* On October 2, 2008, the Court denied amici's motions to participate in these proceedings.

NOT YET SCHEDULED FOR ORAL ARGUMENT

United States Court of Appeals
for the
District of Columbia Circuit

No. 08-7008
Consolidated with 08-7009

HAIDAR MUHSIN SALEH, *et al.*,
Plaintiffs-Appellants,
v.
TITAN CORPORATION, *et al.*,
Defendants-Appellees,

ILHAM NASSIR IBRAHIM, *et al.*,
Plaintiffs-Appellants,
v.
TITAN CORPORATION, *et al.*,
Defendants-Appellees.

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

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

ROBERT P. LOBUE
Counsel of Record

OF COUNSEL:

GABOR RONA
HUMAN RIGHTS FIRST
333 Seventh Avenue
13th Floor
New York, New York 10001

MICHAEL A. BECKER
ELLA CAMPI
PATTERSON BELKNAP WEBB & TYLER LLP
1133 Avenue of the Americas
New York, New York 10036
(212) 336-2000

Amici Curiae are identified in full on the inside cover.

September 10, 2008

AMICI CURIAE INTERNATIONAL HUMAN RIGHTS ORGANIZATIONS AND EXPERTS

HUMAN RIGHTS FIRST
HUMAN RIGHTS WATCH
PHYSICIANS FOR HUMAN RIGHTS
THE CENTER FOR VICTIMS OF TORTURE
PROFESSOR SARAH H. CLEVELAND
PROFESSOR LAURA DICKINSON
PROFESSOR SCOTT HORTON
PROFESSOR JAYNE HUCKERBY
PROFESSOR MARGARET L. SATTERTHWAITE
PROFESSOR KIM LANE SCHEPPELE

Table of Contents

Page

Table of Authorities*

Page

UNITED STATES CASES

* There are no authorities on which we chiefly rely.

INTERNATIONAL JUDICIAL DECISIONS

STATUTES AND REGULATIONS

INTERNATIONAL TREATIES AND AGREEMENTS

OTHER AUTHORITIES

INTRODUCTION

On April 28, 2004, the world was stunned by the publication of photographs depicting atrocities committed by Americans upon prisoners in the United States military's custody at the Abu Ghraib prison in Iraq. This case raises the question whether victims of such abuses are entitled to seek compensation in a civil tort action from government contractors whose employees are alleged to have perpetrated such acts of cruelty. Because application of the "government contractor defense" in these circumstances would be an affront to principles of human rights to which the United States has subscribed, including the international prohibition on torture and other cruel, inhuman, and degrading treatment or punishment, *amici* international human rights organizations and experts ask the Court to rule that this affirmative defense does not bar the tort claims of the plaintiffs against the Titan Corporation.

INTEREST OF AMICI

International human rights law recognizes and seeks to enforce the inalienable rights of all persons that derive from their very humanity. Whereas the law of war ("international humanitarian law") regulates conduct during hostilities and affords significant protections to persons detained in connection with war, international human rights law is of broader reach, as the rights protected derive not from an individual's status as a prisoner, but from his or her status as a human

being. The United States has long championed the principles of international human rights. Over the course of its history, the United States has subscribed to numerous international human rights instruments – some of which it helped to create – that protect individuals from torture, genocide, and other gross human rights violations. Furthermore, the United States has incorporated those protections for international human rights into domestic law.

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

Human Rights First promotes laws and policies that advance universal rights and freedoms and exists to protect and defend the dignity of each individual through respect for human rights and the rule of law.

Human Rights Watch is dedicated to protecting the human rights of people around the world. Among its many activities, HRW investigates and exposes human rights violations to hold abusers accountable.

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

The Center for Victims of Torture (CVT) is an internationally respected torture treatment center with more than 20 years of experience treating torture survivors. CVT works to heal the wounds of torture on individuals, their families and their communities and to stop torture worldwide.

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

Sarah H. Cleveland is the Louis Henkin Professor of Human and Constitutional Rights, Faculty Co-Director, Human Rights Institute, Columbia Law School, where she specializes in international human rights and the role of international law in U.S. courts.

Laura Dickinson is a Foundation Professor of Law and the Executive Director of the Center for Transnational Public-Private Governance at Arizona State University's Sandra Day O'Connor College of Law. She is an expert on human rights, national security law, and the impact of military and security privatization.

Scott Horton is a Distinguished Visiting Professor at Hofstra Law School and is an expert in national security and public international law.

Jayne Huckerby is Research Director at the New York University School of Law Center for Human Rights and Global Justice and is an expert in human rights and public international law.

Margaret L. Satterthwaite is Associate Professor of Clinical Law and Faculty Director, Center for Human Rights and Global Justice at New York University School of Law. She is an expert on human rights and humanitarian law.

Kim Lane Scheppele is the Laurance S. Rockefeller Professor of Public Affairs and Director of the Program in Law and Public Affairs at the Woodrow Wilson School of Public and International Affairs at Princeton University. Professor Scheppele is an expert on the effects of the international "war on terror" on constitutional protections around the world.

STATEMENT OF THE CASE

The allegations relevant to this brief are simple and shocking. During the course of military operations in Iraq, the United States military arrested and detained a wide range of Iraqi citizens, including the plaintiffs. Held as prisoners, the plaintiffs allege that they were tortured or abused in captivity by military contractor employees of Titan serving as interpreters at the Abu Ghraib prison. Defendants are accused of brutal acts that include rape, beatings, and other physical violence sometimes causing death, as well as severe psychological torture, including sleep deprivation, simulated executions, and being forced to watch relatives being tortured or even killed.

The court below held that these serious allegations could not give rise to tort liability so long as "defendants' employees were acting under the direct command and exclusive operational control of the military chain of command." *Ibrahim v. Titan Corp.*, 556 F. Supp. 2d 1, 4 (D. D.C. 2007) (*Ibrahim II*). The court reasoned that, under *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1992), "[f]irst, the court must determine whether 'uniquely federal interests' are at stake. Second, the court must determine whether the application of state tort law would produce a 'significant conflict' with federal policies or interests." *Ibrahim II* at 3. The district court had already determined in its August 12, 2005 opinion that "the treatment of prisoners during wartime implicates 'uniquely federal interests.'" *Ibrahim v. Titan Corp.*, 391 F.Supp. 2d 10, 18 (D. D.C. 2005) (*Ibrahim I*).

Accordingly, in *Ibrahim II*, the district court asked whether "allowing these suits to go forward would produce a significant conflict with identifiable federal policies or interests." *Ibrahim II*, 556 F. Supp. 2d at 3. To answer that question, the district court looked to the Federal Tort Claims Act (FTCA) and issued its unprecedented ruling that, by analogy to the FTCA's "combatant activities" exception, 28 U.S.C. § 2680(j), federal common law would require preemption of plaintiffs' common law tort claims "if the defendants could show that their employees at Abu Ghraib functioned as soldiers in all but name." *Id.* at 3-4.

The district court found that the purpose of the FTCA's combatant activities exception is to prevent state law from "interfer[ing] with an officer's authority, pursuant to the military chain of command, to give legally binding orders to his subordinates." *Id.* at 5. "In other words," the district court wrote, "the exception eliminates the possibility that state law liability could cause a soldier to second-guess a direct order" – a result that implicates a "uniquely federal interest" in the military's unfettered operation in wartime. *Id.* Nowhere did the court consider the nature of the misconduct alleged, the universal condemnation of such conduct, the unqualified prohibitions that international and domestic law place on such conduct, and the universal agreement that an order to torture or abuse detainees can *never* be lawful. The court below decided that Titan's employees were "soldiers in all but name," *id.* at 3, and hence were not subject to state law liability.

SUMMARY OF ARGUMENT

The district court's "soldiers in all but name" test leads to a result that is incompatible with universally accepted norms of human rights law. Soldiers are no more permitted to torture detainees than are civilians working for the military—indeed, soldiers who participated in the abuses at Abu Ghraib have been criminally convicted. The test employed below leads to impractical and irrelevant factual distinctions, and to the perverse result that torture-by-proxy by private contractors

is protected from liability if the contractor is under a supposedly sufficient degree of control by the military. This ignores the fact that military personnel could under no circumstances lawfully order or undertake the conduct alleged here, and that manifestly illegal orders cannot lawfully be obeyed.

The government contractor defense articulated in *Boyle* should not be extended to deny a remedy to persons detained by or on behalf of the United States who have been subjected to torture or other cruel, inhuman or degrading treatment by government contractors. That defense is a creature of judge-made federal common law, which is appropriately informed by principles of international law, including international human rights law. Those principles counsel strongly against enlarging the defense to cover the atrocities alleged in this case. As an act of judicial lawmaking, the district court's opinion flies in the face of the long history of executive and legislative branch efforts to incorporate international human rights principles into the federal law of the United States. For these reasons, the government contractor defense should be confined to the limits established by *Boyle*, not extended so that government contractors remain unaccountable to the victims of gross human rights violations.

I. INTERNATIONAL LAW PROHIBITS TORTURE AND CRUEL, INHUMAN OR DEGRADING TREATMENT OF ANY DETAINED PERSON IN ALL CIRCUMSTANCES

International law prohibits torture and the cruel, inhuman or degrading treatment or punishment of individuals in detention. These fundamental norms have been codified in international treaties and applied and affirmed by international tribunals and U.S. courts. On the basis of both treaty law and state practice, the prohibitions of torture and other cruel, inhuman or degrading treatment or punishment have attained the status of peremptory, or *jus cogens*,[1] norms of customary international law.[2] And these principles have been internalized in U.S. law.

International human rights law prohibits torture and other mistreatment of persons in custody in all circumstances, whether in peacetime or wartime.[3] Among other instruments, the Convention against Torture and Other

---

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

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

[3] A standard definition of "torture" is found in the Torture Victims Protection Act (TVPA), 28 U.S.C. § 1350, Note § 3(b)(1): "any act, directed against an individual in the offender's custody or physical control by which severe pain or suffering

Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the International Covenant on Civil and Political Rights (ICCPR) – each of which has been ratified by the United States – prohibit such treatment.[4] Moreover, international human rights law emphasizes the importance of providing victims of gross violations of international human rights with the right to a meaningful civil remedy – a right which is at stake in this case. The CAT (art. 14) and the ICCPR (art. 9), as well as instruments such as the Universal Declaration of Human Rights (art. 8), emphasize that requirement.[5] Contrary to this principle, the decision below jeopardizes the ability of victims of torture to obtain civil redress. Moreover, coupled with the apparent unwillingness or inability of the government to

---

(other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, . . . intimidating or coercing that individual."

[4] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 46, at 197, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51 (Dec. 10, 1984) [hereinafter CAT]; International Covenant on Civil and Political Rights, S. Exec. Doc. No. 95-E, art. 7, 999 U.N.T.S. 171 (Dec. 16, 1966) [hereinafter ICCPR].

[5] *See, e.g.*, CAT, *supra* note 4, art. 14; ICCPR, *supra* note 4, art. 9; Universal Declaration of Human Rights, art. 8, G.A. Res. No 217A, UN GAOR, 3rd. Sess., 1st plen. Mtg., U.N. Doc A/810 (Dec. 12, 1948) [hereinafter Universal Declaration of Human Rights]; Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Mar. 21, 2006).

prosecute the contractors involved in the atrocities at Abu Ghraib, this will result in a complete vacuum of accountability.

The United States acceded to the CAT in 1994, having embraced the treaty's prohibition against torture "as a standard for the protection of all persons, in time of peace as well as war." S. Exec. Rep. No. 101-30, at 11 (1990). Several CAT provisions are relevant to this case, including these:

- Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction; no exceptional circumstances whatsoever . . . may be invoked as a justification of torture; and an order from a superior order or a public authority may not be invoked as a justification of torture. (Article 2)

- Each State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military . . . and other persons who may be involved in the custody, interrogation or treatment of any individual subject to any form of arrest, detention or imprisonment. (Article 10)

- Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. (Article 14)

In 1999, the U.S. Department of State made its initial report to the U.N. Committee Against Torture – a monitoring body established by CAT – and stated that the "United States has long been a vigorous supporter of the international fight against torture . . . . Every unit of government at every level

within the United States is committed, by law as well as by policy, to the protection of the individual's life, liberty and physical integrity."[6]

Like the CAT, the ICCPR – which the United States joined in 1992 – is unequivocal: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."[7] The ICCPR further provides that parties must undertake "[t]o ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity."[8] The Senate Committee on Foreign Relations determined that the need to maintain the moral leadership exercised by the United States in the world justified U.S. accession: "In view of the leading role that the United States plays in the international struggle for human rights, the absence of U.S. ratification of the [ICCPR] is conspicuous and, in the view of many, hypocritical. The Committee believes that ratification will remove doubts about the seriousness of the U.S.

---

[6] U.S. Department of State, Initial Report of the United States of America to the U.N. Committee Against Torture (Oct. 15, 1999), http://www.state.gov/www/global/human_rights/torture_toc99. html (last visited Sept. 8, 2008) [hereinafter U.S. Report to CAT (1999)].

[7] ICCPR, *supra* note 4, art. 7.

[8] ICCPR, *supra* note 4, art. 2(3)(a).

commitment to human rights and strengthen the impact of U.S. efforts in the human rights field." S. Exec. Rep. No. 102-23 (1992).

Equivalent statements of the norm against torture and other cruel, inhuman or degrading treatment or punishment are found in the Universal Declaration of Human Rights,[9] the U.N. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment,[10] the U.N. Standard Minimum Rules for the Treatment of Prisoners,[11] the European Convention for the Protection of Human Rights and Fundamental Freedoms,[12] the American Convention on Human Rights,[13] and the Rome Statute of the International Criminal Court.[14] These human rights principles have been recognized time and again in

---

[9] Universal Declaration of Human Rights, *supra* note 5, art. 5.

[10] Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, G.A. Res. 43/173, annex, ¶ 6, U.N. Doc. A/43/49 (Dec. 9, 1988).

[11] United Nations Standard Minimum Rules for the Treatment of Prisoners, U.N. Doc. A/CONF/611, annex I, E.S.C. res. 663C, 24 U.N. ESCOR Supp. (No. 1) at 11, U.N. Doc. E/3048 (1957), amended E.S.C. res. 2076, 62 U.N. ESCOR Supp. (No. 1) at 35, U.N. Doc. E/5988 (1977).

[12] Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, *open for signature* March 20, 1952, 213 U.N.T.S. 262 (entered into force May 18, 1954) [hereinafter European Convention].

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

[14] Rome Statute of the International Criminal Court, art. 7, s.1, *opened for signature* July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002) [hereinafter Rome Statute].

domestic courts and international tribunals.[15] Moreover, as parties to instruments such as the CAT and the ICCPR – and as the earliest proponent of the Universal Declaration of Human Rights – the United States has demonstrated its firm commitment to protecting international human rights, including those rights that are alleged to have been violated in these cases.

II. THE GOVERNMENT CONTRACTOR DEFENSE IS A CREATURE OF FEDERAL COMMON LAW, WHICH SHOULD BE INFORMED BY RELEVANT PRINCIPLES OF INTERNATIONAL LAW

The government contractor defense is not based on constitutional or statutory authority, but rather constitutes "federal law of a content prescribed . . . by the courts – so-called 'federal common law.'" *Boyle,* 487 U.S. at 504 (citations omitted). The federal courts recognize the dangers of legislating substantive outcomes under the rubric of federal common law.[16] Here, the Court should be

---

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

[16] Federal common law can often be "traced by traditional methods of interpretation to statutory or constitutional commands," Richard H. Fallon, Jr. et al., *Hart & Wechsler's The Federal Courts and the Federal System* 685 (5th ed. 2003), but federal common law is ultimately judge-made law. Despite the need to engage in "interstitial lawmaking" from time to time, *see Boyle*, 487 U.S. at 531 (J. Stevens, dissenting), federal courts should be reluctant to create new rules of decision in cases raising novel policy questions more appropriate for Congress. *See, e.g., Bush v. Lucas*, 462 U.S. 367 (1983); *United States v. Gilman*, 347 U.S.

particularly wary of extending the government contractor defense to preempt claims arising out of facts and circumstances that are dramatically different from those of *Boyle*, the case in which the defense was first created. Moreover, the Court's determination should be informed by relevant principles of international human rights law, especially where those principles have already been incorporated into U.S. federal law by the legislative and executive branches. Failing to do so risks a judicially-created conflict with international norms that this nation has embraced.[17]

In appropriate cases, federal courts look to international law when interpreting federal statutes or applying federal common law.[18] This approach is consistent with the famous words of the Supreme Court in *The Paquete Habana*: "International law is part of our law, and must be ascertained and administered by the courts of appropriate jurisdiction as often as questions of right depending upon

---

507, 511 (1954). *See also Ibrahim I*, 391 F.Supp.2d at 14 (noting that since *Erie v. Tompkins*, 304 U.S. 64 (1938), "the role of federal common law has been dramatically reduced, and courts have generally looked for legislative guidance before taking innovative measures").

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

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

it are duly presented for their determination." 175 U.S. 677, 700 (1900). Thus, federal courts draw on treaties and customary international law to decide matters ranging from boundary disputes to questions of treaty interpretation and official immunity.[19] In particular, federal courts – including the Supreme Court – have looked to international law to shape the law applicable to the treatment of prisoners and detainees.[20]

Accordingly, U.S. courts consult international law when relevant, and even when international law may not create directly enforceable rights. This approach sometimes takes the form of drawing on international law to give meaning to vague constitutional provisions, as the Supreme Court did in decisions such as *Lawrence v. Texas*, 539 U.S. 558 (2003), and *Atkins v. Virginia*, 536 U.S. 304 (2002).

---

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

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

International law also has a *limiting* value for the federal courts. Whether international law has been directly incorporated into federal law or reflects the U.S. commitment to a particular principle, courts consult that law because "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. The Schooner Charming Betsy*, 2 Cranch 64, 118 (1804); *see Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004). This premise is even more important in the federal common law context. Just as courts will not assume that a congressional enactment was intended to create a conflict with international law, they should also take care not to create such conflicts when engaged in judicial lawmaking.

The desirability of conforming federal judge-made law to international norms is particularly compelling when Congress has already incorporated those norms into federal law, as is the case here with respect to the international prohibitions against torture and the mistreatment of detained persons. For example, the 1992 Torture Victim Protection Act (TVPA) creates a private cause of action for victims of torture committed by an individual who acts under actual or apparent authority or color of law of any foreign nation. *See* Pub. L. 102-256, 106 Stat. 73 (1992). Indeed, the preamble to the TVPA explains that its purpose is to carry out "obligations of the United States under the United Nations

Charter and other international agreements pertaining to the protection of human rights by establishing a civil action for recovery of damages from an individual who engages in torture or extrajudicial killing."

Furthermore, certain criminal statutes – while not speaking directly to congressional imperatives concerning the civil tort liability of contractors – are additional important indicators of the U.S. commitment to international human rights principles. For example, the War Crimes Act of 1996, as amended in 2006, makes it a criminal offense for U.S. military personnel and U.S. nationals to commit torture, or cruel or inhuman treatment of anyone in their custody or control, *see* 18 U.S.C. § 2441, and the federal anti-torture statute enacted in 1994 makes it possible to prosecute any U.S. national or anyone present in the United States who, while outside the United States, commits or attempts to commit torture, *see* 18 U.S.C. § 2340A. These statutes are critical to U.S. compliance with its international obligations, as the United States reported to the U.N. Committee Against Torture in 2006:

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

> U.S. laws prohibiting such practices apply both when the employees are operating in the United States and in other parts of the world.[21]

And in its initial report to the U.N. Committee Against Torture in 1999, the United States specifically discussed the FTCA's role in upholding U.S. obligations pursuant to the CAT. By waiving the sovereign immunity of the United States so that civil actions seeking money damages can proceed in federal court, the United States reported that the FTCA provides a mechanism by which victims of abuse may sue the United States "for personal injury or loss of property caused by a negligent or wrongful act or omission of a government employee acting within the scope of his or her office or employment."[22] The United States noted that the FTCA makes it possible for victims of abuse to sue "federal law enforcement officers for intentional torts, including assault, battery, and false arrest."[23] It is ironic that the FTCA – the same federal statute proferred by the State Department as indicative of U.S. compliance with the international ban on cruel, inhuman and

---

[21] United Nations, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Committee Against Torture, *Consideration of Reports Submitted By States Parties Under Article 19 of The Convention, Second Supplemental Report of the United States of America*, ¶¶ 6-7, U.N. Doc. CAT/C/48/Add.3/Rev.1 (Jan. 13, 2006) [hereinafter U.S. Report to CAT (2006)].

[22] U.S. Report to CAT (1999), *supra* note 6, § II-A.

[23] *Id.*

degrading treatment or punishment – is now the basis for a claimed defense by those who would violate those norms.

Here, the *Charming Betsy* rule requires that the scope of the government contractor defense be interpreted in a manner that recognizes the unequivocal international prohibition of torture and other cruel, inhuman, or degrading treatment or punishment, and the importance placed by international human rights law on the right to a civil remedy for such abuses.[24] Instead, the district court's dramatic extension of the government contractor defense to disallow tort claims against government contractors who are "soldiers in all but name" would facilitate *the violation* of those very principles. By denying any form of civil redress to the victims of the human rights abuses alleged in these cases – abuses which at a minimum constitute violations of customary international law that the United States has recognized and championed – the district court has extended the government contractor defense far beyond the limits contemplated by *Boyle*. The ruling violates the *Charming Betsy* rule by creating a judge-made rule

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

of decision that starkly contradicts not only international law, but the federal law and policy that favors the protection of the very norms that are alleged to have been violated in these cases.

III. THE DISTRICT COURT MISREADS *BOYLE* AND CREATES, RATHER THAN AVOIDS, A SIGNIFICANT CONFLICT WITH "UNIQUELY FEDERAL INTERESTS"

Boyle teaches that the government contractor defense should be available to preempt state law causes of action that would conflict with or frustrate federal policies. 487 U.S. at 507-08. Here, however, there is no legitimate federal interest in immunizing government contractors who engage in torture and other abuses from civil liability. To the contrary, established federal policy counsels in favor of *withholding* the defense in these cases. This Court should therefore hold, as did the court in *In re Agent Orange Product Liability Litigation*, 373 F. Supp. 2d 7, 18 (E.D.N.Y. 2005), that "the government contractor defense does not apply to violations of human rights, norms of international law and related theories."

A. The Rule Created Below Serves No Legitimate Federal Interest

In *Boyle*, the Supreme Court sought to protect the government from the higher costs that would be passed on to it if government contractor's faced liability for their torts. 487 U.S. at 511-12. There is no analogous, legitimate federal interest served by the extension of the government contractor defense to the

present case, where the alleged atrocities constitute manifestly unlawful conduct in which the military itself would not be entitled to engage with impunity.

In *Boyle*, the government contractor defense developed in response to a products liability claim arising from the malfunction of equipment manufactured to government specifications, where the uniquely federal interest at stake was "the procurement of equipment by the United States." 487 U.S. at 507. The notion that a products liability defense would somehow control a case involving acts of torture – *i.e.*, intentional torts – is, to say the least, peculiar. At any rate, the Supreme Court in *Boyle* looked to the "discretionary function" exception to the FTCA to identify that federal interest. *Id.* at 501. To maintain the government's immunity from suits arising out of discretionary decisions such as the specifications of military hardware, the rule protects contractors whose products conform to specifications commanded by the government. As a result, the government contractor defense is analogous to the "superior orders" defense, which in some circumstances excuses tortious acts commanded by higher authority.

But that analogy demonstrates the illogic of extending *Boyle* to the facts of *Ibrahim* and *Saleh*, because neither the military nor its contractors can *ever* lawfully exercise discretion or command to engage in acts of torture or other gross human rights violations. Both international law and U.S. law, *see* 18 U.S.C. § 2340A, 18 U.S.C. § 2441, make clear that torture and similar abuses are *never*

acceptable, without exception. The "superior orders" defense is unavailable where the "superior orders" are manifestly unlawful,[25] which is necessarily the case when such orders would require or facilitate a clear violation of international human rights law:

> The government contractor defense is essentially based on the concept that the government told me to do it, and knew as much or more than I did about possible harms, so I can stand behind the government (which cannot be sued because of its immunity). It is designed in part to save the government money in its procurement costs . . . . [T]his defensive notion has been rejected [at Nuremburg and in other post-World War II criminal trials]. It should not be recognized, as the law now stands, by courts protecting civilians and land from depredations contrary to international law.

In re Agent Orange, 373 F. Supp. 2d at 91.

The absurdity of considering whether the government – and its contractors – can lawfully exercise their discretion to engage in or authorize torture may explain why the court below instead looked to the FTCA's "combatant

---

[25] *See United States v. Ohlendorf* (the Einsatzgruppen Case), IV Trials of War Criminals 1, 470-73, 483-86; *The Llandovery Castle Case*, Supreme Court at Leipzig (1921), *reprinted in* 16 Am. J. Int'l L. 708, 721-22 (1922); *Attorney General v. Eichmann*, 45 Pesakim Mahoziim 3 (Jerusalem Dist. Ct. 1965), *reprinted in* 36 I.L.R. 18, 256 (1968); *The Zyklon B Case (Trial of Bruno Tesh and Two Others)*, *reported in* 1 U.N. War Crimes Commission, Law Reports of the Trials of War Criminals 93 (1947). *See also* Rome Statute, *supra* note 14, art. 33(1) (superior orders defense available only where order "not manifestly unlawful"); U.S. Report to CAT (2006), *supra* note 21, ¶ 6 ("No circumstance whatsoever, including . . . an order from a superior officer or public authority, may be invoked as a justification for or defense to committing torture.").

activities" exception for the purpose of identifying a preemptive federal interest. Relying on *Koohi v. United States*, 976 F.2d 1328 (9th Cir. 1992), and *Johnson v. United States*, 170 F.2d 767 (9th Cir. 1948), for the proposition that the "combatant activities" exception is intended to prevent private litigants from interfering with the decisions of military commanders in the field,[26] the district court concluded that the relevant federal interest is preventing state law from "interfer[ing] with an officer's authority, pursuant to the military chain of command, to give legally binding orders to his subordinates." *Ibrahim II*, 556 F. Supp. 2d at 5. But the court reached that conclusion without any consideration of the fact that some wartime conduct, such as torture or cruel, inhuman or degrading treatment – whether or not undertaken "in direct connection with actual hostilities," *Koohi*, 976 F.2d at 1333 n.5 – cannot *ever* constitute a "legally binding order." To compare the wanton and intentional mistreatment of prisoners and detainees with the inevitable casualties attendant to combat on the battlefield is both misleading and irresponsible. Just as no act of governmental "discretion" can justify torture, no military order – or

[26] Several courts have criticized this conclusion. *See, e.g.*, *McMahon v. Presidential Airways, Inc.*, 460 F. Supp. 2d 1315, 1330, *aff'd*, 502 F.3d 1331 (11th Cir. 2007) ("There is no express authority for judicially intermixing the government contractor defense and the combatant activities exception" and "this Court declines to endorse [] a defense for private contractors based solely on the fact that Defendants were operating in a combat zone."); *Carmichael v. KBR*, 450 F. Supp. 2d 1373, 1379 (N.D. Ga. 2006) (referring to the discussion of *Boyle* preemption in *Koohi* as "conclusory, not analytical").

delegation of responsibility – can provide a defense to the wrongdoing alleged here.

B. The Rule Created Below Undermines Important Federal Interests and Policy

The application of the government contractor defense here would undermine several other federal policies that the district court failed to consider.

First, the United States has a strong interest in making real its professed commitment to the international norm against torture of detainees by preserving the right to obtain civil redress against private contractors. All indications are that Congress would intend a civil tort remedy to be available. For torture conducted under the aegis of a *foreign power*, Congress has afforded such a remedy in the Torture Victims Protection Act, 28 U.S.C. § 1350. This statutory remedy is not available to the present plaintiffs as against Titan, however, because Titan did not act under authority of a foreign power. Moreover, there is no evidence that the design of the TVPA was intended somehow to immunize contractors of the U.S. government such as Titan from the torts of their employees. Thus the result is not to immunize such private contractors from tort claims, but to leave unaffected their common law tort obligations which can and should be enforced.

Furthermore, denying a tort remedy to these plaintiffs by extending the government contractor defense here would perpetuate a pernicious gap in accountability. Unlike certain military personnel, none of the contractors at Abu Ghraib has been criminally prosecuted. Immunizing the government's contractors for the acts alleged here would create the appearance that the United States condones or tolerates "torture by proxy" – the commission of atrocities by private actors for whose conduct the government need not answer. The problem is not a small one, as there may be as many contractors as soldiers in Iraq.[27]

Withholding a remedy from these plaintiffs also undermines the basic rationales of the tort system: deterrence and compensation. *See, e.g., Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 306-07 (1996). Tort remedies customarily function to allocate the cost of preventing injurious conduct to the most efficient cost-avoider. *See Horn v. Duke Homes*, 755 F.2d 599, 604-05 (7th Cir. 1985). The U.S. Army's own investigation into the Abu Ghraib atrocities concluded that many contractors were untrained, that "little, if any, training on Geneva Conventions was presented to contractor employees," and that there was widespread confusion "whether contractor personnel were 'supervising'

---

[27] *See, e.g., Hearing Before the U.S. Senate Committee on Homeland Security and Governmental Affairs* (Feb. 27, 2008) (statement of Jack Bell, Deputy Under Secretary of Defense, Dep't of Defense) (estimating 163,500 Department of Defense contractors in Iraq in early 2008).

government personnel or vice versa."[28] If the government contractor defense is found inapplicable to this type of situation, the threat of tort liability for misconduct by the contractors' employees will create stronger incentives for contractors to properly screen, train and manage their employees. As the Department of Defense has stated, "[c]ontractors are in the best position to plan and perform their duties in ways that avoid injuring third parties."[29]

Finally, the Court should consider that the federal government has an interest that went unheeded by the court below: compliance with international norms of civilized behavior, whether expressed in statutes, treaties or in customary international law. The appearance that the government's own contractors are being given a free pass for serious acts of brutality can only deprive the United States of any moral suasion in its ongoing struggle to achieve greater worldwide observance of these norms. It will also place into peril American citizens who may become captives of a foreign power and for whom the United States will demand treatment no worse than what it affords to others.

---

[28] LTG Anthony R. Jones & MG George R. Fay, Army Regulation 15-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade 50-51 (Aug. 23, 2004), *available at* http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/dod/fay82504rpt.pdf (last visited Sept. 8, 2008).

[29] 73 Fed. Reg. 16764, 16768 (Mar. 31, 2008).

CONCLUSION

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

Respectfully submitted,

PATTERSON BELKNAP WEBB & TYLER LLP

By: _____

Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6469 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point Times New Roman.

(s)_____

Attorney for: Amici

Dated: Sept. 10, 2008

Certificate of Counsel Pursuant to Circuit Rule 29(d)

During the preparation of the foregoing brief submitted on behalf of *amici* International Human Rights Organizations and Experts, we became aware that other groups and individuals were also interested in submitting amicus briefs in connection with this appeal. We endeavored to combine issues, avoid duplication and minimize the number of briefs by requesting potential amici having common expertise and interests to file a joint brief. The appeal, however, raises distinct, complex issues and several potential amici advised us that they did not think it appropriate to join in briefs that address issues beyond their expertise or institutional mission. As a result, we are aware that leave will be sought for the filing of additional amicus briefs to address issues beyond those particular to the interests of the International Human Rights Organizations and Experts who join this brief.

(s) _____

Attorney for: Amici

Dated: Sept. 10, 2008

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
:ss.:
COUNTY OF NEW YORK)

IAN STERN, being duly sworn, deposes and says:

1. I am over 18 years of age, not a party to this action, and am associated with the law firm of Patterson Belknap Webb & Tyler LLP, located at 1133 Avenue of the Americas, New York, New York 10036.

2. On September 10, 2008, I served the foregoing BRIEF OF AMICI INTERNATIONAL HUMAN RIGHTS ORGANIZATIONS AND EXPERTS IN SUPPORT OF PLAINTIFFS-APPELLANTS upon the following attorneys for the parties herein, directed to them at the addresses below:

By Federal Express:

Susan L. Burke
BURKE O'NEIL LLC
4112 Station Street
Philadelphia, PA 19127
(215) 487-6596

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

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

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

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

F. Greg Bowman
WILLIAMS & CONNOLLY LLP
725 12th Street, N.W.
Washington, DC 20005
phone: 202-434-5753

John O'Connor
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, NW
Washington DC 20036
TEL: 202.429.8095

IAN STERN

Sworn to before me this 10th
day of September, 2008

Notary Public

MATTHEW M. FINNEGAN
Notary Public, State of New York
No. 01FI5080222
Qualified in New York County
Commission Expires June 16, 2011