No. 09-1313

IN THE

Supreme Court of the United States

HAIDAR MUHSIN SALEH, ILHAM NASSIR IBRAHIM, et al.,

Petitioners,

—v.—

CACI INTERNATIONAL and TITAN CORPORATION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF *AMICI CURIAE* HUMAN RIGHTS FIRST, HUMAN RIGHTS WATCH, PHYSICIANS FOR HUMAN RIGHTS, CENTER FOR VICTIMS OF TORTURE, AND LAW PROFESSORS ILIAS BANTEKAS, JOHN CERONE, SCOTT HORTON, AND MARCO SASSOLI IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTEREST OF AMICI CURIAE[1]

International human rights law recognizes and seeks to enforce the inalienable rights of all persons that derive from their very humanity. International humanitarian law regulates conduct during hostilities and affords significant protections to persons detained in connection with war. The United States has long championed the principles of international human rights and humanitarian law. Over the course of its history, the United States has subscribed to numerous international human rights and humanitarian law instruments—some of which it helped create—that protect individuals from torture and other gross human rights violations.

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 arising in this case insofar as they intersect—as they surely do—with international human rights and humanitarian law. 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. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation of 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.

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.

Physicians for Human Rights harnesses the specialized skills of doctors, nurses, public health specialists, and scientists to investigate and stop human rights abuses.

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.

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

Ilias Bantekas is a Professor of International Law and Associate Director of the Centre for International and Public Law at Brunel University School of Law in the United Kingdom. He is an expert in international humanitarian law and public international law.

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

Scott Horton is a lecturer in law at Columbia Law School and is an expert in national security and public international law.

Marco Sassoli is a Professor and Director of the Department of International Law and International Organization at the University of Geneva, and Associate Professor at the Universities of Quebec in Montreal and Laval, Canada. He is an expert in human rights and international humanitarian law.

SUMMARY OF ARGUMENT

The torture and abuse visited on detainees at Abu Ghraib was a violation of fundamental human rights and humanitarian law principles. The majority decision of the court of appeals below was also reached in apparent disregard of, and contrary to, those principles. The decision by the D.C. Circuit to immunize the tortious conduct of private military contractors on the ground that such contractors were "integrated into combatant activities over which the military retains command authority" is incompatible with principles of international law to which the United States has subscribed in at least two respects. First, it leaves the aggrieved parties without a civil remedy for the violations of their human rights. Second, it ignores that individuals taken and detained in the course of combat are owed a duty of care under the Geneva Conventions and that civil liability arises from violation of that duty. The court's unprecedented extension of the government contractor defense articulated in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1992), to immunize

unauthorized tortious conduct cannot be reconciled with those principles.

Denying a tort remedy to plaintiffs by extending the government contractor defense here would perpetuate a pernicious gap in accountability. Unlike certain military personnel, no private contractor at Abu Ghraib has been criminally prosecuted. Immunizing government contractors for the acts alleged would create the appearance that the United States condones torture by proxy or is even willing to invite abuses by outsourcing certain military functions to private actors for whose conduct the government need not answer. The problem is not a small one, as there are more contractors than soldiers in Iraq and Afghanistan.[2]

For these reasons in addition to those set forth in the Petition, certiorari should be granted and the decision of the court of appeals below should be reversed.

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[2] *See* Petition for Certiorari at 20-21.

ARGUMENT

I. THE GOVERNMENT CONTRACTOR DEFENSE SHOULD NOT BE EXTENDED IN THE NAME OF A FEDERAL INTEREST WHERE SO DOING UNDERMINES THE U.S. COMMITMENT TO INTERNATIONAL HUMAN RIGHTS

A. The United States Has Embraced a Policy of Ensuring That a Civil Remedy Exists for Victims of Gross Human Rights Violations

International human rights law prohibits the mistreatment of persons in government custody in all circumstances, whether in peace or wartime. A crucial component of international human rights law is the right to fair and adequate compensation for violations of human rights—including the torture and other acts of abuse alleged by plaintiffs here.

The right to a remedy is enshrined in international treaties and international customary law, including in Article 14 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT") and in Articles 2(3)(a) and 9(5) of the International Covenant on Civil and Political Rights ("ICCPR")—each of which has been ratified by the United States.[3] The right to a remedy is also reflected in Article 8 of the Uni-

[3] 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); International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), at 52, 21 U.N. GAOR Supp. (No. 16) U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976 .

versal Declaration of Human Rights, a proclamation of the United Nations General Assembly, which states that "[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."[4] In addition, the Geneva Conventions recognize various private rights and contemplate compensation in courts of law.[5] As a party to instruments such as the CAT, the ICCPR and the Geneva Conventions—and as the earliest proponent of the Universal Declaration of Human Rights—the United States has demonstrated its commitment to protecting international human rights and to providing a right to a remedy where, as here, those rights are alleged to have been violated.

These principles were recently affirmed by the United States and other states in the Montreux Document,[6] which, while not a legally binding instrument, contains various "statements" that are relevant to the principle that states are responsible for providing a right to a remedy, even where gross human rights abuses may be perpetrated by private actors (regardless of whether

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[4] Universal Declaration of Human Rights, G.A. Res. No 217A (III), art. 8, UN GAOR, 3rd. Sess., 1st plen. Mtg., U.N. Doc A/810 (Dec. 12, 1948).

[5] *See, e.g.*, 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).

[6] 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.

international human rights law is found to extend to private actors). Most notably, Statement #4 provides: "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 supplied). A section on "good practices" follows, which includes this 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."

The United States relies on state as well as federal law to provide the civil remedy due victims of human rights violations.[7] Lawsuits in pursuit of a

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[7] *See, e.g.,* United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Committee Against Torture, *Consideration of Reports Submitted By States Parties Under Article 19 of the Convention, Addendum to the Initial Reports of State Parties Due in 1995, United States of America*, U.N. Doc. CAT/C/28/Add.5 (Feb. 9, 2000) [hereinafter U.S. Report to CAT (2000)]; U.S. Reservations, Declarations, and Understandings, International Covenant on Civil and Political Rights, 138 Cong. Rec. S4781-01, ¶ 5 (daily ed., April 2, 1992) ("[T]o the extent that state and local governments exercise jurisdiction over [matters relating to the Covenant], the Federal Government shall take measures appropriate to the Federal system to the end that the competent authorities of the state or local governments may take appropriate measures for the fulfillment of the Covenant.").

remedy for a violation of international human rights have a long history in our state courts and a number of state court decisions have addressed war crime and human rights liability.[8]

Contrary to this principle and precedent, the decision of the D.C. Circuit in this case will result in victims of torture or other abuse at the hands of private military contractors being precluded from any meaningful remedy. The existence of the Foreign Claims Act ("FCA"), 10 U.S.C. § 2734, which provides for compensation, through an administrative process, to individuals who suffer, *inter alia*, personal injury or death as a result of non-combat activities of the armed forces, does not cure the problem created by the D.C. Circuit in this case. The FCA covers "civilian employee[s] of the military department concerned," but does not provide for compensation for the injurious acts of civilian contractors who work for private companies. The FCA, therefore, does not provide a mechanism to compensate the victims of abuses

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[8] *See, e.g., Christian County Court v. Rankin & Tharp*, 63 Ky. 502, 505-06 (1866):

> [T]here is either no remedy for the wrong, or it must be an action against the persons who did the wrong. There must be a remedy, and of that remedy the State judiciary has jurisdiction. There is nothing in the Federal Constitution which deprives a State court of power to decide a question of international law incidentally involved in a case over which it has jurisdiction; and for every wrong the common law of Kentucky provides an adequate remedy. To sustain this action, therefore, it is not necessary to invoke any statutory aid.

perpetrated by private military contractors.[9] There is therefore a gap in federal law—the need to compensate victims of wartime abuses committed by private military contractors—that state tort law is available to fill.

B. The United States Has a Uniquely Federal Interest In Effectuating the Human Rights Law Principles It Has Adopted and Can Do So By Making a Civil Tort Remedy Available To Alleged Victims

The D.C. Circuit erred in holding that allowing plaintiffs' state law claims to proceed against military contractors would create a "significant conflict" with federal interests. Quite the contrary, precluding such claims creates a significant conflict with the unique federal interest in effectuating the values and goals of international human rights law, such as those espoused in the Montreaux Document, which the U.S. has publicly embraced.

The government contractor defense is not based on constitutional or statutory authority, but rather constitutes "federal law of a content prescribed . . . by the courts—so-called 'federal common law.'" *Boyle,* 487 U.S. at 504 (citations

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[9] 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/log.html (Army Bates 555-557).

omitted). The federal courts recognize the need to tread cautiously when judicially "legislating" substantive outcomes under the rubric of federal common law.[10] Here, the D.C. Circuit has extended the government contractor defense to preempt claims arising out of facts that are dramatically different from those of *Boyle*. Moreover, the D.C. Circuit has failed to take the relevant principles of international human rights law, including principles that have been incorporated into federal law, into account. This results in a judicially-created conflict with international norms that the United States embraces.[11]

In appropriate cases, federal courts look to international law when interpreting federal statutes or applying federal common law.[12] This

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[10] Despite the need to engage in interstitial lawmaking from time to time, *see Boyle*, 487 U.S. at 531 (Stevens, J. dissenting), federal courts should be reluctant to create new rules of decision in cases raising novel policy questions more appropriate for Congress. *See, e.g.*, *Bush v. Lucas*, 462 U.S. 367 (1983); *United States v. Gilman*, 347 U.S. 507, 511 (1954). *See also Ibrahim v. Titan Corp. I*, 391 F. Supp. 2d 10, 14 (D.D.C. 2005) (noting that since *Erie v. Tompkins*, 304 U.S. 64 (1938), the role of federal common law has been dramatically reduced, and courts have generally looked for legislative guidance before taking innovative measures).

[11] *See* Melissa A. Waters, *Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties*, 107 COLUM. L. REV. 628, 661 (2007) (By seeking to read domestic legislation consistently with international commitments undertaken by the political branches, a court . . . can ensure that its government is not compromised or embarrassed in the foreign affairs arena.).

[12] *See, e.g.*, *Weinberger v. Rossi*, 456 U.S. 25, 29-30, 32-33 (1982); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21 (1963); *Lauritzen v. Larsen*, 345 U.S. 571, 578 (1953).

approach is consistent with the words of this Court in *The Paquete Habana*: "International law is part of our law, and must be ascertained and administered by the courts of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination." 175 U.S. 677, 700 (1900). Federal courts draw on treaties and customary international law to decide matters ranging from boundary disputes to questions of treaty interpretation and official immunity.[13] In particular, federal courts—including this Court—have looked to international law to shape the law applicable to the treatment of prisoners and detainees.[14]

International law also has a limiting value for the federal courts. Courts consult that law because an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains. *Murray v. The Schooner Charming Betsy*, 2 Cranch 64, 118 (1804); *F. Hoffmann-La Roche Ltd. v. Empagran*

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[13] *See, e.g.*, *Banco Nacional de Cuba v. Chase Manhattan Bank*, 658 F.2d 875, 891-93 (2d Cir. 1981) (finding that under customary international law, compensation for a taking was required); *Connecticut v. Massachusetts*, 282 U.S. 660, 670 (1931) (noting relevance of international law to boundary disputes); *United States v. Enger*, 472 F. Supp. 490, 540-41 (D.N.J. 1978) (construing the congressional intent underlying the term goods or chattels of a diplomat by reference to customary international law).

[14] *See, e.g.*, *Hamdan v. Rumsfeld*, 548 U.S. 557, 613 (2006); *Hamdi v. Rumsfeld*, 542 U.S. 507, 520 (2004). *See also Lareau v. Manson*, 507 F. Supp. 1177, 1188 n.9 (D. Conn. 1980) (Cabranes, J.), *aff'd in part*, 651 F.2d 96 (2d Cir. 1981); *Fernandez v. Wilkinson*, 505 F. Supp. 787, 795-98 (D. Kan. 1980), *aff'd on other grounds sub nom.*, *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382 (10th Cir. 1981).

S.A., 542 U.S. 155, 164 (2004). This premise is even more important in the federal common law context. Just as courts will not assume that an act of Congress is intended to create a conflict with international law, they should also take care not to create such conflicts when engaged in judicial lawmaking.

The desirability of conforming federal judge-made law to international norms is particularly compelling when Congress has already indicated agreement with those norms by voting in favor of U.S. accession to the CAT. In its initial report to the U.N. Committee Against Torture, the United States discussed the role of the FTCA in upholding U.S. obligations pursuant to the CAT. By waiving the sovereign immunity of the United States so that civil actions seeking money damages can proceed in federal court, the United States asserted that the FTCA provides a mechanism by which victims of abuse may sue the United States "for personal injury or loss of property caused by a negligent or wrongful act or omission of a government employee acting within the scope of his or her office or employment."[15] The United States noted that the FTCA makes it possible for victims of abuse to sue "federal law enforcement officers for intentional torts, including assault, battery, and false arrest."[16] It is ironic that the FTCA—the same federal statute proffered by the State Department as providing a civil remedy for injuries caused in violation of the international ban on cruel, inhuman and degrading

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15 U.S. Report to CAT (2000), ¶ 275.

16 *Id.*

treatment or punishment—is now the basis for a claimed immunity by those who are alleged to have violated those norms.

The scope of the government contractor defense should be interpreted in a manner that recognizes the unequivocal international prohibition of torture and other cruel, inhuman, or degrading treatment or punishment, and the importance placed by international human rights law on the right to a civil remedy for such abuses.[17] The decision of the D.C. Circuit creates a judge-made rule of decision that denies the victims of human rights abuses the civil remedy embraced by international law and U.S. policy.

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[17] Regardless of whether the CAT or the ICCPR—or other treaties the United States has signed but not ratified—directly create enforceable rights, the norms encapsulated by such treaties are enforceable where they have attained the status of binding customary international law. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 695 (2004); *The Paquete Habana*, 175 U.S. 677, 700 (1900). *See also Cabrera-Alvarez v. Gonzales*, 423 F.3d 1006, 1007 (9th Cir. 2005) (treating certain provisions of the U.N. Convention on the Rights of the Child—which the United States has not ratified—as customary international law for purposes of evaluating an agency interpretation).

II. THE GOVERNMENT CONTRACTOR DEFENSE, AS EXTENDED BY THE COURT OF APPEALS, CREATES A CONFLICT WITH U.S. OBLIGATIONS UNDER INTERNATIONAL HUMANITARIAN LAW

In addition to creating a conflict with international human rights law, the D.C. Circuit's decision creates a conflict with international humanitarian law ("IHL"), often referred to as the law of war. As this Court has confirmed in recent years, IHL plays an important role in defining the scope of U.S. obligations to persons in its custody.[18] The judge-made government contractor defense set forth in *Boyle* should not be expanded in such a way as to conflict with those obligations.

A. The D.C. Circuit's Decision Disregards the Duty of Care Owed to Detainees

The D.C. Circuit held that plaintiffs' state law tort claims are preempted because the application of state law would produce "significant conflict" with the federal interests represented by the "combatant immunity" exception to government tort liability under the FTCA. The court based its holding on the conclusion that "tort duties of reasonable care do not apply on the battlefield" and that the defendant contractors thus owed no duty

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[18] *See Hamdan*, 548 U.S. 557, 560, 561-62 (2006) (recognizing that military commissions would have to comply with the "rules and precepts of the law of nations," including, *inter alia*, the four Geneva Conventions) (internal citations omitted); *Hamdi*, 542 U.S. at 520 (relying on the law of war, including Geneva and Hague Conventions to determine scope and limits on definition of enemy combatant).

of care to the plaintiff-detainees. *Saleh v. Titan Corp.*, 580 F.3d 1, 7 (D.C. Cir. 2009).

This conclusion is wrong. IHL governs the treatment of detained persons in wartime. IHL imposes a strict legal duty to protect persons in the custody of the detaining power, and prohibits the use of violence or cruel or degrading treatment of any sort. *See, e.g.*, *Hamdan v. Rumsfeld*, 548 U.S. at 613; Geneva Conventions, Common Article 3.[19] Because the court of appeals failed to acknowledge the duty of care owed to detained persons, who are necessarily *removed* from the battlefield, it incorrectly reasoned that a conflict exists between the standard of care imposed by tort law and what it supposed to be the absence of any such duty to detained persons. No conflict exists, and there is no basis for the court's unprecedented expansion of the government contractor defense to preempt civil suits arising out of the mistreatment of detainees in government custody by private military contractors.

Common Article 3, so called because it is found in all four Geneva Conventions, prohibits cruel treatment, torture, and outrages upon personal dignity against persons no longer taking active part in hostilities. It states:

> (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, *detention*, or any other cause,

[19] 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 [hereinafter Common Article 3].

> shall in all circumstances be treated humanely. . .
>
> To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
>
> (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
>
> * * * *
>
> (c) outrages upon personal dignity, in particular humiliating and degrading treatment. . . .

Id. (emphasis added). In *Hamdan*, this Court recognized that Common Article 3 establishes the minimum standard of humane treatment for all detainees held in any armed conflict. 548 U.S. at 557, 56-62. The Department of Defense (DOD) has reached the same conclusion:

> All persons subject to this Directive shall observe the requirements of the law of war, and shall apply, without regard to a detainee's legal status, at a minimum the standards articulated in Common Article 3 to the Geneva Conventions of 1949 . . . , as construed and applied by U.S. law, . . . in the treatment of all detainees, until their final release, transfer out of DoD control, or repatriation.

U.S. Dep't of Defense Directive 2310.01E, § 4.2, September 5, 2006.[20]

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[20] *See also* Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. 108-375, § 1091,

Both of the above authorities—one an expression of the law of nations that has been adopted by this Court, the other a clear expression of the view of the Executive Branch—contradict the view taken by the majority below. According to the majority opinion, "[w]e think that it is an untenable, even absurd, articulation of a supposed consensus of international law" that assault and battery could be condemned by that body of law. *Saleh*, 580 F.3d at 15. But the majority opinion is wrong. Under IHL, it is overwhelmingly clear that the assault and battery of a detained prisoner violates Article 3 of the Geneva Conventions.

B. The D.C. Circuit's Decision Fails to Recognize the Distinction Between Detention and the Battlefield

The distinction between the "battlefield" and "detention" is essential to the overall framework of IHL. If those two zones of activity are conflated into one—as the majority opinion below has done—Common Article 3 is rendered meaningless. The rights of detained persons to humane treatment would become unenforceable if detained persons were viewed as no different from the enemy soldier on the battlefield who poses an immediate threat and who lawfully can be shot dead.

Split second decisions are made on the battlefield and those decisions may harm innocent victims. It is the reality of war that a soldier may

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118 Stat. 2067 (2004) (the McCain Amendment): No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location shall be subject to cruel, inhuman, or degrading treatment or punishment.

justifiably fire his weapon at an apparent threat on the battlefield, only to subsequently discover that he has mistakenly killed or wounded an innocent civilian. To allow tort claims to proceed against soldiers for that conduct—the *authorized* use of force—would, as the majority below fears, hamper the military's ability to perform its function. The "combatant activities" exception of the FTCA may properly be construed to bar tort claims arising from such battlefield incidents. 28 U.S.C. § 2680(j).

But if the soldier's privilege to commit acts of violence on the battlefield were permitted to extend to the controlled environment of the detention center, immunity would be extended to conduct that is condemned by IHL and does not require the protection from civil liability that greatly concerns the majority opinion. For example, under the result of the court below, the guard at Abu Ghraib who without provocation works violence upon a detained person would nonetheless be immune from civil liability in the name of "eliminating tort concepts from the battlefield." *Saleh*, 580 F.3d at 7. To contend that there is no distinction between the battlefield and the detention center is to provide a free pass to soldiers and contractors to disregard the obligation imposed by Common Article 3 and to condone the intentional mistreatment of detained persons in violation of IHL.

The majority opinion below side-stepped this distinction in its effort to identify a significant conflict between a federal interest and applicable state tort law. In reaching this conclusion, the court relied on the Ninth Circuit's decision in

Koohi v. United States, 976 F.2d 1328 (9th Cir. 1992), but *Koohi* provides an illustration of IHL principles that undermines, rather than supports, the reasoning and result below. In *Koohi*, the Ninth Circuit applied *Boyle* to bar a products liability suit against a military contractor, for harm caused by the contractor's missile system used by the U.S. military against perceived enemy attackers on the battlefield (who in fact were civilians). *Id.* at 1337. The *Koohi* court looked to the FTCA for guidance on the question of whether allowing the tort suits to go forward would produce a "significant conflict" with federal policies or interests. *Id.* (applying *Boyle*, 487 U.S. at 504-13). *Koohi* concluded that the "combatant activities" exception to the FTCA precluded tort liability because under both domestic and international law, the military is entitled to defend itself and owes no "duty of care" to an attacker on the battlefield. *Id.* As the court explained, "one purpose of the combatant activities exception is to recognize that during wartime encounters no duty of reasonable care is owed to those against whom force is directed as a result of *authorized* military action." *Id.* (emphasis added).

Koohi's determination itself hinged on an application of IHL principles. Those principles authorize force to be directed towards military objectives, such as enemy forces on the battlefield. The plaintiffs in that case were owed no duty of reasonable care because plaintiffs appeared to be engaged with the defendants in combat. 976 F. 2d at 1337.

In this case, the D.C. Circuit failed to recognize that the IHL framework that drove the *Koohi*

court's decision compels the opposite conclusion here. 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. By contrast, where military or civilian personnel are engaged in the detention of prisoners or suspected enemies who are *hors de combat*, IHL unambiguously imposes a legal duty of humane treatment. *See* Common Article 3. While the interpretation of the FTCA's combatant activities exception in *Koohi* can be harmonized with the laws of war, the D.C. Circuit's application of the statute to the fundamentally distinct factual circumstances here is inconsistent with the laws of war and should be rejected. *The Schooner Charming Betsy*, 2 Cranch at 118; *see also* RESTATEMENT (THIRD) OF THE LAW OF FOREIGN RELATIONS § 114 (1987) ("Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States.").

Amici can identify no federal interest in "eliminating tort concepts" from detention or in developing domestic jurisprudence that directly conflicts with U.S. obligations under IHL. To the contrary, there is a pre-existing and exceptionally strong federal interest in upholding the laws of war (and DOD policy to comply with those laws) including those that require the humane treatment of prisoners in U.S. custody. This federal interest is even stronger in counterinsurgency operations such as the one ongoing in Iraq, where protecting the lives of U.S. soldiers depends on winning over the hearts and minds of the population under occupation by demonstrating our

moral and legal accountability. As General David Petraeus explained in a recent U.S. Army counterinsurgency manual:

> Illegitimate actions are those involving the use of power without authority—whether committed by government officials, security forces, or counterinsurgents. Such actions include unjustified or excessive use of force, unlawful detention, torture, and punishment without trial. Efforts to build a legitimate government through illegitimate actions are self-defeating, even against insurgents who conceal themselves amid noncombatants and flout the law.
>
> Moreover, participation in [counterinsurgency] operations by U.S. forces must follow United States law, including domestic laws, treaties to which the United States is a party, and certain [host nation] laws. Any human rights abuses or legal violations committed by U.S. forces quickly become known throughout the local populace and eventually around the world. Illegitimate actions undermine both long- and short-term [counterinsurgency] efforts.

U.S. DEP'T OF THE ARMY, UNITED STATES ARMY COUNTERINSURGENCY HANDBOOK 1-24, ¶ 1-132 (2006) (reference omitted). *See also* V. TASIKAS ET. AL., RULE OF LAW HANDBOOK: A PRACTITIONER'S GUIDE FOR JUDGE ADVOCATES 67 (2007) ("in light of the need to establish the legitimacy of the rule of law among the host nation's populace, conduct by US forces that would be questionable

under any mainstream interpretation of international human rights law is unlikely to have a place in rule of law operations").

III. UNDER THE CIRCUMSTANCES OF THIS CASE, THE UNITED STATES HAS NO LEGITIMATE "UNIQUELY FEDERAL INTEREST" IN "MILITARY FLEXIBILITY"

The D.C. Circuit concluded that allowing state law tort suits to proceed against military contractors would conflict with federal interests because such suits "are really indirect challenges to the actions of the U.S. military," and would "surely hamper military flexibility." *Saleh*, 580 F.3d at 7, 8. But the court reached that conclusion without considering that the military *never* has the "flexibility" to command conduct involving torture or cruel, inhuman or degrading treatment.

The government contractor defense developed in response to a products liability claim arising from the malfunction of equipment manufactured to government specifications, where the uniquely federal interest at stake was "the procurement of equipment by the United States." *Boyle*, 487 U.S. at 507. To maintain the government's immunity from suits arising out of discretionary decisions such as the specifications of military hardware, the rule protects contractors whose products conform to specifications commanded by the government. As a result, the government contractor defense is analogous to the "superior orders" defense, which in some circumstances excuses tortious acts commanded by higher authority.

Extending *Boyle* to this case would be illogical and unjust, because neither the military nor its

contractors can *ever* lawfully exercise discretion or command to engage in acts of torture or other gross human rights violations. Both international law and U.S. federal law, *see* 18 U.S.C. § 2340A, 18 U.S.C. § 2441, make clear that torture and similar abuses are *never* acceptable, without exception. The "superior orders" defense is unavailable where the superior orders are manifestly unlawful,[21] which is necessarily the case when such orders would require or facilitate a clear violation of international human rights law:

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

[21] *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 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, UN Doc. A/CONF. 183/9; 37 ILM 1002 (1998); 2187 U.N.T.S. 90 art. 33, s.1 (July 17, 1998) (superior orders defense available only where order "not manifestly unlawful"); United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Committee Against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, Addendum to the Second Periodic Reports of States Parties Due in 1999, United States of America,* CAT/C/48/Add.3/Rev.1 ¶ 6 (Jan. 13, 2006) ("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.").

> ment (which cannot be sued because of its immunity). It is designed in part to save the government money in its procurement costs . . . . [T]his defensive notion has been rejected [at Nuremburg and in other post-World War II criminal trials]. It should not be recognized, as the law now stands, by courts protecting civilians and land from depredations contrary to international law.

In re Agent Orange Prod. Liab. Litig., 373 F. Supp. 2d 7, 91 (E.D.N.Y. 2005), *aff'd*, 517 F.3d 104 (2d Cir. 2008), *cert. denied*, 129 S. Ct. 1524 (2009).

The absurdity of considering whether the government—and its contractors—can lawfully exercise their discretion to engage in or authorize torture may explain why the D.C. Circuit looked to the FTCA's "combatant activities" exception for the purpose of identifying a preemptive federal interest. Yet even the law governing combatant activities leaves no room for "flexibility" to command or condone the type of conduct alleged in this case. Just as no act of governmental "discretion" can justify torture, no military order—or delegation of responsibility—can provide a defense to the wrongdoing alleged here.

CONCLUSION

The federal government has an interest in its compliance with international norms of civilized behavior, whether expressed in statutes, treaties or customary international law. The appearance that the government's 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 observance of these norms. It will also place 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. *Amici* urge the Court to grant the writ of certiorari and to conclude that the expansion of the government contractor defense to immunize gross violations of human rights law and IHL is an unjust and unwarranted result.

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