1985); U.S. Reservations, Declarations, and Understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Cong. Rec. S17486-01 (daily ed., Oct. 27, 1990); Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992), *codified at* 28 U.S.C. § 1350, note, § 3(a); 8 C.F.R. § 208.18; Constitution of the Federal Republic of Nigeria, art. 31(1)(a) (1979).

D. Cruel, Inhuman or Degrading Treatment

Ken Wiwa, individually and on behalf of Ken Saro-Wiwa, Blessing Kpuinen, individually and on behalf of John Kpuinen, Owens Wiwa, Michael Tema Vizer, Lucky Doobee, individually and on behalf of Saturday Doobee, Friday Nuate, individually and on behalf of Felix Nuate, Monday Gbokoo, individually and on behalf of Daniel Gbokoo, and David Kiobel, contend that Mr. Anderson is liable for the cruel, inhuman or degrading treatment of Ken Wiwa, Ken Saro-Wiwa, Blessing Kpuinen, John Kpuinen, Owens Wiwa, Michael Tema Vizer, Lucky Doobee, Saturday Doobee, Friday Nuate, Felix Nuate, Monday Gbokoo, Daniel Gbokoo and David Kiobel because (1) the Nigerian Government subjected these plaintiffs to cruel, inhuman or degrading treatment, and (2) Mr. Anderson willfully participated in that cruel, inhuman or degrading treatment by the Nigerian Government.

In order to prove this claim against Mr. Anderson, plaintiffs must prove each of the following elements:

First, plaintiffs must prove that the Nigerian Government subjected Ken Wiwa, Ken Saro-Wiwa, Blessing Kpuinen, John Kpuinen, Owens Wiwa, Michael Tema

Vizor, Lucky Doobee, Saturday Doobee, Friday Nuate, Felix Nuate, Monday Gbokoo, Daniel Gbokoo and David Kiobel to cruel, inhuman or degrading treatment. If plaintiffs cannot prove that the Nigerian Government subjected them to cruel, inhuman or degrading treatment, you must find in favor of Mr. Anderson.

Second, if you find, however, that plaintiffs have met their burden of proving that the Nigerian Government subjected each of them to cruel, inhuman or degrading treatment, you must then decide, under one or more of the legal theories described in the section entitled “Mr. Anderson’s Alleged Willful Participation in the Nigerian Government’s Conduct”, whether Mr. Anderson willfully participated in the cruel, inhuman or degrading treatment by the Nigerian Government. If you find that Mr. Anderson did not willfully participate in the cruel, inhuman or degrading treatment by the Nigerian Government under any of those theories, you must find in favor of Mr. Anderson.

Plaintiffs’ Objections to Defendants’ Proposed Instruction II.D. Cruel, Inhuman or Degrading Treatment (Count IV of Plaintiffs’ Complaint)

The last sentence of the instruction is skewed toward defendants. Another sentence should be added that states that: “If you find that Mr. Anderson is responsible under any of these theories, then you must find in favor of the plaintiffs against Mr. Anderson.”

1. The Nigerian Government’s Conduct

[REPEAT Cruel, Inhuman or Degrading Treatment: The Nigerian Government’s Conduct instruction from Part ____].

2. Mr. Anderson’s Alleged Willful Participation in the Nigerian Government’s Conduct

[REPEAT Mr. Anderson’s Alleged Willful Participation in the Nigerian Government’s Conduct instruction from Part ____.]

a. Plaintiffs' Theory of Aiding and Abetting

[REPEAT Aiding and Abetting instruction from Part ____.]

b. Plaintiffs' Theory of Conspiracy

[REPEAT Conspiracy instruction from Part ____.]

c. Plaintiffs' Theory of Instigation or Inducement of Wrongful Acts

[REPEAT Instigation or Inducement of Wrongful Acts instruction from Part ____.]

d. Plaintiffs' Theory of Reckless Disregard

[REPEAT Reckless Disregard instruction from Part ____.]

SOURCES: Convention Against Torture, and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Dec. 10, 1984, arts. 1, 16, 1465 U.N.T.S. 85, 23 I.L.M. 1027 (1984), *as modified* 24 I.L.M. 535 (1985). U.S. Reservations, Declarations, and Understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Cong. Rec. S17486-01 (daily ed., Oct. 27, 1990); *Harmelin v. Michigan*, 501 U.S. 957, 985 (1991); *The Greek Case*, [1969] Y.B. Eur. Conv. on H.R. 12A at 186; *Raninen v. Finland*, (1997) EHRR 563, 55; *Doe v. Qi*, 349 F. Supp. 2d 1258, 1320-25 (N.D. Cal. 2004).

E. Arbitrary Arrest and Detention

Ken Wiwa, on behalf of Ken Saro-Wiwa, Blessing Kpuinen, on behalf of John Kpuinen, Owens Wiwa, Lucky Doobee, on behalf of Saturday Doobee, Friday Nuate, on behalf of Felix Nuate, and Monday Gbokoo, on behalf of Daniel Gbokoo, contend that Mr. Anderson is liable for the arbitrary arrest and detention of Ken Saro-Wiwa, John Kpuinen, Owens Wiwa, Saturday Doobee, Felix Nuate and Daniel Gbokoo because (1) the Nigerian Government arbitrarily arrested and detained plaintiffs, and (2)

Mr. Anderson willfully participated in each of those arbitrary arrests and detentions by the Nigerian Government.

In order to prove this claim against Mr. Anderson, plaintiffs must prove each of the following elements:

First, plaintiffs must prove that the Nigerian Government arbitrarily arrested and detained Ken Saro-Wiwa, John Kpuinen, Owens Wiwa, Saturday Doobee, Felix Nuate and Daniel Gbokoo. If plaintiffs cannot prove that the Nigerian Government arbitrarily arrested and detained them, you must find in favor of Mr. Anderson.

Second, if you find, however, that plaintiffs have met their burden of proving that the Nigerian Government arbitrarily arrested and detained them, you must then decide, under one or more of the legal theories described in the section entitled “Mr. Anderson’s Alleged Willful Participation in the Nigerian Government’s Conduct”, whether Mr. Anderson willfully participated in those arbitrary arrests and detentions by the Nigerian Government. If you find that Mr. Anderson did not willfully participate in those arbitrary arrests and detentions by the Nigerian Government under any of those theories, you must find in favor of Mr. Anderson.

Plaintiffs’ Objections to Defendants’ Proposed Instruction II.E. Arbitrary Arrest and Detention (Count V of Plaintiffs’ Complaint)

The last sentence of the instruction is skewed toward defendants. Another sentence should be added that states that: “If you find that Mr. Anderson is responsible under any of these theories, then you must find in favor of the plaintiffs against Mr. Anderson.”

1. The Nigerian Government’s Conduct

[REPEAT Arbitrary Arrest and Detention: The Nigerian Government’s Conduct instruction from Part ____].

2. Mr. Anderson's Alleged Willful Participation in the Nigerian Government's Conduct

[REPEAT Mr. Anderson's Alleged Willful Participation in the Nigerian Government's Conduct instruction from Part ____.]

a. Plaintiffs' Theory of Aiding and Abetting

[REPEAT Aiding and Abetting instruction from Part ____.]

b. Plaintiffs' Theory of Conspiracy

[REPEAT Conspiracy instruction from Part ____.]

c. Plaintiffs' Theory of Instigation or Inducement of Wrongful Acts

[REPEAT Instigation or Inducement of Wrongful Acts instruction from Part ____.]

d. Plaintiffs' Theory of Reckless Disregard

[REPEAT Reckless Disregard instruction from Part ____.]

SOURCES: *Sosa v. Alvarez-Machain*, 542 U.S. 692, 736-38 (2004); Restatement (Third) of Foreign Relations Law of the United States § 702; International Covenant on Civil and Political Rights, pt. III, art. IX (1); *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 Civ. 8386 (KMW), 2002 WL 319887, at *6-7 (S.D.N.Y. Feb. 28, 2002); *see also Kiobel v. Royal Dutch Petroleum Co.*, 456 F. Supp. 2d 457, 465-66 (S.D.N.Y. 2006).

F. Violation of the Rights to Life, Liberty and Security of Person, and Peaceful Assembly and Association

Ken Wiwa, on behalf of Ken Saro-Wiwa, Blessing Kpuinen, on behalf of John Kpuinen, Owens Wiwa, Michael Tema Vzor, Lucky Doobee, on behalf of Saturday Doobee, Friday Nuate, on behalf of Felix Nuate, and Monday Gbokoo, on behalf of Daniel Gbokoo, contend that Mr. Anderson is liable for violations of rights to life, liberty and security of person, and peaceful assembly and association against Ken Saro-Wiwa, John Kpuinen, Owens Wiwa, Michael Tema Vzor, Saturday Doobee, Felix Nuate and Daniel Gbokoo because (1) the Nigerian Government violated their rights to life, liberty and security of person, and peaceful assembly and association, (2) Mr. Anderson willfully participated in those violations of rights to life, liberty and security of person, and peaceful assembly and association by the Nigerian Government.

In order to prove this claim against Mr. Anderson, plaintiffs must prove each of the following elements:

First, plaintiffs must prove that the Nigerian Government violated the rights to life, liberty and security of person, and peaceful assembly and association against Ken Saro-Wiwa, John Kpuinen, Owens Wiwa, Michael Tema Vzor, Saturday Doobee, Felix Nuate and Daniel Gbokoo. If plaintiffs cannot prove that the Nigerian Government violated their rights to life, liberty and security of person, and peaceful assembly and association, you must find in favor of Mr. Anderson.

Second, if you find, however, that plaintiffs have met their burden of proving that the Nigerian Government violated their rights to life, liberty and security of person, and peaceful assembly and association, you must then decide, under one or more of the legal theories described in the section entitled “Mr. Anderson’s Alleged Willful

Participation in the Nigerian Government's Conduct", whether Mr. Anderson willfully participated in the violations of the rights to life, liberty and security of person, and peaceful assembly and association by the Nigerian Government. If you find that Mr. Anderson did not willfully participate in the violations of the rights to life, liberty and security of person, and peaceful assembly and association by the Nigerian Government under any of those theories, you must find in favor of Mr. Anderson.

Plaintiffs' Objections to Defendants' Proposed Instruction II.F. Violation of the Rights to Life, Liberty and Security of Person, and Peaceful Assembly and Association (Count VI of Plaintiffs' Complaint)

The last sentence of the instruction is skewed toward defendants. Another sentence should be added that states that: "If you find that Mr. Anderson is responsible under any of these theories, then you must find in favor of the plaintiffs against Mr. Anderson."

1. The Nigerian Government's Conduct

[REPEAT Violation of the Rights to Life, Liberty and Security of Person, and Peaceful Assembly and Association: The Nigerian Government's Conduct instruction from Part ____].

2. Mr. Anderson's Alleged Willful Participation in the Nigerian Government's Conduct

[REPEAT Mr. Anderson's Alleged Willful Participation in the Nigerian Government's Conduct instruction from Part ____.]

a. Plaintiffs' Theory of Aiding and Abetting

[REPEAT Aiding and Abetting instruction from Part ____.]

b. Plaintiffs' Theory of Conspiracy

[REPEAT Conspiracy instruction from Part ____.]

c. Plaintiffs' Theory of Instigation or Inducement of Wrongful Acts

[REPEAT Instigation or Inducement of Wrongful Acts instruction from Part ____.]

d. Plaintiffs' Theory of Reckless Disregard

[REPEAT Reckless Disregard instruction from Part ____.]

SOURCES: *Tachiona v. Mugabe*, 234 F. Supp. 2d 401, 430-31 (S.D.N.Y. 2002).