PUBLIC REDACTED VERSION

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

SUHAIL NAJIM ABDULLAH AL SHIMARI *et al*., **Plaintiffs,**	)	
v.	)	C.A. NO. 08-cv-827 GBL-JFA
CACI PREMIER TECHNOLOGY, INC. **Defendant**	)	

PLAINTIFFS' OPPOSITION TO 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

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PRELIMINARY STATEMENT

Defendant, CACI Premier Technology Corp. ("CACI") seeks dismissal of Plaintiffs' Alien Tort Statute ("ATS") claims on an implausibly simplistic reading of the Supreme Court's recent decision in *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. __, 2013 U.S. LEXIS 3159 (Apr. 17, 2013) and the decades of ATS jurisprudence underlying it. According to CACI, *Kiobel* imposes a "bright line" rule that prohibits the Court from recognizing any otherwise cognizable ATS claims if the alleged violation "occurred outside the United States." Def. Br. 7. Such a categorical bar, however, does not represent the opinion of the Court; it reflects only the concurring opinion of Justice Alito which garnered only one additional vote. *See Kiobel*, 2013 U.S. LEXIS 3159, at *28-30 (Alito, J. concurring).

The opinion of the Court, by contrast, held that at most there should be a *presumption* against the extraterritorial application of the ATS to certain claims. Indeed, in the critical passage CACI's brief ignores, the Court held that ATS claims raised in a particular case can rebut the presumption if the claims "touch and concern the territory of the United States . . . with sufficient force." *Id.* at *26 (citing *Morrison v. National Australia Bank Ltd*., 561 U.S. __, 130 S. Ct. 2869 (2010)).

Plaintiffs ATS claims are in no way foreclosed by *Kiobel*. First, pursuant to the Supreme Court's decision in *Rasul v. Bush*, 542 U.S. 466, 480 (2004), the presumption against extraterritoriality and the foreign policy concerns underlying it do not even apply to ATS claims arising out of a military base or detention facility over which the United States exercised plenary legal authority and control – as that functionally constitutes U.S. territory for purposes of extraterritoriality analysis.

Second, even if the presumption against extraterritoriality is applied to claims arising out the U.S.-run facility at Abu Ghraib, the claims nevertheless "touch and concern" United States territory and interests "with sufficient force" so as to displace the presumption. *See Kiobel*, 2013 U.S. LEXIS 3159, at *26. Unlike in *Kiobel*, Plaintiffs' claims arose out of conduct that occurred in a U.S. occupied territory and detention facility over which the United States had total authority; unlike in *Kiobel*, Plaintiffs' claims challenge conduct undertaken by U.S. citizen employees of a U.S. corporation (domiciled in Virginia) in conspiracy with U.S. military personnel in carrying out (unlawfully) interrogations for the United States government and in violation of fundamental U.S. military and legislative prohibitions against torture and abuse of detainees. Indeed, the very grant of immunity from Iraqi law given to contractors such as CACI by the U.S. government *required the application of U.S. law* to CACI's conduct abroad.

Third, the claims in this case relate to the most serious of conduct: war crimes and torture. The U.S. has long led the global effort to prevent, punish and redress these violations. The violations that form the basis of Plaintiffs' ATS claims led to a multitude of high-level investigations by the United States military as well as Congressional hearings and investigations, and galvanized the nation when photos of naked, humiliated Iraqi detainees were made public nine years ago. The President of the United States has called for accountability and redress to the victims of torture at Abu Ghraib.[1]

Indeed, it is hard to imagine another set of circumstances that so clearly call out for application of the ATS—even if the Abu Ghraib site is considered "extra-territorial" at all. If this case does not survive *Kiobel*'s presumption against extraterritoriality, then possibly no case

[1] President George W. Bush's Statement on the U.N. International Day in Support of Victims of Torture, June 26, 2004 (expressly condemning the abuse of detainees at Abu Ghraib and affirming our nation was committed to fulfilling its obligations under international law to provide a full accounting and remedy for the victims).

could, and the historic 1789 Alien Tort Statute (and the Court's prior decision in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004)) would have been effectively abrogated, albeit *sub silentio*, by *Kiobel*. *Kiobel* intended no such result.

A. The Alien Tort Statute

The ATS grants federal courts jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. The first modern case brought under the ATS was *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980). In *Filártiga*, Paraguayan plaintiffs brought a claim for torture against a Paraguayan official who took up residence in the U.S., for conduct that occurred in Paraguay. 630 F.2d at 878. The Second Circuit held that the ATS provides jurisdiction for civil claims asserting serious breaches of fundamental tenets of international law – even if they occurred abroad. 630 F.2d at 885-86. *See also id.* at 890 (finding that "the international community has come to recognize the common danger posed by the flagrant disregard of basic human rights and particularly the right to be free of torture"). Thus, *Filártiga* stands for the proposition that individuals – and corporations alike – cannot take safe haven inside the United States to avoid liability for egregious human rights violations committed abroad.

When the Supreme Court considered the ATS for the first time in *Sosa*, it expressly affirmed and adopted the reasoning set forth in *Filártiga*. *See Sosa*, 542 U.S. at 732; *see also* Tr. of Feb. 28, 2012 Oral Argument in Kiobel v. Royal Dutch Petroleum, No. 10-1491 ("Feb. 2012 Tr."), at 12:21-23 (describing *Filártiga* as "binding precedent"). The Court in *Sosa* also expressed no reservations about the territorial reach of the ATS for violations of any international law norms as long as they were, like torture, "accepted by the civilized world and

defined with a specificity comparable to features" of the "historical paradigms familiar when § 1350 was enacted." *Sosa*, 542 U.S. at 725, 732.[2]

B. *Kiobel*'s Rejection of a Bright Line Rule Against Extraterritorial Application

In *Kiobel*, a group of Nigerian nationals brought suit under the ATS against certain Dutch, British and Nigerian corporations – whose only U.S. connection was a New York office owned by a separate corporate affiliate – alleging that the defendants aided and abetted the Nigerian government in committing various human rights violations in Nigeria. *See* 2013 U.S. LEXIS 3159, at *7-8. Or, in the words of one Justice, the case "had no connection to the U.S. whatsoever." Feb. 2012 Tr. at 12:1-2. Reaffirming its ruling in *Sosa* that the ATS authorizes federal court jurisdiction over certain international law violations, including violations occurring abroad, the *Kiobel* Court reiterated "that the First Congress did not intend the provision to be 'stillborn,'" 2013 U.S. LEXIS 3159, at *9 (quoting *Sosa*, 542 U.S. at 714). Nevertheless, the Court unanimously held that the ATS could not reach the violations asserted in that case, based on the status of the parties, the location of the torts and the absence of "sufficient ties to the United States." *See id.* at *31 (Breyer, J., concurring).

Contrary to CACI's central assertion, neither the five-justice majority opinion nor the four-Justice concurrence authored by Justice Breyer in *Kiobel* adopted the categorical bar to claims arising extraterritorially. The only opinion to arguably take such a drastic view of the ATS was Justice Alito's separate concurrence, which garnered only one additional vote.[3] The

[2] The *Sosa* Court recognized that the ATS would sometimes apply to conduct that occurred outside the United States when it suggested that exhaustion of remedies in the domestic forum may be required "in an appropriate case." *Sosa*, 542 U.S. at 733, n. 21.

[3] Justice Alito, joined by Justice Thomas, expressed a separate opinion because they sought a "broader standard" than the "narrow approach" of the majority. Under Justice Alito's broader standard, "a putative ATS cause of action will fall within the scope of the presumption against

majority opinion applied the "canon of statutory interpretation known as the presumption against extraterritorial application" to the ATS. *Kiobel*, 2013 U.S. LEXIS 3159, at *10. The majority reasoned that the presumption has particular force in such cases, in order "to protect against unintended clashes between our laws and those of other nations with could result in international discord." *Id.* at *10, quoting *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991) (*Aramco*). The majority recognized that the ATS "provides for some extraterritorial application," *id.* at *21 (quoting *Morrison* 130 S. Ct. at 2883), but concluded that the presumption could not be displaced by the circumstances specifically presented in *Kiobel*. However, because the presumption is just that, the majority found that the presumption can be overcome, "where the claims touch and concern the territory of the United States . . . with sufficient force." *Id.* at *26.

The majority opinion did not provide detailed guidance on the factors that would displace the presumption against extraterritoriality, other than the recognition that the "foreign-cubed" facts in *Kiobel* (foreign plaintiffs, foreign defendant, foreign conduct) do not present sufficient ties to the U.S. But the Court recognized that ATS causes of action would have to be evaluated on a case-by-case basis.

Justice Kennedy's concurring opinion observes:

> [t]he opinion for the Court is careful to leave open a number of significant questions regarding the reach and interpretation of the Alien Tort Statute….Other cases may arise with allegations of serious violations of international law principles protecting persons, cases covered neither by the TVPA nor by the reasoning and holding of today's case; and in those disputes the proper implementation of the presumption against extraterritorial application may require some further elaboration.

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extraterritoriality—and will therefore be barred—unless the domestic conduct is sufficient to violate an international law norm that satisfies *Sosa*'s requirements of definiteness and acceptance among civilized nations." *Kiobel*, 2013 U.S. LEXIS 3159, at *27-29 (Alito, J., concurring).

Id. at *26-27. Justice Kennedy's concurrence, which provided the majority's fifth vote, thus contemplates that the ATS may still "reach" abroad and that future cases may require "implementation of the presumption against extraterritorial application." *Id*. Justice Breyer's four-justice concurrence, similarly observed that the majority's standard "leaves for another day the determination of just when the presumption against extraterritoriality may be 'overcome.'" *Id.* at *37 (quoting *id.* at *17 (opinion of Roberts, C.J.)). Justice Alito's concurrence, in turn, describes the majority's test as "leav[ing] much unanswered." *Id.* at *27. The Justices would not have used this language if CACI's interpretation of *Kiobel* as a categorical bar to extraterritorial claims were correct.

Despite the absence of express guidance from *Kiobel*, there are significant guideposts by which this Court can apply the presumption against extraterritoriality. It should examine the underlying purpose of the extraterritoriality presumption – which is to avoid negative "foreign policy implications" that may come from applying the statute to foreign defendants in a manner that conflicts with foreign laws. *Kiobel*, 2013 U.S. LEXIS 3159, at *13-14. *See infra* Section II(A), (B). The Court should also consider three factors identified by Justice Breyer's concurrence from traditional foreign relations law (and in no way disputed by the majority) that support application of the ATS, including extraterritorially:

> (1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant's conduct substantially and adversely affects an important American national interest, and that includes a distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind.

Id. at *30-31 *See infra* Section II(B) and (C). Finally, the court can also consider post-*Morrison* cases finding that U.S. statutes reach extraterritorially as long as connections to the United States are more than merely "incidental." *See infra* Section II(B). Indeed, it is hard to imagine a

constellation of facts that would ever arise that would provide more support for displacing the presumption than those presented in this case.

C. This Court's Prior ATS Ruling and the Corporate Status of Defendants

In its March 18, 2009 opinion denying in part CACI's motion to dismiss, this Court declined to exercise jurisdiction over the Plaintiffs' ATS claims, reasoning that "tort claims against government contractor interrogators are too modern and too novel to satisfy the *Sosa* [*v. Alvarez-Machain*] requirements for ATS jurisdiction." *Al Shimari v. CACI Premier Technology, Inc.*, 657 F. Supp. 2d 700, 705 (E.D. Va. 2009).[4] The Court found that the status of the defendant – private contractor – impacted the *Sosa* analysis, and ruled that claims against "government contractors under international law . . . are fairly modern and therefore not sufficiently definite among the community of nations, as required under *Sosa*." *Id*. at 726; *see also id*. at 727.

On October 22, 2012, Plaintiffs moved for the Court to reconsider its dismissal of the ATS claims on the grounds that reinstatement would "best serve the interests of justice and be consistent with the legal consensus that has developed subsequent to the Court's 2009 ruling both in this Circuit and around the nation" which recognized that corporations are not exempt from the reach of the ATS. Dkt. # 145. On November 1, 2012, this Court reinstated Plaintiffs' ATS claims. The Court found that the norms which Plaintiffs asserted were violated – war crimes, torture and cruel, inhuman and degrading treatment – satisfy the standard set forth in *Sosa*, and that these norms can be enforced against a U.S. corporation such as CACI. Dkt # 158.

[4] The Court noted that the *Sosa* instructs federal courts not to recognize claims "for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted" and to be cautious "when recognizing additional torts under the common law that enable ATS jurisdiction." 542 U.S at 726 -27.

The majority opinion – like Justice Breyer's concurrence – is predicated on the application of the ATS to corporations. Although the Supreme Court granted certiorari on the question of whether corporations can be held liable under the ATS, its judgment is based instead on the answer to another question (*i.e.*, whether and under what circumstances the ATS could be applied to conduct that occurred in the territory of a foreign sovereign). *Kiobel*, 2013 U.S. LEXIS 3159, at *9. The majority observed that "[c]orporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices." *Id.* at *26. *See also id.* at *51-52 (Breyer, J., concurring). The Court would not have focused on how extensive a corporation's contacts need to be if it found categorically that the ATS did not apply to corporations.

Accordingly, *Kiobel* did not call into question the Court's November 2012 ruling that the ATS applies to corporations and CACI has not (and now cannot) argue that it should. Consequently, this is not an issue before the Court.

ARGUMENT

I. THE QUESTION OF EXTRATERRITORIAL APPLICATION OF THE ATS DOES NOT RELATE TO THE COURT'S SUBJECT MATTER JURISDICTION, BUT TO THE VIABILITY OF A CAUSE OF ACTION.

CACI incorrectly argues that the question of whether Plaintiffs' ATS claims survive *Kiobel*'s presumption against extraterritoriality goes to this Court's subject matter jurisdiction. Def. Br. 2-3. CACI so suggests in order to shift the burden of proof on Plaintiffs, Def. Br. 3, and as part of their otherwise flawed effort to paint *Kiobel* as imposing an inflexible jurisdictional principle.

While Plaintiffs acknowledge that the Court has the authority to reconsider its decision on Plaintiffs' ATS claims, the question of the extraterritorial reach of the Alien Tort Statute is

properly analyzed as a merits question pursuant to Fed. R. Civ. P. 12(b)(6), rather than as a question of subject matter jurisdiction raised by Fed. R. Civ. P. 12(b)(1).[5] *Morrison*, 130 S. Ct. at 2876-77. *See also Kiobel*, 2013 U.S. LEXIS 3159, at *12 (citing *Morrison*, a case not related to subject matter jurisdiction, and explaining, "we think the principles underlying the canon of interpretation *similarly* constrain courts considering *causes of action* that may be brought under the ATS" (emphasis added)).

The Supreme Court explained, "The principles underlying the presumption against extraterritoriality thus constrain courts exercising their power under the ATS." *Id*. In other words, the *Kiobel* decision applied the presumption against extraterritoriality to *claims* asserted under the ATS, not the statute itself, as the ATS is a "strictly jurisdictional" statute and merely "allows federal courts to recognize certain causes of action based on sufficiently definite norms of international law." *Id.* at *11-12 (*quoting Sosa*, 542 U.S. at 713).[6]

The question of subject matter jurisdiction under the ATS consists of an abstract assessment of the norm alleged to have been violated (i.e., a determination as to whether the norm meets the *Sosa* standard). *See, e.g*, *In re Xe Servs. Alien Tort Litig.*, 665 F. Supp. 2d 569, 588 (E.D. Va. 2009) (certain international norms, including war crimes, are "binding, universal and precisely defined" under *Sosa*). Yet, once a court determines an alien plaintiff has stated

[5] Indeed, the Court already has jurisdiction to hear the claims asserted in this case based on 28 U.S.C. § 1332 (diversity jurisdiction). *See, e.g*., *Abur v. Republic of Sudan*, 437 F. Supp. 2d 166, 169 n.4 (D.D.C. 2006) (finding that the court only needed subject matter jurisdiction under the ATS over the claims asserted by alien plaintiffs against alien defendants, as "there is no alien-alien diversity jurisdiction," but could rely on diversity jurisdiction over the claims asserted by U.S. plaintiffs against alien defendants).

[6] This is supported by the framing of the question posed on re-argument in *Kiobel*: "whether and *under what circumstances* courts may recognize a *cause of action* under the Alien Tort Statute, for violations of the law of nations occurring within the territory of a sovereign other than the United States." *Id.* at *6 (emphasis added).

claims that trigger ATS jurisdiction (*i.e.*, claims that meet the *Sosa* standard), as it has in this case (*e.g*. torture, war crimes, and cruel, inhuman and degrading treatment), only then does it analyze whether that norm may be enforced in the particular circumstances of the case under Fed. R. Civ. P. 12(b)(6). *See Kiobel*, 2013 U.S. LEXIS 3159, at *10 ("The question here is not whether petitioners have stated a proper claim under the ATS, but whether a claim may reach conduct occurring in the territory of a foreign sovereign."). Like forms of liability (*i.e.,* aiding and abetting, conspiracy) and questions of who may be held liable (*i.e*., corporations, individuals, non-state actors) for the particular cause of action alleged, extraterritoriality goes to the reach of the statute. *See Morrison,* 130 S. Ct. at 2877 ("to ask what conduct [a statute] reaches is to ask what conduct [it] prohibits, which is a merits question").

As a 12(b)(6) issue, CACI "bear(s) the burden of proving that plaintiffs' claims fail as a matter of law." *Commonwealth ex rel. Cuccinelli v. Sebelius*, 702 F. Supp. 2d 598, 615 n.10 (E.D. Va. 2010) (*quoting Bennett v. MIS Corp.*, 607 F.3d 1076, 1091 (6th Cir. 2010)).[7] In addition, the merits question – *i.e*., whether the facts of the case sufficiently "touch and concern" the United States in order to "displace" the presumption – is not amenable to a bright line rule; it necessarily mandates a case-by-case analysis.[8]

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[7] Even under a 12(b)(6) analysis, the Court may consider the materials that Plaintiffs refer to outside of the complaint. *See Geinosky v. City of Chicago*, 675 F.3d 743, 745 n.1 (7th Cir. 2012) (while "[a] motion under Rule 12(b)(6) can be based only on the complaint itself, documents attached to the complaint, documents that are critical to the complaint and referred to in it, and information that is subject to proper judicial notice," "a party opposing a Rule 12(b)(6) motion may submit materials outside the pleadings to illustrate the facts the party expects to be able to prove.").

[8] The Supreme Court essentially adopted the U.S. government's position in *Kiobel*:

> There is no need in this case to resolve across the board the circumstances under which a federal common-law cause of action might be created by a court exercising jurisdiction under the ATS for conduct occurring in a foreign country.

II. KIOBEL DOES NOT PERMIT DISMISSAL OF PLAINTIFFS ATS CLAIMS

A. The Presumption Against Extraterritorial Application Does Not Apply to the Alleged Torts in Abu Ghraib Over Which the United States Exercised Exclusive Authority and Control.

In *Rasul v. Bush*, 542 U.S. 466 (2004), a decision ignored by CACI, the Supreme Court resolved the question presented here. In *Rasul*, the government argued that the presumption against the extraterritorial application of statutes barred Guantánamo detainees' statutory habeas and ATS claims, particularly where the Cuban government exercised "ultimate sovereignty" over the Guantánamo Bay Naval Base. *See Rasul*, 542 U.S. at 480 (addressing government's argument that "application of the 'longstanding principle of American law' that congressional legislation is presumed not to have extraterritorial application unless such intent is clearly manifested") (quoting *Aramco*, 499 U.S. at 248). The Supreme Court rejected that argument, stressing that the presumption against extraterritorial application of statutes has no force in a place like the Guantánamo where, by the "express terms of its agreements with Cuba, the United States exercises "'complete jurisdiction and control'." *Id.* (quoting Lease Agreement).

Rasul's analysis hued to a line drawn by prior Supreme Court decisions which assessed the applicability of the presumption based on the level of actual control the United States exerted over a particularly extraterritorial space. *Compare Vermilya-Brown v. Connell*, 335 U.S. 377,

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> In particular, the Court should not articulate a categorical rule foreclosing any such application of the ATS. *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980), for example, involved a suit by Paraguayan plaintiffs against a Paraguayan defendant based on alleged torture committed in Paraguay. The individual torturer was found residing in the United States, circumstances that could give rise to the prospect that this country would be perceived as harboring the perpetrator….*Other claims based on conduct in a foreign country should be considered in light of the circumstances in which they arise*.

Supplemental Brief For The United States As Amicus Curiae In Partial Support Of Affirmance, at 4-5, *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491 (filed June 2012) (emphasis added) ("U.S. Suppl. *Kiobel* Br.").

382 & n. 4 (1948) (Fair Labor Standards Act ("FLSA") applies to U.S. naval base in Bermuda because relevant lease granted "rights, power and authority" and "control" to the U.S.) *with Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949) (FLSA did not apply to corporation acting in Iraq/Iran absent "some measure of legislative control" or any "transfer of property rights to the U.S."). Concluding that the practical aspects of U.S. control over Guantánamo Bay rendered the presumption inapplicable there, the *Rasul* Court held that the foreign nationals detained there could invoke the protections of the habeas corpus statute, 28 U.S.C. § 2241, 542 U.S. at 484, and the ATS, *id*. at 484-85.

The extent of U.S. control over Iraq and Abu Ghraib, particularly during the period of time of Plaintiffs' detention, was tantamount to U.S. "exclusive jurisdiction and control" over Guantánamo. *Compare Rasul*, 542 U.S. at 480. Thus, the Supreme Court's ruling in *Rasul* mandates that the anti-extraterritoriality presumption, even as recognized by *Kiobel*, does not apply in this case as threshold matter.

In March 2003, the United States initiated a military invasion of Iraq, overthrew the previously sovereign government, and undertook a long-term military occupation of the country. In May 2003, President George W. Bush appointed Ambassador L. Paul Bremer as civil Administrator of Iraq and executive of a new government agency, the Coalition Provisional Authority ("CPA"). The authority of the CPA, which was answerable to the President of the United States, was sweeping: it assumed all control over all lawmaking functions in the U.S. occupied country:

> The Administrator of the Coalition Provisional Authority (CPA) reports to the President through the Secretary of Defense. . . . The CPA exercises powers of government temporarily in order to provide for the effective administration of Iraq... The ***CPA is vested by the President with all executive, legislative and***

> ***judicial authority necessary to achieve its objectives***… The CPA Administrator has primary responsibility for exercising this authority.[9]

In other words, the CPA functioned as the government of Iraq with plenary legal powers. *See* Declaration of Baher Azmy, Esq., dated May 3, 2013, ("Azmy Decl.") Ex. 1 (CPA Order 1) § 1.2 ("The CPA is vested with all executive, legislative and judicial authority necessary to achieve its objectives…This authority shall be exercised by the CPA Administrator.")). Pursuant to the CPA's plenary authority over Iraq, it issued numerous orders asserting control over all aspects of Iraqi governance. *See e.g.*, Azmy Decl. Ex. 2 (CPA Order 2) § 1 & Appdx. (dissolving Iraqi government ministries, legislative bodies and army and police forces)); Azmy Decl. Ex. 3 (CPA Order 7) § 1 (placing all Iraqi judges, police and prosecutors under CPA control)).

The U.S. government placed all Iraqi prisons, including Abu Ghraib, under the Ministry of Justice, but which was ultimately subject to the "authority, direction and control" of the CPA. Azmy Decl. Ex. 4 (CPA Order 10) § 1, 2. CPA Order 7 banned "torture and cruel, degrading or inhumane treatment." Azmy Decl. Ex. 3 (CPA Order 7) § 3.2. Of particular relevance, CPA Order 17, which was also operative when CACI interrogators were present in Iraq, stipulated that the CPA possesses "exclusive authority and control" over military operations and detention facilities. The CPA provisions asserting plenary authority and control over Iraqi institutions and the Order placing Abu Ghraib under the "authority, direction and control" of the CPA demonstrate equal or greater control than the lease provision granting the U.S. "exclusive jurisdiction and control" over Guantánamo that rendered the presumption against extraterritorial

[9] White House Office of Management and Budget (OMB) (U.S. Office of Management and Budget, "Report to Congress Pursuant to Section 1506 of the Emergency Wartime Supplemental Appropriations Act, 2003 (Public Law 108-11), June 2, 2003) (emphasis added).

statutory application inapplicable. *See Rasul*, 542 U.S. at 480; *see also Vermilya-Brown*, 335 U.S. at 382 (U.S. "rights power and authority" at naval base in Bermuda).[10]

Given the Supreme Court's calculus for assessing whether the presumption against extraterritorial statutory application applies over a particular space, Judge Ellis' decision in *Souryal v. Torres Advanced Enter. Solutions, LLC*, 847 F. Supp. 2d 835 (E.D. Va. 2012), upon which CACI heavily relies, is neither surprising nor on point. In *Souryal*, Judge Ellis considered whether a Family Medical Leave Act claim against a Virginia contracting company, arising out of the Plaintiff's employment in U.S. Embassy in Iraq; the alleged violation occurred in 2009. To determine whether the presumption against extraterritorial statutory application applied to the U.S. embassy in 2009, Judge Ellis asked whether a U.S. Embassy could functionally be considered a "U.S. territory." *Id*. at 840. That test, Judge Ellis explained, was as such: "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*. (emphasis added). Relying on the Court's analysis in *Foley Bros*., and basic (and limited) international law status of foreign embassies generally, Judge Ellis concluded unsurprisingly that the U.S. Embassy in 2009, after full sovereignty was transferred to Iraq, is not a place over which the United States exercises "sovereignty" or even "some measure of legislative control." *Id*. (quoting *Foley Bros.*, 336 U.S. at 285). By contrast, given the U.S.-controlled CPA exercised "all executive, legislative and judicial authority" over

[10] In addition, in June 2004 – at a time when CACI was still providing interrogation services to the U.S. government in Iraq, the CPA issued a revised Order 17. That order placed detention facilities under the "exclusive control and authority" of the Multinational Force, *see* Azmy Decl. Ex. 6 (CPA Order 17, Revised) § 9.1 – an entity that was under the unified command of the United States. *See Munaf v. Geren*, 128 S. Ct. 2207, 2216–17 (2008). The order also reaffirmed the inapplicability of Iraqi law to U.S. contractors or U.S. forces (signaling total U.S. control), and reaffirmed U.S. control over all aspects of Iraqi life including Communications, Azmy Decl. Ex. 5 (CPA Order 17) § 6; Travel and Transport, *id*. at § 7, Customs and Excise, *id*. at § 8; Taxation, Provisions and Supplies, *id*. at § 10.

Iraq, Azmy Decl. Ex. 1 (CPA Order 1) § 1.2, and "authority, direction and control," Azmy Decl. Ex. 4 (CPA Order 10) § 1, 2, a straightforward application the *Foley Bros*. standard (as well as the *Rasul* standard) demonstrates that torts at issue here occurred in what was functionally U.S. territory and is thus not subject to the presumption against extraterritorial application.

Moreover, a principal reason underlying the *Rasul* Court's refusal to apply the non-extraterritoriality presumption to the habeas statute and ATS was that no Cuban law was operative over the Guantánamo Naval Base in a way that could conceivably create a conflict between the U.S. and Cuban governments or embarrass our political branches. Likewise, as *Kiobel* stressed, the non-extraterritoriality presumption itself exists to limit the possibility of conflicts that might arise from suing non-U.S. citizens and applying U.S. norms in a manner that might conflict with a foreign sovereign's laws. *See Kiobel*, 2013 U.S. LEXIS 3159, at *10; *id.* at *32 (Breyer, J., concurring). As in Guantánamo, that concern is simply not present in this case.

Indeed, the CPA subjected contractors to the ultimate authority of the CPA and, in exchange for a grant of certain immunities for U.S. personnel and U.S. contractors from the application of Iraqi law, *see* Azmy Decl. Ex. 5 (CPA Order 17) § 3.1, 3.2 **stipulates that contractors are subject to liability *by U.S. domestic law***, which would include the ATS and substantive legal standards the ATS incorporates. *See* Azmy Decl. Ex. 5 (CPA Order 17) §18 ("Contractors or any persons employed by them . . . shall be submitted and dealt with by the Sending State whose personnel (including the contractors engaged by that state) property, activities or other assets are alleged to have caused the claimed damage . . .").

CACI fails to address *Rasul's* holding. The arguments CACI does raise in anticipation of Plaintiffs' position do no more than attack a straw man. CACI spends five pages arguing that, despite the U.S. military occupation and the total legislative, executive and judicial control

envisioned by the CPA, Iraq retained a residuum of sovereignty, in a technical sense of the term, and that this modicum of sovereignty requires this Court to apply the non-extraterritoriality presumption. Relatedly, CACI argues that determination of a country's sovereignty is a nonjusticiable political question. Both arguments are irrelevant to the Court's extraterritoriality analysis.

In both *Rasul* and *Boumediene v. Bush* (a case that considered the exterritorial reach of the Suspension Clause of the Constitution), the government advanced the same argument CACI raises here: that neither statutes nor the Suspension Clause could apply to Guantánamo because Cuba retained "ultimate sovereignty" over the Guantánamo Bay Naval Base and that questions of sovereignty are political questions.[11] *Rasul* and *Boumediene* each rejected the government's reasoning, and thus CACI's: these cases concluded that practical aspects of U.S. *control* over Guantánamo is the relevant touchstone, and that the more technical question of Cuba's potential claim to sovereignty was not relevant. *Rasul*, 542 U.S. at 475 (habeas statute applies where U.S. exercises "plenary and exclusive jurisdiction, but not "ultimate sovereignty'"); *Boumediene*, 128 S.Ct. at 2253 (rejecting the "Government's premise that *de jure* sovereignty" is the "touchstone for extraterritorial habeas jurisdiction") *id*. at 2257; *id.* at 2257 (rejecting government's political question defense and proposed "formalistic, sovereignty-based test for determining the reach of the Suspension Clause" and adopting functional test that turns on level of U.S. control); *see also Vermilya-Brown*, 335 U.S. at 390.

Likewise, in *Vermilya-Brown*, the government argued that the court could not resolve the question of whether the FLSA applied to a U.S. naval base in Bermuda because sovereignty was a political question. As the Court stressed, however, the issue was not whether the military base

[11] *See* Br. Resp, *Rasul v. Bush*, Nos. 03-334, 03-343, 2004 WL 425739 at *22-23 (Mar. 3, 2004); *See Boumediene v. Bush*, 128 S. Ct. 2229, 2253 (2008).

in Bermuda was within the nation's sovereignty, but whether presence and practical power and control within the sovereignty was sufficient to bring a claimant within the protection of the Act – a question consummately for judicial resolution. 335 U.S. at 380. Critically, the Court even accepted the Executive Branch's determination that the base was within the sovereignty of the British Empire, but held that FLSA applied because the United States exercised "*sole power*" at the base. *Id.* at 390 (emphasis added).

Given the clear aspects of legislative and judicial control the United States exercised over territory in Iraq and Abu Ghraib, the presumption against extraterritorial application of the ATS does not apply in the first instance, regardless of whether and to what extent Iraq retained sovereignty during the relevant period addressed by the Complaint.

B. The Site of the Violations, Location and Nature of the Defendant, and Actions Directed from the United States Sufficiently "Touch and Concern" the U.S. to Displace the Presumption Against Extraterritoriality.

Even if the presumption against extraterritorial application could be deemed to cover a detention facility such as Abu Ghraib where the U.S. exercised plenary legal authority, *Kiobel* held that plaintiffs may rebut the presumption: "[W]here the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application." 2013 U.S. LEXIS 3159, at *26.

In determining which claims "touch and concern" the U.S. with "sufficient force," the Court should consider several factors. First, the Court should bear in mind the primary concern underlying the presumption against extraterritoriality: "unintended clashes between our laws and those of other nations which could result in international discord." *Id.* at *10 (citations omitted). Second, the Court should likewise consider the factors identified by four of the Court's justices – none of which the majority disputed: whether "(1) the alleged tort occurs on American soil, (2)

the defendant is an American national, or (3) the defendant's conduct substantially and adversely affects an important American national interest, and that includes a distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind." [12] *Id.* at *31 (Breyer, J., concurring). This Court has already applied similar considerations in evaluating whether a statute –the Lanham Act – could be applied to extraterritorial conduct:

> In determining whether the contacts and interests of the United States were sufficient to support the exercise of extraterritorial jurisdiction, the Court looks to whether: (1) the defendant's conduct has a significant effect on United States commerce; (2) the defendant is a citizen of the United States; and (3) issuance of an injunction would interfere with trademark rights under the relevant foreign law, making issuance of the injunction inappropriate in light of international comity concerns.

See Schreiber v. Dunabin, 2013 U.S. Dist. LEXIS 53752, at *14-15 (E.D. Va. Mar. 29, 2013) (Lee, J.).

The Court should also examine lower-courts' application of *Morrison* – a case upon which the *Kiobel* majority relies. Most relevant to the allegations before this Court is the way courts have applied *Morrison* to RICO cases. In such cases, courts have found insufficient contacts to justify the extraterritorial application of RICO where the domestic activity was found to be merely "incidental" to the conspiracy. *See Cedeño v. Castillo*, 733 F. Supp. 2d 471, 472 (S.D.N.Y. 2010), *aff'd by* 457 F. App'x 35, 37-38 (2d Cir. 2012) (denying extraterritorial application of RICO statute where the connection between the Venezuelan perpetrators and the United States was "limited to the movement of funds into and out of U.S.-based bank accounts");

[12] Justices Breyer, Ginsburg, Sotomayor, and Kagan did not join in the majority's reasoning because they did not believe that the presumption against extraterritoriality should apply to the ATS. *Kiobel*, 2013 U.S. LEXIS 3159, at *30-31 ("Unlike the Court, I would not invoke the presumption against extraterritoriality," instead being guided "by principles and practices of foreign relations law"). The three factors they identified were not expressly disavowed by the majority, and thus, may still be used by courts to apply the majority's holding.

Sorota v. Sosa, 842 F. Supp. 2d 1345, 1350 (S.D. Fla. 2012) (concluding that the RICO enterprise was foreign where it was "operated entirely in Peru, with its only connection to the United States being that the funds it possessed originated from (and possibly returned to) a Florida bank account").

By contrast, where plaintiffs have shown more – *i.e.*, that the domestic activity was more than merely "incidental" to the enterprise – courts have found the domestic contact sufficient to consider the extraterritorial application of RICO. *See, e.g.*, *Aluminum Bahr. B.S.C. v. Alcoa Inc.*, 2012 U.S. Dist. LEXIS 80478, at *9 (W.D. Pa. June 11, 2012) (finding sufficient domestic activity even where the tortious conduct was the overseas payment of bribes Bahraini businessmen and government officials, because "the decision-making vital to the sustainability of the enterprise, came from Pittsburgh"). Indeed, the Court in *Kiobel* affirmed dismissal of plaintiffs' claims in that case because "all" of the "relevant" conduct took place outside the United States. 2013 U.S. LEXIS 3159, at *26. The Court left open the door to displacing the presumption when such "relevant" conduct takes place in the United States.

Under any of the above analyses, Plaintiffs' claims against CACI would "touch and concern the territory of the United States…with sufficient force to displace the presumption against extraterritorial application." *Id*. First, as explained in Section A, *supra*, the torts were committed on territory and detention facility over which the United States exercised plenary legal and political authority. *Compare Rasul*, 542 U.S. at 480. Second, CACI is a U.S. corporation, headquartered in the U.S., enjoying the protection of U.S. laws; it entered into a contract to provide interrogation services with the U.S. government and thereafter breached that contract by conspiring with U.S. service personnel in torturing and abusing prisoners in violation of U.S. law. Indeed, the very grant of immunity provided to CACI by the CPA, required the

application of U.S. law to conduct occurring there. *See* Azmy Decl. Ex. 5 (CPA Order 17) § 18 Third, the conduct that gave rise to the torts in Iraq was directed by decisions that took place in the U.S. While each of these factors on their own would be sufficient to displace the presumption against extraterritoriality, together, they clearly do. In fact, if the present case would not overcome this presumption, there could be no case that would.

1. The U.S. Exercised Plenary Authority and Control over the Location of the Torts

Even if the U.S.'s exercise of exclusive authority and control over Iraq, and specifically Abu Ghraib, does not completely remove this case from an extraterritoriality analysis, the nature and extent of U.S. control over the locus of the torts is an important factor suggesting that this case sufficiently "touches and concerns" the U.S. to displace the presumption against extraterritoriality:

- The U.S. undertook a long-term military occupation of Iraq;
- U.S. President Bush appointed U.S. Ambassador Bremer as civil Administrator of Iraq and executive of the Coalition Provisional Authority, which assumed all control over all lawmaking functions in Iraq and was directly answerable to the President of the United States;
- The CPA issued orders asserting control over all aspects of Iraqi governance, and placed all Iraqi prisons, including Abu Ghraib, under the "authority, direction and control" of the CPA;
- CPA Order 17, immunized U.S. personnel and U.S. contractors from the application of Iraqi law, and specifically stipulated that contractors are subject to liability under U.S. domestic law;
- Revised CPA Order 17, stated that Iraqi premises and detention facilities were ultimately subject to U.S. control, *see* supra note 13, and reiterated that the United States would regulate all aspects of Iraqi legal conditions.

Because the U.S. had plenary authority over Iraq and no Iraqi law applied generally or to these U.S. contractors operating there, applying ATS to these facts would not risk "clashes between

our laws and those of other nations which could result in international discord." *Kiobel*, 2013 U.S. LEXIS 3159, *10, quoting *Aramco,* 499 U.S. at 248.

2. CACI is a U.S. Corporation Domiciled in this District.

In *Kiobel,* the Court was concerned that the defendants were foreign corporate entities with only a minimal presence in the United States: the defendants' only connection with the United States was an office in New York owned by a separate corporate affiliate. 2013 U.S. LEXIS 3159, *6; *Id.* at *51-51 (Breyer, J. concurring). The Court signaled that U.S. individuals or corporations are differently situated. For example, the Court considered a 1795 opinion by the then-U.S. Attorney General William Bradford which had recognized that the ATS could apply to violations of the law of nations in Sierra Leone. The majority found the opinion irrelevant to the facts before it in *Kiobel* as the opinion "deals with *U.S. citizens,* who by participating in an attack taking place both on the high seas and on a foreign shore, violated a treaty between the United States and Great Britain." *Id.* at *23 (emphasis added). Thus, the Court contemplates that conduct by U.S. citizens occurring on "foreign shore" is still within the ambit of the ATS.[13]

Second, the majority noted, "Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices," suggesting that corporate present plus some additional factors would be adequate. *See id.* at *26. *See also id.* at *39 (Breyer, J., concurring) (ATS should apply extraterritorially if defendant is American).

Third, there is minimal risk of "diplomatic strife," *id.* at *25, where there this Court's judgment would only apply against a U.S. defendant, instead of against a foreign defendant. *See also id.* at *39 (Breyer, J., concurring) (where a defendant is an American national extraterritorial

[13] Justice Breyer examination of international practice comes to the same result: "Many countries permit foreign plaintiffs to bring suits against their own nationals based on the unlawful conduct that took place abroad." 2013 U.S. LEXIS 3159, at *45.

application of ATS would not conflict with "Sosa's basic caution," *i.e.*, "to avoid international friction"). This Court has already abided by this principle. *See Schreiber*, 2013 U.S. Dist. LEXIS 53752, at *17 (Lee, J.) ("*Citizenship of the defendant is a critical factor* in determining whether to extend the Lanham Act extraterritorially because '*application of United States law to United States nationals* abroad ordinarily raises considerably less serious questions of international comity than does the application of United States law to foreign nationals abroad.'" (quoting *Aramco*, 499 U.S. at 274) (emphasis added).

The landmark *Filártiga* case, which was endorsed by the Supreme Court in *Sosa*, 542 U.S. at 732 (citing *Filártiga*, 630 F.2d at 890), further supports application of the ATS to CACI. In *Filártiga*, the Second Circuit held that a Paraguayan citizen could bring an ATS claim for torture that occurred in Paraguay, against a defendant who had been residing in the U.S. 630 F.2d at 878. Recognizing that "the torturer has become like the pirate and slave trader before him *hostis humani generis*, an enemy of all mankind," *Sosa*, 542 U.S. at 732 (quoting *Filartiga*), *Filártiga* stands for the principle the ATS (and the U.S. commitment to human rights embodied in it) must permit Plaintiffs to pursue claims for violations of the law of nations against entities – such as CACI – who reside inside the United States. Otherwise, the United States would essentially be providing "a safe harbor…for a torturer or other common enemy of mankind." *Kiobel*, 2013 U.S. LEXIS 3159, at *39 (Breyer, J. concurring).

3. CACI's Conduct in the U.S. is Sufficient to Displace the Presumption

CACI's conduct inside the United States contributed to and exacerbated the torts occurring abroad. First, the contract under which CACI provided interrogation services at Abu Ghraib was issued out of the United States, *see* Azmy Decl. Ex. 7, and those contracted services facilitated the role of CACI employees in the conspiracy. *See Newmarket Corp. v. Innospec Inc.*,

2011 U.S. Dist. LEXIS 54901, at *15-16 (E.D. Va. 2011) (consistent course of business transactions between parties in Virginia was significant factor in considering extraterritorial application of Virginia Business Conspiracy statute to bribery claims that actually took place in Iraq and Indonesia).

Second, much of the "decision-making vital to the sustainability" of the conspiracy alleged in this litigation came from the U.S. *See, e.g.*, *Aluminum Bahr.*, 2012 U.S. Dist. LEXIS 80478, *9. CACI ratified and encouraged the role its employees played in the torture conspiracy through decisions it made in Virginia. CACI PT and CACI Inc. Federal, [redacted] were both based in Virginia at the time of the conspiracy. TAC ¶ 8. *See also* Azmy Decl Ex. 8 [Morse Tr.] at 57:8-59:3. The [redacted] hiring of interrogators to send to Abu Ghraib was completed in the U.S. *See* Azmy Decl. Ex. 8 [Morse Tr.] at 139:3-20. [redacted] *See* Azmy Decl. Ex. 9; Ex. 8 [Morse Tr.] at 84:15-24.

[redacted] *See* Azmy Decl. Ex. 8 [Morse Tr.] at 87:13-20; 201:12-13. Mr. Mudd frequently visited Abu Ghraib in order to determine whether CACI PT employees were providing satisfactory service and treating detainees in a manner consistent with applicable laws and regulations and report what he learned back to CACI management in Virginia. *See* Azmy Decl.

Ex. 10 [14]; Ex. 11 [Mudd Tr.] at 47:9-11; 96:8-20. During his visits, he would be briefed by CACI's site lead at Abu Ghraib, CACI's country manager, other CACI employees, and military officers at the Hard Site. *See* Azmy Decl. Ex. 12 [Porvaznik Tr.] at 217:14-218:19. These persons, in turn, had access to and reviewed interrogation reports, some of which raised concerns of potential abuse by CACI employees, *see* Azmy Decl. Ex. 13 [Nelson Decl.] at 25:8-13; 47:5-51:7; received at least one report of detainee abuse and the involvement of CACI employees in that abuse, *see id*. at 54:11-61:22; and communicated daily with senior military personnel – including military officials who testified to government investigators that CACI interrogators actually supervised military personnel – regarding the work of CACI personnel. *See* Azmy Decl. Ex. 10; Ex. 12 [Porvaznik Tr.] at 133:24-134:10; 137:24-138:6; Report of the AR15-6 Investigations of the Abu Ghraib Prison and 205th Military Intelligence Brigade by Lieutenant General Anthony R. Jones and Major General George R. Fay at 52. CACI's site lead at Abu Ghraib was also in daily contact with other members of CACI's management in the U.S., *see* Azmy Decl. Ex. 10, and CACI's country manager in Iraq sent reports to CACI management in the U.S. on anything "interesting" that occurred in CACI's provision services to the U.S. government in Iraq, *see* Azmy Decl. Ex. 11 [Mudd Tr.] at 205:3-18; *see also* Azmy Decl. Ex. 14 [Monahan Tr.] at 101:12-102:24. [redacted] *See* Azmy Decl. Ex. 15; Ex. 8 [Morse Tr.] at 42:2-11.

Similarly, CACI, through the acts of its parent company CACI International, engaged in efforts to cover up the role of its employees in the conspiracy in the United States. CACI International was headquartered in Virginia during the relevant time period, and the chief executive officer [redacted] of CACI International, Jack London, [redacted]

[14] [redacted] Azmy Decl. Ex. 8 [Morse Tr.] at 71:22-72:10.

[redacted] *See* Azmy Decl. Ex. 8 [Morse Tr.] at 71:24-72:4; 86:19-24; 87:23-88:4. *See also generally* J. Phillip London, Our Good Name: A Company's Fight to Defend Its Honor and Get the Truth Told About Abu Ghraib (2008).

Finally, CACI's services in Iraq were pursuant to a contract to provide services to the United States government, as opposed to the company's private business abroad. TAC ¶ 15. And it was through this contract that CACI is alleged to have conspired with U.S. – as opposed to foreign – actors, specifically U.S. military personnel deployed at the Abu Ghraib Hard Site. TAC ¶ 78. *Compare Cedeño*, 457 Fed. Appx. at 37 (under any standard for "determining the locus of an enterprise," finding the alleged "association-in-fact" to be "patently foreign" where it was "comprised of various components of the Venezuelan government").

C. The United States' Obligation to Punish Universally Condemned Crimes of Torture and War Crimes Represents an Interest that Sufficiently Touches and Concerns the United States.

The United States has a significant interest in enforcing universal prohibitions on the commission of war crimes, torture and cruel, inhuman and degrading treatment – especially where, as here, the alleged perpetrator is present in the United States. The Supreme Court has affirmed that the U.S. should not provide a "safe haven" for torturers and war criminals. *See Sosa*, 542 U.S. at 732; *see also* 2013 U.S. LEXIS 3159, at *39-42, 44-45 (Breyer, J., concurring). The prohibition against the commission of war crimes and torture are two of the most well-recognized principles of international law, reflected in international treaties, national laws, state practice, and are codified in U.S. law. *See* Pl. Br. for Reconsideration of ATS Claims, Dkt # 145.

The United States was a leader in drafting the foundational documents that prohibit war crimes and torture, including the Geneva Conventions and the Universal Declaration of Human Rights.[15] The U.S. has ratified international treaties and conventions that specifically prohibit war crimes and torture and require all countries to punish these acts, regardless of national links. *See, e.g.*, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT'') Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85, art. 5; Fourth Geneva Convention relative to the Protection of Civilians in Time of War (1949), arts. 3(1)(a) and 147. *See also* International Covenant on Civil and Political Rights, art. 7, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976. Article 14(1) of CAT further provides that States "ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation including the means for as full rehabilitation as possible art. 14 (1). In reporting to the various bodies of the United Nations charged with overseeing States parties' compliance with their treaty obligations, the United States has consistently cited the Alien Tort Statute as one mechanism by which it upholds its obligations to punish these acts and provide a remedy for these offenses.[16]

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[15] *See, generally,* U.N. Human Rights Council, Working Group on the Universal Periodic Review, National Report of the United States, ¶ 5, U.N. Doc. A/HRC/WG.6/9/USA/1 (Aug. 23, 2010) available at: http://lib.ohchr.org/HRBodies/UPR/Documents/session9/US/A_HRC_WG.6_9_USA_1_United%20States-eng.pdf ("From the UDHR to the ensuing Covenants and beyond, the United States has played a central role in the internationalization of human rights law and institutions.").

[16] *See, e.g.,* U.S. Dep't of State, United States Report to the Committee Against Torture, ¶¶ 51, 61-63, 277-280 (reporting on "measures giving effect to its undertakings under [CAT]", cites ATS cases for torture that occurred in territory of foreign sovereigns), U.N. Doc. CAT/C/28/Add.5 (Feb. 9, 2000), available at http://www.state.gov/documents/organization/100296.pdf. *See also* U.N. Human Rights Committee, 4th Periodic report of the United States, ¶ 185, U.N. Doc. CCPR/C/USA/4 (May 22, 2012).

The United States has affirmed that it will not become a "safe haven" for torturers and war criminals by enacting legislation to criminalize these acts with extraterritorial reach.[17] The Torture Statute, 18 U.S.C. § 2340, applies when torture or attempts to commit torture occur "outside the United States" and the alleged offender is either a national of the United States or is present in the United States, "irrespective of the nationality of the victim or alleged offender." 18 U.S.C. § 2340A (a) and (b). The War Crimes Act, 18 U.S.C. § 2441, applies to when members of the U.S. armed forces or U.S. nationals are the perpetrators or victims of war crimes, "whether inside or outside the United States."

Allowing claims to proceed against a *United States* defendant meets U.S. obligations the to the international community and causes no international discord.[18] As the Court observed in *Kiobel*, the United States has had since its founding a national interest in meeting its international obligations, and the ATS is one tool by which it does so. *Kiobel*, 2013 U.S. LEXIS 3159, at *24-25. *See also Sosa*, 542 U.S. 715-718.[19]

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[17] *See also* Torture Victim Protection Act ("TVPA"), 28 U.S. § 1350, note; *Samantar v. Yousuf*, 560 U.S. _, 130 S. Ct. 2278 (2010) (claims brought under the TVPA by foreign plaintiffs against foreign defendant for conduct that occurred in Somalia). The TVPA was adopted in 1992 to complement and expand the reach of the ATS to U.S. citizens. The legislative history makes clear that the ATS "should 'remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law.'" *Sosa*, 542 U.S. at 728 (internal citations omitted). *See also Kiobel*, 2013 U.S. LEXIS 3159, at *48 (Breyer, J. concurring).

[18] The amicus briefs submitted by The Netherlands, the United Kingdom and the European Commission in *Kiobel* find that "[m]any countries permit foreign plaintiffs to bring suits against their own nationals based on unlawful conduct that took place abroad." *Id.* at *45.

[19] The United States has undertaken to "protect, respect and remedy" human rights violations by corporations in accordance with the U.N. Guiding Principles on Business and Human Rights. *See* "U.S. Government Approach to Business and Human Rights," Dep't of State, May 1, 2013("as part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other

Indeed, the United States has already expressed its position on the importance of this specific case: it supports the Iraqi torture victims so seriously harmed at Abu Ghraib pursing a civil remedy in U.S. courts. In its amicus brief to the Fourth Circuit, sitting *en banc*, the United States urged that Plaintiffs' claims related to torture should be permitted to proceed, in the interests of justice, and insofar as they vindicate one of our most important national interests – the prohibition of torture. Br. of Amicus Curiae United States, *Al Shimari v. CACI International, Inc.*, No. 09-1335 (4th Cir. Jan. 14, 2012). Dkt #146 at 22-23, 26. The U.S. Government advised that "courts should take into account the strong federal interests embodied in that federal law," i.e., the Torture Statute, 18 U.S.C. § 2340. *Id.* at 22.

CONCLUSION

Accordingly, this Court should find that recognizing a cause of action for war crimes, torture, and cruel, inhuman and degrading treatment, against a defendant domiciled in the United States for acts of torture and war crimes committed at Abu Ghraib are in the national interest, and that the presumption against extraterritorial application is displaced.

Date: May 3, 2013

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appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy") available at: http://www.humanrights.gov/2013/05/01/u-s-government-approach-on-business-and-human-rights/. *See also* U.S. Suppl. *Kiobel* Br. at 5. (recognizing that the State where a corporation is domiciled can "be thought responsible in the eyes of the international community for [failing to] afford[] a remedy for the company's actions").

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CERTIFICATE OF SERVICE

I hereby certify that on May 3, 2013, I caused the PLAINTIFFS' OPPOSITION TO 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 and accompanying DECLARATION OF BAHER AZMY, ESQ. to be sent to the following counsel for Defendant via email:

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