IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SALEH *et al.*,	)	
Plaintiffs,	)	Civil Action No. 05-1165 (JR)
v.	)	
TITAN CORPORATION *et al.*,	)	
Defendants.	)	

PLAINTIFFS' OPPOSITION TO DEFENDANT TITAN CORPORATION'S MOTION TO DISMISS THE THIRD AMENDED COMPLAINT

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INTRODUCTION

Plaintiffs hereby oppose the motion to dismiss filed by defendant L-3 Communications Titan Corporation ("Titan"). Plaintiffs are former prisoners who were tortured at Abu Ghraib and other facilities in Iraq by Titan and its co-conspirators. Titan seeks to prevent the torture victims from having their day in court. Disturbingly, Titan, in its effort to evade accountability and fiscal responsibility for its corporate misconduct, asserts that torture is the official policy of the United States.

Titan is wrong. Torture is *not* official United States policy, according to all three branches of the United States government. As noted by the Supreme Court: "[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 v. Alvarez-Machain*, 524 U.S. 692, 732 (2004). As alleged by plaintiffs' Third Amended Complaint ("TAC"), the Bush Administration does not claim torture as an official policy. Although the investigation of those who tortured prisoners has not been as extensive as the victims would like,[1] several of Titan's co-conspirators have already been convicted. This Court should reject Titan's cynical effort to avoid accountability by trying to wrap the United States flag around its egregious corporate misconduct. Titan simply lacks the legal authority to claim that its torture was done as part of an official policy and that Titan stands in the shoes of the sovereign, immune from all claims.

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[1] For a summary of the current status of the United States' efforts to investigate and prosecute the perpetrators, see *By the Numbers: Findings of the Detainee Abuse and Accountability Project*, a joint project of New York University's Center for Human Rights and Global Justice, Human Rights First, and Human Rights Watch, *available at* http://www.humanrightsfirst.info/pdf/06425-etn-by-the-numbers.pdf.

STATEMENT OF PROCEDURE

On June 9, 2004, the torture victims filed their class action complaint in the Southern District of California alleging that Titan and the other defendants formed a conspiracy to torture and abuse them. On June 30, 2004 and July 30, 2004, before defendants filed any responsive pleading, the victims amended their complaint.

On September 10, 2004, Titan filed motions to dismiss on grounds including the political question doctrine and the "government contractor defense." *Mot. of Def. Titan Corp. To Dismiss Pls.' Second Amended Compl. (Sept. 10, 2004).* On November 10, 2004, CACI moved to transfer the action to the Eastern District of Virginia. *Mot. of Defs. CACI Int'l Inc., CACI, Inc. - Fed., and CACI N.V. To Transfer Venue (Nov. 10, 2004).* Titan asked the Court to rule on the motions to dismiss before proceeding to rule on the motion to transfer, but the Court denied that request so the motions were never adjudicated. *Tr. of Oral Arg. at 25-26, 60 (Feb. 14, 2005).*

The Southern District of California transferred the action to the Eastern District of Virginia over plaintiffs' objections. *Order Granting Mot. To Transfer Action (March 21, 2005).* The victims then moved to transfer the action to this Court to be consolidated with *Ibrahim v. Titan Corp.*, No. 04-1248 (hereinafter "*Ibrahim* action"). *Pls.' Mot. To Transfer Venue to the Dist. Ct. for the Dist. of Columbia (May 10, 2005).* Thereafter ensued extensive litigation (thirteen briefs) culminating in the Eastern District of Virginia holding that "there is jurisdiction over Defendants under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (2000); and the District of Columbia's long-arm statute." *Order at 1 (Jan. 13, 2006).*

On August 12, 2005, while the parties to the instant action were litigating venue, this Court issued an order in the *Ibrahim* action. *Ibrahim v. Titan Corp.*, 391 F. Supp. 2d 10 (D.D.C. 2005). The Court dismissed the *Ibrahim* plaintiffs' Alien Tort Statute ("ATS") claims because

those plaintiffs had not alleged any state action or any action taken under the color of law, but preserved the question of whether an allegation that a defendant acted under the color of law would state a valid ATS claim. *Id.* at 14-15 & n.3. The Court dismissed the Racketeer Influenced and Corrupt Organizations Act ("RICO") counts for lack of standing. *Id.* at 19-20. The Court concluded that "[p]laintiffs' allegations describe conduct that is abhorrent to civilized people, and surely actionable under a number of common law theories" and denied defendants' motion to dismiss the remaining claims. *Id.* at 15, 19.

On February 9, 2006, the victims sought leave to amend their complaint to conform to this Court's *Ibrahim* ruling. *Pls.' Mot. For Leave To Amend (Feb. 9, 2006).* Titan stipulated to the amendment without waiving its challenges to the Third Amended Complaint ("TAC"). *Stipulation (Feb. 22, 2006).* On March 22, 2006, plaintiffs filed the TAC. On April 7, 2006, Titan filed a motion to dismiss. *Def. L-3 Communications Titan Corp.'s Mem. In Support Of Its Mot. To Dismiss the Third Amended Compl. ("Titan Mem.")* at 11-12. This Opposition responds to Titan's motion to dismiss.

STATEMENT OF RELEVANT FACTS

This action seeks redress for the harms caused by torture. According to the TAC, Titan knowingly entered into a conspiracy to torture prisoners. *TAC ¶ 57.* The TAC alleges Titan and its co-conspirators tortured plaintiffs when they were imprisoned at prisons in Iraq. *Id. ¶¶ 28, 52, 65, 78-80, 91, 196-99, 201-08.* The TAC alleges Titan is liable even in the absence of a conspiracy for the actions of Titan employees in Iraq, including defendants Israel and Nakhla. *Id. ¶¶ 16-17, 29, 56, 61, 62, 41-46, 310-11, 313-16.* Defendant Israel beat, punched and threatened seventeen-year-old Plaintiff Umer during an interrogation. *Id. ¶¶ 18, 50.* Defendant Nakhla assaulted Plaintiff Hadood. *Id. ¶¶ 19, 49.* A Titan employee raped a boy. *Id. ¶ 54.* The

TAC also alleges: Titan and its co-conspirators subjected plaintiffs to electric shocks (*Id.* ¶¶ *116(g), 125, 133(j), 142*); beat plaintiffs (*Id.* ¶¶ *129(d), 133(c), 134, 135(a), 137, 142*); shackled plaintiffs naked under a fan blowing cold air (*Id.* ¶ *123*); denied plaintiffs medical treatment (*Id.* ¶¶ *117, 124*); exposed plaintiffs to extremely loud noise for long periods (*Id.* ¶¶ *116(h), 127, 129(b), 144(a), 146(d), 160(g)*); and threatened plaintiffs and their family members with sexual abuse (*Id.* ¶¶ *52, 135(e), 143, 148, 157*).

The TAC provides a number of other examples of Titan employees torturing plaintiffs in a manner that violates the Geneva Conventions and other applicable domestic and international law and policy. *Id.* ¶¶ *17- 19, 49, 50-54, 63*. The TAC also alleges: Titan was not contractually required to beat and rape prisoners (*Id.* ¶¶ *31, 41*); Titan knew that the United States has repeatedly denounced using such acts of torture and cruel, inhuman, and degrading treatment as methods for interrogation (*Id.* ¶¶ *108-13*); Titan knew that military regulations expressly prohibit using torture and other methods outside the Geneva Conventions limitations on interrogation techniques (*Id.* ¶ *113*); and Titan knew or should have known that the United States intended that each and every person acting under color of United States authority, including Titan translators, would not torture prisoners (*Id.* ¶¶ *31, 41, 108*).

ARGUMENT

This Opposition explains why the Court should deny Titan's motion to dismiss. ***First***, in seeking to dismiss the ATS claims, Titan ignores an entire body of controlling jurisprudence developed subsequent to *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985), that permits ATS plaintiffs to rely on "color of law" as the jurisdictional equivalent of state action for those claims that require state action. Certain claims (war crimes and crimes against humanity) have no such state action requirement. Titan relies exclusively on *Sanchez-Espinoza*, which is

inapplicable because it addressed only conduct that had been claimed as "official action" by President Ronald Reagan. In this case, however, the conduct is illegal under United States law and has been denounced by President Bush. ***Second***, Titan's challenges to the torture victims' claims under RICO mislead the Court and lack merit. Several victims suffered RICO injuries and properly plead them with the requisite specificity. Those claims are not extinguished merely because the injuries occurred abroad because conduct central to the conspiracy as well as the effects of the conspiracy were felt here in this District. ***Third***, plaintiffs urge this Court to find that the government contractor defense cannot – as a matter of law – apply to claims for human rights violations. ***Fourth and finally***, Titan has notice of the claims asserted against it.

I. STANDARD OF REVIEW.

It is black-letter law that every factual allegation has to be taken as true at this procedural stage in the litigation. *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164 (1993); *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). The plaintiffs are entitled to have the benefit of all inferences drawn from those facts. *Kowal v. MCI Commc'ns Corp*., 16 F.3d 1271, 1276 (D.C. Cir. 1994); *Thomas v. Principi*, 394 F.3d 970, 972 (D.C. Cir. 2005). Titan assumes that this legal standard can be avoided merely by mocking plaintiffs' conspiracy claims and use of the word conspiracy to describe what occurred in Iraq. *Titan Mem. at 1-6*. Titan's mockery is legally meaningless.[2] Plaintiffs allege as ***fact*** that a conspiracy exists, Titan participated in the conspiracy, and the conspiracy included employees of both CACI and

[2] Titan is not even internally consistent. Titan ignores the law on conspirators being responsible for each others' criminal acts in asserting no claims have been properly plead against it (*Titan Mem. at 44*), but tries to bootstrap itself into the immunities arguably available to its co-conspirators (*Titan Mem. at 37-38*). Although co-conspirators do act as each others' agents, they cannot share their immunities with each other. *See Section II.E*.

the military. *TAC ¶¶ 57-67*.[3] The TAC allegations, including those relating to the conspiracy, must be considered as true for purposes of analyzing the merits of Titan's Motion To Dismiss.

II. THE VICTIMS STATE VALID ATS CLAIMS ARISING UNDER THE "COLOR OF LAW."

Titan seeks to persuade this Court that the torture victims have failed to state valid ATS claims, arguing that the claims are barred by *Sanchez-Espinoza*. *Titan Mem at 8-25*. Titan also argues that the ATS claims other than torture are improperly plead. This Court expressly noted in *Ibrahim* the "tension" between *Sanchez-Espinoza*'s ruling on state action and "color of law" claims and reserved ruling on the issue until squarely presented. *Ibrahim* at 14 n.3. The starting point to resolve this tension is the Supreme Court's decision in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 729 (2004), which Titan does not mention in its argument about the nonjusticability of the victims' ATS claims.

Parts A through C of this Section address the *Sosa* decision and controlling jurisprudence on the victims' ability to state valid ATS claims by alleging Titan acted under color of law. *See TAC ¶¶ 1, 65, 91*. Part D explains why Titan's exclusive reliance on *Sanchez-Espinoza* fails. That decision addressed only official state action undertaken by private parties who, plaintiffs conceded, were acting as *authorized* agents of the sovereign. No such concession has been made here. Part E explains why, as a matter of law, Titan is not entitled to cloak itself in any immunities arguably enjoyed by its co-conspirators.

A. The *Sosa* Court's ATS Ruling.

The facts of *Sosa* are similar to the instant facts, differing only as to the egregiousness of

[3] Although plaintiffs have not yet had the benefit of any formal discovery, plaintiffs' allegations about the conspiracy have substantial evidentiary support even at this early procedural stage. For example, in their RICO Case Statement (*attached to Titan Mem*.), plaintiffs identified Major General Miller as a member of the conspiracy. According to press reports, General Miller has decided to take the military equivalent of the Fifth Amendment. *See* J. White, *General Asserts Right On Self-Incrimination in Iraq Abuse Cases*, Wash. Post, Jan. 12, 2006, at A1.

the underlying conduct. The U.S. Drug Enforcement Administration hired petitioner Sosa and other Mexican nationals to abduct respondent Alvarez-Machain, also a Mexican national, from Mexico to stand trial in the United States for murder. The Court held that the government officials were immune from liability under the Federal Tort Claim Act's ("FTCA") exception to the waiver of sovereign immunity for claims "arising in a foreign country." *Sosa* at 699-701, 733-38, *citing* 28 U.S.C. § 2680(k). Yet, despite the United States' inextricable intertwinement with Sosa,[4] the Court proceeded to consider the ATS claim against him. That claim failed only because his detention, which lasted a few hours and was followed by legal process, did not violate a universally accepted and specific norm actionable under the ATS. *Sosa* at 725-38.

First, considering the claims against the government defendants, the *Sosa* Court did not even reach the question of whether there was ATS jurisdiction because it found those defendants immune. Next, considering the ATS claims against *Sosa*, the Court – without any mention of immunity – proceeded directly to the question of whether there was ATS jurisdiction. Although a *sub silentio* ruling on a question of subject matter jurisdiction is not necessarily precedential, *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 119 (1984), the Supreme Court's silence is highly significant in light of Titan's averments that its conduct was official U.S. action outside the ambit of ATS. *Titan Mem. at 8*. In *Sosa*, the Supreme Court knew that Sosa and the government officials conspired and worked closely together to kidnap Alvarez-Machain to carry

[4] As stated by the Court of Appeals for the Ninth Circuit, "[W]e view this case as a series of events that began and ended in the United States, and . . . inextricably intertwined with the United States government. The United States' interests are particularly pointed here: the United States itself is a party, *and it is the conduct of the United States government, in its efforts to bring a suspect to justice, that spawned the international incident. . . . [Sosa] was employed as an agent of the American government. . . . The relationship between Sosa and Alvarez was intimately connected with, and a direct product of, the interests of the United States government*." *Alvarez-Machain v. United States*, 331 F.3d 604, 634-35 (9th Cir. 2003) (*en banc*) (emphasis added). *Id*. at 637, 641 (noting that Sosa "was guided by the unlawful directives of American DEA agents" *and the* abductors acted "merely as pawns").

out a purported governmental function. *Id.* at 697-98. The Court could have raised the issue of *Sosa*'s immunity *sua sponte* because immunity is clearly a jurisdictional issue. *See FDIC v. Meyer*, 510 U.S. 471, 475 (1994); *Collins v. Youngblood*, 497 U.S. 37 (1990); *Texas v. Florida*, 306 U.S. 398, 405 (1939) (same).[5]

The *Sosa* Court also cited with approval appellate precedents involving ATS claims as far back as *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), but *never* cited the 1985 *Sanchez-Espinoza* decision. It is not that the Court was unaware of the decision. The United States, supporting Sosa's efforts to evade the claims, cited to the decision in a footnote for the proposition that ATS claims cannot reach private non-state conduct. S*ee Brief for the United States as Respondent Supporting Petitioner at 42, attached as Exhibit A.* Not even Justice Scalia, who both joined the majority and wrote a concurrence in *Sosa*, mentioned *Sanchez-Espinoza*, an opinion he authored as a Circuit Judge. Here, as in *Sosa*, defendants are private actors who acted under color of law and participated in conduct with government officials. Whether the government officials are immune under the FTCA, as were the officials in *Sosa*, is irrelevant to the claim against Titan, an independent contractor. Like the claims against Sosa, the claims against Titan must be separately considered.

B. The Supreme Court in *Sosa* Expressly Endorsed ATS Jurisprudence Permitting ATS Actions Alleging "Color of Law."

In *Sosa*, the Supreme Court cited with approval three appellate decisions (one, a concurrence by Judge Edwards in *Tel-Oren*) decided after *Sanchez-Espinoza*. Each held that a victim stated valid ATS claims by alleging defendants acted under "color of law" in violating

[5] The Supreme Court typically seeks to rule on the narrowest grounds presented. *Vieth v. Jubelirer*, 541 U.S. 267, 281 (2004) (Supreme Court decides issues on narrowest ground available); *Barnes v. Gorman*, 536 U.S. 181, 191-92 (2002) (Stevens, J., concurring). *See also Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 438 (1989) (reaching immunity questions before ATS questions).

human rights norms requiring state action. *Sosa* at 732, *citing In re Estate of Ferdinand Marcos, Human Rights Litig.*, 25 F.3d 1467 (9th Cir. 1994); *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 (D.C. Cir. 1984) (Edwards, J., concurring).

In *In re Estate of Ferdinand Marcos, Human Rights Litigation*, 25 F.3d 1467 (9th Cir. 1994), the Court of Appeals for the Ninth Circuit affirmed the judgment against the daughter of the former dictator although her "acts were not taken within any official mandate." *Id.* at 1470. The Court of Appeals also concluded that although the dictator's acts of torture and execution were clearly outside of his authority as President, he was liable because "under color of law, [he] ordered, orchestrated, directed, sanctioned and tolerated the continuous and systematic violation of human rights." *Id*. at 1471 n.4.[6] The Court of Appeals rejected the argument made by Titan:

> *We also reject* the Estate's argument that because "only individuals who have acted under official authority or under color of such authority may violate international law," *Estate I*, 978 F.2d at 501-02, *a finding that Marcos' alleged actions were outside the scope of his official authority necessarily leads to the conclusion that there was no violation of international law. An official acting under color of authority, but not within an official mandate, can violate international law . . . . See Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980) ("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.").

Id. at 1472, n.8 (emphasis added).

Kadic reached the same result. There, the Court of Appeals for the Second Circuit

[6] The customary international law definition of torture as expressed in the Convention Against Torture does not restrict torture to acts taken by state officials, but rather includes actions taken by private actors in conspiracy with state officials. The Convention covers torture "inflicted by *or at the instigation of or with the consent or acquiescence of* a public official or other person acting in an official capacity." Article 1(1), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted December 10, 1984, G.A. Res. 39/46, U.N. Doc. A/RES/39/46, 1465 U.N.T.S. 85 (entered into force June 26, 1987); (emphasis added). *See also* Andrew Clapham, *Human Rights Obligations and Non-State Actors* 342 (2006).

explained why, under international law, a private person acting under "color of law" could be liable for torture. The court cited to jurisprudence relating to 42 U.S.C. § 1983 for guidance and held plaintiffs were so liable. *Kadic*, 710 F.3d at 245.

Finally, in the concurrence cited with approval by the Supreme Court in *Sosa*, Judge Edwards opined in *Tel-Oren* that torture might be actionable if committed by persons acting under color of law. *Tel-Oren* at 781. Judge Edwards expressed his approval of the reasoning of the Court of Appeals for the Second Circuit in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). He distinguished the liabilities imposed on non-state actors from those imposed on "states and persons acting under the color of state law." He also explained, "the law of nations is not stagnant and should be construed as it exists today among the nations of the world." *Tel-Oren* at 777. Given *Sosa*'s endorsement of these appellate decisions, it seems certain as a matter of law that ATS plaintiffs are permitted to plead actions under the color of law to satisfy the jurisdictional state action for those claims that require such action.

C. After *Sosa*, Federal Court ATS Jurisprudence Continues To Use the "Color of Authority" Analysis.

After the issuance of *Kadic*, but before *Sosa*, federal courts looked to Section 1983 jurisprudence for guidance on determining who acts under the color of law.[7] The *Kadic* approach of using Section 1983 jurisprudence to determine who is acting under the color of law was endorsed in legislative reports accompanying the Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) ("TVPA"). H.R. Rep. No. 102-367 (Nov. 25, 1991) ("Courts should look to 42 U.S.C. Sec. 1983 in construing 'color of law' . . . ."); S. Rep. 102-249

[7] *See, e.g.*, *Estate of Rodriquez v. Drummond*, 256 F. Supp. 2d 1250, 1264-65 (N.D. Ala. 2003); *Nat'l Coalition Government v. Unocal*, 176 F.R.D. 329, 349 (C.D. Cal. 1997) (concluding that a private corporation acts under "color of state law" where corporation willfully participates in joint action with state agents); *Sinaltrainal v. Coca-Cola Co.*, 256 F. Supp. 2d 1345, 1353 (S.D. Fla. 2003).

(Nov. 26, 1991).

Post-*Sosa*, Section 1983 continues to guide the development of ATS jurisprudence on when a private actor acts under color of law. For example, in *Chavez v. Carranza*, No. 03-2932, 2005 WL 2789079, at *5 (W.D. Tenn. Oct. 26, 2005), the court held that when persons who are not government officials "act[ ] together with state officials" or act with "significant state aid," they are deemed governmental actors for the purposes of the state action requirement under the TVPA and the ATS. *See also Doe v. Saravia*, 348 F. Supp. 2d 1112, 1150 (E.D. Cal. 2004) (citing *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 CIV. 8386, 2002 WL 319887, at *13 (S.D.N.Y. Feb. 28, 2002); *Presbyterian Church of Sudan v. Talisman*, 244 F. Supp. 2d 289, 328 (S.D.N.Y. 2003)). It is simply incontrovertible that "deliberate torture perpetrated under color of official authority," *Filartiga*, 630 F.2d at 878, is actionable under the ATS.

Titan argues that the TAC must be dismissed as challenging military policy even if the military conduct at issue is *ultra vires* or illegal. *Titan Mem. at 14*. Even assuming Titan was accurate in alleging that the TAC challenges military policy (which it does not), Titan misstates the law by saying such challenges can never be heard. *Rasul v. Bush*, 542 U.S. 466 (2004), directly contradicts Titan's claim that the Court is required to dismiss any damages action challenging military action regardless of whether the action was "abhorrent and patently unlawful." *Titan Mem. at 14*. In *Rasul*, the Supreme Court held that aliens could state ATS claims against the U.S. in relation to their imprisonment in Cuba. The Court held that the ATS "explicitly confers the privilege of suing for an actionable 'tort . . . committed in violation of the law of nations or a treaty of the United States' on aliens alone." *Id.* at 485.

None of the lesser authorities cited by Titan supports its claim for absolute immunity. In *Schneider v. Kissinger*, 412 F.3d 190, 193-98 (D.C. Cir. 2005), the court dismissed the claims

before it based on the political question doctrine. Plaintiffs' claims clearly are not barred by this doctrine. *See Ibrahim* at 15-16. Both *United States v. Stanley*, 483 U.S. 669, 681 (1987) and *Chappell v. Wallace*, 462 U.S. 296, 300-02 (1983), concerned soldiers bringing *Bivens* claims for service-related injuries. The Supreme Court held that permitting soldiers to raise tort claims against their superiors or the military as an institution would undermine essential military discipline. Titan employees are not in the military chain of command so *Stanley* and *Chappell* do not apply. *TAC ¶ 91*. The TAC alleges defendants flouted military orders. *Id. ¶¶ 31, 91*. Permitting the victims to recover will benefit the military because independent contractors doing business with the military will be more careful to abide by the terms of their contracts if they know they can be sued for conduct outside those terms.

D. *Sanchez-Espinoza* Did Not Address "Color of Law" ATS Claims.

Titan does not address the substantial jurisprudence on the "color of law." Instead, Titan cites only to *Sanchez-Espinoza* as the reason this Court should dismiss the victims' ATS claims for torture. Titan argues that *Sanchez-Espinoza* must be read to require (1) pleading state action in the form of "official acts" as necessary for ATS jurisdiction and (2) dismissal on sovereign immunities grounds because the TAC alleges (according to Titan) these "official acts." *Titan Mem. at 15*. In *Sanchez-Espinoza*, however, the Court of Appeals did not address the issue raised by the victims' TAC – namely, whether the victims state valid ATS claims by alleging torture by Titan and its co-conspirators acting under the color of law. *TAC ¶¶ 1, 65, 91*.

In *Sanchez-Espinoza*, plaintiffs sued government officials and their private parties for acts that were performed with the ***actual*** authority of the President. The plaintiffs conceded the private parties were authorized agents of the State. *Sanchez-Espinoza*, 770 F.2d at 207 n.4. The Court of Appeals held that the doctrine of sovereign immunity barred the claims against the government officials and their agent because the challenged acts were "official actions of the

United States." *Id.* at 207. The Court of Appeals mentioned the private defendants only in a footnote. *Id.* n.4. The Court of Appeals also held that the official conduct of the Reagan Administration's foreign policy in Nicaragua was not "contrary to statutory or constitutional prescription." *Id.* at 207.

Here, the torture victims do *not* concede that Titan and its co-conspirator CACI were acting as agents of the United States or that torture was consistent with statutory and constitutional prescription. Indeed, the TAC alleges precisely the contrary on both points. The TAC alleges torture and other customary law violations are contrary to the policies of the United States and were not authorized by the President or any official act of the United States government, but were in fact specifically *disavowed* by President Bush. *TAC ¶¶ 1, 12-14, 38, 108-13.* The TAC alleges defendants are independent contractors who acted outside the scope of their purported contracts. *Id. ¶¶ 31, 41*. Thus, *Sanchez-Espinoza* is not, as defendants claim, on "all fours with the pending case." *Titan Mem. at 9-10.*

Titan asserts the victims' allegation that the defendants were acting under the "color of law" (*TAC ¶¶ 1, 65, 91*) cannot suffice because otherwise the *Sanchez-Espinoza* plaintiffs would have been able to avoid immunity simply by asserting a "color of law" relationship rather than an "agency" relationship. *Titan Mem. at 14-15.* Titan cites no authority for this assertion, and simply ignores the twenty years of ATS "color of law" jurisprudence developed subsequent to *Sanchez-Espinoza*. The difference between agency and color of law is not a mere "legal characterization," as Titan suggests. The victims' factual allegations in the TAC – not Titan's characterization of the facts – controls. As explained above, this "color of law" jurisprudence, endorsed by the Supreme Court's decision in *Sosa*, rejects the Court of Appeals' reasoning that

"official action" is a necessary element to state an ATS claim and instead holds that asserting "color of law" suffices to allege state action.

Further, by virtue of the *Sanchez-Espinoza* decision, if the ATS is read to require state action for jurisdiction when all norms involving state action are precluded from suit by virtue of sovereign immunity, the ATS would be an empty vessel. *Sosa* rejected the United States' proposed interpretation that would in effect leave the ATS stillborn and concluded instead that the ATS was intended to have practical effect. *Sosa*, 542 at 694. *Sosa* makes clear that, for a limited number of international norms, the ATS provides jurisdiction for suits to be brought pursuant to the federal common law: "The jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time." *Id*. at 724.

Again anticipating and seeking to avoid the controlling impact of *Sosa*, Titan argues that the passage of the TVPA signaled a Congressional intent to preclude ATS claims for conduct taken by United States citizens under the color of law. *Titan Mem. at 15-16.* However, in *Sosa*, the Court specifically noted that the TVPA *supplemented* the ATS and extended *Filartiga*. *Sosa* at 731.[8] The Court also clarified many of the ATS-related issues about which the Court of Appeals in *Sanchez-Espinoza* expressed doubt. *Sosa* rejected the notion that the ATS covers

[8] Titan's reliance on *Enaharo v. Abubakar*, 408 F.3d 877 (7th Cir. 2005), *Titan Mem. at 16, n.11*, is misplaced. Most courts to have considered the issue have held the opposite. *See Wiwa*, 2002 WL 319887, at *4; *Beanal v. Freeport-McMoran*, 969 F. Supp. 362, 380 (E.D. La. 1997); *Abebe-Jira v. Negewo*, 72 F.3d 844, 848 (11th Cir. 1996); *Kadic* , 70F.3dat 246; *Hilao v. Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996). As the dissent in *Enahoro* makes clear, "The majority, in claiming *Sosa* as authority for the preclusive effect of the TVPA, stands *Sosa* on its head. That case in fact relies on the TVPA as evidence of Congressional acceptance of torture as a norm enforceable via the ATCA." *Enaharo* at 889.

"only private, nongovernmental acts that are contrary to treaty or the law of nations – the most prominent examples being piracy and assaults upon ambassadors." *Sanchez-Espinoza* at 206.

Certainly nothing in *Sanchez-Espinoza* can be read to create the sweeping immunity proposed by Titan. The victims here state valid ATS claims. The victims are entitled to their day in court because the TAC alleges defendants acted under the "color of law."

E. Titan Is Not Entitled To the Sovereign Immunities of Its Government Co-Conspirators.

As a matter of law, corporations and private persons are not be permitted to insulate themselves from liability merely by selecting as their co-conspirators persons who enjoy sovereign or other immunities. *See Dennis v. Sparks*, 449 U.S. 24 (1980) (private persons conspiring with judge); *Toussie v. Powell*, 323 F.3d 178, 182-84 (2d Cir. 2003); *Scotto v. Almenas*, 143 F.3d 105, 114 (2d Cir. 1998) (parole officers); *Ballard v. Wall*, 413 F.3d 510, 518 (5th Cir. 2005) (judge); *Uwalaka v. New Jersey*, No. Civ. 04-2973, 2005 WL 3077685 (D.N.J. Nov. 15, 2005) (state employer). Titan lacks legal support for its argument that a conspiracy with military officials bestows sovereign immunities on Titan. *Titan Mem. at 38*.

III. THE VICTIMS ALLEGE ATS CLAIMS THAT MEET THE *SOSA* REQUIREMENTS.

In addition to arguing defendants are entitled to sovereign immunity, Titan argues that the victims have failed to allege conduct that states ATS claims consistent with *Sosa*. The TAC alleges Nakhla, Israel, and other persons employed by Titan engaged in conduct that violates the law of nations. *See, e.g., TAC ¶¶ 17, 19, 49, 50, 196*. Titan is on notice that the TAC alleges Titan had both direct and indirect liability for violations including war crimes, crimes against humanity and torture.

Tellingly, other than making the "color of law" argument addressed above, Titan does not allege the victims failed to state a claim for torture. Titan does not – and cannot – assert that the

TAC fails to allege the necessary elements of torture, which are an act causing severe pain or physical or mental suffering intentionally inflicted by a person acting under color of law for the purpose of obtaining information, intimidation, punishment or discrimination. *See Hilao v. Estate of Ferdinand Marcos*, 103 F.3d 789, 792 (9th Cir. 1996); *Siderman v. Argentina*, 965 F.2d 699, 716-17 (9th Cir. 1992); *Doe v. Liu Qi*, 349 F. Supp. 2d 1258, 1312-19 (N.D. Cal. 2004); *Presbyterian Church*, 244 F. Supp. 2d at 326; *Chavez v. Carranza*, No. 03-2932, 2005 WL 2789079, *6 (W.D. Tenn. Oct. 26, 2005).[9]

The *Sosa* Court indicated that when considering ATS claims, a court must look to international law to determine the contours of customary international norms, including whether state action is required. The court must then look to the common law, informed by international law, to provide the rules by which that norm is to be vindicated, *i.e.*, whether such principles as aiding and abetting, agency and conspiracy are applicable.

A. The TAC States Valid ATS Claims for Extrajudical Killing.

As Titan acknowledges, under international law, an extrajudicial killing is a "deliberate killing not authorized by previous judgment pronounced by a regularly constituted court . . . ." *Titan Mem. at 16* (quoting *Dammarell v. Islamic Republic of Iran*, No. 01-2224, 2005 WL 756090 (D.D.C. Mar. 29, 2005)). Extrajudicial killings have been recognized as "specific, universal, and obligatory," the standard endorsed by *Sosa*.[10] The TAC alleges that the death of Plaintiff Ibrahiem, who was tortured and then denied medical treatment, is just such a "deliberate killing." *Titan Mem. at 16-17*. Titan argues that the claim should be dismissed because a Titan

[9] *See also* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* December 10, 1984, G.A. Res. 39/46, 39 UN GAOR Supp. No. 51, at 197, UN Doc. A/RES/39/708 (1984), *entered into force* June 26, 1987, 1465 U.N.T.S. 85, 23 I.L.M. 1027 (1984), *as modified*, 24 I.L.M. 535, art 1(1); Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992).

[10] *Sosa*, 542 U.S. at 732, *Kadic*, 70 F.3d at 243; *Xuncax v. Gramajo*, 886 F. Supp. 162, 184 (D. Mass. 1995); *Wiwa*, 2002 WL 319887, at *4, *6.

employee is not alleged to be involved and it is the non-delegable duty of the United States to provide medical care. *Titan Mem. at 16-17*.

Neither argument has any merit. First, as Titan admits elsewhere, co-conspirators are liable for the misconduct of each other. *Titan Mem. at 38*. The TAC alleges that Titan participated in a conspiracy to torture. It need not have been a Titan employee killing Plaintiff Ibraheim to state a claim against Titan and the victims need not have alleged at this juncture every detail about the killing. *See Burnett v. Al Baraka Inv. & Dev. Corp.*, 274 F. Supp. 2d 86, 110-11 (D.D.C. 2003) (the nature of conspiracy is such that it is often difficult to provide the details of the conspiracy). Second, Titan is raising a factual dispute not susceptible to resolution via a Rule 12(b) motion to dismiss by asserting that the United States, not the conspirators, withheld medical care. The TAC alleges that it was the conspirators who tortured Ibraheim and subsequently prevented him from getting access to medical care that otherwise would have been provided by the United States. That care was essential to his survival – without it, he died in his son's arms. *TAC ¶¶ 138, 139, 153*. This conduct states a valid claim for extrajudicial killing.

B. The TAC States Valid ATS Claims for Cruel, Inhuman and Degrading Treatment ("CIDT").

Titan does not allege the torture victims failed to allege CIDT. Instead, it claims CIDT does not rise to the level of a norm under *Sosa*. Plaintiffs disagree. Both before and after *Sosa*, many courts found that CIDT is a norm that meets the "specific, universal, and obligatory" standard set forth in *Sosa*. *See, e.g.*, *Taveras v. Taveras*, 397 F. Supp. 2d 908, 915 (S.D. Ohio 2005) (citing *Sosa* and finding that the law of nations prohibited CIDT); *Jama v. INS*, 22 F. Supp. 2d 353, 363 (D.N.J. 1998) ("American Courts have recognized that the right to be free from cruel, unhuman [sic] or degrading treatment is a universally accepted customary human rights norm."). Facts analogous to those alleged by plaintiffs have been found to be within the

core of violations recognized as CIDT. *See Xuncax v. Gramajo*, 886 F. Supp 162, 187 (D. Mass. 1995) (plaintiffs forced to witness the torture or severe mistreatment of immediate relatives and family members being threatened by soldiers); *Wiwa v. Royal Dutch Petroleum Co*., 226 F.3d 88, 92 (2d Cir. 2000) (plaintiffs beaten and forced into exile due to credible threat of physical harm or death); *Chiminya v. Mugabe*, 216 F. Supp. 2d 262, 281-82 (S.D.N.Y. 2002) (plaintiffs dragged down public street and placed in fear of impending death).

The cases cited by Titan all dismiss CIDT claims on grounds that the lack of consistency in the definition proves that the conduct is not a violation of a recognized norm. This reasoning, however, is inconsistent with *Sosa*'s approving citation of *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 163-180 (1820). *Smith* is an illustration of the specificity with which the law of nations defined piracy, one of the "historical paradigms familiar when § 1350 was enacted." *Sosa*, 542 U.S. at 732. *Smith* expressly noted the diversity of definitions of piracy, but held that despite that diversity, all concurred that robbery or forcible depredations upon the sea constituted piracy. *Smith* at 161. *Smith* is consistent with the modern ATS authority that considers whether the conduct at issue is clearly within the norm, but not whether every aspect of what might comprise the norm is fully defined and agreed upon universally. *Xuncax* at 186-87.

C. The TAC States Valid ATS Claims for War Crimes.

United States courts and international jurisprudence have made clear that state action is not required for either war crimes or violations committed during the course of war crimes, such as the CIDT and extrajudicial killing claims at issue here.[11] *Kadic* at 243-44; *Bigio v. Coca-Cola*

[11] The lineage of rules governing the conduct of war is well recognized and the U.S. Department of Defense has acknowledged this history. Theodor Meron, *War Crimes Law Comes of Age* (1998) 65 (quoting a report by the Department of Defense on the conduct of the first Gulf War: " [t]he law of armed conflict with respect to collateral damage and collateral civilian casualties is derived from the Just War tradition of discrimination; that is, the necessity for distinguishing combatants from noncombatants and legitimate military targets…[T]his tradition is a major part

Co., 239 F.3d 440, 448 (2d Cir. 2001); *Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d 1116, 1144 n.122 (C.D. Cal. 2002); s*ee also Restatement (Third) of the Foreign Relations Law of the United States* (1986) § 404 (Pt. II, introductory note); *Developments in the Law – International Criminal Law: V, Corporate Liability for Violations of International Human Rights Law*, 114 Harv. L. Rev. 2025, 2037 (2001).[12] Titan concedes as much. *Titan Mem. at 18*.

Titan argues that victims' claims fail because Titan is not a "belligerent party." *Titan Mem. at 19*. Titan infers from *Kadic* that only "a belligerent party" may commit a war crime and therefore only a group such as an "insurgent military" may qualify as a party. *Id*. This misstates the law. The Second Circuit held in *Kadic* that state action is *not* a jurisdictional necessity for war crimes. *Kadic*, 70 F.3d at 240. Private actors not designated "belligerents" have been held accountable for war crimes since the Nuremberg Trials and these principles have been adopted by United States courts. *Id.* at 243; *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 374 F. Supp. 2d 331, 334 (S.D.N.Y. 2005); *In re "Agent Orange" Prod. Liab. Litig.*, 373 F. Supp. 2d 7 (E.D.N.Y. 2005).

D. The TAC States Valid ATS Claims for Crimes Against Humanity.

In his concurrence in *Sosa*, Justice Breyer noted that international law reflected substantive agreement as to "certain universally condemned behavior" including both war crimes and crimes against humanity. *Sosa*, 542 U.S. at 763. Justice Breyer relied in part on *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T ¶¶ 155-56 (Int'l Trib'l for Prosecution of Persons Responsible for Serious Violations of Int'l Humanitarian Law Committed in Territory of Former Yugoslavia since 1991, Dec. 10, 1998). *Sosa*, 542 U.S. at 762. *Furundzija* recognized aiding

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of the foundation upon which the laws of war is built . . . .") (internal citations omitted).

[12] In the War Crimes Act, 18 U.S.C. § 2441, Congress defined "war crimes" by reference to the Geneva Conventions. The core principles of the Geneva Conventions were themselves declarative of and incorporated customary international humanitarian law at the time of ratification. Meron, *supra* note 11, at 160.

and abetting liability where the private defendant gave "assistance, encouragement, or moral support, which has a substantial effect on the perpetration of the crime." *Furundzija*, 95-17/1-T ¶ 235. International law has been clear since the adoption of the Nuremberg Principles that private actors may be held liable for crimes against humanity. *See Control Council Law No. 10 Art. II(2)* (the prohibition against crimes against humanity applies to "[a]ny person, without regard to . . . the capacity in which he acted."); *Prosecutor v. Kupreskic*, IT-95-16-T, ICTY Trial Chamber, Judgment, 14 January 2000, ¶ 555 ("While crimes against humanity are normally perpetrated by State organs . . . there may be cases where the authors of such crimes are individuals having neither official status nor acting on behalf of a governmental authority.").

Titan does not challenge the justiciability of crimes against humanity under the ATS as a matter of law. Instead, Titan claims that the actions alleged by the torture victims do not rise to the factual level required to state claims of crimes against humanity. To state a claim for crimes against humanity, the torture victims need to allege "a widespread or systematic attack directed against any civilian population." *Cabello v. Fernadez-Larios*, 402 F.3d 1148, 1161 (11th Cir. 2005). *See also Ofosu v. McElroy*, 933 F. Supp. 237, 245 (S.D.N.Y. 1995) (stating that the definition of crimes against humanity includes "persecutions on political, racial or religious grounds"). The victims allege that the Torture Conspirators tortured a substantial portion of the populations in Iraqi prisons under U.S. control. The TAC alleges that some of the Torture Conspirators were motivated by religious or political animus. *TAC ¶ 62, 107, 160(v).* These allegations suffice to state a claim.

E. *Sosa*'s "Special Factors" Are Not Relevant To The Torture Victims' Claims.

In *Sosa*, the Supreme Court limited ATS jurisdiction to universally accepted norms in part to avoid improper foreign relations conflicts. *Sosa*, 542 U.S. at 728 ("Since many attempts by federal courts to craft remedies for the violation of new norms of international law would

raise risks of adverse foreign policy consequences, [recognition of new norms] should be undertaken, if at all, with great caution."). The norms against torture, summary execution, crimes against humanity, and war crimes upon which plaintiffs' claims are based, however, are not "new" norms. Rather, these norms have been recognized in *Filartiga*; *In re Estate of Marcos, Human Rights Litigation*; and *Kadic* – cases that *Sosa* cited with approval. *See supra* at 8-10. Plaintiffs' claims do not require the court to weigh any factors before recognizing those "new" norms about which *Sosa* urged caution. In any event, the factors named all weigh in favor of hearing the victims' claims.

1. The Torture Victims Have No Alternative Remedies To Exhaust.

Titan relies on the availability of alternative remedies that were already rejected in *Ibrahim*. *Compare Titan Mem. at 20 with Ibrahim*, 391 F. Supp. 2d at 17, n.4. Titan points to the fact that subsequent to the decision in *Ibrahim*, the State Department made another pledge to set up a system for compensation. *Titan Mem. at 21*. Nothing substantive has changed since the Court's clear decision in *Ibrahim*. Titan's assertions notwithstanding, a statement by the State Department is not the equivalent of congressional intent to occupy the field.

Alternative remedies are simply not available to the victims. The Foreign Claims Act ("FCA"), 10 U.S.C. § 2734, establishes a procedure for resolving claims arising out of military conduct in wartime. Contrary to Titan's unsupported assumptions, the FCA does not provide a remedy for claims against private contractors and therefore is not an alternative remedy for the injuries presented here.[13] *Id.* § 2734(a) (limiting claims to injuries caused by non-combat activities of the Armed Forces under the jurisdiction of the Secretary of Defense or *by a civilian*

[13] Plaintiffs respectfully disagree with the notion that their injuries are the result of combatant activities. All of the injuries that are the basis of plaintiffs' claims occurred when the plaintiffs were detained and when they were *hors de combat*.

employee of the military) (emphasis added).[14] There also appear to be significant challenges to bringing FCA claims – even against the military – for injuries relating to torture and other abuse in Iraqi prisons under U.S. military control.[15]

Titan asserts that its acts constituted "government activities" that "were undertaken on behalf of officials acting in their official capacity." *Titan Mem. at 40* n.29, 39. Thus, presumably Titan would assert that it is able to insulate itself from any liability found under Iraqi law by invoking Coalition Provisional Authority Order 17. *Status of the Coalition Provisional Authority, MNF—Iraq, Certain Missions and Personnel in Iraq, CPA/ORD/27 June 2004/17 at 5* ("Contractors shall be immune from Iraqi legal process with respect to acts performed by them pursuant to the terms and conditions of a Contract or any sub-contract thereto.").[16]

2. National Security, Foreign Policy and Military Discipline Concerns Weigh In Favor of the Torture Victims.

Titan presses this Court to view insulating Titan from liability for torturing Iraqis as somehow helpful or necessary to the United States' war effort. *Titan Mem. at 22-23*. This argument offends and lacks merit. The United States does not have an interest in promoting torture as part of combatant activities. Torturing prisoners actually places American soldiers at risk. *See Declarations of Marney E. Mason and Peter Bauer, attached to Pls.' Mot. For Prelim.*

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[14] *See also* U.S. Army Claims Manual, *Claims Procedures, Department of the Army Pamphlet 27-162*, at 339 (Aug. 8, 2003) ("Liability under the FCA may be based on *acts or omissions of U.S. soldiers or civilian employees of a U.S. military department* only if they are considered negligent or wrongful.") (emphasis added). Federal regulation defines civilian employee as: "a person whose activities the Government has the right to direct and control, not only as to the result to be accomplished but also as to the means used; this includes, but is not limited to, full-time Federal civilian officers and employees." 32 C.F.R. § 536.3(b). Titan and CACI are not federal government civilian employees; they are "independent contractors" whose misconduct is not subject to FCA claims.

[15] *See Letter from Susan L. Burke to LTC Herring (Oct. 3, 2005)* (stating plaintiffs' counsel's understanding that "injuries resulting from criminal acts of torture and abuse are beyond the purview of the Claims Service."), *attached as Exhibit B.*

[16] *Available at http://www.cpa-iraq.org/regulations/20040627_CPAORD_17_Status_of_Coalition__Rev__with_Annex_A.pdf*

Injunction Against CACI Int'l (Sept. 14, 2004) (military intelligence experts testifying that torture is ineffective and endangers American soldiers), *attached as Exhibit C*. All of Titan's proposed "special factors" compel denial of Titan's motion.

F. Titan and Other Corporations Are Subject to ATS Claims.

Titan next seeks refuge from the well-established tenet of law that corporations are subject to civil legal actions based on international law. Domestic law recognizes that corporations are subject to criminal prosecution for aiding and abetting torture, genocide, and war crimes, even when committed abroad (18 U.S.C. §§ 1091, 2340A, 2441). Clearly, imposing *civil* liability is not an open question. Each and every case that has addressed whether a corporation may be held liable under the ATS has decided in the affirmative. *See Agent Orange*, 373 F. Supp. 2d at 58 (holding that "[a] corporation is not immune from civil legal action based on international law.");[17] *Presbyterian Church*, 374 F. Supp. 2d 331 (S.D.N.Y. 2005) (affirming its prior holding that corporations are not immune under international law).[18] Defendants have not – and cannot – cite a single case where a court concluded that corporations are immune from liability under the ATS. The potential liability of corporations under the ATS has been widely recognized or assumed by federal courts.[19]

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[17] Titan's reference to *Agent Orange, Titan Mem. at 25*, simply ignores that court's explicit holding finding that corporations are liable under the ATS. *Agent Orange*, 373 F. Supp. 2d at 59 "[E]ven if it were not true that international law recognizes corporations as defendants, they still could be sued under the ATS . . . . [T]he Supreme Court made clear that 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*." *Agent Orange*, 373 F. Supp. 2d at 59 (emphasis added).

[18] Titan points out that the *Presbyterian Church* 2003 decision was decided before *Sosa*, but makes no mention of the Southern District of New York's two (post-*Sosa*) decisions in 2005 affirming the 2003 decision. *Titan Mem. at 24*.

[19] In *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 438 (1989), the Court noted that the ATS "by its terms does not distinguish among classes of defendants . . . ." *See also* 26 Op. Atty. Gen. 250 (1907) (aliens injured by a private company's diversion of water in violation of a bilateral treaty between Mexico and the U.S. could sue under the ATS).

The Supreme Court appears to have acknowledged (albeit in dicta) that corporations can be sued under the ATS. *Sosa*, 542 U.S. at 733 n.20. Prior to *Sosa*, a number of courts assumed that corporations are potentially liable for violations of the law of nations. *See, e.g.*, *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117, 127-28 (E.D.N.Y. 2000); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 445 (D.N.J. 1999); *Bowoto v. Chevron Texaco Corp.*, 312 F. Supp. 2d 1229, 1247 (N.D. Cal. 2004); *Eastman Kodak v. Kavlin*, 978 F. Supp. 1078, 1090-95 (S.D. Fla. 1997); *Carmichael v. United Techs. Corp.*, 835 F.2d 109, 113-14 (5th Cir. 1988); *Jota v. Texaco, Inc.*, 157 F.3d 153 (2d Cir. 1998); *Wiwa*, 226 F.3d 88 (2d Cir. 2000); *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002).

Titan presents no policy reason why corporations should be uniquely exempt from tort liability under the ATS.[20] Titan's reliance on a single law journal article written in 1947 concerning the status of corporations under international law ignores the nearly sixty years of jurisprudence that followed. *Titan Mem. at 24-25*. As noted in the first *Presbyterian Church* decision, it is not surprising that corporations may be held liable under international law, as substantial twentieth century precedent shows corporations may be liable under the ATS and that corporations are juridical persons capable of having the requisite intent to commit a criminal act. *Presbyterian Church*, 244 F. Supp. 2d at 318-19. Titan's contention concerning the absence of corporate liability in the Rome Statute of the International Criminal Court was addressed in the most recent *Presbyterian Church* decision:

[20] The Supreme Court has specifically held that international law allows courts to pierce the corporate veil. *First Nat'l City Bank v. Banco Para El Comercio*, 462 U.S. 611, 628-30 (1983). The International Court of Justice acknowledged in *Case Concerning The Barcelona Traction Light & Power Co., (Judgment of 5 February 1970) I.C.J. 1970 ¶ 3*, that as a matter of international law, the separate status of an incorporated entity may be disregarded in certain exceptional circumstances. If, as defendants contend, corporations are *per se* immune from international law liability, the ruling in *First National Bank* would have been unnecessary.

> The facts that certain States may provide for civil, but not criminal, liability for corporations, and that such differences may have led the drafters of the Rome Statute, which established a *criminal* court, to limit its scope to natural persons, does not compel the conclusion that corporations may not be held liable in any way for violations of customary international law.

Presbyterian Church of Sudan v. Talisman Energy, Inc., No. 01 Civ. 9882, 2005 WL 2082847, at *3 (S.D.N.Y. Aug. 30, 2005). *See also Agent Orange*, 373 F. Supp. 2d at 57 ("[L]imitations on criminal liability of corporations do not necessarily apply to civil liability of corporations.").

The Nuremberg Charter permitted the prosecution of "a group or organization" and allowed the tribunal to declare an entity a "criminal organization." *Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal*, 1951, arts. 9, 10, 82 U.N.T.S. 279. The tribunals "consistently spoke in terms of corporate liability." *See also Presbyterian Church*, 244 F. Supp. 2d at 315-16, *citing* Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 Yale L.J. 443, 478 (2001).

Titan mistakenly relies on *Correctional Services Corp. v. Malesko*, 534 U.S. 61 (2001) for the proposition that ATS claims against corporations are disfavored. *Titan Mem. at 23*. The decision in *Malesko* not to permit a *Bivens* action to corporations that ran federal prisons relied, in part, on the conclusion that there was a tort action against the corporation.[21] As this Court noted in *Ibrahim*, there is no alternative remedy to the torture victims' claims against defendants. The logic of Titan's argument would have a result that conflicts with the basic principles of corporate law. The corporation is a legal fiction that limits the exposure of shareholders. *First*

[21] 534 U.S. at 73-74 ("Therefore, we reasoned in *Bivens* that other than an implied constitutional tort remedy, there remain[ed] . . . but the alternative of resistance, which may amount to a crime . . . Such logic does not apply to respondent, whose claim of negligence or deliberate indifference requires no resistance to official action, and whose lack of alternative tort remedies was due solely to strategic choice.") (citation omitted).

Am. Corp. v. Al-Nahyan, 17 F. Supp. 2d 10, 20 (D.D.C. 1998). Titan seems to suggest that if international law did not recognize corporate liability, that would mean that corporations would be absolutely immune based simply on the fact of incorporation. Since it is a bedrock tenet of American law that corporations can be held liable for their torts, Titan's argument – unsupported by law – should not persuade.

IV. THE VICTIMS STATE VALID RICO CLAIMS.

The TAC alleges that Titan and the other defendants formed an enterprise that affected interstate commerce, engaged in pattern of racketeering activity including threats of murder, and caused injury to person or property to the plaintiffs in the RICO Class. *TAC ¶¶ 12, 101, 319.* These allegations suffice to state valid claims under RICO. RICO prohibits: (a) the use of income "derived . . . from a pattern of racketeering activity" to acquire an interest in, establish, or operate an enterprise engaged in or whose activities affect interstate commerce; (b) the acquisition of any interest in or control of such an enterprise "through a pattern or racketeering activity;" (c) the conduct or participation in the conduct of such an enterprise's affairs "through a pattern of racketeering activity;" and (d) conspiring to do any of the above. 18 U.S.C. § 1962.

Titan's argument fails for four reasons. First, the instant action differs from *Ibrahim* because plaintiffs here allege RICO injuries. Although Titan admits that plaintiffs allege property losses (which are RICO injuries), they argue repeatedly that plaintiffs lack standing because "personal injuries" are not cognizable under RICO. *Titan Mem. at 26-27.* Second, plaintiffs adequately alleged conduct in and affecting the United States (as well as a RICO enterprise), which makes the extraterritorial application of RICO appropriate. Third, Titan's acts in Iraq constitute RICO predicate acts. Fourth, the TAC alleges an enterprise and Titan's acts are not insulated from liability merely because its co-conspirators include government officials.

A. The Victims Allege RICO Injuries and Therefore Have Standing.

Each RICO plaintiff was the victim of the predicate act of robbery. 18 U.S.C. § 1961; *TAC ¶¶ 12, 38, 114, 131-32, 140, 151, 326. See also RICO Case Statement (S.D. Cal.) ¶ 5(a)* (*attached to Titan Mem.*) ("*RCS*").[22] Thus, each of the RICO plaintiffs suffered a RICO injury to property. Titan's argument that plaintiffs lack standing rests on the argument that the alleged robberies occurred when plaintiffs were arrested and therefore cannot be imputed to the Torture Conspirators. This is inconsistent with the TAC allegations. *TAC ¶¶ 131, 140*. More importantly, only at the time of release from prison did seizure of money and goods become robbery; the initial *taking* does not establish who *stole* it. Regardless of timing, the robberies were as much part of the attempt to intimidate and demean the prisoners as any other act of torture and abuse. *Id. ¶¶ 114-58*. Predicate acts, including robbery, were a part of the Torture Conspiracy even when they were not contemporaneous with interrogations.[23]

Although plaintiffs at this stage may not be able to identify the persons who were present when their property was seized, they have alleged that those actions were taken by the conspirators. *Id. ¶¶ 12, 38*. A participant in a RICO enterprise is liable if any member of the enterprise committed an illegal act. *Salinas v. United States*, 522 U.S. 52, 64-66 (1997) (co-conspirator need not participate in every act of enterprise in order to be held liable, so long as the defendant "adopt[s] the goal of furthering or facilitating criminal endeavor.").

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[22] In the Southern District of California, where plaintiffs originally filed this action, the RICO case statement required by the Local Rules is accorded the same status as an amendment to the complaint. *See S.D. Cal CivLR 11.1(a) Civil RICO Actions Filed* ("The court shall construe the RICO Case Statement as an amendment to the pleadings.").

[23] The murder by torture of Plaintiff Ahmed's father (*TAC ¶¶ 136, 137, 139, 152, 153*) was a predicate act even if the two were not being interrogated at the time the beatings occurred. The shooting of the prisoner Saed in the neck and permitting him to bleed to death (*TAC ¶ 117*) was a predicate act even if at the time Saed was dying, neither he nor the prisoner watching his death was being interrogated.

Titan claims that the allegations do not support an inference of proximate cause. *Titan Mem.* at 28-29. As this Court noted in *Burnett*, 274 F. Supp. 2d at 100, "[p]roximate cause is defined as 'a test of whether the injury is the natural and probable consequence of the negligent or wrongful act and ought to be foreseen in light of the circumstances.'" (citation omitted). Here, the complaint alleges that the robberies caused injury to plaintiffs' property. *TAC ¶¶ 101, 114, 131, 132, 140, 151, 174, 326. See Fed. Info. Sys. Corp. v. Boyd*, 753 F. Supp. 971, 977 (D.D.C. 1990) (RICO plaintiffs had standing where checks were stolen).

B. RICO Has Extraterritorial Reach Under Both the "Effects" and "Conduct" Tests.

This Court has jurisdiction over plaintiffs' RICO claims because the TAC alleges that conduct materially furthering the unlawful conspiracy occurred in the United States and had an effect in the United States. *TAC ¶¶ 39, 98, 102*. Although the statute is silent on the question of whether it confers subject matter jurisdiction to claims involving foreign entities or to acts and conspiracies occurring outside the United States, even Titan admits that courts look to securities and antitrust jurisprudence to determine whether RICO has extraterritorial reach.[24] *Titan Mem. at 30*. This court should therefore evaluate RICO claims under the "conduct" and "effects" tests. *Butte Mining PLC v. Smith*, 76 F.3d 287, 291 (9th Cir. 1996) (holding that the conduct and effects tests applied to securities law required dismissal of RICO claims). The TAC allegations suffice to state RICO claims under both tests.

[24] In this Circuit, *Doe v. Israel*, 400 F. Supp. 2d 86 (D.D.C. 2005), is the only case which addressed the extraterritorial reach of RICO. *Israel* concluded that Congress intended that RICO apply extraterritorially, but did not identify with clarity specifically what tests should be used to determine its application in a given case. *Id.* To the extent that a test may be discerned, *Israel* determined that Congress was concerned with the "character of the activity." *Id.* at 115-16.

1. Titan's Torture and Pillaging in Iraq Caused Substantial Effects in the United States.

Several courts have applied the "effects" test to find RICO jurisdiction over human rights abuses occurring abroad.[25] This line of cases relies on the "effects" test as set forth in *North South Finance v. Al-Turki*, 100 F.3d 1046, 1052 (2d Cir. 1996), and *Consolidated Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252, 261-62 (2d Cir. 1986). Laws "may be given extraterritorial reach whenever a predominantly foreign transaction has substantial effects within the United States . . . ." *N. S. Finance* at 1052 (internal citations omitted). The TAC alleges that the effect of the conduct occurring in Iraq was to increase the demand in the U.S. for services that Titan was providing to the military. *TAC ¶ 39-40*. As a result of this competitive advantage, Titan was awarded contracts on a no-bid basis. *Id. ¶ 106*. The creation of economic advantage over other U.S.-based competitors seeking government contracts constitutes an effect in the U.S.

Titan contends that its earning of millions of dollars in the United States as a result of the RICO enterprise (*Id. ¶ 102*) is only a marginal or tangential effect. *Titan Mem. at 31*. Titan's support for this conclusion is *Doe v. Israel*, 400 F. Supp. 2d 86 (D.D.C. 2005) (suit by Palestinians against Israeli officials and group funding Israeli settlers). *Israel* does not reference any allegations of conduct having an effect in the United States. Here, however, the TAC explicitly makes such allegations.[26] *TAC ¶¶ 39, 42, 68, 102*.

Titan seeks to add a new requirement for the assertion of RICO jurisdiction under the common law "effects" test by borrowing language from cases analyzing the Foreign Trade

[25] *See, e.g., Bowoto*, 312 F. Supp. 2d at 1249; *Wiwa*, 2002 WL 319887 at *20-22.

[26] To the extent that the Court finds the allegations to be insufficient, plaintiffs should be provided with the opportunity to take jurisdictional discovery concerning the financial arrangements and rewards which flowed to defendants in the United States and the competitive advantages they obtained over U.S.-based competitors as a result of the predicate acts in which they engaged. *Edmond v. U.S. Postal Serv.*, 949 F.2d 415, 425 (D.C. Cir. 1991) (finding jurisdictional discovery appropriate where plaintiffs have alleged existence of conspiracy, defendants' participation therein, and some conspiratorial act within forum).

Antitrust Improvements Act ("FTAIA"), despite the fact that ***no*** court appears to have applied FTAIA jurisprudence to RICO claims. *Titan Mem. at 31*. *See F. Hoffman-La Roche LTD v. Empagran, S.A.*, 542 U.S. 155, 169-74 (2004) (holding that Congress "designed the FTAIA to clarify, perhaps to limit, but not *to expand* in any significant way, the Sherman Act's scope as applied to foreign commerce" and intended that the domestic effect of anti-competitive conduct must be an "*adverse* (as opposed to a beneficial) effect."); *United States v. LSL Biotechns.*, 379 F.3d 672, 679 (9th Cir. 2004) (distinguishing FTAIA from the common law effects test when holding that the former guided its inquiry in a claim of foreign restraints of trade). There is no basis for Titan's assertion that these two cases, involving the statutory construction of the FTAIA, impose additional conditions on the common law effects test adopted in *North South Finance*. That test is properly applied here.

2. Titan's Conduct in the United States Significantly Furthered its Unlawful Actions Abroad.

The conduct test considers whether the defendant's conduct in the United States was significant – as opposed to preparatory – with respect to the alleged violation and whether it materially furthered the unlawful scheme. *Butte Mining*, 76 F.3d at 291-92 (approving a test articulated in *Grunenthal v. Holz*, 712 F.2d 421, 424 (9th Cir. 1983)); *accord Robinson v. TCI/US W. Commc'ns, Inc.*, 117 F.3d 900, 906 (5th Cir. 1997) ("the domestic conduct need be only significant to the fraud rather than a direct cause of it.") (citations omitted). *Grunenthal* held that the plaintiff had satisfied the conduct test where the transaction at issue involved foreign securities, corporations and citizens, where the parties held one meeting in U.S. during which the defendants made misrepresentations that were "significant with respect to the alleged violations" and "furthered the fraudulent scheme." *Grunenthal* at 425 (citations omitted).

Under this framework, plaintiffs establish RICO jurisdiction under the conduct test by showing that Titan's domestic conduct was "significant" with respect to the predicate acts, and that defendants' conduct "furthered" the predicate acts, regardless of where the acts themselves occurred. *Id.* at 424. The TAC alleges both Titan and CACI: acquired firms in the U.S. in order to obtain government contracts (*TAC ¶¶ 39, 68-69*); entered into no-bid contracts to supply services to the U.S. (*Id. ¶¶ 31, 106*); recruited widely in the United States for employees to carry out these services in Iraq (*Id. ¶ 42, 72, 320*); had executives whose relationships with government representatives were fostered at meetings in the United States (*Id. ¶¶ 70, 98*); recruited individuals in the United States willing to participate in human rights abuses who became essential to the unlawful conduct (*Id. ¶¶ 62, 63*); and took steps within the United States to prevent and limit the investigation of allegations of abuse in Iraq including CACI's amendment of its "code" to facilitate the criminal conspiracy (*Id. ¶ 169*). These activities were not just "significant," but fundamental to the conspiracy and furthered the commission of the predicate acts.[27] It is disingenuous to characterize these activities as "merely preparatory." *Titan Mem. at 33*.

Although Titan admits that plaintiffs have alleged "but for" causation, Titan insists that this is insufficient to meet the conduct test. *Id.* at 33. Titan fails to cite any authority to support that assertion. Allegations parallel to those plead here have been deemed sufficient to sustain a RICO claim. *See, e.g., Bowoto* at 1249 (applying the effects and conduct tests to allow RICO claims against corporation that conspired with Nigerian military to kill villagers in Nigeria).

[27] *Aldana v. Fresh Del Monte Produce, Inc.*, 305 F. Supp. 2d 1285 (S.D. Fla. 2003), cited by Titan, is inapposite. There, plaintiffs did not allege meetings or other activities occurring in the United States. *Compare Aldana* with *TAC ¶ 98*.

Moreover, punishing unlawful conduct by United States citizens is a proper basis for extraterritorial jurisdiction under the effects test. The Second Circuit has noted that the existence of a "U.S. party to . . . punish" supports extraterritorial jurisdiction. *Europe & Overseas Commodity Traders, S.A. v. Banque Paribas London*, 147 F.3d 118, 130-31 (2d Cir. 1998). *See also Euro Trade & Forfaiting, Inc. v. Vowell*, No. 00 CIV 8431, 2002 WL 500672, at *10 (S.D.N.Y. Mar. 29, 2002) (noting that ability of the plaintiffs "to identify a U.S. party who requires protection or punishment" is relevant to the application of extraterritorial jurisdiction).

C. Titan's Conduct in Iraq Suffices as Predicate Acts.

The TAC alleges numerous RICO predicate acts, including multiple acts of murder and robbery. *TAC ¶¶ 10, 12, 14, 107, 114, 117, 131, 132, 139, 140, 151-53, 160, 167, 170, 323-24, 326*. Titan argues that plaintiffs failed to plead predicate acts because those acts took place in Iraq. *Titan Mem. at 33*. The location of the predicate act is immaterial under § 1961(1)(A). As the Court of Appeals for the Second Circuit held, "Under RICO . . . 'state offenses are included by generic designation,'" and "references to state law serve [merely] a definitional purpose, to identify *generally* the kind of activity made illegal by the federal statute." *United States v. Bagaric*, 706 F.2d 42, 62 (2d Cir. 1983) (internal citation omitted), *abrogated on other grounds by Scheidler*, 510 U.S. 249 (1994). *See also United States v. Coonan*, 938 F.2d 1553, 1564 (2d Cir. 1991) ("[S]ection 1961(1)(A) merely describes the type of generic conduct which will serve as a RICO predicate and satisfy RICO's pattern requirement."); *United States v. Paone*, 782 F.2d 386, 393 (2d Cir. 1986) ("The statute is meant to define, in a more generic sense, the wrongful conduct that constitutes the predicates for a federal racketeering charge"); *United States v. Miller*, 116 F.3d 641, 645 (2d Cir. 1997) (RICO's allusion to state crimes "not intended to incorporate elements" of state crimes, "but only to provide a general substantive frame of reference"); *United States v. Watchmaker*, 761 F.2d 1459, 1469 (11th Cir. 1985) ("[R]eferences

to state law serve a definitional purpose, to identify generally the kind of activity made illegal by the federal statute.") (citation omitted).[28] It does not appear that any court in this circuit has directly addressed the argument that an in-state location, subject to a state penal code, is a necessary element to plead RICO predicate act. The TAC clearly alleges conduct in this jurisdiction, which may even be indictable here. *TAC ¶¶ 161-69*. Regardless, this Court should follow the well-developed law holding that the reference to state law is intended to be generic, not location-specific.

D. Titan and the Co-Conspirators Formed a RICO Enterprise.

1. The TAC Adequately Alleges an Enterprise.

A RICO enterprise constitutes "a group of persons associated together for a common purpose of engaging in a course of conduct." *United States v. Turkette*, 452 U.S. 576, 583 (1981). This can include individuals and entities "associated in fact" although not themselves a legal entity. 18 U.S.C. § 1961(4). The existence of a RICO enterprise is proven by showing the existence of "an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." *Turkette* at 583. The elements necessary to establish an enterprise are: "(1) a common purpose among the participants, (2) organization, and (3) continuity." *United States v. Perholtz*, 842 F.2d 343, 366 (D.C. Cir. 1988). Plaintiffs' allegations meet these criteria. Plaintiffs' RCS alleges that participants in the "enterprise" shared

[28] *See also Wiwa*, 2002 WL 319887, at *24. There, the court considered whether location of the crime is an "essential" element and based on the generic nature of RICO's references to "chargeable under state law" concluded that "location is best categorized as a procedural obstacle to conviction of the sort that plaintiffs are not required to satisfy in order to allege a predicate act under RICO." *Id*. Here, even assuming that the reference to state crimes incorporated into the location of the offense, the fact that preparatory acts occurred within the District of Columbia would be sufficient to meet the jurisdictional requirements. As *Wiwa* explained, it would make little sense to endorse a subject matter jurisdiction test for RICO that contemplates extraterritorial application if such extraterritorial conduct could not form the predicate acts necessary to plead a RICO claim. *Id*.

a common purpose, that is, to intimidate prisoners into providing "intelligence" in order to artificially inflate the demand for interrogations and related services. *RCS ¶ 5.* By designing and implementing this plan, defendants expected to and did obtain a competitive advantage and received additional government contracts and payments for these services. *TAC ¶¶ 39, 68.* The association-in-fact is ongoing, as evidenced by allegations that the participants functioned as a continuing unit and that the executives of CACI and Titan and certain government officials managed and operated the affairs of the enterprise. *Id. ¶¶ 64, 70, 71, 90, 98; RCS ¶ 6(b).*

The TAC further alleges that: defendants had close relationships with government officials that implemented the conspiracy through meetings, telephonic discussions, in-person discussions, email discussions and other communications that occurred in, among other places, California, Virginia, and the District of Columbia (*Id.¶ 98*); Titan furthered the goals of the conspiracy by intentionally recruiting individuals known to harbor animus towards Iraqi prisoners (*Id.¶ 62*); Titan furthered the goals of the conspiracy by adopting corporate policies that encouraged mistreatment of prisoners (*Id.¶ 59*); Titan furthered the goals of the conspiracy by failing to report its employees' crimes (*Id.¶60*); defendants were able to reap handsome monetary rewards in exchange for abusing and torturing plaintiffs (*Id.¶¶ 31, 102, 104, 319*); and the fruits of the unlawful conspiracy were invested in the ongoing operations of defendant corporations (*Id.¶¶ 102, 104*).

In support of the argument that the TAC fails to plead an enterprise, Titan cited to post-conviction appeals that contest the adequacy of the proof offered in criminal trials, *United States v. White*, 116 F.3d 903 (D.C. Cir. 1997); *Perholtz*; and a decision on a motion for a judgment of acquittal at the close of the government's case in a criminal trial, *United States v. Morrow*, No. CRIM.A. 04-355, 2005 WL 1389256 (D.D.C. June 13, 2005). None of these cases sheds any

light on the requirements for *pleading* a RICO enterprise. Plaintiffs are not required, at the pleading stage, to present the evidence required to support a judgment, much less to meet the requirements for a criminal conviction.

2. That the Conspiracy Includes Government Officials Has No Legal Import.

Titan argues that it cannot be held liable under RICO because the torture victims have alleged that certain government officials participate in the RICO conspiracy. Based on the principle that the government itself cannot be a RICO defendant, Titan weaves an elaborate but unsupported argument that it and CACI therefore have absolute immunity. *Titan Mem. at 34-35*. Titan does not – and cannot – cite a single case announcing this new legal principle that RICO's absolute immunity for the government insulates corporations from liability merely because they conspire with government officials who act outside the law.[29]

It is black-letter law that the qualified immunity enjoyed by some government employees is not accorded to private actors who conspire with them. *Richardson v. McKnight*, 521 U.S. 399, 412 (1997) ("private actors are not *automatically* immune (i.e., § 1983 immunity does not automatically follow § 1983 liability)"); *Wyatt v. Cole*, 504 U.S. 158, 168-69 (1992) (private parties generally not eligible to receive qualified immunity from suit under § 1983). *Richardson* is fatal to Titan's immunity assertion. In *Richardson*, the Supreme Court held that prison guards who were corporate employees were not entitled to qualified immunity. The Court held that there was no policy reason to extend immunity to private parties because competition and fear of liability will prevent a private entity from being either too timid or too aggressive in its performance. *Id*. at 409. Another policy reason for the immunity was the importance of

[29] Titan makes the unfounded assertion that plaintiffs "have now attempted to cover up the fact that high-level government officials are part of the alleged enterprise." *Titan Mem. at 34*. The victims make no such effort. They stand by their RCS and the allegations made therein.

encouraging "talented candidates" for public employment, which is clearly inapplicable to private parties. *Id.* at 408. Finally, the Court held that the threat of distraction engendered by lawsuit was not sufficient to justify the application of immunity where the protection of important rights was at issue. *Id.* Here, Titan is seeking more immunity than would be accorded under *Richardson* to a prison guard directly employed by the United States. There is no legal support for such an outcome.

Titan tries to construct an argument based on cases holding nothing more than that the government and its agencies may not be held liable under RICO. *Titan Mem. at 35*. Titan conflates this with the distinct question of whether government officials can participate in a RICO enterprise. They can. *United States v. Angelilli*, 660 F.2d 23, 30-33 (2d Cir. 1981); *United States v. Urban*, 404 F.3d 754 (3d Cir. 2005) (municipal construction department); *Genty v. Resolution Trust Corp.*, 937 F.2d 899, 906-07 (3d Cir. 1991); *Averbach v. Rival Mfg. Co.*, 809 F.2d 1016, 1018 (3d Cir. 1987) (court); *United States v. Bacheler*, 611 F.2d 443, 450 (3d Cir. 1979) (Philadelphia Traffic Court); *United States v. Frumento*, 563 F.2d 1083, 1092 (3d Cir. 1977) (Pennsylvania Department of Revenue's Bureau of Cigarette and Beverage Taxes); *United States v. Cianci*, 378 F.3d 71 (1st Cir. 2004) (municipal entities); *United States v. Chance*, 306 F.3d 356 (6th Cir. 2002) (sheriff); *De Falco v. Bernas*, 244 F.3d 286 (2d Cir. 2001); *United States v. Freeman*, 6 F.3d 586 (9th Cir. 1993).

Finally, Titan's conclusion that the United States is an indispensable party is not supported by any case law. Assuming plaintiffs prove that defendants are joint tortfeasors, there is no reason that complete compensatory relief may not be accorded among the remaining parties. *Temple v. Synthes Corp., Ltd.*, 498 U.S. 5, 7 (1990) ("It has long been the rule that it is not necessary for all joint tortfeasors to be named as defendants in a single lawsuit.").

V. TITAN CANNOT USE THE GOVERNMENT CONTRACTOR DEFENSE TO INSULATE FROM REVIEW CONDUCT THAT WAS NOT REQUIRED BY CONTRACT AND DID NOT BENEFIT THE UNITED STATES

As an independent contactor, as opposed to an agency or employee of the government, Titan is not directly entitled to the tort liability immunities reserved for the sovereign under the FTCA, 28 U.S.C. § 2680, but is only able to avail itself of the sovereign's immunity via the judicially-developed doctrine known as the "government contractors defense." The federal interest in preventing torture is ill-served by permitting Titan to invoke the government contractor defense here. Undersigned counsel are aware of only one decision on this issue, which held that the defense cannot be invoked to immunize a government contractor against human rights claims. That approach best serves the strong federal interest in preventing torture. *TAC* ¶¶ *109-13* (citing indicia of the federal interest). *See also Second Periodic Report of the United States of America to the Committee Against Torture, May 6, 2005.*

This Court held in the *Ibrahim* action that in order to seek refuge under the government contractor defense, Titan needed to file a motion for summary judgment proving that its employees are soldiers in all but name. The victims will be filing forthwith a motion for summary judgment that proves with admissible evidence that Titan translators were *not* soldiers in all but name. Victims here, however, respectfully request that the Court hold, as a matter of law, not fact, that the government contractor defense cannot be invoked to defend against the TAC, which alleges "conduct that is abhorrent to civilized people and surely actionable under a number of common law theories." *Ibrahim* at 15. The only court to have considered this precise issue so held for analytically compelling reasons.

A. Violating Human Rights and International Law Does Not Benefit the United States.

The "government contractor" affirmative defense, created by the Supreme Court in *Boyle*

v. United Technologies Corp., 487 U.S. 500 (1988), protects contractors acting for the United States in its sovereign capacity. As succinctly stated by the Court of Appeals for the Second Circuit, "[s]tripped to its essentials, the military contractor's defense under *Boyle* is to claim, 'The Government made me do it.'" *In re Joint E. & S. Dist. NY Asbestos Litig*., 897 F.2d 626, 632 (2d Cir. 1990). As a result, the government contractor defense has never been held by any court to protect against human rights claims.

This makes perfect sense because the sovereign by definition cannot contract for conduct that it is outside the law. *See Alden v. Maine*, 527 U.S. 706, 754-55 (1999) ("The constitutional privilege of a State to assert its sovereign immunity in its own courts does not confer upon the State a concomitant right to disregard the Constitution or valid federal law."); *Goldhaber v. Foley*, 519 F. Supp. 466, 481 (E.D. Pa. 1981) ("[I]t is generally recognized that '[s]overeign immunity is not a bar if the public official is acting in excess of his authority.'") (citation omitted). It is for that reason that the only court to have considered whether human rights claims may be defeated by the government contractor defense held that such claims necessarily survive the defense. *See In re "Agent Orange" Prod. Liab. Litig.*, 373 F. Supp. 2d 7 (E.D.N.Y. 2005).

In *Agent Orange*, the District Court for the Eastern District of New York was asked to rule on conduct by government contractors occurring in a war zone during the Vietnam War. Those advocating the defense argued the same theory argued here – namely, the United States needs the unfettered ability to conduct wars without worrying about whether government contractors might be held liable to civil claims. The District Court reasoned that this argument lacked merit because it failed to recognize the universally-recognized legal duty to refrain from violating human rights:

> The government contractor defense is essentially based on the concept that the government told me to do it, and knew as much or more than I did about possible

> harms, so I can stand behind the government (which cannot be sued because of its immunity). It is designed in part to save the government money in its procurement costs because suppliers, less concerned with the risk of suits, can eliminate some difficult insurance factors from cost projections.
>
> As shown below in a discussion of the Nuremberg and other post-World War II criminal trials, this defensive notion has been rejected. ***It should not be recognized, as the law now stands, by courts protecting civilians and land from depredations contrary to international law.***

Id. at 91.

Titan claims that its alleged actions were acts of the United States because of the contractual relationship and that "this is the case even where the policies and directions pursuant to which the government officials and their agents acted turn out to be illegitimate or unlawful." *Titan Mem. at 39*. Even if the military ordered Titan employees to torture prisoners, however, Titan would not be able to defend following such orders. As the court in *Agent Orange* explained, the defense of necessity is available to civilians forced to decide in the heat of battle whether to obey a military order that may violate human rights. *Agent Orange* at 96-99. To invoke the necessity defense, the evil avoided must be greater than the evil inflicted. The court found that when the only "evil" is economic harm to a corporate entity, the defense of necessity is not available. *Id*. at 99. As the court eloquently explained:

> ***We are a nation of free men and women habituated to standing up to government when it exceeds its authority***. *See, e.g., Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 72 S.Ct. 863, 96 L. Ed. 1153 (1952) (holding that seizure of steel mill during a war on an order of the President "to avert a national catastrophe" in his position as Commander-in-Chief of the armed forces exceeded his constitutional power). Under the circumstances of the present case, necessity is no defense. ***If defendants were ordered to do an act illegal under international law they could have refused to do so, if necessary by abandoning their businesses***.

Id. at 99.[30]

[30] Neither would Titan have a defense under the "superior orders" doctrine. Even assuming the doctrine could be extended to apply to civilian contractors, who are outside the chain of

Here, as alleged in the TAC, Titan was not willing to walk away from economic gain. *TAC ¶ 40*. Titan's employees were not required to stay in Iraq. Titan's employees were not physically coerced to torture prisoners, yet they did. The TAC includes a host of other allegations that make it clear that Titan's conduct underlying its tort liability in this case falls outside the ambit of the government contractor defense. Plaintiffs allege that the United States has repeatedly denounced torture and other cruel, inhuman, and degrading treatment as methods of interrogation. *Id.¶¶108-13* Plaintiffs allege that the military expressly prohibits use of interrogation methods that violate the Geneva Conventions. *Id.¶113*. Plaintiffs allege that Titan knew or should have known that the United States intended that any person acting under color of its authority, such as Titan translators, would conduct interrogations in accordance with the relevant domestic and international law. *Id.¶¶ 31, 41, 108*. Plaintiffs allege Titan employees broke the law and acted outside military supervision. *Id.¶¶ 49-56, 65, 78*. The TAC alleges this misconduct was done not to further the war effort, but rather to further Titan's pecuniary interests in both making more (and spending less) money. *Id.¶¶ 40, 66, 102*. In sum, the TAC alleges conduct that is outside the ambit of the government contractor defense, which only protects lawful conduct engaged in to benefit the United States. The government contractor defense is intended to protect lawful corporate acts done to benefit the government; not to create a new breed of mercenaries unable to be touched by the rule of law.

B. Violating Human Rights Was Not Called For by the Terms of the Purported Government Contract.

The government contractor defense does not automatically protect contractor conduct; it

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command and not subject to the Uniform Code of Military Justice, it does not apply to orders to commit manifestly unlawful conduct such as that alleged in the TAC. *See United States v. Calley*, 46 C.M.R. 1131,1183 (A.C.M.R.), *aff'd*, 22 C.M.A. 534 (C.M.A. 1973). *See also* Army Field Manual (FM) 27-10, *The Law of Land Warfare*, R. 509; *Manual for Courts-Martial United States* (2005), RCM 916.

only covers situations where a contractor is essentially acting as an arm of the government in performing the acts that led to tort liability. In *Boyle*, the Supreme Court did not actually apply the government contractor defense, but instead remanded for a factual determination of whether the contractor was truly standing in the shoes of the United States by implementing a discretionary policy decision. *Boyle* at 511-12 (citing Section 2680(a) of the FTCA). *See also Malesko* at 74 n.6 ("Where the government has directed a contractor to do the very thing that is the subject of the claim, we have recognized this as a special circumstance where the contractor may assert a defense.").

Titan aggressively claims that "the alleged actions of Titan's linguists were undertaken with and on behalf of officials acting in their official capacity." *Titan Mem. at 38-39*. This statement contradicts the TAC. The TAC alleges that Titan employees to assaulted prisoners, threatened prisoners with death, raped prisoners, and threatened prisoners with dogs. This is not contractually-required or requested conduct.[31] *TAC ¶¶ 41, 108-13.* Actions that exceed the lawful limits of a government's delegation of power likely can never be immunized as government acts, even in the execution of war. *Orlikow v. United States*, 682 F. Supp. 77, 81 (D.D.C. 1988) ("[W]hen a decision is made to conduct intelligence operations by methods which are unconstitutional or egregious, it is lacking in statutory or regulatory authority.").

Jama v. INS, 334 F. Supp. 2d 662 (D.N.J. 2004) is analogous to the facts here. Plaintiffs were asylum seekers who alleged abuse during detention at a federal facility. *Id* at 665. Plaintiffs sued the United States; Esmor, a contractor for the INS; and individual INS officials. The District Court held that sovereign immunity did not protect Esmor and the FTCA did not limit action against it. Esmor argued that its participation in the abuse should be insulated from

[31] Some of Titan's co-conspirators have been prosecuted and convicted under the auspices of the Uniform Code of Military Justice. *See supra*, n.1.

scrutiny because it was acting pursuant to the government contract. The court rejected this specious argument, holding that "[i]n hiring, training, and supervising its employees, Esmor was required not only to abide by the detailed terms of the Contract, but also to fulfill its more general obligation of running the facility safely. It would defy logic to suggest that the INS could have 'approved' practices that breached this larger duty." *Id.* at 689. Titan similarly asks this Court to defy logic and insulate Titan's grave and serious breaches of law – which are also breaches of the terms of its contract with the United States – from any judicial scrutiny. The victims respectfully request that the court hold as a matter of law that the claims cannot be dismissed under the government contractor defense.

VI. TITAN HAS NOTICE OF THE CLAIMS AGAINST IT

Titan argues in the alternative that victims' claims must be dismissed or a more definite statement required, claiming that plaintiffs failed to comply with Rules 8 and 10. This argument lacks merit. Titan would undoubtedly like to know all of the evidence the torture victims intend to introduce at trial, but plaintiffs are not required to plead their evidence in their complaint. Rather, under Rule 8(a), a complaint need only provide "fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Mayle v. Felix*, 125 S. Ct. 2562, 2570 (2005) (quoting *Conley*, 355 U.S. at 47). "This simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002) (citations omitted). It is not necessary for plaintiffs to plead all legal elements of their claims in the complaint, *Swierkiewicz*, 534 U.S. 506, or "plead law or match facts to every element of a legal theory," *Krieger v. Fadely*, 211 F.3d 134, 136 (D.C. Cir. 2000) (internal citation omitted). There are very limited exceptions to the notice pleading rule and the Supreme Court has declined to extend them beyond Rule 9(b). *Swierkiewicz*, 534 U.S. at 513; *Hoskins v. Poelstra*, 320 F.3d

761, 764 (7th Cir. 2003). Rule 8(f) provides that "[a]ll pleadings shall be so construed as to do substantial justice." Fed. R. Civ. P. 8(f). Given the simplified standard for pleadings, a court should not dismiss a complaint for failure to state a claim unless the defendant can show beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); *Kingman Park Civic Ass'n. v. Williams*, 348 F.3d 1033, 1040 (D.C. Cir. 2003).

The TAC alleges that: Titan is responsible for the actions taken by its employees at Abu Ghraib and other prisons (*TAC ¶ 16*); Titan is liable for the wrongful acts of Nakhla, Israel, and its other employees who tortured plaintiffs (*Id.* ¶¶ *17, 18, 49-55*); Titan knew or should have known that its employees were conspiring to commit torture and intentionally recruited and hired individuals with violent animus toward Iraqis in U.S. custody (*Id.* ¶¶ *56, 62*); Titan did not have valid contracts with the United States, hired unskilled translators, and did not adequately screen or train those hired (*Id.* ¶¶ *42-44*); Titan failed to supervise its employees and refused to spend the resources to train and educate its employees properly (*Id.* ¶¶ *45, 46, 60*); Titan conspired to torture plaintiffs and prevent the discovery and dissemination of its involvement in the wrongdoing (*Id.* ¶¶ *52, 57, 58, 163*); Titan conspired with CACI and others to create a lawless environment in order to foster the wrongdoing (*Id.* ¶ *64*); Titan permitted its employees to wear U.S. military uniforms and represent themselves as authorized to torture, and worked together with CACI to dupe the United States and the military into accepting that unfit Titan employees had proper clearance (*Id.* ¶¶ *64, 65*); Titan furthered the goals of the conspiracy by adopting and implementing policies and procedures that permitted and encouraged the bad acts, failing to report crimes, fostering a climate of lawlessness, and encouraging its employees not to report violations (*Id.* ¶¶ *59-61*); Titan took steps in attempt to impede government investigations and

the dissemination of information about the torture (*Id.* ¶¶ *66, 163*); Titan failed to investigate allegations of wrongdoing and take effective action as a result of reported wrongdoing (*Id.* ¶¶ *63, 164*); and Titan was willing to engage in wrongful conduct in order to profit financially and did so profit from its wrongdoing and that of its co-conspirators (*Id.* ¶ *40*).

From these factual allegations, Titan is clearly on notice that plaintiffs intend to hold them liable for the wrongdoing of its employees, both vicariously and as co-conspirators. Titan is on notice that plaintiffs intend to hold them liable for damages arising out of their torture and all the other wrongful acts committed by Titan, its employees, and its co-conspirators. To the extent that these claims are not detailed, evidence gathered through formal discovery or evidence already in the defendant's possession but yet unknown to plaintiffs is due to defendants' conspiracy to cover up the details and extent of their wrongdoing. *Burnett*, 274 F. Supp. 2d at 110-11 (noting that there is no heightened pleading requirement for conspiracy and the nature of conspiracy is such that it is often difficult to provide details thereof). Titan's motion to dismiss should be denied outright and insofar as it seeks an order directing the torture victims to file another complaint.

Finally, but importantly, Titan's representation to the Court that the complaint is essentially pseudonymous is disingenuous. What Titan fails to reveal to the Court is that plaintiffs' counsel provided the information sought by Titan more than one year ago as to the named plaintiffs then on file. *See Declaration of Susan L. Burke, attached as Exhibit D.* Defense counsel simply never asked the victims' counsel for the same information about the recently added plaintiffs, despite being alerted to the issue in victims' motion to amend. *Mem. in Support of Pls.' Mot for Leave to Amend (Sept. 12, 2005)* at 4, n.1 ("Plaintiffs do not wish to reveal the full names of Mustafa, Natheer, Othman, and Hassan publicly because they are

minors.") (emphasis added). Titan counsel did not object to that method of proceeding, nor did it request the information from counsel at that time. Instead, seeking to score a debaters' point, Titan awaits this filing to make the point. Such conduct merely increases the contentiousness of litigation for no real reason.

The victims have no desire to proceed under pseudonyms. Indeed, this lawsuit is part of an effort to give the torture victims back their sense of identities that were taken from them when they were stripped naked, beaten and subjected to electric shocks. To that end, plaintiffs will be filing under seal a separate submission with the full names and prisoner numbers of the named plaintiffs.

CONCLUSION

For the foregoing reasons, Titan's Motion To Dismiss should be denied.

Dated: May 8, 2006

/s/ Susan L. Burke

Susan L. Burke (D.C. Bar # 414939)
BURKE PYLE LLC
3527 Lancaster Avenue
Philadelphia, PA 19104
Telephone: (215) 387-4705
Facsimile: (215) 387-4713

Jennifer Green
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, NY 10012
Telephone: (212) 614-6439
Facsimile: (212) 614-6499

Shereef Hadi Akeel (admitted *pro hac vice*)
AKEEL & VALENTINE, P.C.
401 South Old Woodward Avenue
Suite 430
Birmingham, MI 48009
Telephone: (248) 594-9595
Facsimile: (248) 594-4477

Counsel for Plaintiffs and Class Plaintiffs

INDEX TO EXHIBITS

A. *Sosa v. Alvarez-Machain*, No. 03-339, Brief for the United States as Respondent Supporting Petitioner (U.S. 2004)

B. Letter from Susan L. Burke to LTC Herring (Oct. 3, 2005)

C. Declarations of Marney E. Mason and Peter Bauer attached to *Plaintiffs' Motion For Preliminary Injunction Against CACI International (Sept. 14, 2004)*

D. Declaration of Susan L. Burke in Support of Plaintiffs' Opposition to Defendant Titan's Motion To Dismiss the Third Amended Complaint

CERTIFICATE OF SERVICE

I, Jonathan H. Pyle, do hereby certify that on the 8th day of May 2006, I caused true and correct copies of Plaintiffs' Opposition to Defendant Titan Corporation's Motion To Dismiss the Third Amended Complaint to be served via electronic mail upon the following individuals at the addresses indicated:

F. Whitten Peters
Thomas M. Craig
WILLIAMS AND CONNOLLY
725 12th Street, North West
Washington, DC 20005
wpeters@wc.com
Counsel for Defendant Titan Corp.

J. William Koegel Jr.
John F. O'Connor
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, North West
Washington, DC 20036
wkoegel@steptoe.com
Counsel for Defendants CACI International, CACI Inc. – Federal, and CACI-PT

Adam L. Rosman & Ellen D. Marcus
ZUCKERMAN SPAEDER LLP
1800 M Street, North West
Washington, DC 20036
arosman@zuckerman.com
Counsel for Defendant Adel Nakhla

Henry E. Hockeimer Jr.
Jessica Natali
BALLARD SPAHR ANDREWS & INGERSOLL, LLP
1735 Market St, 51st Floor
Philadelphia, PA 19103
hockeimerh@ballardspahr.com
Counsel for Defendant Steven Stefanowicz

Alison L. Doyle
Shari L. Klevens
MCKENNA LONG & ALDRIDGE LLP
1900 K Street, North West
Washington, DC 20006-1108
adoyle@mckennalong.com
Counsel for Defendant John B. Israel

Jonathan H. Pyle