

ACCOUNTABILITY FOR CORPORATE COMPLICITY IN TORTURE

*Susan Burke**

Well, last speaker of the conference. I don't know about all of you, but I've certainly learned a tremendous amount here, and it's been a wonderful day. My name is Susan Burke, and I'm going to speak briefly on three topics.

First, I'm going to talk about how I got involved in human rights work. Unlike everyone else that you've seen and heard, I'm neither a scholar nor a full-time human rights lawyer; I'm just a regular lawyer. I'm going to talk a little bit about my past leading up to the *Saleh* case. Second, I'm going to talk about the legal thinking that went into how we structured the case. Third, I'm going to talk about our goals in bringing the case

On the first topic – how did I get involved? It's really due to Amnesty. I got out of law school in 1987, and I have worked primarily as a corporate defense lawyer. I defend large companies from various attacks by the government, by other companies, and so forth. On the side, I've always done a fair amount of pro bono human rights work and have helped Amnesty on different projects over the years. But my interest and time spent on human rights issues escalated dramatically when I read newspaper reports stating that 9/11 made it “time to take the gloves off.” I was concerned that our own country was beginning to torture people. I called my friends at Amnesty and I said, “Can this be true? Are we starting to torture people?” and they said, “Well, yes.” This was very early on and they said, “From what we can tell, yes.” So I kept in touch with them and I began to work with the University of Pennsylvania Law students, and we began to kick around various ideas and did some legal research to explore the different ways we could stop the torture.

I began to talk again with more people at Amnesty and said, “Who else out there is doing this work? Where are the people that are worried about this? Who should I talk with to make sure that the work I'm doing with these Penn Law students isn't duplicating someone else's work?” Every

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once in a while in the non-profit world, there is some duplication of efforts. I didn't want that to happen. They said, "Go talk to Michael Ratner at the Center for Constitutional Rights." So that's what I did. Ratner and I began to talk about the different approaches we might take, looking at Cuba and Afghanistan, while becoming increasingly concerned about Iraq. We began to focus on the role played by corporations. Michael Ratner, being well versed in this area, had some wonderful ideas. We began to think through just how we could seek legal redress against the non-state actors for their role in the torture. Such proceedings would help us all accomplish the end goal of accountability for the torture.

This brings me to the second topic – our legal approach. Over time we narrowed it down, because as more information came out, we had plenty of evidence to work with. Combining this with my experience with class actions in my private practice, we filed a class action in June 2004. We represent the class of people in Iraq who were tortured and abused in prisons that were under U.S. custody. We have sued two government contractors—CACI and Titan. CACI provided half the interrogators at Abu Ghraib, and Titan provided translators throughout the country. I'm happy to say that CACI has subsequently pulled out of the interrogation business. So in the short term, at least, the initial imposition of extra costs on corporate actors is an important leverage point in and of itself, and not to be overlooked.

We are in for a lengthy battle with these two corporations. Our lawsuit alleges that CACI and Titan are responsible for conspiring with others, including government officials. We believe the corporations are not entitled to sovereign immunities because the United States' official position remains, even today, that torture is illegal. Therefore, anyone in Iraq who colluded with these corporate actors was engaged in a criminal conspiracy, similar to the Mafia. We've employed the mob statute, RICO—the Racketeering statute. We're saying that kidnapping, murder, and torture are criminal actions and that they have been done for economic gain. As I've gotten more into this issue, I've been fascinated with the whole issue of outsourcing, the use of private parties to perform some action that had previously been considered an inherently governmental function. I think it will be interesting to see how the courts resolve this issue.

Joe Margulies commented earlier that 9/11 has come to be viewed as an intelligence failure—and as a result we need to get more intelligence. I think that you can see this when you examine what happened in Abu Ghraib and other places in Iraq. Essentially, intelligence became the prize. In the days of Viet Nam, the body counts were the prize and just as people began to falsify the body counts. In this case, people began to make up "intelligence." Torture makes people say what they think the torturers want to hear. As a result, translators and companies engaged in interrogation

record and report this information and create more so-called “intelligence.” These reports create more profits for your company because the more of these reports you generate, the more work you’re given. There is an entire corporate profit motive in the torture, which is simply something that hasn’t fully come to the public’s attention. Do you really want to have people who don’t have their allegiance to the U.S. government, but rather to a corporate interests, be the ones deciding what goes in an intelligent report? Mind you, it is important to remember that all of these corporate people have the ability to walk off the job whenever they feel like it because they are not part of the military structure. This issue of outsourcing intelligence gathering has actually led us to have some strange bedfellows. A lot of military intelligence experts have been supportive of our efforts and have provided us with affidavits on why interrogation is an inherently governmental function.

We have just been through a lengthy fight over venue that finally concluded with us before Judge Robertson in D.C. The litigation is now in the motion-to-dismiss stage, where these companies say that despite making millions off of this, they nonetheless should stand in the shoes of the government and be given sovereign immunity. They do so by claiming that a judicially-created doctrine known as “the government contractor defense,” which emerged in a products liability context, should be extended to cover these human rights violations. That doctrine was announced by the Supreme Court in the *Boyle* decision, which states that if you are a weapons manufacturer and you’re selling weapons to the government, you are protected from tort liability if the products are produced in accordance with government specifications. For example, in *Boyle*, a helicopter had been produced by a private manufacturer under government specifications. The government had dictated how the ejection seat should work. Somebody got hurt and they sued the company that made it and the company said, “Well, wait a minute. We didn’t come up with these specs. We were under contract to the government. We just did what they told us to do.” Under that theory, since the government would be immune in that instance based on their desire to protect the public, it makes sense to have this judicial protection. You are allowed to stand in the shoes of the government, vis-à-vis state tort suits premised on product design defects. This has some sensible ramifications; however, the government contractor defense cannot be applied in the Iraq context.

These people are saying that since they have a contract to translate or contract to conduct interrogations, they should be immunized from the fact that they tortured people. Our response to that is, “Gee, show us that contract, where it’s written down that you were supposed to keep people naked, that you were supposed to beat them for three continuous days, that you were supposed to use electricity to obtain information, and then maybe

you have something to talk about.” The contracts themselves here are really what are at issue. For CACI, those contracts have been set aside by the government because they were procured in an unlawful manner. We argue that they don’t even have a contract, let alone a contract that speaks to their conduct. The same argument applies to Titan. The role of a translator is a fascinating one. From translator recruiting procedures and our trips to interview the victims, we are beginning to learn that on certain occasions the translators were the ones who were initiating beatings. While in some instances the translator would assist in torturing the victims, on occasion it was the translator who was the sole perpetrator of violence. The military personnel would have to step in to stop the torture. Our interviews with the victims have demonstrated that a wide range of scenarios occurred. This violent conduct is not part of any contract.

Turning to the third and final part, what’s the goal of this litigation? What do we expect to accomplish? What do we want to accomplish? Today has been fascinating to listen to the different reflections on Nuremberg and to listen to the different perspectives of the speakers. I want to go back to something that Professor Wilson said about “shining the light of shame.” That is one goal of bringing the lawsuits: to shine the light and force these people to have some form of accountability. If we’re able to defeat this government contractor defense, we’ll be in discovery and will be building a record under oath in the American legal system regarding the events at Abu Ghraib, Camp Bucca, Camp Cropper, and the other prisons in Iraq.

Accountability is one of our goals, and the other is a notion of civil liability as referenced by the earlier panelists. These acts should not be litigated from a human rights perspective, but rather from a criminal perspective. My approach is just more practical; nothing was happening, nobody was investigating, nobody was prosecuting, and no one was really trying to get to the bottom of all of this, so we were creating a vacuum. It would be better if there were criminal prosecutions for these actions, but with Alberto Gonzalez in charge of the Department of Justice, I am not holding my breath. In addition to ensuring accountability for the transgressions that we already know about, we are also bringing a variety of resources to further the investigation. Keith Roman, our investigator, is here with me today, and I am very grateful for the work he has done. We are putting a lot of effort into trying to interview experts, trying to get documents, and trying to meet with eyewitnesses as well as with those who have suffered. Our aim is to compile a record, and to create a testimony to the suffering of all the victims.

We went to meet with the folks that are responsible for doing this, the Criminal Investigative Division (CID) of the Army. These folks claim that they are doing it, but we spent three days with them in Kuwait and it was

one of the most depressing three-day meetings of my life. At the beginning, we had some rapport and we talked about the different things that we were finding. There's one particularly troubling site known as "the Disco," where they're using these metal containers, these Conex containers that reach from here to the wall. They're not that big, and they're essentially temporary torture chambers that can be moved around the country. So the criminal investigators from the Army are telling us, "Oh, yeah, yeah," they had heard about "The Disco" too, and while they had documented that these terrible beatings had happened there, they had run into the brick wall—the CIA and Special Forces—so, hey, there wasn't a lot they could do about it.

It went downhill from there. The end of the session concluded with us saying, "Well, we have interviews, and we have two people in Baghdad who are conducting interviews of victims." We also flew to Jordan to conduct additional interviews with the victims. By that point I had personally interviewed about 35 to 40 victims and we had over 140 interviewed by our team. We wanted to provide the CID with access to the victims because we wanted there to be criminal investigations and prosecutions. Now there was a three-person detainee abuse task force that is supposedly investigating everything in Iraq beyond the original Abu Ghraib report and the existing investigations of the "Hard Site." The officer in charge explained to us his own rule of thumb on what would and would not be investigated. First, a report by a victim wouldn't do. Second, there had to be physical evidence for them to pursue it and if the report struck him as preposterous, it wouldn't be investigated. I asked him, "Well, what about the pyramid photos that came out? If you had been told about them in advance, wouldn't you have thought they were preposterous?" He responded that he had read in a blog that the photos were staged. This came from the mouth of the head of the Detainee Task Force Abuse. When we offered him all of our evidence and all of our cases, his response was that he was headed back to Fort Worth. He was a policeman in his regular life and he was due to return home in December. He said that the CID would be happy to take the reports, but he would appreciate it if we waited until after December to provide them. There's not a lot of governmental investigation going on. That's one of our second goals, to fill the vacuum. We have and will continue to invest the donations we receive as well as our personal funds to research the issues, to investigate, and to create a written record.

Our final goal is to get some form of justice for the victims and to give them a sense of closure. I firmly believe that we're going to win this lawsuit, and that we're going to win a lot of money for these victims, although it could never make up for what they've lost. I don't think money restores your faith in humanity, but at least its something. In that regard, we are hoping to give them some form of relief.

I'll close by telling you briefly about one victim who's very dear to my heart. The fellow who you probably all know as a kind of icon, the fellow that was on the box. There're actually two different gentlemen, but one of them is somebody that we have met with several times and his name is Haj Ali. He told us a terrible story of being tortured by Graner and the others in the Hard Site, of having been tortured with electricity, and of other terrible deprivations. The thing that is so wonderful about Haj Ali is that he has taken all of his pain and started a human rights group in Iraq. He is a most optimistic and hopeful man. Every once in a while, even though I speak no Arabic and he speaks no English, he'll call me on my cell. "Miss Susan, Miss Susan." I'll reply, "Haj Ali, Haj Ali" and it's just a wonderful feeling of human connection. We can't really talk to each other, but he knows that we care and he knows that we're working for him. So if nothing else, even if we don't win and we get kicked out, at least he knows we're trying.