

## HIRED GUNS AND HIGHER LAW: A TORTURED EXPANSION OF THE MILITARY CONTRACTOR DEFENSE

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### INTRODUCTION

In the recent history of major military operations of the United States, the role of private military contractors (PMCs) has greatly expanded and is now central to the efficient functioning of the military effort in Iraq.<sup>1</sup> PMCs are domestic companies that contract to provide various services to military operations.<sup>2</sup> While PMCs maintain civilian status, they are authorized to accompany soldiers and military personnel in the field and provide indirect support to operations abroad, including logistical tasks such as security management, janitorial services, specific engineering projects, translation, and interrogation.<sup>3</sup> The contractual agreements often refer to the tasks performed as “information technology” or some other generalized terminology, rendering it difficult

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<sup>1</sup> See Michael N. Schmitt, *War, International Law, and Sovereignty: Reevaluating the Rules of the Game in a New Century: Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*, 5 CHI. J. INT’L L. 511, 512 (2005) (estimating that the number of contractors present in the current conflict in Iraq is between twenty and thirty thousand and noting that “[t]he scope of conflict-related activities which civilians perform today is unprecedented. Of greatest importance is their centrality to the complex logistics system.”).

<sup>2</sup> See Devin S. Sesai, *Have Your Cake and Eat It Too: A Proposal for a Layered Approach to Regulating Private Military Companies*, 39 U.S.F.L. REV. 825, 826 (2005) (“Groups, such as Executive Outcomes and DynCorp, have been called mercenaries, security consultants, civilian contractors, private military companies (‘PMCs’), or even ‘hired guns.’ Regardless of their title, these groups provide services ranging from consulting to logistical support to full-fledged armed divisions and are now undoubtedly a part of global politics and the global market.”).

<sup>3</sup> For examples of tasks that private military contractors advertise that they perform, see CACI homepage, <http://www.caci.com> (last visited Feb. 18, 2006); Titan homepage, <http://www.titan.com/products-services/> (last visited Feb. 18, 2006); Blackwater USA – Security Consulting, <http://www.blackwaterusa.com/securityconsulting/services.asp> (last visited Feb. 18, 2006); DynCorp International, <http://www.dyn-intl.com/subpage.aspx?id=15> (last visited Feb. 18, 2006).

to determine exactly which services will be performed<sup>4</sup> and exactly how many civilian employees will be devoted to a particular function.<sup>5</sup>

The federal government hires PMCs to cut costs and provide less expensive alternatives to training traditional military forces to perform such logistical tasks.<sup>6</sup> Additionally, the military cannot operate at optimal efficiency without the expertise and support of specialized forces, like PMCs.<sup>7</sup> Proponents argue that private support is increasingly necessary as military combat and enemy communication become more technologically advanced and globalized.<sup>8</sup> Critics argue that the administration's aggressive reliance on domestic outsourcing has gone beyond what should be acceptable, given the difficulty of accountability for contractors acting in lieu of military personnel.<sup>9</sup> Additionally, critics argue that

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<sup>4</sup> For a more detailed account of the U.S. trend of privatizing traditional government functions, see Paul Verkuil, *Public Law Limitations on Privatization of Government Functions*, 84 N.C.L. REV. 397, 443 (2006).

The role of private military contractors expanded in Iraq without a change in the law on private delegations. Under the FAIR Act, private contractors can only provide "non-inherently governmental" goods and services, but they cannot fill military positions, such as those involving essential military skills or other skills necessary for career progression. The line between military and competitive functions has been blurred in a way that the laws have not yet responded to. When private contractors are accused of participating in acts of torture, there is a failure of public responsibility. Torture is one governmental "function" that cannot be privatized.

*Id.*

<sup>5</sup> Intelligence, Inc., <http://www.alternet.org/module/printversion/21422> (last visited Mar. 11, 2006) ("A great number of the contracts . . . are officially for 'information technology,' but in reality have been used to fund intelligence work—more specifically, the hiring of civilian interrogators to work directly in Afghanistan, Cuba, and Iraq.").

<sup>6</sup> See Schmitt, *supra* note 1, at 515 (noting that even though the government may be saving money by employing civilians, the civilians still make substantial financial gains. In some cases, the pay may outweigh military salaries to such a degree that well-trained military personnel leave the military to obtain higher wages).

<sup>7</sup> See *Regulating Private Military Companies: The Need for a Multidimensional Approach*, <http://www.fco.gov.uk/Files/kfile/pmclilly.pdf> (last visited Feb. 14, 2006) (noting that such growth is not unique to the United States).

<sup>8</sup> See CACI Homepage, <http://www.caci.com/business/intel.shtml> (last visited October 12, 2006) ("We [u]ncover terrorist activity by providing capabilities ranging from complex space-based operations to human source intelligence . . . . Featuring cutting edge technologies and a cadre of some of the most experienced and knowledgeable programming and engineering teams [sic] our solutions touch on every facet of defense and law enforcement intelligence needs. Team CACI is developing the best solutions to meet the nation's rapidly evolving intelligence needs.").

<sup>9</sup> "[I]n Iraq, where there is little public or congressional oversight, the administration has privatized everything in sight . . . . [Particularly shocking] is the privatization of purely

civilians are less knowledgeable when using logistical skills in a military context, and their very presence offends traditional concepts of order during wartime.<sup>10</sup>

Whatever the theoretical perspective, it is clear that private corporations are a well-settled part of the current military structure in Iraq, as well as in Afghanistan and Cuba.<sup>11</sup> Therefore, the implications of how these private actors legally relate to military personnel, the U.S. government and its courts, and Iraqi citizens have become important to jurists and scholars alike. Attention to these legal relationships has gained new import following allegations that PMCs personally participated in violations of *jus cogens*<sup>12</sup> norms by

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military functions . . . . It's one thing to have civilians drive trucks and serve food; it's quite different to employ them as personal bodyguards to U.S. officials, as guards for U.S. government installations, and . . . as interrogators in Iraqi prisons." Paul Krugman, *Battlefield of Dreams*, N.Y. TIMES, May 4, 2004, at A29, quoted in Steven L. Schooner, *Contractor Atrocities at Abu Ghraib: Compromised Accountability in a Streamlined, Outsourced Government*, 16 STAN. L. & POL'Y. REV. 549, 553 (2005).

<sup>10</sup> Some argue that the civilianization of the military violates the concept of "Unity of Command," as defined by the Joint Chiefs of Staff. "Unity of command means that all forces operate under a single commander with the requisite authority to direct all forces employed in pursuit of a common purpose." Joint Publication 3-0 Doctrine for Joint Operations A-2 (Sept. 10, 2001), available at <http://jdeis.cornerstoneindustry.com/jdeis/paragraphsPop.jsp?cId=1100&parId=7840&SearchString=>.

<sup>11</sup> Shawn Macomber, *You're Not in the Army Now: Should the Pentagon Be in the Business of Outsourcing War?*, THE AMERICAN SPECTATOR, Nov. 2004 ("Private military firms, originally a temporary panacea to address the security gap that resulted from the post-Cold War downsizing of the armed forces, have become a \$100 billion a year industry. According to the Center for Public Integrity, between 1994 and 2002 the Defense Department signed some 3,000 contracts with U.S. contractors worth an estimated \$300 billion. The same study shows that 14 of the top contractors also paid out political contributions of over \$1 million to political candidates over the last decade, which didn't hurt their position either.").

<sup>12</sup> See BLACK'S LAW DICTIONARY 712 (7th ed. 1999) ("A mandatory norm of general international law from which no two or more nations may exempt themselves or release one another."). See also *Siderman de Blake v. Argentina*, 965 F.2d 699, 715 (9th Cir. 1992) (citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. d (1987)).

While *jus cogens* and customary international law are related, they differ in one important respect. Customary international law, like international law defined by treaties and other international agreements, rests on the consent of states. A state that persistently objects to a norm of customary international law that other states accept is not bound by that norm, see Restatement § 102 Comment d, just as a state that is not party to an international agreement is not bound by the terms of that agreement.

*Id.* The implication is, then, that *jus cogens* norms do not rest upon consent of any state, but rather sprout directly from nature.

torturing prisoners at the Abu Ghraib prison camp in 2004.<sup>13</sup>

The legal status of PMCs is unique. Unlike their military counterparts, employees of privately contracted corporations are not subject to military law.<sup>14</sup> However, the degree to which civilian law applies to private contractors assisting the military is not settled.<sup>15</sup> Additionally, victims of torture have struggled to determine which laws and forums are best suited to handle their claims. International law, violation of treaties, and common law tort claims have been central to many of the complaints.<sup>16</sup> Where victims can claim that a violation of the law of nations has occurred, they may seek redress in United States federal district court under the Alien Tort Statute (ATS).<sup>17</sup>

PMCs argue that no claims exist under the ATS against private companies when they are acting under the control of the United States in support, whether direct or indirect, of combat operations during wartime.<sup>18</sup> Essentially, parties contracting with the United

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<sup>13</sup> When the scandal broke, most attempted to invoke the Military Extraterritorial Jurisdiction Act passed in 2000, as a basis for bringing suit. This attempt proved difficult when considering the legal status of the PMCs. See Ellen McCarthy & Renae Merle, *Contractors and the Law; Prison Abuse Cases Renew Debate*, THE WASHINGTON POST, Aug. 27, 2004, at E01 ("Some legal experts say it's unclear whether CACI is covered . . . the Military Extraterritorial Jurisdiction Act, as written, may not technically cover CACI's interrogators.") (quoting Professor Steven L. Schooner).

<sup>14</sup> The Uniform Code of Military Justice does not apply to civilians. See *Grisham v. Hagan*, 361 U.S. 278, 279-80 (1960).

<sup>15</sup> Though this Note will not directly address issues of justiciability, defendants in the cases discussed herein regularly argue that courts may not take cognizance of the actions because of the political question doctrine: the lawsuit is judicially unmanageable due to its relationship to authorized military activity and/or the lawsuit puts the judiciary at odds with the executive branch. See *Ibrahim v. Titan Corp.*, 391 F. Supp. 2d 10, 15-16 (D.D.C. 2005).

<sup>16</sup> See Third Amended Class Action Complaint, *Saleh v. Titan Corp.*, No. 05-CV-1165 (D.D.C. filed Sept. 12, 2005) [hereinafter *Saleh Third Amended Complaint*].

<sup>17</sup> The Alien Tort Statute, 28 U.S.C. § 1350 (2000), was originally part of the Judiciary Act of 1789. It provides: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." This law remained intact but was rarely invoked until the landmark case, *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). In that case, a Paraguayan was kidnapped and tortured by a Paraguayan police official. The relatives of the kidnapped sued the Paraguayan government under the ATS. *Id.* The novelty of this case is central still today, as the statute allows jurisdiction in U.S. courts for human rights claims even when neither plaintiff nor defendant has any connection whatsoever to the United States.

<sup>18</sup> See Memorandum of Points and Authorities in Support of Defendant Titan Corporation's Motion to Dismiss, *Saleh v. Titan Corp.*, No. 04-CV-1143 (S.D. Cal. filed Sept. 14, 2004). It is important to note that many oppose application of the Alien Tort Statute to corporate defendants altogether. However, at least one court has determined that corporations may be held liable for violations of customary international law, and this Note

States government contend that, because they are simply adhering to the specifications of a contractual agreement with the government, they are entitled to immunity that springs out of this contractual relationship. This affirmative defense, known as the military contractor defense,<sup>19</sup> has been consistently applied to cases arising from products liability claims associated with manufacturing contracts with the U.S. government.<sup>20</sup>

Applying the military contractor defense, in the context of torture claims that violate international norms, would require expansion of the defense to a new type of claim, one that arises out of alleged violations of customary international law.<sup>21</sup> Such expansion may even constitute improper lawmaking by the judiciary. Most simply argue that there is no basis for the expansion, and to craft such a defense would necessarily undermine important federal policy interests.<sup>22</sup> Most compelling is the argument that if the victims of these crimes are precluded from holding PMCs accountable for their violations of the law by application of this affirmative defense, then there may be no viable fora in which to hold private contractors accountable for their violations of international law.

Normally, if one defendant is able to escape liability by virtue of some contractual or agency relationship (the simplest American law example is vicarious liability), then the plaintiff still retains the ability to sue the principal. However, when PMCs escape liability, the principal is the U.S. government, a party that will almost cer-

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assumes such liability is at least in some circumstances possible against a corporate defendant. The assumption is necessary to address the issue of any affirmative defense.

<sup>19</sup> The “military contractor defense” is also known as the “government contractor defense.” I will employ the former.

<sup>20</sup> See *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988). In that case, the domestic supplier of a military helicopter was not liable under state law for design defects that contributed to the drowning death of a U.S. marine. The Supreme Court held that state tort law liability is preempted when the company acted according to reasonably precise specifications given by the United States, the product complied with those specifications, and the company warned the government about any known dangers. *Id.* at 512. See also *Beaver Valley Power Co. v. Nat’l Eng’g and Contracting Co.*, 883 F.2d 1210 (3d Cir. 1989); *Snell v. Bell Helicopter Textron*, 107 F.3d 744 (9th Cir. 1997).

<sup>21</sup> This argument was advanced by the class action plaintiffs in the Abu Ghraib prison case as applied to their lawsuits against private government contractors. See, e.g., Plaintiff’s Memorandum of Points and Authorities in Opposition to Motion of Defendants CACI’s Motion to Dismiss, *Saleh v. Titan Corp.*, No. 04-CV-1143 (S.D. Cal. filed Oct. 22, 2004) [hereinafter CACI’s Memorandum].

<sup>22</sup> The important policy considerations on which many litigators are focused include efficiency in military procurement and compliance with international law, which is a part of U.S. federal common law.

tainly attempt to invoke sovereign immunity as a shield. If the federal government is immune from suit under sovereign immunity and the PMCs are likewise immune under the military contractor defense, then the flow of liability is cut off. The victims of egregious violations of customary international law are without a legally viable avenue,<sup>23</sup> and the PMCs operate in literal lawlessness.

This Note will examine pending cases that may determine whether claims filed under the Alien Tort Statute (ATS) against PMCs for violations of international law can prevail.<sup>24</sup> Specifically, it will consider pending litigation concerning the liability, or lack thereof, of employees of PMCs who allegedly participated in torture at Abu Ghraib prison camp in 2004.<sup>25</sup> It will further examine the possibility of holding the federal government accountable under common law claims if courts rule that the PMCs are immune under the military contractor defense. This Note argues that the military contractor defense, which provides PMCs an affirmative defense against claims arising from products liability and manufacturing contracts with the United States government, should not be expanded to apply to claims brought under the ATS.

Part I will provide historical context and recount recent developments in ATS jurisprudence, which have fueled arguments in favor of expansion of the military contractor defense. These developments include the landmark case, *Sosa v. Alvarez-Machain*,<sup>26</sup> which provides the basis for the modern understanding of what actions constitute violations of the law of nations. Part II will present, in detail, the policy basis and origin of the military contractor defense and its subsequent expansions. Part III will address recent

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<sup>23</sup> David J. Scheffer, *Future Implications of the Iraq Conflict: Beyond Occupation Law*, 97 AM.J.INT'L L. 842, 858 (2003) ("An Iraqi victim of occupation law abuses conceivably could bring an action in U.S. federal courts against officials of the United Kingdom under the Alien Tort Statute provided that the occupying power is the alleged responsible party and the jurisdictional requirements of that law are satisfied.").

<sup>24</sup> While this Note will tangentially address how the victims of the alleged torture may proceed under common law claims in U.S. federal district court, a more in-depth study of how they may proceed under the ATS is central to understanding the United States' commitment, or lack thereof, to universal law.

<sup>25</sup> See Saleh Third Amended Complaint, *supra* note 16. Defendant companies were contracted by the United States military to perform "interrogation, interpretation, translation, intelligence gathering, and security" at certain prisons in Iraq. *Id.* at ¶ 39. Plaintiffs allege that defendants, acting under the color of United States authority, engaged in these violations of international law independently, and not pursuant to any orders directly from or contracts with the U.S. military. *Id.* at ¶ 45.

<sup>26</sup> 542 U.S. 692 (2004).

allegations against PMCs for the role of their employees during the Abu Ghraib prison torture scandal and criticize the theories on which defendant contractors base their claims for expansion of the military contractor defense.<sup>27</sup> Part III further argues that if there is to be any application whatsoever of the military contractor defense in ATS cases, the defense should be narrowly construed. Part IV will offer alternative avenues for adjudication of such claims if courts rule that the military contractor defense does apply to claims brought under the ATS. One such avenue is to bring a lawsuit against the United States directly, under the Federal Tort Claims Act (FTCA).<sup>28</sup> Suing the federal government would allow liability to flow to the United States when its contractors have violated *jus cogens* norms and the law provides no other viable remedy. Private companies should not be allowed to operate in lawlessness regardless of their vital position in the United States' modern military structure. If the military contractor defense does protect PMCs from liability, the courts should construe the FTCA such that sovereign immunity is waived and the federal government absorbs liability.

## I. MODERN ALIEN TORT STATUTE JURISPRUDENCE

### A. *History and Structure*

Since the end of World War II, victims of human rights abuses have attempted to adjudicate international human rights claims in U.S. federal courts. Attempts include challenges against the U.S.

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<sup>27</sup> See *Saleh v. Titan Corp.*, 04-CV-1143 (D.D.C. filed Sept. 1, 2004). See also *Ibrahim v. Titan Corp.*, 391 F. Supp. 2d 10 (D.D.C. 2005). The defendant company, Titan Corporation, is a domestic company headquartered in San Diego, California. Washington Technology published their contracts with the U.S. government which were valued at \$1,183,394,966, ranking ninth in total overall government contracts in 2005. Top 100 Federal Prime Contractors – 2005, <http://www.washingtontechnology.com/top-100/2005/> (last visited Mar. 9, 2006). In September 2004, defendant Titan Corporation moved to dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. See Titan Corporation's Motion to Dismiss, *Saleh v. Titan Corp.*, No. 04-CV-1143, (D.D.C. Sept. 14, 2004).

<sup>28</sup> The Federal Tort Claims Act, 28 U.S.C. § 2680(h) (2005), permits parties to sue the United States in federal court for most torts committed by persons acting on the government's behalf. However, the Act has important limitations. Liability under the FTCA is limited to "circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b) (2000). However, the FTCA does not imply any complete waiver of sovereign immunity. The United States retains the power to define the jurisdiction of its courts and may refuse to hear cases where the United States is a defendant on a variety of jurisdictional theories.

government for domestic action as well as challenges to U.S. military action abroad.<sup>29</sup> In recent years, the Supreme Court has more frequently referred to maxims of international law when deciding domestic cases.<sup>30</sup> The ATS permits lawsuits for torts that violate the law of nations and for those that violate treaties to which the United States is a party.<sup>31</sup> Because various treaties of the United States preclude torture,<sup>32</sup> it seems that any torture claim should be permitted jurisdiction in U.S. district courts under the ATS. However, the non-self-executing treaty doctrine, which allows courts to find that the treaty provisions at issue were not intended to go into effect without implementing specific legislation to that end, has largely halted treaty-based ATS claims.<sup>33</sup> Instead, victims of human rights violations generally base their claims under the por-

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<sup>29</sup> See Sandra Coliver, Jennie Green, & Paul Hoffman, *Holding Human Rights Violators Accountable by Using International Law in U.S. Courts: Advocacy Efforts and Complementary Strategies*, 19 EMORY INT'L L. REV. 169, 190 (2005) (These include challenges to racial discrimination and nuclear testing and challenges to the deployment of U.S. weapons abroad and the U.S. support for the contras in Nicaragua).

<sup>30</sup> *Id.* ("This has included cases involving legal questions such as the death penalty for the mentally retarded, affirmative action, 'sodomy' laws applied to homosexual conduct, and, most recently, juvenile execution.").

<sup>31</sup> 28 U.S.C. § 1350 (2000).

<sup>32</sup> See, e.g., 7 U.S.C. § 1733 (2000) (prohibiting the export of agricultural commodities to countries that practice cruel, inhuman or degrading treatment); War Crimes Act of 1996, 18 U.S.C. § 2441 (2000); Torture Act, 18 U.S.C. § 2304A (2000); Military Extraterritorial Jurisdiction Act, 18 U.S.C. §§ 3261-3267 (2000); 22 U.S.C. § 262d(a)(1) (2000) (stating that United States policy prohibits providing international assistance to countries that practice cruel, inhuman or degrading treatment); 22 U.S.C. § 2151n (2004) (prohibiting development assistance to countries that practice cruel, inhuman or degrading treatment); 22 U.S.C. § 2304 (2000) (prohibiting security assistance to countries that practice cruel, inhuman or degrading treatment); Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 (2000); Uniform Code of Military Justice, Arts. 77-134; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, Annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), entered into force June 26, 1987; Geneva Conventions I-IV, 75 U.N.T.S. 31, 85, 135, 287, entered into force Oct. 21, 1950; Army Field Manual (prohibiting use of torture and other inhumane treatment of detainees during interrogation on the basis that it produces intelligence that is inherently unreliable); President George W. Bush, Statement Regarding United Nations International Day in Support of Victims of Torture (June 26, 2003) (available at <http://www.whitehouse.gov/news/releases/2003/06/20030626-3.html>) ("The United States is committed to the world-wide elimination of torture and we are leading this fight by example. I call on all governments to join with the United States and the community of law-abiding nations in prohibiting, investigating, and prosecuting all acts of torture and in undertaking to prevent other cruel and unusual punishment.").

<sup>33</sup> For a complete account of this and other doctrines regarding analysis of treaties, see John C. Yoo, *Globalism and the Constitution: Treaties, Non Self Execution, and The Original Understanding*, 99 COLUM. L. REV. 1955 (1999).

tion of the statute that provides jurisdiction in U.S. district court for aliens who are victims of torts in violation of the law of nations.<sup>34</sup> In recent human rights litigation, the modern perception of what constitutes a violation of the law of nations has become a pivotal issue.

In June 2004, the U.S. Supreme Court affirmed the use of the ATS in human rights cases where the alleged violations of international norms are “specific, universal, and obligatory.”<sup>35</sup> The facts of the civil lawsuit<sup>36</sup> began in a 1985 criminal case,<sup>37</sup> when a Drug Enforcement Administration (DEA) agent working in Mexico was captured, tortured, interrogated, and executed. Dr. Alvarez-Machain, a Mexican national, was accused of participating in this crime by keeping the agent alive during the torture.<sup>38</sup> The DEA sought his extradition by the Mexican government to no avail.<sup>39</sup> The DEA then hired several Mexican nationals to bring Alvarez-Machain to the United States against his will to be tried in U.S. federal court.<sup>40</sup> Alvarez-Machain sought to dismiss the case based on the illegal abduction, but his claim was rejected.<sup>41</sup> In 1992, Alvarez-Machain was acquitted of the charges surrounding the death of the DEA agent, and then brought a civil lawsuit against the United States, claiming his abduction by U.S. officials constituted a violation of the law of nations, creating jurisdiction in the U.S. district court under the ATS.<sup>42</sup>

The district court found in favor of Dr. Alvarez-Machain, ruling that sufficient foundation existed to create jurisdiction under the ATS, and the Ninth Circuit affirmed.<sup>43</sup> However, in an opinion written by Justice Souter in June 2004, the Supreme Court reversed on the basis that this arbitrary arrest claim did not rise to the level intended by the drafters of the ATS.<sup>44</sup> The opinion did not undermine prior case law that held torture, slavery, genocide, and crimes

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<sup>34</sup> See Coliver, Green, & Hoffman, *supra* note 29.

<sup>35</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004).

<sup>36</sup> *Id.*

<sup>37</sup> *United States v. Alvarez-Machain*, 504 U.S. 655 (1992).

<sup>38</sup> *Id.* at 657.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> See generally Defendant's Motion to Dismiss, *United States v. Alvarez-Machain*, No. CV 93-4072 (C.D. Cal. 1999).

<sup>42</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692, 692 (2004).

<sup>43</sup> See generally *Alvarez-Machain v. United States*, 331 F.3d 604 (9th Cir. 2003).

<sup>44</sup> *Sosa*, 542 U.S. at 737.

against humanity are valid ATS claims.<sup>45</sup> Instead, the Court stated that human rights cases brought under the ATS should only include those violations of norms that are generally accepted by the civilized world and should be “defined with the specificity comparable to the features of the eighteenth century paradigms we have recognized.”<sup>46</sup> Violations include piracy, infringing the rights of ambassadors, and violations of safe conducts.<sup>47</sup> The words used by the Court left the door open for argument regarding what specific actions would meet the requirements for bringing an ATS claim; however, the Court said nothing to undermine lower court decisions that held claims of torture actionable under the ATS.<sup>48</sup>

Further, the decision in *Sosa* did, albeit indirectly, support the lower courts that have held that private actors, such as PMCs, may be held accountable for violations of the law of nations under the ATS.<sup>49</sup> The Supreme Court noted that while there was insufficient consensus in 1984 that torture by private actors violated international law, by 1995, there was sufficient consensus that some violations of international law by private actors were actionable under the ATS.<sup>50</sup> This notation by the Court, coupled with the statement that “for purposes of civil liability, the torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind,”<sup>51</sup> makes it abundantly clear that the Supreme Court endorsed a finding that torture by private entities, like PMCs, is actionable under the ATS.

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<sup>45</sup> *Id.* at 733. To clarify, the claim analyzed by the Court in *Sosa* is not a torture claim. The question was whether Dr. Alvarez-Machain’s arbitrary arrest rose to the level of the historical paradigms, not whether torture itself rose to the level of a violation of the law of nations.

<sup>46</sup> *Id.* at 725.

<sup>47</sup> *Id.* at 724.

<sup>48</sup> The *Sosa* opinion resolved some questions about how and when to apply the ATS; however, the decision left much unresolved as well. For example, those seeking to curb ATS human rights litigations often cite the Court’s finding that the ATS is essentially a jurisdiction-granting statute and not a forum to create new causes of action. However, human rights advocates seeking to broaden the scope of ATS litigation note that *Sosa* held that ATS claims must “rest on a norm of international character accepted by the civilized world . . . .” See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 692. The implication is that universally accepted human rights violations do not require the creation of a new cause of action but only a forum in which to bring the already existing claim.

<sup>49</sup> *Id.* at 733 n.20 (noting that by 1995, sufficient consensus existed to determine that genocide by private actors violates international law).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 732 (quoting *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (1980)).

### B. *Defenses to ATS Claims*

ATS litigators are working diligently to broaden the scope of cognizable claims under the ATS,<sup>52</sup> but even after a claim is established as cognizable, a variety of other obstacles may still prevent plaintiffs from surviving a motion to dismiss.<sup>53</sup> For example, defendants have argued that the law of nations does not apply to private actors, and therefore any private entity cannot be liable for ATS violations.<sup>54</sup> Particularly, corporations argue that they escape ATS liability simply due to their status as corporations.<sup>55</sup> Further, in multiple pending corporate cases, defendants claim that the real perpetrator is the foreign subsidiary based in the country where the project takes place. For example, when a parent company operates with several layers of corporate structure, defendants contend that these layers protect the parent company from liability.<sup>56</sup>

In addition, PMCs have also argued that some ATS claims are non-justiciable political questions, particularly if the contract was drafted during a time of war.<sup>57</sup> The argument, then, is that because war is a traditional function of the executive, policy choices about

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<sup>52</sup> Human rights lawyers and organizations seek to broaden the scope of cognizable claims to include forced labor, violations of rights of association resulting in physical or mental harm, indirect support of slavery, corporate liability, third party complicity, aiding and abetting liability, etc. See Coliver, Green, & Hoffman, *supra* note 29.

<sup>53</sup> This Note assumes torture is actionable under ATS. This assumption is necessary to discuss the application of the military contractor affirmative defense.

<sup>54</sup> This argument is severely undermined by *Kadic v. Karadzic*. There, the Second Circuit found that under international law, universal norms, such as genocide, war crimes, summary execution, rape, and torture in pursuit of these crimes, apply to private actors, and can thus provide the basis for ATS litigation against entities other than the state. *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995).

<sup>55</sup> While Defendants continue to argue that *Sosa* limited ATS claims against corporate defendants, the circuit courts have continued to allow such claims. See *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 319 (S.D.N.Y. 2003).

<sup>56</sup> See generally *Royal Dutch Petroleum v. Wiwa*, 532 U.S. 941 (2001). Issues regarding the piercing of the corporate veil are pending and continue to be hotly debated.

<sup>57</sup> The political question doctrine, as explained in *Baker v. Carr*, 369 U.S. 186 (1962), instructs courts to refrain from ruling on issues where the following factors tend to suggest the judiciary is not the appropriate forum: (1) where the constitution has committed the issue or policy to a coordinate political branch, (2) where the judiciary lacks manageable standards to resolve the issue, (3) where it is impossible to make a determination without clearly invading policy decisions of a kind for non-judicial discretion, (4) where a judicial resolution would demonstrate lack of respect to the other branches, (5) where the unusual need to adhere to a political decision already made exists, and (6) where there is potential for embarrassment from multiple announcements from various branches. Defendants state that “[d]amages claims based on the conduct of war are classic political questions that are committed exclusively to Congress and the President for resolution.” CACI Memorandum, *supra* note 21, at 5.

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how to provide resources in support of war, including the choice to contract privately, is non-justiciable by courts as it reflects a political question.<sup>58</sup>

Defendants also contend that, under the doctrine of *forum non conveniens*, the court must dismiss all claims in U.S. courts when an adequate alternative forum exists in a non-U.S. jurisdiction.<sup>59</sup> However, in the Abu Ghraib prison cases examined in this Note, PMCs rarely argue for a *forum non conveniens* analysis, as it is unlikely that any court would consider the Iraqi judicial system an adequate alternative forum for bringing human rights claims.

Finally, and most centrally at issue here, private government contractors will argue that they are immune from suit under the military contractor defense. To evaluate the strength of the argument for immunity, the history and policy underlying the origin of the military contractor defense must be closely examined.

## II. THE MILITARY CONTRACTOR DEFENSE

### A. *The Origin and Policy Basis for the Defense*

The military contractor defense was created in *Boyle v. United Technologies Corp.*<sup>60</sup> In *Boyle*, the Court held that the defendant, the supplier of a military helicopter, was not liable under Virginia state law for alleged design defects that may have contributed to the drowning death of a U.S. marine.<sup>61</sup> As a preliminary matter, the Court determined that “uniquely federal interests” were at

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<sup>58</sup> See *Ibrahim v. Titan Corp.*, 391 F. Supp. 2d at 15 (D.D.C. 2005).

<sup>59</sup> See Coliver, Green & Hoffman, *supra* note 29, at 218 (“In ATS corporate cases, especially those against foreign corporations, *forum non conveniens* arguments and arguments that U.S. courts lack personal jurisdiction are standard fare.”).

<sup>60</sup> 487 U.S. 500 (1988).

<sup>61</sup> Before *Boyle*, lower courts had begun extending immunity to military contractors. In *Sanner v. Ford Motor*, 144 N.J. Super. 1 (Law Div. 1976), the plaintiff was seriously injured after an accident in his military vehicle. The vehicle lacked seatbelts and a roll bar, as the government contract specified that such safety features not be included. The court found for the defendant, reasoning that in the production of military equipment, a manufacturer is obligated to fulfill contract specifications as requested by the government. *Id.* In *re “Agent Orange” Product Liability Litigation*, 534 F. Supp. 1046 (E.D.N.Y. 1982) recognized the extension of U.S. immunity to privately contracted parties. This case involved claims brought by veterans and their families against chemical companies that produced the herbicide Agent Orange. In fact, the three-prong *Boyle* test originated here when the *In re Agent Orange* Court held that to be granted immunity, the defendants must prove that the government established specifications for the chemical in question, that the chemical manufactured materially satisfied the government’s requirements, and that the government knew as much as the chemical companies about the dangers of the chemical.

stake and that the application of the state law liability theory presented a “significant conflict” with federal policies or interests.<sup>62</sup> The Court then outlined the necessary conditions<sup>63</sup> to preempt a state tort law liability claim concerning design defects. These conditions include: “(1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States.”<sup>64</sup>

*Boyle*, itself, did not confer immunity on government contractors. Rather, it only provided protection “for acts . . . [carried out by PMCs] while complying with government specifications during execution of performance of a contract with the United States.”<sup>65</sup> Because the military contractor defense is an affirmative defense,<sup>66</sup> generally asserted when a defendant files a motion to dismiss, the PMC carries the burden of proving the existence of the contract as well as the burden of proving that the contract governed the actions in question.<sup>67</sup> In other words, the government contractor must show that the acts being questioned in the complaint are pre-

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<sup>62</sup> *Boyle*, 487 U.S. 500.

<sup>63</sup> If performance contracts can be the basis of the assertion of the military contractor defense, then the *Boyle* standards to determine whether the government contractor gains immunity must be altered. The second and third prongs in *Boyle*, requiring that equipment conform to reasonably precise specifications as approved by the United States and that the supplier warn the United States do not apply to personal service contracts. The first prong, that the United States has approved reasonably precise specifications, may be applicable to a contract requiring interrogation, translation, or security skills, but the terms have less than clearly defined meaning when applied to service as opposed to procurement contracts (for example—the size, amount, weight, and metal type of military ordered drill bits). Performance contracts for an isolated function may lend themselves to a point-by-point legal standard, as *Boyle* prescribes for manufacturer contracts. 487 U.S. at 512.

<sup>64</sup> *Id.*

<sup>65</sup> *McKay v. Rockwell Int’l Corp.*, 704 F.2d 444, 448 (9th Cir. 1983) (interpreting the decision in *Boyle*).

<sup>66</sup> See Larry J. Gusman, *Rethinking Boyle v. United Technologies Corp. Government Contractor Defense: Judicial Preemption of the Doctrine of Separation of Powers*, 39 AM. U. L. REV. 391, 393 (1990) (evaluating whether the Supreme Court’s creation of the military contractor affirmative defense contravenes Congress’ exclusive plenary authority to expand, restrict, or waive the federal government’s sovereign immunity interests).

<sup>67</sup> See *Snell v. Bell Helicopter Textron*, 107 F.3d 744, 746 (9th Cir. 1997). See also *Sundstrom v. McDonnell Douglas Corp.*, 816 F. Supp. 577, 582 (N.D. Cal. 1982) (analyzing claims under the *Boyle* standard and requiring that the contractor’s actions must be closely aligned with those actions outlined in the contract to qualify for the affirmative defense).

cisely the acts that United States government contracted with it to perform.<sup>68</sup>

### B. *Evolution of the Military Contractor Defense*

The military contractor defense has expanded in several important ways since *Boyle*. However, most of the expansion has taken place in negligence actions where the *Boyle* analysis can logically be applied. For example, *In re Joint Eastern and Southern District New York Asbestos Litigation*<sup>69</sup> became one of the first cases where the defendant attempted to apply the military contractor defense in a failure to warn case. In that case, workers who were exposed to cement containing asbestos during their Navy employment sued the cement manufacturer under state law.<sup>70</sup> The manufacturer raised the affirmative defense as defined by *Boyle*, and argued that it should be immune because its actions were in accordance with strict Navy specifications.<sup>71</sup> The court affirmed the denial of the manufacturer's motion for summary judgment, holding that federal law does provide a defense for military contractors sued under state law, but the defense is limited to situations when state tort law poses a "significant conflict" with the duties imposed under a federal contract.<sup>72</sup>

While the Ninth Circuit has held that the military contractor defense is only available to government contractors who design and manufacture military equipment, and therefore not available to any service-based contractors,<sup>73</sup> the Eleventh Circuit has held that the military contractor defense does apply to service contracts.<sup>74</sup> In *Hudgens*, the contract provided that DynCorp, a ser-

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<sup>68</sup> See *Boyle*, 487 U.S. at 512.

<sup>69</sup> 897 F.2d 626 (2d Cir. 1990).

<sup>70</sup> *Id.* at 626-628.

<sup>71</sup> *Id.* at 626.

<sup>72</sup> *Id.* at 628.

<sup>73</sup> See *Snell v. Bell Helicopter Textron*, 107 F.3d 744, 744 (9th Cir. 1997), where the Court determined that the military contractor defense did not preempt the wrongful death action against a helicopter manufacturer when three people died after a Marine helicopter went down. The Court held that the defendant contractor did not establish (as required in any affirmative defense) that the government was involved in or approved of the specifications of the helicopter. Therefore, the military contractor defense was unavailable to the defendants. See also *In re Hawaii Fed. Asbestos Cases*, 960 F.2d 806, 810 (9th Cir. 1992); *Nielson v. George Diamond Vogel Paint Co.*, 892 F.2d 1450 (9th Cir. 1990).

<sup>74</sup> *Hudgens v. Bell Helicopters/Textron*, 328 F.3d 1329 (11th Cir. 2003). The Eleventh Circuit is not alone. District courts in other circuits have applied the defense to government contractors who had performance based contracts with the United States. See *Askir*

vice contractor, would maintain military helicopters.<sup>75</sup> After a helicopter crash, the victims of the crash sued DynCorp for negligent maintenance, and DynCorp claimed that the military contractor defense applied to it.<sup>76</sup> Plaintiffs argued that the affirmative defense only applied to design defects, but the court ruled:

Although *Boyle* referred specifically to procurement contracts, the analysis it requires is not designed to promote all-or-nothing rules regarding different classes of contract. Rather, the question is whether subjecting a contractor to liability under state tort law would create a significant conflict with a unique federal interest. We would be exceedingly hard-pressed to conclude that the unique federal interest recognized in *Boyle*, as well as the potential for significant conflict with state law, are not likewise manifest in the present case. . . . We thus hold that the government contractor defense recognized in *Boyle* is applicable to the service contract between the Army and DynCorp.<sup>77</sup>

In so holding, the Eleventh Circuit set precedent for the *Boyle* analysis to apply in cases of service contracts, like those at issue in the pending Abu Ghraib cases.<sup>78</sup>

Since torture, or any other actionable ATS claim, will rarely constitute an act that the U.S. government has contracted an independent company to perform, it is clear that if Supreme Court precedent were the only guiding light, the military contractor defense could not be logically applied to ATS claims. In other words, service contracts may provide the basis for asserting the military contractor defense.<sup>79</sup> However, no claim of a violation of the law of

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v. Brown & Root Serv. Corp., No. 95-C 110008, 1997 U.S. Dist. LEXIS 14494 (S.D.N.Y. Sept. 22, 1997) (Claim dismissed because the military contractor defense gave immunity to contractor with performance contract supporting the United Nations' peacekeeping operation in Somalia.).

<sup>75</sup> Hudgens, 328 F.3d at 1329.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 1334.

<sup>78</sup> This author finds it unlikely that the *Boyle* standards, or any standard provided by the judiciary, can efficiently determine when long-term contracted service providers (like CACI and Titan) should be entitled to immunity. The specifications necessary to execute a procurement contract are clear by the terms of the document itself. It would not be difficult for the court to determine whether or not the government specifications substantially have been met. However, with long-term service contracts, the requirements that the government provide the contractor are ongoing, and an inquiry as to whether the contractor strayed from the specifications is a considerably more difficult task. The proper body to provide standards by which courts may then determine whether service providers should be entitled to immunity is the legislature.

<sup>79</sup> See *In re Joint E. & S. Dist. New York Asbestos Litigation*, 897 F.2d at 626-628.

nations can support the assertion of the defense, because any such claim is, by definition, in significant conflict with the U.S. federal interest in preventing international human rights violations.<sup>80</sup> Torture, unlike other claims that ATS litigators are fighting to have recognized by the federal courts, has been prohibited by acts of Congress, congressional pronouncements, executive statements, judicial decisions, binding treaties, and military regulations.<sup>81</sup> Additionally, the long recognized military practice clearly establishes that the federal interest is served by preventing torture, even during wartime.<sup>82</sup> Under *Boyle* and its progeny, when PMCs violate internationally accepted norms, they cannot avail themselves of the military contractor defense.

### C. PMCs During Wartime: *Koohi v. United States*<sup>83</sup>

However, a 1992 Ninth Circuit opinion casts doubt on whether these lines have remained so clear.<sup>84</sup> In *Koohi v. United States*,<sup>85</sup> the court examined the applicability of an exception to the FTCA in the context of claims against the United States for the negligent operation of a U.S. warship and claims against the weapons manufacturer for design defects.<sup>86</sup> While the facts in *Koohi* involved a weapons manufacturer, unlike the service-based performance contract at issue in the pending Abu Ghraib torture cases, the court's treatment of defense contractor immunity during "wartime" has important implications for the current litigation.

The action that gave rise to the litigation in *Koohi* occurred during the "tanker war" hostilities between Iran and Iraq in the 1980s.<sup>87</sup> The heirs of civilian passengers who died during an accidental shooting of a passenger aircraft sued both the U.S. govern-

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<sup>80</sup> *Boyle v. United Technologies Corp.*, 487 U.S. 500, 504 (1988).

<sup>81</sup> *See supra* note 32.

<sup>82</sup> *Id.*

<sup>83</sup> *Koohi v. United States*, 976 F.2d 1328 (9th Cir. 1992).

<sup>84</sup> *See id.*

<sup>85</sup> *Id.*

<sup>86</sup> For more detailed facts about the history of this lawsuit, see David K. Linnan, *Iran Air Flight 655 and Beyond: Free Passage, Mistaken Self-Defense, and State Responsibility*, 16 YALE J. INT'L L. 245, 248-58 (1991).

<sup>87</sup> In August of 1986, Iran began attacking ships at Kuwaiti ports, especially those under the Kuwaiti flag. The United States, in March of 1987, allowed Kuwaiti tankers to sail under the American flag with United States naval protection. During a July 1988 conflict between a U.S. reconnaissance helicopter and Iranian gunboats, an Iranian civilian airliner took off from a nearby joint commercial-military airfield. When the civilian aircraft did not respond to warnings from the U.S. warship, the warship fired missiles at the aircraft.

ment and the weapons manufacturer.<sup>88</sup> The success of the plaintiffs' lawsuit against the federal government depended partially on a waiver of sovereign immunity in the FTCA and a finding that none of the exceptions to the FTCA applied to this situation.<sup>89</sup> The court ruled that the combatant activities exception to the FTCA applied both to the United States as well as its privately contracted weapons manufacturer.<sup>90</sup> As to the former finding, the reasoning was simple. The *Koohi* court held that there was no doubt that the "tanker war" constituted a "time of war" for purposes of the FTCA exception.<sup>91</sup> Further, as against the United States, the court stated, "It is clear that the operations conducted by the Vincennes [the U.S. naval cruiser] are 'combatant activities.'"<sup>92</sup> As to the defense contractors, the court reasoned the plaintiffs' action was also preempted by the combatant activities exception because "[O]ne purpose of the combatant activities exception is to recognize that during wartime encounters no duty of reasonable care is owed [even by contractors] to those against whom force is directed as a result of authorized military action."<sup>93</sup>

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Two hundred ninety passengers died. The heirs of those passengers sued the United States and the contracted weapons manufacturers for negligence. *Koohi*, 976 F.2d at 1330-1331.

<sup>88</sup> *Id.* at 1329-1330.

<sup>89</sup> In other words, the waiver of sovereign immunity enacted in the FTCA for purposes of certain tort actions contains an express list of exceptions, or situations whereby the United States will retain immunity. One of those exceptions is for "any claim arising out of combatant activities of the military or naval forces, or the Coast Guard, during time of war." 28 U.S.C. § 2680(j). This statutory exception to the FTCA is known as the "combatant activities exception," and it "seems clear that the purpose of the exception . . . is to ensure that the government will not be liable for negligent conduct by our armed forces in times of combat." See *Koohi v. United States*, 976 F.2d 1328, 1334 (9th Cir. 1992). Importantly, the argument is that this exclusion should also apply in the ATS context, as the federal policy interests during wartime should be given the same weight in the ATS context. At the very least, FTCA provides a baseline of guidance to assist courts in applying ATS to government contractors.

<sup>90</sup> *Koohi*, 976 F.2d at 1336.

<sup>91</sup> *Koohi*, 976 F.2d at 1335 ("In sum, we have no difficulty in concluding that when, as a result of a deliberate decision by the executive branch, United States armed forces engage in an organized series of hostile encounters on a significant scale with the military forces of another nation, the FTCA exception applies [as to defendant United States].").

<sup>92</sup> *Id.* at 1333 n.5. The court further explained that based on *Johnson v. United States*, 170 F.2d 767 (9th Cir. 1948), the combatant activities include "not only physical violence, but activities both necessary to and in direct connection with actual hostilities." *Id.* at 770.

<sup>93</sup> *Koohi*, 976 F.2d at 1337. The court further reasoned that the purpose of supplying a warship with ammunition "surely was not to protect the lives of enemy forces or persons associated with those forces." *Id.* The court cited *Boyle* to point out that, "[t]he Supreme Court has recognized that the exceptions to the FTCA may preempt common law tort actions against defense contractors under certain circumstances." *Id.* at 1336. However,

Using the rationale employed in *Koohi*, PMCs argue that they cannot be held liable for *any* actions, whether intentional, negligent or otherwise, as they are entitled to immunity springing from their relationship to the U.S. government during wartime.<sup>94</sup> However, military contractor defense jurisprudence has not expanded beyond the products liability context to preempt claims of intentional torts that violate accepted international norms.<sup>95</sup> The Abu Ghraib prison cases, then, present an important issue for resolution: Will the courts be willing to expand the military contractor defense to shield private contractors from liability when they engaged in torture while performing what they consider combatant activities during wartime?

### III. CASE STUDY: THE ABU GHRAIB EXAMPLE

#### A. Context and Control at the Prison

While the U.S. military officials who were allegedly involved in the torture are immune from civilian law penalties, the complaints allege that a significant number of PMC employees, mostly interpreters and interrogators,<sup>96</sup> directly participated in the torture

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the *Koohi* court does not explain what these circumstances are or how the situation in *Koohi* is similar in nature to those outlined for preemption by the Supreme Court. It does, however, cite *Boyle* as precedential in its holding that “preemption [is] appropriate when imposition of liability on defense contractor will produce same effect sought to be avoided by the FTCA exception.” *Boyle v. United Technologies Corp.*, 487 U.S. 500, 511 (1988).

<sup>94</sup> The *Koohi* Court does not require a declaration of war for purposes of determining whether “wartime” exists in the FTCA analysis:

In *Johnson v. United States*, we declined to construe the term “time of war.” See *Johnson v. United States*, 170 F.2d 767 (9th Cir. 1948). Here, we must do so; we employ the normal tools of our trade—reason and judgment. While our task is made considerably more difficult by the absence of legislative history, see *Johnson*, 170 F.2d at 769 (noting that the legislative history of the exceptions to the FTCA are ‘singularly barren Congressional observation apposite to the specific purpose of each exception’), our analysis leads us to a clear and definitive result. We agree with those courts that have found the term not to require an express declaration of war. See *Vogelaar v. United States*, 665 F. Supp. 1295, 1302 (E.D. Mich. 1987); *Rotko v. Abrams*, 338 F. Supp. 46, 47 (D. Conn. 1971), *aff’d*, 455 F.2d 922 (2d Cir. 1972); *Morrison v. United States*, 316 F. Supp. 78, 79 (M.D. Ga. 1970).

*Koohi*, 976 F.2d at 1334.

<sup>95</sup> See *infra*, Parts III.B and III.C.

<sup>96</sup> The widows of dead detainees and former detainees allege in the complaint that the torture included beating; deprivation of food and water; subjecting them to long periods of excessive noise; forcing them to be naked for long periods; threatening to attack them with dogs; urinating on them; depriving them of sleep; gouging out an eye; electrocuting; holding a pistol (later determined to have been unloaded) to the head of a detainee and forcing

of prisoners. In a number of pending lawsuits,<sup>97</sup> former detainees subjected to torture and the families of those who died at Abu Ghraib are suing defendants Titan Corporation (Titan) and CACI International (CACI),<sup>98</sup> the PMCs who employed the alleged perpetrators under a variety of claims.<sup>99</sup>

CACI<sup>100</sup> provided most of the interrogators employed at Abu Ghraib prison in Iraq, and Titan<sup>101</sup> supplied translators.<sup>102</sup> The Fay Report, a 143-page Army report, presented the results of an investigation that aimed to determine accountability of prisoner abuse at Abu Ghraib.<sup>103</sup> In total, the Fay Report indicated that more than fifty people were in some way responsible for the abuse, including both civilian contractors and military personnel.<sup>104</sup> “General Fay’s assessment of the use of these contracts, and his

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them to pull the trigger; forcing them to witness the abuse of other prisoners, including rape, sexual abuse, and spearing a prisoner; forbidding prisoners to pray; falsely reporting that their families had been killed. Saleh Third Amended Complaint, *supra* note 16.

<sup>97</sup> In September 2005, Saleh and other class action plaintiffs filed the Third Amended Complaint against defendants Titan and CACI claiming similar torture and related mistreatment of non-U.S. citizens held at Abu Ghraib and other prison camps in Iraq. Plaintiffs alleged that defendants, acting under the color of U.S. authority, engaged in illegal acts independent of their contractual relationship to the United States. Defendants urged the court to dismiss because, among other grounds to do so, the military contractor defense applies to ATS claims. This case was transferred from California to the District of Columbia. *Id.* Additionally, *Al Rawi v. Titan*, 04-cv-1143 (S.D. Cal. filed July 30, 2004), another similar case concerning torture by government contractors, has been transferred to the District of Columbia.

<sup>98</sup> See CACI homepage, [http://www.caci.com/main\\_faq.shtml](http://www.caci.com/main_faq.shtml) (last visited Nov. 3, 2006). The original full name of the company was California Analysis Center, Inc. In 1967, the company was renamed Consolidated Analysis Centers, Inc. The company name was officially changed to CACI, Inc. in 1973 and subsequently to CACI International Inc., due to increased global business. *Id.*

<sup>99</sup> In addition to the ATS, Plaintiffs asserted claims under RICO, common law of assault and battery, wrongful death, government contracting laws, false imprisonment, intentional infliction of emotional distress, conversion, and negligence. See *Ibrahim v. Titan Corp.*, 391 F. Supp. 2d 10, 15-16 (D.D.C. 2005).

<sup>100</sup> See Shane Harris, *Technology Contract Used to Purchase Interrogation Work*, <http://www.govexec.com/dailyfed/0504/052004h1.htm> (last visited Nov. 3, 2006) (noting that CACI’s contracts were for “intelligence advisors” and “intelligence and technical support”). See also CACI homepage, *supra* note 3.

<sup>101</sup> Titan provided linguistics services. See MAJ. GEN. ANTONIA TAGUBA, ARTICLE 15-6 INVESTIGATIONS OF THE 800TH MILITARY POLICE BRIGADE, 26, 36, 48 (2004) [hereinafter Taguba Report]; see also Joel Brinkley & James Glanz, *Contractors in Sensitive Roles, Unchecked*, N.Y. TIMES, May 7, 2004, at A15. See also Titan Homepage *supra* note 3.

<sup>102</sup> See Schooner, *supra* note 9 at 555.

<sup>103</sup> GEORGE R. FAY, ARTICLE 15-6 INVESTIGATION OF THE ABU GHRAIB DETENTION FACILITY AND 205TH MILITARY INTELLIGENCE BRIGADE 52 (2004) [hereinafter Fay Report], available at <http://news.findlaw.com/nytimes/docs/dod/fay82504rpt.pdf>.

<sup>104</sup> *Id.* at 7-8.

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conclusion that more than a third of the improper incidents involved contractor personnel, suggests the obvious: ‘The general policy of not contracting for intelligence functions and services was designed in part to avoid many of the problems that eventually developed at Abu Ghraib . . . .’<sup>105</sup> Most scholars have concluded that “the Fay Report leaves no doubt that some of the specific problems experienced in Abu Ghraib can be traced to insufficient contractor oversight,”<sup>106</sup> leaving victims and their lawyers to determine whether suing the contractors or suing the federal government is a more viable option.

### B. *Litigation Arising From Alleged Torture at Abu Ghraib*

Ilham Nassir Ibrahim is one of the Iraqi individuals suing under the ATS<sup>107</sup> for violations of international norms suffered at Abu Ghraib prison camp in Iraq.<sup>108</sup> As of this writing, *Ibrahim v. Titan Corp.* is the only Abu Ghraib prison torture case in which any decision on a defendant’s motion to dismiss has been rendered.<sup>109</sup> On August 12, 2005, Judge James Robertson of the District Court for the District of Columbia ruled that the central question regarding the plaintiffs’ ATS claims was whether the law of nations applied to private actors, like Titan and CACI.<sup>110</sup> The Court stated that while the Supreme Court did not expressly resolve this issue in *Sosa*, previous D.C. Circuit decisions suggest that the law of nations does not apply to private actors, and cannot then be applied to PMCs.<sup>111</sup> On this basis, Judge Robertson dismissed plaintiffs’ ATS claims.<sup>112</sup> However, the district court allowed the common law claims of torture to survive the motion to dismiss stage. Regarding the common law claims, Judge Robertson properly ruled that he would not expand the *Boyle* analysis of the military contractor defense<sup>113</sup> “beyond *Koohi*’s negligence/products liability context to automatically preempt any claims, including

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<sup>105</sup> See *Schooner*, *supra* note 9 at 555 (quoting Fay Report, *supra* note 103 at 49).

<sup>106</sup> *Id.* at 556.

<sup>107</sup> See *supra* Part I.

<sup>108</sup> See *Ibrahim v. Titan Corp.*, 391 F. Supp. 2d 10, 15-16 (D.D.C. 2005).

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 14.

<sup>111</sup> *Id.* (“The Supreme Court has not answered that question . . . but in the D.C. Circuit the answer is no.”) The Court also dismissed the Plaintiffs’ RICO, false imprisonment, and conversion claims but denied dismissal as to the remaining common law claims.

<sup>112</sup> *Id.* at 15.

<sup>113</sup> See *supra* Part II.

these intentional tort claims, against contractors performing work they consider to be combatant activities.”<sup>114</sup> Judge Robertson expressly stated that an expansion to provide immunity for intentional tort claims “would be the first time that *Boyle* has ever been applied in this manner.”<sup>115</sup> The court indicated that it would again review the applicability of the military contractor defense when armed with additional facts at the summary judgment stage.<sup>116</sup>

The argument that the law of nations does not apply to private actors is flawed, because *Sosa* opened the door to ATS actions against private corporations. The Supreme Court did indirectly address the question of whether the law of nations applies to private actors.<sup>117</sup> The majority implied that private government contractors may, for some international law violations, be held liable to plaintiffs under the ATS despite their status as private corporations.<sup>118</sup> The Court noted that while the D.C. Circuit could not establish consensus in 1984 that torture by private actors violated international law,<sup>119</sup> such consensus regarding genocide was established by international law more than ten years later.<sup>120</sup> Though the Court did not expressly endorse a blanket ruling that private entities could always be sued under the ATS, the Court clearly determined that this question could be answered by considering the modern consensus.<sup>121</sup> When the action at issue does violate the law of nations, as torture does, and the perpetrator of the action is a private company, *Sosa* implies that a private actor may be liable under the ATS. Further, to demonstrate consensus, many United States courts have already held that private corporations could be

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<sup>114</sup> Ibrahim v. Titan Corp., 391 F. Supp. 2d 10, 18 (D.D.C. 2005).

<sup>115</sup> *Id.* at 17.

<sup>116</sup> *Id.* at 19.

<sup>117</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.20 (2004).

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* See also *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 791-95 (D.C. Cir. 1984).

<sup>120</sup> *Sosa*, 542 U.S. at 733 n.20; see also *Kadic v. Karadzic*, 70 F.3d 232, 239-41 (2d Cir. 1995). In *Kadic*, plaintiffs claimed that Defendant Radovan Karadzic, president of the self-proclaimed Bosnian-Serb republic of “Srpska,” committed genocide, war crimes, and crimes against humanity in his private capacity and for other violations in his capacity as state actor. The court held that subject matter jurisdiction existed under ATS, that Karadzic “may be found liable for genocide, war crimes, and crimes against humanity in his private capacity and for other violations in his capacity as a state actor, and that he is not immune from service of process.” *Id.*

<sup>121</sup> Since nothing in *Sosa* undermined *Filartiga*, torture should clearly be a basis for suit under the ATS.

sued under the ATS.<sup>122</sup> *Sosa* clearly held that, with respect to the creation of causes of action, existing claims, exemplified by *Filartiga*, *Kadic*, and *In re Estate of Ferdinand Marcos, Human Rights Litigation*<sup>123</sup> are generally actionable under the ATS.<sup>124</sup>

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<sup>122</sup> John Doe I v. Unocal Corp., No. 00-56603, 2002 WL 31063976, at \*9 (9th Cir. Sept. 18, 2002); *Kadic*, 70 F.3d at 242-43; *Bowoto v. Chevron Texaco Corp.*, 312 F. Supp. 2d 1229 (N.D. Cal. 2004); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 311-19 (S.D.N.Y. 2003) (reviewing ATS and international jurisprudence); *Wiwa v. Royal Dutch Petroleum Co.*, 96 Civ. 8386, 2002 WL 319887, at \*17-18 (S.D.N.Y. Feb. 28, 2002).

<sup>123</sup> *Marcos* particularly informs the pending cases concerning torture at Abu Ghraib, as the alleged violations of international law are not dissimilar, and the *Sosa* court expressly endorsed the reasoning of the Ninth Circuit. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 730-34 (2004) (discussing *In re Estate of Ferdinand Marcos, Human Rights Litigation*, 25 F.3d 1467, 1475 (9th Cir. 1994)). *Marcos*, a class action ATS case alleging torture among other claims, began when President Ferdinand Marcos declared martial law in the Philippines. Military intelligence officials acting under the direction of Marcos and other government representatives tortured, killed, or “disappeared” at least 10,000 people. One of the victims, an opposition leader named Sison, was interrogated, beaten, denied sleep, and electrocuted. More specifically, Sison was

interrogated by members of the military, who blindfolded and severely beat him while he was handcuffed and fettered; they also threatened him with death. When this round of interrogation ended, he was denied sleep and repeatedly threatened with death. In the next round of interrogation, all of his limbs were shackled to a cot and a towel was placed over his nose and mouth; his interrogators then poured water down his nostrils so that he felt as though he were drowning. This lasted for approximately six hours, during which time the interrogators threatened Sison with electric shock and death. At the end of this water torture, Sison was left shackled to the cot for the following three days, during which time he was repeatedly interrogated. He was then imprisoned for seven months in a suffocatingly hot and unlit cell, measuring 2.5 meters square; during this period he was shackled to his cot, at first by all his limbs and later by one hand and one foot, for all but the briefest periods (in which he was allowed to eat or use the toilet). The handcuffs were often so tight that the slightest movement by Sison made them cut into his flesh.

*Hilao v. Estate of Marcos*, 103 F.3d 789, 790-91 (9th Cir. 1996).

The court upheld plaintiffs’ ATS claims, and damages were distributed to Sison and the class. *Marcos*, 25 F.3d at 1475-76. For a more detailed understanding of forced disappearance, see Office of the High Commission for Human Rights, Fact Sheet No. 6 (Rev. 2), Enforced or Involuntary Disappearances, <http://www.unhchr.ch/html/menu6/2/fs6.htm#introduction> (last visited Mar. 1, 2006).

<sup>124</sup> *Sosa*, 542 U.S. at 732-33. For facts on *Filartiga*, see *supra* note 17. Note also that the Supreme Court in *Filartiga* directly compared the torturer with his eighteenth century paradigm. “[F]or purposes of civil liability, the torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind . . . .” *Id.* at 732 (quoting *Filartiga v. Pena-Irala*, 630 F.2d 876, 890).

C. *Alleged Violations of International Norms at Abu Ghraib and the Expansion of the Military Contractor Defense to Shield PMCs*

On this point, defendants insisted that they were integrated into the military, had a fixed place in the hierarchy, and were soldiers in every respect save title.<sup>125</sup> Contractors in this position seek to divorce themselves from the United States when the court is considering whether a violation of the law of nations must be an official, state sponsored violation, but seek to align themselves for purposes gaining the affirmative defense.<sup>126</sup> The *Ibrahim* court held that CACI and Titan had not produced enough fact-based evidence to support a finding that the military contractor defense immunizes them from plaintiff's common law claims.<sup>127</sup> After additional discovery, the court will readdress this expansion of the defense on a motion for summary judgment.<sup>128</sup> In addition to *Ibrahim*, decisions in similar cases<sup>129</sup> are pending as to whether government contractors providing interrogation and interpretation services have immunity. If the judiciary expands the military contractor defense to apply to PMCs in these pending cases, victims of violations of international norms may look to the principal, the United States, for damages.

IV. WHERE THERE IS A RIGHT, THERE SHOULD BE A REMEDY: THE FTCA AS AN ALTERNATE AVENUE FOR FOREIGN TORTURE VICTIMS

If the military contractor defense is determined to be applicable to PMCs who violate international law, and they are then immune from liability, the FTCA should be construed such that victims may sue the U.S. government under the FTCA.<sup>130</sup>

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<sup>125</sup> *Ibrahim v. Titan Corp.*, 391 F. Supp. 2d 10, 22 (D.D.C. 2005).

<sup>126</sup> Government contractors argue a purely business, absolutely civilian relationship to the United States when they attempt to convince courts that they are shielded from ATS claims by virtue of being private entities. However, where they hope to seek to take advantage of the FTCA exception to the waiver of immunity, they align themselves with the government in such a way that leads a reader to believe they were acting as soldiers in all but name.

<sup>127</sup> *Id.* at 19.

<sup>128</sup> *Id.* at 18.

<sup>129</sup> See *Al Rawi v. Titan*, 04-cv-1143 (S.D. Cal. filed July 30, 2004).

<sup>130</sup> For purposes of this analysis, the assumption is, as it would be for a Fed. R. Civ. P. Rule 12(b)(6) motion to dismiss, that plaintiffs' factual claims of torture are accurate.

A. *PMCs As Independent Contractors or Agents of  
The United States*

Despite the partial adoption in the United States of the historical British notion that “the King can do no wrong,”<sup>131</sup> the FTCA allows lawsuits against the federal government under “circumstances where the United States, if a private person, would be liable to claimant in accordance with the law of the place where the act or omission occurred.”<sup>132</sup> However, the FTCA differentiates between “agents” and “independent contractors” of the United States. When the party in question is deemed an agent, the FTCA applies, and immunity is waived. Where the party in question is operating as an independent contractor, however, the United States cannot be sued when the independent contractor is negligent.<sup>133</sup> In *United States v. Orleans*,<sup>134</sup> the Supreme Court held that any party under contract with the government becomes its agent for purposes of the FTCA, if the government supervises the actions of the party. Therefore, when the government supervises day-to-day operations with a party under contract, agency is established. A claimant may then sue the United States under the FTCA. Additional statutory exceptions to this waiver of immunity must also be considered.<sup>135</sup>

For PMCs to prevail when they argue that the military contractor defense should apply to them, they must demonstrate that their actions were taken under the direct supervision of the United States. In other words, the only successful posture to the court is that service contractors should escape private liability because they were simply executing a contract by the strict terms provided and supervised by the U.S. government. The military contractor de-

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<sup>131</sup> See ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* 9.2.1, at 545 (Little Brown 2d ed. 1994) (“Throughout American history, United States courts have applied this principle, although they often have admitted that its justification in this country is unclear.”) (citing *United States v. Lee* 106 U.S. 196, 207 (1982)); BERNARD SCHWARTZ, *ADMINISTRATIVE LAW* 9.22, at 607 (Aspen 3d ed. 1991) (referring to sovereign immunity in the United States as “one of the mysteries of legal evolution.”).

<sup>132</sup> 28 U.S.C. § 1346(b) (2000). The FTCA was originally passed as Title IV of the Legislative Reorganization Act. See Pub. L. No. 79-601, 60 Stat. 842 (1946).

<sup>133</sup> See *Logue v. United States*, 412 U.S. 512 (1973). A Texas jail holding federal prisoners was independently contracted by the federal government, so the United States could not be sued under the FTCA for negligent death of the federal inmate. The court reasoned that the actual persons responsible were, at the time of the death, employees of the State of Texas, not agents of the United States. *Id.*

<sup>134</sup> 425 U.S. 807 (1976).

<sup>135</sup> 28 U.S.C. § 2680 (2000).

fense only “protects a government contractor from liability for acts done by him while complying with the government specifications during executing of the performance of a contract with the United States.”<sup>136</sup> Therefore, by definition, if the contractors claim the military contractor defense applies, they have also claimed that their performance was subject to U.S. supervision. If this argument prevails, the court has, if not expressly, deemed the contractors “agents” for purpose of the agency/independent contractor distinction. Pursuant to *Orleans*, the torture victims may then sue the United States for the acts of its agents under the FTCA.

In Titan’s motion to dismiss, the company claimed an extremely high level of federal control over the day-to-day practical operations of Titan employees.<sup>137</sup> Titan further argues that, under the contract, the military’s supervisory power was unlimited.<sup>138</sup> The factual claims of this near total supervision support the application of the military contractor defense to ATS and other common law claims against Titan. If the court rules that the military contractor defense applies to Titan or CACI, the court does so on the theory that by doing exactly what the government requested, defendants are entitled to immunity springing from that relationship. In this situation, it would be difficult for the court to legitimize a later ruling that such service providers are independent contractors, for purposes of the FTCA agent/independent contractor inquiry.<sup>139</sup>

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<sup>136</sup> See *United States ex rel. Ali v. Daniel*, 355 F.3d 1140, 1146 (9th Cir. 2004) (quoting *McKay v. Rockwell Int’l Corp.*, 704 F.2d 444, 448 (9th Cir. 1983)).

<sup>137</sup> See Memorandum of Points and Authorities in Support of Defendant Titan Corporation’s Motion to Dismiss, *Saleh v. Titan Corp.*, No. 04-CV-1143 (S.D. Cal. filed Sept. 14, 2004).

<sup>138</sup> The military’s control over Titan’s employees started before they were hired, and became total once they arrived in Iraq . . . Titan’s linguists exercised no independent authority; they were the very bottom of the interrogation totem pole, instructed to be nothing more than a reflection of the interrogator . . . [who is a bona fide federal employee].

*Id.* at 8-11.

<sup>139</sup> See Scheffer, *supra* note 23 at 858. David Scheffer suggests that the argument that PMCs are independent contractors is further diminished by the U.S. status as an occupier of Iraq.

The day-to-day operations of some independent contractors in Iraq presumably would have to be supervised by either of the occupying powers or the Authority in order to ensure compliance with occupation law. Anything less might be an abdication of responsibility by the occupying power of its legal obligations. It thus may prove difficult to sustain the independent contractor exception in any claim lodged under the Federal Torts Claim Act.

*Id.*

If the courts rule that the PMC's actions were suitably synergistic with the United States government, and allow the contractors to prevail on the military contractor defense,<sup>140</sup> the courts have then settled the issue of whether it can be shown that the government had authority to control Titan and CACI's violations of international law. This finding thereby prevents the government from denying liability under FTCA based on a theory that Titan and CACI were acting outside the scope of governmental supervision.

Even if the court determines that Titan and CACI were agents for purposes of the agent/independent contractor distinction, there remain four potentially applicable exceptions to the FTCA that may prevent suit against the United States even if a contractor is ruled (implicitly or otherwise) an agent.<sup>141</sup>

#### B. *The Combatant Activities Exception to the FTCA*

The combatant activities exception precludes “[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.”<sup>142</sup> On its face, the FTCA is not applicable here because the language of the statute does not provide immunity for parties other than those listed: the military forces, naval forces, and the Coast Guard.<sup>143</sup> On the language alone, to apply this exception to the FTCA, the military personnel would have to have perpetrated the torture. However, the *Koochi* Court determined that plaintiffs’ action against the defendant weapons manufacturer was preempted by the “combatant activities” exception of the FTCA.<sup>144</sup> The court reasoned that since “one

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<sup>140</sup> See *United States v. Orleans*, 425 U.S. 807, 814-15 (1976). See also *Letnes v. United States*, 820 F.2d 1517, 1519 (9th Cir. 1987).

<sup>141</sup> For an enlightening discussion of the possibility of U.S. liability for the pending Abu Ghraib torture cases, see generally Anthony Sebok, *Could Suits Against the U.S. Government By Iraqis Subject to Abuse In Abu Ghraib Prison Succeed?*, FINDLAW, May 31, 2004, <http://writ.news.findlaw.com/sebok/20040531.html>.

<sup>142</sup> 28 U.S.C. § 2680(j) (2000).

<sup>143</sup> While the question of whether the current conflict in Iraq constitutes a “time of war” is an important inquiry, most courts have not required an express declaration of war by Congress. See *Koochi v. United States*, 976 F.2d 1328, 1334 (9th Cir. 1992) (“We are strongly influenced by the fact that in modern times hostilities have occurred without a formal declaration of war far more frequently than following a formal pronouncement . . . from a practical standpoint ‘time of war’ has come to mean periods of significant armed conflict rather than times governed by formal declaration of war.”). See also *Rotko v. Abrams*, 338 F. Supp. 46, 47 (D. Conn. 1971), *aff’d* 455 F.2d 922 (2d Cir. 1972); *Vogelaar v. United States*, 665 F. Supp. 1295, 1302 (E.D. Mich. 1987).

<sup>144</sup> See *Koochi*, 976 F.2d. at 1336.

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.”<sup>145</sup> However, the *Koohi* Court also held that for purposes of liability under the FTCA, it is immaterial whether the victim is civilian or military, “so long as the person giving the order or firing the weapon does so for the purpose of furthering our military objectives or of defending lives, property, or other interests.”<sup>146</sup>

While case law exists to support claims that PMCs may become immune via the combatant activity exception to the FTCA,<sup>147</sup> such case law does not support immunity for PMCs when the purpose of the action in question does not support our military objectives nor defense of American life.<sup>148</sup> The intentional torture claims at Abu Ghraib not only fail to support our military objectives, they directly oppose clear federal interests.<sup>149</sup> In this situation, PMCs such as Titan and CACI cannot take advantage of immunity by asserting the FTCA exception for combatant activities during a time of war.

### C. *PMCs as Investigative or Law Enforcement Officers*

Secondly, the FTCA waiver of immunity shall not apply to:

Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, “investigative or law enforcement officer” means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.<sup>150</sup>

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<sup>145</sup> *Id.* at 1337.

<sup>146</sup> *Id.* at 1336.

<sup>147</sup> *See supra* Part III(C).

<sup>148</sup> *See Koohi*, 976 F.2d at 1336.

<sup>149</sup> *See supra* note 32.

<sup>150</sup> 28 U.S.C. § 2680(h).

Because no party disputes that the torturous acts in question were intentional, the central inquiry is whether or not employees of PMCs who commit acts of torture are “investigative or law enforcement officers” under the statute.<sup>151</sup> If they are deemed investigative or law enforcement officers, then the United States is not immune to lawsuits arising out of their actions.<sup>152</sup> The question of whether the Titan and CACI employees were empowered by law to execute searches or seize evidence (making arrests would obviously not apply to this situation) will likely be directed to the contract itself. However, where the language of the contract is broad or vague in scope, the court should query whether practice in fact establishes that the CACI and Titan contractors were acting as investigative or law enforcement officers. More simply stated, even if the contract does not expressly deem the contractors investigative or law enforcement officers, their actions as such without government objection should prevent the government from asserting immunity. The government cannot assert immunity based solely on a semantic argument, particularly where policy supports prevention of torture, and the victims cannot sue the PMCs directly.

#### D. *The Foreign Country Exception to the FTCA*

The third possible exception that applies here is the foreign country exception, which precludes the waiver of immunity for “[a]ny claim arising in a foreign country.”<sup>153</sup> The government can argue that the claims of torture at Abu Ghraib arose in a foreign country and thus, the United States has not waived immunity.<sup>154</sup>

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<sup>151</sup> Professor and columnist Anthony Sebok aptly concludes that the abuse at the Abu Ghraib prison was performed by men and women who were, indeed, charged with the power to investigate enemy activities. (Whether they were also charged with the “enforcement” of law seems irrelevant; the amended statute used the word “or” not “and”). . . . After all, the best that can be said for what was supposed to have occurred at the Abu Ghraib prison is that interrogation and penal tasks were supposed to have been performed by agents of the U.S. Government. If these agents committed intentional torts in the course of performing their duties – as the photographic evidence seems to establish that they did – then the FTCA does not give the government an escape hatch.

See Sebok, *supra* note 141.

<sup>152</sup> *Id.*

<sup>153</sup> 28 U.S.C. § 2680(k).

<sup>154</sup> The *Sosa* Court rejected the “headquarters doctrine,” which had been adopted by various federal courts of appeals. That doctrine provided that when a tort claim was based on harm suffered in a foreign country, victims could nonetheless proceed against the United States under the FTCA if the actions giving rise to the harm were planned inside

However, the foreign country exception in the FTCA does not preclude any lawsuit from going forward where the actions at issue happened outside the United States. Rather, the exception allows the government to retain immunity where the injuries occurred in another sovereign territory.<sup>155</sup> The reasoning here, put simply, is that the local judicial system should handle cases that arise domestically. In *Saleh*, the plaintiffs argue that “the foreign country exception was created to avoid holding the United States liable under the laws of a foreign nation. Here, prosecution of the plaintiffs’ claims against the defendants does not implicate the laws of Iraq.”<sup>156</sup> It is undisputed that there was no local judicial system at the time in question in Iraq. Iraq was not, at the time of the injuries in question, a sovereign nation.<sup>157</sup> “The reality is that the [United States] was, at the relevant time, sovereign in Iraq—and, at the relevant time, relief in truly Iraqi courts was unavailing. In light of the reality, the ‘foreign country exception’ should not apply.”<sup>158</sup>

#### E. *The Discretionary Functions Exception to the FTCA*

Finally, the government may argue that the discretionary functions exception applies here, and thus the United States has not waived immunity.

The statute provides:

Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.<sup>159</sup>

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the United States. The *Sosa* Court held that that this doctrine “threatens to swallow the foreign country exception whole” and contravenes the purpose of avoiding the application of foreign law. Since *Sosa*, the foreign country exception applies to all claims based on harm suffered abroad, “regardless of where the tortious act or omission occurred.” See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 692 (2004).

<sup>155</sup> See Scheffer, *supra* note 23 at 858.

<sup>156</sup> Plaintiff Saleh’s Opposition to Defendant Titan Corporation’s Motion to Dismiss, *Saleh v. Titan Corp.*, No. 04-CV-1143 (S.D. Cal. filed Sept. 14, 2004) (citing *Meredith v. United States*, 330 F.2d 9, 10 (9th Cir. 1964)).

<sup>157</sup> *Id.*

<sup>158</sup> See Sebok, *supra* note 141.

<sup>159</sup> 28 U.S.C. § 2680(a).

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The Supreme Court has interpreted this statute such that to fall within the discretionary function exception,<sup>160</sup> the conduct must be discretionary in nature; it must involve an element of judgment or choice.<sup>161</sup> Whether the conduct involves an element of judgment depends on the type of action, not the actor's status.<sup>162</sup> If a federal regulation dictates a particular course and the actor strays from that course, there is no element of judgment, so the action is not one suited for the discretionary function exception.<sup>163</sup> In other words, if any federally recognized rule prohibits an action, then taking that action cannot be considered discretionary for purposes of this exception to the FTCA.<sup>164</sup> The Supreme Court's reasoning for defining what constitutes a discretionary task in this way reflects its concern with public policy. "There are obviously discre-

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<sup>160</sup> See James R. Levine, Note, *The Federal Tort Claims Act: A Proposal For Institutional Reform*, 100 COLUM. L. REV. 1538 (2000) (arguing that while the discretionary function exception may, in some cases, leave deserving claimants uncompensated, fiscal concerns deem it necessary).

[T]he discretionary function exception has cut too deeply into the liability that the Act creates. As a result, the FTCA has carved out only a thin slice of liability. It leaves many deserving plaintiffs uncompensated. However, eliminating or curtailing the operation of the discretionary function exception may be an unhelpful solution. In addition to the theoretical justifications for the exception, which hinge on the separation of powers, real fiscal concerns underlie its application. Limiting the exception could expose the federal government to massive tort judgments to which it has not previously been susceptible. Even if the government can afford to pay the claims, the sums could reach levels at which it ceases to serve the public interest to pay them. Courts have been mindful of these concerns.

*Id.*

<sup>161</sup> See *Berkovitz v. United States*, 486 U.S. 531, 536 (1987).

<sup>162</sup> See *United States v. Gaubert*, 499 U.S. 315, 325 (1991).

<sup>163</sup> *Id.*

<sup>164</sup> For a complete account of the impact of *United States v. Gaubert*, see Bruce A. Peterson & Mark E. Van Der Weide, *Susceptible to Faulty Analysis: United States v. Gaubert and the Resurrection of Federal Sovereign Immunity*, 72 NOTRE DAME L. REV. 447 (1997).

In 1991 the United States Supreme Court, with an unexpected and unexplained turn of phrase, significantly expanded the scope of insulated government conduct. In *United States v. Gaubert*, Justice Byron White, writing for all members of the Court except Antonin Scalia, declared that the discretionary function exception encompassed all discretionary government actions that were 'susceptible to policy analysis,' whether or not the erring official actually considered policy factors, or for that matter, whether he considered any factors at all. This phrase is now raised by the government's lawyers in countless negligence lawsuits against the United States, and it has greatly restricted the federal government's tort liability for all but the most mundane transgressions. Since *Gaubert*, the government has been winning far more discretionary function exception cases, and it has been winning them more often without going to trial.

*Id.* at 448.

tionary acts performed by a Government agent that are within the scope of his employment but not within the discretionary function exception because these acts cannot be said to be based on the purposes that the regulatory regime seeks to accomplish.”<sup>165</sup> If an action passes that first hurdle and is considered an action of choice, then the court should ask whether the discretionary function was designed to shield the act at issue.<sup>166</sup> Additionally, “a complaint will survive a motion to dismiss only to the extent it alleges facts supportive of a finding that the challenged actions of the agent are not grounded in the governmental policy of the regulatory scheme.”<sup>167</sup>

Defendant Titan argues that the FTCA bars claims when they are based on discretionary acts of the government, and cites *Boyle* as a basis to show that military selection of military equipment constitutes a discretionary function.<sup>168</sup> However, “when a decision is made to conduct intelligence operations by methods which are unconstitutional or egregious, it is lacking in statutory or regulatory authority.”<sup>169</sup> On this basis, the plaintiffs contend the discretionary function does not apply in this case. Because the acts in question are clearly prohibited by federal interests and a variety of federal regulations,<sup>170</sup> they cannot be considered discretionary for the first hurdle of the analysis. Even if these acts passed this hurdle, they would fail the second hurdle; torture is certainly not the type of act that the discretionary function was created to protect. For these reasons, it is unlikely the government can assert this exception to the FTCA’s waiver of immunity in the pending Abu Ghraib torture cases.

#### CONCLUSION

The vital role of PMCs in the current military structure cannot be disputed. Because they have grown to serve a central function in military operations, the law must catch up with such growth. Whether facilitating legislation in efforts to force the federal government to adhere to strict oversight standards or allowing the ju-

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<sup>165</sup> See *Gaubert*, 499 U.S. at 325.

<sup>166</sup> *Id.* at 322-23.

<sup>167</sup> *Flax v. United States*, 847 F. Supp. 1183, 1188 (D.N.J. 1994).

<sup>168</sup> Titan Corporation’s Motion to Dismiss, *Saleh v. Titan Corp.*, No. 04-CV-1143, at n.16 (D.D.C. Sept. 14, 2004) (citing *Boyle v. United Tech. Corp.*, 487 U.S. 500, 511 (1988)).

<sup>169</sup> *Orlikow v. United States*, 682 F. Supp. 77, 81 (D.D.C. 1988).

<sup>170</sup> See *supra* note 32.

diciary to deter prohibited activity by denying immunity under the military contractor defense, a systemic change is necessary to support the relatively new and continually expanding domestic outsourcing of traditionally military functions. A study of the U.S. federal courts' treatment of ATS claims indicates a reluctance to execute claims that violate international law or *jus cogens* norms as a matter of course. Such reluctance reflects the difficulty of the amorphous nature of international law. However, in the pending Abu Ghraib torture cases, where the Supreme Court as well as American jurisprudence supports the contention that torture does, in fact, violate the law of nations, ATS claims against PMCs should be entertained.

However, if law supports the expansion of the military contractor defense to provide immunity to PMCs, then certainly policy supports a strict reading of the FTCA, such that victims of heinous acts at the hands of U.S. civilian contractors might secure damages against the federal government itself. Public policy, as well as settled principles of international law, demands that crimes against humanity are afforded some forum for adjudication; the unprecedented presence of the private sector in conflicts abroad poses new and under-examined challenges. Whether these challenges could have been better handled in advance is a question for the executive administration, the military, the press, and perhaps the American people. Providing compensation for victims and ensuring deterrence of future violations of international norms is the responsibility of the legal system. The only alternative is to tacitly accept the mayhem that resulted from the systemic failure at Abu Ghraib prison.