United States Court of Appeals

for the

District of Columbia Circuit

No. 08-7008
Consolidated with 08-7009

HAIDAR MUHSIN SALEH et al.,
Plaintiffs-Appellants,

v.

TITAN CORPORATION. et al.,
Defendants-Appellees,

ILHAM NASSIR IBRAHIM, et al.,
Plaintiffs-Appellants,

v.

TITAN CORPORATION, et al.,
Defendants-Appellees,

On Appeal from the United States District Court for the District of Columbia in Case Nos. 04-cv-1248 and 05-cv-1165 (Hon. James Robertson, Judge)

JOINT REPLY BRIEF OF APPELLANTS
PUBLIC COPY—SEALED MATERIAL DELETED

SUSAN L. BURKE (D.C. Bar No. 414939)
WILLIAM T. O'NEIL (D.C. Bar No. 426107)
KATHERINE R. HAWKINS
BURKE O'NEIL LLC
4112 Station Street,
Philadelphia, PA 19127
(215) 487-6590

KATHERINE GALLAGHER
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, NY 10012

SHEREEF HADI AKEEL
AKEEL & VALENTINE, P.C.
888 West Big Beaver Road
Troy, Michigan 48084-4736

Attorneys for Saleh Plaintiffs-Appellants

L. PALMER FORET (D.C. Bar No. 260356)
THE LAW FIRM OF
L. PALMER FORET, P.C.
1735 20th Street, N.W.
Washington, D.C 20009
(202) 332-2404

CRAIG T. JONES
RODERICK E. EDMOND
EDMOND JONES LINDSAY, LLP
127 Peachtree Street, NE, Suite 410
Atlanta, GA 30303
(404) 525-1080

Attorneys for Ibrahim Plaintiffs-Appellants

October 31, 2008

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

*Authorities upon which we chiefly rely are marked with asterisks

Statutes and Rules

Other Authorities

GLOSSARY OF ABBREVIATIONS

ATS	Alien Tort Statute
CACI	Collectively, CACI International, Inc. and CACI Premier Technology, Inc.
CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
DoD	Department of Defense
FTCA	Federal Tort Claims Act
RI.__	The District Court record in *Ibrahim*, et. al., v. *CACI Premier Technology*, et. al, No. 1:04-cv-1248 (D.D.C.) (Robertson, J.)
RS.__	The District Court record in *Saleh*, et. al., v. *CACI International Inc.*, et. al, No. 1:05-cv-1165 (D.D.C.) (Robertson, J.)
TVPA	Torture Victim Protection Act
L-3	Collectively, Titan Corporation, L-3 Communications Titan Corporation, and L-3 Services, Inc.

STATUTES, REGULATIONS, AND GUIDELINES

The applicable statutes and regulations, except for those included in previous briefs, are reproduced in the addendum hereto.

SUMMARY OF THE ARGUMENT

L-3 hired thousands of Iraqis off the streets of Baghdad and other Iraqi cities and failed to train or supervise them in any way despite express contractual obligations to do so. Now, after having been paid handsomely, L-3 blames the military for letting L-3 employees participate in the Abu Ghraib prison abuse that shocked the world and tarnished this nation's image: "the military chose not to, or failed, to control the linguists in all cases." L-3.Br. at 45. L-3, not the military, should have adequately trained and supervised its employees.

Plaintiffs, victims of the abuse, seek redress. The District Court, after permitting discovery limited to topics other than the prison abuse itself, granted L-3 summary judgment because it found that L-3 translators were under the "exclusive control" of the military. Plaintiffs do not take issue with the ***adoption*** of the "exclusive operational control" test.[1] Rather, they argue that the District Court erred in the ***implementation*** of the "exclusive operational control" test as to L-3 because the Court ignored or overlooked certain critical evidence that created material disputes preventing summary judgment at this preliminary stage in the

---

[1] The District Court reasoned that *"[w]hen the military allows private contractors to retain authority to oversee and manage their employees' job performance on the battlefield, no federal interest supports relieving those contractors of their state law obligations to select, train, and supervise their employees properly." Ibrahim v. Titan Corp.*, 556 F. Supp. 2d 1, 5 (D.D.C. 2007)("*Ibrahim II*")(emphasis added). Thus, the Court looked to see whether the military exercised "direct command and exclusive operational control" over corporate employees. *Id.*

litigation. The first 34 pages of L-3's Brief merely defend the ***adoption*** of the test itself, which Plaintiffs simply do not challenge *ab initio*. Plaintiffs believe the test itself, properly applied to the record here, necessarily precludes summary judgment for L-3.

Only at page 35 of its Brief does L-3 finally join issue with the Plaintiffs' argument that there are genuine material factual disputes about whether the military exclusively controlled L-3 employees. L-3, unable to ignore the material disputes, resorts to arguing credibility and weight, which are jury functions. L-3.Br. at 42-44. L-3 also resorts to claiming entitlement to inferences being drawn in its favor, including inferences from evidence not even in the record. L-3.Br. at 45-47. L-3, as the movant on summary judgment, is not entitled to any inferences drawn in its favor as the mechanism to resolve the material factual disputes.

But one example suffices to entitle Plaintiffs to reversal. Plaintiffs argue that the District Court overlooked the evidentiary fruits of the military investigation which established certain L-3 translators (Adel Nakhla, Etaf Mheisen, John Israel) abused prisoners as a result of orders from ***CACI,*** not military, personnel. Pl.Br. at 16-20, 23-25. L-3's only rebuttal: "The record is clear that the CACI interrogators were working at the direction of the military." L-3.Br. at 45. L-3 simply ignores the fact that the District Court itself denied summary judgment to CACI because there was evidence showing that its employees were

not under the exclusive control of the military. *Ibrahim II,* 556 F. Supp. 2d at 10-11.

L-3 is asking this Court to insulate L-3 from liability for breaching corporate duties of training and supervision, and instead shift from L-3 to the United States' military the burden of having to supervise thousands of Iraqis hired by L-3 off the streets of Baghdad. The military paid L-3 hundreds of millions of dollars in exchange for L-3's contractual promise to supervise those employees. Tellingly, the military has not sought to intervene in support of L-3. Instead, the military issued regulatory comments cautioning the judiciary against shifting the risk of loss from corporate misconduct by contractors outside the military span of control to innocent third parties.

This Court, on this record, should not rule that L-3 is entitled to summary judgment. This Court should overturn the District Court's premature grant of summary judgment to L-3, and remand the proceedings back for discovery. L-3 remains free to press its affirmative defense at trial but it is not entitled to summary judgment.

ARGUMENT

I. THERE ARE GENUINE DISPUTES OVER MATERIAL FACTS.

A. Plaintiffs and L-3 Employees Are Not "Alien Enemies."

L-3, suggesting this Court would be undertaking a radical step by permitting "enemies" of this nation to bring claims in our judicial system, defines Plaintiffs as "alien enemies" merely because they are Iraqis. L-3.Br. at 24, n. 5. But by L-3's proposed definition, the vast majority of L-3 employees were "alien enemies" of the United States. L-3 misleads the Court by implying its employees are Americans deploying from Fort Benning, Georgia, after some corporate-equivalent of boot camp. L-3.Br. at 5-6. The vast majority of L-3 translators were Iraqi nationals that L-3 hired off the streets of Baghdad and other Iraqi cities. Hopkins Dep. at 165(

); Hopkins Decl.¶14 (L-3 employed 3052 translators total in December 2003). L-3 did not train these Iraqis on the law of war or on the proper treatment of prisoners. *See* Winkler Dep. at 166; Hopkins Dep. at 215-16, 288-89.

Neither L-3 translators nor Plaintiffs are actually "alien enemies." They are simply Iraqis. In the ongoing Iraqi military conflict, there is no legal or factual support for L-3's contention that every Iraqi is automatically an "alien enemy." As support for its definition, L-3 cites the March 19, 2003, Presidential statement that hostilities against Iraq designed to "disarm Iraq, to free its people and to defend the

world from grave danger." But cynically, L-3 fails to cite the United States' May 1, 2003, Presidential statement announcing the end of the war, and claiming "the tyrant is fallen and Iraq is free."

After this May 1, 2003, date, there is no rational reason to label every Iraqi as an alien enemy. Plaintiffs never engaged in acts of war or violence of any sort against the United States. Instead, they were mistakenly picked up by the military, and subsequently released without any charges. RS.151 ¶¶1, 7. Plaintiffs were among the many innocent Iraqis were mistakenly detained in military prisons. As the Honorable James R. Schlesinger found on page 29 of the *Final Report of the Independent Panel To Review DoD Detention Operations* (August 24, 2004), the military, lacking sufficient interpreters, "reverted to rounding up any and all suspicious-looking persons – all too often including women and children. The flood of incoming detainees contrasted sharply with the trickle of released individuals." The military estimates that the vast majority of those detained at Abu Ghraib and elsewhere were such innocents. RS.112, Appendix C-9, at 37 (military report estimates that 85%-90% of the detainees were of no intelligence value).

What is unique about Plaintiffs that distinguishes them from these other innocent Iraqis is that they had the bad fortune to be abused while imprisoned. It is L-3's role in that abuse that is at issue here. This Court is not being asked to hear claims made by enemies of the United States; it is being asked to hear claims made

by unfortunate Iraqis who were mistakenly imprisoned, and then subjected to abuse and torture by "a small group of morally corrupt soldiers and civilians" that "violated U.S. criminal law" or were "inhumane and coercive without lawful justification." *CACI Premier Technology, Inc. v. Rhodes*, 536 F.3d 280, 286 (4th Cir. 2008)(quoting investigative report by Major General George Fay).

B. The Factual Disputes Here Are Material.

L-3 argues that evidence that its employees tortured prisoners on their own initiative,[2] or following instructions from CACI interrogators, is not material to whether L-3 can be deemed to be under the military's direct command and exclusive operational control. L-3.Br. at 45. L-3 claims that as long as the military

[2] L-3 seeks to litigate the underlying merits of the claims themselves despite the fact that ***no discovery on the merits has occurred***. L-3 claims "it has become clear that there is little or no evidence" that its employees tortured the Plaintiffs. This is demonstrably false. For example, L-3's sole evidence that Adel Nakhla has been exonerated is a single 2006 news article that relies on anonymous government sources, and concludes that Nakhla's role "remains unclear." RS.56-2. But Nakhla was actually photographed participating in prisoner abuse at Abu Ghraib, and has confessed his role in abuse to Army investigators. *See* RS.112, Appendix C-37; RS.112, Appendix C-38; RS.46, Exhibit O. Major General George Fay's investigation into the abuses of the Abu Ghraib concluded that Nakhla, identified as "CIVILIAN-17," "[a]ctively participated in detainee abuse." RS.112, Appendix C-9, at 133.

assigned the translators, then a reasonable jury is required to infer that the military "chose not to, or failed" to prevent the contractors' illegal torture of prisoners. *Id.*[3]

First and most importantly, L-3, as the movant on summary judgment, is not entitled to have any inferences drawn in its favor. *See Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (1986); *Bloomgarden v. Coyer*, 479 F.2d 201, 208 (D.C. Cir. 1973).

Second, L-3's factual claim that L-3-initiated torture is merely evidence that "the military chose not to, or failed, to control the linguists in all cases" creates a genuine and material dispute factual. The record is devoid of evidence that the military "chose" to have L-3 translators torture prisoners, or "failed to stop" L-3 translators from torturing prisoners unless L-3 is trying to rely on the military co-conspirators, such as Charles Graner and Ivan Frederick. Those men have been court-martialed and convicted; so clearly their choices cannot be imputed to the military. And in any event, it is black-letter law that conspiring government officials cannot be used to extend immunities to their co-conspirators. *See Richardson v. McKnight*, 521 U.S. 399, 412 (1997); *Wyatt v. Cole*, 504 U.S. 158, 168-69 (1992).

---

[3] L-3 also makes the bizarre and unfounded representation that "the other linguists cited by plaintiffs – "Iraqi Mike," Etaf Mheisen and Hamza Elsherbiny – are not alleged to have engaged in any abuse involving the plaintiffs in these cases." L-3 Br. at 36. That is simply not true, as is evidenced by the Third Amended Complaint. RS.34,¶17.

L-3's summary judgment record is wholly devoid of any military testimony that would support L-3's claim that non-conspiring military personnel gave L-3 direction to torture, or failed to stop L-3 employees from torturing prisoners. Douglas Rumminger, the only military witness submitting a declaration in support of L-3, testified he gave assignments to L-3 translators at Abu Ghraib, but he was not responsible for preventing L-3 employees from torturing prisoners or violating the Geneva Conventions. Rumminger Dep. at 69-70. He does not testify that the military directed L-3 translators to torture prisoners. The military regulations and manuals, as well as United States law, prohibit anyone from "choosing" not to stop torture. The military regulations and field manuals state that L-3 and other contractors, not the military, are responsible for preventing illegal conduct by their own employees. *See* U.S. Army Field Manual 3-100.21 §4-45("Maintaining discipline of contractor employees is the responsibility of the contractor's management structure, not the military chain of command. The contractor, through company policies, has the most immediate influence in dealing with infractions involving its employees. It is the contractor who must take direct responsibility and action for his employee's conduct."). *See also id.* at §§1-22, 4-2; U.S. Army Regulation 715-9 §3-2(f); 48 C.F.R. §§203.7000-203.7001 (2007).

L-3's claim that the military caused L-3 to torture prisoners is also directly contradicted by the terms of L-3's contract with the military, which, consistent

with the above regulations, required L-3 to "provide all…supervision" of its employees. RS.112, Appendix C-1 at §C-1.1; *see id.* at §C-1.4.1.1 (L-3 required to "provide a sufficient number of on-Site Managers to adequately supervise contractor personnel during the period of this contract"); *id.* at §C-1.4.1.1.4 (L-3 required to provide "at least one staff member with a security clearance equal to or higher than the linguists working in their region of responsibility.")

L-3 witnesses and corporate documents confirm L-3's responsibility and authority to discipline its employees. *See* Crowley Decl.¶¶7-9(former L-3 site manager testifies that L-3, not the military, had the power to discipline translators); RS.112, Appendix C-6. Clearly, a jury could reasonably rely on this testimony and these exhibits to find that the military did not exercise direct command and ***exclusive*** operational control over L-3 employees. The District Court erred by taking this issue away from the jury in light of the genuine and material factual dispute.

C. There Is a Material Dispute About Whether the Military Agreed To Modify L-3's Contract.

L-3 argues that the Court should disregard the contract terms requiring it to supervise its employees because "Titan and the Army had the right to modify the contract between them to fit the circumstances of the war in Iraq." L-3.Br. at 46. (L-3 simply ignores former L-3 employee Crowley's testimony to the effect that L-

3 management did supervise the translators.) The evidence, however, permits a jury to find that the military did not modify the contract.

First, L-3 did not submit any testimony from any military witness claiming the contract had been modified. Second, L-3 did not present any documentary evidence establishing that the military waived the requirement that L-3 provide adequate supervision. The only military witness to submit a declaration for L-3, Douglas Rumminger, testified he lacked knowledge of L-3's contract. Rumminger Dep. at 62. He also testified he was not the party responsible for supervising L-3 employees and stopping them from committing war crimes. Rumminger Dep. at 69-70.

In the face of the evidentiary contest, L-3 asks this Court to usurp the role of the jury, and draw inferences in L-3's favor. That is, L-3 claims "[t]hat Titan [now L-3] was performing as the military expected is evidenced by the fact that even after the disclosures about Abu Ghraib, Titan's contract was repeatedly renewed." L-3.Br. at 46-47. As the movant, L-3 is not entitled to inferences in its favor. Although perhaps a jury may construe the military's renewal of the L-3 contract as ratification of L-3's abuse at Abu Ghraib, it is equally or more plausible that a jury would be persuaded that the military overlooked L-3's role in the abuse because it had an urgent need for translators. Further, since L-3 is adding new facts to the record, it is worth noting that L-3 actually refunded money to the United States as

a result of its employees' misconduct. *See* Bruce V. Bigelow, *Titan to Repay Army $937,000 for Translators*, San Diego Union-Tribune, June 16, 2004; Leon Worden, *Titan Won't Bill Army for Implicated Linguists' Time*, The Signal, June 17, 2004. A jury could construe that repayment as evidence that L-3 was acknowledging it failed to perform its supervisory duties when it let Nakhla and the others torture Plaintiffs.

L-3 similarly proffers conjectures about the credibility of its witnesses, arguing that L-3 former employees would not be viewed as biased. But a jury is also not required to credit L-3 executives' or former executives' testimony that -- directly contrary to the contract's language -- they had no absolutely no responsibility or authority to prevent their employees from torturing prisoners. Given that L-3's own documents impeach this testimony, it is clear a jury could go either way. A jury is likewise not required to credit L-3 witnesses' self-serving claims that, for some unknown reason, L-3 drafted a series of employee manuals, training presentations, and classified advertisements that did not accurately reflect corporate policy. Former L-3 site manager Crowley testified to the contrary – and consistently with the documents in question -- that he "told Titan translators under [his] . . . supervision not to bring complaints and issues to military personnel. They were told to bring complaints and issues to me and the other Titan managers," Crowley Decl.¶5. Crowley, whom L-3 opted not to depose, also

testified that L-3 management failed to report detainee abuse by its translators to the military, *id.* at ¶¶12-17.[4]

L-3's Brief argues about the weight of the evidence and credibility of the witnesses. L-3 Br. at 40-46. But those are jury issues. *Anderson,* 477 U.S. at 255. There are several genuine disputed facts that are material to the outcome of this action. The District Court's decision was based on a factual finding that the military not only did not require, but actually *forbade* L-3 from supervising its employees' performance to prevent their torture of prisoners. *See Ibrahim II*, 556 F.Supp.2d at 5. That District Court finding is a critical error, as it appears to have been based solely on Abu Ghraib site manager David Winkler's testimony that he was "prohibited by the military from observing linguists performing their duties or from discussing their interrogations." *Id.* at 6.

L-3's Brief concedes, however, that this prohibition applied only "in the absence of illegal conduct," and that "that translators could enlist the help of a site manager such as Winkler to report illegal conduct up the military chain of

[4] L-3 also fails to support its claim that the military refused to fund enough site managers to adequately supervise translators. *See* L-3.Br. at 10, 44. The only citation that L-3 provides for this assertion is a statement by Kevin Hopkins that "[i]n December 2003, there were 28 Titan Site Managers for 3052 linguists." Hopkins Decl.¶14. Hopkins does not state that L-3 attempted to provide a more adequate number of Site Managers, or that the military prevented it from doing so.

command." L-3.Br. at 42-43.[5] Such admissions of corporate authority to prevent and report illegal behavior sufficed to serve as the basis to deny summary judgment to CACI; they should also suffice to deny summary judgment to L-3. The District Court simply erred by overlooking this evidence.

II. THE *BOYLE* DOCTRINE SHOULD NOT BE APPLIED TO PROTECT L-3 FROM LIABILITY FOR TORTURE.

If L-3 is entitled to summary judgment here, it means that the District Court viewed the military co-conspirators' unlawful orders to torture prisoners as immunizing L-3. The military has disavowed the acts of those criminals within its ranks, and has court-martialed and convicted them. But even more importantly, even if L-3 had proven (which it has not) that the military ordered illegal conduct, there is no reason why L-3 employees had to follow such orders. For "[w]e are a nation of free men and women habituated to standing up to government when it exceeds its authority….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.***"

[5] L-3 disputes the validity of the *Reeves* rule that self-interested testimony cannot be the only evidence supporting a grant of summary judgment. But that legal rule remains in effect, and was not challenged in the authorities cited by L-3. *See, e.g., Pitt v. District of Columbia*, 558 F. Supp. 2d 11, 16-18 (D.D.C. 2008); *Teneyck v. Omni Shoreham Hotel*, 254 F. Supp. 2d 17, 19 (D.D.C. 2003).

In re "Agent Orange" Prod. Liab. Litig, 373 F. Supp. 2d 7, 99 (E.D.N.Y. 2005)(emphasis added).

Even if L-3 employees were ordered to engage in abuse (which is not proven on the summary judgment record), civil tort liability should still be available because such liability serves as an important financial disincentive and counterweight to L-3's desire to let its employees participate in abuse rather than walk away from potential revenues. Ensuring that financial incentives are in accord with the socially-desired behavior is the quintessential role of tort law.

Plaintiffs respectfully suggest that this Court refuse L-3's invitation to commit reversible error, and instead hold that the judicially-created affirmative defense for government contractors articulated by the Supreme Court in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988)(the "*Boyle* doctrine") cannot be invoked here. Any other outcome squarely conflicts with the Supreme Court's reasoning in *Richardson*, 521 U.S. at 409.

A. Holding L-3 Liable for Illicit Brutality Does Not "Fetter" Any Military Commander.

As the Supreme Court instructed in *Boyle*, a threshold requirement for finding that the affirmative defense applies is that a "uniquely federal interest" is at stake. 487 U.S. at 504. There is no federal interest in permitting military officials to order contractors to engage in unlawful conduct, which appears to be L-3's

argument. Adjudication of Plaintiffs' claim will *not* interfere with the military chain of command or an officer's ability to give "legally binding orders" to his subordinates, *Ibrahim II,* 556 F. Supp. 2d at 5, because military officials simply cannot lawfully order the conduct here.

While war is "an inherently ugly business," *Ibrahim v. Titan*, 391 F. Supp 2d 10, 18 (D.D.C. 2005), it is not an unregulated one. *See*, *e.g.,* Geneva Convention relative to the Protection of Civilian Persons in Time of War. Geneva, 12 Aug. 12, 1949 ("Fourth Geneva Convention"), Arts. 3, 27, 31, 32, 37, 100, 147 (treaty provisions prohibiting torture of prisoners); 10 U.S.C. §§881, 892, 893, 928 (2008)(Uniform Code of Military Justice articles defining offenses of conspiracy, cruelty and maltreatment, dereliction of duty, and assault). L-3 cites *Johnson v Eisentrager* and argues letting the litigation proceed would cause the "fettering of a field commander." 339 U.S. 763, 779 (1950). L-3.Br. at 25. Nowhere does *Eisentrager* suggest that a field commander would be permitted to order or sanction the illicit brutality at issue here – acts of torture and horrific abuse against civilian detainees.

Because commanders cannot authorize torture, permitting adjudication of the victims' claims does not limit any military officials any further than he or she is already limited by the letter of the law. *Ibrahim II,* 556 F. Supp. 2d at 5 (finding that the purpose of the FTCA combatant activities exception is to ensure that there

will be no interference with an "officer's authority, pursuant to the military chain of command, to give *legally binding orders* to his subordinates")(emphasis added).[6]

B. Holding L-3 Liable for Torturing Prisoners Serves the United States' Interests.

L-3 assiduously ignores half of the test that the District Court put forward in an effort to capture the *Boyle* test, namely whether its corporate employees were acting under the "direct command" of the military chain of command. *Ibrahim II*, 556 F. Supp. 2d at 4. Focusing only on the latter half, "exclusive operational control," *see, e.g.,* L-3.Br. at 21 and 26-28, L-3 attempts to avoid stating its defense starkly before the Court: L-3 claims their translators tortured prisoners at the behest of the United States military.[7]

Instead, seeking to skirt the issue, L-3 resorts to the "underlying function" analysis used in *Bivens* jurisprudence.[8] This effort is unavailing, as is L-3's effort

---

[6] The "superior orders" defense is not even available to military personnel where the orders are manifestly unlawful. *See Little v. Barreme,* 6 U.S. 170, 179 (1804); *United States v. Calley*, 22 U.S.C.M.A. 534, 544 (U.S.C.M.A. 1973). *See also United States v. Ohlendorf*, IV Trials of War Criminals 1, 470-73, 483-86.

[7] Plaintiffs have never made any such allegation. What Plaintiffs have alleged is that there were military and governmental co-conspirators (some of whom are now serving jail time) working with these corporate malfeasants. That is clearly true.

[8] There is record evidence that L-3 translators tortured prisoners outside the confines of interrogation, including photographic evidence. *See supra*, pg. 6, n.2. L-3 is therefore not entitled to rely on the reasoning in *Rasul* or *In re Iraq & Afghanistan Plaintiffs Litig*.

to claim without evidence that Mr. Saleh and the other 255 plaintiffs were simply not tortured. L-3.Br. at 35-36. The latter dispute is not at issue on this appeal, and must await merits discovery. The former issue – whether "translation" or "interrogation" as an underlying function insulates L-3 from scrutiny for torturing prisoners – can be answered by looking at the genesis of the *Boyle* doctrine. The Supreme Court there was careful to ensure that simply being a government contractor and thus serving a governmental "function" did not warrant pre-emption, *Boyle*, 487 U.S. at 508-512 (discussing the "limiting principle"), but rather required actual government involvement in the conduct at issue. *Id.* at 512 (three-part test including approval of the "precise specifications" at issue). Importing the *Bivens* "function" analysis into the *Boyle* framework leads to the unworkable result that government contractors providing services that necessarily replace or support a governmental function are, by definition, immune from any liability despite flouting the government's will.

L-3 submits that *Boyle* can be extended to service contractors because it has its basis in *Yearsley v. W.A. Ross Construction Co.,* 309 U.S. 18 (1940), which involved a services contract. L-3 reasons that applying the *Boyle* framework to service-providers like L-3 does not represent an extension of the doctrine. L-3.Br. at 18, 33.

L-3's argument misses the point: there are no allegations that the contractors in *Yearsley* (on whose behalf the United States appeared as *amicus curiae*) violated the terms of their contract. In *Yearsley*, the contractor was granted immunity from suit as an agent of the United States because the work which it "had done...was all authorized and directed by the Government of the United States … and the work thus authorized and directed by the governmental officers was performed pursuant to the Act of Congress." 309 U.S. at 20. The starting point for the *Yearsley* analysis remains valid: the government lacks authority to contract for an unlawful act. Here, L-3 acted contrary to the manner in which it was authorized and directed to work, i.e., *lawfully*. *See Yearsley,* 309 U.S. at 21 ("Where an agent or officer of the Government purporting to act on its behalf has been held to be liable for his conduct causing injury to another, the ground of liability has been found to be either that he ***exceeded his authority*** or that it was not validly conferred.")(emphasis added).[9] The United States has not sought to intervene or to support L-3 in any way.

The *Boyle* Supreme Court's invocation of *Yearsley* proves Plaintiffs point: the defense must be limited to those acts that the government was empowered to

[9] For this reason, L-3's reference to cases examining whether an agency relationship was established for purposes of establishing liability under the FTCA are inapposite. L-3 Br. at 27. Plaintiffs have not alleged an agency relationship and L-3 cannot establish one. *Singh v. S. Asian Soc'y of the Georege Washington Univ.*¸ 2008 U.S. LEXIS 43760 (D.D.C. June 5, 2008) is equally unhelpful, as it considers liability for an independent contractor. *See* L-3 Br. at 30.

order a contractor to perform. 487 U.S. at 506, quoting *Yearsley*, 309 U.S. at 20-21. And that requirement is an insurmountable hurdle that L-3 overlooked in citing *Yearsley* as a defense to allegations of torture, war crimes and assault and battery. Clearly, these heinous acts of torture cannot be authorized and cannot fall within the boundaries of the law.

C. The Combatant Activities Exception Does Not Apply.

L-3 uses a series of mischaracterizations to try to bring this case within the parameters of *Koohi v. United States*, 976 F.2d 1328 (9th Cir. 1992). ***First***, L-3 mischaracterizes Plaintiffs as "alien enemies" when they are simply innocent Iraqis in the same status as the majority of L-3's own Iraqi employees.

Second, L-3 equates a military prison with a "battlefield." Detention centers or prisons have to be kept outside "the battlefield." *See* Fourth Geneva Convention, Art. 83 ("The Detaining Power shall not set up places of internment in areas particularly exposed to the dangers of war") and Arts. 84-88; Geneva Convention relative to the Treatment of Prisoners of War, Geneva, Aug. 12, 1949, Art. 23.

Third, L-3 translators were not engaged in combatant activities. Providing translation services for persons being detained outside combat has far less connection to actual hostilities than "[t]he act of supplying ammunition to fighting vessels in a combat area during war." *Johnson v. United States*, 170 F.2d 767, 770 (9th Cir. 1948).

Fourth, L-3 errs by characterizing *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004), as controlling the issue of whether L-3 translators were engaged in "combat activities." L-3.Br. at 21, n.4. There, the Supreme Court found that "the military detention of prisoners during wartime, however, is an 'important incident[] of war'" But "important incidents of war" is a broad term that subsumes far more war-time conduct within its reach than is found within the much narrower FTCA term "combatant activities." As the government contractor defense is a creature of federal common law, this Court should be wary of extending it to preempt claims arising out of facts and circumstances that are dramatically different than *Boyle.*

Fifth, L-3 is wrong in asserting that, under *Koohi,* no duty of care is owed to the Plaintiffs. L-3.Br. at 25. L-3 owed Plaintiffs – captives who had never been engaged in combat – a strict duty of care including freedom from "cruel inhuman or degrading conduct." *See Hamdan v. Rumsfeld*, 548 U.S. 557, 560-63 (2006)(Common Article 3 of the Geneva Conventions establishes the minimum standard of detainee treatment, applicable in all armed conflicts).[10] Indeed, even

[10] After the Abu Ghraib scandal was made public, the United States specifically confirmed that the Geneva Conventions applied to the Abu Ghraib detainees, either through the protections for POWs under the Third Geneva Convention or otherwise under the Fourth Geneva Convention and under Common Article 3. *See* Testimony of Secretary of Defense Donald H. Rumsfeld, Senate Armed Services Committee Hearing on Treatment of Iraqi Prisoners, May 7, 2004, 2004 WL 1027359.

L-3's contract imposes a duty of care: Plaintiffs are third-party beneficiaries to the contract language requiring L-3 to abide by the law of war.

Sixth, L-3 ignores the reality that the government contractor defense is a creature of judge-made federal law, *Boyle*, 487 U.S. at 504, and needs to be applied in accord with United States' laws, including its commitment to prohibit torture under all circumstances, as demonstrated by its ratification of Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT") and the International Covenant on Civil and Political Rights. Federal courts – including the Supreme Court – have looked to international law to shape the law applicable to the treatment of prisoners and detainees. *See, e.g.*, *Hamdan*, 548 U.S. at 613; *Hamdi*, 542 U.S. at 520.

Koohi requires no different result. There, the Court of Appeals for the Ninth Circuit concluded that the "combatant activities" exception precluded tort liability. The Court reasoned that under both domestic and international law, authorized military action is permitted to respond to an attacker on the battlefield without any duty of care to that attacker. 976 F.2d at 1337. In *Koohi,* plaintiffs were owed no duty of reasonable care because their aircraft took off from a military-commercial airport, was flying in a combat zone, and failed to communicate its "civilian status" to the U.S. military. 976 F. 2d at 1337.

The Court's finding relied on international law principles that authorize force to be directed towards military objectives, such as enemy forces on the battlefield. But that very same body of law prohibits the use of force against Plaintiffs, clearly persons "outside the fight" who do not participate in hostilities. Here, Plaintiffs were innocents mistakenly imprisoned by the military, which clearly had duties to refrain from torturing them.

In the battlefield context, military objectives may properly be targeted and lawful, split-second military decisions may properly be insulated from judicial review. *See Koohi*, 976 F. 2d at 1337 (describing need to preserve "unfettered military discretion" on the battlefield). By contrast, where military or civilian personnel are engaged in the *detention* of civilians outside of combat, international legal principles unambiguously impose a duty of humane treatment. *See* Common Article 3. Thus, while *Koohi*'s interpretation of the FTCA's combatant activities exception can be harmonized with the laws of war, the District Court's application of the statute to the fundamentally distinct factual circumstances of this case is inconsistent with the laws of war and should therefore be rejected. *Murray v. The Schooner Charming Betsy,* 2 Cranch 64, 118 (1804).

D. The Military Opposes Extending the *Boyle* Framework to Service Contractors in Iraq.

Not surprising, the military itself recognizes how extending the *Boyle* doctrine to contractors serving in Iraq would be counter-productive to the war effort. The Department of Defense ("DoD") recently adopted a regulation urging the judiciary not to shift the loss from corporate misconduct to innocent third parties for the acts of service contractors who are simply beyond the military's intended or actual span of control. L-3 concocts a circular argument to rebut this point: the military constantly controlled L-3 employees, so therefore the DoD Regulation does not apply. L-3.Br. at 33-34. But the DoD Regulation does apply, and highlights the error of the District Court's decision, because it directly refutes the notion that the military is ***able*** to control L-3 employees at all times. The DoD clearly states that "[t]he public policy rationale behind *Boyle* does not apply when a performance-based statement of work is used in a services contract, because the Government does not, in fact, exercise specific control over the actions and decisions of the contractor or its employees or subcontractors." The DoD Regulation further demonstrates that the District Court erred when accepting L-3's disputed factual claim that the military controlled L-3 translators "24 hours a day, seven days a week." L-3 Br. at 30. The DoD Regulation also demonstrates that the United States' interests would not be served by affirming the District Court

decision insulating L-3 from liability for breaching the laws prohibiting torture and abuse of civilians detained in military prisons.

III. PLAINTIFFS' COMPLAINT STATES VALID FEDERAL COMMON LAW CLAIMS BROUGHT UNDER THE ALIEN TORT STATUTE.

Such torture and abuse in military prisons by private parties such as L-3 is actionable under the federal Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, jurisprudence. Plaintiffs believe the District Court erred in dismissing these claims. The Supreme Court's *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) decision controls, and compels the opposite result. L-3 makes several errors in trying to evade the precedential and controlling effect of *Sosa*.

First, L-3 misapprehends the line of cases (endorsed by *Sosa*) beginning with *Kadić v. Karadžić,* 70 F.3d 232 (1995), which recognize that private actors can be held liable for serious violations of international law, such as the claims for war crimes of the type alleged by Plaintiffs. L-3.Br. at 48-50, 52-55. Radovan Karadžić, the defendant in *Kadić*, was found liable for violations of international law including war crimes *not* because he was a private party *acting on behalf* of a State or a quasi-state. L-3.Br. at 48. Rather, he was found liable for these violations "in his private capacity," *Kadić*, 70 F.3d at 236, because "as understood in the modern era […] certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state *or only as private*

individuals." *Id.* at 239.(emphasis added). The Second Circuit arrived at this conclusion after examining sources of law including the Restatement (Third) of Foreign Relations, *id.* at 240, and conducting a "particularized examination" of the offenses charged and the liability each incurred under international law. *Id.* at 241; s*ee Id.* at 241-245. There was no suggestion that some form of state action (or imputed liability of the state) was required to hold an individual liable for *his own* war crimes. And of course, torture *is* a war crime. *See Kadić,* 70 F.3d at 243-244; Common Article 3 of the Geneva Conventions.

After *Kadić,* decisional law across the nation began to reflect that non-state actors may be held accountable for select, egregious violations. Pl.Br. at 60-61, *see also Burnett v. Al Baraka Inv. & Dev. Corp*., 274 F. Supp. 2d 86, 100 (D.D.C. 2003)(finding the ATS "may be applied to certain actions of private, non-state actors"); *Jama v. I.N.S.*, 343 F. Supp. 2d 338, 360–61 (D.N.J 2004); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 311-319 (S.D.N.Y. 2003); *Estate of Rodriquez v. Drummond Co. Inc.*, 256 F. Supp. 2d 1250, 1260-62 (N.D. Ala. 2003).

This is the state of the law endorsed by *Sosa.* There, the Supreme Court addressed whether certain violations (arbitrary arrest and detention) were actionable against a non-state actor, and found that they were not because the length and severity did not rise to the level of violation of an international norm.

Sosa, 542 U.S. at 734-738. But the Supreme Court in *Sosa* did not even need to examine the facts of the detention if, as L-3 claims, petitioner's status as a non-state actor carried the day. Thus, the fact that the Supreme Court analyzed the issue as it did, and also cited *Kadić* with approval, serves as an endorsement of the overwhelming weight of the jurisprudence that precludes this Court's reliance on the reasoning of the *Sanchez-Espinoza* decision.[11]

The *Sanchez-Espinoza* position of 'you are either a non-state actor and thus not liable for international law violations' *or* 'you are a state actor and thus immune,' has been discredited by the decisional law accepted and endorsed by *Sosa*. *Sanchez-Espinoza*, 770 F.2d at 206-207.[12] It is now clear that non-state

[11] Contrary to L-3's assertion, Plaintiffs do not "acknowledge" that the District Court correctly interpreted *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985) or *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984). L-3. Br. at 48. None of the judges in *Tel-Oren* claimed to make the broad finding that international law does not apply to non-state actors in all cases, which purportedly served as the basis for the District Court's conclusion that L-3 could not be held liable under the ATS. *See Tel-Oren*, 276 F.2d at 795(Edwards, J. concurring); *Id*. at 806-807(Bork, J. concurring); *Id.* at 823(Robb, J., concurring).

[12] For this reason, the District Court erred in finding that "*Sanchez-Espinoza* makes clear that there is no middle ground between private action and government action, at least for purposes of the Alien Tort Statute." *Saleh v. Titan,* 436 F.Supp.2d 55, 58 (D.D.C. 2006). 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, and claims against non-state actors are barred, the ATS would be an empty vessel. *Sosa* rejected the 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 brought pursuant to the federal common law. *Id*. at 724.

actors, including corporations and non-state actors who act with state actors, can be held liable for international law violations. *See e.g., Arias v. Dyncorp*, 517 F. Supp. 2d 221, 227-228 (D.D.C. 2007); *Wiwa v. Royal Dutch Petroleum*, Case No. 96-CIV 8386 2002 WL 319887 (S.D.N.Y. Feb. 28, 2002); *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1157 (11th Cir. 2005).

Second, L-3's reliance on *Correctional Services Corp. v. Malesko*, 534 U.S. 61 (2001) is inapposite. L-3 Br. at 57. *Malesko* addressed only the narrow question of whether *Bivens* actions should be extended to corporations. The Court found that because "the purpose of *Bivens* is to deter the officer, not the agency," and the particular deterrent effect of *Bivens* would not be realized by extending liability through this particular cause of action to corporations. *Malesko*, 534 U.S. at 69. But here, extending the ATS to corporations would serve the deterrent effect intended by tort law, because it would penalize L-3 for violating *Sosa*-level norms, such as the prohibition against war crimes and torture. *Sosa*, 542 U.S. at 729-730.

Third, contrary to L-3's assertions, *see* L-3.Br. at 50-51, the Torture Victim Protection Act ("TVPA"), 28 U.S.C. § 1350 (note)(2000) *supports* Plaintiffs' position. The TVPA sought to extend, rather than reduce, the jurisdictional reach of the judiciary to permit U.S. citizens to bring claims for torture and extrajudicial killings occurring abroad. The TVPA was not intended to displace federal

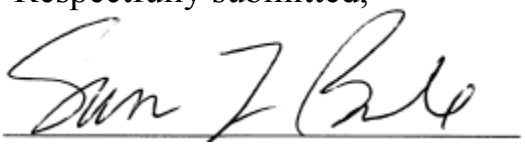
common law arising under ATS, and was not intended to be the exclusive remedy for torture claims. *See Aldana v. Del Monte Fresh Produce N.A., Inc*, 416 F.3d. 1242, 1250-51 (11th Cir. 2005). The TVPA demonstrated Congress's clear intention that the ATS "should remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law." H.R. Rep. No. 367, 102d Cong., 2d Sess., at 4 (1991), *reprinted* in 1992 U.S.C.C.A.N. 84, 86. The assertion that the TVPA limits the scope of the ATS was rejected by *Sosa*, 542 U.S. at 728.

Fourth and finally, Plaintiffs do not, as L-3 suggests, seek to elevate common crimes or violations into the realm of war crimes. L-3 Br. at 53. Unlike the plaintiffs in *Saperstein v. Palestinian Authority*, Plaintiffs are not simply "grasping at the *Kadić* decision and attempting to bring the alleged conduct within the language of Common Article 3." 2006 U.S.Dist. LEXIS 92778, at *28 (Dec. 22, 2006 S.D. Fla.). With all due respect for the loss suffered by the plaintiffs in *Saperstein*, *id*. at 30-31, Plaintiffs are not alleging one singular act of murder as sufficient to be a war crime. At this early stage in the litigation, this Court must look to Plaintiffs' Complaint, which pled wide-spread rape, cruel treatment, forced nudity and murder. The Complaint properly pled war crimes.

CONCLUSION

This Court is being asked to affirm the District Court's extension of the *Boyle* doctrine to immunize L-3, a private party whose employees tortured innocent Iraqis mistakenly detained at Abu Ghraib and other military prisons. This Court, reviewing the matter *de novo*, should overturn that decision, which resulted from the District Court ignoring several genuine issues of material fact. As set forth above, the record evidence does not support L-3's claim that the military wanted L-3 translators to torture prisoners. L-3 invites this Court to engage in reversible error by suggesting time and time again that the Court draw inferences in L-3's favor. This Court should overturn the District Court decision and remand this action for discovery.

Respectfully submitted,



Susan L. Burke (D.C. Bar No. 414939
William T. O'Neil (D.C. Bar No. 426107)
Katherine R. Hawkins
BURKE O'NEIL LLC
4112 Station Street
Philadelphia, PA 19127
(215) 487-6596

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

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

Attorneys for Saleh Plaintiffs-Appellants

L. Palmer Foret (D.C. Bar No. 260356)
THE LAW FIRM OF
L. PALMER FORET, P.C.
1735 20th Street, N.W.
Washington, D.C 20009
(202) 332-2404

Craig T. Jones
Roderick E. Edmond
EDMOND JONES LINDSAY LLP
127 Peachtree Street, NE, Suite 410
Atlanta, GA 30303
(404) 525-1080

Attorneys for Ibrahim Plaintiffs-Appellants

ADDENDUM

ADDENDUM: STATUTES AND REGULATIONS

TABLE OF CONTENTS

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 46, at 197, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51 (Dec. 10, 1984) ("CAT")

Article 1

1. For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

Article 2

1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.

2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political in stability or any other public emergency, may be invoked as a justification of torture.

3. An order from a superior officer or a public authority may not be invoked as a justification of torture.

Torture Victim Protection Act, 28 U.S.C. § 1350 (note) (2000)

Pub. L. 102–256, Mar. 12, 1992, 106 Stat. 73, provided that:

SECTION 1. SHORT TITLE.

This Act may be cited as the 'Torture Victim Protection Act of 1991'.

SEC. 2. ESTABLISHMENT OF CIVIL ACTION.

(a) Liability.—An individual who, under actual or apparent authority, or color of law, of any foreign nation—

(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or

(2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

(b) Exhaustion of Remedies.—A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred.

(c) Statute of Limitations.—No action shall be maintained under this section unless it is commenced within 10 years after the cause of action arose.

SEC. 3. DEFINITIONS.

(a) Extrajudicial Killing.—For the purposes of this Act, the term 'extrajudicial killing' means a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. Such term, however, does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation.

(b) Torture.—For the purposes of this Act—

(1) the term 'torture' means any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or

suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind; and

(2) mental pain or suffering refers to prolonged mental harm caused by or resulting from—

(A) the intentional infliction or threatened infliction of severe physical pain or suffering;

(B) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(C) the threat of imminent death; or

(D) the threat that another individual will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

Copyright 1991 Congressional Information Service, Inc.
Committee Reports

102nd Congress

House Report 102-367 Part 1

102 H. Rpt. 367; Part 1

TORTURE VICTIM PROTECTION ACT OF 1991

DATE: November 25, 1991. Ordered to be printed

SPONSOR: Mr. Brooks, from the Committee on the Judiciary, submitted the following

REPORT
CONFERENCE REPORT
(To accompany H.R. 2092 which on July 29, 1991, was referred jointly to the Committee on Foreign Affairs and the Committee on the Judiciary)
(Including cost estimate of the Congressional Budget Office)

TEXT:

The Committee on the Judiciary, to whom was referred the bill (H.R. 2092) to carry out obligations of the United States under the United Nations Charter and other international agreements pertaining to the protection of human rights by establishing a civil action for recovery of damages from an individual who engages in torture or extrajudicial killing, having considered the same, report favorably thereon with an amendment and recommend that the bill, as amended, do pass.

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Torture Victim Protection Act of 1991".

SEC. 2. ESTABLISHMENT OF CIVIL ACTION.

(a) Liability. An individual who, under actual or apparent authority, or color of law, of any foreign nation

(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or

(2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individuals legal representative, or to any person who may be a claimant in an action for wrongful death.

(b) Exhaustion of Remedies. A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred.

(c) Statute of Limitations. No action shall be maintained under this section unless it is commenced within 10 years after the cause of action arose.

SEC. 3. DEFINITIONS.

(a) Extrajudicial Killing. For the purposes of this Act, the term "extrajudicial killing" means a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. Such term, however, does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation.

(b) Torture. For the purposes of this Act

(1) the term "torture" means any act, directed against an individual in the offenders custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind; and

(2) mental pain or suffering refers to prolonged mental harm caused by or resulting from

(A) the intentional infliction or threatened infliction of severe physical pain or suffering;

(B) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the sense or the personality;

(C) the threat of imminent death; or

(D) the threat that another individual will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

explanation of amendment

Inasmuch as H.R. 2092 was ordered reported with a single amendment in the nature of a substitute, the contents of this report constitute an explanation of that amendment.

summary and purpose

The purpose of H.R. 2092 is to provide a Federal cause of action against any individual who, under actual or apparent authority, or color of law, of any foreign nation, subjects any individual to torture or extrajudicial killing.

Hearings

No hearings were held on H.R. 2092 during the 102nd Congress. Predecessor legislation, H.R. 1417, was the subject of hearings before the Foreign Affairs Subcommittee on Human Rights on March 23, 1988, and April 20, 1988.

Committee vote

On November 19, 1991, a reporting quorum being present, the Committee on the Judiciary ordered H.R. 2092 favorably reported to the House by voice vote with a single amendment in the nature of a substitute.

Discussion

I. Background

Official torture and summary execution violate standards accepted by virtually every nation. The universal consensus condemning these practices has assumed the status of customary international law. As the Second Circuit Court of Appeals held in 1980, "official torture is now prohibited by the law of nations."Filartiqa v. Pena-Irala, 630 F.2d 876, 884 (2d Cir. 1980). The prohibition against summary executions has acquired a similar status.

These universal principles provide scant comfort, however, to the many thousands of victims of torture and summary executions around the world. Despite

universal condemnation of these abuses, many of the worlds governments still engage in or tolerate torture of their citizens, and state authorities have killed hundreds of thousands of people in recent years. (See "Amnesty International, Political Killings by Governments 5" (1983).) Too often, international standards forbidding torture and summary executions are honored in the breach.

For this reason, recent international initiatives seeking to address these human rights violations have placed special emphasis on enforcement measures. A notable example is the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which was adopted, with strong support from the U.S. Government, by the U.N. General Assembly on December 10, 1984. The Convention was signed by the United States on April 18, 1988 and ratified by the U.S. Senate on October 27, 1990. Essentially enforcement-oriented, this Convention obligates state parties to adopt measures to ensure that torturers are held legally accountable for their acts.

One such obligation is to provide means of civil redress to victims of torture. Judicial protections against flagrant human rights violations are often least effective in those countries where such abuses are most prevalent. A state that practices torture and summary execution is not one that adheres to the rule of law. The general collapse of democratic institutions characteristic of countries scourged by massive violations of fundamental rights rarely leaves the judiciary intact. The Torture Victim Protection Act (TVPA), H.R. 2092, would response to this situation.

II. Need for legislation

The TVPA would establish an unambiguous and modern basis for a cause of action that has been successfully maintained under an existing law, section 1350 of the Judiciary Act of 1789 (the Alien Tort Claims Act), which permits Federal district courts to hear claims by aliens for torts committed "in violation of the law of nations." (28 U.S.C. sec. 1350). Section 1350 has other important uses and should not be replaced. There should also, however, be a clear and specific remedy, not limited to aliens, for torture and extrajudicial killing.

In the case of Filartiqa v. Pena-Irala, the Second Circuit Court of Appeals recognized a right of action against foreign torturers under the rarely invoked Alien Tort Claims Act. Citizens of Paraguay brought suit in Federal court against a former inspector general of police, who had tortured to death a family member of the plaintiffs, and who was present in the United States. The district court dismissed the complaint for lack of jurisdiction, construing the phrase "law of nations" narrowly; the Court of Appeals reversed. The appellate court unanimously acknowledged that although torture of ones own citizens was not recognized as a

violation of the law of nations in 1789, when the Alien Tort Claims Act was enacted, the universal prohibition of torture had ripened into a rule of customary international law, thereby bringing torture squarely within the language of the statute. (See Filartiqa, 630 F.2d at 844-85).

The Filartiqa case met with general approval. At least one Federal judge, however, questioned whether section 1350 can be used by victims of torture committed in foreign nations absent an explicit grant of a cause of action. In Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984), cert. denied 470 U.S. 103 (1985), a case involving terrorist activities of the Palestine Liberation Organization, Judge Bork questioned the existence of a private right of action under the Alien Tort Claims Act, reasoning that separation of powers principles required an explicit and preferably contemporary grant by Congress of a private right of action before U.S. courts could consider cases likely to impact on U.S. foreign relations.

The TVPA would provide such a grant, and would also enhance the remedy already available under section 1350 in an important respect: While the Alien Tort Claims Act provides a remedy to aliens only, the TVPA would extend a civil remedy also to U.S. citizens who may have been tortured abroad. Official torture and summary executions merit special attention in a statute expressly addressed to those practices. At the same time, claims based on torture or summary executions do not exhaust the list of actions that may appropriately be covered be section 1350. That statute should remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law.

III. Summary of H.R. 2092, as amended

The legislation authorizes the Federal courts to hear cases brought by or on behalf of a victim of any individual who, under actual or apparent authority, or color of law, of any foreign nation, subjects a person to torture or extrajudicial killing. It defines "torture" and "extrajudicial killing in accordance with international standards. The bill would apply only to those acts undertaken under color of official authority. Only "individuals," not foreign states, can be sued under the bill. Striking a balance between the desirability of providing redress for a victim and the fear of imposing additional burdens on U.S. courts, the bill recognizes as a defense the existence of adequate remedies in the country where the violation allegedly occurred.

In cases of extrajudicial killing, because the victim will not be alive to bring suit, the victims "legal representative and any person who may be a claimant in an action for wrongful death" may bring suit. Courts may look to state law for guidance as to which parties would be proper wrongful death claimants.

The definition of "torture" in the legislation is limited to acts by which severe pain or suffering, whether physical or mental, is intentionally inflicted for such purposes as obtaining a confession, punishment, or coercion. This language tracks the definition of "torture" adopted in the Torture Convention and the understandings included in the Senates ratification of the Convention. Like the definition included in the Torture Convention, this one also specifically excludes "pain and suffering arising only from or inherent in, or incidental to, lawful sanctions." Thus, the act would not permit suits based on the pain inherent in lawfully imposed punishments.

The term "extrajudicial killing" is defined in the bill as "a deliberate killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." The definition thus excludes executions carried out under proper judicial authority. The inclusion of the word "deliberated" is sufficient also to include killings that lack the requisite extrajudicial intent, such as those caused by a police officers authorized use of deadly force. The concept of "extrajudicial killings" is derived from article 3 common to the four Geneva Conventions of 1949.

The phrase "under actual or apparent authority, or color of law" makes clear that the plaintiff must establish some governmental involvement in the torture or killing to prove a claim. Courts should look to 42 U.S.C. Sec. 1983 is construing "color of law" and agency law in construing "actual or apparent authority." The bill does not attempt to deal with torture or killing by purely private groups.

The bill provides that a court shall decline to hear and determine a claim if the defendant establishes that the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred. This requirement ensures that U.S. courts will not intrude into cases more appropriately handled by courts where the alleged torture or killing occurred. It will also avoid exposing U.S. courts to unnecessary burdens, and can be expected to encourage the development of meaningful remedies in other countries.

A ten year statute of limitation insures that the Federal Courts will not have to hear stale claims. In some instances, such as where a defendant fraudulently conceals his or her identification or whereabouts from the claimant, equitable tolling remedies may apply to preserve a claimants rights.

The TVPA is subject to restrictions in the Foreign Sovereign Immunities Act of 1976 (FSIA). Pursuant to the FSIA, "a foreign state," or an "agency or instrumentality" thereof, shall be immune from the jurisdiction of the courts of the United States and of the States," with certain exceptions as elsewhere provided in

the FSIA, and subject to international agreements to which the United States was a party at the time of the FSIAs enactment.

While sovereign immunity would not generally be an available defense, nothing in the TVPA overrides the doctrines of diplomatic and head of state immunity. These doctrines would generally provide a defense to suits against foreign heads of state and other diplomats visiting the United States on official business.

IV.

History of legislation
Action in 100th Congress

Legislation virtually identical to H.R. 2092 was introduced by Mr. Yatron and cosponsored originally by Judiciary Committee Chairman Rodino and Mr. Leach on March 4, 1987. The bill, H.R. 1417, was jointly referred to the Committee on Foreign Affairs and the Committee on the Judiciary. The Foreign Affairs Subcommittee on Human Rights held hearings on March 23 and April 20, 1988, and the Foreign Affairs Committee marked up and reported the bill favorably to the House with an amendment on June 7, 1988. The Judiciary Committee adopted an amendment in the nature of a substitute and reported the bill, as amended, favorably to the House by voice vote on September 30, 1988. This amended bill passed the House by voice vote on October 5, 1988.Action in 101st Congress

Legislation virtually identical to H.R. 2092 was also introduced in the 101st Congress. The bill, H.R. 1662, was introduced by Mr. Yatron on April 4, 1989, and jointly referred to the Committee on the Judiciary and the Committee on Foreign Affairs. Original cosponsors included Judiciary Committee Chairman Brooks and Foreign Affairs Committee Chairman Fascell. The bill was marked up by the Subcommittee on Immigration, Refugees, and International Law on April 5, 1989, and ordered favorably reported, with an amendment, to the full Judiciary Committee by voice vote. The Judiciary Committee ordered the bill favorably reported, with amendments, to the House by voice vote on April 25, 1989. This amended bill passed the House by a vote of 362-4 on October 2, 1989.Action in 102nd Congress

H.R. 2092 was introduced by Mr. Yatron on April 24, 1991 and jointly referred to the Committee on Foreign Affairs and the Committee on the Judiciary. On September 12, 1991, the Subcommittee on International Law, Immigration and Refugees ordered the bill favorably reported to the full Judiciary Committee by voice vote.

Committee oversight findings

In compliance with clause 2(l)(3)(A) of rule XI of the Rules of the House of Representatives, the Committee reports that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this reports.

Committee on government operations oversight findings

No findings or recommendations of the Committee on Government Operations were received as referred to in clause 2(l)(3)(D) of rule XI of the Rules of the House of Representatives.

New budget authority and tax expenditures

Clause 2(l)(3)(B) of House Rule XI is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

Congressional budget office cost estimate

In compliance with clause 2(l)(3)(C) of rule XI of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill H.R. 2092, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 403 of the Congressional Budget Act of 1974:

U.S. Congress,
Congressional Budget Office,
Washington, DC, November 21, 1991.
Hon. Jack Brooks,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, DC.

Dear Mr. Chairman: The Congressional Budget Office (CBO) has reviewed H.R. 2092, the Torture Victim Protection Act of 1991, as ordered reported by the House Committee on the Judiciary on November 19, 1991. The bill makes any person who, under the authority of any foreign nation, tortures or extrajudicially kills any person liable to the injured party or the injured partys representative in a civil action.

Enactment of the bill would have no significant budget impact on federal, state or local governments. Also, enactment of H.R. 2092 would not affect direct spending or receipts. Therefore, pay-as-you-go procedures would not apply to the bill.

If you would like further details on this estimate, we will be pleased to provide them. The CBO staff contact is Kent Christensen, who can be reached at 226-2840.

Sincerely,
Robert D. Reischauer,
Director.

inflationary impact statement

Pursuant to clause 2(l)(4) of rule XI of the Rules of the House of Representatives, the Committee estimates that H.R. 3048 will have no significant impact on prices and costs in the national economy.

SUBJECT: TORTURE (94%); DAMAGES (91%); SUITS & CLAIMS (90%); VICTIMS RIGHTS (90%); HUMAN RIGHTS (90%); LEGISLATION (90%); INTERNATIONAL RELATIONS (89%); TREATIES (89%); HUMAN RIGHTS ORGANIZATIONS (78%); US FEDERAL GOVERNMENT (78%); APPEALS (78%); APPELLATE DECISIONS (78%); DECISIONS & RULINGS (78%); SETTLEMENTS & DECISIONS (78%); STATUTE OF LIMITATIONS (78%); WRONGFUL DEATH (78%); VOTERS & VOTING (73%);

LOAD-DATE: December 03, 1991

International Covenant on Civil and Political Rights,
S. Exec. Doc. No. 95-E, art. 7, 999 U.N.T.S. 171 (Dec. 16, 1966) ("ICCPR").

Article 7

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

Geneva Convention relative to the Treatment
of Prisoners of War, Geneva, Aug. 12, 1949, ("Third Geneva Convention")

Article 23

No prisoner of war may at any time be sent to, or detained in areas where he may be exposed to the fire of the combat zone, nor may his presence be used to render certain points or areas immune from military operations.

Prisoners of war shall have shelters against air bombardment and other hazards of war, to the same extent as the local civilian population. With the exception of those engaged in the protection of their quarters against the aforesaid hazards, they may enter such shelters as soon as possible after the giving of the alarm. Any other protective measure taken in favour of the population shall also apply to them.

Detaining Powers shall give the Powers concerned, through the intermediary of the Protecting Powers, all useful information regarding the geographical location of prisoner of war camps.

Whenever military considerations permit, prisoner of war camps shall be indicated in the day-time by the letters PW or PG, placed so as to be clearly visible from the air. The Powers concerned may, however, agree upon any other system of marking. Only prisoner of war camps shall be marked as such.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)

I, Susan L. Burke, hereby certify that:

1. I am attorney representing the *Saleh* Plaintiffs.

2. This brief is in Times New Roman 14-point type. Using the word count feature of the software used to prepare this brief, I have determined that the text of the brief (excluding the Certificate as to Parties, Table of Contents, Table of Authorities, Glossary of Abbreviations, Addendum, and Certificates of Compliance and Service) contains 6,991 words.

Susan L. Burke

CERTIFICATE OF SERVICE

S*aleh, et al. v. Titan Corporation, et al.*, No. 08-7008

I, Elissa Matias being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

Counsel Press was retained by Attorneys for Appellants to print this document. I am an employee of Counsel Press.

On the **31st Day of October 2008**, I served the within (Proof) **JOINT REPLY BRIEF FOR APPELLANTS (Sealed and Unsealed Versions)** upon:

Joseph W. Koegel, Jr.
John F. O'Connor
Steptoe & Johnson, LLP
1330 Connecticut Avenue, NW
Washington, DC 20036-1795
202-429-3000
Attorneys for CACI International, Inc. and CACI Premier Technology, Inc.

Frank G. Bowman
F. Whitten Peters
Ari S. Zymelman
Williams & Connolly
725 12th Street, NW
Washington, DC 20005
202-434-5000
Attorneys for L-3 Services, Inc

via Federal Express, by causing 2 true copies of each to be deposited, enclosed in a properly addressed wrapper, in an official depository of Federal Express.

Unless otherwise noted, 7 copies of both versions have been filed with the Court on the same date and in the same manner as above.

October 31, 2008 _____