IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFFS' OPPOSITION TO CACI DEFENDANTS'
MOTION TO DISMISS THE THIRD AMENDED COMPLAINT

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INTRODUCTION

Plaintiffs oppose the motion to dismiss filed by CACI International Inc., CACI, Inc.-Federal, and CACI Premier Technology, Inc. (hereinafter "CACI").[1] Plaintiffs are former prisoners who were tortured at Abu Ghraib and elsewhere in Iraq. Plaintiffs allege in their Third Amended Complaint ("TAC") that CACI should be held accountable because CACI and its employees (along with co-conspiring government officials) participated in and directed the torture of prisoners. CACI claims that there is "no real dispute that the activities for which plaintiffs sue [torturing and conspiring to torture prisoners] were part of the U.S. military's prosecution of the Iraq war" and argues that therefore plaintiffs' claims should not be heard in federal court. *Memorandum of CACI In Support Of Their Motion To Dismiss Plaintiffs' Third Amended Complaint (filed April 7, 2006) (hereinafter "CACI Mem.") at 20.*

CACI ignores the truth that the sovereign here (the United States) has expressly stated that the conduct at issue – torturing and conspiring to torture prisoners at Abu Ghraib – is not official policy. *TAC ¶¶ 91, 108-13*. Quite the opposite. The sovereign intended that CACI, Titan and other government contractors operating in Iraq abide by the law. *Id.* In fact, the sovereign has criminally prosecuted some of CACI's co-conspirators and has claimed to be investigating others. CACI lacks the legal power to transform the torture into an official policy of the United States merely to evade corporate accountability for the harm caused by its own wrongdoing.

STATEMENT OF PROCEDURE

On June 9, 2004, the plaintiffs filed their class action complaint in the Southern District

[1] Plaintiffs hereby incorporate by reference their oppositions to the Rule 12(b) motions filed by defendants Titan, Nakhla, Stefanowicz, and Israel.

of California alleging that CACI and others formed a conspiracy to torture and abuse them. On June 30, 2004 and July 30, 2004, before defendants filed any responsive pleading, the plaintiffs amended their complaint.

On September 10, 2004, CACI filed a motion to dismiss arguing, *inter alia,* that the political question doctrine and the so-called "government contractors' defense" protect them from any litigation concerning their conduct in Iraq. *See Motion of Defendants CACI International, Inc., CACI Inc. - Federal, and CACI N.V To Dismiss Plaintiffs' Second Amended Complaint (filed Sept. 10, 2004).*

On November 10, 2004, after the parties had briefed the motions to dismiss, but before any hearing, CACI filed a motion to transfer the action to the Eastern District of Virginia. *Motion of Defendants CACI International Inc., CACI, Inc. - Federal, and CACI N.V. To Transfer Venue (filed Nov. 10, 2004).* Although Titan Corporation (hereinafter "Titan") asked the Court to rule on the motion to dismiss before proceeding to rule on the motion to transfer, the Court denied that request and the previous motions were never adjudicated. *Transcript of Oral Argument at 25-26, 60 (Feb. 14, 2005).*

On March 21, 2005, the Southern District of California (J. Rhoades) transferred the action to the Eastern District of Virginia over the plaintiffs' objections. *Order Granting Motion To Transfer Action (March 21, 2005).* On May 10, 2005, after the action was transferred to the Eastern District of Virginia, the plaintiffs moved to transfer the action to this Court to be consolidated with *Ibrahim et al. v. Titan Corp. et al.*, No. 04-1248 (hereinafter "the *Ibrahim* action"). *Plaintiffs' Motion To Transfer Venue to the District Court for the District of Columbia (filed May 10, 2005).* Thereafter ensued extensive litigation (thirteen briefs) culminating in the Eastern District of Virginia holding that "there is jurisdiction over Defendants under the

Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (2000); and the District of Columbia's long-arm statute." *Order at 1 (Jan. 13, 2006).*

On August 12, 2005, during this period when the parties to the instant action were litigating venue, this Court issued an order in the *Ibrahim* action. *Ibrahim v. Titan Corp. et al.*, 391 F. Supp. 2d 10 (D.D.C. 2005). The Court dismissed Counts I (Alien Tort Statute) because plaintiffs had not alleged any state action or any action taken under the color of law. *Id.* at 14-15. The Court dismissed the RICO counts because plaintiffs lacked RICO injuries. *Id.* at 19-20. The Court also dismissed the false imprisonment, conversion, and government contract law claims. *Id.* at 20. This Court also held that "[p]laintiffs' allegations describe conduct that is abhorrent to civilized people, and surely actionable under a number of common law theories" and denied defendants' motion to dismiss the remaining claims. *Id.* at 15, 19.

Meanwhile, in this action, on January 13, 2006, the Eastern District of Virginia (J. Hilton) again granted the motion to transfer for reasons of judicial economy. The Court held that judicial economies were well served by having this Court hear the action. *Order at 3 (Jan. 13, 2006).* The Court held that "there is jurisdiction in the D.D.C. because the D.D.C. has personal jurisdiction over Defendants under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (2000); and the District of Columbia's long-arm statute. D.C. Stat. § 13-423(a)(E) (2005)." *Id.* at 1.

On February 9, 2006, plaintiffs sought leave to amend their complaint to reflect factual developments and conform to this Court's ruling in the *Ibrahim* action. CACI was alone among the parties opposed the motion for leave to amend. On March 17, 2006, the Court ordered the victims to file a complaint specifying which of the three CACI entities engaged in the conduct at issue. On March 22, 2006, plaintiffs filed the Third Amended Complaint.

On April 7, 2006, CACI filed a motion to dismiss the TAC, arguing that (1) the Alien Tort Statute ("ATS") claims must be dismissed, (2) the common law claims are preempted, (3) all of the claims present non-justiciable political questions, and (4) the RICO claims fail as a matter of law. This Opposition responds to CACI's motion.

SUMMARY OF RELEVANT TAC ALLEGATIONS

This action seeks redress for the harms caused by torture. According to the TAC, CACI knowingly entered into a conspiracy to torture prisoners. *TAC ¶ 83*. CACI and its co-conspirators (Titan and government officials) tortured plaintiffs and class members when they were imprisoned at Abu Ghraib and other facilities. *Id. ¶¶ 28, 29, 52, 64, 78-82, 91, 114-60.* CACI is responsible for the actions of CACI employees and agents in Iraq, including defendants Stefanowicz, Duggan, and Johnson, as well as being liable for the acts of its co-conspirators. *Id. ¶ 24.*

The TAC alleges: CACI and its co-conspirators repeatedly conducted and directed interrogations in manner that violated United States law and policy and international law. *Id. ¶¶ 31, 78-80*. CACI and its co-conspirators subjected plaintiffs to electric shocks, *id. ¶¶ 116(g), 125, 133(j), 142*; repeatedly beat plaintiffs, *id. ¶ 116, 123, 129(d), 133(c), 134, 135(a), 137, 142, 146(b);* shackled plaintiffs naked to the bars of their cells under a fan blowing cold air, *TAC ¶ 123*; denied plaintiffs medical treatment, *TAC ¶ 124*; exposed plaintiffs to extremely loud noise for long periods of time, *id. ¶ 116(h), 127, 129(b), 137(e), 144(a), 146(d)*; and threatened plaintiffs and their family members with sexual abuse, *id. ¶ 118, 130, 135(e), 143, 148, 157*. CACI interrogators wrongfully gave orders to certain United States military personnel that resulted in the torture and mistreatment of plaintiffs and class members. *Id. ¶¶ 79, 91*.

The TAC alleges: CACI knew that the United States as the sovereign has repeatedly

denounced torture and other cruel, inhuman, and degrading treatment as methods of interrogation. *Id.* ¶¶ *109-13*. CACI knew that U.S. military regulations also prohibit methods outside the Geneva Conventions as interrogation techniques. *Id.* ¶ *113*. CACI knew or should have known that the United States intended that any person acting under color of United States authority, such as CACI interrogators, would conduct interrogations in accordance with the relevant domestic and international law. *Id.* ¶¶ *31, 108*. CACI was not contractually required to torture prisoners during interrogations. *Id.* ¶¶ *31*.

The TAC alleges: CACI does not even have a valid contract with the United States under which it could lawfully perform interrogations in Iraq. *Id* ¶ *71*. CACI entered into a contract that purports to designate inherently governmental functions to a private entity, which is prohibited by statute. *Id.* ¶ *71*. The purported CACI contract is also void because CACI procured the contract in violation of federal regulations. *Id.* ¶ *71*. CACI, acting without a valid government contract, violated domestic and international laws. *Id.* ¶¶ *1, 31, 71, 78-80, 82, 101, 113*.

CACI failed to properly screen, train, or supervise its employees. *Id.* ¶¶ *31, 41, 64.* CACI knew or should have known that its employees were torturing and mistreating prisoners. *TAC* ¶¶ *72-76, 81-84*. CACI adopted corporate policies to prevent the reporting of human rights violations to the appropriate authorities. *TAC* ¶¶ *87-95*.

ARGUMENT

As set forth in detail below, none of CACI's legal arguments seeking to evade corporate accountability survives scrutiny.

First, CACI seizes on allegations that CACI conspired with government officials (*TAC* ¶ *28*) to argue that although private actors conspiring with government officials may be acting

under the "color of law," they are entitled to sovereign immunity from Alien Tort Statute ("ATS") claims under *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985). CACI ignores the fact that the *Sanchez-Espinoza* plaintiffs sued government officials (including the President) for carrying out the official policy of the United States, while in this case, plaintiffs are suing to *enforce* the official policy of the United States, which is that torture is illegal. Nothing in *Sanchez-Espinoza* supports their argument, especially in light of the Supreme Court's subsequent decisions on the ATS (*Sosa*) and the appropriate preemption analysis for government contractors (*Boyle*).

Second, plaintiffs recognize that this Court has already held that the "government contractor defense" is a fact-based affirmative defense that should be litigated via a motion for summary judgment.[2] Nonetheless, they respectfully submit that this Court should hold that CACI and the other defendants cannot invoke the "government contractor defense" to defend against claims based on conduct that violates United States and international law.

Third, CACI asserts the political question defense without acknowledging that this Court has already considered and rejected all of the arguments proffered by CACI in the *Ibrahim* action.

Fourth, the TAC alleges Racketeering Influenced and Corrupt Organizations Act ("RICO") claims for certain plaintiffs. Plaintiffs are confident they have properly navigated the standards of RICO pleading and none of CACI's arguments withstands scrutiny. Even if they did not, plaintiffs would be entitled to re-plead to respond to any perceived deficiencies in the RICO allegations.

[2] Plaintiffs are going to file a motion seeking summary judgment against CACI in the immediate future.

I. STANDARD OF REVIEW

It is black letter law that this Court must accept as true all the factual allegations in the complaint when considering CACI's motion to dismiss under Fed. R. Civ. P. 12(b)(1) and (b)(6). *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164 (1993). The Court is also required to construe the complaint liberally and grant plaintiffs the benefit of all inferences able to be drawn from the allegations. *Thomas v. Principi*, 394 F.3d 970, 972 (D.C. Cir. 2005).[3]

Here, the torture victims' action can only be dismissed if the Court, after "[c]onstruing [plaintiff's] factual allegations and all reasonable inferences there from in his favor" finds that CACI has established "beyond doubt" that they simply have not alleged any facts that would support the claims for relief. *Shea v. Rice*, 409 F.3d 448, 451 (D.C. Cir. 2005) (quoting *Gilvin v. Fire*, 259 F.3d 749, 756 (D.C. Cir. 2001)). For the reasons set forth below, CACI simply has not – and cannot – meet that high standard.

II. THE TAC STATES VALID ATS CLAIMS.

CACI takes a sledgehammer approach, alleging that this Court should dismiss all of the torture victims' claims merely because CACI was providing interrogation services for the United States. CACI claims that the TAC is merely an attempt to plead around this Court's finding that

[3] The Court is limited to the facts alleged in the TAC for the purposes of CACI's motion to dismiss under Rule 12(b)(6). The Court is not so limited in ruling on CACI's motion to the extent it relies on Rule 12(b)(1). There, the Court is free to consider facts outside the pleadings in deciding whether to dismiss for lack of subject matter jurisdiction. The torture victims here are likely entitled to discovery in the event additional facts are needed to establish jurisdiction. *Herbert v. Nat'l Academy of Sciences*, 974 F.2d 192, 198 (D.C. Cir. 1992). Although this Court is free to rule on disputed jurisdictional facts at any time, "if they are inextricably intertwined with the merits of the case it should usually defer its jurisdictional decision until the merits are heard." *Shea v. Rice*, 409 F.3d 448, 451 (D.C. Cir. 2005) (quoting *Gilvin v. Fire*, 259 F.3d 749, 756 (D.C. Cir. 2001)).

the *Ibrahim* claims fail to state a claim under ATS because CACI and the other defendants are not state actors.

This is absurd. Beginning with the initial class action lawsuit filed in June 2004 (which predated the *Ibrahim* filing), the *Saleh* torture victims have consistently alleged that CACI and the other defendants acted under the "color of law" because they conspired with government and military officials. Although the veracity of allegations are not at issue on a motion to dismiss, the torture victims allege complicity by military and government officials because that is what actually happened at Abu Ghraib and the other prisons.

As explained in Section A, below, CACI fails to recognize that plaintiffs need not even allege state action to state ATS claims under war crimes and crimes against humanity. War crimes and crimes against humanity include torture.

As explained in Section B and C, below, CACI also ignores this Court's express preservation of the "color of law" issue (*Ibrahim*, 391 F. Supp. 2d at 14 n. 3) and twenty years of ATS jurisprudence subsequent to *Sanchez-Espinoza* culminating in the Supreme Court's decision in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). This jurisprudence makes it clear that a victim alleging human rights violations occurred under the "color of law" has pled sufficient state action for those ATS claims that require state action.

As explained in Section D, CACI reads too much into *Sanchez-Espinoza*, 770 F.2d 202 (D.C. Cir. 1985), which is both superseded by subsequent Supreme Court jurisprudence and factually distinct from the instant case. CACI argues that the victims' allegation that CACI was acting under the "color of law" by conspiring with government officials necessarily entitle CACI to sovereign immunity. This argument is flawed because it fails to recognize the distinction between official and *ultra vires* action. In *Sanchez-Espinoza*, the plaintiffs challenged conduct

that President Reagan expressly proclaimed to be the official foreign policy of the United States and that did not violate any constitutional or statutory prescription. *Sanchez-Espinoza* at 205-06. Here, the TAC challenges conduct that President Bush has expressly disavowed as being the official policy of the United States. *TAC ¶ 111*. The facts here do not fit within the *Sanchez-Espinoza* rubric, but rather are on point with the facts confronted by the Supreme Court in *Sosa*.

Finally, as set forth in Section E, CACI cannot hide behind the immunity of the government merely because it conspired with government official because although conspirators may be liable for each others' conduct, they do not enjoy each others' immunities.

A. The TAC Need Not Allege Color of Law To State Valid Claims for War Crimes and Crimes Against Humanity.

Plaintiffs' TAC alleges war crimes and crimes against humanity. *TAC ¶¶ 224-52*. These two crimes do not require plaintiffs to plead CACI acted under the color of law in order to state a claim under ATS. CACI ignores the body of law that holds private actors liable for violations of the prohibitions against war crimes and crimes against humanity without regard to the existence of state action.

To understand this body of law, it is important to start with the *Sosa* decision, because the Supreme Court there established the framework for analyzing ATS claims. *Sosa* at 729. The Supreme Court held that the ATS provided jurisdiction for tort claims based on violations of customary law norms that are universal, specific and obligatory. The majority cited with approval *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980); *In re Estate of F. Marcos Human Rights Litig.*, 25 F.3d 1467, 1475 (9th Cir. 1994); and Judge Edwards' concurring opinion in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 (D.C. Cir. 1984); and also looked to *Kadic v. Karadzic*, 70 F.3d 232, 239-241 (2d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996). Together with *Sosa*, these cases require that courts look to international law to determine

whether the scope of liability for a violation of a given norm extends to private persons. 542 U.S. at 733 n.20.

In his concurrence in *Sosa*, Justice Breyer noted that international law reflected substantive agreement as to "certain universally condemned behavior" including both war crimes and crimes against humanity. *Id.* at 763. Justice Breyer relied in part on *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T ¶¶ 155-56 (Int'l Trib'l for Prosecution of Persons Responsible for Serious Violations of Int'l Humanitarian Law Committed in Territory of Former Yugoslavia since 1991, Dec. 10, 1998). *Furundzija* recognized aiding and abetting liability where the defendant, a private person, gave "assistance, encouragement, or moral support, which has a substantial effect on the perpetration of the crime." *Id.* 95-17/1-T ¶ 235.

International law has been clear since the adoption of the Nuremberg Principles that private actors could be liable for war crimes[4] and crimes against humanity.[5] *Nuremberg Principles Article VII* ("[C]omplicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle VI [defining crimes against peace, war crimes, and crimes against humanity] is a crime under international law.").[6] *See also Control Council*

[4] International law is clear that war crimes can be committed by civilians without reference to state action. Knut Dormann, *et al*., *Elements of War Crimes Under the Rome Statute of the International Criminal Court* 34-37 (2003) ("[T]he mere fact of being a civilian does not guarantee any protection whatsoever from charges based upon international criminal law"); Antonio Cassese, *International Criminal Law* 48 (2003).

[5] *Prosecutor v. Kupreskic*, IT-95-16-T, ICTY Trial Chamber, Judgment, 14 January 2000, ¶ 555 ("While crimes against humanity are normally perpetrated by State organs, i.e. individuals acting in an official capacity such as military commanders, servicemen, etc., there may be cases where the authors of such crimes are individuals having neither official status nor acting on behalf of a governmental authority."). Crimes against humanity have existed in customary international law for over half a century and are also evidenced in prosecutions before some national courts. Cherif Bassiouni, *Crimes Against Humanity*, *in* Roy Gutman & David Rieff, eds., *Crimes of War: What the Public Should Know* (1999).

[6] *Report of the International Law Commission to the General Assembly*, U.N. GAOR, 5th Sess., Supp. No. 12, at 1, U.N. Doc. A/1316 (1950).

Law No. 10 (the prohibition against crimes against humanity applied to "[a]ny person, without regard to . . . the capacity in which he acted." Art. II(2));[7] *Prosecutor v. Kunarac*, IT-96-23&23/1-T, ICTY Trial Chamber, Judgment, 22 February 2001 ¶ 493 (the commission of war crimes and crimes against humanity "will engage the perpetrator's individual criminal responsibility. In this context, the participation of the state becomes secondary and, generally, peripheral. With or without the involvement of the state, the crime committed remains of the same nature and bears the same consequence."); Guenael Mettraux, International Crimes and the *ad hoc* Tribunals 277 (2005) ("there is no question today that international crimes can be committed by state or government officials as well as by private individuals").

The international law jurisprudence developed subsequent to the Nuremberg Trials makes clear that war crimes need not be acts tied to the practices of a party to the conflict:

> It is not . . . necessary to show that . . . the proscribed acts [were] . . . part of a policy or of a practice officially endorsed or tolerated by one of the parties to the conflict, or that the act be in actual furtherance of a policy associated with the conduct of war or in the actual interest of a party to the conflict; *the obligations of individuals under international humanitarian law are independent and apply without prejudice to any questions of the responsibility of States under international law*.

[7] Art. II, para. 2 of Control Council Law No. 10 states in relevant part: "Any person without regard to nationality or the capacity in which he acted, is deemed to have committed a crime as defined in paragraph 1 of this Article, if he . . . (b) was an accessory to the commission of any such crime or ordered or abetted the same or (c) took a consenting part therein or (d) *was connected with plans or enterprises involving its commission* . . . or (f) with reference to paragraph 1 (a) if he . . . *held high position in the financial, industrial or economic life* of any such country." (Emphasis added). The same was true in the post-World War II Tokyo Tribunals. *Charter of the International Military Tribunal for the Far East, Art. 5* (Tribunal may punish those "who as individuals or as members of organizations" committed crimes against humanity). *See also United States v. Flick*, 6 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, 1187, 1192 (1952) ("[a]cts adjudged criminal when done by an officer of the government are criminal also when done by a private individual"); *United States v. Krupp*, 9 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, 1327, 1375 (1950) ("the laws and customs of war are binding no less upon private individuals than upon government officials and military personnel").

Prosecutor v. Tadic, IT-94-1-T, ICTY Trial Chamber, Opinion and Judgment, 7 May 1997 ¶¶ 572, 573 (emphasis added).

Numerous federal courts here in the United States both before and after *Sosa* have held that private parties may be sued under ATS for committing war crimes and crimes against humanity. *Kadic*, 70 F.3d at 236;[8] *In re "Agent Orange" Prod. Liability Litig.*, 373 F. Supp. 2d 7, 53 (E.D.N.Y. 2005); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 319 (S.D.N.Y. 2003); *Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d 1116, 1149 (C.D. Cal. 2002); *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1179-81 (C.D. Cal. 2005); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 440 (D.N.J. 1999).

To same effect, Judge Edwards in *Tel-Oren* recognized that there were "a handful of crimes to which the law of nations attributes individual responsibility." *Tel-Oren* at 795 (Edwards, J., concurring). Judge Edwards noted that *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 161-62 (1820), was based on the view that there "are private violations of the law of nations." *Tel-Oren*, 726 F.2d at 794. *Sosa* approved not only Judge Edwards' opinion in *Tel-Oren*, but also *Smith*'s finding that piracy (conduct by a private party) violated the law of nations. *Sosa*, 542 U.S. at 732. As a matter of federal common law, therefore, it is clear that private parties may be held liable for conduct rising to the level of war crimes or crimes against humanity *even if* the torture victims had not alleged CACI acted under the color of law.[9]

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[8] In *Kadic* the United States argued that private persons may be found liable under the ATS for violations of international humanitarian law. 70 F.3d at 239-40.

[9] CACI erroneously contends that the doctrine of *stare decisis* precludes the Court from considering anew whether the law of nations applies to private actors. *CACI Mem. at 6*. The doctrine of *stare decisis* provides that "a decision on an issue of law embodied in a final judgment is binding on the court that decided it and such other courts as owe obedience to its decisions, in all future cases." B.J. Moore, J. Lucas & T. Currier, *Moore's Federal Practice* ¶ 0.402[1]. *See also Gillig v. Advanced Cardiovascular Sys.*, 67 F.3d 586, 589 (6th Cir. 1995);

B. The TAC States ATS Claims for the Conduct Outside the Scope of War Crimes and Crimes Against Humanity.

Here, the torture victims allege CACI acted under the color of law when it tortured them. *TAC ¶¶ 1, 91*. CACI simply ignores *Sosa* and ignores two decades of development in ATS jurisprudence developed subsequent to *Sanchez-Espinoza* by arguing, "Plaintiffs cannot have it both ways, alleging that Defendants are state actors for jurisdictional purposes but private actors for purposes of sovereign immunity." *CACI Mem. at 2*. This is simply not accurate. It ignores the Supreme Court's decision in *Sosa*, which expressly cited with approval three appellate court decisions that held that ATS provided jurisdiction over a private person acting under "color of law" and such a private person could be held liable for violating a human rights norm (such as torture) that requires state action.

In *Sosa*, the Supreme Court expressly cited with approval three appellate court decisions (one the Edwards' concurrence in *Tel-Oren*) that had been decided after *Sanchez-Espinoza*. Each held that a victim or victims stated valid ATS claims by alleging defendants acted under "color of law" in violating human rights norms such as torture that requires state action. *Sosa*, 542 U.S. at 732, *citing In re Estate of F. Marcos Human Rights Litig.*, 25 F.3d 1467 (9th Cir. 1994) ("*Marcos*"); *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995); and Judge Edwards' concurrence in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 (D.C. Cir. 1984) ("Edwards' *Tel-Oren* decision").

In *Marcos*, the Court of Appeals for the Ninth Circuit affirmed the judgment against Marcos-Manotac, the daughter of the former dictator, although her "acts were not taken within

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Gately v. Mass., 2 F.3d 1222, 1226 (1st Cir. 1998); *United States v. Swan*, 327 F. Supp. 2d 1068, 1071 (D. Neb. 2004). Because the judgment in *Ibrahim* is not final, it cannot have the effect of *stare decisis*. Further, if *Ibrahim* is read, as CACI urges, to preclude all international law claims against private persons it would clearly be inconsistent with *Sosa* and should be reconsidered. *Stare decisis* is not an inexorable command and may be overridden. *Lawrence v. Texas*, 539 U.S. 558, 560 (2003).

any official mandate." *Marcos* at 1470 (citing *In re Estate of F. Marcos Human Rights Litig.*, 978 F.2d 493, 498 (9th Cir. 1992)). The Court of Appeals also concluded that the dictator's acts of torture, execution, and disappearance were clearly acts outside of his authority as President. *Marcos*, 25 F.3d at 1471. The Court of Appeals nonetheless held he was liable because "under color of law, [he] ordered, orchestrated, directed, sanctioned and tolerated the continuous and systematic violation of human rights." *Id*. at 1471 n.4.[10]

The Court of Appeals rejected the argument made now by CACI:

> *We also reject* the Estate's argument that because "only individuals who have acted under official authority or under color of such authority may violate international law," *Estate I*, 978 F.2d at 501-02, *a finding that Marcos' alleged actions were outside the scope of his official authority necessarily leads to the conclusion that there was no violation of international law. An official acting under color of authority, but not within an official mandate, can violate international law . . . . See Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir.1980) ("Paraguay's renunciation of torture as a legitimate instrument of state policy, however, does not strip the tort of its character as an international law violation, if it in fact occurred under color of government authority.").

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

Kadic reached the same result. There, the Court of Appeals for the Second Circuit explained why, under international law, a private person, acting under "color of law" could be liable for torture. Court of Appeals found that the "'color of law' jurisprudence of 42 U.S.C. § 1983 is a relevant guide to whether a defendant has engaged in official action for purposes of

[10] The customary international law definition of torture as expressed in the Convention Against Torture does not restrict torture to acts taken by state officials but rather includes actions taken by private actors in conspiracy with state officials. The Conventions defines torture as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person . . . 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." Article 1(1), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted December 10, 1984, G.A. Res. 39/46, U.N. Doc. A/RES/39/46, 1465 U.N.T.S. 85 (entered into force June 26, 1987); (emphasis added). *See also* Andrew Clapham, *Human Rights Obligations and Non-State Actors* 342 (2006).

jurisdiction under the Alien Tort Act"and held that plaintiffs were "entitled to prove" that defendant "act[ed] in concert with Yugoslav officials or with significant Yugoslavian aid." *Kadic*, 70 F.3d at 245.

Finally, in the concurrence cited with approval by the Supreme Court in *Sosa*, Judge Edwards opined in *Tel-Oren* that torture might be actionable if committed by persons acting under color of law. *See* Edwards' *Tel-Oren* decision, 726 F.2d at 781. Judge Edwards expressed his approval of the reasoning of the Court of Appeals for the Second Circuit in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). He distinguished the liabilities imposed on non-state actors from those imposed on "states and persons acting under the color of state law." He also explained, "the law of nations is not stagnant and should be construed as it exists today among the nations of the world." *Id*. at 387. In short, as a result of *Sosa*'s endorsement of these decisions, it is now crystal clear that victims allege valid ATS claims in alleging color of law.

CACI argues that Judge Edwards' color of law analysis referred to those tried at Nuremberg and therefore did not address the issue of "private individuals alleged to have conspired with government officials." *CACI Mem. at 7 n.5*. CACI is incorrect. Many of the persons convicted at Nuremberg were private persons who aided and abetted or conspired with government officials.[11] Under *Control Council Law No. 10*, the prohibition against crimes against humanity applied to "[a]ny person, without regard to. . . the capacity in which he acted." *Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity*, Dec. 23, 1945, Art. II(2), 82 UNTS 279.

[11] In a footnote, CACI argues that aiding and abetting liability is not available under the ATS. *CACI Mem.* at 10 n.7. As shown above, there is ample authority to support the conclusion that aiding and abetting liability (as well as conspiracy) is well established under international law. At this juncture, however, given that the TAC alleges direct and indirect liability, the Court need not rule on the precise parameters of indirect liability at this procedural juncture.

The Nuremberg Tribunals convicted a number of purely private actors for conspiring with or aiding and abetting government actions. The Nuremberg Tribunal held in *United States v. Flick*, 6 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, 1187, 1217, 1222 (1952) that Otto Steinbrinck was convicted "under settled legal principles" for "knowingly" contributing money to an organization committing widespread abuses. In another case, the Nuremberg Tribunal held that a private defendant could be held liable for knowingly providing the Nazis with poison gas used at Auschwitz. *In re Tesch (Zyklon B Case)*, 13 Int'l. L.R. 250 (Br. Mil. Ct. 1946). Similarly, the Nuremberg Tribunal held that a private defendant could be convicted "as an accessory" because he turned over lists of communists knowing that "the people listed would be killed when found." *United States v. Ohlendorf*, 4 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, 1, 569 (1949). *See also United States v. Goering*, 6 F.R.D. 69, 112 (1947) (Nuremberg Tribunal holding that when businessmen with knowledge of Hitler's aims cooperated with him, "they made themselves parties to the plan he had initiated."); *United States v. Krauch (I.G. Farben Trial)*, 8 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, 1190-92 (1949). Thus, CACI is simply wrong to dismiss as inapposite Judge Edwards' references to the Nuremberg Trials.

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

Following *Kadic*, many courts looked to Section 1983 jurisprudence for guidance on determining who acted under the color of law.[12] The *Kadic* approach of using Section 1983

[12] *See, e.g., Estate of Rodriquez v. Drummond*, 256 F. Supp. 2d 1250, 1264-65 (N.D. Ala. 2003), *citing Bigio v. Coca-Cola Co.*, 239 F.3d 440, 448 (2d Cir. 2000); *NCGUB v. Unocal*, 176 F.R.D. 329, 349 (C.D. Cal. 1997) (the court concluded that a private corporation acts under "color of state law" where corporation willfully participates in joint action with state agents); *Sinaltrainal v. Coca-Cola Co.*, 256 F. Supp. 2d 1345,1353 (S.D. Fla. 2003).

jurisprudence to determine who is considered to be acting "under the color of law" was also endorsed in the legislative report accompanying the Torture Victim Protection Act ("TVPA"): "Courts should look to 42 U.S.C. Sec. 1983 in construing 'color of law' . . . ." H.R. Rep. No. 102-367 (Nov. 25, 1991); *accord* S. Rep. 102-249 (Nov. 26, 1991).

Post-*Sosa*, courts continue to look to Section 1983 for guidance in determining when a private actor acts "under color of law." In *Chavez v. Carranza*, No. 03-2932, 2005 WL 2789079, at *5 (W.D. Tenn. Oct. 26, 2005), the court held that when persons who are not government officials "act[] together with state officials" or act with "significant state aid," they are deemed governmental actors for the purposes of the state action requirement under the TVPA and the ATS. The court found that Section 1983 was an appropriate guide. *See also Doe v. Saravia*, 348 F. Supp. 2d 1112, 1150 (E.D. Cal. 2004) (citing pre-*Sosa* decisions of *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 CIV. 8386, 2002 WL 319887, at *13 (S.D.N.Y. Feb. 28, 2002); *Presbyterian Church*, 244 F. Supp. 2d at 328).

D. The Torture Victims' ATS Claims Are Not Foreclosed by this Court's Decision in *Ibrahim* or by the Court of Appeals' Decision in *Sanchez-Espin*oza.

CACI claims that *Sanchez-Espinoza* "forecloses Plaintiffs' 'rogue state actor' theory of jurisprudence under the ATS. To state a claim under the ATS, plaintiffs must allege official government action, which, as this Court recognized in *Ibrahim*, would lead inexorably to sovereign immunity." *CACI Mem. at 20*. CACI is wrong on both counts. This Court expressly reserved for a later day resolution of the tension between ATS "color of law" jurisprudence and the *Sanchez-Espinoza* decision on immunities for private parties acting as agents for the United States. This Court should not fall into the trap set for it by CACI, who drafted its papers as if *Sanchez-Espinoza* serves as the final controlling word on ATS claims against private parties. In fact, the Supreme Court has issued a landmark decision (*Sosa*) in which it addressed the validity

of ATS claims raised against a private party named Sosa.

In *Sosa*, agents from the United States Drug Enforcement Administration ("DEA") hired Sosa and other Mexican nationals to abduct Alvarez-Machain, also a Mexican national, from Mexico to stand trial in the United States. Alvarez-Machain was eventually acquitted and brought a civil suit against the United States, DEA officials, and Sosa. In contrast to the facts here, neither plaintiffs nor defendants disputed the fact that Sosa acted as an agent of DEA and that he had been conspiring with DEA officials to abduct Alvarez-Machain. In fact, the Court of Appeals for the Ninth Circuit had found that "Sosa acted merely as an agent or instrument for law enforcement officers." *Alvarez-Machain v. United States*, 266 F.3d 1045, 1057 (9th Cir. 2001).[13]

The *Sosa* court did not reach the question of whether there was ATS jurisdiction over Alvarez-Machain's claims against government defendants because it first considered whether the government defendants were immune, and found that they were. It held that the claims against the United States had to be analyzed under the Federal Tort Claims Act and that the federal officials were immune from liability under the Act's exception retaining sovereign immunity for claims "arising in a foreign country." *Sosa* at 699, 733-38, *citing* 28 U.S.C. § 2680(k).

Despite having conferred immunity on the conspiring government officials, the Court did not bestow immunity on Sosa but instead proceeded directly to the question of whether there was ATS jurisdiction. Although a *sub silentio* ruling is not automatically precedential, *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 119 (1984), the Supreme Court's approach to liability here is highly significant because it contradicts CACI's insistence that *Sanchez-*

[13] Here, the TAC alleges CACI was not acting as an authorized agent of the United States, but rather was acting contrary to the United States' express wishes that all interrogations be conducted in a lawful manner. *TAC ¶¶ 108-13*.

Espinoza necessarily protects "agents of the United States" from ATS claims, *CACI Mem. at 9-10*. The Supreme Court knew that Sosa was such an agent, having worked closely with the DEA officials to kidnap Alvarez-Machain. *Id.* at 697-98.

The Supreme Court could have raised the issue of *Sosa*'s immunity *sua sponte* because immunity is clearly a jurisdictional issue. *See FDIC v. Meyer*, 510 U.S. 471, 475 (1994); *Collins v. Youngblood*, 497 U.S. 37 (1990); *Texas v. Florida*, 306 U.S. 398, 405 (1939) (same).[14] If CACI is correct that "agents of the United States" are "entitled to the same sovereign immunity that government officials would enjoy," *CACI Mem. at 9*, the Supreme Court would have dismissed the claims against Sosa for all of the reasons it dismissed the claims against the government officials. *Barnes v. Gorman*, 536 U.S. 181, 191-92 (2002) (Stevens, J., concurring). *See also Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 438 (1989) (reaching immunity questions before ATS questions).

Instead of dismissing the entire matter as precluded by sovereign immunity, the Supreme Court issued its landmark decision on the ATS. The Court cited with approval numerous Circuit Court precedents back to *Filartiga* (1980) involving ATS claims but never once cited *Sanchez-Espinoza* (1985). It is not that the Court was unaware of the decision. The United States, supporting Sosa's efforts to evade the claims, cited to the decision in a footnote for the proposition that ATS claims cannot reach private non-state conduct. *See Brief for the United States as Respondent Supporting Petitioner at 42, attached an Exhibit A.* Not even Justice Scalia, who joined the *Sosa* majority and wrote a concurrence, mentioned the opinion he authored as a Court of Appeals Judge.

[14] The Supreme Court typically seeks to rule on the narrowest grounds presented. *See Vieth v. Jubelirer*, 541 U.S. 267, 281 (2004) (Supreme Court decides issues on narrowest ground available).

Sosa considered for the first time the scope of ATS jurisdiction and held it encompassed any action for "violations of any international law norm" with as "definite content and acceptance among civilized nations" as "the historical paradigms familiar when § 1350 was enacted." *Id.* at 732. *Sosa* suggested that torture is an international law norm that meets the standard, citing *Filartiga* with approval multiple times. *Id.* at 732 & 738 n.29, citing *Filartiga*, 630 F.2d at 890 & 884 n.15 ("[F]or purposes of civil liability, the torturer has become – like the pirate and slave trader before him – hostis humani generis, an enemy of all mankind"; "The fact that the prohibition of torture is often honored in the breach does not diminish its binding effect as a norm of international law.") Justice Breyer noted that international law reflected "substantive agreement" that "torture" not only is "universally condemned behavior," but is so egregious that many countries exercise universal jurisdiction over torturers. *Id*. at 762.

The only way to read *Sanchez-Espinoza* consistently with *Sosa* is to recognize that the Court of Appeals for the District of Columbia had before it twenty years ago a set of facts not present here. There, the Court of Appeals was asked to rule on actions that had been deemed to be "official" government acts approved by President Ronald Reagan. *Sanchez-Espinoza*, 707 F.2d at 205-06. (Indeed, the lower court had dismissed the cause of action as a political question. *Sanchez-Espinoza*, 568 F. Supp. 596, 599 (D.D.C. 1983)). The Court found the official foreign policy of the United States at issue in *Sanchez-Espinoza* was not "contrary to statutory or constitutional prescription." 707 F.2d at 207.[15]

To the extent *Sanchez-Espinoza* remains valid after *Sosa*, it does so only insofar as the

[15] In dicta, the court noted its opinion that "when the officer's action is unauthorized because contrary to statutory or constitutional prescription . . . that exception can have no application when the basis for jurisdiction requires action authorized by the sovereign as opposed to private wrongdoing." *Id.* The Court did not have this situation before it; rather, plaintiff conceded that the actions were authorized and even included the President among the defendants. Therefore, the *Sanchez* court's statement, being dicta, is irrelevant.

claims challenge an official policy of the United States that has been found not to violate statutory or constitutional prescription. In *Ibrahim*, this Court noted that the conduct alleged violates "clear United States policy . . . and have led to recent high profile court martial proceedings against United States soldiers." *Ibrahim*, 391 F. Supp. 2d at 16. The controlling TAC allegations say the opposite: The United States has not adopted an official policy to torture prisoners in interrogations. The United States has not adopted or ratified CACI's conduct as part of an official policy. *TAC ¶¶ 1, 31, 108-13*. The practices have been repeatedly and specifically disavowed by President Bush. *Id. ¶ 111*. Only CACI, not the United States, has claimed that the United States has chosen torture as part of its war-making powers. *Id. ¶¶ 108-13; CACI Mem. at 10* (plaintiffs "seek redress for actions of the United States government and its civilian contractors and agents, taken pursuant to the United States' war-making powers."). In these circumstances, it would be imprudent for this Court to adopt CACI's overreading of *Sanchez-Espinoza* and ignore the teachings of the Supreme Court in *Sosa*.[16]

E. CACI Does Not Enjoy Sovereign Immunity Merely Because It Conspired with Government Officials Willing To Break the Law.

As a matter of law, corporations and private persons should not be permitted to insulate

[16] Even assuming that *Sanchez-Espinoza* should be read as CACI urges, CACI would have to obtain a certification from the United States stating that its employees acted on behalf of the United States when they tortured prisoners. If the United States want to immunize a government employee as acting on behalf of the United States, it certifies under 28 U.S.C. § 2679(d)(1) that the person was acting within the scope of its employment. When *Sanchez-Espinoza* was written, federal employees were absolutely immune from state tort liability only if (1) they were acting within the scope of their employment and (2) their actions were discretionary in nature. *Westfall v. Erwin*, 484 U.S. 292, 300 (1988). The Westfall Act, 28 U.S.C. § 2679(d) (2000), negated the discretionary function requirement, providing instead that immunity attaches so long as the employee "was acting within the scope of his office or employment at the time of the incident out of which the claim arose" *Id*. Thus, when a federal employee is sued for a wrongful or negligent act, the Attorney General, or by designation the U.S. Attorney in the district where the claim is brought, may certify that the employee was acting at the time within the scope of his or her employment. *Id.*; 28 C.F.R. § 15.3(a) (2002). Upon certification, an action against that employee is deemed to be an action brought against the United States. *See* 28 U.S.C. § 2679(d)(2); *Stokes v. Cross*, 327 F.3d 1210 (D.C. Cir. 2003).

themselves from liability for violating the law of nations merely by selecting as their co-conspirators persons who enjoy sovereign or other immunities. *See, e.g., Dennis v. Sparks*, 449 U.S. 24 (1980) (persons conspiring with judge do not enjoy judicial immunity from prosecution); *Toussie v. Powell*, 323 F.3d 178, 182-84 (2d Cir. 2003) (state officials); *Scotto v. Almenas*, 143 F.3d 105, 115 (2d Cir. 1998) (parole officers); *Ballard v. Wall*, 413 F.3d 510, 518 (5th Cir. 2005) (judge); *Uwalaka v. New Jersey*, No. Civ. 04-2973 (SRC), 2005 WL 3077685 (D.N.J. Nov. 15, 2005) (state employer); *Fantasia v. Office of the Receiver*, No. Civ. A. 01-1079-LFO, 2001 WL 34800013 (D.D.C. Dec. 21, 2001) (court-appointed receiver).

In sum, this Court should deny CACI's motion to dismiss the plaintiffs' ATS claims. ATS jurisprudence including *Sosa* makes it clear that those claims can be heard. The TAC alleges CACI is an independent contractor acting under color of law to torture prisoners. *TAC ¶¶ 68, 91*. The fact that the TAC alleged CACI conspired with government officials (who may or may not be immunized under the Federal Tort Claim Act depending upon the circumstances) to engage in these illegal acts does not suffice as reason to dismiss the ATS claims as barred by the sovereign immunity enjoyed by the United States. Like the claims against *Sosa*, the claims against CACI and its employees must be separately considered under the ATS.

III. THE GOVERNMENT CONTRACTOR DEFENSE CANNOT BE USED TO SHIELD CRIMINAL ACTS NOT CONTRACTUALLY REQUESTED BY THE SOVEREIGN.

As an independent contactor, as opposed to an agency or employee of the government, CACI is not directly entitled to the tort liability immunities reserved for the sovereign under the Federal Tort Claim Act ("FTCA"). 28 U.S.C. § 2680. CACI is only able to avail itself of the sovereign's immunity via the judicially-developed doctrine known as the "government contractors defense."

The federal interest in preventing torture is ill-served by permitting CACI to invoke the

government contractor defense here. Plaintiffs respectfully request that the Court reconsider its ruling in the *Ibrahim* action that the defense may be available upon a factual showing and instead hold that the government contractor defense is not available to contractors if the conduct at issue is criminal activity that violates universally-recognized human rights. Undersigned counsel are aware of only one decision on this issue, which held that the defense *cannot* be invoked to immunize a government contractor against human rights claims.[17] That approach best serves the strong federal interest in preventing torture. *TAC ¶¶ 109-13* (citing indicia of the federal interest). *See also* Second Periodic Report of the United States of America to the Committee Against Torture, May 6, 2005.

This Court ruled in the *Ibrahim* action that CACI could not invoke the defense as any form of automatic preemption. Instead, CACI and the other defendants were permitted to file motions for summary judgment establishing that their employees were "indeed soldiers in all but name." *Ibrahim*, 391 F. Supp. 2d at 18. Here, CACI takes another run at automatic immunity, arguing that the TAC allegations support that outcome. This argument lacks merit.

The government contractor defense was created by federal courts to protect contractors from design defect claims in supplying equipment pursuant to military or government specifications. The TAC alleges CACI's conduct was undertaken without being contractually required by any valid government contract, *TAC ¶ 31*; constitutes torture and other illegal conduct universally condemned; and could not lawfully be contracted for by the United States, *TAC ¶ 71*. By definition, if the TAC allegations control here as CACI argues, CACI cannot

[17] *See Agent Orange*, 373 F. Supp. 2d 7 (E.D.N.Y. 2005), discussed *infra* at 25-26. Although as urged above, plaintiffs do not think CACI should be entitled to invoke the defense as a matter of law, plaintiffs are filing a Motion for Summary Judgment to establish that CACI employees were indisputably not soldiers in all but name. For that reason, this Opposition does not address CACI's factual assertions, which are littered throughout its Motion. *See, e.g., CACI Mem. at 3, 18-19.*

invoke the defense because the conduct is conduct that the United States could not lawfully have contracted to obtain.

A. This Court Should Hold that the Government Contractor Defense Cannot Be Invoked To Defend Conduct That Violates Universally Recognized Human Rights and International Law.

The government contractor affirmative defense, created by the Supreme Court in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), protects contractors acting for the United States in its sovereign capacity. As succinctly stated by the Court of Appeals for the Second Circuit, "[s]tripped to its essentials, the military contractor's defense under *Boyle* is to claim, 'The Government made me do it.'" *In re Joint E. & S. Dist. New York Asbestos Litig.*, 897 F.2d 626, 632 (2d Cir. 1990). As a result, the government contractor defense has never been held by any court to protect against human rights claims. CACI does not – and cannot – cite to any legal authority for the proposition that legality is of "no moment" to the task of determining whether a government contractor deserves some derivation of the sovereign's immunity. *CACI Mem. at 20.*

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

The contractors in *Boyle* and *Koohi v. United States*, 976 F.2d 1328 (9th Cir. 1992) did not break any laws – both involved contractors who had followed military specifications in manufacturing equipment and were later sued over accidents involving that equipment on product liability grounds. It simply does not follow from these cases that the government contractor defense can be expanded to include an independent contractor's illegal acts – which would not even be excused under the superiors' order doctrine if committed by military servicemen[18] – merely because those acts occurred in a war zone. If CACI's reasoning were accepted, any contractor acting in a war zone would enjoy sovereign immunity regardless of whether their contract was legal and called for by the contract with the United States. Such a lawless edifice cannot be constructed merely because the Supreme Court wanted to protect from state product liability claims those government contractors who engaged in the lawful act of producing equipment to government specification.

In this *Agent Orange* decision, the District Court for the Eastern District of New York was asked to rule on conduct by government contractors occurring in a war zone during the Vietnam War. The defendants argued the same theory presented here, namely, the United States needs the unfettered ability to conduct wars without worrying about whether government contractors might be held liable to civil claims. The District Court reasoned that such an argument lacked merit because it failed to acknowledge the universally-recognized legal duty to refrain from violating human rights. *Id.* at 91.

Even if the military had ordered CACI employees to torture prisoners, CACI would not

[18] Even assuming the defense could be extended to apply to civilian contractors, who are outside the chain of command and not subject to the Uniform Code of Military Justice, the superior orders defense does not apply to orders to commit manifestly unlawful conduct such as that alleged in the TAC. *See United States v. Calley*, 46 C.M.R. 1131, 1183 (A.C.M.R.), *aff'd*, 22 C.M.A. 534 (C.M.A. 1973). *See also* Army Field Manual (FM) 27-10, *The Law of Land Warfare*, R. 509; *Manual for Courts-Martial United States* (2005), RCM 916.

be able to invoke the government contractor defense to defend itself. Rather, CACI would have to assert the defenses of "superior orders," which does not apply to contractors, or "necessity." As the District Court in *Agent Orange* explained, the defense of necessity is available to civilians forced to decide in the heat of battle whether to obey a military order that may violate human rights. *Id*. at 96-99. To invoke the necessity defense, the evil avoided must be greater than the evil inflicted. The District Court found that when the only "evil" is economic harm to a corporate entity, the defense of necessity is not available. *Id*. at 99. As the District Court eloquently explained:

> We are a nation of free men and women habituated to standing up to government when it exceeds its authority. . . . If defendants were ordered to do an act illegal under international law they could have refused to do so, if necessary by abandoning their businesses.

Id. at 99 (citations omitted).

The situation here is comparable to that found in *Jama v. INS*, 334 F. Supp. 2d 662 (D.N.J. 2004). Plaintiffs in *Jama* were asylum seekers who alleged abuse during detention at a federal facility. Plaintiffs sued the United States; Esmor, a contractor for the Immigration and Naturalization Services ("INS"); and individual INS officials.[19] The District Court held that sovereign immunity did not protect Esmor and the FTCA did not limit action against it. Esmor argued that its participation in the abuse should be insulated from scrutiny because it was acting pursuant to the government contract. The court rejected this specious argument, holding that "[i]n hiring, training, and supervising its employees, Esmor was required not only to abide by the detailed terms of the Contract, but also to fulfill its more general obligation of running the

[19] In a finding directly on point and noted in Plaintiffs' Opposition to CACI's Motion To Dismiss the Alien Tort Claims, the district court in *Jama* noted that the contractor, its officers, agents, and employees "were performing governmental services. Thus they were state actors and it is unnecessary to address the question raised in *Kadic*, namely the extent to which non-state actors can be sued under the ATCA." *Jama* at 15 (citation omitted).

facility safely. It would defy logic to suggest that the INS could have 'approved' practices that breached this larger duty." *Id*. at 689. CACI similarly asks this Court to defy logic and insulate CACI's grave and serious breaches of law – which are also breaches of the terms of its contract with the United States – from any judicial scrutiny. This request should be rejected outright, and the Court should rule as a matter of law that CACI is not entitled to invoke the government contractor defense because that defense is only available to protect lawful activity, not criminal activity. Here, the TAC alleges illegal conduct that falls outside the ambit of the government contractor defense.

B. CACI Cannot Rely on *Sanchez-Espinoza* To Extend the Government Contractor Defense To Cover Conduct That Violates Universally Recognized Human Rights and International Law.

Citing *Sanchez*, CACI argues that it need not introduce facts entitling it to the sovereign immunity under *Boyle* and its progeny, but rather is entitled to automatic sovereign immunity because the TAC alleges military and government officials conspired with CACI to torture prisoners. This is yet another overreading of the impact of *Sanchez-Espinoza* that ignores the impact of the subsequent Supreme Court *Boyle* decision.

In *Boyle*, the Supreme Court ruled that the FTCA's "discretionary function" exception displaces state common law claims against a government contractor for design defects if the contractor adhered to reasonably precise government specifications. 487 U.S. at 512. The Court noted that its prior decision in *Yearsley v. W.A. Ross Const. Co.*, 309 U.S. 18, 20-21 (1940) had "*come close* to holding as much." 487 U.S. at 506 (emphasis added).[20] Responding to a dissent

[20] In *Yearsley*, plaintiff sued defendant W.A. Ross Construction Company, a private company that constructed dikes in the Missouri River, for damages due to erosion on plaintiff's land caused by the dikes. The defendant established as fact that "the work was done pursuant to a contract with the United States Government, and under the direction of the Secretary of War and the supervision of the Chief of Engineers of the United States, for the purpose of improving the navigation of the Missouri River, as authorized by an Act of Congress." 309 U.S. at 19. The

by Justice Brennan, the Court stressed that it was not suggesting that "the immunity [of federal officials] . . . might extend . . . [to] nongovernment employees such as a Government contractor." *Id.* at 505. Moreover, the Court indicated no disagreement with Brennan's opinion that "*Yearsley* depended upon an actual agency relationship with the Government . . . . *Yearsley* [does not] extend anywhere beyond the takings context, and we have never applied it elsewhere." *Id.* at 525. Thus, the Supreme Court in 1988 made it clear that its precedent could not be read to find greater immunity for government contractors than that prescribed by the *Boyle* government contractor defense.

Thus, after the Court of Appeals decided *Sanchez-Espinoza* in 1985, the Supreme Court decision in *Boyle* made clear that whatever effective "immunity" private contractors have under *Boyle* and its progeny, they are not "entitled to the same sovereign immunity that government officials would enjoy." *CACI Mem.* at 9.

Indeed, the umbrella of sovereign immunity does not even extend so far as to cover Amtrak, despite the fact that Amtrak was created by Congress and is an agency or instrumentality of the United States for First Amendment purposes. *See Sentner v. Amtrak*, 540 F. Supp. 557, 560 (D.N.J. 1982) (no immunity), *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 394 (1995) (Amtrak is government agency for First Amendment purposes). Nor does it cover the Red Cross, despite the fact that the Red Cross is "almost 'an arm of the government,'" *Marcella v. Brandywine Hosp.*, 47 F.3d 618, 624 (3d Cir. 1995).

Court held that "if this authority to carry out the project was validly conferred, that is, if what was done was within the constitutional power of Congress, there is no liability on the part of the contractor for executing its will." *Id.* at 20-21. Just as in *Yearsley*, where defendant was protected from liability for "executing [the] will [of] Congress," the defendants in *Sanchez* were protected from liability for carrying out "official actions of the United States" as "agents of the United States." 770 F.2d at 207 n.4.

CACI does not – and cannot – cite to any support for its incredible statement that there is "no real dispute that the activities for which Plaintiff sue [torturing and conspiring to torture prisoners] were part of the U.S. military's prosecution of the Iraq war." *CACI Mem. at 20*. Nor can CACI support its assertion that "the alleged acts were done pursuant to the contractual provision of Interrogation Services." CACI Mem. at 17. CACI's assertions are directly contradicted by the statements and actions of the sovereign itself. *TAC ¶¶ 108-13* (citing numerous statements of Executive branch officials denouncing torture).[21] In sum, here, the federal interest in preventing torture is ill-served by permitting CACI to invoke the government contractors defense. The government contractor defense is intended to protect lawful corporate acts done to benefit the government; not to create a new breed of mercenaries unable to be touched by the rule of law.

C. The Federal Interest in Unfettered Military Action in Combat Activity Is Not Implicated by the TAC's Allegations.

Plaintiffs respectfully request that the Court consider and rule on the legal question of what constitutes "combat activities" for the purposes of the FTCA combatant activities exception. *Koohi* does not answer that question, because actual open combat was at issue there. The government contractor defense was invoked there to insulate a weapons manufacturer who was being sued because United States soldiers mistakenly shot down a civilian aircraft using its weapon in an area of combat. *Koohi* at 1329-30. Plaintiffs submit that "combatant activities" for purposes of the government contractor defense should be limited to actual combat to prevent the defense from shielding all government contractors' activities in a war zone. This understanding has support in the case law.

[21] The U.S. military expressly prohibits use of interrogation methods that violate the Geneva Conventions. *TAC ¶ 113*. CACI knew or should have known that the United States intended that any person acting under color of its authority, such as CACI interrogators, would conduct interrogations in accordance with the relevant domestic and international law. *TAC ¶ 108*.

In 1947, one district court found that combatant activities denoted actions during actual conflict with enemy forces, as opposed to the wider spectrum of "wartime" activities. *Skeels v. United States*, 72 F. Supp. 372, 374 (W.D. La. 1947). In *Skeels*, the plaintiffs were the survivors of a fisherman killed when an Army plane dropped a pipe into the Gulf of Mexico during WWII training exercises. They sought damages under the FTCA. The court found that the injury, although it occurred during wartime, was not covered by the FTCA combatant activities exception because it was not sustained during actual conflict:

> ***If it had been intended that all activities of the armed forces in furtherance or preparation for war were to be included, the use of the words 'war activities,' it seems, would have been more appropriate, but instead, the exception or exemption from liability for torts was restricted to 'combat activities,' which as indicated by the definitions, means the actual engaging in the exercise of physical force*** . . . . It is believed that *the phrase was used to denote actual conflict*, such as where the planes and other instrumentalities were being used, not in practice and training, far removed from the zone of combat, but ***in bombing enemy occupied territory, forces or vessels, attacking or defending against enemy forces, etc.*** In practice or training remote from combat, there would be the same opportunity for care and caution as in peace time; whereas, in **actual fighting**, the attention and energies of the military personnel would be directed and devoted to the destruction of the enemy and its property, as well as to the protection of the lives of their own forces, citizens and property by the use of force immediately applied. In view of the very recent enactment of this measure no precedents have been found but the conclusions reached seem to agree with common sense and the ordinary meaning of the words.

Id. at 374 (emphasis added).

Similarly, in the 1984 *Agent Orange* litigation, the District Court for the Eastern District of New York interpreted the phrase to be limited to actual hostilities:

> The caselaw and the commentators all emphasize, however, that the term "combatant activities" should be interpreted very narrowly. Thus, one commentator understands the phrase to refer only to "operations . . . directly connected with engaging the enemy." *Id.*, 56 Yale L.J. at 549. 1 Jayson, Handling Federal Tort Claims § 262, at 13-107, states that the term implies "actual hostilities and physical violence" . . . . Thus, for example, if a civilian was injured on a battlefield by a grenade that exploded prematurely because the government's specifications for the grenade were improper, that civilian should not be barred by

> the combatant activities exception from suing. On the other hand, if a soldier was aiming a handgrenade at the enemy and, as a result of his negligence, a civilian was injured, the combatant activities exception would apply.

In re Agent Orange Prod. Liab. Litig., 580 F. Supp. 1242, 1255 (E.D.N.Y. 1984). That court went on to hold that the "combat activities" exception did not apply because, although the privately-manufactured defoliant was used during active combat during the Vietnam War, the conduct at issue in the complaint was use of the defoliant outside the battlefield. *Id.*

In *Fisher v. Halliburton*, 390 F. Supp. 2d 610 (S.D. Tex. 2005), the plaintiffs filed various tort claims against a contractor stemming from an incident in which military contractor employees were injured or killed while driving a fuel convoy to the Baghdad airport. Plaintiffs claimed that the contractor failed to disclose the true risks of the position and purposely put its employees at a risk. Halliburton moved to dismiss, arguing, *inter alia*, that the claims were barred by the FTCA combatant activities exception. The court found the government contractor defense inapplicable:

> Defendants herein have cited no case in which the § 2680(j) "combatant activities" exception or any other exception to the FTCA's waiver of sovereign immunity has been held to bar (or, in the *Boyle*/*Koohi* phraseology, to "preempt") claims against a defense contractor other than in situations in which the contractor has provided allegedly defective products, and this Court's research has found none . . . .

Id. at 615-16. Halliburton filed a motion for reconsideration, arguing that in applying *Koohi*, the court did not need to rely on the three-part analysis of *Boyle*, but only to consider whether the challenged action constituted a combatant activity during a time of war. The court declined to reconsider its ruling, reiterating that it would not extend *Koohi* beyond its current boundaries as a products liability case. *Fisher v. Halliburton*, No. Civ. A. H-05-1731, 2005 WL 2001351 (S.D. Tex. Aug. 18, 2005).

In *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004), the Supreme Court noted that the capture and detention of combatants are "important incidents of war." This holding does not support an argument that CACI interrogators were performing combatant activities. There are many important "incidents of war" that are well outside the realm of combat. Imprisoning plaintiffs and class members kept them *out* of combat. *Hamdi* at 518 ("The purpose of detention is to prevent captured individuals from returning to the field of battle and taking up arms once again.").

In contrast to the circumstances here and in *Fisher* involving contractors' claims, the only circumstances under which the "combatant activities" exception has been expanded beyond its plain language for claims brought by *soldiers* against the United States. In *Feres v. United States*, 340 U.S. 135 (1950), the Supreme Court held that servicemen cannot sue the United States under the FTCA for injuries sustained incidental to active military service, even where the incident occurred outside of combat. *Feres* at 146 (barring, *inter alia*, FTCA claim for death in an accidental fire in Army barracks during peacetime). This extension of immunities beyond the language of the FTCA exception was necessary, the Court held, to prevent interference in the unique and "distinctively federal" relationship between the United States and members of the Armed Forces. *Id*. at 143. The concerns that motivate the "combat activities" exception, including preserving military discipline, *United States v. Stanley*, 483 U.S. 669, 683-84 (1987); *Chappell v. Wallace*, 462 U.S. 296, 300-02 (1983), or encouraging public service, *Richardson v. McKnight*, 521 U.S. 399, 408 (1997) are present here, where contractors served outside the military command and control structure and were recruited to work in the private sector for salaries that dwarf that of those men and women who enlist in the military to serve our country. Moreover, the United States does not have an interest in promoting torture as part of combatant

activitiesbecause the United States has expressly criminalized war crimes, which include violations of the Geneva Conventions, such as torture of prisoners of war. *See* 18 U.S.C. § 2441. This Court "combat activities" exception is intended to protect soldiers and responsible military contractors, not mercenaries who practice torture.

D. The Foreign Country Exception Does Not Apply to CACI.

In *Boyle*, the Supreme Court did not hold that every FTCA exception is automatically incorporated into the government contractor defense. Rather, the critical inquiry is whether "a significant conflict exists between an identifiable federal policy or interest and the operation of state law," *Boyle* at 507 (citation omitted), and the FTCA exceptions reflect one source of such identifiable federal interests. As this has Court, there is sparse legislative history to explain the "foreign country" FTCA exception that might "theoretically" apply here. *Ibrahim*, 391 F. Supp. 2d at 18 n.6. Moreover, there is no legal precedent for extending the government contractor defense to draw on any federal interests reflected in this exception. The FTCA bar tort suits against the United States for claims arising in a foreign country. FTCA, 28 U.S.C. § 2680(k). As the Supreme Court has noted, Congress immunized federal officials for injuries occurring on foreign soil because otherwise, the FTCA would subject the United States to foreign tort law under the doctrine of *lex loci delicti*. *Sosa* at 707 ("The application of foreign substantive law exemplified in these cases was . . . what Congress intended to avoid by the foreign country exception."). *See also Meredith v. United States*, 330 F.2d 9, 10 (9th Cir. 1964) ("Congress was unwilling to subject the United States to liabilities depending upon the laws of a foreign power.") (citation omitted).

This understandable concern about subjecting the United States to foreign tort liability is not implicated in the instant case against CACI. First, it is not at all clear that the same concerns about subjecting the *United States government* to foreign law are implicated where a private

corporation would be subjected to the laws of the place where it is doing business. Second, even if those concerns are transferable to the activities of government contractors, the prosecution of plaintiffs' tort law claims does *not* implicate any of the laws of Iraq and thus there would be no conflict with federal interests. *See McMahon v. Presidential Airways, Inc.*, 410 F. Supp. 2d 1189, 1199 (M.D. Fla. 2006) ("A cursory review of case law regarding [the foreign country exception] reflects that its purpose is to protect the Government from being subjected to the laws of a foreign jurisdiction . . . . In light of the . . . failure to expound upon the applicability of this defense and the fact that no issue of foreign law has yet been raised in this case, the Court declines to hold that the 'foreign country' exception presents a colorable defense . . . .").

In sum, plaintiffs respectfully request that this Court hold, as a matter of law, that CACI is not entitled to invoke the government contractors defense against claims for conduct that violates internationally recognized human rights norms.

IV. THE TAC DOES NOT RAISE POLITICAL QUESTIONS.

Nothing in this Court's decision in *Ibrahim* rejecting the political question doctrine suggests that the issue should be decided differently here. *Ibrahim* is clear: claims connected to combat are not necessarily political questions. The instant case is on all fours with *Ibrahim* in this respect.

CACI nonetheless attempts to distinguish this case from *Ibrahim* on two grounds. First, CACI argues that the present complaint alleges that defendants acted in concert with government officials. *CACI Mem. at 22-23*. But as in *Ibrahim*, the key point is that plaintiffs here do not challenge or seek to enjoin official United States policy – indeed, plaintiffs' action helps enforce that policy. This case does not "involve the courts in 'overseeing the conduct of foreign policy or the use and disposition of military power.'" *Ibrahim*, 391 F. Supp. 2d at 15. Both the legislative and executive branches have already determined that the use of torture is not

acceptable. *See supra* at 23-24. Any conduct by U.S. personnel in furtherance of the conspiracy to use torture, then, was *ultra vires*, as this Court noted in *Ibrahim*: "Here plaintiffs sue private parties for actions of a type that violate clear United States policy." *Ibrahim*, 391 F. Supp. 2d at 16.

Second, CACI argues that because they are alleged to have acted "under color of" U.S. law, the Court would "sit in judgment of the manner in which the United States has waged the war in Iraq." *CACI Mem. at 23-24*. The torture of prisoners is not how the United States wages war. Official governmental acts or policy are not at issue. As this Court noted in *Ibrahim*, the conduct complained of here has led to court martial proceedings against United States soldiers. *Ibrahim*, 391 F. Supp. 2d at 16. CACI and its employees are not subject to court-martial proceedings; rather they are subject to damages in a court of law.[22] CACI acted under color of law and in violation of both U.S. and international law. It is this conduct that the torture victims ask this Court to review, not the government's conduct of the war. CACI fails to cite any authority in support of its suggestion that political questions arise by virtue of the fact that defendants act under color of U.S. law. In sum, CACI's political question argument simply repeats arguments that this Court already rejected in *Ibrahim*.

V. THE TAC ALLEGES VALID RICO CLAIMS AGAINST CACI

Plaintiffs' claims meet all the requirements of the RICO statute. First, they have standing to bring the claims because they suffered injuries to their businesses and property. Second, they adequately allege that CACI's predicate acts were the proximate cause of these injuries. Third, plaintiffs allege that CACI defendants were part of a RICO enterprise. Fourth and finally, they

[22] As in *Ibrahim*, plaintiffs do not, as defendants erroneously argue, seek damages for "injuries . . . suffered as a consequence of the United States invading and occupying Iraq." *CACI Mem. at 26*. Rather, they seek damages for injuries suffered as a consequence of defendants' illegal actions taken in concert with certain American soldiers and officials, which the President and Congress have both denounced as harming, not aiding, U.S. policy in Iraq.

adequately allege that CACI was part of a conspiracy under § 1962(d).

Plaintiffs' RICO subclass is composed of those who were: (1) robbed or imprisoned in Iraq; (2) tortured or mistreated in violation of international law; and (3) suffered injury to their businesses as a result. *TAC ¶¶ 12, 38*. This subclass alleges that CACI and its co-conspirators committed predicate acts under § 1961(1) – murder, threatened murder, and robberies – as part of a conspiracy to inflate artificially the amount of money CACI received for providing "intelligence" services. *Id. ¶¶ 12, 317-29*; *plaintiffs' RICO Case Statement (filed July 30, 2004) (attached to Titan Memorandum in Support of its Motion To Dismiss (Apr. 7, 2006))* (*"RCS")* ¶¶ *2, 5, 10*. CACI and its co-conspirators also conspired to the prevent discovery and investigation of these acts. *TAC ¶¶ 28, 84-89, 92-95, 161-69*. CACI was aware of and agreed to participate in the predicate acts. *Id. ¶¶ 83, 85-87*. As a result of this conspiracy, CACI made millions of dollars in profit, as indeed was the goal. *Id. ¶¶ 31, 99, 104*.

CACI's RICO arguments presume a heightened pleading standard for RICO claims. However, CACI does not – and cannot – cite any authority imposing such a heightened standard for RICO claims. *See Leatherman* at 168 (Rule 9(b) imposes particularity requirement only for allegations of fraud and mistake). Pleadings in RICO actions are "properly measured under the more liberal pleading requirements of Rule 8(a)." *Hecht v. Commerce Clearinghouse, Inc.*, 897 F.2d 21, 26 n.4 (2d Cir. 1990). Moreover, RICO itself is to be "liberally construed to effectuate its remedial purposes." 18 U.S.C. § 1961 (note); *Sedima v. Imrex Co.*, 473 U.S. 479, 497-98 (1985).

A. Some of the Torture Victims Suffered RICO Injuries.

Plaintiffs allege that they were deprived of property as well as business and employment opportunities. *CACI Mem. at 34*. The co-conspirators took cash, gold, jewelry, or other property from some of the RICO plaintiffs. *TAC ¶¶ 131, 140, 151*. These robberies were part of a

campaign of intimidation that, along with other acts of torture and abuse, were designed to break plaintiffs psychologically in order to extract "intelligence" from them, thereby artificially inflating the demand for defendants' services. *RCS ¶ 2, 5, 10.* Those plaintiffs who were robbed have standing under RICO. It is immaterial at what point in time the robberies occurred (*CACI Mem. at 35*) just as it is immaterial whether plaintiffs were robbed by defendants themselves or by another member of the Torture Conspiracy. A participant in a RICO enterprise is liable if any member of the enterprise committed an illegal act. *Salinas v. United States*, 522 U.S. 52, 63 (1997) (co-conspirator need not participate in every act of enterprise in order to be held liable, so long as the defendant "adopt[s] the goal of furthering or facilitating the criminal endeavor.").[23]

CACI's argues plaintiffs lack standing because defendants did not "conduct" the enterprise's affairs. *CACI Mem. at 34-35*. In furtherance of this argument, defendants erroneously claim that a RICO defendant must have some part in *directing* the affairs of the enterprise. *CACI Mem. at 35, citing Reves v. Ernst & Young*, 507 U.S. 170, 179 (1993). This is wrong. The Supreme Court stated, in *Reves*, that RICO liability is not limited to those with primary responsibility for the enterprise's affairs. *Reves* at 185. Adopting the "operation or management" test to delimit who is considered to participate in an enterprise, *Reves* held that: "An enterprise is 'operated' not just by upper management but also by lower rung participants in the enterprise who are under the direction of upper management. An enterprise also might be

[23] Plaintiffs named Major General Geoffrey D. Miller and Lieutenant Colonel Steven L. Jordan in their RCS as one of the conspiring government officials. *RCS ¶ 3*. On April 28, 2006, Lt. Col. Jordan was indicted on twelve counts of the Uniform Code of Military Justice stemming from his misconduct at Abu Ghraib and the resulting investigation. When Gen. Miller was called to testify at two court-martial proceedings for fellow soldiers in January 2006, he asserted his right not to incriminate himself (Military Article 31, the equivalent of the Fifth Amendment on this point). In the RCS, plaintiffs also describe an incident in December 2003 where Sgt. Cardona "and other persons yet be identified" in which he threatened an Abu Ghraib prisoner with death by loosing dogs on him. *RCS ¶ 5.b.*

'operated' or 'managed' by others 'associated with' the enterprise who exert control over it . . . ." *Id.* at 184-85. CACI's conduct, as alleged and reiterated above, clearly meets this standard.

B. The TAC Alleges RICO Violations.

1. Plaintiffs adequately allege that defendants' Section 1962 violations proximately caused injury to plaintiffs' business or property.

Defendants' predicate acts were the proximate causes of injury to plaintiffs' business or property. *See TAC ¶ 38* (alleging members of RICO subclass were robbed). CACI alleges that the plaintiffs' financial injuries cannot be attributed to them because some other actor robbed the plaintiffs. First, the TAC allegations, not CACI's speculations, control. Second, even if someone other than a CACI employed robbed plaintiffs (which is not yet established), plaintiffs nonetheless have claims against CACI. Proximate cause exists where the injury is a "substantial factor in the sequence of responsible causation" and "reasonably foreseeable or anticipated as a natural consequence" of the conduct. *Hecht*, 897 F.2d at 23-24. Proximate cause exists with respect to these property loss claims even if the property was taken by someone other than CACI. It is black letter law that a co-conspirator need not participate in every act of the enterprise in order to be held liable. *Salinas* at 64-66. Thus, because defendants adopted the goal of furthering or facilitating the criminal endeavor, they are liable because the enterprise caused plaintiffs' property losses (even if CACI did not effectuate the robberies themselves).

CACI fails to appreciate that, because § 1962(d) does not require that a predicate act actually be committed (as the agreement itself is the essential harm), the act causing the injury does not need to be a predicate act of racketeering. *Gagan v. Am. Cablevision*, 77 F.3d 951, 959 (7th Cir. 1996). Instead, causation is established where an *overt act* in furtherance of the conspiracy, and not necessarily one of the RICO predicate acts, causes the injury. *Id.* This has certainly been pled.

2. Plaintiffs adequately plead the existence of an "enterprise."

A RICO enterprise constitutes "a group of persons associated together for a common purpose of engaging in a course of conduct." *United States v. Turkette*, 452 U.S. 576, 583 (1981). It can include individuals and entities which are "associated in fact" although not themselves a legal entity. 18 U.S.C. § 1961(4). The existence of a RICO enterprise is proven by showing the existence of "an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." *Turkette* at 583. A RICO enterprise "[a]t a minimum . . . must exhibit 'some sort of structure . . . for the making of decisions, whether it be hierarchical or consensual.'" *Chang v. Chen*, 80 F.3d 1293, 1299 (9th Cir.1996) (citation omitted). The three elements necessary to establish an enterprise are: "(1) a common purpose among the participants, (2) organization, and (3) continuity." *United States v. Perholtz*, 842 F.2d 343, 362 (D.C. Cir. 1988). This can include relationships that comprise a "consensual [contractually-negotiated] decision-making structure." *Comwest, Inc. v. Am Operator Servs., Inc.*, 765 F. Supp. 1467, 1475 (C.D. Cal. 1991). It can also be a "loose or informal" association of distinct entities. *Williams v. Mohawk Indus.*, 411 F.3d 1252, 1258 (11th Cir. 2005). Plaintiffs' allegations meet these criteria.

The TAC alleges that participants in the "enterprise" shared a common purpose. The murders, robberies, and obscene acts alleged are part of a common plan to intimidate prisoners into providing "intelligence" in order to artificially inflate the demand for interrogations and related services. *RCS ¶¶ 2, 5, 10*. By designing and implementing this plan, defendants expected to and did obtain a competitive advantage and received additional government contracts and payments for these services. *TAC ¶ 106*. The association-in-fact is ongoing, as evidenced by allegations that the participants functioned as a continuing unit and that the executives of CACI and Titan and certain government officials managed and operated the affairs of the

enterprise. *TAC ¶ 70, 71, 98, 325*.

The TAC further alleges that defendant Titan and the CACI corporate defendants had close and important relationships with government officials that implemented the Torture Conspiracy through meetings, telephonic discussions, in-person discussions, email discussions and other communications that occurred in, among other places, California, Virginia, and the District of Columbia (*TAC ¶ 98*); defendants were able to reap handsome monetary rewards in exchange for abusing and torturing plaintiffs and assisting the United States in securing them in unlawful conditions (*TAC ¶ 31, 99, 100, 104, 105*); and the fruits of the unlawful conspiracy were invested in the on-going operations of defendant corporations (*TAC ¶ 104*).

C. The TAC Alleges a Section 1962(d) Conspiracy.

To be held liable for conspiracy under Section 1962(d), a defendant must have agreed that some member of the conspiracy would violate the substantive elements of Section 1962 (a), (b), or (c). *Salinas v. United States*, 522 U.S. 52, 63-64 (1997); *BCCI Holdings (Luxembourg) Societe Anonyme v. Khalil*, 56 F. Supp. 2d 14, 57 (D.D.C. 1999), *rev'd on other grounds*, 214 F.3d 168 (D.C. Cir. 2000). Conspiracy under Section 1962(d) exists here because defendants conspired to violate Section 1962. *TAC ¶ 329*. Under *Hecht*, a RICO plaintiff must allege an agreement among the co-conspirators to commit predicate acts. *Hecht*, 897 F.2d at 25-26. Plaintiffs allege just such an agreement in paragraphs 328-29 of the TAC (conspirators were aware of and agreed to participate in predicate acts). CACI claims, incorrectly, that the complaint "must allege some factual basis for the finding of a conscious agreement among the defendants." *CACI Mem. at 39* (emphasis in original). However, neither of the cases they cite support this heightened pleading standard. *Hecht*, 897 F.2d at 25-26; *Wright v. Towns*, No. 90-0565, 1991 WL 100388, at *8-9 (D.D.C. May 30, 1991).

CACI overstates the nature of the agreement that co-conspirators must have. First, to be

liable of conspiracy under Section 1962(d), a defendant need not know the other members of the enterprise; he need only know of the enterprise's existence and scope. *United States v. Schell*, 775 F.2d 559, 568-69 (4th Cir. 1985); *United States v. Boylan*, 898 F.2d 230, 242 (1st Cir. 1990) (RICO conspiracy does not require that all defendants participate in all acts, know of entire scheme, or be acquainted with all other defendants, only that component parts be linked together so as to afford plausible inference that agreement existed). Second, the agreement need only be that someone will engage in the illegal conduct; a defendant need not agree to commit the crime himself. *Salinas*, 522 U.S. at 65.

CACI contends that plaintiffs must allege that the co-conspirators "agreed to pursue the same objective by criminal means." *CACI Mem. at 39, citing Salinas* at 63, 65. Plaintiffs factual allegations meet this standard. Plaintiffs alleged CACI was aware of and agreed to participate in predicate acts, including murder, assault and battery, and obstruction of justice, and/or other obscene acts in order to generate income by increasing the demand for "intelligence" services. *RCS ¶ 2, 5, 10*. *See also Williams*, 411 F.3d at 1258 (the common objective of making money is sufficient for RICO claim). As stated above, CACI is not free to impose a heightened specificity merely because plaintiffs assert RICO claims. *See supra* at 37.

D. CACI's Call for the Submission of Evidence Prior To Discovery Is Frivolous.

CACI makes much of the fact that in the intervening two years since plaintiffs' complaint was originally filed, the TAC's allegations as to CACI International Inc. and CACI, Inc.-Federal are made "upon information and belief." *CACI Mem. at 40-42*. This is to be expected, given that discovery has not commenced. Although plaintiffs' investigative efforts are able to uncover a substantial amount of information about the torture itself, it is to be expected that plaintiffs have not yet been able to discover all the facts relevant to the internal workings of CACI.

The TAC alleges facts establishing liability for each of the CACI entities. For example,

with regards to CACI International's liability, see *TAC ¶¶ 72-73; TAC ¶ 76*. CACI International knew or should have known about the prisoner abuse and taken affirmative steps to stop it, but instead allowed employees to design and implement illegal interrogation programs. *TAC ¶¶ 81-82*. It amended its Code of Ethics so as to encourage employees to disregard the law. *TAC ¶ 88.* CACI International ratified the acts of its subsidiaries by supplying personnel knowing that CACI PT was involved in prisoner abuse (*Id. ¶¶ 72-74*), failing to punish abusive employees or stop the abuse (*Id. ¶¶ 81-82*), and conducting a coordinated campaign to suppress information and whitewash the prisoner abuse scandal (*Id. ¶¶ 84, 93, 95*). The TAC alleges CACI PT was the agent of CACI International, with the latter controlling the former and acquiring it in order to meet its own strategic goals. *Id. ¶¶ 21-22, 68*. This control is also suggested by CACI International's complete ownership of CACI PT (*Id. ¶¶ 21-22*), its imposition of policies upon CACI-PT (*Id. ¶¶ 87-88*), its hiring of employees for the subsidiary (*Id. ¶¶ 72-74*) , and the presence of its employees at interrogation facilities in Iraq (*Id. ¶ 76*). Thus CACI International, as the principal, is liable for the conduct of its agent CACI-PT.

The TAC allegations also speak to CACI-Federal's liability. CACI-Federal owned and controlled CACI PT (*Id. ¶¶ 21-22*), hired CACI PT employees and failed to adequately train them (*Id. ¶¶ 72-74*), had employees present at CACI PT's work in Iraq (*Id. ¶ 76*), cleared inappropriate translators for co-conspirator Titan (*Id. ¶¶ 64, 90*), knew or should have known about the prisoner abuse and taken affirmative steps to stop it, but instead allowed it to continue (*Id. ¶¶ 81-82*). CACI-Federal is also liable for failing to stop or punish them (*Id. ¶¶ 81-83*) and for participating in the campaign to suppress knowledge of the abuses and obstruct justice (*Id. ¶¶ 84, 93, 95*). In sum, this Court should deny CACI's motion trying to force the torture victims to amend once again.

CONCLUSION

This Court should deny CACI's motion to dismiss. CACI utterly fails to establish that the TAC fails to state a claim upon which relief can be granted. Rather, as explained above, the TAC states valid ATS claims asserting CACI acted under the color of law. The TAC also states valid RICO claims that are not barred by the fact that the injuries occurred in Iraq. This Court.should not yield to CACI's renewed request for automatic preemption from the TAC's common law claims. Instead, this Court should either hold that CACI is not entitled to invoke the preemption at all or, alternatively, hold that CACI must seek that preemption by filing a motion for summary judgment.

Dated: May 8, 2006

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INDEX TO EXHIBITS

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