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

SUHAIL NAJIM ABDULLAH AL SHIMARI *et al*.,	)	
Plaintiffs,	)	
v.	)	C.A. No. 08-cv-0827 GBL-JFA
CACI INTERNATIONAL, INC., *et. al*.,	)	
Defendants	)	

PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION SEEKING REINSTATEMENT OF THE ALIEN TORT STATUTE CLAIMS

CACI cannot deny that this Court possesses ample discretion under Fed. R. Civ. P. 54(b) to reconsider its order dismissing Plaintiffs' Alien Tort Statute ("ATS") claims on jurisdictional grounds, or that this would be an appropriate procedural juncture to do so. Nor can CACI point to any prejudice that it would suffer should the Court reinstate Plaintiffs' ATS claims relating to war crimes, torture and cruel, inhuman and degrading treatment brought against CACI – a reinstatement that would align this Court's ATS jurisprudence with that of two sister courts in this Circuit and numerous other courts of appeal. The equities run significantly in favor of reconsideration. Discovery has not yet commenced. Yet, should the parties undertake months of discovery on the remaining non-ATS claims, and should the Supreme Court's ruling this term in *Kiobel* ultimately vindicate Plaintiffs' position on the enforceability of these ATS claims against private entities such as CACI, the parties would have to repeat discovery, wasting time and resources.

This Court should reinstate Plaintiffs' ATS claims. After this Court's 2009 decision, a judicial consensus emerged, holding that a proper analysis under *Sosa* recognizes that the universal, specific international law norms prohibiting war crimes, torture and cruel, inhuman and degrading treatment can be enforced against a corporate entity such as CACI. CACI fails to overcome the weight of this authority, especially the District Court's (J. Messitte) thorough analysis in *Al-Quraishi v. Nakhla*, 728 F. Supp. 2d 702 (D. Md. 2010), a case involving identical claims. There, the District Court notes that the universal and obligatory norms against torture and cruel, inhuman and degrading treatment are enforceable against non-state actors such as CACI. In trying to defeat the emerging consensus, CACI manufactures an entirely new "second step" in the *Sosa* analysis that has no basis in law, precedent or logic. Critically, however, CACI *nowhere* contests that Plaintiffs' allegations of CACI's *war crimes* are sufficiently specific, universal and obligatory to apply to entities such as CACI for this conduct. This critical concession demonstrates that, at a minimum, the Court should reinstate Plaintiffs' ATS claims relating to war crimes (which themselves incorporate prohibitions on torture). It also easily disposes of CACI's tiresome attempt to recast – without a shred of authority in ATS jurisprudence – its preemption and political question defenses as doctrinal objections to ATS liability. These defenses – grounded as they are in inapposite federalism and separation of powers doctrines – provide no safe haven from the statutory grant of ATS jurisdiction to punish CACI's egregious conduct.

I. RECONSIDERATION OF THE DISMISSAL OF PLAINTIFFS' ATS CLAIMS IS WARRANTED.

The Court has plenary power to reconsider an interlocutory order (such as its dismissal of the ATS claims), "as justice requires," *Fayetteville Investors v. Commercial Builders,* 936 F.2d 1462, 1473 (4th Cir. 1991), and is not constrained by the "heightened standards" applicable to

motions to reconsider final orders. *Am. Canoe Ass'n. v. Murphy Farms, Inc.*, 326 F.3d 505, 514–15 (4th Cir. 2003). Reconsideration of orders relating to the court's subject matter jurisdiction is particularly appropriate, as the judiciary prizes correctness in this area above "some of the procedural bars in place to protect the values of finality and judicial economy." *Mercury Mall Assocs. v. Nick's Mkt.*, 368 F. Supp. 2d 513, 517 (E.D. Va. 2005).

CACI does not contest these propositions. Rather, it cites to two cases that merely underscore the ways in which parties cannot be permitted to *abuse* Fed. R. Civ. P. 54(b), by attempting to present evidence it could well have presented in the initial proceeding and thus impermissibly seeking a "second bite at the apple." In *Brainware, Inc. v. Scan-Optics, Ltd.*, No. 3:11-cv-755, 2012 U.S. Dist. LEXIS 116009, at *8 (E.D. Va. Aug. 16, 2012) (cited at Defs. Br. 5), the defendants sought "an opportunity to re-argue their motion using information which was known to the defendants at the time they submitted their briefs on the privilege issue but which was not presented to the Court." *Id*. The court admonished the defendants for purposefully being "obfuscatory" by "choos[ing] to build a record that was legally insufficient to support the burden that the law imposes upon them" and then later requesting that the Court reconsider its ruling against them based on evidence available to them at the outset. *Id*. at *14. In *United States v. Smithfield Foods, Inc.*, the defendants sought reconsideration "by presenting new evidence on factual issues that were not dispositive, and by rearguing the facts and law originally argued in the parties' briefs and at [a] hearing." 969 F. Supp. 975, 978 (E.D. Va. 1997).

By contrast, Plaintiffs are not attempting to introduce facts or arguments available prior to the Court's decision, nor are they merely seeking simply to disagree with the Court's prior ruling (though, naturally, Plaintiffs respectfully do believe the decision was incorrect). Rather, Plaintiffs are suggesting that the Court revisit its analysis in light of the substantial ATS jurisprudence that

has developed since the Court's 2009 ruling and the Supreme Court's pending decision in *Kiobel v. Royal Dutch Petroleum Co.*, 132 S. Ct. 472 (2011), on the issue of whether corporations may be held liable for torture and other war crimes. Pl. Mem. 5, 6-7, Dkt No. 145. It is appropriate for courts to grant motions for reconsideration when a party raises relevant case law not available at the time of the court's original order. *See, e.g., Smithfield*, 969 F. Supp. at 977 (listing a "significant change in the law" as a basis for granting a motion for reconsideration).

As described in Plaintiffs' Memorandum, two district courts in this Circuit and a number of courts of appeal have come to a different conclusion than this Court on the question of the enforceability of ATS claims for war crimes, torture and cruel, inhuman and degrading treatment against private entities such as CACI. *See In re Xe Servs. Alien Tort Litig.*, 665 F. Supp. 2d 569 (E.D. Va. 2009) (war crimes and summary executions qualify as the norms under the *Sosa* test and enforceable against non-state, corporate entities); *Al-Quraishi v. Nakhla*, 728 F. Supp. 2d 702, 742-56 (D. Md. 2010) (norms of war crimes, torture, and cruel, inhuman and degrading treatment cognizable under ATS and enforceable against private military contractor on facts similar to this case). *See also Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 764-66 (9th Cir. 2011); *Doe v. Exxon*, 654 F.2d 11, 41-47 (D.C. Cir. 2011); *Flomo v. Firestone Natural Rubber Co, LLC*, 643 F.3d 1013, 1019 (7th Cir. 2011) (Posner, J.).[1] In addition, the Supreme Court has granted *certiorari* to review the decision of the Second Circuit in *Kiobel v. Royal Dutch Petroleum Corp.*, 621 F.3d 111 (2010), which held, contrary to three other Circuits, that the ATS cannot be used to vindicate violations of

[1] In light of this authority, CACI's claim that, "the state of the law has, if anything, became less favorable for Plaintiffs' ATS claims" since the Court's 2009 decision is simply bizarre. (Defs. Br. 5-6). CACI makes this assertion apparently by ignoring on one side of the ledger, the actual ATS cases just cited, while counting up on the other side, a smattering of cases that rule in favor of defendants on the basis of doctrines unrelated to the ATS such as *Bivens* special factors and qualified immunity.

international law norms committed by corporate entities. *See* 132 S. Ct. 472 (2011).[2] This emerging consensus would be reason enough to reconsider this Court's 2009 decision dismissing Plaintiffs' ATS claims. *Mercury Mall*, 368 F. Supp. at 515, 518; *Am. Canoe*, 326 F.3d at 314.

In addition, a number of equities strongly favor Plaintiffs' position that reconsideration is warranted. First, Defendants have not identified any prejudice – practical, financial or otherwise – that would ensue from reinstating Plaintiffs' ATS claims. Second, the Supreme Court's pending decision in *Kiobel* – which will resolve the question of whether ATS norms are enforceable against corporate entities such as CACI – counsels strongly in favor of reinstatement of Plaintiffs' claims. Significantly, no discovery has yet occurred in this case. Thus, on the one hand, if the Supreme Court ultimately vindicates much of Plaintiffs' position and concludes (sometime in calendar year 2013), that private entities such as CACI can be liable for ATS violations, Plaintiffs would have lost an opportunity in the coming months to conduct discovery on their ATS claims. If Plaintiffs' claims were to be reinstated post-*Kiobel*, the parties would have to redo much of the ATS discovery that could be done in any event. Yet, on the other hand, if the ATS claims are reinstated now, and the Supreme Court agrees with this Court's decision and CACI's position, CACI at that time can easily move to dismiss Plaintiffs' ATS claims. In other words, in light of the developing weight of authority in Plaintiffs' favor, and the absence of prejudice to CACI from reinstatement, it would be a more prudent use of judicial and litigant resources to reinstate the ATS claims now (without prejudice to dismissal post-*Kiobel* if necessary), rather than wait to do so in the future should the Supreme Court rule in Plaintiffs' favor in *Kiobel*.

Third, CACI has recently indicated its intention to dismiss three Plaintiffs from this case on

[2] The United States government, as amici curiae, effectively disagrees with the Court's conclusion that Plaintiffs' claims are too novel to apply to government contractors to satisfy *Sosa*. *See* Br. of Amicus Curiae United States at 16, 21, *Kiobel*, 132 S.Ct. 472 (2011).

statute-of-limitations grounds. *See* CACI Status Report 17-19, Dkt No. 143. Plaintiffs' strongly disagree that their claims are barred due to the statute of limitations and will contest any such defense motion when it is filed. But this prospect, yet again, counsels in favor of reinstatement, at least pending the Supreme Court's decision in *Kiobel*. The statute of limitations period for ATS claims is, at a minimum, ten years and would foreclose dismissal of Plaintiffs on that ground. *See, e.g., Jean v. Dorelien*, 431 F.3d 776 (11th Cir. 2005) (borrowing 10-year statute of limitations from the TVPA and applying equitable tolling principles); *Lizarbe v. Reardon*, 642 F. Supp. 2d 473, 480 (D. Md. 2009) (same). Currently – *i.e.*, absent ATS claims – a CACI win on its motion on statute of limitations would dismiss three plaintiffs entirely from the case. Such dismissal would be unnecessary and premature in light of the possibility that the Supreme Court could later rule that Plaintiffs' ATS claims should not have been dismissed in the first place. In order to avoid this manifestly unjust contingency, the Court should reinstate the ATS claims, without prejudice to later dismissal should *Kiobel* ultimately support CACI's position on ATS.

Finally, Defendants have indicated every intention to appeal this Court's rejection of CACI's preemption defenses, on interlocutory grounds under 28 U.S.C. § 1291. Contrary to CACI's position and the D.C. Circuit's curious and incorrect majority opinion in *Saleh v. Titan*, 580 F.d 1 (D.C. Cir. 2009), that a *federal statutory claim – i.e.*, the ATS – could somehow be preempted by the judge-made common law doctrine of "battlefield preemption," ATS claims would not be subject to Defendants' preemption defenses and thus could not be subject to an interlocutory appeal on preemption grounds. Accordingly, the interest of reaching a final judgment on all of the claims prior to potential review on appeal, also counsel in favor of reinstating the ATS claims.

II. PLAINTIFFS ARE NOT ASSERTING NOVEL NEW TORTS BUT RATHER VIOLATIONS OF SPECIFIC, UNIVERSAL AND OBLIGATORY INTERNATIONAL NORMS.

This Court declined to exercise jurisdiction over Plaintiff's ATS claims for war crimes, torture and cruel, inhuman and degrading treatment because it found such claims as against "government contractor interrogators are too modern and too recent" to satisfy the admittedly high threshold under the *Sosa* framework for "recognizing new torts." *Al Shimari v. Dugan*, 657 F.Supp.2d 700, 705, 727-38 (E.D. Va. 2009). As respectfully submitted in Plaintiffs' Memorandum, the Court's analysis – which was undertaken before a number of other courts examined a similar question – appears to collapse two distinct inquiries into one. Thus, as a number of courts have since done, in applying the *Sosa* framework to claims similar or identical to the ones Plaintiffs assert, the Court should first assess whether the *norms* at issue – war crimes, torture, and cruel, inhuman and degrading treatment – are sufficiently universal and obligatory under international law to justify recognizing a cause of action under the ATS. *Xe Services*, 665 F. Supp. 2d at 582-87 (war crimes); *Al-Quraishi v. Nakhla*, 728 F. Supp. 2d at 742-56 (war crimes, torture, cruel, inhuman and degrading treatment); *Sarei, PLC*, 671 F.3d at 764-66 (recognizing war crimes but not systematic racial discrimination).

As the District Court (J. Ellis) explained, *Sosa* permits recognition of a cause of action for violations of the "law of nations" if such norms "(i) are universally recognized, (ii) have specific definition and content, and (iii) are binding and enforceable, rather than merely aspirational." *Xe Services*, 665 F. Supp. 2d at 582. Critically, CACI does not contest the proposition that the tort of war crimes is cognizable under the *Sosa* framework and enforceable against private entities. *See* Section (A)(1).

In applying *Sosa* framework, as this Court stressed and Plaintiffs readily concede, this

Court must be very mindful of certain prudential considerations before recognizing *new* causes of action – hesitations that stem from the limited role of federal courts, vis-à-vis Congress, to create causes of action and the potential practical or foreign policy consequences of recognizing new claims grounded in international law. *See Al Shimari*, 657 F. Supp. 2d at 726-27 (citing *Sosa*, 542 U.S. at 725, 728 and listing five of considerations counseling caution); *Xe Services*, 665 F. Supp.2d at 577, 582; *Al-Quraishi*, 728 F.Supp.2d at 742. These prudential considerations, however, do not impose an independent, "second step" into the *Sosa* analysis as Defendants baldly assert, albeit without citation to any authority. Rather, the high bar *Sosa* sets to recognizing new torts itself incorporates these considerations; it is *because* the Supreme Court in *Sosa* was concerned with the limited role of federal courts that it demands that an alleged international law norms resemble the historical paradigms (*e.g.*, piracy) that existed when the ATS was enacted and that such norms be universal, definite and obligatory.[3] *Sosa* does not require Courts to ask the same question in two escalating steps, as CACI suggests. *See Xe Services*, 665 F. Supp. 2d at 577, 582; *Al-Quraishi*, 728 F. Supp. 2d at 742-43. Indeed, these considerations have almost no relevance where numerous courts have *already* recognized that war crimes and torture (and to a lesser extent, cruel, inhuman and degrading treatment) are cognizable under the ATS – and thus do not draw courts into the problems of recognizing "new" torts.[4]

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[3] Critically, while the Court paid heed to the arguments for judicial caution in recognizing new torts, the Court explicitly rejected the notion (proposed by Justice Scalia) that such "cautions" preclude federal courts from recognizing any international norms as judicially enforceable today beyond the small category recognized in 1789. *Sosa*, 542 U.S. at 729.

[4] Thus, in *Sosa* the Court considered whether Plaintiff's claim that Mexican nationals abducted him from Mexico for trial in the U.S., violated an international norm against arbitrary arrest and detention. The Court consulted a variety of authoritative international law sources, and ultimately concluded that, while various international law treaties condemned arbitrary detention and arrest as contrary to human rights, they stated the principles did not reveal a consensus among nations about what conduct would constitute an enforceable rule against arbitrary arrest and detention. *Sosa*, 542

Contrary to Defendants' attempt to simplify Plaintiffs' position (Defs. Br. 7-8), Plaintiffs do *not* contend that factual allegations are categorically irrelevant to assessing the viability of a cause of action under the ATS. Facts can shape the contours of a claim. This is why, in *Xe Services*, the District Court (J. Ellis) recognized that war crimes are international law norms cognizable under the ATS (and enforceable against a private military contractor) as a matter of law, but dismissed the plaintiffs' complaint under *Iqbal*, with leave to re-plead more detailed facts under *Iqbal*. *See also Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252 (11th Cir. 2009) (war crimes are cognizable under ATS, but do not apply in the context of a civil war skirmish). What Plaintiffs stressed in their brief, and what Defendants take out of context, is this central point: the mere fact that defendants are government contractors operating in a detention setting does not destroy otherwise cognizable causes of action enforceable against such entities. Indeed, CACI itself does not make this point.

Thus, the two questions the Court should answer are (1) whether the claims alleged by Plaintiffs for war crimes, torture and cruel, inhuman and degrading treatment are sufficiently universal, definite and obligatory to support an ATS cause of action and (2) whether such claims are enforceable against non-state actors or corporate entities such as CACI. As the emerging legal consensus demonstrates, the answer to both of these questions is, "yes."

U.S. at 736-38 & n. 27. Similarly, in *Flores v. S. Peru Copper Corp*., 343 F.3d 140, 160 (2d Cir. 2003), the court examined a range of international law sources to conclude that asserted "right to life" and "right to health" were not sufficiently definite to support a cause of action under the ATS. *Compare Abdullahi v. Pfizer, Inc*., 562 F.3d 163 (2d Cir. 2009) (examining range of international law sources and finding binding customary international law norm supporting ATS claim for involuntary medical experimentation).

A. Defendants Concede That War Crimes Norms Are Applicable And Enforceable Against Non-State Actors Such As CACI.

Remarkably, CACI nowhere disputes applicability of Plaintiffs' *war crimes* claims against CACI, under the *Sosa* standard. Nor could it. It is beyond question that, since Nuremberg, war crimes (which include torture and cruel or inhuman treatment) are considered universal, definite and obligatory international law norms – that apply to state and non-state actors alike.

The Geneva Conventions – which have been ratified by nearly every country in the world, including the United States and Iraq, prohibit war crimes, and the Fourth Geneva Convention specifically covers and protects civilians in war zones and occupied territories. *See* Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516. "Grave breaches" of the Conventions, which constitute war crimes, include "torture and inhumane treatment" and willfully causing great suffering or serious injury to body or health" of a civilian during the course of armed conflict G.C. IV, art. 147. "That this Convention, which represents the international consensus on war crimes, makes no distinctions between state actors and private actors suggests that in fact there is no distinction, and that private actors as well as public ones are liable for war crimes." *Al-Quraishi*, 728 F. Supp. 2d at 744-45. Similarly, Congress has criminalized war crimes, without regard to the status of the perpetrator, and defined war crimes as "grave breaches" of the Geneva Conventions. *See* War Crimes Act of 1996, 18 U.S.C. § 2441. Thus, Congress has explicitly determined that the Geneva Conventions constitute binding international law norms enforceable in federal courts, and has criminalized torture and cruel, inhuman and degrading treatment as underlying war crimes. *See* 18 U.S.C. § 2441 (d)(1)(A) and (B). All Circuit courts that have considered the question, conclude that war crimes are sufficiently universal and obligatory to satisfy the *Sosa* standard, and that war crimes are

enforceable against non-state actors such as CACI. *See Sinaltrainal*, 578 F.3d at 1266-67; *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1202 (9th Cir. 2007); *Kadić v. Karadžić*, 70 F.3d 232, 240 (2d Cir. 1995).[5] In this Circuit, District Courts (J. Ellis and J. Messitte) each held that the norm of war crimes is cognizable under the ATS and enforceable against private military contractors. *See Xe Services*, 665 F.Supp.2d at 582-87; *Al-Quraishi*, 728 F. Supp. 2d at 744-47.

War crimes by definition occur in the context of armed conflict. This self-evident proposition easily disposes of CACI's argument that the preemption of state law claims under the "combatant activities" provision of the FTCA or under the doctrine of "battlefield preemption" (arguments that in any event have no bearing on consideration of federal ATS claims) should immunize CACI from liability for its asserted "battlefield" activities.[6] Likewise, because Congress made the policy decision to criminalize "grave breaches" of the Geneva Conventions committed by private entities, CACI's otherwise highly attenuated argument that this Court should stay its hand in deference to Congress' prerogative, Defs. Br. 15 (citing *Lebron v. Rumsfeld*, 670 F.3d 540) (4th Cir. 2012), implodes on itself.[7]

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[5] *Kadić* recognized that "The liability of private individuals for committing war crimes has been recognized since World War I and was confirmed at Nuremberg after World War II, and remains today an important aspect of international law." *Id*. at 239. *Kadić* was decided pre-*Sosa*, but deployed the Second Circuit's flagship analysis in *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980), which was expressly endorsed by the Supreme Court in *Sosa*. *See Abdullahi v. Pfizer, Inc*., 562 F.3d 163, 175-187 (2d Cir. 2009) (concluding that *Kadić*'s analysis is consonant with standards set forth in *Sosa). See also Sosa*, 542 U.S. at 762 (Breyer, J., concurring in part and concurring in the judgment) (war crimes is example of "universally condemned behavior" for which "universal jurisdiction exists to prosecute").

[6] Plaintiffs, of course, have long contested that challenge that the violations occurred on the "battlefield" and that the corporate contractors were engaged in "combatant activities." As civilians in a country engaged in an armed conflict and subject to military occupation , they were entitled to protections of the Geneva Conventions.

[7] Indeed, the Defense Department requires contractors to notify their employees that they are subject to prosecution under the War Crimes Act. *See* 48 C.F.R. §§ 252.225-7040 (e)(2)(ii).

B. Torture And Cruel, Inhuman And Degrading Treatment Satisfy The *Sosa* Standard.

CACI does not dispute that torture or cruel, inhuman and degrading treatment are sufficiently universal and obligatory to meet the *Sosa* standard. Instead, it argues that, unlike war crimes, which unambiguously apply to any and all private actors, such claims require either some measure of state action or that the defendant acted under color of law. *See Kadić*, 70 F.3d at 243; *Aldana v. Del Monte Fresh Produce, N.A.*, 416 F.3d 1242, 1247 (11th Cir. 2005). While this Court did not dismiss Plaintiffs' torture or cruel, inhuman and degrading treatment claims on this basis, CACI is correct that ATS liability typically requires a showing that the private actors acted under color of law. (Defendants are not correct that actual state action is required).

The *Al-Quraishi* District Court (J. Messitte) dealt thoroughly with this very objection and concluded that, at the motion to dismiss stage, the Iraqi plaintiffs in that case sufficiently plead that the private military contractors were operating under color of law. *Al-Quraishi*, 728 F. Supp. 2d at 748-53.[8] The District Court (J. Messitte) looked to the Fourth Circuit's law under 42 U.S.C. §1983, for standards governing when private parties are acting under color of law. First, the Court concluded that private entities that undertake a putatively "public function" – *i.e.*, undertaking a function "that has been traditionally and exclusively reserved to the sovereign" – act under "color of law." *Id.* at 749 (citing *Mentavlos v. Anderson*, 249 F.3d 301, 313 (4th Cir. 2001) and quoting

[8] CACI largely ignores Judge Messitte's persuasive decision, except to criticize it in a footnote for ignoring legal standards that CACI has itself invented. Defs. Br. 18 n. 6. First, as previously mentioned, there is no independent "second step" of *Sosa* in the manner CACI describes; rather, the prudential considerations cautioning against the creation of *new* ATS claims are themselves incorporated into the high standards *Sosa* sets for recognizing "universal, definite and obligatory" international law norms in the ATS. Second, Judge Messitte in fact readily acknowledged these important prudential considerations and thus did not, as CACI suggests, fail to acknowledge them. 728 F. Supp. 2d at 742. Finally, as explained later, CACI's attempted invocation of limitations on recognition of new causes of action under *Bivens* is doctrinally and logically irrelevant to analysis of claims under the ATS.

Andrews v. Fed. Home Loan Bank of Atlanta, 998 F.2d 214, 219 (4th Cir. 1993)). The District Court concluded that the allegations against the private contractor, that it "operated alongside the military, carrying out a military task which likely would have been performed by the military itself under other circumstances." *Id*. at 750. Under this analysis, CACI's role in conducting interpretation and interrogation services in U.S.-run prisons must also be construed as a public function. In addition, Plaintiffs here allege that CACI employees conspired with U.S. military personnel in carrying out acts of torture and cruel, inhuman and degrading treatment. *See* Am. Compl. ¶¶ 66-67, 72. Such willful "joint action" is sufficient to state a claim that a private entity was acting "under the color of law." *Al-Quraishi*, 728 F. Supp. 2d at 750-51 (applying *Dennis v. Sparks*, 449 U.S. 24 (1980). As such, CACI's alleged torture, and cruel, inhuman and degrading treatment was undertaken "under color of law," and thus is cognizable as a universal, definite and obligatory international law norm under the ATS.

Plaintiffs do not claim that CACI is a "state actor." Defs. Br. 10. It also surely does not follow from a conclusion that CACI was acting "under the color of law," that CACI would be "entitled to immunity." (Def. Br. 10 n.2). As the District Court (J. Messitte) explained, *Al-Quraishi*, 728 F. Supp. 2d at 752-53, the law has long recognized a firm distinction between genuinely official and authorized actions and those unauthorized actions undertaken by private individuals "under the color of law"; while state officials acting with lawful authority may be entitled to sovereign immunity, private individuals acting unlawfully but under the color of law are not. *See, e.g., Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982); *Wiwa v. Royal Dutch Petroleum*, 226 F.3d 88 (2d Cir. 2000). Indeed, the very foundational ATS case, *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980) recognized that the individual defendant – a Paraguayan police chief – can be acting under color of law for purposes of attaching ATS liability for torture, without

being entitled to the privilege of immunity:

> We doubt whether an action by a state official in violation of the Constitution and laws of the Republic of Paraguay, and wholly ungratified by that nation's government, could properly be characterized as an act of state. Paraguay's renunciation of torture as a legitimate instrument of state policy, however, does not strip the tort of its character as an international law violation if it in fact occurred under color of government authority.

630 2d at 889-90.

C. CACI's Corporate Status Does Not Exempt It From Liability Under The ATS.

While CACI recognizes that this question is before the Supreme Court in *Kiobel*, it does not argue that properly cognizable ATS norms cannot be enforced against corporate entities. As Plaintiffs explained in their opening brief, the question of (a) the source and universality of the norm is distinct from the question of (b) against whom the norm can be enforced. *See* Pl. Mem. 16-18. As previously explained, two courts in this Circuit, and several courts of appeal, recognize this distinction and conclude that corporations are not exempt from enforcement of otherwise cognizable ATS norms. *See infra* at 4 (citing cases). Indeed, as the D.C. Circuit recently observed:

> Given that the law of every jurisdiction in the United States and of every civilized nation, and the law of numerous international treaties, provide that corporations are responsible for their torts, it would create a bizarre anomaly to immunize corporations from liability for the conduct of their agents in lawsuits brought for "shockingly egregious violations of universally recognized principles of international law."

Exxon, 654 F.3d at 57 (quoting *Zapata v. Quinn*, 707 F.2d 691 (2d Cir. 1983).

III. PRINCIPLES GOVERNING *BIVENS*, QUALIFIED IMMUNITY, OR THE TORTURE VICTIM PROTECTION ACT DO NOT APPLY TO PLAINTIFFS' ATS CLAIMS.

CACI attempts to bootstrap principles underlying some of its preemption and immunity defenses to its arguments opposing Plaintiffs' motion for reconsideration. Each one is doctrinally

and analytically irrelevant to the question of whether federal courts can enforce universal and obligatory international law norms against war crimes and torture against entities such as CACI.

Bivens Special Factors. CACI places great weight on the Fourth Circuit's decision in *Lebron v. Rumsfeld*, 670 F.3d 540 (4th Cir. 2012), which declined to authorize a *Bivens* remedy, against the Secretary of Defense for his alleged role in authorizing the torture of Jose Padilla. CACI suggests that, even in the ATS context, *Lebron* mandates that this Court should decline to recognize a cause of action against private contractors for torture or, that a *Bivens* "special factors" analysis should, for the first time ever, be incorporated into the ATS realm. Defs. Br. 14-16. This proposition – unsupported by any case law – is fundamentally mistaken. First, *Bivens* claims are distinct because they lack any statutory basis and are authorized exclusively by implied federal judicial power; as such, the Supreme Court has counseled hesitation in assuming the traditional prerogatives of Congress in authorizing causes of action. By obvious contrast, the Congress enacted the ATS expressly to authorize "the district courts [to] recognize private causes of action for certain torts in violation of the law of nations." *Sosa*, 542 U.S. at 274. *See also Exxon*, 654 F.3d at 55 (rejecting applicability of *Bivens* special factors analysis to judicial role in interpreting the ATS). Second, Congress has consistently reaffirmed, as a policy matter, that war crimes, 18 U.S.C. §2441 and torture, 18 U.S.C. § 2340, are illegal, demonstrating that enforcing these norms via the ATS against CACI would be consonant with congressional policy, not contrary to it.[9]

[9] In addition, as the Fourth Circuit repeatedly emphasized, *Lebron* challenged discretionary judgments and policies made by "high-level civilian policy makers [and] military officers who implemented their orders." 670 F.3d at 543; *id*. at 552 ("Padilla disagrees with policies allegedly formulated"). The Court was reluctant to use a damages action to second-guess those high-level, discretionary policy determinations. As Plaintiffs have repeated stressed, and this Court has agreed, they do not challenge any discretionary policies or judgments of the Executive branch.

Qualified Immunity. CACI also suggests that it would be somehow unfair for the Court to reconsider its 2009 decision on the grounds that there have been subsequent legal developments. Defs. Br. 20. In so doing, CACI appears to make an appeal to principles underlying qualified immunity, a doctrine that recognizes that individuals should not be held liable for past conduct unless the alleged wrong was "clearly established" at the time it was committed; the doctrine seeks to give government officials latitude to make discretionary decisions that the law had not recognized as illegal at the time. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). From this premise, CACI argues that they should not be held to answer for asserted war crimes and torture based on the emerging legal consensus Plaintiffs have identified.

CACI is confused. Courts that have recognized liability for war crimes and torture since this Court's 2009 ruling have not established new norms of conduct that CACI could not previously have known. The very reason that war crimes, torture and cruel, inhuman and degrading treatment are cognizable under the ATS is that such norms have reached universal – and uncontested – status. The prohibition against such conduct was explicitly codified in the four Geneva Conventions of 1949, criminalized in the War Crimes Act of 1996, and has long been prohibited under U.S. military law and policies. Unlike a government official acting in an area of legal uncertainty, CACI cannot plausibly assert it was unaware of these historic international law prohibitions at the time it engaged in egregious acts atAbu Ghraib.

Torture Victim Protection Act. Defendants misconstrue the intent of Congress in enacting the Torture Victim Protection Act of 1991 ("TVPA"), 28 U.S.C. § 1350. Defs. Opp. 14-15. Congress did not intend to occupy the field regarding remedies for torture when it adopted the TVPA, but rather sought to "supplement" the tort remedies provided by the *Filàrtiga* line of cases under the ATS, and extend such remedies to U.S. citizens by providing them an explicit

cause of action for torture and extra-judicial killing. *Sosa*, 542 U.S. at 731. *See also* S. Rep. No. 102-249, at 4 (1991 ("[s]ection 1350 has other important uses and should not be replaced"). *See* H.R. Rep. No. 102-367(I), at 4 (1991). Notably, at no time, including during the careful deliberations around adoption of the TVPA, has Congress sought to amend the ATS to limit its scope or reach. Indeed, while the United States recently took the position that Congress intended to limit the reach of the TVPA to natural persons by using the word "individuals," it rejected any argument that the ATS was likewise limited, instead voicing its support for the application of the ATS to corporations. *Compare Mohamad v. Palestinian Auth.*, 11-88, Br. of Amicus Curiae United States, *with Kiobel v. Royal Dutch Petroleum*, 10-1491, Br. of Amicus Curiae United States. Nothing in this Court's recent decision in *Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702 (2012), suggests that the TVPA limits the scope of ATS jurisdiction in any way.

IV. PLAINTIFFS SUFFICIENTLY PLEAD CONSPIRACY AND AIDING AND ABETTING LIABILITY UNDER THE ATS.

CACI makes a number of significantly mistaken arguments regarding the applicability of accessory liability for violations of the law of nations under the ATS. At the onset, this Court has already found that the Plaintiffs sufficiently plead facts to support a conspiratorial liability claim. *See* Dkt. No. 94 at 65.

First, CACI confuses conspiracy as a theory of accessory liability (alleged by Plaintiffs here) with the inchoate substantive crime of conspiracy (not alleged by Plaintiffs). Only the latter is limited to the crimes of genocide and aggression. *Hamdan v. Rumsfeld*, 548 U.S. 557, 610 (2006) (discussing conspiracy only as a stand-alone offense under international law) (cited at Defs. Br. 22); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 453 F. Supp. 2d 633, 662-65 (S.D.N.Y. 2006) (stating "conspiracy as a criterion of complicity for the commission of substantive

crimes" is "accepted in international law") (cited at Defs. Br. 22). Indeed, a long line of cases has recognized conspiracy liability for violations under ATS for substantive law violations beyond genocide and aggression. *See, e.g., Sinaltrainal*, 578 F.3d at 1267-69; *Hilao v. Estate of Marcos*, 103 F.3d 767, 776 (9th Cir. 1996); *Carmichael v. United Techn. Corp.*, 835 F.2d 109, 115 (5th Cir. 1988); *In re Terrorist Attacks on September 11, 2001*, 392 F. Supp. 2d 539, 565 (S.D.N.Y. 2005); *Doe v. Unocal Corp.*, 963 F. Supp. 880, 896 (C.D. Cal. 1997).[10]

The Plaintiffs' Amended Complaint sufficiently alleges CACI's conspiratorial role in the war crimes, torture, and cruel, inhuman and degrading treatment of Plaintiffs: CACI's employees directly participated in the torture of the detainees, by instigating, directing, and participating in it, *see* Am. Compl. ¶¶ 66-67, and CACI conveyed its intent to conspire with co-conspirators to torture detainees and ratified its employees' participation in the torture, *see* Am. Compl. ¶ 72.

Second, CACI attempts to import agency principles employed in specific anti-discrimination statutes into the ATS realm, through its reliance on *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 287 (4th Cir. 2004) (cited at Defs. Br. 22-23). Even if Hill's statute-specific agency principles were to apply to ATS claims,[11] it could provide a basis to

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[10] Liability pursuant to a joint criminal enterprise ("JCE") theory under international law does not require, as CACI erroneously suggests, a defendant's personal participation *in the conduct itself*. JCE liability may attach to defendants participating *in a common design* to pursue a course of conduct where one of the perpetrators commits an act that, while outside the common design, was nevertheless a natural and foreseeable consequence of that common purpose. *See Lizarbe*, 642 F. Supp. 2d at 490. This is affirmed by the Second Circuit precedent on which CACI relies. *See See Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 260 (2d Cir. 2009) ("an essential element of a joint criminal enterprise is a criminal intention to participate in a common criminal design" (internal quotations omitted)) (cited at Defs. Br. 22-23 n.8).

[11] In *Hill*, the Court expressly clarified that, under the specific discrimination statutes implicated in the case, Congress "evinced an intent to place some limits on the acts of employees for which employers…are to be held responsible." 354 F.3d at 287 (internal quotations omitted). The Court held that, *under those statutes*, employers are liable only "for the acts of its employees holding supervisory or other actual power to make tangible employment decisions." *Id*. The rule

dismiss Plaintiffs' conspiracy claims. Prior to any discovery, it is reasonable that the Plaintiffs cannot identify the formal decision-maker at CACI who authorized or ratified the acts that constitute war crimes, torture, and cruel, inhuman and degrading punishment. Similarly, whether or not that decision-maker then had the authority to bind CACI could only be revealed through discovery.

Third, the Plaintiffs have adequately pled CACI's aiding and abetting liability. While the Fourth Circuit looked to international law in *Aziz v. Alcolac, Inc.*, 658 F.3d 388 (4th Cir. 2011), the ATS's grant of jurisdiction was "enacted on the understanding that the common law would provide a cause of action" for certain torts (*i.e.*, those "in violation of the law of nations"). *Sosa*, 542 U.S. at 724. Accordingly, courts look to federal common law – not the law of nations – to determine whether a cause of action in the form of accessory liability exists for ATS suits to enforce the relevant substantive international law norm. *See, e.g., Filártiga v. Peña-Irala*, 577 F. Supp. 860, 863 (E.D.N.Y. 1984); *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1156 n.2, 1159 (11th Cir. 2005).[12] Under federal common law, the *mens rea* required for aiding and abetting liability is knowledge. *See Halberstam v. Welch*, 705 F.2d 472, 477 (D.C. Cir. 1983). The Supreme Court's pending decision in *Kiobel* will likely provide important guidance on this matter.

Even under the Fourth Circuit's approach of looking to international law, the *mens rea* standard is the same – knowledge. *See, e.g.*, *Exxon*, 654 F.3d at 39; *Bowoto v. Chevron Corp.*, No.

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in *Hill* is further limited in cases, as this one, where the formal decision-maker in a given situation cannot be identified. *See Worldwide Network Servs., LLC v. DynCorp Int'l, LLC*, 365 Fed. Appx. 432, 441 (4th Cir. 2010). In *Worldwide Network Services*, the court found "conflicting evidence regarding who had authority to terminate the CivPol Subcontract." *Id*.

[12] *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009), upon which *Aziz* relies, reads a footnote in *Sosa*, which is non-binding dicta, overbroadly: the footnote addresses only direct liability (who may be liable); it does not address secondary liability (what behavior may incur liability). *See Talisman*, 582 F.3d at 258 (*citing Sosa*, 542 U.S. at 732 n.20).

C 99-02506 SI, 2006 U.S. Dist. LEXIS 63209, at *17-18 (N.D. Cal. 2006); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1356 (N.D. Ga. 2002); *see, also Prosecutor v. Furundžija*, Case No. IT-95-17/1/T, Judgment ¶¶ 238, 239, 240 n.261, 248 (Dec. 10, 1998) (discussing Nuremberg era cases where the courts found knowledge sufficient for aiding and abetting liability). Present day international criminal tribunals, including the ICTY[13] and ICTR[14] have continued to apply the knowledge standard.

In any event, the Plaintiffs' Amended Complaint meets the purpose standard adopted in *Aziz*. There, the court found that the only conduct alleged was placing "into the stream of international commerce" chemicals that had "many lawful commercial applications." *Aziz*, 658 F.3d at 401, 390. These facts alone did not suggest that the defendant acted purposefully. *Id*. at 401. Unlike *Aziz*, Plaintiffs specifically alleged CACI's employees were cited by military officials as directing and intentionally participating in torture at Abu Ghraib. *See* Am. Compl. ¶ 66. The Plaintiffs also specifically alleged how the employees' conduct is attributable to CACI, *see* Am. Compl. ¶¶ 74-80, as well as CACI's knowledge of and motivation to assist in the torture of the Plaintiffs, *see* Am. Compl. ¶¶ 72-73. These allegations are only consistent with a purpose to aid and abet in torture; there is no lawful use of CACI's "assistance," as in *Aziz*.

CONCLUSION

For the foregoing reasons, and for the reasons stated in Plaintiffs' Opening Memorandum of Law, this Court should reinstate Plaintiffs' ATS claims.

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[13] *See, e.g.*, *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgment ¶¶ 674, 692 (July 15, 1999); *Prosecutor v. Krnojelac*, Case No. IT-97-25-A, Judgment ¶ 51 (Sept. 17, 2003).

[14] *See, e.g.*, *Prosecutor v. Ndindabahizi*, Case No. ICTR-01-71-A, Judgment, ¶ 122 (Jan. 16, 2007); *Prosecutor v. Ntagerura*, Case No. ICTR-99-46-A, Judgment, ¶ 370 (July 7, 2006).

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CERTIFICATE OF SERVICE

I hereby certify that on October 30, 2012, I electronically filed the Plaintiffs' Reply in Support of the Motion Seeking Reinstatement of the Alien Tort Statute Claims through the CM/ECF system, which sends notification to counsel for Defendants.

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