Ken Saro-Wiwa

The Supreme Court term tomorrow opens with a bang: *Kiobel v. Royal Dutch Petroleum,* which has assumed very large significance in the international human rights community. But should Legal Planet readers care? I think that they should.

The plaintiffs in *Kiobel* allege that Royal Dutch Petroleum (better known in the United States as Shell Oil) aided and abetted the military government of Nigeria (from 1992 to 1995)in a systematic campaign of torture, extrajudicial killings and crimes against humanity. This campaign arose in the oil-rich Ogoniland region of Nigeria, where the government wanted to develop crude oil, and the indigeous people, led by the heroic non-violent protestor Ken Saro-wiwa fought the dictatorship every step of the way. Saro-wiwa was eventually arrested and executed by the dictatorship.

So what is this case doing in the United States? Formally, it seems quite simple. The Alien Tort Claims Act, 28 USC 1350, part of the Judiciary Act of 1789 reads *in full*:

> The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

If Shell actually aided and abetted the torture, extrajudicial killings, and crimes against humanity (which it denies, although it did pay a $15 million settlement to Saro-wiwa's family), then this would seem to be a slam dunk.

But Shell has another defense: the ATS, it claims, only applies to natural persons, and the company is, well, a company. There is nothing in either the text or history of the statute to suggest such a distinction, but a panel of the Second Circuit held that the statute does not encompass corporate liability because of what it said were policy considerations. The Circuit *en banc* split 5-5, upholding the panel opinion.

And strictly speaking, that is the issue that the Supremes have to consider: does the ATS allow for corporate liability or not?

So why should environmental lawyers care about this? Certainly not because the ATS imposes liability for environmental destruction. Earlier lower court cases suggested as much, but the Supreme Court's most recent pronouncement on the terse and ambiguous

statute (Judge Henry Friendly, in a famous dictum, referred to it as a "legal Lohengrin" because no one knows where it came from) limited it to a "core set of norms" that states observe either through treaties, *jus cogens,* or customary practice. Egregious human rights violations probably count; environmental destruction probably doesn't.

But Shell wasn't in Nigeria because its executives liked the weather. The underlying background of *Kiobel* represented a potentially very profitable drive for resource extraction, one that many native peoples don't like or in which they want a greater piece of the action. Whether it is fracking, oil drilling, coal or uranium mining, the placement of transmission lines, the construction of dams, or even the siting of the thousands of photovoltaic cells, local communities and national and/or corporate interests are often going to be at loggerheads. And in those countries suffering under dictatorships, that means that human rights abuses will often occur; Saro-wiwa's protest dervied from what we saw as the government and company's theft of indigenous resources and habitat.

Put another way, *Kiobel* reveals that a real understanding of the costs and benefits of international energy and natural resources issues can no longer divorced from human rights issues. You might think that this is good (if energy development and natural resource extraction requires human rights abuses, then that is a reason to change the North's development footprint) or bad (frivolous lawsuits are driving up the cost of energy development), but you can no longer ignore it.

Georgetown's Tony Arend has a nice series of posts setting forth the issues, as well as links to the always-invaluable SCOTUSBlog. Check it out.