

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

SUHAIL NAJIM)	
ABDULLAH AL SHIMARI <i>et al.</i>,)	
)	
Plaintiffs,)	
)	C.A. NO. 08-cv-827 GBL-JFA
v.)	
)	
CACI PREMIER TECHNOLOGY, INC.)	
)	
Defendant)	
)	

**PLAINTIFFS' MEMORANDUM ON THE ELEMENTS
OF THEIR CLAIMS UNDER THE ALIEN TORT STATUTE**

Plaintiffs respectfully submit this memorandum, pursuant to this Court's October 3, 2014 Order, setting forth the elements of their claims under the Alien Tort Statute, 28 U.S.C. § 1330 (“ATS”).

Plaintiffs assert factually-detailed claims of direct liability of Defendant CACI Premier Technology, Inc. (“CACI”) through the conduct of its employees for (1) torture, (2) cruel, inhuman or degrading treatment, and (3) war crimes. Third Am. Compl. ¶¶ 210-63. Plaintiffs also assert liability against CACI for these law-of-nations violations through participation of its employees in a conspiracy and by aiding and abetting those who carried out the abuses. *Id.*

The ATS “enables federal courts to consider a limited category of claims that are defined by the law of nations.” *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516, 525 (4th Cir. 2014) (citing *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004)). This Court has previously held that each of Plaintiffs’ claims for torture, cruel, inhuman or degrading treatment, and war crimes

are “sufficiently definite and universal violations of international law” to support jurisdiction under the ATS. *See Al Shimari*, 758 F.3d at 525 (citing this Court’s analysis of Plaintiffs’ ATS claims). *See also* Hr’g Tr. 24-29, Nov. 1, 2012. In its most recent ruling in this case, the Court of Appeals noted that this Court “has not yet identified the precise elements that the plaintiffs will be required to prove in their ATS claims for the alleged international law violations.” *Al Shimari*, 758 F.3d at 536 (quoting *Taylor v. Kellogg Brown & Root Services, Inc.*, 658 F.3d 402, 411 (4th Cir. 2011)). This memorandum identifies the elements of Plaintiffs’ ATS claims.¹

I. The Elements of Plaintiffs’ Three ATS Claims

A. Torture

Torture has been an established cause of action under the ATS since “the birth of the modern line of cases beginning with *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980),” as “the torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind.” *Sosa*, 542 U.S. at 724-25, 732 (quotations omitted). The basic elements of a claim of torture are “severe pain or suffering . . . intentionally inflicted on [p]laintiffs for the purposes of punishing [p]laintiffs for acts that [p]laintiffs committed, and/or for the purposes of intimidating or coercing [p]laintiffs.” *Doe v. Nestle, S.A.*, 748 F. Supp. 2d 1057, 1077 (C.D. Cal. 2010) (internal quotations omitted). *See also* War Crimes Act, 18 U.S.C. § 2441(d)(1)(A) (“The act of a person who commits, or conspires or attempts to commit, an act 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 for the purpose of obtaining information or a confession, punishment, intimidation, coercion, or any reason based on discrimination of any kind.”); 18 U.S.C. § 2340(1) (“an act committed by a person acting

¹ Based on Plaintiffs’ understanding of this Court’s October 3 Order, this memorandum does not apply the elements of Plaintiffs’ ATS claims to the factual allegations asserted against CACI or otherwise seek judicial relief on any of Plaintiffs’ ATS claims.

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"); Convention Against Torture, art. 1, ¶ 1 ("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 a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him 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").

"Allegations of severe beatings, extended confinements, and deprivation of food – causing both physical and mental injury – generally constitute torture." *Nestle*, 748 F. Supp. 2d at 1077 (citing *Doe v. Qi*, 349 F. Supp. 2d 1258, 1267-70, 1314-18 (N.D. Cal. 2004) (collecting cases)). For example, in *Al-Quraishi v. Nakhla*, which arose from the same factual circumstances at Abu Ghraib as does this case, the District of Maryland found that "beatings, electric shocks, threats of death and rape, mock executions, and hanging from the hands and feet . . . may justify a finding of torture." 728 F. Supp. 2d 702, 760 (D. Md. 2010). The D.C. Circuit found that torture includes "'sustained systematic beating, application of electric currents to sensitive parts of the body, and tying up or hanging in positions that cause extreme pain.'" *Simpson v. Socialist People's Libyan Arab Jamahiriya*, 326 F.3d 230, 234 (D.C. Cir. 2003) (quoting *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 92-93 (D.C. Cir. 2002)). The Ninth Circuit ruled that binding, blindfolding, and severely beating a detainee constituted torture, as did severely beating a detainee and burning him with cigarettes. *Al-Safer v. INS*, 268 F.3d 1143, 1147 (9th Cir. 2001).

Similarly, the Eleventh Circuit found that forcing a detainee to undress, binding her arms and legs, whipping her, and threatening her with death all fall within the definition of torture. *Abebe-Jira v. Negewo*, 72 F.3d 844, 845 (11th Cir. 1996). The District Court for the District of Columbia defined torture to include both the “deprivation of basic human necessities” and “direct attacks on a person,” including stripping a detainee naked, blindfolding him, and threatening him with electrocution or a gun. *Daliberti v. Republic of Iraq*, 97 F. Supp. 2d 38, 45 (D.D.C. 2000). The court also found that “cruel, inhumane conditions, den[ying] sufficient food and water, subject[ion] to constant and deliberate demoralization, physical[] beating[s]” and denial of essential medical treatment constitute torture. *Surette v. Islamic Republic of Iran*, 231 F. Supp. 2d 260, 264 (D.D.C. 2002).

Torture “can only be committed by either state actors or those who act under the color of law.” *Al-Quraishi*, 728 F. Supp. 2d at 748. *See also In re Xe Servs. Alien Tort Litig.*, 665 F. Supp. 2d 569, 588 (E.D. Va. 2009) (“Nothing in the ATS or *Sosa* may plausibly be read to distinguish between private individuals and corporations; indeed, *Sosa* simply refers to both individuals and entities as ‘private actors.’”) (citing *Sosa*, 542 U.S. at 732 n.20). However, “it is not necessary for plaintiffs to prove that the torture was committed in accordance with official [state] policy,” *Al-Quraishi*, 728 F. Supp. 2d at 748 (quoting *Bowoto v. Chevron Corp.*, 557 F. Supp. 2d 1080, 1092 (N.D. Cal. 2008)), since “a person may act under color of law even when there is no legal basis or authority for his or her actions,” *id.* at 752. Indeed, torture cannot not be lawfully ordered or directed by the government: any such order would be manifestly illegal, and anyone who was ordered (or believed he was authorized) to commit such acts would be duty-

bound to refuse to do so, and could not invoke “superior orders” as a defense. *See, e.g., In re Agent Orange Product Liability Litig.*, 373 F. Supp. 2d 7, 91 (E.D.N.Y. 2005).²

B. Cruel, Inhuman or Degrading Treatment

Courts have found cruel, inhuman or degrading treatment (“CIDT”) to be actionable under the ATS, particularly given that “[m]any of the same international agreements and conventions which ban and condemn torture also outlaw CIDT.” *Al-Quraishi*, 728 F. Supp. 2d at 756. *See also id.* at 757 (collecting cases). CIDT “is defined as acts which inflict mental or physical suffering, anguish, humiliation, fear and debasement, which fall short of torture.” *Nestle*, 748 F. Supp. 2d at 1077 (internal quotations omitted). *See also* War Crimes Act, 18 U.S.C. § 2441(d)(1)(B) (“The act of a person who commits, or conspires or attempts to commit, 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.”). “The principal difference between torture and [cruel, inhuman, or degrading treatment] is ‘the intensity of the suffering inflicted.’” *Nestle*, 748 F. Supp. 2d at 1077 (quoting Restatement (Third) of Foreign Relations, § 702 n.5).

While “[a]s a general matter, ‘[t]he prohibition of cruel, inhuman and degrading treatment has been widely recognized in numerous sources of international law,’” *William v. AES Corp.*, 1:14cv343 (JCC/TRJ), 2014 U.S. Dist. LEXIS 88047, at *25 (E.D. Va. June 26, 2014) (quoting *Bowoto*, 557 F. Supp. 2d at 1092), CIDT claims are only viable under the ATS

² *See also, e.g.*, United Nations, Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Committee Against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, Second Supplemental Report of the United States of America ¶¶ 6-7*, U.N. Doc. CAT/C/48/Add.3/Rev.1 (Jan. 13, 2006) at ¶ 6 (United States represents that “[n]o circumstance whatsoever, including ... an order from a superior officer or public authority, may be invoked as a justification for or defense to committing torture.”).

“if the specific conduct alleged by the plaintiffs has been universally condemned as cruel, inhuman, or degrading,” *Al-Quraishi*, 728 F. Supp. 2d at 759. *See also William*, 2014 U.S. Dist. LEXIS 88047, at *25-26. In *Al-Quraishi*, the District of Maryland found allegations of “beatings, electric shocks, threats of death and rape, mock executions, and hanging from the hands and feet” to meet this standard. 728 F. Supp. 2d at 760.

C. War Crimes

War crimes claims have consistently been recognized as actionable under the ATS and are “clearly” cognizable against private actors. *In re Xe Servs. Alien Tort Litig.*, 665 F. Supp. 2d at 584. *See also id.* at 585 (citing *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 2009 WL 2431463, at *10 (11th Cir. 2009); *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 173 (2d Cir. 2009); *Doe I v. Unocal Corp.*, 395 F.3d 932, 945-46 (9th Cir. 2002); *Al-Quraishi*, 728 F. Supp. 2d at 747.

As the court noted in *In re Xe Servs. Alien Tort Litig.*, “by ratifying the Geneva Conventions and by enacting the War Crimes Act,” Congress “has adopted a precise, universally accepted definition of war crimes.” 665 F. Supp. 2d at 582, 588. “The Fourth Geneva Convention, which concerns the protection of civilians during armed conflicts of an international character” defines war crimes as encompassing “‘willful killing, torture or inhuman treatment, including biological experiments, [or] wilfully causing great suffering or serious injury to body or health [of persons] . . . in the hands of a Party to the conflict or Occupying Power.’” *Id.* at 582 n.14 (quoting Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, arts. 4, 147).

War crimes claims only encompass conduct that “occurred in the context of and in association with an ongoing armed conflict.” *In re Xe Servs. Alien Tort Litig.*, 665 F. Supp. 2d at

585. This nexus may be shown by demonstrating that the defendant “act[ed] with a purpose related to the objectives of the armed conflict,” as well as other factors, such as “temporal and geographic proximity to the armed conflict, the nature of the conduct, and the identity of the victims.” *Id.* at 587. The Eastern District of Virginia has rejected arguments that the nexus requirement is limited to conduct in “direct furtherance of a ‘military objective,’” but rather includes conduct by defendants “motivated by ideology or the prospect of financial gain” within the scope of war crimes claims. *Id.* It applies equally to private actors and state actors. *See Al-Quraishi*, 728 F. Supp. at 744 (“The Fourth Geneva Convention does not limit its application based on the identity of the perpetrator of the war crimes. Rather, its protections are based on who the potential victims of war crimes are.”).

Thus, the elements of a cause of action for war crimes are the (i) intentional (ii) killing or infliction of 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. *In re Xe Servs. Alien Tort Litig.*, 665 F. Supp. 2d at 588.

II. Modes of ATS Liability

In addition to direct liability of CACI for the abuse of plaintiffs brought about by CACI’s employees, plaintiffs have also alleged secondary liability on the theories of civil conspiracy and aiding and abetting.

“[V]irtually every court to address the issue’ has ‘recogniz[ed] secondary liability for violations of international law since the founding of the Republic.’” *Yousuf v. Samantar*, 1:04cv1360 (LMB/JFA), 2012 U.S. Dist. LEXIS 122403, at *31 (E.D. Va. Aug. 28, 2012) (quoting *Aziz v. Alcolac, Inc.*, 658 F.3d 388, 396 (4th Cir. 2011) (collecting cases)). Plaintiffs

assert two forms of secondary liability in the present case: conspiracy and aiding and abetting liability.

A. Conspiracy

A long line of cases has recognized conspiracy liability for violations under ATS. *See, e.g., Yousuf*, 2012 U.S. Dist. LEXIS 122403, at *33-34; *Sinaltrainal*, 578 F.3d at 1267-69; *Hilao v. Estate of Marcos*, 103 F.3d 767, 776 (9th Cir. 1996); *Carmichael v. United Tech. Corp.*, 835 F.2d 109, 115 (5th Cir. 1988); *Kadic v. Karadzic*, 70 F.3d 232, 244-45 (2d Cir. 1995); *In re Terrorist Attacks on September 11, 2001*, 392 F. Supp. 2d 539, 565 (S.D.N.Y. 2005); *Burnett v. Al Baraka Inv. & Dev. Corp.*, 274 F. Supp. 2d 86, 100 (D.D.C. 2003).

At common law, the elements of a conspiracy are “a combination of two or more persons, by some concerted action, to accomplish some criminal or unlawful purpose, or to accomplish some purpose, not in itself criminal or unlawful, by criminal or unlawful means.” *Tysons Toyota v. Globe Life Ins. Co.*, Nos. 93-1359, 93-1443, 93-1444, 1994 U.S. App. LEXIS 36692, at *14 (4th Cir. Dec. 29, 1994). The Eleventh Circuit articulated similar elements of conspiracy liability under the Alien Tort Statute: (1) two or more persons agreed to commit a wrongful act; (2) the defendant joined the conspiracy knowing of at least one of the goals of the conspiracy and intending to help accomplish it; and (3) one or more of the violations were committed by someone who was a member of the conspiracy and acted in furtherance of the conspiracy. *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1159 (11th Cir. 2005).

Similarly, under international law, conspiratorial liability attaches where an individual’s “contribution is ‘intentional’ and either ‘made with the aim of furthering the criminal activity or criminal purpose of the group,’ or ‘made in the knowledge of the intention of the group to

commit the crime.”” *Aziz*, 658 F.2d at 401 n.13 (quoting Rome Statute of the International Criminal Court, art. 25(3)(d)).³

Under both common law and international law, a defendant may be held liable for the substantive offenses that his co-conspirators committed in furtherance of the conspiracy. *United States v. Oliver*, 513 F. App’x 311, 315 (4th Cir. 2013) (““The [Pinkerton v. United States, 328 U.S. 640 (1946)] doctrine makes a person liable for substantive offenses committed by a co-conspirator when their commission is reasonably foreseeable and in furtherance of the conspiracy.”” (quoting *United States v. Ashley*, 606 F.3d 135, 142-43 (4th Cir. 2010))); *Lizarbe*, 642 F. Supp. 2d at 490 (explaining that joint criminal enterprise liability may attach where: “(i) the crime charged was a natural and foreseeable consequence of the execution of [the] enterprise, and (ii) the accused was aware that such a crime was a possible consequence of the execution of [the] enterprise, and, with that awareness, participated in [the] enterprise” (internal quotations omitted)); *Prosecutor v. Tadić*, Case No. IT-94-1-A, Appeal Judgment, ¶ 204, ¶ 206 (Int’l Crim. Trib. for the Former Yugoslavia July 15, 1999) (“While murder may not have been explicitly acknowledged to be part of the common design, it was nevertheless foreseeable that the forcible removal of civilians at gunpoint might well result in the deaths of one or more of those civilians. Criminal responsibility may be imputed to all participants within the common enterprise where the risk of death occurring was both a predictable consequence of the execution of the common design and the accused was either reckless or indifferent to that risk.”)).⁴

³ The international law “analog” to conspiracy is “joint criminal enterprise.” *Yousuf*, 2012 U.S. Dist. LEXIS 122403, at *33. See also *Lizarbe v. Rondon*, 642 F. Supp. 2d 473, 490 (D. Md. 2009) (explaining that the “elements [for joint criminal enterprise liability] sound a great deal like those for conspiracy”).

⁴ *Tadić* is the seminal case on accessory liability under international law and was relied upon by the court in *Yousuf*. 2012 U.S. Dist. LEXIS 122403, at *34.

The *mens rea* for civil conspiracy is reflected in the defendant's knowledge of the conspiracy's unlawful objective, even where the defendant is unaware of the identity of all co-conspirators or details of the conspiracy. *See Ungar v. Islamic Republic of Iran*, 211 F. Supp. 2d 91, 100 (D.D.C. 2002). *See also In re Chiquita Brands Int'l, Inc. Alien Tort Statute & S'holder Derivative Litig.*, 792 F. Supp. 2d 1301, 1344-45 (S.D. Fla. 2011) (holding that the plaintiffs only needed to "allege that Chiquita intended for the AUC to torture and kill civilians in Colombia's banana growing regions, which is the conduct that allegedly harmed or killed Plaintiffs' relatives").

B. Aiding and Abetting

The Fourth Circuit has held that "aiding and abetting liability is well established under the ATS." *Aziz*, 658 F.3d at 396 (internal quotations omitted). Looking to international law, *Aziz* concluded,

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 the facilitating the commission of that crime.

Id. (quoting *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 258 (2d Cir. 2009)).

While "purpose" is established when a defendant "not only knew about [the human rights violations] and failed to take necessary and reasonable measures to prevent it, but [] in fact ordered and affirmatively permitted such violations," *Yousuf*, 2012 U.S. Dist. LEXIS 122403, at *39, it is also established when the defendant's goals are furthered by the international law violation. For example, in *Doe v. Nestle*, the Ninth Circuit explained that the plaintiffs' allegations that "[d]riven by the goal to reduce costs in any way possible, the defendants

allegedly supported the use of child slavery, the cheapest form of labor available,” demonstrate “how the use of child slavery benefitted the defendants and furthered their operational goals in the Ivory Coast.” No. 10-56739, 2014 U.S. App. LEXIS 17429, at *27-28 (9th Cir. Sept. 4, 2014). Contrasting the case before it with *Talisman*, where “the defendant did not in any way benefit from the underlying human rights atrocities carried out by the Sudanese military, and in fact, those atrocities ran contrary to the defendant’s goals in the area, and even forced the defendant to abandon its operations,” and *Aziz*, where “the plaintiffs alleged that the defendants sold chemicals knowing they would be used to murder Kurds in northern Iraq, but failed to allege that the defendants had anything to gain from the use of chemical weapons,” the court in *Nestle* found that “the defendants obtained a direct benefit from the commission of the violation of international law.” 2014 U.S. App. LEXIS 17429, at *29. Thus, the *Nestle* court concluded that the plaintiffs’ allegations met the “purpose” requirement under the *Talisman/Aziz* understanding of aiding and abetting liability under the ATS. *Id.*

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 6, 2014, I electronically filed the Plaintiffs' PLAINTIFFS' MEMORANDUM ON THE ELEMENTS OF THEIR CLAIMS UNDER THE ALIEN TORT STATUTE through the CM/ECF system, which sends notification to counsel for Defendants.

/s/ John Kenneth Zwerling

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