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

NOT YET SCHEDULED FOR ORAL ARGUMENT

United States Court of Appeals
for the
District Court of Columbia Circuit

No. 08-7008
Consolidated with 08-7009

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

ILHAM NASSIR IBRAHM, *et al.*,
Plaintiffs-Appellants,
v.
TITAN CORPORTATION
Defendants-Appellees.

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

BRIEF OF *AMICI CURIAE* EXPERTS IN INTERNATIONAL HUMANITARIAN LAW IN SUPPORT OF PLAINTIFFS-APPELLANTS

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STATEMENT OF *AMICI*

Amici curiae are experts in international humanitarian law ("IHL"), the body of law comprised of treaties and customary international law governing armed conflict, also referred to as the "law of war." IHL generally establishes limits on the waging of war, governs U.S. military operations in Iraq and is designed to protect Americans as well as foreign civilians and combatants in areas of armed hostilities. *Amici* wish to bring to the court's attention fundamental principles and rules of international humanitarian law relevant to evaluating federal policy concerns in these cases and to assessing whether private military contractors alleged to have committed what would constitute serious violations of IHL against detainees in their custody should be entitled to a defense from tort liability.

Specifically, *Amici* write to explain that the district court's assumption that the defendants-contractors involved in the long-term detention and interrogation of plaintiffs owed "no duty of reasonable care" to detainees in their custody is contrary to binding rules of the Geneva Conventions and that the district court's classification of civilian contractors as the functional equivalent of combatants is inconsistent with the laws of war, essential to the conduct of hostilities throughout the civilized world.

SUMMARY OF ARGUMENT

The district court ruled that employees of private military contractors ("PMCs") who are under the "exclusive operational command" of the United States military were "soldiers in all but name" and were thus qualified as "combatants" under Section 2680(j) of the Federal Tort Claims Act ("FTCA"). *Ibrahim v. Titan Corp*., 556 F.Supp.2d 1, 10 (D.D.C 2007) ("*Ibrahim II*"). Having denominated them *de facto* "combatants," the court extended to the PMCs the same immunity from tort liability that U.S. military could receive under the FTCA. *Id*. In addition, purporting to rely upon a test adopted by the Ninth Circuit's decision in *Koohi v. United States*, 976 F.2d 1328, 1337 (9th Cir. 1992), the district court also assumed that the private contractors acting under or alongside the military in conducting detention and interrogation operations owed those captive detainees "no duty of reasonable care" which could support tort liability in these cases.

International law in general and the laws of war in particular, constitute an integral part of United States law and policy, helping to inform the content of domestic legal obligations. *See Hamdan v. Rumsfeld,* 126 S. Ct. 2749, 2786 (2006); *Hamdi v. Rumsfeld*, 542 U.S. 507, 520 (2004); *The Paquette Habana*, 175 U.S. 677, 700 (1900). The district court's decision, however, is fundamentally inconsistent with international humanitarian law principles in two independent

respects.

First, the district court relied on a proposition in *Koohi* suggesting that private contractors were entitled to invoke the combatant activities exception of the FTCA where the plaintiffs were owed "no duty of reasonable care" by the defendants who had engaged them in combat. *Ibrahim v. Titan*, 391 F. Supp.2d 10, 17 (D.D.C. 2005) ("*Ibrahim I*") (citing *Koohi v. United States*, 976 F. 2d at 1337). However, the district court was mistaken in assuming that the differently-situated plaintiffs in these cases were owed no duty of care or in concluding that such a duty would produce a "significant conflict" with an asserted federal interest embodied in the FTCA, in avoiding tort liability in combat situations.

Under clear principles of international law binding upon the United States, the defendants owed the plaintiffs in this case – as captives in the power of the U.S. military and not persons actually engaged in combat – a strict legal duty of care including freedom from cruel or degrading treatment. *See* Common Article 3 of the Geneva Conventions; *Hamdan*,126 S.Ct. at 2755, 2756-57 (ruling that Common Article 3 sets the baseline for humane treatment of all military detainees and is binding on the United States). The district court thus improperly construed the FTCA in a manner that conflicts with U.S. international law obligations, *see Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804), and ignored the countervailing federal interest in obeying U.S. obligations under

international law to treat prisoners humanely and to hold responsible those who breach that obligation.

Second, by adopting the Geneva Conventions, the United States has accepted rules of armed conflict that draw a clear and purposeful line between "civilians" and "combatants" and do not permit the type of functional analysis employed by the district court in these cases. In particular, the Third and Fourth Geneva Conventions establish strict criteria for distinction between civilians and combatants, under which the contractors in this case are plainly and permanently deemed civilians.

In addition, the district court's rationale for designating the defendants "soldiers in all but name" – that they are subject to the "operational control" of their military employers – is at odds with IHL's longstanding system of responsible command. The law of war is premised on the assumptions that organized military forces require responsible command – a robust system of accountability between commanders and their soldiers – and that commanders can be held criminally responsible for the war crimes of their subordinates. Even if it were true that some civilian contractors such as Titan Corporation receive orders or are under the "operational control" of the U.S. military, they still do not qualify as combatants.

ARGUMENT

I. BY FAILING TO RECOGNIZE THAT CONTRACTORS OWED PLAINTIFF-DETAINEES A LEGAL DUTY OF CARE UNDER INTERNATIONAL HUMANITARIAN LAW, THE DISTRICT COURT INCORRECTLY EXTENDED COMBATANT-ACTIVITIES IMMUNITY TO THE DEFENDANTS IN THIS CASE.

In order to determine whether plaintiffs' state law tort claims were preempted by federal common law, the district court asked whether the application of state law would produce "significant conflict" with the federal interests represented by the exception to government tort liability under the Federal Tort Claims Act ("FTCA"). *Ibrahim II*, 556 F.Supp.2d at 3 (applying *Boyle v. United Technologies Corporation*, 487 U.S. 500 (1988)). Specifically, the court considered whether the FTCA's "combatant immunity" exception to tort liability would extend to the conduct of the military contractors in this case. *Id.* The district court's answer to this question hinged, in part, on whether the contractors owed a duty of care to the plaintiff-detainees. Instead of considering whether a duty was owed in light of the special legal status of the plaintiffs – enemy prisoners removed from the battlefield *(*"*hors de combat*") and civilian detainees – the district court mechanically applied *Koohi v. United States*, 976 F.2d 1328 (9th Cir. 1992), a product liability case concerning the use of force against perceived enemy attackers on the battlefield. *Ibrahim v. Titan*, 391 F.Supp.2d at 17 (citing *Koohi*, 976 F. 2d at 1337). The district court thus concluded that Titan, like the

manufacturers of the missile system deployed in a combat situation in *Koohi*, owed "no duty of reasonable care" to plaintiffs. *Id.*

This conclusion was deeply mistaken. The law of war governing the treatment of detained persons in wartime unambiguously imposes a strict legal duty to protect persons in the custody of the detaining power, and prohibits the use of violence or cruel or degrading treatment of any sort. *See e.g.* Geneva Conventions, Common Article 3. Because the district court failed to acknowledge the duty of care owed to *detained* persons on or off the battlefield, it impermissibly applied a federal statute – the FTCA – in a manner inconsistent with one of the most fundamental obligations of IHL: the duty to protect civilians and persons *hors de combat*, i.e., those who do not, or who no longer, participate in hostilities. *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) ("an act of congress ought never to be construed to violate the law of nations if any other possible construction remains"). Indeed, far from protecting a federal interest, the district court's holding *undermines* the strong federal interest in observing longstanding laws of war which not only give the nation credibility in its combat operations but which also protect U.S. troops on the battlefield.

A. Defendants Owed Plaintiff Detainees a Duty of Care Under the Laws of War and Defendants' Alleged Conduct Violated that Duty

The four Geneva Conventions of 1949 are a principal source of international humanitarian law.[1] The Geneva Conventions apply to "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties" as set forth in Common Article 2 of the Conventions, which is also customary international law.[2] *See* Dep't of the Army, *Field Manual 27-10, The Law of Land Warfare*, ¶¶ 4 (1956) [hereinafter "*Army Field Manual*"]. The United States played a leading role in drafting these multilateral treaties in the wake of World War II, in order to remedy deficiencies in prior humanitarian law treaties, and to govern the lawful conduct of war and ensure the humane treatment of all persons subject to armed hostilities. *Id.* at ¶ 2-3.

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[1] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

[2] For the Geneva Conventions to apply, the alleged acts must have taken place during a qualified armed conflict and be closely related to that conflict. That requirement is met here as the events in question occurred in a U.S. military detention sites in Iraq either during an international armed conflict between the United States and Iraq or during a non-international armed conflict in which U.S. private military companies were implicated.

Specifically, in an effort to mitigate the effects of war by protecting persons who do not, or who no longer, participate in hostilities, the Geneva Conventions provide particular protections to four classes of Protected Persons: the wounded and the sick in the field (First Geneva Convention ("GC I")), the wounded and sick at sea (Second Geneva Convention ("GCII")), prisoners of war (Third Geneva Convention ("GC III")), and civilians (Fourth Geneva Convention ("GC IV"s). Two Additional Protocols supplement the Conventions with additional rules and protections. Additional Protocol I ("AP I") addresses international armed conflicts. Additional Protocol II ("AP II") addresses non-international armed conflicts. Although the United States has not ratified either Protocol, it has recognized that certain provisions constitute binding customary international law.[3]

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

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

[3] *See* Michael J. Matheson, The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions, 2 Am. U. J. Int'l L. & Pol'y 419, 427-28 (1987).

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

Violations of Common Article 3 are war crimes that impose individual criminal responsibility[4] including responsibility against civilians and corporate entities.[5]

In *Hamdan v. Rumsfeld*, the Supreme Court recognized that Common Article 3 establishes the minimum standard of humane treatment for all detainees

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[4] *See* Army Field Manual, ¶¶ 498-499: "Any person, whether a member of the armed forces or a civilian, who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment….The term 'war crime' is the technical expression for a violation of the law of war by any person or persons, military or civilian." *See also* Rule 151 of ICRC Customary Study, at 551 ("Individuals are criminally responsible for war crimes they commit.").

[5] Individual criminal responsibility for war crimes committed in international armed conflicts was the basis for prosecutions of civilians under the Charters of the International Military Tribunals at Nuremburg and the Statutes of the International Criminal Tribunals for the former Yugoslavia and Rwanda. This liability extends to business representatives. *See, e.g., Prosecutor v Van Anraat, Netherlands, LJN*: BA6734, Gerechtshof 's-Gravenhage , 2200050906-2, 9 May 2007; *United States v. Carl Krauch et al*. (I.G. Farben case), American Military Tribunal, 30 July 1948, in 8 TWC 1081, 1153.

held in any armed conflict. 126 S.Ct. at 2755, 2756-57. The Defense Department also acknowledges that the protections of Common Article 3 apply to all detainees, regardless of their status. According to a DOD Directive:

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

DOD Directive 2310.01E, September 5, 2006, §4.2. .[6]

The district court was thus mistaken in assuming that these plaintiffs were owed no duty of care. Even if these detainees could not be classified as prisoners of war, they at least were owed a duty of humane treatment under Common Article 3. The allegations in the plaintiffs' complaints – which include rape, acts of torture, cruelty, sexual humiliation and extreme physical violence – certainly constitute violations of that binding duty of humane treatment.

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[6] *See also* Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. 108-375, §1091, 118 Stat. 2067 (2004) (the "McCain Amendment"): "No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location shall be subject to cruel, inhuman, or degrading treatment or punishment." *See also* 18 U.S.C. § 2241 (criminalizing conduct that would constitute a "grave breach" of Common Article 3). *Amici* note that § 2241's amalgamation of "grave breaches" with Common Article 3 is inconsistent with treaty and customary international law. Nonetheless, the provision does reflect the universal understanding that violations of Common Article 3 constitute war crimes.

B. The District Court Misconstrued *Koohi* and Created New Law in Conflict with U.S. Obligations Under IHL and Federal Interests in Observing the Laws of War.

In *Koohi v. United States*, the Ninth Circuit applied *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), to bar a products liability suit against a military contractor, for harm caused by the contractor's missile system used by the U.S. military against perceived enemy attackers on the battlefield (who in fact were civilians). *See Ibrahim II*, 556 F.Supp.2d at 3 (applying *Koohi v. United States*, 976 F.2d at 1337 (9th Cir. 1992)). The *Koohi* court looked to the FTCA for guidance on the question of whether allowing the tort suits to go forward would produce a "significant conflict" with federal policies or interests. *Id.* (applying *Boyle*, 487 U.S. at 504-13). *Koohi* concluded that the "combatant activities" exception to the FTCA precluded tort liability because under both domestic and international law, the military is entitled to defend itself and owes no "duty of care" to an attacker on the battlefield. *Id.* As the district court explained, "[O]ne purpose of the combatant activities exception is to recognize that during wartime encounters no duty of reasonable care is owed to those against whom force is directed as a result of *authorized* military action." *Id.* (emphasis added).

Significantly, *Koohi*'s determination itself hinged on an application of IHL principles. Those principles do authorize force to be directed towards military objectives, such as enemy forces on the battlefield. Specifically, *Koohi* determined

that the plaintiffs in that case were owed no duty of reasonable care because plaintiffs appeared to be engaged with the defendants in combat: their aircraft took off from a military-commercial airport, was flying in a combat zone, and failed to communicate its "civilian status" to the U.S. military. 976 F. 2d at 1337.

In this case, the district court misapplied *Koohi*, by failing to recognize that the IHL framework which drove that court's decision actually compels the *opposite* conclusion here. In the battlefield context, military objectives may properly be targeted, *see infra* Section II(B), and lawful, split-second military decisions may properly be insulated from judicial review. *See Koohi*, 976 F. 2d at 1337 (describing need to preserve "unfettered military discretion" on the battlefield). By contrast, as described above, where military or civilian personnel are engaged in the *detention* of prisoners or suspected enemies who are *hors de combat*, IHL unambiguously imposes a legal duty of humane treatment. *See* Common Article 3; *cf. Koohi*, 976 F.2d at 1337 (use of force against detainees would constitute "unauthorized military action"). Thus, while *Koohi*'s interpretation of the FTCA's combatant activities exception can be harmonized with the laws of war, the district court's application of the statute to the fundamentally distinct factual circumstances of these cases is inconsistent with the laws of war and should therefore be rejected. *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804); *see also Restatement (Third) of the Law of*

Foreign Relations § 114 (1987) ("Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States.").

The district court compounded its error by concluding that there is a "unique federal interest" in "unfettered military action" in these cases, and that imposition of a duty of care under state law would present a "significant conflict" with this federal interest. *Ibrahim II*, 556 F. Supp. 2d at 3 (citing *Koohi*, 976 F.2d at 1337). *Amici* can identify no federal interest in permitting unfettered military action over captive prisoners, or in developing domestic jurisprudence that directly conflicts with U.S. obligations under IHL. To the contrary, there is a pre-existing and exceptionally strong federal interest in upholding the laws of war (and explicit DOD policy to comply with those laws) including those that require the humane treatment of prisoners in U.S. custody. This federal interest is even stronger in counterinsurgency operations such as the one ongoing in Iraq, where protecting the lives of U.S. soldiers depends on winning over the "hearts and minds" of the population under occupation by demonstrating our moral and legal accountability. As General David Petraeus explained in a recent U.S. Army counterinsurgency manual:

> Illegitimate actions are those involving the use of power without authority – whether committed by government officials, security forces, or counterinsurgents. Such actions

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

U.S. Dep't of the Army, *United States Army Counterinsurgency Handbook* (2007) at 1-24, para.1-132 (reference omitted). *See also* Rule of Law Handbook: A Practitioner's Guide for Judge Advocates (V. Tasikas, T. B. Nachbar, and C. R. Oleszycki, eds., 2007) ("in light of the need to establish legitimacy of the rule of law among the host nation's populace, conduct by US forces that would be questionable under any mainstream interpretation of international human rights law is unlikely to have a place in rule of law operations").

Further, the United States has an obligation under the Geneva Conventions to "search for persons alleged to have committed, or to have ordered to be committed. . . grave breaches and . . . bring such persons, regardless of their nationality, before its own courts."[7] Thus, for the district court to dismiss a civil

[7] Geneva Convention I, Art. 49; Geneva Convention II, Art. 50; Geneva

suit brought on the basis of actions which represent clear violations of the Geneva Conventions is not only at odds with U.S. precedent recognizing civil liability for war crimes and other IHL violations,[8] it is directly counter to the U.S.'s international obligation to promote accountability for serious violations of the laws of war.

II. THE DISTRICT COURT'S DECISION TO CREATE A CATEGORY OF CIVILIAN CONTRACT EMPLOYEES WHO ARE THE FUNCTIONAL EQUIVALENT OF SOLDIERS IS INCONSISTENT WITH THE LAWS OF WAR.

The "combatant activities" exception to the FTCA bars damages suits for "any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war." 28 U.S.C. § 2680(j). Even though the defendants in these cases were civilians, the district court concluded they are entitled to the "combatant activities" defense to suits under the FTCA and corresponding state law torts it deemed preempted by FTCA, because the defendants "functioned as soldiers in all but name." *Ibrahim II*, 556 F. Supp. 2d at 3. The court reasoned that the defendants could be deemed the functional equivalent of soldiers because they acted under the "direct command and exclusive operational control of the military chain." *Id.* at 5.

Convention III, Art. 129; Geneva Convention IV, Art. 146.

[8] *See, e.g., Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980); *Kadic v. Karadzic*, 70 F.3rd 232 (2nd Cir. 1995).

In so deciding, the district court ignored relevant law of war principles that strongly undercut the court's central conclusions. First, under the laws of war, civilian contractors can in no sense be deemed "combatants," unless they are formally incorporated into the armed forces of a party. "Combatant" is a term of art with a well-settled meaning under the Geneva Conventions, which are fully binding on the United States. *See* Geneva Convention III, Art. 4(A)(1) and (2), (3) and (6); Additional Protocol I, Arts. 43, 50. These treaties deliberately employ a definition of "combatant" with clear criteria plainly not met by the civilian contractors in this case, regardless of their functional role. *Id.*

Second, the novel legal principle established by the district court, that civilians can attain "combatant" status by merely demonstrating they were subject to the direct command or "operational control" by military supervisors falls far short of the definition of "combatant" under the law of war, which requires that an individual be subject to responsible command, enforceable through military discipline, such as the Uniform Code of Military Justice. *See* AP I, Art. 43. A test that establishes combatant status based merely on the existence of operational control by a military officer blurs internationally accepted distinctions that were established deliberately to promote the conduct of war not by civilians, criminals or disorganized groups, but by armies with *responsible* chains of command.

The district court's decision thus incorrectly provides private military contractors the privilege of immunity from tort liability without imposing any of the corresponding burden that typically accompanies combatant status in accord with international law – discipline and punishment pursuant to a military chain of command.

A. The Law of War is Relevant to Determining the Status of Actors in an Armed Conflict Such as the Defendant Contractors.

It has been accepted since the Founding of the U.S. that treaties and customary international law are part of United States law. *See* U.S. Const., Art. VI, cl. 2; *see also The Paquette Habana*, 175 U.S. at 700, Restatement (Third) of the Foreign Relations Law of the United States § 111, reporters' note 4 (1987) ("international law is 'part of our law' . . . and is federal law"). International law likewise is highly relevant to interpretation of federal domestic law and policy. *See Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804); *see also Weinberger v. Rossi*, 456 U.S. 25, 29-30, 32-33 (1982) (looking to international law in interpreting statute prohibiting employment discrimination against U.S. citizens on military bases overseas unless permitted by treaty).

The Supreme Court has in recent years confirmed that the laws of war should be consulted in defining the scope of U.S. obligations to persons in its custody. *See Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2786 (2006) (recognizing that

military commissions would have to comply "with the 'rules and precepts of the law of nations,' including, *inter alia,* the four Geneva Conventions signed in 1949") (internal citations omitted); *Hamdi v. Rumsfeld*, 542 U.S. 502, 520 (2004) (relying on "the law of war," including Geneva and Hague Conventions to determine scope and limits on definition of "enemy combatant"). The laws of war are thus highly instructive in considering the propriety of the common law rule fashioned by the district court to immunize defendants for torts that would constitute serious breaches of the Geneva Conventions.

B. The Law of War Employs Bright Line Criteria to Define Combatant Status In Order To Achieve Important Goals Regarding The Conduct Of Armed Conflict.

The Geneva Conventions employ clear and deliberate criteria to establish a person's combatant status. Under the laws of war, one is either a combatant or a civilian. As the Commentary to the Fourth Geneva Convention explains "[e]very person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, [or] a civilian covered by the Fourth Convention . . . . *There is no intermediate status*.") (emphasis added).[9] Thus, the laws of war do not countenance a functional test of

[9] Commentary IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War 51 (Jean S. Pictet ed., 1958).

the kind employed by the district court. Under the laws of war, the defendants can be classified as civilians only, not combatants.

The distinction in IHL between civilians and combatants, which is established by rigid criteria also incorporated into U.S. military regulations, *see infra* at 23-24, determines the protection afforded to a person by international law and determines the legal consequences of his or her conduct. *See generally* Dieter Fleck, The Handbook of Humanitarian Law in Armed Conflict 65-66 (1995). The distinction is foundational to the entire architecture of humanitarian legal principles, which strives to protect civilians (noncombatants) from the harms of war and to ensure that combat is conducted by combatants and their commanders who are trained in the law of war, and can be held responsible for its violation. The district court's conflation of these two categories is inconsistent with the laws of war and unnecessarily threatens their broader humanitarian objectives.

Geneva Convention III establishes criteria to ascertain combatant status; specifically, it sets out criteria to determine if a person captured on the battlefield is a privileged belligerent entitled to GC III's substantial protections for prisoners of war ("POWs"). Under Article 4 of GC III, POW status is authorized for "Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces." GC III, Art. 4(A)(1). Soldiers who are not members of the state's armed forces – i.e.

"Members of other militias and members of other volunteer corps, including those of organized resistance movements," GCIII, Art. 4(A)(2) – may still be regarded as combatants entitled to privileged POW status if they meet each of four specific criteria.[10]

Civilian contractors appear to fall under GC III, Art. 4(A)4, which covers logistical support personnel accompanying armed forces. However, while all individuals described in GC III Art. 4(A)(1)-(6) receive POW status, only those in GC III Art. 4(A)(1)-(3) and (6) are considered combatants. *See* AP I, Art. 50(1). Those described in articles 4(A)(4) and (5) thus remain civilians. *Id.*; Air Force Pamphlet 110-31, 3-4(b) (19 Nov. 1976) (citing GC III Art. 4(A)4 and stating that civilians accompanying the armed forces are not combatants); DOD Directive 3020.41, 6.1.1, 6.1.5, October 3, 2005 (contingency contractors are "civilians accompanying the force" who are barred from "inherently governmental" functions and duties); ICRC Commentary on API, Art. 43 at para. 1677 ("…only members

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[10] Those criteria are:
(a) Commanded by a person responsible for his subordinates
(b) Having a fixed distinctive sign recognizable at a distance
(c) Carrying arms openly; and
(d) Conducting operations in accordance with the laws and customs of war.
GC III, Art. 4(A)(2). *See also* AP I, Art. 50(1) ("A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 A (1), (2), (3) and (6) of the Third Convention")

of the armed forces are combatants. This should therefore dispense with the concept of 'quasi-combatants'…").

The laws of war also create a logical incentive structure that turns on the distinctive status of combatant versus civilian. Specifically, IHL encourages the conduct of combatant activities to be undertaken only by soldiers of a state army, *see* GC III, Art. 4(A)(1), or other specified militia members, *see* GC III, Arts. 4(A)(2) and (3) by privileging and protecting each separate status. First, combatants as defined by GC III are privileged to engage in hostilities against other combatants, without fear of prosecution for their acts provided they observe the laws of war. GC III Arts. 87, 99; AP I, Art. 43(2). Correspondingly, they can be intentionally targeted with lethal force. *See* AP I, Art. 48; AP II, Art. 52(2). Further, combatants who are captured are denominated "prisoners of war," and are entitled to a host of additional legal and humanitarian protections not available to noncombatants (civilians) who engage in unprivileged belligerency. *See, e.g.*, GC III, Parts II-V.

Civilian status is likewise privileged and protected. Civilians who do not participate in hostilities cannot be targeted. *See* Common Article 3(1), AP I, Art. 51(2); AP II, Art. 13(2). But, a civilian who acts as a fighter and engages in direct hostilities loses his immunity from attack. *See id.* Because engagement in hostilities by persons not subject to responsible command is disfavored,

unprivileged belligerents are not entitled to POW protections and immunity from prosecution to which lawful combatants are entitled.[11]

The parallel privileges and protections of distinct combatant and civilian status serve larger aims of the IHL regime. First, they promote the "principle of distinction" – referred to as "the grandfather of all principles" – which holds "that military attacks should be directed at combatants and military property, and not civilians or civilian property." Dep't of the Army, Law of War Handbook 166 (2004). Under this law of war principle, combatants should know they can be punished for attacking civilians and civilians should know they lose protection from attack for participating in hostilities; with those lines drawn, hostilities should be limited to only genuine combatants, i.e. soldiers.

Second, by maintaining a bright-line distinction between combatants and civilians and attempting to channel combat to organized armies, IHL promotes a vital system of command responsibility. *See, e.g.*, AP I, Art. 43; Army Field Manual, § 501; US Air Force Pamphlet 110-31 § 15-2(d)(1976). Combatants are subject to chains of military command with command responsibility under

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[11] *See Public Committee against Torture in Israel v. Israel*, Israeli Supreme Court, HCJ 769/02, Dec. 11, 2005, ¶¶. 29-32; Knut Dörmann, *The Legal Situation of "Unlawful/Unprivileged Combatants*," 85 Int'l Rev. Red Cross 45, 46-47 (2003); Michael A. Newton, *Unlawful Belligerency After September 11: History Revisited and Law Revised*, in New Wars, New Laws? Applying the Laws of War to 21st Century Conflicts 75 (2005).

international law and forms of domestic military discipline and punishment. *Id.* Such military chains of command, with enforceable disciplinary procedures, training in the law of war, and command responsibility for military superiors, make it less likely that violations of the laws of war will occur than if non-accountable persons engage in combat activities. As a result, command responsibility in the context of armed hostilities must be encouraged.

C. Under the Law of War, Employees Of Private Military Contractors Are Neither Combatants Nor The "Functional Equivalent" Of Combatants.

The district court's use of a functional analysis to assess the "combatant" status of the private military contractors is decidedly at odds with the bright line rule distinguishing civilians from combatants under the laws of war. *See supra*. Because the law of armed conflict provides a comprehensive classification scheme for all persons in an armed conflict, one must be either a civilian or a combatant; there is "no intermediate status." Commentary to the Fourth Geneva Convention at 51. Under the criteria set forth above, the private military contractors are not combatants. They are not "members of the armed forces of a Party to the conflict," GC III, Art. 4(A)(1), AP I, art 43(2); nor are they "Members of other militias and members of other volunteer corps including those of organized resistance movements," GC III, Art. 4(A)(2) or "Members of regular armed forces" under GC III, Art. 4(A)(3).

Army regulations implementing IHL principles classify contractors exclusively as civilians, and specifically prohibit allowing contractors to engage in any activity that would endanger their civilian status:

> Contractors and their employees are not combatants, but civilians "authorized" to accompany the force in the field. Authorization to accompany the force is demonstrated by the possession of a DD Form 489 (Geneva Conventions Identity Card for Persons who Accompany the Armed Forces). This status must not be jeopardized by the ways in which they provide contracted support.

Army Field Manual 3-100.21 ("Contractors on the Battlefield") 1-21, January 2003. The DOD has stated that "the Government is not contracting out combat functions." Federal Register, Vl. 73, No. 62, DOD response to 2.c. The DOD has also explicitly recognized that its procurement rules "prohibit[] contractor personnel from participating in direct combat." *Id.* at 2.b. Military regulations also prohibit contractors from wearing U.S. military uniforms and from being a part of the military chain of command. Army Regulation 715-9, § 3.3(d).

In addition, regardless of the level of "operational control" exerted by their military supervisors, the private contractors here could not, consistent with the laws of war, be considered the "functional equivalent" of combatants. The gravamen of a person's status as a combatant under IHL turns on the existence of responsible command – a direct, accountable chain of command from officer to

soldier. This principle is embodied in the classification of all "members of the armed forces of a party to the conflict" as combatants, GC III, Art. 4(A)(1), for all such soldiers are presumptively subject to the military chain of command of their country's armed forces. Likewise, Art. 4(A)(3) applies to members of regular armed forces. This requirement is further made explicit by designating combatant status to other militia, volunteer corps and resistance movements only if they are "commanded by a person responsible for his subordinates." GC III, art 4(A)(2).

Additional Protocol I similarly defines combatant status with near-exclusive reference to responsible command:

> The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct or its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict.

Additional Protocol I, Art. 43. Command responsibility - the doctrine that military superiors can be held criminally responsible for the war crimes of their subordinates - developed to address breaches of responsible command. *See* AP I, Arts. 86-87.[12]

[12] The United States considers these articles to reflect customary international law. *See* Matheson, *supra*, at 428. *See also Yamashita v. Styer*, 327 U.S. 1, 14-16

Unlike members of U.S. armed forces who are entitled to combatant status under the laws of war, civilian contractors are not subject to a functionally equivalent chain of command. While the district court may have correctly observed that some contractors, like some soldiers, receive orders from military officers, the district court's decision does not appreciate the legal significance of orders in the two different contexts. As the Supreme Court has recognized, "military necessity makes demands on its personnel without counterpart in civilian life." *Schlesinger v. Councilman*, 420 U.S. 738, 757 (1975) (internal quotations omitted); *see also United States v. Brown*, 348 U.S. 110, 112 (1954) (emphasizing the "peculiar and special relationship of the soldier to his superiors").

Because contractors owe no more than a contractual duty to military supervisors, employees may ignore or contravene a military officer's orders and suffer only the consequence of termination, damages or other remedy for breach of contract. Indeed, a civilian employee of a private contractor presumptively owes a higher duty of care to his employer and its shareholders than to a military officer giving him a command or to the United States government.

Members of the armed forces, by contrast are subject to an elaborate system of discipline, training and punishment that requires commands by military

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(1946); ICTY Statute, Art. 7(3), adopted May 25, 1993, S.C. Res. 827, U.N. Doc. S/RES/827 (giving the ICTY jurisdiction to hold individuals criminally responsible for war crimes via command responsibility).

superiors be obeyed and ensures that combatant activities are in accordance with the laws of war. The Supreme Court has explained that the military imposes "overriding demands of discipline and duty" *Burns v. Wilson*, 346, U.S. 137, 140 (1953), and that those demands become especially

> imperative in combat, but conduct in combat inevitably reflects the training that precedes combat; for that reason, centuries of experience has developed a hierarchical structure of discipline and obedience to command, unique in its application to the military establishment and wholly different from civilian patterns.

Chappel v. Wallace, 462 U.S. 296, 300 (1983).

Specifically, soldiers who disobey orders, unlike their civilian counterparts in this litigation, are routinely subject to discipline and punishment under the Uniform Code of Military Justice. *See, e.g.*, U.C.M.J. Art. 90, 10 U.S.C. § 890.[13] At the same time, commanders are responsible for all actions of military subordinates, and have an affirmative legal duty to prevent violations of the laws of war. *See* 10 U.S.C. § 892. Because private military contractors are not subject to these long-standing legal and disciplinary constraints, they cannot be considered "soldiers in all but name." In effect, the district court's decision offers a privilege,

[13] Indeed, recognizing the fundamental legal distinction between civilian and soldier, the Supreme Court has prohibited the application of military justice to civilians. *See Reid v. Covert*, 354 U.S. 1 (1957) (holding that Constitution guarantees civilian spouses of military personnel accused of crimes a jury trial, even if those rights not applicable to military personnel themselves).

in the form of domestic tort law immunity, to these ersatz "soldiers," at the same time the IHL regime seeks to deny them other important privileges given true combatants under the laws of war. In light of the clear rules and deliberate logic underlying the IHL regime, such incongruity should not stand.

Indeed, the district court's decision risks creating a void of accountability when contractors are employed in areas of armed conflict.[14] The decision gives some private contractors a crucial benefit of combatant status – immunity from domestic tort liability for what the court mistakenly assumed to be "combatant activities"– – without any of the fundamental burdens and limitations that normally accompany that status: subjection to military discipline and UCMJ jurisdiction.[15] Having freed private contractors from any such liability, the district court's decision may have produced a perverse incentive to employ contractors, rather than soldiers, more frequently to conduct operations which would be deemed otherwise unlawful under the UCMJ.

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[14] This accountability void has been widely reported. *See, e.g.*, Maj. Gen. Antonio Taguba, Article 15-6 Investigation of the 800th Military Police Brigade, ¶¶ 11-12, cited in Karen J. Greenberg & Joshua L. Dratel, The Torture Papers: The Road to Abu Ghraib 405 (2005).

[15] Congress has recently amended the UCMJ to extend prospectively its provisions to civilians "serving with or accompanying an armed force in the field." Pub. L. 109-364, §552 (2006), 10 U.S.C. § 802(a)(10). In light of the Court's holding in *Reid v. Covert*, *supra* note 22, however, there is a serious constitutional question of whether military justice could ever be applied to civilians presumptively entitled to constitutional protections.

Amici believe that the existence of such an incentive, and the underlying reasoning of the district court, weaken U.S. adherence to its obligations under the laws of war – adherence the military itself recognizes serves vital federal interests in securing peace in an occupied country and protecting the lives of American soldiers.

CONCLUSION

For the foregoing reasons, the court should conclude that defendants are not entitled to invoke the "combatant activities" exception of the FTCA in order to avoid tort liability for their inhumane conduct.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 11, 2008, I caused a copy of the foregoing Motion for Leave of Experts in International Humanitarian Law to Participate as *Amici Curiae* in Support of Plaintiffs-Appellants to be mailed via First Class Mail to each of the following parties. I also sent a copy of the Motion to each party via email on the same day:

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