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

SUHAIL NAJIM ABDULLAH AL SHIMARI, et al.,	)	
Plaintiffs,	)	Case No. 1:08-CV-00827-LMB-JFA
v.	)	
CACI PREMIER TECHNOLOGY, INC.,	)	
Defendant.	)	

MEMORANDUM OF DEFENDANT CACI PREMIER TECHNOLOGY, INC. REGARDING THE SUBSTANTIVE LAW GOVERNING PLAINTIFFS' CLAIMS

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I. INTRODUCTION

This memorandum addresses only the law applicable to Plaintiffs' claims, which now are limited to claims brought under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350. *See* Dkt. #574 (dismissing common-law claims with prejudice). CACI PT addresses only questions of governing law, and does not attempt to define the elements of causes of action under governing law or address the threshold defects in Plaintiffs' claims under that law. CACI PT does address preemption, however, because preemption controls what substantive law, if any, the Court can apply to Plaintiffs' claims. More specifically, we explain how the laws otherwise governing Plaintiffs' ATS claims are preempted.

II. PLAINTIFFS' CLAIMS AND THE CONDUCT OF DISCOVERY IN THIS CASE

After nine years of litigation, Plaintiffs have dismissed their common-law claims. Plaintiffs' dismissal of their common law claims is not, however, responsive to the Court's suggestion that Plaintiffs simplify the case by eliminating some of the *acts of alleged mistreatment* from the case. (12/16/16 Tr. at 17). Plaintiffs' dismissal of common-law claims, without dropping specific allegations of mistreatment does not narrow at all the lawfulness inquiry – which the Court has indicated it plans to tackle first – as the Court still will need to determine the lawfulness of every single alleged act of alleged mistreatment. The case becomes simplified only if the Court eliminates acts of mistreatment from the case on the grounds that they are not cognizable under ATS.

With the dismissal of the common-law claims, there are nine counts remaining in the case, all brought under the ATS. Plaintiffs' claims fall under three basic headings: (1) Torture; (2) CIDT; and (3) War Crimes. For each of these counts, Plaintiffs include separate claims alleging conspiracy and aiding and abetting.

As we have previously noted, the Court dismissed all of Plaintiffs' conspiracy claims in 2013 as not meeting the pleading standard set forth in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-57 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). *See* Dkt. #215. The Court ultimately granted Plaintiffs leave to file a Third Amended Complaint, but ruled that "[o]nly amendments related to conspiracy allegations between CACI Premier Technology, Inc. and the United States Military will be permitted." Dkt. #227. Plaintiffs did not adhere to this limitation, and asserted a number of new facts (less than two months before discovery closed). In a particularly jarring example, Plaintiff Rashid, who had filed three prior versions of his complaint, and responded to interrogatories asking him to detail his injuries, apparently discovered for the first time nine years after his release from U.S. custody that he had been shot in the leg during his incarceration. TAC ¶ 53.

CACI PT moved the dismiss the conspiracy claims realleged in the TAC as not curing the defects from the Second Amended Complaint, and separately moved to strike the amendments in the TAC that did not comply with the Court's ruling that only conspiracy allegations would be permitted on amendment. Dkt. #300 (motion to strike), 312 (motion to dismiss). The Court entered judgment for CACI PT before ruling on these motions; accordingly Plaintiffs' conspiracy allegations have not withstood a Rule 12(b)(6) challenge nor has action been taken yet regarding the unauthorized amendments.

This case proceeded through **full and unlimited merits discovery** before the Court entered judgment in CACI PT's favor in 2013. **Plaintiffs were able to conduct all the merits discovery that they sought**.[1] Indeed, that discovery included evidence bearing directly on the

[1] Before the discovery deadline, Plaintiffs filed a motion to compel additional deposition testimony from CACI PT regarding Plaintiffs' inability to travel to this country, a subject on which all of CACI PT's information has come from Plaintiffs' counsel and their representations

Court's political question and lawfulness inquiry. This evidence includes declarations by the military chain of command that confirm the military's exclusive control over interrogation operations at Abu Ghraib prison, including approval of interrogation techniques. Dkt #518-1 at Exs. 2-5.

CACI PT, however, was not able to complete its discovery. CACI PT had moved to compel a wide range of discovery before the discovery deadline passed. The issues on which CACI PT sought discovery included a motion to compel the United States to produce documents identifying Plaintiffs' interrogators, if any; a motion to compel the United States to produce unredacted government reports; and motions to compel Plaintiffs to appear for depositions and medical examinations and for sanctions for their failure to appear. CACI PT's motions to compel were mooted by the Court's entry of judgment but will need to be addressed on remand. The Fourth Circuit's remand instructions, which require the Court to determine what actually happened to these Plaintiffs and under whose direction it occurred, will require a fulsome round of discovery that includes the discovery noted above that CACI sought in 2013.

III. THE LAW GOVERNING PLAINTIFFS' REMAINING CLAIMS

A. There Is No Body of Substantive Tort Law Governing Plaintiffs' Remaining Claims Because the Alien Tort Statute Is Preempted

The Court's desire to resolve governing law questions at the threshold – including some governing law questions that the Court already resolved in prior decisions in this case – necessarily requires the Court to address whether bodies of federal or international law ***apply at***

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to this Court. CACI PT opposed the motion on that basis, and judgment was entered before the Court ruled on Plaintiffs' motion. Plaintiffs' motion likely is mooted by the Court's ruling that Plaintiffs could appear for depositions by video.

all, i.e., whether they are preempted. Preemption, by its very nature, affects what bodies of law can apply to a party's claims.

Plaintiffs' claims under ATS are preempted by the combatant activities exception to the Federal Tort Claims Act, 28 U.S.C. § 2680(j), and by Constitutional principles. CACI PT's position that Plaintiffs' ATS claims are preempted is not a novel, untested legal theory. In a putative class action *in which these Plaintiffs were putative class members*, the D.C. Circuit held that the plaintiffs' ATS claims against CACI PT were preempted. *Saleh v. Titan Corp.*, 580 F.3d 1, 14 (D.C. Cir. 2009).

"[T]he policy embodied by the combatant activities exception is simply the elimination of tort from the battlefield." *Saleh*, 580 F.3d at 7.. In enacting the combatant activities exception, Congress "recognize[d] 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." *Koohi v. United States*, 976 F.2d 1328, 1337 (9th Cir.1992). Similarly, the U.S. Constitution's allocation of the responsibility for the prosecution of war exclusively to the political branches of the federal government precludes tort suits against those performing duties during wartime, in a theater of war, under the ultimate control of the U.S. military. *Saleh*, 580 F.3d at 11.[2]

Moreover, Coalition Provisional Order 17 ("CPA Order 17") creates an exclusive claims regime for Iraqis claiming personal injury through the occupation of Iraq, and that exclusive regime is an administrative claim filed under the Foreign Claims Act.

[2] Because this memorandum is for the Court's information and is not seeking specific relief, we have not set out CACI PT's full preemption argument here. CACI PT would welcome the opportunity to present its preemption defense in full, as a dispositive motion, if the Court will permit it.

1. The Combatant Activities Exception to the FTCA and the Constitutional Allocation of War Powers Preempts Plaintiffs' ATS Claims

Plaintiffs' ATS claims arise out of CACI PT's provision of contract interrogation personnel in a war zone, to the federal government, in aid of the federal government's exercise of the most quintessentially federal power imaginable – the prosecution of war against a foreign nation. U.S. Const. art. I, § 8, cls. 1, 11-15; art. II, § 2, cls. 1, 2. In sum, "[m]atters related to war are for the federal government alone to address." *Deutsch v. Turner Corp.*, 324 F.3d 692, 712 (9th Cir. 2003). Moreover, the combatant activities exception to the FTCA clearly evinces an intent by Congress that conduct on the battlefield not be regulated by tort law.

In *Saleh*, the D.C. Circuit considered these principles and their application to tort claims arising out of war zone conduct by service contractors. The Court noted that "uniquely federal interests are implicated" by tort suits brought by Abu Ghraib detainees. *Saleh*, 580 F.3d at 7. In considering whether the application of tort law to war zone conduct conflicts with these uniquely federal interests, the Court held that the principle underlying the combatant activities exception to the FTCA was that combatant activities "by their very nature should be free from the hindrance of a possible damage suit." *Id.* (quoting *Johnson v. United States*, 170 F.2d 767, 769 (9th Cir. 1948)). Accordingly, the D.C. Circuit held that the federal principles underlying the combatant activities exception preempted tort claims in the following circumstances:

> During wartime, where a private service contractor is integrated into combatant activities over which the military retains command authority, a tort claim arising out of the contractor's engagement in such activities shall be preempted.

Id. at 9. Moreover, the court held, military control need not be exclusive for *Saleh* preemption to apply, so long as the military is ultimately in charge. *Id.*

The *Saleh* court further held that, separate and apart from the combatant activities exception, the plaintiffs' common-law claims were preempted by the Constitutional allocation of war powers to the federal government. *Id.* at 11 ("The states (and certainly foreign entities) constitutionally and traditionally have no involvement in federal wartime policy-making. On the other side of the balance, the interests of any U.S. state (including the District of Columbia) are *de minimis* in this dispute – all alleged abuse occurred in Iraq against Iraqi citizens.").

Turning to the plaintiffs' ATS claims, the *Saleh* court acknowledged the Supreme Court's admonition that federal courts exercise great restraint before allowing ATS claims to proceed. *Id.* at 14 (citing *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732-33 (2004)). That principle, combined with the federal interest in preventing the imposition of tort duties on the battlefield, precluded recognition of ATS jurisdiction under the same "ultimate military control" test that barred the plaintiffs' common-law claims: As the Court explained:

> Finally, appellants' ATS claim runs athwart of our preemption analysis which is, after all, drawn from congressional[ly] stated policy, the FTCA. If we are correct in concluding that state tort law is preempted on the battlefield because it runs counter to federal interests, the application of international law to support a tort action on the battlefield must be equally barred. To be sure, ATS would be drawing on federal common law that, in turn, depends on international law, so the normal state preemption terms do not apply. But federal executive action is sometimes treated as "preempted" by legislation. Similarly, an elaboration of international law in a tort suit applied to a battlefield is preempted by the same considerations that led us to reject the D.C. tort suit.

Saleh, 580 F.3d at 16 (citation omitted). Thus, Plaintiffs' ATS claims are subject to the "ultimate military authority" preemption test, a test that is clearly satisfied here.

2. Plaintiffs' ATS Claims Are Barred By the Dictates of CPA Order 17

In addition to combatant activities preemption and Constitutional preemption, Plaintiffs' ATS claims also are precluded by CPA Order 17. CPA Order 17 establishes an exclusive claims

regime by which personal injury claims by non-coalition personnel were to be submitted through an administrative claims process established by the nation from which the claimant seeks recovery.

By the time CACI PT interrogation personnel arrived at Abu Ghraib prison in October 2003, Iraq was under the administration of the Coalition Provisional Authority ("CPA"). On June 26, 2003, the CPA Administrator, Ambassador L. Paul Bremer, issued CPA Order 17, and that order remained in effect throughout the time Plaintiffs allege that they were held at the Abu Ghraib hard site.

Section 3(1) of CPA Order 17 preempts application of Iraqi law. Ex. 1 at § 3(1). The Court agreed with CACI PT's straightforward construction of CPA Order 17 (Dkt. #460 at 24-28), holding that Iraqi law could not be applied in this case. Section 6 is more important to Plaintiffs' ATS claims, as Section 6 creates an exclusive claims regime for Iraqis injured during the occupation:

> Third party claims including those for property loss or damage and for personal injury, illness or death or in respect of any other matter arising from or attributed to Coalition personnel or any persons employed by them, whether normally resident in Iraq or not and that do not arise in connection with military combat operations, shall be submitted and dealt with by the Parent State whose Coalition personnel, property, activities or other assets are alleged to have caused the claimed damage, in a manner consistent with the national laws of the Parent State.

CPA Order 17, § 6. The Parent State at issue here is the United States.

Section 6 of CPA Order 17 provides for the filing of *administrative claims* that would be decided in whatever manner the Parent State has put in place for evaluating such administrative claims under its *national laws*. This provision does not permit claims under *international law*, which is the substantive law for an ATS claim. *Sosa*, 542 U.S. at 732. Moreover, the section permits claims and not suits, requires that they be "dealt with" and not "adjudicated," and uses

the same combat/non-combat dichotomy as the Foreign Claims Act, 10 U.S.C. § 2734(a), the administrative claims process applicable in Iraq.

Thus, CPA Order 17 establishes the following rules for claims arising out of the occupation of Iraq: (1) Coalition personnel are not subject to Iraqi law; (2) if a claimant's injury arises in connection with military combat operations, there is no explicit provision for recovery, though the Executive historically has reserved the power to pay such claims when deemed advisable;[3] and (3) if a claimant's injury arises out of noncombat operations, Section 6 provides that the claimant shall submit a claim to the Parent State (here, the United States) where it will be dealt with under national law (here, the Foreign Claims Act). Exhibit 1 at § 6; *see also Saleh*, 580 F.3d at 2.

B. If Not Preempted, the Law Governing Plaintiffs' ATS Claims

As noted at the December 16, 2016 status conference, the parties agree on the law typically governing ATS claims at the highest level of generality possible – they are governed by "international law." That level of generality is singularly unhelpful to the Court, and the parties likely have significant disagreements when it comes to the specific sources of law applying (or not) to Plaintiffs' ATS claims.

For a cause of action to be recognized under the ATS, it must "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" recognized by the Supreme Court as actionable

[3] As a policy matter, the United States on occasion pays claims under the FCA even when the damages are not, technically speaking, within the FCA's scope. David P. Stephenson, *An Introduction to the Payment of Claims Under the Foreign and the International Agreement Claims Act*, 37 A.F.L. Rev. 191, 197 & n.52 (1994) (noting U.S. payment of combat-related claims in Grenada under FCA as a matter of policy). This is consistent with the Secretary of Defense's direction that the Army identify funds to pay abuse claims even if the claims would not be payable under a strict reading of the FCA. Dkt. #444-1, Ex. 1 at 22.

under ATS. *See Sosa*, 542 U.S. at 725. Indeed, "[a]ctionable violations of international law must be of a norm that is specific, universal, and obligatory." *Id.* at 732 (quoting *In re Estate of Marcos Human Rights Litig.*, 25 F.3d 1467, 1475 (9th Cir. 1994)). The federal courts have "no congressional mandate to seek out and define new and debatable violations of the law of nations." *Sosa*, 542 U.S. at 728. As a result, even if a violation of the law of nations can be defined with specificity, the Court should exercise great restraint in assessing whether other factors caution against allowing a claim to proceed under the ATS. *Id.* at 726.

At least three factors inform the Court's judgment whether to recognize a claim under ATS. *First*, whether a particular international norm is sufficiently "specific, universal, and obligatory"[4] is determined based on international norms existing ***at the time of the conduct at issue***. *Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co.*, 517 F.3d 104, 118 (2d Cir. 2008) (rejecting claims relating to use of Agent Orange because the claims did not involve universally-recognized violations of international law at the time of the conduct alleged); *Hereros v. Deutsche Afrika-Linien Gmblt & Co.*, 232 F. App'x 90, 95 (3d Cir. 2007) (rejecting ATS claims arising between 1890 and 1915 because the conduct alleged did not violate a universally recognized norm of international law at that time). The relevant time frame here is 2003-04.

Second, a determination of international norms, and their applicability in United States courts, must be made with due regard for the laws of the United States. "United States law is not subordinate to customary international law or necessarily subordinate to treaty-based international law and, in fact, may conflict with both." *United States v. Shibin*, 722 F.3d 233, 245 (4th Cir. 2013) (quoting *United States v. Yousef*, 327 F.3d 56, 91 (2d Cir. 2003). Thus,

[4] *Sosa*, 542 U.S. at 732.

United States legislation, and the congressional policies underlying such legislation, inform the Court's analysis of the availability of causes of action under ATS and in fact take precedence over customary international law. *Id.* This federal legislation includes, among other things: (1) Congress's decision not to create a private right of action under the Anti-Torture Act, 18 U.S.C. § 2340, or the War Crimes Act, 18 U.S.C. § 2441, and not creating a private right of action applicable to U.S. military operations under the Torture Victims Protection Act, 28 U.S.C. § 1350 note; (2) Congress's decision to exempt claims arising out of combatant operations from the FTCA's waiver of sovereign immunity, 28 U.S.C. § 2680(j) (combatant activities exception); and (3) Congress's enactment of the Military Commissions Act of 2006, 28 U.S.C. § 2241(e)(2), which stripped federal courts of jurisdiction to address claims relating to the treatment in detention of enemy combatants.

Third, the Court should make its determination not in a vacuum, but in the context of relevant facts. For example, in *Aziz*, the Fourth Circuit affirmed dismissal on the Plaintiffs' aiding and abetting claims not in a vacuum, but by addressing the specific conduct alleged and then determining whether that conduct violated an international norm. *Aziz v. Alcolac, Inc.*, 658 F.3d 388, 401 (4th Cir. 2011); *Estate of Amergi ex rel. Amergi v. Palestinian Auth.*, 611 F.3d 1350, 1358 (11th Cir. 2010) (assessing cognizability of causes of action under ATS based on factual context of claims). *Cf. White v. Pauly*, ___ U.S. ___, 2017 WL 69170, at *4 (Jan. 9, 2017) (holding, in *Bivens* case, that "'clearly established law' should not be defined 'at a high level of generality.' As this Court explained decades ago, the clearly established law must be 'particularized' to the facts of the case. Otherwise, '[p]laintiffs would be able to convert the rule of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights.'" (citations omitted)). The "specific, universal, and obligatory"

standard for ATS claims is analogous to the "clearly established law" standard for *Bivens* actions.

1. If Not Preempted, There is No Body of Law Supplying an Actionable CIDT Claim

At the time of the actions at issue in this case, there was no United States statute recognizing CIDT, providing for a private right of action for CIDT claims, or criminalizing CIDT. At the international level, the only potential source for CIDT as an international norm is the Convention Against Torture, but CIDT provisions in the Convention Against Torture do not support recognition of a CIDT cause of action under the ATS.

Tellingly, while the United States' understanding of the definition of "torture" as described in the Convention Against Torture was codified in conjunction with the ratification of the Convention, *see* 28 U.S.C. § 1350 note (1991); 18 U.S.C. § 2340 (1994), provisions related to CIDT "did not find their way into legislation" prior to 2005, well after the events at issue in this case. *See* Omer Ze'ev Bekerman, *Torture - The Absolute Prohibition of a Relative Term: Does Everyone Know What is in Room 101?*, 53 Am. J. Comp. L. 743, 768 (2005); *see also* Michael John Garcia, Cong. Research Serv., RL32438, U.N. Convention Against Torture (CAT): Overview and Application to Interrogation Techniques, at 14 (2009).

The absence of implementing legislation is particularly relevant as the United States included a declaration in its instruments of ratification that Articles 1 through 16 of the Convention were **not** self-executing. *See* Report of the Committee on Foreign Relations, S. Exec. Rep. No. 30, 101st Cong., 2d Sess. 1, 2 at 12 (1990) ("Senate Report"). As the Fourth Circuit has held:

> "International treaties are not presumed to create rights that are privately enforceable" in the absence of implementing legislation from Congress. *Goldstar (Panama) S.A. v. United States*, 967 F.2d 965, 968 (4th Cir. 1992). A self-executing treaty is one that

> "evidences an intent to provide a private right of action," *id.*, and therefore does not require "domestic legislation . . . to give [it] the force of law in the United States," *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984). Conversely, non-self-executing treaties "do not create judicially-enforceable rights unless they are first given effect by implementing legislation." *Auguste v. Ridge*, 395 F.3d 123, 132 n. 7 (3d Cir. 2005); *see United States v. Thompson*, 928 F.2d 1060, 1066 (11th Cir. 1991) ("[A] treaty must be self-executing in order for an individual citizen to have standing to protest a violation of the treaty.").

Altuar v. United States, 156 F. App'x 555, 565 (4th Cir. 2005) (opinion of Traxler, J., joined by Duncan, J.) (parallel citation omitted).

Thus, without implementing legislation, the prohibition against CIDT had no legal effect and therefore cannot meet the "obligatory" requirement for claims brought under ATS. Restatement (Third) of Foreign Relations Law of the United States § 111 (1987) ("a 'non-self-executing' agreement will not be given effect as law in the absence of necessary implementation").

Even more important, the position of the United States at the time of the conduct involved in this action (2003-04) was that the provision in the Convention Against Torture addressing CIDT "does not apply to alien detainees held abroad."[5] Accordingly, Plaintiffs' claims cannot be based on an international norm that was "specific, universal, and obligatory." *Sosa*, 542 U.S. at 732. Indeed, the United States maintained this position as to the extent of its treaty obligations until November 12, 2014, more than ten years after the Abu Ghraib scandal became public. And even then, the United States' position in November 2014 makes clear that "the law of armed conflict," and not the Convention Against Torture, "is the controlling body of

[5] Letter from William E. Moschella, Assistant Atty. General, to Senator Patrick J. Leahy (Apr. 4, 2005) at 2 (Exhibit 2).

law with respect to the conduct of hostilities and the protection of war victims."[6] Moreover, the United States' current position leaves open the possibility that CIDT prohibitions do not apply to transitory detention facilities overseas, as the United States only acknowledges that its obligations with respect to CIDT extend to "places that the State Party controls as a governmental entity," and that this includes Guantanamo Bay and U.S. registered ships and aircraft.[7] Therefore, the absence of implementing legislation, along with the United States' view that the CIDT portion of the Convention did not apply to aliens held abroad, means that there is no governing law existing at the time of Plaintiffs' detention to support Plaintiffs' claims.

The Eleventh Circuit's decision in *Aldana v. Del Monte Fresh Produce, N.A.*, 416 F.3d 1242 (11th Cir. 2005), appears to be the only court of appeals decision assessing whether claims of CIDT are cognizable under the ATS, and the court categorically held that such claims are unavailable. *Id.* at 1247; *see also In re Chiquita Brands International, Inc.*, 792 F. Supp. 2d 1301, 1323-24 (S.D. Fla. 2011).

2. If Not Preempted, the Law Defining Plaintiffs' Torture Claims Would Be the Convention Against Torture and Domestic Implementing Legislation

"Torture," as a general precept, was unlawful when Plaintiffs were held at the Abu Ghraib hard site in 2003-04. Concomitantly, a critical mass of international law condemned torture at that time. Unsurprisingly, courts have recognized certain claims of torture as actionable under ATS. *See, e.g., Filartiga v. Pena-Irala*, 630 F.2d 876, 878 (2d Cir. 1980); *Kadic v. Karadzic*, 70 F.3d 232, 242 (2d Cir. 1995); *Roe v. Drummond Co., Inc.*, 552 F.3d 1303, 1315 (11th Cir. 2008). This abstract question of lawfulness, devoid of the context out of which

[6] Opening Statement of Mary E. McLeod, Acting Legal Adviser, U.S. Dept. of State, to the United Nations Committee Against Torture (Nov. 12-13, 2014) (Exhibit 3).

[7] *Id.*

the claims arise or the specific actions alleged to constitute torture, is singularly unhelpful to the Court. The context of Plaintiffs' claims, and the details of the acts of which they complain, however, demonstrate that Plaintiffs' claims are not actionable under the auspices of a torture cause of action.

As noted in Section III.B.1, *supra*, the Convention Against Torture was not self-executing, and thus was not obligatory in the absence of implementing legislation. Unlike CIDT, however, the United States *had* enacted implementing legislation regarding torture at the time of the events at issue in this case. That implementing legislation, however, undermines, rather than supports, recognition of a torture claim under ATS *in this case*. In particular, Congress enacted the Torture Victims Protection Act, 28 U.S.C. § 1350 note, in recognition of the Convention Against Torture, but that statute provides a private right of action only for torture committed *under color of foreign law* and, as the Fourth Circuit has held, applies only to individuals and not to corporations. *Aziz*, 658 F.3d at 394. Moreover, Congress has enacted the Anti-Torture Act, 18 U.S.C. § 2340 *et seq.*, but that statute does not create a private right of action. The Supreme Court has cautioned federal courts against supplementing a federal criminal statute by creating a concomitant private damages claims that Congress did not see fit to create. *See, e.g.*, *Janus Capital Grp., Inc. v. First Derivative Traders*, 564 U.S. 135, 141 (2011). This admonition is particularly apt where, as here, Congress *did* create a private right of action under the TVPA but did not extend it to the claims Plaintiffs assert.

Moreover, Plaintiffs have not alleged facts sufficient to state a plausible right of recovery from CACI PT. Equally significant, after full and unfettered merits discovery, Plaintiffs still have not developed evidence connecting CACI PT to the mistreatment they allege. This absence

of any facts tying Plaintiffs' claims to CACI PT also precludes recognition of a torture cause of action.

Finally, claims brought under the ATS must allege conduct that violated international norms that were specific, universal, obligatory *at the time of the conduct in question*. Many of Plaintiffs' allegations involve the alleged imposition of interrogation techniques on them that were adopted by the U.S. military and approved at the highest levels of the United States government. Thus, while there is no question on an abstract level that torture, as a federal criminal law matter, is unlawful, there was great uncertainty at the time of Plaintiffs' imprisonment whether certain approved interrogation techniques and conditions of confinement constituted torture. Indeed, the Ninth Circuit made this precise point in affirming dismissal of *Bivens* claims asserted against John Yoo that were based on his role in sanctioning enhanced interrogation techniques used in the War on Terror. *See Padilla v. Yoo*, 678 F.3d 748, 752 (9th Cir. 2012) (holding that while "torture," as an abstract concept, was unlawful in 2001-03, there was widespread disagreement during that time about if and how the term "torture" applied to particular interrogation practices, such as "extreme isolation; interrogation under threat of torture, deportation and even death; prolonged sleep adjustment and sensory deprivation; exposure to extreme temperatures and noxious odors; denial of access to necessary medical and psychiatric care; substantial interference with [Padilla's] ability to practice his religion; and incommunicado detention for almost two years").

Indisputably, federal statutes criminalizing torture and the Convention Against Torture attempt to define torture. That said, even though the prohibition against torture is universally recognized, and that claims of torture can be actionable under the ATS in some contexts,

Plaintiffs' torture claims *against CACI PT* are not actionable as a matter of law and also based on the lack of connection between Plaintiffs' treatment and CACI PT.

3. If Not Preempted, Common Article III of the Fourth Geneva Convention Provides a Definition of War Crimes, Though There Is No Basis for Allowing a War Crimes Claim Under ATS

As with torture, a general proscription on war crimes existed in 2003-04. The sources of law for a prohibition against war crimes are the Fourth Geneva Convention and U.S. legislation criminalizing war crimes. Some courts have recognized war crimes as an actionable ATS claim under circumstances dissimilar to those here. *See, e.g.*, *Kadic*, 70 F.3d at 245; *Mastafa v. Chevron Corp.*, 770 F.3d 170, 180 (2d Cir. 2014). The existence of these sources of law does not, however, support recognition of a war crimes claim under ATS where, as here, the claim involves U.S. military operations and conditions of detention approved by the military chain of command.

Common Article III of the Fourth Geneva Convention provides the following definition of war crimes:

> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
>
> (1) Persons taking no active part in the hostilities . . . shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour . . . .
>
> To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
>
> (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture . . . .

Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 3, Aug. 12, 1949, 75 U.N.T.S. 287.

The United States has embraced the definition of "war crimes" found in Common Article III of the Fourth Geneva Convention. Indeed, as noted above, Congress enacted a *criminal* prohibition on the commission of war crimes. 18 U.S.C. § 2441. When Congress passed that statute, however, it did not create a private right of action, and the law of this Circuit is that there is no private right of action for violation of the Geneva Conventions. *Goldstar (Panama) S.A.*, 967 F.2d at 968. Indeed, in *Goldstar*, the Fourth Circuit rejected an ATS claim brought for an alleged violation of the Hague Convention. *Id.* The court observed that the Hague Convention, like the Geneva Conventions, was not self-executing, and therefore could not support a claim brought directly under the Convention or a private right of action brought derivatively under ATS. *Id.* The same result is required here, as the absence of the creation of a private right of action in implementation of the Geneva Conventions domestically precludes judicial recognition of a cause of action Congress declined to permit.

4. Plaintiffs' Conspiracy Claims Are Not Recognized as Separate Causes Under ATS, and There Is No Universally Accepted Norm of International Law That Recognizes Co-Conspirator Liability

The Supreme Court has held that the only conspiracies recognized as stand-alone violations of international law are conspiracies to commit genocide or to wage aggressive war, neither of which is 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 . . . 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 separate conspiracy claims brought under ATS pursuant to *Hamdan*); *Liu Bo Shan v. China Constr. Bank Corp.*, 421 F. App'x 89, 94 n.6 (2d Cir. 2011) (same). When codifying war

crimes prior to 2006, Congress consistently excluded conspiracy—for example, the War Crimes Act, 18 U.S.C. § 2441, contained no crime of conspiracy. Only in 2006, years after the conduct at issue in this case, did conspiracy become cognizable under the War Crimes Act.

The United States has conceded on multiple occasions that conspiracy is not recognized as an offense under customary international law. *See Bahlul v. United States*, No. 11-1324, *En Banc* Br. for Pet'r (Corrected), at 41 (D.C. Cir. May 28, 2013) (summarizing government's admissions that no consensus exists for treating the stand-alone offense of conspiracy as a violation of international law); *Bahlul v. United States*, No. 11-1324, Pet. of United States for Reh'g *En Banc*, at 4 ("In this case, the government acknowledged that the offenses for which Bahlul was convicted have not attained recognition as offenses under customary international law . . . .").

5. The Fourth Circuit Has Recognized Aiding and Abetting Liability, But Has Adopted the Stringent "Purposefulness" Standard

The Fourth Circuit's decision in *Aziz*, 658 F.3d at 398, adopted the stringent "purposefulness" standard for aiding and abetting liability under ATS. That said, however, the Fourth Circuit rejected the aiding and abetting claim asserted in *Aziz* because the plaintiffs did not allege facts, as opposed to conclusory statements, that would support a plausible claim of aiding and abetting liability. As the Court explained:

> Applying [the *Twombly/Iqbal*] standard here, the Appellants' sole reference to Alcolac's intentional conduct in the Amended Complaint is an allegation that Alcolac placed Kromfax "into the stream of international commerce with the purpose of facilitating the use of said chemicals in the manufacture of chemical weapons to be used, among other things, against the Kurdish population in northern Iraq." Such a cursory allegation, however, untethered to any supporting facts, constitutes a legal conclusion that neither binds us nor is "entitled to the assumption of truth."

Id. at 401 (citation omitted). Plaintiffs' claims here would meet the same fate, either on a motion to dismiss for lack of supporting allegations or on summary judgment for lack of facts.

IV. THE COURT SHOULD REASSESS ITS DECISION TO DECIDE LAWFULNESS AT THE THRESHOLD

The Court declined to accept the parties' joint recommendation to address threshold dispositive motions before tackling the "lawfulness" aspect of the political question doctrine. Accordingly, this memorandum has addressed the governing law issues as directed by the Court. With the Court's indulgence, we will also address, at least briefly, the problematic issues created by first determining the applicable law.

The Fourth Circuit has handed this Court a proverbial Rubik's Cube with its remand instructions, as every apparent path forward creates new obstacles and challenges. We submit that the governing law analysis only highlights the pitfalls inherent in assessing lawfulness in the abstract. The Court's approach will decide questions of lawfulness without even assessing whether Plaintiffs can state cognizable claims. Moreover, the Court's contemplated process addresses lawfulness without considering whether Plaintiffs have evidence to support their theories for imposing liability on CACI PT. Plaintiffs have had full merits discovery, and have not adduced evidence tying CACI PT personnel to the mistreatment that allegedly occurred to them while held by the U.S. military. The absence of legally-cognizable claims or evidence supporting liability render questions of governing law and lawfulness an academic exercise in the context of this case.

When the Fourth Circuit remanded this case in 2014, its remand instructions were clear that the Court should address the political question issue "before proceeding further with the case." *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516, 537 (4th Cir. 2014) ("*Al Shimari III*"). There was no such instruction accompanying the Fourth Circuit's most recent remand. To

the contrary, the Fourth Circuit directed the Court to consider merits issues alongside the jurisdictional issues if "disputed [jurisdictional] facts are 'inextricably intertwined' with the facts underlying the merits of the plaintiffs' claims." *Al Shimari v. CACI Premier Tech., Inc.*, 840 F.3d 147, 160-61 (4th Cir. 2016) ("*Al Shimari IV*"). Given that *Al Shimari IV* changed the court's political question test, adding a "lawfulness" inquiry that "will require the district court to examine the evidence regarding the specific conduct to which the plaintiffs were subjected and the source of any direction under which the acts took place," there is little question that the jurisdictional inquiry is now intertwined with the merits. *Id.*

The Fourth Circuit's remand instructions in *Al Shimari IV* relied on *Kerns v. United States*, 585 F.3d 187, 193 (4th Cir. 2009), where the court explained the virtues of not delaying resolution of merits issues when the jurisdictional inquiry implicates merits questions:

> [N]o purpose is served by indirectly arguing the merits in the context of federal jurisdiction. ***Judicial economy is best promoted when the existence of a federal right is directly reached and, where no claim is found to exist, the case is dismissed on the merits***. Thus, when the jurisdictional facts and the facts central to a tort claim are inextricably intertwined, the trial court should ordinarily assume jurisdiction and proceed to the intertwined merits issues.

Kerns, 585 F.3d at 193 (emphasis added) (citation omitted) (alteration in original).

Here, resolution of threshold dispositive motions is not only appropriate under *Al Shimari IV* and *Kerns*, but also necessary to avoid another jurisprudential taboo – the issuance of advisory opinions.[8] Deciding abstract lawfulness questions before resolving whether Plaintiffs can even

[8] The prohibition on advisory opinions is not the only additional subject matter jurisdiction issue lurking in this case. The Fifth Circuit recently rejected the Fourth Circuit's extraterritoriality analysis in *Al Shimari III*, setting up a clear circuit split on extraterritoriality analysis under the ATS. *See Adhikari v. Kellogg Brown & Root, Inc.*, ___ F.3d ___, 2017 WL 33556, at *9 (5th Cir. 2017) ("Plaintiffs argue they would be able to allege facts that satisfy *Al Shimari*, but *Al Shimari* is not the test."). In addition, Plaintiffs' claims are barred by the

state cognizable claims or sufficiently connect their treatment to CACI PT puts the Court in the position of issuing proclamations on lawfulness issues that, because of threshold flaws in Plaintiffs' allegations, or because of an absence of evidence connecting CACI PT to Plaintiffs' treatment, will have no meaningful effect on the case. *United States v. McClure*, 241 F. App'x 105, 108 (4th Cir. 2007) (judicial rulings "must be likely to have some effect on the dispute" or they are advisory opinions) (citing *Chi. & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948)).

In addition, the Court's contemplated approach will have it rendering a decision regarding "lawfulness" without regard to what actually happened to Plaintiffs and whether CACI PT has any responsibility for whatever might have happened to Plaintiffs. Plaintiffs have had **full merits discovery** in this case, and if they cannot connect their treatment to CACI PT now, they are not going to be able to do so. Conducting an abstract lawfulness inquiry, without regard to whether the alleged conduct can be tied to CACI PT will result in the Court offering opinions on the lawfulness of conduct by a coordinate branch of government (the Executive branch) when no government entity is a party in this case.

Indeed, once the Court has determined the specific conduct to which the Plaintiffs were subjected – a fact-intensive inquiry – the Court will need to adjudicate the legality of that conduct. This will require passing judgment on the decisions of the Executive Branch and the military regarding treatment of detainees. The strategies and tactics employed with respect to detainees at Abu Ghraib were developed and determined by the United States, not CACI PT. It is well established that the Interrogation Rules of Engagement ("IROEs") at Abu Ghraib prison were developed and approved by high-level Executive Branch officials for use at Guantanamo

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jurisdiction-stripping provision of the Military Commissions Act of 2006. *See* 28 U.S.C. § 2241(e)(2).

Bay and that those IROEs migrated through military channels to Afghanistan and Iraq.[9] As the Executive Summary of the Senate Armed Services Committee's Report, *Inquiry Into the Treatment of Detainees in U.S. Custody*, explained, in Spring 2002 the CIA proposed a program of enhanced interrogation techniques for suspected al-Qaeda terrorists that received personal attention from the National Security Advisor, the CIA Director, principals of the National Security Council, the Attorney General, and the Secretary of Defense. *Id.* As Vice President Cheney said of the CIA's 2002 program, the techniques from which later migrated to Afghanistan and Iraq: "We all approved it."[10]

These IROEs permitted, among other things, "stress positions, environmental manipulation, sleep management, and military working dogs in interrogations."[11] The contents of the IROEs, as well as government analyses of their legality, are necessary to inform the Court's judgment as to whether whatever conduct, if any, that actually occurred and was attributable to CACI PT personnel was lawful, unlawful, or fell into a "grey area," as well as the Court's judgment about the extent of actual military control or sensitive military judgments. In other words, the remand instructions of *Al Shimari IV* require the Court to pass judgment on discretionary decisions and legal analyses made by the Executive Branch regarding the prosecution of the war in Iraq. That alone is an unprecedented task. For self-evident reasons, the Court should not undertake that task without the participation of the United States.

Moreover, Plaintiffs do not contend, and never have contended, that CACI PT personnel did anything to them directly. Rather, they argue that CACI PT should be held liable for

[9] *See* Executive Summary, Senate Armed Services Committee, *Inquiry into the Treatment of Detainees in U.S. Custody* at xxii-xxiii (Nov. 20, 2008) ("Senate Report").

[10] Paul Kane & Joby Warrick, "Cheney Led Briefings of Lawmakers To Defend Interrogation Techniques," *The Washington Post*, A1, A4 (June 3, 2009).

[11] Senate Report, *supra*, at xxiv.

mistreatment committed on them *by soldiers*. Thus, the Court will have to judge not only the lawfulness of the decisions made by Executive branch officials establishing interrogation and detention policy, but also the lawfulness of actions by soldiers interacting with detainees at Abu Ghraib prison. The Court's contemplated approach has this analysis occurring before any determination is made whether CACI PT is connected to Plaintiffs' treatment. Thus, the *only* entity surely to have the lawfulness of its actions adjudged by this Court is the United States government, without the U.S. government being asked to participate in this inquest. This, again, shows the wisdom of involving the United States in judging the lawfulness of its actions.

Moreover, the Court urged Plaintiffs to "simplify" the case (12/16/16 Tr. at 17), and Plaintiffs have purported to do so by dismissing their common-law claims. But the dismissal of the common-law claims does not simplify the case *at all* under the Court's contemplated approach. The Court's disinclination to allow CACI PT to assert defenses other than political question at this time means that CACI PT cannot prune from the case alleged acts of mistreatment that plainly do not qualify as actionable under the ATS. Accordingly, unless the Court allows CACI PT to litigate which acts of misconduct are actionable under ATS and which are not (or Plaintiffs voluntarily drop acts of misconduct not actionable under ATS), the dismissal of the common-law claims does not narrow one iota the scope of the lawfulness inquiry because the Court *still* will have to decide the lawfulness of every act of mistreatment of which Plaintiffs complain. While CACI PT understands and appreciates the Court's desire to decide subject matter jurisdiction issues before everything else, the Fourth Circuit's remand instructions make that problematic and not possible in the way the Court likely intends.

Finally, the "lawfulness" inquiry now made a part of the Fourth Circuit's political question jurisprudence is an inquiry that is distinct from an examination of the law governing

Plaintiffs' ATS claims. The lawfulness inquiry considers whether conduct to which Plaintiffs were subjected was unlawful under criminal laws then applicable to CACI PT employees. *Al Shimari IV*, 840 F.3d at 158. That source of criminal law presumably must be federal criminal law, to the extent it applies extraterritorially. The question of criminality simply has no relationship at all to the choice of law concepts applicable to Plaintiffs' ATS claims.

Respectfully submitted,

/s/ Conor P. Brady

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CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of January, 2017, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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