

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS**

JANE DOES 1-5

Plaintiffs,

v.

Civil No.: 4:23-cv-00813

WILLIE OBIANO,

Defendant.

**PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT'S
OPPOSED MOTION TO DISMISS**

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NATURE AND STATE OF PROCEEDINGS

Defendant Willie Obiano has filed a motion to dismiss under Rule 12 (b) (1) and (6) of the Federal Rules of Civil Procedure. Plaintiffs Jane Does 1-5 are filing this Memorandum in Opposition to Defendant's motion to dismiss.

STATEMENT OF ISSUES TO BE RULED ON BY THE COURT

- A. Whether Defendant Obiano enjoys foreign official immunity from Plaintiffs' Torture Victim Protection Act (TVPA) claims for extrajudicial killings under color of Nigerian law, an issue of subject matter jurisdiction in which Plaintiffs must establish by a preponderance of the evidence that the court has jurisdiction over the case. *Kokkonen v. Guardian Light Ins. Co.*, 511 U.S. 375, 377 (1994).
- B. Whether Plaintiffs' TVPA claims raise nonjusticiable political questions under the common law of foreign official immunity, an issue of subject matter jurisdiction in which Plaintiffs must establish by a preponderance of the evidence that the court has jurisdiction over the case. *Kokkonen v. Guardian Light Ins. Co.*, 511 U.S. 375, 377 (1994).
- C. Whether Plaintiffs have exhausted adequate and available remedies in Nigeria for the extrajudicial killings under the TVPA, an issue under Rule 12 (b) (6) of the Federal Rules of Civil Procedure. To survive a motion to dismiss for failure to state a claim, the complaint must allege facts in addition to the reasonable inferences therefrom that are sufficient to establish a facially plausible claim for relief. The facts alleged must be taken as true, and all reasonable inferences from the facts must be drawn in favor of the non-moving party. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atlantic Corp v. Twombly*, 550 U.S. 554, 556 (2007) ("[A] well-pleaded complaint may

proceed even if it strikes a savvy judge that actual proof of those facts is improbable....”).

- D. Whether the Complaint adequately alleges extrajudicial killings within the meaning of the TVPA, an issue under Rule 12 (b) (6) of the Federal Rules of Civil Procedure. To survive a motion to dismiss for failure to state a claim, the complaint must allege facts in addition to the reasonable inferences therefrom that are sufficient to establish a facially plausible claim for relief. The facts alleged must be taken as true, and all reasonable inferences from the facts must be drawn in favor of the non-moving party. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atlantic Corp v. Twombly*, 550 U.S. 554, 556 (2007) (“[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable....”).

. SUMMARY OF ARGUMENT

Federal common law definitively denies foreign official immunity for extrajudicial killings and other *jus cogens* violations of international law. The issue of foreign official immunity raises an issue under federal common law and does not raise a nonjusticiable political question. Nigeria offers no adequate and available remedies for the five extrajudicial killings at issue in this case. Indeed, Plaintiffs Jane Does 1-5 would be immediately exterminated by the Government of Nigeria for attempting in Nigeria to seek redress of the extrajudicial killings of their husbands, all supporters of Indigenous People of Biafra (IPOB). The Complaint more than amply alleges extrajudicial killings under color of Nigerian law within the meaning of the TVPA, including indiscriminate shootings of peaceful IPOB supporters participating in demonstrations to restore a Biafra sovereignty.

I. COUNTERSTATEMENT

A few pages of history are commonly worth volumes of logic. *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921).

In 1914, in the European “Scramble for Africa,” Great Britain, brandishing machine guns, herded three distinct, rival, incompatible ethnic groups under a single sovereign: Biafrans largely in the southeast, Yoruba largely in the southwest, and Fulani largely in the north. Not a single African voted in favor of the British decreed boundaries of Nigeria. It was an artificial, combustible, fissiparous state the day it was born.

The British granted Nigeria independence in 1960 without a referendum among its distinct ethnic groups to determine whether they preferred separate sovereignties to avoid internecine warfare and to vindicate government by the consent of the governed. Biafrans were soon targeted for persecution by the radical Muslim Fulani. (At present, twelve (12) predominantly Fulani Nigerian states in the north embrace draconian, misogynistic Sharia law).

The 1967 Aburi Accord endowed Biafrans with authorities to forestall their oppression by the Government of Nigeria. But the Accord was immediately dishonored by the Government, which ignited the 1967-1970 genocidal, grisly, Biafran Civil War. A staggering 2-3 million Biafrans died, including more than one million infants by starvation.

The war ended, but the genocide of Biafrans by the Government of Nigeria continued incrementally. In 2012, Nnamdi Kanu became the voice and leader of the peaceful Biafran sovereignty movement, i.e., Indigenous People of Biafra (IPOB). He broadcast from London, renounced his Nigerian citizenship, and acquired British citizenship.

IPOB’s political objective is for the five majority Igbo States in Southeast Nigeria to re-establish an independent sovereign state of Biafra through a regional referendum. By 2015,

IPOB had risen to regional prominence as the leading organization of Igbo minority-led advocacy for a sovereign state in the south-east. It focused on peaceful actions to this end, with a particular emphasis on media messaging and political protests.

From September 2015 onward, however, IPOB rallies were prohibited by the Government of Nigeria as an alleged threat to national security. As related by five (5) United Nations Special Rapporteurs in an October 1, 2020, letter to the President of Nigeria (Exhibit 1, p.3):

“On October 14, 2015, the leader of IPOB was arrested in Lagos on charges of criminal conspiracy and treason...Following the arrest, it appears that regional tensions heightened significantly and there was a marked increase in the number of protests and demonstrations in the south-east of Nigeria. Despite the fact that most IPOB protests and gatherings...were largely non-violent, Nigerian Security Forces (NSF) reportedly violently broke up scores of IPOB or “pro-Biafra” rallies and meetings, killing and arresting dozens of their participants. Between 2015 and 2016, it is alleged that law enforcement officials killed at least 100 IPOB members in different public events in Aba (Abia State), and Awka and Onitsha (Anambra State). On 29 and 30 May 2016, during a demonstration, the Nigerian military opened fire on IPOB members and bystanders in Onitsha. It is alleged that at least 60 persons were killed and over 70 injured, many of whom were shot in the back.”

On September 18, 2017, the President of Nigeria arbitrarily decreed that IPOB was a terrorist organization without any due process. *Id.* at pp. 3-5, 8.

The African Court of Human and People’s Rights found on March 8, 2018, that the terrorist listing was a *prima facie* violation of the African Charter. *Id.* at p. 5. The five United Nations Special Rapporteurs further noted (*Id.*):

“[T]here have been increasing reports that IPOB’s proscription has led to a rise in alleged violations of the rights of IPOB supporters...These have allegedly included arbitrary arrests and detention, torture, and ill-treatment, enforced disappearances and threats to life, as well as extrajudicial killings. As all IPOB activities were declared illegal and can lead to arrest and prosecution, several members of IPOB have been charged with treason, which is punishable by the death penalty.”

The Government of Nigeria ignored the request of the Special Rapporteurs to provide detailed information about the rationale and justification for designation IPOB as a terrorist group and its activities unlawful. *Id.* at p. 9.

Despite frantic lobbying by the Government of Nigeria for nearly 6 years, no other country in the world, including the United States, has listed IPOB as a terrorist organization.

Defendant Willie Obiano served as Governor of Anambra State in Nigeria from March 17, 2014, to March 17, 2022. During his service as Governor of Anambra State, Defendant Obiano possessed command responsibility and effective control over the Nigerian soldiers complicit in the extrajudicial killing of John Does 1-5 under color of Nigerian law acting in concert with Nigerian President Muhammadu Buhari or his agents.

The five extrajudicial killings of IPOB supporters under color of Nigerian law that form the predicate of this Torture Victim Protection Act lawsuit were foreseeable not only by Defendant Willie Obiano but by the entire Nigerian population that had witnessed escalating atrocities against IPOB members since the proscription of IPOB in 2017 in violation of international law. Jane Doe No.1's husband was the victim of an extrajudicial killing on or about October 23, 2020, while attending a peaceful IPOB rally. Complaint, at ¶ 4. Jane Doe No. 2's husband was the victim of an extrajudicial killing while attending a peaceful IPOB rally on or about August 9, 2020. *Id.* at ¶ 5. Jane Doe No. 3's husband was the victim of an extrajudicial killing while attending a peaceful IPOB rally on or about August 9, 2020. *Id.* at ¶ 6. Jane Doe No. 4's husband was the victim of an extrajudicial killing while attending a peaceful IPOB rally on or about October 23, 2020. *Id.* at ¶ 7. Jane Doe No. 5's husband was the victim of an extrajudicial killing while attending a peaceful IPOB rally on or about August 9, 2020. *Id.* at ¶ 8.

The Government of Nigeria has refused to investigate any of the five extrajudicial killings. *Id.* at ¶s 21, 23, 25, 28, 30.

It is no accident that each of the alleged extrajudicial killings in 2020 under color of Nigerian law targeted IPOB supporters. As documented by Exhibit 1, IPOB supporters in the five Biafran States, including Defendant Obiano's Anambra State, occupied free fire zones. Complaint, at ¶ 18. They were and remain as defenseless as Jews in Nazi Germany. Defendant Obiano knew of their vulnerability to assassination by Nigerian security forces.

In June 2021, IPOB leader Nnamdi Kanu, while visiting Nairobi, Kenya, was kidnapped, tortured, and subject to extraordinary rendition by Nigerian authorities to Abuja, Nigeria, on concocted charges of treason and terrorism. Mr. Kanu has been illegally detained in solitary confinement ever since (nearly 2 years) with no trial date in sight in violation of sixteen (16) international human rights covenants as determined in a July 20, 2022, Opinion of the United Nations Working Group on Arbitrary Detention. Exhibit 2. The Government of Nigeria is in contempt of the Working Group's ruling calling for his immediate and unconditional release.

Jane Does 1-5 would risk immediate assassination by the Government of Nigeria if their identities were publicly disclosed. Complaint, at ¶s 4-8.

II. ARGUMENT

1. Defendant Obiano Commands No Foreign Official Immunity

Defendant Obiano has no federal common law foreign official immunity from Plaintiffs' TVPA claims anchored to extrajudicial killings under color of Nigerian law. Such violations of *jus cogens* norms of international law are never shielded from accountability under the controlling decision of the United States Court of Appeals for the Fourth Circuit in *Yousuf v. Samantar*, 699

F. 3d 763 (4th Cir. 2012), a decision ignored by Defendant Obiano. No government can authorize torture or extrajudicial killings. And to hold otherwise, would reduce the TVPA to a shell.

Samantar was a high-ranking Somali official who allegedly subjected Plaintiffs or members of their families to torture and extrajudicial killing, among other things. Plaintiffs in that case initiated TVPA suits against Samantar, who unsuccessfully invoked a federal common law immunity defense. The Court of Appeals explained that a *jus cogens* or peremptory norm of general international law can only be modified by a subsequent norm of international law having the same character.” Id. at 775. Prohibitions against torture and extrajudicial killings qualify as *jus cogens* violations. Id. They may be committed in the course of the official’s employment by the Sovereign, but cannot be officially authorized by the Sovereign because international law does not recognize that an act that violates *jus cogens* is a sovereign act. Id. at 775-776.

The Court of Appeals in *Yousuf v. Samantar* noted “an increasing trend in international law to abrogate foreign official immunity for individuals who commit acts, otherwise attributable to the State, that violate *jus cogens* norms,” including American courts. Id. at 776-777. It thus concluded that “under international and domestic law, officials from other countries are not entitled to foreign official immunity for *jus cogens* violations, even if the acts were performed in the defendant’s official capacity.” Id. at 777. The Court added, “in enacting the TVPA, Congress essentially created an express private right of action for individuals victimized by torture and extrajudicial killing that constitute violations of *jus cogens* norms.” Id. Defendant Obiano’s failure to cite to the *Samantar* case is an attempt to airbrush this controlling federal precedent out of TVPA jurisprudence.

And Defendant’s reliance on the federal district court’s decision in *Doe I, et al v. Buratai, et. al.*, Case No.: 1:17-cv-01033-DLF (D.C.D.C.) is misplaced. Contrary to Defendant’s assertion

(Def. Mem. at p. 9), the Court of Appeals affirmed the dismissal of the lawsuit based on *an absence of personal jurisdiction*, not on an absence of subject matter jurisdiction because of foreign official immunity. Exhibit 3, at p. 2. (“This Court granted summary affirmance of the District Court’s dismissal of the claims against Obiano on *personal jurisdiction grounds*...We now affirm the District Court’s dismissal of the remaining Nigerian officials on *personal jurisdiction grounds*.” [emphasis added]). A court may properly address personal jurisdiction before addressing subject matter jurisdiction if the former issue is clear, but the latter is complex or uncertain. *Ruhrgas AG v. Marathon Oil Co., et al.*, 526 U.S. 574 (1999).

The *Buratai* decision of the federal district court as regards foreign official immunity carries no precedential value because the case was not affirmed on appeal by the United States Court of Appeals for the District of Columbia Circuit. Moreover, the *Buratai* district court decision relied upon by Defendant is trumped by the decision of the United States Court of Appeals for the Fourth Circuit in *Yousuf v. Samantar*. Further, in *Buratai*, the Nigerian government had at least requested the U.S. State Department to submit a suggestion of immunity (which had not been acted upon at the time of decision). Here, in contrast, the Nigerian government has refrained from even asking for a suggestion of immunity.

Defendant Obiano wanders off into the fields of head of state or foreign sovereign state immunity irrelevant to his foreign official immunity defense, which was specifically addressed and rejected by the Court of Appeals in *Yousuf v. Samantar*. (Def. Mem. at pp.10-14). Plaintiffs agree with Defendant that foreign official immunity lapses when an official acts beyond the scope of authority. *Id.* at 14. But as the Court of Appeals explained in *Samantar, supra*, at 776, “[A]s a matter of international and domestic law, *jus cogens* violations [like extrajudicial killing] are, by definition, acts that are not officially authorized by the Sovereign.”

Finally, Defendant Obiano's invocation of *Doe I v. Israel*, 400 F. Supp. 2d 86 (D.D.C. 2005) is unavailing. That case did not address foreign official immunity but immunity under the Foreign Sovereign Immunities Act. And its decision on that score was overruled by the United States Supreme Court in *Samantar v. Yousuf*, 560 U.S. 305 (2010).

Accordingly, Defendant's foreign official immunity defense is meritless.

2. Political Question Doctrine

Defendant Obiano frivolously maintains that foreign official immunity raises a nonjusticiable political question. Def. Mem. at pp.15-19. As the Court of Appeals explained in *Samantar, supra*, at 767, foreign official immunity is governed by the "common law," which is judge-made law, not law made by the executive or legislature. Black's Law Dictionary (10th Edition, 2014). The Court of Appeals specifically denied that foreign official immunity raised a nonjusticiable political question entrusted to the Executive. *Id.* at 773. The Court reasoned that foreign official immunity was justiciable under the common law and ruled against *Samantar*. *Id.* at 773, 777.

Defendant is unable to cite a single case holding that foreign official immunity presents a nonjusticiable political question. That conclusion was impliedly rejected by the United States Supreme Court in *Yousuf v. Samantar, supra*, at 326, when it remanded the case to the District Court to address foreign official immunity. ("Whether petitioner may be entitled to immunity under the common law, and whether he may have other valid defenses to the grave charges against him, are matters to be addressed in the first instance by the District Court on remand."). That remand would have made no sense if the Supreme Court understood foreign official immunity to raise a nonjusticiable political question.

In sum, Defendant's political question defense should be summarily rejected.

3. Exhaustion of Adequate and Available Remedies in Nigeria

Defendant fancifully argues (Def. Mem. at p. 19) that Plaintiffs have failed to allege the absence of “adequate and available remedies” in Nigeria for the extrajudicial killings of five IPOB supporters treated under Nigerian law as traitors subject to the death penalty. The Complaint specifically alleges that the Nigerian government has declined to investigate the extrajudicial killings, and that Plaintiffs would risk instant extermination by the Nigerian government if they sued in Nigeria and their identities were known (which is why they have sued under pseudonyms in this Court). Complaint at ¶¶ 4-8, 21, 23, 25, 28, 30. The Complaint further alleges that the Nigerian judiciary is not independent but an arm of the Executive Branch. *Id.* at ¶¶ 21, 23, 25, 28, 30. That truth is recognized by the U.S. State Department. Its 2022 Human Rights Report on Nigeria stated, “The constitution and law provide for an independent judiciary, but the government did not respect judicial independence and impartiality.” Exhibit 4.

Plaintiff’s Complaint noted a monetary award to Nnamdi Kanu by the Abia State High Court in Nigeria. Complaint at ¶ 16. But the Government of Nigeria has flouted the award and has not paid Mr. Kanu a single naira. In desperation, Defendant relies on decisions by the Community Court of Justice of the Economic Community of West African States (ECOWAS), forgetting that the exhaustion required by the TVPA is remedies available in the country in which the wrongdoing occurred. See Exhibit 8 to Def. Mem. To state the obvious, ECOWAS is not Nigeria.

Defendant has failed to show that Nigeria has adequate and available remedies for Plaintiffs Jane Does 1-5 to redress the extrajudicial killings of their husbands, IPOB supporters, treated as traitors deserving the death penalty under Nigerian law.

4. The Complaint Adequately Alleges Extrajudicial Killings

The TVPA, section 3 (a) defines extrajudicial killing as follows: “—For the purposes of this Act, the term "extrajudicial killing" means a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”

The extrajudicial killing allegations in the Complaint easily satisfy that definition.

1. “On October 23, 2020, John Doe No. 1 was attending a peaceful IPOB rally in Nnewi , Anambra State...supporting restoration of Biafra sovereignty. He was shot dead by Nigerian military forces...in a prominent market square where the Biafran demonstrators had peacefully gathered. About seven truckloads of heavily armed Nigerian military men stormed the market square and began indiscriminately shooting at IPOB demonstrators, killing at least 13 including John Doe No.1.” Complaint at ¶s 19-20.
2. “On August 9, 2020, John Doe No. 2 was attending a peaceful IPOB rally in Nnewi, Anambra State...supporting restoration of Biafra sovereignty. He was shot dead by Nigerian military forces...who indiscriminately targeted the peaceful demonstrators.” Id. at ¶ 22.
3. “On August 9, 2020, John Doe No. 3 was attending a peaceful IPOB rally in Nnewi, Anambra State...supporting restoration of Biafra sovereignty. He was shot dead by Nigerian military forces...who indiscriminately targeted the peaceful demonstrators.” Id. at ¶ 24.
4. “On October 23, 2020, John Doe No. 4 was attending a peaceful IPOB rally in Nnewi, Anambra State...supporting restoration of Biafra sovereignty. He was shot dead by Nigerian military forces...in a prominent market square where the Biafran demonstrators

had peacefully gathered. About seven truckloads of heavily armed Nigerian military men stormed the market square and began indiscriminately shooting at the IPOB demonstrators, killing at least 13 including John Doe No. 4.” Id. at ¶s 26-27.

5. “On August 9, 2020, John Doe No. 5 was attending a peaceful IPOB rally in Nnewi, Anambra State...supporting restoration of Biafra sovereignty. He was shot dead by Nigerian military forces...who indiscriminately targeted the peaceful demonstrators.” Id. at 29.

The allegations recited above clearly satisfy the TVPA definition of extrajudicial killings: deliberate, indiscriminate killings of peaceful protestors by the Nigerian military for exercising their rights to free speech and association. The killings were not pursuant to a judgment by a regularly constituted court. More granular details necessarily await discovery. Nigeria is a police state. Journalists are not free to report on the ongoing genocide of Biafrans. Multiple precautions will be required to protect the safety of witnesses. One false move means instant death for Biafrans.

In 2017, Defendant Obiano directed the Supervisory Committee of Anambra Vigilante Group, first cousin of the Nazi Gestapo, to enhance efforts to snuff out political opponents, especially Biafrans. Complaint at ¶ 32. Since at least 2017, Defendant Obiano knew of an ongoing genocide of Biafrans in Anambra State and the neighboring Biafran States of Enugu, Imo, Abia, and Ebonyi. Id. at ¶ 33.

In sum, the Complaint more than amply alleges extrajudicial killings within the meaning of the TVPA sufficient to survive a motion to dismiss under Rule 12 (b) (6) of the Federal Rules of Civil Procedure.

III. CONCLUSION

For the reasons set forth above, Defendant's motion to dismiss should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Memorandum in Opposition was served on all attorneys of record electronically through the CM/ECF filing system this 12th day of June 2023.

/s/Bruce Fein

Bruce Fein