Nos. 13-1937(L), 13-2162

IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

SUHAIL NAJIM ABDULLAH AL SHIMARI,
TAHA YASEEN ARRAQ RASHID,
SALAH HASAN NUSAIF AL-EJAILI,
and ASA'AD HAMZA HANFOOSH AL-ZUBA'E,
Plaintiffs-Appellants,

v.

CACI PREMIER TECHNOLOGY, INC., and CACI INTERNATIONAL, INC.,
Defendants-Appellees,

and

TIMOTHY DUGAN and L-3 SERVICES, INC.,
Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DIVISION

BRIEF *AMICUS CURIAE* OF INTERNATIONAL LAW SCHOLARS IN SUPPORT OF PLAINTIFFS-APPELLANTS

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INTEREST OF *AMICI*

Amici -- listed in the Appendix -- are legal experts in the field of international law and human rights. Their work has been cited by courts at all levels of the federal judiciary for guidance in determining the content and impact of international law in domestic proceedings, including those under the Alien Tort Statute.[1] It is well-established that the courts of this country determine the content of international law by reference "to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators." *The Paquete Habana*, 175 U.S. 677, 700 (1900)). *See also* AMERICAN LAW INSTITUTE, RESTATEMENT (THIRD) U.S. FOREIGN RELATIONS LAW, § 103(2)(c) ("In determining whether a rule has become international law, substantial weight is accorded to . . . the writings of scholars. . . ."). Each signatory separately and all collectively offer an expertise on the issues in this case that is not available from the parties themselves.

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than the amici or their counsel contributed money to the preparation or submission of this brief. Both parties have consented to the filing of this brief.

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SUMMARY OF ARGUMENT

The international law regimes designed to protect human rights and prevent war crimes fundamentally hinge on two underlying premises: (1) those who commit grave violations of international law are not entitled to immunity of any sort, and (2) the domestic courts play an essential role in upholding the rule of law. As a matter of international law, the Unites States has an obligation to foreclose immunity for torture and war crimes committed by its nationals by providing a meaningful remedy to those injured by grave violations of humanitarian and human rights norms. Nothing in *Kiobel v. Royal Dutch Petroleum Co.*, __ U.S. __, 133 S. Ct. 1659 (April 17, 2013), prevents the United States from maintaining its historic commitment to the protection of human rights.

In *Kiobel*, the Supreme Court resolved the unique case before it, on the particular facts alleged in the complaint, without offering conclusive guidance on the resolution of this case. The Court characterized *Kiobel* as a "foreign-cubed" case, meaning that *foreign* plaintiffs were suing *foreign* defendants for conduct that occurred entirely in *foreign* territory. In those circumstances, the presumption against the extraterritorial application of U.S. law applied and required that *Kiobel* be dismissed. But the Court also

explicitly acknowledged that some cases under the Alien Tort Statute could sufficiently "touch and concern" the United States to overcome the presumption against extraterritoriality. 133 S. Ct. at 1669. This is just such a case.

International law, which from the beginning of the Republic has been "part of our law," *The Paquete Habana*, 175 U.S. 677, 700 (1900), and which must be considered in the interpretation of federal statutes, *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804), offers one authoritative definition of which cases "touch and concern" the United States. At a minimum, international law recognizes and protects every State's sovereign interest in the conduct of its nationals, including corporations, even when their conduct occurs abroad. International law also clearly recognizes and protects the interest of every State in protecting the integrity of its essential government functions including the detention of prisoners – wherever these functions may be fulfilled or threatened. Equally clear, international law recognizes and protects the prerogative of States to regulate conduct within its territory or within its jurisdiction and control. *A fortiori*, the conduct of an American corporation, under contract with the United States government, for the performance of governmental functions

like the treatment of detainees at a U.S. facility, necessarily "touches and concerns" the United States.

In addition, international law independently recognizes the sovereign interest of every State in certain grave violations of international law -- including torture -- and requires States to provide a meaningful remedy for those who have survived such abuses, whether at the hands of government actors or at the hands of natural and juridical persons working under contract with the government. This Court should not place the United States in breach of its international obligations – and in disregard of its national commitment to the protection of human rights – by denying even the possibility of a remedy for abuses of this magnitude.

ARGUMENT

I. The *Kiobel* Presumption Is Not A Blanket Rule Limiting ATS Cases to Tortious Conduct Within the United States

In *Kiobel,* the Supreme Court barred the Nigerian plaintiffs' case seeking relief against foreign corporations for violations of the law of nations outside the United States. The Court explicitly based its decision on the fact that *Kiobel* was a "foreign-cubed" case, a term of art traceable to *Morrison v. National Australian Bank*, 130 S. Ct. 2869 (2010), referring to the fact that foreign plaintiffs were suing foreign defendants for conduct that occurred entirely in foreign territory. Applying that rubric to the facts of

Kiobel, the Supreme Court emphasized that "all the relevant conduct took place outside the United States," 133 S. Ct. at 1669, but established in the next sentence that the presumption against extraterritoriality might be overcome in ATS cases "when the claims touch and concern the territory of the United States with sufficient force to displace" it. *Ibid.*

Expanding on the territorial presumption established in *Morrison v. National Australian Bank, Foley Brothers Inc. v. Filardo*, 336 U.S. 281 (1949), and *Boureslan v. Arabian American Oil Co*., 499 U.S. 244 (1991), the new *Kiobel* presumption must be applied claim-by-claim under the ATS, on the facts of each case, rather than under the statute as a whole. As a consequence, the *Kiobel* decision leaves open the possibility that the ATS might reach foreign conduct so long as it sufficiently "touches and concerns" the United States. From that perspective, *Kiobel* resolved the unique case before the Court, on the particular facts alleged in that complaint, without offering conclusive guidance on the resolution of this or any other case involving U.S. nationals as defendants, conduct within the jurisdiction or control of the United States or performed under contract with the U.S. government, or other linkages to the United States.

Kiobel must also be read in conformity with *Sosa v. Alvarez-Machain,* 542 U.S. 692 (2004), which preserved the possibility of ATS jurisdiction

over extraterritorial conduct. *Sosa*, which was itself a "foreign-cubed case," turned on the whether the international norm in question was specific, universal, and obligatory, and its analysis would have been inexplicable if all ATS cases involving foreign conduct were for that reason barred. To the contrary, the *Sosa* court cited multiple foreign-cubed cases with approval, 542 U.S. at 732-33, including *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980); *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995), and *In re Estate of Ferdinand E. Marcos Human Rights Litigation*, 978 F.2d 493 (9th Cir. 1992). Without addressing, let alone distinguishing, these precedents, the *Kiobel* court simply determined that "all the relevant conduct" in the singular case before it occurred abroad, but nothing in the Court's analysis undermines the *Sosa* court's approach to the "relevant conduct" in other cases, even if it occurred abroad.[2] Notably, the brief of the United States on the question of extraterritoriality explicitly preserved *Filartiga* and its progeny even as it suggested that the U.S. connections in *Kiobel* were

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[2] It is significant that multiple briefs in the *Sosa* litigation explicitly invoked the *Morrison* presumption against extraterritoriality as a reason to dismiss Alvarez-Machain's case. *See, e.g.*, Brief for the United States as Respondent Supporting Petitioner, *Sosa v. Alvarez-Machain*, 2004 WL 182581, at 46-50. It was all to no avail: the *Sosa* court did not even make extraterritoriality a factor in the impressionistic determination of whether a cause of action would be inferred, 542 U.S. at 724-28, let alone whether jurisdiction was proper or whether a claim had been stated.

simply too attenuated. Supplemental Brief for the United States as *Amicus Curiae* in Partial Support of Affirmance, *Kiobel v. Royal Dutch Petroleum Co.*, 2012 WL 2161290, at 19.

That *Kiobel* does not create a blanket rule limiting ATS cases to tortious conduct in the United States is patently clear from the separate opinion of Justices Alito and Thomas. They concurred in the judgment but would have required that the "domestic [*i.e.*, U.S.] content" of the claim must be "sufficient to violate an international norm that satisfies *Sosa*'s requirements of definiteness and acceptance among civilized nations." 133 S. Ct. at 1670 (Alito, J., concurring). In other words, Justices Alito and Thomas insisted that ATS jurisdiction can be proper *only* if the breach of *Sosa*-qualified norms occurs in the territory of the United States. That standard would of course bar some of the most celebrated decisions in the history of ATS litigation, including those cited with approval in *Sosa* itself, like *Filartiga, Karadzic*, and *Marcos*, *supra.* That the other seven justices in *Kiobel* did not adopt the Alito-Thomas restriction suggests in turn that foreign-injury cases can survive, so long as there is a sufficient connection to the United States. From that perspective, the District Court committed reversible error, applying the bright-line standard in the Alito concurrence as though it were the majority rule. A1804 (concluding that it "lacked ATS

jurisdiction over Plaintiffs' claims because the acts giving rise to their tort claims occurred exclusively in Iraq, a foreign sovereign").

The lower court's reversible error is especially clear in light of Justice Kennedy's concurrence. In providing a fifth vote to the Roberts opinion, Justice Kennedy wrote separately to confirm that the ATS might still apply to "human rights abuses committed abroad" in cases not covered by the "reasoning and holding" of *Kiobel*, 133 S. Ct. at 1669. In short, the one thing that *Kiobel cannot* provide is a bright-line rule based exclusively on a territorial inquiry.

The responsibility for defining the elements of *Kiobel*'s "touch and concern" test now falls to the lower courts, and, on the question of what kind of connections count, international law provides guidance: just as international law defines the positive substantive norms that are actionable under the ATS per *Sosa,* international law defines the positive jurisdictional reach of the ATS post-*Kiobel* and the kinds of claims it covers.

II. As a Matter of International Law, Every State Has an Irreducible Sovereign Interest in the Conduct of Its Nationals, Whether Natural or Juridical

Under international law, every sovereign is touched and concerned by the conduct of its own nationals. According to the International Court of Justice, nationality "constitute[s] the juridical expression of the fact that the

individual upon whom it is conferred ... is in fact more closely connected with the population of the State conferring nationality than with that of any other State." *Nottebohm Case (Liech. v. Guat.)*, Second Phase, 1955 ICJ Rep. 4, 23 (Apr. 6). One inherent consequence of the connection between State and national (or citizen) is the applicability in principle of the State's laws to its nationals. International law refers to this prerogative of sovereignty as a State's "jurisdiction to legislate (or prescribe)" with respect to its own citizens. In this respect, § 402(2) of the RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES is entirely consistent with traditional and contemporary international authorities, providing, subject to certain reasonableness limitations, that "a state has jurisdiction to prescribe law with respect to ... the activities, interests, status, or relations of its nationals outside as well as within its territory."[3]

The Supreme Court has long recognized that the conduct of U.S. nationals – even when they live or act abroad – touches and concerns the authority of the United States. *See Blackmer v. U.S.*, 284 U.S. 421 (1932):

[3] Of course, determining nationality in every case may not be simple. It may change over time or be terminated, and multiple States may have jurisdiction to legislate simultaneously, requiring a conflicts of law regime to choose the applicable law in some cases and in some forums; moreover, the right to enforce the law – the so-called "jurisdiction to enforce" – is separate from the jurisdiction to legislate, but these complications do not vitiate the basic and legally-protected interest of every State in its own nationals.

> While it appears that [Blackmer] removed his residence to France …, it is undisputed that he was, and continued to be, a citizen of the United States. He continued to owe allegiance to the United States. By virtue of the obligations of citizenship, the United States retained its authority over him, and he was bound by its laws made applicable to him in a foreign country. Thus, although resident abroad, the petitioner remained subject to the taxing power of the United States. For disobedience to its laws through conduct abroad, he was subject to punishment in the courts of the United States.

Blackmer, 284 U.S. at 436-437 (citations omitted). The Court noted explicitly that the case raised no issue of international law, because "[t]he Law of Nations does not prevent a State from exercising jurisdiction over its subjects travelling or residing abroad, since they remain under its personal supremacy." *Id.* at n.2. *Accord The Apollon*, 22 U.S. 362, 369 (1824); *United States v. Bowman*, 260 U.S. 94 (1922). The universal[4] understanding of the prescriptive connection between every State and its nationals is sufficient to distinguish this case – and any other ATS case involving *U.S. defendants* -- from *Kiobel*.

For these purposes, international law draws no distinction between natural and juridical persons: corporations are inarguably within the jurisdiction to prescribe of the State of its nationality. In some cases,

[4] GRANT & BARKER, THE HARVARD RESEARCH IN INTERNATIONAL LAW: ORIGINAL MATERIALS 519 (2008). The Supreme Court has repeatedly acknowledged the authority of the HARVARD RESEARCH on matters of international law. *United States v. Alvarez-Machain*, 504 U.S. 655, 686 (1992); *United States v. First Nat. City Bank*, 379 U.S. 378, 396 (1965).

corporate nationality is a simple question of where the corporation is incorporated. Thus for example, the International Law Commission has determined -- for purposes of diplomatic protection -- the same understanding that has governed jurisdiction to prescribe, namely that

> the State of nationality [of a corporation] means the State under whose law the corporation was incorporated.[5]

As with natural persons, special cases may arise making the determination of a particular corporation's nationality contestable,[6] and a conflicts-of-law rule may be necessary when more than one State's law applies. But none of that potential complexity undermines the essential connection of the United States to the conduct of companies incorporated in the United States.

III. As a Matter of International Law, Every State Has an Irreducible Sovereign Interest in Conduct that Occurs Wholly or Substantially Within Its Jurisdiction or Control

International law recognizes another category of cases that touch and concern the United States to the extent that they involve conduct that occurs within the territory of the United States or within its jurisdiction or control. The territoriality principle of jurisdiction to prescribe may be considered the

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[5] International Law Commission, *Draft Articles on Diplomatic Protection*, Art. 9 (adopted 2006).

[6] "[W]hen the corporation is controlled by nationals of another State or States and has no substantial business activities in the State of incorporation, and the seat of management and the financial control of the corporation are both located in another State, that State shall be regarded as the State of nationality." *Ibid*.

sine qua non of sovereignty: every State retains legislative authority over conduct that occurs within its physical territory, meaning that it can attach legal consequences to such conduct, even if its effects are felt somewhere else. In the ATS context, tortious conduct by a defendant within U.S. territory in violation of the law of nations or a treaty of the United States would satisfy *Kiobel*, in which the Court found that *none* of the relevant conduct occurred in the United States. Tortious conduct in American territory in violation of the law of nations would satisfy even the most demanding test adopted by Justices Alito and Thomas in their separate concurrence in *Kiobel*, s*upra*.

Crucially, the international principle of territoriality is not limited to the physical boundaries of a State but also includes areas within a State's effective control and jurisdiction. Famously that includes vessels on the high seas, which international law treats as extensions of the flag-state's territory. *The Lotus Case*, [1927] P.C.I.J., Ser. A, No. 10, at 25; Geneva Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 11, at Art. 6. And special regimes govern jointly-administered areas or international condominia.

Because international law recognizes the reality that the modern world of jurisdiction is not divided neatly into territorially-defined boxes, it was no

violation of international law when the Supreme Court determined that the presumption against extraterritoriality did not apply to U.S. military facilities located outside of the United States. *See Rasul v. Bush*, 542 U.S. 466, 480 (2004), and *Boumediene v. Bush*, 553 U.S. 723, 771 (2008) (holding that the detainee petitioners were in "a territory that, while technically not part of the United States, is under the complete and total control of our Government.") Applied to this case post-*Kiobel*, the question is whether services provided under a U.S. government contract and delivered at a U.S. military installation – completely under U.S. military control though located in a foreign country – "touches and concerns" the territory of the United States.

Amici respectfully submit that under international law, control of that magnitude translates into effective jurisdiction, which translates in turn into prescriptive authority, a legislative prerogative that reflects the international community's conclusions about which matters touch and concern which States. There is no doubt that Abu Ghraib was within the reach of U.S. law as far as international law is concerned, and there is no principled distinction at international law that would exclude the application of the Alien Tort Statute.

IV. As a Matter of International Law, Every State Has an Irreducible Sovereign Interest in Its Essential Governmental Functions, Whether Carried Out Or Threatened By Nationals or by Non-Nationals

Under principles of international law, the conduct of non-nationals may also touch and concern the United States "with sufficient force to displace the [*Kiobel*] presumption," 133 S. Ct., at 1669. Specifically, international law has long recognized the legitimacy of a State's jurisdiction to prescribe with respect to conduct outside its territory that involves its national security or essential government functions, regardless of the actor's nationality. *See generally* I.A. SHEARER, STARKE'S INTERNATIONAL LAW 183-212 (8th ed. 1994). This so-called "protective principle" is sometimes oversimplified to cover only terrorism and related crimes, but it also clearly covers extraterritorial conduct that involves essential and routine government functions, like maintaining security, running detention facilities, controlling immigration, and minting currency, *inter alia.* In *United States v. Bowman*, 260 U.S. 94 (1922), for example, the Supreme Court relied on the protective principle in a case involving a conspiracy to defraud a corporation in which the United States was a stockholder, acknowledging "the right of the government to defend itself against obstruction, or fraud *wherever perpetrated*...." *Bowman*, 260 U.S. at 98 (emphasis supplied). Crucially, the

protective principle covers foreign conduct not only by the State's own nationals but also by foreign citizens. *See* AMERICAN LAW INSTITUTE, RESTATEMENT (THIRD) OF U.S. FOREIGN RELATIONS LAW § 402(3) and comment f (recognizing that a State's jurisdiction to prescribe extends to "certain conduct outside its territory *by persons not its nationals* that is directed against the security of the state or against a limited class of other state interests") (emphasis supplied). The fact that this case sounds in tort and not criminal law does not diminish the state interest in the conduct of those who operate under a government contract, providing essential services instead of threatening them. In either case, international law recognizes that a State is intimately connected to – touched and concerned by – the conduct of its contractors.

International law doctrines other than jurisdiction to prescribe reinforce the necessary juridical relationship between contractors – regardless of citizenship -- and the governments with which they do business. In its authoritative catalogue of the circumstances under which a State may bear responsibility under international law, the International Law Commission ("ILC") concluded that

> The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Acts*, Art. 8 (Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10), ch. IV.E.1. In its authoritative commentary to article 8, the ILC clarifies that even unauthorized or illegal conduct by a private actor can trigger the State's responsibility as a matter of international law:

> where persons or groups have committed acts under the effective control of a State, the condition for attribution will still be met even if particular instructions may have been ignored.

Id., comment 8 to Article 8, at 48. Recognizing the potential for its own state responsibility internationally, the United States requires that its contractors – regardless of citizenship and location of service – operate in a dense regulatory environment, profoundly controlled by the government itself, all of which qualifies as evidence of the kind of contractor conduct that "touches and concerns" the United States.[7]

[7] *See* USA PATRIOT Act of 2001, Pub. L. 107-56, 115 Stat. 272, § 804 (expanding the United States' special maritime and territorial jurisdiction to include U.S.-operated facilities overseas by amending 18 U.S.C. § 7 to include "the premises of United States diplomatic, consular, military or other United States Government missions or entities in foreign States"); Military Extraterritorial Jurisdiction Act of 2000 ("MEJA"), 18 U.S.C. §§ 3261-3267 (2004 Supp.) (subjecting contractors to federal criminal prosecution).

V. As a Matter of International Law, Grave Violations of International Human Rights Law Touch and Concern the United States

The Supreme Court explained in *Kiobel* that the presumption against extraterritoriality is designed to prevent "unintended clashes between our laws and those of other nations which could result in international discord." *Kiobel*, 133 S. Ct. at 1664 (internal citation omitted). By their nature, breaches of international norms that satisfy *Sosa*, *i.e.* norms that are specific, universal, and obligatory, touch and concern the United States. International law certainly grants the United States the authority to enforce those norms in its domestic courts; indeed, it would be a violation of international law for the United States to become a safe haven for violators.

At the time the ATS was adopted, Emerich de Vattel was the most influential international jurist, and he clearly articulated the communal interest in assuring accountability for certain international wrong-doers:

> [A]lthough the justice of each nation ought in general to be confined to the punishment of crimes committed in its own territories, we ought to except from this rule those villains, who, by the nature and habitual frequency of their crimes, violate all public security, and declare themselves the enemies of the human race.

Emerich de Vattel, LAW OF NATIONS 179 (1758, reprinted ed. 1805) (§ 233). The Supreme Court has clearly understood and vindicated that interest in a

variety of settings, especially pirates and slave-traders. In the modern era, torture, genocide, and crimes against humanity make the perpetrators the enemy of all humankind, because humanitarian disasters and grave human rights violations respect no territorial lines. *See Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980); *Abdullahi v. Pfizer*, 562 F.3d 163, 186 (2d. Cir. 2009) (finding that nonconsensual medical experimentation with an anti-meningitis drug was a factor in a polio outbreak in Nigeria, triggering an international outbreak spreading across much of Africa, reinfecting twenty previously polio-free countries). Because these grave wrongs have international ramifications no matter what their domestic location may be, there is the obligation of all nations to support and promote the international order as the "society of the human race." Emerich de Vattel, LAW OF NATIONS 113-14 (1758, reprinted ed. 1805) (§ 35). As acknowledged by the European Commission in its amicus brief in *Kiobel*, some wrongs -- no longer limited to piracy and slave-trading -- are "so repugnant that all States have a legitimate interest and therefore have the authority to suppress and punish them." *See* Brief of *Amicus Curiae* European Commission In Support of Neither Party, *Kiobel,* No. 10-1491, at 16.

Modern international law recognizes that gross violations of human rights touch and concern all nations, including the United States. The term

of art for such wrongs is that they are said to violate obligations *erga omnes*, of legal interest to all states. The doctrine of *erga omnes* recognizes the "the right of a State to concern itself, on general humanitarian grounds, with atrocities affecting human beings in another country." *South West Africa Cases* (*Eth. v. S. Afr.; Liber. v. S. Afr.*), 1962 I.C.J. 319, 425-428 (Dec. 21) (Preliminary Objections). In *Barcelona Traction, Light and Power Co., Ltd.* (*Belg. v. Spain*), 1970 I.C.J. 3, 32 (Feb. 5), the International Court of Justice explained that *erga omnes* obligations may "derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the *principles and rules concerning the basic rights of the human person*, including protection from slavery and racial discrimination." *Id.* (emphasis added).

International law grants a wide measure of discretion for states to enforce international law through their domestic judicial systems, and states are limited in the exercise of this power only by express norms which *prohibit* it. See *The Lotus Case*, [1927] P.C.I.J., Ser. A, No. 10:

> Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to the persons, property, and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules.[8]

[8] The ICJ has continued to rely on the *Lotus* principle. *See, e.g., Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United*

In a more modern idiom, international law secures the sovereign authority of a state to hold accountable those who violate a customary norm of human rights law.

But international law goes further than simply allowing domestic accountability: it *requires* states to provide a meaningful remedy against perpetrators. Vattel himself envisioned these state obligations with "respect to great crimes, which are equally contrary to the laws and safety of all nations, … [which] owe one another all the duties which the safety and welfare of that society require." *See* Emerich de Vattel, LAW OF NATIONS 163 (1758, reprinted ed. 1805) (§ 176), 113-14 (§ 35). And today, the *erga omnes* legal obligation imposed upon all states to participate in the prevention and remedy of gross violations of human rights by any other state is well-established. *See, e.g., Case Concerning Application of the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Preliminary Objections, Judgment, I.C.J. Reports 1996, 595, at

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States of America) (merits), 1986 I.C.J. 101, 135; *Advisory Opinion on the Threat or Use Of Nuclear Weapons*, 1996 I.C.J. 226; *Advisory Opinion on the Accordance with International Law of Unilateral Declaration of Independence in Respect of Kosovo*, 2010 I.C.J. 141. See also *Arrest Warrant of 11 April 2000* (*Dem. Rep. Congo v. Belg.*), 2002 I.C.J. 3, 77-79 (Feb. 14) (joint separate opinion of Judges Buergenthal, Higgins, and Kooijamns), where the judges stated that *Lotus* "represents a continuing potential in the context of jurisdiction."

¶ 31 ("the rights and obligations enshrined by the [Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277] are rights and obligations *erga omnes*" and "the obligation each State thus has to prevent and to punish the crime of genocide is not territorially limited by the Convention"); *Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory, Advisory Opinion,* I.C.J. Reports 2004, ¶ 155 (July 9, 2004) (finding that Israel's violations of its *erga omnes* obligations "to respect the right of the Palestinian people to self-determination" and towards "certain of its obligations under international humanitarian law" were "the concern of all States").

Equally significant, certain treaties include provisions *aut dedere aut judicare*, which require States to "extradite or prosecute" those who violate the treaty, and there is an emerging understanding at customary law that those who commit crimes against humanity are subject to the same obligation even if it is not contained in a treaty.[9] Historically, the wrongs

[9] *See* Int'l Law Comm'n Special Rapporteur, FOURTH REPORT ON THE OBLIGATION TO EXTRADITE OR PROSECUTE (AUT DEDERE AUT JUDICARE), U.N. Doc. A/CN.4/648 (May 31, 2011) (by Mr. Zdzislaw Galicki), on the customary international law norm of *aut dedere aut judicare* for crimes against humanity.

alleged in this case, including torture, have triggered the *aut dedere aut judicare* obligation and therefore touch and concern the United States.

In the recent case of *Belgium v. Senegal*, the International Court of Justice examined the obligation of *aut dedere aut judicare* within the context of the Convention Against Torture, and clarified the nature and basis of the State obligation. *See Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.)*, Judgment (Int'l Ct. Justice July 20, 2012). The court held unanimously that Senegal was required to take action to hold an individual within its territory accountable for violations of customary international law norms. "State parties have a common interest to ensure, in view of their shared values" that acts in violation of international human rights norms "are prevented and that, if they occur, their authors do not enjoy impunity." *Id*. at ¶ 68. Further, a nation's obligation is "triggered by the presence of the alleged offender in its territory, regardless of the nationality of the offender or the victims, or of the place where the alleged offences occurred." *Id.* The case of *Belgium v. Senegal* is apposite where, as here, the United States has ratified the Convention Against Torture and the Geneva Conventions on the Laws of War, both of which include extradite or prosecute provisions.

In short, at this stage of this litigation, the kinds of international wrongs alleged in the complaint touch and concern the territory of the United States, and under international law the United States not only has the authority but the obligation to provide a forum in order that these international standards may be vindicated.

VI. Corporations Are Not In Principle Immune from Obligations Under International Law

In *Kiobel*, the Supreme Court pointedly ignored the question at the heart of the court of appeals' decision and much of the public interest in the case, namely whether corporations may in principle bear international obligations to respect human rights norms. The conflict among the circuit courts, which triggered the grant of *certiorari* in *Kiobel*, remains as trenchant as ever, with the Second Circuit as the sole outlier among the circuit courts of appeals in an overall consensus that corporations are not immune from international law for purposes of the ATS.[10] It is important that this Court not recognize a law-free zone for corporations, effectively

[10] Prior to the Supreme Court's decision in *Kiobel*, every other circuit court to address the issue disagreed with the Second Circuit's conclusion in *Kiobel*. *See Romero v. Drummond Co.*, 552 F.3d 1303, 1315 (11th Cir. 2008); *John Doe VIII et al. v. Exxon Mobil Corp.*, 654 F.3d 11 (D.C. Cir. 2011); *Flomo v. Firestone Nat. Rubber Co., LLC*, 643 F.3d 1013 (7th Cir. 2011); *Sarei v. Rio Tinto, PLC*, Nos. 02-56256, 02-56390, 09-56381, 2011 WL 5041927 (9th Cir. Oct. 25, 2011), *dismissed on other grounds* (June 28, 2013).

immunizing entities that commit serious human rights violations. International law neither creates nor tolerates such an immunity.

First, certain egregious conduct violates international human rights standards, whether committed by state or non-state actors. Although it is true that international criminal tribunals distinguish between natural and juristic persons *for purposes of their own jurisdiction*, nothing in international law precludes the imposition of civil or tort liability for corporate misconduct. Thus, the proper question is not whether human rights treaties explicitly impose liability on corporations. It is whether those treaties distinguish between juristic and natural individuals in a way that exempts the former from all responsibility. There is nothing in the text or context of those treaties supporting that distinction.

Second, it is wrong to conclude from the alleged absence of human rights cases against corporations that they are exempt from human rights norms: international law never defines the means of its domestic implementation and remediation, leaving States a wide berth in assuring that the law is respected and enforced as each thinks best. It hardly follows that States remain free to allow violations so long as a corporation commits the wrong. Equally important, in adopting the ATS, Congress directed the federal courts to allow civil actions for violations of international law that

take tortious form, without specifying the types of defendants who might be sued. As recognized by the Supreme Court, "[t]he Alien Tort Statute by its terms does not distinguish among classes of defendants…." *Argentine Republic v. Amerada Hess Shipping Corp*., 488 U.S. 428, 438 (1989). Over a century ago, the Attorney General of the United States concluded that corporations are in principle capable of violating the law of nations or a treaty of the United States for purposes of the Alien Tort Statute. 26 *Op. Att'y Gen*. 250 (1907) (concluding that aliens injured by a private company's diversion of water in violation of a bilateral treaty between Mexico and the United States could sue under the ATS).

The Second Circuit in *Kiobel* apparently felt compelled by *dicta* in a footnote in *Sosa, supra,* but nothing in *Sosa* requires so distorted a focus. To the contrary, *Sosa* rejected the aggressive corporate immunity positions advanced by business groups appearing *amicus curiae*, reasoning only that "the determination whether a norm is sufficiently definite to support a cause of action" is "related . . . [to] 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." *Id*. at 732 n. 20. The Supreme Court thus distinguished between those wrongs that require

state action (*e.g.*, torture[11]) from those that do not (*e.g.*, genocide). The text shows that the Court in *Sosa* was referring to a single class of non-state actors (natural and juristic individuals), not two separate classes as assumed by the Second Circuit panel in *Kiobel*.

Nor is it relevant that the *Sosa* court would only recognize a cause of action, derived from the common law, for certain violations of international law:

> The jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time.

542 U.S. at 724. The ATS requires only that the tort be "*committed*" in violation of a specific, universal, and obligatory norm or international law, *id.* at 724, not that international law itself recognize a right to sue or distinguish for purposes of civil liability between natural and juristic individuals.

[11] It is clear in context that the Supreme Court was referring to "torture" as defined in the Torture Convention Against Torture and Other Cruel, Inhuman Or Degrading Treatment Or Punishment, 10 December 1984, 1465 U.N.T.S. 85, art. 1. Other international instruments prohibiting torture do not have the state action requirement, including common article 3 of the Geneva Convention on the Laws of War. *See, e.g.,* Convention Relative to the Treatment of Prisoners of War, Feb. 2, 1956, 6 U.S.T. 3316, T.I.A.S. 3364, 75 U.N.T.S. 135, art. 3.

Authoritative interpretations of international law also establish that there is no law-free zone for corporate actions, especially with respect to human rights obligations. And because corporate liability for serious harms is a universal feature of the world's legal systems, it qualifies as a general principle of law – one of the sources of international norms. ICJ Stat., art 38(1)(c). *See also* AMERICAN LAW INSTITUTE, RESTATEMENT (THIRD) OF U.S. FOREIGN RELATIONS LAW §102(1)(c) (1987) ("A rule of international law is one that has been accepted as such by the international community of states ... by derivation from general principles common to the major legal systems of the world.").

Equally important, the Second Circuit approach if made general would place the United States in breach of its international legal obligation to provide a meaningful remedy for violations of human rights, no matter who or what violates them. The Second Circuit majority's conclusions allow governments to privatize their way around their obligations under international human rights law: the simple expedient of creating a corporation to run prisons or maintain civil order or fight wars would effectively block the imposition of liability on the entity that is directly responsible for the violation. The Second Circuit's approach thus conflicts with the obligation of States to provide a meaningful remedy for such

abuses. *See, e.g.*, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Dec. 16, 2005) ("where a person, a legal person, or other entity is found liable for reparation to a victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim"). This conclusion has already been articulated by the Special Representative to the Secretary-General on the Issue of Human Rights and Transnational Corporations, who noted in 2009:

> As part of their duty to protect, States are required to take appropriate steps to investigate, punish, and redress corporate-related abuse of the rights of individuals within their territory and/or jurisdiction – in short, to provide access to remedy.

Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, 87, U.N. Doc. A/HRC/11/13 (Apr. 22, 2009).

The international obligation to provide a remedy is especially applicable to this case. Because of the immunity granted to U.S. government contractors by the U.S.-controlled Coalition Provisional Authority, there is no meaningful alternative forum. The United States is a forum of necessity.

The *Kiobel* majority's apparently dispositive concerns with international comity have no role in this case, because there is no possibility of a meaningful alternative forum, nor is there any doubt about which nation's law governed the actions of CACI at the time the abuses occurred. The Coalition Provisional Authority ("CPA") was established by the U.S. government in 2003 after the Iraqi government was deposed[12] and funded by Congress thereafter as an "entity of the U.S. government."[13] The CPA issued orders reflecting complete governmental and legal control and supplanting any possible sovereign power Iraq could exercise as a nation.[14] It also expressly immunized U.S. forces and contractors from Iraqi law. *See* CPA Order 17 §§ 2, 4 (providing that "Contractors shall be immune to Iraqi legal process"); *id.* at § 4(2), (7) (providing that such immunity is "without prejudice to the exercise of jurisdiction by the Sending State and the State of nationality of a Contractor"). In stark contrast to *Kiobel*, only one nation -- the United States -- can provide a meaningful remedy, prevent impunity, and

[12] Coalition Provisional Authority and Iraqi Governing Council, *The November 15 Agreement: Timeline to a Sovereign, Democratic and Secure Iraq*, available at http://iraqcoalition.org/government/AgreementNov15.pdf.

[13] *See* Emergency Supplemental Appropriations Act for the Defense and Reconstruction of Iraq and Afghanistan, Pub. L. No. 108-106, 117 Stat. 1209, 1225, 1236 (Nov. 6, 2003).

[14] *See e.g.*, CPA Order 2 § 1 & Appx. (dissolving Iraqi government ministries, legislative bodies and army and police forces); CPA Order 7 § 1 (placing all Iraqi judges, police and prosecutors under CPA control).

strengthen the international rule of law long championed by the United States.

CONCLUSION

This case is readily distinguished from *Kiobel,* because the plaintiffs' allegations of conduct in the United States and at a U.S. military installation abroad, by U.S. nationals who are in any event also U.S.-government contractors, clearly touch and concern the territory of the United States as a matter of international law.

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APPENDIX

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Jenny S. Martinez is Professor of Law and Warren Christopher Professor in the Practice of International Law and Diplomacy at Stanford Law School. Her research focuses on the role of courts and tribunals in advancing and protecting human rights, ranging from her work on the nineteenth-century international tribunals involved in the suppression of the trans-Atlantic slave trade through her work on contemporary institutions like the International Criminal Court and the role of courts in policing human rights abuses in connection with anti-terrorism policies. She has also written extensively on

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