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

IN RE: XE ALIEN TORT CLAIMS ACT LITIGATION	**No. 1:09-cv-615** **No. 1:09-cv-616** **No. 1:09-cv-617** **No. 1:09-cv-618** **No. 1:09-cv-645** **(consolidated for pretrial purposes)** **(TSE/IDD)**

CONSOLIDATED POST-HEARING BRIEF IN RESPONSE TO THE COURT'S ORDER

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INTRODUCTION

Defendants submit this brief and the attached supplemental expert report in response to the Court's August 28 Order. The supplemental expert report discusses the Iraqi courts' possible construction of CPA Order No. 17 and the brief provides relevant legal context regarding the interpretation of the Order and the consequences of the uncertainty about the Iraqi courts' construction of the Order.

ARGUMENT

I. CPA ORDER NO. 17 APPEARS TO PRECLUDE PLAINTIFFS FROM LITIGATING THEIR CLAIMS IN IRAQI COURTS, BUT THE PROVISION'S EFFECT IS NOT CERTAIN.

Defendants explained in their earlier briefs that Section 4(3) of CPA Order No. 17 provides broad immunity from Iraqi legal process for "Coalition Contractors" that were "supplying goods and/or services" at the time of the alleged torts. *See* Dkt. No. 38, 32-33; Dkt. No. 57, 30. Defendants believe that the immunity described in Section 4(3) applies to the conduct at issue in these cases, but Defendants recognize that Order No. 17 can be read to contemplate situations in which contractors may not be entitled to immunity from Iraqi legal process. Thus, Section 4(3) is expressly limited to conduct that is "pursuant to the terms and conditions of a Contract."

The Complaints in these cases appear to allege that the conduct supposedly giving rise to Plaintiffs' claims was not undertaken pursuant to the State Department contracts. *E.g.*, *Abtan Am.* Compl. (Dkt. No. 5) ¶ 83 ("Defendants' acts were deliberate killings that * * * were not carried out under the authority of any country or court."); *see id.* ¶¶ 58-60. Indeed, during the hearing on Defendants' motions to dismiss, Plaintiffs' counsel explained that, "the relationship between the state and [Defendants] is defined by contract" but that Defendants did not "abide[] by the contract." Aug. 28, 2009 Tr. at 35; *id.* at 33 ("what we alleged in the complaint was that they did not have authority from the United States to do what they did"). Plaintiffs thus appear

to believe that the ICs' actions *were not* pursuant to the terms and conditions of the contracts between USTC and the United States Government.[1]

Following the August 28, 2009 hearing, Defendants asked Professor Haider Ala Hamoudi, who has previously provided expertise on Iraqi law in these proceedings, to examine the effect of CPA Order No. 17 on Plaintiffs' claims. In his second supplemental expert report, which is submitted with this brief, Professor Hamoudi concludes that it "is quite uncertain under Iraqi law, and it would be unclear how any Iraqi court reviewing this case for the first time might choose to read and apply" the immunity provision of CPA Order No. 17. Ex. A ¶ 5. Although Defendants believe that the conduct about which Plaintiffs complain was undertaken pursuant to the terms and conditions of the contracts (with the exception of the allegations of the *Sa'adoon* complaint, *see* note 1, *supra*)), it is not certain how an Iraqi court would rule on that issue (*id.* ¶ 4) given Plaintiffs' allegations and the absence of a definitive "Certification" of compliance with "the terms and conditions of the "Contract" by the Sending State, *i.e.*, the United States. CPA Order No. 17 § 4(5).

As Professor Hamoudi explains, in light of the uncertainties created by the assertions in Plaintiffs' complaints, "there is no guarantee that the [Iraqi] judge would deem defendants immune from suit in the instant matter." Hamoudi Second Supp. Report ¶ 5. The only way to

[1] In the *Sa'adoon* complaint, Plaintiffs also allege that IC Andrew Moonen, of his own accord and after hours, attended a holiday party, got drunk, wandered "intoxicated" through Baghdad, and shot and killed a security guard "for no reason." *Sa'adoon* Compl. (Dkt. No. 1) ¶¶ 17-24.

know whether such claims could be litigated in Iraq is for these cases to be dismissed, and for Plaintiffs to re-file their actions in their home country.[2]

II. PLAINTIFFS MUST EXHAUST IRAQI REMEDIES BEFORE ASSERTING ALIEN TORT STATUTE CLAIMS IN THIS COURT.

In view of the absence of a clear answer regarding Plaintiffs' ability to bring their claims in Iraqi courts, this Court should dismiss the ATS claims on the additional ground that the doctrine of exhaustion of local remedies requires Plaintiffs to attempt to pursue those claims in an Iraqi court before seeking relief in this Court.

The Supreme Court in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), considered whether foreign plaintiffs bringing ATS claims must first exhaust their local remedies before bringing suit in the United States. The Court noted that the European Commission had filed an *amicus* brief arguing that "basic principles of international law require that before asserting a claim in a foreign forum, the claimant must have exhausted any remedies available in the domestic legal system." *Id.* at 733 n.21. Although the Court ultimately decided the case on other grounds, it announced that it "would certainly consider this requirement in an appropriate case." *Id.*

An exhaustion requirement for ATS claims in general—and for Plaintiffs' ATS claims in this case in particular—makes sense for four reasons. *First*, the requirement that "local remedies must be exhausted" is a "well-established rule of customary international law." *Switzerland v.*

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[2] This Court reached a similar conclusion in *Galustian v. Peter*, 590 F. Supp. 2d 804 (E.D. Va. 2008), *appeal docketed*, 09-1069 (4th Cir. Jan. 15, 2009). There, the Court ruled that although it was uncertain whether CPA Order No. 17 would result in immunity in Iraq, "it was appropriate to dismiss th[e] case without prejudice" and allow the plaintiff to proceed in Iraq. *Id.* at 807. "Should plaintiff file this case in Iraq only to find that defendant is protected by Order 17 immunity, plaintiff can refile this suit in the Eastern District of Virginia." *Id.* (footnote omitted). The defendant in *Galustian* consented to jurisdiction and waived any immunity under CPA Order No. 17 in the Iraqi courts. Defendants in these cases have done neither.

United States (Interhandel), 1959 I.C.J. Rep. 6, 27 (March 21, 1959); *see also* Br. of *Amicus Curiae* the European Comm'n, *Sosa v. Alvarez-Machain*, No. 03-339, *available at* 2004 WL 177036, at *24-*25 (January 23, 2004) (gathering authorities).[3] Plaintiffs should not be permitted to violate one rule of international law in the course of purporting to vindicate another.

Second, an exhaustion requirement would help ameliorate one of the concerns that the Supreme Court articulated in *Sosa* with regard to ATS claims. There, the Court observed that one reason why federal common law claims in this area should be created, "if at all, with great caution" is that suits involving conduct that occurred abroad inevitably pose "adverse foreign policy consequences." 542 U.S. at 728. If ATS plaintiffs are required first to exhaust their local remedies, those foreign policy conflicts may be avoided because the foreign state is provided "an opportunity to redress [the matter] by its own means, within the framework of its own domestic legal system." *Switzerland*, 1959 I.C.J. Rep. at 27.

Third, as this Court pointed out at the hearing on the motions to dismiss, ascertaining the content of international law—and then whether an international law principle is sufficiently definite and universally accepted to satisfy the *Sosa* standard—is a difficult and uncertain task. *See* Aug. 28, 2009 Tr. at 7. Directing a plaintiff to seek redress in his or her home country could eliminate any need for a U.S. court to undertake this inquiry.

Fourth, exhaustion of remedies is required by the principles governing judicially created private rights of action. *Sosa* confirmed that ATS claims may be brought only when the court is

[3] *See also Enahoro v. Abubakar*, 408 F.3d 877, 886 (7th Cir. 2005) (suggesting that "a requirement for exhaustion is itself a basic principle of international law"); *id.* at 890 n.6 (Cudahy, J., dissenting) (collecting authorities showing that "[e]xhaustion of remedies requirements are a well-established feature of international human rights law"); S. Rep. No. 102-249, at 10 (1991) (express exhaustion requirement in Torture Victim Protection Act, 28 U.S.C. § 1350 *note*, reflects "general principles of international law").

persuaded that a federal common law remedy should be crafted for the asserted violation of international law. *See* 542 U.S. at 724. But when recognizing a novel private right of action, "the general practice has been to look for legislative guidance" and to defer to Congress's policy judgments. *Id.* at 726. For example, in crafting a private right of action, courts should avoid the "anomalous" result of imposing liability "beyond the bounds [that Congress] delineated for comparable express causes of action." *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 180 (1994) (internal quotation marks omitted).

The express private cause of action that is most similar to Plaintiffs' claims of summary execution and war crimes in violation of international law is the Torture Victims Protection Act ("TVPA"), 28 U.S.C. § 1350 *note*, which imposes civil liability on any "individual who, under actual or apparent authority, or color of law, of any foreign nation * * * subjects an individual to extrajudicial killing * * *." *Id.* § 2(a)(2). Any federal common law cause of action under the ATS therefore should be modeled after the TVPA—which requires plaintiffs first to "exhaust[] adequate and available remedies in the place in which the conduct giving rise to the claim occurred." *Id.* § 2(b).[4]

Indeed, an en banc panel of the Ninth Circuit recently held that courts should consider exhaustion before entertaining an ATS claim. *See Sarei v. Rio Tinto, PLC*, 550 F.3d 822 (9th Cir. 2008) (en banc). (The Fourth Circuit has not yet addressed the issue.) A plurality of the en

[4] *See Enahoro*, 408 F.3d at 885-86 (explaining that any cause of action under the ATS must respect the policy judgments Congress made in crafting the TVPA); *id.* at 890 (Cudahy, J., dissenting) ("[W]hile not directly applicable to the [ATS], the TVPA scheme is surely persuasive since it demonstrates that Congress not only assumed that the exhaustion requirements imposed by customary international law were discernible and effective in themselves, but also that they should be reflected in U.S. domestic law."). The TVPA has been described as the "appropriate vehicle for interstitial lawmaking" for the ATS. *Papa v. United States*, 281 F.3d 1004, 1012 (9th Cir. 2002) (internal quotation marks omitted).

banc Ninth Circuit concluded that, "as a threshold matter, certain ATS claims are appropriately considered for exhaustion under both domestic prudential standards and core principles of international law." *Id.* at 824 (plurality). Specifically, "[w]here the 'nexus' to the United States is weak, courts should carefully consider the question of exhaustion, particularly—but not exclusively—with respect to claims that do not involve matters of universal concern." *Id.* (internal quotation marks omitted).[5]

In *Sarei*, the plaintiffs had alleged violations of international law that the court deemed to be of "universal concern": "torture, crimes against humanity, and war crimes." 550 F.3d at 831. But because the allegations "involve[d] a foreign corporation's complicity in acts on foreign soil that affected aliens," the court nonetheless concluded that "lack of a significant United States 'nexus'" militated in favor of requiring the plaintiffs "to exhaust their local remedies in accordance with the principle of international comity." *Id.*

The same logic applies here. Regardless of whether Plaintiffs' allegations rise to the level of matters of "universal concern," the nexus between the allegations and the United States is "weak" at best. The alleged killings all involved Iraqi victims and took place on Iraqi soil. Because the Iraqi judicial system may provide an adequate forum for vindicating such claims, the ATS claims should be dismissed so that Plaintiffs may pursue any remedies made available to them by their own country. Indeed, as Professor Hamoudi, an expert on the Iraqi court

[5] Only four of the eleven judges on the en banc panel in *Sarei* rejected an exhaustion requirement. *See* 550 F.3d at 843 (Reinhardt, J., dissenting, joined by Pregerson, Berzon, and Rawlinson, JJ.). Of the remaining seven judges, the only disagreement on exhaustion was whether to go further than the plurality opinion and require exhaustion in all cases, rather than limit the requirement to cases that lack a nexus to the United States. *See id.* at 833 & n.1 (Bea, J., concurring, joined by Callahan, J.); *id.* at 840 (Klenfield, J., concurring).

system, confirms, a cause of action for wrongful death exists under Iraqi law against a person who commits an unlawful killing. Dkt. No. 38, Ex. B ¶ 14.

It is true that, as noted above, there is uncertainty regarding the effect of CPA Order No. 17 on Plaintiffs' ability to assert their claims in the Iraqi judicial system. Under the exhaustion principles applicable here, the appropriate step at this juncture is to dismiss these cases and permit Plaintiffs to pursue their claims in their home forum. This Court should not deprive the Iraqi courts of the opportunity to exercise primary jurisdiction over claims arising out of conduct occurring in Iraq and involving Iraqi citizens merely because there is a *chance* that Iraqi law may bar some or all of the claims.

III. THE DOCTRINES OF *FORUM NON CONVENIENS* AND COMITY PROVIDE GROUNDS FOR DISMISSING ALL OF PLAINTIFFS' CLAIMS SO THAT PLAINTIFFS MAY PURSUE THEM IN AN IRAQI COURT.

The Court could dismiss the Complaints in their entirety on the ground that principles of *forum non conveniens* and international comity require Plaintiffs to attempt to pursue their claims in an Iraqi court.

Under the doctrine of *forum non conveniens*, "a court may dismiss an action in favor of an alternative forum when 'the chosen forum would establish * * * oppressiveness and vexation to a defendant * * * out of all proportion to plaintiff's convenience, or when the chosen forum [is] inappropriate because of considerations affecting the court's own administration and legal problems.'" *Compania Naviera Joanna SA v. Koninklijke Boskalis Westminster NV*, 569 F.3d 189, 200 (4th Cir. 2009) (quoting *Am. Dredging Co. v. Miller*, 510 U.S. 443, 447-48 (1994) (alterations and omissions in original). As discussed above, it is possible that an Iraqi court

would be an "available" and "adequate" forum (*Piper Aircraft, Co. v. Reyno* 454 U.S. 235, 254 (1981)) for Plaintiffs' claims.[6]

In *Compania Naviera*, the Fourth Circuit identified six factors that district courts should weigh in deciding whether to dismiss on the basis of *forum non conveniens*:

> (1) the ease of access to sources of proof; (2) the availability of compulsory process for securing the attendance of unwilling witnesses; (3) the costs of obtaining the attendance of witnesses; (4) the ability to view premises; (5) the general facility and cost of trying the case in the selected forum; and (6) the public interest, including administrative difficulties, the local interest of having localized controversies decided at home, and the interest of trying cases where the substantive law applies.

569 F.3d at 200.

Closely related to the principle of having local disputes decided locally is international comity, which is the respect that one nation accords to the laws and judgments of another. *See Hilton v. Guyot*, 159 U.S. 113, 164 (1895). The comity doctrine is one of abstention; it vests district courts with discretion, in deference to the interests of a foreign country, to "decline to exercise jurisdiction in a case" that would be more "properly adjudicated in a foreign state." *In re Maxwell Commc'n Corp.*, 93 F.3d 1036, 1047 (2d Cir. 1996); *accord Canada Malting Co. v. Paterson Steamships, Ltd.*, 285 U.S. 413, 422-23 (1932) (observing that courts "occasionally decline, in the interest of justice, to exercise jurisdiction, where the suit is between aliens or

[6] It is true that requiring Plaintiffs to litigate in Iraq rather than in this Court likely would limit the remedies available to them, as the law of Iraq—like that of almost all other countries—is less generous to plaintiffs in tort cases than the law of the United States. But as the Supreme Court observed, "if the possibility of an unfavorable change in substantive law [were] given substantial weight in the *forum non conveniens* inquiry, dismissal would rarely be proper." *Piper Aircraft*, 454 U.S. at 250. Accordingly, courts need not "compare the rights, remedies, and procedures available under the law that would be applied in each forum" to assess whether "the law applied by the alternative forum is as favorable to the plaintiff as that of the chosen forum." *Id.* at 251.

nonresidents, or where for kindred reasons the litigation can more appropriately be conducted in a foreign tribunal").

In *Ungaro-Benages v. Dresdner-Bank AG*, 379 F.3d 1227 (11th Cir. 2004), the Eleventh Circuit held that international comity required the dismissal of a lawsuit alleging that two German banks unlawfully had obtained the plaintiffs' assets during the Nazi regime. Recognizing that the German government had established a foundation to adjudicate such claims, and that the lawsuit would require the application of German law to events that occurred in Germany, the court of appeals held that the district court appropriately declined to exercise jurisdiction. *See id.* at 1231, 1237-40.

The factors relevant under these doctrines would support dismissal here. There can be no dispute that the vast majority of the relevant witnesses and physical evidence pertaining to the alleged shootings are in Iraq. The parties cannot invoke the Court's subpoena power to obtain access to those sources of proof. To make matters worse, Iraq is a signatory to neither the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, March 18, 1970, 23 U.S.T. 2555, *reprinted as a note to* 28 U.S.C. § 1781, nor the Convention on the Service Abroad of Extrajudicial Documents, Nov. 15, 1965, 20 U.S.T. 361. As a result, it would be difficult if not impossible to take discovery from third parties in Iraq if the case proceeds here, and Defendants therefore would be substantially prejudiced in obtaining evidence critical to their defense. At the very least, attempting to secure the compliance of Iraqi witnesses through diplomatic channels would be extremely cumbersome and expensive.

Moreover, as the briefing on this motion to dismiss alone has demonstrated, these actions present a substantial administrative burden for the Court. Among other things, the Court would face the challenge of discerning and applying Iraqi law, which is a civil law system based in part

on Islamic law. In doing so, the Court would have to reconcile competing translations of the original Arabic documents.

Finally, as explained above, the United States has little or no connection to this dispute. It is Iraq that has a strong interest in providing a remedy to Iraqi citizens who are injured or killed by conduct occurring in Iraq. That undertaking is best left to the Iraqi courts.

CONCLUSION

For the foregoing reasons, the Court should dismiss the ATS claims so that Plaintiffs may exhaust any Iraqi remedies. The Court may wish to consider dismissing the complaints in their entirety and directing Plaintiffs to attempt first to pursue all of their claims in the Iraqi courts.

Dated: September 4, 2009

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on September 4, 2009, I electronically filed 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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EXHIBIT A

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

IN RE: BLACKWATER ALIEN TORT CLAIMS ACT LITIGATION	**Case No. 1:09-cv-615** **Case No. 1:09-cv-616** **Case No. 1:09-cv-617** **Case No. 1:09-cv-618** **Case No. 1:09-cv-645** **(consolidated for pretrial purposes)** **(TSE/IDD)**

SECOND SUPPLEMENTAL EXPERT REPORT OF HAIDER ALA HAMOUDI RESPECTING CPA ORDER 17

1. Following the hearing that took place on August 28, Defendants' counsel asked me to analyze the effect under Iraqi law of Order 17 of the Coalition Provisional Authority of Iraq ("CPA"). Specifically, I have been asked about the scope of the immunity grant under Order 17, particularly as it would apply to facts such as those that appear in this case. My opinion with respect to this matter is set forth below.

2. In relevant part, Section 4 of CPA Order 17 provides as follows:

> . . .
>
> 3) Contractors shall be immune from Iraqi legal process with respect to acts performed by them pursuant to the terms and conditions of a Contract or any sub-contract thereto. Nothing in this provision shall prohibit MNF Personnel from preventing acts of serious misconduct by Contractors, or otherwise temporarily detaining any Contractors who pose a risk of injury to themselves or others, pending expeditious turnover to the appropriate authorities of the Sending State. In all such circumstances, the appropriate senior representative of the Contractor's Sending State in Iraq shall be notified.
>
> . . . .
>
> 5) Certification by the Sending State that its Contractor acted pursuant to the terms and conditions of the Contract shall, in any Iraqi legal process, be conclusive evidence of the facts so certified.

3. Ultimately the question that arises is what would constitute, under the CPA Order, acts performed "pursuant to the terms and conditions of a Contract" and what conduct might fall beyond that, and therefore not be protected by the grant of immunity.

4. This is a particularly important issue in cases where Section 5 has not been triggered by a certification of compliance from the Sending State. I understand and therefore assume for purposes of this report that the United States has not issued such a certification for the matters at issue.

5. My conclusion is that the interpretation of the scope of CPA Order 17 is quite uncertain under Iraqi law, and it would be unclear how any Iraqi court reviewing this case for the first time might choose to read and apply the provision. As a result, sufficient flexibility is available to an Iraqi judge such that there is no guarantee that the judge would deem defendants immune from suit in the instant matter. There are several reasons this is so.

6. CPA Orders, while a part of Iraqi law unless repealed by a subsequent Iraqi government, are not well integrated into the fabric of Iraqi law. The signed versions of the Orders, including Order 17, are in English. Given that Order 17 by its terms (as with CPA Orders generally) becomes law upon signature, this means that the only authoritative version is in English. Arabic translations of the Orders, including Order 17, are widely available, and one has even been published in the official Iraqi Gazette. However, the fact that the authoritative version is in a language that most Iraqi judges cannot readily understand renders such orders somewhat problematic to apply.

7. In addition, the CPA Orders were written largely by American lawyers, with little input from prominent Iraqi legal figures. As a result, the Orders fit awkwardly with the balance of Iraqi laws, which are influenced by French law and Islamic law far more than American law.

8. The result of this is that the CPA Orders, including Order 17, have not been the subject of much consideration or discussion by prominent scholars or others. I have researched secondary authority with a view to developing a broader understanding of the language of Order 17, and I have found no analysis of it, or of any other CPA Orders, in leading treatises. The most that recent treatises might do is include CPA Orders as appendices without discussion as to how they should be interpreted.

9. In circumstances where source material is scarce, Iraqi judges are accustomed to resorting to their own sense of equity and justice in making rulings. As an example of how this is sanctioned by, and even required of, judges, in the context of Iraqi civil courts in particular, Article 1(2) of the Iraqi Civil Code indicates that if no provision is available in the Civil Code to provide a rule for any given set of facts, then courts should turn to custom. If custom provides no answer, then resort may be made to Islamic law and if Islamic law offers no conclusion, then the judge must rule according to the "necessities of justice." It is not clear to me whether and how the immunity grant in Section 4(3) of CPA Order 17 would harmonize more with the "requirements of justice" if it were read broadly or narrowly.

10. Should Plaintiffs pursue their claims in Iraqi court, the issues addressed in my previous reports should impose substantial limitations on their ability to recover under Iraqi law. That said, it seems entirely possible that Plaintiffs would be permitted to

proceed with their claim notwithstanding the immunity grant in Order 17 for the reasons set forth above.

September 4, 2009

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