IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
GREENBELT DIVISION

WISSAM ABDULLATEFF SA'EED AL-QURAISHI, et al., **Plaintiffs,** **v.** **ADEL NAKHLA, et al.,** **Defendants.**	**Civil Action No. 8:08-cv-01696-PJM**

PLAINTIFFS' OPPOSITION TO L-3'S MOTION TO DISMISS

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PLAINTIFFS' OPPOSITION TO L-3'S MOTION TO DISMISS

The Fourth Circuit held the prison abuse at Abu Ghraib "stunned the U.S. military, public officials in general, and the public at large." *CACI Premier Technology, Inc. v. Rhodes*, 536 F.3d 280, 285 -286 (4th Cir. 2008). The Court, relying on extensive official military investigations, described the torture of prisoners as "sadistic, blatant, and wanton criminal abuses." *Id*. 297. These "shameful events" were perpetrated by a "group of morally corrupt soldiers and civilians," "violated U.S. criminal law" and were "inhumane or coercive without lawful justification." *Id.* at 286.

L-3 employees, including Adel Nakhla, were part of this group of morally corrupt persons, which is properly referred to as a "conspiracy." *See* BLACKS' LAW DICTIONARY 305 (7th ed. 1999). Yet L-3 claims it is entitled to evade any judicial accountability in American courts for participating in this conspiracy. Equating itself with the sovereign, L-3 casts a wide net of legal doctrines – including some wholly irrelevant such as the Takings Clause – seeking to evade civil liability for allowing its employees to torture innocent human beings. Internal analytical consistency falls by the wayside, as L-3 argues both that it is entitled to sovereign immunity because it was simply performing the "function" (torture) delegated by the military (*L-3 Mem., Section II*) and that it engaged

in torture in its private capacity for the purpose of analyzing whether the victims' Alien Tort Statute ("ATS") claims state a cause of action. (*L-3 Mem., Section III)*.

L-3's admissions compel denial of its motion. L-3 admits: (1) "torture is both illegal and wrong" (*L-3 Mem. at 24*); and (2) "one can be prosecuted for conspiring with an otherwise immune person" (*L-3 Mem. at 23*). Torture is absolutely prohibited. *See* 10 U.S.C. § 801 ("the Constitution, laws, and treaties of the United States and the applicable guidance and regulations of the United States Government prohibit the torture or cruel, inhuman, or degrading treatment of foreign prisoners held in custody by the United States"); *accord* 10 U.S.C. § 801 (2006) ("the Constitution, laws, and treaties of the United States and the applicable guidance and regulations of the United States Government prohibit the torture or cruel, inhuman, or degrading treatment of foreign prisoners held in custody by the United States"); 10 U.S.C. § 801 (2006) ("the Constitution, laws, and treaties of the United States and the applicable guidance and regulations of the United States Government prohibit the torture or cruel, inhuman, or degrading treatment of foreign prisoners held in custody by the United States"); 18 U.S.C. §§ 2441 (2006), 2340A (2001); 22 U.S.C. § 2152(1999); 28 U.S.C. § 1350 (1992) (effective June 25, 1948); 42 U.S.C. § 2000dd (2006); 10 U.S.C. § 950v (2006); 32 C.F.R. § 116; 28 C.F.R. § 0.72. There is no legal doctrine that immunizes a private for-profit corporation from liability when it conspired with others and illegally subjected defenseless prisoners to beatings, rapes, electric shocks, dog attacks, extended hangings from cell bars, and mock executions. *See* SAC at ¶¶ 9-452.

The federal judiciary in the United States is equipped and able to handle the resolution of such claims, which are similar to police brutality claims. No statutory or

federal common law immunity doctrine protects those who "crossed the line from official duty into illicit brutality." *Griggs v. WMATA,* 232 F.3d 917, 921 (D.C. Cir. 2000)(affirming district court's holding that a transit police officer who ordered a police dog to attack a suspect was not entitled to absolute immunity); *Medina v. United States*, 259 F.3d 220, 225 (4th Cir. 2001) ("Federal officials do not possess discretion to violate constitutional rights or federal statutes.")

STATEMENT OF FACTS

On April 9, 2003, the United States military overthrew the Iraqi government led by Saddam Hussein. At present, the United States is not at war with Iraq. The United States military forces in Iraq are subjected to hostile attacks by Iraqis and others who are called "insurgents."

The plaintiffs ("victims" or "torture victims") are Iraqis. *See* Second Amended Complaint ("SAC") at ¶ 4. Each of the victims was an innocent person who was mistakenly detained, and later released without being charged with any crime. SAC at ¶ 46, 56, 68, 72, 76, 83, 88, 94, 98, 102, 106, 110, 114, 120, 125, 131, 144, 151, 156, 164, 172, 179,183, 187, 191, 195, 199, 203, 207, 211, 215, 219, 223, 227, 231, 235, 239, 243, 247, 251, 255, 259, 263, 270, 277, 282, 289, 293, 300, 306, 310, 316, 321, 327, 335, 342, 347, 353, 360, 364, 371, 377, 383, 387, 391, 396, 400, 409, 417 & 422.

The SAC describes how each victim was tortured. *See, e.g.,* SAC at ¶¶ 11-20 (Al-Quraishi arrested, slapped, beaten, hung on a pole, subjected to electric shocks and mock executions, stripped naked, had cold water poured on him, forced onto a naked pyramid with other detainees, forcibly shaved, and interrogated for seven days); SAC at ¶¶ 23-45 (Al-Janabi slammed, dragged, forced into a wooden crate, had fingers pressed into his

eyes, subjected to mock execution, threatened with injury from helicopters, tanks and dogs, chained in painful positions in his cell, threatened with rape, dragged by his penis, and deprived of food and sleep); SAC at ¶¶ 48-55 (Al-Ogaidi handcuffed, hung from bars of his cell, forced to stay awake for days, and threatened with death); SAC at ¶¶ 59-67 (Al-Taee beaten, threatened with death, suffocated, deprived of food and sleep, forced to consume so much water that he vomited, placed in stress positions for extended periods of time, and had a plastic ring tied around his penis and tightened); SAC at ¶¶ 69-72 (Al-Niamey beaten, kicked in the face, kept naked, had cold water poured on him, and had his head, chest and legs stepped on.); (Dhahir beaten and threatened with unleashed dogs.); SAC at ¶¶ 118-120 (AI-Hamadani strangled, beaten and kicked); SAC at ¶¶ 124-128 (Dirweesh beaten, kept in a black coffin, dragged across the ground while naked, and had urine and feces thrown on him); SAC at ¶¶ 132-133 (Al Mashhadani beaten, kept naked in his cell); and SAC at ¶¶ 137-140 (Al-Saidi beaten, threatened with dogs and kept naked).

There is ample evidence that this torture was caused by L-3 and its co-conspirators. The SAC alleges L-3 employees admitted, at times under oath, that they inflicted severe bodily harms on the detainees. They beat them, kept them in stress positions until they collapsed, made them to do push-ups until they collapsed, kept them awake for inhumane periods of time, choked them, and exposed to extreme temperatures. SAC ¶ 427.

The military's investigations, including the report issued by General Taguba, concluded that L-3 employees conspired with Charles Graner and other soldiers to torture detainees. The military reports identify by name L-3 employees Adel Nakhla, John

Israel, Etaf Mheisen, and an L-3 employee known as "Iraqi Mike." SAC ¶ 426. The military investigations also reported an L-3 employee tried to ply a detainee's teeth out of his head, and a different L-3 employee almost killed a detainee until stopped by a Special Forces official. SAC ¶ 426.

L-3 management was well aware of L-3 employees torturing detainees. SAC ¶¶ 428-37. L-3 management hid what it knew from the United States military personnel who were not part of the conspiracy to torture detainees. SAC ¶ 433. L-3 discouraged its employees from reporting the abuse. SAC at ¶ 434. L-3 tried to cover up its role in torturing prisoners by destroying documents, videos and photographs, hiding prisoners who were being tortured from the Red Cross, and misleading military officials who were not part of the conspiracy. SAC ¶ 445.

ARGUMENT

There is no reason to dismiss this lawsuit. As explained below in Section I, this Court has jurisdiction to hear tort claims premised on illegal conduct by L-3. L-3's arguments seeking dismissal based on immunity and political question doctrines are infirm. Supreme Court and Fourth Circuit jurisprudence compels denial. As explained below in Section II, the torture victims state valid claims under the Alien Tort Statute. Finally, as explained below in Section III, the victims also state valid common law claims. This Court should deny L-3's motion seeking to be free of any form of accountability for its egregious misconduct.

I. THIS COURT CAN HEAR THE TORTURE VICTIMS' CLAIMS.

Slamming shut the courthouse doors to victims of corporate torturers – at this early juncture without the benefit of discovery[1] – would be a radical result not supported by the existing decisional law of the Supreme Court or this Circuit. The Supreme Court noted in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004), "for 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 Supreme Court also held in *Boumediene v. Bush,* 128 S.Ct. 2229 (2008), that not even the acts of the President of the United States may be shielded from judicial scrutiny when suspected enemy combatants assert that they are being detained without due process by the government of the United States. Yet L-3, a for-profit corporation that breached the laws of the United States, argues that this action brought by Iraqis already found by the military to be innocents mistakenly detained should be dismissed. As explained below, L-3 cannot evade accountability.

A. L-3 Is Not Being Sued for Arresting and Detaining the Victims; It is Being Sued for Torturing Them.

L-3 wholly ignores the litany of human suffering set forth in the SAC, and instead creates the fiction that the victims are seeking (1) redress for having been arrested and detained[2] and (2) declarations of innocence from the United States military.[3] ***First,*** the

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[1] *McMahon v. Presidential Airways, Inc.,* 502 F.3d 1331, 1359-62 (11th Cir. 2007) (inappropriate to dismiss a case before discovery on the mere chance that a political question may eventually present itself).

[2] *See L-3 Mem. at 19,* "The Complaint challenges the justification for Plaintiffs' capture and detention by the U.S. military, the interrogation methods used to gather intelligence from the detainees in Iraq, and the military's methods of supervising and

This footnote continues on the next page. . .

victims are not seeking compensation for being mistakenly detained by the United States military. While the erroneous detentions caused great pain and suffering for the detainees and their families, the victims are not seeking redress for those mistakes.[4] L-3 calls the victims' lawsuit a challenge to "conditions of confinement," *L-3 Mem. at 10,* and argues it calls for judicial oversight of day-to-day military decision making. This is wrong. The victims want compensation from L-3 because L-3 lets its employees join the group of thugs (the conspirators) that inflicted unconscionable physical and mental pain summarized in the Statement of Facts. SAC ¶¶ 9-452.

Such conduct was not official United States military action. Torture is against the law. *See* 10 U.S.C. § 801 (2006) ("the Constitution, laws, and treaties of the United States and the applicable guidance and regulations of the United States Government prohibit the torture or cruel, inhuman, or degrading treatment of foreign prisoners held in

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This footnote continued from preceding page.

administering its battlefield detention facilities." *See also id.*, "Plaintiffs' claims arise from their capture and detention by the U.S. military in a foreign war zone; their adjudication would require a wholly unprecedented injection of the judiciary into wartime military operations and operation conduct against the local population, in particular the conditions of confinement and interrogation for intelligence gathering." *See also L-3 Mem. at 17*, "[t]he allegations in this case, which involved injuries arising during capture and detention by the U.S. military, clearly implicate such important governmental functions: the arrest and detention activities.. .

[3] *See L-3 Mem. at* 24, The determination of the military whether to detain someone abroad in the course of the occupation, and whether they were "innocent" or of "no intelligence value" is exactly the kind of determination that is committed solely to the political branch."

[4] As the Honorable James R. Schlesinger found and published in the *Independent Panel To Review DoD Detention Operations*, (August 24, 2004), at p. 29, the military, lacking sufficient interpreters, "reverted to rounding up any and all suspicious-looking persons – all too often including women and children. The flood of incoming detainees contrasted sharply with the trickle of released individuals."

custody by the United States"); 18 U.S.C. §§ 2441 (2006), 2340A (2001); 22 U.S.C. § 2152 (1999); 28 U.S.C. § 1350 (1992) (effective June 25, 1948); 42 U.S.C. § 2000dd (2006); 10 U.S.C. § 950v (2006); 32 C.F.R. § 116; 28 C.F.R. § 0.72. The sad fact that certain high-level administration officials encouraged, or contributed to, such misconduct does not eliminate the illegality or wrongness of the torture. *See United States Senate Armed Services Committee Inquiry into the Treatment of Detainees in U.S. Custody* (Executive Summary) (released Dec. 11, 2008)("Senate Report"). As L-3 bluntly admitted, torture is illegal and wrong. *L-3 Mem. at 24*.

Second, the victims are not seeking determinations of innocence in this lawsuit; the United States military has already issued such determinations. The victims merely plead as fact those military determinations of innocence because the victims view such facts as relevant to damages.

L-3 creates this hypothetical lawsuit as a straw man, believing this Court could be misled into viewing a lawsuit against a publicly-traded American corporation engaged in for-profit enterprise for torturing people should be governed by the same law as a lawsuit against the military for having negligently and mistakenly arrested and detained innocent persons. The lawsuit filed by the victims does not challenge the military's negligence; it challenges L-3's complicity in torture.

B. The Victims Have Standing.

L-3's standing argument wrongly assumes a fact not in evidence: namely, that the victims are "alien enemies resident abroad." Reasoning from this falsehood, L-3 argues the torture victims cannot enter the courthouse. *See L-3 Mem. at 10.*

No statute or decisional law supports L-3's argument that the victims cannot come into this Court merely because the military mistakenly detained them, and then let them

go without pressing any charges. The Supreme Court rejected that very same argument made by the government in *Rasul v. Bush*, 542 U.S. 466 (2004). The government in *Rasul*, as L-3 does here (*L-3 Mem.* at 10-11), unsuccessfully relied on *Johnson v. Eisentrager*, 339 U.S. 763 (1950), and argued that ATS did not apply to aliens currently being detained by the United States. The Supreme Court ruled even ***current*** detention did not deprive an alien of standing. *See Rasul,* 542 U.S. at 484-485 ("nothing in *Eisentrager* or in any of our other cases categorically excludes aliens detained in military custody outside the United States from the "'privilege of litigation'" in U. S. courts. […] The fact that petitioners in these cases are being held in military custody is immaterial to the question of the District Court's jurisdiction over their nonhabeas statutory claims").

The Supreme Court warned in *Boumediene v. Bush*, 128 S. Ct. 2229, 2259-2260 (2008), that labels such as "enemy aliens" should not be prematurely applied to individuals who – unlike the German nationals in *Eisentrager* – contest the label. The Supreme Court decisions relating to standing of detainees would require this Court to reject L-3's standing argument even if the torture victims were still being detained. But here, the military determined these victims were innocents, not insurgents. As L-3 itself concedes, deference is due the military's findings on such matters. *L-3 Mem. at 17.*[5]

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[5] The Court must consider all well-pled allegations in a complaint as true and must construe all factual allegations in the light most favorable to the plaintiff. *See Albright v. Oliver,* 510 U.S. 266, 268, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994); *Harrison v. Westinghouse Savannah River Co.,* 176 F.3d 776, 783 (4th Cir.1999).

C. L-3 Is Not Entitled To Derivative Immunity Merely Because It Conspired with Military Officials.

L-3 wrongly assumes that co-conspiring soldiers are immune from civil damage suits, as is discussed below in Subsection D. But the Court need not decide that issue to deny L-3's motion to dismiss. Even if the law were as L-3 describes it, and military co-conspirators were immune from suit, that outcome does not control does not have any bearing on whether L-3, a for-profit, non-governmental entity, has immunity from suit. It is black-letter law, necessarily conceded by L-3 in its Memorandum at page 23, that a conspirator does not enjoy his co-conspirators' immunities. *See Richardson v. McKnight,* 521 U.S. 399, 412 (1997); *Wyatt v. Cole,* 504 U.S. 158, 168-69 (1992). *Accord Ibrahim v. Titan Corp.,* 391 F. Supp. 2d 10, 17 (D.D.C. 2005) (L-3 not immune from civil action alleging conspiracy to torture). L-3 cannot claim immunity merely because it conspired with potentially immune parties. L-3 is a for-profit corporation that has no immunity from civil suits.

D. L-3's Military Co-Conspirators Are Not Immune From Suit.

L-3 argues its military co-conspirators are immune from suit, and therefore L-3 must be immune. Even if L-3 was allowed to rely on co-conspirators' immunities (which it is not, see above at Subsection C), L-3 is wrong about the military co-conspirators being immune.

Because torture is illegal, Supreme Court jurisprudence compels the conclusion that L-3's military co-conspirators could be sued for civil damages despite the fact that their wrongful conduct occurred in a military detention facility in Iraq. In *Little v. Barreme,* 6 U.S. (2 Cranch) 170 (1804), the Supreme Court upheld a damages award against a captain who served in the United States Navy during wartime. The Court found

him liable for damages to a ship owner for the illegal seizure of his vessel during wartime despite the fact that he was acting under orders from the President. *Id.* at 179. The Court held that the President's orders authorizing seizure of the ship went beyond his statutory authority, and therefore did not immunize the captain from a lawsuit for civil damages. The Court rejected the argument that the owner's claim should be resolved by "negotiation" with the government rather than a damages action. *Id.*.

In *Mitchell v. Harmony,* 54 U.S. (12 How.) 115 (1851), the Court permitted a soldier to be sued for trespass for wrongfully seizing a citizen's goods while in Mexico during the Mexican War. In *Ford v. Surget,* 97 U.S. 594 (1878), the Court allowed suit against a soldier for trespass and destruction of cattle because the plaintiff alleged that the soldier's actions violated the laws of war. [6]

These Supreme Court decisions permitting damages actions to proceed when a soldier's conduct is unlawful and unauthorized remain good law, and permit the military co-conspirators to be sued in federal court for damages. If such suits were brought, the soldiers conspiring with L-3 employees likely would try to invoke immunity under the federal statute known as the Westfall Act, 28 U.S.C. § 2679 (1988). But that Act protects only conduct within the scope of employment.

Therefore, the controlling question for soldier immunity becomes whether torture and brutality can be considered a governmental function merely because interrogation is a

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[6] Vietnamese survivors of the My Lai massacre brought suit against the culpable soldiers and officers, albeit thirty-two years after the fact. *Hoan Van Tu et al. v. Major General Koster et al.,* 364 F.3rd 1196 (10th Cir. 2004). Neither the District Court nor the Court of Appeals for the Tenth Circuit barred the suit from proceeding merely because the defendants were military. Rather, the Courts held that the statute of limitations barred the suit.

governmental function. That question has now been answered "no" by the Supreme Court. On December 15, 2008, the Supreme Court vacated *Rasul v. Myers,* 512 F.3d 644, 654 (D.C. Cir. 2008), a decision L-3 relies on to prove military co-conspirators are immune to civil liability. In *Rasul*, the Court of Appeals reasoned, as does L-3 at pages 17-18, that torture should be considered within the scope of employment for these governmental officials because torture arose from the "function" of interrogation. Based on that reasoning, the Court of Appeals dismissed the claims. The Supreme Court granted *certiorari* and vacated the ruling. The Supreme Court remanded and directed the Court of Appeals to re-consider its holding in light of *Boumediene v. Bush,* 128 S. Ct. 2229 (2008). *Rasul v. Myers***,** 2008 U.S. LEXIS 9139 (U.S., Dec. 15, 2008) *vacating and remanding* 512 F.3d 644 (D.C. Cir. 2008). [7]

In *Boumediene,* the Supreme Court held that the federal judiciary was empowered to adjudicate habeas claims brought by prisoners held at Guantanamo Bay. The prisoners alleged that President Bush violated their Constitutional due process rights. The Court determined that the Constitution protects persons as well as citizens, and permits foreign nationals litigating in our courts to enforce separation-of-powers principles that ensure judicial review of Executive Branch activity. *Boumediene,* 128 S. Ct. at 2246. This ruling, combined with the fact that the Court vacated the *Rasul* ruling that found torture within the scope of a soldier's employment, means that a lawsuit brought by the torture

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[7] L-3 also cites to *In re Iraq and Afghanistan Litig.,* 479 F. Supp. 2d 85 (D.D.C. 2007). *See Ali v. Rumsfeld*, No. 07-5178 (consolidated with 07-5185, 07-5186, 07-5187) (D.C. Cir. Oct. 27, 2008). The Court of Appeals for the District of Columbia ordered that the parties there to file papers on how the action should proceed in light of the Supreme Court's vacation of the *Rasul v. Myers* decision.

victims against military and governmental officials would be permitted to proceed in the federal courts.

In comparable contexts, Westfall Act immunity is routinely denied to government law enforcement employees when they brutalize others. The courts find it serves no public interest to insulate police officers who "crossed the line from official duty into illicit brutality." *Griggs v. WMATA,* 232 F.3d 917, 921 (D.C. Cir. 2000)(affirming district court's holding that a transit police officer who ordered a police dog to attack a suspect was not entitled to absolute immunity). *Accord, Saucedo-Gonzales v. United States,* 2007 WL 2319854 (W.D.Va. 2007) (if correctional officers "utilized a constitutionally excessive amount of force," their actions are not protected discretionary functions"). As the Court of Appeals for the Fourth Circuit has explained, "[f]ederal officials do not possess discretion to violate constitutional rights or federal statutes." *Medina v. United States,* 259 F.3d 220, 225 (4th Cir. 2001); *see also Better Gov't Bureau v. McGraw (In re Allen)*, 119 F.3d 1129 , 1131 (4th Cir. 1997)(government officials acting beyond the scope of authority are not engaged in the duties of public office, and are instead acting outside the scope of any duty of public office, and thus neither the principal rationale for official immunity nor the immunity itself shields them).

E. No Public Interest Would Be Served by Granting Corporate Torturers Immunity.

Granting common law immunity in this Circuit is controlled by an analysis of the public interest served by the immunity. No public interest would be served by allowing L-3 to evade tort liability for its role in what the Fourth Circuit has described as "sadistic, blatant, and wanton criminal abuses" that "violated U.S. criminal law" and "stunned the

U.S. military, public officials in general, and the public at large." *CACI Premier Technology, Inc. v. Rhodes*, 536 F.3d 280, 285 -286 (4th Cir. 2008)

L-3 argues that the public has an interest in protecting military decision-making from intrusion, and that interest requires this Court to dismiss the torture victims' lawsuit against L-3. *See L-3 Mem. at 17-19.* L-3 argues, in essence, that torture is part of the interrogation function, and reflects military discretionary judgments. There are three factors that compel denial of L-3's motion seeking immunity: (1) the body of relevant Supreme Court and Fourth Circuit decisions, (2) the Department of Defense's opposition to immunity; and the (3) the public harm that would result from insulating L-3 from liability for willfully participating in egregious acts such as beatings, hanging, electric shocks, dog attacks, and rape.

1. Supreme Court and Fourth Circuit Decisions

The Supreme Court's vacation of the *Rasul* decision, discussed above, and Fourth Circuit jurisprudence, compels this Court not to grant L-3 immunity. As this Circuit explained in one of the decisions heavily relied upon by L-3, *Mangold v. Analytic Services, Inc*., 77 F.3d 1442 (4th Cir. 1996), absolute immunity "tends to undermine the basic tenet of our legal system that individuals be held accountable for their wrongful conduct…. For these reasons, the common law immunity recognized in *Barr* and *Westfall* is afforded ***only*** to the extent that the public benefits obtained by granting immunity outweigh its costs." 77 F.3d 1442, 1446-47 (4th Cir. 1996) (emphasis added, internal citations omitted.)

L-3 relies on two Fourth Circuit cases to bolster its claim to common law immunity. In *Mangold,* 77 F.3d 1442, the Court confronted the situation in which a military colonel who had been charged with defrauding the United States sued a defense

contractor for slander for statements made to government investigators. The Court, in those circumstances, recognized an absolute immunity that had "two roots": (1) the public interest in identifying and addressing fraud, waste and mismanagement in government, and (2) the common law privilege to testify with absolute immunity in courts of law, before grand juries, and before government investigators. Applied here, the Court's reasoning would yield no immunity for L-3, because it is the wrongdoer corporation who has defrauded the government by failing to live up to its contractual promises to ensure its employees abide by the Geneva Conventions and other laws and regulations prohibiting torture. Now, if an L-3 whistleblower making statements about the torture to military investigators were sued by L-3, that whistleblower might be able to rely on *Mangold* for immunity.

L-3 also relies on *Butters v. Vance*, 225 F. 3d 462 (4th Cir. 2000). There, in order to accord Saudi Arabian government its sovereign right to be free from American laws prohibiting sexual discrimination, the Court of Appeals granted immunity under the Foreign Sovereign Immunities Act ("FSIA") to a contractor serving the Saudi Arabian government. L-3 claims that decision compels immunity here. The results from a FSIA case cannot be applied to immunity in other contexts. *See Pettiford v. City of Greensboro*, 556 F. Supp. 512, 533 (M.D.N.C. 2008). But even if it could, the reasoning of that decision, applied to the facts here, actually yields the opposite result. The *Butters* Court ensured that the Saudi Arabian government was not being indirectly haled into American courts and subjected to American law merely because the Saudi government set up an embassy in the United States and used contractors.

L-3, an American corporation serving the United States, is seeking something far different and far more radical than that sought by the Saudi government in *Butters*. L-3 wants to be immunized from the laws of the United States.[8] Here, neither the United States government nor L-3, an American corporation, is entitled to be insulated from United States law. L-3 is not being haled into Iraqi courts; it is being sued in the United States. L-3 wants to be free to act with impunity in Iraq without being subject to any law whatsoever. Such a result is not in the public interest.

2. Department of Defense Opposition

L-3 admits that "[t]he United States military has used civilian contractors to a greater extent and differently in Iraq than in any previous conflict, including having contractor employees fill jobs previously held solely by military personnel." *L-3 Mem. at 4*. The military itself, well aware of this action, the Eastern District of Virginia action, and the *Saleh* action filed in June 2004, has not sought to intervene. That fact speaks volumes.

The Department of Defense has gone on record opposing absolute immunity for defense contractors. The military has limited tools available to prevent ongoing defense contractors' misconduct. L-3 is outside the military chain of command with its

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[8] L-3 misleads the Court by suggesting that L-3 and its employees are subject to military justice and the military's enforcement of the Uniform Code of Military Justice for the misconduct at issue here. *See L-3 Mem. at 14-15*. That is simply not true for Abu Ghraib torture, as was clearly evidenced by General Taguba's inability to recommend courts martial for Adel Nakhla and the other corporate employees he identified as abusers. Instead, General Taguba referred the matter to the Department of Justice. Subsequent to the Abu Ghraib scandal, Congress made contractors subject to the Uniform Code of Military Justice. See Fiscal Year 1997 National Defense Authorization Act, § 552. Interestingly, the only person to have been court-martialed to date is an L-3 employee.

relationship with the military is governed by contract and regulation.[9] L-3, not the military, is supposed to make sure that its employees are supervised, and are not torturing detainees.

L-3 is not allowed to shift this duty onto the military. *See U.S. Army Regulation 715-9* stating that military contractors must "perform the necessary supervisory and management functions of their employees," because "[c]ontractor employees are not under the direct supervision of military personnel in the chain of command." *U.S. Army Regulation 715-9, Contractors Accompanying the Force (Oct. 29, 1999) ("AR 715-9"), §3-2(f).* The relevant military Field Manual also makes clear that the corporate contractors, not the military chain of command, are exclusively responsible for maintaining discipline among their employees: "It is the contractor who must take ***direct responsibility and action*** for his employee's conduct." *U.S. Army Field Manual 3-100.21, Contractors on the Battlefield (Jan. 2003) ("FM 3-100.21") §4- 45 (emphasis added). See also Joint Publication 4-0, Doctrine for Logistic Support of Joint Operations (April 6, 2000) V-7, V-8.*

L-3 is supposed to report its employees' misconduct to the United States military. Federal procurement regulations require L-3 to inform the United States when its

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[9] Military discipline has no civilian counterpart, and does not apply to the actions of L-3 employees at issue in this case. *See, e.g., Orloff v. Willoughby*, 345 U.S. 83, 94 (1953)(judicial deference only applies to those "lawfully inducted" into the Army); *United States v. Brown*, 348 U.S. 110, 112 (1954); *Parker v. Levy*, 417 U.S. 733, 743 (1974); *Schlesinger v. Councilman*, 420 U.S. 738, 757 (1975)("the military must insist upon a respect for duty and a discipline without counterpart in civilian life."); *Chappell v. Wallace*, 462 U.S. 296, 300 (1983)("no military organization can function without strict discipline and regulation that would be unacceptable in a civilian setting.").

employees violate, or are suspected of violating, the law. *48 C.F.R. §§203.7000-203.7001 (2008).*

Because the military has to rely on L-3 to police its own conduct, the military wants to make sure that L-3 remains subject to the same type of legal tort exposures that have the salutary effect of compelling corporate compliance with the law. To achieve that end, the Department of Defense promulgated regulations in March 2008 voicing unequivocal support for "holding contractors accountable for the negligent or willful actions of their employees, officers, and subcontractors." *Defense Federal Acquisition Regulation Supplement; Contractor Personnel Authorized To Accompany U.S. Armed Forces, 73 Fed. Reg. 16764, 16768 (Mar. 31, 2008)*.

The Department of Defense expressly cautioned against shifting the risks away from corporate wrongdoers onto innocent third parties: "Contractors will still be able to defend themselves when injuries to third parties are caused by the actions or decisions of the Government. ***However, to the extent that contractors are currently seeking to avoid accountability to third parties for their own actions by raising defenses based on the sovereignty of the United States, this rule should not send a signal that would invite courts to shift the risk of loss to innocent third parties***." *Id.* The Department of Defense has spoken clearly that granting absolute immunity to all of these many defense contractors, and shifting the losses to innocent third parties, would not serve the military's interests.

3. Public Harm

The public interest in ensuring that the contractors do not disserve the military by treating the war zone as an "anything goes zone" is paramount. L-3 is not part of the military. It is a for-profit corporation whose employees' malfeasance has caused serious

and long-lasting negative repercussions for the military and this nation. L-3 promised the United States military that it would supervise its employees. Instead, as L-3 management uniformly testified in the *Saleh* litigation, L-3 failed to spend any money to create a supervisory structure or to control its employees. Had L-3 been supervising Adel Nakhla, perhaps he would not have held down a fourteen-year old boy as his co-conspirator sodomized him. Had L-3 been supervising Adel Nakhla, perhaps he would not have been holding Mr. Al-Quraishi down while a co-conspirator poured feces on him. SAC ¶¶ 16-18. Had L-3 fulfilled its contractual supervisory duties, the nation-harming Abu Ghraib tragedy may not have occurred. Denying, not granting, immunity here serves the same public interest noted in *Mangold.*

Granting L-3 immunity would harm the public because it would undermine the military's efforts to ensure that interrogations do not deteriorate into torture sessions. The military itself has always carefully defined interrogation to be limited to obtaining information through lawful means. The controlling Army Field Manual 34.52, September 1992, defines "interrogation" as "the process of questioning a source to obtain the maximum amount of usable information. The goal of any interrogation is to obtain useable and reliable information, in a ***lawful*** manner and in a minimum amount of time, and to satisfy intelligence requirements of any echelon of command."

The military's lawfulness, as well as the black letter of the statutory law that prohibits torture, must be respected, and eliminates L-3's argument that the "function" of interrogation subsumes torture within its boundaries. As explained by the Fourth Circuit in *Baum v. United States*, 986 F.2d 716, 720 (4th Cir. 1993), a party cannot invoke derivative immunity based on a claim it was fulfilling a discretionary government

function if a federal statute, regulation or policy applies and compels particular result. *See also United States v. Gaubert*, 499 U.S. 315, 322 (1991)(quoting *Berkovitz v. United States*, 486 U.S. 531, 536 (1988)), holding that actions are not discretionary "if a 'federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow,' because 'the employee has no rightful option but to adhere to the directive.'" *Accord*, *Perkins v. United States*, 55 F.3d 910, 914 (4th Cir. 1995)("Obviously, failure to perform a *mandatory* function is not a *discretionary* function").

Denying L-3 immunity encourages and incents the type of behavior desired by the public. If L-3 employees were ordered to torture prisoners by military conspirators, those corporate employees and the corporation itself are unlike soldiers who cannot leave Iraq without formal discharge from the military. L-3 and its employees are wholly free to quit and leave Iraq at any time. As Judge Weinstein put it so eloquently, "We are a nation of free men and women habituated to standing up to government when it exceeds its authority…. Under the circumstances of the present case, necessity is no defense. ***If defendants were ordered to do an act illegal under international law they could have refused to do so, if necessary by abandoning their businesses.*** *In Re "Agent Orange" Product Liability Action*, 373 F.Supp.2d 7, 99 (E.D.N.Y. 2005). The public interest would be harmed by granting L-3's motion seeking an accountability-free zone.

F. The Torture Victims' Claims Do Not Raise Political Questions.

Next, L-3 argues that the victims' lawsuit raises a non-justiciable political question. L-3 argues that the lawsuit is essentially one against military officials, and the "claims are not converted into cognizable ones by moving the government official from the category of "defendant" to "co-conspirator." *Mem. at 24*. L-3 reasons, "One cannot prosecute claims against L-3 based on acts of the military without invading the province

of the military's Iraq detention operations." Based on these false characterizations of the victims' lawsuit, L-3 argues that the lawsuit raises a political question that must be held to be non-justiciable under the Fourth Circuit's decision in *Tiffany* v. *United States*, 931 F.2d 271 (4th Cir. 1991). *L-3 Mem. at 19-26.* This is simply wrong. The Fourth Circuit's *Tiffany* decision and Supreme Court political question jurisprudence compel this Court to deny L-3's motion to dismiss. The political question doctrine was intended to protect against judicial overreaching into executive and legislative functions. *See Marbury v. Madison,* 1 Cranch 137, 164-166, 2 L.Ed. 60 (1803); *Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo of Petroleum Laden Aboard Tanker,* 577 F.2d 1196, 1203 (5th Cir. 1978) ("[T]he genesis of the political question is the constitutional separation and disbursement of powers among the branches of government."). As the Supreme Court warned in the seminal case, *Baker v. Carr,* 369 U.S. 186, 211 (1962), "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."

The Supreme Court has repeatedly ruled that not all disputes that touch on the President's war powers and combat raise political questions. For example, the Supreme Court reversed a presidential directive ordering the seizure of steel mills to protect the production of armaments for the Korean War, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), and reviewed on the merits a presidential order resolving the Iranian hostage crisis, *Dames & Moore v. Regan*, 453 U.S. 654 (1981). The Supreme Court ruled in *Hamdi v. Rumsfeld,* 542 U.S. 507 (2004), and again in *Boumediene v. Bush*, 128 S.Ct. 2229, 2277 (2008), that the federal courts are obliged to hear disputes arising from the military's operation of detention facilities. Although detaining persons

clearly constitutes an "important incident[] of war," *Hamdi,* 542 U.S. at 518 (2004), claims arising from such detentions are well within the traditional competencies of the judiciary, and are not textually committed to the Executive or Legislative branches.

In *Baker v. Carr,* 369 U.S. 186, 217 (1962), the Supreme Court set out six tests to determine if a lawsuit raises a political question. The Court cautioned the separation-of-powers principles require courts to avoid decision "of 'political questions,' not . . . political cases." *Id*. L-3 argues that this lawsuit passes two of these six tests: (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department and (2) lack of judicially discoverable and manageable standards for resolving the dispute.

1. Textually demonstrable constitutional commitment

On the first test, L-3 argues that the Court of Appeals for the Fourth Circuit's decision in *Tiffany* v. *United States*, 931 F.2d 271 (4th Cir. 1991), controls here and compels a different result than that reached by the District Court (J. Robertson) in *Ibrahim* and *Saleh*. There, the District Court (J. Robertson) summarily rejected the same argument made here, stating "[t]he Constitution's allocation of war powers to the President and Congress does not exclude the courts from every dispute that can arguably be connected to ''combat,'' as the Supreme Court's rejection of the government's separation of powers argument in *Hamdi v. Rumsfeld* makes clear." *Ibrahim v. Titan Corp.,* 391 F. Supp. 2d 10, 15 (D.D.C. 2008) (internal citation omitted).

In *Tiffany*, the lawsuit was against the United States government itself, not against a for-profit corporation. The Court was asked to determine whether government employees could be sued for the engaging in the very conduct for which they were employed – tracking aircraft and deploying fighter planes in order to defend American air

space. 931 F.2d at 273-75. These government employees were operating the national air defense system, and mistakenly collided with a plane.

There was no allegation that the government employees had acted unlawfully or maliciously in doing so. Rather, the lawsuit alleged negligence. The Fourth Court held that the judiciary should not intrude on the exercise of professional judgments of the military personnel who were making split-second decisions on whether aircraft invading United States airspace were hostile or not.

L-3 argues that since the torture arose in the context of military interrogations, and interrogations require military judgment, this lawsuit raises a political question. But this is faulty reasoning. The Fourth Circuit expressly cautioned in *Tiffany* against accepting the very argument now being made by L-3. The Court stated that its political question analysis would be wholly different if the plaintiffs were arguing, as the plaintiffs did in *Berkovitz v. United States,* 486 U.S. 531 (1988), "that the government violated any ***federal laws contained either in statutes or in formal published regulations such as those in the Code of Federal Regulations***." The Court went on to state "[t]here can be no doubt that the mandate of a federal statute is ***a far stronger foundation for the creation of an action duty . . .than [an] administrative directive***." *Tiffany,* 931 F.2d at 280 (citations omitted).

The torture victims allege L-3 employees, together with certain military and governmental officials, engaged in a litany of bad acts, including beatings, rape, electric shocks, dog attacks, hangings from bars, and threats of death and rape. *See* Statement of Facts, above, summarizing each victims' torture.

Congress outlawed such conduct. *See* 18 U.S.C. § 2340A (2001), which defines "torture" as "the act of a person who commits, or conspires or attempts to commit, an act specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control ***for the purpose of obtaining information*** or a confession, punishment, intimidation, coercion, or any reason based on discrimination of any kind." (emphasis added.); *see also* 18 U.S.C. § 2441 (d) and (e)(2006). Anyone engaging in torture may be sentenced to 20 years imprisonment. 18 U.S.C. § 2340A(a)(2004).

That L-3 employees and its co-conspirators were supposed to be obtaining information by lawful means from the detainees when they engaged in this egregious conduct does not transform the lawsuit into a political question. The very text of the torture statute assumes as an element of the crime that the misconduct occurred as part of what would otherwise be a lawful effort to obtain information. The law draws a clear line between conduct that may be the subject of military discretion and policy making on the one side, and conduct that had already been deemed illegal. In *Tiffany*, the Fourth Circuit was asked to rule on legal conduct that may have been negligent. Here, the Court is being asked to rule on the amount of damages caused by indisputably illegal conduct.[10]

Tiffany does not compel dismissal. Further, the *Tiffany* decision must be read in accord with the Supreme Court's controlling decisions in *Hamdi v. Rumsfeld* and *Boumediene*. That is, the Supreme Court has repeatedly held that the judicial branch

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[10] Had the *Tiffany* decision barred the victims' claims, the Court of Appeals for the Fourth Circuit would have refused to adjudicate the dispute presented in *CACI Premier Technology, Inc. v. Rhodes,* 536 F.3d 280 (4th Cir. 2008).

should hear challenges arising out of the military's war-time detention operations. It makes no sense for L-3 to argue that this Court, in light of these controlling precedents, is somehow precluded from hearing a challenge to a private party's misconduct towards detainees in those facilities. For that reason alone, this Court must reject L-3's invitation to commit reversible error

Other Courts of Appeal, presented with tort claims arising in Iraq against defense contractors working for the United States military, have found such actions justiciable. For example, in *Lane v. Halliburton*, 529 F.2d 548, 558-560 (11th Cir. 2008), the Court denied defendants' motion to dismiss on political question grounds because the fact that the alleged acts were "set against the backdrop of United State military action in Iraq" does not necessarily implicate any decisions textually committed to the Executive, such as employing the use of force or deploying troops in a foreign land, nor does it constitute a "direct challenge[] to actions taken by a coordinate branch of government."

In *McMahon v. Presidential Airways, Inc.,* 502 F.3d 1331 (11th Cir. 2007), the Eleventh Circuit affirmed the district court's rejection of the political question defense in a case against a military contractor. The district judge had found it particularly compelling that the doctrine had never been applied by an appellate court to the activities of a private party, and saw no reason a traditional tort suit against a private corporation should not be allowed to proceed. *McMahon v. Presidential Airways, Inc.,* 460 F. Supp. 2d 1315, 1323 (M.D. Fla. 2006) ("[C]ases involving traditional tort liability – even if they relate to the military or occur during a time of war – are capable of judicial resolution. The judicial standards required are no different than in ordinary tort actions; it is simply the context that has changed."). The district court also saw significance in the "basic

difference between questioning the military's execution of a mission and questioning the manner in which a contractor carries out its contractual duties." *Id.* (citing *Smith v. Halliburton Co. (Smith I),* No. H-06-0462, 2006 WL 1342823 at *3 (S.D. Tex. 2006).

2. Judicially discoverable and manageable

Although complex in facts, this is a legally straightforward tort action that is clearly judicially discoverable and manageable. Courts have even found judicially discoverable and manageable standards to adjudicate *direct* challenges to *United States* military actions. *See Sterling v. Constantin*, 287 U.S. 378, 401 (1932) (suit brought by owners of oil and gas leasehold interests against military commanders and others).

Although this action is complex, the critical evidence is eyewitness testimony, not documents. To the extent there are documents (most of the torturers did not log or otherwise memorialize their bad acts, although a few did), the military has already collected much of the documentation that will be needed to go forward in this case; and that material has been used to court martial and convict several of L-3's co-conspirators. Notably, the military has *not* sought to classify most of the relevant evidence. *See American Civil Liberties Union v. Dep't. of Defense*, 543 F.3d 59, 66 n.7 (2d Cir. 2008). Many of the documents reflecting and detailing the torture are already available. There are scores of American and Iraqis eyewitnesses to the conduct described in the Second Amended Complaint. Many of the eyewitnesses are in the United States and available to testify.[11]

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[11] It is also premature to raise this argument. See *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1513 ("It is premature to conclude that essential evidence is

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The District Court (J. Robertson) in the District of Columbia allowed a similar damages action to go forward without any difficulties. He bifurcated discovery into two phases, and limited the first phase to the "government contractor defense", a fact-based affirmative defense. There were no difficulties with discovery. The parties obtained document and testamentary discovery from the military without any difficulties. There is no reason to expect anything different here.

3. Other Four *Baker* Tests

The other four *Baker* factors (not briefed by L-3) are not present here. Those four factors are: (1) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; (2) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; (3) an unusual need for unquestioning adherence to a political decision already made; and (4) the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

First, no initial policy determination is needed, as there is already a clearly-defined body of law prohibiting torture. *See, e.g., Presbyterian Church of Sudan v. Talisman,* 244 F. Supp. 2d 289, 347 (S.D.N.Y. 2003) (no need to make "initial policy decisions of the kind normally reserved for nonjudicial discretion.").

Second, hearing tort suits against private parties is a function constitutionally committed to the judicial branch, and fulfilling that function is not disrespectful to the

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undiscoverable merely on the basis of the complaint and related declarations"); *Ibrahim*, 391 F. Supp. 2d at 16 (dismissing such "[m]anageability problems" as premature).

coordinate branches of government. Adjudication of this tort action is well within the subject matter jurisdiction of this Court. *See,e.g., Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione*, 937 F.2d 44, 49 (2d Cir. 1991) (tort issues are "constitutionally committed" to the judiciary). Such claims do not present non-justiciable political questions simply because they have foreign policy implications. *See, e.g.*, *Flynn v. Shultz*, 748 F.2d 1186, 1191 (7th Cir. 1984), *cert. denied*, 474 U.S. 830 (1985) ("[a]n area concerning foreign affairs that has been uniformly found appropriate for judicial review is the protection of individual or constitutional rights from government action."); *Koohi v. United States*, 976 F.2d 1328, 1332 (9th Cir. 1992) ("damage actions are particularly judicially manageable" and "are particularly nonintrusive.")

Third, there is no need here for adherence to a political decision already made. The military itself already court-martialed L-3's co-conspirators, with varying results. Independent judicial examinations of the culpability of various known conspirators are the hallmark of the United States' judicial integrity, and are not in any way undermining any political decision that requires adherence. Indeed the Executive Branch itself has claimed such adjudications are necessary and appropriate. See *Kadic v. Karadzic,* 70 F.3d 232, 249 (2d Cir. 1995).

Fourth, judicial resolution of L-3's liability for participating in the conspiracy would not contradict any prior decisions taken by other governmental branches. To date, the Executive and Legislative Branches have expressed their views. The military issued investigative reports finding L-3 employees complicit in the abuse. The Legislative Branch, speaking through the Senate Armed Services Committee, described the existence of the conspiracy to torture detainees. But even if a trial in this matter contradicts these

findings by resulting in a "not guilty" verdict for L-3, such contradictions are not the type that would "seriously interfere with important governmental interests." *Kadic,* 70 F.3d at 249. Rather, that outcome, although contradictory, would be consistent with the independent adjudicatory role of the federal courts.

II. THE VICTIMS ASSERT VALID ATS CLAIMS.

L-3, claiming the victims fail to state valid claims under the Alien Tort Statute, makes three arguments: ***First***, L-3 argues that the victims cannot state a claim under ATS unless they are challenging "official" torture by the United States, but that if they are challenging "official" torture by the United States their claims fail on immunity grounds. L-3 advocates this "heads you lose, tails you lose" approach because it served L-3 well in the District of Columbia *Saleh* litigation, where the District Court (J. Robertson) followed a dated but arguably valid District of Columbia Court of Appeals decision called *Sanchez-Espinoza.*[12] As explained below in Subsection B, L3's argument fails to persuade when considered in the light of the subsequent and controlling Supreme Court decision in *Sosa,* which wholly ignored *Sanchez-Espinoza* and instead cited with approval ATS jurisprudence that supports the victims' legal position here.

Second, L-3 argues that corporations cannot be sued under ATS. This argument also fails to persuade. The decisional law in the United States and abroad makes it crystal clear that victims of war crimes may sue corporate entities.

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[12] Whether that precedent remains good law, or has been overruled by the Supreme Court's *Sosa* decision, is the subject of the appeal currently pending before the Court of Appeals for the District of Columbia. Oral argument is scheduled for February 10, 2009.

Third, L-3 tries to amend the ATS to include an unspoken exhaustion of remedies requirement. No such statutory requirement exists. Nor should common law barriers to justice be concocted here, where there is no alternative judicial or administrative forum in which victims of corporate torture are permitted to file claims.

Fourth, L-3 argues that the international body of law prohibiting cruel, inhuman and degrading treatment does not rise to the *Sosa*-required level. The victims maintain that this body of law satisfies the *Sosa* requirements.

A. The Supreme Court's Opinion in *Sosa* Controls.

The ATS grants jurisdiction over claims "by an alien for a tort only, committed in violation of the law of nations . . . ." 28 U.S.C. § 1350. To the best of undersigned counsel's knowledge, the Court of Appeals for the Fourth Circuit has never ruled on an action brought under the Alien Tort Statute. Thus, this Court is controlled only by Supreme Court jurisprudence. The seminal Alien Tort Statute ("ATS") case, *Sosa v. Alvarez-Machin*, 542 U.S. 692 (2004), provides the framework for this Court's analysis of L-3's motion to dismiss for failure to state a claim. As shown the SAC clearly states valid ATS claims.

In *Sosa*, 542 U.S. at 729, the Supreme Court confirmed that federal common law should be read to include prohibitions on certain types of misconduct penalized by international law. *Id.* at 724. Recognizing that international law is part of federal common law, *see Filartiga v. Pena-Irala*, 630 F.2d 876, 887 (2d Cir. 1980), the Court held the ATS allowed federal district courts to hear claims that "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms [of violation of safe conducts, infringement of the rights of ambassadors, and piracy]." *Id*. at 725.

The *Sosa* Court explained that these 18th-century international paradigms, existing when ATS was enacted, included not only the diplomatic aspects governed by the executive and legislative branches, but also "a second, more pedestrian element [that fell within the judicial sphere] regulating the conduct of individuals situated outside domestic boundaries and consequently carrying an international savor." *Sosa* at 715. The Court explained that there was "a sphere in which these rules binding individuals for the benefit of other individuals overlapped with the norms of state relationships." *Id.* Violations of safe conducts, infringements of the rights of ambassadors, and piracy were among the violations that the ATS was enacted to address. *Id.*

The *Sosa* Court recognized violations of any international norm with "[no] less definite content and acceptance among civilized nations than the historical paradigms familiar when §1350 was enacted." *Id*. at 732. The Court stated that this standard is "generally consistent with the reasoning of many of the courts and judges who faced the issue before it reached this Court." *Sosa*, 542 U.S. at 732. The *Sosa* Court held, therefore, that modern federal courts could, "albeit cautiously," identify justiciable claims by looking to the "customs and usages of civilized nations, *Id.* at 734, citing *The Paquete Habana*, 175 U.S. 677, 700 (1900). *Id. at 725*. Acting cautiously and giving due deliberation to the dissenting argument (J.Scalia), the *Sosa* Court decided that "other considerations persuade us that the judicial power should be exercised on the understanding that the door is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today." *Id.* at 729.

L-3 argues that this judicial caution must result in this Court slamming shut the door to the victims' ATS claims, which allege cruel, inhuman or degrading treatment;

civil conspiracy to treat plaintiffs in a cruel, inhuman or degrading manner; and aiding and abetting cruel, inhuman or degrading treatment *See L-3 Br. at 27-28.* This argument cannot withstand scrutiny because the *Sosa* Court expressly confirmed that war crimes, torture and cruel, inhuman and degrading treatment are precisely the "specific, universal, and obligatory" violations that are actionable under the ATS. 542 U.S. at 732. The Court cited with approval the analysis and conclusions put forth in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d. Cir. 1980), *In re Estate of Ferdinand Marcos, Human Rights Litigation* 25 F.3d 1467, 1475 (9th Cir. 1994), and *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 (D.C. Cir. 1984) (Edwards, J., concurring). This triumvirate of decisions should guide this Court's analysis of the intent and meaning of the Supreme Court's ruling.[13] Indeed, the Supreme Court adopted the reasoning set forth in *Filartiga* that "the torturer has become like the pirate and slave trader before him *hostis humani generis*, an enemy of all mankind." 630 F.2d at 890. In short, the victims' torture and war crimes claims are exactly the genre of ATS claims expressly recognized and endorsed by the Supreme Court.

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[13] In *Sosa*, the Court specifically chose not to adopt "a policy of case-specific deference to the political branches," *Sosa*, 542 U.S. at 733, n. 21, which is precisely what L-3 suggests here. *Mem. at 33*. Instead, the Court unequivocally recognized federal courts can hear claims related to "a narrow class of international norms," which includes the norms violated by L-3. *Sosa*, 542 U.S. at 729. That the claims arose in the context of a war does not set them outside that class; rather that fact places them squarely within the norms already recognized by the Supreme Court. The claims cited with approval in *Sosa* arose from armed conflict. *See, e.g., Marcos*, 25 F.3d at 1469 (state of martial law); *Kadić v. Karadžić*, 70 F.3d 232, 241-44 (2d Cir. 1995) (civil war in Bosnia

B. The Victims Are Not Required To Allege Official State Action In Order To State Valid ATS Claims.

Here, the torture victims allege L-3 violated the laws and breached its duties to the United States when it tortured defenseless prisoners. The victims assert that torture is contrary to the laws of the United States and cannot be authorized by the President or any official act of the United States. Indeed, as a factual matter, the United States has specifically *disavowed* an intent to torture, as demonstrated by the court-martials which followed the Abu Ghraib scandal. SAC ¶¶ 436, 437. The victims allege L-3 acted outside the scope of its contract and injured this nation's standing by torturing persons detained by the United States military. *Id.* ¶¶451, 482.

That some of L-3's co-conspirators are military officials does not turn this torture tragedy into official United States foreign policy. *See L-3 Mem. at 30* (characterizing the victims as challenging official United States foreign policy.) Plaintiffs seek only to adjudicate horrific acts of abuse committed against them by L-3, Nakhla and their co-conspirators. Torture and war crimes are illegal under United States law, and as such, they cannot constitute "official acts." Acts recognized as crimes by – and against – the international community cannot be attributable to the state as a "state action" due to the consensus among states that such acts are impermissible and illegal under all circumstances. *See Filartiga*, 630 F.2d at 889.[14]

L-3 asserts that the victims cannot state a claim under ATS unless they are challenging "official" torture by the United States, but that if they are challenging

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[14] International law does not recognize immunity for acts constituting war crimes. *See, e.g., Prosecutor v. Blaški*c, IT-95-14-AR, (Issue of subpoena duces tecum), Oct. 29, 1997, 1997 WL 33774595, ¶41 (U.N. I.C.T. (App.)(Yug.)).

"official" torture by the United States their claims fail on immunity grounds. This challenge falls short for two reasons: ***First***, this Court is free to be persuaded by the overwhelming weight of ATS jurisprudence (initially developed by the Court of Appeals for the Second Circuit) and find that ATS claims need not allege state action. ***Second***, even if the Court decides not to adopt this reasoned jurisprudence as the basis for its denial of L-3's motion, this Court can nonetheless deny L-3's motion on because the "state action" requirement is satisfied by the victims' allegations that their co-conspirators were members of the military, which gave the color of state action to the conspiracy's bad acts.

1. ATS Claims Need Not Allege State Action.

L-3's "heads you lose, tails you lose" approach served L-3 well in the District of Columbia *Saleh* litigation, where the District Court (J. Robertson) believed he was compelled to follow the *Sanchez-Espinoza* decision. There, plaintiffs sued government officials, including President Reagan, and private parties for acts that were performed under the ***actual*** authority of the President. Plaintiffs conceded that the private parties were authorized agents of the State. *Sanchez-Espinoza*, 770 F.2d at 207 n.4. The Court of Appeals held that the doctrine of sovereign immunity barred the claims against the government officials and their agents because the challenged acts were "official actions of the United States." *Id.* at 207. It also held that the official conduct of the Reagan Administration's foreign policy in Nicaragua was "authorized by the sovereign" and as such not "contrary to statutory or constitutional prescription." *Id.* at 207.

L-3 goes beyond the *Sanchez* reasoning to argues that no claims may be stated under ATS unless challenging "official state action," yet if the claims challenged "official state action," they do not survive an immunity analysis. In essence, L-3 argues that the

ATS can *never* apply. Such an argument was flatly rejected by the Supreme Court in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). In *Sosa*, the Court found that the ATS is a jurisdictional statute that "was intended to have practical effect the moment it became law." 542 U.S. at 724. Indeed, the Supreme Court rejected this same argument when it was put forward by the defendant in *Sosa*, opining that the ATS would be "stillborn" if "any claim for relief required a further statute expressly authorizing adoption of causes of action." *Id.* at 714.

Victims of human rights abuses may state ATS claims without alleging "official" acts of the United States. The *Sosa* Court discussed violations of the law of nations understood to be within our federal common law at the time of the passage of the ATS, nearly all of which involved acts of private individuals not committed under color of law. *See, e.g.,* discussion of Longchamps, a French adventurer (*Sosa* at 716-717); cases arising out of piracy and prize captures (*Id*. at 720); cases against privateers (*Id.*, citing *Bolchos v. Darrel*, 3 F.Cas. 810 (No.1, 607) (D.S.C. 1795); and the 1795 Opinion of Attorney General Bradford, discussing a civil suit that could be brought against Americans who had taken part in the French plunder of a British slave colony in Sierra Leone. (*Id.* at 721). Notably, the definition of piracy included the requirement that the pirate was a *private actor*, as explained by *United States v. Smith*, 5 Wheat. 153, 163-180 n. a, 5 L.Ed. 57 (1820) (cited in *Sosa* because the case illustrated the specificity with which the law of nations defined piracy. *Sosa,* at 732).

Jurisprudence developed under ATS makes it clear that human rights victims do not need to allege state action in order to plead valid claims under ATS. In *Kadić,* the Second Circuit Court of Appeals found that the alleged "acts of murder, rape, torture, and

arbitrary detention of civilians, committed in the course of hostilities," by the self-declared president of the Bosnian Serb republic were actionable under the ATS. The president did not qualify as a "state actor" under international law. 70 F. 3d at 242. Looking to the law of nations for guidance, including the 1949 Geneva Conventions and Article 3 common to each of the four conventions, the Court of Appeals found that "[t]he liability of private individuals for committing war crimes has been recognized since World War I and was confirmed at Nuremberg after World War II."[15] *Id.* at 243. The Court of Appeals further found that if torture were committed in the course of war crimes, then no state action should be required in order to find liability for torture when committed in the furtherance of war crimes. *Id.*

Numerous courts have followed the *Kadić* precedent, and have held that non-state actors can be held liable under the ATS for egregious violations of international law. *See Bao Ge*, 201 F. Supp. 2d at 22, n.5 (private parties can be held liable under ATS for "egregious acts of misconduct"); *Doe v. Islamic Salvation Front*, 993 F. Supp. 3, 14 (DDC 1998) (finding that crimes against humanity, war crimes, murder and rape, "are proscribed by international law against both state and private actors, as evinced by Common Article 3 [of the 1949 Geneva Conventions]"); *Iwanowa v. Ford Motor Co.,* 67 F. Supp. 2d 424, 445 (D.N.J. 1999) ("No logical reason exists for allowing private

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[15] International jurisprudence dating back to the Second World War recognized liability for non-state actors. For example, in *U.S. v. Flick*, a civilian industrialist was convicted because he knew of the criminal activities of the SS and nevertheless contributed money that was vital to its financial existence. 6 Trial of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No. 10, 1, 1216-1223 (1949). Similarly in *In re Tesch (Zyklon B Case*), 13 Int'l L. Rep. 250 (Br. Mil. Ct. 1946), industrialists were convicted for sending poison gas to a concentration camp, knowing it would be used to kill.

individuals and corporations to escape liability for universally condemned violations of international law merely because they were not acting under color of law"); *Jama v. Esmor Correctional Services, Inc.,* 2005 WL 2901899 (D.N.J. Nov. 14 2005) (ATS jurisdiction over private contractor for customary international human rights violations including inhuman and degrading treatment). *See also Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 438 (1989) (observing that the ATS "by its terms does not distinguish among classes of defendants").

L-3 misapprehends the line of cases beginning with *Kadić*, which recognize that private actors can be held liable for serious violations of international law. *L-3 Mem. at 31*. Radovan Karadžić, the defendant in *Kadić*, was found liable for violations of international law including war crimes *not* because he was a private party acting on behalf of a State or a quasi-state. Rather, he was found liable for these violations "in his private capacity," *Kadić*, 70 F.3d at 236, because "as understood in the modern era […] certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state *or only as private individuals*." *Id.* at 239 (emphasis added). The Court of Appeals for the Second Circuit arrived at this conclusion after examining sources of law including the Restatement (Third) of Foreign Relations, *Id.* at 240, and conducting a "particularized examination" of the offenses charged and the liability each incurred under international law. *Id.* at 241; s*ee Id.* at 241-245. There was no suggestion that some form of state action (or imputed liability of the state) was required to hold an individual liable for *his own* war crimes.

Torture *is* a war crime. *See Kadić,* 70 F.3d at 243-244; Common Article 3 of the Geneva Conventions. The torture victims do not, as L-3 suggests, seek to elevate

common crimes or violations into the realm of war crimes. *L-3 Mem. at 31*. Unlike the plaintiffs in *Saperstein v. Palestinian Auth.,* U.S. Dist. LEXIS 92778, (Dec. 22, 2006 S.D. Fla), here the victims are not simply "grasping at the *Kadić* decision and attempting to bring the alleged conduct within the language of Common Article 3." *Saperstein,* U.S. Dist. LEXIS 92778, at * 28. With all due respect for the loss suffered by the plaintiffs in *Saperstein*, *Id. at* 30-31, the torture victims here are not alleging that a single murder constitutes a war crime. The victims' allegations of repeated rapes, beatings, mock executions, forced nudity and hangings, which satisfy the requirements of establishing a war crime. SAC ¶¶ 512-526.[16]

The political branches have ratified the conclusion reached by the Court of Appeals for the Second Circuit's conclusion that non-state actors who commit war crimes and torture captives during an armed conflict violate international law. Indeed, the Executive expressed its view to this effect in the *Kadić* proceedings. 70 F.3d at 239-240 ("The Executive Branch has emphatically restated in this litigation its position that private persons may be found liable under the Alien Tort Act for acts of genocide, war crimes and other violations of international humanitarian law.") In 1996, Congress enacted the War Crimes Act, 18 U.S.C. § 2441 (1996), which established criminal

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[16] The elements for a war crime are: (i) the violation must constitute an infringement of a rule of international humanitarian law; (ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met; (iii) the violation must be "serious", that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim; and(iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule. *Prosecutor v. Tadić*, IT-94-1, Jurisdiction Appeal, Oct. 2, 1995, para. 94. *See also* Arts. 8 and 25 of the Rome Statute of the International Criminal Court, A/183.9.

liability for war crimes when "the person committing such war crime or the victim of such war crime is a member of the Armed Forces of the United States or a national of the United States."[17] The 1996 Act's definition of the term "war crime" included all "grave breaches", and all violations of Common Article 3, of the four Geneva Conventions. 18 U.S.C. § 2441 (1996).[18]

Contrary to L-3's assertions, passage of the Torture Victim Protection Act ("TVPA"), 28 U.S.C. § 1350 (note)(2000) – a statute meant to ensure that American torture victims have a remedy in U.S. courts— does not weaken the conclusion that ATS claims may be brought for private torture. *See L-3 Mem. at 28-29*. The TVPA sought to extend, rather than reduce, the jurisdictional reach of the ATS so that United States citizens could bring claims for torture and extrajudicial killings; it was not intended to circumscribe the remedies already available to aliens under the ATS. *See Aldana v. Del Monte Fresh Produce N.A., Inc*, 416 F.3d. 1242, 1250-51 (11th Cir. 2005). The legislative history of TVPA confirms that ATS "should remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law." H.R. Rep. No. 367, 102d Cong., 2d Sess., at 4 (1991), *reprinted* in

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[17] The Department of Defense requires contractors to notify their U.S. citizen employees that they are subject to prosecution under the War Crimes Act for violations of the laws of war. *See* 48 C.F.R. § 252.225-7040(e)(2)(ii).

[18] Torture and other cruel and inhumane acts towards prisoners are grave breaches of the Third Geneva Convention (the Convention Relative to the Treatment of Prisoners of War, Geneva, 12 August 1949); grave breaches of the Fourth Geneva Convention (Convention relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949); and violations of Common Article 3. *See also* 2006 Military Commissions Act ("MCA") MCA § 950v(b)(11), MCA § 6(b)(1) (defining "torture" and "cruel or inhuman treatment" as war crimes without regard to status of perpetrator).

1992 U.S.C.C.A.N. 84, 86. Indeed, the very same assertion made by L-3 that the TVPA limits the scope of the ATS was expressly rejected by the Supreme Court in *Sosa*, 542 U.S. at 728.

2. The Victims Allege an Illegal Conspiracy That Operated Under the "Color" of State Action.

Should this Court reject the victims' arguments and instead graft a state action requirement onto the ATS, the Court should nonetheless deny L-3's motion to dismiss the ATS claims. The victims have alleged a conspiracy with certain members of the military to commit illegal – and therefore non-official – acts of torture and other war crimes. Conspiring with state actors has been found sufficient to create the "color" of state action, which has been deemed sufficient to satisfy any ATS state action requirement. See, e.g., *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1157 (11th Cir. 2005) (ATS "reaches conspiracies and accomplice liability"); *Bowoto v. Chevron*, 2008 U.S. Dist. LEXIS 54728, at *33-35(N.D. Cal. May 30, 2008); *Aguasanta Arias v. Dyncorp*, 517 F. Supp. 2d 221, 227-228 (D.D.C. 2007); *Wiwa v. Royal Dutch Petroleum*, Case No. 96 CIV 8386 2002 WL 319887 (S.D.N.Y. Feb. 28, 2002) (corporate defendant liable for "joint action" with state actors); *Abebe-Jira v. Negewo*, 72 F.3d 844, 845-48 (11th Cir. 1996) (affirming verdict for torture and cruel, inhuman or degrading treatment where defendant supervised or participated with others "in some of the acts of torture"). Making such a finding does not mean that the Court is holding that the acts were undertaken "on behalf of the United

States," as L-3 suggests, but rather means that the "color" alone suffices. L-3 Mem. at 29.19.

C. The Victims Are Permitted To Sue L-3, a Corporation.

Finally, to the extent that L-3 argues that its status as a corporation shield it from liability, federal courts have found that not only non-governmental individuals but also corporations can be held liable for serious international law violations and L-3 presents no reason to distinguish between these classes of defendants under the ATS. See L-3 Br. at 32-33.[20] Both pre- and post-*Sosa*, federal courts have found that such actions can be brought against American corporations operating abroad. *See, e.g.*, *Doe v. Exxon Mobil Corp.*, 473 F.3d 345, 354-55 (D.C. Cir. 2007); *Khulumani v. Barclay National Bank, Ltd.*, 504 F.3d 254, 282 (2nd Cir. 2007) (Katzman, J., concurring)(noting that "[w]e have repeatedly treated the issue of whether corporations may be held liable under the ATCA as indistinguishable from the question of whether private individuals may be."); *Id*. at 289 (Hall, J., concurring) (corporations may be liable under the ATS in cases where "a defendant played a knowing and substantial role in the violation of a clearly recognized international law norm."); *Iwamowa v. Ford Motor Co*., 67 F. Supp. 2d 424 (D.N.J. 1999)(finding that private individuals and corporations could be held liable for use of

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[19] The "under color of law" jurisprudence under 42 U.S.C. § 1983 which courts have drawn from in the ATS and TVPA context, does not include such a requirement. One of the ways in which "under color of law" is satisfied is when private individuals are "willful participant[s] in joint action" with government officials. *See Dennis v. Sparks*, 449 U.S. 24, 27 (1980). *See also Wagenmann v. Adams*, 829 F.2d 196, 211 (1st Cir. 1987) (private actor who "exerted influence" over the police by conspiring with them to have plaintiff arrested acted under color of law).

[20] It is notable that the cases cited by L-3 address the question of corporate liability in the context of the TVPA rather than the ATS.

slave labor); *In re Agent Orange Product Liab. Litig.*, 373 F. Supp. 2d at 58 ("Limiting civil liability to individuals while exonerating the corporation directing the individual's action through its complex operations and changing personnel makes little sense in today's world.") In finding that the American corporation Chevron could be held liable for violations under the ATS, the court stated: "Once this line [between state and private actors under international law] has been crossed and an international norm has become sufficiently well established to reach private actors, there is very little reason to differentiate between corporations and individuals." *Bowoto v. Chevron Corp.*, 2006 U.S. Dist. LEXIS 63209, *37 (N.D. Cal. Aug. 22, 2006).

L-3's reliance on *Correctional Services Corp. v. Malesko*, 534 U.S. 61 (2001) is inapposite. L-3 Br. at 32. Malesko addressed only the narrow question of whether *Bivens* actions should be extended to corporations. The Court found that because "the purpose of *Bivens* is to deter the officer, not the agency," and the particular deterrent effect of *Bivens* would not be realized by extending liability through this particular cause of action to corporations. *Malesko*, 534 U.S. at 69. This discussion of extending a *Bivens* remedy to corporations has no effect applying a federal statute, the ATS, to corporations, when the recognized purpose of the ATS is to enforce international law for well-recognized norms such as those alleged in this case. Sosa, 542 U.S. at 729-730.

D. The Victims Are Not Required To Exhaust Any Alternative Remedies.

L-3 analogizes the ATS to a claim made under the *Bivens* doctrine, and argues that this Court should impose an "exhaustion of alternative remedies" requirement on the torture victims. L-3 Mem. at 34-35. But this is the only venue in which to seek justice against the corporate wrongdoers. L-3 offers no internal corporate administrative process for those seeking redress for the criminal acts of its employees. L-3 is essentially trying

to avoid the basic rule of joint and several liability by arguing that the victims should be forced to sue a different tortfeasor who participated in the conspiracy. No statutory or decisional law supports this evasion.

Nor would ATS require exhaustion, even if an alternative venue to sue L-3 existed. ATS contains no exhaustion requirement. The Supreme Court has never held that ATS claimants must exhaust local remedies. The majority of courts that have reached this issue have declined to graft an exhaustion requirement onto ATS even when the claims were made against state entities that offered alternative fora for redress. *See e.g., Bowoto v. Chevron*, 557 F.Supp.2d 1080, 1096-97 (N.D.Cal. 2008); *Abiola v. Abuakar*, 435 F.Supp.2d 830, 836-38 (N.D.Ill. 2006) *vacated on condition of settlement by Abiola v. Abubakar*, 2008 U.S. Dist. LEXIS 2937 (Jan. 14, 2008); *Jean v. Dorelien*, 431 F.3d 776,781 (11th Cir. 2005).

E. The International Body of Law Prohibiting Cruel, Inhuman and Degrading Treatment Meets the *Sosa* Requirements.

L-3, implicitly admitting that the victims' torture and war crimes counts satisfy the *Sosa* standard, dispute that claims based on "cruel, inhuman and degrading treatment" satisfies the *Sosa* standard. *L-3 Mem. at 36*. This issue has not been ruled upon by the Supreme Court or the Court of Appeals for the Fourth Circuit. The test, as explained above in Subsection A, is the one set forth in *Sosa*, which examines whether the tort rests "on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms [of violation of safe conducts, infringement of the rights of ambassadors, and piracy]."

The victims believe this tort claim satisfies that standard. Common Article 3 of the Geneva Conventions and the Convention Against Torture to which the United States

is a party, both outlaw cruel, inhumane and degrading treatment as a violation of customary international law in the same fashion they outlaw torture. The only real difference between the two torts is the "intensity of the suffering inflicted." *Restatement (Third) § 702 (Rep. Note 5)*.

To determine this open issue, this Court should look to the Supreme Court's *Sosa* decision itself for guidance on whether this tort meets the requisite specificity standard. The Supreme Court cited *United States v. Smith,* 18 U.S. (5 Wheat.) 153, 163-180 (1820) as an illustration of the specificity with which the law of nations defined piracy, one of the "historical paradigms familiar when §1350 was enacted." *Sosa*, 542 U.S. at 732. In *Smith,* the Court expressly noted the diversity of definitions of piracy, but held that despite that diversity, all writers concur in holding that robbery, or forcible depredations upon the sea is piracy. 18 U.S. (5 Wheat.) at 161. The *Sosa* Court's reliance on *Smith* suggests the present Court would agree with modern ATS authority which considers whether the conduct at issue is clearly within the norm, but not whether every aspect of what might comprise the norm is fully defined and universally agreed upon. *See e.g. Taveras v. Taveras,* 397 F. Supp. 2d 908, 915 (S.D. Ohio 2005); *Jama v. INS*, 22 F. Supp. 2d 353 (D.N.J. 1998); *Hilao v. Estate of Marcos*, 103 F.3d 789 (9th Cir. 1996); *Wiwa v. Royal Dutch Petroleum Co.*, 2002 U.S. Dist. LEXIS 3293, at *21-22 (S.D.N.Y); *see also Čelebići* Judgement, para. 517 (finding "there can be no doubt that inhuman treatment is prohibited under conventional and customary international law"); *Id*. para. 542 (holding that "inhuman treatment is treatment which deliberately causes serious mental and physical suffering that falls short of the severe mental and physical suffering required for the offence of torture [and] the offence need not have a prohibited purpose or be

committed under official sanction as required by torture"). *Xuncax v. Gramajo*, 886 F. Supp. 162, 186-187 (D. Mass. 1995)(specifically addressing the rejection of cruel, inhuman and degrading treatment by *Forti v. Suarez-Mason,* 694 F. Supp. 707, 711-712 (N.D. Cal. 1988)).

As noted by L-3, some courts have rejected the tort, finding it lacked the requisite specificity and status in customary international law. For example, L-3 cites *Suarez-Mason* and *Aldana v. Del Monte Fresh Produce, N.A., Inc.* 416 F.3d 1242, 1247 (11th Cir. 2005). Although acknowledging this split of authority, the victims urge this Court to recall the instruction of Judge Edwards in *Tel-Oren* (which is one of the decisions cited with approval by the *Sosa* Court) that "the 'law of nations' is not stagnant and should be construed as it exists today among the nations of the world." 726 F.3d at 777. *See also Sosa,* 542 U.S. at 729, 733 (affirming that "the domestic law of the United States recognizes the law of nations" and that the current state of the law of nations must be considered in deciding a claim under the ATS).

III. THE VICTIMS' COUNTS I-20 STATE VALID CLAIMS UNDER FEDERAL, MARYLAND AND IRAQI LAW.

L-3, relying on lawyers not even educated or practicing in Iraq, concocts a convoluted series of arguments that would slam the courthouse door shut. At the outset, it is impossible for this Court to make a well-informed decision on the applicable law before the parties have conducted discovery. Choice-of-law determinations necessarily turn on the facts.

But based on the facts known to date, L-3 is wrong. ***First***, this Court should apply federal common law to the victims' claims. This Court should look to the federal body of law prohibiting torture (and to L-3's contract promising adherence to those laws)

as the source of L-3's tort duty to refrain from torturing prisoners. Had L-3 abided by the law and its contractual duties, the torture would not have happened.

Second, even if this Court decides to hear Counts I-20 under Maryland law rather than federal law, the Maryland *lex loci deliciti* rule leads to the application of Virginia or California, not Iraq, law. The "wrong" at issue is clearly the torture that occurred in Iraq, but the *lex loci deliciti* rule looks to "the last event necessary to make an ***actor liable*** for an alleged tort takes place." *See L-3 Mem. at 38*, quoting the *Restatement (First) at § 377* (emphasis added.) Unless L-3 stipulates that it immediately became liable as a corporate entity as soon as one of its employees tortured a defenseless prisoner, the last event necessary to make L-3 liable occurred in the United States, likely Virginia but perhaps California. This Court cannot rule on this issue before discovery because it is unclear whether this liability-creating act by the corporation occurred in Virginia or California.

Third, even if this Court decides to hear Counts I-20 under Iraqi law, the victims state valid claims. As explained by the victims' expert, Iraqi law does not compel the dismissal of the torture victims' claims. (The Declaration from the victims' expert is being translated, and will be submitted separately.)

Fourth, the victims' Second Amended Complaint adequately pleads a conspiracy. This Court need not accept L-3's attempt to ignore all but two paragraphs of the Complaint. When read as a whole, the torture victims properly plead a conspiracy. Ample independent evidence of the conspiracy exists, including military reports, photographs, government documents, and a recent report by the Senate Armed Services Committee.

A. Federal, Not State, Law Governs the Victims' Claims.

This Court should look to federal law to determine the source of the duties imposed on L-3. L-3's contract is with the United States. By its terms, L-3 promises to abide by the laws of the United States. L-3 earned hundreds of millions of dollars under contracts with the United States federal government. L-3 expressly agreed to abide by United States federal laws and regulations governing the military's conduct (as well as federal procurement laws) in return for being paid so handsomely to provide services to the United States. *See* 48 C.F.R. §§203.7000-203.7001 (2008)(procurement regulations);U.S. Army Regulation 715-9, Contractors Accompanying the Force (Oct. 29, 1999) §3-2(c), §3-2(f) (military contractors must supervise and manage their employees); U.S. Army Field Manual3-100.21, Contractors on the Battlefield (Jan. 2003) §1-25, §4-45 (military contractors are responsible for disciplining their employees and ensuring their compliance with the law).

Under these circumstances, this Court should apply federal law. *See In Re Peanut Crop Ins. Litigation*, 524 F.3d 458, 470 (4th Cir. 2008); *Long Island Sav. Bank, FSB v. United States,* 503 F.3d 1234, 1245 (Fed.Cir.2007). Federal statutory and common law imposes a duty on every American not to torture. *See* 10 U.S.C. § 801 ("the Constitution, laws, and treaties of the United States and the applicable guidance and regulations of the United States Government prohibit the torture or cruel, inhuman, or degrading treatment of foreign prisoners held in custody by the United States"); 18 U.S.C. §§ 2441, 2340A; 22 U.S.C. § 2152; 22 U.S.C. § 2656; 28 U.S.C. § 1350; 42 U.S.C. § 2000dd; 10 U.S.C. § 801; 10 U.S.C. § 950v; 32 C.F.R. § 116; 28 C.F.R. § 0.72.

L-3 repeatedly breached that duty, and can be sued in this Court for doing so. Nothing in the Bremer Order leads to a different result. That Order protected American

corporations from being haled into Iraqi courts; by its terms, it does not protect them from being haled into American courts.[21]

B. The Maryland *Lex Loci Delicti* Rule Leads to Virginia or California, Not Iraq, Law.

If this Court, wrongly, decides to apply state rather than federal law, it is governed by Maryland's *lex loci delecti* rule. L-3 assumes without much discussion that this rule forces the Court to apply Iraqi law. But although the "wrong" at issue is clearly the torture that occurred in Iraq, the lex loci deliciti rule is more complex than argued by L-3. That rule actually focuses on the liability of the actor before the Court, here L-3. According to the Restatement (First), § 377, the Court should focus on finding the "the last event necessary to make an actor ***liable*** for an alleged tort takes place." *See L-3 Mem. at 38*, quoting the Restatement (First) at § 377 (emphasis added.) L-3 is not going to stipulate that L-3 immediately became liable as a corporate entity once a single one of its employees tortured a prisoner. If L-3 so stipulates, then the rule would lead this Court to apply Iraq law. But L-3 is not going to be liable unless the jury finds that L-3's corporate conduct was such that it should be held responsible for the acts of its

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[21] L-3 misleads the Court by citing to the wrong section of the Bremer Order. L-3 translators are not "Coalition Personnel," as defined in Section 1(1) of Order 17, as they are not "forces employed by a Coalition State" or "assigned to, or under the direction or control of the Administrator of the CPA."[21] Rather, they are "Coalition Contractors," who are supplying goods and/or services to or on behalf of Coalition Forces or the CPA under contractual arrangements." *Id*. at p.1. The current version of CPA Order 17 confirms that contractors are required to "respect relevant Iraqi laws," and that the Order is "without prejudice to the exercise of jurisdiction by the Sending State and the State of nationality of a Contractor in accordance with applicable laws." CPA Order 17 (Revised), Sec. 4(4), 4(7) (June 27, 2004).

employees. As a result, it would be imprudent for the Court to rule on this issue until the parties have had the benefit of discovery.

L-3 management testified in depositions held in the *Saleh* action that L-3 utterly failed to create or implement any supervisory structure in Iraq. Instead, to the extent any supervision occurred, it occurred from L-3 program offices in Virginia. This would lead to Virginia law applying. However, discovery may well show that L-3's corporate decision to breach its contract, fail to supervise, and refuse to report the torture it learned about to the military, happened at corporate headquarters, which was then in California. As a result, California law may apply. In sum, this Court cannot rule on the choice-of-law issue without the benefit of discovery.

C. Even if the *Lex Locit Delicit* Rule Led to Iraq Law, the Victims State Valid Claims Under Iraqi Law.

L-3 is wrong about Iraq law. The victims' expert, who currently practices in Baghdad, Iraq, has examined the expert opinions offered by L-3's lawyers who studied the Iraqi legal system from afar. These expert opinions are wrong for the reasons set forth in the Declaration. Iraqi courts would permit the victims' claims to proceed.[22]

If L-3's experts were right (which they are not), and Iraq law leads to dismissal, this Court should deny L-3's motion because Maryland courts do not apply to *lex loci* when it is contrary to the forum's public policy. *Lab. Corp. of America v. Hood*, 395 Md. 608 (Md. 2006); *Aleem v. Aleem*, 404 Md. 404 (Md. 2008); and *Lowndes v. Cooch*, 87

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[22] By omission, it appears L-3 and its experts admit that Iraqi law recognizes claims for assault and battery (Count 10), sexual assault and battery (Count 13), intentional and negligent infliction of emotional distress (Counts 16 and 20) and negligent hiring and supervision (Count 20).

Md. 487 (1898). Clearly, comity principles do not compel use of Iraq law because Iraq has "no interest in applying their law to damages issues if it would result in less protection to their national in a suit against a United States corporation." *Doe v. Exxon Mobil Corp*., No. Civ.A.01-1357,2006 WL 516744 at *2(D.D.C. Mar. 2 2006).

D. The Victims' Complaint Adequately Pleads a Conspiracy.

L-3 half-heartedly argues that the Court should focus on only two paragraphs our of a 560-paragraph complaint and dismiss the victims' conspiracy allegations because those two paragraphs plead conclusions, not facts. This is nonsense. The victims plead facts that, if proven, would establish the conspiracy. *See Statement of Facts, above.* The victims' allegations are not speculative, but are supported photographs, court martial testimony, sworn witness statements collected by the military, a report from the Senate Armed Services Committee, reports from General Taguba, Fay and Jones, a report from the Honorable James Schlesinger, and reports from the Inspector General,

CONCLUSION

L-3 is an American corporation that knowingly and willfully accepted hundreds of millions of dollars from the United States and promised to serve its interests in a law-abiding manner. Instead, L-3 permitted its employees to repeatedly participate in torturing detainees along with certain criminally-minded military officials and soldiers. Such malfeasance brought great shame to this nation, and permanently injured the victims. L-3 twists and distorts legal doctrines, seeking sovereign immunity. None of these doctrines shields L-3 from the consequences of its egregious misconduct. The victims respectfully request that this Court deny L-3's motion to dismiss, and order the parties to commence discovery.

Dated: January 4, 2009

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of January, 2009, I caused the foregoing Opposition to Motion to Dismiss to be emailed to the following:

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