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

SUHAIL NAJIM ABDULLAH AL SHIMARI, *et al*., **Plaintiffs,** **v.** **CACI PREMIER TECHNOLOGY, INC.,** **Defendant.**	Case No. 1:08-cv-0827 LMB-JFA

PLAINTIFFS' MEMORANDUM ON THE APPLICABLE LAW GOVERNING PLAINTIFFS' CLAIMS OF TORTURE, WAR CRIMES AND CRUEL, INHUMAN AND DEGRADING TREATMENT

Pursuant to this Court's Order of December 16, 2016, Dkt. 571, Plaintiffs respectfully submit this memorndum on the applicable sources of law governing their claims under the Alien Tort Statute, 28 U.S.C. § 1350 ("ATS") for (i) torture, (ii) cruel, inhuman and degrading treatment ("CIDT") and (iii) war crimes.[1]

I. Background: The Mistreatment of Plaintiffs

In the small and confined universe of Tier 1A of the Hard Site at Abu Ghraib, TAC ¶ 12, members of the 372nd Military Police Company charged with guarding detainees took instructions from civilian interrogators employed by CACI to "'soften up' detainees for

[1] Plaintiffs have voluntarily dismissed their common law claims against Defendant, Dkt. 574, and accordingly, are proceeding only on Counts 1-9 of the Third Amended Complaint ("TAC"). And, pursuant to the Court's instructions at the December 16, 2016 hearing, the Parties will brief the *application* of the governing law to the more fully developed facts after all Plaintiffs have been deposed.

interrogation" by creating "extreme and abusive" and "torturous conditions . . . to which Plaintiffs were subject," TAC ¶ 18. *See also* TAC ¶¶ 85, 98-101, 109-123, 126-127. CACI personnel, Steven Stefanowicz and Daniel Johnson, "had actually ordered" co-conspirator and non-commissioned officer in charge of the Hard Site Ivan Frederick "to set the conditions for abusing detainees." TAC ¶ 85. Military investigative reports confirmed that CACI employees ordered or worked alongside court martialed military personnel to abuse detainees. TAC ¶¶ 81-84, 87-88. CACI interrogators also ordered other lower-level soldiers to torture and abuse detainees. See TAC ¶¶ 100, 111. Alleged CACI co-conpsirators, including Sergeant Ivan Frederick III and Charles Graner, who were each court martialed and imprisoned for their role in prisoner abuse each gave testimony in this case that CACI interrogators "used code words or terms such as 'special treatment,' 'soften up,' 'doggie dance,' and related code-words to signal to their military co-conspirators to employ torture and other abusive techniques of the kind Plaintiffs suffered at the Hard Site." TAC ¶ 117. The CACI interrogators and soldiers alike "understood, that 'softening up' and 'special treatment' for interrogations equated to serious physical abuse and mental harm in an attempt to make detainees more responsive to questioning." TAC ¶ 118.

During their detention at the Hard Site of Abu Ghraib in 2003-2004, Plaintiffs Suhail Al Shimari, Taha Rashid, Salah Al-Ejaili, and Asa'ad Al- Zuba'e were subjected to numerous abusive and coercive techniques, used separately and in combination, that form the basis of their claims for relief.

Plaintiff Al Shimari was subjected to electric shocks, repeated beatings, stripped and kept naked, deprived of sleep for extended periods of time, subjected to sensory deprivation and

extremes of temperature, threatened with death, forcibly shaved, threatened with dogs, and deprived of food while detained at the Hard Site. TAC ¶¶ 24-35, 27-38.

Plaintiff Rashid was subjected to being stripped and kept naked, subjected to sensory deprivation, placed in stress positions for extended periods of time including being hung from the ceiling, having women's underwear placed over his head while handcuffed, repeated beatings, repeatedly shot in the head with a taser gun and subjected to electric shocks, suffered a broken arm and injured leg, subjected to mock execution, forcibly subjected to sexual acts and forced to watch the rape of a female detainee, and deprived of food and water while detained at the Hard Site. TAC ¶¶ 39-58.

Plaintiff Al Zuba'e was subjected to repeated beatings, stripped and kept naked, subjected to extremes of temperature, with both cold water thrown on his naked body, hooded and chained to the bars of his cell, threatened with unleashed dogs, beaten on his genitals, and imprisoned in a solitary cell in conditions of sensory deprivation for a day while detained at the Hard Site. TAC ¶¶ 59-68.

Plaintiff Al-Ejaili was subjected to repeated beatings, stripped and kept naked, imprisoned in a solitary cell in conditions of sensory deprivation, subjected to extremes of temperature, with both hot and cold water thrown on his naked body, placed in stress positions for extended periods of time, threatened with unleashed dogs, and deprived of food and sleep while detained at the Hard Site. TAC ¶¶ 69-76.

II. Legal Prohibition on Torture, Cruel, Inhuman and Degrading Treatment, and War Crimes

Two bodies of law impose legal norms prohibiting torture, CIDT and war crimes.The Geneva Conventions, which applied during the armed conflict and occupation in Iraq, as the

primary source of applicable internaitonal law, placed legal constraints on the United States and its citizens, and imposed unambiguous prohibitions on torture, CIDT and war crimes; these prohibitions are reflected in the U.S. criminal code. *See* 18 U.S.C. § 2340/2340A and 18 U.S.C. § 2441. At the same time, the Alien Tort Statute, provides jurisdiction over claims against persons or entitites that engage in such conduct, as each consitutes a universal and obligatory norm under the law of nations so as to meet the jurisdictional requirements for recognizing an ATS claim.

A. The Geneva Conventions

The Geneva Conventions, which have been ratified by nearly every country in the world including the United States (in 1955) and Iraq (in 1956), applied to detainees in Iraq at all times, including their prohibitions against torture and cruel and inhuman treatment, *see* Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention], arts. 3, 5, 147.[2] The Geneva Conventions mandate that all individuals are protected from universally condemned torture and war crimes regardless of their status—i.e., civilian or combatant. *See*, *e.g.*, Third

[2] Although the Fourth Circuit has rejected the argument that the military could have lawfully authorized torture, CIDT or war crimes, *Al Shimari v. CACI, Premier Tech., Inc.*, 840 F.3d 147 (4th Cir. 2016), it is nevertheless worth noting that virtually all of the conduct alleged by Plaintiffs was not, in fact, authorized. Two separate Interrogation and Counter-Resistance Policies, or "Interrogation Rules of Engagement" ("IROEs") were issued at Abu Ghraib during the relevant time period. Both IROEs contain the instruction that the Geneva Conventions apply at all times. While the first, issued on September 14, 2003, authorized certain interrogation techniques such as the use of military working dogs, stress positions and sleep management, the second, issued on October 12, 2003, removed authorization of those and certain other techniques. *Compare* Dkt. 528, Ex. JJ (CJTF-7 Interrogation and Counter-Resistance Policy ("IROE I")) *with* Dkt. 528, Ex. KK (CJTF-7 Interrogation and Counter-Resistance Policy, enclosure 1 ("IROE II")). And neither IROE ever authorized beatings, electric shocks, deprivation of food and water, sexual abuse, unmuzzled dogs, the stripping naked of detainees or other humiliations inflicted on Plaintiffs. *See generally* IROE I; IROE II.

Geneva Convention; Fourth Geneva Convention, arts. 3, 5. *See also* Expert Report of Professor Geoffrey Corn, Esq, Dkt. 388, Decl. of Baher Azmy, Esq. (dated May 3, 2013), Ex. B, pp. 2-10, 12-13. In *Hamdan v. Rumsfeld*, the Supreme Court could not be more clear that Article 3, common to all the Geneva Conventions, applies to all individuals taking no active part in hostilities, including captive so-called "enemy combatants."[3] 548 U.S. 557, 630-32 (2006). CACI employees were bound to comply with the Geneva Conventions and applicable U.S. law, including 18 U.S.C. §2340 and 18 U.S.C. §2441.[4]

B. Legal Basis for Plaintiffs Claims: The ATS

The ATS grants federal courts jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. Interpreting this statute in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), the Supreme Court emphasized that, "[f]or two centuries we have affirmed that the domestic law of the United States recognizes the law of nations." *Id*. at 729. Indeed, the Court cited to a number of cases recognizing that "international law is part of our law." *E.g.*, *The Paquete Habana*, 175 U.S 677, 700 (1900) ("International law is part of our law, and must be ascertained and administered by

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[3] Plaintiffs were civilian detainees, not "enemy combatants." *See Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516, 521 n. 2 (4th Cir. 2014).

[4] Under the CACI contract, CACI employees were obliged to act "IAW [in accordance with] Department of Defense, US Civil Code, and International Regulations." *See* Dkt. 528, Decl. of Peter Nelson (dated Dec. 19, 2014), Ex. P (Delivery Order 35) at ¶ 4. All CACI intelligence staff going to Iraq were briefed on Geneva Convention protections. Dkt. 528, Ex. S (Porvaznik Dep.) (filed under seal) at 111:16-112:4; Dkt. 528, Ex. NN (JDIC Memorandum of Understanding) (filed under seal). The Army Field manual mandated that interrogators "understand US law of war obligations contained in the [Geneva Convention for the Amelioration of the Wounded and Sick in Armed Forces in the Field of August 12, 1949], [Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949], and [Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949] regarding the treatment of [enemy prisoners of war], retained personnel, and civilian internees." Army Field Manual 34-52 at 1-14 (1992).

the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination"); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964) ("[I]t is, of course, true that United States courts apply international law as a part of our own in appropriate circumstances"). The Court held that the ATS authorizes federal courts to use their common law powers to recognize a cause of action for a "narrow class" of international law violations that have no less "definite content" and "acceptance among civilized nations" than the claims familiar to Congress at the time the statute was enacted. *Sosa*, 542 U.S. at 724-25, 729, 732. *See also In re Estate of Marcos Human Rights Litig. (Hilao v. Marcos)*, 25 F.3d 1467, 1475 (9th Cir. 1994) ("Actionable violations of international law must be of a norm that is specific, universal, and obligatory") (cited with approval by *Sosa*, 542 U.S. at 732).

The Supreme Court advised that the existence and content of international law should be derived from reference to treaties, executive or legislative acts or judicial decisions, and "customs and usages of civilized nations," as evidenced by "the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat." *Sosa*, 542 U.S. at 734 (quoting *The Paquete Habana*, 175 U.S. at 700); *see also United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160-161 (1820); *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 176 (2d Cir. 2009). The Restatement (Third) on Foreign Relations Law identified similar sources from which rules of international law are to be derived, namely (1) customary international law, (2) international agreements and (3) general principles of law. Rest. (Third) Foreign Relations Law §102. These categories and sources are

mirrored in the statute of the International Court of Justice, which is considered the definitive statement on the sources of international law.[5]

Under these sources of law for law of nations violations, it cannot reasonably be disputed that torture,[6] cruel, inhuman or degrading treatment,[7] and war crimes[8] at the time of the events at

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[5] The Statute of the International Court of Justice, June 26, 1945, 33 U.N.T.S. 993, Art. 38 (1), provides: "The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

[6] *See Sosa v. Alvarez-Machain*, 542 U.S. at 732 (quoting with approval *Filártiga v. Peña-Irala*, 630 F.2d 876, 890 (2d Cir. 1980) ("[F]or purposes of civil liability, the torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind")); H.R. Rep. 102-367(I) (1991) at 2-3 ("The universal consensus condemning [official torture] has assumed the status of customary international law."); *Prosecutor v. Kunarac*, Case No. IT-96-23-T, Trial Judgment, ¶ 466 (ICTY Feb. 22, 2001) ("[t]orture is prohibited under both conventional and customary international law," and "can be said to constitute a norm of *jus cogens*"). *See also* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT'') Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85; Fourth Geneva Convention, art. 3(1)(a).

[7] The Geneva Conventions and the Convention Against Torture, to which the United States is a party, each prohibit cruel, inhuman and degrading treatment as a violation of customary international law in the same fashion they outlaw torture. *See* CAT, art. 16; Fourth Geneva Convention, arts. 3(1)(a) and 147. *See also, e.g., Bowoto v. Chevron Corp.*, 557 F. Supp. 2d 1080, 1092-1095 (N.D. Cal. 2008) (explaining that CIDT claims meet *Sosa* when the particular conduct alleged has been "universally condemned as cruel, inhuman, or degrading").

[8] *See, e.g., Kiobel v. Royal Dutch Petroleum*, 621 F.3d 111, 120 (2d Cir. 2010); *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1263 (11th Cir. 2009); *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 763-64 (9th Cir. 2011); *Kadić v. Karadžić*, 70 F.3d 232, 241-44 (2d Cir. 1995); *Sosa*, 542 U.S. at 762 (Breyer, J., concurring in part and concurring in the judgment) (war crimes are an example of "universally condemned behavior" for which "universal jurisdiction exists to prosecute"); *In re Xe Servs. Alien Tort Litig.*, 665 F. Supp. 2d 569, 582 (E.D. Va. 2009) . *See also* Fourth Geneva Convention, art. 3(1)(a); Rome Statute of the International Criminal Court, U.N. Doc. A/183.9, July 17, 1998, art. 8.

issue (2003-2004) were universally prohibited and thus are cognizable under the ATS.[9] The conduct that meets the definition of these universally recognized norms is discussed in the following section.

III. Standard for Assessing Law of Nations Violations: Torture, CIDT and War Crimes

The sources of international and domestic law that render torture, CIDT and war crimes universal and obligatory prohibitions, also define the content of these legal norms to ultimately be applied to the treatment Plaintiffs endured in order to adjudicate their ATS claims.

A. Torture

Torture constituted unlawful conduct in violation of well settled international or criminal law applicable to CACI employees in 2003-2004. *See, e.g.,* Fourth Geneva Convention, arts. 3(1)(a) and 147; *Prosecutor v. Delalić*, Case No. IT-96-21-T, Trial Judgment, ¶ 454 (ICTY Nov. 16, 1998) (finding that the prohibition against torture is absolute, non-derogable in all circumstances and a *jus cogens* norm); 18 U.S.C. § 2340 (1996). The elements of a claim of torture were clearly established well before Plaintiffs' detention at Abu Ghraib. The federal anti-torture statute, enacted in 1994 to implement the 1984 United Nations Convention Against Torture ("CAT"), defines torture as an act "specifically intended to inflict severe physical or mental pain or suffering . . . upon a person within his custody or physical control." 18 U.S.C. § 2340(1) (2004). *See also U.S. v. Belfast*, 611 F.3d 783, 806 (11th Cir. 2010) (finding that 18 U.S.C. § 2340 "tracks the provisions of the CAT in all material respects").[10] The statute further defines "severe mental pain or suffering" as

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9 The District Court previously found that torture, cruel, inhuman and degrading treatment, and war crimes all satisfied the *Sosa* standard. Dkt.159.

10 CAT, 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

> the prolonged mental harm caused by or resulting from—
>
> (A) the intentional infliction or threatened infliction of severe physical pain or suffering;
>
> (B) 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;
>
> (C) the threat of imminent death; or
>
> (D) 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 senses or personality. 18 U.S.C. § 2340(2) (2004).

Id. at § 2340(2). The Torture Victim Protection Act, enacted in 1992, adopts a similar definition of torture. 28 U.S.C. § 1350 note § 3(b)(2), 106 Stat. 73 (1992) (prolonged mental harm caused by "intentional[] inflict[ion]" of "severe physical pain or suffering," threat of death or threat of detah or severe pain to another); *see also* War Crimes Act, 18 U.S.C. § 2441(d)(1)(A).

Certain conduct has been universally recognized to constitute an underlying act for torture, such as "sustained systematic beating, application of electric currents to sensitive parts of the body, and tying up or hanging in positions that cause extreme pain," S. EXEC. REP. NO.. 101-30, at 14 (1990); "[e]lectric shock[;] [i]nfliction of pain through chemicals or bondage (other than legitimate use of restraints to prevent escape[;] [f]orcing an individual to stand, sit, or kneel in abnormal positions for prolonged periods of time[;] [f]ood deprivation[;] [a]ny form of beating" and "[m]ock executions[;] [a]bnormal sleep deprivations[;] [c]hemically induced psychosis," U.S. DEP'T OF ARMY, FIELD MANUAL 34-52, INTELLIGENCE INTERROGATION (Sept. 28, 1992) at 1-8, *available at*

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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"). The term "act" should not be read to exclude omissions. *See* Manfred Nowak and Elizabeth McArthur, The United Nations Convention Against Torture - A Commentary (Oxford University Press, 2008) at 68 (drafters would not exclude conduct "which intentionally deprives detainees of food, water and medical treatment from the definition of torture").

https://www.loc.gov/rr/frd/Military_Law/pdf/intel_interrrogation_sept-1992.pdf; and "the use of rape and other forms of sexual violence," Torture Victims Relief Act of 1998, 22 U.S.C. § 2152 (1998) note; *see also Zubeda v. Ashcroft*, 333 F.3d 463, 472 (3rd Cir. 2003) ("[r]ape can constitute torture"); *Prosecutor v. Furundžija*, No. IT-95-17/1-T, (ICTY Trial Chamber Dec. 10, 1998) (finding sexual violence can constitute torture). The International Military Tribunal for the Far East (IMTFE) found that Japanese soldiers had used the following forms of torture: water treatment, burning, electric shocks, the knee spread, suspension, kneeling on sharp instruments and flogging. *United States et al. v. Sadao Araki*, IMTFE 1948, at 49,663, *available at* http://www.worldcourts.com/imtfe/eng/decisions/1948.11.04_IMTFE_Judgment.htm; *see generally* Expert Report of Darius Rejali, Declaration of Peter Nelson, dated January 17, 2017, Ex. A (internationally-recognized expert on government interrogation and torture finding that restraint techniques, positional techniques, exhaustion exercises, electrical shocks, sleep deprivation and close confinement in extreme temperatures have been widely characterized, including by the U.S. government, as torture).

The United Nations Committee Against Torture, which monitors the implementation of the CAT, found that "(1) restraining in very painful conditions, (2) hooding under special conditions, (3) sounding of loud music for prolonged periods, (4) sleep deprivation for prolonged periods, (5) threats, including death threats, (6) violent shaking, and (7) using cold air to chill" constitute torture. *Conclusions and Recommendations of the Committee Against Torture - Israel*, 18th Sess., U.N. Doc. A/52/44 (1997) at ¶ 257; *see also* Committee Against Torture, *Dragan Dimitrijevic vs. Serbia and Montenegro*, U.N. Doc. CAT/33/D/207/2002 (2004), paragraph 5.3 (finding that being handcuffed to a radiator and then a bicycle while in detention, beaten by several police officers, including through kicks, punches and striking with a metal bar constitute

torture); case *Ben Salem vs. Tunisia* (2007), § 16.4; case *Saadia Ali vs. Tunisia* (2008), § 15.4 (finding punching or kicking can constitute torture and/or CIDT). International human rights bodies, including the Committee Against Torture, have found exposure to extreme temperatures[11]; sleep deprivation[12]; threats of mistreatment[13]; and forced nudity[14] can be underlying acts for torture and/or CIDT. Similarly, according to the then-United Nations Special Rapporteur on Torture, Nigel S. Rodley, severe beatings without breaking bones or causing lesions, yet causing intense pain and swelling, have long been considered torture. Nigel S. Rodley, The Treatment of Prisoners Under International Law at 95-96 (2d ed. 1999). *See also* J. Herman Burgers & Hans Danelius, The United Nations Convention Against Torture 117 (1988) ("The most characteristic and easily distinguishable case is that of infliction of physical pain by beating, kicking or similar acts. In many cases, the pain is inflicted with the help of objects such as canes, knives, cigarettes or metal objects which transmit electrical shocks. In order to constitute torture, the act must cause severe pain.").

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[11] *See Tekin vs. Turkey*, App. No. 24563/94, Eur. Ct. H.R. (1998); *Akdeniz vs. Turkey*, App. No. 23954/94, Eur. Ct. H.R (2001); Human Rights Comm., *Polay Campos v. Peru*, Communication No. 577/1994, U.N. Doc. CCPR/C/61/D/577/1994 (Nov. 6, 1997), at § 9.

[12] *Ireland vs. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) at § 167 (1978).

[13] Special Rapporteur for the Commission on Human Rights, Report to the General Assembly on the question of torture and other cruel, inhuman or degrading treatment or punishment (UN Doc. A/56/156) July 3, 2001; Human Rights Comm., *Estrella v. Uruguay* (Communication No. 74/1980) Mar. 29, 1983; *Campbell and Cosans v. the United Kingdom*, Eur. Ct. H.R *(*1982), § 26; *Gafgen v. Germany*, Eur. Ct. H.R (2010): § 91 and 108. Committee against Torture: Summary account of the results of the proceedings concerning the inquiry on Peru, doc. A/56/44, 2001, §186; Concluding Observations on Denmark, doc. A/57/44, 2002, §74(c)–(d); Concluding Observations on Denmark, doc. CAT/C/DNK/CO/5, 2007, § 14; Concluding Observations on Japan, doc. CAT/C/JPN/CO/1, 2007, §18. Human Rights Committee: General Comment No. 20, 1992, §6.

[14] Committee against Torture, Case *Saadia Alia* v. *Tunisia*, U.N. Doc. CCAT/C/41/D/291/2006 (2008) § 15.4; *Valasinas v. Lithuania*, Eur. Ct. H.R, Judgment (2001).

Critically, however, in evaluating claims of torture, U.S. courts have generally declined to parse particular conduct to assess if, in isolation, it would meet the definition of torture; instead, given the cumulative harm that abuse can inflict, courts have appropriately examined the *totality* of treatment to determine if it collectively meets the "severe pain" threshold. Accordingly,courts have found a wide variety of acts in combination to meet the legal definition of torture. *See Abebe-Jira v. Negewo*, 72 F.3d 844, 845 (11th Cir. 1996) (forcing a detainee to undress, binding her arms and legs, whipping her, and threatening her with death); *Al-Saher v. INS*, 268 F.3d 1143, 1147 (9th Cir. 2001) (binding, blindfolding, and severely beating a detainee); *Acree v. Republic of Iraq*, 271 F.Supp.2d 179, 185 (D.D.C. 2003), vacated on other grounds,370 F.3d 41(D.C. Cir. 2004) (severe beatings, mock executions, threatened dismemberment; systematically starved, denied sleep, exposed to freezing cold; denied medical care; shocked with electrical devices; confined in dark, filthy conditions, causing victims to suffer serious physical injuries); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1346 (N.D. Ga. 2002) (beatings that caused severe pain, disfigurement and broken bones, by batons and other instruments, or while a detainee was hanging upside down from a rope, and "long-term psychological harm" that resulted from being forced to play Russian roulette); *Surette v. Islamic Republic of Iran*, 231 F. Supp. 2d 260, 264 (D.D.C. 2002) ("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); *Daliberti v. Republic of Iraq*, 146 F.Supp.2d 19, 25 (D.D.C. 2001) (being held at gunpoint, with threats of injury for not confessing, deprived of medical treatment, and incarcerated in a room with no bed, window, light, electricity, water, toilet or adequate access to sanitary facilities); *Jenco v. Islamic Republic of Iran*, 154 F.Supp.2d 27, 32 (D.D.C. 2001) (deprivation of adequate food, light, toilet facilities

and medical care for 564 days); *Ortiz v. Gramajo*, 886 F. Supp. 162, 169 (D. Mass. 1995) (being tied up by soldiers, beatenwith hands and guns, and over 14 hours, with soldiers taking turns interrogating victim and putting him inside thick plastic bags and holding a knife to his head); *In re Extradition of Suarez-Mason*, 694 F.Supp. 676, 682 (N.D. Cal. 1988) (being kept naked for an extended period during which victim was intermittently gang raped, immersed in frigid water, electrically shocked, andforced to parade naked in front of groups of laughing soldiers; being forced to listen to tape of victim's child crying while being abused).

International criminal tribunals have similarly assessed torture claims by viewing abuses comprehensively. *See, e.g.*, *Prosecutor v. Kvočka et al.*, No. IT-98-30-PT, ¶144. (ICTY Trial Chamber Nov. 2, 2001) ("beating, sexual violence, prolonged denial of sleep, food, hygiene, and medical assistance, as well as threats to torture, rape, or kill relatives. . ." held to constitute torture); *Prosecutor v. Krnojelac*, No. IT-97-25-I, ¶¶5.17- 5.26 (ICTY Indictment, June 17, 1997) (citing eight instances of physical beatings during interrogations charged as torture);. *See also* United Nations Committee Against Torture, *Conclusions and recommendations of the Committee against Torture - United States of America*, CAT/C/USA/CO/2, July 25, 2006, para. 24 (finding acts of "involving sexual humiliation, 'waterboarding', 'short shackling' and using dogs to induce fear, […] constitutes torture or cruel, inhuman or degrading treatment or punishment"); *Aydin v. Turkey*, 57/1996/676/866, European Court of Human Rights, Judgment of Sept. 25, 1997 (finding detention over three days, blindfolded, disorientated "in a constant state of physical pain and mental anguish" caused by beatings and "apprehension of what would happen next," and being "paraded naked in humiliating circumstances" constituted torture); Nigel S. Rodley, The Treatment of Prisoners Under International Law at 92-95 (2d ed. 1999) (collecting cases). Additionally, subjective criteria, such as the victim's age, state of health or

circumstance, in addition to "the objective severity of the harm inflicted," is necessary for determining whether a particular set of conduct constitutes torture. *Prosecutor v. Kvocka et al.*, No. IT-98-30-PT, ¶¶142-43 (ICTY Trial Chamber Nov. 2, 2001) ("[T]he severity of the pain or suffering is a distinguishing characteristic of torture that sets it apart from similar offences."); *see also* Expert Report of Dr. Mohammed H. Fadel, Decl. Peter Nelson, Ex. B (assessing the impact of certain conduct, including forced nudity and sexual assault, in light of Islamic law and teachings).[15]

Torture arises not only from the rendering of severe physical harm but also from severe mental harm. Indeed, the drafters of the Convention Against Torture considered the infliction of severe mental harm sufficiently grave to constitute torture even in the absence of physical harm. CAT, art. 1 (1) ("severe pain or suffering, ***whether*** *physical* ***or mental****"*) (emphasis added); *see also* 18 U.SC. § 2340 (1) ("severe physical or mental pain or suffering"). There is no requirement, therefore, that a torture survivor exhibit physical marks or scars of the harm inflicted. Numerous bodies have observed that some of the most long-lasting and profound forms of cruelty are those inflicted on the psychological level. *See* Rodley, at 97-98 (collecting cases). *See also, .e.g*., *Xuncax*, 886 F. Supp. at 170 (describing suffering of plaintiff who had witnessed the torture or cruel treatment of his father and other individuals and made to believe his mother and siblings had been killed); *Prosecutor v. Kunarac*, Case No. IT-96-23-A, Appeal Judgment, ¶

[15] In one case against Japanese non-commissioned officers tried by an Australian military tribunal, a finding of maltreatment was aggravated by the fact that, after beating the prisoners unconscious, the defendants had cut off their hair and beards. The court noted that the prisoners were "Indians, of the Sikh religion, which forbids them to have their hair or beards removed. . ." *See* Trial of Tanaka Chuichi, 11 LRTWC 62 (Australian Military Court, Rabaul, July 12, 1946), excerpted 60 INTERNATIONAL LAW STUDIES, DOCUMENTS ON PRISONERS OF WAR 450 (Howard S. Levie ed.,1979).

150 (ICTY June 12, 2002) ("sexual violence necessarily gives rise to severe pain or suffering, whether physical or mental, and in this way justifies its characterization as an act of torture").

Accordingly, even as certain acts alleged by Plaintiffs have been found to constitute a stand-alone underlying act of torture, the assessment of Plaintiffs claims of torture will need to be assessed in their totality.[16]

B. Cruel, Inhuman and Degrading Treatment

Cruel, inhuman and degrading treatment ("CIDT") constituted unlawful conduct in violation of well settled international or criminal or law applicable to CACI employees in 2003-2004. *See, e.g.*, Fourth Geneva Convention, arts. 3(1)(a) and 147; 18 U.S.C. § 2441 (2002). The War Crimes Act defines CIDT as "[t]he 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." 18 U.S.C. § 2441(d)(1)(B). CIDT "includes acts which inflict mental or physical suffering, anguish, humiliation, fear and debasement, which do not rise to the level of 'torture' or do not have the same purposes as 'torture.'" *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1348 (N.D. Ga. 2002). "The principal difference between torture and [CIDT] is 'the intensity of the suffering inflicted.'" *Doe v. Nestlé, S.A.*, 748 F. Supp. 2d 1057, 1077 (C.D. Cal. 2010) (quoting Restatement (Third) of Foreign Relations, § 702 n.5), *vacated*, 738 F.3d 1048 (9th Cir. 2013). The "gradations . . . are marked only by the degrees of mistreatment the victim suffers, by the level of malice the offender exhibits and by evidence of

[16] Assessing the overall context in which individual acts occurred and their physical or mental effect of each Plaintiff, it is recalled that Major General George Fay's investigation of the abuses at Abu Ghraib noted that "[t]he use of clothing as an incentive (nudity) is significant in that it likely contributed to an escalating "de-humanization" of the detainees and set the stage for additional and more severe abuses to occur." Maj. Gen. George R. Fay, Investigating Officer, Article 15-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade (U), at 10 (2004).

any aggravating or mitigating considerations that may inform a reasonable application of a distinction." *Al-Quraishi v. Nakhla*, 728 F. Supp. 2d 702, 759 (D. Md. 2010). The Committee Against Torture explained that the assessment of whether conduct constitutes either CIDT or torture must take into account the particular circumstances in which the acts occurred:

> Treatment aimed at humiliating victims may amount to degrading treatment or punishment, even without intensive pain or suffering. It is difficult to assess in abstracto whether this is the case with regard to acts such as the removal of clothes. However, stripping detainees naked, particularly in the presence of women and taking into account cultural sensitivities, can in individual cases cause extreme psychological pressure and can amount to degrading treatment, or even torture. The same holds true for the use of dogs, especially if it is clear that an individual phobia exists. Exposure to extreme temperatures, if prolonged, can conceivably cause severe suffering.
>
> On the interviews conducted with former detainees, the Special Rapporteur concludes that some of the techniques, in particular the use of dogs, exposure to extreme temperatures, sleep deprivation for several consecutive days and prolonged isolation were perceived as causing severe suffering. *He also stresses that the simultaneous use of these techniques is even more likely to amount to torture.*[17]

Like claims of torture, courts determine whether the conduct inflicted on plaintiffs constitute CIDT by assessing their mistreatment comprehensively. *See Jama v. U.S. I.N.S.*, 22 F.

[17] United Nations Commission on Human Rights, *Situation of Detainees at Guantánamo Bay - Report of the Chairperson of the Working Group on Arbitrary Detention, Ms. Leila Zerrougui; the Special Rapporteur on the independence of judges and lawyers, Mr. Leandro Despouy; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Mr. Manfred Nowak; the Special Rapporteur on freedom of religion or belief, Ms. Asma Jahangir and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Mr. Paul Hunt*, E/CN.4/2006/120, Feb. 27, 2006, at paras. 51-52 (emphasis added). *See also* Manfred Nowak, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment: Civil and Political Rights, Including Questions of Torture and Detention*, 62nd Sess., U.N. Doc. E/CN.4/2006/6 (2005), para. 35 (noting that "conditions that give rise to ill-treatment frequently facilitate torture and therefore the measures required to prevent torture must be applied to prevent ill-treatment."). The Special Rapporteur on Torture further indicated that powerlessness on the part of the victim—who is under the complete physical or mental control of another party—can be a factor when determining whether the severity of the alleged abuse rises to the level of torture or CIDT. *Id.* at para. 39. This analysis requires consideration of subjective factors, such as "sex, age and physical and mental health," and "in some cases also religion, which might render a specific person powerless in a given context." *Id.* at 29.

Supp. 2d 353, 358 (D.N.J. 1998) (CIDT where detainees were forced to sleep under bright lights 24 hours a day and live in filth and constant smell of human waste, packed in rooms with twenty to forty detainees, beaten, deprived of privacy, subjected to degrading comments from guards and sexual abuse); *Xuncax v. Gramajo*, 886 F. Supp. 162,187 (D. Mass. 1995) (CIDT where plaintiffs "(1) witness the torture [ ] or severe mistreatment [ ]of an immediate relative; (2) watch soldiers ransack their home and threaten their family [ ](3)[are] bombed from the air [ ]; or (4) have a grenade thrown at them [ ]."); *id*. (citing *The Greek Case*, Y.B. Eur. Conv. on H.R. 186, 461-65 (1969) (describing cases where political detainees were subjected to acts of intimidation, humiliation, threats of reprisal against relatives, presence at torture of another, and interference with family life in violation of Article 3 of the European Convention on the Protection of Human Rights and Fundamental Freedom)); *see also* Report of the International Committee of the Red Cross (ICRC) on the Treatment by the Coalition Forces of Prisoners of War and Other Protected Persons by the Geneva Conventions in Iraq During Arrest, Internment and Interrogation § 3.2 (Feb. 2004) (reporting as "ill-treatment" giving detainees women's underwear to wear); *Araki*, IMTFE 1948, at 49,702 (finding purposeful exposure of prisoners of war to temperature extremes for interrogation purposes to constitute ill-treatment under the 1929 Geneva Conventions). *Compare Doe v. Qi*, 349 F. Supp. 2d 1258, 1325 (N.D. Cal. 2004) (holding that incarceration for one day and being pushed, shoved, hit, and placed in a choke-hold are not severe enough to uphold a claim of CIDT under the ATS); *William v. AES*, 28 F. Supp. 3d 553, 566 (E.D. Va. 2014) (rejecting CIDT claim based on sole allegation that defendants provided "substandard electrical supply").

Prior to the adoption of the Convention Against Torture, the European Court of Human Rights found the following five interrogation techniques, individually or if used in combination

to constitute CIDT: (1) forcing the detainees to remain for periods of some hours in a "stress position," described by those who underwent it as being "spread-eagled against the wall, with their fingers put high above the head against the wall, the legs spread apart and the feet back, causing them to stand on their toes with the weight of the body mainly on the fingers"; (2) putting a black or navy colored bag over the detainees' heads and, at least initially, keeping it there all the times except during interrogation; (3) pending their interrogations, holding the detainees in a room where there was a continuous loud and hissing noise; (4) pending their interrogations, depriving the detainees of sleep; and (5) subjecting the detainees to a reduced diet during their stay at the center and pending interrogations. *Ireland v. United Kingdom*, Judgment, European Court of Human Rights, at para. 96, 167-168 (1978), available at http://www.ena.lu/judgement_european_court_human_rights_ireland_united_kingdom_18_january_1978-020004468.html.[18] The court found these acts constituted CIDT even when no physical injuries resulted from them. *Id*. at 104, 167.

C. War crimes

War crimes constituted unlawful conduct in violation of well settled international or criminal or law applicable to CACI employees in 2003-2004. *See, e.g.*, Fourth Geneva Convention, arts. 3 and 147; 18 U.S.C. § 2441. The War Crimes Act in effect at the time of the allegations in this case, 18 U.S.C. § 2441 (2002), provides that a war crime includes any "grave breach" of the Geneva Conventions (i.e., Fourth Geneva Convention, art. 147, prohibiting torture, inhuman treatment and wilfully causing great suffering or serious injury to body or health) and violations of Common Article 3 to the Geneva Conventions, which include torture,

[18] This 1978 decision has been criticized in more recent years for an overly atomized assessment of the techniques against the torture standard, and the resulting failure to fully assess the net effect of the techniques as torture. *See Selmouni v France*, Judgment, Eur. Ct. H.R, July 28, 1999, paras. 98-106.

cruel treatment, and outrages upon personal dignity, in particular humiliating and degrading treatment.[19] *See In re Xe Servs. Alien Tort Litig.*, 665 F. Supp. 2d at 581 (finding that in "ratifying the Geneva Conventions, Congress has adopted a precise, universally accepted definition of war crimes [and] through enactment of a separate federal statute, Congress has incorporated this precise definition into the federal criminal law. 18 U.S.C. § 2441.") More that 180 nations have agreed with that defintion, as signatories to the 1949 Geneva Conventions. *See also Prosecutor v. Tadić*, Case No. IT-94-1, Jurisdiction Appeal, para. 94 (Oct. 2, 1995) (setting out the elements of war crimes which occur in the time of armed conflict including occupation, namely that the violation of a rule of customary or treaty law must be "serious," in that it constitutes a breach of a rule "protecting important values" and involving "grave consequences" for the victim). Accordingly, torture and CIDT also constitute war crimes cognizable under the ATS.

Respectfully submitted,

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[19] The War Crimes Act was amended and now provides that a war crime is any "grave breach" of the Geneva Conventions (i.e., Fourth Geneva Convention, art. 147) and "grave breach" of Common Article 3 violations which are defined as including torture, CIDT, intentionally causing bodily injury, or sexual assault or abuse, among others. *See* 18 U.S.C. § 2441 (d) (2006).

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CERTIFICATE OF SERVICE

I hereby certify that on January 17, 2017, I electronically filed the Plaintiffs' Memorandum on the Applicable Law Governing Plaintiffs' Claims of Torture, War Crimes and Cruel, Inhuman and Degrading Treatment through the CM/ECF system, which sends notification to counsel for Defendant.

/s/ John Kenneth Zwerling

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