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

IN RE: XE SERVICES ALIEN TORT 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 REPLY BRIEF IN RESPONSE TO THE COURT'S ORDER

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INTRODUCTION

Defendants submit this brief pursuant to the Court's September 10 Order in response to Plaintiffs' September 4 and September 16 supplemental filings regarding Defendants' pending motion to dismiss. Plaintiffs argue that CPA Order No. 17 renders Iraq an unavailable forum for purposes of the *forum non conveniens* analysis, and that the Order's existence excuses their failure to exhaust their local remedies before bringing Alien Tort Statute ("ATS") claims in this Court. As we explain below, however, the applicability and effect of Order No. 17 remain uncertain—an uncertainty that will persist until Plaintiffs seek relief in Iraq. Furthermore, even if exhaustion were not required for ATS purposes, the D.C. Circuit's decision ten days ago in a case involving tort claims against two government contractors in Iraq provides further support for the dismissal of Plaintiffs' ATS claims. Finally, Plaintiffs' submission of a statement of interest filed by the United States fourteen years ago in *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995), does not bolster their Alien Tort Statute claim.

ARGUMENT

I. BECAUSE THE EFFECT OF CPA ORDER NO. 17 IS UNCERTAIN, THIS COURT MAY REQUIRE PLAINTIFFS TO ATTEMPT TO INVOKE THE JURISDICTION OF THE IRAQI COURTS.

A. The Effect Of CPA Order No. 17

This Court ordered supplemental briefing on the effect of CPA Order No. 17 to enable the Court to assess whether the courts of Iraq might be available for adjudication of Plaintiffs' claims. Expressing concern over the difficulty of determining the relevant aspects of Iraqi law, the Court observed that this problem would be eliminated if Plaintiffs could litigate their claims in Iraq. *See* Transcript of August 28, 2009 Hearing on Defendants' Motions to Dismiss ("8/28/09 Tr."), at 64-65. It therefore directed the parties to file briefs addressing how the Iraqi courts interpret the Order. *Id*. at 69-70.

Defendants' position regarding the meaning of Order No. 17 remains unchanged: the Order precludes the assertion of Plaintiffs' claims in the courts of Iraq, as well as in any other court that would apply Iraqi law to those claims, with the possible exception of the claims asserted in the *Sa'adoon* case which arise out of conduct that plainly fell outside Defendant Moonen's scope of employment and that was not "pursuant to the terms and conditions of" the State Department contract. *See* Dkt. No. 74, at 2 & n.1. Plaintiffs assert that the Order precludes all claims from being heard in Iraq, but has no effect on their ability to assert those claims in other courts. *See* Dkt. No. 91, at 6-16.

This Court directed the parties to provide more than a statement of position on the Order's meaning, however. It ordered them to explain how the Iraqi courts would decide that question. Defendants' inquiries revealed that, although the relevant authorities support Defendants' interpretation of the statute, it is not certain that the Iraqi courts would reach that result. Dkt. No. 74, at 2-3. That is because the immunity provisions cited by Defendants and Plaintiffs—Section 4(3) and Section 18—are expressly limited "to acts performed by [a contractor] pursuant to the terms and conditions of" a contract. There is no basis for predicting with certainty how an Iraqi court would apply that critical clause to acts that are expressly alleged to fall outside the scope of the relevant contract. *Id.* at 2-3 & Ex. A.[1]

Plaintiffs' submissions fail to address this question. Rather, Plaintiffs at first appeared to contend that a contractor is entitled to immunity in the absence of an express waiver of immunity by the Sending State pursuant to Section 5. *See* Dkt. No. 75, Ex. A. But that interpretation of the Order conflicts with its express language: if a waiver of immunity by the Sending State were

[1] Plaintiffs' assertion that Defendants have changed their position or are "playing fast and loose with the courts" (Dkt. No. 91, at 6) is incorrect; Defendants are simply answering the Court's inquiry regarding an issue not addressed in either party's initial pleadings.

required in every case, there would be no need for Section 4(5)—which provides that a Sending State's determination that a 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"—because immunity would attach in every case *unless* the plaintiff had procured an explicit waiver. CPA Order No. 17, § 4(5).

Plaintiffs' more recent submissions put forward a different interpretation, recognizing that the immunity for contractors applies "with regard to work carried [out] under the terms and conditions of a contract" or "while carrying out their work" or to "acts that they carry out within the frame of their official activities, in accordance with the provisions and terms of a contract." Dkt. No. 91, Exs. A, B, C. That conclusion is not only consistent with the language of the immunity provisions, it also is compelled by Section 4(5), which indicates that in the absence of a Sending State determination under that provision, the facts relevant to the entitlement to immunity will be determined by the Iraqi court hearing the case.[2]

Even though Plaintiffs' submissions thus make clear that the immunity grant turns upon whether the relevant conduct was "pursuant to the terms and conditions of" the State Department contract, Plaintiffs never explain why an Iraqi court would inevitably find that condition satisfied in these cases. As we explained in our initial submission, Plaintiffs' view of the facts, as recited in the Complaint's allegations, is inconsistent with such a conclusion. Dkt. No. 74, at 1-2 (citing Abtan Am. Compl. ¶ 83 ("Defendants' acts were deliberate killings that * * * were not carried out under the authority of any country or court.")); *id.* ¶¶ 58-60. And that is especially true in

[2] Plaintiffs also submitted a document from the Iraq Ministry of Education relating to a request to bring a claim against a contractor. Dkt. No. 91, Ex. D. But as the document does not indicate whether there was a question whether the conduct giving rise to the claim was "pursuant to the terms and conditions of" the relevant contract, it sheds no light on the issue on which Order No. 17 immunity turns.

the *Sa'adoon* case. The only way to know how an Iraqi court would resolve this uncertainty would be to require Plaintiffs to exhaust their local remedies by refiling their claims in Iraq.

B. This Court May Require Plaintiffs To Exhaust Iraqi Remedies Before Asserting Their ATS Claims.

Defendants explained that the Court may require Plaintiffs to exhaust their local remedies before seeking relief in this Court under the ATS. *See* Dkt. No. 74, at 3-7. In response, Plaintiffs first argue that Defendants waived the exhaustion argument because it was not discussed in the motion to dismiss. *See* Dkt. No. 91, at 18-19. Defendants raised the exhaustion issue in response to the Court's inquiry regarding Order No. 17. *See* 8/28/09 Tr. at 69-70; Dkt. No. 69.

Because the Court has the power to dismiss *sua sponte* on exhaustion grounds after providing Plaintiffs with an opportunity to address the issue, *see Anderson v. XYZ Corr. Health Servs., Inc.*, 407 F.3d 674, 681-82 (4th Cir. 2005) (holding that "failure-to-exhaust is an affirmative defense does not foreclose in all cases the possibility of a *sua sponte* dismissal on exhaustion grounds," as long as the plaintiff has the opportunity to respond), there is no need to consider the waiver question.

Moreover, Federal Rule of Civil Procedure 12(g)—on which Plaintiffs rely—provides that "a party that makes a motion under this rule must not make *another motion* under this rule raising a defense or objection that was available to the party but omitted from its earlier motion." Fed. R. Civ. P. 12(g) (emphasis added). Defendants have not made *another* motion to dismiss. They filed one motion that remains pending. In any event, the exhaustion defense would be timely even if Defendants' post-hearing brief were treated as a separate motion, filed while the first one was pending. *See Jetform Corp. v. Unisys Corp.*, 11 F. Supp. 2d 788, 790-91 (E.D. Va. 1998) (explaining that "[t]he purpose of Rule 12(g) is to prevent unnecessary delay at the

pleading stage," and that the latter concern was not present where the defendant's "second motion was made before the Court ruled on the first motion"). Here, the Court invited the parties to submit supplemental briefing in connection with the pending motion, and Plaintiffs have had a full and fair opportunity to address the exhaustion issue in their supplemental post-hearing brief. Accordingly, the defense has not been waived.

Plaintiffs also dispute that exhaustion should be required under the ATS. While it is true that the ATS does not contain an express exhaustion requirement (Dkt. No. 91, at 19), the Supreme Court stated in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004), that it would "certainly" consider an exhaustion requirement in an "appropriate case," and the Ninth Circuit—the only court of appeals to addressed this issue post-*Sosa*, has held that exhaustion may be required. *See* Dkt. No. 74, at 5-6. Moreover, Defendants have identified a number of reasons why such a requirement is appropriate here. First, the exhaustion of local remedies is a customary and well-established rule of international law. *See id.*, at 3-4 (citing authorities). Plaintiffs assert that the international authorities cited in Defendants' brief for this proposition are not "compelling," Dkt. No. 91, at 18, but they offer no contrary authority.

Second, as defendants explained in their post-hearing brief, the exhaustion requirement reduces the risk of adverse foreign policy consequences that may otherwise result from the recognition of new common law claims under the ATS. *See Sosa*, 542 U.S. at 728. Plaintiffs argue that their claims portend no foreign policy conflicts because the declarations they have submitted show that "Iraq is comfortable with the fairness and efficacy of litigation in this nation." Dkt. No. 91, at 22. However, none of Plaintiffs' declarants purports to speak for the Iraqi government. Plaintiffs themselves concede that "the Iraqi government clearly has a strong interest in the case." *Id.* at 17. Accordingly, absent a clear statement by the Iraqi government

renouncing any interest in applying its law to this controversy, the foreign policy considerations underlying the exhaustion requirement apply with full force.[3]

Third, defendants noted that an ATS exhaustion requirement ensures that the Court will not be required to sift through an assortment of domestic and international sources of law to determine whether an asserted international norm is sufficiently definite and precise to support an ATS claim. *See Sosa*, 542 U.S. at 728 Although Plaintiffs maintain that their ATS claims rest on well-recognized international law norms, they do not take issue with the Court's observation that the process of identifying such norms is a difficult and uncertain task. *See* 8/28/09 Tr. at 7.

C. The Doctrines Of *Forum Non Conveniens* And Comity Provide Grounds For Requiring Plaintiffs To Pursue Their Claims In An Iraqi Court.

The Court has the power to dismiss Plaintiffs' claims under the *forum non conveniens* and comity doctrines. *See* Dkt. No. 74, at 7-10. Plaintiffs argue that dismissal under the *forum non conveniens* doctrine is proper only if an adequate alternative forum exists, and they insist that Iraq is not an available forum because CPA Order No. 17 deprives the Iraqi courts of jurisdiction over Defendants. *See* Dkt. No. 91, at 3-4. But the applicability of Order No. 17 remains uncertain where, as here, a claimant expressly alleges contractor conduct outside the scope of the relevant contract. *E.g.*, Abtan Am. Compl., ¶¶ 58-60, 83.

Plaintiffs take particular exception to Defendants' assertion that their claims have at most a weak connection to the United States, and that an Iraqi jury would have a far greater interest in adjudicating them than would a jury in this jurisdiction. *See* Dkt. No. 91, at 16-17. While the

[3] The new Status of Forces Agreement between Iraq and the United States, which became effective January 1, 2009, revokes the immunity conferred by CPA Order No. 17. It states, in pertinent part, that "Iraq shall have the primary right to exercise jurisdiction over United States contractors and United States contractor employees." Status of Forces Agreement Art. 12, ¶ 2.

United States Department of State contracted with some of the Defendants to provide security services in Iraq, the nexus between these cases and the United States ends there. But the nexus ends there. Plaintiffs are Iraqi nationals asserting claims that are based on conduct that allegedly occurred in Iraq, and that are governed by Iraqi substantive law. Plaintiffs observe that the Nisoor Square incident "caused widespread public outrage in Iraq." Dkt. No. 91, at 11 & n.3. Iraq has a greater interest in applying its law to torts that occurred on its soil than does the United States.

II. PLAINTIFFS' REFERENCE TO THE UNITED STATES' STATEMENT OF INTEREST IN *KADIC* CANNOT SAVE THEIR WAR CRIMES CLAIMS.

Plaintiffs' response to the Court's Order for supplemental briefing on CPA Order No. 17 invokes and attaches as an exhibit the United States' Statement of Interest in *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995). *See* Dkt. No. 75, Ex. D. Plaintiffs assert that it is "relevant to the determination of [their] claims asserted under the Alien Tort Statute." *See id.*, at 2 & Ex. D. But neither the Statement of Interest nor *Kadic* itself provides any support for Plaintiffs' ATS claims.

To begin with, the Statement of Interest was filed more than a decade before the Supreme Court's seminal decision in *Sosa*, and therefore does not take account of the stringent standard for recognition of a cause of action set forth by the Supreme Court in that case. *See* Dkt. No. 38, at 6; Dkt. No. 57, at 1-2. Indeed, the D.C. Circuit's recent decision in *Saleh v. Titan Corp.*, No. 08-7008, 2009 WL 2902081 (D.C. Cir. Sept. 11, 2009), confirms that *Sosa*'*s* standard precludes Plaintiffs' ATS claims.

Defendants explained in their Motion to Dismiss that the ATS virtually never gives rise to claims against non-state actors, citing a number of authorities—authorities that Plaintiffs have made no attempt to rebut. *See* Dkt. 38, at 6-7; Dkt. No. 57, at 2. Plaintiffs assert instead that

"[t]he Supreme Court held in *Sosa* that private parties can be held liable for violations of the law of nations." *See* Dkt. No. 47, at 39.

The D.C. Circuit flatly rejected this precise argument in *Saleh*.[4] It concluded that the fact that the *Sosa* Court reserved the question whether a private actor can be liable under the ATS and "went on to analyze whether an ATS cause of action" existed for the claim of arbitrary detention did *not* mean that the Court "must have implicitly determined that a private actor could be liable" under the ATS. 2009 WL 2902081, at *13. "[C]ourts often reserve an issue they don't have to decide because, even assuming *arguendo* they favor one side, that side loses on another ground." *Id.*; *see also* Dkt. No. 57, at 2-3.

Saleh also rejected Plaintiffs' expansive reading of the Second Circuit's opinion in *Kadic,* concluding that the "holding is not so broad" as to imply that "certain categories of" conduct are actionable even when undertaken by a private actor. 2009 WL 2902081, at *13; *cf.* Dkt. No. 47, at 35 (asserting that any "national of the United States" can be liable for war crimes). The court emphasized that "it must be remembered that in *Kadic*, the defendant was the self-proclaimed President of the Serbian Republic of Bosnia-Herzegovina." *Saleh*, 2009 WL 2902081, at *13. His militia was a "quasi-state entity . . . easily distinguishable from a private actor such as Titan," one of the government contractor defendants in *Saleh*. *Id.* *Saleh* therefore supports

[4] Given that Plaintiffs' counsel here also represented the plaintiffs in *Saleh*, it is not surprising that the D.C. Circuit's opinion directly addressed and rejected a number of the specific ATS arguments asserted by Plaintiffs before this Court. (The D.C. Circuit divided 2-1 in dismissing the plaintiffs' tort claims on preemption grounds based upon the Supreme Court's decision in *Boyle v. United Technologies Corp*., 487 U.S. 500 (1988).)

Defendants' view that *Kadic* did not retreat from the principle that war crimes cannot be committed by purely private actors. *See* Dkt. No. 57, at 8 n.7.[5]

The plaintiffs in *Saleh*, like Plaintiffs here (*see, e.g.*, 8/28/09 Tr. at 33-34), disavowed any allegation that Defendants were acting under color of law. They were "unwilling to assert that the contractors are state actors," the D.C. Circuit observed, because:

> Not only would such an admission make deep inroads against [the plaintiffs'] arguments with respect to the [government contractor] preemption defense, it would virtually concede that the contractors have sovereign immunity. Thus, as the district court recognized, appellants are caught between Scylla and Charybdis: they cannot artfully allege that the contractors acted under color of law for jurisdictional purposes while maintaining that their action was private when the issue is sovereign immunity.

2009 WL 2902081, at *14. The D.C. Circuit held that the absence of either a state action or a color of law allegation was fatal to the plaintiffs' ATS claim. *See id.*

The same conclusion applies here. Plaintiffs have pled that the alleged killings "were *not* carried out under the authority of any country or court." *E.g.*, Abtan Am. Compl. ¶ 83 (emphasis added). Just as in *Saleh*, an allegation of state action would undermine Plaintiffs' claims. *See* 8/28/09 Tr. at 34:2-4 (this Court observed that Plaintiffs "don't want to get in the position of

[5] The United States' Statement of Interest in *Kadic* makes the same point, citing the war crimes prosecution of a Confederate officer following the Civil War and explaining that "the United States Government has previously applied the law of nations to a non-state actor who was serving as an official in a belligerent regime during a civil war." Dkt. No. 75, Ex. D, at 10. (The references in the Statement of Interest to the liability of private actors for genocide are inapplicable to war crimes claims: international instruments do impose liability on private actors for genocide, but there is no similar settled war crimes norm clearly applicable to private actors. *Cf.* Convention on the Prevention and Punishment of the Crime of Genocide art. IV, 78 U.N.T.S. 277 (1951).)

having the Westfall Act take over"); *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 207 & n.4 (D.C. Cir. 1985) (Scalia, J.); Dkt. No. 38, at 7 n.5.[6]

Finally, Plaintiffs' broad definition of "war crimes" as encompassing any intentional "killing [of] people that were innocent civilians" during an armed conflict is untenable under *Saleh*'s analysis *See* 8/28/09 Tr. at 24-26. Mindful of *Sosa*'s "imperative of judicial restraint," the court in *Saleh* had "little difficulty" rejecting the plaintiffs' "stunningly broad" ATS claim, because it was an "untenable, even absurd, articulation of a supposed consensus of international law." 2009 WL 2902081, at *13. Although *Saleh* left open the possibility that war crimes could "have a broader reach" than torture, *id.* at *14 n.13, Plaintiffs' definition would reach any murder occurring in a war zone. And it would swallow whole the offenses of torture and summary execution: Plaintiffs could simply plead a claim of "war crimes" to avoid the state-action and other limitations embedded in those norms. *See* Dkt. No. 38, at 12; Dkt. No. 57, at 9. Such a radical expansion of the scope of ATS liability is at odds with both *Saleh* and *Sosa*.

That is why, as Defendants explained in their memoranda in support of the motion to dismiss, a "war crimes" claim can be asserted only against a party to a conflict with respect to an act that was committed in furtherance of war hostilities. Dkt. No. 38, at 11; Dkt. No. 57, at 8-9. Those limitations, which necessarily require that the plaintiff allege that the defendant is a state actor or (like Kadic himself) part of an insurgent force that is party to a military conflict, ensure that the "war crimes" norm is not improperly inflated to encompass any wrongdoing that occurs in a war zone.

Accordingly, Plaintiffs' ATS claims should be dismissed.[7]

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[6] Plaintiffs do not, and could not, claim that Defendants constitute an insurgent military force equivalent to that headed by *Kadic*.

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 21, 2009

Respectfully submitted,

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(… cont'd)

[7] Plaintiffs' counsel conceded during the argument on the motions to dismiss that the Complaints do not allege facts establishing a primary violation by Mr. Prince or the other defendants here and disclaimed any reliance on secondary liability principles. *See* 8/28/09 Tr. at 41-42, 51-54. This alone requires dismissal of the ATS claims.

CERTIFICATE OF SERVICE

I hereby certify that, on September 21, 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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