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

REPLY MEMORANDUM IN SUPPORT OF DEFENDANT L-3 SERVICES, INC.'S MOTION TO DISMISS

Dated: January 26, 2009

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GLOSSARY OF ABBREVIATIONS

ATS	Alien Tort Statute
Br.	Defendant L-3 Services, Inc.'s Memorandum of Points & Authorities in support of its motion to dismiss
CACI	Collectively, CACI International Inc., CACI Incorporated – Federal, and CACI Premier Technology, Inc.
CPA	Coalition Provisional Authority
Opp.	Plaintiffs' opposition to the motion to dismiss
TVPA	Torture Victim Protection Act

INTRODUCTION

Rather than respond to L-3's legal authority, Plaintiffs resort to repeating graphic allegations (casting out the word "torture" more than 100 times) to distract from the fundamental flaws in their assertion that they have a civil damages claim against L-3, even if what they allege is true. Whether these plaintiffs can pursue civil claims against L-3 does not depend on whether proven torturers should be punished (there are criminal statutes and prosecutorial discretion for such matters),[1] nor is it a question of whether if their allegations of innocence and injury are true they deserve compensation (it is undisputed that such relief is available under the U.S. Army's statutory claims authority). The dispositive issue is whether a civil damages suit exists to augment criminal law and administrative compensation for injuries arising from detention of local residents by the United States acting as Occupying Forces. It does not.

There is no room in U.S. jurisprudence to allow these Plaintiffs to regulate the United States' conduct of war and occupation through suits against its contractors who provided personnel to augment military forces engaged in detention and interrogation in a zone of war and/or occupation. Whether it is based on one or more of the several legal doctrines used to repulse intrusion on the sovereign immunity of the United States in the conduct of its wars (Standing, Law of Occupation, Derivative Sovereign Immunity, Political Question), or simply the failure to plead a cause of action under the ATS or Iraqi civil law, these claims should not and cannot be litigated. Punishment and compensation must be left to the United States because forces acting in occupation "are responsible for their conduct only to their own government," being "amenable to no other tribunal, except that of public opinion, which, it is to be hoped, will always brand with infamy all who authorize or sanction acts of cruelty and oppression." *Dow v. Johnson*, 100 U.S. 158, 165-66 (1879). Plaintiffs cannot substitute their constant invocation of torture and graphic allegations to circumvent this fundamental principal of U.S. jurisprudence. As the Supreme Court anticipated over 130

[1] Plaintiffs point to the lack of "enough" prosecutions of L-3 employees as evidence there is no such punishment. (Plaintiffs' Opposition to L-3's Motion to Dismiss ("Opp.") 16 n.8.) The lack of prosecution is not for want of investigation, however, but simply because the allegations have not borne out, or the prosecutors have exercised their discretion. Accepting the fiction of Plaintiffs' allegations as true for this motion does not mean drawing inferences from the government's lack of prosecution based on that fiction.

years ago, parties such as these Plaintiffs would always be willing to make such allegations if it would get them into Court: "Nor can it make any difference with what denunciatory epithets the complaining party may characterize their conduct. If such epithets could confer jurisdiction, they would always be supplied in every variety of form." *Id.* at 165. Plaintiffs invite the Court to prove the adage that bad facts make bad law; to take their "denunciatory epithets" and substitute them for the sound policy expounded by the Supreme Court from *Dow* to *Eisentrager* and implemented in cases such as *El-Shifa* and *Tiffany* that bars such claims. This invitation should be declined.

"Denunciatory ephithets" is all that Plaintiffs supply, while ignoring the authority that should control the outcome here. Along the way, Plaintiffs embellish their arguments and gloss over the unprecedented nature of their claims by repeatedly mischaracterizing authority. For example, Plaintiffs argue without citation that General Taguba's investigation into abuses at Abu Ghraib "concluded that L-3 employees conspired with" soldiers (Opp. 4), but the words "conspire" and "conspiracy" do not appear in the publicly-released report. Plaintiffs mislead by referencing supposed government findings (Opp. 5) that do not relate to the Plaintiffs in this case. Plaintiffs suggest that the Supreme Court's *Sosa* decision supports their claims when in fact, it does the opposite, *see infra*, § II.A.1.a. When convenient they take both sides of the same issue. They argue that they do not seek a determination of innocence while at the same time attempting to distinguish controlling precedent on the basis of their allegation of innocence, *compare* Opp. 8 *with* 9; they assert War Crimes claims while suggesting that there is no war. *Compare* Opp. 37-38 *with* 3.

In terms of substance, Plaintiffs make critical concessions. They are alien citizens of Iraq (Defendant L-3 Services, Inc.'s Motion to Dismiss & Request for a Hearing ("Br.") 7); at all relevant times Iraq was subject to a military occupation sanctioned by international law (Br. 4); the U.S. military was authorized to use all necessary measures to contribute to the maintenance of security and stability in Iraq including the capture and detention of suspected insurgents (Br. 4 & n.4); throughout the occupation, U.S. forces have been subject to armed attack (Br. 4); Plaintiffs were detained (whether by mistake or not) pursuant to this authority by the U.S. military (Br. 1); Plaintiffs' allegations are based upon their treatment

while so detained in U.S. military detention facilities in Iraq, *id.*; and top military officials confirmed that Defendants were responsible to and under control of the U.S. military while working within such facilities. (Br. 5.) Based on these undisputed facts, Plaintiffs' claims must be dismissed. (Br. 10-26.) Plaintiffs' response is to simply ignore the relevant authority (they do not discuss the Law of Occupation cases or the Enemy Property cases) and imply that *Eisentrager* is not good law by mis-citing *dicta* from *Rasul* and ignoring that both *Rasul* and *Boumediene* stated to the contrary. As to the numerous reasons the claims must be dismissed even if taken individually, Plaintiffs fare no better, similarly conceding the important points. Neither their legal mischaracterization nor their appeal for this Court to make new law nor their Iraqi law expert who fundamentally agrees with L-3's expert (as Reema Ali's Supplementary Declaration (Ex. L) explains) should serve to fend off dismissal. Defendant's motion should be granted.

I. No Claims Lie for Injuries Arising from Wartime Confinement of Aliens Abroad.

A. These Plaintiffs May Not Bring Civil Damages Claims for What Happened While Confined and Interrogated in Iraq.

Plaintiffs concede their claims arise out of detention by the U.S. military in Occupied Iraq, and they completely ignore the body of case law that applies to these conceded facts and the Supreme Court's holding in *Johnson v. Eisentrager*, 339 U.S. 763, 776-77 (1950). Instead, Plaintiffs respond by implying that *Eisentrager* is no longer good law. (Opp. 9.) But the Supreme Court authority cited by Plaintiffs, if anything, underscores *Eisentrager's* continued vitality here. We explained in our opening brief how in *Boumediene v. Bush*, the Court recognized unique factual circumstances at Guantanamo Bay that precluded *Eisentrager*'s application to prisoners held there, while reaffirming its vitality as applied to foreign occupation. *See* 128 S. Ct. 2229, 2260 (2008) ("[T]here are critical differences between Landsberg Prison, circa 1950, and the United States Naval Station at Guantanamo Bay in 2008."); (Br. 16).[2] As usual,

[2] In contrast to Guantanamo but similar to Iraq, *Eisentrager* involved circumstances under which "the prison was under the jurisdiction of the combined Allied Forces," such that the United States was "answerable to its Allies for all activities occurring there," *id.* at 2260, there was no planned "long-term occupation of Germany, nor did they intend to displace all German institutions even during the period of occupation," *id.*, "[i]n addition to supervising massive reconstruction and aid efforts the American forces stationed in

Plaintiffs do not address this at all. Nor can there be serious dispute that these differences were at play in both *Boumediene* and *Rasul*: Justice Stevens, the author of the *Rasul* majority joined the *Boumediene* opinion, and the actual holding of *Rasul* was that *Eisentrager* did not apply because the then-current habeas statute gave the Guantanamo detainees standing without regard to their constitutional entitlement not, as Plaintiffs suggest, because *Eisentrager* was not good law.[3]

Most telling about Plaintiffs' inability to deal with the precedent in this area is that they do not even attempt to address two venerable lines of authority fatal to their claims. They completely ignore the Law of Occupation (Br. 12-15) in which the Supreme Court anticipated and rejected Plaintiffs' arguments over 100 years ago. Plaintiffs similarly do not discuss, but dismiss with the back of their hand, the Enemy Property cases because they are brought under the Takings Clause. (Opp. 1.) But rather than distinguish them, that fact makes these cases particularly relevant, as it reveals the fundamental presumption that claims by aliens arising from wartime activities of the United States are not cognizable, even in the absence of U.S. sovereign immunity (which is waived by the Takings Clause). *See* Br. 11-12.

Plaintiffs argue that labels such as enemy aliens "should not be prematurely applied to individuals who – unlike the German nationals in *Eisentrager* – contest the label." (Opp. 9, citing *Boumediene*.) But the relevant status to justify continued detention in *Boumediene*—enemy *combatant*—required a determination that the detainee took up arms against the United States (i.e., that the detainee was not

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Germany faced potential security threats from a defeated enemy," and "the Court was right to be concerned about judicial interference with the military's efforts to contain enemy elements, guerilla fighters, and were-wolves," *id*. at 2261 (internal quotation marks omitted).

[3] Plaintiffs also cite Justice Stevens's discussion of the Guantanamo detainees' non-habeas *statutory* claims (Opp. 9), which was *dicta* as those claims were not pursued in their appeal to the Supreme Court, *see Rasul v. Bush*, 542 U.S. 466, 505 n.6 (Scalia, J., dissenting), and at any rate does not apply outside the unique factual circumstances of Guantanamo. Moreover, even if not *dicta* this discussion would not apply to federal common law claims under the ATS. *See* § I.B.1., *infra*. In short, *Rasul* held that alien detainees in Guantanamo could bring a habeas petition because Guantanamo is territorially different than Landsberg prison, and the habeas statute then extant allowed such claims. *Boumediene* then held, after Congress repealed that statute for Guantanamo, that because the territory was unique, Congress had no power to repeal the right of habeas there. Both cases reaffirmed the vitality of *Eisentrager*'s analysis for enemy aliens detained abroad, precisely the situation here.

innocent) whereas here, and in *Eisentrager*, the relevant status is enemy *alien*. Whether Plaintiffs are "innocent" (Opp. 1, 3, 6, 9, 18) or "mistakenly detained" (Opp. 3, 6) has nothing to do with their standing, which depends on their status as alien enemies—based solely on their belligerent relationship of their state of citizenship[4]—and where they are detained. This is established beyond dispute by the pleadings here (as in *Eisentrager*) and was not altered by the United States' "temporary occupation and domination of any portion of the enemy's country." *Dow*, 100 U.S. at 166; *see* Br. 13.

B. Fourth Circuit Precedent Compels a Finding of Derivative Sovereign Immunity.

L-3's opening brief demonstrated that L-3 is entitled to immunity derivative of that of the United States based on the function that was delegated to the L-3 employees, relying on *Butters v. Vance International, Inc.*, 225 F.3d 462, 466 (4th Cir. 2000) and *Mangold v. Analytic Services, Inc.*, 77 F.3d 1442, 1447-50 (4th Cir. 1996), and the line of cases holding that Plaintiffs' allegations fall within the scope of employment. *See* Br. 17-19. In opposition, Plaintiffs do not assert that *Butters* and *Mangold* are not good law. They agree that the relevant question is whether their allegations of "torture and brutality can be considered a governmental function … because interrogation is a governmental function" (Opp. 11-12), and do not dispute that every case to have considered that question found that no claims lay against either the soldiers or private contractors that were sued. Instead, Plaintiffs misrepresent other cases and change the subject, arguing that (i) L-3 is not immune because a conspirator does not enjoy his co-conspirators' immunities, (ii) L-3 cannot be derivatively immune because U.S. military officials do not enjoy immunity for the conduct alleged, and (iii) notwithstanding the case law to the contrary, this court should withhold immunity from L-3 because Plaintiffs have alleged torture. (Opp. 10-20.) These arguments are not supported by the case law or public policy and should be rejected.

[4] "[A]n alien enemy is the subject of a foreign state at war with the United States." *Eisentrager*, 339 U.S. at 769 n.2.

1. The Reasoning in *Richardson v. McKnight* Supports Immunity.

Plaintiffs' argument that L-3 cannot derive immunity from its alleged co-conspirators (Opp. 10) misapprehends the source from which the immunity derives, and the cases cited for the proposition do not support it in any event. L-3's immunity from common law claims derives from the immunity of the United States, not the immunity of U.S. officials with whom L-3 supposedly conspired. *Richardson v. McKnight*, 521 U.S. 399 (1997), says nothing about the issues involved here. That case involved claims under federal statutory law and was based on the fact that "correctional functions have never been exclusively public," *id.* at 405, "[t]he case [did] not involve a private individual…serving as an adjunct to government in an essential governmental activity," *id.* at 413, and that the defendant managed its activities with "relatively less ongoing direct state supervision," *id.* at 409. Everything is opposite here. All claims sound in the common law, *see Correctional Services Corporation v. Malesko*, 534 U.S. 61, 71-74 & n.5 (2001) (refusing to allow *Bivens* action for constitutional violation against corporation, and contrasting *Bivens*, common law tort, and statutory actions), and the military detention of prisoners in a combat zone is a well-recognized extension of the war power and an "important incident[] of war," *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004). *Richardson* has no more application here than it did to *Mangold* and *Butters*, which did not cite it.

2. The Function Delegated to L3's Employees Supports Immunity.

L-3 is entitled to immunity derivative of the Government's for those claims arising out of the conduct of L-3 employees to whom a core military function was delegated. *See* Br. 17-18. In an attempt to fend off the holdings of *Butters* and *Mangold*, Plaintiffs assert that their allegations of torture could not fall within the scope of employment, and that therefore there can be no immunity. (Opp. 11.) Every court to have considered damages claims alleging torture by U.S. officials and their contractors has found those alleged acts, no different in kind from the ones alleged here, to be within the scope of their employment. (Br. 24.) Plaintiffs have not a single case on their side and do not attempt to distinguish the cases we cite.

Bereft of any authority in support of their position or answer to our authority, Plaintiffs ridiculously assert that the Supreme Court has rejected these holdings wholesale, not with a discussion or holding, but

because it vacated *Rasul v. Myers* and remanded for further consideration in light of *Boumediene*. (Opp. 12.) An order granting *certiorari*, vacating an opinion, and remanding for further consideration has no precedential authority. *See Tyler v. Cain*, 533 U.S. 656, 666 n.6 (2001) (rejecting petitioner's attempt to find substantive support in order vacating a judgment and remanding for further consideration in light of intervening authority because order "was not a 'final determination on the merits'"). If anything can be discerned, the remand had nothing to do with torture and the scope of employment but instead dealt with the unrelated holding on constitutional claims by Guantanamo detainees.[5]

The three 19th Century cases that Plaintiffs assert as "good law" (Opp. 10-11) are not, at least not as Plaintiffs represent them. Take the last of the sequence, *Ford v. Surgent*, 97 U.S. 594 (1878). It had nothing to do with cattle or with a soldier's liability, and did *not* find the defendant liable. *Ford* held that the defendant *civilian*—sued for civil damages for burning a neighbor's cotton in the Confederacy—was absolved of civil liability because he did so at the direction of the *Confederate* military, *see Ford,* 97 U.S. at 605. This directly supports that L-3 is relieved of civil liability for the acts taken by its employees carrying out a military function. Reaching further back does Plaintiffs no good. In a case we cited, but Plaintiffs chose to ignore, the Supreme Court made clear that the holding of *Mitchell v. Harmony*, 54 U.S. (13 How.) 115 (1851) was inapplicable to the situation here. Unlike the U.S. citizen plaintiff in *Harmony* who accompanied the U.S. forces, citizens of an occupied territory have no civil claims against the occupiers:

> We do not controvert the doctrine of *Mitchell* v. *Harmony*, reported in the 13th of Howard; on the contrary, we approve it. But it has no application to the case at bar… . The question here is, What is the law which governs an army invading an enemy's country? It is not the

[5] The now-vacated *Rasul v. Myers*, 512 F.3d 644 (D.C. Cir. 2008), relied on the Circuit's opinion in *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007) in analyzing plaintiffs' constitutional claims—not for its holding that notwithstanding plaintiffs' "allegations of serious criminality," defendants' actions were within the scope of their employment and therefore defendants were immune. *Compare Rasul*, 512 F.3d at 663-67 (constitutional claims) *with id.*, 512 F.3d at 654-63 (scope of authority). *Harbury v. Hayden*, 522 F.3d 413 (D.C. Cir. 2008) held as did *Rasul* that torture of foreign nationals abroad was within the scope of employment, but did not involve the constitutional questions addressed in *Boumediene*. Notwithstanding its holding in *Boumediene v. Bush*, 128 S. Ct. 2229 (2009), more than three months earlier, the Supreme Court denied *certiorari*. *Harbury v. Hayden*, 129 S. Ct. 195 (U.S. Oct 6, 2008).

> civil law of the invaded country; it is not the civil law of the conquering country: it is military law, the law of war… .

Dow, 100 U.S. at 169-70.[6]

3. Public Policy Favors Immunity; and the Defense Department has Not Sided with Plaintiffs'.

Plaintiffs pay lip service to *Butters* and *Mangold* while wrongly reading them in a narrow fashion.[7] Still, they urge a different outcome because they claim to apply immunity here would be against the public interest and the Department of Defense is opposed to such immunity. (Opp. 13-20.) The first argument distorts the question of public interest, while the second relies upon an unauthoritative publication that does not say what Plaintiffs claim.

Plaintiffs' argument on public interest is not consistent with the test set out in *Butters* and *Mangold*. The question is not, as Plaintiffs would have it, whether the alleged *misconduct* is in the public interest. *See, e.g.*, Opp. 19 (explaining why it is bad to immunize the allegations of torture). The question is whether the *function* that had been delegated by the government to the L-3 employees—acting as linguists for military units engaged in detention and interrogation in military prisons of military prisoners during a war and occupation—is sufficiently important to the public interest to warrant the limitation of claims that immunity entails. Derivative immunity has no purpose *except* to insulate a contractor from liability even for concededly tortious conduct, where the underlying *function* the contractor was performing implicates an

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[6] *Little v. Barreme*, 6. U.S. (2 Cranch) 170 (1804), is similarly inapplicable to these facts. Moreover, the rationale of that case has been clearly overtaken in the intervening 200+ years. *See generally* Orval Edwin Jones, *Tort Immunity of Federal Executive Officials: The Mutable Scope of Absolute Immunity*, 37 Okla. L. Rev. 285, 286-297 (1984) (describing development of officer immunity); Karen Lin, Note, *An Unintended Double Standard of Liability: The Effect of the Westfall Act on the Alien Tort Claims Act*, 108 Colum. L. Rev. 1718, 1721-25 (2008) (same).

[7] Plaintiffs' narrowing arguments are particularly weak. (Opp. 14-15.) *Pettiford* does not support that "[t]he results from an FSIA case cannot be applied to immunity in other contexts." (Opp. 15) (citing *Pettiford v. City of Greensboro*, 556 F. Supp. 2d 512, 533 (M.D.N.C. 2008).) *Pettiford* found that *Butters* did not apply to federal statutory claims against a municipality where "quintessential[]" government functions were not at issue. *Id.* at 533. The common law claims at issue here—arising out of the interrogation of military detainees during war—fall squarely within *Butters*' holding. *See* § I.B.1, *infra*. Plaintiffs also attempt to hold *Mangold* to its facts, reporting to the government, which is certainly not how *Butters* read it four years later. *See Butters*, 225 F.3d at 466.

important governmental interest. *See, e.g.*, *Mangold*, 77 F.3d at 1447 ("[T]he scope of that immunity is defined by the nature of the *function* being performed… ."); *Butter*s, 225 F.3d at 466 ("[I]mmunity exists because it is in the public interest to protect the exercise of certain governmental functions.").[8] An immunity defense, by its very nature, precludes damages claims—even potentially meritorious ones—on the ground that there are important governmental interests that justify precluding such claims. *See Wallen v. Domm*, 700 F.2d 124, 126 (4th Cir. 1983) ("Once the wrongful acts are excluded from an exercise of authority, only innocuous activity remains to which immunity would be available. Thus, the defense would apply only to conduct for which it is not needed."). In addition to the very significant public interest in insulating the War Making power from civil suits by foreign citizens identified above, Judge Robertson cogently explained why it is equally important that contractor employees working for military units should not have to weigh the consequences of obeying military orders against the exposure to liability. *Ibrahim v. Titan Corp.*, 556 F. Supp. 2d 1, 5 (D.C. Cir. 2007), appeal docketed, No. 08-7008 (D.C. Cir. Jan. 29, 2008)

The Federal Register remarks made in 2008 cited by Plaintiffs for the proposition that "[t]he Department of Defense has spoken clearly that granting absolute immunity to…defense contractors…would not serve the military's interests" (Opp. at 18), say no such thing. The remarks in response to public comments on an amendment to the Defense Federal Acquisition Regulation Supplement respond to a suggestion that a proposed change to the Acquisition Regulations might be misinterpreted to create liability for contractors where none existed before. The remarks state that the proposed rule "retains the current rule of law" and is consistent with court decisions finding state law preempted or non-justiciable questions raised

[8] Plaintiffs' argument that the nature of the alleged illegality removes the conduct from the realm of government function is nothing more than an attempt to say that torture can never be immunized, when the consistent holding is that abuses in the course of military detentions and interrogations, even torture, are clearly in the scope of employment. *See* § I.B.2, *supra*. The cases on which they rely (Opp. 13, 19-20) deal only with immunity for discretionary functions that is an exception to the waiver of immunity in the FTCA. That has no application where, as here, the government has not waived its immunity for its conduct of combatant activities and claims abroad. *See Perkins v. United States*, 55 F.3d 910, 914 (4th Cir. 1995) (distinguishing discretionary function case law for other sources of immunity).

and refer to a recently promulgated provision that post-dates the allegations in the Complaint and is not contained in L-3's contract.[9]

C. This Case Must Be Dismissed Under the Political Question Doctrine.

The fundamental elements of the political question doctrine's application to this case are not in dispute: Plaintiffs agree that the issues raised by their complaint "touch on the President's war powers and combat" and do not dispute that "detaining persons clearly constitutes an 'important incident[] of war.'" (Opp. 21-22.) The Senate Armed Services Committee, following nearly two years of investigation, has confirmed that the abuses in Iraq arose out of the policies of the highest levels of the Executive in the conduct of the war:

> The abuse of detainees in U.S. custody cannot simply be attributed to the action of "a few bad apples" acting on their own. The fact is that senior officials in the United States government solicited information on how to use aggressive techniques, redefined the law to create the appearance of their legality, and authorized their use against detainees.

Senate Armed Services Committee Inquiry Into the Treatment of Detainees in U.S. Custody (Dec. 11, 2008) ("Senate Report").[10] Contrary to Plaintiffs' assertions, such involvement by the Executive make the issues in this area a political question no matter how those decisions were implemented. *See Bancoult v. McNamara*, 445 F.3d 427, 436-37 (D.C. Cir. 2006) (political question whether the U.S. military had committed, *inter alia*, genocide, torture, cruel, inhuman, or degrading treatment, and intentional infliction of emotional distress in the course of implementing a policy made at the highest levels of the Executive).

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[9] The military regulations and manuals cited by Plaintiffs (Opp. 16-17), have nothing to do with the question of derivative immunity. In any event, Plaintiffs' assertions about the lack of control over the L-3 linguists in Iraq were considered and rejected by Judge Robertson, who found that they were under the exclusive command and control of the military. *Ibrahim v. Titan Corp.*, 556 F. Supp. 2d 1, 10 (D.D.C. 2007), *appeal docketed*, No. 08-7008 (D.C. Cir. Jan. 29, 2008). Even before reaching that question, Judge Robertson considered and rejected Plaintiffs' reliance on these manuals and regulations as either an expression of military intent or to bar the defenses asserted here. *Id.* at 9.

[10] *Available at* http://armed-services.senate.gov/Publications/EXEC%20SUMMARY-CONCLUSIONS_For%20Release_12%20December%202008.pdf (last visited January 26, 2009).

Beyond attempting to minimize the impact of the report's conclusions (Opp. 8), Plaintiffs try to argue that their case can go forward where no similar case has done so, contending that recent Supreme Court precedent limits the precedent to the contrary (Opp. 25); that the criminalization of torture takes their claims outside the reach of the doctrine; that the rationale of *Tiffany* is limited to the negligence context; and that the necessary evidence will be available. *Id.* at 22-25. Plaintiffs are simply not correct.

Hamdi & Boumediene. Plaintiffs wrongly assert that these cases limit *Tiffany v. United States*, 931 F.2d 271 (4th Cir. 1991). (Opp. 24-25.) In *Hamdi v. Rumsfeld*, a habeas petition for a U.S. citizen detained in the U.S., the parties agreed that the Constitution gave the courts the right to adjudicate the petition, i.e., there was no question of justiciability, and the issue was what process was due. 542 U.S. 507, 525-26 (2004).[11] Four years later, *Boumediene v. Bush* held that aliens detained in Guantanamo had a constitutional right to bring a claim for habeas review. Neither case addressed the political question doctrine at all, and neither said the judiciary should review the treatment of detainees by the military. Both authorized habeas review for detainees held under U.S. sovereignty—which "is not an appropriate or available remedy for damages claims," for conditions of confinement or otherwise. *Wolff v. McDonnell*, 418 U.S. 539, 554 (1974).

Tiffany. Plaintiffs go to great lengths in their attempt to distinguish and cabin *Tiffany*, but they miss the point.[12] While Plaintiffs want to make *Tiffany* and this case about the discretionary function exception, *Tiffany* did not rest on that exception, *see id.* at 277 ("[T]he discretionary function exception alone does not

[11] It is telling that Plaintiffs quote not from *Hamdi* but from Judge Robertson's citation to *Hamdi* in the *Ibrahim* case (Plaintiffs' counsel here was counsel in *Saleh*, not *Ibrahim*). (Opp. 22.) Judge Robertson did not address all of the cases cited in our opening brief at 24, was not bound by *Tiffany*, and of course had begun to retreat from his holding in *Ibrahim* by the time he addressed the matter in *Saleh*, a point raised in our opening brief and not addressed by Plaintiffs. *See Saleh v. Titan Corp.*, 436 F. Supp. 2d 55, 58 (D.D.C. 2006) ("[T]he more plaintiffs assert official complicity in the acts of which they complain, the closer they sail to the jurisdictional limitation of the political question doctrine.").

[12] Plaintiffs first note that the defendant in *Tiffany* was not a corporation. (Opp. 22.) The political question doctrine, however, turns on the justiciability of the subject matter, not on the identity of the defendant. *See, e.g.*, *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 983 (9th Cir. 2007) (dismissing suit against bulldozer manufacturer in part on political question grounds).

capture all the important aspects of this case."), but instead held that the kind of inquiry that Plaintiffs ask for here—torts based on "the strategy and tactics employed on the battlefield," *id.*—is a political question.[13] Plaintiffs' contention that this rationale is applicable only to negligence is also without support.[14]

Criminalization of Torture. Plaintiffs contend that because there is a criminal statute on torture, 18 U.S.C. § 2340A, this creates an actionable duty that makes these allegations justiciable. *See* Opp. 23-24. Criminal statutes do not create private rights of action, i.e., actionable duties, and this statute is no exception. *See* 18 U.S.C. § 2340B. With a criminal statute, the Executive remains in control of the prosecution, and there are no political question concerns. Plaintiffs insist, however, that § 2340A "draws a clear line" against which this Court can judge the alleged actions of L-3. Untrue. Nothing delineates which interrogation methods are permissible and under what circumstances (DOJ's changing opinions on what constitutes torture is evidence that the issue is not well settled); that is a discretion-laden determination delegated to the Executive branch and shielded from judicial review by the political question doctrine. That is why the D.C. Circuit has dismissed on political question grounds four torture lawsuits since 2006 and repeatedly held that torture would be within the scope of employment if it had occurred. *See* Br. 24.

There are no Judicially Manageable Standards. Plaintiffs' claim that there are judicially manageable standards is unsupported by law or fact. The sole case they cite for the proposition, *Sterling v. Constantin*, 287 U.S. 378 (1932) (Opp. 26), has nothing to do with these issues. It held that a federal court

[13] Plaintiffs absurdly claim that "[h]ad the *Tiffany* decision barred [their] 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)." (Opp. 24 n.10.) The defamation claims in *Rhodes* did not require reexamination of any Executive decision, and neither the court nor the parties raised the issue.

[14] Plaintiffs' reliance on *McMahon* and *Lane* (Opp. 25-26), is misplaced. Those cases involved suits against contractors by their own employees or by military personnel they were transporting. Their rationale was that such transportation claims *could* be adjudicated without raising political questions. *See, e.g.*, *Lane*, 529 F.3d at 567 (plaintiffs' tort claims would not require "second-guessing the acts and decisions of the Army"). None involved detention or claims by Iraqis based on their treatment by the military. Unlike the "friendly" suits on which Plaintiffs rely, one cannot address Plaintiffs' claims without touching on the military's policies of detention (were they innocent or properly deemed security risks?), interrogation (what are the limits of interrogation on the battlefield during wartime?), and administration of military detention facilities (what is reasonable supervision and control in a wartime facility overwhelmed with prisoners?).

can review under *Ex Parte Young* a governor's acts under a state constitution. The facts are also contrary to what Plaintiffs claim. In the *Saleh* and *Ibrahim* actions, the Government produced no documents, and the discovery addressed L-3's employees' relationships with L-3 and the military. It did not touch upon Plaintiffs' injuries, the military's interrogation plans, or government records concerning the detention facilities. While *ACLU v. Dep't of Defense*, 543 F.3d 59 (2d Cir. 2008), has nothing to do with the classification of "most of the relevant evidence,"[15] we know that the CIA—which was responsible for the Ghost Detainee program to which the Complaint repeatedly adverts (*see* SAC ¶¶ 28, 40, 402, 445)[16]—will not even search for documents concerning four lead Plaintiffs based on classification. *See* Ex. K (Letters from CIA to L-3's counsel denying FOIA requests concerning Al-Janabi, Al-Ogaidi, Al-Quraishi and Al-Taee because "[t]he fact of the existence or nonexistence of requested records is currently and properly classified and is intelligence sources and methods information that is protected from disclosure by section 6 of the CIA Act of 1949."); *see also* CIA's Mot. Summ. J., at 9-20, *Amnesty Int'l v. CIA*, No. 07-05435, dkt. 55 (S.D.N.Y. Apr. 21, 2008) (asserting same exemptions); Ex. I at 5-7 (requiring classification of interrogation related materials).

II. The Complaint Does Not State a Claim.

A. The ATS Counts Must Be Dismissed (Counts 1-9).

Plaintiffs' opposition makes clear that all of their Alien Tort Statute (ATS) claims (Counts 1-9) must be dismissed for two independent reasons: (i) they require as a jurisdictional necessity an official action of the United States, and (ii) they are barred by well-established limitations under federal common and international law. Counts 4-6 must be dismissed for the additional reason that they assert an international norm that is not recognized as *Sosa* requires.

[15] The issue in that case was limited to whether the infamous Abu Ghraib photographs—none of which were classified, unlike the interrogation policies and records that are implicated by Plaintiffs' claims—should be withheld under FOIA based on the detainees' privacy rights.

[16] The Fay Report (Opp. 50) concluded that "Ghost Detainees" at Abu Ghraib were CIA detainees. Available at: news.findlaw.com/hdocs/docs/dod/fay82504rpt.pdf at 9 (last visited January 26, 2009).

1. Plaintiffs' ATS Claims Rely Upon U.S. Action as a Jurisdictional Necessity.

a. Torture and Cruel, Inhuman, and Degrading Treatment (Counts 1-6).

Relying on persuasive authority from other circuits, L-3 established that (a) the ATS does not confer federal jurisdiction over civil damages claims for non-official torture (Br. 28-29), and (b) if L-3's actions were official actions of the United States—as required under international law—their ATS claims would be barred by sovereign immunity. (Br. 29-30.) In opposition, Plaintiffs tacitly concede the latter and contest only the former, arguing that their ATS claims need not implicate official action. Yet Plaintiffs fail to identify *any* authority to support their position that *non-official* torture or cruel, inhuman, and degrading treatment is actionable under the ATS, even if it was consistent with their Complaint, which it is not. Instead, Plaintiffs urge this Court that it is writing on a blank slate in this Circuit,[17] and misleadingly suggest that *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) supports their claims of *non-official* torture. (Opp. 30-32.) *Sosa* does not provide such support, let alone reverse the unanimous precedent from the Circuits on the issue: *Sosa* did not involve claims of torture and neither held nor suggested what Plaintiffs assert; if anything the Court's *dicta* does the precise opposite. While it is true that *Sosa* references two opinions holding *official* torture under color of *foreign* law to be actionable (*Filartiga v. Pena-Irala*, 630 F.2d 876, 884 (2d Cir. 1980) ("[W]e conclude that ***official torture*** is now prohibited by the law of nations.") and *In re Estate of Ferdinand Marcos Human Rights Litig.*, 25 F.3d 1467, 1475 (9th Cir. 1994) (norm ***prohibits official torture***)), which L-3 does not dispute, it cited in the very same discussion an opinion *flatly rejecting* claims for *non-official* torture. *See* 542 U.S. at 732 & n.20 (quoting Judge Edwards's concurrence in *Tel-Oren v. Libyan Arab Rep.*, 726 F.2d 774, 781 (D.C. Cir. 1984) (***holding torture absent state action is not cognizable***)). Only through Plaintiffs' tortured reading and rendition of precedent do two holdings that

[17] When the Fourth Circuit has not addressed an issue, it does not treat the slate as blank but looks to the precedent of its sister circuits. *See, e.g.*, *Shaliehsabou v. Hebrew Home of Greater Wash., Inc.*, 363 F.3d 299, 310 (4th Cir. 2004) ("Given the lack of authority in our cases, we look to the decisions of our sister circuits . . . ."); *Bouchat v. Balt. Ravens Football Club*, 346 F.3d 514, 520 (4th Cir. 2003) ("Though our Court has not spoken directly on this point, several of our sister circuits have . . . ."); *Apex Plumbing Supply v. U.S. Supply Co.*, 142 F.3d 188, 192 (4th Cir. 1998) ("Because there exists no binding precedent in this circuit, we look, first, to persuasive authority from our sister circuits.").

official torture is actionable, plus one rejecting claims for non-official torture, become a "triumvirate" that "should guide this Court's analysis in their favor. (Opp. 32.)

If these direct holdings were not enough, the most relevant U.S. legislation (the TVPA) and international agreement (the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment) make clear that such ATS claims require state action. (Br. 28-30.) As we explained in our opening brief, Congress expressly limited the TVPA to ***official torture*** under color of ***foreign law***, thereby excluding from its coverage both *non-official* torture and actions taken under *color of U.S. law*. It is also clear that the TVPA expressed Congress's understanding of the requirements of the same claims by foreigners under the ATS, i.e., that the ATS also requires state action. (Br. 28-29, 32-33; *see also Kadic v. Karadzic*, 74 F.3d 377, 378 (2d Cir. 1996) (TVPA was enacted "to codify the cause of action recognized . . . in *Filartiga*, even as it extend[ed] the cause of action to plaintiffs who are United States citizens").) Plaintiffs do not dispute that the TVPA is so limited or that their theories of liability fail to state a claim under the TVPA for these reasons. Nor do they dispute that the TVPA illustrates Congress's understanding of the scope of ATS claims for torture. Nonetheless, Plaintiffs would have this Court find that aliens' ATS claims for torture are afforded broader reach than those of U.S. citizens under the TVPA in direct contravention of Congress's intent.[18]

With regard to whether their claims survive if official action is required (here that of the United States), Plaintiffs do not dispute that *Sanchez-Espinoza* requires their ATS claims to be dismissed. (Br. 30-31.) Instead, they attempt to distinguish it by arguing that the court "*held*" the conduct at issue was

[18] Plaintiffs' sole response to the TVPA and authorities cited by L-3 explaining how the TVPA sheds light on torture claims under the ATS—that the TVPA "was not intended to circumscribe the remedies already available to aliens under the ATS" (Opp. 39)—is a non-sequitur. Plaintiffs' argument that the War Crimes Act (18 U.S.C. § 2441) is evidence that the "political branches have ratified the conclusion . . . that non-state actors who commit war crimes . . . violate international law" (Opp. 38-39), is just wrong. This criminal statute does not address implied causes of action and—being enforceable by the sovereign—does not implicate sovereign immunity, which undergirds *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985). *See Sosa*, 542 U.S. at 727 ("The creation of a private right of action raises issues beyond the mere consideration whether underlying primary conduct should be allowed or not, entailing, for example, a decision to permit enforcement without the check imposed by prosecutorial discretion.").

"authorized by the sovereign" and "not contrary to statutory or constitutional prescription." (Opp. 34 (internal quotations omitted) (emphasis added).) This false distinction rests upon selective quotation and mischaracterization.[19] *Sanchez-Espinza* involved exactly the same sort of allegations by private individuals and corporations working as government contractors: murder, rape, and war crimes. (Br. 30.)

Plaintiffs also suggest that L-3's argument, i.e., *Sanchez-Espinoza's* holding, means that the "ATS can *never* apply." (Opp. 34-35.) It can only "never apply" where the jurisdictionally required official action is that of the United States; all the cases on which Plaintiffs rely, which involve foreign states, remain undisturbed. *See Sanchez-Espinoza*, 770 U.S. at 207 n.5 ("Since the doctrine of foreign sovereign immunity is quite distinct from the doctrine of domestic sovereign immunity that we apply here …. nothing in today's decision necessarily conflicts with the decision of the Second Circuit in *Filartiga v. Peña-Irala,* 630 F.2d 876 (2d Cir.1980).").

b. War Crimes Claims (Counts 7-9).

In our opening brief, we anticipated and addressed Plaintiffs' incorrect reliance on *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995) to assert that their war crimes claims escape the reach of *Sanchez-Espinoza* or that there is a conflict between the cases. (Br. 31.) As we explained, *Kadic* recognized that international law had been extended to regulate belligerents in internal armed conflicts, even where those parties had not yet achieved statehood. Under *Kadic*, and international law currently, War Crimes do not require state action, but do require belligerent action. This case plainly does not present the issue addressed in *Kadic*. *See Saleh*, 436 F. Supp. 2d at 57-58 & n.3 (rejecting *Kadic* argument). There is no question about the status of Plaintiffs' custodian: it was the United States, which is both a state and a belligerent in Iraq. (Br. 31.) If Titan's employees were not acting on behalf of the United States as belligerent, it is hard to see how they were committing War Crimes, because acting on behalf of a belligerent (not necessarily a

[19] The sentence selectively quoted by Plaintiffs reads: "These consequences are tolerated when the officer's action is unauthorized because contrary to statutory or constitutional prescription . . . but we think that exception can have no application when the basis for jurisdiction requires action authorized by the sovereign as opposed to private wrongdoing." *Sanchez-Espinoza*, 770 F.2d at 207.

recognized state) is the *sine qua non* of a War Crime claim.[20] Because *Kadic* is inapplicable here, so too are the cases cited by Plaintiffs (Opp. 36-37) that supposedly "followed" *Kadic*'s reasoning, none of which actually held that ATS claims for war crimes are cognizable against private actors. Those authorities (like *Kadic*) at most extend international jurisdiction to organized belligerents even when such belligerents are not acting for recognized states. They do not hold or even suggest that private torture violates international law merely because it occurs in the context of a war; nor do any turn on association with U.S. military action.[21]

The contours of *Kadic* are clearly reflected in authority discussed (Br. 31-32) by L-3, *Saperstein* and *Abagninin*, in which courts distinguished allegations constituting illegal private conduct that happens to take place during war from violation of international norms when the same conduct is undertaken on behalf of a belligerent. Plaintiffs' attempt (Opp. 38) to distinguish *Saperstein*, which involved allegations of murder, as not qualifying as a war crime due to lack of severity or repetition is plainly contradicted by the court's discussion. It is also wrong because murder of "one or more persons" undertaken on behalf of a belligerent is clearly a war crime, *see* 18 U.S.C. § 2441(d)(1)(D) and, as the quoted statutory language (and Plaintiffs' own brief (Opp. 38 n.16)) demonstrates, there is no requirement that such conduct be repeated more than once. Plaintiffs do not respond to *Abagninin*.

c. Claiming "Color of Law" Does Not Change the Analysis

Plaintiffs contend, albeit as a fallback, that alleging a conspiracy with military personnel is sufficient to satisfy the ATS's state action requirement. (Opp. 40.) That is incorrect. *See Saleh v. Titan Corp.*, 436 F. Supp. 2d 55, 58 (D.D.C. 2006), *appeal docketed*, No. 08-7008 (D.C. Cir. Jan. 29, 2008) ("[I]n the absence of

[20] Plaintiffs want to have it both ways. They want there to be a war or occupation to allow them to categorize their claims as War Crimes, but want to avoid the consequences of that assertion under the Law of Occupation and *Eisentrager*.

[21] Plaintiffs' reliance (Opp. 36 & n.15) on the Nuremberg Proceedings is inapposite. Because Nuremberg tribunals involved actions taken by persons alleged to be agents of the Nazi government, they clearly implicated state action. These arguments were considered (and rejected) by Judge Edwards in his concurring opinion in *Tel-Oren*. *See* 726 F.2d at 792-93.

supporting citation it is difficult to see how conspiratorial behavior, which by definition is secretive, can show the color of law."). More fundamentally, "there is no middle ground between private action and government action" for purposes of the ATS. *Id.* (citing *Sanchez-Espinoza*, 770 F.2d 202). To the extent international law's state action requirement is satisfied through U.S. action, sovereign immunity is implicated. And while the Fourth Circuit has not directly ruled on this issue, this is the logical conclusion of Fourth Circuit precedent. *See Goldstar (Panama) S.A. v. United States*, 967 F.2d 965 (4th Cir. 1992) (ATS is not a waiver of sovereign immunity); *Butters,* 225 F.3d 462 (contractor cannot be sued where principal immune). Simply put, no court has held that "color of law" alters or substitutes for international law's state action requirement or is a way of distinguishing the rationale of *Sanchez-Espinoza*. Plaintiffs' own authority (Opp. 40) makes clear that "color of law" is merely a guide to whether there has been state action.[22]

2. The ATS Claims Are Barred by Common and International Law Limitations.

a. Corporations Are Not Liable Under the ATS.

Plaintiffs do not dispute that corporations are not subject to suit under international law (Br. 34) or federal common law. (Br. 32-33.) They argue instead that the federal common law rule does not apply because the ATS is a statutory cause of action. (Opp. 42.) But *Sosa* rejected this very assertion and held to the contrary.[23] Plaintiffs also argue that because federal courts have permitted ATS suits against corporations (Opp. 41), this Court should too. But those decisions—none of which are controlling—fail to address L-3's arguments. Such decisions are unpersuasive, because "[q]uestions which merely lurk in the

[22] *See e.g., Bowoto v. Chevron*, No. 99-02506, 2006 WL 2455752, at *6 (N.D. Cal. Aug. 22, 2006) ("[I]t would be inappropriate to import 'color of law' jurisprudence from § 1983 to expand the statute's reach."); *Wiwa v. Royal Dutch Petroleum Co.*, No. 96-8386, 2002 WL 319887, at *13 (S.D.N.Y. Feb. 28, 2002) ("[P]laintiffs must demonstrate state action in order to proceed with their [ATS] claims."); *Tel-Oren,* 726 F.2d at 791 ("The [PLO] is not a recognized state, and it does not act under color of any recognized state's law. In contrast, the Paraguayan official in *Filartiga* acted under *color of state law*, although in violation of it.") (emphasis added).

[23] *See* 542 U.S. at 724 ("In sum, although the ATS is a jurisdictional statute creating no new causes of action . . . . [it] is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations . . . .").

record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster v. Fall*, 266 U.S. 507, 511 (1925). Moreover, Plaintiffs do not dispute that corporations cannot be sued under the TVPA. (Br. 33.) This is again compelling evidence of Congress's understanding of the scope of the ATS, *see supra* § II.A.1.a., to which Plaintiffs have no response.

b. Special Factors Bar Plaintiffs' ATS Claims.

Plaintiffs do not dispute that alternate remedies bar implied claims under federal common law and international law (Br. 34-35), that they are eligible for compensation from the U.S. Army for substantiated abuse in U.S. military detention facilities (Br. 35), or that their claims implicate military affairs and national security, which are special factors requiring dismissal. *Id.* These tacit concessions are sufficient grounds for dismissal. Rather than contest these critical points, Plaintiffs argue that they are entitled to a remedy against their choice of defendant—as opposed to the U.S. Army. The law is clearly otherwise. *See Wilson v. Libby*, 535 F.3d 697, 709 (D.C. Cir. 2008) (suit barred by alternate remedy even though plaintiff unable to recover from preferred defendants on preferred claims). Plaintiffs also argue that the "majority of courts that have reached this issue have declined to graft an exhaustion requirement" onto the ATS (Opp. 43), but none of their cases involve the United States and the requirement to evaluate whether there are common law special factors against implying a cause of action.

3. Counts 4-6 Fail To Meet *Sosa*'s Standard For Additional Reasons.

Aldana v. Del Monte Fresh Produce, N.A., Inc., 416 F.3d 1242, 1246-47 (11th Cir. 2005) (Br. 36) is the most persuasive authority on this issue and requires dismissal of Counts 4-6, but Plaintiffs do not address it. Other than a single district court case, the federal decisions relied upon by Plaintiffs (Opp. 43-45) were all decided before *Sosa* and "reflect[] a more assertive view of federal judicial discretion over claims based on customary international law than the position" taken by the Supreme Court. *Sosa*, 542 U.S. at 748 n.27 (internal quotation marks omitted).

III. Plaintiffs' Common Law Claims Should be Dismissed (Counts 10-20).

A. Iraq Law Applies to Counts 10-20.

Plaintiffs do not dispute that the Maryland choice of law principle for their common law tort claims is *lex loci*, nor can they dispute that for the claims in Counts 10-20—common law torts for which diversity provides subject matter jurisdiction—this Court must apply Maryland's choice of law rules. *See* Br. 37.[24] Instead they argue that federal common law should apply to their diversity common law claims, that *lex loci* would point to either Virginia or California (and that they need discovery to figure it out), and that Maryland would reject Iraq law on public policy grounds. These arguments are devoid of reason or authority.

Federal Common Law. Counts 10-20 (Assault, Battery, Sexual Assault, Negligent & Intentional Infliction of Emotional Distress, Negligent Supervision & Hiring) are quintessential state law claims governed by state common law. There is no general federal common law of tort, as plaintiffs seem to insist. *Compare* Opp. 47 ("Federal statutory and common law imposes a duty on every American not to torture"), *with Sosa*, 542 U.S. at 726 (no general federal common law). Not one of the statutes they string cite provides a statutory private right of action for their claims. The cases they cite— *In re Peanut Crop Ins. Litig.*, 524 F.3d 458 (4th Cir. 2008) and *Long Island Sav. Bank, FSB v. United States*, 503 F.3d 1234 (Fed. Cir. 2007)—are inapplicable *contract* cases brought against the United States that say nothing about *tort* claims against a private party. *Cf. Ibrahim v. Titan Corp.*, 391 F. Supp. 2d 10, 20 (D.D.C. 2005), *appeal docketed*, No. 08-7008 (D.C. Cir. Jan. 29, 2008) (detainees have no standing to bring claims based on L-3's contract with the government; this ruling was not appealed).

***Lex Loci Delicti Only Points to Iraq*.** Plaintiffs agree that Maryland uses *lex loci* to choose the law applicable to the claims they assert in Counts 1-10. (Opp. 48.) They also concede, as they must, that the only injuries they allege occurred in Iraq. *Id.* Instead they assert *without a single case citation* that

[24] Having nothing of substance to say, Plaintiffs muddy the waters by couching their Opposition with regard to all twenty counts. (Opp. 45.) Yet Counts 1-10 allege violations of international law (official torture, war crimes, etc.) for which the ATS purportedly provides jurisdiction and makes them federal common law claims, *see Sosa*, 542 U.S. at 732, while Counts 10-20 are common law tort claims that arise under diversity.

Maryland law would point to Virginia or California because "the last act" necessary to hold them liable was unspecified corporate conduct. (Opp. 48-49, citing the Restatement (First) of Conflict of Laws § 377 (1934).) This is nonsense, as the first note to § 377 and the case law make clear. "[W]hen a person sustains bodily harm, the place of wrong is the place where the harmful force takes effect upon the body." Restatement (First) of Conflict of Laws § 377 (note 1). That is certainly the law in Maryland: "[W]here the events giving rise to a tort action occur in more than one State, we apply the law of the State where the *injury*—the last event required to constitute the tort—occurred." *Lab Corp. of Am. v. Hood*, 911 A.2d 841, 845 (Md. 2006) (emphasis added); *see also Erie Ins. Exchange v. Heffernan*, 925 A.2d 636, 648-49 (Md. 2007); *Philip Morris v. Angeletti*, 752 A.2d 200, 230-32 (Md. 2000); *Hauch v. Connor*, 453 A.2d 1207, 1209-10 (Md. 1983); *White v. King*, 223 A.2d 763, 765 (Md. 1966). As to discovery, Plaintiffs have pleaded the place of injury; what is there to discover?

There is No Public Policy Exception. Plaintiffs argue that if not all their common law claims would survive under Iraqi law, such a result would be contrary to Maryland's public policy. (Opp. 49.) Plaintiffs provide no explanation why the law of Iraq is contrary to the public policy of Maryland, beyond citing *Lab Corp. of Am. v. Hood*. This does not come close to meeting the "heavy burden on him who urges rejection of foreign law on the ground of public policy." *The Harford Mut. Ins. Co. v. Bruchey*, 238 A.2d 115, 117-18 (Md. 1968). Plaintiffs do not state what Maryland public policy would be contravened by the application of Iraqi law. Maryland courts have emphasized:

> that "public policy" is not a term to be bandied about lightly in every conflict of laws case. One should be well convinced of the weight of a supposed policy before advancing it against bedrock legal principles. The Court of Appeals has made it clear that for the argument of "public policy" to succeed the alleged public policy must be a very strong one.

Jacobs v. Adams, 505 A.2d 930, 937 (Md. Ct. Spec. App. 1986). In fact, with the exception of *Lab. Corp.* involving a possible conflict with Maryland's clearly expressed public policy favoring the right to seek an abortion, we are not aware of a single tort case in Maryland that has held that *lex loci* should be ignored

because of a conflict with Maryland public policy.[25] Contrast that with the lack of hesitation to apply foreign law to bar claims allowable under Maryland law.[26] "Maryland public policy is not violated when the foreign law is merely different from Maryland law." *Ayres v. District of Columbia*, No. 06-1826, 2008 WL 3312193, at *2 (4th Cir. Aug. 8, 2008). In upholding immunity under District law because the Court was unwilling in the absence of a strong public policy to "override another jurisdiction's view of the law regarding events in that jurisdiction," the Fourth Circuit noted that it is generally the province of the Maryland state legislature to declare such public policy through the enactment of specific statutes. *Id.*; *see also Motor Club of Am. Ins. Co. v. Hanifi*, 145 F.3d 170, 180 (4th Cir. 1998) (stating that "absent a statement by the legislature that something is contrary to Maryland public policy," courts will generally adhere to *lex loci*).

B. Plaintiffs' Claims and Relief Under Iraqi Law.

CPA 17. Plaintiffs agree that this order, incorporated into Iraqi law, immunizes L-3 from Iraqi Legal Process generally (Ex. G at 2, § 3(2)) and from Iraqi law, *id.* § 3(1), in connection with the performance of their contract.[27] (Opp. 48.) Reading Ex. G § 3 or Ex. H §§ 4-5 as a whole—which delegates waiver of the immunity to the Sending State not to individual plaintiffs—one cannot imagine that it contemplated suits in the United States by Iraqis against contractors for violations of Iraqi law in performance of their contracts.

[25] The two other cases cited by Plaintiffs are far afield. *Lowndes v. Cooch*, 39 A. 1045 (Md. 1898), held that Maryland would apply Delaware law in a case involving the inheritance of stock. *Aleem v. Aleem,* 947 A.2d 489 (Md. 2008) did not even involve a choice of law question, rather the recognition of a foreign judgment (here a bill of divorce obtained under Islamic law without the presence of the wife). The nature of the discussion and the comparison of Maryland public policy with the law and facts in *Aleem* and *Lab Corp.* shows by how much Plaintiffs miss the mark in asserting that Maryland would ignore its choice of law provisions in this case, which would not recognize certain theories of vicarious liability or damage measures.

[26] *See Jacobs*, 505 A.2d at 936 (D.C. law applied to traffic accidents in D.C.; Maryland residents' claims barred: "[i]t is not for us to allow a cause of action where none is permitted by the law of the situs"); *Harford*, 238 A.2d at 119 (rejecting public policy attack where traffic accident in Virginia brought for loss of consortium, a claim recognized in Maryland, but not in Virginia; a mere "difference of law between the place of the wrong and the forum" was insufficient to trigger the public policy exception).

[27] L-3 cited the ***same*** provision as Plaintiffs and did not "mislead." *Compare* Opp. 48 n.21, *with* Br. 38.

That the contractors are supposed to "otherwise" obey Iraqi law does not provide for a private right of action, but simply authority for the Sending State to control its contractors. This is of course completely consistent with *Dow v. Johnson*, *Coleman v. Tennessee*, *Ford v. Surgent*, and the other occupation law cases ignored by Plaintiffs. No one can read those cases and think they would have come out differently if the Plaintiffs had traveled to the Occupier's courts to press their claims.

The Substance of Iraqi Law Bars Plaintiffs' Claims. Plaintiffs submit a document from their expert purporting to create a dispute over the content of Iraqi law. Like much of their arguments in their brief, this document makes broad assertions that are completely unsupported by its contents. First, the Court should disregard this "document" that Plaintiffs misrepresent to be a declaration (Opp. 49): it is not notarized nor does it comply with the requirements of 28 U.S.C. § 1746. Second, from the face of the document, the author did not review the Complaint in this matter, just L-3's expert declaration which was provided in English. Given his apparent inability to write in English, it is unclear how he can opine on the sufficiency of the Complaint under Iraqi law or what he considered in reviewing our expert's declaration.[28] Third, to the extent that there is a dispute, the Court should hold a hearing to determine the content of Iraqi law to resolve this motion. *See* Fed. R. Civ. P. 44.1 (foreign law determined by the Court as a question of law).

But a hearing is not necessary, as their expert does not actually contradict Ms. Ali on the content of Iraqi law or the authority of the sources on which she relies. As set forth in greater detail in the accompanying second declaration from Ms. Ali, Dr. Al-Soufi agrees on each particular on which Ms. Ali relies, and is unable to make an affirmative assertion that Iraq recognizes punitive damages, or provides a cause of action for civil conspiracy, or aiding and abetting liability independent of liability for a direct tort.[29] In each case, the Al-Soufi document engages in classic question-begging. In the case of punitive

[28] There are other troubling aspects to this document. Plaintiffs' counsel represented to the Court that they did not submit the declaration with their brief (filed two days late on January 4 with extensive and substantive revisions to the text from the rough draft filed on January 2) because it was being translated. This document, however, was not signed until January 6. The translation was submitted January 12.

[29] Dr. Al-Soufi's original Arabic document does not even attempt to provide Arabic words for "Punitive Damages" but instead uses the English words exclusively. *See* Ex. L (Ali Supp. Decl.) ¶ 7.

damages, Plaintiffs' expert merely asserts that the Iraqi Code does not explicitly *forbid* punitive damages. *See* Al-Soufi Decl. (trans.) ¶ 9. And while he spills a lot of ink on the discretion of the judge to award compensatory damages, his description makes clear that they are compensatory, not punitive. *Id.* (repeatedly referring to "damages incurred," "damages requiring compensation," "restorative compensation," and "direct damage").

The same is true of his discussion of civil conspiracy and aiding and abetting claims. Dr. Al-Soufi's discussion centers on the concept of joint and several liability. (*Id.* ¶ 12.) But requisite to joint liability is that each person committed a wrongful act directly against the injured party. (Ex. J, Ali Decl. ¶ 16.) In this case, Plaintiffs seek to hold L-3 liable for the actions of the military and CACI, among others, not solely for actions in which L-3 directly participated.[30]

C. Plaintiffs' Conspiracy Claims Are Insufficient.

To the extent L-3 focused on only two paragraphs of the Second Amended Complaint to the exclusion of the other 558, that is because those are the only two discussing in any way the formation or joining of a conspiracy. The mere existence of 558 additional paragraphs, however, does not salvage Plaintiffs' conspiracy claims if, as is the case here, none of them contain sufficient information to satisfy the requirements of Rule 8.

Plaintiffs have certainly alleged that they were abused and they have alleged in a few instances that L-3 employees may have been involved. What they have not alleged, however—in any of those 560 paragraphs—are *facts* sufficient to "reasonably lead to the inference that [defendants] positively or tacitly came to a mutual understanding to try to accomplish a common unlawful plan." *Ruttenberg v. Jones*, 283 Fed. Appx. 121, 132 (4th Cir. 2008). As a result, Plaintiffs' conspiracy allegations fail as a matter of law and must be dismissed. *See Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1964-65 (2007).

[30] Dr. Al-Soufi and Ms. Ali also agree about the law concerning respondeat superior, but Dr. Al-Soufi asserts, not even having read the complaint, that L-3 maintained control over its employees, an issue that we did not raise at this stage, but which has been rejected after discovery in the *Ibrahim* and *Saleh* cases.

CONCLUSION

For all the foregoing reasons, the expert declarations, and its Memorandum of Points and Authorities, L-3 Services' motion to dismiss this case with prejudice should be granted.

Respectfully submitted,

Dated: January 26, 2009

/s/ F. Greg Bowman

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