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' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION SEEKING REINSTATMENT OF THE ALIEN TORT STATUTE CLAIMS

/s/ Susan L. Burke
Susan L. Burke (VA Bar #27769)
Susan M. Sajadi
BURKE PLLC
1000 Potomac Street, N.W.
Washington, DC 20007
Telephone: (202) 386-9622
Facsimile: (202) 232-5513
sburke@burkepllc.com

Katherine Gallagher
Admitted pro hac vice
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, NY 10012

Shereef Hadi Akeel
AKEEL & VALENTINE, P.C.
888 West Big Beaver Road
Troy, MI 48084-4736

Attorneys for Plaintiffs

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INTRODUCTION

Plaintiffs, four Iraqi men who were tortured at Abu Ghraib prison in Iraq, respectfully request that this Court reconsider its March 18, 2009 ruling and reinstate Plaintiffs' Alien Tort Statute claims ("ATS"). Doing so would best serve the interests of justice and be consistent with the legal consensus that has developed subsequent to the Court's 2009 ruling both in this Circuit and around the nation.

PROCEDURAL BACKGROUND

On September 15, 2008, Plaintiffs filed their Amended Complaint ("Complaint"), Dkt. No. 28, alleging that CACI and its co-conspirators subjected them to torture and other forms of serious mistreatment. (Plaintiffs were released without charge by the United States military.) The Complaint asserts common law claims for assault, battery, sexual assault, infliction of emotional distress, and negligent hiring and supervision and under the ATS for torture, cruel, inhuman or degrading treatment, and war crimes.

On March 18, 2009, the Court denied CACI's motion to dismiss Plaintiffs' state law claims, rejecting CACI's argument that such claims were preempted or that CACI was entitled to some novel form of derivative sovereign immunity for their conduct. *See* Dkt. No. 94, reported at 657 F. Supp. 2d 700 (E.D. Va. 2009). The Court, however, declined to exercise jurisdiction over the Plaintiffs' ATS claims, reasoning that "tort claims against government contractor interrogators are too modern and too novel to satisfy the *Sosa* [*v. Alvarez-Machain*] requirements for ATS jurisdiction." *Id*. at 705. The Court noted that the Supreme Court's *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), instructs federal courts not to recognize claims "for violations of any international law norm with less definite content and acceptance among civilized nations

than the historical paradigms familiar when § 1350 was enacted" and to be cautious "when recognizing additional torts under the common law that enable ATS jurisdiction." *Id*. at 726 -27. The Court, however, did not actually address the question of whether war crimes, torture and cruel, inhuman and degrading treatment are sufficiently universal and obligatory international law norms to meet the *Sosa* standard. Instead, the Court reasoned that the status of the defendant – private contractor – impacted the analysis, ruling claims against "government contractors under international law . . . are fairly modern and therefore not sufficiently definite among the community of nations, as required under *Sosa*." *Id*. at 726; *see also id*. at 727 ("civil causes of action against government contractors in this context" do not qualify under *Sosa*). The Court noted that "the use of contractor interrogators is a recent practice" (*id*. at 727), and concluded that to exercise ATS jurisdiction over CACI would be an imprudent exercise of "recognizing new torts." *Id*. at 728.[1]

On September 28, 2011, a divided Fourth Circuit panel reversed the District Court's ruling denying CACI's motion to dismiss, reasoning that CACI should be immune from liability. On May 11, 2012, this decision was vacated by the Court of Appeals sitting *en banc*, which agreed with Plaintiffs that the Court lacked jurisdiction over CACI's premature appeal. *Al Shimari v. CACI Int'l, Inc.*, 679 F.3d 205 (4th Cir. 2012) (*en banc*).

[1] On March 23, 2009, the Defendant sought interlocutory review by the Court of Appeals for the Fourth Circuit. *See* Dkt. No. 96. On April 28, 2009, Plaintiffs moved to dismiss Defendant's appeal as premature because the Court's Memorandum Order was not a final judgment, and the Defendant had no direct right of appeal under 28 U.S.C. § 1291. *See Al Shimari v. CACI Int'l, Inc.*, No. 09-1335 (4th Cir. Apr. 28, 2009), Dkt. No. 11. When a panel of the Court of Appeals issued an order on November 16, 2009 requiring briefing on the merits of CACI's appeal, Plaintiffs filed a conditional notice of cross appeal of the Court's dismissal of their ATS claims in the event the appellate court decided that it had the jurisdiction to hear the Defendant's appeal. *See* Dkt. No. 115. The Court of Appeals dismissed Plaintiffs' cross-appeal. *See Al Shimari v. CACI Int'l, Inc.*, No. 09-2324 (4th Cir. Feb. 23, 2010), Dkt. No. 13.

On May 31, 2012, CACI moved to stay the Court of Appeals' mandate, claiming it was going to file a petition for certiorari to the United States Supreme Court. *See Al Shimari v. CACI International, Inc.*, No. 09-1335 (4th Cir. May 31, 2012), Dkt. No. 179. Plaintiffs opposed the motion, which was denied by the Court of Appeals. *Id.* at Dkt. No. 185. CACI never actually filed the petition for certiorari.

On June 29, 2012, the Court of Appeals issued the formal mandate. *Al Shimari v. CACI International, Inc.*, No. 09-1335 (4th Cir. May 31, 2012), Dkt. No. 186.

ARGUMENT

This Court indisputably has the power to reverse its prior dismissal and reinstate Plaintiffs' ATS claims. This Court should do so. As evidenced by appellate and district court decisions issued subsequent to the Court's March 18, 2009 order, the analysis of whether Plaintiffs' allegations of war crimes, torture and cruel, inhuman and degrading treatment state viable claims under the ATS does not turn on the relative novelty of the United States' use of contractors to perform interrogations. Rather, the analysis turns on a two-part inquiry: First, does the conduct alleged in the Complaint rise to the level of acts that satisfy international law norms for war crimes, torture and cruel, inhuman and degrading treatment. The emerging legal consensus makes clear that the answer to that question is yes. Second, if the first question is answered in the affirmative, the next question is whether the federal courts, as a matter of common law, permit lawsuits against corporations located in their jurisdiction. The answer to that is clearly yes. Plaintiffs respectfully request that this Court reconsider its prior ruling and reinstate Plaintiffs' ATS claims. Such a result best serves the interests of justice and judicial economy.

CACI is not harmed in any way by including the claims for discovery purposes, as the discovery is not going to be made more extensive merely by including the ATS claims. CACI obviously retains the right to bring an appeal after a trial if the verdict favors Plaintiffs. But if the Court permits discovery to proceed without the ATS claims, and Plaintiffs thereafter win an appeal on the viability of the ATS claims, the parties and the Court would be forced to engage in duplicative proceedings.

I. THIS COURT HAS THE POWER TO REVERSE ITS PRIOR RULING.

According to the Court of Appeals for the Fourth Circuit, the Court's March 18, 2009 order is not a final judgment. *Al Shimari*, 679 F.3d at 212. *See also Simms v. Osborne*, No. 95-6379, 1995 U.S. App. LEXIS 22509 (4th Cir. Aug. 16, 1995) (dismissing as interlocutory an appeal of the district court's order that dismissed only some defendants and some claims); *Am. Canoe Asus'n v. Murphy Farms, Inc.*, 326 F.3d 505, 514-15 (4th Cir. 2003). The March 18, 2009 order did not adjudicate all of the Plaintiffs' claims, and therefore is governed by Rule 54(b). *See* Fed. R. Civ. P. 54 ("any order . . . that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties . . . may be revised *at any time)* (emphasis added); *see also Foreman v. Unnamed Officers of the Fed. Bureau of Prisons*, No. 09-2038, 2010 U.S. Dist. LEXIS 121532, at *3 (D. Md. Nov. 17, 2010); *see also Corinthian Mortg. Corp. v. Choicepoint Precision Mktg., LLC*, No. 1:07cv832, 2008 U.S. Dist. LEXIS 28129 (E.D. Va. Apr. 4, 2008) (reconsidering the court's earlier dismissal of some of the plaintiff's claims under Fed. R. Civ. P. 54(b)); *Mercury Mall Assocs. v. Nick's Mkt.*, 368 F. Supp. 2d 513, 517 (E.D. Va. 2005).

This Court has broad discretion to review and reverse its prior dismissal of the ATS claims, which are "not subject to the strict standards applicable to motions for reconsideration of

a final judgment." *Am. Canoe*, 326 F.3d at 514. The Court has "to afford such relief . . . as justice requires." *Fayetteville Investors v. Commercial Builders, Inc.*, 936 F.2d 1462, 1473 (4th Cir. 1991); *see also Harper v. Gaskets*, No. 12-0460, 2012 U.S. Dist. LEXIS 103834, at *11 (D. Md. July 25, 2012). Thus, the Court is permitted to "conduct a *de novo* review of any of its prior rulings . . . when it is convinced [that] a prior ruling was incorrect." *Palmetto Pharm. LLC v. AstraZeneca Pharm. LP*, No. 2:11cv00807, 2012 U.S. Dist. LEXIS 90253, at *10 (D.S.C. June 29, 2012) (granting motion for reconsideration) (internal quotations omitted).

Here, the Court should reverse its prior decision for the reasons explained below. Doing so does not prejudice CACI in any way, as discovery has not even commenced. *See Am. Canoe*, 326 F.3d at 515, noting reversal is particularly appropriate where, as here, the Court's decision was "rendered early in the litigation, before there had been much factual development [or] discovery."; *see also Lafarge N. Am., Inc. v. State St. Bank & Trust Co.*, No. 1:08cv761, 2008 U.S. Dist. LEXIS 97030, at *12-13 (E.D. Va. Nov. 25, 2008).

II. THIS COURT SHOULD REVISIT ITS ANALYSIS IN LIGHT OF THE EMERGING LEGAL CONSENSUS.

Although permitted to do so, the Plaintiffs are not merely asserting error and asking the Court "to rethink its prior decision." *Burgess v. Williams*, No. 1:11cv316, 2012 U.S. Dist. LEXIS 52699, at *4 (M.D.N.C. Apr. 16, 2012); *Above the Belt, Inc. v. Mel Bohannan Roofing*, 99 F.R.D. 99, 101 (E.D. Va. 1983) (an error that "would work manifest injustice" should be corrected). Rather, the Plaintiffs respectfully suggest that the Court revisit its analysis in light of the ATS jurisprudence that has developed subsequent to the Court's March 18, 2009 ruling.

This Court has the "ultimate responsibility". . . "to reach the correct judgment under law," and "nowhere is [this responsibility] greater and more unflagging than in the context of subject matter jurisdiction issues." *Am. Canoe*, 326 F.3d at 515. As such, reconsideration is

proper because "the value of correctness in the subject matter jurisdiction context overrides at least some of the procedural bars in place to protect the values of finality and judicial economy." *Id*. *See also Foreman*, 2010 U.S. Dist. LEXIS 121532.

There is a developing body of the law that should prompt this Court to reconsider its analysis and conclusion that the ATS could not be enforced against a private entity such as CACI. *Compare AGV Sports Grp., Inc v. Protus IP Solutions, Inc.*, No. RDB-08-3388, 2010 U.S. Dist. LEXIS 37404, at *6 (D. Md. Apr. 15, 2010) (denying plaintiffs' motion for reconsideration where plaintiffs failed to point to any relevant case law or evidence that was unavailable at the time of the court's original order).

This law is not yet settled. Plaintiffs respectfully draw the Court's attention the fact that the Supreme Court granted certiorari in an ATS case called *Kiobel v. Royal Dutch Petroleum Co.*, 132 S. Ct. 472 (2011). That appeal raises the issue of whether corporations may be held liable for torture and other war crimes. The United States government filed briefs urging the Supreme Court to rule that ATS claims are enforceable against corporations.[2] *See Mercury Mall*, 368 F. Supp. 2d at 515, 518 (reconsidering order on defendant's motion to dismiss following a

[2] The U.S. Amicus in *Kiobel* also disagreed with this Court's conclusion that the claims here, as applied to government contractors are "too recent and too novel" to satisfy *Sosa*, for the reasons explained above:

> [i]n determining whether a federal common law cause of action should be fashioned, courts are not required to determine whether "corporate liability for a 'violation of the laws of nations' is a norm 'accepted by the civilized world and defined with a specificity' sufficient to provide a basis for jurisdiction under the ATS …In so holding, the court of appeals confused the threshold limitation identified in *Sosa* (which does require violation of an accepted and sufficiently defined substantive international-law norm) with the question of how to enforce that norm in domestic law (which does not require an accepted and sufficiently defined practice of international law).

Brief of Amicus Curiae United States at 16, *Kiobel v. Royal Dutch Petroleum Co.*, 132 S. Ct. 472 (2011) (No. 10-1491); *id*. at 21 ("[b]oth natural persons and corporations can violate international-law norms that require state action.").

recent Supreme Court opinion, which "shed new light on a previously unsettled question of law that was pivotal to that decision"). Proceedings to date suggest the Supreme Court is most concerned about the extraterritorial application of ATS to cases having only foreign plaintiffs, foreign defendants and foreign conduct – that is, cases with "no connection to the United States whatsoever."[3] Here, of course, there are no such concerns because CACI is domiciled in the Eastern District of Virginia.

The Supreme Court likely will issue a ruling on *Kiobel* during the pendency of this lawsuit. This Court should reinstate the ATS claims for purposes of discovery, and issue a final ruling on the viability of the ATS claims only after the Supreme Court has spoken. Doing so will not prejudice CACI in any way, as discovery on the ATS claims is not substantively different than discovery on the state law claims. In contrast, were the Court to order the case to proceed to discovery without the ATS claims, and the Supreme Court *Kiobel* ruling favors the Plaintiffs, CACI would inevitably argue that the ATS claims could not be tried simultaneously with the state law claims, but instead would require another delay. Given that CACI's meritless premature appeal has already delayed this lawsuit for two and one half years, Plaintiffs urge this Court to consider the prejudice to Plaintiffs of proceeding with less than all their claims, particularly in light of the developing judicial consensus discussed below.

A. Two District Courts in this Circuit Have Permitted ATS Claims To Proceed Against Similarly-Situated Corporate Defendants.

The emerging judicial consensus – particularly in this Circuit – serves as reason for this Court to reconsider the manner in which it analyzed the ATS claims, and reinstate the ATS

[3] After hearing argument on the issue of whether corporations could be held liable under the ATS in February 2012, the Supreme Court ordered additional briefing on the question of whether and under what circumstances the ATS could be applied to conduct that occurred in the territory of a foreign sovereign. Argument was heard on this question on October 1, 2012. *See* http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-1491rearg.pdf.

claims. Two District Courts in this Circuit concluded that the ATS could apply to claims brought against private military contractors. Each court concluded that a substantive tort alleged here – war crimes – is sufficiently universal and obligatory to support an ATS cause of action under the *Sosa* analysis. *See In re Xe Servs. Alien Tort Litig*., 665 F. Supp. 2d 569, 582 (E.D. Va. 2009) ("[b]y ratifying the Geneva Conventions, Congress has adopted a precise, universally accepted definition of war crimes."); *Al-Quraishi v. Nakhla*, 728 F. Supp. 2d 702, 744 (D. Md. 2010) (same).

First, in *In re Xe Servs. Alien Tort Litig.*, the Court (Ellis, J.) permitted the parties to plead ATS war crime claims which occurred in Iraq against the private military contractor "Xe Services" (formerly known as Blackwater Worldwide).[4] *See In re Xe Servs. Alien Tort Litig.*, F. Supp. 2d at 582-592. The Court (Ellis, J.) concluded that: (1) war crimes qualify as a norm under the *Sosa* test; and (2) such substantive claims can be enforced against private, non-state actors such as Blackwater.[5] ("[T]he ATS recognizes a cause of action alleging war crimes, and claims arising under this cause of action are cognizable against non-state actor defendants, including corporations.").[6] *Id* at 588.

Second, in *Al-Quraishi v. Nakhla*, 728 F. Supp. 2d 702 (D. Md. 2010), the Court (Messitte, J.) confronted ATS claims for war crimes, torture, cruel, inhuman and degrading treatment against L-3, the company that provided translators at Abu Ghraib. The Court (Messitte, J.) issued a lengthy and well-reasoned decision concluding that ATS causes of actions can be enforced against private parties, including corporations, not just against state actors. *Id*. at 742-

[4] This case was dismissed with prejudice following a settlement reached between the parties. *See In re Xe Servs. Alien Tort Litig.*, No. 1:09cv615 (E.D. Va. Jan. 6, 2010) Dkt. No. 105.

[5] In *In re Xe Servs. Alien Tort Litig*., the court further found that punitive damages are available for ATS claims. 665 F. Supp. 2d at 595-96.

[6] Immediately after this ruling, Defendant Blackwater paid compensation to the victims in order to settle the litigation.

56. [7]

Having found that the war crimes norm is sufficiently universal and obligatory, each District Court concluded – contrary to this Court's judgment – that the precedent and logic supporting the ATS demonstrates that the norm can be enforced against corporate defense contractors. *See In re Xe Servs. Alien Tort Litig*., 665 F. Supp. 2d at 584 ("it is quite clear that the language of the ATS is not self-limiting to claims against state actors"); *id*. at 588 ("[n]othing 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. 732 n. 20); *Al-Quraishi*, 728 F. Supp. 2d 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."); *see also id*. at 753-54.[8] The court in *Al-Quraishi* likewise found that torture and plaintiffs' particular allegations of cruel, inhuman and degrading treatment are actionable under the ATS, and can be brought against a private military contractor. 728 F. Supp. 2d at 747-53 (torture), 756-60 (cruel, inhuman and degrading treatment).

B. Three Courts of Appeals Also Reached the Conclusion That ATS Claims May Be Asserted Against Corporations Such as CACI.

Subsequent to the Court's March 18, 2009 ruling, three Courts of Appeals reached the same result. The Ninth Circuit, D.C. Circuit, and Seventh Circuit each concluded that ATS

[7] This matter also settled after the Court of Appeals' *en banc* ruling.

[8] The Court (Messitte, J.) set forth disagreement with this Court's ruling as follows:

> Based on its review of international law in . . . this Opinion, this Court believes that the legal status of the claims in this case is sufficiently well established with respect to suits against private actors to allow them to go forward. As for the concern that suits against military contractors serving as interrogators are "too novel," the Court finds no reason to distinguish between contractor-interrogators and other types of private entities.

Al-Quraishi, 728 F. Supp. 2d at 754 n. 21.

claims may be asserted against private entities and corporations. *See Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 764-66 (9th Cir. 2011) (en banc), *petition for cert. filed* (U.S. Nov. 23, 2011) (No. 11-649) (claim of war crimes against corporate entity sufficiently definite and universal to support ATS jurisdiction and citing *In re Xe Services* and *Al-Quraishi* with strong approval); *Doe v. Exxon*, 654 F.2d 11, 41-47 (D.C. Cir. 2011) *petition for reh'g en banc filed* (D.C. Cir. Aug. 8, 2011) (demonstrating that text, history and logic of ATS all support corporate liability for violations of international law norms such as torture); *Flomo v. Firestone Nat'l Rubber Co, LLC*, 643 F.3d 1013, 1019 (7th Cir. 2011) (Posner, J.) *petition for reh'g en banc denied* (7th Cir. Aug. 30, 2011) (corporations are not exempt from enforcement of universal norms under ATS); *see also Kiobel v. Royal Dutch Petroleum*, 621 F.3d 111 F 124-25 (2d Cir. 2010) (*cert. granted*) (Leval, J., concurring) ("No principle of domestic or international law supports the majority's conclusion that the norms enforceable through the ATS – such as the prohibition by international law of genocide, slavery, war crimes, piracy, etc. – apply only to natural persons and not to corporations, leaving corporations immune from suit and free to retain profits earned through such acts."); *see also Romero v. Drummond Co.*, 552 F.3d 1303, 1315 (2008).

III. THIS COURT SHOULD ANALYZE PLAINTIFFS' ATS CLAIMS USING THE MORE ROBUST ATS JURISPRUDENCE NOW AVAILABLE FOR GUIDANCE.

As explained above, a strong judicial consensus has emerged since the Court's March 18, 2009 ruling demonstrating that private entities such as CACI can be liable under the ATS for violating universally established international law norms such as war crimes, torture and cruel, inhuman and degrading treatment. This consensus suggests the Court should revisit the manner in which it analyzed Plaintiffs' ATS claims three years ago, and permit those claims to proceed unless and until the Supreme Court rules to the contrary in *Kiobel*. Indeed, in the absence of the

ATS claims, CACI will be able to further delay a trial establishing whether it tortured Plaintiffs, as CACI has made clear it intends to continue to seek interlocutory appellate review on preemption of state common law claims. Given that the ATS is a federal statute, Plaintiffs' ATS claims are not subject to the same preemption theories espoused by CACI.

When the Court initially ruled in March 2009, the Court concluded that these norms could not be applied against "government contractors in this context" because "the use of contractor interrogators is a recent practice;" as such, the Court concluded that hearing these claims against CACI would be "recognizing new torts." *Al Shimari v. CACI Premier Technology, Inc.*, 657 F. Supp. 2d 700, 727, 728 (E.D. Va. 2009). In arriving at this conclusion, the Court conflated the *Sosa* analysis of the *norms* against war crimes, torture, and cruel, inhuman and degrading treatment with the separate analysis required to determine the issue regarding *against whom* those norms can be *enforced*. *See Doe v. Exxon*, 654 F.3d at 41.

A. The First Step Is To Analyze Whether Plaintiffs' Complaint Alleges Violations of Universal Norms.

The Court's March 18, 2009 analysis did not separately address the question of whether war crimes, torture, and cruel, inhuman and degrading treatment are sufficiently universal or obligatory to meet the *Sosa* standards. Yet it is clear that those torts have reached the threshold to support a cause of action under the ATS. To determine whether a cause of action exists under the ATS, a court must first identify whether the relevant international *norm* is sufficiently universal, specific and obligatory. *Sosa*, 542 U.S. at 733-38.[9] That question turns on an

[9] Making clear that claims brought under the ATS "must be gauged against the current state of international law," *Sosa*, 542 U.S. at 733, the Court decided that "the door [for such ATS federal common law claims] is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of *international norms* today." *Id.* at 729 (emphasis added). The Court held the ATS allowed federal district courts to hear claims that "rest on a *norm* of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century

assessment of the norm in the abstract and is not dependent upon the particular factual context (or status of the defendant) in which the norm arises. *See, e.g, In re Xe Servs. Alien Tort Litig.*, 665 F. Supp. 2d at 588 (concluding that Congress has defined certain international norms, including war crimes, and that the norms are "binding, universal and precisely defined"; *Sarei*, 671 F.3d at 758-70 (assessing whether the prohibitions against genocide, war crimes, crimes against humanity and racial discrimination constitute "specific, universal, and obligatory internationally accepted norm[s]"); *In re Chiquita Brands Int'l, Inc*., 792 F. Supp. 2d 1301, 1313-38 (S.D. Fla. 2011) (assessing numerous norms, including the prohibition against terrorism, torture, cruel and inhuman treatment, war crimes against the *Sosa* standard); *Romero*, 552 F.3d at 1316 (extrajudicial killing). *Compare Flores v. S. Peru Copper Corp.*, 343 F.3d 140, 160 (2d Cir. 2003) (holding that "the asserted 'right to life' and 'right to health' are insufficiently definite to constitute rules of customary international law. . . .").

Thus, for example, in *Abdullahi v. Pfizer, Inc*, the court evaluated whether the relevant international norm – prohibition on involuntary medical experimentation – met the *Sosa* standard, without considering the unique *context* in which the allegations arose, *i.e.*, drug trials on children in Nigeria without informed consent. *See Abdullahi*, 562 F.3d 163, 175-88 (2d Cir. 2009) (finding treaty law, practice and international case-law, including the Nuremberg precedents, demonstrate a "prohibition [exists] in customary international law against nonconsensual human medical experimentation" enforceable through ATS).

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paradigms [of violation of safe conducts, infringement of the rights of ambassadors, and piracy]." *Id*. at 725 (emphasis added). *See also id.* at 732-33, citing with approval *Tel-Oren*, 726 F.2d at 781 (Edwards, J., concurring) (suggesting that the "limits of section 1350's reach" be defined by "a handful of heinous actions – each of which violates definable, universal and obligatory *norms*"); *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") (emphasis added).

Here, Plaintiffs allege that CACI and its co-conspirators engaged in a panoply of acts, such as beatings, electric shocks, sexual assaults, sensory deprivations, mock executions, and, in the case of Plaintiff Rashid, dragging him across the floor with a rope tied tightly around his penis. *See* Complaint, Dkt. No. 28, at 3-6. These allegations indisputably state cognizable ATS claims.

That war crimes and torture are accepted by the "civilized world" and "defined with […] specificity," *Sosa*, 542 U.S. at 725, cannot reasonably be disputed. The prohibition against war crimes is one of the most well-established and is codified at the Fourth Geneva Convention relative to the Protection of Civilians in Time of War (1949), Article 3(1)(a), among other international instruments. *See, e.g.*, Rome Statute of the International Criminal Court, U.N. Doc. A/183.9, July 17, 1998, art. 8; Statute of the International Criminal Tribunal for the former Yugoslavia, U.N. Doc. S/RES/827 (1993), arts. 2-3.

War crimes claims have consistently been recognized as actionable under the ATS. *See, e.g., Kiobel*, 621 F.3d at 120; *Sinaltrainal v. Coca-Cola Co*., 578 F.3d 1252, 1263 (11th Cir. 2009); *Sarei*, 671 F.3d at 763-64; *Kadić v. Karadžić*, 70 F.3d 232, 241-44 (2d Cir. 1995); *see also 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 this district, in *In re Xe Servs. Alien Tort Litig.*, 665 F. Supp. 2d at 581, the Court (Ellis, J.) expressly concluded that:

> claims for violations of the international norm proscribing war crimes are cognizable under the ATS. By ratifying the Geneva Conventions, Congress has adopted a precise, universally accepted definition of war crimes. Moreover, through enactment of a separate federal statute, Congress has incorporated this precise definition into the federal criminal law. 18 U.S.C. § 2441. Thus, Congress has clearly defined the law of nations to include a binding prohibition on the

> commission of war crimes. Given this, and given *Sosa*'s teachings, it follows that an allegation of a war crime states a cause of action under the ATS.

The War Crimes Act, 18 U.S.C. § 2441 (c), to which the District Court refers, reflects the definition of war crimes set forth in Common Article 3 of the Geneva Conventions. More than 180 nations, including the United States, agreed to that definition. *See also Prosecutor v. Tadić*, Case No. IT-94-1, Jurisdiction Appeal, para. 94 (Oct. 2, 1995) (setting out the elements of war crimes).

The prohibition on torture is equally definite and obligatory. Torture is universally prohibited by customary international law. *See, e.g.*, Universal Declaration of Human Rights, UDHR art. 5, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948); 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. *See also 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*").

Finally, the international norm prohibiting cruel and inhuman treatment also satisfies *Sosa*'s "accepted by the civilized world" and "defined with […] specificity" test. Common Article 3 of the Geneva Conventions and the Convention Against Torture, to which the United States is a party, each outlaw cruel, inhumane and degrading treatment as a violation of customary international law in the same fashion they outlaw torture. *See* CAT, art. 16. The only real difference between the two torts is the "intensity of the suffering inflicted." Restatement (Third) § 702 (Rep. Note 5). Cruel and inhuman treatment is specifically defined in the War Crimes Act, 18 U.S.C. § 2441 (d)(1)(B). Courts have differed in their assessments of whether cruel and inhuman treatment satisfies the *Sosa* standard, depending on the seriousness of the

claims set forth in each case. *Compare Bowoto v. Chevron Corp*., 557 F. Supp. 2d 1080, 1092-1095 (N.D. Cal. 2008) *with In re Chiquita Brands Int'l, Inc*., 792 F. Supp. 2d at 1323-1324.

Here, the seriousness of the claims satisfies the standard. Plaintiffs urge this Court to follow and adopt the thorough, scholarly analysis of this question set forth in *Al-Quraishi*. *See* 728 F. Supp. 2d at 756 –60 (collecting sources of international law prohibiting cruel, inhuman and degrading treatment). As the Court (Messitte, J.) concluded, "'It is not necessary that every aspect of what might comprise a standard such as 'cruel, inhuman or degrading treatment' be fully defined and universally agreed upon before a given action meriting the label is clearly proscribed under international law, any more than it is necessary to define all acts that may constitute 'torture' or 'arbitrary detention' in order to recognize certain conduct as actionable misconduct under that rubric. '" *Id.* at 759-760, citing *Xuncax v. Gramajo*, 886 F.Supp. 162, 187 (D. Mass. 1995).

B. The Second Step Is To Determine Whether Universal Norms May Be Enforced Against CACI and Other Government Contractors.

The second step in the analysis is deciding whether the universal norm may be enforced against CACI, a defense contractor working for the United States in Iraq. This question is not decided by international law (which is what governs the development of a norm as explained above) [10] but rather is determined by resort to federal common law, which plainly recognizes that

[10] Even if one were to look to international law as a source of corporate liability, it is customary international law that corporate entities can be punished for violations of the law of nations. *See Doe v. Exxon*, 654 F.3d at 48 (observing that the International Criminal Tribunal for the former Yugoslavia jurisprudence recognizes that acts "instigated or directed . . . by any organization or group" can trigger liability) (quoting *Prosecutor v. Tadić*, Case No. IT-94-1-T, Trial Chamber Opinion and Judgment, paras. 654-55 (May 7, 1997)); *Flomo*, 643 F.3d at 1017 (explaining allied punishment of Nazi corporations under customary international law authority).

private entities such as corporations can be liable for torts.[11] *See Sarei, PLC*, 671 F.3d at 764-66; *Doe v. Exxon*, 654 F.2d at 41-47; *Flomo*, 643 F.3d at 1019; *see also Kiobel*, 621 F.3d at 124-25. Thus, because the torts asserted in this case are already well established and cognizable under *Sosa*, enforcing those torts against CACI would not be "recognizing new torts," which is the way the Court's March 18, 2009 Order (Dkt. No. 94) portrayed the issue, but merely adjudicating existing torts.

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; *see also Sosa*, 542 U.S. 692. As an initial matter, the text of the ATS, even while it restricts who may be a *plaintiff*, plainly does not distinguish between categories of *defendants*. The phrase "any civil action" applies regardless of a defendant's status or the novelty of the factual circumstances surrounding the defendants' asserted international law violation. As the Supreme Court explained, the ATS "by its terms does not distinguish among classes of defendants." *Argentine Republic v. Amerada Hess Shipping Corp*., 488 U.S. 428, 428 (1989). The context in which the ATS was drafted also demonstrates that the ATS would be enforceable against corporate entities. *See Doe v. Exxon*, 654 F.3d at 44-49. The same Congress that drafted the ATS understood corporations to be juridical entities, subject to traditional common law presumptions about their amenability to suit. *See Trustees of Dartmouth College v. Woodward*,

[11] Although international law itself does not generally decide the issue of against whom an ATS norm may be enforced, federal common law does incorporate international law to some degree. The Supreme Court has recognized that "international law is part of our law," and as such, is part of federal common law. *See, e.g., 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 Paquete Habana*, 175 U.S 677, 700 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination").

17 U.S. (4 Wheat) 518, 667 (1819) (Story, J.) ("an aggregate corporation, at common law is a collection of individuals, united into one collective body, under a special name . . . possess[ing] the capacity . . . of suing and being sued.").

In *Sosa,* the Supreme Court instructs federal courts to look to international law to ascertain if an alleged "tort" would support a cause of action under the ATS – *i.e.* whether the international law *norm* alleged to have been violated has no "less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted." This question of (a) the *source of the norm* is analytically distinct from the question of (b) *against whom such a norm can be enforced*. The norm, or the right at issue, comes from universally accepted international law practice, but the remedy (against whom the right may be enforced, possibility of accessory liability, forms of damages, etc.) is a function of federal common law. *Doe v. Exxon*, 654 F.3d at 42-44; *Flomo,* 643 F.3d at 1019 (emphasizing a key distinction between "a principle of law, which is a matter of substance, and the means of enforcing it, which is a matter of procedure or remedy"). *See also Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 (D.C. Cir 1984) (Edwards, J., concurring) ("the law of nations has never been perceived to create or define the civil actions to be made available by each member of the community of nations; by consensus, *the states leave that determination to their respective municipal laws*); *Filártiga v. Peña-Irala*, 630 F.2d 876, 886 (2d Cir. 1980) (emphasis added); Restatement (Third) of Foreign Relations § 906 & cmt b (1987).[12]

[12] The D.C. Circuit provided this helpful illustration of the point:

> [I]n legal parlance one does not refer to the tort of "corporate battery" as a cause of action. The cause of action is battery; agency law determines whether a principal will pay damages for the battery committed by the principal's agent. Here the court may assume thay the individuals acting as agents of a corporation violated substantive international law norms.

Doe v. Exxon, 654 F.3d at 41.

The increasingly robust ATS jurisprudence (including decisions from this Circuit, *see In re Xe Servs. Alien Tort Litig.*, 665 F. Supp. 2d 569 (E.D. Va. 2009); *Al-Quraishi v. Nakhla*, 728 F. Supp. 2d 702 (D. Md. 2010)), makes it clear that defense contractors and other private entities are not exempt from remedial proceedings seeking compensation for violation of universally recognized international law norms. *See Sarei*, 671 F.3d at 764-66; *Doe v. Exxon*, 654 F.3d at 42-44; *Flomo*, 643 F.3d at 1019; *Romero.*, 552 F.3d at 1315 ("The text of the Alien Tort Statute provides no express exception for corporations, and the law of this Circuit is that this statute grants jurisdiction from complaints of torture against corporate defendants"); *In re Agent Orange Product Liability Litig.*, 373 F. Supp. 2d 7, 9 (S.D.N.Y. 2005) ("an ATS claim is a federal common law claim and it is a bedrock tenet of American law that corporations can be held liable for their torts."); *Doe v. Islamic Salvation Front*, 993 F. Supp. 3, 14 (D.D.C. 1998) (finding that crimes against humanity, war crimes, murder and rape, "are proscribed by international law against both state and private actors, as evinced by Common Article 3 [of the 1949 Geneva Conventions]"); *Bowoto v. Chevron Corp.*, No. C 99-02506 SI, 2006 U.S. Dist. LEXIS 63209, at *37-38 (N.D. Cal. Aug. 22, 2006).

Nothing in federal common law jurisprudence (which incorporates international law, see footnote 12) supports a finding that CACI's status as a private company matters to the remedial analysis. Long-standing federal common law permits lawsuits against corporations. *See Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat) 518, 667 (1819). International law incorporated into federal common law likewise permits lawsuits against corporations. For example, the Geneva Conventions apply to state actors and non-state actors alike. Indeed, Common Article 3 of the Geneva Conventions necessarily binds non-state actors because it governs *non*-international armed conflicts, which presupposes at least one actor that is not a

state. *See also Doe v. Islamic Salvation Front*, 993 F. Supp. at14 (finding that crimes against humanity, war crimes, murder and rape, "are proscribed by international law against both state and private actors, as evinced by Common Article 3 [of the 1949 Geneva Conventions]"). Notably, the Department of Defense requires contractors to notify their American employees that they are subject to prosecution under the War Crimes Act. *See* 48 C.F.R. § 252.225-7040(e)(2)(ii).

Torture claims have consistently been recognized as actionable under the ATS against private parties similarly-situated to CACI. In *Al-Quraishi v. Nakhla*, the District Court (Messitte, J.) concluded that plaintiffs, who also alleged that they were tortured at the hands of private contractors at Abu Ghraib, could bring their claims under ATS because actions such as "beatings, electric shocks, threats of death and rape, mock executions, and hanging from the hands and feet" could be brought against an American corporation in that context. *Al-Quraishi*, 728 F. Supp. 2d at 760. *See also Siderman de Blake v. Argentina*, 965 F.2d 699, 717 (9th Cir. 1992) (freedom from "official torture is fundamental and universal, a right deserving of the highest status under international law, a norm of *jus cogens*"); *Filártiga*, 630 F.2d at 883 ("[W]e have little difficulty discerning [torture's] universal renunciation in the modern usage and practice of nations."); *see also* Restatement (Third) of Foreign Relations Law § 702 (1987) (listing the torture prohibition as part of the "Customary International Law of Human Rights"). Indeed, in *Sosa*, the Supreme Court adopted the reasoning set forth in *Filártiga* that "[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." *Sosa*, 542 U.S. at 732, (citing *Filártiga*, 630 F.2d at 890).

The terms of torture are defined in both the War Crimes Act, 18 U.S.C. § 2441 (d)(1)(A), the federal criminal law, 18 U.S.C. § 2340 (1) and (2) and the Convention Against Torture, art. 1, ¶ 1. Taking into account the allegations in this case and the circumstances under which the acts or torture are alleged to have occurred, CACI is not excused from this norm merely because it is a for-profit entity. *See* 18 U.S.C. § 2340 (1). *See also* CAT, art. 1. As Judge Posner succinctly explained, just because there have not been many instances in which corporations have been subject to international civil or criminal law liability, "that doesn't mean that they are exempt from that law." *Flomo*, 643 F.3d at 1019.

CONCLUSION

Reinstatement of the Plaintiffs' ATS claims serves the interests of justice. As this Court has itself acknowledged, the allegations in this case relate to CACI's role in one of the most shocking and shameful episodes in recent American history. *Al Shimari v. CACI Premier Technology, Inc.*, 657 F. Supp. 2d 700, 706-707(E.D. Va. 2009) (reciting Complaint's allegations of beatings, electric shocks, sensory deprivation, extreme temperatures, death threats, oxygen deprivation, extreme temperatures, breaking bones, mock executions); *see also CACI Premier Technology, Inc. v. Rhodes*, 536 F.3d 280, 285-86 (4th Cir. 2008) (noting Defendant's role in "sadistic, blatant, and wanton criminal abuses" at Abu Ghraib). The United States Government, in proceedings before the Fourth Circuit Court of Appeals, urged that Plaintiffs' claims related to torture should be permitted to proceed, in the interests of justice, and insofar as they vindicate one of our most important national interests – the prohibition of torture. *See* Brief of Amicus Curiae United States at 22-23, 26, *Al Shimari v. CACI International, Inc.*, No. 09-1335 (4th Cir. Jan. 14, 2012), Dkt. No. 146. Defendant is not prejudiced by reinstatement of the ATS claims because no discovery has yet taken place in this case. (This extended delay is exclusively attributable to Defendant's litigation strategy of filing a premature appeal.) In contrast, failure to

reconsider the Court's ATS ruling harms these Plaintiffs, who suffered greatly at the hands of CACI during their detention at Abu Ghraib.

/s/ Susan L. Burke
Susan L. Burke (VA Bar #27769)
Susan M. Sajadi
BURKE PLLC
1000 Potomac Street, N.W.
Washington, DC 20007
Telephone: (202) 386-9622
Facsimile: (202) 232-5513
sburke@burkepllc.com

Katherine Gallagher
Admitted pro hac vice
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, NY 10012

Shereef Hadi Akeel
AKEEL & VALENTINE, P.C.
888 West Big Beaver Road
Troy, MI 48084-4736

Attorneys for Plaintiffs

Dated: October 11, 2012

CERTIFICATE OF SERVICE

I hereby certify that on October 11, 2012, I electronically filed the Plaintiffs' Memorandum 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.

/s/ Susan L. Burke
Susan L. Burke (VA Bar #27769)