UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

SUHAIL NAJIM ABDULLAH AL SHIMARI, et al.,	)	
Plaintiffs,	)	Case No. 1:08-CV-00827-GBL-JFA
v.	)	
CACI PREMIER TECHNOLOGY, INC.	)	
Defendant.	)	

MEMORANDUM IN SUPPORT OF DEFENDANT CACI PREMIER TECHNOLOGY, INC.'S MOTION FOR RECONSIDERATION OF THE COURT'S ORDER REINSTATING PLAINTIFFS' ALIEN TORT STATUTE CLAIMS [Dkt. #159] OR IN THE ALTERNATIVE TO DISMISS THE ALIEN TORT STATUTE CLAIMS FOR LACK OF SUBJECT MATTER JURISDICTION

I. INTRODUCTION

On April 17, 2013, the United States Supreme Court issued its decision in *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. ___, 2013 WL 1628935 (Apr. 17, 2013). In *Kiobel*, the Supreme Court held that the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, does not apply extraterritorially. *Kiobel*, 2013 WL 1628935, at *6. This is a bright line test that forecloses ATS claims here. ***All*** of the violations of international norms alleged in the Third Amended Complaint, as well as all of Plaintiffs' alleged injuries, occurred in Iraq. Since the ATS does not provide jurisdiction for alleged violations of the law of nations occurring in Iraq, the Court must dismiss the ATS claims.

This Court dismissed Plaintiffs' original ATS claims in 2009. *Al Shimari v. CACI Premier Technology, Inc.*, 657 F. Supp. 2d 700, 727 (E.D. Va. 2009). Upon remand of this

action, the Court granted Plaintiffs' motion to reinstate Plaintiffs' ATS claims. [Dkt. #159]. The Supreme Court's decision in *Kiobel* makes clear that this Court's original decision to dismiss Plaintiffs' ATS claims was the correct result, as ATS does not create jurisdiction over alleged violations of international norms occurring outside the United States. Accordingly, the Court should reconsider its November 1, 2012 order reinstating Plaintiffs' ATS claims and dismiss those claims. Alternatively, the Court can proceed without regard to reconsideration and dismiss the ATS claims for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1).

Questions of subject matter jurisdiction are not subject to waiver and may be asserted at any time. *Kanai v. McHugh,* 638 F.3d 251, 255 (4th Cir. 2011) (citation omitted). Moreover, subject matter jurisdiction, when questioned, must be decided before any other matter. *United States v. Wilson,* 699 F.3d 789, 793 (4th Cir. 2012) (citation omitted). Applied to this action, these principles require this Court to decide this motion challenging subject matter jurisdiction with respect to the ATS claims before adjudicating any other matters in this action.

II. ANALYSIS

A. Plaintiffs Bear the Burden of Establishing Subject Matter Jurisdiction

The issue of subject matter jurisdictions is not a 'jump ball' where the parties are equally positioned. Rather, the burden of proving subject matter jurisdiction is on the plaintiff, the party asserting jurisdiction. *McLaughlin v. Safeway Services, LLC,* 429 Fed. App'x 347, 348 (4th Cir. 2011); *Best Med. Belgium, Inc. v. Kingdom of Belgium,* 2012 U.S. Dist. LEXIS 180961, *9 (E.D. Va. Dec. 20, 2012) (Lee, J.) (citations omitted). The Court lacks subject matter jurisdiction when a plaintiff asserts claims under a federal statute that does not reach extraterritorial conduct alleged in the complaint. *Schreiber v. Dunabin,* No. 1:12-cv-852, U.S. Dist. LEXIS 53752, at *12-13 (E.D. Va. Mar. 29, 2013) (Lee, J.). A plaintiff must establish the existence of subject matter jurisdiction by a preponderance of the evidence. *United States ex rel. Vuyyuru v. Jadhav,*

555 F.3d 337, 347 (4th Cir. 2009). This means that the Plaintiffs here must, by a preponderance of the evidence, demonstrate the existence of subject matter jurisdiction for alleged violations of international norms occurring in Iraq – in spite of the Supreme Court's holding that that the ATS does not apply extraterritorially, and in spite of their consistent allegations, through four versions of their Complaint, that all of the operative activity for their ATS claims took place in Iraq.

In attempting those jurisdictional gymnastics, Plaintiffs must also confront the longstanding principle of American law that because legislation is presumed to apply only within the territorial jurisdiction of the United States unless the contrary affirmative intention of Congress is clearly expressed, *Small v. United States*, 544 U.S. 385, 388-89 (2005); *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991), courts must resolve *restrictively* any doubts concerning the extraterritorial application of a statute. *Smith v. United States*, 507 U.S. 197, 204 (1993); *Arc Ecology v. United States*, 411 F.3d 1092, 1097 (9th Cir. 2005).

B. This Court Has Plenary Power to Reconsider Its Order Reinstating Plaintiffs' ATS Claims

This Court's order reinstating Plaintiffs' ATS claims is not a final order because it does not resolve all claims by all Plaintiffs. Fed. R. Civ. P. 54(b); *see also Am. Canoe Ass'n v. Murphy Farms*, 326 F.3d 505, 514-15 (4th Cir. 2003) ("[A] district court retains the power to reconsider and modify its interlocutory judgments, including partial summary judgments, at any time prior to final judgment when such is warranted."). Indeed, because the Court's Order *reinstated* claims, the Order did not resolve any claims by any of the Plaintiffs. "[A]ny order . . . that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties . . . may be revised at any time before the entry of judgment adjudicating all the claims and all the parties' rights and liabilities." Fed. R. Civ. P. 54(b). As Plaintiffs themselves acknowledged in seeking reinstatement of their ATS claims, based solely on non-binding precedent, "the Court is

permitted to conduct a *de novo* review of any of its prior rulings . . . when it is convinced [that] a prior ruling was incorrect.'"[1] Indeed, as Plaintiffs further acknowledged, "[i]t is appropriate for courts to grant motions for reconsideration when a party raises relevant case law not available at the time of the court's original order."[2] CACI agreed in the context of Plaintiffs' motion for reconsideration, acknowledging that the issuance of binding case law is a quintessential situation where reconsideration is appropriate.[3]

Here, the Court reinstated Plaintiffs' ATS claims, all of which are based on supposed violations of the law of nations occurring outside the United States. Since the time of the Court's Order, however, the United States Supreme Court has issued a decision holding that ATS does not apply to claims involving violations of international norms occurring outside the United States. Accordingly, reconsideration in order to conform this Court's Order to binding Supreme Court precedent is both appropriate and necessary.

C. The Supreme Court Rejected the Extraterritorial Application of ATS in *Kiobel*

On March 18, 2009, this Court dismissed Plaintiffs' claims brought under ATS, holding that Plaintiffs' claims did not have the "definite content and acceptance among civilized nations [as] the historical paradigms familiar when § 1350 was enacted." *Al Shimari v. CACI Premier Technology, Inc.*, 657 F. Supp. 2d 700, 727 (E.D. Va. 2009). In particular, the Court held that it

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[1] Plaintiffs' Memorandum of Law in Support of their Motion Seeking Reinstatement of the Alien Tort Statute Claims at 5 [Dkt. #145] (quoting *Palmetto Pharm. LLC v. AstraZeneca Pharm. LP*, No. 2:11-cv-807, 2012 U.S. Dist. LEXIS 90253, at *10 (D.S.C. June 29, 2012)).

[2] Plaintiffs' Reply in Support of their Motion Seeking Reinstatement of the Alien Tort Statute Claims at 4 [Dkt. #157] (citing *United States v. Smithfield Foods, Inc.*, 969 F. Supp. 975, 977 (E.D. Va. 1997) (listing a "significant change in the law" as a basis for granting a motion for reconsideration)).

[3] Defendants' Opposition to Plaintiffs' Motion Seeking Reinstatement of the Alien Tort Statute Claims at 5 [Dkt. #154].

was far from clear that Plaintiffs' allegations, involving claims against contractors used in an overseas war zone "constitute specific, universal, and obligatory violations of the law of nations." *Id.* In addition, the Court held that "even if Plaintiffs' claims were sufficiently accepted and universal, the Court is unconvinced that ATS jurisdiction reaches private defendants such as CACI."

On November 1, 2012, the Court granted Plaintiffs' motion to reinstate claims asserted by Plaintiffs under ATS. [Dkt. #159]. All of the ATS claims currently pursued by Plaintiffs allege violations of the law of nations occurring in Iraq and causing injury to Plaintiffs while in the custody of the United States in Iraq.

On April 17, 2013, the United States issued its decision in *Kiobel*, 2013 WL 1628935. *Kiobel* involved ATS claims brought by Nigerians now living in the United States, with the Plaintiffs contending that certain Dutch, British, and Nigerian corporations aided and abetted the Nigerian government's violations of the law of nations. *Id.* at *3. After the district court denied the corporations' motions to dismiss, the Second Circuit reversed and held that dismissal was required because the ATS did not permit suits against corporate defendants. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 145 (2d Cir. 2010). The Supreme Court granted *certiorari* to consider the question of corporate liability, but then directed the parties to file supplemental briefs addressing whether the ATS had extraterritorial application. *Kiobel*, 2013 WL 1628935, at *3.

The Court began its analysis by emphasizing the well-established principle of the "presumption against extraterritoriality" and noting that this canon of statutory construction "provides that '[w]hen a statute gives no clear indication of an extraterritorial application, it has none.'" *Id.* at *4 (quoting *Morrison v. Nat'l Australia Bank Ltd.*, 130 S. Ct. 2869, 2878 (2010)).

As the Court observed in *Kiobel*, the presumption against extraterritorial effect of United States laws is well established. The Supreme Court described this doctrine at length in its recent decision in *Morrison*:

> It is a "longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991) (*Aramco*) (quoting *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949)). This principle represents a canon of construction, or a presumption about a statute's meaning, rather than a limit upon Congress's power to legislate, *see Blackmer v. United States*, 284 U.S. 421, 437 (1932). It rests on the perception that Congress ordinarily legislates with respect to domestic, not foreign matters. *Smith v. United States*, 507 U.S. 197, 204, n.5 (1993). Thus, "unless there is the affirmative intention of the Congress clearly expressed" to give a statute extraterritorial effect, "we must presume it is primarily concerned with domestic conditions." Aramco, *supra*, at 248 (internal quotation marks omitted). The canon or presumption applies regardless of whether there is a risk of conflict between the American statute and a foreign law, *see Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 173–174 (1993). When a statute gives no clear indication of an extraterritorial application, it has none.

Morrison, 130 S. Ct. at 2877-78 (parallel citations omitted). Thus, the Supreme Court acknowledged that it "typically appl[ies] the presumption to discern whether an Act of Congress regulating conduct applies abroad," and that "[t]he principles underlying the presumption against extraterritoriality thus constrain courts exercising their power under the ATS." *Kiobel*, 2013 WL 1628935, at *5, 6.

The petitioners in *Kiobel* argued that even if the presumption against extraterritoriality applied, ATS overcomes that presumption and therefore can apply outside the United States. The Supreme Court emphatically rejected that argument:

> But to rebut the presumption, the ATS would need to evince a clear indication of extraterritoriality. It does not.
>
> To begin, nothing in the text of the statute suggests that Congress intended causes of action recognized under it to have

> extraterritorial reach. The ATS covers actions by aliens for violations of the law of nations, but that does not imply extraterritorial reach – such violations affecting aliens can occur either within or outside the United States.

Id. at *6 (internal citation and quotation marks omitted). Indeed, the Court specifically rejected the premise that because ATS was understood at the time of enactment to reach acts of piracy that the statute should have general extraterritorial effect. As the Court observed, pirates are unique in that, by definition, "[p]iracy typically occurs on the high seas, beyond the territorial jurisdiction of the United States or any other country." *Id.* at *8. For that reason, the Court concluded that "pirates may well be a category unto themselves," and that the availability of ATS claims against pirates does not imply the extraterritorial reach of ATS with respect to other categories of defendants. *Id.* (citing *Morrison*, 130 S. Ct. at 2883 ("[W]hen a statute provides for some extraterritorial application, the presumption against extraterritoriality operates to limit that provision to its terms.")).

ATS claims that seek relief for violations of the law of nations occurring outside of the United States are not allowed.[4] After noting that "all the relevant conduct took place outside the United States," the Court summarized its holding as follows:

> We therefore conclude that the presumption against extraterritoriality applies to claims under the ATS, and that nothing in the statute rebuts that presumption. [T]here is no clear indication of extraterritoriality here, and petitioners' case seeking relief for violations of the law of nations occurring outside the United States is barred.

Id. at *10 (internal quotations omitted) (alteration in original).

[4] The Court observed that "even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorially."

D. *Kiobel* Requires Dismissal of Plaintiffs' ATS Claims for Lack of Subject Matter Jurisdiction

The application of *Kiobel* to the present action is straightforward. *Kiobel* holds that the ATS does not apply to conduct occurring outside the United States. *Id.* at *10. Simply put, the ATS does not apply extraterritorially. Because Plaintiffs' ATS claims (torture, war crimes, and cruel, inhuman and degrading treatment, along with conspiracy and aiding and abetting counts associated with each) involve conduct and injuries occurring in Iraq, *Kiobel* controls the result here and requires that the Court dismiss those claims for lack of subject matter jurisdiction.

Iraq, of course, is not within the territorial jurisdiction of the United States. That it was a country that was subject to invasion and occupation during some of the time of Plaintiffs' detention does not make any difference. The Supreme Court did not base its holding on a constitutional, foreign affairs rationale that jurisdiction should not extend to claims arising in a foreign sovereign's territory. Rather, the Court decided *Kiobel* through a straightforward application of the general presumption against extraterritoriality, a doctrine that presumes that statutes do not apply to conduct outside the United States. *Kiobel*, 2013 WL 1628935, at *4 ("The canon provides that '[w]hen a statute gives no clear indication of an extraterritorial application, it has none . . . .'" (quoting *Morrison*, 130 S. Ct. at 2878)); *see also id.* at *5 ("We typically apply the presumption to discern whether an Act of Congress regulating conduct applies abroad."). Indeed, as noted above, the Court summed up its holding in terms of a lack of extraterritoriality rather than as a rule limited to conduct occurring within another nation's sovereign territory:

> We therefore conclude that the presumption against extraterritoriality applies to claims under the ATS, and that nothing in the statute rebuts that presumption. [T]here is no clear indication of extraterritoriality here, and petitioners' case seeking relief for violations of the law of nations ***occurring outside the United States*** is barred.

Id. at *10 (emphasis added) (internal quotations omitted) (alteration in original).

Notably, the *Kiobel* Court relied heavily on the Court's decision in *Morrison*, where the Court observed that the presumption against extraterritoriality applies "regardless of whether there is a risk of conflict between the American statute and a foreign law." *Morrison*, 130 S. Ct. at 2878 (citing *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 173–174 (1993)). Indeed, the *Kiobel* Court's treatment of piracy makes clear that the Court's holding is one that rejects extraterritoriality generally, and that the limited exception for piracy (perhaps the paradigmatic violation of the law of nations at the time of ATS's enactment) does not support a conclusion that ATS applies extraterritorially for any other categories of violations of the law of nations. *Kiobel*, 2013 WL 1628935, at *8 (citing *Morrison*, 130 S. Ct. at 2883 ("[W]hen a statute provides for some extraterritorial application, the presumption against extraterritoriality operates to limit that provision to its terms.")).

Despite the bright line established by *Kiobel* and despite the indisputable fact that Plaintiffs have consistently alleged that all of the conduct constituting violations of international norms actionable through the ATS occurred in Iraq, Plaintiffs will attempt to persuade the Court that their claims somehow survive *Kiobel*. We now address what we anticipate will be Plaintiffs' creative theories.

1. Iraq Was and Is a Sovereign State.

Plaintiffs may try to argue that the Supreme Court did not really mean what it said in *Kiobel* – that *Kiobel* does not bar all claims based on extraterritorial conduct, but only those claims based on conduct occurring in the territory of a foreign sovereign. From that departure, Plaintiffs may then argue that Iraq is not a foreign sovereign. There are two answers to that semantical gamesmanship. First, the Supreme Court did not limit its opinion in that way. Second, the political question doctrine bars judicial review of Iraq's sovereignty.

The plain language of *Kiobel* holds that claims arising outside the territory of the United States are barred. The Supreme Court, when referring to the locus of conduct that, because of the presumption against extraterritoriality, *could not form the basis of an ATS claim*, used a variety of terms. These terms include "outside the United States" (*Kiobel*, 2013 WL 1628935, at *10, "abroad" (*id.* at *5, *6, *7, *8), "in the territory of a foreign sovereign" (*id.* at *6), "beyond the territorial jurisdiction of the United States" (*id.* at *8), "in the territory of another sovereign" (*id.* at *5, *7, *8, *9), "in another civilized jurisdiction" (*id.* at *6), and "on foreign soil. (*id.* at *6)." What all of these formulations have in common is that they describe conduct that is *extraterritorial* – that is, conduct occurring outside the United States. Thus, all of the Supreme Court's formulations of places where conduct cannot form the basis of a claim under ATS are correct because they all fit squarely within the presumption against extraterritoriality that controlled the decision in *Kiobel*.

Moreover, even if *Kiobel* were limited, which it most clearly is not, to claims involving violations of international norms occurring in a foreign sovereign territory, Iraq qualifies. In *Wye Oak Tech., Inc. v. Republic of Iraq*, 666 F.3d 205 (4th Cir. 2011), the Fourth Circuit found jurisdiction over Iraq, as a foreign state, based on the commercial activities exception to the Foreign Sovereign Immunities Act. Of course, the Foreign Sovereign Immunities Act only applies to foreign sovereigns.

As the Supreme Court explained in *Boumediene v. Bush*, 553 U.S. 723, 754 (2008), sovereignty, in the legal sense, means a "claim of right," even if that right cannot be practically exercised. *Id.* Sovereignty "implies a state's lawful control over its territory generally to the exclusion of other states, authority to govern in that territory, and authority to apply law there." *Id.* (quoting 1 *Restatement (Third) of Foreign Relations Law of the United States* § 206, cmt. b,

at 94 (1986)). The *Boumediene* Court explained that military occupation does not eviscerate sovereignty: "Indeed, it is not altogether uncommon for a territory to be under the *de jure* sovereignty of one nation, while under the plenary control, or practical sovereignty, of another. This condition can occur when the territory is seized during war, as Guantanamo was during the Spanish-American War." *Id.* As the Supreme Court observed in *Boumediene*, even though Cuba is the sovereign with respect to Guantanamo Bay, "Cuba effectively has no rights as a sovereign until the parties agree to modification of the 1903 Lease Agreement or the United States abandons the base." *Id.* at 753; *see also Cuban Am. Bar Ass'n. v. Christopher*, 43 F.3d 1412, 1425 (11th Cir. 1995) (holding that control and jurisdiction is not equivalent to sovereignty). Despite its utter lack of rights, Cuba is the sovereign over Guantanamo Bay, not the United States. *Boumediene*, 553 U.S. at 754 ("We therefore do not question the Government's position that Cuba, not the United States, maintains sovereignty, in the legal and technical sense of the term, over Guantanamo Bay.").[5]

When CACI PT first deployed interrogators to Iraq in October 2003, Iraq was administered by the Coalition Provisional Authority ("CPA"). The Third Circuit described the formation and nature of the CPA as follows:

> The Coalition Provisional Authority ("CPA") was created in May 2003 by the United States, the United Kingdom, and other members of the Coalition Forces to function as a temporary governing body in Iraq. U.S. Secretary of Defense Donald Rumsfeld appointed Ambassador Paul Bremer to serve as Administrator of the CPA, and shortly after it was established, the

[5] In *Boumediene*, the Supreme Court declined to embrace "a formalistic, sovereignty-based test for determining the reach of the Suspension Clause" in holding that the jurisdiction-stripping provision of the Military Commissions Act was an unconstitutional suspension of the writ of habeas corpus. The Court explicitly confined its constitutional holding "only" to the extraterritorial reach of the Suspension Clause, a determination that "turn[ed] on objective and practical concerns, not formalism" with respect to sovereignty. 553 U.S. at 764; *see id.* at 755-64.

> U.N. Security Council passed a resolution recognizing the CPA's legitimacy. The U.N.'s resolution called upon the CPA to "promote the welfare of the Iraqi people through the effective administration of the territory. . . . For the next fourteen months, the CPA carried out this mandate by administering humanitarian programs and reconstruction projects.

United States v. Whiteford, 676 F.3d 348, 351 (3d Cir. 2012) (citation omitted). This history was recounted by Judge Ellis in *United States ex rel. DRC, Inc. v. Custer Battles, LLC*, 444 F. Supp. 2d 678, 688-89 (E.D. Va. 2006), where he concluded that the CPA was not an instrumentality of the United States. On appeal, the Fourth Circuit noted and did not disturb that holding, but ultimately held that because invoices were presented to U.S. government employees "detailed" to the CPA, that was sufficient for purposes of a False Claims Act violation even if the CPA itself was not an instrumentality of the United States. *United States ex rel. DRC, Inc. v. Custer Battles, LLC*, 562 F.3d 295, 306 (4th Cir. 2009), *aff'g in part, rev'g in part* 444 F. Supp. 2d 678.

The source documents relied on by these courts similarly demonstrate that the coalition invasion and occupation of Iraq did not change Iraq's status as a sovereign territory, as it is the state that is sovereign, not any particular government. From the time of Iraq's occupation, it continued to have its own laws. CPA Regulation No. 1, issued on May 16, 2003 (prior to the deployment of CACI PT interrogation personnel), provided as follows:

> Unless suspended or replaced by the CPA or suspended by legislation issued by democratic institutions of Iraq, laws in force in Iraq as of April 16, 2003 shall continue to apply in Iraq insofar as the laws do not prevent the CPA from exercising its rights and fulfilling its obligations, or conflict with the present or any other Regulation or Order issued by the CPA.

CPA Reg. No. 1 (May 16, 2003) (O'Connor Decl., Ex. 1). Most notably, after creation of the CPA, the United Nations Security Council issued Security Council Resolution 1483, in which the Security Council endorsed the CPA as an international entity providing temporary

governance for Iraq (O'Connor Decl., Ex. 2 at 2), and expressly ***"[r]eaffirm[ed] the sovereignty and territorial integrity of Iraq***." *Id.* at 1 (emphasis added).

On July 13, 2003, again before CACI PT interrogation personnel arrived in Iraq, the CPA established the Governing Council of Iraq, a delegation of Iraqis that served as "representatives of the Iraqi people" and became "the principal body of the Iraqi interim administration, pending the establishment of an internationally recognized, representative government by the people of Iraq." CPA Reg. No. 6 at 1 (O'Connor Decl., Ex. 3).[6] On October 16, 2003, the United Nations Security Council issued Resolution 1511, in which the Security Council expressed support for the Governing Council of Iraq (O'Connor Decl., Ex. 4 at 2), and once again reaffirmed that Iraq continued to be a sovereign nation:

> *Acting* under Chapter VII of the Charter of the United Nations, [the Security Council],
>
> 1. ***Reaffirms*** **the sovereignty and territorial integrity of Iraq**, and *underscores*, in that context, the temporary nature of the exercise by the Coalition Provisional Authority (Authority) of the specific responsibilities, authorities, and obligations under applicable international law recognized and set forth in resolution 1483 (2003), which will cease when an internationally recognized, representative government established by the people of Iraq is sworn in and assumes the responsibilities of the Authority . . . .

Id. (emphasis added).

In March 2004, the Law of Administration for the State of Iraq for the Transitional Period became the Iraqi Constitution, and was signed by the Iraqi Governing Council. *See* http://www.refworld.org/docid/45263d612.html. In June 2004, the United Nations Security Council adopted Resolution 1546 to facilitate the transfer of power from the CPA to an interim

[6] The Governing Council of Iraq was dissolved on June 9, 2004 in connection with the establishment of a democratically-elected Iraqi government. *See* CPA Reg. No. 9 (O'Connor Decl., Ex. 5).

Iraqi government, stating that the CPA would cease to exist by June 30, 2004. Subsequently, on June 28, 2004, the CPA transferred what power it possessed to the Iraqi Interim Government.

Iraq never ceased to exist as a sovereign nation. Its borders remained intact. Its local laws, not the United States Code, continued as the law of the land. Though the CPA was necessary to provide some form of temporary government after the displacement of the Saddam Hussein regime, the existence of the CPA did not change Iraq's status as a sovereign nation any more than changes in administrations in this country affect the sovereignty of the United States. Therefore, even if *Kiobel* could be contorted to apply only to conduct occurring in a foreign sovereign territory, that (nonexistent) requirement would be satisfied.

This inquiry regarding Iraqi sovereignty is, however, precisely the type of inquiry that presents a political question. *See, e.g., Nat'l City Bank v. Republic of China*, 348 U.S. 356, 358 (1955) ("The status of the Republic of China in our courts is a matter for determination by the executive and is outside the competence of this Court."); *Jones v. United States*, 137 U.S. 202, 212 (1890) ("Who is the sovereign, *de jure* or *de facto*, of a territory is not a judicial, but a political[] question . . . ."); *Lin v. United States*, 561 F.3d 502, 506-07 (D.C. Cir. 2009) (holding that whether the United States had temporary *de jure* sovereignty over Taiwan was a political question the courts could not decide).[7] The United Nations Security Council, of which the United States is a permanent member with an absolute veto power, reaffirmed that Iraq

[7] The political question doctrine is alive and well in this Circuit. *See Taylor v. Kellogg Brown & Root Services, Inc.*, 658 F.3d 402, 411 (4th Cir. 2011) (holding that a servicemember's claim against a military contractor for injuries sustained as a result of the contractor's alleged negligence in Iraq was barred by the political question doctrine); *In re: KBR Burn Pit Litigation*, 2013 U.S. Dist. LEXIS 26862 (D. Md. Feb. 27, 2013) (holding claims by servicemembers against a military contractor alleging negligence and breach of contract arising out of the operation of burn pits in Iraq and Afghanistan were barred by the political question doctrine, derivative sovereign immunity and the combatant activities exception to the FTCA), *appeal docketed*, March 26, 2013 (4th Cir. No. 13-1430).

continued to exist as a sovereign territory for the entire time that CACI PT was providing interrogation support to the United States. The cases cited above stand for the clear proposition that there is no justiciable basis for this Court to second-guess that determination.

2. Abu Ghraib Prison Was Not Within United States Territory

An even more fanciful argument might be that Abu Ghraib prison was, under some stretch of the imagination, a U.S. territory. This argument is no better than frivolous. Judge Ellis's analysis in *Souryal v. Torres Adv. Enterprise Solutions, LLC*, 847 F. Supp. 2d 835 (E.D. Va. 2012), explains why. In *Souryal*, the issue was whether the U.S. Embassy in Iraq was a U.S. territory. In concluding that it was ***not*** a U.S. territory, Judge Ellis first observed that "[a]n exact definition of "U.S. territory" is not found in the cases on extraterritorial effect of federal statutes, but it can be generally said that a region constitutes a U.S. territory if the U.S. has jurisdiction to regulate conduct by virtue of the conduct occurring within that region." *Id.* at 840. For that, the court cited *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949), where the Supreme Court held that the FLSA does not apply outside "places over which the United States has sovereignty or has some measure of legislative control."

Judge Ellis also found support for his holding in *Vermilya-Brown Co. v. Connell*, 335 U.S. 377, 380-81 (1948), where the Supreme Court held that territorial jurisdiction exists if the region is "a territory of the United States in a political sense, that is, a part of its national domain." Thus, "the touchstone of whether a particular region is a U.S. territory is presence, extent, and exercise of U.S. sovereignty 'in a political sense' over that region." *Souryal*, 847 F. Supp. 2d at 840. Since the United States did not exercise political sovereignty over the land on which the U.S. Embassy was located, the Embassy was not a U.S. territory. *Id.* Earlier this month, Judge Cacheris reached the same conclusion in *Boatright v. Aegis Defense Servs.*, 2013

WL 1385274, *7 (E.D. Va. April 3, 2013) (holding "United States embassies are not U.S. territories").

Other courts have reached similar conclusions. *See Arc Ecology v. U.S. Dep't of the Air Force*, 411 F.3d 1092 (9th Cir. 2005) (holding that CERCLA's extension of jurisdiction to any "U.S. territory or possession over which the United States has jurisdiction" did not include a United States military base in the Philippines); *Collins v. CSA, Ltd.*, 2012 U.S. Dist. LEXIS 50822, at *8-10 (N.D. Tex. March 27, 2012) (holding that for purposes of 42 U.S.C. §1981, U.S. military bases abroad are not "within the jurisdiction of the United States," which extends to "every State and Territory"); *cf. Al Maqaleh v. Gates*, 605 F.3d 84, 94-97 (D.C. Cir. 2010) (holding that United States control of military detention facility under a lease of a military base in Afghanistan is not sufficient to trigger extraterritorial application of the Suspension Clause).

Nothing about Abu Ghraib prison, a military detention facility manned by U.S. military personnel and Iraqi police,[8] magically converted it to a U.S. territory. The Congress of the United States never asserted legislative control over Abu Ghraib, and the United States never exercised sovereignty over Abu Ghraib "in a political sense."

3. The Conduct Allegedly Violating Established International Norms Occurred Exclusively in Iraq

Finally, Plaintiffs may argue that their ATS claims "touch and concern" the territory of the United States to an extent sufficient to avoid dismissal. To make that argument, Plaintiffs will need to ignore approximately 99% of the allegations of operative facts in their Third Amended Complaint, and 100% of the operative facts underlying their ATS claims. They will start by noting that CACI PT is a business incorporated in Delaware with its principal place of

[8] *See* Fay Report at 79 (noting presence of Iraqi police officers working at Abu Ghraib prison during time facility was used by United States as intelligence-gathering facility), *available at* http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/dod/fay82504rpt.pdf.

business in Virginia, and was a party to the contract with the United States to provide intelligence support services, including interrogators, to the military in Iraq. The interrogators supplied by CACI PT were American citizens with U.S. security clearances and were hired by CACI PT in the United States. Plaintiffs may suggest that these activities in the United States somehow justify the exercise of jurisdiction for the alleged violations of the law of nations occurring in Iraq. *Kiobel* and Fourth Circuit precedent defeat such an argument.

Starting with *Kiobel*, the Supreme Court could not have been clearer in *Kiobel* that the sole consideration is whether or not *the alleged violations of the law of nations* occurred extraterritorially. *Kiobel*, 2013 WL 1628935, at *10 ("[T]here is no clear indication of extraterritoriality here, and petitioners' case seeking relief for violations of the law of nations occurring outside the United States is barred." (citations and internal quotations omitted) (alteration in original)). Therefore, connections between CACI PT and the United States cannot save ATS claims that allege violations of the law of nations occurring extraterritorially.

Indeed, the Supreme Court's decision in *Kiobel* is a straightforward application of the Court's extraterritoriality decision in *Morrison*, where the plaintiffs similarly argued that their securities fraud claims were not extraterritorial because some of the alleged false statements were made in Florida (though the securities were purchased abroad). *Morrison*, 130 S. Ct. at 2877-78. The Supreme Court rejected the plaintiffs' argument, holding that because the focus of Congress's concern in enacting securities fraud legislation was fraud *in connection with the purchase and sale of securities*, the presumption against extraterritoriality required that the purchase and sale of securities occur in the United States. *Id.* Here, ATS is concerned with violations of the law of nations. For that reason, the Court in *Kiobel* expressly held that the conduct that must occur in the United States is the *violation of the law of nations*, and that some

other contact between the parties or claim and the United States is simply insufficient to trigger ATS jurisdiction. *Kiobel*, 2013 WL 1628935, at *10.

With respect to the Fourth Circuit, the principal case on territorial jurisdiction is *In re French*, 440 F.3d 145 (4th Cir. 2006). In *French*, the court of appeals addressed whether an alleged fraudulent transfer in violation of the Bankruptcy Code was territorial or extraterritorial in nature. As a threshold matter, the court noted the presumption against extraterritoriality, leaving it at best unclear whether the Bankruptcy Code had extraterritorial effect. The court therefore had to decide first whether the conduct in dispute was territorial or extraterritorial. The Fourth Circuit concluded that its analysis should turn on "whether the participants, acts, targets, and effects involved in the transaction at issue are primarily foreign or primarily domestic." *Id.* at 149-50.

The court found that the conduct in question was "domestic" because "the perpetrator and most of the victims of the fraudulent transfer have long been located in the United States," meaning that "the effects of this transfer were (naturally) felt most strongly here, and not in the Bahamas." *Id.* at 150. Additionally, the allegedly wrongful decision to transfer the property in question for less than equivalent value in exchange was made in the United States, and that conduct satisfied an element under the fraudulent transfer statute. As a result, the court in *French* concluded that because the bulk of the alleged unlawful conduct occurred in the United States, it was primarily domestic and the Bankruptcy Code provisions in issue therefore applied to the allegedly fraudulent transfer. This made it unnecessary for the court to consider whether the provisions had extraterritorial effect.

The principles in *French*, when applied here, dictate the result opposite of that reached in *French*. Here, the Supreme Court has already ruled that the ATS has no extraterritorial effect,

and the Court must resolve any doubts against finding jurisdiction. Here, the ATS claims' "acts, targets and effects" occurred solely in Iraq. Here, there is no question that the conduct alleged to violate international norms occurred *exclusively* in Iraq. CACI PT provided interrogators in Iraq, the Plaintiffs (all Iraqis) were detained in Iraq, and all of the alleged abuse claimed by Plaintiffs occurred in Iraq. *See, e.g.* Third Am. Compl. ¶¶ 1, 4-7, 10-11, 24, 39, 59, 68. By any standard, the wrongful conduct alleged here was foreign, not domestic, and therefore extraterritorial. Since *Kiobel* bars ATS claims asserting violations of international norms occurring outside the United States, the Court lacks subject matter jurisdiction over the ATS claims here and must dismiss them.

III. CONCLUSION

Kiobel makes clear that ATS does not provide jurisdiction for claims, such as those in this case, arising out of violations of the law of nations when the conduct occurs outside the United States. Accordingly, the Court should dismiss Plaintiffs' ATS claims for lack of subject matter jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of April, 2013, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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