

FILED

AUG X 2 2004

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

LARRY BOWOTO, et al.

No. C 99-2506 SI

Plaintiffs,

**ORDER DENYING MOTION FOR COURT
TO REQUEST VIEWS**

v.

CHEVRONTEXACO CORPORATION and
CTOP, et al.,

Defendants.

On July 30, 2004, this Court heard argument on defendants' Motion for the Court to Request the Views of the United States on the Impact of Adjudication of this Lawsuit on Foreign Relations with Nigeria. Having carefully considered the argument of counsel and the papers submitted, the Court hereby DENIES defendants' motion.

BACKGROUND

This action was filed on May 27, 1999 by five Nigerian plaintiffs who alleged that defendant ChevronTexaco Corporation¹ ("ChevronTexaco" or "CVX") was involved in the commission of human rights abuses in Nigeria. The complaint has been amended several times, and now includes as defendants both CVX, a United States-based corporation, and ChevronTexaco Overseas Petroleum, Inc. ("CTOP"), a Delaware corporation which is a wholly-owned subsidiary of CVX, as well as 500 "Moe" defendants. Chevron Nigeria Limited (CNL) operates a joint venture with the Nigerian National Petroleum Company, the Nigerian state oil company.

Plaintiffs allege that defendants acted unlawfully and committed human rights abuses in three incidents occurring in Nigeria. The first was the Parabe incident, which occurred on May 28, 1998.

¹ ChevronTexaco Corporation was known as Chevron Corporation until October 9, 2001, when it changed its name.

1 Plaintiffs allege that CNL, acting in concert with defendants, recruited the Nigerian military and police
2 to fire weapons at Nigerians staging a protest on one of Chevron's oil platforms, the Parabe platform.
3 Two protesters were killed in this incident. Plaintiffs allege that CNL's management and security forces
4 were involved in the subsequent detainment and torture of Bola Oyinbo, one of the leaders of the protest
5 movement on the Parabe platform.

6 The second and third were the Opia and Ikenyan incidents, which occurred on January 4, 1999.
7 Plaintiffs allege a helicopter flown by Chevron pilots and transporting Nigerian military and/or police
8 flew over the community of Opia and opened fire on the villagers, killing one person and injuring others.
9 Plaintiffs allege that the helicopter then flew to the Ikenyan community, opened fire and killed one
10 person and injured several others. Plaintiffs allege that thirty minutes later, CNL sea trucks containing
11 CNL personnel and Nigerian military approached Opia and opened fire on the villagers, killing several
12 people. Plaintiffs allege that the soldiers disembarked from the sea trucks and set fire to buildings and
13 livestock, killing another person.

14 In October, 2001, the parties stipulated to a bifurcated discovery schedule which limited Phase
15 I discovery to issues related to the liability/responsibility of the United States defendants, CVX and
16 CTOP, for whatever occurred in Nigeria at Parabe, Opia and Ikenyan. It was contemplated that at the
17 end of Phase I discovery, CVX and CTOP would move for summary judgment on the limited issue of
18 their direct or derivative liability for their own acts, or the acts of their employees, agents,
19 co-conspirators, alter egos, or joint venturers. In the summary judgment motion brought before the
20 Court, defendants CVX and CTOP sought summary adjudication that plaintiffs have not presented a
21 triable issue of fact supporting defendants' liability under any of these theories. The Court denied
22 defendants' summary judgment motion, finding that there were triable issues of fact relating to agency
23 liability as to defendants. See Order Den. Defs.' Mot. for Summ. J. (Mar. 22, 2004).

24 Now before the Court is defendants' motion for the Court to request the views of the United
25 States Department of State on whether adjudication of this lawsuit would adversely impact its
26 relationship with Nigeria. Defendants wish only for the Court to send a letter to the State Department
27 requesting a Statement of Interest with respect to this litigation, and not to decide on the underlying
28 issues raised by the act of state doctrine. The Court declines to make such a request at this time.

DISCUSSION

1
2 **1. The Act of State Doctrine**

3 Defendants argue that plaintiffs' allegations with respect to the policies and practices of the
4 Nigerian government and its military implicate the act of state doctrine. The doctrine may apply when
5 a court is called upon to pass judgment on the legality or validity of an "official act of a foreign
6 sovereign performed within its own territory." W.S. Kirkpatrick & Co. v. Environmental Tectonics
7 Corp., Int'l, 493 U.S. 400, 405, 110 S.Ct. 701, 704 (1990). "The doctrine reflects the prudential concern
8 that the courts, if they question the validity of sovereign acts taken by foreign states, may be interfering
9 with the conduct of American foreign policy by the Executive and Congress." Siderman de Blake v. The
10 Republic of Argentina, 965 F.2d 699, 707 (9th Cir. 1992) (citing W.S. Kirkpatrick & Co., 493 U.S. at
11 404, 110 S.Ct. at 704); see also Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 84 S.Ct. 923
12 (1964).²

13 Defendants argue that plaintiffs' complaint makes clear that they are challenging the official
14 conduct of the Nigerian government. Defendants cite several sections of plaintiffs' complaint that they
15 argue implicate -- if not directly challenge -- an alleged policy and practice of human rights abuses on
16 the part of the Nigerian government. Defendants, while not asking the Court to determine the
17 applicability of the doctrine, attempt to "demonstrate that a colorable claim can be made that the doctrine
18 applies, thereby supporting our request that the Court solicit a statement of interest from the State
19 Department." Id. at 6:14-18.

20 Plaintiffs counter, arguing, among other things, that (i) the Court cannot consider defendants'
21 act of state defense without a full record regarding what happened at Parabe, Opia and Ikenyan and (ii)
22 that there is no need to seek the State Department's views on this case as human rights violations of the
23 kind at issue are not acts of state.

24 The act of state doctrine was initially raised as a defense over four years ago in this case. At that
25

26
27 ² Sabbatino identifies factors that the Court must balance to apply the defense. They include:
28 (i) the degree of codification or consensus that the particular conduct violates international law; (ii)
the importance of the foreign relations implications; and (iii) whether a change of government
measurably alters the balance of relevant considerations. 376 U.S. at 428, 84 S.Ct. at 940.

1 to dismiss. Judge Legge determined that the proper standard for analysis of defendants' motion to
2 dismiss is Rule 12(b)(6), failure to state a claim upon which relief can be granted. See Decl. of Renee
3 Beltranena, Ex. D, Tr. of Proceedings at 10-12. Judge Legge concluded that he did not believe that he
4 could determine from the face of the pleadings that the act of state doctrine applied.

5 In making his decision, Judge Legge relied on Siderman de Blake v. The Republic of Argentina,
6 965 F.2d at 707. In Siderman, the Ninth Circuit affirmed its prior holding that “[t]he act of state doctrine
7 is not a jurisdictional limit on courts.” Id. (quoting Liu v. Republic of China, 892 F.2d 1419, 1424 (9th
8 Cir. 1989) cert. dismissed, 497 U.S. 1058, 111 S.Ct. 27 (1990)). Instead, courts apply this doctrine in
9 deciding cases within their jurisdiction. Id. (“If a court lacks jurisdiction over a case involving a foreign
10 state, the act of state doctrine never comes into play.”). In other words, the act of state doctrine would
11 not bar an action for lack of subject matter jurisdiction pursuant to Federal Rules of Civil Procedure Rule
12 12(b)(1); it does, however, bar an action for failure to state a claim upon which relief can be granted
13 pursuant to Rule 12(b)(6). See id.

14 Judge Legge denied defendants' motion to dismiss but stated that the Court would, at some point,
15 have to consider the balancing factors from Sabbatino to determine if the act of state doctrine would
16 ultimately bar this action. At the May 12, 2000 hearing, Judge Legge stated, “I believe I’m confronted
17 with a pleading decision, and I can’t get the balancing from just the face of the complaint, and the
18 balancing will have to be done when there is a record.” The Court agrees that the applicability of this
19 defense needs to be addressed; however, the Court disagrees with defendants as to timing and finds that
20 there is no good cause to request information in furtherance of this defense well before the conclusion
21 of Phase II fact discovery.

22
23 **2. Phase II Discovery**

24 In October, 2001, both parties stipulated to bifurcate discovery. See Amended Order Regarding
25 Disc. Plan. Phase I discovery was limited to issues relating to the liability of Chevron Corporation.
26 Specifically, Phase I encompassed all facts relating to plaintiffs' allegations that: (i) Chevron
27 Corporation directly participated in the alleged wrongdoing; and (ii) Chevron Corporation has vicarious
28 or derivative liability for the acts of Chevron Nigeria Limited or any other person or entity. The Order

1 or derivative liability for the acts of Chevron Nigeria Limited or any other person or entity. The Order
2 stated explicitly that “[n]o other discovery concerning the issues not raised in Phase I shall be allowed,
3 except upon written agreement by the parties or, failing such agreement, upon a court order finding that
4 such discovery is necessary to preserve evidence that would otherwise be lost.” Id. at 2:23-27. Chevron
5 Corporation was ordered not to move for summary judgment as to any fact-based issue that could not
6 be fully explored by the parties during Phase I discovery. Id. at 3:6-8. Now, after the Court has denied
7 Chevron Corporation’s Phase I summary judgment motion, Phase II discovery is commencing and shall
8 include all other issues raised in this action. In fact, according to plaintiffs, whether the military launched
9 operations at Parabe, Opia, and Ikenyan at defendants’ request, rather than the Nigerian government, is
10 “at the heart of Phase II discovery.” Pls.’ Opp’n at 5:5-7.

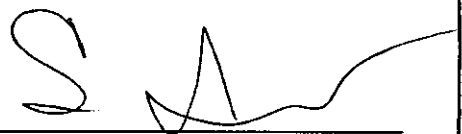
11 Plaintiffs argue that both the requirements of the act of state doctrine as well as Judge Legge’s
12 prior denial of defendants’ motion to dismiss, make “abundantly clear that this Court cannot evaluate
13 defendants’ act of state arguments until summary judgment, when there is a full record concerning the
14 events at issue.” Id. at 2:10-15.³ The Court agrees that the pretrial schedule is relevant in that a record
15 needs to be developed in order for the Court to decide on the applicability of the act of state doctrine.
16 See Sideman, 965 F.2d 699. Accordingly, the Court must defer its consideration of the act of state
17 doctrine and relevant supplementary materials.

18
19 **CONCLUSION**

20 For the foregoing reasons, the Court hereby DENIES defendants’ motion without prejudice to
21 making the request for the views of the United States and raising the underlying issue at a later time.
22 [docket # 395]

23 **IT IS SO ORDERED.**

24 Dated: July 30, 2004

25 
26 _____
27 SUSAN ILLSTON
28 United States District Judge

29 _____
30 ³ Phase II discovery is not set to end until early 2006 and dispositive motions are set to be briefed
31 a few months after the close of discovery.

United States District Court
for the
Northern District of California
August 2, 2004

* * CERTIFICATE OF SERVICE * *

Case Number:3:99-cv-02506

Bowoto

vs

Chevron Corporation

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on August 2, 2004, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

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