UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

ESTHER KIOBEL, individually and on behalf of her late husband, Dr. BARINEM KIOBEL, BISHOP AUGUSTINE NUMENE JOHN-MILLER, DORNUBARI ANSLEM JOHN-MILLER, CHARLES BARIDORN WIWA, ISRAEL PYAKENE NWIDOR, KENDRICKS DORLE NWIKPO, ANTHONY B. KOTE-WITAH, VICTOR B. WIFA, DUMLE J. KUNENU, BENSON MAGNUS IKARI, LEGBARA TONY IDIGMA, PIUS NWINEE, SIMEON DEDDOA, KPOBARI TUSIMA, individually and on behalf of his late father, CLEMENT TUSIMA, and individually on behalf of all others similarly situated, Plaintiffs, v. ROYAL DUTCH PETROLEUM COMPANY; SHELL TRANSPORT AND TRADING COMPANY, p.l.c., Defendants.	02 CV 7618 (KMW)

REPLY MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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Plaintiffs continue their recent attack on the bona fides of the democratically-elected Nigerian Government. Abandoning their previous endorsement of the Nigerian Government as their means of giving notice to the putative class of all residents of Ogoniland, plaintiffs urge this Court to disregard the Nigerian Government's protest letter to the Attorney General of the United States. Here, we ignore the propriety of plaintiffs' flip-flop and note instead that plaintiffs' conduct on this very motion highlights the risk that judicial determination of the legality of the conduct of a foreign government will cause embarrassment to U.S. foreign policy. In short:

- Proceeding with this litigation would require the Court to assess the legality of official actions of the sovereign Federal Republic of Nigeria within its territory.

- The act of state doctrine and the international comity doctrine would generally require the Court not to proceed with such an adjudication to the detriment of Nigerian-American relations.

- In Wiwa, the Court declined to apply the act of state doctrine because of the emergence of a new democratic government in Nigeria, holding "[i]f the government which perpetuated the challenge act of state is no longer in existence the danger of interference with the Executive's conduct of foreign policy is surely much less than the typical case where the act of state is that of the current foreign government". Wiwa v. Royal Dutch Petroleum Co., No. 96 CV 8386, 2002 WL 319887, at *28 (S.D.N.Y. Feb. 28, 2002).

- The possibility of interference with the Executive's conduct of foreign policy has increased dramatically. The current Nigerian Government has unequivocally stated that an adjudication in this litigation would "adversely affect . . . the further development of our nascent democracy", "jeopardize the on-going process . . . to reconcile with the Ogoni people" and "plac[e] under strain the cordial relations that exist with the Government of the United States of America".

- "The focus of the act of state doctrine is the conduct of foreign policy by the United States government" (Opposition at 4) and the act of state doctrine helps preserve the Executive's "preeminen[ce] in the realm of foreign relations". Wiwa, 2002 WL 319887, at *28 (internal quotations omitted).

- Although the United States Government criticized the previous military regime, the Department of State has a different view of the democratically-elected Government.[1]

The issue before the Court is thus how to assess the threat to the Executive's conduct of foreign policy. Plaintiffs' claims regarding the actions of a sovereign nation within its own territory and the effect of those claims on the sovereign nation's conduct of its own affairs--as well as their attack on the good faith of the current Nigerian Government--will interfere with U.S. relations with Nigeria. The Nigerian Government has said so. At a minimum, the Court should ask the U.S. Government what impact it believes adjudicating plaintiffs' claims would have on U.S. foreign relations.

I. THE ACT OF STATE AND INTERNATIONAL COMITY DOCTRINES REQUIRE DISMISSAL

A. The Act of State Doctrine Requires Dismissal.

The Nigerian Government's protest, which postdates the Court's decision in Wiwa,[2] goes to the heart of the Court's prior act of state doctrine holding. In Wiwa,

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[1] "Since the inauguration of the democratically elected Obasanjo government, the bilateral relationship has continued to improve, and cooperation on many important foreign policy goals, such as regional peacekeeping, has been good" and [Most] civil society leaders and most Nigerians see a marked improvement in human rights and democratic practice under [the new government]." Background Note: Nigeria, June 2002, available at http://www.state.gov/r/pa/ei/bgn/2836.htm, as viewed May 5, 2003. Moreover, the Department of State views this relationship as important because Nigeria is "the most populous country in Africa", "provides about 10% of overall U.S. oil imports" and "has played a leading role in forging an anti-terrorism consensus among states in Sub-Saharan Africa". Id. Plaintiffs' frequent citations to Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289 (S.D.N.Y. 2003), and their new efforts to equate the current Nigerian Government to the Republic of the Sudan, are thus inapposite. The Sudan "has been declared a state sponsor of terrorism by the United States government". Id., at 343.

[2] The Court should obviously not refuse to take the current diplomatic situation into account on an issue going to the separation of powers. In any event, whether viewed as stare decisis, "law of the case" or collateral estoppel (Opposition at 3-4, 7-10), the change of circumstances since the prior decision is controlling. See, e.g., United States v. Nolan, 136 F.3d 265, 269 (2d Cir. 1998) ("The principle of stare decis[i]s is applicable only where the facts in the two actions are the same.") (internal quotations omitted); Sagendorf-Teal v. County of Rensselaer, 100 F.3d 270, 277 (2d Cir. 1996) ("Application

the Court declined to apply the act of state doctrine because it found there to be "no basis to conclude that adjudicating plaintiffs' claims would interfere with Nigerian-American relations" and that doing so "would more likely be consonant, than at odds, with the present position of the Nigerian government". Wiwa, 2002 WL 319887, at *28 (internal quotations omitted). Now, however, the democratically elected Nigerian Government has made clear that it believes this litigation will undermine internal Nigerian efforts to address Ogoni issues and impair Nigerian relations with the U.S.

Plaintiffs' arguments that the Court should ignore the Nigerian Government's letter are without merit.

First, plaintiffs' argument that the Court can ignore the Nigerian Government's letter because the U.S. Government has already criticized the prior government (Opposition at 5-7) is illogical. Determining whether to apply the act of state doctrine requires the Court to "consider whether resolution of the case will 'likely impact on international relations' or 'embarrass or hinder the executive in the realm of foreign relations'". Wiwa, 2002 WL 319887, at *28 (quoting Allied Bank Int'l v. Banco Credito Agricola de Cartago, 757 F.2d 516, 520-21 (2d Cir. 1985)). For that inquiry to be meaningful, the Court must consider the diplomatic situation that exists at the time of its decision. The relevant issue for U.S. foreign policy today is not an abstract concern about criticizing the old regime.[3] The issue is that the current Nigerian Government has

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of the law of the case doctrine is discretionary and does not limit a court's power to reconsider its own decisions prior to final judgment. Among the major grounds justifying such a reconsideration is the availability of new evidence.") (internal citation and quotations omitted); Montana v. United States, 440 U.S. 147, 158 (1979) ("It is, of course, true that changes in facts essential to a judgment will render collateral estoppel inapplicable in a subsequent action raising the same issues").

[3] Plaintiffs' argument that the act of state doctrine should not be "applied to a non-existing government" (Opposition at 5) is thus also wrong.

officially informed the U.S. Government that adjudication of plaintiffs' claims would, among other things, impair current Nigerian-American relations. That cannot simply be ignored. The letter proves that "resolution of the case will likely impact on international relations or embarrass or hinder the executive in the realm of foreign relations". Wiwa, 2002 WL 319887, at *28.

Second, plaintiffs' challenge to the Nigerian Government's credibility on the ground that it did not send its letter earlier (Opposition at 5) is misguided.[4] The Nigerian Government means what it said in the letter. We do not quote the letter again.

Third, plaintiffs erroneously accuse the Nigerian Government of "illogic", arguing that "[a]pparently, the Nigerian Government believes its interests can withstand an adjudication" of the Wiwa plaintiffs' claims but not of the claims in Kiobel. (Opposition at 4 n.1.)[5] That is an out-and-out misrepresentation of the Nigerian Government's position. The Nigerian Government's letter applies to all three of the consolidated actions and states that all three will adversely affect Nigerian-American relations and Ogoni reconciliation efforts undertaken by the current Nigerian Government. We do not quote the letter again.

Fourth, plaintiffs appear to find it significant that they have not named the Nigerian Government as a defendant. (Opposition at 5.) That is irrelevant. See Hunt v. Mobil Oil Corp., 550 F.2d 68, 76 (2d Cir. 1977).

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[4] We note the irony that the Kiobel plaintiffs assert that the timing of the letter shows that the issues raised "may not be quite as critical as has been represented" (Opposition at 4-5). The Kiobel plaintiffs waited six years after Wiwa to file this action.

[5] Plaintiffs further suggest that if the Nigerian Government were serious, it would have "sought relief" itself. (Opposition at 4 n.1.) The Nigerian Government is not a party to the litigation and could not have "sought relief" without intervening. But foreign policy is not conducted through motion practice. Sovereign nations are entitled to avail themselves of diplomatic channels to air their concerns.

B. The International Comity Doctrine Requires Dismissal.

Contrary to plaintiff's argument (Opposition at 11), there is an official governmental act or process to which deference is owed. The Nigerian Government's letter shows that adjudication of plaintiffs' claims will "definitely jeopardize the on-going process initiated by the current government of Nigeria to reconcile with the Ogoni people" and specifically "refer[s] to the Human Rights Violation Investigation Commission" (the "Oputa Commission"). (Millson Decl., Ex. A.)[6] Although, as the Court has noted, the Oputa Commission's "chief purpose is not to 'remedy' [human rights] violations, but to promote reconciliation", Wiwa, 2002 WL 319887, at *18, it cannot be disputed that promoting reconciliation is a substantial and worthy governmental goal,[7] which the Nigerian Government has said this litigation will "definitely jeopardize". Dismissal on international comity grounds is thus appropriate.[8]

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[6] Although plaintiffs cite this Court's finding in Wiwa that the Oputa Commission "does not provide an adequate alternative forum for [plaintiffs'] claims" (Wiwa, 2002 WL 319887, at *18), the Court considered the Oputa Commission in the course of determining whether plaintiffs had exhausted "alternative and adequate" remedies, not as part of an international comity analysis. Id. at *17-*18. Unlike exhaustion, international comity does not turn solely on plaintiffs' alternative remedies. Rather, a principal focus is whether the Court's decision will have "ramifications beyond [the Court's] territorial jurisdiction and into that of another nation", United Feature Syndicate, Inc. v. Miller Features Syndicate, Inc., 216 F. Supp. 2d 198, 209 (S.D.N.Y. 2002), such that the litigation will interfere with "proceedings taking place in foreign countries", Pravin Banker Assocs., Ltd. v. Banco Popular del Peru, 109 F.3d 850, 854 (2d Cir. 1997).

[7] In addition, the Oputa Commission is authorized to "recommend" remedial measures to the Nigerian Government, which will implement the remedies deemed appropriate. Wiwa, 2002 WL 319887, at *18 (citing Tribunals of Inquiry Act (Amend.), ch. 447(d) (Oct. 4, 1999) (Nigeria)).

[8] To the extent plaintiffs' claims are based on the proceedings of the Special Tribunal (e.g., Count I), there is a "true conflict" between those claims and the law of Nigeria, warranting international comity deference. Hartford Fire Ins. Co. v. California, 509 U.S. 764, 798 (1993) (internal quotations omitted); see In re Maxwell Communications Corp. plc, 93 F.3d 1036, 1050 (2d Cir. 1996) ("there is a true conflict necessitating the application of comity principles"). There is no dispute that under current Nigerian law, "no civil proceedings" may be instituted "on account of or in respect of any act, matter or thing done or purported to be done under or pursuant to any Decree or Edict". Federal

Moreover, plaintiffs' contention that the Nigerian Government's letter shows "there is no strong interest in Nigeria in resolving these human rights issues fairly" (Opposition at 14-15) is false. Far from being a "threat"[9] the letter expresses the Nigerian Government's desire to "reconcile with the Ogoni people" and "find a peaceful and satisfactory solution" to problems of "other similar ethnic groups in the country". Contrary to plaintiffs' suggestion (Opposition at 10), there is no Nigerian interest at stake here that is "fundamentally prejudicial to those of the domestic forum". Pravin Banker Assocs., 109 F.3d at 854. Especially in light of the U.S. Government's recent observations about improvements in Nigeria's human rights record, international comity counsels against lightly taking plaintiffs' word over the Nigerian Government's.

II. PLAINTIFFS HAVE FAILED TO STATE A CLAIM

Plaintiffs' principal response[10] to our argument that the Complaint fails to state a cause of action for aiding and abetting is that we somehow forgot that the Court held that the Wiwa complaint stated a claim for primary liability.

Military Government (Supremacy and Enforcement of Powers) Decree 1994, § 1(2) (Nigeria). And plaintiffs agree that the Special Tribunal was "legally constituted" pursuant to such a Decree. (Opposition at 6 (internal quotations omitted)); see Civil Disturbances (Special Tribunal) Decree No. 2 of 1987 (Nigeria). Plaintiffs nevertheless argue that Nigerian law does not prohibit their claims because the Nigerian Government is not a defendant. There is nothing to this. Nothing in § 1(2) limits its application to "civil proceedings" against the government. To the extent plaintiffs' claims are based on the "utilization of the Special Tribunal" (Compl. ¶ 85), they are "on account of or in respect of" acts done pursuant to a Decree.

[9] Incredibly, plaintiffs claim that the Nigerian Government's letter "is nothing less than a naked threat of retribution" by "the chief legal officer of the democratically elected government of Nigeria". (Opposition at 14.)

[10] Plaintiffs have simply failed to defend Count VII of the complaint which alleges liability for "property destruction". As noted in our opening brief (Defs. Mem. at 10 n.14), "property destruction" is not a recognized violation of international law. See Tachiona v. Mugabe, 234 F. Supp. 2d 401, 440 (S.D.N.Y. 2002) (finding no "persuasive evidence that universal consensus exists recognizing [a right to own property and not be arbitrarily deprived of it] as customary international law"); Restatement (Third) of

We have not forgotten.

The Wiwa complaint accused us of extra-judicial killing.

Murder.

We have not forgotten.

The complaints are a lie. Although, if this were a Rule 10b-5 strike suit, there would be Rule 9(b) motion practice, designed to protect innocent people from being shaken down, the Rules do not provide such protection for false claims of murder. The Rules do not specify a motion to dismiss a complaint on the grounds it is false. So we have to litigate this case to rid ourselves of this slur. We have been doing that.

Since plaintiffs' initial disclosures underscore their cavalier disregard for the Rules, we asked interrogatories about people who had personal knowledge about the defendants' involvement in the conduct challenged in the complaint. Even though the plaintiffs' responses were (late and) wholly deficient, they concede that they know of no one with "personal knowledge" of their allegations that defendants:

> (a) "developed with the Nigerian Government a 'joint strategy' to deploy military forces in Ogoniland" (referring to ¶¶ 1, 2 and 24 of the Complaint) (Interrogatory No. 1);
>
> (b) "called in Nigerian Government troops who fired on peaceful protestors" (referring to ¶¶ 15 and 43 of the Complaint) (Interrogatory No. 2)
>
> (c) were present when the military "shot a seventy-four year old man and two youths, killing one" (referring to ¶ 46 of the Complaint) (Interrogatory No. 3);

Foreign Relations Law § 702, cmt. k. Plaintiffs have not disputed this or offered any legal support for their "property destruction" claim. Because Count VII does not "'adequately plead[] a violation of the law of nations (or a treaty of the United States)'", it should be dismissed. Wiwa, 2002 WL 319887, at *3 (quoting Kadic v. Karadzic, 70 F.3d 232, 238 (2d Cir. 1995)).

(d) "participated in the planning and coordination of 'security operations' including raids and terror campaigns conducted in Ogoniland' (referring to ¶ 76e of the Complaint) (Interrogatory No. 4);

(e) "chartered a helicopter that was used to 'reconnoiter' villages, conduct reconnaissance, or 'transport military forces'" (referring to ¶¶ 8 and 44 of the Complaint) (Interrogatory No. 5);

(f) "requested that the Mobile Police Force intervene in Ogoniland after October 1990" (referring to ¶ 39 of the Complaint) (Interrogatory No. 6);

(g) "ceased operations in Ogoniland only 'temporarily . . . until political protest was suppressed'" (referring to ¶ 40 of the Complaint) (Interrogatory No. 8);

(h) "provided any patrol boats or helicopters to the Nigerian police, the Nigerian military or Nigerian government intelligence or security personnel for use in Ogoniland" (referring to ¶¶ 15, 44 and 76c of the Complaint) (Interrogatory No. 11);

(i) "monitored and exchanged intelligence with the Nigerian military in Ogoniland" (referring to ¶ 76b of the Complaint) (Interrogatory No. 14);

(j) "made payments to the military, police (other than the supernumerary policy assigned to SPDC) and Nigerian Government security and intelligence personnel in Ogoniland" (referring to ¶ 76a of the Complaint) (Interrogatory No. 15);

(k) "bribed or attempted to bribe any witness to give false testimony and paid witnesses to give false testimony" (referring to ¶¶ 3, 66a and 76c of the Complaint) (Interrogatory No. 19).

And their litigation tactics confirm this total lack of interest in the truth. For example:

(a) Although plaintiffs know that Alan Detheridge personally delivered to the Nigerian ambassador a letter from the Chairman of Royal Dutch seeking clemency for Ken Saro-Wiwa, plaintiffs deposed him for two days but did not ask him about this letter;

(b) Although plaintiffs know that Brian Anderson told the President of Nigeria that he would not operate behind a military shield[11] and that he personally sought clemency from the Governor of Rivers State, plaintiffs deposed him for two days, but chose not to ask him about this;

[11] This related to a strike in the rest of Nigeria in 1994. The plaintiffs have not told the Court that SPDC withdrew from operations in Ogoniland in January 1993.

(c) Although Plaintiffs knew that Mr. Achebe and Mr. Anderson were both present at meetings with Mr. Owens Wiwa, at the request of the British ambassador to Nigeria to discuss Ken Saro-Wiwa, plaintiffs deposed Mr. Anderson and Mr. Achebe for a total of four days without asking them about these conversations;[12] and

(d) Plaintiffs seek to take the depositions of a large number of people on a recommendation that SPDC buy better weapons for its security force -- which are called "supernumerary police". What that has to do with a charge of murder is hard to fathom. Especially since the weapons were never bought.

What does that have to do with a motion to dismiss? the Court may legitimately ask. This case is now seven years old. We believe that it's time to put the plaintiffs to their proof of murder. We repeat, we are fully aware that this Court has found that there is a sufficient pleading in Wiwa to plead primary liability. So we urge

[12] Plaintiffs did ask Mr. Achebe about a meeting he had had with Mr. Ken Saro-Wiwa in June 1993 in which Mr. Saro-Wiwa stated he felt "strongly that the ... political system in the country offer[ed] no imperatives for the Federal and State Governments, controlled by ethnic majorities, to recognise the Ogoni demands", that "[t]herefore, a radical solution, including goading the army to massacre the villagers so as to draw international attention and pressure on Nigeria, [was] his answer" and that "by threatening Shell's interest and image, he [could] force the Company's alliance to pressure the Nigerian government [to] change the political system". During his deposition, Mr. Achebe stated Mr. Saro-Wiwa said during the meeting: "Shell does not deserve all these complaints and all these allegations, and all [these] exaggerated claims that [I have] made against Shell, but that is the only weapon [I have] to get Shell to back up the Ogoni demand" and "it is a good thing that the army has come into Ogoniland .. and .. even [to] have confrontation because when there is confrontation then it becomes a matter that can be used in the international arena to attract attention". (Tr. at 35-36.)

the Court to address the aiding-and-abetting issue not reached in Wiwa,[13] so that everyone can focus on the murder charge.

May 5, 2003

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[13] Plaintiffs contend that the Court conclusively resolved the secondary liability issue in Wiwa (Opposition at 15), but that is plainly untrue. The Court "did not address the merits of defendants' arguments concerning secondary liability". Wiwa, 2002 WL 319887, at *14 n.17. Rather, the Court held that under the ATCA, plaintiffs had to meet the "joint action" test, meaning that they had to allege "acts that, if proven, would demonstrate a substantial degree of cooperative action between the corporate defendants and Nigerian officials in conduct that violated plaintiffs' rights". Id. at *13 (internal quotations omitted). In Wiwa, id., at *16, the Court found aiding and abetting liability appropriate under the Torture Victim Protection Act, 28 U.S.C. § 1350 ("TVPA"), but plaintiffs have not brought such a claim here.