

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

SUHAIL NAJIM ABDULLAH AL SHIMARI,	}	
et al.,	}	
Plaintiffs,	}	Civil No.08-cv-827
VS.	}	November 1, 2012
TIMOTHY DUGAN, et al.,	}	
Defendants.	}	

MOTIONS HEARING

BEFORE: THE HONORABLE GERALD BRUCE LEE
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF: BURKE, PLLC
 BY: SUSAN L. BURKE, ESQ.
 SUSAN M. SAJADI, ESQ.
 CENTER FOR CONSTITUTIONAL RIGHTS
 BY: BAHER AZMY, ESQ.
 KATHERINE GALLAGHER, ESQ.

FOR THE DEFENDANT: STEPTOE & JOHNSON
 BY: JOSEPH WILLIAM KOEGEL, JR., ESQ.
 JOHN O'CONNOR, ESQ.

OFFICIAL COURT REPORTER: RENECIA A. SMITH-WILSON, RMR, CRR
 U.S. District Court
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1 (Thereupon, the following was heard in open
2 court at 10:15 a.m.)

3 THE CLERK: 1:08 civil 827, Al Shimari versus
4 Dugan, et al.

5 MS. BURKE: Good morning, Your Honor. Susan
6 Burke for the plaintiffs.

7 THE COURT: Good morning.

8 MS. BURKE: And Mr. Baher Azmy and
9 Ms. Katherine Gallagher from the Center For
10 Constitutional Rights and my colleague, Susan Sajadi.

11 Mr. Azmy has come down from New York today to
12 do the argument.

13 THE COURT: All right.

14 MR. KOEGEL: Good morning, Your Honor. Bill
15 Koegel and John O'Connor for the CACI defendants.

16 THE COURT: Good morning.

17 MR. O'CONNOR: Good morning, Your Honor.

18 THE COURT: Ms. Burke said a lot of names.
19 Tell me your name again.

20 MR. AZMY: Good morning, Your Honor. Baher
21 Azmy, A-Z-M-Y from The Center For Constitutional Rights.

22 THE COURT: Good morning, Mr. Azmy.

23 MR. AZMY: Good morning. The Center For
24 Constitutional Rights has been in these cases for a long
25 time, but this is my first appearance before Your Honor.

1 THE COURT: This case has been around a long
2 time.

3 MR. AZMY: It has. And today we seek this
4 Court's reconsideration of its 2009 order dismissing
5 plaintiffs' Alien Tort Statute claims for war crimes,
6 torture and cruel and inhuman and degrading treatment.

7 It's clear that this Court has plenary
8 authority under Rule 54(b) to reconsider its decision
9 dismissing those claims. And we contend that it's
10 particularly appropriate at this stage of the
11 proceedings, at this procedural juncture to do so for a
12 number of reasons.

13 First, there have been significant legal
14 developments since Your Honor's decision in 2009 on this
15 question. Specifically Judge Lee in *In re Xe Services*
16 and -- sorry, Judge Ellis in *In re Xe Services* and Judge
17 Messitte in the companion case to this case, *Al-Quaraishi*
18 *v. Nakhla*, a case which I think is on all fours with this
19 case, both held that federal courts have jurisdiction to
20 hear war crimes claims under the ATS against private
21 military contractors such as CACI who are operating in
22 Iraq.

23 In addition, there have been a number of
24 Court of Appeals decisions in the Seventh Circuit in
25 *Ftomo* and the DC Circuit in *Exxon* and in the Ninth

1 Circuit in *Sarei* which we all discussed in our brief
2 which also hold that ATS norms can be applied against
3 private entities and corporate entities.

4 These are all persuasive decisions, Judge
5 Ellis and Judge Messitte's decision. We would urge you
6 to review as you consider this motion. And we believe
7 that this creates a legal consensus, an emerging legal
8 consensus going in the opposite direction since --

9 THE COURT: Well, we have two district judges
10 and we have three circuits that say that there could be a
11 claim under the ATS for war crimes and that corporate
12 liability would attach.

13 MR. AZMY: Right.

14 THE COURT: The Supreme Court has the *Kiobel*
15 case. Is that how it's pronounced?

16 MR. AZMY: I believe *Kiobel*.

17 THE COURT: *Kiobel* case.

18 MR. AZMY: That's right, Your Honor, yes.

19 So there's one Court of Appeals case that has
20 gone in the other direction from the three Court of
21 Appeals cases.

22 THE COURT: Is that the Fifth Circuit?

23 MR. AZMY: That's from the Second Circuit
24 with a dissenting opinion.

25 So *Kiobel* because that Court held that

1 corporations are exempt from ATS liability were a strong
2 dissent from Judge Leval, and it's that decision that the
3 Supreme Court is going to review in *Kiobel*.

4 And this takes us to what I think are some of
5 the equities for why in addition to the significant legal
6 developments this is a good moment to reconsider the
7 decision.

8 First, the defendants have identified no
9 prejudice that would ensue from reinstating these claims
10 now.

11 No discovery has occurred. And there's a
12 question here about the Court subject matter jurisdiction
13 which the Fourth Circuit --

14 THE COURT: But the factual discovery would
15 be the same for this claim as others. Is that right?

16 MR. AZMY: Not necessarily, Your Honor. I
17 think -- and, I think the concern is if the *Kiobel*
18 decision ultimately vindicates the position that
19 plaintiffs have taken and reaffirms our position, we will
20 have lost an opportunity to undertake discovery during
21 this time. And we think it makes more sense to do
22 discovery along side the non-ATS claims.

23 THE COURT: Well, I guess my question was
24 whether the discovery would be the same in any event.
25 Because the facts that are alleged that underlie the

1 whole -- all the other claims are the same body of facts
2 that would be the subject matter of discovery anyway.

3 MR. AZMY: There may be, Your Honor,
4 substantial overlap. And it's simply hard to anticipate
5 all the contingencies and we strongly -- we're strongly
6 concerned that the defendants would oppose discovery that
7 may go to the war crimes and torture-related claims that
8 may go to questions of intent and purpose on the
9 discovery and war -- on the war crimes and torture
10 claims. And I think it makes more sense to have those
11 claims firmly in the case should there be disputes about
12 whether a particular line of discovery goes beyond merely
13 the state law claims and is relevant to the war crimes
14 claims.

15 It's far easier to bring those disputes, Your
16 Honor, with them in the case.

17 But I also want to stress, Your Honor, it's
18 not just about the discovery in the case, although it's
19 important.

20 What happened in this case is as we alleged,
21 we believe surely assault and battery. It's surely
22 sexual assault, and it's surely negligent supervision.
23 But it's much more. It's important to call what happened
24 what it is. What happened, war crimes, as we alleged,
25 torture, and cruel and inhuman and degrading treatment.

1 And Virginia surely -- the state of Virginia
2 surely has an interest in vindicating the Virginia state
3 common law torts of assault and battery.

4 But, the federal government, I believe this
5 Court and our plaintiffs also have a very strong interest
6 in vindicating the very strong federal norms regarding
7 war crimes and torture, and we know this for a number of
8 reasons.

9 The United States in the *en banc* proceedings
10 in the Fourth Circuit filed an amicus brief largely
11 citing with plaintiffs and urging the Court to allow this
12 case to proceed precisely so that we could vindicate the
13 federal interests in the anti-torture statute in calling
14 this what it is.

15 Of course, we know, President Bush and
16 Congress and the generals have decried what happened in
17 Abu Ghraib as egregious and beyond the pale. And theirs
18 is something more than just sexual assault going on here.
19 And I think --

20 THE COURT: Well, I appreciate that, but I
21 guess what I'm confronted with is the circumstance where
22 the matter has come back 3 years later. There have been
23 developments in the case law, and I have reviewed many of
24 the cases that you all have identified, including the
25 District Court decisions. But I'm focused more on the

1 Circuit decisions. We don't have a defendant's decision
2 in our circuit. DC Circuit certainly would be helpful,
3 and there are a couple others.

4 I guess the question is whether since I did
5 not do a full analysis the last time, in light of the
6 developments in the law it's appropriate to allow first
7 of all reconsideration under Rule 54 and then also to
8 allow the claim to go forward.

9 MR. AZMY: Uh-huh.

10 THE COURT: And this is a motion to dismiss.

11 MR. AZMY: Uh-huh.

12 THE COURT: We have no way of knowing what
13 the Supreme Court's going to do in *Kiobel*. But if I
14 allow -- reinstate the claim after *Kiobel* if that has any
15 impact in the decision, I can then revisit the matter.

16 MR. AZMY: Yes, Your Honor, if you reinstate
17 the claims now, allow discovery to proceed and in my view
18 the unlikely event that *Kiobel* holds that corporations
19 are exempt from liability, at that point the defendants
20 could move to dismiss the claims at summary judgment or
21 before trial.

22 And there would be no prejudice to the
23 defendants to have those claims in the case now. And if
24 *Kiobel* reaffirms plaintiff's position on the corporate
25 liability question, then it would have made more sense to

1 pursue these claims along side each other.

2 THE COURT: All right. I think I understand
3 your position. Let me hear from Mr. Koegel.

4 MR. KOEGEL: Thank you, Your Honor.

5 To hear the plaintiffs' motion, you'd think,
6 this was a very simple matter. All the Court has to do
7 under the plaintiffs' approach is determine whether
8 there's an international norm with the requisite
9 specificity for torture or war crimes or cruel and
10 degrading treatment.

11 And if the Court concludes the answer is yes,
12 we're done. The claim goes forward.

13 It's not that simple. It's not the approach
14 the Supreme Court used in *Sosa*. It's not the approach
15 that the Court of Appeals have used in assessing ATS
16 claims as we've cited in our brief. For example, the DC
17 Circuit and the Second Circuit both talk about the
18 necessity to go beyond that.

19 The Court in its original decision on our
20 motion to dismiss in fact employed the second step of the
21 *Sosa* analysis, looking to determine whether the five
22 special factors identified in *Sosa* cause -- dictated the
23 Court should exercise great caution which is the term the
24 Supreme Court used in *Sosa* in the second step, great
25 caution, in allowing a cause of action to proceed.

1 And when the Court looks at those five
2 special factors, the core principle is what has the
3 legislature done. What has Congress had to say that
4 would be relevant and would inform the Court's judgment?

5 We know the answer to that question based
6 upon the Fourth Circuit's decision earlier this year in
7 the *Lebron* case in which the Fourth Circuit in the
8 analogous context of determining whether to recognize a
9 *Bivens* action, to permit a *Bivens* action for detainee
10 abuse to proceed, determined that Congress had given
11 repeated, continuous and substantial attention to this
12 matter and had not determined to permit a private cause
13 of action. And as a result, the Court was not going to
14 disregard Congress' action and allow a *Bivens* claim to go
15 forward.

16 The same result obtains here. If the Court
17 looks at the relevant action by Congress, we have the
18 combatant activities exception to the FTCA which Congress
19 has not changed which bars any tort claims arising from
20 the combatant activities in the military.

21 We have the Federal Torture Statute which
22 provides only a criminal penalty. There is no civil
23 cause of action available.

24 We have the War Crimes Act, again, a federal
25 statute that provides only a criminal remedy.

1 And the United States has never charged
2 either CACI or any of its personnel with any violations
3 of any federal criminal statutes.

4 We have the Tortured Victims Protection Act
5 which does provide a civil remedy but only -- only for
6 actions arising under color of foreign law.

7 We can all agree that the photographs that
8 came out of Abu Ghraib are abhorrent, reprehensible at
9 best.

10 Congress has clearly focused on this
11 situation repeatedly over the years, and it has not
12 determined to provide a civil cause of action to these
13 plaintiffs under any federal statute.

14 That caused the Fourth Circuit in *Lebron* to
15 determine that it would be inappropriate to recognize a
16 *Bivens* action. That reasoning applies with equal force
17 here. It's the Court of Appeals' decision that we submit
18 is of greatest relevance and significant to the Court's
19 decision on ATS.

20 There's a second point that -- that applies
21 here as well. The plaintiffs approach this as if we were
22 relitigating the motion to dismiss.

23 We directed our arguments in our opposition
24 memorandum to those that they had made in their motion
25 seeking reconsideration. We didn't go back and seek to

1 relitigate every single legal issue that was present in
2 the motions to dismiss.

3 The result will -- in the reply brief the
4 plaintiffs submit, well, the defendants don't assert A or
5 they don't assert B. Well, there's a reason for that.
6 It wasn't raised in their motion seeking reconsideration.
7 We restricted our arguments to the matters they had
8 raised.

9 They argued that well there would be no
10 prejudice to CACI in reinstating these claims.

11 That misses the point. The question is
12 whether there is a valid basis in law for reinstating
13 these claims. If there is, then the motion should be
14 granted. If there's not, as we submit, then prejudice is
15 quite irrelevant.

16 CACI, in any event, should not be required to
17 have to defend in discovery and otherwise claims that
18 have no legal merit.

19 And, the request to reinstate the ATS claims
20 falls short of the standard required by -- by this Court
21 for --

22 THE COURT: Well, the Supreme Court is
23 considering the *Kiobel* case now, and the plaintiff has
24 cited I think three Circuit cases that have addressed
25 this issue that I don't think were available to us at the

1 time of my original decision on this matter.

2 Should I wait and see what the Supreme Court
3 does in *Kiobel*?

4 MR. KOEGEL: Probably not necessary, Your
5 Honor, because *Kiobel* presents the Supreme Court with two
6 issues. Originally cert was granted on the issue of
7 whether corporations could be liable under the ATS.
8 After oral argument on that point, the Supreme Court
9 asked for submission of additional briefs on a second
10 question dealing with the extraterritorial issue.

11 That is, could claims that arise in a foreign
12 country have no seeming connection to the United States,
13 be brought under ATS?

14 So those are the two issues pending in the
15 Supreme Court on *Kiobel*. And we submit that however the
16 Supreme Court comes out, there's still an inadequate
17 basis to permit these ATS claims to go forward, given the
18 *Sosa* analysis that the Court's required to undertake,
19 that at the time you issued your initial decision, *Kiobel*
20 had not been decided by the Second Circuit. And
21 prevailing view was to the extent there had been any law
22 developed on the issue was corporations were amenable to
23 suit under the ATS. The Second Circuit in *Kiobel* said,
24 no they were not, and the Supreme Court decided to review
25 that decision.

1 But whether the Supreme Court decides *Kiobel*
2 on the extraterritorial application issue or the
3 amenability of a corporation to suit, this Court doesn't
4 get to those issues unless it concludes that one, there
5 is an international norm that existed in 2003 and 2004,
6 and it's a plaintiff's burden to show that, and they
7 didn't make that showing in connection with their
8 original submission. And nothing has really changed in
9 that respect since the Court's decision in 2009.

10 We've got two District Court decisions that
11 have come down that we believe suffer from the same flaw
12 in analysis that the plaintiffs' approach take.

13 In fact, they cite those two decisions as
14 support for the simple approach they take in urging
15 simply determine whether there's an international norm
16 with requisite specificity, and if the answer is yes,
17 you're done. There's no room in --

18 THE COURT: There are five considerations in
19 *Sosa* that have to be taken into account, and I think I
20 did take those into account.

21 But I -- the *Doe versus Exxon Mobile* case
22 corporations are not immune from liability under ATS.
23 There are other decisions out there now that suggest
24 otherwise about what my original ruling was.

25 What impact, if any, should that have on my

1 consideration?

2 MR. KOEGEL: Virtually none, Your Honor,
3 because as we've indicated *Sosa* requires specific
4 application of the context in which the claim arise.

5 THE COURT: To the facts of this particular
6 case before the Court, not a general matter of what the
7 rules might be.

8 MR. KOEGEL: Exactly, exactly.

9 THE COURT: All right.

10 MR. KOEGEL: That was the approach you took
11 in your 2009 ruling. It was correct then. It remains
12 the law today.

13 As a result, those cases are dependent upon
14 the context from which those claims arose.

15 And, while it may have been appropriate in
16 those cases, the facts are traumatically different to say
17 the least. And the question remains whether the context
18 from which this case arises provides a basis for
19 recognizing that in 2003 and 2004, there was a
20 universally recognized international norm with the
21 requisite specificity required by *Sosa* to permit ATS
22 claims for torture, war crimes and cruel and inhuman
23 treatment brought by detainees against a civilian
24 contractor, a novel proposition at best.

25 And particularly given the special factors

1 that *Sosa* dictates must be examined by the Court which
2 the plaintiffs don't address at all, not at all.

3 The *Lebron* court did. And *Lebron* provides
4 compelling -- a compelling basis to conclude that those
5 special factors dictate the Court not recognize these
6 claims in this context.

7 THE COURT: All right.

8 MR. KOEGEL: It's really that simple at the
9 end of the day.

10 The Court could determine to wait on *Kiobel*.
11 But given the vagaries of that case and given that even
12 if the Supreme Court rules that ATS can be applied in an
13 extraterritorial manner and that corporations are liable,
14 that won't eliminate the need to conduct the *Sosa*
15 analysis at the very threshold of consideration for ATS
16 claims.

17 So, obviously if the Supreme Court says
18 corporations can't be liable, the matter is quite simple.
19 But we're not at that point. The Court's confronted with
20 a motion for reconsideration to reinstate the ATS claims.
21 Unless there's a valid legal basis to do that, the motion
22 should be denied, and we think there's the -- the
23 plaintiffs have fallen far short of the showing required
24 under *Sosa* to put those claims back into this case.

25 As Mr. Azmy acknowledges, discovery will be

1 affected by the presence of ATS claims. For example, the
2 Fourth Circuit's decision in the *Aziz* case which rejects
3 the knowledge standard advocated by plaintiffs and
4 requires much more, that's going to require discovery
5 into corporate purpose, corporate intend, and questions
6 that are going to arise about potential respondeat
7 superior liability that won't be present in discovery for
8 common law -- the common law tort claims that plaintiffs
9 seek to advance.

10 So, we think that the scope of discovery will
11 also inform the Court's judgment about whether to
12 reinstate those claims at this point in time, because it
13 will expand what we need to address in discovery on a
14 going forward basis.

15 THE COURT: Thank you.

16 MR. AZMY: Your Honor, may I --

17 THE COURT: Yes.

18 MR. AZMY: -- respond to a couple of those
19 points.

20 I'd like to talk about the merits of the ATS
21 claim and respond to counsel's assertion that we are
22 somehow oversimplifying the question.

23 Now --

24 THE COURT: What about the *Sosa*
25 considerations?

1 MR. AZMY: Your Honor, under *Sosa*, this Court
2 is required to ask three questions. One, is the norm at
3 issue universally accepted? Two, does it have definite
4 and specific content? And three, is it obligatory,
5 rather than merely aspirational?

6 Now, these five *Sosa* factors that Your Honor
7 stress and that defendant incorrectly, categorically
8 incorrectly call a second somehow escalating step are
9 incorporated into the high standard.

10 If you read *Sosa*, the Court starts with this
11 notion that "federal courts should be cautious in light
12 of their limited role, visa-vie Congress in creating new
13 international law causes of action". They don't want to
14 invite willy-nilly some causes of action that might
15 disrupt foreign policy.

16 And so, in order to guard against that
17 possibility, any norm to be -- to be accepted under *Sosa*
18 has to meet those three criteria. It's embedded in the
19 test. And now there may be some --

20 THE COURT: I'm not so sure they are embedded
21 in the test. And that's one of the concerns I have. And
22 that is, as you say create a new cause of action, what
23 are the contours of it, how is it established, what
24 causation is required?

25 MR. AZMY: Uh-huh.

1 THE COURT: How do you approve it? How do I
2 instruct the jury? Those are all factors that trial
3 judges take into consideration.

4 And, Ms. Burke has heard me say this,
5 district judges don't like to be first.

6 Can you cite me to a case where a case like
7 this has gone to trial on an ATS claim?

8 MR. AZMY: Well, a number of cases have
9 settled before trial and the --

10 THE COURT: So, the answer is no, not one has
11 ever gone to trial?

12 MR. AZMY: Let me give it some --

13 THE COURT: You've had a lot of time.

14 MR. AZMY: The *Kadic* case from the Second
15 Circuit, Your Honor, which held that private entities,
16 non-state actors can be liable for war crimes. And I
17 want to stress --

18 THE COURT: That one did go to trial?

19 MR. AZMY: I believe it did, yes, yes.

20 THE COURT: So I'd be the second judge in
21 America to do this if I did, then?

22 MR. AZMY: Well, Your Honor, perhaps. But
23 there are -- let me talk about why it should not be
24 complicated to at least try the war crimes claim.

25 Now, defendants raise some ambiguity about

1 the torture claim because there is some question about
2 whether or not torture can apply to non-state actors.

3 And, I want to put that to the side one
4 second. Judge Messitte deals with that very thoroughly,
5 and focus on war crimes, because this is the point that
6 we underscore the defendants drop in their opposition
7 brief.

8 There can be no dispute that -- respectfully,
9 that war crimes meet the *Sosa* standard.

10 One hundred and eighty countries have adopted
11 the Geneva Conventions, including the U.S. and Iraq.
12 That goes to universal acceptance.

13 Number two, the Geneva Conventions define
14 grave breaches of the conventions as war crimes, and
15 include in that torture, cruel and inhuman and degrading
16 treatment very specifically. That goes to specific and
17 definite content.

18 Finally and very critically, Your Honor, in
19 1996, Congress passed the War Crimes Act which
20 criminalizes grave breaches of the Geneva Conventions as
21 war crimes. That goes to it being obligatory.

22 THE COURT: But it did make it a claim or
23 cause of action for a civil liability, did it?

24 MR. AZMY: It didn't make it -- it didn't
25 make it a claim for civil liability. That's what ATS

1 does. And that's why every court, Your Honor, that has
2 considered the question finds -- has concluded that war
3 crimes, especially, is specific, universal and
4 obligatory.

5 THE COURT: And that's putting to the side
6 cruel, inhuman --

7 MR. AZMY: For now, which I acknowledge --
8 which the defendants raised some ambiguity about. We
9 believe based on Judge Messitte's analysis you could
10 apply it to non-state actors.

11 But War Crimes is clear, and you could avoid
12 dealing with the torture, cruel and inhuman norm by just
13 ruling that war crimes, which unambiguously apply to
14 non-state actors, to private entities, because the Geneva
15 Conventions do not distinguish between the type of
16 perpetrator, nor does the War Crimes Act. They focus on
17 the victim.

18 And there's no, as the DC Circuit and the two
19 district courts and the *Flomo* decision in the Seventh
20 Circuit very strongly say, corporations are not exempt
21 from these prohibitions simply because they have a
22 corporate structure, particularly where, under U.S.
23 agency law principles, a corporation goes in there, makes
24 billions of dollars on this contract based on what their
25 employees do, and then claims immunity from what the

1 employees do by virtue of its corporate structure.

2 All of the courts --

3 THE COURT: I appreciate that position. I
4 don't need you to recite all of the arguments if your
5 brief. I was focused more on the *Sosa* factors, and I've
6 raised the considerations that I have.

7 I think that I'm prepared to rule. I'm
8 prepared to rule.

9 MR. AZMY: Thank you, Your Honor.

10 THE COURT: Let the record reflect this
11 matter is before the Court on the plaintiffs' motion to
12 reconsider the Court's dismissal of the Alien Tort
13 Statute claims.

14 And plaintiffs argue that the question of
15 corporate liability for ATS claims law has certainly
16 evolved since the time I heard the case in 2009.

17 And I concluded previously that the ATS claim
18 should not lie in this case. And I expressed great
19 concern then about the *Sosa* factors of what I considered
20 at that time to be the novelty of a government contractor
21 in a war zone being held civilly liable for an ATS claim
22 for the reasons set forth in my previous opinion.

23 I have reexamined the case law submitted to
24 me, and I don't want to skip over the question of whether
25 or not I could even do this procedurally. I think under

1 Rule 54, I can, and I should reexamine my previously
2 rulings, given the evolution of the law since 2003-2004
3 and my judgment. A lot has happened.

4 Sosa still remains the law, but I am
5 persuaded that there are new decisions that have come
6 from other courts that suggest that I should reexamine my
7 ruling, and so I will.

8 I think that the -- I'm not going to use the
9 word "consensus", but it seems to me, there is a growing
10 body of law that suggests that plaintiffs' claims which
11 encompass war crimes are within the purview of
12 international law, a norm of international law.

13 And under the ATS, "the Court has the
14 original jurisdiction of a civil action by an alien for
15 any tort committed in violation of the law of nations or
16 treaty of the states".

17 While Sosa says that the Congress did not
18 intend to create new causes of actions, the Court must
19 "require any claim based upon present law of nations --
20 present day law of nations to rest upon the norm of
21 international character and accepted by civilized world
22 and define with specificity comparable to the features of
23 18th Century paradigms that Congress had in mind when it
24 enacted the ATS. And that's in Sosa pages 725.

25 Sosa refers to offenses against ambassadors,

1 violations of safe conduct and piracy. And the statute
2 does confer subject matter jurisdiction over a limited
3 number of offenses defined.

4 The Second Circuit in the F-I-L-A-R-T-I-G-A
5 case and that's, *Filártiga* has acknowledged that torture,
6 war crimes and genocide have been recognized as
7 actionable under the ATS. And civil liability has been
8 imposed for the torturer, just like for the pirate and
9 the slave trader before him.

10 I declined to exercise jurisdiction at that
11 time because I was of the opinion that the tort claims
12 against the government contract interrogators were too
13 modern and too novel to satisfy the *Sosa* requirements.
14 And I went through some analysis of what I call the *Sosa*
15 factors.

16 Two district courts, including Judge Ellis of
17 this court in the *Xe Services* case and Judge Messitte in
18 the Al-Quraishi and that's A-L-Q-U-R-A-I-S-H-I case, have
19 examined the issue in more detail than I did, on the
20 issue of whether or not corporations can be held liable
21 under the ATS and also looking at the norms of whether or
22 not war crimes are actionable under the ATS under *Sosa*.

23 And Judge Ellis in the *Xe* case which is the
24 Blackwater case determined that substantive claims can be
25 enforced against private non-state actors such as

1 Blackwater.

2 And the case involving *L-3 Services* that
3 Judge Messitte wrote concluded the claim of war crimes
4 may be asserted against private actors apart from any
5 state actions.

6 Whatever the Supreme Court might do in the
7 *Kiobel* case and that's K-I-O-B-E-L may or may not have
8 any impact on what we do here. But the case was just
9 argued, and I understand that they're competing views of
10 what that case involves.

11 But I am of the opinion that in this case
12 that CACI is similarly situated as a corporate defendants
13 in *Xe Services* and *Al-Quraishi* and could be liable and
14 may be liable for violation of law of nations under ATS.

15 I am going to allow the claim to go forward
16 for several reasons. First, because I think that the way
17 the law has evolved, there is an argument that can be
18 made that reasonable jurors could disagree about that
19 there is a claim.

20 I think that there is enough here where war
21 crimes clearly would fall within the purview of the ATS.
22 And I do think that the case law concerning the Geneva
23 Conventions is specific and universal and obligatory.

24 The United States has adopted the Geneva
25 Conventions. In my previous decision I did not

1 separately address the issue of international norms. I'm
2 now making a judgment that I think that by ratifying the
3 Geneva Conventions, that is, define war crimes are
4 binding and universal, sufficient to establish a claim
5 here. And the actions that plaintiffs allege here are no
6 less specific in terms of their -- the allegations that
7 they made about what occurred.

8 Also, and another very important reason why
9 I'm going to allow it is in the interest of judicial
10 economy, this case has been pending for several years. I
11 think it's time that we go forward with the discovery
12 that needs to be done.

13 The discovery on this ATS issue should be
14 done. If it turns out that the Supreme Court were to
15 rule that corporations are not liable under ATS, then
16 obviously on summary judgment I could take care of that.

17 I still may see this case on summary
18 judgment. I certainly expect to. And I do think that
19 the discovery should be fulsome on this issue as it
20 relates to all the other claims that are before the
21 Court, so that by the time we get to the end of the case
22 as it relates to discovery and motions practice, I'll
23 have a full record, and then, each side will have an
24 opportunity at that point to fully brief all the issues
25 that may remain involving summary judgment, including

1 this claim it seems to me after discovery's concluded.

2 And, then we can decide about trial. And I
3 have -- the reservations I've expressed about how to try
4 such a claim being the second judge in America to try
5 one, ought to inform plaintiff of the concerns that I
6 have about whether or not this will survive all of that.

7 And if it does, that I would need --
8 certainly need to see some real substantive briefing of
9 just how this matter would proceed.

10 So, for right now, I'm going to grant the
11 motion for the reasons I've just stated. And I will get
12 back to you all very shortly with a response on
13 submissions you made on discovery.

14 Thank you. You're excused.

15 MR. KOEGEL: Your Honor.

16 THE COURT: Yes.

17 MR. KOEGEL: May I?

18 THE COURT: Come to the podium, sure.

19 MR. KOEGEL: Point of clarification, will the
20 Court address which of the nine ATS counts it is
21 reinstating? The Court indicated in its ruling --

22 THE COURT: Yeah.

23 MR. KOEGEL: -- that you were going to
24 reinstate the substantive war crimes counts. There are
25 counts for conspiracy and for aiding and abetting for

1 each of the three substantive ATS claims, leaving a total
2 of nine counts.

3 THE COURT: I'm reinstating all nine.

4 MR. KOEGEL: All nine?

5 THE COURT: Yes.

6 MR. KOEGEL: Thank you.

7 THE COURT: Thank you. You're excused.

8 MS. BURKE: Thank you, Your Honor.

9 (Proceeding concluded at 10:51 a.m.)
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CERTIFICATE OF REPORTER

I, Renecia Wilson, an official court reporter for the United State District Court of Virginia, Alexandria Division, do hereby certify that I reported by machine shorthand, in my official capacity, the proceedings had upon the motions in the case of Al Shimari, et al vs. Timothy Dugan, et al.

I further certify that I was authorized and did report by stenotype the proceedings and evidence in said motions, and that the foregoing pages, numbered 1 to 29, inclusive, constitute the official transcript of said proceedings as taken from my shorthand notes.

IN WITNESS WHEREOF, I have hereto subscribed my name this 19th day of August, 2013.

/s/
Renecia Wilson, RMR, CRR
Official Court Reporter