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

SUHAIL NAJIM ABDULLAH AL SHIMARI, et al., Plaintiffs, v. CACI INTERNATIONAL INC, et al., Defendants.	Case No. 1:08-CV-00827-GBL-JFA

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION SEEKING REINSTATEMENT OF THE ALIEN TORT STATUTE CLAIMS

J. William Koegel, Jr. (Bar No. 38243)
John F. O'Connor (admitted *pro hac vice*)
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
Telephone: (202) 429-3000
Facsimile: (202) 429-3902

Counsel for Defendants CACI International Inc and CACI Premier Technology, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

LEGISLATIVE MATERIALS

BOOKS AND ARTICLES

I. INTRODUCTION

Plaintiffs assert that new developments in the law justify reconsideration of the Court's ruling that the Alien Tort Statute ("ATS") cannot form the basis for jurisdiction in this action. Plaintiffs' "new developments," however, are largely confined to two district court opinions, and Plaintiffs do not even reference the one Fourth Circuit decision addressing ATS, as that decision is harmful to Plaintiffs' position. Plaintiffs also ignore a second, recent Fourth Circuit decision in which the court of appeals declined to recognize a *Bivens* claim arising from detainee abuse because of Congress's failure to create a private right of action for detainees while enacting torture and war crimes legislation. *Lebron v. Rumsfeld*, 670 F.3d 540 (4th Cir. 2012). Plaintiffs effectively ask this Court to supply them with claims under ATS that Congress has declined to provide them directly.

This Court decided the ATS issue correctly the first time. Nothing has happened that warrants a different decision now. Plaintiffs' argument is precisely the type of argument for which reconsideration is inappropriate. Plaintiffs do not assert that the Court misunderstood Plaintiffs' arguments, or that intervening binding precedent requires a different result than that reached by the Court. Instead, Plaintiffs simply seek another chance to make the same arguments the Court considered and rejected. This is not an appropriate basis for reconsideration.

Moreover, even if the Court were to allow Plaintiffs to recycle their arguments, there is no basis for reaching a different result. Plaintiffs argue that the Court erred in that the Court should have ignored the context of Plaintiffs' claims in determining whether they alleged a violation of a universally-recognized norm of international law. That position, however, is foreclosed by the Supreme Court's decision in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), where the Court engaged in precisely the contextual analysis that Plaintiffs claim is

inappropriate. In addition, Plaintiffs severely misstate the second part of the *Sosa* test, representing that it only involves consideration of whether corporations can be held liable under ATS. This is demonstrably wrong. *Sosa* established, and this Court correctly observed, that the test requires consideration of a number of factors that strongly counsel against recognizing a claim under ATS in this context. Moreover, since the Court decided CACI's motion to dismiss, the Fourth Circuit and other courts have adopted a restrictive doctrine of accessorial liability that would preclude Plaintiffs' claims against CACI *even if* such claims would be available against individual actors. The Court should deny Plaintiffs' motion.

II. BACKGROUND

According to the allegations in their Amended Complaint, Plaintiffs are four Iraqis who were apprehended by the United States military in Iraq and detained at Abu Ghraib prison. Am. Compl. ¶ 1. CACI Premier Technology, Inc. ("CACI PT") provided civilian interrogators to supplement the United States Army units performing the military's interrogation mission in Iraq. Plaintiffs allege that they were abused while in United States custody in Iraq, though they do not allege that they had any interaction with any CACI employees. *Id.* ¶¶ 11-63. Instead, Plaintiffs seek to hold CACI liable based on a vague and undefined "torture conspiracy," whereby Plaintiffs allege that unidentified CACI personnel caused CACI to join the conspiracy and that CACI is therefore liable for any abuse suffered by Plaintiffs at the hands of any person serving at Abu Ghraib prison. *Id.* ¶ 72.

Plaintiffs' counsel represented a putative class of persons (including these Plaintiffs) alleging that they suffered abuse while in military custody in Iraq. On behalf of that putative class, these Plaintiffs' counsel filed suit against CACI and others. Ultimately, class certification was denied, and the D.C. Circuit held that the named plaintiffs' common-law and ATS claims

were preempted, and that claims were unavailable under ATS for other reasons as well. *See generally Saleh v. Titan Corp.*, 580 F.3d 1 (D.C. Cir. 2009).

Prior to the D.C. Circuit's decision in *Saleh*, this Court issued a ruling on CACI's motion to dismiss the present action. *Al Shimari v. CACI Premier Technology, Inc.*, 657 F. Supp. 2d 700 (E.D. Va. 2009). In that decision, the Court rejected CACI's motion to dismiss Plaintiffs' common-law claims based on defenses such as immunity, preemption, and political question. *Id.* The Court also, however, rejected ATS as a jurisdictional basis for Plaintiffs' claims. *Id.* at 726-28. In reaching this conclusion, the Court noted that the Supreme Court's decision in *Sosa* set forth the required framework for assessing claims brought under the jurisdictional grant of ATS. *Id.* at 725. With respect to the first step of the *Sosa* analysis, the Court held that Plaintiffs had not sufficiently alleged violations of specifically-defined, universally-accepted norms of international law. *Id.* at 726. The Court held that Plaintiffs had failed to meet this burden because, among other reasons, "the Court doubts that the content and acceptance of the present claims are sufficiently definite under *Sosa* because the use of contractor interrogators is a modern, novel practice." *Id.* at 727.

The Court also held that Plaintiffs had failed to satisfy *Sosa*'s second requirement, that their claims did not run afoul of the special factors counseling judicial reluctance to permit claims in the context of ATS. *Id.* at 728; *see also id.* at 726-27 (setting forth the five concerns that motivated the *Sosa* Court to require "vigilant doorkeeping" with respect to claims brought under ATS). In particular, the context of Plaintiffs' claims, which sought to impose liability under ATS on a contractor providing interrogation services to the U.S. military in a combat-zone interrogation facility, made the Court "particularly wary of exercising too much discretion in

recognizing new torts." *Id.* at 728; *see also id.* (declining to recognize Plaintiffs' claims under ATS "in light of the five initial *Sosa* concerns").

CACI appealed the Court's decision declining to dismiss Plaintiffs' common-law tort claims. After a divided Fourth Circuit panel reversed the Court's denial of CACI's motion to dismiss, *Al Shimari v. CACI Int'l Inc*, 658 F.3d 413 (4th Cir. 2011), the Fourth Circuit granted rehearing *en banc* and dismissed CACI's appeal for lack of appellate jurisdiction. *Al Shimari v. CACI Int'l Inc*, 659 F.3d 205 (4th Cir. 2012). Plaintiffs had noticed a cross-appeal from this Court's decision rejecting claims brought under ATS, but that cross-appeal was dismissed by the Fourth Circuit as untimely. With the case now on remand, Plaintiffs ask the Court to reconsider its ATS ruling.

Plaintiffs' Amended Complaint asserts tort claims for: (1) torture; (2) cruel, inhuman or degrading treatment; (3) war crimes; (4) assault and battery; (5) sexual assault and battery; (6) intentional infliction of emotion distress; (7) negligent hiring and supervision; and (8) negligent infliction of emotional distress. For the first six of these tort claims, Plaintiffs append to each a count alleging civil conspiracy and a count alleging aiding and abetting. The Amended Complaint, on its face, asserts all eighteen (18) counts as common law tort claims *and* as ATS claims. Plaintiffs now, however, separate their claims into common-law claims and ATS claims.[1] As a result, Plaintiffs ask the Court to reinstate their ATS claims for: (1) torture; (2) cruel, inhuman or degrading treatment; and (3) war crimes, as well as for the companion claims of conspiracy and aiding & abetting.

[1] "The Complaint asserts common law claims for assault, battery, sexual assault, infliction of emotional distress, and negligent hiring and supervision and under the ATS for torture, cruel, inhuman or degrading treatment, and war crimes." Pl. Mem. at 1.

III. ANALYSIS

A. Plaintiffs' Motion Does Not Meet the Standard for Reconsideration

The standard for reconsideration of an order that does not dispose of the entire case is well-established in this District:

> [I]n deciding a motion to reconsider, the Court must not evaluate the basis upon which it made a prior ruling, if the moving party is simply "rearguing" a prior claim. It is only appropriate for the court to review a previous decision where, for example, it has patently misunderstood a party, or has made a decision outside the adversarial issues presented to the Court by the parties, or has made an error not of reasoning but of apprehension . . . . Such problems rarely arise and the motion to reconsider should be equally rare. There is a limited context in which a litigant should move for reconsideration.

Brainware, Inc. v. Scan-Optics, Ltd., No. 3:11-cv-755, 2012 WL 3555410, at *2 (E.D. Va. Aug. 16, 2012) (internal citations and quotations omitted) (omission in original); *see also United States v. Smithfield Foods, Inc.*, 969 F. Supp. 975, 977-78 (E.D. Va. 1997) (same).

Here, Plaintiffs do not argue that the Court misunderstood the nature of Plaintiffs' claims, or decided an issue not before the Court, or that binding precedent decided since issuance of the Court's decision compels a different result. Rather, Plaintiffs' argument is precisely the type routinely rejected by district courts – a straightforward contention that the Court's reasoning was flawed in rejecting ATS as a jurisdictional basis for Plaintiffs' claims. Essentially, Plaintiffs argue that this Court should simply cast aside its own reasoning and adopt the reasoning by two other district judges. But those district judges do not sit in review of this Court's decisions, so the decisions of co-equal trial judges, even if their decisions were not distinguishable, do not form an appropriate basis for reconsideration of this Court's own reasoning with respect to Plaintiffs' assertion of claims under ATS. Indeed, as discussed below, the state of the law has, if

anything, become less favorable for Plaintiffs' ATS claims since this Court issued its decision in March 2009.

Finally, and contrary to Plaintiffs' assertion, reinstating ATS claims would not remove those claims from the reach of CACI's defenses. Plaintiffs argue that because ATS is a federal statute, their ATS claims are not subject to preemption. Pl. Mem. at 11. This is simply wrong. As the D.C. Circuit recognized in *Saleh,* ATS turns on international law and is preempted to the same extent as state law. *Saleh*, 580 F.3d at 16. In addition, Plaintiffs have not argued, and could not credibly argue, that claims brought under ATS are not subject to defenses based on immunity and the political question doctrine.

B. The Court Correctly Rejected ATS as a Basis for Jurisdiction

As this Court noted in its ruling on CACI's motion to dismiss, in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), the Supreme Court established a two-step framework for determining whether a claim is cognizable under ATS. The first step requires the Court to determine whether the Plaintiffs' claims "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms" viewed as cognizable at the time of ATS's enactment. *Id.* at 725. The *Sosa* Court noted that this allowed "a relatively modest set of actions alleging violations of the law of nations." *Id.* at 720. If the Plaintiffs' claims satisfy this considerable hurdle, the Court still must exercise "judicial caution" and may not permit the claim to go forward if doing so would implicate the special considerations identified by the Court in *Sosa* as urging restraint before recognizing claims under ATS. *Id.* at 725-28. In rejecting ATS as a basis for Plaintiffs' claims, the Court ruled that Plaintiffs failed to satisfy both of the *Sosa* requirements. *Al Shimari*, 657 F. Supp. 2d at 727-28.

As a threshold matter, Plaintiffs' motion is premised on an obvious misapplication of the *Sosa* test. Plaintiffs assert that the Court should consider their claims of international norms by turning a blind eye to the context of Plaintiffs' claims, which is exactly the opposite of what the Supreme Court did in *Sosa*. *Sosa*, 542 U.S. at 738. Even worse, Plaintiffs mischaracterize *Sosa* by contending that the second part of the *Sosa* framework merely involves a consideration of whether corporations may be liable under ATS – an issue this Court did not even reach in rejecting ATS. *Sosa* makes clear that the second part of the required framework involves consideration of a number of factors that the Court correctly ruled preclude assertion of claims under ATS here. *Id.* at 725-28. Plaintiffs' motion fails at the outset because they rely upon fictitious standards not provided by, and inconsistent with, *Sosa.*

1. The Court Correctly Ruled That Plaintiffs' Claims Were Not Sufficiently Established and Defined to Support Jurisdiction Under ATS

In rejecting ATS as a basis of jurisdiction, the Court held that Plaintiffs did not meet the first prong of the *Sosa* test – that their claims have at least the "definite content and acceptance among civilized nations [as] the historical paradigms familiar when § 1350 was enacted." *Al Shimari*, 657 F. Supp. 2d at 727. The Court reached this conclusion because it was far from clear that Plaintiffs' particular allegations, involving claims against contractors used in a war zone "constitute specific, universal, and obligatory violations of the law of nations." *Id.* In addition, the Court held that "even if Plaintiffs' claims were sufficiently accepted and universal, the Court is unconvinced that ATS jurisdiction reaches private defendants such as CACI." *Id.* at 728.

Plaintiffs make two arguments in seeking reconsideration. Plaintiffs first assert that the Court erred in considering the *context* of Plaintiffs' claims in determining whether they alleged a specific, defined violation of the law of nations. Rather, they claim that the Court should avert

its eyes from Plaintiffs' actual allegations and simply decide whether the label they put on their claim is sufficiently defined in international law. Pl. Mem. at 11-12 ("That question turns on an assessment of the norm in the abstract and is not dependent upon the particular factual context (or status of the defendant) in which the norm arises."). Second, Plaintiffs argue that the Court erred because some courts have, based on the allegations in *those cases*, recognized some of the norms of international law alleged by Plaintiffs here. Pl. Mem. at 13-15.

Plaintiffs' argument that the Court must decide whether a norm of international law is universal and specifically defined in the abstract, without regard to context, is a novel argument and Plaintiffs cite no case law adopting this requirement. Rather, Plaintiffs cite a few cases noting that certain torts are universally accepted as norms of international law and argue from that premise that these Courts must have ignored the context of the claims in those cases. Pl. Mem. at 12. But Plaintiffs' premise that context is irrelevant to the first prong of *Sosa* is defeated by *Sosa* itself. In *Sosa*, the plaintiff asserted a claim for "arbitrary detention" under ATS. Without deciding whether some types of arbitrary detention might qualify as binding customary international law, the Court looked at the context of Alvarez-Machain's claim and held that his claim did not allege a violation of binding customary international law:

> Whatever may be said for the broad principle Alvarez advances, in the present, imperfect world, it expresses an aspiration that exceeds any binding customary rule having the specificity we require. Creating a private cause of action to further that aspiration would go beyond any residual common law discretion we think it appropriate to exercise. ***It is enough to hold that a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to support the creation of a federal remedy.***

Sosa, 542 U.S. at 738 (emphasis added) (footnotes omitted).

Indeed, in *Sosa*, the Supreme Court addressed the requirement that a plaintiff show a universal, binding norm of international law and immediately noted that "[a] related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual." *Id.* at 732 n.20. Thus, *Sosa* itself not only permits, but ***requires***, consideration of the context of a plaintiff's specific claim in order to assess whether the plaintiff alleges a violation of a specifically-defined, binding customary norm of international law.

For that reason, the D.C. Circuit recently rejected the very argument Plaintiffs make here, noting the "context-dependent nature of the ATS analysis" and rejecting ATS jurisdiction over a non-state actor for claims of torture. *Ali Shafi v. Palestinian Auth.*, 642 F.3d 1088, 1095-96 (D.C. Cir. 2011) ("*Sosa* makes clear that the analysis of whether international law extends the scope of liability . . . to the perpetrator being sued, if the defendant is a private actor pertains to the 'given norm' being analyzed" (quotations and citations omitted; omission in original)). The Second Circuit recently followed the same approach of assessing a plaintiff's claim in context, dismissing an ATS claim because, among other reasons, the plaintiff had failed to assert a claim "that falls within the subset of international norms for the violation *of which private individuals may be held liable even in the absence of state action*." *Orkin v. Swiss Confederation*, 444 F. App'x 469, 472 (2d Cir. 2011) (emphasis added). Thus, this Court was demonstrably correct in evaluating the context of Plaintiffs' claims in concluding that Plaintiffs had not established a specifically-defined, universally accepted binding norm of international law that could be asserted against CACI.

Plaintiffs' reliance on case law from other courts, based on the allegations in those cases, does nothing to undermine this Court's conclusion on ATS jurisdiction. With respect to torture,

case law is quite clear that such claims are not actionable against non-state actors under ATS. *See, e.g.*, *Ali Shafi*, 642 F.3d at 1095-96; *Kadic v. Karadzic*, 70 F.3d 232, 241-44 (2d Cir. 1995); *Sanchez-Espinosa v. Reagan*, 770 F.2d 202, 209 (D.C. Cir. 1985); *Tel-Oren v. Libyan Arab Rep.*, 726 F.2d 774, 791-95 (D.C. Cir. 1984) (Edwards, J., concurring).[2] Citing two district court cases, Plaintiffs argue that whether an ATS claim is available for cruel, inhuman, and degrading treatment "depend[s] on the seriousness of the claims set forth in each case," Pl. Mem. at 14-15, but this is a misstatement of the cases Plaintiffs cite. The court in *In re Chiquita Brands International, Inc.*, 792 F. Supp. 2d 1301, 1323-24 (S.D. Fla. 2011), did not reject ATS because the allegations were not serious enough, but categorically rejected the premise that a violation of the prohibition on cruel, inhuman and degrading treatment was sufficiently established to *ever* form the basis for a claim under ATS. *Id.*

Indeed, Plaintiffs' discussion of the law on this subject somehow omitted reference to the Eleventh Circuit's decision in *Aldana v. Del Monte Fresh Produce, N.A.*, 416 F.3d 1242 (11th Cir. 2005). To CACI's knowledge, *Aldana* is the only court of appeals decision assessing whether cruel, inhuman, and degrading treatment constitutes an international norm that is cognizable under ATS, and the court categorically held that such a claim is unavailable under ATS. *Id.* at 1247 ("We see no basis in law to recognize Plaintiffs' claim for cruel, inhuman, degrading treatment or punishment."); *see also Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d 1116, 1162 n.190 (C.D. Cal. 2002) (rejecting cruel, inhuman and degrading treatment claim under

[2] Moreover, if CACI is viewed as a state actor, it is entitled to immunity. *See, e.g.*, *Filarsky v. Delia*, 132 S. Ct. 1657, 1662-63 (2012); *Ali v. Rumsfeld*, 649 F.3d 762, 774 (D.C. Cir. 2011); *Saleh v. Titan Corp.*, 580 F.3d 1, 15 (D.C. Cir. 2009) ("Of course, plaintiffs are unwilling to assert that the contractors are state actors. Not only would such an admission make deep inroads against their arguments with respect to the preemption defense, it would virtually concede that the contractors have sovereign immunity."); *Mangold v. Analytic Svcs., Inc.*, 77 F.3d 1442, 1445-56 (4th Cir. 1996); *Sanchez-Espinosa*, 770 F.2d at 207.

ATS), *aff'd in part, rev'd in part on other grounds*, 487 F.3d 1193 (9th Cir. 2007). With so many courts rejecting Plaintiffs' position, it is difficult to credit Plaintiffs' position that the recognition of these claims is so universal that the Court should cast aside its own analysis and reinstate Plaintiffs' claims.

2. Plaintiffs' Motion Misstates the Second Part of the Test Announced in *Sosa*, Which the Court Correctly Applied in Rejecting ATS as a Jurisdictional Basis

According to Plaintiffs' motion, if the Court were to conclude that Plaintiffs have alleged "violations of universal norms," Pl. Mem. at 11, the only remaining step is to decide "whether the universal norm may be enforced against CACI, a defense contractor working for the United States in Iraq." Pl. Mem. at 15. Plaintiffs then go on to discuss a few cases holding that corporations are not *per se* excluded from the reach of ATS, Pl. Mem. at 16-19, though even that question is subject to a circuit split that may or may not be resolved by the Supreme Court. *See Kiobel v. Royal Dutch Petroleum*, 621 F.3d 111, 145 (2d Cir. 2010), *cert. granted*, 132 S. Ct. 472 (2011).[3] By characterizing the second step of the *Sosa* analysis as simply deciding whether the claims could be brought against corporations, Plaintiffs grossly mischaracterize *Sosa*.

As this Court correctly held, even if a claim brought under ATS constitutes a universally accepted norm of international law, *Sosa* still requires "judicial caution when considering the kinds of individual claims that might implement the jurisdiction conferred by [ATS]," and identified five factors that "argue for great caution in adapting the law of nations to private

[3] In *Kiobel*, the Second Circuit held that corporations (or other legal entities) could not be held liable under ATS, and that customary international law and hence ATS did not recognize or allow corporate accessory liability. *Certiorari* was granted on the issue of corporate liability. After oral argument, the Supreme Court set the case for reargument and ordered supplemental briefing on whether ATS could be applied to conduct that occurred in the territory of a foreign sovereign.

rights." *Sosa*, 542 U.S. at 725, 728. These special factors counseling restraint include the following:

(1) At the time of ATS's enactment, the common law was perceived as the process of discovering preexisting law rather than making new law.

(2) The federal courts' practice "to look for legislative guidance before exercising innovative authority over substantive law."

(3) The Court "has recently and repeatedly said that a decision to create a private right of action is one better left to legislative judgment in the great majority of cases."

(4) "[T]he potential implications for the foreign relations of the United States of recognizing such causes should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs."

(5) The absence of a "congressional mandate to seek out and define new and debatable violations of the law of nations."

Id. at 725-28; *see also Al Shimari*, 657 F. Supp. 2d at 726-27 (identifying the same five factors).

This Court found that Plaintiffs' claims should not be permitted in light of this required judicial caution. *Al Shimari*, 657 F. Supp. 2d at 728 ("Here, the Court is particularly wary of exercising too much discretion in recognizing new torts."); *id.* at 727 ("[D]istrict courts must temper 'the determination [of] whether a norm is sufficiently definite to support a cause of action' with 'an element of judgment about the practical consequences of making that cause available to litigants.'" (quoting *Sosa*, 542 U.S. at 732-33)). Thus, the second step of the *Sosa* analysis is not simply deciding whether ATS applies to corporations, but requires consideration of the panoply of reasons why the Supreme Court held that district courts should be reluctant to recognize claims under ATS. Several of these considerations are implicated here and preclude reinstatement of ATS as a jurisdictional basis for Plaintiffs' claims.

a. *Sosa* Strongly Counsels Against Creating, Through Judicial Pronouncement, a Private Federal Right of Action When Congress Has Declined to Create Such a Right Statutorily

In *Sosa*, the Court noted that "the general practice has been [for federal courts] to look for legislative guidance before exercising innovative authority over substantive law." *Sosa*, 542 U.S. at 726. Moreover, the Supreme Court "has recently and repeatedly said that a decision to create a private right of action is one better left to legislative judgment in the great majority of cases." *Id.* at 727. Indeed, the *Sosa* Court warned against inferring a private right of action simply because conduct has been criminalized: "The creation of a private right of action raises issues beyond the mere consideration whether underlying primary conduct should be allowed or not, entailing, for example, a decision to permit enforcement without the check imposed by prosecutorial discretion." *Id.* Here, the legislative landscape makes clear that the Court should not undertake the task of creating novel federal torts arising out of the United States' prosecution of a war, as Congress has repeatedly legislated in the areas implicated by Plaintiffs' Amended Complaint and has repeatedly declined to create an applicable private right of action.

In enacting the Federal Tort Claims Act ("FTCA"), Congress broadly waived sovereign immunity for tort suits, but specifically retained immunity for "[a]ny claim arising out of the combatant activities of the military or naval forces . . . during time of war." 28 U.S.C. § 2680(j). Courts analyzing the FTCA's combatant activities exception repeatedly have held that the policy embodied by the exception was "the elimination or tort from the battlefield." *Saleh*, 580 F.3d at 7.[4] Congress enacted the federal torture statute, 18 U.S.C. § 2340-2340A, and the War Crimes

[4] *See also Koohi v. United States*, 976 F.2d 1328, 1333, 1337 (9th Cir. 1992) ("The reason [why claims against the contractor were preempted], we believe, is that one purpose of the combatant activities exception is to recognize that during wartime encounters no duty of reasonable care is owed to those against whom force is directed as a result of authorized military action."); *Ibrahim v. Titan Corp.*, 391 F. Supp. 2d 10, 18 (D.D.C. 2005) ("The exception seems to represent Congressional acknowledgement that war is an inherently ugly business for which

Act, 18 U.S.C. § 2441. In enacting these statutes, however, Congress provided criminal remedies for torture and war crimes, but left that remedy exclusively as a criminal prosecution and declined to create a private right of action that would "permit enforcement without the check imposed by prosecutorial discretion." *Sosa*, 542 U.S. at 727.

More recently, Congress implemented the Convention Against Torture by enacting the Torture Victims Prevention Act of 1991 ("TVPA"), 28 U.S.C. § 1350 note. In enacting the TVPA, Congress *did* create a private right of action for torture, but carefully circumscribed the contours of that private right of action. The TVPA allows civil suits only against individuals and not against corporations. *Id.*; *see also Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702, 1710-11 (2012). Even more to the point, the TVPA limits a private right of action to acts of torture "under actual or apparent authority, or color of law, ***of any foreign nation***." TVPA, § 2(a), 28 U.S.C. § 1350 note. Indeed, in signing the TVPA, President George H.W. Bush stated: "I am signing the bill based on my understanding that the Act does not permit suits for alleged human rights violations in the context of United States military operations abroad." Statement by President George Bush Upon Signing H.R. 2092, 1992 U.S.C.C.A.N. 91 (Mar. 12, 1992).

Thus, while Congress has enacted significant legislation regarding both torture and war crimes, the legislative branch has conspicuously declined to provide any private right of action for either torture or war crimes to individuals in Plaintiffs' position. Lacking any statutory claim under federal law, Plaintiffs ask this Court to provide them with the precise causes of action that Congress did not. The Court should decline that invitation.

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tort claims are simply inappropriate."); *Bentzlin v. Hughes Aircraft Co.*, 833 F. Supp. 1486, 1493 (C.D. Cal. 1993) ("The *Koohi* court noted that in enacting the combatant activities exception, Congress recognized that it does not want the military to 'exercise great caution at a time when bold and imaginative measures might be necessary to overcome enemy forces.'" (citation omitted)).

A powerful precedent for rejecting Plaintiffs' position is found in a Fourth Circuit decision from earlier this year. In *Lebron v. Rumsfeld*, 670 F.3d 540 (4th Cir. 2012), the Fourth Circuit held that a United States citizen who was arrested and detained as an enemy combatant in the United States upon his return from Afghanistan could not bring a *Bivens* action against top Department of Defense officials for their policy judgments regarding the designation and treatment of enemy combatants. *Id.* at 544-45, 547, 556-57. In declining to recognize a cause of action for detainee abuse in the analogous context of a *Bivens* action, where a court must conduct a similar "special factors" analysis to that required by *Sosa*,[5] the Fourth Circuit relied heavily on Congress's failure to create a private cause of action during a time in which it was repeatedly enacting detainee-related legislation:

> Of course Congress may decide that providing a damages remedy to enemy combatants would serve to promote a desirable accountability on the part of officials involved in decisions of the kind described above. But to date Congress has made no such decision. This was not through inadvertence. Congress was no idle bystander to this debate. Indeed, it devoted extensive attention to the precise questions Padilla presents pertaining to the treatment of detainees and to the legitimacy of interrogation measures. [citing and quoting Military Commissions Act of 2009, Military Commissions Act of 2006, and Detainee Treatment Act of 2005].
>
> This history reveals a Congress actively engaged with what interrogation techniques were appropriate and what process was due enemy combatant detainees. In enacting these statutes, Congress acted with a "greater ability to evaluate the broader ramifications of a remedial scheme by holding hearings and soliciting the views of all interested parties," *Holly* [*v. Scott*, 434 F.3d 287, 289 (4th Cir. 2006)], than we possess, constrained as we are by the limited factual record of a single case. Padilla asks us to ignore this ample evidence that "congressional inaction has not been inadvertent," *Schweiker v. Chilicky*, 487 U.S. 412, 423

[5] Indeed, the United States analogized the *Sosa* inquiry to the *Bivens* inquiry in recommending that the Supreme Court not review the dismissal of the ATS claims in *Saleh*. *See* Brief for the United States as *Amicus Curiae* at 22, *Saleh v. Titan Corp.*, No. 09-1313, 2011 WL 2134985 (U.S. filed May 2011).

> (1988), and do what Congress did not do, namely to trespass into areas constitutionally assigned to the coordinate branches of our government.

Id. at 551-52 (parallel citation omitted).

Here, *Sosa* specifically commands courts considering claims brought under ATS "to look for legislative guidance before exercising innovative authority over substantive law," and to consider that "a decision to create a private right of action is one better left to legislative judgment in the great majority of cases." *Sosa*, 542 U.S. at 725-28. Congress has enacted criminal statutes, such as the federal torture statute and the War Crimes Act, while declining to enact a corresponding private right of action. Congress has created private rights of action through the FTCA and the TVPA, but carefully limited those private rights of action to exclude conduct arising out of U.S. military operations. In the last decade, Congress has enacted myriad legislation concerning detainees and interrogation techniques but has steadfastly declined to include a private right of action in such legislation. As the Fourth Circuit held in *Lebron*, the unmistakable conclusion from this legislative history is that Congress has not seen creating a private right of action such as that pursued by these Plaintiffs as appropriate, and *Sosa* strongly counsels against creating a private right that Congress has declined to create.

The *Lebron* court also offered an extensive review of the numerous factors counseling hesitation, including the importance of "[p]reserving the constitutionally prescribed balance of powers," *id.* at 548-50; the sensitive nature of the allegations involved in detainee cases, *id.* at 550-51; the need to review the military command structure in order to determine liability, *id.* at 553; the administrability concerns regarding the need to require current and former officials to testify about the rationale for the policy at issue, *id.* at 553-54. In the Fourth Circuit's judgment, these considerations also provided strong reasons for not recognizing an implied tort action. *Id.*

Many of the same special factors counseling hesitation for a *Bivens* claim relied on by the Fourth Circuit in *Lebron* are present in this case. In their Amended Complaint, Plaintiffs challenge the development and implementation of numerous military policies and decisions, both by CACI personnel and by unidentified co-conspirators. This action will require the Court to delve into the military's policies and practices governing interrogation techniques. The allegations implicate the military chain of command and the decisions by Executive Branch and military officials regarding the interrogation of enemy combatants. Plaintiffs' allegations raise questions regarding the treatment of the Plaintiffs while in U.S. custody in a war zone. Litigation of their case will require testimony from military personnel and access to the classified files on the Plaintiffs, as well as government reports regarding detainee operations at Abu Ghraib. Discovery from the alleged military co-conspirators is also necessary.

Recognition of the analysis required by the five factors in *Sosa's* second test also illustrates why the decision in *In re: Xe Alien Tort Litigation,* 665 F.Supp. 2d 569 (E.D. Va. 2009) does not support reinstatement of Plaintiffs' claims under ATS. In holding that war crimes was a cognizable cause of action under ATS, the court failed to conduct the analysis required by *Sosa's* second test. Rather, the court concluded that there was an international norm proscribing war crimes and, without more, held that an allegation of war crimes stated a cause of action under ATS. *Id.* at 582. The court then held that the complaint failed to allege facts, as required by *Iqbal* and *Twombly*, to show a plausible entitlement to relief for the claims of war crimes. *Id.* at 589-92. Judge Ellis found that the complaint merely asserted that the defendants engaged in acts that were deliberate, willful, intentional and malicious, that the acts occurred during a period of armed conflict, that war crimes were committed against the plaintiffs, that the defendants were liable for war crimes, and that the misconduct caused grave and foreseeable injuries to the

plaintiffs. *Id.* at 590. He then held these were no more than conclusory allegations bereft of the required facts, and therefore failed to state cognizable claims for war crimes. *Id.* at 591.[6]

The allegations in the Amended Complaint here are indistinguishable from the allegations held inadequate in *Xe Alien Tort Litigation.* Am. Compl. ¶¶ 11-73 If this Court chooses to adopt the ATS reasoning from *Xe,* it would be equally appropriate for the Court to recognize that *Xe* does not support reinstatement of Plaintiffs' ATS claims because the reasoning of *Xe* would require dismissal under *Iqbal* and *Twombly*.

b. Recognizing Common-Law Tort Claims Arising Out of War and Military Occupation Would Inappropriately Infringe on the Discretion of the Legislative and Executive Branches in Managing Foreign Affairs

In *Saleh,* the district court dismissed ATS claims arising out of the plaintiffs' detention in Iraq and the D.C. Circuit affirmed. *See Saleh,* 580 F.3d at 16-17. In recommending denial of the plaintiffs' petition for writ of *certiorari,* the United States argued that review of the plaintiffs' ATS claims was inappropriate because of the wartime context of the claims:

> Consideration by this Court of petitioners' claims based on the ATS is unwarranted for an additional reason. This suit is brought by foreign nationals against U.S. persons based on conduct

[6] Judge Messitte's analysis in *Al-Quraishi v. Nakhla,* 728 F. Supp. 2d 702, 742 (D. Md. 2010), suffers from the same flaw. Unlike this Court's analysis of ATS, Judge Messitte treated the legal inquiry as solely a determination whether the torts alleged were universally-accepted violations of universal norms, without acknowledging, much less applying, the second part of the *Sosa* test. Moreover, Judge Messitte rejected the defendants' reliance on the absence of a statutory cause of action as unimportant, which is at odds with *Sosa* as well as the Fourth Circuit's treatment of detainee claims in the *Bivens* context. *See Lebron,* 670 F.3d at 551-52; *see also Aziz v. Alcolac, Inc.*, 658 F.3d 388, 395 (4th Cir. 2011) (noting the vigilant doorkeeping" required by *Sosa*'s second test, over and above determining whether an international norm is sufficiently well defined). Judge Messitte also expressed skepticism that corporations were excluded from the reach of the TVPA, *Al-Quraishi*, 728 F. Supp. 2d at 755, a conclusion with which the Supreme Court has unanimously disagreed. *Mohamad,* 132 S. Ct. at 1710-11; *see also Aziz,* 658 F.3d at 392. Thus, this Court's ATS analysis is not only more consistent with *Sosa* than are the analyses in *Xe* and *Al-Quraishi,* but is also more faithful to the Fourth Circuit's later treatment of related issues in *Aziz* and *Lebron*.

> occurring in a military setting in a foreign country, and it therefore raises a threshold question whether a common-law cause of action based on the jurisdictional grant in the ATS should be created in these circumstances. *See Sosa*, 542 U.S. at 725-28; *Rasul* [*v. Myers*, 563 F.3d 527, 532 n.7 (D.C. Cir. 2009)] (special factors counsel against creating a *Bivens* cause of action by foreign nationals against U.S. officials based on allegations of abuse in military detention).

Brief for the United States as *Amicus Curiae* at 22, *Saleh v. Titan Corp.*, No. 09-1313, 2011 WL 2134985 (U.S. filed May 2011) (internal record cite omitted).

In *Saleh*, the D.C. Circuit reached the same conclusion and affirmed dismissal of the plaintiffs' ATS claims in part because "[t]he judicial restraint required by *Sosa* is particularly appropriate where, as here, a court's reliance on supposed international law would impinge on the foreign policy prerogatives of our legislative and executive branches." *Saleh*, 580 F.3d at 16. Indeed, it has long been the case that questions regarding the propriety of compensation for wartime injuries is a matter to be decided between governments and not through the vehicle of tort suits. *See Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 230 (1796); *Perrin v. United States*, 4 Ct. Cl. 543, 544 (1868); *Frumkin v. JA Jones, Inc.*, 129 F. Supp. 2d 370, 376 (D.N.J. 2001); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 485 (D.N.J. 1999); *Burger-Fischer v. Degussa AG*, 65 F. Supp. 2d 248, 273 (D.N.J. 1999); Restatement (Third) Foreign Relations Law of the United States § 713 cmt. a (1987). In fact, the United States has made an administrative claims process available to compensate bona fide victims of detainee abuse, *Saleh*, 580 F.3d at 2-3, which is yet another reason why the Court should be reluctant, through recognition of a novel federal tort, to intrude in an area of foreign relations that constitutionally and historically has been the exclusive province of the political branches.

c. Events Occurring After the Conduct at Issue in Plaintiffs' Amended Complaint Are Not Properly Considered in Determining Whether a Claim Under ATS is Cognizable

In *Sosa*, the Supreme Court held that one reason why courts should exercise "judicial caution" when considering claims asserted under ATS is that "the prevailing conception of the common law has changed since 1789 in a way that counsels restraint in judicially applying internationally generated norms." *Sosa*, 542 U.S. at 725. As the Court explained, when the ATS was enacted, the common law was perceived as preexisting law applying outside any State that was "discovered" by a court, while the contemporary view is that the common law is a process by which judges either make or create law. *Id.*

Here, Plaintiffs' motion for reconsideration argues that case law and other developments *after* this Court's motion to dismiss ruling should inform the Court's judgment as to whether an international norm existed many years earlier, to the period when CACI was providing interrogation services in Iraq. In essence, Plaintiffs argue that recent developments should retroactively create a cognizable ATS claim that would be binding on conduct that occurred many years before these developments. This is exactly the concern identified by the Supreme Court in mandating caution in recognizing new torts based on the notion that the common law involves creating law rather than discovering preexisting law.

The Ninth Circuit grappled with this issue in directing dismissal of *Bivens* claims asserted against John Yoo based on advice he provided from 2001 to 2003 concerning permissible standards for detainee treatment. *Padilla v. Yoo*, 678 F.3d 748, 761 (9th Cir. 2012). As the Ninth Circuit observed, it was unreasonable to judge Yoo's conduct based on case law decided after the fact. *Id.* In particular, the court held that it was inappropriate to judge Yoo's analysis of the term torture based on understandings developed after the conduct at issue in his case. *Id.* at 764 ("In 2001-03, there was general agreement that torture meant the intentional infliction of

severe pain or suffering, whether physical or mental. The meaning of 'severe pain or suffering,' however, was less clear in 2001-03." (footnote omitted)). As a result, the court held Yoo immune from suit based on the state of the law that existed in 2001-03, and disregarded events post-dating Yoo's conduct.

The same analysis applies here. In deciding whether Plaintiffs have demonstrated a universal, binding norm of international law with "definite content and acceptance among civilized nations," the Court does not examine the current state of international law. Rather, the Court must examine the state of international law ***at the time of the defendants' alleged conduct***, *i.e.*, 2003- 2004. *Sosa* does not permit Plaintiffs' claims to be based on authorities or norms developed *after* the defendants' alleged conduct. If that were not the case, parties would be subject to courts creating common law causes of action based on events the defendant had no ability to take into account at the time of its conduct because binding norm did not then exist. *Id.*; *see also Sosa*, 542 U.S. at 725.[7] Plaintiffs' motion principally rests on district court decisions issued not only after this Court's motion to dismiss ruling, but many years after the conduct alleged in the Amended Complaint. Those decisions cannot constitute evidence of a universally-recognized, binding norm in 2003-04.

[7] *Cf. Saucier v. Katz*, 533 U.S. 194, 201 (2001); *Wilson v. Layne*, 526 U.S. 603, 609 (1999); *Lefemine v. Wideman*, 672 F.3d 292, 298-99 (4th Cir. 2012) (in determining qualified immunity, relevant and dispositive inquiry is whether the right was clearly established at the time of the defendants' alleged conduct). In determining whether a right was clearly established at the time of the defendants' alleged conduct, the Court focuses not upon the right at its most general or abstract level, but at the level of its application to the specific conduct being challenged. *Id.* (citing *Jackson v. Long*, 102 F.3d 722, 728 (4th Cir. 1996)). Moreover, for a right to be clearly established, it must be clearly established by this Circuit or the Supreme Court. *Edwards v. City of Goldsboro*, 178 F.3d 231, 251 (4th Cir. 1999); *see also Chao v. Self Pride, Inc.*, 232 F. App'x 280, 286-87 (4th Cir. 2007) (for a FLSA violation, defendants must have notice of the FLSA requirements at the time of the alleged violation).

C. There Are Other Reasons, Not Addressed in the Court's Motion to Dismiss Ruling, Why Reinstatement of ATS as a Jurisdictional Basis Would Be Inappropriate

There are at least two other reasons, not addressed in the Court's decision on CACI's motion to dismiss, that counsel strongly against reinstating ATS as a jurisdictional basis for Plaintiffs' claims.

First, Plaintiffs' Amended Complaint alleges no contact between Plaintiffs and any CACI employee. Instead, the Amended Complaint alleges, in the vaguest terms possible, that CACI conspired with military personnel to abuse detainees, and communicated its entry into the conspiracy "by making a series of verbal statements and by engaging in a series of criminal acts or torture alongside and in conjunction with several co-conspirators." Am. Compl. ¶ 72. Based on that vague allegation of conspiracy, Plaintiffs seek to tag CACI with liability, through conspiracy and aiding and abetting counts, for any detainee abuse committed by any person at Abu Ghraib prison, without a scintilla of evidence that CACI had anything to do with these Plaintiffs, the interrogation of these Plaintiffs, or the treatment of these Plaintiffs.

The Supreme Court, however, has held that the only conspiracies considered as violations of international law are conspiracies to commit genocide or to wage aggressive war, neither of which are alleged here. *Hamdan v. Rumsfeld*, 548 U.S. 557, 610 (2006) ("[T]he only 'conspiracy' crimes that have been recognized by international war crimes tribunals (whose jurisdiction often extends beyond war crimes proper to crimes against humanity and crimes against the peace) are conspiracy to commit genocide and common plan to wage aggressive war . . . ."); *see also Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 260 (2d Cir. 2009) (rejecting conspiracy claims brought under ATS pursuant to *Hamdan*).[8] Moreover,

[8] While international law may recognize a violation of international law for engaging in a "joint criminal enterprise," the Second Circuit noted in *Presbyterian Church* that even if such a

even if Plaintiffs could assert a conspiracy claim under ATS, they would have to show that CACI joined this supposed conspiracy through an agent with actual authority to bind CACI, and not through actions of low-level interrogators. *See, e.g.*, *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 289 (4th Cir. 2004); *see also* Restatement (Third) of Agency § 2.01 cmt. b. The Amended Complaint does not identify any CACI agent with authority to bind CACI to a conspiracy that is by definition criminal.

With respect to Plaintiffs' aiding and abetting claims, Plaintiffs' motion discusses developments in the law but fails to cite *Aziz v. Alcolac, Inc.*, 658 F.3d 388 (4th Cir. 2011), the only ATS decision by the Fourth Circuit since this Court's decision on CACI's motion to dismiss. In *Aziz*, the Fourth Circuit applied the more stringent "purposefulness" standard of aiding and abetting claims under ATS, rejecting the more lenient knowledge standard applied by some courts. *Id.* at 398. In reaching this result, the Fourth Circuit adopted the Second Circuit's reasoning in *Talisman*, holding that "*Sosa* guides courts to international law to determine the standard for imposing accessorial liability." *Id.*[9] Based on that conclusion, the Fourth Circuit held that "for liability to attach under the ATS for aiding and abetting violation of international law, a defendant must provide substantial assistance with the purpose of facilitating the alleged violation." *Id.* at 401. Applying that standard, the Fourth Circuit noted that the plaintiffs' amended complaint alleged that Alcolac had sold chemicals used to make mustard gas "with the purpose of facilitating the use of said chemicals" to make mustard gas to be used against Iraqi

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cause of action were cognizable under ATS, there is no basis for concluding that international law would allow liability under a joint criminal enterprise theory for conduct in which the defendant had not personally participated. *Talisman*, 582 F.3d at 260.

[9] Indeed, the Fourth Circuit's pronouncement in *Aziz* that international law governs *who* may be held liable under ATS is directly contrary to the representation in Plaintiffs' memorandum that this question "is not decided by international law . . . but rather by resort to federal common law." Pl. Mem. at 15.

Kurds. *Id.* The Fourth Circuit, however, correctly viewed this allegation as a legal conclusion not accompanied by supporting facts, and therefore affirmed dismissal of the plaintiffs' ATS claims. *Id.* at 401-02. Similarly, the Amended Complaint here makes vague allegations of aiding and abetting, but offers no facts as to how any CACI employee had any role whatsoever in aiding and abetting any abusive conduct to which these Plaintiffs may have been subjected, or how CACI had the purposeful intent of harming these particular Plaintiffs. Therefore, as in *Aziz*, aiding and abetting counts cannot satisfy the stringent analysis required by *Sosa*.

Second, *Kiobel v. Royal Dutch Petroleum*, 621 F.3d 111, 145 (2d Cir. 2010), *cert. granted*, 132 S. Ct. 472 (2011), is currently pending before the Supreme Court. One of the questions presented by that case is whether corporations are *per se* excluded from liability under ATS. The Supreme Court also may decide issues involving the extraterritorial reach of ATS, or the extent to which a plaintiff must exhaust other available remedies, either of which could have a substantial effect on the availability of ATS for claims such as those brought by Plaintiffs. The Fourth Circuit's decision in *Aziz*, 658 F.3d at 394 n.6, noted that it was not deciding whether corporations could be liable under ATS because that issue was raised for the first time on appeal. The Court did, however, reject the position asserted by Plaintiffs here that questions as to *who* may be liable for a violation of international law under ATS is a question of domestic law, and, like the Second Circuit in *Kiobel*, held that this question was governed by international law. *Aziz*, 658 F.3d at 398; *see also Kiobel*, 621 F.3d at 126. It was the conclusion that international law governed the scope of liability under ATS, a position now adopted by the Fourth Circuit, that led the Second Circuit to the conclusion that such liability did not extend to corporations. *Kiobel*, 621 F.3d at 141. Thus, even if the Supreme Court resolves the *Kiobel* case without determining whether corporations may be held liable under ATS, the Fourth Circuit's adoption

of international law as the applicable standard suggests that the law of this Circuit would bar such claims under ATS.

IV. CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' motion.

Respectfully submitted,

/s/ J. William Koegel, Jr.

J. William Koegel, Jr.
Virginia Bar No. 38243
John F. O'Connor (admitted *pro hac vice*)
Attorneys for Defendants CACI Premier Technology, Inc. and CACI International Inc
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000 – Telephone
(202) 429-3902 – Facsimile
wkoegel@steptoe.com
joconnor@steptoe.com

October 25, 2012

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of October, 2012, I caused the foregoing to be filed electronically through this Court's ECF system, which will send a notification to the following counsel of record:

Susan L. Burke
Susan Sajadi
Attorneys for Plaintiff
Burke PLLC
1000 Potomac Street, N.W.
Suite 150
Washington, D.C. 20007
sburke@burkpllcl.com
ssajadi@burkepllc.com

/s/ J. William Koegel, Jr.

J. William Koegel, Jr.
Virginia Bar No. 38243
John F. O'Connor (admitted *pro hac vice*)
Attorneys for Defendants CACI Premier Technology, Inc. and CACI International Inc
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000 – Telephone
(202) 429-3902 – Facsimile
wkoegel@steptoe.com
joconnor@steptoe.com