

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KEN WIWA, *et al.*,

Plaintiffs,

– against –

ROYAL DUTCH PETROLEUM COMPANY, *et al.*,

Defendants.

96 Civ. 8386 (KMW)(HBP)

KEN WIWA, *et al.*,

Plaintiffs,

– against –

BRIAN ANDERSON,

Defendant.

01 Civ. 1909 (KMW)(HBP)

**REPLY MEMORANDUM OF LAW OF BRIAN ANDERSON IN SUPPORT OF
HIS RULE 12(b)(1) MOTION TO DISMISS WIWA PLAINTIFFS' ATS
CLAIMS FOR LACK OF SUBJECT MATTER JURISDICTION**

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Additional Citation Conventions

Pleadings and Court Submissions

“Defs.’ Mem.”: Memorandum of Law in Support of Defendants’ Rule 12(b)(1) Motion to Dismiss *Wiwa* Plaintiffs’ ATS Claims for Lack of Subject Matter Jurisdiction, filed January 16, 2009 (*Wiwa* Docket No. 331)

“Green Ex. ___”: Exhibit to the Declaration of Jennifer Green, filed February 6, 2009 (*Wiwa* Docket No. 347)

“Millson 3d Ex. ___”: Exhibit to the Declaration of Rory O. Millson in Support of Royal Dutch and Shell Transport’s and Brian Anderson’s Reply Memoranda of Law in Support of Defendants’ Rule 12(b)(1) Motion to Dismiss *Wiwa* Plaintiffs’ ATS Claims for Lack of Subject Matter Jurisdiction

“Opp’n”: Plaintiffs’ Memorandum of Law in Opposition to Defendants’ Motion to Dismiss for Lack of Subject Matter, filed February 6, 2009 (*Wiwa* Docket No. 336)

“RD/ST Reply Mem.”: Reply Memorandum of Law of Royal Dutch and Shell Transport in Support of Their Rule 12(b)(1) Motion to Dismiss *Wiwa* Plaintiffs’ ATS Claims for Lack of Subject Matter Jurisdiction

Discovery

“Pls.’ Resps. to Anderson 3d Set of RFAs”: *Wiwa* Plaintiffs’ Response to Brian Anderson’s Third Set of Requests for Admission to the *Wiwa* Plaintiffs Revised Pursuant to October 24, 2008 Order of the Court

“Pls.’ Resps. to 5th/6th Set of RFAs”: All Plaintiffs’ Responses and Objections to Defendants’ Fifth Set of Requests for Admission to the *Wiwa* Plaintiffs and Sixth Set of Requests for Admission to the *Kiobel* Plaintiffs Revised Pursuant to the October 24, 2008 Order of the Court

“Revised 10/10/03 Suppl. Anderson Resps.”: *Wiwa* Plaintiffs’ Revised October 10, 2003 Supplemental Responses to Brian Anderson’s Interrogatories

Mr. Anderson submits this reply memorandum to respond to plaintiffs' separate section against him. (Opp'n 28-29.) This memorandum does not repeat the law set forth in defendants' opening memorandum and in Royal Dutch and Shell Transport's reply memorandum. That law requires the ATS claims against Mr. Anderson to be dismissed because after years of discovery, plaintiffs have no evidence that Mr. Anderson, the alleged "perpetrator being sued", was involved in any tort.¹

Mr. Anderson did not begin his employment with SPDC until January 1994. (Anderson Tr. 9:11-13, Millson 2d Ex. 2.) By that time:

- SPDC, because of attacks on its staff, had declared Ogoni a no-go area (C 000910-11, Millson Ex. 8); and
- The alleged incidents at Biara and Korokoro upon which plaintiffs rely had already taken place (Opp'n 5-7, 14).²

Violence between Ogoni factions was so bad by the time Mr. Anderson arrived in Nigeria to head up SPDC that Mr. Saro-Wiwa himself, writing on behalf of MOSOP, had asked the military authorities to arrest and detain a number of Ogonis.³

¹ The only persons who plaintiffs maintain have personal knowledge of Mr. Anderson's involvement in any of the alleged torts, other than Owens Wiwa who is discussed below, are Legbara Anthony Idigima and Nick Ashton-Jones. (*See* Pls.' Resps. to Anderson 3d Set of RFAs Nos. 14, 52, 59, 92, Millson 3d Ex. 8.) Mr. Idigima's testimony, however, demonstrates that he has no such personal knowledge. (Idigima Tr. 187:23-188:1, 189:3-10, 190:17-191:2, Millson 3d Ex. 10.) Moreover, the basis for Mr. Ashton-Jones's alleged knowledge, that he was "brutally beaten after Okuntimo found [him] talking to Ledum Mitee inside Bori Military Camp" (Revised 10/10/03 Suppl. Anderson Resps. at 2, Millson 3d Ex. 11), has nothing to do with Brian Anderson.

² In addition, the military dictatorship in place during the trial and the subsequent executions was headed by General Sani Abacha who had seized power a few months prior to Mr. Anderson's arrival. (K. Wiwa Tr. 104:15-25, Millson 2d Ex. 10.)

³ Plaintiffs concede that the letter from Mr. Saro-Wiwa to the military authorities bears his signature. (Pls.' Resps. to 2d Set of RFAs No. 122, Millson 2d Ex. 11.)

(*See* Pls.’ Resps. to 2d Set of RFAs Nos. 109-113, 117-119, 121-122, Millson 2d Ex. 11; *see also* Ex. A to Defs.’ 2d Set of RFAs, referred to in No. 122, Millson 2d Ex. 12.)

Consequently, most of plaintiffs’ complaint, as they concede, does not involve Mr. Anderson. (Opp’n 28-29; *see generally* Anderson Second Am. Compl.) The only events that allegedly involve Mr. Anderson relate to the trial and the executions of the Ogoni Nine, including untrue allegations that Mr. Anderson:

- “maintained regular contact with the military regime and Gen. Abacha”, “meeting on several occasions with General Abacha during the [trial]” in order to coordinate with respect to the trial (Opp’n 29); and
- “attempted to extort a promise to end MOSOP’s campaigns against Shell and cancellation of a documentary scheduled to be shown in England in exchange for Ken Saro-Wiwa’s freedom” (Opp’n 29).

Mr. Anderson did have several meetings with Abacha during 1994 and 1995 as the managing director of SPDC, but contrary to plaintiffs’ assertion (Opp’n 29), he engaged in no coordination with respect to the trial of the Ogoni Nine.⁴

Shortly after he arrived in January 1994, Mr. Anderson, accompanied by his predecessor, had a brief introductory meeting with General Abacha. (P. Watts Tr. 159:13-20, Millson 3d Ex. 12.) From time to time thereafter, Mr. Anderson met with

⁴ Plaintiffs have no evidence that supports this assertion. (Opp’n 29.) The documents plaintiffs cite are irrelevant. For example, Plaintiffs’ Exhibit 53 is a document written by Anderson describing a meeting with General Abacha regarding joint venture business. Plaintiffs’ claim that this document shows that “Mr. Anderson was aware several months before the verdict that Ken Saro-Wiwa would be executed” (Opp’n 29) is incorrect. Mr. Anderson stated in this document—based on General Abacha’s statements at their meeting—that General Abacha “has no sympathy for Saro Wiwa whatsoever, and we must therefore prepare ourselves for a conviction in this trial with all the difficulties that portends for us”. (A 002909-17, Green Ex. 53.) Similarly, Plaintiffs’ Exhibit 101 is a document from 1993, before the trial even started and before Mr. Anderson even joined SPDC. Likewise, Plaintiffs’ Exhibits 138, 139 and 140 do not describe any meeting with General Abacha, and Plaintiffs’ Exhibits 141 and 142 have nothing to do with the trial of the Ogoni Nine.

Abacha to discuss the various issues regarding SPDC, including community disturbances and the Ogoni situation.⁵ For example, Mr. Anderson told General Abacha in August 1994 that SPDC “was not prepared to go into the Ogoni land until there was a solution to the security . . . problems there”. (A 002992-95, Millson 3d Ex. 14.) When General Abacha “offered to send in troops” to protect SPDC workers if they returned, Mr. Anderson responded that he “would not accept that”. (A 002992-95, Millson 3d Ex. 14.) Mr. Anderson told Abacha that he believed that the problems in Ogoni needed to be resolved politically. (Anderson Tr. 90:7-17, Millson 3d Ex. 13.)

Moreover, Mr. Anderson made public statements urging fair treatment of Mr. Saro-Wiwa and the rest of the Ogoni Nine. For example, in March 1995, Mr. Anderson had SPDC release a Briefing Note supporting Mr. Saro-Wiwa’s access to a fair trial, proper legal services and proper health care. (A 000191-94, Millson Ex. 23.) The Briefing Note stated that although SPDC, as a private company, “has neither the right nor the competence to become involved or attempt to interfere with th[e] legal processes”, that “SPDC would wish to see the proper processes of law applied in the case of Mr. Saro-Wiwa” and that “SPDC also wishes him to be correctly treated and have access to proper legal and healthcare services”.⁶ (A 000191-94, Millson Ex. 23.)

⁵ Mr. Anderson several times raised the issue of cash call arrears by the Nigerian National Petroleum Company (“NNPC”). Cash calls involved the amounts that the NNPC was obligated to provide to cover its share of the expenses of the Joint Venture with SPDC, Elf and Agip. Throughout this period, NNPC was in arrears on these payments. (P. Watts Tr. 66:19-67:3, Millson 3d Ex. 12; Anderson Tr. 39:14-40:15, Millson 3d Ex. 13.)

⁶ Plaintiffs assert that “[o]n [Mr. Anderson’s] watch, SPDC’s lawyer . . . oversaw the bribery of tribunal witnesses”. (Opp’n 29.) Plaintiffs offer no evidence for this false statement. As discussed in Royal Dutch and Shell Transport’s reply, plaintiffs have no

Contrary to plaintiffs' assertion, Mr. Anderson did *not* "attempt[] to extort a promise to end MOSOP's campaigns against Shell . . . in exchange for Ken Saro-Wiwa's freedom". (Opp'n 29.) On April 20, 1995, while the trial was proceeding, the British High Commissioner, at Owens Wiwa's request, arranged a meeting between Owens Wiwa and Mr. Anderson at the Queen's Birthday Party at the High Commissioner's residence. (O. Wiwa Tr. 219:19-220:15, 223:22-224:8, Millson 3d Ex. 15; Anderson Tr. 146:17-19, Millson 3d Ex. 13.) Owens Wiwa requested "help to get the release of [Mr. Saro-Wiwa] and the removal of the army from Ogoniland". (A 002931-39, Millson 3d Ex. 16.) Mr. Anderson told him that they could not do either. (A 002931-39, Millson 3d Ex. 16.)

At a subsequent meeting between Mr. Anderson and Owens Wiwa, at which Mr. Achebe of SPDC was present (O. Wiwa Tr. 223:14-21, Millson 3d Ex. 15), Owens Wiwa showed Mr. Anderson and Mr. Achebe a letter from Mr. Saro-Wiwa dated May 13, 1995. (O. Wiwa Tr. 242:15-243:14, Millson 3d Ex. 15; K 040458-61, Millson 3d Ex. 17.) The letter expressed "two extreme scenarios": (1) Shell must "join the international pressure for the release of the Ogoni [Nine], work with MOSOP (against the government); pay reparations, royalties to Ogonis; invest massively for Ogoni development and environmental clean up and everyone (including Shell) will be forever happy thereafter"; or (2) "Shell maintains its current position of non-interference with the political/judicial processes, the Ogoni accused persons are condemned and executed; international uproar against Nigeria and Shell and Shell's business and image are

evidence that SPDC or its lawyer had any involvement in the trial or bribery. (RD/ST Reply Mem. 9-10.)

seriously hurt around the whole world”. (C 004678-81, Millson 3d Ex. 18.)

Mr. Anderson “reiterated that his demand for Shell to become involved with political and legal matters of Nigeria was wrong and Shell would not do it”, and he stated that the “tone and content of the letter showed that nothing had changed regarding the views of [Mr. Saro-Wiwa]”. (C 004678-81, Millson 3d Ex. 18.) Owens Wiwa replied that he agreed that the tone was “uncompromising” and could be “interpreted as ‘nothing has changed’”, but that Mr. Saro-Wiwa wrote it “during a particularly depressing moment”, and stated that he was authorized to say that “MOSOP’s position would become more conciliatory towards Shell”, but that he had “no mandate to move from [Mr. Saro-Wiwa’s] position” regarding political and judicial matters. (C 004678-81, Millson 3d Ex. 18.) Mr. Anderson concluded by expressing that “until there was change in MOSOP’s attitude and approach, [he] saw [] no basis for continuing the dialogue for the meantime, even though the door was not shut”. (C 004678-81, Millson 3d Ex. 18.)

Plaintiffs claim that Mr. Anderson offered at this meeting to obtain the release of Mr. Saro-Wiwa in exchange for a promise to end MOSOP’s campaigns against Shell. (Opp’n 29.) Mr. Anderson did no such thing. (Anderson Tr. 147:23-150:24, Millson 3d Ex. 13; *see also* C 000044-45, Green Ex. 104; C 004678-81, Millson 3d Ex. 18.) To the contrary, Mr. Anderson “offered Owens Wiwa the possibility that [SPDC] would be prepared to put in some humanitarian aid . . . in exchange for the undertaking by [Mr. Saro-Wiwa] to soften their official stance” on royalties/reparations and the claim that SPDC had funded the military. (C 000044-45, Green Ex. 104.) Owens Wiwa was unreceptive, focusing on “martyrdom rather than concessions”. (C 000044-45, Green Ex. 104.) There was no relationship, however, between Mr. Saro-Wiwa’s “martyrdom” and

Mr. Anderson's offer to provide humanitarian aid. (Anderson Tr. 149:11-150:24, Millson 3d Ex. 13.) Rather, Mr. Anderson "needed to understand and believe that there was some change of heart away from these very outlandish claims against Shell for us to be able to do something in the Ogoni area". (Anderson Tr. 149:11-150:24, Millson 3d Ex. 13; *see also* C 000044-45, Green Ex. 104.)⁷

After Mr. Saro-Wiwa and the rest of the Ogoni Nine were convicted of the murders of the Ogoni elders, Mr. Anderson led SPDC's efforts to obtain clemency. Immediately after the verdict, Mr. Anderson issued an SPDC press release stating that SPDC has "every sympathy with the families of Ken Saro-Wiwa and his co-defendants" and that Mr. Saro-Wiwa is "entitled to due legal process and medical support". (A 002535, Millson 3d Ex. 20; Anderson 174:7-17, Millson 3d Ex. 13.) In the week before the Ogoni Nine were executed, Mr. Anderson went to see Lieutenant Colonel Komo, the Rivers State Governor, requesting clemency. (Anderson Tr. 164:10-16, Millson 3d Ex. 13.) Mr. Achebe also went to Abuja to meet with Mr. Nwauoduah, Director General of the State Security Services to express SPDC's belief that the government should not execute Mr. Saro-Wiwa or the rest of the Ogoni Nine, stating that:

"one more death in Ogoniland was not helpful, that the government should not execute him. The law was there, they were found guilty, the outcome was death and basically our position, which is what I told Mr. Nwauoduah, is there have been too many deaths in Ogoni. Four chiefs were killed, inter ethnic conflict, people have died on both sides. The government should find a way to cool down the general situation and not by

⁷ Although plaintiffs refuse to admit that Owens Wiwa has no personal knowledge that Mr. Anderson directed anyone to injure Mr. Saro-Wiwa, the rest of the Ogoni Nine or any other Ogoni (Pls.' Resps. to Anderson 3d Set of RFAs Nos. 183, 190, Millson 3d Ex. 8; Pls.' Resps. to 5th/6th Set of RFAs Nos. 395-397, Millson 3d Ex. 19), Owens Wiwa's testimony demonstrates that he has no such personal knowledge (O. Wiwa Tr. 254:23-257:3, Millson 3d Ex. 15).

implementing a death sentence . . . [which] would just inflame the area even further”. (2/6/03 Achebe Tr. 41:18-43:24, Millson 3d Ex. 2.)

In addition, Mr. Anderson tried to have discussions with General Abacha but he was not successful in obtaining a meeting.⁸ (Anderson Tr. 140:15-141:1, 155:14-157:13, Millson 2d Ex. 2.) On November 1, 1995, Mr. Anderson met with the former Head of State to attempt to secure a meeting with General Abacha to urge clemency. The former Head of State agreed to try to arrange a meeting for later in November, but advised Mr. Anderson against seeking a meeting at that time. (Anderson Tr. 155:14-157:2, Millson 2d Ex. 2.)

On November 8, 1995, Mr. Anderson issued a statement and held a press conference in Lagos. He stated that SPDC has “every sympathy for Mr. Saro-Wiwa’s family and the families of his co-defendants” and reiterated Mr. Saro-Wiwa’s “right to fair legal treatment”. (C 000723-24, Millson 3d Ex. 21.) He further stated that he believed that Nelson Mandela’s approach of “quiet diplomacy” was the best course of action to follow in order to avoid “any action which may unsettle or exacerbate an already charged situation”. (C 000723-24, Millson 3d Ex. 21.)

Mr. Anderson also recommended to the CMD that a letter appealing for clemency be written from the Chairman of the CMD directly to General Abacha, which Mr. Herkströter did. (A 004268-70, Millson 2d Ex. 38.) On November 8, 1995, Mr. Anderson issued an SPDC press release publicizing Mr. Herkströter’s letter. (C 004700, Millson Ex. 24.)

⁸ The last meeting that Mr. Anderson had with General Abacha was on July 22, 1995. (Anderson Tr. 140:6-141:1, Millson 2d Ex. 2; A 002909-17, Green Ex. 53.)

Thus, Mr. Anderson engaged in “quiet diplomacy” to attempt to secure fair treatment and ultimately clemency for Mr. Saro-Wiwa and the rest of the Ogoni Nine. (Defs.’ Mem. 18-19; Anderson Tr. 137:16-22, Millson 3d Ex. 13.) There is no evidence to the contrary. That these efforts ultimately proved unsuccessful is not a basis to hold Mr. Anderson responsible for the outcome of the trial or the executions, any more than it is to hold Nelson Mandela responsible for his similar failed efforts at “quiet diplomacy”.⁹


There is no evidence that Mr. Anderson violated any norm of international law regarding the Ogoni Nine. Plaintiffs’ reliance on the alleged offer by Mr. Anderson to Owens Wiwa is misplaced. It never happened. Even if it had, plaintiffs cannot point to any norm of customary international law that would condemn an offer to attempt to intercede conditioned upon promises relating to future conduct. Consequently, plaintiffs have no evidence to support subject matter jurisdiction for any ATS claims against Mr. Anderson, the “perpetrator being sued” here.

⁹ Plaintiffs’ assertion, without citation, that Mr. Anderson “collaborated with his superiors at Shell to cover up SPDC’s involvement in both the trial and the ongoing violent repression of Ogoni opposition” (Opp’n 29) is simply not true.

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Respectfully submitted,

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