No. 10-1491

In The
Supreme Court of the United States

ESTHER KIOBEL, et al.,

Petitioners,

v.

ROYAL DUTCH PETROLEUM CO., et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

SUPPLEMENTAL BRIEF OF *AMICI CURIAE* GENOCIDE VICTIMS OF KRAJINA IN SUPPORT OF PETITIONERS

ROBERT J. PAVICH*
IAN LEVIN
JOHN J. PAVICH
PAVICH LAW GROUP, P.C.
20 S. Clark Street
Suite 700
Chicago, IL 60603
(312) 782-8500
rpavich@
pavichlawgroup.com
*Counsel of Record for
Amici Curiae

ANTHONY D'AMATO
Leighton Professor of Law
NORTHWESTERN UNIVERSITY
SCHOOL OF LAW
375 East Chicago Avenue
Chicago, IL 60611
(312) 503-8474
a-damato@
law.northwestern.edu

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether and under what circumstances the Alien Tort Statute, 28 U.S.C. § 1350, allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

SECONDARY SOURCES

INTERESTS OF *AMICI CURIAE*[1]

Amici curiae is a class of 200,000 ethnic Serbs, residing in the Krajina region of Croatia in 1995. They were found to be victims of war crimes and crimes against humanity perpetrated in the course of a Croatian military attack and bombardment of their demilitarized region which was under the protection of the United Nations.[2] The victims have filed a class action suit alleging that Military Professional Resources Incorporated, a United States global private military corporation participated in and aided and abetted these crimes.[3] This action has been stayed pending the decision of this Court herein.

This *amici* is offered to demonstrate the importance of the appropriate use of the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, in providing necessary

---

[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. Petitioners and Respondents have filed with the Clerk of the Court letters granting blanket consent to the filing of *amici* briefs.

[2] The Croatian military leaders were found guilty of war crimes and crimes against humanity on 11 April 2011. See *Prosecutor v. Gotovina, et al.*, Case No. IT-06-90, Judgment of the Tribunal found at: http://www.icty.org/x/cases/gotovina/tjug/en/110415_judgement_vol1.pdf

[3] Case No. 10-CV-5197 – United States District Court for the Northern District of Illinois – Eastern Division: The named defendant, L-3 Services Inc., a U.S. Defense Contractor had purchased MPRI.

oversight of and accountability for the conduct of American global mercenary corporations.

SUMMARY OF ARGUMENT

The past 20 years have witnessed the development of the global privatized military industry, the modern mercenaries of our time. They have been active in conflict and transition zones throughout the world. Private contractor personnel now outnumber uniformed American military personnel in Iraq and Afghanistan. Well known American global private military corporations include Blackwater, MPRI and KBR (Halliburton). Their activities outside the United States are not subject to the customary rules of military conduct including the Uniform Code of Military Justice and the Geneva Conventions. Third-party oversight and accountability are absent regarding their conduct on foreign soil.

The ATS should apply to the actions of American global corporate mercenaries who commit grave violations of international law on foreign soil. It is highly unlikely, if not inconceivable, that application of the ATS under these circumstances would offend international comity or harm our foreign relations. Such an application of the ATS is consistent with the statute's language and purpose and with a fundamental principle of international law: that the perpetrator

of crimes against humanity is an enemy of mankind and may be tried wherever he is found.

ARGUMENT

I. Corporate Warriors: The Rise Of The Privatized Military Industry.[4]

In the last twenty years, the United States has seen a striking growth in the private military consulting business. This growth has been fueled, in part, by the United States wars in Afghanistan and Iraq, which have stretched the United States military nearly to the breaking point. While the private military consulting industry has undoubtedly alleviated some of this pressure on the United States military during times of prolonged conflict, many concerns have arisen over the apparent lack of oversight and regulation of these companies. Additionally, as these companies are not officially connected to, or controlled by, the United States government, some of the activities they engage in, particularly on behalf of foreign sovereign governments, are not always transparent. This lack of transparency has, in the past, led to criticisms that these private military companies may have been involved in, or at the least facilitated, human rights abuses.

[4] This heading is taken from the title of the seminal work on the subject. Peter Singer, *Corporate Warriors* Cornell University Press (2008).

Recently, a number of investigative reports have been produced detailing the rise of this industry and the implications for the United States and for United States policy.

In July 2007, the Los Angeles Times reported:

> More than 180,000 civilians – including Americans, foreigners and Iraqis – are working in Iraq under U.S. contracts, according to State and Defense Department figures . . . Including the recent troop buildup, 160,000 soldiers and a few thousand government employees are stationed in Iraq.[5]

Four years later, the New York Times reported:

> There were 113,491 employees of defense contractors in Afghanistan as of January 2012, compared with about 90,000 American soldiers, according to Defense Department statistics . . . The biggest contractor in terms of war zone deaths is apparently the defense giant L-3 Communications. If L-3 were a country, it would have the third highest loss of life in Afghanistan as well as in Iraq; only the United States and Britain would exceed it in fatalities. Over the past 10 years, L-3 and its subsidiaries including Titan Corporation and MPRI Inc. had at least 370 workers killed and 1,789 seriously wounded

[5] *Los Angeles Times* 4 July 2007.

> or injured through the end of 2011 in Iraq and Afghanistan.[6]

The work of private military contractors outside the United States has not only been dangerous but also highly profitable and very controversial.

This has been well documented in the Singer opus. As to profits:

> "By summer 2007, the contract value for just this one company's work in Iraq was reported to be as much as $20.1 billion.
>
> To put this into context, the amount paid to Halliburton-KBR for just that period is roughly three times what the United States government paid to fight the entire 1991 Persian Gulf War." (Singer p. 247)

As to controversy:

> Current international law is still written primarily to deal with individual mercenaries and has almost no bearing on the industry. Regulation and oversight at the national level also are still minimal. The result is that military firms and their employees continue to exist within a gray area of the law, with an uncertain legal status and minimal accountability. A number of incidents in Iraq illustrate this. For example, a reported 100 percent of the translators and up to 50 percent of the interrogators at the Abu Ghraib

[6] *New York Times* 11 February 2012.

> prison were private contractors from the Titan and CACI firms respectively. The U.S. Army found that contractors were involved in 36 percent of the abuse incidents that it identified happened at the prison. It also cited six particular employees as being potentially culpable in the abuses. Whereas the enlisted U.S. Army soldiers who were named in the Abu Ghraib abuse reports were properly court martialed for their crimes, not one of the private contractors named in the U.S. Army investigation reports has yet been charged, prosecuted, or punished, with the U.S. Army believing that it does not have jurisdiction. (Singer pp. 250-1).

This Court has itself recently addressed the aftermath of another notorious international incident involving American mercenaries, denying a Petition for Certiorari brought by individual employees of Blackwater U.S.A., indicted by the Justice Department for the wrongful killing of Iraqi civilians[7].

The fact is that American private global military contractors are part of a world-wide industry, which is poorly regulated and lacking accountability.

> They are corporate bodies that specialize in the provision of military skills, including combat operations, strategic planning, intelligence, risk assessment, operational support, training and technical skills. By the

[7] *Slough, et al. v. United States*, No 11-591 (4 June 2012).

> very fact of their function, they break down what have long been seen as the traditional responsibilities of government. (Singer p. 8) . . . [T]he privatized military industry is a reality of the twenty-first century. This entrance of the profit motive onto the battlefield opens up vast, new possibilities and raises a series of troubling questions – for democracy, for ethics, for management, for law, for human rights, and for national and international security. (Singer p. 260).

The ATS stands as one of the few effective restraints on these modern corporate mercenaries, but only if the statute can reach them outside the United States

II. The ATS Applies To Conduct Outside The United States.

The principle of universal jurisdiction recognized in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) "allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States" when the conduct giving rise to the cause of action constitutes genocide or a crime against humanity rendering the perpetrator an enemy of mankind.[8]

---

[8] See **Supplemental Brief of *Amici Curiae* Victims of the Hungarian Holocaust In Support of Petitioners**.

III. The Presumption Against Extraterritoriality Notwithstanding, The ATS Applies To Conduct Of U.S. Corporations Outside The United States.

The nationality principle, found expressly in the Restatement (Third) of Foreign Relations Law of the United States (1987) §402(2), gives a state the right to prescribe law respecting "the activities, interests, status, or relations of its nationals outside as well as within its territory."

Moreover, §404 states that a state can prescribe punishment for "offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism." So even non-American entities, committing those crimes, would fall rightly under the jurisdiction of any state they were found, including the U.S.

U.S. Courts have long recognized this universally accepted principle of nationality jurisdiction. According to the court in *U.S. v. Juda*, "[u]nder international law, a nation may generally assert jurisdiction over its citizens." *U.S. v. Juda*, 46 F.3d 961 at 967 (9th Cir. 1995). Numerous U.S courts, in holding U.S. nationals responsible for crimes committed abroad, have repeatedly relied upon this well-settled principle. In *U.S. v. Hill*, 279 F.3d 731 at 740 (9th Cir. 2002), the court explained that "[e]xtraterritorial jurisdiction is also proper under the nationality theory, which permits a country to apply its statutes to extraterritorial acts of its own nationals." See also *U.S. v.*

Vasquez-Velasco, 15 F.3d 833 at fn. 5 (9th Cir. 1994), "Territoriality and **nationality are the universally recognized bases for the exercise of extraterritorial jurisdiction**." (emphasis added).[9]

It is beyond dispute, then, that allowing an alien to bring suit in U.S. courts, under the ATS, against a U.S. national for a tort committed in violation of international law, whether domestically or abroad, does not violate international law or international comity. Rather, decades of jurisprudence confirms that it is entirely proper, and indeed expected, that U.S. courts exercise jurisdiction over a U.S. national for its actions committed abroad and in violation of American law.

Moreover, with the growth of global private military corporations, many of which are incorporated in the U.S., there has come increasing concern regarding

---

[9] This Court has itself recognized and confirmed the nationality principle. In determining whether U.S. law applied to a U.S. citizen residing in France, this Court in *Blackmer v. U.S.,* 284 U.S. 421 at 436 (1932), explained that "While it appears that the petitioner removed his residence to France in the year 1924, it is undisputed that he was, and continued to be, a citizen of the United States. He continued to owe allegiance to the United States. **By virtue of the obligations of citizenship, the United States retained its authority over him, and he was bound by its laws made applicable to him in a foreign country**." (emphasis added). See also, *Skiriotes v. State of Florida*, "[T]he United States is not debarred by any rule of international law from governing the conduct of its own citizens upon the high seas or even in foreign countries[.] *Skiriotes v. State of Florida,* 313 U.S. 69 at 73 (1941).

oversight and accountability. These corporations are not subject to the Uniform Code of Military Justice, or to the Geneva conventions, and are bound only by the laws of the country in which they operate. Even then, however, they are often, through treaties or Status of Forces Agreements, given immunity to prosecution in the countries where they engage. The only effective regulation of such a corporation is through its country's laws and its government. But if we accept, as Respondents propose, that the ATS has no extraterritorial application, then the U.S. courts have no jurisdiction over such a corporation if it commits genocide or crimes against humanity outside of the United States.

No other country renders its judiciary and its government so powerless over its own citizens. Even Respondents' *amici* balk at contending that U.S. Courts cannot regulate the behavior of their own citizens and corporations abroad (See **Brief Of The Government Of The United Kingdom Of Great Britain And Northern Ireland And The Kingdom Of The Netherlands As *Amici Curiae* In Support Of The Respondents** (p. 30). And yet, if the Court accepts Respondents' arguments that the ATS is not extraterritorial in scope, that is precisely the result.

This may be why Judge Posner observed in *Flomo v. Firestone,* "no court to our knowledge has ever held that [the ATS] doesn't apply extraterritorially; and *Sosa* was a case of nonmaritime extraterritorial conduct yet no Justice suggested that therefore it couldn't be maintained. Deny extraterritorial application, and the statute would be superfluous, given the ample

tort and criminal remedies against, for example, the use of child labor (let alone its worst forms) in this country." *Flomo v. Firestone Nat. Rubber Co., LLC*, 643 F.3d 1013 at 1025 (7th Cir. 2011).

CONCLUSION

Amici, Genocide Victims of Krajina, respectfully suggest that the Alien Tort Statute, 28 U.S.C. § 1350, allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States when the conduct giving rise to the cause of action constitutes genocide or a crime against humanity rendering the perpetrator an enemy of mankind.

Moreover, to hold United States law inapplicable to the conduct of United States nationals outside the United States would violate the doctrine of nationality jurisdiction.

Respectfully submitted,

ROBERT J. PAVICH*
IAN LEVIN
JOHN J. PAVICH
PAVICH LAW GROUP, P.C.
20 S. Clark Street
Suite 700
Chicago, IL 60603
(312) 782-8500
rpavich@
pavichlawgroup.com
**Counsel of Record for*
Amici Curiae

ANTHONY D'AMATO
Leighton Professor of Law
NORTHWESTERN UNIVERSITY
SCHOOL OF LAW
375 East Chicago Avenue
Chicago, IL 60611
(312) 503-8474
a-damato@
law.northwestern.edu