USA, Al-Shimari v. CACI Premier Technology, Inc.

INTRODUCTORY TEXT: *This case presents two court opinions concerning the treatment of former Abu Ghraib detainees by private military company CACI Premier Technology, Inc. This case study highlights particular issues relating to private actors—especially private military companies—under IHL, and domestic implementation of IHL.*

N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

Background Note: This note is intended to provide domestic legal context to allow the reader to better extract the IHL principles found in this case. This note does not provide US legal advice.

US law can be unofficially grouped into two broad categories: civil (tort, contracts, commercial, family, administrative, estate law, etc.) and criminal. Depending on the relevant law, the nature of the parties, and the location of the parties, a person may bring a lawsuit in a state district court or federal district court. The Alien Tort Statute ("ATS") allows a non-US national ("alien") to bring a lawsuit in a federal district court when the alien claims he or she suffered damages in tort from a violation of international law. Here, Al-Shimari and others brought a civil lawsuit under the ATS against CACI Premier Technology, Inc. ("CACI"), claiming tort damages from torture and other mistreatment incurred while detained by CACI.

This case has a complex procedural history (*see* Center for Constitutional Rights, 'Al Shimari v. Caci et al.' <https://ccrjustice.org/home/what-we-do/our-cases/al-shimari-v-caci-et-al> accessed 23 August 2017.) When a plaintiff files a civil lawsuit in a federal district court, a defendant has the opportunity to challenge the jurisdiction of the court and whether the plaintiff made a sufficient claim to commence a lawsuit. CACI has filed numerous motions to dismiss on these grounds. In the latest, CACI claimed that the court does not have jurisdiction over the claims of torture, for the question of the use of torture in armed conflict is a political, not legal, question. Political questions are for the executive, not the judiciary, to answer. As seen below, the Fourth Circuit Court of Appeals disagreed.

The second document contains the district court's opinion on the applicable law following remand. As mentioned, the US Fourth Circuit Court of Appeals overturned the district court's order to dismiss the case. When an appellate court overturns an order to dismiss a case, the case is reopened and sent back to the district court. On remand, the district court asked the parties to submit briefs to enable the judge to determine whether torture constituted a violation of international law. This determination would, in turn, determine whether the court had jurisdiction in accordance with the appellate court's opinion. This case study will focus solely on the question of whether the allegations of torture constituted violations of international law.]

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A. AL-SHIMARI v. CACI PREMIER TECHNOLOGY, INC.

[**Source:** United States Court of Appeals for the Fourth Circuit, Al-Shimari [et al] v. CACI Premier Technology, Inc. et al, 840 F.3d 147, 21 October 2016, available at https://ccrjustice.org/sites/default/files/attach/2016/10/98_10-21-16_Opinion-Vacating-Remanding_0.pdf (footnotes omitted)]

[…]

Barbara Milano Keenan, Circuit Judge:

[…]

[1] Following the invasion of Iraq in 2003, the United States took control of Abu Ghraib prison (Abu Ghraib), a facility located near Baghdad, Iraq that previously was under the control of Saddam Hussein. Upon assuming control of the facility, the United States military used the prison to detain criminals, enemies of the provisional government, and other persons held for interrogation related to intelligence gathering. Due to a shortage of military interrogators, the United States government entered into a contract with CACI to provide additional interrogation services at Abu Ghraib.

[2] As documented in a later investigation conducted by the United States Department of Defense, “numerous incidents of sadistic, blatant, and wanton criminal abuses were inflicted on several detainees” at Abu Ghraib between October and December 2003. […] Department of Defense investigators concluded that CACI interrogators as well as military personnel

engaged in such abusive conduct. […] Numerous service members were disciplined administratively or punished under military law by court martial for conduct related to these acts. Some service members received significant terms of imprisonment for their role in these offenses.

[3] The plaintiffs alleged in their complaint that CACI interrogators entered into a conspiracy with low-ranking military police officials to commit abusive acts on the plaintiffs, in order to "soften up" the detainees so that they would be more responsive during later interrogations. The plaintiffs further alleged that they were victims of a wide range of mistreatment, including being beaten, choked, "subjected to electric shocks," "repeatedly shot in the head with a taser gun," "forcibly subjected to sexual acts," subjected to sensory deprivation, placed in stress positions for extended periods of time, deprived of food, water, and sleep, threatened with unleashed dogs and death, and forced to wear women's underwear.

[4] Additionally, the plaintiffs alleged that CACI interrogators "instigated, directed, participated in, encouraged, and aided and abetted conduct towards detainees that clearly violated the Geneva Conventions, the Army Field Manual, and the laws of the United States." […] The plaintiffs contend that these acts of abuse were possible because of a "command vacuum" at Abu Ghraib, caused by the failure of military leaders to exercise effective oversight over CACI interrogators and military police.

[…]

III.

[…]

A.

[5] The political question doctrine derives from the principle of separation of powers, and deprives courts of jurisdiction over "controversies which revolve around policy choices and value determinations constitutionally committed" […] to the executive branch. […] Although most military decisions are committed exclusively to the executive branch, a claim is not shielded from judicial review merely because it arose from action taken under orders of the military. […]

[…]

B.

[…]

i.

[6] As stated above, the first […] factor asks whether the acts occurred while the government contractor was under the direct control of the military. […] [W]e also described this factor in terms of "the extent to which military personnel actually exercised control" over the contractor's acts. […]

[7] In the district court, the evidence regarding the military's control over the CACI interrogators proceeded on parallel tracks, with evidence demonstrating formal military control presented alongside evidence showing that the military failed to exercise actual control over the interrogators. With regard to formal control, the record shows that the military was in charge of the official command structure at Abu Ghraib and instituted procedures governing the interrogation process. For example, in September and October 2003, military leadership located in Baghdad issued two memoranda establishing the particularized rules of engagement for interrogations (IROEs) conducted at Abu Ghraib, which authorized the use of several, specific interrogation techniques. […] In addition, all interrogators were required to submit interrogation plans to the military chain of command for advance approval. These plans specified the interrogation methods that the particular interrogators intended to employ and included requests for separate approval of more aggressive tactics, if necessary.

[8] Other evidence in the record, however, indicated that the military failed to exercise actual control over the work conducted by the CACI interrogators. In one government report, an investigator unequivocally concluded that military leaders at Abu Ghraib "failed to supervise subordinates or provide direct oversight" of the mission, and that the "lack of command presence, particularly at night, was clear." […] The same report emphasized that interrogation operations were "plagued by a lack of an organizational chain of command presence and by a lack of proper actions to establish standards and training" by senior leadership. […] Additional evidence in the record also indicates that CACI interrogators ordered low-level military personnel to mistreat detainees. This evidence supported the plaintiffs' contention that the formal command authority held by the military did not translate into actual control of day-to-day interrogation operations.

[…]

[9] Rather than addressing the issue of actual control, the district court began and ended its analysis by drawing conclusions based on the evidence of formal control. This approach failed to address the full scope of review that the district court needed to conduct on remand. We explained in [a previous decision in this case] that the record was inconclusive "regarding the extent to which military personnel actually exercised control over CACI employees in their performance of their interrogation functions." […] We further observed that we were "unable to determine the extent to which the military controlled the conduct of the CACI

interrogators outside the context of required interrogations, which is particularly concerning given the plaintiffs' allegations that '[m]ost of the abuse' occurred at night, and that the abuse was intended to 'soften up' the detainees for later interrogations." […]

[10] We thus asked the district court to consider whether the military actually controlled the CACI interrogators' job performance, including any activities that occurred outside the formal interrogation process. [This question] is not satisfied by merely examining the directives issued by the military for conducting interrogation sessions, or by reviewing any particular interrogation plans that the military command approved in advance. Instead, the concept of direct control encompasses not only the requirements that were set in place in advance of the interrogations, but also what actually occurred in practice during those interrogations and related activities.

[11] In examining the issue of direct control, when a contractor engages in a lawful action under the actual control of the military, we will consider the contractor's action to be a "de facto military decision [ ]" shielded from judicial review under the political question doctrine. […] However, the military cannot lawfully exercise its authority by directing a contractor to engage in unlawful activity. Thus, when a contractor has engaged in unlawful conduct, irrespective of the nature of control exercised by the military, the contractor cannot claim protection under the political question doctrine. The district court failed to draw this important distinction. Accordingly, we conclude that a contractor's acts may be shielded from judicial review […] only to the extent that those acts (1) were committed under actual control of the military; and (2) were not unlawful.

ii.

[12] We turn now to consider the district court's treatment of […] whether a decision on the merits of the claim would require the court to "question actual, sensitive judgments made by the military." […] The [district] court explained that it was unequipped to evaluate whether the use of certain "extreme interrogation measures in the theatre of war" was appropriate or justified. In the court's view, adjudicating the plaintiffs' claims would impinge on the military's authority to select interrogation strategies and rules of engagement. Debates existing within the executive branch at that time regarding the propriety of certain aggressive interrogation tactics reinforced the court's conclusion.

[…]

[13] The commission of unlawful acts is not based on "military expertise and judgment," and is not a function committed to a coordinate branch of government. […] To the contrary, Congress has established criminal penalties for commission of acts constituting torture and war crimes. […] Therefore, to the extent that the plaintiffs' claims rest on allegations of unlawful conduct in violation of settled international law or criminal law then applicable to the CACI employees, those claims fall outside the protection of the political question doctrine. […]

iii.

[14] In reaching this conclusion, we emphasize the longstanding principle that courts are competent to engage in the traditional judicial exercise of determining whether particular conduct complied with applicable law. […] Accordingly, when a military contractor acts contrary to settled international law or applicable criminal law, the separation of powers rationale underlying the political question doctrine does not shield the contractor's actions from judicial review. […]

[…]

iv.

[15] […] [W]e hold that any conduct of the CACI employees that occurred under the actual control of the military or involved sensitive military judgments, and was not unlawful when committed, constituted a protected exercise of discretion under the political question doctrine. Conversely, any acts of the CACI employees that were unlawful when committed, irrespective whether they occurred under actual control of the military, are subject to judicial review. Thus, the plaintiffs' claims are justiciable to the extent that the challenged conduct violated settled international law or the criminal law to which the CACI employees were subject at the time the conduct occurred. […]

[…]

[16] Here, the plaintiffs alleged pursuant to the ATS that CACI interrogators engaged in a wide spectrum of conduct amounting to torture, war crimes, and/or cruel, inhuman, or degrading treatment, as well as various torts under the common law. Among other things, the plaintiffs alleged that they were subjected to beatings, stress positions, forced nudity, sexual assault, and death threats, in addition to the withholding of food, water, and medical care, sensory deprivation, and exposure to extreme temperatures. Counsel for CACI conceded at oral argument that at least some of the most egregious conduct alleged, including sexual assault and beatings, was clearly unlawful, even though CACI maintains that the plaintiffs cannot show that CACI interrogators perpetrated any of these abuses.

[17] […] [A]s noted above, some of the alleged acts plainly were unlawful at the time they were committed and will not require extensive consideration by the district court. Accordingly, on remand, the district court will be required to determine which of the alleged acts, or constellations of alleged acts, violated settled international law and criminal law governing CACI's conduct and,

therefore, are subject to judicial review. […] The district court also will be required to identify any “grey area” conduct that was committed under the actual control of the military or involved sensitive military judgments and, thus, is protected under the political question doctrine.

[…]

C.

[18] […] The [district] court emphasized that its general lack of expertise in applying international law, and the difficulty of determining the constraints of such law, also rendered the case non-justiciable. We disagree with the district court's conclusion.

[…]

[19] With regard to the present case, the terms “torture” and “war crimes” are defined at length in the United States Code and in international agreements to which the United States government has obligated itself. […] Courts also have undertaken the challenge of evaluating whether particular conduct amounts to torture, war crimes, or cruel, inhuman, or degrading treatment. […]

[…]

IV.

[20] We recognize that the legal issues presented in this case are indisputably complex, but we nevertheless cannot abdicate our judicial role in such cases. Nor will we risk weakening prohibitions under United States and international law against torture and war crimes by questioning the justiciability of a case merely because the case involves the need to define such terms. The political question doctrine does not shield from judicial review intentional acts by a government contractor that were unlawful at the time they were committed.

[21] Accordingly, we vacate the district court's judgment, and remand this case for further proceedings consistent with the principles and instructions stated in this opinion.

[…]

B. PLAINTIFF'S MEMORANDUM ON THE APPLICABLE LAW GOVERNING PLAINTIFFS' CLAIMS OF TORTURE, WAR CRIMES AND CRUEL, INHUMANE AND DEGRADING TREATMENT

[**Source:** District Court for the Eastern District of Virginia, Alexandria Division, “Al Shimari v. CACI Premier Technology, Inc.”, Memorandum Opinion, 28 June 2017, available at https://ccrjustice.org/sites/default/files/attach/2017/06/615_6-28-17_Order%20on%20ATS.pdf (footnotes omitted)]

[…]

I. BACKGROUND

[1] Plaintiffs Suhail Al Shimari, Salah Al-Ejaili, and Asa’ad Al-Zuba’e […], all Iraqi nationals, were detained in the custody of the U.S. Army at Abu Ghraib prison in Iraq in 2003 and 2004. […]

[…]

II. DISCUSSION

[…]

[2] [T]he question before the Court is whether torture, CIDT [cruel, inhuman or degrading treatment], and war crimes constitute violations of the law of nations. […]

A. Torture

[3] […] Both parties agree that according to "a critical mass of international law" torture was unlawful at the time of the relevant events and that torture claims are "actionable under ATS." […] There is ample case law supporting this proposition. The Second Circuit's decision in Filartiga v. Pena-Irala, the case that gave birth to the modern line of ATS litigation, held that "the torturer has become—like the pirate and slave trader before him—hostis humani generis, an enemy of all mankind." […] This conclusion has been affirmed by the numerous other courts, including the Fourth Circuit. […]

[4] […] As the Seventh Circuit has aptly explained, because the ATS makes violations of the law of nations actionable in U.S.

courts "the fact that Congress may not have enacted legislation implementing a particular treaty or convention (maybe because the treaty or convention hadn't been ratified) does not make a principle of customary international law evidenced by the treaty or convention unenforceable in U.S. courts." […]

[…]

[5] […] In the context of torture, relevant statutes defining "torture" include the Anti-Torture Act […] and the TVPA [Torture Victim Protection Act] […]. According to the Anti-Torture Act, "'torture' means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control." […] Similarly, the TVPA, which applies to individuals who act "under actual or apparent authority, or color of law, of any foreign nation," defines torture as "any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind." […]

[6] Because these statutes, as well as many international agreements dealing with torture, see, e.g., the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment […], speak in terms of actions committed by state actors or persons acting under color of law, torture claims are not actionable against private parties "when not perpetrated in the course of genocide or war crimes"[…]. Notwithstanding the limitation to state actors, an ostensibly private organization may be found to have acted under color of law when, for example, "there is such a 'close nexus between the State and the challenged action' that seemingly private behavior 'may be fairly treated as that of the state itself.'" […] The Fourth Circuit has elaborated that state action may be found when a private actor engaged in a "public function," that is "if the private entity has exercised powers that are 'traditionally the exclusive prerogative of the State.'" […] Likewise, "state action has also been found in circumstances where the private actor operates as a 'willing participant in joint activity with the State or its agents.'"[…]

[7] […] [A] court in this circuit found that contractors operating alongside the military as interpreters for non-English speaking detainees at Abu Ghraib performed a public function. […] That finding was premised on the observation that "[o]peration of a military force is one of the most basic governmental functions, and one for which there is no privatized equivalent." […] "While certain discreet military tasks, such as translation services in this case, may be delegated to contractors, the military still has need to understand, digest, and act upon information taken from the enemy (or suspected enemy) prisoners who speak a language other than English." […] Because defendants were "alleged to have operated alongside the military, carrying out a military task which likely would have been performed by the military itself under other circumstances," the court concluded that their work could be viewed as a public function. […] Turning to the alternative, "willing participant" standard, the court found that based on plaintiffs' allegations that "certain members of the military, indisputably state actors, conspired and acted together with Defendant to commit the alleged acts of torture" plaintiffs had "properly alleged joint action between Defendants and state actors such that Defendants may be deemed to have acted under color of law." […] Although this Court does not currently decide the color-of-law question, it finds [this] analysis persuasive and the parties should treat it as controlling precedent.

[8] Defendant proceeds to argue that plaintiffs have not alleged facts sufficient to state a cause of action for torture because "claims brought under the ATS must allege conduct that violated international norms that were specific, universal, and obligatory at the time the conduct in question" and "there is great uncertainty at the time of Plaintiffs' imprisonment whether certain approved interrogation techniques and conditions of confinement constituted torture." […] But, in the face of a clearly stated statutory definition of torture, debates within the Executive Branch regarding interrogation techniques do not undermine the clarity or force of the prohibition. Moreover, irrespective of these debates, the widespread judicial agreement that torture is actionable under the ATS constitutes a recognition that the prohibition against torture is specific, universal, and obligatory.

B. CIDT

[…]

[9] Turning to the substance of the prohibition, defendant suggests that CIDT did not have a defined standard at the time of the events in question because it had not been specifically codified like the definition of torture. […] This argument has been rejected by numerous courts across this country. "Despite the absence of a distinct definition for what constitutes cruel, inhumane or degrading treatment, various authorities and international instruments make clear that this prohibition is conceptually linked to torture by shades of misconduct discernible as a continuum." […] "The gradations of the latter are marked only by the degrees of mistreatment the victim suffers, by the level of malice the offender exhibits and by evidence of any aggravating or mitigating considerations that may inform a reasonable application of a distinction." […] "Generally, cruel, inhuman or degrading treatment includes acts which inflict mental or physical suffering, humiliation, fear and debasement, which do not rise to the level of 'torture' or do not have the same purposes as 'torture.'" […] Instead, the focus is on whether the specific conduct alleged is condemned by the international community as a violation of international law. […] For example, in [a previous case], the court found that a complaint alleging "beatings, electric shocks, threats of death and rape, mock executions, and hanging from the hands and feet," successfully pled a claim for CIDT, although the court qualified that the alleged acts might also "justify a finding of torture."[…] Moreover, the difficulty of determining whether particular conduct falls on the spectrum of CIDT and torture does not make the

definition of CIDT any less specific because difficult line drawing between prohibitions (i.e. first- and second-degree assault) is endemic to complex legal systems, even when concepts are specifically defined. And, "distinctly classified or not, the infliction of cruel, inhuman or degrading treatment by agents of the state, as closely akin to or adjunct to torture, is universally condemned and renounced as offending internationally recognized norms of civilized misconduct." […]

[10] In addition, although as of 2004 Congress had not passed a statute analogous to the Anti-Torture Act that expressly criminalized CIDT, […] courts are not without legislative guidance as to the meaning of CIDT. To the contrary, the War Crimes Act, which was in force at the time of the events in question prohibited "grave breach[es] of common Article 3" of the Geneva Convention, including "cruel or inhuman treatment," which is defined 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." […]

C. War Crimes

[…]

[11] […] Defendant acknowledges that "[a]s with torture, a general proscription on war crimes existed in 2003-04" and that "courts have recognized war crimes as actionable ATS claims". […] The content of this norm is provided by the War Crimes Act of 1996, which states that a war crime includes any conduct "defined as a grave breach" of any of the Geneva Conventions of August 12, 1949 or prohibited by select articles of the Hague Convention IV. […] The grave breaches of the Geneva Conventions defined by the statute include "torture" and "cruel or inhuman treatment," as well as "intentionally causing serious bodily injury." […]

[12] Importantly, the Fourth Geneva Convention, which covers treatment of civilians in war zones and occupied territories, "does not limit its application based on the identity of the perpetrator of the war crimes," suggesting that there is no distinction between state and private actors when it comes to liability for war crimes. […] The most influential decision recognizing this principle is the Second Circuit's decision in Kadic, which explained that "[t]he 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." […] Consistent with this history, the War Crimes Act "does not provide that non-state actors are exempt from prosecution," […] and current government regulations specifically instruct contractors to notify their employees that they can be held liable under the statute […].

[13] Notwithstanding the consensus that war crimes are clearly defined and actionable against private actors under the ATS, defendant argues that the norm prohibiting war crimes does not provide a cause of action in this case because "the claim involves U.S. military operations and conditions of detention approved by the military chain of command."[…] This argument is contradicted by [the Court of Appeal's] holding that "the military cannot lawfully exercise its authority by directing a contractor to engage in unlawful activity."[…] In keeping with [that] opinion, whether the U.S. military approved the conditions of detention has no bearing on whether war crimes claims are actionable under ATS.

[14] Next, defendant argues that because the War Crimes Act does not create a private right of action, it cannot support a claim brought by the ATS. […] Moreover, […], the case defendant cites as holding that "the Hague Convention, like the Geneva Conventions, was not self-executing, and therefore could not support a claim brought under the Convention or a private right of action brought derivatively under the ATS," […] says no such thing. […] [I]n the instant action plaintiffs are not arguing that the Geneva Conventions are self-executing or constitute a waiver of sovereign immunity but rather that the law of nations provides a common law cause of action for war crimes, and defendant has conceded the correctness of plaintiffs' arguments by acknowledging that "courts have recognized war crimes as an actionable ATS claim."[…]

[…]

Discussion

I. Classification of the Situation and Applicable Law

1. (Document A, paras [1], [4]; Document B, paras [1], [10]-[12])

a. Using the information available in this case, could you classify the situation in Iraq between 2003 and 2004 when the alleged acts took place? What was the applicable law? (GC I-IV, Common Art. 2)

b. Does Common Article 3 apply to this case? Why or why not? Does Common Article 3 apply in times of international armed conflict? Are breaches of Common Article 3 war crimes? In IAC? In NIAC? Can violations of Common Article 3 constitute grave breaches? How do you understand the use of the term "grave breach of common Article 3" employed by the U.S. in its War Crimes Act of 1996? *(Document B, para. [10])*? (GC I-IV, Common Arts. 2 and 3; GC I-IV, Arts. 50/51/130/147; CIHL, Rule 156)

c. Based on the information given, who are the parties to the conflict? What kind of entity is CACI Premier Technology, Inc.? Describe its involvement in this conflict. Do its agents qualify as State actors or non-State actors? Could CACI be a party to the conflict? Why/Why not? Do the answers to these questions matter when determining whether a violation of IHL or a war crime has been committed? (GC III, Art. 4; CIHL, Rules 3, 4)

II. Classification of Persons

2. (Document A, paras [1]-[2]; Document B, para [1])
a. How would you classify the plaintiffs in this case? How would you classify the CACI employees? For both groups, what additional information do you need to evaluate their status? (GC III, Art. 4; GC IV, Art. 4; CIHL, Rules 3-5)
b. What protection does IHL offer the plaintiffs? What obligations are imposed upon CACI Personnel by IHL? (GC I-IV, Common Art. 1; GC III, Arts. 12-17; GC IV, Arts. 4, 27, 32, 76; CIHL, Rules 87, 90, 139)
c. Does the relationship between the US government and CACI affect the classification of CACI personnel? (GC I-IV, Common Art. 2; GC III, Art. 4)

III. Levels of Control

3. (Document A, paras [5]-[11])
a. For what purposes does the Court discuss the level of control by the US over CACI ? To classify the conflict? To attribute IHL violations committed by CACI to the US? To determine whether courts can give victims of CACI a remedy under US law?
b. Can State control over a non-State entity affect the classification of the conflict? Under what circumstances? What level of control is required to affect the classification of the conflict? In this case, does the U.S. control over CACI's activities in Iraq affect in any way the classification of the conflict? Why/Why not?
c. What level of control over the actions of CACI employees does the U.S. military need to exercise in order for the actions of those employees to be attributable to the U.S. under the rules of State Responsibility? Finally what level of control does the Court of Appeals for the Fourth Circuit say the U.S. military must have over CACI in order for the political question doctrine to apply? Is this level of control sufficient for the political question doctrine to apply, or are there other questions that should be fulfilled? How are these levels of control different from each other, if at all? (GC I-IV, Common Art. 2; GC III, Art. 4; CIHL, Rule 4, 149; ICJ, Nicaragua v. United States, paras 80 – 122; ICTY, The Prosecutor v. Tadić, paras 87 – 145; ICJ, Bosnia and Herzegovina v. Serbia and Montenegro, paras 396 - 407)
4. (Document A, para [6]) Does the appellate Court use the terms "direct" control and "actual" control synonymously?
5. (Document A, paras [7]-[15]) What does the Court say about the "formal" and "actual" control of CACI actions by the military? What level of control will make the political question doctrine applicable? Under what circumstances? What does this mean for our case?

IV. Abuse of detainees

6. (Document A, paras [13]-[22]; Document B).
a. Are torture or cruel, inhuman, or degrading treatment (CIDT) ever permitted under IHL? (GC I-IV, Common Art. 3; GC I-IV, Arts. 50/51/130/147; GC III, Art. 13; GC IV, Art. 27; CIHL, Rule 90)
b. What is the definition of torture under U.S. law? Under IHL? What is the definition of CIDT under U.S. law? Under IHL? Are there any differences between the U.S. definitions and the IHL definitions? (GC I-IV, Common Art. 3; GC III, Art. 13; GC IV, Art. 32; CIHL, Rule 90)
c. (Document B, paras [5]-[7]) May a non-state actor commit torture? According to the district court, what type of authority must a non-state actor enjoy in order to commit torture under U.S. law? Does the same apply for IHL? Must the non-state actor have control over the person to commit torture? Under US law? Under IHL? (GC I-IV, Common Art. 3; CIHL, Rules 90, 139)
d. (Document B, para [8]) According to the District Court, is the determination of the U.S. Executive Branch relevant to evaluations of whether certain conduct constituted torture under international law? Why/Why not?
e. (Document B, paras [9]-[10]) What is CIDT? How has it been defined by the U.S? What is the relationship between torture and CIDT? Is there any difference between the two concepts in IHL? (GC I-IV, Common Art. 3; GC I-IV, Arts. 50/51/130/147; GC IV, Arts 27 and 32; CIHL, Rule 90)
f. (Document B, para [13]) Does approval of acts of torture, CIDT, or other war crimes by the military chain of command affect the classification of those acts as war crimes? In this case? In IHL? Why or why not? (GC I-IV, Common Art. 3; GC I-IV, Arts. 50/51/130/147; CIHL, Rule 90, 152, 153)
g. *(Document B, para [12])* May war crimes be committed by non-State entities? By private individuals? Only by belligerents? What is the difference between a war crime and a common crime committed in an armed conflict? (GC I-IV, Arts. 49/50/129/146, 50/51/130/147)
h. (Document A, para [4]) In addition to the perpetrators of the acts, do you think others should be held responsible for the violations referred to in this case? How are the "command vacuum" and the "failure of military leaders to exercise effective oversight over CACI interrogators and military police" relevant in answering the preceding question? (GC I-IV, Arts. 49/50/129/146; CIHL, Rules 152, 153)
i. (Document B, para 14) Does the issue—whether the Geneva Conventions are self-executing—affect State Parties' obligations to respect IHL treaties? Why or why not? Does that issue affect the application of IHL to the case of Al-Shimari? Why or why not? (GC I-IV, Common Art. 1; CIHL, Rule 139)
j. Document A, paras [12]-[14]; [18]) The district court concluded that it was "unequipped to evaluate whether the use of certain 'extreme interrogation measures in the theatre of war' was appropriate or justified." *(para [12])* It also alleged difficulties in applying international law (*para. [18])*. In what ways are these conclusions problematic from an IHL perspective? What obligations of States are at stake? (GC I-IV, Common Art. 1; GC I-IV, Arts. 49/50/129/146, 50/51/130/147; CIHL, Rules 139, 157)
k. Who may seek remedies for violations of IHL? Under IHL, do victims have a right to compensation for IHL violations? How may individuals seek redress as victims of IHL violations? In your opinion, is it appropriate for individuals to seek civil judicial remedies for violations of IHL? What are the pros and cons of this approach? (Hague Convention IV, Art. 3; P I, Art. 91; CIHL, Rule 150)