No. 15-1464

In the Supreme Court of the United States

FARHAN MOHAMOUD TANI WARFAA, PETITIONER

v.

YUSUF ABDI ALI

ON CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

In *Kiobel* v. *Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), this Court held that the Alien Tort Statute, 28 U.S.C. 1350, does not provide for jurisdiction over claims involving conduct occurring outside the United States, unless the claims asserted "touch and concern the territory of the United States * * * with sufficient force to displace the presumption against extraterritorial application." *Kiobel*, 133 S. Ct. at 1669. The question presented by the conditional cross-petition is:

Whether claims against a former foreign official who allegedly committed human rights abuses abroad touch and concern the territory of the United States with sufficient force to displace the presumption against extraterritoriality if the former foreign official subsequently became a resident of the United States.

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INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Acting Solicitor General to express the views of the United States. In the view of the United States, the conditional cross-petition for a writ of certiorari should be denied.[1]

STATEMENT

1. a. The Alien Tort Statute (ATS) provides that "[t]he district courts shall have original jurisdiction of 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. In *Sosa* v. *Alvarez-Machain*, 542 U.S. 692 (2004), this Court explained that the ATS "is in terms only jurisdictional" and does

[1] Concurrent with this filing, the United States is filing an amicus brief at the Court's invitation recommending that the Court deny cross-respondent Ali's petition in No. 15-1345.

not itself create a statutory cause of action. *Id.* at 712, 724.

Sosa concluded, however, that the ATS permits courts to recognize a federal common-law cause of action for violations of international law in certain limited circumstances. The Court did not purport to define a full set of "criteria for accepting a cause of action subject to jurisdiction under [Section] 1350." *Sosa*, 542 U.S. at 732. But it explained that, at a minimum, "federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than [the three] historical paradigms": violation of safe conducts, infringement of the rights of ambassadors, and piracy. *Id.* at 724, 732; see *id.* at 733 n.21 ("This requirement of clear definition is not meant to be the only principle limiting the availability of relief in the federal courts for violations of customary international law.").

b. In *Kiobel* v. *Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), this Court identified another limitation on claims asserted under the ATS. In *Kiobel*, which involved claims asserted by Nigerian nationals against certain Dutch, British, and Nigerian corporations, the Court considered "whether [an ATS] claim may reach conduct occurring in the territory of a foreign sovereign." *Id.* at 1664; see *id.* at 1662. The defendants argued that the presumption against extraterritorial application of federal statutes precludes such a claim. *Id.* at 1664. That canon of statutory construction provides that when "a statute gives no clear indication of an extraterritorial application, it has none." *Ibid.* (quoting *Morrison* v. *National Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010)). The Court ob-

served that the presumption against extraterritoriality typically applies to "Act[s] of Congress regulating conduct," but concluded that "the principles underlying the canon * * * similarly constrain courts considering causes of action that may be brought under the ATS," *ibid.*, even though it is a "strictly jurisdictional" provision, *ibid.* (quoting *Sosa*, 542 U.S. at 713).

The Court determined that "nothing" in the ATS provides a sufficiently "clear indication of extraterritoriality" to "rebut[] the presumption." *Kiobel*, 133 S. Ct. at 1665, 1669 (citation omitted). Although the text of "[t]he ATS covers actions by aliens for violations of the law of nations," the Court explained, "that does not imply extraterritorial reach" because "such violations affecting aliens can occur either within or outside the United States." *Id.* at 1665. Indeed, the Court observed, that was true of the "principal offenses against the law of nations" recognized when the ATS was enacted, *id.* at 1666 (citation omitted): violation of safe conducts and infringement of the rights of ambassadors could occur entirely inside the United States, and piracy "typically occurs on the high seas, beyond the territorial jurisdiction" of any country. *Id.* at 1666-1668; see *id.* at 1667 ("Applying U.S. law to pirates * * * does not typically impose the sovereign will of the United States onto conduct occurring within the territorial jurisdiction of another sovereign, and therefore carries less direct foreign policy consequences."). Finally, the Court concluded that, although the ATS ensures that certain "foreign officials injured in the United States" have a "forum" for seeking "judicial relief," the "historical context" does not clearly support the inference "that Congress also intended federal common law under the ATS to provide a cause

of action for conduct occurring in the territory of another sovereign." *Id.* at 1668-1669.

The Court thus held that the ATS does not as a general matter overcome the presumption against extraterritoriality, and that no cause of action was available against the corporate defendant in *Kiobel* itself where "all the relevant conduct took place outside the United States." 133 S. Ct. at 1669. The Court further stated that "even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritoriality." *Ibid.* And the Court reasoned that "it would reach too far to say that mere corporate presence suffices," because "[c]orporations are often present in many countries." *Ibid.*

In concurrence, Justice Kennedy observed that Congress has enacted statutes such as the Torture Victim Protection Act of 1991 (TVPA), Pub. L. No. 102-256, 106 Stat. 73, to authorize a cause of action for certain "human rights abuses committed abroad," and "that class of cases will be determined in the future according to the detailed statutory scheme Congress has enacted." *Kiobel*, 133 S. Ct. at 1669 (Kennedy, J., concurring). He also stated that "[o]ther 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 that in such "disputes the proper implementation of the presumption against extraterritorial application may require some further elaboration and explanation." *Ibid.*[2]

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[2] Justice Alito, joined by Justice Thomas, separately concurred to express the view that "a putative ATS cause of action will fall within the scope of the presumption against extraterritoriality—

2. a. As described in greater detail in the brief filed by the United States in No. 15-1345, cross-petitioner Warfaa is a Somali national who alleges that cross-respondent Ali tortured and attempted to murder him because of petitioner's membership in a clan opposed to the regime of Mohamed Siad Barre. Pet. App. 26a-27a.[3] Anticipating the overthrow of the Barre regime, Ali fled Somalia in 1990 and entered Canada from the United States. *Id.* at 27a. Canada deported Ali to the United States. *Id.* at 27a-28a. The United States similarly intended to deport Ali, but he voluntarily returned to Somalia in 1994. *Id.* at 28a. Ali entered the United States again in 1996 and has been living here since then. *Ibid.*

b. In 2004, Warfaa brought this action under the ATS in the Eastern District of Virginia, alleging that Ali "is liable for engaging in attempted extrajudicial killing, torture, degrading treatment, arbitrary detention, crimes against humanity, and war crimes." Pet. App. 28a. The amended complaint alleges that Ali has

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and will therefore be barred—unless the domestic conduct is sufficient to violate an international law norm that satisfies *Sosa*'s requirements." *Kiobel*, 133 S. Ct. at 1670 (Alito, J., concurring). Justice Breyer, joined by Justices Ginsburg, Sotomayor, and Kagan, concurred in the judgment and would have construed the ATS "as providing jurisdiction only where distinct American interests are at issue," including the "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 1674 (Breyer, J., concurring in the judgment).

[3] Citations to "Pet. App." are to the appendix to the petition in No. 15-1345. See Cross-Pet. 1 n.1.

been residing in the United States since December 1996. See D. Ct. Doc. 89, at 3 (May 9, 2014).[4]

The district court granted Ali's motion to dismiss Warfaa's ATS claims for lack of subject matter jurisdiction. See Pet. App. 30a-32a.[5] The district court explained that the ATS provides jurisdiction "for only a limited category of claims premised on violations of internationally accepted norms." *Id.* at 31a (citing *Sosa*, 542 U.S. at 729). In the court's view, this Court's decision in *Kiobel* barred all claims concerning "conduct occurring in the territory of a foreign sovereign." *Ibid.* (quoting *Kiobel*, 133 S. Ct. at 1664). Because Warfaa's claims are premised on conduct that occurred only in Somalia, the district court ruled that it lacked jurisdiction over the ATS claims. *Id.* at 31a-32a.

3. Warfaa appealed the district court's dismissal of the ATS claims, following the court's entry of a final judgment on those claims under Federal Rule of Civil Procedure 54(b). See D. Ct. Doc. 118, at 1-2. The court of appeals affirmed. See Pet. App. 65a-79a.

Like the district court, the court of appeals concluded that Warfaa's ATS claims "fall squarely within the ambit of *Kiobel*'s broad presumption against extraterritorial application of the ATS." Pet. App. 76a. The court considered the applicability in this case of

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[4] Throughout this brief, references to residency are not intended to connote immigration status, but merely to refer to any person who is physically present in the United States.

[5] Warfaa also brought claims under the TVPA. The district court, affirmed by the court of appeals, denied a motion to dismiss those claims after concluding that Ali was not immune from suit. See Pet. App. 41a-42a. That ruling is the subject of the principal certiorari petition (No. 15-1345) and is not addressed further here.

the statement in *Kiobel* that claims involving violations of the law of nations occurring outside the United States may be cognizable under the ATS if the claims "'touch and concern' United States territory 'with sufficient force to displace the presumption against extraterritorial application.'" *Id.* at 69a (quoting *Kiobel*, 133 S. Ct. at 1669). Observing that the presumption does not necessarily apply in every case in which "the actual injuries were inflicted abroad," the court stated that a "fact-based" analysis is required. *Ibid.* (quoting *Al Shimari* v. *CACI Premier Tech., Inc.*, 758 F.3d 516, 528 (4th Cir. 2014)); see *id.* at 78a n.11 (rejecting "categorical rule barring the ATS' application to conduct solely outside the United States" as "overbroad"). But the court concluded that where, as in this case, all of "the relevant conduct took place outside the United States," and nothing in the case "involve[s] U.S. citizens, the U.S. government, U.S. entities, or events in the United States," the ATS does not provide jurisdiction for adjudicating the claims. *Id.* at 76a (quoting *Kiobel*, 133 S. Ct. at 1669). The court noted Ali's "after-acquired residence in the United States long after the alleged events of abuse," but concluded that such "residency, lacking any connection to the relevant conduct, is not a cognizable consideration in the ATS context." *Id.* at 76a-77a.

Judge Gregory dissented with respect to the dismissal of the ATS claims. See Pet. App. 79a-88a. He reasoned that the ATS claims are cognizable under the ATS in light of Ali's decision to become a U.S. resident and "enjoy the protections of U.S. law," as well as in light of training that he received in the United States while he was an officer in the Somali National Army. *Id.* at 83a-86a. Judge Gregory stated

that the ATS should not be interpreted to "provid[e] safe haven to an individual who allegedly committed numerous atrocities abroad." *Id.* at 87a.

DISCUSSION

In *Kiobel* v. *Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), this Court left open the possibility that ATS claims involving conduct occurring outside the United States may "touch and concern the territory of the United States * * * with sufficient force" to "displace the presumption against extraterritorial application." *Id.* at 1669. The court of appeals found that cross-petitioner Warfaa's ATS claims do not satisfy that standard, because they involve conduct in a foreign country by a foreign national. In the court's view, the fact that Ali later moved to this country does not mean that Warfaa's claims sufficiently touch and concern the territory of the United States to displace the presumption against extraterritoriality.

That ruling does not warrant further review for several reasons. The cross-petition is conditional on a grant of certiorari in No. 15-1345, and the United States is filing, simultaneously with this brief, an amicus brief at the Court's invitation recommending that the petition in No. 15-1345 be denied. In addition, the decision below does not conflict with any decision of this Court or of any other court of appeals, and this case would be a poor vehicle for consideration of the question presented in any event. In the view of the United States, the cross-petition should be denied.

A. The Cross-Petition Is Conditional In Nature And Is Not The Subject Of Any Conflict In Authority

1. As a threshold matter, the cross-petition is expressly "conditional in nature," and Warfaa seeks this

Court's review of the question presented "only if the Court is disposed to grant the initial petition" in No. 15-1345. Cross-Pet. 1. For the reasons set forth in the brief filed by the United States, the Court should deny that petition. Accordingly, the Court should deny the cross-petition as well.

2. Contrary to Warfaa's assertion (Cross-Pet. 11-21), the decision below does not conflict with any decision of this Court or of another court of appeals. First, Warfaa incorrectly contends (Cross-Pet. 11-15) that the decision below conflicts with this Court's decision in *Kiobel* and is in tension with the decision in *Sosa* v. *Alvarez-Machain*, 542 U.S. 692 (2004). *Kiobel* did indicate that a claim involving foreign conduct could "touch and concern the territory of the United States" with "sufficient force" to displace the presumption against extraterritoriality. 133 S. Ct. at 1669. But the Court did not elaborate on that possibility in concluding that no cause of action was available under federal common law in the circumstances of that case, which involved foreign corporations having a U.S. presence. See *id.* at 1662, 1664, 1669. The court of appeals' decision here, in a case involving an individual defendant and conduct abroad, is not inconsistent with anything in the opinion in *Kiobel*. And *Sosa* resolved a question about what *categories* of common-law claims may be asserted under the ATS, not any question about whether and under what circumstances the presumption against extraterritoriality may bar a claim of the requisite type. See *Sosa*, 542 U.S. at 732; see also *Kiobel*, 133 S. Ct. at 1666-1668 (stating that the "principal offenses against the law of nations" recognized when the ATS was enacted could occur entirely within the United States or "beyond the terri-

torial jurisdiction" of any country). Accordingly, nothing in the decision below is inconsistent with *Sosa* either.

Second, Warfaa incorrectly contends (Cross-Pet. 15-21) that the decision below conflicts with *Mujica* v. *AirScan Inc.*, 771 F.3d 580 (9th Cir. 2014), cert. denied, 136 S. Ct. 690 (2015), and *Doe* v. *Drummond Co.*, 782 F.3d 576 (11th Cir. 2015), cert. denied, 136 S. Ct. 1168 (2016). Those cases differ from this one in a number of important respects. In *Mujica*, Colombian citizens brought suit under the ATS against U.S. corporations for alleged complicity in the bombing of a Colombian village. See 771 F.3d at 584. The Ninth Circuit concluded that "the fact that [d]efendants are both U.S. corporations" was "not enough," standing alone, "to establish that the ATS claims here 'touch and concern' the United States with sufficient force." *Id.* at 594; see *ibid.* (explaining that "a defendant's U.S. citizenship or corporate status is one factor that, *in conjunction with other factors*, can establish a sufficient connection between an ATS claim and the territory of the United States") (emphasis added). In *Drummond*, Colombian citizens brought suit under the ATS against a U.S. corporation and its officers for alleged use of paramilitaries in Colombia. See 782 F.3d at 579. The Eleventh Circuit stated that "[a]lthough the U.S. citizenship of Defendants is relevant to our inquiry, this factor is insufficient to permit jurisdiction on its own." *Id.* at 596.

Both *Mujica* and *Drummond* involved corporations or corporate agents as defendants rather than (as here) an individual actor. In both cases the court held that a cause of action was not available under the ATS even though the defendant was a U.S. person at the

time of the alleged conduct, and not (as here) a defendant who took up residence in the United States only after the conduct occurred. And neither court accepted the proposition that an action would lie under the ATS based solely on a defendant's U.S. citizenship, and not (as here) U.S. residency.

B. The Cross-Petition Would Be A Poor Vehicle For Considering When A Claim Can Displace The Presumption Against Extraterritoriality Under The ATS

1. In urging the Court to grant certiorari, Warfaa relies on the Second Circuit's decision in *Filartiga* v. *Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), contending that recognition of a cause of action would advance the goal of preventing the United States from becoming (or being seen as) a safe haven for individuals who commit human rights violations abroad. *Filartiga* involved allegations that a former Paraguayan police inspector had tortured and killed a Paraguayan citizen in Paraguay. When the victim's sister learned that the alleged perpetrator was living in New York, she and her father brought suit, asserting that jurisdiction over their claims was proper under the ATS. See *id.* at 878-879. The district court dismissed the suit, holding that the ATS excludes claims concerning a foreign state's treatment of its own citizens. See *id.* at 880.

On appeal, the Second Circuit reversed and remanded for further proceedings. *Filartiga*, 630 F.2d at 889. Its ruling was consistent with the argument, advanced in an amicus brief filed by the United States, that the ATS encompasses claimed violations of human rights norms that are "clearly defined" and the violation of which is "universally condemned," U.S. Amicus Mem. at 23, *Filartiga*, *supra* (No. 79-6090), and that the failure to recognize a claim for

torture and extrajudicial killing "in these circumstances might seriously damage the credibility of our nation's commitment to the protection of human rights," *id.* at 22-23.

After *Filartiga*, federal courts generally assumed —and, in at least one case, expressly held—that claims asserting violation of certain specifically defined and universally accepted human rights norms could be brought in U.S. courts under the ATS, even if the violation took place in a foreign country. See *In re Estate of Ferdinand E. Marcos Human Rights Litig.*, 978 F.2d 493, 499-501 (9th Cir. 1992) (holding that action under the ATS was appropriate "even though the actions" of the foreign defendant "which caused" the foreign plaintiff "to be the victim of official torture and murder occurred" in the Philippines), cert. denied, 508 U.S. 972 (1993). But there was uncertainty on the question. Compare *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774, 788 (D.C. Cir. 1984) (Edwards, J., concurring) (interpreting the ATS to encompass claims concerning "universal crimes" wherever perpetrated), cert. denied, 470 U.S. 1003 (1985), with *id.* at 816 (Bork, J., concurring) (construing the ATS to exclude claims founded on "disputes over international violence occurring abroad").

Congress concluded that the interests of the United States would be served by allowing a private right of action for extraterritorial violations of the norms at issue in *Filartiga*. Accordingly, it enacted an express but carefully circumscribed cause of action, available only against an individual acting under color of foreign law, for acts of "torture" or "extrajudicial killing." TVPA § 2(a), 106 Stat. 73. The TVPA thus provides a statutory basis for claims like the ones in *Filartiga*.

But for claims that fall outside the scope of the TVPA, courts may recognize such claims under the ATS only if they involve the violation of specifically defined and universally accepted human rights norms, see *Sosa*, 542 U.S. at 728, 732-733, and if they have a sufficient connection to the United States to displace the presumption against extraterritoriality, see *Kiobel*, 133 S. Ct. at 1669.

2. In this case, Warfaa attempted to bring claims under the ATS for violation of international-law norms in addition to the norms against torture and extrajudicial killings.[6] As explained above, there is no post-*Kiobel* circuit conflict on whether claims against individual foreign nationals who subsequently came to reside in the United States are cognizable under the ATS. In addition, this case would be a poor vehicle for the Court to address when ATS claims have a sufficient connection to the United States to displace the presumption against extraterritoriality. Some of Warfaa's ATS claims are not cognizable because they have been displaced by the TVPA, and all of his ATS claims arise out of the same set of facts and injuries as his TVPA claims. Because Warfaa has filed only a conditional cross-petition, he is content to proceed in the district court solely on his TVPA claims, which

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[6] Warfaa notes (Cross-Pet. 8, 29-30) that the United States, in its supplemental amicus brief in *Kiobel* (No. 10-1491), stated (at 4-5) that "allowing suits [under the ATS] based on conduct occurring in a foreign country in the circumstances presented in *Filartiga* is consistent with the foreign relations interests of the United States, including the promotion of respect for human rights." See *id.* at 19-20. The Court in *Kiobel* did not discuss those considerations or the availability of a cause of action in such circumstances. Cf. 133 S. Ct. at 1671 (Breyer, J., concurring in the judgment).

would afford him an adequate remedy for the conduct that he has alleged.

a. Warfaa's amended complaint asserts six claims. It includes two claims alleged to be actionable under both the TVPA and the ATS: attempted extrajudicial killing and torture. See D. Ct. Doc. 89, at 11-18.[7] The court of appeals affirmed the district court's determination that Warfaa had adequately pleaded claims against Ali under the TVPA and that those claims could proceed because Ali is not immune from suit. See Pet. App. 40a-42a, 47a-49a, 78a-79a.

Because Warfaa may bring those claims under the TVPA, he may not bring them under the ATS as a matter of federal common law. As this Court explained in *American Electric Power Co.* v. *Connecticut*, 564 U.S. 410 (2011), if "Congress addresses a question previously governed by a decision rested on federal common law," then "the need for such an unusual exercise of law-making by federal courts disappears." *Id.* at 423 (citation omitted). "The test for whether congressional legislation excludes the declaration of federal common law is simply whether the statute speak[s] directly to [the] question at issue." *Id.* at 424 (brackets in original; citation and internal quotation marks omitted). Because Congress has the principal responsibility to "prescribe national policy in areas of special federal interest," evidence of a "clear and

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[7] It is not clear that the TVPA provides a cause of action for *attempted* extrajudicial killing. See TVPA § 2(a), 106 Stat. 73. Both the court of appeals (Pet. App. 78a-79a) and the district court (see, *e.g.*, *id.* at 47a-48a) seem to have treated the TVPA as providing such a cause of action. For present purposes, Ali appears to have waived any argument to the contrary. See Appellant Br., *Warfaa* v. *Ali*, No. 14-1810 (Dec. 15, 2014).

manifest" congressional purpose to supplant judicial fashioning of federal common law is not required. *Id.* at 423-424.

In enacting the TVPA, which establishes a federal cause of action for torture or extrajudicial killing by an individual acting "under actual or apparent authority, or color of law, of any foreign nation," § 2(a), 106 Stat. 73, Congress spoke "directly" to the question of a remedy for certain conduct that violates universally accepted and specifically defined human rights norms, *American Elec. Power Co.*, 564 U.S. at 424. The TVPA thus "excludes" the possibility, *ibid.*, of bringing a claim for the same conduct under the ATS as a matter of federal common law. See *ibid.*; see also *Kiobel*, 133 S. Ct. at 1669 (Kennedy, J., concurring) ("Many serious concerns with respect to human rights abuses committed abroad have been addressed by Congress in statutes such as the [TVPA], and that class of cases will be determined in the future according to the detailed statutory scheme Congress has enacted.").[8]

Under that analysis, the TVPA has rendered noncognizable under the ATS Warfaa's common-law claims for torture and attempted extrajudicial killing. Those claims allege conduct that, if proven, would give

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[8] Some lower court decisions predating *American Electric Power Co.* incorrectly suggested or assumed that the TVPA does not always exclude overlapping ATS claims. Compare, *e.g.*, *Aldana* v. *Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1250 (11th Cir. 2005) (per curiam) (stating that plaintiffs can "bring distinct claims for torture under each statute"), cert. denied, 549 U.S. 1032 (2006), with *Enahoro* v. *Abubakar*, 408 F.3d 877, 884-885 (7th Cir. 2005) ("No one would plead a cause of action under the [TVPA] and subject himself to its requirements if he could simply plead under international law."), cert. denied, 546 U.S. 1175 (2006).

rise to TVPA liability. See *Kiobel*, 133 S. Ct. at 1669 (Kennedy, J., concurring). Accordingly, there is no reason for the Court to grant review to consider whether Warfaa's claims based on allegations of torture and attempted extrajudicial killing touch and concern the territory of the United States with sufficient force to displace the presumption against extraterritorial application of federal common law causes of action under the ATS.

b. Warfaa's complaint also includes four claims alleged to be actionable only under the ATS: arbitrary detention, crimes against humanity, war crimes, and cruel, inhuman, or degrading treatment. See D. Ct. Doc. 89, at 11-18. The TVPA does not provide a cause of action for those claims. But it is not clear whether Warfaa has adequately pleaded a claim for arbitrary detention that would be actionable under the ATS. Compare *id.* at 5-7, 15 (alleging that Warfaa was detained for three months), with *Sosa*, 542 U.S. at 737 (observing that to be cognizable under the ATS, a claim for arbitrary detention would at a minimum have to allege prolonged detention, but not defining the requisite period of time). And Warfaa's claims for crimes against humanity, war crimes, and cruel, inhuman, or degrading treatment appear to be largely derivative of his claims for torture and attempted extrajudicial killing. See D. Ct. Doc. 89, at 14-15, 16-18. All of those claims arise out of the same alleged period of detention and rest on the same alleged injuries.

Pursuant to the court of appeals' judgment, only Warfaa's TVPA claims remain live—and so by choosing to file only a conditional cross-petition, Warfaa has indicated his willingness to proceed in the trial court

only on his TVPA claims. The availability of those claims under the TVPA will further the purpose he invokes in this case of preventing the United States from being viewed as harboring or providing a safe haven for human-rights abusers. Under these circumstances, it appears that a decision by this Court as to whether any of his ATS claims adequately touches and concerns the United States would, as a practical matter, be of little significance with respect to this case.

CONCLUSION

The conditional cross-petition for a writ of certiorari should be denied.

Respectfully submitted.

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