

KIOBEL, THE ATS, AND HUMAN RIGHTS LITIGATION IN U.S. COURTS

This panel was convened at 9:00 am, Friday, April 5, by its moderator, Roger Alford of Notre Dame Law School, who introduced the panelists: John B. Bellinger of Arnold & Porter LLP; Lori Damrosch of Columbia Law School; Samuel Estreicher of New York University School of Law; David Scheffer of Northwestern University; and Elizabeth Wilson of Seton Hall University.*

REMARKS BY ELIZABETH A. WILSON[†]

Ogoni is the land
The people, Ogoni
—Ken Saro-Wiwa

Though the *Kiobel* case will be decided on recondite issues of statutory interpretation and international law, the roots of the case lie in the long struggle of a disenfranchised indigenous group in Nigeria, the Ogoni, against a corrupt and exploitative central Nigerian government and against a variety of entities belonging to the multinational corporation that I will refer to here as Royal Dutch/Shell, or more briefly as Shell. I want to talk about the history of this struggle, as a reminder of the flesh and blood issues that are at stake in Alien Tort Statute (ATS) litigation.

In the late 1950s, vast oil reserves were discovered in Nigeria, the great majority of which are located in the Niger Delta region, where Ogoniland is situated in the region known as Rivers State.¹ Home to close to six million inhabitants, the densely populated Niger Delta is a huge and ancient floodplain that sustains a rich, fragile, and bio-diverse ecosystem. Besides the Ogoni, a number of other indigenous peoples inhabit the Niger Delta; for millennia, the majority have made their living from fishing and agriculture. Most of the groups inhabiting the Niger Delta do not belong to the ethnic groups that have dominated Nigerian politics for the last 40 years; indeed, for much of that time Niger Delta groups have been excluded from Nigerian politics by design.

The Ogoni's root complaint has long been that Ogoniland contributes significantly to Nigeria's oil wealth, but receives nothing in return but despoliation of their lands, degradation of their health and culture, and threats to their very existence. Shell's own estimates are that Ogoniland produced 634 million barrels of oil, valued at US\$5.2 billion.² During the critical years 1993–1995, the United States imported between 9,618 thousand barrels of oil per month (January 1994) to 32,143 thousand barrels per month (August 1994).³ The history of

* Mr. Bellinger, Professor Damrosch, Professor Estreicher, and Professor Scheffer did not submit remarks for the *Proceedings*.

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¹ HUMAN RIGHTS WATCH, NIGERIA: THE Ogoni CRISIS: A CASE STUDY OF MILITARY REPRESSION IN SOUTH-EASTERN NIGERIA n.3 (1995) (“90 percent of Nigeria's annual foreign exchange earnings and 80 percent of the federal government's revenue” comes from oil originating in the Niger Delta region).

² Richard Boele, Heike Fabig & David Wheeler, *Shell, Nigeria and the Ogoni. A Study in Unsustainable Development: I. The Story of Shell, Nigeria and the Ogoni People—Environment, Economy, Relationships: Conflict and Prospects For Resolution*, 9 SUSTAINABLE DEV. 74–86 (2001).

³ U.S. ENERGY INFORMATION ADMINISTRATION, INDEPENDENT STATISTICS & ANALYSIS, *U.S. Imports from Nigeria of Crude Oil and Petroleum Products (Thousand Barrels)*, <http://www.eia.gov/dnav/pet/hist/LeafHandler.ashx?n=PET&s=MTTIMUSN1&f=M>.

the Niger Delta since the oil reserves were discovered makes Nigeria a prime example of the “resource curse.” Since the time it was discovered in the Niger Delta, oil has been central to the Nigerian economy, particularly since the 1970s when the revenues from oil increased exponentially and the oil industry was effectively nationalized. From the beginning, oil extraction was not conducted with the care that would have been taken in more developed countries with majority-white populations. Oil in Nigeria comes with a high percentage of associated gas, which has been flared off in close proximity to villages, creating acid rain and causing numerous health and environmental problems. Pipelines have been maintained inadequately, which in turn has led to oil well blow-outs releasing huge spills of oil that were never adequately cleaned up. A report by World Wildlife Fund in 2006 estimated that in the past 50 years, one and a half million tons of oil have been spilled in the Niger Delta region, the equivalent of an Exxon Valdez disaster every single year.⁴

The Ogoni began to organize against the exploitation of their land in 1990, with the founding the Movement for the Survival of the Ogoni People or MOSOP.⁵ A non-violent resistance movement dedicated to achieving human rights for the Ogoni people and reclaiming their ecologically devastated land, MOSOP was led in a creative and non-violent struggle by a charismatic, Gandhiesque figure—the gifted playwright and media personality Ken Saro-Wiwa. Inspired by the French writer André Gide, who toured the Congo under King Leopold II of Belgium and wrote about it to the shock of ordinary Europeans, Ken Saro-Wiwa wrote about the plight of the Ogoni and raised the consciousness of the international community. By 1990, Ken Saro-Wiwa abandoned writing and dedicated himself exclusively to the Ogoni struggle, which began in earnest in 1990 with the presentation to the Nigerian government of the “Ogoni Bill of Rights.”

A truly radical document demanding political autonomy and self-governance from the Nigerian state, the Ogoni Bill of Rights compares favorably to the American Declaration of Independence and the French Declaration of the Rights of Man and the Citizen. Pronounced in 1990, the Bill of Rights self-consciously situated itself within the revolutionary (and largely non-violent) cascade of independence movements that brought about the end of communism and the dissolution of the Soviet Union. MOSOP’s decision to name itself an organization committed to the “survival” of the Ogoni people points to the implicit charge that a kind of genocide through environmental murder was taking place. Saro-Wiwa himself did not hesitate to use the term “genocide” and wrote a detailed analysis of the dynamic of exploitation which he called *Genocide in Nigeria: The Ogoni Tragedy*. Today, the lifespan of an average Ogoni stands at little over 40 years.

When the Nigerian government remained unresponsive, MOSOP decided instead to appeal to the international community and focus its energy directly on Shell. MOSOP presented a demand to Shell for \$10 billion in damages and royalties to the Ogoni people, as well as an immediate end to all three companies’ violence against the Ogoni region’s environment. In July 1992, Saro-Wiwa addressed the United Nations Working Group on Indigenous Peoples in Geneva as part of an effective strategy of building allies in the international and human rights communities. To the Working Group, he submitted the Ogoni Bill of Rights, as well as *Genocide in Nigeria*. In powerful words, Saro-Wiwa conveyed the Ogoni’s complaint

⁴ Micaela L. Neal, *The Niger Delta and Human Rights Lawsuits: A Search for the Optimal Legal Regime*, 24 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 343 n.44 (2011).

⁵ MOSOP is an umbrella organization that includes numerous grassroots organizations, like the Conference of Ogoni Traditional Leaders, the National Youth Council of Ogoni People, the Council of Ogoni Professionals, and more. See <http://www.mosopcanada.org/story.php>.

that Shell and Nigerian officials—and by extension all those who consume the oil mined from Ogoniland, including the United States—have been enriched at the expense of the Ogoni environment and the health and cultural survival of the Ogoni people:

I speak on behalf of the Ogoni people. You will forgive me if I am somewhat emotional about this matter. I am Ogoni . . . Petroleum was discovered in Ogoni in 1958 and since then an estimated 100 billion dollars' worth of oil and gas has been carted away from Ogoniland. In return for this the Ogoni people have received nothing.

On January 4, 1993, in commemoration of the United Nations Year of Indigenous People, MOSOP mobilized 300,000 Ogoni (out of 500,000 total population) to come out in support of the Ogoni Bill of Rights and of its demand to Shell, in a day of non-violent demonstrations. Once the level of resolve among the Ogoni became clear, Shell pulled out from Ogoniland, and to this day has not officially returned to the oil fields there. The withdrawal of Shell from Ogoniland, and the loss of profits that represented triggered a violent reaction from the Nigerian government, which began a campaign of intimidation. In attacks on Ogoni communities disingenuously termed “ethnic conflicts,” the Nigerian government under military dictator General Abacha murdered hundreds of Ogonis.⁶ Ken Saro-Wiwa was arrested five times, finally, along with eight others, being put on trial for trumped-up murder charges. During this time, MOSOP became a member of the Unrepresented Nations and People's Organization (UNPO), which further publicized the Ogoni cause to the international community. Ken Saro-Wiwa and eight others (who became known as “the Ogoni 9”) were tried, not in the courts of Nigeria but in a special, procedurally defective military tribunal. Shockingly, they were executed on November 10, 1995.

The political and environmental conditions in the Niger Delta deteriorated considerably, even after General Abacha's sudden death, which brought about the return of Nigeria to democracy. The Ogoni had succeeded in their campaign to the extent that Shell ceased oil production in Ogoniland in 1993, but the facilities were never decommissioned. In addition, oil pipelines from other fields pass through Ogoniland without being properly maintained. The violent suppression of MOSOP caused predictable pathologies to develop, and the Niger Delta region is now one of the most dangerous in the world. A recent study by the Council of Foreign Relations on the proliferating groups in the delta notes that the unrest that began peacefully with MOSOP “has grown into a major insurgency, but one made complex by a mixture of protest, greed, crime, and political collusion.”⁷ Sabotage and theft now contribute to the environmental challenges facing the Ogoni people and the rest of the inhabitants of the Delta. Numerous additional spills have taken place, with little to no cleanup. By early 2013, the security situation was bringing about a drop in Nigeria's oil production.

In 2005, the government of Nigeria appointed a negotiator to facilitate a reconciliation between Shell and the Ogoni. It was as part of this process that Shell funded an assessment, carried out by the United Nations Environment Programme (UNEP), into the extent of environmental damage in Ogoniland. Among the findings was that there was *no safe drinking water* in Ogoniland and that even land that looked healthy was in some cases polluted to depths of up to five meters. The report concluded that “[t]he environmental restoration of Ogoniland could prove to be the world's most wide-ranging and long term oil clean-up

⁶ Boele et al., *supra* note 2, at 80.

⁷ See Judith Burdin Asuni, *Understanding the Armed Groups of the Niger Delta* (Council on Foreign Relations Working Paper, 2009).

exercise ever undertaken” if restoration of the land to full, productive health is to be achieved.⁸ Even if the recommendations of the UNEP are followed to the letter, the restoration process is estimated to take as much as 25 to 30 years.⁹

A year after the report’s release, little action had been taken. Rather than setting up the emergency bodies recommended by the report, the government instead set up the infelicitously named Hydrocarbon Pollution Restoration Project (HYPREP). This project has succeeded in planting some pollution warning signposts in Ogoniland and billboards on oil thefts in Port Harcourt, but little else has happened. In February 2013, UNEP officials led by Erik Solheim, former Norwegian Minister of Environment and International Development and UNEP Special Envoy for Disasters and Conflicts, visited Nigeria to follow up with government officials and partners in Abuja and Port Harcourt and to press the urgency of beginning remedial efforts.¹⁰

ATS litigation has been criticized as an elitist strategy, more effective at providing fodder for law school clinics than effecting real social change. But I submit that in the Ogoni struggle resulting in the *Kiobel* (and *Wiwa*) lawsuits, ATS litigation has been part of a long-haul, multi-pronged effort that has included grassroots activism, international advocacy, mediation, governmental reform, and even violence. Filing suit was hardly the first choice of MOSOP. Nor would any lawsuit in the United States likely have been filed had the Nigerian government not reacted with such violence and had Ken Saro-Wiwa not been murdered. Though I cannot defend this point fully here, of the many tactics applied to the intractable Ogoni problem of land, oil, and greed, ATS litigation has been among the most successful. Earlier cases brought by the Center for Constitutional Rights on behalf of Ken Wiwa, Ken Saro-Wiwa’s son and estate administrator, forced a settlement with Shell for \$15.5 million and served to keep pressure both on Shell and on the Nigerian government.

The ATS is important for another reason. Because of the package of reservations that the United States generally attaches to human rights treaties, our legal system is generally closed off from the international human rights framework that the rest of the world is committed to creating. Idiosyncratic though it may be, the ATS is not anomalous in “legalizing” human rights. For more than a half-century in Europe and for decades already in Latin America, fully functioning human rights courts have been the normative ideal and are operational—deciding cases and meting out justice, including both monetary and injunctive relief. The legalization of human rights is the unstoppable wave of the future. And when countries or regions look to develop their human rights institutions, they do not look to the United States. They look to Europe. If the Supreme Court decides *Kiobel* in such a way as to eliminate the creative human rights jurisprudence that has developed through the ATS, this will only further deprive the United States of influence over the developing international human rights legal framework.

⁸ UNITED NATIONS ENVIRONMENT PROGRAMME, ENVIRONMENTAL ASSESSMENT OF Ogoniland REPORT 12 (2011), available at <http://www.unep.org/disastersandconflicts/CountryOperations/Nigeria/EnvironmentalAssessmentof-Ogonilandreport/tabid/54419/Default.aspx>.

⁹ *Id.*

¹⁰ *UNEP Team in Nigeria to Discuss Steps Needed to Implement Ogoniland Report*, UNEIP NEWS CENTRE, Feb. 5, 2013, <http://www.unep.org/newscentre/default.aspx?DocumentID=2704&ArticleID=9386>.