**Nos. 09-1335(L), 10-1891 and 10-1921**

IN THE

**United States Court of Appeals**

**FOR THE FOURTH CIRCUIT**

*SUHAIL NAZIM ABDULLAH AL SHIMARI, ET AL.,*
*Plaintiffs-Appellees,*

*v.*

*CACI INTERNATIONAL INC., ET AL.,*
*Defendants-Appellants.*

*On Appeal from the United States District Court for the Eastern District of Virginia, Alexandria Division, No. 08-00827*

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*WISSAM ABDULLATEFF SA'EED-AL-QURAISHI, ET AL.,*
*Plaintiffs-Appellees,*

*v.*

*L-3 SERVICES, INC. & ADEL NAKHLA,*
*Defendants-Appellants.*

*On Appeal from the United States District Court for the United States District Court for the District of Maryland, No. 08-1696*

# BRIEF OF *AMICI CURIAE* INTERNATIONAL HUMAN RIGHTS ORGANIZATIONS AND EXPERTS IN SUPPORT OF PLAINTIFFS-APPELLEES


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**LIST OF AMICI CURIAE**

HUMAN RIGHTS FIRST

THE CENTER FOR VICTIMS OF TORTURE

THE INTERNATIONAL COMMISSION OF JURISTS

THE WORKING GROUP ESTABLISHED BY THE COMMISSION ON HUMAN RIGHTS ON THE USE OF MERCENARIES AS A MEANS OF VIOLATING HUMAN RIGHTS AND IMPEDING THE EXERCISE OF THE RIGHT OF PEOPLES TO SELF-DETERMINATION

HUMAN RIGHTS WATCH

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MARCO SASSÒLI

GARY SOLIS

SCOTT M. SULLIVAN

DR ANICÉE VAN ENGELAND

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Only one form needs to be completed for a party even if the party is represented by more than one attorney. Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case. Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements. Counsel has a continuing duty to update this information.

No. 09-1335 Caption: Al Shimari, et al v. CACI International, Inc., et al

Pursuant to FRAP 26.1 and Local Rule 26.1,

Human Rights First
(name of party/amicus)

who is amicus, makes the following disclosure:
(appellant/appellee/amicus)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☑ YES ☐ NO
If yes, identify entity and nature of interest:

Defendant corporations, to the extent that they are publicly held.

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☐ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

## CERTIFICATE OF SERVICE

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I certify that on December 20, 2011 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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## STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY TO FILE[1]

International human rights law recognizes and seeks to enforce the rights of all persons that derive from their very humanity. Whereas the law of war ("International Humanitarian Law" or "IHL") regulates conduct during armed conflict and affords significant protections to persons detained in connection with war that are also relevant in this case, international human rights law is of broader reach: it protects rights in both war and peacetime that derive not from an individual's status as a combatant or wartime detainee, but from his or her status as a human being.

Amici, the organizations and experts listed below, are dedicated to the support and defense of those rights and protections and have a unique perspective and expertise on the issues in this case insofar as they intersect—as they surely do—with international human rights. The following organizations join this brief:

**Human Rights First** promotes laws and policies that advance universal rights and freedoms and exists to protect and defend the dignity of each

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[1] The parties have consented to the filing of this brief. Pursuant to Federal Rule of Appellate Procedure 29(c)(5), counsel for *amici* represent that no counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

individual through respect for human rights and the rule of law.

**The Center for Victims of Torture (CVT)** is an internationally respected torture treatment center with more than 25 years of experience treating torture survivors. CVT works to heal the wounds of torture on individuals, their families and their communities and to stop torture worldwide.

**The International Commission of Jurists (ICJ)** is an international non-governmental organization dedicated to the promotion and observance of the rule of law and human rights. The ICJ was created in 1952 and is comprised of 60 well-known jurists representing different legal systems.

**The Working Group established by the Commission on Human Rights on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination** works to establish accountability of private military and security contractors in accordance with international human rights and humanitarian law. The Working Group is established pursuant to United Nations General Assembly resolution 64/151 and to Human Rights Council resolution 18/4. Its participation as amicus curiae is on a voluntary basis, without prejudice to, and not to be considered as a waiver, express or implied, of the privileges and immunities of the United Nations, its officials and experts on missions, pursuant to the 1946 Convention on the Privileges and

Immunities of the United Nations.

**Human Rights Watch (HRW)** is one of the world's leading independent organizations dedicated to defending and protecting human rights. HRW investigates and exposes human rights violations and holds abusers accountable. HRW currently monitors human rights abuses in over 80 countries.

In addition, the following experts join this brief in their personal capacity (affiliations are provided for identification purposes only):

**Ilias Bantekas**, Professor of International Law and Human Rights at Brunel University Law School and Fellow at the Institute of Advanced Legal Studies University of London.

**John Cerone**, Professor of International Law and Director of the Center for International Law & Policy at New England Law | Boston, is an expert in human rights and international humanitarian law.

**Geoffrey Corn**, Professor of Law at South Texas College of Law, is a retired U.S. Army Lieutenant Colonel who formerly served as the Army's senior law of war expert. He is an expert in the law of armed conflict.

**David Glazier**, Professor of Law at Loyola Law School, served twenty-one years as a U.S. Navy surface warfare officer. In that capacity, he commanded the USS George Philip. He has published extensively on law of armed

conflict topics.

**Kevin Jon Heller**, Senior Lecturer at Melbourne Law School, teaches international criminal law and international humanitarian law. He is also Project Director for International Criminal Law at the Asia Pacific Centre for Military Law, a joint venture of Melbourne Law School and the Australian Defence Forces.

**Michael Newton**, Professor of the Practice of Law at Vanderbilt University Law School, is an expert in IHL, taught at West Point and negotiated the Elements of Crimes Document for the International Criminal Court on behalf of the United States.

**Marco Sassòli**, Professor and Director of the Department of International Law and International Organization of the University of Geneva and Associate Professor at the Universities Laval and of Quebec in Montreal, Canada, has been a registrar at the Swiss Supreme Court and has worked for 13 years, both at its headquarters and in conflict areas for the International Committee of the Red Cross.

**Gary Solis**, Adjunct Professor of Law at Georgetown University Law Center, George Washington Law School, and the United States Military Academy, served as a judge advocate for 18 years and is an expert on the law of armed conflict.

**Scott M. Sullivan**, Assistant Professor of Law at the LSU Law Center and an Associate of the Robert Strauss Center for International Security and Law, specializes in international and national security law and is the author of multiple publications regarding U.S. law and policy on private military contractors.

**Dr Anicée Van Engeland**, Lecturer in Law at the University of Exeter and a Research Associate at SOAS, is a consultant for different organizations on humanitarian law, human rights and Islamic law.

## STATEMENT OF THE CASE

The allegations relevant to this brief are simple and shocking. During the course of military operations in Iraq, the United States military detained numerous Iraqi citizens, including the Plaintiffs. Held as prisoners, the Plaintiffs allege that they were tortured or abused in captivity by civilian contractors employed by the U.S. military to serve as interrogators and translators at the Abu Ghraib prison and other locations. Defendants are accused of brutal acts of physical and psychological torture that include sexual assault, beatings, deprivations of food, water and sleep, and being forced to watch the rape of another prisoner.

The district courts below denied Defendants' motions to dismiss on various grounds. *See Al Shimari v. CACI Premier Technology, Inc.*, 657 F. Supp.

2d 700, 731 (E.D. Va. 2009) and *Al-Quraishi v. Nakhla*, 728 F. Supp. 2d 702, 715 (D. Md. 2010). Defendants filed these interlocutory appeals. In companion opinions, *Al Shimari v. CACI International, Inc.*, 658 F.3d 413 (4th Cir. 2011), and *Al-Quraishi v. L-3 Servs., Inc.*, 657 F.3d 201 (4th Cir. 2011), a majority of the panel (the "Panel") reversed, holding that the Plaintiffs' tort claims were preempted by federal interests, as articulated in *Saleh v. Titan Corp.*, 580 F.3d 1, 8-12 (D.C. Cir. 2009). *Saleh*, in turn, applied the contractor defense recognized in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), and held that similar state law claims against private contractors that worked at Abu Ghraib were preempted by federal common law because of the "uniquely federal interests" reflected in the "combatant activities" exception found in the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2680(j). *Saleh*, 580 F.3d at 5-7. The *Saleh* court, coining the term "Battlefield Preemption," held that "where a private service contractor is integrated into combatant activities over which the military retains command authority, a tort claim arising out of the contractor's engagement in such activities shall be preempted." *Id.* at 9. The Panel in *Al Shimari* found proof of the requisite integration in the allegations of the complaint that "*all* the misconduct charged was *the product of a conspiracy*" between the contractors' employees and military personnel. *Al Shimari*, 658 F.3d at 418 (emphasis in original).

Circuit Judge King argued in dissent, *inter alia*, that *Boyle* should not be extended to the private contractors because the contractor employees' tortious conduct was contrary to, and not controlled by, federal directives: "*Boyle* has never been applied to protect a contractor from liability resulting from the contractor's violation of federal law and policy. And there is no dispute that the conduct alleged, if true, violated both." *Al Shimari*, 658 F.3d at 431 (internal quotation marks omitted). The dissent further observed that "[n]o federal interest implicates the torture and abuse of detainees." *Id.* at 430.

## SUMMARY OF ARGUMENT

This case raises the question whether the victims of military detention abuses are entitled to seek compensation through civil tort actions against government contractors whose employees are alleged to have perpetrated these acts of cruelty.

The alleged torture and abuse visited on the detainees at Abu Ghraib and other military prisons was unquestionably a violation of fundamental human rights. The United States has long championed these principles and subscribed to numerous international human rights instruments—some of which it helped to create—that protect individuals from torture, genocide, and other gross human rights violations. Furthermore, the United States has incorporated those

international human rights protections into domestic law.

The Panel majority's decision to extend the government contractor defense set forth in *Boyle* to eliminate liability for this unauthorized tortious conduct cannot be reconciled with those principles and leaves the aggrieved parties without a civil remedy for the violations of their human rights. Thus, it creates, rather than resolves, a significant conflict with uniquely federal interests.

Disenfranchising these Plaintiffs from their only opportunity to obtain redress for their injuries on the theory adopted by the panel here—whether labelled "battlefield preemption," the "government contractor defense," or otherwise—would be an affront to principles to which the United States has embraced, including the international prohibition on torture and other cruel, inhuman, and degrading treatment or punishment, and the strong domestic and international policy of affording a remedy for such abuses.

Moreover, the denial of a tort remedy to Plaintiffs creates a pernicious gap in accountability and ignores the fact that military personnel could under no circumstances lawfully order or undertake the conduct alleged here. Indeed, military personnel who engaged in the same or similar conduct were criminally prosecuted and the government is processing civil claims filed by victims of these military personnel. The Panel's decision to protect civilian contractors from being

held accountable as a matter of discretionary federal common law, by contrast, creates the appearance that the United States condones or tolerates "torture by proxy"—the commission of atrocities by "private" actors for whose conduct the government need not answer

*Amici* international human rights organizations and experts ask the Court to rule that this affirmative defense does not bar Plaintiffs' claims.

## ARGUMENT

### THE PANEL'S ADOPTION OF *SALEH'S* "BATTLEFIELD PREEMPTION" THEORY IS A MISGUIDED EXTENSION OF *BOYLE* THAT CREATES, RATHER THAN AVOIDS, A SIGNIFICANT CONFLICT WITH "UNIQUELY FEDERAL INTERESTS"

#### A. The Judicially Created Doctrine Of "Battlefield Preemption" For Private Contractors Alleged To Have Committed Torture Against Detainees Serves No Legitimate Federal Interest

The government contractor defense adopted in *Boyle* was developed in response to a products liability claim arising from defective military equipment manufactured in compliance with government specifications. 487 U.S. at 511-12. The Supreme Court held that state law should be preempted when a "'significant conflict' exists between an identifiable federal policy or interest and the [operation] of [] state law" (first alteration in original). 487 U.S. at 507. The Court cautioned, however, that identification of "an area of uniquely federal interest does not . . . end the inquiry. That merely establishes a necessary, not a sufficient, condition for

the displacement of state law" *Id.* (footnote omitted). Conflict between federal policy and state law must exist.

The Supreme Court identified the uniquely federal interest at stake in *Boyle* as the procurement of military equipment. *Id.* at 507. In fashioning the defense, the Supreme Court analogized to the "discretionary function" exception to the FTCA's waiver of immunity as a basis for protecting the government's discretion to select, and the contractor's ability to produce, equipment designed in a manner that conflicts with state law requirements. *Id.* at 511.

In applying *Boyle* to the facts of this case, the Panel analogized to the "combatant activities" exception of the FTCA and concluded that there was a uniquely federal interest in the government's conduct of war, "including intelligence-gathering activities within military prisons." *Al Shimari*, 658 F.3d at 419. The Panel also ruled that "potential liability under state tort law would undermine the flexibility that military necessity requires in determining the methods for gathering intelligence." *Id.* at 418. While there is undoubtedly a valid federal interest in the government's conduct of war, including its activities within military prisons, there can be no federal interest in having "flexibility" to order torture as a means of gathering intelligence because it is manifestly unlawful conduct in which the military itself would not be entitled to engage with impunity.

Nor is there a legitimate federal interest in preventing suit against government contractors who engage in torture and other abuses in direct disregard of their contractual and legal obligations. This Court should therefore hold, as did the court in *In re Agent Orange Product Liability Litigation*, 373 F. Supp. 2d 7, 18, 91 (E.D.N.Y.), *aff'd*, 517 F.3d 104 (2d Cir. 2005), that "the government contractor defense does not apply to violations of human rights, norms of international law and related theories."

In *Boyle*, the court held that conformity with government specifications was a prerequisite to application of the government contractor defense. *Boyle*, 487 U.S. at 512. This alone demonstrates the illogic of extending *Boyle* to the facts of *Al Shimari* and *Al-Quraishi* because engaging in gross human rights violations such as torture can *never* be in conformity with lawful government directives. Both international law and U.S. law, *see* 18 U.S.C. § 2340A, 18 U.S.C. § 2441, make clear that torture and similar abuses are never permissible. The "superior orders" defense is unavailable where the superior orders are manifestly unlawful,[2] which is necessarily the case when such orders would require or facilitate a violation of international human rights law.

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[2] *See United States v. Ohlendorf* (the Einsatzgruppen Case), IV Trials of War Criminals 1, 470-73, 483-86; *The Llandovery Castle Case*, Supreme Court at

Moreover, the law of war—more commonly known as International Humanitarian Law ("IHL")—imposes a legal duty to protect persons in the custody of a detaining power, and prohibits the use of violence or cruel and degrading treatment of any sort against detainees. *See, e.g.*, *Hamdan v. Rumsfeld*, 548 U.S. 557, 613 (2006); Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135. ("Common Article 3").[3] Because the Panel failed to acknowledge the duty of care owed to detained

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Leipzig (1921), *reprinted in* 16 Am. J. Int'l L. 708, 721-22 (1922); *Attorney General v. Eichmann*, 45 Pesakim Mahoziim 3 (Jerusalem Dist. Ct. 1965), *reprinted in* 36 I.L.R. 18, 256 (1968); *The Zyklon B Case (Trial of Bruno Tesh and Two Others)*, *reported in* 1 U.N. War Crimes Commission, Law Reports of the Trials of War Criminals 93 (1947). *See also* Rome Statute of the International Criminal Court, *opened for signature* July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002) [hereinafter Rome Statute], at art. 33(1) (superior orders defense available only where order "not manifestly unlawful"); United Nations, Convention Against Torture, Committee Against Torture, *Consideration of Reports Submitted By States Parties Under Article 19 of The Convention, Second Supplemental Report of the United States of America*, U.N. Doc. CAT/C/48/Add.3/Rev.1 (Jan. 13, 2006) [hereinafter U.S. Report to CAT (2006)], at ¶ 6 ("No circumstance whatsoever, including . . . an order from a superior officer or public authority, may be invoked as a justification for or defense to committing torture.").

[3] Since at least 1863, the United States military has had an explicit policy recognizing the distinction between the treatment owed to a captured enemy and the rights of combatants on the battlefield: "A prisoner of war is subject to no punishment for being a public enemy, nor is any revenge wreaked upon him by the intentional infliction of any suffering, or disgrace, by cruel imprisonment, want of food, by mutilation, death or any barbarity." President Lincoln, April 24, 1863—General Orders. No. 100: Instructions for the Government of the United States

persons, it incorrectly reasoned that a conflict exists between the standard of care imposed by tort law and the "flexibility" to craft policy governing military conduct in war. No such conflict exists; a detention center is not a battlefield. The rights of detained persons to humane treatment would be rendered meaningless if detained persons were viewed as no different than the enemy soldier on the battlefield who poses an immediate threat and who lawfully can be shot dead. Indeed, the United States has committed itself to the opposite policy for detainees.[4]

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Army in the Field, Art. 56 [hereinafter Lieber Code]. In an unbroken chain of law, the Lieber Code influenced other civilized nations and led to the promulgation of the Rules and Regulations Governing War on Land, which were the subject of the 1899 Convention of the Hague [hereinafter Hague II]. Specifically, Article 4 of Hague II codifies the custom that prisoners of war are protected persons, providing that "Prisoners of war are in the power of the hostile Government, but not in that of the individuals or corps who captured them. They must be humanely treated." The duties of Hague II were then annexed and promulgated in Hague Convention Respecting the Laws and Customs of War on Land, 1907, art. 3, 36 Stat. 2277, 2290 [hereinafter Hague IV]; these same regulations were expressly incorporated by the second Geneva Convention (July 27, 1929—relating to the treatment of POWs) and finally extended to detainees of whatever class under Common Article 3 in the fourth Geneva Conventions of August 12, 1949. *See also* Army Regulation 190-8, 1-5 (1997) (setting forth "U.S. policy, relative to the treatment of [detainees] in the custody of the U.S. Armed Forces," including prohibition on "inhumane treatment").

[4] The express policy of the Department of Defense prior to the Abu Ghraib scandal was to "[e]nsure that the members of their Components comply with the law of war during all armed conflicts, however such conflicts are characterized, and with the principles and spirit of the law of war during all other operations." Dept. of Defense Dir. 5100.77, § 5.3.1 (Dec. 9, 1998), *available at* **http://www.au.af.mil/au/awc/awcgate/dod/d510077p.txt**.

Similarly, there can be no federal interest in precluding state tort claims for government contractors when the United States government has committed itself to an administrative system of recompense for torture committed by its own soldiers—thereby demonstrating that maintaining a civil remedy for detainee abuse is part of the expression of a federal interest (See Point D below). The government, in fact, has disavowed a federal interest in displacing civil liability. As Judge King observed in his dissent, in 2008 the Department of Defense issued a rule advising contractors that the "inappropriate use of force by contractor personnel authorized to accompany the U.S. Armed Forces can subject such personnel to United States or host nation prosecution and civil liability."[5] Contractor Personnel Authorized to Accompany U.S. Armed Forces Deployed Outside the United States, 73 Fed. Reg. 16,764, 16,775 (Mar. 31, 2008) (codified at 48 CFR pt. 252) (the "DOD Rule"). In addition, the Department of State has announced that "the United States is committed to ensuring that its contractors are subject to proper oversight and held accountable for their actions." U.S. Dep't of State, Press Release, *Department of State Legal Adviser Promotes Accountability*

[5] *See Al Shimari*, 658 F.3d at 430-31 (King, J., dissenting) (observing that the DOD Rule "may reflect the government's general view that permitting contractor liability will advance, not impede, U.S. foreign policy." (internal quotation marks omitted)).

*for Private Military and Security Companies* (Sept. 17, 2008). Such "oversight" is not implemented through military discipline, however, because contractors accompanying the military can never be fully "integrated" with the military chain of command. *See* Army Regulation 715-9, 3-2(f) (1999) (Contractors Accompanying the Forces) ("The commercial firm(s) providing the battlefield support services will perform the necessary supervisory and management functions of their employees. Contractor employees are not under the direct supervision of military personnel in the chain-of-command."). The premise of *Saleh* and of the Panel here thus fails on its own terms: First, it is the policy of the United States that contractors accompanying and assisting military forces be accountable for their actions. Second, contractors committing human rights abuses are not operating in accordance with mandatory federal directives, which, as *Boyle held,* is a prerequisite for displacing state tort law remedies.

There simply is no "uniquely federal interest" analogous to *Boyle* that supports the Panel's decision.

### B. Domestic As Well As International Law Prohibits Torture And Cruel, Inhuman Or Degrading Treatment Of Any Detained Person In All Circumstances

International human rights law prohibits torture and other mistreatment of persons in custody in all circumstances, whether in peacetime or

wartime.[6] These norms have been codified in international treaties and applied and affirmed by international tribunals and U.S. courts. Among other instruments, the Geneva Conventions,[7] the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"),[8] and the International Covenant on Civil and Political Rights ("ICCPR")—each of which has been ratified by the United States—prohibit such treatment.[9] Equivalent statements of the norm

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[6] One commonly used definition of "torture" is found in the Torture Victims Protection Act, 28 U.S.C. § 1350, Note § 3(b)(1): "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, . . . intimidating or coercing that individual...."

[7] *See* Common Article 3, *supra* text accompanying n.3, (prohibiting "at any time and in any place whatsoever" with respect to "[p]ersons taking no active part in the hostilities," acts such as "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture" and "outrages upon personal dignity, in particular humiliating and degrading treatment").

[8] G.A. Res. 46, at 197, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51 (Dec. 10, 1984) at art. 2 (requiring "effective legislative, administrative, judicial or other measures to prevent acts of torture"), 10 (requiring education "of law enforcement personnel . . . and other persons who may be involved in the custody, interrogation or treatment of any individual subject to any form of arrest, detention or imprisonment" about torture prohibition) and 14 (requiring "redress and [ ] an enforceable right to fair and adequate compensation" for torture victims).

[9] S. Exec. Doc. No. 95-E, art. 7, 999 U.N.T.S. 171 (Dec. 16, 1966). Like the CAT, the ICCPR—which the United States joined in 1992—is unequivocal: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or

against torture and other cruel, inhuman or degrading treatment or punishment are found in the Universal Declaration of Human Rights,[10] the U.N. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment,[11] the U.N. Standard Minimum Rules for the Treatment of Prisoners,[12] the European Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention"),[13] the American Convention on Human Rights,[14] and the Rome Statute of the International Criminal Court ("Rome Statute").[15] These human rights principles have been recognized time and again in domestic courts

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punishment." The ICCPR further provides that parties must undertake "[t]o ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity." *Id.* at art. 2(a)

[10] G.A. Res. No 217A, art. 5, UN GAOR, 3rd. Sess., 1st plen. Mtg., U.N. Doc A/810 (Dec. 12, 1948).

[11] G.A. Res. 43/173, annex, ¶ 6, U.N. Doc. A/43/49 (Dec. 9, 1988).

[12] U.N. Doc. A/CONF/611, annex I, E.S.C. res. 663C, 24 U.N. ESCOR Supp. (No. 1) at 11, U.N. Doc. E/3048 (1957), amended E.S.C. res. 2076, 62 U.N. ESCOR Supp. (No. 1) at 35, U.N. Doc. E/5988 (1977).

[13] Protocol, European Convention, art. 1, *open for signature* March 20, 1952, 213 U.N.T.S. 262 (entered into force May 18, 1954).

[14] American Convention on Human Rights, *opened for signature* Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (entered into force July 18, 1978).

[15] Rome Statute, *supra* n.2 art. 7, s.1.

and international tribunals.[16] On the basis of both treaty law and state practice, the prohibitions of torture and other cruel, inhuman or degrading treatment or punishment have attained the status of peremptory, or *jus cogens*,[17] norms of customary international law.[18]

As a party to instruments such as the CAT,[19] the ICCPR, and the Geneva Conventions,[20] and as the earliest proponent of the Universal Declaration of Human Rights, the United States has demonstrated its commitment to protecting

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[16] *See, e.g.*, *Chahal v. United Kingdom*, 23 Eur. Ct. H. R. 413 ¶ 79 (1996) (finding that despite the "immense difficulties faced by States in modern times in protecting their communities from terrorist violence . . . . even in these circumstances, the [European Convention] prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct"); *Prosecutor v. Blaskic,* ICTY, Case No. IT-95-14, Judgment (Trial Chamber I, March 3, 2000) ¶ 155.

[17] A "peremptory," or *jus cogens*, norm of international law is "a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." *Belhas v. Ya'alon*, 515 F.3d 1279, 1286 (D.C. Cir. 2008) (citations omitted).

[18] Customary international law is determined by "consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law." *Kadic v. Karadzic*, 70 F.3d 232, 238 (2d Cir. 1995) (internal quotations and citations omitted).

[19] The United States acceded to the CAT in 1994, having embraced the treaty's prohibition against torture "as a standard for the protection of all persons, in time of peace as well as war." S. Exec. Rep. No. 101-30, at 11 (1990).

[20] *See, e.g.*, Common Article 3; *supra* text accompanying n.3.

international human rights. The universal prohibition against torture has also been incorporated into U.S. law.

In 1999, the U.S. Department of State made its initial report to the U.N. Committee Against Torture—a monitoring body established by CAT—and stated that the

> United States has long been a vigorous supporter of the international fight against torture . . . . Every unit of government at every level within the United States is committed, by law as well as by policy, to the protection of the individual's life, liberty and physical integrity."[21]

And in 2006, in the wake of the Abu Ghraib scandal, the United States reaffirmed that commitment in reporting to the U.N. Committee Against Torture that

> [t]he United States is unequivocally opposed to the use and practice of torture. . . . All components of the United States Government are obligated to act in compliance with the law, including all United States constitutional, statutory, and treaty obligations relating to torture and cruel, inhuman or degrading treatment or punishment. The U.S. Government does not permit, tolerate, or condone torture, or other unlawful practices, by its personnel or employees under any circumstances . . . . U.S. laws prohibiting such practices apply both when the

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[21] U.S. Department of State, Initial Report of the United States of America to the U.N. Committee Against Torture (Oct. 15, 1999), http://www.state.gov/www/global/human_rights/torture_toc99. html (last visited Dec. 5, 2011) [hereinafter U.S. Report to CAT (1999)].

employees are operating in the United States and in other parts of the world.[22]

Certain criminal statutes are important additional indicators of the U.S. commitment to international human rights principles. For example, the War Crimes Act of 1996, as amended in 2006, intended to implement provisions of the Geneva Conventions including Common Article 3, makes it a criminal offense for U.S. military personnel and U.S. nationals to commit torture or cruel or inhuman treatment of anyone in their custody or control, *see* 18 U.S.C. § 2441, and the federal anti-torture statute enacted in 1994 makes it possible to prosecute any U.S. national or anyone present in the United States who, while outside the United States, commits or attempts to commit torture, *see* 18 U.S.C. § 2340A.

These United States pronouncements and statutes make clear that upholding the universal ban on torture is an important federal interest.

### C. The United States Has A Uniquely Federal Interest In Effectuating The Human Rights Law Principles It Has Adopted And Its Stated Policy Of Ensuring That A Civil Remedy Exists for Victims of Gross Human Rights Violations

A crucial component of international human rights law is the victim's right to a remedy for violations of human rights—including the torture and other acts of abuse alleged by Plaintiffs here. This right is enshrined in international

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[22] U.S. Report to CAT (2006), *supra* n.2, at ¶¶ 6-7.

treaties and customary international law, including in Articles 13 and 14 of the CAT[23] and in Articles 2(3)(a) and 9(5) of the ICCPR.[24] The Human Rights Committee, the supervisory mechanism of the ICCPR, has indicated that "Article 2, paragraph 3, requires that States Parties make reparation to individuals whose Covenant rights have been violated. Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged."[25] The Geneva Conventions also recognize various private rights and contemplate compensation in courts of law.[26] In addition, Article 8 of the Universal Declaration of Human Rights[27] states that "[e]veryone has the right to an effective

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[23] CAT, *supra* note 8, arts. 13 and 14.

[24] ICCPR, *supra* note 9, art. 9.

[25] Human Rights Committee, General Comment No. 31, at ¶ 16, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (Mar. 29, 2004).

[26] *See, e.g.,* Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287, art. 5 (discussing "individual . . . rights and privileges under the present Convention"); Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 20 U.S.T. 3316, 75 U.N.T.S. 135, art. 7 ("Prisoners of war may in no circumstances renounce in part or in entirety the rights secured to them by the present Convention . . . ."); *see also* Jordan J. Paust, *Judicial Power to Determine the Status and Rights of Persons Detained Without Trial*, 44 Harv. Int'l L.J. 503, 516 nn. 43-45 (2004) (citing numerous additional examples).

[27] Universal Declaration of Human Rights, *supra* note 10, art. 8.

remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."[28] The obligation to provide a remedy for a treaty violation is non-derogable, even in times of national emergency.[29] The right to an effective remedy is recognized in regional human rights instruments and in the jurisprudence of regional tribunals.[30]

The right to a remedy is also recognized in international customary law. The 2005 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Law and Serious Violations of International Humanitarian Law—adopted by consensus, thus also by the United States—states: "A victim of a gross violation of international human rights law or of a serious violation of international humanitarian law shall have equal access to an effective judicial remedy as provided for under international law ...." (Principle 12).[31]

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[28] *Id.*

[29] *See* Human Rights Committee, General Comment No. 29, at ¶ 14, U.N. Doc. CPR/C/21/Rev.1/Add.11 (Aug. 31, 2001).

[30] *See Velasquez Rodriguez v. Honduras, Reparations,* Judgment, Inter-Am. Ct. Human Rights (ser. C) No. 7 at 25, July 21 1989; *Garrido and Baigorria v. Argentina, Reparations*, Judgment, Inter-Am. Ct. Human Rights (ser. C) No 39 at 40, August 27 1998; *Cordova v. Italy (No. 1)*, App. No. 40877/98, 40 Eur. Ct. H.R. Rep. 974, 984 (2003).

[31] G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Mar. 21, 2006).

Through statutes such as the Foreign Claims Act, discussed in more detail below, and the 1992 Torture Victim Protection Act (TVPA), the United States has demonstrated its commitment to providing redress to victims of torture. For example, the TVPA creates a private cause of action for victims of torture committed by an individual who acts under actual or apparent authority or color of law of any foreign nation. *See* Pub. L. 102-256, 106 Stat. 73 (1992). Indeed, the preamble to the TVPA explains that its purpose is 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."

In 2008, this principle was reaffirmed by the United States – particularly in connection with private contractors – when it developed and signed the Montreux Document on "Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict."[32] The Montreux Document is made up of two

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[32] International Committee of the Red Cross, Montreux Document on the Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict, September 17, 2008, *available at*

parts. The first part is a restatement of states' international legal obligations vis-à-vis contractors. It makes clear that states have an international legal responsibility for providing a remedy for gross human rights abuses perpetrated by private actors (regardless of whether international human rights law is found to extend to private actors). In particular, the Montreux document states:

> Contracting States are responsible to implement their obligations under international human rights law . . . To this end they have the obligation, in specific circumstances, to take appropriate measures to prevent, investigate *and provide effective remedies for* relevant misconduct of PMSCs [private military and security companies] and their personnel.

(emphasis added). The second part of the Montreux Document is a compendium of "good practices" that states should follow with respect to contractors operating in armed conflict. It includes recommendation (#72): "To provide for non-criminal accountability mechanisms for improper and unlawful conduct of PMSCs and their personnel, including: (a) providing for civil liability; and (b) otherwise requiring PMSCs to provide reparation to those harmed by the misconduct of PMSCs and their personnel."

As a leading proponent of the Montreux Document, the United States

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**http://www.un.org/ga/search/view_doc.asp?symbol=A/63/467** (last visited Dec. 8, 2011).

reaffirmed its commitment to providing redress to persons who suffer human rights violations by military contractors.

In violation of these principles, the Panel's decision jeopardizes the ability of victims of torture to obtain civil redress. Coupled with the apparent inability or unwillingness of the government to prosecute the contractors involved in the atrocities at Abu Ghraib and elsewhere, this will result in a vacuum of accountability.

### D. The Panel's Decision Creates A Significant Conflict With U.S. Obligations To Provide A Remedy For Victims Of Human Rights Violations

The Panel erred in holding that allowing Plaintiffs' state law claims to proceed against military contractors would create a "significant conflict" with federal interests. *Al Shimari*, 658 F.3d at 418-19. Quite the contrary; precluding such claims creates a significant conflict with the uniquely federal interest in effectuating the United States' obligations under international law and the values and goals of international human rights law, such as those espoused in the Montreux Document, which the U.S. has publicly embraced, and the DOD Rule.[33]

As stated above, the right to an effective remedy cannot be derogated from in any circumstance. This right is even more important when at issue is the

[33] *See supra* pp.14-15 (discussion of DOD Rule).

reparation for violations of fundamental rules such as the prohibition against torture in all circumstances. Moreover, under customary and codified IHL, the United States is *obligated* to provide compensation to those who are injured by the military when such injuries arise in connection with a violation of the laws of war.[34] Indeed, that is the policy and practice of the United States today, as embodied by the Foreign Claims Act (FCA), 10 U.S.C. § 2734, which affords non-U.S. claimants the right to an administrative remedy for such injuries by U.S. soldiers and employees.[35] The FCA contains a narrow exception for injuries incident to "combat"—not "combatant"—activities.[36] This means that the FCA does not provide recompense for the unpreventable casualties incident to combat, although compensation may be available where the injury is caused by excessive

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[34] *See* Hague IV, *supra* n.3, at art. 3; International Committee of the Red Cross, Rule 150. Reparation, Customary IHL Database, http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule150 (last visited Dec. 19, 2011) (requiring "full reparation" in the form of restitution, compensation, or satisfaction for losses or injury caused by violation of international humanitarian law).

[35] The Military Claims Act, 10 U.S.C. § 2733 ("MCA") (enacted 3 July 1943) provides a similar administrative remedy to U.S. residents.

[36] 10 U.S.C. § 2734(b)(3); Army Regulation 27-20, 10-11 (2008). Payment cannot be made where injury is caused by the armed forces acting properly within the rules of engagement to attack a perceived belligerent. The Department of Defense has developed an extensive body of administrative case law, available at http://www.aclu.org/natsec/foia/log.html, that construes the "combat activity" exception narrowly.

or misdirected force. In making this distinction, the FCA's liability regime tracks the distinction in international humanitarian law between the inevitable casualties caused by privileged belligerents and wrongful, non-combat acts that create liability and require compensation.

In fact, the United States is already processing FCA claims by Abu Ghraib detainees who allege violations of their rights by U.S. military personnel.[37] The FCA, however, by its terms does not apply to tort claims against private contractors.[38] Moreover, contractors are neither lawful combatants nor "privileged belligerents."[39] That cannot mean that Congress intended injuries caused by

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[37] At least twelve victims of abuses committed by U.S. military personnel at Abu Ghraib have submitted FCA claims. *See* Major Julie Long, *What Remedy For Abused Iraqi Detainees*, Department of Army Pamphlet 27-100-187, 187 Mil. L. Rev. 43, 43 n.9 (2006).

[38] The FCA covers "civilian employee[s] of the military department concerned," *see* 10 U.S.C. § 2734(a)(3) but has been construed by the Department of Defense to not provide for compensation for the injurious acts of civilian contractors who work for private companies. For example, a claim brought under the FCA by the widow of an Iraqi man who was killed by private military contractors was denied because contractors are not governmental employees. *See* American Civil Liberties Union, Documents Received From the Department of the Army in Response to ACLU Freedom of Information Act Request (released on Oct. 31, 2007) (**http://www.aclu.org/natsec/foia/pdf/Army0555_0557.pdf**) (denying claim because "private contractors are not qualified governmental employees as enumerated in paragraph [2-2 of Army Regulations 27-20], and as such, their acts are not within the scope of the [FCA]").

[39] *See, e.g.*, Army Field Manual 3-100.21 (100-21) January 2003, Contractors on the Battlefield, 1-21; ("Contractors and their employees are not combatants, but

contractors rather than soldiers to go without remedy. This Court should recognize that preserving a remedy for parties injured by private contractors is entirely consistent with the federal policy to compensate victims of military abuse.[40]

But instead of analogizing to the FCA, the Panel looked to the FTCA for guidance, *see Al Shimari*, 658 F.3d at 419, even though the FTCA applies *only* to claims arising *within* the United States, *see* 28 § U.S.C. 2680(k); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 700 (2004). As such, the FTCA does not reflect U.S. law or policy with respect to whether the right to a remedy is owed to victims of abuses committed by U.S. military personnel (and by analogy, contractors) *outside* the United States. It is the FCA, not the FTCA, that provides the better indicator of federal policy, and the FCA makes clear that U.S. policy—consistent with international law—is to compensate the victims of wartime-related injuries.

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civilians 'authorized' to accompany the force in the field,"); 73 Fed. Reg. 16,764-65 (Mar. 31, 2008) (codified at 48 CFR pt. 252) (the "DOD Rule"), DOD response to 2.c., 2.b (stating that "the Government is not contracting out combat functions," and recognizing that DOD procurement rules "prohibit[] contractor personnel from participating in direct combat"). Army Regulations also prohibit contractor personnel from wearing military uniforms and from being part of the military chain-of-command.

[40] While the *Saleh* court recognized that the FCA paid for claims on certain detainee abuse, it wrongly used that as a reason to preclude suits against private contractors. *See Saleh*, 580 F.3d at 8 ("[T]he Army Claims Service has confirmed that plaintiffs will not be totally bereft of all remedies for injuries sustained at Abu Ghraib, as they will retain rights under the [FCA].").

Finally, the Court should consider yet another federal interest that went unheeded by the Panel: the appearance that the government's own contractors are being given a free pass for serious acts of brutality can only deprive the United States of any moral suasion in its ongoing struggle to achieve greater worldwide compliance with human rights principles. It also places into peril American citizens who may become captives of a foreign power and for whom the United States will demand treatment no worse than what it affords to others.

## CONCLUSION

The Court should hold that the government contractor defense is not available as a bar to tort claims involving violations of international norms of human rights.

Respectfully submitted,

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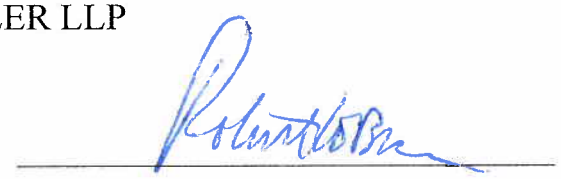
By: 

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**UNITED STATES COURT OF APPEALS**
**FOR THE FOURTH CIRCUIT**

**No.** 09-1335 **Caption:** Al Shimari, et al v. CACI International, Inc., et al

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