

December 29, 2011

Hon. Donald B. Verrilli, Jr.
Solicitor General
United States Department of Justice
950 Pennsylvania Avenue, NW, Room 5143
Washington, DC 20530-0001

Re: The Fourth Circuit Court of Appeal's invitation to file a brief expressing the views of the United States in *Al Shimari, et al. v. CACI Intl., Inc., et al.*, No. 09-1335(L) and *Al-Quraishi, et al. v. Nakhla et al.*, Nos. 10-1891 & 10-1921.

Dear Mr. Verrilli,

I write to draw your attention to *Al Shimari v. CACI* and *Al-Quraishi v. Nakhla*, presently awaiting en banc review in the Fourth Circuit. It is my understanding that the United States has been invited to submit a brief expressing its views. We hope the United States will submit a brief urging the court to reach the merits of the case and asserting that international legal obligations and the federal interests of the United States, mandate the availability of enforceable remedies for the abuses that defendants are alleged to have committed against plaintiffs.

The now-vacated decision of the appellate court adopted the "battlefield preemption" theory created by the D.C. Circuit in *Saleh v. Titan*, 580 F.3d 1 (D.C. Cir. 2009), which held that where a civilian contractor is integrated into combat activities over which the military retains command authority, a tort claim arising out of the contractor's engagement in such activities is preempted. Both the D.C. Circuit and the vacated panel majorities erroneously treated detention, which is not a combat activity to which immunities rightfully apply, as if it were a battlefield combat activity. It also treated civilian contractors as if they were U.S. soldiers entitled to invoke the Federal Tort Claims Act (FTCA) bar to damages suits for the "combatant activities" of the "military or naval forces of the Coast Guard."

As the United States government's amicus brief in *Saleh* rightly states, "[u]nder domestic and international law, civilian contractors engaged in authorized activity are not 'combatants,' they are 'civilians accompanying the force' and, as such, cannot lawfully engage in 'combat functions' or 'combat operations.'" While the government's brief also criticizes the D.C. Circuit's decision in *Saleh* as "inexact, unclear, and potentially misguided," it did little to clearly state the U.S. government's position on contractor accountability. By ultimately recommending that the petition for a writ of certiorari be denied, it left the impression that the U.S. government supports the D.C. Circuit's decision in *Saleh*. For this reason, we urge the U.S. government in its brief in *Al Shimari* and *Al-Quraishi* to unequivocally reject both the rationale and decision in *Saleh* and in the vacated decisions in the cases at bar.

We believe that *Saleh* and the vacated decisions create a conflict with the United States' international legal obligations and are contrary to the interests of the United States.

First, the decisions extend the statutory provision of a tort exemption for lawful, authorized combat activities to other, non-combat activity. They do so by disregarding the distinction between the battlefield, where killing is lawful, and detention, where International Humanitarian Law (IHL, or the law of armed conflict as expressed in many provisions of the Geneva Conventions and as implemented in the U.S. War Crimes Statute) 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.

Second, the decisions ignore the significant fact that contractors are not privileged belligerents entitled to engage in hostilities in armed conflict. They thereby do violence to the most fundamental rule of IHL – the principle of distinction - by extending combatant activities exemptions to these non-combatants/civilians.

Moreover, the decisions undermine COIN strategy by withholding measures to protect civilian populations. This, in turn, heightens the danger to Coalition troops and contractors, alike.

The laws of war and implementing U.S. military regulations distinguish civilians from combatants to protect civilians 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.

Under IHL, a person's status as a combatant turns on the existence of responsible command – a direct chain of accountability from officer to soldier. Members of the armed forces are subject to an elaborate system of discipline, training and punishment that requires commands by military superiors be obeyed and ensures that combatant activities are performed in accordance with the laws of war. Contractors, on the other hand, owe no more than a contractual duty to military supervisors and may ignore or contravene a military officer's orders and suffer only the consequence of termination, damages or other remedy for breach of contract.

In order to limit hostilities to privileged belligerents, and to protect civilians, the laws of war create parallel privileges and protections of distinct combatant and civilian status. Combatants can be intentionally targeted with lethal force, but correspondingly are privileged to engage in hostilities without fear of prosecution, provided they observe the laws of war. Civilians, on the other hand, cannot be targeted unless they directly participate in hostilities. However, civilians are not entitled to the immunity from prosecution enjoyed by privileged belligerents and may be prosecuted for mere participation in hostilities, as well as for war crimes.

The court recognizes a privilege of immunity from tort liability for civilian military contractors without imposing any of the corresponding burdens that accompany combatant status – discipline and punishment pursuant to a military chain of command. This decision blurs the line between civilians and combatants, places civilians at greater risk for harm, and also puts U.S. soldiers and contractors themselves at unreasonable risk.

By clearly prohibiting attacks on civilians, the principle of distinction safeguards U.S. soldiers from possible civilian reprisals. But when contractors, whom the civilian population may not distinguish from U.S. soldiers, commit unlawful acts upon the local civilian population with impunity, U.S. soldiers are placed at greater risk of retaliation. As soldiers are under increased risk of attack because of hostility caused by the actions of contractors, they are in turn, less able to operate effectively in combat zones.

It is also in the best interest of contractors to be subject to, and liable for violations of, the principle of distinction. Blurring the line only increases the risk that contractors will engage in conduct that makes them targetable, and will be perceived as legitimate targets. This in turn, can lead to a vicious cycle of riskier, and potentially unlawful, behavior by contractors, with commensurate violence against them.

Additionally, while combatant immunity protects the military mission and those who implement it, extending immunity to civilian contractors has the opposite effect of undermining COIN strategy, as some high profile incidents in Iraq and Afghanistan have shown. The absence of an enforceable right to redress for serious crimes against civilians can only alienate local populations and undermine U.S.

counterinsurgency efforts. As then-Senator Barack Obama stated, “We cannot win a fight for hearts and minds when we outsource critical missions to unaccountable contractors.”

The United States recognized that contractor accountability advances U.S. interests when it became a signatory to the *Montreux Document on the Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict*. The *Montreux Document* recommends that States “provide for non-criminal accountability mechanisms for improper and unlawful conduct” of private contractors including, civil liability.

We hope that you will see fit to submit a brief on behalf of the United States, consistent with the positions expressed in this letter and in the amicus briefs filed in the *Al Shimari* and *Al-Quraishi* cases by Human Rights First, et al and by the group of Retired Military Leaders. Please let me know if you have any questions or would like to discuss the matter further.

Sincerely,

A handwritten signature in cursive script that reads "Gabor Rona".

Gabor Rona
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