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 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

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Preliminary Statement

Plaintiffs have no evidence that Royal Dutch and Shell Transport, the alleged "perpetrator[s] being sued", violated any international norm recognized by *Sosa*. Royal Dutch and Shell Transport never operated in Nigeria, and they were not involved in any of the alleged torts at Biara, Korokoro or the trial of the Ogoni Nine. After over twelve years of litigation, plaintiffs have been forced to admit that they have no witnesses with personal knowledge of those defendants' involvement in any tort.[1] (Opp'n 16 n.17.)

As plaintiffs would have it, so long as plaintiffs "claim[] that they suffered international law violations" (Opp'n 2), subject matter jurisdiction exists, regardless of whether the defendant has any connection whatsoever to the alleged violations. Their argument rests on two wholly untenable positions. *First*, plaintiffs would have this Court avoid any consideration of jurisdictional facts, arguing that the ATS creates no "*sui generis*" requirement. (Opp'n 2.) But the ATS requires "a more searching preliminary review of the merits than is required, for example, under the more flexible 'arising under' formulation" of section 1331. *Filartiga v. Pena-Irala*, 630 F.2d 876, 887 (2d Cir. 1980); *see also Kadic v. Karadzic*, 70 F.3d 232, 238 (2d Cir. 1995). And the Second Circuit has held repeatedly that even in section 1331 cases, "[w]here jurisdictional facts are placed in dispute, the court has the power and obligation to decide issues of fact by reference to evidence outside the pleadings". *E.g.*, *APWU v. Potter*, 343 F.3d 619, 627 (2d Cir. 2003). The party invoking jurisdiction must prove it by a preponderance of the

[1] Plaintiffs suggest, without any citation, that their proof at trial will include "the multiple admissions that will be admissible under Fed. R. Evid. 801". (Opp'n 16 n.17.) If plaintiffs had such admissions, showing the commission of a tort by Royal Dutch or Shell Transport, the time to surface those would have been now, to establish some basis for subject matter jurisdiction.

evidence.[2] (Defs.' Mem. 10 (citing *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000); *Malik v. Meissner*, 82 F.3d 560, 562 (2d Cir. 1996)).) Although *Filartiga* and *Kadic* may not require a "full-blown factual analysis of the merits" (Opp'n 2), they clearly require plaintiffs to prove sufficient jurisdictional facts, which are absent here. Unlike *Europe & Overseas Commodity Traders, S.A. v. Banque Paribas London*, 147 F.3d 118 (2d Cir. 1998), on which plaintiffs rely (Opp'n 3), this case presents no "close case [of] the factual basis" for subject matter jurisdiction; there is a complete absence of facts establishing that the named defendants violated any well-settled norm of international law.

Second, according to plaintiffs, "the question of whether the defendant can be held liable is *distinct* from subject matter jurisdiction". (Opp'n 3 (emphasis added).) *Sosa*, however, says just the opposite: "A *related* consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual". 542 U.S. at 732 n.20 (emphasis added); *see also id.* at 760 (Breyer, J., concurring) ("The norm must extend liability to the type of perpetrator (*e.g.*, a private actor) the plaintiff seeks to sue".). Thus, plaintiffs' arguments about agency, veil piercing, and other vicarious liability under domestic law (Opp'n 12-28) are wholly inapposite, because they do not meet *Sosa*'s standard.

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[2] Plaintiffs' reliance on *CNA v. United States*, 535 F.3d 132 (3d Cir. 2008), for the proposition that the Court should apply a "more lenient standard" (Opp'n 4) is misplaced. CAN is a non-ATS case that does not involve the "more searching review" required by *Filartiga*, and although it found that the issue was jurisdictional and that "[t]his much accords with the approach of our Second Circuit colleagues" in *Makarova*, 201 F.3d at 113, continuing on it diverges from the Second Circuit in applying a lower evidentiary standard than *Makarova*'s preponderance standard.

The question here is whether any of the acts of "the perpetrator being sued" violate a norm of international law meeting *Sosa*'s strict standard. Some norms are specific enough to reach a secondary actor. For example, whereas Pena was himself the torturer (*Filartiga*, 630 F.2d at 876), Karadzic's liability was secondary—for "acts of rape, torture, and summary execution . . . committed during hostilities by troops under Karadzic's command" (*Kadic*, 70 F.3d at 244). Likewise, the fact that Karadzic ordered genocide rendered him liable for the acts of his soldiers under a settled norm. *Id.* But even if Royal Dutch and/or Shell Transport "set the remuneration and benefits packages" for Brian Anderson (Opp'n 20), or SPDC "consulted with and sent information to defendants" (Opp'n 20), those acts do not violate any such norm.

Indeed, if one were interested in customary international law standards for secondary liability, rather than domestic law standards of agency and veil piercing, one would look to the ICJ's decision holding that, under customary international law:

> "United States participation, even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the *contras*, the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself, on the basis of the evidence in the possession of the Court, for the purpose of attributing to the United States the acts committed by the *contras* in the course of their military or paramilitary operations in Nicaragua. All the forms of United States participation mentioned above, and even the general control by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State. . . . For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed". *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States), Jurisdiction and Admissibility*, 1984 ICJ REP. 392, June 27, 1986, ¶ 115.

Plaintiffs here are seeking to hold Royal Dutch and Shell Transport liable for the acts of the Nigerian military, with not even an allegation, much less proof, that would meet the standard set out in *Nicaragua v. United States*. That failure is jurisdictional, because no norm of international law reaches the conduct of the "perpetrator[s] being sued".

Argument

I. PLAINTIFFS HAVE NO EVIDENCE THAT ROYAL DUTCH OR SHELL TRANSPORT, THE "PERPETRATOR[S] BEING SUED", WERE INVOLVED IN ANY WAY IN THE ALLEGED TORTS.

Plaintiffs do not dispute that Royal Dutch and Shell Transport had no involvement in the alleged incident at Korokoro (Opp'n 5-6, 14), the alleged incident at Biara[3] (Opp'n 6-7, 14), or any of the alleged arrests and detentions of Michael Vizor and Owens Wiwa (Opp'n 8-10). Nor do plaintiffs dispute that Royal Dutch and Shell Transport were not even made aware of these events until after the fact through reports sent from SPDC.[4] (Opp'n 24-25; Defs.' Mem. 12, 14.)

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[3] Since plaintiffs concede that Ms. Kogbara was not protesting at the time she was allegedly shot by the military at Biara (Opp'n 12 n.13), she has no claim for violation of the rights to peaceful assembly and association. (Int'l Law Br. 61-62 & n.40 (citing *Wiwa*, 2002 WL 319887, at *11).) Plaintiffs now argue, without meaningful support, that liability exists where the military's conduct was directed at people who were in fact protesting, "but in fact cause[d] the intended injury to a third person". (Opp'n 12 n.13.)

[4] Plaintiffs' other events (Opp'n 10-12, 13-14) are irrelevant. None is alleged to have caused any actionable injury to plaintiffs. (Although Friday Nuate's house burned down, the Court has already found that property destruction is not actionable under the ATS, *see Kiobel*, 456 F. Supp. 2d 457, 464 (S.D.N.Y. 2006).) Although plaintiffs claim that incidents at Umuechem and Bonny show that there was a "wider campaign of attacks on the civilian population" (Opp'n 10-11), this Court last held that the "Ogoni people" are the "specific civilian population" subject to the alleged persecution. *Wiwa*, 2002 WL 319887, at *10. Umuechem and Bonny are not in Ogoni, and the alleged incidents had nothing to do with Ogoni. (*See* Pls.' Resps. to 4th Set of RFAs Nos. 1-8, Millson 3d Ex. 1; 2/5/03 Achebe Tr. 164:2-5, Millson 3d Ex. 2.) In any event, the assertions are wrong.

Royal Dutch and Shell Transport were aware of the trial of the Ogoni Nine, but there is no evidence that they committed any tort with respect to that trial. Although they never directed SPDC regarding how to proceed with respect to the trial or SPDC's appeal for clemency (Jennings Tr. 94:13-96:7, Millson 2d Ex. 7), Royal Dutch and Shell Transport did make their own efforts publicly to support fair treatment of Mr. Saro-Wiwa and the rest of the Ogoni Nine, both before and after they were convicted and to obtain clemency. (Defs.' Mem. 18-19.) For example:

- Sir John Jennings, a director of Shell Transport, sent letters supporting Mr. Saro-Wiwa's access to a fair trial, proper legal services and proper health care. (Opp'n 22-23; Defs.' Mem. 18 (citing C 004932-34, Millson Ex. 20; A 001388-90, Millson Ex. 21; A 001409-11, Millson Ex. 22).)
- Cor Herkströter, Chairman of the CMD and a director of Royal Dutch, sent a letter to General Abacha requesting that the Nigerian Government grant clemency. (Opp'n 22; Defs.' Mem. 19 (citing A 004271, Millson 2d Ex. 39; A 004268-70, Millson 2d Ex. 38).)
- On November 8, 1995, Shell International Petroleum Company Limited issued a press release describing Mr. Herkströter's letter. (Opp'n 22; Defs.' Mem. 19 (citing A 001673, Millson Ex. 25).)[5]

First, the investigation regarding Umuechem did not conclude that SPDC bore any responsibility for the events that took place. (C 003459-71, Green Ex. 21.) *Second*, the Nigerian Government requires that the Navy be stationed at all oil export terminals, including Bonny. *Third*, plaintiffs' assertion, without any evidence, that the Government feigned a civil war so that the military could "disguise[]" its attacks on the Ogoni (Opp'n 10) is a complete fabrication. There was an actual violent conflict between the Ogoni and Andoni, which ultimately was resolved by the Ogoni-Andoni Peace Accord in October 1993. Plaintiffs rely solely on the testimony of two of the Benin 7 witnesses that SPDC provided support to the military. (Opp'n 10-11 (all other persons on which plaintiffs rely do not have any personal knowledge regarding SPDC).) Reliance on that testimony, and on that of a third Benin witness in another section (Opp'n 14), is improper.

[5] Plaintiffs' assertion that "it was defendants and not SPDC who decided that Brian Anderson would not attempt to intercede in the trial and who orchestrated a publicity campaign around an alleged plea for clemency that never really existed" (Opp'n 25) is wrong. (A 004268-70, Millson 2d Ex. 38.)

That these efforts ultimately proved unsuccessful is not a basis to hold Royal Dutch and Shell Transport responsible for the outcome of the trial or the executions, any more than Nelson Mandela could be held responsible for his failed efforts at "quiet diplomacy" to obtain clemency for Mr. Saro-Wiwa.[6]

II. PLAINTIFFS' AGENCY THEORIES ARE WITHOUT MERIT.

Parents are not liable for the acts of their subsidiaries absent extraordinary circumstances. (*See* Defs.' Mem. 22-24 (citing *United States v. Bestfoods*, 524 U.S. 51, 61 (1998) ("It is a general principle of corporate law deeply ingrained in our economic and legal systems that a parent corporation . . . is not liable for the acts of its subsidiaries" (quotations omitted).), and *Kingston Dry Dock Co. v. Lake Champlain Transp. Co.*, 31 F.2d 265, 267 (2d Cir. 1929) (L. Hand, J.) ("Liability normally must depend upon the parent's direct intervention *in the transaction*" (emphasis added).)).) Plaintiffs' response is only an *ipse dixit* assertion that this black letter law is "inapposite".[7] (Opp'n 18 n.21.)

To avoid this law, plaintiffs advance their own novel theory. (Opp'n 16-23.) This theory, based on paragraph 19 of the report of plaintiffs' "corporate structure" expert, is that *all* subsidiaries in integrated multinational corporations are the agents of their parents. The expert states explicitly:

> "[I]t is clearly known in my field that subsidiaries in all types of multinationals involve a principal-agent relationship, but when the

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[6] Blessing Kpuinen is now a United States citizen, and thus, is unable to maintain her claims under the ATS. (Int'l Law. Br. 80-82.) Contrary to plaintiffs' contention (Opp'n 30), the time-of-filing rule from diversity cases does not apply here. (*See* Int'l Law Br. 80-81 & n.54.)

[7] Since plaintiffs concede the applicability of this black letter law to their veil-piercing/alter ego theory of liability (Opp'n 18 n.21), their failure to proffer any evidence in support of such an assertion amounts to an abandonment of this theory.

> relationship takes place inside a highly integrated multinational, it is all the more obvious that the subsidiary manager does not maximize the subsidiary's own profit in isolation, but instead seeks to contribute as much as possible to the joint profits of the total multinational enterprise. It is also clear that the governing entity at the top of the multinational enterprise controls the core strategic decisions and business practices of the subsidiary". (Siegel Report ¶ 19, Millson 3d Ex. 3.)

This "expert" admitted that the structure of the Royal Dutch/Shell Group of Companies is in this respect the same as that of most multinationals. (*See* Defs.' RICO Reply 8-9 (collecting Professor Siegel deposition testimony).) In other words, under the expert's theory, all subsidiaries of integrated multinationals are "agents".

Plaintiffs' expert has now taken the "analysis" one step further, offering a legal conclusion in his "declaration". After repeating paragraph 19 of his expert report (*see* Siegel Decl. ¶ 28), he declares, "[i]t seems that the law primarily views the above kind of parent-subsidiary relationship as what constitutes a clear principal-agent relationship". (*Id.* ¶ 29.) This testimony is totally improper. *First*, the Court does not accept expert testimony on the law of the forum. *See, e.g.*, *Allen v. City of New York*, No. 03 Civ. 2829 (KMW)(GWG), 2007 WL 24796, at *10 (S.D.N.Y. Jan. 3, 2007). *Second*, this "expert" is not competent to testify as to the law. At his deposition, he conceded that he had no legal training and offered no legal opinions. (Siegel Tr. 11:18-24, 19:25-20:16, 118:19, 136:22-23, Millson 3d Ex. 4.) *Third*, this unsupported statement of "the law" is wholly inconsistent with the well-established black letter law discussed above, which plaintiffs cannot dispute.

Moreover, plaintiffs have no evidence that SPDC committed any tort.[8] Their only theory is that the Nigerian military was SPDC's agent in order to support their erroneous "the agent of an agent is the agent of the principal" (Opp'n 17 n.19) theory.[9] But in order for SPDC to be responsible for the acts of the military, SPDC must have had "effective control of the military or paramilitary operations in the course of which the alleged violations were committed". *Nicaragua*, 1984 ICJ REP. 392, ¶ 115. Plaintiffs offer no evidence that it had such control.

Nor could they.

SPDC was not involved in the alleged torts arising out of Biara[10] or Korokoro or the alleged arrests and detentions of Owens Wiwa and Michael Vizor. Plaintiffs offer only self-serving and conclusory assertions, based on their own beliefs and alleged hearsay statements by the military, that the various incidents were caused by

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[8] Plaintiffs argue that Royal Dutch and Shell Transport can be held liable for SPDC's conduct under either a "ratification" theory or "reckless disregard" theory, based on their alleged "[f]ailure to fully investigate misconduct of a purported agent and to punish or otherwise disavow the services of such person". (Opp'n 23-28.) But there was no misconduct by SPDC. Indeed, after twelve years of litigation, plaintiffs have not been able to find a shred of evidence of such misconduct.

[9] Plaintiffs rely solely on the fact that SPDC was in a joint business venture with the Nigerian Government for the exploration and production of oil. (Opp'n 14.) That joint venture (of which Elf and AGIP were also members (2/5/03 Achebe Tr. 65:15-19, Millson 3d Ex. 2)), however, has no bearing on whether SPDC had any direct role in the conduct alleged to have caused injury to plaintiffs.

[10] To the contrary, SPDC issued to Willbros a set of guidelines regarding the pipeline project, which stated that Willbros was to avoid confrontation with local communities. (C 002410-14, Millson 2d Ex. 29; DEF 0023862-70, Millson 2d Ex. 25.)

their opposition to "Shell". (*See, e.g.*, Opp'n 8-10, 14.) Plaintiffs have no witness with personal knowledge of SPDC's involvement.[11]

Likewise, plaintiffs have no evidence that SPDC committed any tort with respect to the trial of the Ogoni Nine before the Civil Disturbances Tribunal. Plaintiffs admit that they do not have any witness, including Oronto Douglas, who has personal knowledge of any involvement by SPDC in the trial, including the alleged bribery of witnesses. (*See* Defs.' Mem. 17-18.) But plaintiffs now offer the declaration of Mr. Douglas as "evidence" that SPDC was involved in the trial.[12] (Opp'n 14-15.) Mr. Douglas's declaration states only that SPDC's attorney was present to conduct a "watching brief", which Mr. Douglas claims to mean that SPDC had an interest in the trial. (Douglas Decl. ¶¶ 17-18.) The purpose of the "watching brief" of SPDC's counsel

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[11] Plaintiffs concede that all but one of the people they previously identified as having personal knowledge of SPDC's involvement in Biara and Korokoro in fact have no such knowledge. (Pls.' Resps. to 3d Set of RFAs Nos. 44-46, Millson 3d Ex. 5.) Although plaintiffs deny that Benson Ikari lacks personal knowledge of Biara (Pls.' Resps. to 3d Set of RFAs No. 48, Millson 3d Ex. 5), at his deposition he conceded that he had no such knowledge (Ikari Tr. 13:13-18, 163:17-165:5, 211:18-213:6, 253:2-15, Millson 3d Ex. 6.) Moreover, Ms. Kogbara conceded that she did not see anyone from SPDC present during the incident at Biara. (Kogbara Tr. 61:15-18, Millson 3d Ex. 7.) Similarly, plaintiffs concede that the two witnesses they had previously identified as having personal knowledge of SPDC's involvement in Korokoro in fact have no such knowledge. (Pls.' Resps. to 3d Set of RFAs Nos. 49-50, Millson 3d Ex. 5.)

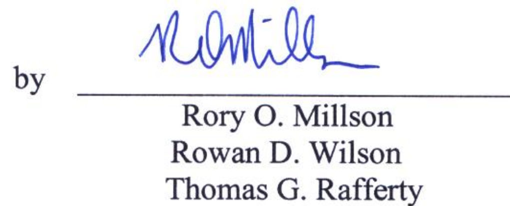
[12] Moreover, plaintiffs have admitted that Mr. Douglas does not have personal knowledge of any payments to the military. (Pls.' Resps. to 3d Set of RFAs No. 86, Millson 2d Ex. 13; Pls.' Resps. to Anderson 3d Set of RFAs No. 29, Millson 3d Ex. 8.) Although plaintiffs still deny that Mr. Douglas has no personal knowledge that defendants asked the Nigerian Government to use force and intimidation to silence any opposition to SPDC's operations in Ogoniland (Pls.' Resps. to 3d Set of RFAs No. 6, Millson 3d Ex. 5), the sole basis for that denial is the following statement: he and two others "were brutally beaten after Okuntimo found them talking to Ledum Mitee inside Bori Military Camp" (Revised 10/10/03 Suppl. Resps. at 3, Millson 3d Ex. 9.) This statement has nothing to do with any of the defendants or SPDC.

was to make sure that SPDC could respond if and when allegations were made against SPDC. (Okocha Decl. ¶ 26, Millson 2d Ex. 35.) Observing a trial does not make the observer responsible for the conduct of the trial. For example, several human rights organizations made an appearance and observed the trial (Okocha Decl. ¶¶ 24-25, Millson 2d Ex. 35), and Michael Birnbaum observed the proceedings in order to write a report on it (Revised 10/10/03 Suppl. Resps. at 11, Millson 3d Ex. 9). No one would claim that they were liable for the conduct of the trial. Nor can the mere presence of SPDC's counsel make SPDC liable.

February 20, 2009

Respectfully submitted,

CRAVATH, SWAINE & MOORE LLP,



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