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I. INTRODUCTION

Plaintiffs filed suit in June 2001, seeking injunctive relief and damages for their injuries. The claims include extrajudicial killing; causing the disappearance of individuals; torture and other cruel, inhuman, or degrading treatment, including sexual assault; and prolonged arbitrary detention. The primary defendant is Exxon Mobil, the largest oil company in the world, along with several of its subsidiaries. Plaintiffs allege, solely and exclusively, that their injuries were caused by Exxon Mobil's paid security forces, which inflicted a reign of terror upon innocent villagers who happened to reside within the security perimeter of the company's huge natural gas facility in Aceh, Indonesia. The operative allegations are that Exxon Mobil opted to hire military security forces, who received direction, financial and other material support, and training from officials of Exxon Mobil. Cmpl. ¶¶ 41, 44, 46. These hired guns are the source of Plaintiffs' injuries.

The issue before the Court remains the disposition of Exxon Mobil's Motion to Dismiss, filed on October 1, 2001.

With the Motion to Dismiss still pending, the Supreme Court issued its opinion in *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004), which addressed the proper scope of The Alien Tort Statute (ATS), 28 U.S.C. §1350, one of the statutes at issue in this case.¹ This court then directed the parties to brief the impact of *Sosa* on Plaintiffs' ATS claims. Defendants filed their Second Supplemental Brief (hereinafter "Defs.' Second Supp. Br.") on July 29, 2004.

Plaintiffs have also stated claims under the Torture Victim Protection Act ("TVPA"), 28

¹ This statute has in the past been referred to as the Alien Tort Claims Act or ATCA. Plaintiffs adopt the nomenclature employed by the *Sosa* Court ("ATS").

U.S.C. § 1350, note (1992). These claims are unaffected by the ruling in *Sosa*.² Indeed, the *Sosa* Court expressly hailed the TVPA as a modern basis for federal claims based on torture and extrajudicial killing. *See Sosa*, 124 S. Ct. at 2763.

II. ARGUMENT

A. *SOSA* FULLY AUTHORIZES THIS ACTION

1. Under *Sosa*, Plaintiffs may continue to utilize 28 U.S.C. §1350 to bring claims for torts in violation of the law of nations in United States courts.

The Supreme Court held that “Section 1350 was enacted on the congressional understanding that courts would exercise jurisdiction by entertaining some common law claims derived from the law of nations” and “there is every reason to suppose that the First Congress did not pass the ATS as a jurisdictional convenience to be placed on the shelf for use by a future Congress or state legislature that might, some day, authorize the creation of causes of action or itself decide to make some element of the law of nations actionable ... the reasonable inference from history and practice is that the statute was intended to have practical effect the moment it became law.” *See Sosa*, 124 S. Ct. at 2765, n19, 2758, 2743.

As Defendants begrudgingly acknowledge, *Sosa* unequivocally holds that Plaintiffs may continue to utilize 28 U.S.C. §1350 to bring claims for torts in violation of the law of nations in United States courts.

Defendants appear to suggest that the only bases for private action are the torts

² Moreover, the existence of the TVPA claims is fatal to Defendants’ argument regarding the recognition of new norms, *see infra* p. 12, and to Defendants’ assertion of the political question doctrine. *See* Pls.’ Opp’n to Defs.’ Mot. to Dismiss at 34 - 38.

recognized by international law in the 18th century when the statute was enacted. This position, advocated by the *Sosa* dissenters, was explicitly rejected by the majority. *Id.* at 2764-67. The Supreme Court held that any new norms must contain no “less definite content and acceptance among civilized nations than the historical paradigms familiar when §1350 was enacted” not that the norms themselves be limited to those recognized in 1789. *Id.* at 2765.

The Court held that the door is open to a narrow class of international norms today and that there is no bar to “judicial recognition of new substantive rules.” *Id.* at 2764. Contrary to Defendants’ assertion, the Court specifically held that “it would take some explaining to say now that federal courts must avert their gaze entirely from any international norm intended to protect individuals.” *Id.* at 2764-65.

The Court further held “we think courts should require any claim based on the present-day law of nations to rest on a norm of international character” defined with specificity and that claims “**must be gauged against the current state of international law**, looking to those sources we have long, albeit cautiously, recognized.” *Id.* at 2761-66 (emphasis added). Those sources of international law, the Court explained, are “the customs and usages of civilized nations, and as evidence of these, to the works of jurists and commentators” *Id.* at 2766-67 (quoting *Paquete Habana*, 175 U.S. 677, 700 (1900)). Interestingly, the Court cited *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 163-180, (1820), as an illustration of the specificity with which the law of nations defined piracy. *See Sosa*, 124 S. Ct. at 2765. In *Smith*, Justice Story relied primarily on the works of academic writers to determine that piracy was a sufficiently defined violation of the law of nations: “What the law of nations on this subject is, may be ascertained by consulting the works of jurists, writing professedly on public law ... there is

scarcely a writer on the law of nations, who does not allude to piracy as a crime of a settled and determinate nature....” *See Smith*, 18 U.S. (5 Wheat.) at 160-61. Thus, Defendants’ insistence that Plaintiffs point to specific self-executing treaties to establish violations of international law does not find support in *Sosa* or in the Supreme Court opinions construing international law as it existed in the 1800s.

Defendants repeatedly characterize the standard enunciated in *Sosa* as a “new standard.” It is not new. The Supreme Court applied the “specific, universal, and obligatory” test that has been in use since *Filartiga*. *See Sosa*, 124 S. Ct. at 2774-75. Indeed, as the dissent correctly points out, courts have been using the “verbal formula” endorsed by the Supreme Court for more than a decade. *See id.* at 2775 (Scalia, J., dissenting) (pointing out that *In Re Estate of Marcos Human Rights Litig.*, 25 F.3d 1467 (9th Cir. 1994), required actionable norms to be “specific, universal, and obligatory,” the same formula adopted by the *Sosa* majority); *see also Flores v. Southern Peru Copper Co.*, 343 F.3d 140, 154 (2d Cir. 2003) (rejecting claim for environmental harm under ATS and noting “courts must proceed with extraordinary care and restraint” when determining status of customary international law). *Sosa* does not represent a departure from past ATS jurisprudence.

2. The claims alleged here are precisely the type of norms recognized in *Sosa*.

While acknowledging that arbitrary detention may violate international law in other circumstances, the Supreme Court held that the brief detention alleged by Dr. Alvarez-Machain did not rise to the level of a violation of a specific, binding norm of international law: “a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to

support the creation of a federal remedy.” *See Sosa*, 124 S. Ct. at 2769.

Here, in contrast, Plaintiffs have alleged violations of specific, well-defined norms of international law: genocide; murder; causing the disappearance of individuals; torture and other cruel, inhuman, or degrading treatment, including sexual assault; and prolonged arbitrary detention.

Eight plaintiffs allege that they were tortured, including being beaten, burned with cigarettes, shot, gouged with a knife, electrocuted, intentionally threatened with death or severe physical pain, sexually assaulted, and their children severely beaten. Cmpl. ¶¶ 48-55. Three plaintiffs, including women whose husbands were shot while working in their rice fields, allege genocide, murder and/or causing the disappearance of another. *Id.* ¶¶ 56-58. Seven of the plaintiffs who were also tortured allege prolonged arbitrary detentions lasting from several days, for John Doe V, to several weeks, for John Doe IV, to several months, for John Doe II and John Doe VI. *Id.* ¶¶ 49-54.

Defendants do not contend – as they can not – that genocide, murder, causing the disappearance of individuals, or torture fail to state a claim under international law. The Supreme Court specifically cited *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (recognizing torture as a violation of international law) and *In re Estate of Marcos Human Rights Litigation*, 25 F.3d 1467 (9th Cir. 1994) (recognizing torture, execution, and disappearance) as examples of appropriate judicial recognition of violations of international norms. The Court looked to the Restatement (Third) of Foreign Relations Law when it assessed Dr. Alvarez’s claim, and noted that the Restatement did not recognize a “brief detention in excess of positive authority” as a violation of international law. *See Sosa*, 124 S. Ct. at 2745. The Restatement

does, however, recognize genocide; murder or causing the disappearance of individuals; torture or other cruel, inhuman, or degrading treatment; and prolonged arbitrary detention as violations of international law “whose status as customary law is generally accepted and whose scope and content are generally agreed.” Restatement (Third) of Foreign Relations Law § 702. Thus, the norms at issue here include the norms recognized by the Supreme Court and are plainly recognized by sources relied upon by the Supreme Court itself as binding, specific norms of international law.

Defendants make a perfunctory challenge to Plaintiffs’ arbitrary detention claims. In a footnote, Defendants assert that under *Sosa* prolonged arbitrary detention is not cognizable under the ATS. Defs.’ Second Supp. Br. at 12 n.13. Defendants misread the opinion, which holds only that “a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law.” *See Sosa*, 124 S. Ct. at 2769.

The length and nature of the detentions suffered by Plaintiffs here well exceeds the short detention of less than a day that the Supreme Court found inadequate in *Sosa*. Plaintiffs’ detentions, which in all cases were combined with severe torture, clearly violate international law. The Supreme Court noted that the Restatement condemns prolonged arbitrary detention and explained that “it is easy to say that some policies of prolonged arbitrary detentions are so bad that those who enforce them become enemies of the human race.” *Id.* This is just such an “easy” case. All of the Plaintiffs were accosted by Exxon Mobil troops while at home, traveling between villages or, in one case, while transporting vegetables to the local market for sale. Cmpl. ¶¶ 48-54. No Plaintiff was arrested pursuant to any type of warrant. Plaintiffs were held

in custody with no pretense of due process or any recourse to a court. All of the detainees were tortured, most for months on end: John Doe II was detained for three months of torture; John Doe III was detained for one month of torture; John Doe IV was detained for several weeks of torture; John Doe V was detained for several days, during which he was tortured, including the use of electrical shocks, burns, and severe beatings resulting in lasting head injury; John Doe VI was detained for four months of torture; John Doe VII was detained for one day, during which he was beaten with the butt of a gun and a hammer, causing him to suffer lasting, severe injuries. Cmpl. ¶¶ 49-54.

Dr. Alvarez, by contrast, was held for less than a day, made no allegations of mistreatment, was promptly transferred to lawful authority and was able to timely challenge his detention in court. *See Sosa*, 124 S. Ct. at 2769. In their initial *Opposition to Defendants' Motion to Dismiss*, Plaintiffs listed the numerous cases that recognize prolonged arbitrary detention as a violation of international law under the ATS. Pls.' Opp'n to Defs.' Mot. to Dismiss at 10 (citing cases); *see also Siderman de Blake v. Rep. of Argentina*, 965 F.2d 699 (9th Cir. 1992); *de Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1385, 1397 (5th Cir. 1985); M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 Duke J. Comp. & Int'l L. 235, 261 (1993) (at least 119 national constitutions recognize the right to be free from arbitrary detention). Defendants' challenge to Plaintiffs' claim of prolonged arbitrary detention, made in cursory footnote, merits cursory dismissal.

The only claim seriously challenged by Defendants is the claim for sexual assault by Jane

Doe I.³ A soldier from the unit assigned to Exxon Mobil forced his way into Jane Doe I's home when she was pregnant, beat her, threatened her with her own death and that of her unborn child and sexually assaulted her. Defendants' argument that this conduct does not violate international law fails for two reasons. First, sexual assault clearly falls in the category of torture, which *Sosa* identifies as a violation of international law. *See Sosa*, at 124 S. Ct. at 2765 (citing *Filartiga*, 630 F.2d at 876). The Torture Victim Protection Act defines "torture" as "any act" by which severe pain or suffering is intentionally inflicted. 28 U.S.C. § 1350 note §3. Defendants provide no rationale for excluding an act of sexual assault from that definition and cite no cases in support. To the contrary, courts routinely apply that definition to cover sexual assault. *See, e.g., Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995) (rape and other forms of physical violence against women constitute torture); *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995) (finding allegations of sexual assault "more than sufficient to establish that Gramajo did under color of law ... subject Ortiz to torture as defined in §3(a) of the Torture Victim Protection Act"); *Prosecutor v. Kvocka*, ICTY-98-30/1 (Nov. 2, 2001) available at <http://www.un.org/icty/kvocka/trialc/judgement/index.htm>.

Second, both international and domestic cases as well as international agreements and the works of scholars and jurists recognize sexual assault committed under the color of law as a violation of international law. *See, e.g., Prosecutor v. Mucic*, ICTY-96-21 (Nov. 16, 1998), available at <http://www.un.org/icty/celebici/trialc2/judgement/index.htm> ("there can be no doubt

³ Defendants argue extensively against the recognition of "violence against women" as a violation of international law. Because Defendants can not seriously be arguing that torture, extrajudicial killing, and the other types of violence alleged here are not violations of law when committed against women, as opposed to men, Plaintiffs assume that Defendants mean to challenge the sexual assault claim made by Plaintiff Jane Doe I.

that rape and other forms of sexual assault are expressly prohibited under international humanitarian law”); *Prosecutor v. Furundzija*, ICTY-95-17/1 (Dec. 10, 1998), available at <http://www.un.org/icty/furundzija/trialc2/judgement/index.htm>; Control Council Law No. 10 at Art. II(1)(c). Defendants’ argument that Jane Doe I’s sexual assault claim fails to state a claim for a violation of international law clearly fails as a matter of law.

3. Claims for Torture and Genocide Are Not Preempted.

Defendants’ preemption argument is frivolous. Federal common-law preemption applies “when Congress addresses a question previously governed by a decision rested on federal common law,” such that the need for the common-law rule “disappears.” *See City of Milwaukee v. Illinois*, 451 U.S. 304, 314 (1981). Thus, in *Sosa*, the Supreme Court noted that Congress could “modify or cancel any judicial decision so far as it rests on recognizing an international norm as such,” and that it could preempt the recognition of new causes of action if it were to “occupy the field” with comprehensive legislation addressing violations of international law. *See Sosa*, 124 S. Ct. at 2765. If Congress had occupied the field, the *Sosa* court would have dismissed on that account. But as *Sosa* itself pointed out, Congress has not occupied the field with respect to violations of international law, or with respect to any of the particular norms at issue here. *Id.* (noting that not only has Congress expressed no disagreement with cases construing the ATS, but Congress responded by enacting legislation “supplementing the judicial determination”). In fact, Congress passed the Torture Victim Protection Act, 28 U.S.C. § 1350 note, to “enhance the remed[ies]” for torture and extrajudicial killing, not to preempt them. H.R.

Rep. No. 102-367.⁴ Nor is there any indication that Congress has preempted the recognition of genocide claims. The Genocide Convention Implementation Act established criminal penalties for genocide, as required by the Convention, in 1988. The statute does not speak to civil liability. Since that time, numerous courts have recognized the prohibition against genocide as a norm of international law that supports jurisdiction under the ATS. *See Sosa*, 124 S.Ct. at 2766 n.20 (citing *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995)); *Presbyterian Church of Sudan v. Talisman Energy*, 244 F. Supp. 2d 289 (S.D.N.Y. 2003); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322 (N.D. Ga. 2002). Congress has given no indication that it disapproves of the recognition of this norm.

B. DEFENDANTS’ ASSERTION THAT SOSA MANDATES DISMISSAL IN DEFERENCE TO THE STATE DEPARTMENT’S VIEWS IS WITHOUT MERIT

1. Plaintiffs’ Parallel Claims Under the TVPA Obviate *Sosa*’s Concern about Recognition of New Norms.

Defendants pluck a single sentence from the Supreme Court’s opinion in *Sosa* to argue

⁴ Defendants’ argument regarding “cruel, inhuman and degrading treatment” is irrelevant. The conduct alleged here clearly falls under the category of torture, so the court need not reach the issue of whether cruel or inhuman conduct also violates international law. Nevertheless, courts have recognized cruel, inhuman and degrading treatment as a violation of international law. *See Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322 (N.D.Ga. 2002); *Doe v. Major Gen. Johnny Lumintang*, Civ. Action No. 00-674 (D.D.C. 2001); *see also* 22 U.S.C. § 2304(d)(1) (defining “gross violations of internationally recognized human rights” as including “cruel, inhuman, or degrading treatment or punishment”). The TVPA definition of torture is more expansive than the definition in the Convention Against Torture, and encompasses conduct that might otherwise be considered simply cruel, inhuman or degrading. For example, the TVPA, but not the Convention, counts as torture “the threat that another individual will imminently be subjected to death” and the application of mind altering substances. *Compare* 28 U.S.C. § 1350 note §§ 2 *with* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-2, 1465 U.N.T.S. 85 at Part I, Art. 1, ¶1. Courts are capable of deciding whether or not the conduct alleged rises to an actionable level, whether the conduct is denominated “torture” or “cruel and inhuman.”

that the State Department's submission of a letter, at the request of the court, expressing concern that this litigation may impact on foreign relations with Indonesia, requires dismissal of Plaintiffs' ATS claims. Defs.' Second Supp. Br. at 1-2. In the sentence quoted by Defendants, the Court was expressing concern about judges recognizing new norms without consideration of foreign policy issues: "[s]ince many attempts by federal courts to craft remedies for the violation of *new norms* of international law would raise risks of adverse foreign policy consequences, they should be undertaken, if at all, with great caution." *See Sosa*, 124 S. Ct. at 2763 (emphasis added). Plaintiffs here are not seeking judicial recognition of new norms, so the concern expressed in *Sosa* does not apply.

In this case, Plaintiffs have parallel claims under the TVPA for torture and extrajudicial killing. The TVPA was passed by Congress in 1992, and the *Sosa* Court referred to it as a "clear mandate" that provides "'an unambiguous and modern basis for' federal claims of torture and extrajudicial killing." *See Sosa*, 124 S. Ct. at 2763 (quoting H.R. Rep. No. 102-367, pt. 1, p. 3 (1991)). In passing the TVPA, Congress was fully apprized of the likely impact on foreign relations if a case was brought that implicated another government. Indeed, the Justice Department opposed the TVPA on the specific ground that such litigation would hamper Executive Branch efforts to conduct foreign relations. *See S. Rep. 102-249 at 14 (1991)*; Pls.' Reply to Defs.' Supplemental Br. in Supp. of their Mot. to Dismiss at 1-2. Nevertheless, having considered the foreign affairs implications, a strong bipartisan majority in Congress passed the TVPA and it was signed into law by the President.

Not only were they willing to risk tensions in foreign affairs, Congress affirmatively

expressed the desire to directly confront other countries, like Indonesia,⁵ that fail to prevent pervasive human rights violations. For example, the Senate Judiciary Committee Report on the bill states, “[j]udicial protection against flagrant human rights violations is often least effective in those countries where such abuses are most prevalent Consequently the [TVPA] is designed to respond to this situation by providing a civil cause of action in U.S. courts for torture committed abroad.” *See* S. Rep. 102-249, at 3-4 (1991) (previously attached as Ex. 3 to Pls.’ Mem. In Opp’n To Def. Motion to Dismiss. *See also Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 789 (D.C. Cir. 1984) (“If Congress determined that aliens should be permitted to bring actions in federal courts, only Congress is authorized to decide that those actions ‘exacerbate tensions’ and should not be heard.”) (Edwards, J. concurring); Decl. of Harold Koh, former Assistant Secretary of State for Democracy, Human Rights, and Labor and now Dean of Yale Law School at p. 9 (“Congress intended for claims of violations of fundamental human rights to be heard by the federal courts and did not give the executive branch a veto over adjudicating such cases, particularly when private conduct is alleged.”) (attached as Ex. E to Pls.’ Supp. Opp’n to Defs.’ Mot. to Dismiss Concerning the State Department’s Response to the Court’s Inquiry).

The *Sosa* Court’s concern that courts creating new international torts might impact foreign relations simply has no application to this case, rooted in well-established norms, especially where Congress has created a parallel statutory remedy in the TVPA.

2. *Sosa* Does not Create an Overarching “Foreign Relations” Legal Defense for Exxon Mobil, A Private Party.

⁵ *See* Pls.’ Supplemental Opp’n to Defs.’ Mot. to Dismiss at 17 (discussing criticism of Indonesia human rights practices in U.S. State Department Indonesia Human Rights Reports).

The law is clear that providing the Executive Branch with a general veto power over cases brought under federal statutes would violate the separation of powers doctrine, and would conflict with Chief Justice Marshall’s landmark words that “[i]t is emphatically the province and duty of the judicial department to say what the law is.” *See Marbury v. Madison*, 5 U.S. (Cranch) 137, 177 (1803). Nothing in *Sosa* alters this fundamental cornerstone of our legal system.⁶

Rather, in *Sosa* the Supreme Court made some general observations concerning foreign relations:

the possible collateral consequences of making international rules privately actionable argue for judicial caution . . . [which] is itself a reason for a high bar to new private causes of action for violating international law, for the potential implications for the foreign relations of the United States of recognizing such causes should make courts particularly wary of impinging of the discretion of the Legislative and Executive Branches in managing foreign affairs. It is one thing for American courts to enforce constitutional limits on our own State and Federal Governments’ power, but quite another to consider suits under rules that would go so far as to claim a limit on the power of foreign governments over their own citizens, and to hold that a foreign government or its agent has transgressed those limits. Cf. *Sabbatino*, *supra*, at 431-432. Yet modern international law is very much concerned with just such questions, and apt to stimulate calls for vindicating private interests in § 1350 cases. Since many attempts by federal courts to craft remedies for the violation of new norms of international law would raise risks of adverse foreign policy consequences, they should be undertaken, if at all, with great caution. Cf. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 813 (D.C. Cir. 1984)(Bork, J. concurring) (expressing doubt that § 1350 should be read to require “our courts [to] sit in judgment of the conduct of foreign officials in their own countries with respect to their own citizens).

See Sosa, 124 S. Ct. at 2763. This passage, along with a brief statement at *Sosa*, 124 S. Ct. at 2766, n. 21, constitute the total commentary by the *Sosa* Court on foreign relations issues, and

⁶ Plaintiffs have previously addressed the separation of powers implications of providing the Executive Branch with a veto power over federal claims by elevating abstract “views” to legal doctrine. *See* Pls.’ Supplemental Opp’n to Defs.’ Mot. to Dismiss.

there is nothing in these passages to justify a sweeping veto power over federal statutory claims that Exxon Mobil apparently seeks to bestow on the State Department.⁷ Moreover, Exxon overstates the strength of the State Department letter.

Defendants' reliance on the footnote in *Sosa* that in *dicta* discusses the *In re South African Apartheid Litigation*, Defs.' Second Supp. Br. at 2, is misplaced. The Court suggested that deference might be appropriate where political mechanisms provide an alternate method of redressing particular human rights abuses, such as South Africa's Truth and Reconciliation Commission. *See Sosa*, 124 S. Ct. at 2766 n.21. There is no analogous mechanism or policy with respect to Exxon Mobil's abuses in Indonesia. Also, this statement does not represent a departure from past practice. *See, e.g., Sarei v. Rio Tinto*, No. Civ. 00-11695, 2002 WL 1906814, at * 72 (S.D. Cal. July 9, 2002) (dismissal on political question grounds based on the establishment of a human rights commission and the availability of an adequate alternative forum in Papua New Guinea). Here, there is no conflict with an already established alternative

⁷ The Court's citation to *Sabbatino*, a key case applying the act of state doctrine, indicates that the Court understands that any foreign policy assertions must be channeled through existing legal doctrines, such as the act of state or political question doctrines.

Counsel for Plaintiffs have reviewed approximately 728 cases in which the State Department's views were expressed, and, except cases in cases relating to the application of sovereign immunity which present unique questions, ***not a single court has declined jurisdiction in deference to the State Department's views unless the requirements of the act of state, political question, or international comity doctrines were met.*** There is no case granting the Executive Branch a veto power simply based on an expression of abstract "views" unless the requisite legal elements of one of these doctrines was satisfied. *Sosa* does not contain such an expansion of executive power. Moreover, as Plaintiffs have previously demonstrated, the act of state doctrine simply has no application to private and commercial acts such as those undertaken by Exxon Mobil, a private entity, at issue in this case. *See Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 695 (1976); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 708 (9th Cir. 1992).

resolution process, and no basis to assert that Plaintiffs could pursue their claims in Indonesia. *See* Pls.’ Mem. of P. & A. in Opp’n to Defs.’ Mot. to Dismiss at 38-45. Dismissal in this case would terminate Plaintiffs claims.

In fact, events since the filing of the complaint have only confirmed the corrupt nature of the legal system in Indonesia and that it would put Plaintiffs and their witnesses in grave danger to confront their well-armed and politically powerful torturers in Indonesia. *See* U.S. Dep’t of State, Country Reports on Human Rights Practices – 2003, Indonesia (Feb. 25, 2004) (enumerating abductions of human rights activists and noting “the tactic of leaving a body in a public place had been used by the TNI in the past as a form of intimidation”; noting that Indonesia has “made little progress in establishing accountability for human rights violations and detailing “little” or “no” progress in prosecuting those responsible for the disappearances of pro-democracy activists and student demonstrators; noting “concern” over “controversial prosecutions” of political activists; and concluding “the judiciary remained subordinate to the executive and often was influenced by the military, business interests, and politicians outside the legal system ... low salaries encouraged corruption, and judges were subject to pressure from government authorities, which often influenced the outcome of cases.”); Nani Farida, *Aceh Military Goes After Activists*, The Jakarta Post, Feb. 26, 2004 (describing criticism by national and international NGOs of the abduction of six student activists by the police).

Apart from this footnote, *Sosa* does not suggest that deference to the political branches is appropriate in any other instance. Quite the contrary, the Supreme Court in *Sosa* necessarily rejected Exxon Mobil’s “foreign relations” defense. The Bush Administration argued strenuously in *Sosa* that human rights claims should not be actionable under ATS because such

claims are “incompatible” with the political branches’ foreign affairs authority. Br. of the United States Supporting Petitioner at 40-46, available at www.usdoj.gov/osg/briefs/2003/3mer/2mer/2003-0339.mer.aa.pdf. This argument was not adopted by the Court.

In prior submissions to this court, Defendants argued that this court must abstain from jurisdiction because adjudication of this suit alleging human rights violations against Exxon Mobil would impact the war on terror. Recent events have made this argument even less plausible.

In a series of decisions with a far more direct link to the war on terror, the Supreme Court held that the war on terror does not trump the rule of law. *See Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004); *Rasul v. Bush*, 124 S. Ct. 2686 (2004); *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004). The Supreme Court recently ruled that aliens captured abroad during the military campaign against Al Qaeda could challenge their confinement and that citizens held as enemy combatants must be given a meaningful opportunity to contest their detention. Courts martial of the enlisted men and women who allegedly abused prisoners in the Abu Gharib prison are proceeding.

It is difficult to make a credible argument that resolution of the claims of eleven villagers against the worlds’ largest oil company for human rights abuses will impact the war on terror at all, and impossible to believe that any impact would be greater than the cases already decided by the Supreme Court.

Moreover, recent developments in the U.S.- Indonesia relationship -- with far more importance to U.S. - Indonesia ties than this litigation, undermine Defendants’ contention that this litigation against Exxon Mobil could strain U.S. ties to the Indonesian Government.

For example, on August 6, 2004, an Indonesian appeals court overturned the convictions

of army and police officers for crimes against humanity in East Timor. *See* Evelyn Rusli, *Indonesia Court Voids 4 Convictions in 1999 East Timor Strife*, N.Y. Times, Aug. 7, 2004, at A2. The United States State Department criticized the decision, saying it was “profoundly disappointed” and that “the overall process was seriously flawed and lacked credibility.” *Id.*⁸ Interestingly, one of the Presidential candidates in Indonesia, General Wiranto, has been indicted for war crimes in East Timor.

Further, on March 3, 2004, Magistrate Judge Alan Kay denied Major General Johny Lumintang’s motion to set aside a \$66 million judgment against him for complicity in human rights violations in East Timor. *See Doe v. Major Gen. Johny Lumintang*, Civ. Action No. 00-674 (D.D.C. 2004). In that case, the *Deputy Chief of Staff of the Indonesian army* – the second highest ranking officer in the Indonesian armed forces -- was found personally responsible for acts against the plaintiffs and for a larger pattern of gross human rights violations, including a campaign of killing, torture, and terror in violation of the ATS and the TVPA. *See Doe v. Major Gen. Johny Lumintang*, Civ. Action No. 00-674 (D.D.C. 2001). This litigation -- directly against the Indonesian military -- apparently did not cause any foreign policy effects, as it was not even mentioned by the State Department or the Indonesian Ambassador in their letters. It is hard to

⁸ These developments further undermine Defendants’ assertion that Indonesia provides an adequate alternative forum. Defs.’ Second Supp. Br. at 1 n.1. In addition, a coalition of non-governmental organizations, including Amnesty International, Human Rights Watch, and the U.N. Representative for the International Federal for East Timor, recently wrote to U.N. Secretary General Kofi Annan regarding efforts to prosecute human rights violations in East Timor. *See* Letter of Juan E. Mendez, President, International Center for Transitional Justice to Kofi Annan, Secretary-General, The United Nations, of June 24, 2004 available at www.hrw.org/english/docs. The letter asks the UN to create an international commission to take over the prosecutions as Indonesia’s judicial system does “not appear to demonstrate a genuine effort to punish the perpetrators or maintain minimum recognized standards of independence or impartiality.” *Id.* at 2.

imagine how litigation against a private actor could have more impact on foreign affairs than a lawsuit directly against the military itself.

Last June, the Washington Post reported that the United States was investigating whether Indonesian soldiers were responsible for an attack on American citizens. Dana Priest, *A Nightmare, and a Mystery, in the Jungle*, Wash. Post, June 22, 2003 at A1 (describing ambush of teachers on a picnic outing in Papua, Indonesia). Matthew P. Daley, Deputy Assistant Secretary of State for East Asian and Pacific Affairs, was quoted in the article as stating “The preponderance of the evidence indicates to us that members of the Indonesian army were responsible for the murders in Papua.” *Id.* The Senate Foreign Relations Committee passed an amendment prohibiting the release of certain military funds in response to this incident, and the U.S. Ambassador to Indonesia raised this issue with the President of Indonesia. *Id.* An indictment has now been issued by the United States Justice Department against a rebel leader, not the military, but the investigation, apparently, continues. The impact of this incident, and the resulting investigations, makes any possible impact of this litigation against Exxon Mobil on U.S.- Indonesian relations pale in comparison.

Any indirect possibility that this case might impact foreign relations in a legally cognizable way is further removed because the allegations relate to events prior to February 2001, and there have been two new governments since then, and a third one is imminent. There is no reason to expect that any indirect criticism of the Indonesian government resulting from Exxon Mobil’s use of security forces under a government that has changed two or three times would bring into question any official acts of the current government. *Cf. Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964) (The act of state doctrine is not applied if a new

government is in power and is not itself responsible for the acts in question).

Indeed, current officials of the Indonesian government are now questioning whether they should continue to allow large private companies like Exxon Mobil to, in essence, privatize the military. See Fabiola Desy Unidjaja, *TNI to Leave Vital Facilities Within a Year*, Jakarta Post, June 25, 2004; Marianne Kearney, *Military to Quit Mine Protection*, The Courier Mail (Brisbane), June 26, 2004; Robert F. Kennedy Memorial Center for Human Rights, *The West Papua Report 3* (June/July 2004). It is at least as plausible that the emerging Indonesian government would welcome an effort that would require large multinationals, like Exxon Mobil, to take responsibility for their profit-seeking actions, as it is that the government would take offense if Exxon Mobil is found legally responsible. Interestingly, U.K.-based BP has declined to hire the TNI for security at its plant in Papua, Indonesia. See *BP Sidesteps Extortion of Indonesia's Army*, The Times (London), May 2, 2003 (quoting Arian Ardie, a "senior consultant" to BP as saying "the policy of surrounding businesses with a ring of steel has been at the root security problems" and that paying the army for security has been part of the problem rather than part of the solution: security plans "cannot rely on ever-increasing use of force or the threat of violence."). Based on the recommendation of a panel of advisers headed by former Senate Majority Leader George Mitchell, BP has adopted a "community based" security approach of including the communities in the vicinity of the plant and local authorities. Local Papuans are to provide perimeter security, with police on call for major internal disturbances. See Manuela Saragosa, *Oil Giant Gets Indonesia Warning*, BBC News, Mar. 12, 2003; See also Tangguh Independent Advisory Panel Second Report on Tangguh LNG Project 17 (Nov. 2003) (noting that support for police should be consistent with the State Department Voluntary

Principles on Security, the United Nations Declaration on Human Rights, the UN Code of Conduct for Law Enforcement Officials, among others).

Defendants' attempt to stretch the *Sosa dicta* beyond its facts fails. *Sosa* does not create a new legal defense of "foreign relations concerns." Any such issues must be addressed in the context of accepted legal doctrines and the State Department has raised no concerns in this case that implicate the comity, act of state or political question doctrines. The federal courts cannot abdicate their duty to decide federal cases based on the State Department's fears that litigation in a U.S. court might prove embarrassing politically without running afoul of separation of powers principles. *See, e.g., First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 775-76 (1972) (Powell, J., concurring). Otherwise, "the fate of the individual claimant would be subject to the political considerations of the Executive Branch. Since those considerations change as surely as administrations change, similarly situated litigants would not be likely to obtain even-handed treatment." *Id.* at 792 (Brennan, J., dissenting).

C. SOSA DOES NOT PRECLUDE AIDING AND ABETTING OR SECONDARY LIABILITY: DEFENDANTS CONFUSE THE STANDARD FOR ESTABLISHING A VIOLATION OF INTERNATIONAL LAW WITH THE STANDARDS FOR LIABILITY

Sosa did not, as Defendants assert, address the standard for aiding and abetting or secondary liability under the ATS. Defendants improperly conflate the question of what violations of international law support subject matter jurisdiction under the ATS (here, genocide; murder or causing the disappearance of an individual; torture and other cruel, inhuman, or degrading treatment, including sexual assault; and prolonged arbitrary detention) with the question of what law applies to establish liability for those wrongs. The issue of what law of

secondary liability applies to ATS claims is a separate question. *See, e.g.*, Note, 116 Harv. L. Rev. 1525 (2003) (“consider the case in which the jurisdictional burden involving the law of nations has been met and the court must decide a further question such as a standard for third-party liability”); *Cf. Doe v. Islamic Salvation Front*, 257 F. Supp. 2d 115, 120 n. 12 (D.D.C. 2003) (noting that “tort principles from federal common law may be more useful” in determining secondary liability under the ATS than the application of international law).

Sosa did not reach the issue of liability standards. The *Sosa* footnote referenced by Defendants, *Sosa*, 124 S. Ct. at 2766 n.20, dealt with an entirely different issue: for certain crimes, international law reaches beyond government officials or parties whose conduct is equivalent to state action to hold purely private parties responsible. *Sosa* simply points out that for direct liability to attach to a private party not acting under color of law, courts must determine if “sufficient consensus exists” that the conduct violates one of the handful of norms that extend to private conduct. *Id.*; *see also Bigio v. Coca-Cola Co.*, 239 F.3d 440, 448 (2d Cir. 2000) (“if a plaintiff does not allege conduct that supports private liability under international law, he or she must plead that the conduct was ‘committed by state officials or under color of law’” for ATS liability to attach); *Bao Ge v. Li Peng*, 201 F. Supp. 2d 14, 20 (D.D.C. 2000) (same). For example, genocide and crimes against humanity do not require a showing of state action for liability to attach under the ATS. *See, e.g., Kadic*, 70 F.3d at 242; *Bao Ge*, 201 F. Supp. 2d at 20; *Talisman*, 244 F. Supp. 2d at 305; *Tachiona v. Mugabe*, 169 F. Supp. 2d 259, 313 (S.D.N.Y. 2001). In addition, acts of torture, summary execution, arbitrary detention and sexual assault committed in the course of those wrongs do not require state action. *See, e.g. Kadic*, 70 F.3d at 243; *Talisman*, 244 F. Supp. 2d at 311; *Tachiona*, 169 F. Supp. 2d at 324.

However, here, it is not disputed that Plaintiffs have pled state action: the wrongs at issue were committed by a state actor, a unit of the Indonesian military assigned to Exxon Mobil. If Exxon had hired private security guards, it would not now be liable under international law for claims requiring state action, because private guards do not act under color of law, a requirement for liability for some of the offenses alleged in this case. Exxon willingly subjected itself to this liability when it decided to use Unit 113 for security.

Under the principles of aiding and abetting or secondary liability, Exxon can be held responsible for the acts of the military unit it paid, equipped and supervised. *See Burnett v. Al Baraka Investment*, 274 F. Supp. 2d 86, 100 (D.D.C. 2003) (“although no defendant in this case is sued as a direct perpetrator of a tort committed in violation of the law of nations, proof that they were accomplices, aiders and abettors, or co-conspirators would support a finding of liability under the ATCA”). *See also Hilao v. Estate of Marcos*, 103 F.3d 767, 776 (9th Cir. 1996) (affirming jury instruction on aiding torture); *Carmichael v. United Tech. Corp.*, 835 F.2d 109 (5th Cir. 1988) (assuming ATS imposes liability for aiding and abetting); *Talisman*, 244 F. Supp. 2d at 320, 321 (courts “have almost unanimously permitted actions premised on a theory of aiding and abetting” under the ATS); *Barrueto v. Larios*, 205 F. Supp. 2d 1325 (S.D. Fla. 2002); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322 (N.D. Ga. 2002); *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 Civ. A. 8386, 2002 WL 319887 (S.D.N.Y. Feb. 28, 2002); *Tachiona*, 169 F. Supp. 2d at 312.⁹

⁹ Plaintiffs alleged that Exxon Mobil aided and abetted human rights violations by its security forces and that Exxon Mobil is vicariously liable for their joint venture and agency relationship with the military units hired to protect its property. Defendants assert that Plaintiffs

To determine liability standards under the ATS, courts have applied the international law standards most recently enunciated by the International Tribunals for Yugoslavia and Rwanda. *See Talisman*, 244 F. Supp. 2d at 323 (noting the jurisprudence of the ICTY and ICTR is increasingly being consulted by courts to determine the standards of liability under the ATS); *Wiwa*, 2002 WL 319887; *Tachiona*, 169 F. Supp. 2d at 280 (noting that the Tribunals “have been legitimized” by the U.S., citing Pub. L. No. 104-106, Judicial Assistance to the ICTY and ICTR); *see also Mehinovic*, 198 F. Supp. 2d 1322 (N.D. Ga. 2002) (ICTY and ICTR particularly relevant and have been “explicitly endorsed” by the U.S.). Other courts have relied on tort principles from federal common law. *See Doe I v. Unocal Corp.*, ___ F.3d___, 2002 WL 31063976, at *24 - *36 (9th Cir. Sept. 18, 2002) (Reinhardt, J., concurring), *vacated and rehearing en banc granted*; *Cf. Islamic Salvation Front*, 257 F. Supp. 2d at 120 n. 12 (urging application of “tort principles from federal common law” to determine secondary liability under the ATS).

To some extent, the question of whether to apply international law standards or domestic tort standards is academic: fortunately, the international law standards for aiding and abetting or secondary liability and the standards this Circuit follows in civil tort cases¹⁰ are very similar and both clearly provide for liability here. *See* Pls.’ Mem. of P. & A. in Opp’n to Mot. to Dismiss at

allege aiding and abetting liability only for their state law claims. Plaintiffs believe the complaint meets the pleading standards of the Federal Rules. *See* Fed. R. Civ. P. 8. If the court feels the complaint is not clear on this point, Plaintiffs request leave to amend. *See Simplex Time Recorder Co. v. Sec’y of Labor*, 766 F.2d 575, 585 (D.C. Cir. 1985) (leave to amend should be liberally granted absent prejudice to the opposing party (*citing Foman v. Doris*, 371 U.S. 178, 182 (1962))).

¹⁰ This Circuit follows the Restatement (Second) of Torts § 876(b) in civil cases. *See Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983).

15-23; compare *Talisman*, 244 F. Supp. 2d at 324 (applying international law standards which require only “some knowledge that the assistance will facilitate the crime” to show aiding and abetting) and *Prosecutor v. Furundzija*, ICTY-95-17/1 (July 21, 2000), at ¶¶236, 245-46, <http://www.un.org/icty/furundzija/appeal/judgement/index.htm> (An aider and abettor need not even know the precise crime that the perpetrator intends to commit: it is enough that the aider and abettor is “aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed....” Under such circumstances, the aider and abettor is deemed to have “intended to facilitate the commission of that crime, and is guilty as an aider and abettor.”)¹¹ with *Halberstam*, 705 F.2d at 478 (“Aiding-abetting focuses on whether a defendant knowingly gave ‘substantial assistance’ to someone who performed wrongful conduct, not on whether the defendant agreed to join the wrongful conduct”).

Even if Defendants were correct that *Sosa* requires the standards for aiding and abetting or secondary liability to have no “less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted,” that standard is met. The concept of aiding and abetting liability under international law has been recognized by U.S. courts since the very beginnings of the Republic. In *Talbot v. Janson*, 3 U.S. (3 Dall.) 133 (1795), a case decided under the law of nations only six years after the passage of the ATS, the U.S. Supreme Court found that Talbot, a French citizen, who had assisted Ballard, a U.S. citizen, in unlawfully capturing a Dutch ship, acted in contravention of the law of nations and was liable

¹¹ This aiding and abetting standard was recently reaffirmed by the ICTY Appeals Chamber. See *Prosecutor v. Tihomir Blaskic*, IT-95-14-A (App. Chamber July 29, 2004). The Appeals Chamber noted that “there are no reasons to depart from this definition.” *Id.* at 22. Defendants’ contention that the Tribunal decisions vary on this point is therefore moot.

for the value of the captured assets. Justice Paterson found that the defendant surrendered his protection under international law when he supplied his accomplice's ship with guns and used him "as the instrument and means of capturing vessels." *Id.* at 156. Judge Iredell, writing in concurrence, agreed, finding that Talbot abetted Ballard when he "cruised before and after, in company with him [and] put guns on board of [Ballard's] vessel." *Id.* at 167 (Iredell, J., concurring).

Likewise, the 1795 Attorney General Opinion issued by Attorney General Bradford, and relied on by the Court, *see Sosa*, 124 S. Ct. at 2758, specifically states that a claim for relief would be available for "aiding and abetting" under the ATS in a civil action arising out of violations of the laws of war. *See Breach of Neutrality*, 1 Op. Att'y Gen. 57, 59 (1795); 124 S. Ct. at 2759. *See also Heinfeld's Case*, 11 F. Cas. 1099 (C.C. Pa. 1793) (future Chief Justice John Jay writing that "whoever shall render himself liable to punishment or forfeiture, under the law of nations, by committing, aiding or abetting hostilities forbidden by his country, ought to lose the protection of his country against such punishment or forfeiture."); *The Amiable Nancy*, 1 F. Cas. 765, 768 (Cir. Ct., D.N.Y., 1817) ("It has long been regarded as a general principle of maritime law, and not resulting from any special contract, that owners of a privateer are liable for torts committed by captains whom they may employ"). Similarly, early Congresses enacted laws barring the building or equipping of vessels for the slave trade and specifically condemned "aiding or abetting" such trade, recognizing the slave trade as a violation of international law akin to piracy. *See, e.g.*, Statute of March 22, 1794, Ch.11, §1, 1 Stat. 347. This early authority demonstrates the longstanding basis for secondary liability, including aiding and abetting, under the law of nations.

Secondary liability continues to be well defined and accepted in international law. For example, the Nuremberg Tribunals held that Hitler:

had to have the cooperation of statesmen, military leaders, diplomats and ***businessmen***. When they, with knowledge of his aims, gave him their cooperation, they made themselves parties to the plan he had initiated. They are not to be deemed innocent . . . if they knew what they were doing.

See United States v. Hermann Wilhelm Goering, 6 F.R.D. 69, 112 (Nuremberg Tribunal 1947)

(emphasis added). Friedrich Flick, the head of a group of industrial enterprises, was convicted of slave labor based on an employee's decision to increase production quotas knowing forced labor would be required to do so. *See United States v. Friedrich Flick*, 6 Trials of War Criminals Before the Nuremberg Military Tribunals (1952). The Tribunal held Flick fully responsible although the slave labor program had its origin in and was operated by the Nazi regime, and he did not "exert any influence or [take] any part in the formation, administration or furtherance of the slave-labor program." *Id.* at 1198. It was not a requirement for liability that Flick specifically sought to use forced laborers. In fact, Flick testified that it was not his intent to use slave labor, and denied full knowledge of slave labor until very late in the war. *Id.* at 807. In that same case, Defendant 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. *Id.* at 1217, 1222; *See also* I.G. Farben Trial (Case 6 of the American Nuremberg Tribunals); Krupp Trial (Case 10 of the American Nuremberg Tribunals).

The statutes establishing the International Tribunal for Yugoslavia, at Art. 7, and the International Tribunal for Rwanda, at Art. 6, both provide for aiding and abetting liability, as does the Rome Statute of the International Criminal Court, at Art. 25, which imposes liability on

those who aid, abet, or otherwise assist in the commission of an offense “including providing the means for its commission.” From the early prize cases to the Nuremberg Tribunals to the recent case law of the ICTY and ICTR, the principles of secondary liability for violations of international law are well-established. Defendants’ arguments to the contrary are merit less.

III. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that Defendants’ Motion to Dismiss be denied.

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