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-GBL-JFA
v.	
CACI PREMIER TECHNOLOGY, INC.,	
Defendant.	

DEFENDANT CACI PREMIER TECHNOLOGY, INC.'S MEMORANDUM ON THE ELEMENTS OF PLAINTIFFS' ALIEN TORT STATUTE CLAIMS

Savannah E. Marion (Virginia Bar No. 80648)
John F. O'Connor (Admitted *pro hac vice*)
Linda C. Bailey (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 Defendant CACI Premier Technology, Inc.

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. ANALYSIS 2

A. Plaintiffs Must Prove the Existence of International Norms, and the Elements of Purported ATS Claims, at the Time of the Conduct Alleged 4

B. Required Elements for Plaintiffs' Torture Claim 6

C. Required Elements for Plaintiffs' Cruel, Inhuman or Degrading Treatment Claim 11

D. Required Elements for Plaintiffs' War Crimes Claim 15

E. Required Elements of Plaintiffs' Conspiracy Claims 16

F. Required Elements for Plaintiffs' Aiding and Abetting Claims 20

TABLE OF AUTHORITIES

Page(s)

CASES

Aldana v. Del Monte Fresh Produce, N.A.,
416 F.3d 1242 (11th Cir. 2005) 12

Ali Shafi v. Palestinian Auth.,
642 F.3d 1088 (D.C. Cir. 2011).....10

Ashcroft v. Iqbal,
556 U.S. 662 (2009).....19

Aziz v. Alcolac, Inc.,
658 F.3d 388 (4th Cir. 2011) 20-21

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007)..... 18-19

Bowoto v. Chevron Corp.,
557 F. Supp. 2d 1080 (N.D. Cal. 2008).....13

Cabello v. Fernandez-Larios,
402 F.3d 1148 (11th Cir. 2005) 18

Cohn v. Bond,
953 F.2d 154 (4th Cir. 1991) 19

Doe I v. Liu Qi,
349 F. Supp. 2d 1258 (N.D. Cal. 2004).....9, 14

Du Daobin v. Cisco Sys., Inc.,
2 F. Supp. 3d 717, 728-29 (D. Md. 2014).....20

ePlus Tech Inc. v. Aboud,
313 F.3d 166 (4th Cir. 2002) 19

Hamdan v. Rumsfeld,
548 U.S. 557 (2006).....17

Hereros v. Deutsche Afrika-Linien Gmblt & Co.,
232 F. App'x 90 (3d Cir. 2007) 4

Hill v. Lockheed Martin Logistics Mgmt., Inc.,
354 F.3d 277 (4th Cir. 2004) 19

In re Chiquita Brands International, Inc.,
792 F. Supp. 2d 1301 (S.D. Fla. 2011) 12-13

In re Estate of Marcos Human Rights Litig.,
25 F.3d 1467 (9th Cir. 1994) 3

In re Xe Servs. Alien Tort Litig.,
665 F. Supp. 2d 569 (E.D. Va. 2009) 12, 15

Ireland v. the United Kingdom,
25 Eur. Ct. H.R. (1978) 9, 13

Kadic v. Karadzic,
70 F.3d 232 (2d Cir. 1995) 10

Liu Bo Shan v. China Constr. Bank Corp.,
421 F. App'x 89 (2d Cir. 2011) 17

Loren Data Corp. v. GXS, Inc.,
501 Fed. App'x 275 (4th Cir. 2012) 18

Marmott v. Maryland Lumber Co.,
807 F.2d 1180 (4th Cir. 1986) 19

Mohamed v. Jeppesen Dataplan, Inc.,
614 F.3d 1070 (9th Cir. 2010) 18

Orkin v. Swiss Confederation,
444 F. App'x 469 (2d Cir. 2011) 10

Padilla v. Yoo,
678 F.3d 748 (9th Cir. 2012) 4-5

Presbyterian Church of Sudan v. Talisman Energy, Inc.
582 F.3d 244 (2d Cir. 2009) 17-18, 20-21

Price v. Socialist People's Libyan Arab Jamahiriya,
294 F.3d 82 (D.C. Cir. 2002) 9

Roe v. Bridgestone Corp.,
492 F. Supp. 2d 988 (S.D. Ind. 2007) 14

Sanchez-Espinosa v. Reagan,
770 F.2d 202 (D.C. Cir. 1985) 10

Sarei v. Rio Tinto PLC,
650 F. Supp. 2d 1004 (C.D. Cal. 2009) 14

Sosa v. Alvarez-Machain,
542 U.S. 692 (2004) 3-5

Tel-Oren v. Libyan Arab Republic,
726 F.2d 774 (D.C. Cir. 1984) 10

Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co.,
517 F.3d 104 (2d Cir. 2008) 4

Walters v. McMahen,
795 F. Supp. 2d 350 (D. Md. 2011) 19

AGENCY PROCEEDINGS

Prosecutor v. Tadic,
Case No. IT-94-1-A, Appeal Judgment, ¶ 206 (July 15, 1999) 18

STATUTES

Anti-Torture Act, 18 U.S.C. § 2340 (2006) 7, 11

Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 note (1991) 7, 12

War Crimes Act, 18 U.S.C. § 2441 (2014) 13, 17

CODE OF FEDERAL REGULATIONS

8 C.F.R. § 208.18 (2014) 8, 10

BOOKS AND ARTICLES

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) 12

Restatement (Third) of Agency § 2.01 cmt. 19

Restatement (Third) of Foreign Relations Law of the U.S. (1987) 12-13

INTERNET

Letter from William E. Moschella, Assistant Atty. General, to Patrick J. Leahy, U.S. Sen. (Apr. 4, 2005), at 2, *available at* http://www.scotusblog.com/movabletype/archives/CAT%20Article%2016.Leahy-Feinstein-Feingold%20Letters.pdf 5

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), *available at* https://geneva.usmission.gov/2014/11/12/acting-legal-adviser-mcleod-u-s-affirms-torture-is-prohibited-at-all-times-in-all-places/ 6

OTHER AUTHORITIES

Report of the Committee on Foreign Relations, S. Exec. Rep. No. 30, 101st Cong., 2d Sess. 1, 2 (1990)..... 8-10, 12, 14

I. INTRODUCTION

This case is following the same arc as *Saleh v. Titan Corp.*, 580 F.3d 1 (D.C. Cir. 2009), where the plaintiffs kept their claims afloat by making bare *allegations* that CACI PT[1] had controlled operations at Abu Ghraib prison. Then the case proceeded to discovery, and the plaintiffs not only had no evidence of any contact between themselves and CACI PT personnel, but "there [was] no dispute that [the CACI PT employees] were in fact integrated and performing a common mission with the military under ultimate military command." *Saleh*, 580 F.3d at 6-7.

The same process is unfolding here. This case now has proceeded through full discovery, as well as an additional discovery period for Plaintiffs to take any jurisdictional discovery they neglected to complete the first time around. Nevertheless, Plaintiffs have no evidence of any meaningful contact between themselves and CACI PT personnel. Thus, even if all of the Alien Tort Statute ("ATS") claims asserted by Plaintiffs rested on well-established international norms—which they do not—Plaintiffs have developed no evidence that CACI PT personnel violated any of those norms in connection with Plaintiffs' detention. Accordingly, Plaintiffs necessarily will have to proceed on theories of secondary liability such as conspiracy and aiding and abetting in an effort to hold CACI PT liable for the conduct of military personnel, but they fare no better in that arena.

This Court dismissed the conspiracy claims in Plaintiffs' Second Amended Complaint because Plaintiffs could not even *allege* facts supporting an inference of co-conspirator liability. Dkt. #215. Plaintiffs reasserted conspiracy allegations in a Third Amended Complaint, but the revised allegations are similarly flawed.[2] Plaintiffs' aiding and abetting theories suffer from the

[1] "CACI PT" refers to Defendant CACI Premier Technology, Inc.

[2] CACI PT will renew its previously-mooted motion to dismiss the Third Amended Complaint (Dkt. #312) in the event the Court declines to dismiss on political question grounds.

same defects—a lack of adequate allegations but, more importantly, a lack of facts showing that anyone who mistreated these Plaintiffs was purposefully aided by CACI PT.

Therefore, in CACI PT's view, defining the elements of Plaintiffs' ATS claims is an academic exercise, as the lack of connection between these Plaintiffs and CACI PT personnel, after full discovery, is case dispositive. That said, the elements of Plaintiffs' ATS claims can inform the Court's political question analysis because the elements show the extent to which Plaintiffs will have to show a connection between CACI PT's conduct and military decision-making and conduct in order to prove their claims. *See Al Shimari v. CACI Premier Technology, Inc.*, 758 F.3d 516, 536 (4th Cir. 2014); *id.* at 533 (court conducting political question inquiry must "carefully assess the relationship between the military and the contractor" (internal quotations omitted)). Indeed, as Judge Robertson presciently observed nearly a decade ago in *Saleh*, "the more plaintiffs assert official complicity in the acts of which they complain, the closer they sail to the jurisdictional limitation of the political question doctrine." *Saleh v. Titan Corp.*, 436 F. Supp. 2d 55, 58 (D.D.C. 2006).

As CACI PT explains below, the elements of Plaintiffs' ATS claims, to the extent they are recognized as viable ATS claims, require Plaintiffs to show substantial connection between CACI PT's conduct and military decision-making. Thus, as CACI PT will show when it files its political question memorandum on November 21, 2014, the required connection between CACI PT's conduct and military operations, as reflected in the elements of Plaintiffs' ATS claims, is one of <u>many</u> reasons why the political question doctrine requires dismissal of Plaintiffs' claims.

II. ANALYSIS

There are many hurdles Plaintiffs must overcome in order to prevail on their ATS claims. At the threshold, Plaintiffs must establish that their claims would not implicate nonjusticiable political questions. *See Al Shimari*, 758 F.3d at 536-37. Even if Plaintiffs can establish

justiciability, they would have to show that their 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" recognized by the Supreme Court as actionable under ATS. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004). 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)). As the Supreme Court explained in *Sosa*, 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 caution in assessing whether other factors caution against allowing a claim to proceed under the ATS. *Id.* at 726. And then, of course, the plaintiff must support his or her claims with actual proof.

The present submission has a narrow purpose—to identify, for purposes of the political question inquiry mandated by the Fourth Circuit—the elements of the various ATS claims asserted by Plaintiffs. To the extent elements for a particular ATS claim can be discerned, this does not mean that Plaintiffs' claim is viable, or can be proven. Those are issues that would be addressed if the Court does not dismiss this action on political question grounds. For purposes of the political question analysis, the key takeaway with regard to the elements of Plaintiffs' ATS claims is that all of them require, in some form or fashion, a clear connection between the conduct of CACI PT and military decision-making and conduct at Abu Ghraib prison.

A. Plaintiffs Must Prove the Existence of International Norms, and the Elements of Purported ATS Claims, at the Time of the Conduct Alleged

A determination whether a particular international norm is sufficiently "specific, universal, and obligatory"[3] as to be cognizable under ATS is determined based on international norms existing at the time of the conduct at issue in the case. *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); *cf. Padilla v. Yoo*, 678 F.3d 748, 768 (9th Cir. 2012) (rejecting torture-related *Bivens* claim by U.S. citizen because, while torture was a recognized violation of an international norm in 2001-03, it was not universally established that the enhanced interrogation techniques used against Padilla constituted torture).

While not an ATS case, *Padilla* is particularly instructive with respect to the definition of torture as it existed at the time of these Plaintiffs' detention. While Plaintiffs urge that torture has been an established cause of action under the ATS since 1980 (Pl. Mem. at 2), Plaintiffs ignore that in 2003—the time period of their allegations—it remained unclear whether various interrogation techniques necessarily amounted to torture. In *Padilla*, the Ninth Circuit directed the dismissal of *Bivens* claims asserted against John Yoo based on advice he provided from 2001 to 2003 concerning permissible standards for detainee treatment. 678 F.3d at 761. The Court based its decision on the fact that at the time of Padilla's detainment, there was widespread disagreement about if and how the term "torture" applied to particular interrogation practices,

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

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." *Id.* at 752. As a result, the Ninth Circuit found itself unable to "say that any reasonable official in 2001-03 would have known that the specific interrogation techniques allegedly employed against Padilla, however appalling, necessarily amounted to torture." *Id.* at 768. Thus, the Court held that, while "the unconstitutionality of torturing an American citizen was beyond debate in 2001-03, it was not clearly established at that time that the treatment Padilla allege[d] he was subjected to amounted to torture. *Id.* This would seem to be precisely the absence of "specific, universal, and obligatory" international norms that are necessary for an ATS claim. *Sosa*, 542 U.S. at 732.

With respect to Plaintiffs' claims of Cruel, Inhuman, and Degrading Treatment ("CIDT"), the position of the United States at the time of the conduct involved in this action was that the provision in the Convention Against Torture addressing CIDT "does not apply to alien detainees held abroad."[4] Given that, at the time of Plaintiffs' detention, the United States unequivocally viewed the prohibition against CIDT as not applying to aliens detained by the United States overseas, 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

[4] Letter from William E. Moschella, Assistant Atty. General, to Senator Patrick J. Leahy (Apr. 4, 2005) at 2, *available at* http://www.scotusblog.com/movabletype/archives/CAT%20Article%2016.Leahy-Feinstein-Feingold%20Letters.pdf.

November 2014 makes clear that "the law of armed conflict," and not the Convention Against Torture, "is the controlling body of law with respect to the conduct of hostilities and the protection of war victims."[5] 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.[6]

B. Required Elements for Plaintiffs' Torture Claim

A claim of torture under the ATS has five elements: (1) that the defendant used extreme, deliberate and unusually cruel practices to inflict severe pain and suffering on the plaintiff; (2) that the acts were specifically intended to inflict severe pain and suffering on the plaintiff; (3) that the acts had an illicit purpose such as to obtain information from the plaintiff or a third person; (4) that a public official, prior to the activity constituting torture, had knowledge of such activity and thereafter breached his legal responsibility to intervene to prevent such activity; and (5) that the acts were not incidental to lawful sanctions. As explained below, these elements derive from international treaties of which the United States is a party, United States statutes and regulations implementing the United States' treaty obligations, and case law addressing the elements of torture under international law.

"Torture" is defined under Article 1 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Convention Against Torture") as:

---

[5] 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), *available at* https://geneva.usmission.gov/2014/11/12/acting-legal-adviser-mcleod-u-s-affirms-torture-is-prohibited-at-all-times-in-all-places/.

[6] *Id.*

> [A]ny act by which severe pain or suffering . . . is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession . . . when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

See Convention Against Torture, Dec. 10, 1984, 1465 U.N.T.S. 85, art. 1, ¶ 1 (emphasis added); *see also* Pl. Mem. at 3.[7] United States regulations implementing the Convention Against Torture provide greater detail:

> (1) Torture is defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.
>
> (2) Torture is an extreme form of cruel and inhuman treatment and does not include lesser forms of cruel, inhuman or degrading treatment or punishment that do not amount to torture.
>
> (3) Torture does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions. Lawful sanctions include judicially imposed sanctions and other enforcement actions authorized by law, including the death penalty, but do not include sanctions that defeat the object and purpose of the Convention Against Torture to prohibit torture.

[7] The Torture Victim Protection Act of 1991 and the Anti-Torture Act define torture similarly. *See* The Torture Victim Protection Act of 1991, 106 Stat. 73, § 3, note following 28 U.S.C. §1350, at §3 ("[A]ny act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions) . . . ."); Anti-Torture Act, 18 U.S.C. § 2340 (2006) ("[A]n act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control.").

> (4) In order to constitute torture, mental pain or suffering must be prolonged mental harm caused by or resulting from:
>
> (i) The intentional infliction or threatened infliction of severe physical pain or suffering;
>
> (ii) The administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
>
> (iii) The threat of imminent death; or
>
> (iv) The threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the sense or personality.
>
> (5) In order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering. An act that results in unanticipated or unintended severity of pain and suffering is not torture.
>
> (6) In order to constitute torture an act must be directed against a person in the offender's custody or physical control.
>
> (7) Acquiescence of a public official requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity.

8 C.F.R. § 208.18 (2014) (emphasis added).

These sources, as well as the case law applying these sources in the context of ATS claims, establish at least five requirements for a viable torture claim under the ATS.

First, "[t]he term 'torture,' . . . is usually reserved for extreme, deliberate and unusually cruel practices, for example, sustained systematic beating, application of electric currents to sensitive parts of the body, and tying up or hanging in positions that cause extreme pain." *See* Report of the Committee on Foreign Relations, S. Exec. Rep. No. 30, 101st Cong., 2d Sess. 1, 2 at 14 (1990) ("Senate Report"). "The critical issue is the degree of pain and suffering that the

alleged torturer intended to, and actually did, inflict upon the [alleged] victim." *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 93 (D.C. Cir. 2002) (citing Senate Report at 15 ("The United States understands that, in order to constitute torture, an act must be a deliberate and calculated act of an extremely cruel and inhuman nature, specifically intended to inflict excruciating and agonizing physical or mental pain or suffering.") (internal quotation marks omitted)). "[T]orture does not automatically result whenever individuals in official custody are subjected even to direct physical assault." *Id.*

Because torture applies only in cases of "severe pain or suffering," to establish torture, Plaintiffs must first "establish facts and details specific enough to permit the court to assess the severity of the mistreatment." *Doe I v. Liu Qi*, 349 F. Supp. 2d 1258, 1312 (N.D. Cal. 2004). Thus, Plaintiffs' first hurdle is to produce evidence of CACI PT involvement in any mistreatment they suffered that would fall within the restrictive definition of torture, a burden Plaintiffs cannot meet. In *Price v. Socialist People's Libyan Arab Jamahiriya*, allegations of "kicking, clubbing, and beatings" were insufficient to permit the court to assess the severity of the plaintiffs' pain and suffering. 294 F.3d at 93. To satisfy the "rigorous" torture definition, the court required additional information regarding the beatings' "frequency, duration, the parts of the body at which they were aimed, and the weapons used to carry them out." *Id.*

Similarly, in *Ireland v. the United Kingdom*, 25 Eur. Ct. H.R. (1978), the European Court struggled to determine whether the acts complained of constituted torture. It observed that torture is an aggravated and deliberate form of cruel, inhuman, or degrading treatment resulting in intense suffering. The court held that suspected terrorists who were detained and subjected to wall standing, hooding, and constant loud, hissing noise, and who were deprived of sleep, food, and drink by the British Army had not been subjected to torture. *Id.*

Second, the alleged acts must have been *specifically intended* to inflict severe physical or mental pain or suffering. *See* 8 C.F.R. § 208.18(a)(5) (2014); Senate Report at 6 ("For an act to be 'torture,' it must be an extreme form of cruel and inhuman treatment, cause severe pain and suffering, *and be intended to cause severe pain and suffering*.") (emphasis added); *id.* at 13. An act that results in unanticipated or unintended severity of pain or suffering does not constitute torture. *Id.* at 14. In view of the specific intent requirement, the Senate Foreign Relations Committee noted that rough and deplorable treatment, such as police brutality, does not amount to torture. *See id.* at 13-14.

Third, the alleged acts must have an illicit purpose. The Senate Foreign Relations Committee noted the type of motivation that typically underlies torture, such as obtaining information, and it recognized that the illicit purpose requirement emphasizes the specific intent requirement. Senate Report at 14; *see also* 8 C.F.R. § 208.18(a)(1) (2014).

Fourth, torture covers intentional governmental acts, not negligent acts or acts by private individuals. *See* Senate Report at 14 ("[T]he Convention applies only to torture that occurs in the context of governmental authority, excluding torture that occurs as a wholly private act . . . ."). Indeed, courts have repeatedly held that a claim of torture under ATS requires official government action. *See Ali Shafi v. Palestinian Auth.*, 642 F.3d 1088, 1095-96 (D.C. Cir. 2011); *Kadic v. Karadzic*, 70 F.3d 232, 241-44 (2d Cir. 1995); *Orkin v. Swiss Confederation*, 444 F. App'x 469, 472 (2d Cir. 2011); *Sanchez-Espinosa v. Reagan*, 770 F.2d 202, 209 (D.C. Cir. 1985); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 791-95 (D.C. Cir. 1984) (Edwards, J., concurring) Thus, to constitute torture, an act must be directed against a person in the offender's custody or control, *see* 8 C.F.R. § 208.18(a)(6) (2014), and a government official must, at a minimum, acquiesce to the torture. *See* Senate Report at 14. A public official "acquiesce[s]" in

a private act of torture "only if the act is performed with his knowledge and the public official has a legal duty to intervene." *Id.* Thus, Plaintiffs must show that a "public official, prior to the activity constituting torture, ha[d] knowledge of such activity and thereafter breach[ed] his legal responsibility to intervene to prevent such activity." *See id.* at 15.[8]

Fifth, torture does not include pain or suffering incidental to "lawful sanctions." The Senate Foreign Relations Committee specifically instructed that "sanctions" was not to be interpreted narrowly and includes, *inter alia*, "penalties imposed in order to induce compliance." *Id.* at 14. The term also "embraces law enforcement actions other than judicially imposed penalties." *Id.* Thus, sanctions—even harsh sanctions—designed to induce a detainee's compliance and not for some other illicit purpose, cannot constitute torture irrespective of whether they incidentally cause pain and suffering.

C. Required Elements for Plaintiffs' Cruel, Inhuman or Degrading Treatment Claim

Courts are divided as to whether claims for cruel, inhuman or degrading treatment ("CIDT") are sufficiently defined as to be actionable under the ATS. And as noted in Section II.A, the United States' position at the time of Plaintiffs' detention was that the CIDT provisions in the Convention Against Torture did not apply to aliens detained overseas. Thus, it is far from clear whether elements even exist for a CIDT claim. As discussed below, it is clear beyond debate that if a claim for CIDT is available under the ATS, Plaintiffs must prove that the conduct at issue constituted official government action that, at a minimum, had the informed acquiescence of a public official with a duty to intervene.

[8] This element alone renders Plaintiffs' torture claims nonjusticiable. The "public officials" at issue here are U.S. Army personnel carrying out a sensitive military mission. Questioning their knowledge and actions in this context is a textbook example of what the political question doctrine seeks to avoid.

Tellingly, while the United States' understanding of the definition of "torture" 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), the limitations reflected in the Convention related to CIDT "did not find their way into legislation" prior to 2005. *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). This 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* Senate Report at 12. Thus, without implementing legislation, the prohibition against CIDT had no legal effect. *See also* 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").

As such, it is unsurprising that multiple courts have concluded that CIDT claims do not represent the type of universal, obligatory norm recognized under the ATS. *Cf. In re Xe Servs. Alien Tort Litig.*, 665 F. Supp. 2d 569 (E.D. Va. 2009) (describing claims permitted under the ATS those that (i) are universally recognized, (ii) have specific definition and content, and (iii) are binding and enforceable, rather than merely aspirational.). 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 the prohibition on CIDT constitutes an international norm that is cognizable under the ATS, and the court categorically held that such a claim is unavailable. *Id.* at 1247 ("We see no basis in law to recognize Plaintiffs' claim for cruel, inhuman, degrading treatment or punishment."). The court in *In re Chiquita Brands*

International, Inc., 792 F. Supp. 2d 1301, 1323-24 (S.D. Fla. 2011), categorically rejected the premise that a prohibition on CIDT was sufficiently established to form the basis for a claim under ATS. *Id.* This Court should follow suit.

If the Court were to conclude that a CIDT claim is actionable under the ATS, the elements of such a claim are unclear (which is itself a reason not to recognize the claim). *See Bowoto v. Chevron Corp.*, 557 F. Supp. 2d 1080, 1093 (N.D. Cal. 2008) ("There is no widespread consensus regarding the elements of cruel, inhuman and degrading treatment."). Article 16 of the Convention Against Torture, defines cruel, inhuman, and degrading acts by exclusion, describing them as "acts of cruel, inhuman or degrading treatment or punishment *which do not amount to torture as defined in article 1*, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." Convention Against Torture, 1465 U.N.T.S. 85, art. 16, ¶ 1 (emphasis added).[9] Determining the lines between torture, CIDT, and conduct that is insufficiently egregious to fall into either category, however, is at best a murky endeavor. "The difference between torture and cruel, inhuman, or degrading treatment or punishment 'derives principally from a difference in the intensity of the suffering inflicted.'" Restatement (Third) of Foreign Relations Law of the United States § 702, n.5 (quoting *Ireland v. the United Kingdom*, 25 Pub. Eur. Ct. H.R., ser. A. para. 167 (1987)).

Thus, even district courts assuming or a concluding that a CIDT claim can be viable under ATS have rejected such claims based on the lack of consensus that CIDT encompasses the

[9] The War Crimes Act of 1996, which was not derived from the Convention, provides no significant assistance, as its definition of cruel and inhuman treatment essentially mirrors the Covenant's definition for torture: "an act intended to inflict severe or serious physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions), including serious physical abuse, upon another within his custody or control." 18 U.S.C. § 2441(d)(1)(B) (2014).

conduct involved in the cases before them. *See, e.g.*, *Sarei v. Rio Tinto PLC*, 650 F. Supp. 2d 1004, 1029-30 (C.D. Cal. 2009) ("Because multiple elements of plaintiffs' CIDT claim do not involve conduct that has been universally condemned as cruel, inhuman, or degrading, the court concludes that the specific CIDT claim plaintiffs assert does not exclusively involve matters of universal concern.")[10]; *Roe v. Bridgestone Corp.*, 492 F. Supp. 2d 988, 1023-24 (S.D. Ind. 2007) (holding that "exploitative labor practices" do not constitute CIDT for purposes of an ATS claim); *Doe I*, 349 F. Supp. 2d at 1321-25 (incarceration for one day and being pushed, shoved, hit, and placed in a choke-hold were not severe enough to support a CIDT claim under the ATS).

To overcome this hurdle, Plaintiffs must identify precedents applying the general international norm against CIDT—if any exists—to specific actions that are comparable to the actions alleged in their complaint. *Roe*, 492 F. Supp. 2d at 1023-24 (dismissing CIDT allegations because it was unable to "find that the general international norm against cruel, inhuman and degrading treatment is sufficiently specific to apply to this case under the ATS"). If Plaintiffs can overcome this hurdle, they must then prove that the alleged acts were "committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." Convention Against Torture, 1465 U.N.T.S. 85, art. 16, ¶ 1. As explained *supra*, Section II.B, the lowest of these standards, "acquiescence," requires Plaintiffs to show that a "public official, prior to the activity constituting torture, ha[d] knowledge of such activity and thereafter breach[ed] his legal responsibility to intervene to prevent such activity." *See* Senate Report at 15.

[10] The district court's decision in *Sarei* was affirmed in part and reversed in part on other grounds by the Ninth Circuit, 671 F.3d 736 (9th Cir. 2011), and the Ninth Circuit's decision was vacated by the Supreme Court, 133 S. Ct. 1995 (2013).

D. Required Elements for Plaintiffs' War Crimes Claim

As explained below, resolution of Plaintiffs' war crimes claim would require the Court to determine, among other things, whether Plaintiffs were "civilians" (as opposed to insurgents), whether Plaintiffs were "innocent" civilians, and whether the Plaintiffs suffered any injuries they can prove in the context of an armed conflict.

The United States has embraced the definition of "war crimes" found in Common Article III of the Fourth Geneva Convention. Common Article III provides, in relevant part:

> 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 (Geneva Convention IV). Thus, it is a war crime to "intentionally . . . kill or inflict serious bodily injury upon innocent civilians during the course of an armed conflict." *In re Xe Servs. Alien Tort Litig.*, 665 F. Supp. 2d at 582 (Ellis, J.) (dismissing the plaintiffs' ATS claims because they failed to allege sufficient facts that showed a plausible entitlement to relief against the defendants in that case). To assert a war crimes claim, Plaintiffs must demonstrate that CACI PT "(i) intentionally (ii) killed or inflicted serious bodily harm (iii) upon innocent civilians (iv) during an armed conflict and (v) in the context of and in association with that armed conflict." *Id.* at 588.

The requirement of a war crimes claim that Plaintiffs qualify as "innocent civilians" is important in the context of this case, as three of the four Plaintiffs have been barred by the United States from even entering this country based on their roles hostile to U.S. forces in Iraq. Indeed, as CACI PT documented in connection with three of the Plaintiffs' failure to appear for court-ordered depositions and medical examinations, Plaintiff Al Shimari's detainee file identifies him as a "high ranking member of the Ba'ath Party" and former Iraqi military, and states that he was captured when a search of his property revealed a machine gun, six rocket launchers, ammunition, blasting caps, gun powder, and two improvised explosive devices. According to his detainee file, Plaintiff Rashid was captured when one of his improvised explosive devices exploded near a coalition convoy. Plaintiff Al Zuba'e's detainee file states that he was captured based on a "be on the lookout" notice as someone responsible for planning attacks on coalition forces. Dkt. #368 at 5-6 (quoting and citing to detainee files filed with the Court).

The requirement that the alleged conduct take place "in the context of and in association with [an] armed conflict" requires "a more substantial relationship . . . between the armed conflict and the alleged conduct than the mere fact that the conduct occurred while an armed conflict was ongoing." *Id.* at 585. Both political branches of the U.S. government have "defined the law of nations to require a nexus of context and association to the armed conflict in order for conduct to constitute a war crime." *Id.* at 586-87. Such a nexus may include "acting with a purpose related to the objectives of the armed conflict, "temporal and geographic proximity to the armed conflict," "the nature of the conduct," and "the identity of the victims." *Id.* at 587.

E. Required Elements of Plaintiffs' Conspiracy Claims

Before turning to the elements of Plaintiffs' theory of co-conspirator liability, CACI PT notes that Plaintiffs have pleaded their theory incorrectly. Conspiracy is not a stand-alone

violation of the law of nations, and is therefore not an appropriate separate count under the ATS. Rather, co-conspirator liability is a theory of secondary liability that, if recognized, must be pursued under each of Plaintiffs' substantive ATS claims.[11] The Supreme Court has held that the only conspiracies considered 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).[12]

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 government 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 the government's multiple admissions that no consensus exists for treating the stand-alone offense of

[11] Plaintiffs appear to concede as much, referring to their conspiracy and aiding and abetting counts as "[m]odes of ATS [l]iability" and referring to them as "theories," rather than separate counts. Pl. Mem. at 7.

[12] While international law may recognize a violation of international law for engaging in a "joint criminal enterprise," the Second Circuit noted in *Talisman* that even if such a 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. 582 F.3d at 260.

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 . . . ."). Thus, if a theory of co-conspirator liability may be pursued for, say, torture, it must be pursued as part of Plaintiffs' torture count and not as a separate, stand-alone violation of international law.

Whether a theory of co-conspirator liability is available under the ATS—even when properly pleaded—remains an open question in this Circuit. In the event the Court decides to recognize a co-conspirator theory of liability for some or all of Plaintiffs' ATS claims, Plaintiffs would need to establish proof of an agreement. *See, e.g.*, *Talisman*, 582 F.3d at 260 (holding that conspiracy liability under the ATS, if recognized, would require either an "agreement" or "'a criminal intention to participate in a common criminal design'") (quoting *Prosecutor v. Tadic*, Case No. IT-94-1-A, Appeal Judgment, ¶ 206 (July 15, 1999)); *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1085 n.7 (9th Cir. 2010); *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1159 (11th Cir. 2005) (holding that conspiracy liability under the ATS requires proof that "two or more persons agreed to commit a wrongful act"). Allegations reflecting parallel conduct are insufficient to state a cognizable conspiracy claim. "Specifically, when concerted conduct is a matter of inference, a plaintiff must include evidence that places the parallel conduct in 'context that raises a suggestion of a preceding agreement' as 'distinct from identical, independent action.'" *Loren Data Corp. v. GXS, Inc.*, 501 Fed. App'x 275, 280 (4th Cir. 2012) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 549, 556 (2007)).

As the Fourth Circuit explained, "[t]he evidence must tend to exclude the possibility that the alleged co-conspirators acted independently, and the alleged conspiracy must make practical,

economic sense." *Id.* Indeed, in *A Society Without a Name v. Virginia*, the Fourth Circuit admonished that "[w]ithout more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality." 655 F.3d 342, 346 (4th Cir. 2011) (emphasis added) (quoting *Twombly*, 550 U.S. at 556-57) (omission in original). Plaintiffs must adduce facts that suggest agreement, rather than facts that are merely consistent with agreement.

Moreover, to pursue a conspiracy claim against a corporation, a plaintiff must demonstrate facts reflecting affirmative *corporate* engagement in the conspiracy. Thus, if Plaintiffs are allowed to pursue a conspiracy theory, they would have to show that CACI PT agreed to this supposed conspiracy through an agent with actual authority to bind CACI PT, and not through the 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 (2006). A "supervisor's mere knowledge" that subordinates are engaged in improper conduct is insufficient to give rise to liability; instead, a supervisor can only be held liable for "his or her own misconduct." *Ashcroft v. Iqbal* , 556 U.S. 662, 677 (2009).

A corporation cannot conspire with its employees—and employees, when acting within the scope of their employment, cannot conspire amongst themselves. *Walters v. McMahen,* 795 F. Supp. 2d 350, 358 (D. Md. 2011) (citing *ePlus Tech Inc. v. Aboud,* 313 F.3d 166 (4th Cir. 2002); *see also Cohn v. Bond,* 953 F.2d 154, 159 (4th Cir. 1991); and *Marmott v. Maryland Lumber Co.*, 807 F.2d 1180, 1184 (4th Cir. 1986)). Accordingly, and importantly for purposes of political question analysis, Plaintiffs must prove their conspiracy theory by proving that CACI PT conspired with persons other than its own employees—presumably with the military personnel performing the mission at Abu Ghraib prison.

Finally, Plaintiffs must prove that CACI PT acted "with the purpose of facilitating" a universally recognized international norm. As discussed *infra* in connection with aiding and abetting liability, the Fourth Circuit held in *Aziz* "that the ATS imposes liability for aiding and abetting violations of international law, but only if the attendant conduct is purposeful." 658 F.3d at 390. The *Aziz* Court "adopt[ed] . . . as the law of this Circuit" the Second Circuit's analysis in *Talisman*, 582 F.3d 244, 258 (2d Cir. 2009). In *Talisman*, the Second Circuit held that "a defendant may be held liable under international law for aiding and abetting the violation of that law by another when the defendant (1) provides practical assistance to the principal which has a substantial effect on the perpetration of the crime, and (2) *does so with the purpose of facilitating the commission of that crime*." *Aziz*, 658 F.3d at 396 (quoting *Talisman*, 582 F.3d at 258) (emphasis added). *Talisman* had further held that "under a theory of relief based on a joint criminal enterprise, plaintiffs' conspiracy claims would require the same proof of *mens rea* as their claims for aiding and abetting." 582 F.3d at 260.

Thus, in light of the Fourth Circuit's adoption of *Talisman* "as the law of this Circuit," any conspiracy theory of liability requires the defendant act with the purpose of facilitating the alleged crime. *Aziz*, 658 F.3d at 398. Contrary to Plaintiffs' preference, Pl. Mem. at 10, the Fourth Circuit does not permit use of the knowledge *mens rea* standard. *See, e.g., Du Daobin v. Cisco Sys., Inc.*, 2 F. Supp. 3d 717, 728-29 (D. Md. 2014) ("Although Plaintiffs here contend that the Court should look to the Rome Statute and not *Talisman* and apply a lesser *mens rea* standard of knowledge to their conspiracy and joint criminal enterprise claims . . . , in light of *Aziz* . . . the Court is simply not at liberty to do so.").

F. Required Elements for Plaintiffs' Aiding and Abetting Claims

The Fourth Circuit's decision in *Aziz v. Alcolac, Inc.*, 658 F.3d 388 adopted the stringent "purposefulness" standard for aiding and abetting liability under ATS. *Id.* at 398. Specifically,

the Fourth Circuit agreed with the Second Circuit's standard that "a defendant may be held liable under international law for aiding and abetting the violation of that law by another when the defendant (1) provides practical assistance to the principal which has a substantial effect on the perpetration of the crime, and (2) *does so with the purpose of facilitating the commission of that crime*." *Aziz*, 658 F.3d at 396 (emphasis added) (quoting *Talisman*, 582 F.3d at 258). Based on that conclusion, the Fourth Circuit held that "for liability to attach under the ATS for aiding and abetting a violation of international law, a defendant must provide *substantial assistance with the purpose of facilitating the alleged violation*." *Id.* at 401 (emphasis added).

Here, of course, Plaintiffs do not allege any meaningful contact between themselves and CACI PT personnel. Thus, it appears that Plaintiffs' aiding and abetting theory is that CACI PT somehow assisted military personnel in their mistreatment of Plaintiffs. That Plaintiffs' conspiracy and aiding and abetting theories of liability seek to hold CACI PT liable for the decisions and conduct of military personnel demonstrates the nonjusticiable nature of Plaintiffs' claims. *Al Shimari*, 758 F.3d at 533

Respectfully submitted,

/s/ Savannah E. Marion

Savannah E. Marion
Virginia Bar No. 80648
John F. O'Connor (admitted *pro hac vice*)
Linda C. Bailey (admitted *pro hac vice*)
Counsel for Defendant CACI Premier Technology, Inc.
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000 – telephone
(202) 429-3902 – facsimile
joconnor@steptoe.com
lbailey@steptoe.com
smarion@steptoe.com

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of November, 2014, 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 counsel of record.

/s/ Savannah E. Marion
Savannah E. Marion
Virginia Bar No. 80648
Attorney for Defendant CACI Premier Technology, Inc.
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000 – telephone
(202) 429-3902 – facsimile
smarion@steptoe.com