

Accountability for Private Military Contractors Under the Alien Tort Statute

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INTRODUCTION

With the conflicts in Iraq and Afghanistan and the ongoing fight against global terrorism, the American military has increasingly relied on private entities to perform functions traditionally reserved for militaries. These private military contractors (“PMCs”)¹ provide a wide array of services, including support for weapons and communications systems, infrastructure reconstruction, detainee interrogation, police training, and demining and destruction of explosives. Beyond Iraq and Afghanistan, there has been a tremendous expansion in the use of PMCs for peacekeeping and other functions commonly performed by state militaries.² The estimated annual value of PMC

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1. The terminology used to describe these private entities varies from one author to the next. This paper adopts “private military contractors” as a generic term to describe private companies providing services, under government contract, that traditionally have been performed by national militaries, as well as the individuals employed by these companies to perform such services.

2. See, e.g., FOREIGN AND COMMONWEALTH OFFICE, PRIVATE MILITARY COMPANIES: OPTIONS FOR REGULATION, 2001–02, H.C. 577, at 4, 19 (report of the British government, noting PMC logistical support for the United Nations Mission in Sierra Leone and predicting that an increase in demand for private military services will likely come from developing countries, developed countries and international organizations); U.N. Gen. Assembly, Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding Exercise of the Right of Peoples to Self-determination, *Report on the Question of the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-determination*, ¶ 37, U.N. Doc. A/63/325 (Aug. 25, 2008) [hereinafter U.N. Working Group, *Report on Mercenaries*] (discussing “emerging phenomenon in Latin America regarding the use of private security companies increasingly involved in the protection of geo-strategic sites” and reporting that a private military company contracted with a Mexican mayor to train local police in torture techniques); Press Release, Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding Exercise of the Right of Peoples to Self-determination, UN Working

contracts already runs into the hundreds of billions of dollars,³ and according to one estimate, “the United States and Great Britain account for over 70% of the world’s market for their services.”⁴ Considerable room for debate exists over their advantages and disadvantages,⁵ but PMCs are now a fact of modern warfare.⁶ Given the industry’s size and PMCs’ critical role in sensitive operations, close scrutiny is in order.⁷

Because PMCs operate in a variety of different contexts, it would be difficult to compile a comprehensive list of PMC functions, but in Iraq, these functions have been described as falling within two broad categories: armed and unarmed services. Armed services include protection of fixed locations and buildings, traveling convoys, traveling individuals, and high-ranking persons. Unarmed services include “operational control,” such as the management of command operations centers, information gathering and threat analysis, and

Group Concludes Fourth Session, Expresses Concern About the Involvement of Mercenaries and Private Military/Security Companies in Conflict Situations (Sept. 9, 2008), available at <http://www.unhcr.ch/hurricane/hurricane.nsf/0/7ECE79A6DBC07FEC12574BF0054C086?openDocument> (expressing the Working Group’s deep concern over PMCs’ involvement in the conflict situation in Georgia); *Call the Blue Helmets*, ECONOMIST, Jan. 6, 2007, at 24 (“Since the world is likely to need large numbers of peacekeepers for the foreseeable future, a further option is being explored: ‘leasing’ the fire engine by hiring private security companies to do more of the work.”).

3. U.N. Working Group, *Report on Mercenaries*, *supra* note 2, ¶ 26 (estimating that the industry earns between \$100 and \$120 billion annually); Haider Rizvi, *Peacekeepers-for-Hire? Not So Fast, Critics Warn*, INTER PRESS SERVICE, Mar. 30, 2009, available at <http://www.ipsnews.net/news.asp?idnews=46319> (reporting on debate over use of PMCs in United Nations’ peacekeeping missions).

4. SourceWatch, Private Military Corporations, http://www.sourcewatch.org/index.php?title=Private_Military_Corporations (last visited Mar. 21, 2009). See also CONG. BUDGET OFFICE, CONTRACTORS’ SUPPORT OF U.S. OPERATIONS IN IRAQ 13 (2008) (estimating \$6 billion to \$10 billion in total spending by U.S. agencies and U.S.-funded contractors for private security services from 2003 to 2007, of which \$3 billion to \$4 billion was for private security services in Iraq). Although the Obama administration has outlined plans for the phased withdrawal of U.S. troops from Iraq, it is unclear what the impact will be on PMCs operating in Iraq. See Peter Baker, *With Pledges to Troops and Iraqis, Obama Details Pullout*, N.Y. TIMES, Feb. 28, 2009, at A6. In Afghanistan, however, where the Obama administration has committed to an increase of U.S. troops, the PMC presence already seems to be building. See *Private Security Firms Jumping into Afghanistan*, CBS NEWS, Mar. 22, 2009, <http://cbs3.com/national/private.security.firms.2.965321.html>.

5. See, e.g., JENNIFER K. ELSEA ET AL., CONG. RESEARCH SERV., REP. NO. RL32419, PRIVATE SECURITY CONTRACTORS IN IRAQ: BACKGROUND, LEGAL STATUS, AND OTHER ISSUES 35–50 (2008), available at <http://www.fas.org/sgp/crs/natsec/RL32419.pdf> (discussing issues of PMCs’ effect on the U.S. military force structure, the reliability and quality of PMCs in Iraq, oversight and control issues, cost, and the perception of state authority and commitment); CONG. BUDGET OFFICE, *supra* note 4, at 17 box 2 (comparing the cost of a private security contract and a U.S. military alternative).

6. See CONG. BUDGET OFFICE, *supra* note 4, at 13 tbl.2 (comparing ratios of contractor to military personnel in past and present U.S. military operations). *The Economist* describes the war in Iraq as “the first privatised war.” *Military-Industrial Complexities*, ECONOMIST, Mar. 29, 2003, at 56.

7. Because most of the available information about PMCs relates to PMCs operating in Iraq, this Comment draws heavily on examples from Iraq. Nevertheless, the arguments in this Comment should be read to apply to PMCs operating in other contexts as well.

training for Iraqi security forces.⁸ In all, about three-quarters of the PMCs in Iraq carry weapons,⁹ either to provide armed services or for self-defense purposes.¹⁰

PMCs providing armed and unarmed services have committed countless acts of a potentially criminal or tortious nature. In 2004, PMC translators and interrogators at the Abu Ghraib prison in Iraq allegedly participated in, or were present during, the rape and torture of detainees.¹¹ In a separate case from 2004, a PMC language specialist started as a site manager but found himself with the 82nd Airborne Division, “patrolling downtown Mosul, one of Iraq’s more dangerous cities . . . kicking in doors, rounding up suspected insurgents and ‘shooting and being shot at’ as he helped make the streets safer.”¹² However, the majority of incidents involving inappropriate uses of force by PMCs seem to arise where PMCs provide armed services. Between 2005 and 2007, the private security firm Blackwater was “involved in at least 195 ‘escalation of force’ incidents in Iraq . . . that involved the firing of shots by Blackwater forces.”¹³ According to Blackwater’s own reports, its forces fired first in over

8. ELSEA ET AL., *supra* note 5, at 3. Although this description refers specifically to Iraq, PMCs operate in many places other than Iraq and may serve other functions as well. In both *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007) and *Mohamed v. Jeppesen Dataplan, Inc.*, 539 F. Supp. 2d 1128 (N.D. Cal. 2008), *rev’d*, 563 F.3d 992 (9th Cir. 2009), for example, plaintiffs sued PMC corporations that allegedly assisted with the United States’ covert rendition program. Plaintiffs in the former case alleged that PMCs provided aircraft and crew for the rendition, *El-Masri*, 479 F.3d at 300, while the latter case alleged that PMCs provided travel and logistical services for the rendition program, *Jeppesen*, 539 F. Supp. 2d at 1132.

9. CONG. BUDGET OFFICE, *supra* note 4, at 15.

10. *Id.* at 19 (reporting that, as of February 28, 2008, 638 Department of Defense contractor employees carried weapons for self-defense in Iraq and Afghanistan).

11. *See, e.g.*, GEORGE R. FAY, AR 15-6 INVESTIGATION OF THE ABU GHRAIB DETENTION FACILITY AND 205TH MILITARY INTELLIGENCE BRIGADE 47–48 (2004), *available at* <http://www.defenselink.mil/news/Aug2004/d20040825fay.pdf> (report of U.S. Army’s investigation into the abuses at Abu Ghraib, revealing that “[s]everal of the alleged perpetrators of the abuse of detainees were employees of government contractors” providing interrogators and linguists for the prison). In one incident, a PMC raped a detainee while a soldier stood by and took pictures. *Id.* at 81–82. In another incident, during an interrogation by a PMC, a staff sergeant went in and out of the interrogation, at times suffocating and inflicting pain on the detainee. *Id.* at 49. In another interrogation, a PMC and soldiers used dogs to intimidate the detainee. *Id.* at 87.

12. David Washburn & Bruce V. Bigelow, *In Harm’s Way: Titan In Iraq, Contract Workers Say “Wild West” Conditions Put Lives in Danger*, SAN DIEGO UNION-TRIB., July 24, 2005, at A1, *available at* <http://www.corpwatch.org/article.php?id=12510>. As farfetched as this experience may sound, a company commander with the 82nd Airborne Division corroborated this PMC’s story. *Id.* A similar experience was reported by Goran Habbeb, an employee with the private military company Titan. Though officially employed as a translator, “he was sometimes sent alone into villages to look for insurgents and to covertly record GPS locations to provide to the troops—a task normally reserved for counter-intelligence officers.” Pratap Chatterjee, *A Translator’s Tale*, CORPWATCH, Aug. 9, 2006, <http://www.corpwatch.org/article.php?id=13992>. However, “[s]ometimes he would get caught in a firefight and have to fire back, another task not covered by his job description.” *Id.*

13. *See, e.g.*, MAJORITY STAFF OF H. COMM. ON OVERSIGHT AND GOV’T REFORM, 110TH CONG., MEMORANDUM REGARDING ADDITIONAL INFORMATION ABOUT BLACKWATER USA 1–2 (2007), *available at* <http://oversight.house.gov/documents/20071001121609.pdf>.

80 percent of these incidents, despite a contractual requirement that Blackwater use only defensive force.¹⁴ In one of the most highly publicized incidents involving PMCs in Iraq, Blackwater employees shot and killed seventeen unarmed Iraqi civilians and injured twenty others on September 16, 2007, despite being authorized only to discharge their firearms in self-defense and as a last resort.¹⁵ Some of the PMCs claimed that they were under fire from suspected insurgents, but one of them later admitted that the shootings were unprovoked.¹⁶ Although a detailed account of PMC abuses is beyond the scope of this article, similar incidents have been extensively detailed elsewhere, painting a picture of frequent, unjustified use of force by and general impunity for PMCs.¹⁷

Until relatively recently, PMCs enjoyed immunity from criminal prosecution in Iraq. The Coalition Provisional Authority, which operated as a transitional government following the 2003 invasion of Iraq, established this immunity on June 27, 2004 in Order Number 17.¹⁸ PMC immunity ended last year, however, when the United States and Iraq signed a three-year Status of Forces Agreement (“SOFA”) that recognized Iraq’s “primary right to exercise jurisdiction over United States contractors and United States contractor employees.”¹⁹ Although the SOFA was approved by Iraq’s parliament on November 27, 2008, and went into effect on January 1, 2009, the SOFA remains subject to an Iraqi referendum that has been postponed until 2010.²⁰

14. *Id.*

15. Josh Meyer, *U.S. Details Case Against Blackwater Guards*, L.A. TIMES, Dec. 9, 2008, at 1.

16. *Id.*

17. *See, e.g.*, HUMAN RIGHTS FIRST, PRIVATE SECURITY CONTRACTORS AT WAR: ENDING THE CULTURE OF IMPUNITY (2008), available at <http://www.humanrightsfirst.info/pdf/08115-usls-psc-final.pdf> [hereinafter HUMAN RIGHTS FIRST, PRIVATE SECURITY CONTRACTORS]; U.N. Working Group, *Report on Mercenaries*, *supra* note 2, ¶¶ 28–30 (discussing PMCs in Iraq and elsewhere); MAJORITY STAFF OF H. COMM. ON OVERSIGHT AND GOVERNMENT REFORM, 110TH CONG., *supra* note 13, at 2, 9–13.

18. *See* Coalition Provisional Authority Order No. 17 (Revised): Status of the Coalitional Provisional Authority, MNF – Iraq, Certain Missions and Personnel in Iraq § 4, ¶ 3, available at http://www.cpa-iraq.org/regulations/20040627_CPAORD_17_Status_of_Coalition_Rev_with_Annex_A.pdf (The order, revised June 27, 2004, provided that “[c]ontractors shall be immune from Iraqi legal process with respect to acts performed by them pursuant to the terms and conditions of a Contract or any sub-contract thereto.”). After the Coalition Provisional Authority dissolved, “[l]aws put in place by the CPA . . . remain[ed] in force during the transitional period, unless rescinded or amended.” KENNETH KATZMAN & JENNIFER ELSEA, IRAQ: TRANSITION TO SOVEREIGNTY 6 (Cong. Research Serv. Order Code RS21820, 2004), available at <http://fpc.state.gov/documents/organization/39337.pdf>.

19. Agreement Between the United States of America and the Republic of Iraq on the Withdrawal of United States Forces from Iraq and the Organization of Their Activities During Their Temporary Presence in Iraq, U.S.-Iraq, Art. 12, ¶ 2, Nov. 17, 2008, available at http://www.mnf-iraq.com/images/CGs_Messages/security_agreement.pdf.

20. *Id.*; *Iraqi Parliament Approves Landmark US Military Pact*, AFP, Nov. 27, 2008, available at http://www.google.com/hostednews/afp/article/ALeqM5hJG-Yv3OUGJWBqLZDoX4H8_ncpBg;7Dead,10WoundedinIraqBlastsatSunniLeaders'Meeting, SEATTLE TIMES, July 31, 2009, available at http://seattletimes.nwsourc.com/html/nationworld/2009572711_

Over the last few years, and especially in the aftermath of the September 2007 Blackwater shootings, PMC accountability has been the subject of considerable media coverage, scholarly debate, advocacy efforts, and congressional attention.²¹ The U.S. government, U.S. military, and Multi-National Force-Iraq undertook a host of reforms to improve coordination and control over PMCs in Iraq.²² Additionally, academics, advocacy groups, and governments proposed contract design²³ and other avenues²⁴ to increase PMC accountability. Discussions of U.S. jurisdiction over PMC abuses, however, have thus far largely ignored tort liability and have focused instead on criminal

iraqbombs31.html.

21. Federal prosecutors' investigation into the September 16, 2007, shootings by Blackwater appears to be an exception to the government's indifference to PMC abuses. The investigation was seemingly motivated by the unprecedented American and Iraqi outrage and media coverage following the incident. *See, e.g.*, Steve Fainaru, *Warnings Unheeded on Guards in Iraq*, WASH. POST, Dec. 24, 2007, at A1; James Glanz & Alissa J. Rubin, *Blackwater Shootings 'Deliberate Murder,' Iraq Says*, N.Y. TIMES, Oct. 8, 2007, at A6; David Johnston, *State Dept. Made Immunity Offer to Firm's Guards*, N.Y. TIMES, Oct. 30, 2007, at A1; David Johnston & John M. Broder, *U.S. Prosecutors Subpoena Blackwater Employees*, N.Y. TIMES, Nov. 20, 2007, at A10; Editorial, *Legal Loopholes in Iraq*, N.Y. TIMES, Nov. 5, 2007, at A24.

22. *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFFICE, REPORT NO. GAO-08-966, REBUILDING IRAQ: DOD AND STATE DEPARTMENT HAVE IMPROVED OVERSIGHT AND COORDINATION OF PRIVATE SECURITY CONTRACTORS IN IRAQ, BUT FURTHER ACTIONS ARE NEEDED TO SUSTAIN IMPROVEMENTS (2008); Memorandum of Agreement (MOA) between the Department of Defense and the Department of State on USG Private Security Contractors (December 5, 2007), <http://www.defenselink.mil/pubs/pdfs/Signed%20MOA%20Dec%205%202007.pdf>; *see also* Letter from Peter Maurer, Permanent Representative of Switz. to the U.N., to the Sec'y Gen., U.N., annex, U.N. Doc. A/63/467-S/2008/636 (Oct. 6, 2008) [hereinafter Montreux Document] (The Montreux Document on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict.).

23. *See, e.g.*, Montreux Document, *supra* note 22, pt. II.A.4 (recommending terms of contract with PMCs); HUMAN RIGHTS FIRST, PRIVATE SECURITY CONTRACTORS, *supra* note 17, at 34 (recommending provisions for U.S. government agency contracts with PMCs); Roger P. Alford, *Arbitrating Human Rights*, 83 NOTRE DAME L. REV. 505 (2008) (suggesting that corporations that aid and abet human rights abuses look to their contracts with governments and rely on arbitration provisions to force governments into sharing responsibility for their human rights abuses); Laura A. Dickinson, *Government for Hire: Privatizing Foreign Affairs and the Problem of Accountability Under International Law*, 47 WM. & MARY L. REV. 135 (2005) (focusing on three modes of accountability that could apply to private contractors: (1) democratic accountability, *i.e.*, norms of transparency and democracy, (2) provisions in government contracts, and (3) internal institutional accountability, *i.e.*, corporations' own cultures and mechanisms of accountability).

24. For example, a Green Paper issued by the British Foreign and Commonwealth Office contends that the International Criminal Court ("ICC"), once operational, will also hold PMC employees accountable if they become involved in armed conflict and violate international humanitarian law. *See* FOREIGN AND COMMONWEALTH OFFICE, PRIVATE MILITARY COMPANIES: OPTIONS FOR REGULATION, 2001-02, H.C. 577, at 14. However, as of June 1, 2008, only 108 countries had agreed to be bound by the ICC; notably, the United States has refused to become party to the Rome Statute of the International Criminal Court. *See* ICC, The State Parties to the Rome Statute, <http://www.icc-cpi.int/menus/asp/states+parties/> (last visited June 6, 2009). Moreover, the ICC has limited jurisdiction, covering only genocide, crimes against humanity, war crimes, and the crime of aggression. Rome Statute of the International Criminal Court, pt. 2, art. 5, July 17, 1998, 37 I.L.M. 999 (1998).

liability. Because the United States has only limited jurisdiction for the criminal prosecution of PMCs operating abroad,²⁵ U.S. legislators have introduced bills to expand jurisdiction and criminally prosecute PMCs for their abuses.²⁶

Despite heightened attention in recent years to PMC accountability, commentators have largely ignored PMCs' potential tort liability under the Alien Tort Statute ("ATS," also known as the "Alien Tort Claims Act" or "ATCA"),²⁷ which has become the main mechanism for aliens seeking accountability in the United States for human rights abuses committed abroad. *Ibrahim v. Titan Corp.*²⁸ and *Saleh v. Titan Corp.*²⁹ provided the first opportunity for a U.S. court to hold PMC interrogators and translators accountable under the ATS for abusing individuals detained by the U.S. military at Abu Ghraib and other Iraqi prisons.³⁰ Although U.S. District Court for the District of Columbia ultimately dismissed the ATS claims in both cases,³¹ several more ATS cases against PMCs have been filed.³²

With the increase of ATS litigation against PMCs, this Comment takes a close look at *Ibrahim* and *Saleh*, as well as case law suggesting that plaintiffs may indeed be able to hold PMCs accountable under the Alien Tort Statute in

25. U.S. jurisdiction over PMCs is limited to provisions of the Military Extraterritorial Jurisdiction Act of 2000 and the Uniform Code of Military Justice, which establish the United States' special maritime and territorial jurisdiction or extraterritorial jurisdiction. *See* ELSEA ET AL., *supra* note 5, at 20–31.

26. Security Contractor Accountability Act of 2007, S. 2147, 110th Cong. (2007); MEJA Expansion Act of 2007, H.R. 2740, 110th Cong. (2007); Transparency and Accountability in Security Contracting Act of 2007, H.R. 369, 110th Cong. (2007). The advocacy group Human Rights First also recommends legislation to expand criminal jurisdiction over U.S. government contractors, in addition to increased prosecution of contractors who commit crimes abroad. HUMAN RIGHTS FIRST, HOW TO END IMPUNITY FOR PRIVATE SECURITY AND OTHER CONTRACTORS: BLUEPRINT FOR THE NEXT ADMINISTRATION (2008), *available at* <http://www.humanrightsfirst.org/pdf/PSC-081118-end-cont-impun-blueprint.pdf>; HUMAN RIGHTS FIRST, PRIVATE SECURITY CONTRACTORS, *supra* note 17, at 33–34.

27. 28 U.S.C. § 1350 (2006).

28. 391 F. Supp. 2d 10 (D.D.C. 2005).

29. 436 F. Supp. 2d 55 (D.D.C. 2006).

30. Although Titan Corp. and CACI International, Inc. were named as defendants in both cases, individual PMC employees were also named in *Saleh*. *Compare Ibrahim*, 391 F. Supp. 2d at 12 (listing Titan Corp. and CACI, International, Inc. as defendants), *with Saleh*, 436 F. Supp. 2d at 56–7 (listing Titan Corp, CACI International, Inc., and PMC employees as defendants).

31. *See Saleh*, 436 F. Supp. 2d at 57; *Ibrahim*, 391 F. Supp. 2d at 13–15.

32. *See* Mohamed v. Jeppesen Dataplan, Inc., 539 F. Supp. 2d 1128 (N.D. Cal. 2008) (dismissed on the basis of state secrets privilege), *rev'd*, 563 F.3d 992 (9th Cir. 2009); Complaint, Al Shimari v. Dugan, No. 2:08-cv-00637 (S.D. Ohio Jun. 30, 2008) (transferred to the Eastern District of Virginia on Aug. 6, 2008) (regarding torture at Abu Ghraib); Complaint, Al-Tae v. L-3 Services, Inc., No. 2:08-CV-12790 (E.D. Mich. June 30, 2008) (dismissed Aug. 11, 2008) (regarding torture at Abu Ghraib and other locations); Complaint, Al-Ogaidi v. Johnson, No. 2:08-CV-01006 (W.D. Wash. Jun. 30, 2008) (transferred to the Eastern District of Virginia on Aug. 13, 2008) (regarding torture at Abu Ghraib); Complaint, Estate of Albazzaz v. Blackwater Worldwide, No. 1:07-CV-02273 (D.D.C. Dec. 19, 2007) (regarding September 9, 2007 shootings by Blackwater employees at Al Watahba Square); Complaint, Estate of Atban v. Blackwater USA, No. 1:07-CV-01831 (D.D.C. Oct. 11, 2007) (regarding September 16, 2007 shootings by Blackwater employees at Nisoor Square).

certain cases. Part I provides an overview of the Alien Tort Statute and discusses its state action requirement. Part I.A explains how the “color of law” analysis utilized in domestic civil rights lawsuits under 42 U.S.C. § 1983.³³ relates to the ATS’s state action requirement and then applies the tests to PMC conduct in Iraq. Part I.B examines *Ibrahim* and *Saleh*’s dismissal of plaintiffs’ ATS claims for failure to establish state action. Part II moves on to consider challenges and defenses that PMC defendants might raise during the course of ATS litigation: forum non conveniens, plaintiffs’ failure to exhaust local remedies, the government contractor defense, the political question doctrine, and the state secrets privilege. Finally, Part III takes a step back to consider the broader arguments for and against PMC tort liability under the ATS. Although the outcomes of individual ATS lawsuits against PMCs will vary according to the facts and circumstances presented in each case, this Comment argues that the ATS may be used in certain circumstances to hold PMCs accountable for their torts, that courts considering ATS suits against PMCs should not follow *Ibrahim* and *Saleh*’s reasoning to dismiss ATS claims, and that the arguments for PMC tort liability under the ATS outweigh the arguments against liability.

I

THE ALIEN TORT STATUTE

Although the first Congress passed the Alien Tort Statute in 1789, only one case invoked ATS jurisdiction in the first 172 years of the statute’s existence.³⁴ In 1980, the Second Circuit breathed new life into the statute with its decision in *Filártiga v. Pena-Irala*, which held that the ATS provided federal subject matter jurisdiction for a violation of the law of nations—in that case, torture by a state official against a detainee.³⁵ Over the next three decades, *Filártiga* spawned a small avalanche of ATS lawsuits brought by aliens against private actors for human rights violations.³⁶

According to the Alien Tort Statute, “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.”³⁷ Thus, the ATS

33. 42 U.S.C. § 1983 (2009).

34. *Filártiga v. Pena-Irala*, 630 F.2d 876, 887 n.21 (2d Cir. 1980) (noting *Bolchos v. Darrell*, 3 F. Cas. 810 (D.S.C. 1795)).

35. 630 F.2d 876; *see, e.g.*, Beth Stephens, *Individuals Enforcing International Law: The Comparative and Historical Context*, 52 DEPAUL L. REV. 433, 436 (2002) [hereinafter Stephens, *Individuals Enforcing International Law*] (“The transformation of this statute began in 1980, with the Second Circuit’s decision in *Filártiga*.”)

36. *See, e.g.*, Stephens, *Individuals Enforcing International Law*, *supra* note 35, at 433–34 (“These civil [ATS] lawsuits for human rights abuses have triggered great excitement within the human rights community, viewed as an important step in the long-term movement toward the enforcement of human rights norms.”); Beth Stephens, *Judicial Deference and the Unreasonable Views of the Bush Administration*, 33 BROOK. J. INT’L L. 773, 777 (2008) [hereinafter Stephens, *Judicial Deference*] (estimating that 185 ATS cases have been filed since *Filártiga*).

37. 28 U.S.C. § 1350 (2006).

provides subject matter jurisdiction where (1) the plaintiff is an alien, (2) the cause of action lies in tort, and (3) the tort was committed in violation of a U.S. treaty or the law of nations. In general, treaties and the law of nations regulate state action, rather than private individuals or entities acting in their own capacity.³⁸ Plaintiffs, however, cannot sue states under the ATS for tort violations of U.S. treaties and the law of nations, because the doctrine of sovereign immunity protects states that have not waived their right to be immune from suit.³⁹ Nevertheless, ATS plaintiffs may sue private individuals or entities for tort violations of U.S. treaties or the law of nations if they can establish either that (1) the U.S. treaty or law of nations allegedly violated by the defendant applies to individuals directly⁴⁰ or (2) the private individuals or entities' actions were somehow taken in concert with the state and should therefore be considered state action.⁴¹ Because of the relatively small body of international law applying directly to individuals, the following subsections focus on tests for determining when private action should be considered state action and how those tests might apply in the PMC context.

38. See, e.g., 1 OPPENHEIM'S INTERNATIONAL LAW 16 (Robert Jennings & Arthur Watts eds., 9th ed. 1992) ("States are the principal subjects of international law. . . . As a rule, the subjects of the rights and duties arising from international law are states solely and exclusively, and international law does not normally impose duties or confer rights directly upon an individual human being"); 44B AM. JUR. 2D *International Law* § 22 (2008) ("Although states, and their rights, duties, and interests, are not the sole subjects of international law, they are the principal subjects of international law."). Though international law generally does not apply to private individuals, this is not an absolute rule. See, e.g., *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 793–94 (D.C. Cir. 1984) (Edwards, J., concurring) (discussing cases involving individual liability under law of nations, without color of state law). Piracy and slave trading, for example, are cited as norms of international law aimed at private individuals. *Id.* at 794. For further discussion of individual liability under international law in the absence of state action, see *Kadic v. Karadzic*, 70 F.3d 232, 239–40 (2d Cir. 1995) (discussing acts of genocide, piracy, war crimes, and other violations of international humanitarian law).

39. See, e.g., *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 207 (D.C. Cir. 1985) (citing sovereign immunity as basis for dismissing ATS claims against present and former U.S. officials whose actions were taken in their official capacity). An apparent tension exists in holding PMCs accountable for their tort actions under the ATS while recognizing immunity for state actors. *Sanchez-Espinoza* notes this tension in a footnote, speculating in dicta that the private individuals acting as agents of the United States might also be covered by the doctrine of sovereign immunity. *Id.* at 207 n.4. The court cites no authority for the proposition that sovereign immunity extends to agents of the U.S. government. However, as discussed in further detail, see *infra* note 177, official immunity is a more appropriate framework than sovereign immunity in the case of PMCs, and the justifications underlying official immunity do not support an extension of the principle to PMCs.

40. See *supra* note 38, regarding international laws that apply directly to individuals.

41. See, e.g., *Aldana v. Del Monte Fresh Produce, N.A.*, 416 F.3d 1242, 1247–48, 1264 (11th Cir. 2005); *Kadic*, 70 F.3d at 245; *Trajano v. Marcos (In re Estate of Marcos)*, 978 F.2d 493, 501–02 (9th Cir. 1992); *Beanal v. Freeport-McMoRan, Inc.*, 969 F. Supp. 362, 374 (E.D. La. 1997).

A. Establishing State Action

*Kadic v. Karadzic*⁴² stands as a seminal case in the development of the ATS's state action analysis because of the court's use of the "color of law" analysis employed in § 1983 claims. In *Kadic*, plaintiffs brought an ATS suit in the Southern District of New York against Radovan Karadžić, "President of the self-proclaimed Bosnian-Serb republic of 'Srpska.'"⁴³ The plaintiffs alleged that the defendant committed genocide; war crimes; and rape, torture, and summary execution.⁴⁴ The court affirmed that international laws prohibiting genocide and war crimes applied directly to individuals and that individuals could therefore be sued under the ATS without a showing of state action.⁴⁵ However, the court wrote that "torture and summary execution—when not perpetrated in the course of genocide or war crimes—are proscribed by international law only when committed by state officials or under color of law."⁴⁶ Therefore, these alleged atrocities could be prosecuted under the ATS only (1) "without regard to state action, to the extent that they were committed in pursuit of genocide or war crimes"—two crimes that do not require state action in order for individual liability to attach—or (2) if plaintiffs established that the defendant was a state actor.⁴⁷ Anticipating that the district court would have to engage in the state action analysis on remand, the court went on to consider whether Karadžić's actions constituted state action.⁴⁸ In doing so, the *Kadic* court imported the "under color of law" analysis employed in deciding § 1983 claims.⁴⁹

Given the similarity between suits brought under the ATS and those brought under 42 U.S.C. § 1983, importing § 1983's color-of-law analysis makes sense. Section 1983 provides a cause of action for an individual whose federal constitutional rights are violated by someone acting under color of state law. Similarly, for torts committed in violation of a U.S. treaty or a law of nations that does not apply directly to individuals, ATS plaintiffs must show that the tort was committed by an individual whose actions may fairly be characterized as state action.

In the aftermath of *Kadic*, the Eleventh Circuit and district courts in the Sixth, Ninth, and D.C. Circuits adopted the Second Circuit's approach of using § 1983's color-of-law analysis to determine the existence of state action in ATS

42. 70 F.3d 232 (2d Cir. 1995).

43. *Id.* at 236.

44. *Id.* at 241, 243–44.

45. *Id.* at 241–43.

46. *Id.* at 243.

47. *Id.* at 243–44.

48. *Id.* at 244.

49. *Id.* at 245 ("The 'color of law' jurisprudence of 42 U.S.C. § 1983 is a relevant guide to whether a defendant has engaged in official action for purposes of jurisdiction under the Alien Tort Act.").

suits.⁵⁰ Since the Second, Ninth, and Eleventh Circuits hear the vast majority of ATS claims, the color-of-law analysis applies to most ATS cases heard today. However, one district court in the D.C. Circuit has emphatically rejected use of the color-of-law analysis in an ATS case.⁵¹

Courts engaging in the color-of-law analysis will find this to be a highly muddled area of the law for at least two reasons. First, § 1983's "under color of state law" analysis also encompasses the "state action" analysis employed for claims brought under the Fourteenth Amendment to the United States Constitution.⁵² The Fourteenth Amendment provides that

[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.⁵³

Similar to § 1983 claims, which require rights to have been violated under color of state law (and similar to claims brought under the ATS, which requires state action for most violations of the law of nations and U.S. treaties), Fourteenth Amendment claims must allege that the relevant rights violations have resulted from "conduct that may be fairly characterized as 'state action.'"⁵⁴ Second, confusion over the color-of-law analysis results from courts' use of different tests in determining what constitutes action "under color of law."

For a party to be acting under color of law, there must be (1) "the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the State is responsible," and (2) "a person who may fairly be said to be a state actor."⁵⁵ Courts evaluate this latter requirement based on several factors, including whether the challenged activity results from the state's exercise of "coercive power," whether the state provides "significant encouragement, either overt or covert," or whether a private actor operates as a "willful participant in joint activity with the State or its agents."⁵⁶

50. See, e.g., *Aldana v. Del Monte Fresh Produce, N.A.*, 416 F.3d 1242, 1247–48, 1264 (11th Cir. 2005); *Arias v. Dyncorp*, 517 F. Supp. 2d 221, 227–28 (D.D.C. 2007); *Chavez v. Carranza*, 413 F. Supp. 2d 891, 899 (W.D. Tenn. 2005); *Bao Ge v. Li Peng*, 201 F. Supp. 2d 14, 21–22 (D.D.C. 2000) (following the analysis of *Doe v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997), *aff'd in part, rev'd in part*, 395 F.3d 932 (9th Cir. 2002)); *Beanal v. Freeport-McMoRan, Inc.*, 969 F. Supp. 362, 374 (E.D. La. 1997); *Doe v. Unocal*, 963 F. Supp. at 890.

51. See *Doe v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20, 25–26 (D.D.C. 2005) (stating that "basing liability for Alien Tort Statute violations on color of law jurisprudence is . . . overreach[ing]").

52. *Lugar v. Edmundson Oil Co.*, 457 U.S. 922, 935 (1982).

53. U.S. CONST. amend. XIV, § 1.

54. *Lugar*, 457 U.S. at 924.

55. *Id.* at 937.

56. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 296 (2001) (citations omitted). Though referred to as factors in *Brentwood*, other courts have treated them as "different factors or tests in different contexts." See *Lugar*, 457 U.S. at 939. The muddled nature of the inquiry was illustrated by the *Lugar* Court's declining to decide "[w]hether these different

Courts have treated a nominally private entity as a state actor when it is controlled by an “agency of the State,” when it has been delegated a public function by the State, when it is “entwined with governmental policies,” or when government is “entwined in [its] management or control.”⁵⁷ In considering the foregoing factors, the Supreme Court noted that “no one fact . . . nor . . . any set of circumstances is absolutely sufficient, for there may be some countervailing reason against attributing activity to the government.”⁵⁸

Applying these tests to the PMC context, it quickly becomes apparent that the factors relating to a state’s coercive power, state agency control, and governmental entwinement bear no relation to governments’ relationships with PMCs. First, rather than being coerced by states, PMCs have consensual, contractual relationships with the governments for which they work. Second, PMCs are not controlled by state agencies in the manner considered by *Pennsylvania v. Board of Directors of City Trusts of Philadelphia*: there, the college was controlled by a board of directors, which was a state agency.⁵⁹ Third, the government’s involvement in the affairs and structure of PMCs does not begin to approach the level of state entwinement found in *Brentwood Academy v. Tennessee Secondary School Athletic Ass’n*.⁶⁰ In *Brentwood Academy*, a fine levied by “a statewide association incorporated to regulate interscholastic athletic competition among public and private secondary schools” constituted state action, because public school officials accounted for nearly all of the association’s acts; without their participation, “[t]here would be no recognizable Association, legal or tangible.”⁶¹ Moreover, the State of Tennessee assigned ex officio board members to the association, and the association’s “ministerial employees” were entitled to participate in the state retirement system.⁶² By comparison, PMCs are not run by the governments they contract with, nor are they treated as government employees.

The following subsections consider only the remaining factors in the color-of-law analysis and how they might apply in the PMC context.

1. Public Function

PMCs’ performance of certain public functions may satisfy the test for state action. On its own, a contractor’s “significant or even total engagement in performing public contracts” will be insufficient in establishing state action.⁶³

tests are actually different in operation or simply different ways of characterizing the necessarily fact-bound inquiry.” *Id.*

57. *Brentwood Acad.*, 531 U.S. at 296 (citations omitted).

58. *Id.* at 295–96.

59. See 353 U.S. 230, 230–31 (1957) (*per curiam*).

60. See *Brentwood Acad.*, 531 U.S. 288.

61. *Id.* at 290, 300.

62. *Id.*

63. *Rendell-Baker v. Kohn*, 457 U.S. 830, 841 (1982). In *Rendell-Baker*, the Court found that a private school’s actions did not constitute state action, even though the school received public funds. *Id.* The Court rejected arguments related to state coercion, performance of a public

Instead, the public function test is satisfied by the performance of (1) functions that traditionally fall within the exclusive province of the state⁶⁴ or (2) functions traditionally performed by private actors that enter the realm of state action by virtue of “the context in which [the private actor] performs these services for the State.”⁶⁵ Judgments made and activities undertaken on the basis of state direction may establish state action,⁶⁶ but a defendant’s exercise of “professional discretion and judgment” does not foreclose a finding of state action.⁶⁷

Although PMCs are not supposed to perform inherently governmental activities,⁶⁸ a colorable argument can be made that PMCs take on powers traditionally and exclusively reserved to the state and therefore satisfy the public function test for state action. Courts considering this argument should look to the definition of inherently governmental activities adopted by Congress and the executive branch.⁶⁹ An inherently governmental activity is one that involves:

- (1) Binding the United States to take or not to take some action by contract, policy, regulation, authorization, order, or otherwise;
- (2) Determining, protecting, and advancing economic, political, territorial, property, or other interests by military or diplomatic action, civil or criminal judicial proceedings, contract management, or otherwise;
- (3) Significantly affecting the life, liberty or property of private persons; or
- (4) Exerting ultimate control over the acquisition, use, or disposition of United States property (real or personal, tangible or intangible), including establishing policies or procedures for the collection, control, or disbursement of appropriated and other federal funds.⁷⁰

function and existence of a symbiotic relationship. *Id.* at 841–43.

64. *See, e.g.*, *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 353 (1974) (rejecting the contention that public utilities represent a “public function”). Among the “powers traditionally exclusively reserved to the State” are elections, the operation of a company town, and the operation of a municipal park. *Id.* at 352.

65. *West v. Atkins*, 487 U.S. 42, 56 n.15 (1988).

66. *Id.* at 52–53 n.10.

67. *Id.* at 52.

68. *See* Circular No. A-76 (Revised) from Office of Management and Budget, Executive Office of the President, to the Heads of Executive Departments and Establishments, at A-2 (May 29, 2003) (“An inherently governmental activity is an activity that is so intimately related to the public interest as to mandate performance by governmental personnel.”); ELSEA ET AL., *supra* note 5, at 32.

69. *See* 31 U.S.C. § 501 note (2006) (Section (b) of the Comprehensive Analysis and Development of Single Government-Wide Definition of Inherently Governmental Function) (using the same definition of inherently governmental function as used in the Federal Activities Inventory Reform Act of 1998, Pub. L. No. 105-270, 112 Stat. 2382 (codified at 31 U.S.C. § 501 note)); Federal Acquisition Regulation, 48 C.F.R. § 7.503 (2006) (“and any other relevant Federal law or regulation, as determined by the Director of the Office of Management and Budget in consultation with the Chief Acquisition Officers Council and the Chief Human Capital Officers Council”); Circular No. A-76 (Revised) from Office of Management and Budget, *supra* note 68.

70. Circular No. A-76 (Revised) from Office of Management and Budget, *supra* note 68.

The Office of Management and Budget (“OMB”) interprets this definition to allow contractors to engage in activities “where the contractor does not have the authority to decide on the course of action, but is tasked to develop options or implement a course of action, with agency oversight.”⁷¹ According to the OMB, permissible PMC functions include “guard services, convoy security services, pass and identification services, plant protection services, or the operation of prison or detention facilities, without regard to whether the providers of these services are armed or unarmed.”⁷² However, the OMB directs agencies to consider

[t]he provider’s authority to take action that will significantly and directly affect the life, liberty, or property of individual members of the public, including the likelihood of the provider’s need to resort to force in support of a police or judicial activity; whether the provider is more likely to use force, especially deadly force, and the degree to which the provider may have to exercise force in public or relatively uncontrolled areas.⁷³

Despite the OMB’s determination of permissible PMC functions, many PMC activities in Iraq appear to be inherently governmental because they significantly and directly affect the lives, liberty, and property of individual members of the Iraqi public. PMCs—especially those involved in security functions—are likely to have to resort to force in support of police activities. The security escorts conducted by PMCs, for example, directly support the police’s function of ensuring public security, and in the course of providing such services, PMCs are placed in positions where they are likely to use deadly force. In Iraq, for example, PMCs’ performance of their duties resulted in injury and death for many Iraqi civilians,⁷⁴ often in relatively uncontrolled, public situations where PMCs were under threat or perceived threat of danger.⁷⁵

Leaving aside PMCs’ performance of inherently governmental functions, *West v. Atkins* supports the proposition that PMCs, at least in some situations, satisfy the public function test by virtue of the context in which they perform their services for the state.⁷⁶ In *West*, the Supreme Court held that a private physician, under contract with a state prison hospital, acted under color of state

71. *Id.*

72. *Id.* at A-3.

73. *Id.*

74. Human Rights First estimates that PMCs in Iraq have fired their weapons thousands of times, hundreds of which were toward civilians. HUMAN RIGHTS FIRST, PRIVATE SECURITY CONTRACTORS, *supra* note 17, at 3.

75. *See id.* at 10–12. For its report, Human Rights First reviewed hundreds of Serious Incident Reports filed by Pentagon contractors, the vast majority of whom reported attacks on contractors and those they were protecting. *Id.* at 10. Such attacks included “roadside bombs, gunfire directed at convoys, and other direct attacks on contractors.” *Id.* In one incident, PMCs stopped at a checkpoint were attacked by locals hurling rocks and petrol bombs. *Id.* In dozens of incidents, PMCs engaged in force because they thought civilian vehicles posed threats. *Id.* at 11.

76. *See* 487 U.S. 42 (1988).

law when he treated the plaintiff-inmate's injury.⁷⁷ The inmate alleged that the physician-defendant's refusal to schedule a necessary surgery violated his Eighth Amendment right to be free of cruel and unusual punishment.⁷⁸ The state had a constitutional obligation to provide adequate medical care to individuals it incarcerated,⁷⁹ and in relying on the doctor's professional judgment to discharge this obligation, the state clothed the doctor with the authority of law.⁸⁰ If the doctor abused his position, the Court concluded that "the resultant deprivation was caused, in the sense relevant for state-action inquiry, by the State's exercise of its right to punish West by incarceration and to deny him a venue independent of the State to obtain needed medical care."⁸¹

Similar to the state's constitutional obligation to provide adequate medical care to inmates in *West*, the United States had an obligation under the law of nations to ensure humane treatment of its detainees during interrogations at Abu Ghraib.⁸² PMC interrogators and translators, in taking on the government's duty to perform interrogations in a humane way, acted under color of law. Their abuse, therefore, resulted from the state's exercise of its right to detain and interrogate suspects. Extending this argument, ATS plaintiffs involved in other situations might allege that PMCs are clothed with the authority of law when the government relies on PMCs' professional judgment to discharge the government's obligations under the laws of war.

Finally, PMCs may also satisfy the public function test articulated in *Kadic*, which suggested that the "state action concept, where applicable for some violations like 'official' torture, requires merely the semblance of official authority."⁸³ "The inquiry, after all," explained the Second Circuit, "is whether a person purporting to wield official power has exceeded internationally recognized standards of civilized conduct."⁸⁴ As interrogators and translators in positions of power over the detainees, the PMCs certainly had the semblance of official authority. For example, the Fay investigation into the Abu Ghraib abuses reported an incident in which a PMC interrogator threatened to bring in a staff sergeant if the detainee refused to answer; the staff sergeant went in and out of the cell, inflicting pain on the detainee during the interrogation.⁸⁵ In that

77. *Id.*

78. *Id.*

79. *Id.* at 54.

80. *Id.* at 55.

81. *Id.*

82. See Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; ANTHONY R. JONES, AR 15-6 INVESTIGATION OF THE ABU GHRAIB PRISON AND 205TH MILITARY INTELLIGENCE BRIGADE 14 (2004), available at <http://www.defenselink.mil/news/Aug2004/d20040825fay.pdf> (acknowledging that "[t]he provisions of Geneva Convention IV, Relative to Protection of Civilian Persons in Time of War, did apply to detainees in Iraq").

83. *Kadic v. Karadzic*, 70 F.3d 232, 245 (2d Cir. 1995).

84. *Id.*

85. FAY, *supra* note 11, at 79.

situation, the PMC would have appeared to possess official authority over the detainment and the detainee's treatment. Also, actions like the ones taken by the PMC on a security patrol with the 82nd Airborne Division⁸⁶ appeared to be officially sanctioned, because the PMC engaged in the use of force alongside members of the military.

2. Joint Activity/Symbiotic Relationship

In ATS litigation against PMCs, the state action requirement also appears to be satisfied by joint activity undertaken by PMCs and the U.S. military, as well as the symbiotic nature of their relationship.⁸⁷ First, according to the Supreme Court, the joint action test can be satisfied by a conspiracy where the private actor is "a willful participant in joint activity with the State or its agents."⁸⁸ "[T]hat the officer has acted unlawfully or outside the scope of his or her authority is no defense,"⁸⁹ because state authorization is immaterial to finding conspiracy under the joint activity test.⁹⁰ Actions taken under color of law, therefore, need not be in conformity with official policy.⁹¹ Second, independent of the joint action test, official action can be established by a symbiotic relationship where "the parties confer mutual benefits to each other such that their interdependence is crucial to each one's success."⁹²

The involvement of state actors in a PMC's commission of a tort may be sufficient to establish joint activity for a finding of state action. In

86. Washburn & Bigelow, *supra* note 12.

87. Although the presence of a "symbiotic relationship" between the state and a private actor has often been cited as a factor in determining state action, *see, e.g.*, Edmonson v. Leesville Concrete Co., 500 U.S. 614, 636 (1991), and *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 175 (1972), this factor runs into and overlaps with the joint activity factor. The "symbiotic relationship" language traces back to *Rendell-Baker v. Kohn*, 457 U.S. 830, 842–43 (1982), which in turn discusses *Blum v. Yaretsky*, 457 U.S. 991 (1982), and *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961). Both *Blum* and *Burton*, however, analyze the existence of mutual benefits in the context of determining whether the state was a "joint participant." *Blum*, 457 U.S. at 1010–11; *Burton*, 365 U.S. at 724–25. Given the overlap between the two factors, this subsection discusses both.

88. *Howerton v. Gabica*, 708 F.2d 380, 383 (9th Cir. 1983) (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152 (1970) and *United States v. Price*, 383 U.S. 787, 794 (1966)).

89. *Id.* at 383 n.6 (citing *Dennis v. Sparks*, 449 U.S. 24, 28 n.4 (1980); *Adickes*, 398 U.S. at 152).

90. *Sparks*, 449 U.S. at 28 n.4; *Adickes*, 398 U.S. at 152. Some circuit courts, however, have mistakenly looked for official policy and custom. *See, e.g.*, *Hoai v. Vo*, 935 F.2d 308, 313–14 (D.C. Cir. 1991) (noting in dicta that appellants also failed to allege that official rule or custom gave rise to the alleged wrongs); *Collins v. Womancare*, 878 F.2d 1145, 1155 (9th Cir. 1989) (noting that plaintiffs failed to dispute or allege "any facts in opposition to [defendant's] contention that the police maintained a policy of neutrality in the dispute").

91. "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." *Monroe v. Pape*, 365 U.S. 167, 184 (1961) (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)).

92. *Sinaltrainal v. Coca-Cola Co.*, 256 F. Supp. 2d 1345, 1353 n.6 (S.D. Fla. 2003) (citing *Burton*, 365 U.S. at 723–24).

Howerton v. Gabica, for example, the Ninth Circuit determined that joint activity occurred where a police officer provided unofficial assistance to landlords seeking eviction of their tenants.⁹³ The court ruled that the police officer's actions "created an appearance that the police sanctioned the eviction."⁹⁴ Similarly, at Abu Ghraib, the military's joint participation with PMCs in abusing detainees would have given the appearance of official sanction.⁹⁵ Additionally, minding *Howerton's* statement that unlawful action or action beyond the scope of one's authority is no defense,⁹⁶ the existence of an official policy prohibiting such conduct would not prevent a finding of state action by the PMCs. As another example, PMCs discharging their weapons alongside members of the military or while protecting U.S. diplomats, officials, or military might also appear to be acting under official sanction.⁹⁷

ATS plaintiffs suing PMCs might also establish state action by relying on *Sinaltrainal v. Coca-Cola Co.* to assert the existence of a symbiotic relationship between PMCs and the U.S. government.⁹⁸ In the ATS case of *Sinaltrainal*, the U.S. District Court for the Southern District of Florida, considering a motion to dismiss for lack of subject matter jurisdiction, determined that plaintiffs sufficiently alleged a symbiotic relationship between paramilitaries, the Colombian military, and local police forces.⁹⁹ The court reasoned that (1) the paramilitaries were "permitted to exist, openly operate under the laws of Colombia, and [were] assisted by government military officials" and (2) plaintiffs alleged a mutually beneficial, symbiotic relationship between the government and paramilitaries.¹⁰⁰ Thus, in the PMC context, a symbiotic relationship may be established by (1) the PMCs' open operations, supported by and in cooperation with the U.S. military, and (2) the interdependence of the governments and PMCs.

Figures from Iraq illustrate the interdependence of the U.S. government and PMCs. Simply stated, PMCs rely on governmental entities for their contracts. In the Abu Ghraib scandal, CACI International Inc. had \$66 million in obligations in 2004 under its contract to provide interrogation services in Iraq—nearly 8 percent of its total revenues (\$843.1 million) in the previous year—and its arrangement with the General Services Administration (not including contracts with other federal agencies) accounted for 30 to 35 percent

93. *Howerton*, 708 F.2d at 381.

94. *Id.* at 384.

95. *See, e.g.*, FAY, *supra* note 11, at 49 (describing interrogation by PMC in which a staff sergeant went in and out of the cell where the interrogation was taking place, at times suffocating and inflicting pain on the detainee), 81–82 (describing PMC's rape of a detainee while soldier took pictures), and 87 (describing interrogation by PMC and soldiers using dogs for intimidation of detainee).

96. *Howerton*, 708 F.2d at 383 n.6.

97. *See, e.g.*, Washburn & Bigelow, *supra* note 12.

98. 256 F. Supp. 2d 1345 (S.D. Fla. 2003).

99. *Id.* at 1353.

100. *Id.*

of CACI's total revenues.¹⁰¹ The Titan Corporation, for its part, enjoyed "a billion-dollar contract with the Army that also include[d] 1,000 translators in 23 other countries."¹⁰² As for the U.S. government's dependence on PMCs, the military's heavy use of PMCs implies that contractors are crucial to the success of U.S. missions. From 2003 through 2007, nearly one-fifth of all funding for U.S. operations in Iraq went to contractors, and in 2008, the Congressional Budget Office estimated a one-to-one ratio of contractor employees to U.S. military members in Iraq.¹⁰³

Finally, *Arias v. Dyncorp* provides further support for finding state action in PMC cases via the joint activity test.¹⁰⁴ In *Arias*, the U.S. District Court for the District of Columbia denied defendants' motion to dismiss after finding that State Department contractors' actions were cloaked in the authority of the U.S. and Colombian governments.¹⁰⁵ The court found that the following allegations were sufficient to state a claim under the joint activity test: (1) the contractors contracted with the U.S. government to spray cocaine and heroin fields in Colombia, (2) the contractors were to be paid with funds approved by Congress, and (3) the contractors acted in coordination with the Colombian and U.S. governments.¹⁰⁶ Because the *Arias* complaint omitted specific details about Dyncorp's coordination with the U.S. and Colombian governments,¹⁰⁷ this test seems rather easy to meet for ATS plaintiffs at the pleading stage; all PMCs operate under contract with a government, receive payment from government-approved funds, and act to some degree in coordination with the contracting government.

3. Significant Encouragement

In some situations, ATS plaintiffs may argue that PMC actions should be treated as state action because the PMC actions were significantly encouraged by the state. According to *Blum v. Yaretsky*, a state's "significant encouragement, either overt or covert," of private action may allow the private

101. GSA Reviews CACI Contract, WASH. TECH., June 3, 2004, http://www.washingtontechnology.com/print/19_5/23680-1.html.

102. Washburn & Bigelow, *supra* note 12.

103. See CONG. BUDGET OFFICE, *supra* note 4, at 2.

104. See 517 F. Supp. 2d 221 (D.D.C. 2007).

105. *Id.* at 228.

106. *Id.* (citing Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 296 (2001), for the color-of-law tests). Insofar as *Rendell-Baker v. Kohn*, 457 U.S. 830, 841 (1982), established that performance of a public contract is insufficient to constitute state action, *Arias* appears distinguishable because of the additional allegation that the PMC acted in coordination with the Colombian and U.S. governments. Also, although this Comment disagrees as to the relevance of the "agency control" and "government entwinement" tests in the PMC context, the court held that plaintiffs alleged sufficient facts to state a claim that satisfied the joint activity, agency control, or government entwinement tests. *Arias*, 517 F. Supp. 2d at 228.

107. See Complaint at ¶¶ 62, 66, *Arias*, 517 F. Supp. 2d 221 (No. 01-1908), available at <http://ciponline.org/colombia/irlfdyncorp.htm>.

action to be treated as state action.¹⁰⁸ In many cases, however, courts avoid outlining the contours of the significant encouragement inquiry by simply holding that significant encouragement did not exist or was not alleged.¹⁰⁹ “Fairly characterizing the level of federal governmental involvement can be accomplished ‘[o]nly by sifting facts and weighing circumstances,’”¹¹⁰ and “[m]ere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible.”¹¹¹

In the Abu Ghraib context, a court could easily find that members of the military significantly encouraged private action that should be considered state action. The U.S. Army’s report on the Abu Ghraib abuses (commonly referred to as the Fay report, after one of the lead authors and investigators) referred to several specific incidents involving PMCs and members of the U.S. military.¹¹² In one incident, a PMC interpreter raped a teenage detainee while a female soldier took pictures.¹¹³ In another incident, a PMC and two soldiers conducted an interrogation using military working dogs for intimidation; all three individuals believed that they were authorized to do so by an army officer, and the Fay report stated that it was “probable that approval was granted by [Colonel] Pappas without such authority.”¹¹⁴ The Fay report also cited members of the military and PMCs as either present or participating on another occasion, when detainees “were stripped of their clothing, handcuffed together nude, placed on the ground, and forced to lie on each other and simulate sex while photographs were taken,” and similar incidents occurred over several days.¹¹⁵ In each of these cases, the government went far beyond simple acquiescence, and its participation resulted in significant encouragement of the abuses.

Although this Section has suggested a number of ways for ATS plaintiffs to argue that PMC actions constitute state action, the D.C. district court used the state action requirement to reject ATS claims in both *Ibrahim* and *Saleh*—two of the earliest cases to bring ATS claims against PMCs for their actions in Iraq. The following Subsection provides some background on these cases and undertakes a critical review of the D.C. district court’s refusal to find state action in either case.

108. 457 U.S. 991, 1004 (1982).

109. “[N]o case has actually found that the state’s encouragement of private activity clothed such a response in state action.” JAMES A. KUSHNER, *GOVERNMENT DISCRIMINATION: EQUAL PROTECTION LAW AND LITIGATION* § 2:32 (2008).

110. *Village of Bensenville v. Fed. Aviation Admin.*, 457 F.3d 52, 64 (D.C. Cir. 2006) (quoting *Moose Lodge v. Irvis*, 407 U.S. 163, 172 (1972)).

111. *Blum*, 457 U.S. at 1004.

112. See FAY, *supra* note 11, at 71–95 (describing specific incidents of abuse at Abu Ghraib committed by the U.S. military and/or PMCs).

113. *Id.* at 81–82 (incident #22).

114. *Id.* at 87 (incident #31).

115. *Id.* at 72–73 (incident #3).

B. Facts and Analytical Shortcomings in Ibrahim and Saleh

Ibrahim and *Saleh* both arose from PMCs' scandalous treatment of detainees held under U.S. military custody in Iraqi prisons, including Abu Ghraib. One *Ibrahim* plaintiff, for example, alleged that he was beaten with fists and sticks, urinated on, deprived of sleep, stripped of clothing for most of his detention, exposed to cold temperatures and loud music, photographed while naked, forced to witness another detainee's rape, and threatened with attack dogs.¹¹⁶ Another plaintiff alleged that the defendants beat her husband, gouged out one of his eyes, electrocuted him, broke one of his legs, speared him, and ultimately killed him.¹¹⁷ In *Saleh*, the named plaintiff alleged that he was roped to twelve other naked prisoners by their genitals, had his penis stretched by rope and beaten with a stick, was kept naked for long periods of time, was forced to ejaculate into a cup that was then poured over his head and body, was stripped of clothing and forced into a sexual position with another man, was repeatedly shocked with an electric stick and beaten with a cable, was deprived of sleep by blaring music and dousings of cold water, was dragged by a belt tied around his neck, had chemicals poured over his body, was urinated on and covered in feces, was threatened by an attack dog, and was physically beaten.¹¹⁸ During his detention, Saleh also claimed to witness the random killing of detainees, the rape of two male detainees, and the sodomization of three detainees with a stick, and he heard the suspected rape of female detainees.¹¹⁹ Plaintiffs' other allegations included defendants' beating of detainees; translation of threats of rape and death for detainees; translation of threats of rape and death for detainees' family members; stripping, handcuffing, and placing of detainees in sexual positions; and the rape of a fourteen-year-old detainee.¹²⁰

Despite these horrific allegations, the court in *Ibrahim* dismissed all of plaintiffs' ATS claims for failure to allege state action,¹²¹ and the court in *Saleh* dismissed plaintiffs' ATS claims by holding that the state action requirement did not extend to private individuals acting under color of law.¹²²

Two major errors appear in the state action analysis of *Ibrahim* and *Saleh*. First, for the war crimes alleged in both cases,¹²³ plaintiffs should not have

116. First Amended Complaint ¶ 38, *Ibrahim v. Titan Corp.*, 391 F. Supp. 2d 10 (D.D.C. 2005) (No. 04-01248), 2005 WL 495036.

117. *Id.* ¶ 51.

118. Third Amended Class Action Complaint ¶ 116, *Saleh v. Titan Corp.*, 436 F. Supp. 2d 55 (D.D.C. 2006) (No. 05-1165).

119. *Id.* ¶¶ 117–120.

120. *Id.* ¶¶ 50, 52–54, 79.

121. *Ibrahim*, 391 F. Supp. 2d at 14–15.

122. *Saleh*, 436 F. Supp. 2d at 57–58.

123. See First Amended Complaint, *supra* note 116, ¶ 64 (bringing ATS claims for war crimes, crimes against humanity, torture, abuse of persons in custody, murder, enforced kidnapping and/or wrongful detention, unlawful seizure of property, disrespect for religious beliefs, assault and battery, intentional infliction of emotional distress, wrongful death, false

been required to show state action, because the universal prohibition on war crimes should apply directly to individuals.¹²⁴ Second, with respect to the remaining ATS claims, *Saleh* erred by citing *Sanchez-Espinoza v. Reagan*¹²⁵ as circuit precedent for the proposition that “there is no middle ground between private action and government action, at least for purposes of the Alien Tort Statute.”¹²⁶ Rather than treating *Saleh* as binding or persuasive authority, courts considering ATS suits against PMCs should view this decision as an anomaly within ATS jurisprudence.

An understanding of *Sanchez-Espinoza*'s discussion of public and private action under the ATS must begin with background facts about the case, which was decided a full decade before the Second Circuit's color-of-law analysis in *Kadic*.¹²⁷ In *Sanchez-Espinoza*, Nicaraguan citizens sued (1) present and former executive officials (“federal appellees”)—“most of whom [were] sued both individually and in their official capacities”—for tort injuries inflicted by Contras in Nicaragua and (2) two organizations for operating paramilitary training camps in the United States.¹²⁸ Plaintiffs alleged that the federal appellees, “acting in concert and conspiracy with the other defendants and others unknown, have authorized, financed, trained, directed and knowingly provided substantial assistance for the performance of activities which terrorize and otherwise injure the civilian population of the Republic of Nicaragua.”¹²⁹

imprisonment, conversion, obstruction of justice, and negligence); Third Amended Class Action Complaint ¶¶ 175–181, 193–199, 209–214, 224–229, 239–243, *supra* note 118 (bringing ATS claims for extrajudicial killing; torture; cruel, inhuman, or degrading treatment; war crimes; and crimes against humanity).

124. See *Romero v. Drummond Co.*, 552 F.3d 1303, 1316 (11th Cir. 2008); *Kadic v. Karadzic*, 70 F.3d 232, 239 (2d Cir. 1995); *Bowoto v. Chevron Corp.*, No. 99-02506, 2006 WL 2455752 (N.D. Cal. Aug. 26, 2006); *Doe v. Islamic Salvation Front*, 993 F. Supp. 3, 7–8 (D.D.C. 1998).

125. 770 F.2d 202, 207 (D.C. Cir. 1985).

126. *Saleh*, 436 F. Supp. 2d at 58. *Saleh* also stated that the Supreme Court case of *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), did not overrule *Sanchez-Espinoza*'s proposition that there is no middle ground between private action and government action. *Saleh*, 436 F. Supp. 2d at 57–58. However, *Sosa* also did not rule out the possibility of a middle ground. In determining whether a norm constitutes a cause of action, the *Sosa* Court said that one consideration is “whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual.” 542 U.S. at 732 n.20 (comparing Judge Edwards's concurrence in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 791–795 (D.C. Cir. 1984), discussing the lack of consensus in 1984 that torture by private actors violate international law, with *Kadic*, 70 F.3d at 239–241, finding in 1995 that genocide by private actors violates international law). The two cases considered by *Sosa*—*Tel-Oren* and *Kadic*—both claimed torture as a violation of the law of nations, and argued that the prohibition against torture applies directly to individuals, so a discussion of state action was irrelevant. Thus, the *Sosa* Court did not reject the possibility of finding official action under a color of law/state action analysis.

127. Compare *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985), with *Kadic*, 70 F.3d 232 (decided in 1995).

128. *Sanchez-Espinoza*, 770 F.2d at 205.

129. *Id.* at 205.

The main ATS issue confronting the court was whether the statute “confers jurisdiction over suits against officers of the United States alleging violation of international law by this country”¹³⁰—not whether the statute conferred jurisdiction over private individuals acting under color of state law. The court began by assuming that the ATS covered state acts, but this assumption applied only insofar as the federal appellees were being sued for money damages for actions taken in their official capacities. In other words, the court applied the ATS to actions taken by the United States through its officials, but refused to apply the statute outside of a money-damages remedy because “[i]t would make a mockery of the doctrine of sovereign immunity if federal courts [could] sanction or enjoin . . . official actions of the United States.”¹³¹

Although the court primarily concerned itself with suits against officers of the United States, the court also considered ATS claims filed against the defendants in their personal capacities. The court stated that the ATS “may conceivably have been meant to cover only private, nongovernmental acts that are contrary to treaty or the law of nations—the most prominent examples being piracy and assaults upon ambassadors.”¹³² The court pronounced itself unaware of any treaty that would make private individuals’ conduct of the activities at issue unlawful.¹³³ Then it stated that the law of nations “does not reach private, nonstate conduct of this sort for the reasons stated by Judge Edwards in *Tel-Oren v. Libyan Arab Republic*.”¹³⁴ However, a review of Judge Edwards’s concurring opinion in *Tel-Oren* provides no support for this contention.

Tel-Oren raised ATS claims against private individuals—members of the Palestine Liberation Organization—who, without color of law, killed and wounded dozens of individuals.¹³⁵ The D.C. Circuit affirmed dismissal, with each judge writing a separate opinion.¹³⁶ Judge Edwards’s opinion discussed two strands of individual liability under international law: (1) officials acting under color of law, as in the case of official torture, and (2) private, nongovernmental acts taken without any state authority or direction.¹³⁷ Since *Tel-Oren* did not raise the issue of private individuals (i.e., non-officials) taking action under color of law, Judge Edwards did not address whether the ATS covered such acts.

Therefore, *Saleh*’s reliance on *Sanchez-Espinoza* was misplaced, as *Sanchez-Espinoza* and *Tel-Oren* were decided at a time when individual

130. *Id.* at 204.

131. *Id.* at 207.

132. *Id.* at 206.

133. *Id.*

134. *Id.* at 206–07.

135. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 775 (D.C. Cir. 1984).

136. *Id.*

137. *Id.* at 793 (Edwards, J., concurring).

liability under the law of nations was interpreted to apply to (1) private individuals, acting without color of law, in limited causes of action like piracy and (2) officials acting under color of law. These cases did not consider the possibility of private individuals acting under color of law and therefore should not have been treated as binding circuit precedent in *Saleh*.

In fact, a great deal of persuasive authority supports a finding of state action in *Saleh*. Other post-*Sanchez-Espinoza* D.C. district court cases have explicitly adopted the color-of-law analysis,¹³⁸ as have the Second and Eleventh Circuits and district courts in the Sixth and Ninth Circuits.¹³⁹ Together, these circuits hear the vast majority of ATS claims, and given the foregoing analysis, courts should be careful in following the position taken in *Saleh*.

II

PMCs' POTENTIAL CHALLENGES AND DEFENSES TO ATS LITIGATION

Assuming that plaintiffs can establish subject matter jurisdiction under the ATS, defendants can raise a host of challenges and defenses: forum non conveniens, plaintiffs' failure to exhaust remedies, the government contractor defense, the political question doctrine, and the state secrets privilege. The following Section discusses these potential challenges and defenses and considers how courts might address such issues.

A. *Forum Non Conveniens*

The doctrine of forum non conveniens ("FNC") presents a serious hurdle for alien plaintiffs seeking to sue PMCs in U.S. courts, but the outcome of any FNC challenge will hinge on the specific facts in each case, the alternative forum proposed, and the discretion of the presiding judge. Forum non conveniens allows a court to dismiss a case, in its discretion, when (1) "an alternative forum has jurisdiction to hear [a] case" and (2) "trial in the chosen forum would 'establish . . . oppressiveness and vexation to a defendant . . . out of all proportion to plaintiff's convenience', or . . . the 'chosen forum [is] inappropriate because of considerations affecting the court's own administrative and legal problems.'"¹⁴⁰

The first prong of the FNC test—existence of an adequate alternative forum—will ordinarily be met if "the defendant is amenable to process in the other jurisdiction" and the alternative forum "permits litigation of the subject

138. *Arias v. Dyncorp*, 517 F. Supp. 2d 221, 228 (D.D.C. 2007); *Doe v. Islamic Salvation Front*, 993 F. Supp. 3, 8 (D.D.C. 1998).

139. *See, e.g., Aldana v. Del Monte Fresh Produce, N.A.*, 416 F.3d 1242, 1247–48, 1264 (11th Cir. 2005); *Kadic v. Karadzic*, 70 F.3d 232, 245 (2d Cir. 1995); *Chavez v. Carranza*, 413 F. Supp. 2d 891, 899 (W.D. Tenn. 2005); *Doe v. Unocal, Corp.*, 963 F. Supp. 880, 890 (C.D. Cal. 1997).

140. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 (1981) (quoting *Koster v. Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 524 (1947)).

matter in dispute.”¹⁴¹

The second prong of the FNC test requires a weighing of private and public interests.¹⁴² Litigants’ private interests include

relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. . . . [And] enforceability of a judgment if one is obtained.¹⁴³

Public interest factors include the administrative difficulty caused by congested litigation in U.S. courts, the burden of jury duty on a community that may have no relation to the litigation, the “local interest in having localized controversies decided at home”, and the appropriateness of having a case decided where the governing law originates rather than in a forum that must “untangle problems in conflict of laws, and in law foreign to itself.”¹⁴⁴ A plaintiff’s choice of forum receives considerable deference, unless the plaintiff is a foreign citizen or resident,¹⁴⁵ and the moving party has the burden of establishing that the case should be dismissed under FNC.¹⁴⁶

ATS litigants suing PMCs for torts committed in Iraq will have to contend with two recent decisions: the U.S. District Court for the Eastern District of Virginia’s 2008 decision in *Galustian v. Peter*,¹⁴⁷ which dismissed a defamation action on FNC grounds after finding Iraq to be an adequate alternative forum, and the U.S. Supreme Court’s 2008 decision in *Munaf v. Geren*, which recognized Iraqi courts’ jurisdiction to try American citizens.¹⁴⁸ In reaching its decision on the FNC issue, the *Galustian* court acknowledged the dangerous conditions in Iraq and the challenges facing Westerners in Iraq, but found that the parties’ and relevant nonparties’ previous choice to reside in Iraq under such conditions weighed in favor of an FNC dismissal.¹⁴⁹ The court also noted that, if the court did not dismiss the case under the FNC doctrine, the defendant’s U.S.-based attorneys—who had not previously elected to reside in Iraq—would be forced to travel to Iraq to

141. *Galustian v. Peter*, 561 F. Supp. 2d 559, 562 (E.D. Va. 2008) (citations omitted).

142. *Piper*, 454 U.S. at 241.

143. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947).

144. *Id.* at 508–09.

145. *Piper*, 454 U.S. at 241–42 (approvingly reviewing district court’s analysis).

146. *See, e.g.,* *USHA (India), Ltd. v. Honeywell Int’l, Inc.*, 421 F.3d 129, 135 (2d Cir. 2005); *Kontoulas v. A.H. Robins Co.*, 745 F.2d 312, 315 (4th Cir. 1984).

147. 561 F. Supp. 2d 559 (E.D. Va. 2008). A D.C. district court also indicated that it would be receptive to an FNC argument that Iraq constituted an adequate alternative forum. *Nattah v. Bush*, 541 F. Supp. 2d 223, 237 nn.13 & 14 (D.D.C. 2008).

148. 128 S. Ct. 2207 (2008).

149. *Galustian*, 561 F. Supp. at 564 nn.5 & 6. The plaintiff operated a private security company in Iraq, and the defendant operated a forum for private security firms and other businesses involved in reconstruction in Iraq. *Id.* at 560–61.

provide adequate representation.¹⁵⁰ The *Galustian* court then dismissed the case, conditioning dismissal on defendant's submission to Iraqi courts' jurisdiction, defendant's waiver of any applicable statute of limitations defenses, and the U.S. government's waiver of immunity on defendant's behalf under Order 17.¹⁵¹ In *Munaf*, the U.S. Supreme Court refused to intervene in the exercise of Iraq's judicial sovereignty¹⁵² after an Iraqi court tried and sentenced Mohammad Munaf, an American citizen, in an hour and a half or less, with no evidence or witnesses presented.¹⁵³

Although FNC motions will be difficult to counter, ATS plaintiffs may respond in several ways. The first and most obvious argument they can raise is that other courts are not bound to follow the district court opinion in *Galustian*.

Second, even if courts look to *Galustian* for guidance, they should keep in mind that *Galustian* relied in part on the parties' choice to reside in Iraq. In many potential ATS cases against PMCs, the plaintiffs will not have made an actual choice to live in the dangerous conditions existing in the alternative forum being proposed, such as Iraq and Afghanistan.

Third, although *Munaf v. Geren* upheld Iraq's sovereign right to prosecute American citizens for crimes committed on Iraqi soil,¹⁵⁴ the Supreme Court did not consider the adequacy of Iraqi courts. The *Munaf* Court emphasized that states have exclusive and absolute jurisdiction over crimes committed within their own territory,¹⁵⁵ even when application of a foreign state's law would violate the U.S. Constitution.¹⁵⁶ In contrast to crimes, which are prosecuted by governments, tort actions are brought by private individuals whose choice of forum does not implicate a foreign state's right to prosecute criminal activity.

Fourth, regardless of the alternative forum being proposed, ATS plaintiffs will need to work with the facts relevant to their cases, such as the location of witnesses and evidence. Although courts are generally wary of finding a foreign forum inadequate,¹⁵⁷ plaintiffs may be able to dispute the adequacy of a forum "if it does not permit the reasonably prompt adjudication of a dispute, if the forum is not presently available, or if the forum provides a remedy so clearly unsatisfactory or inadequate that it is tantamount to no remedy at all."¹⁵⁸

150. *Id.* at 564 n.6.

151. *Id.* at 563 (conditioning dismissal on defendant's submission to Iraqi courts' jurisdiction and defendant's waiver of any applicable statute of limitations defenses); *Galustian v. Peter*, 570 F. Supp. 2d 836 (E.D. Va. 2008) (further conditioning previous dismissal on U.S. government's waiver of immunity on defendant's behalf under Order 17).

152. *Munaf*, 128 S. Ct. at 2221.

153. Lori Hinnant, *Iraqi Courts Mired in War's Chaos*, SEATTLE TIMES, Dec. 7, 2007, at A8.

154. *Munaf*, 128 S. Ct. at 2221.

155. *Id.* at 2221–22.

156. *Id.* at 2222.

157. *See, e.g.*, *Eastman Kodak Co. v. Kavlin*, 978 F. Supp. 1078, 1084 (S.D. Fla. 1997) ("The 'alternative forum is too corrupt to be adequate' argument does not enjoy a particularly impressive track record.")

158. *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 189 (2d Cir. 2009).

Evidence related to “corruption, delay or lack of due process in the foreign forum” will be relevant to the FNC analysis,¹⁵⁹ although courts have generally rejected arguments that corruption makes a foreign forum inadequate.¹⁶⁰

In cases raising Iraq as an alternative forum, victims will likely argue that extraordinary legal and practical hurdles prevent them from procuring legal redress in Iraq. At least thirty-one judges have been killed in Iraq since the 2003 U.S. invasion, and more than 150 lawyers have been killed during the same time period.¹⁶¹ Hundreds of lawyers have left Iraq, and hundreds more have been threatened and asked to abandon their cases.¹⁶² A senior U.S. military lawyer in Iraq commented in 2007 that the rule of law does not exist in Iraq, and the Iraqi Security Forces Independent Assessment Commission reported not only that the Iraqi National Police force should be disbanded because of corruption, but also that the ministry overseeing police forces was nonfunctioning.¹⁶³ Just last year, Iraq’s rule of law coordinator criticized Iraqi judges for ignoring evidence in favor of their instincts, and even now, basic elements of a judicial system, like court transcripts, simply do not exist in Iraq.¹⁶⁴ Although not much information on Iraq’s civil courts is widely available, the State Department’s 2009 human rights report on Iraq reveals that

[t]he legal framework exists, as well as an independent and impartial judiciary, for dealing with civil issues in lawsuits seeking damages for, or cessation of, human rights violations. . . . However, during the year the priorities of an understaffed judiciary and government administration focused on issues more directly related to security, and these procedures and remedies were not effectively implemented.¹⁶⁵

Given the priority placed on Iraq’s struggling criminal justice system, tort actions are unlikely to receive reasonably prompt adjudication in Iraq. After all, approximately forty thousand detainees were held in Iraqi custody at the end of 2008,¹⁶⁶ and the deputy justice minister admitted that “judges cannot keep up with the flood of cases.”¹⁶⁷ Fewer than half of detainees see a judge within one

159. *Id.*

160. *See, e.g., Eastman Kodak Co.*, 978 F. Supp. at 1084 (reviewing cases from the First, Second, and Fifth Circuits).

161. Hinnant, *supra* note 153. In 2008 alone, ten judges and eighty-six lawyers were killed. BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEP’T OF STATE, 2008 HUMAN RIGHTS REPORT: IRAQ (2009), available at <http://www.state.gov/g/drl/rls/hrrpt/2008/nea/119116.htm> [hereinafter BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEP’T OF STATE, IRAQ].

162. Hinnant, *supra* note 153.

163. Quinn Bowman, *Iraq in Transition: Violence, Legal System Drawbacks Lead to Detainee Buildup*, ONLINE NEWSHOUR, Sept. 21, 2007, http://www.pbs.org/newshour/indepth_coverage/middle_east/iraq/july-dec07/ruleoflaw_09-21.html.

164. Dina Temple-Raston, *Iraqis on Slow Road to Building Judicial System*, NPR, Mar. 27, 2008, <http://www.npr.org/templates/story/story.php?storyid=89162530>.

165. BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEP’T OF STATE, IRAQ, *supra* note 161.

166. *Id.*

167. Hinnant, *supra* note 153.

year of their detention, and many detainees meet their appointed defense attorneys only at their initial judicial hearing.¹⁶⁸ The State Department report goes on to mention “misappropriation of official authority”; “torture and other cruel, inhuman, or degrading treatment or punishment”; impunity; “denial of fair public trials”; “delays in resolving property restitution claims”; and “widespread, severe corruption at all levels of government.”¹⁶⁹ With a criminal justice system so completely overwhelmed and ineffective, a U.S. court could easily infer that Iraqi civil courts are unlikely to provide adequate legal redress for tort victims.

FNC motions may be difficult to overcome, but ATS plaintiffs should not give up hope of pursuing their claims. Defendants wary of litigation in a foreign forum may choose not to raise the issue, and if forum non conveniens is raised and accepted as a basis for dismissal, courts should be pressed to make the dismissal contingent on defendants’ submission to jurisdiction in the proposed alternative forum. Finally, assuming that an adequate alternative forum exists, plaintiffs may indeed seek justice in the alternative forum.

B. Exhaustion of Local Remedies

Whether exhaustion should be required for ATS claims is an open question,¹⁷⁰ but even if exhaustion is required, ATS plaintiffs suing PMCs should be able to argue that local remedies are inadequate and unavailable and that exhaustion therefore should not be required. Congress codified the Torture Victim Protection Act of 1991 (“TVPA”) as a note to the ATS, providing a federal cause of action for aliens and U.S. citizens bringing certain claims of torture and extrajudicial killing. Although the TVPA explicitly requires exhaustion of “adequate and available remedies in the place in which the conduct giving rise to the claim occurred”¹⁷¹ before a TVPA claim may be brought in U.S. courts, considerable debate exists as to whether this exhaustion requirement should apply to non-TVPA claims under the ATS. So far, “courts have avoided the issue by finding that even if exhaustion were to apply to the ATCA, local remedies would in those cases be futile and therefore need not be exhausted.”¹⁷² In the event that a court were to require exhaustion, however,

168. BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEP’T OF STATE, IRAQ, *supra* note 161.

169. *Id.*

170. *See Sarei v. Rio Tinto PLC*, 487 F.3d 1193, 1213 (9th Cir. 2007) (“Neither the Supreme Court nor any circuit court . . . has resolved the issue of whether the ATCA requires exhaustion of local remedies.”). Although the Ninth Circuit initially held that exhaustion was not required for non-TVPA ATS claims, *id.* at 1223, an en banc review resulted in a remand to the district court to determine whether to impose an exhaustion requirement. *See Sarei v. Rio Tinto, PLC*, 550 F.3d 822 (9th Cir. 2008) (en banc).

171. 28 U.S.C. § 1350 note (2006) (Torture Victim Protection Act).

172. *Sarei*, 487 F.3d at 1214 (citing *Enahoro v. Abubakar*, 408 F.3d 877, 889–90 (7th Cir. 2005); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 343 n.44 (S.D.N.Y. 2003)).

ATS plaintiffs could rely on arguments similar to those used to counter an FNC motion to dismiss—that the place in which the conduct giving rise to the claim occurred is unlikely to provide an “adequate and available” remedy.

C. Government Contractor Defense

Federal contractors facing common law claims have successfully avoided tort liability by claiming a government contractor defense based on principles of sovereign immunity,¹⁷³ but the government contractor defense has not yet extended and should not extend to cover PMCs violating the law of nations or a treaty of the United States. In the Supreme Court case where the government contractor defense originated, *Boyle v. United Technologies Corp.*, the Court found that state tort law significantly conflicted with and had to give way to “uniquely federal interests” in procuring equipment for the military.¹⁷⁴ As the Court stated, “Displacement will occur only where . . . a ‘significant conflict’ exists between an identifiable ‘federal policy or interest and the [operation] of state law,’ or the application of state law would ‘frustrate specific objectives’ of federal legislation.”¹⁷⁵ *Boyle* involved a wrongful death action, brought on behalf of a U.S. Marine pilot who died in a helicopter designed by the defendant-contractor. The Court found that the Federal Tort Claims Act (“FTCA”), which allows individuals to sue the U.S. government for torts committed by persons acting on behalf of the federal government, contained an explicit exception from liability that displaced state law holding government contractors liable for design defects in military equipment. The Court reasoned that the exception from liability avoided the “second-guessing” of discretionary judgments and protected the government from financial liability that it would otherwise avoid by application of federal sovereign immunity.¹⁷⁶

173. See, e.g., *Boyle v. United Techs. Corp.*, 487 U.S. 500 (1988) (applying government contractor defense to contractor that supplied aircraft to U.S. military); *Hudgens v. Bell Helicopters/Textron*, 328 F.3d 1329 (11th Cir. 2003) (applying government contractor defense to contractor that maintained Army aircraft); *McKay v. Rockwell Int’l Corp.*, 704 F.2d 444 (9th Cir. 1983) (applying government contractor defense to contractor that manufactured aircraft for U.S. military).

174. 487 U.S. at 504.

175. *Id.* at 507 (citation omitted).

176. See *id.* at 511–12. In *Boyle*, the discretionary judgment had to do with “the selection of the appropriate design for military equipment to be used by our Armed Forces.” *Id.* at 511. The potential financial liability took the form of increased contractor prices. *Id.* at 511–12. The *Boyle* majority suggested that the United States government, and not the government contractor, constituted the real party in interest. Instead of applying the principles of sovereign immunity (which deals with a government’s immunity from suit), however, the Court should have focused on official immunity (an individual government official’s immunity from suit). See, e.g., *Dugan v. Rank*, 372 U.S. 609, 620 (1963) (in determining whether a suit is against the government such that sovereign immunity would apply, “[t]he general rule is that a suit is against the sovereign if ‘the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,’ or if the effect of the judgment would be ‘to restrain the Government from acting, or to compel it to act.’” (citations omitted)). A natural comparison can be drawn between government employees, who enjoy official immunity, and government contractors who often

While the *Boyle* Court weighed the “uniquely federal interests” in insulating federal contractors against the interests underlying a *state tort law*, courts considering the government contractor defense in ATS suits must weigh the “uniquely federal interests” in insulating federal contractors from a *federal law*, the Alien Tort Statute. As argued below, the federal interests in

perform the same functions but have no immunity. This comparison was made by the dissent in *Boyle*, penned by Justice Brennan and joined by Justices Marshall and Blackmun. After discussing the doctrine of official immunity, the dissent concluded that “the essential justifications for official immunity do not support an extension to the Government contractor.” 487 U.S. at 524 (Brennan, J., dissenting).

The *Boyle* dissent’s conclusion finds support in the U.S. Supreme Court’s treatment of private contractors running prisons under state contract. In *Richardson v. McKnight*, 521 U.S. 399, 411–12 (1997), the Court refused official immunity for prison guards employed in privately run correctional facilities operating under state contract. The Court acknowledged the increased financial liability that would result from denying immunity, but found it significant that Tennessee had not chosen to extend sovereign immunity, though Tennessee presumably anticipated increased contract prices and the potential for contractors to be distracted from their duties if forced to defend such actions. The Court chose instead to focus instead on whether the extension of immunity would serve the central goal of official immunity—the prevention of unwarranted timidity by public officials. *Id.* at 400, 409–12. Finding that immunity would not serve that goal, the Court denied official immunity to the state contractors. *Id.*

Although the U.S. Supreme Court’s treatment of private corporations running prisons under federal contract in *Correctional Services Corp. v. Malesko*, 534 U.S. 61 (2001), points toward an opposite conclusion, *Malesko* is less applicable than *Richardson* in the PMC context. Rather than holding that official immunity did not extend to the federal contractors, the *Malesko* Court held that a federal inmate injured by an employee of the private corporation contracted to operate the facility had no implied right to file a *Bivens* action (the federal equivalent to a § 1983 claim, applying to individuals acting under color of federal law) against the corporation to redress the alleged constitutional violation. The Court’s justifications included the fact that (1) *Bivens*’s purpose of deterring individual federal officers from violating constitutional rights would not be served by extending a *Bivens* right of action to corporate defendants, *id.* at 70–71, (2) no federal prisoner in a government-run facility could sue the individual officer’s employer—the Bureau of Prisons or the U.S. government, *id.* at 71–72, and (3) the inmate had alternative remedies available, *id.* at 72–73. The logic of *Malesko*, however, does not apply to the PMC context. First, the *Malesko* Court spent a good portion of its opinion discussing *Bivens*’s status as a judicially created remedy strictly limited to violations of the Fourth and Eighth Amendments and the Due Process Clause of the Fifth Amendment. *Id.* at 66–67. While the judiciary might understandably be wary of extending the scope of a judicially created remedy too far, the Alien Tort Statute is a *congressionally* created remedy. Furthermore, unlike the prisoners in *Malesko*, plaintiffs suffering torts at the hands of PMCs may not have access to alternative remedies. See, for example, the discussion of availability of alternative fora in Part II.A *supra*. Finally, the rationale underpinning official immunity does not support extension of such immunity to federal contractors. In *Scheuer v. Rhodes*, which established qualified immunity for executive officials, the Supreme Court explained the rationale for official immunity:

- (1) the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion;
- (2) the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good.

416 U.S. 232, 239–40 (1974). Whereas government officers are legally obligated to work for the public good and may, by virtue of their public office, be presumed to operate in good faith, PMCs are unaccountable to the public at large. Given their explicit profit motive, PMCs are unlikely to suffer from a problem of overdeterrence. As the *Richardson* Court found, “marketplace pressures provide the private firm with strong incentives to avoid overly timid, insufficiently vigorous, unduly fearful, or ‘nonarduous’ employee job performance.” 521 U.S. at 410.

insulating federal contractors from liability are relatively weak in comparison to the federal interests underlying the ATS.

The *Boyle* Court discussed the federal interests underlying the government contractor defense by reference to the federal interests served by sovereign immunity. This analysis makes sense, given that the government contractor defense operates as a de facto extension of immunity. A closer analysis of the federal interests underlying the doctrine of sovereign immunity, however, suggests that courts should narrowly construe the government contractor defense¹⁷⁷ because these interests are relatively weak when applied to PMCs. First, plaintiffs filing ATS suits against PMCs can often establish state action without implicating the discretionary judgments or official policies of the U.S. government. As a practical matter, the human rights abuses that ATS plaintiffs allege will presumably violate official U.S. policies in most cases,¹⁷⁸ and where the discretionary judgments of government officials are involved, the political question doctrine will likely block judicial review anyway.¹⁷⁹

Second, avoiding indirect financial liability for the federal government—an interest the Supreme Court raised in *Boyle*¹⁸⁰—is not an overriding concern in the context of sovereign immunity.¹⁸¹ Sovereign immunity protects against direct financial liability, but as the Supreme Court explained in *Federal Maritime Commission v. South Carolina State Ports Authority*, “the primary function of sovereign immunity is not to protect state treasuries . . . but to afford the States the dignity and respect due sovereign entities.”¹⁸² “Sovereign immunity does not merely constitute a defense to monetary liability or even to all types of liability. Rather, it provides an immunity from suit.”¹⁸³ As the *Boyle* dissent further pointed out, the Court declined to displace state law with federal common law in a number of other cases involving the possibility of indirect financial liability (via increased prices from contractors).¹⁸⁴ Even where sovereign immunity insulates the government from suit, the government may nevertheless assume indirect financial liability—for example, in civil rights

177. At least two courts have declined to extend *Boyle* to recognize immunity for contractors. *See* *United States ex rel. Ali v. Daniel, Mann, Johnson & Mendenhall*, 355 F.3d 1140, 1146–47 (9th Cir. 2004) (“the government contractor defense does not confer sovereign immunity on contractors”); *Carmichael v. Kellogg, Brown & Root Servs., Inc.*, 450 F. Supp. 2d 1373, 1377 n.3 (N.D. Ga. 2006) (“It is important to note that the government contractor defense created by *Boyle* results in the preemption of certain state law causes of action, not a grant of immunity to contractors.”).

178. *See, e.g., supra* text accompanying note 91.

179. *See* subsection D, *infra*, on the political question doctrine.

180. *See Boyle*, 487 U.S. at 511–12.

181. *See Fed. Mar. Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743 (2002).

182. *Id.* at 769.

183. *Id.* at 766. *See also* *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 431 (1997) (rejecting the argument that “ultimate financial liability” should control “whether [a party] is the kind of entity that should be treated as an arm of the State”).

184. 487 U.S. at 521–22 (Brennan, J., dissenting).

suits nominally filed against individual officials.¹⁸⁵ The D.C. Circuit also noted in *Gray v. Bell* that the “[f]ear that enormous liabilities might threaten public solvency” constitutes a less forceful justification for federal sovereign immunity than for state sovereign immunity and common law municipal immunity.¹⁸⁶ Moreover, the government may reduce its exposure to indirect financial liability from ATS claims by imposing greater control over PMCs and thus preventing PMC torts from occurring in the first place.

Compared with the rather weak federal interests in extending a sovereign immunity defense to PMCs, the federal interests in allowing ATS cases to proceed against PMCs are strong. First, because domestic law incorporates the law of nations, the United States has an interest in upholding the law of nations and U.S. treaties and in having such claims adjudicated in U.S. courts, if anywhere. In a U.S. court, the government can file a statement of interest, to which the court will accord deference.¹⁸⁷ Second, if the actions of American PMCs are to be evaluated in a court of law, a fair trial and outcome are more likely to occur if the case is adjudicated in the United States rather than in a country like Iraq.¹⁸⁸ Third, litigation may help to deter future abuses and thus uphold official U.S. policies.

Given that the rationales underlying sovereign immunity do not apply in the PMC context and that the federal government has significant interests in allowing ATS cases to go forward against PMCs, it would be imprudent for courts to extend the government contractor defense to PMCs in ATS cases.¹⁸⁹

185. “In most cases compensation for official misconduct must be sought from the individual public official [although] these defendants are almost always reimbursed by the government that employs them” JOHN C. JEFFRIES ET AL., *CIVIL RIGHTS ACTIONS: ENFORCING THE CONSTITUTION* 111 (2d ed. 2007). “For obvious reasons, governments generally choose to protect their employees against damage liability, either by themselves providing defense counsel and indemnifying the employees against loss or, less commonly, by purchasing insurance.” *Id.* at 111 n.a.

186. 712 F.2d 490, 511 n.67 (D.C. Cir. 1983) (citing *Rayonier, Inc. v. United States*, 352 U.S. 315, 320 (1956) (“[F]or obvious reasons the United States cannot be equated with a municipality, which conceivably might be rendered bankrupt if it were subject to [huge] liability for the negligence of its [employees]”).

187. See, e.g., *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004) (suggesting that, when the U.S. government files a statement of interest, “there is a strong argument that federal courts should give serious weight to the Executive Branch’s view of the case’s impact on foreign policy”); Stephens, *Judicial Deference*, *supra* note 36, at 773, 780–87 (arguing that, with the exception of George W. Bush’s administration, courts have afforded great deference to executive branch views on the impact of a particular case on foreign affairs, although they have been careful to state that they are not required to follow the executive branch’s views).

188. See, for example, the discussion of Iraq’s legal system in Part II.A, *infra*. Mohammad Munaf experienced the system’s shortcomings firsthand, when he was tried and sentenced in an hour and a half or less, without evidence or witnesses. Hinnant, *supra* note 153.

189. For other arguments against applying the government contractor defense in ATS suits, see Ryan Micallef, Note, *Liability Laundering and Denial of Justice: Conflicts Between the Alien Tort Statute and the Government Contract Defense*, 71 Brook. L. Rev. 1375, 1408–13 (2006) (arguing that application of the defense would (1) create a loophole allowing the government to “wash its hands of political or financial responsibility” for “dirty work” assigned to contractors,

D. Political Question Doctrine

The political question doctrine presents another substantial challenge to ATS litigation against PMCs. In suits involving foreign affairs, defendants and the executive branch of the U.S. government will often claim that the issues present nonjusticiable political questions. Although the outcome of political question assertions should turn on the circumstances of each case, ATS plaintiffs must be careful in crafting their complaints. An ATS plaintiff must establish why the court should treat a PMC's actions as state actions yet simultaneously avoid implying the existence of any political questions. The relevant factors in determining justiciability are:

[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.¹⁹⁰

As indicated by the vagueness of these factors, the political question doctrine provides courts with a great deal of discretion in determining justiciability. Courts tend to accord great deference to executive branch views on the justiciability of cases involving foreign affairs,¹⁹¹ but the doctrine does not prevent consideration of "every dispute that can arguably be connected to 'combat'"¹⁹² nor every "action [that] is 'taken in the ordinary exercise of discretion in the conduct of war.'"¹⁹³

The first factor in the political question analysis—a textually demonstrable constitutional commitment of the issue to a coordinate political department—favors dismissal of PMC cases if the litigation requires examination of a decision by the military that would typically be insulated from judicial review.¹⁹⁴ Not all military decisions, however, are shielded under this

(2) threaten national security and credibility by creating a threat of terrorist backlash for unpunished violations and conveying "impertinence to the international community," and (3) defy the principle that every right must have a remedy).

190. *Ibrahim v. Titan Corp.*, 391 F. Supp. 2d 10, 15 (D.D.C. 2005) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

191. See *Stephens*, *Judicial Deference*, *supra* note 36, at 773, 780–87.

192. *Ibrahim*, 391 F. Supp. 2d at 15 (citing *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004)).

193. *Id.* (quoting *Koochi v. United States*, 976 F.2d 1328, 1332 (9th Cir. 1992)). For a more in-depth discussion of the political question doctrine's inapplicability in the ATS and PMC context, see *Ibrahim*, 391 F. Supp. 2d at 15–16.

194. *Lane v. Halliburton*, 529 F.3d 548, 560 (5th Cir. 2008); *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1359–60 (11th Cir. 2007).

first factor.¹⁹⁵ The types of military decisions insulated from review are those involving “core military decisions, including . . . ‘communication, training, and drill procedures’” and “[t]he strategy and tactics employed on the battlefield.”¹⁹⁶ In *Lane v. Halliburton*, civilians accused their PMC employer of misrepresenting the risks of working in Iraq to induce acceptance of employment.¹⁹⁷ In *McMahon v. Presidential Airways, Inc.*, survivors of U.S. soldiers killed in a plane crash brought a wrongful death suit against the PMC that owned and operated the U.S. Army’s plane.¹⁹⁸ Because neither case required the court to scrutinize a military decision, the first factor in the political question analysis was found to favor nondismissal.¹⁹⁹ *Lane* stated that this was the appropriate outcome in ordinary tort suits,²⁰⁰ whereas *McMahon* reasoned that the plaintiff had not challenged any discrete areas of responsibility retained by the military for the flights.²⁰¹

Like *Lane* and *McMahon*, many ATS actions against PMCs should not require the court to examine core military decisions. As a threshold issue, Part I.A of this Comment established that the state action requirement can be met in certain situations without implicating any official military decisions. Beyond the state action requirement, PMC cases under the ATS are unlikely to call into question any military decisions. The Blackwater shootings at Nisoor Square on September 16, 2007, for example, occurred in defiance of a military command not to fire except in self-defense and in the absence of authority for the PMCs to even leave their section of Baghdad.²⁰² Similarly, *Arias*—another ATS case—involved plaintiffs in Ecuador who were allegedly harmed by a PMC’s aerial spraying of pesticides pursuant to a U.S. government contract to eradicate cocaine and heroin fields in Colombia.²⁰³ The court held that the case did not require review of the executive branch’s foreign policy decision because it did not challenge the legality of the U.S. government’s plan for Colombia, and that the case did not question implementation of the plan because the spraying in Ecuador was not part of the plan.²⁰⁴

The second factor in the political question analysis—lack of judicially discoverable and manageable standards—also favors justiciability, although at

195. As *Koohi* stated, “The Supreme Court has made clear that the federal courts are capable of reviewing military decisions, particularly when those decisions cause injury to civilians . . . [T]his is true in time of war as well as in time of peace.” 976 F.2d 1328, 1331 (9th Cir. 1992) (citing *The Paquete Habana*, 175 U.S. 677 (1900)).

196. *McMahon*, 502 F.3d at 1359 (discussing *Aktepe v. United States*, 105 F.3d 1400 (11th Cir. 1997); *Tiffany v. United States*, 931 F.2d 271 (4th Cir. 1991)).

197. 529 F.3d at 554–55.

198. 502 F.3d at 1336.

199. *Lane*, 529 F.3d at 560; *McMahon*, 502 F.3d at 1359–60.

200. 529 F.3d at 560.

201. 502 F.3d at 1361.

202. Meyer, *supra* note 15.

203. *Arias v. Dyncorp*, 517 F. Supp. 2d 221, 223–24 (D.D.C. 2007).

204. *Id.* at 225.

least one case involving a PMC has found otherwise. In *Fisher v. Halliburton*, employees sued their PMC employer for using a civilian convoy as a decoy to cover a later convoy.²⁰⁵ The district court decided that no judicial standards existed to determine whether the Army had given adequate intelligence to the PMC, whether Army forces deployed with the PMC were sufficient, and whether the Army could or should have overridden the PMC's authority to deploy or recall convoys.²⁰⁶ Other courts, however, have stated that actions for damages are "particularly judicially manageable," compared with actions for injunctive relief, which may require courts to undertake "operational decision-making beyond their competence."²⁰⁷

The third and fourth factors in the political question analysis are highly subject to judicial discretion, while the fifth and sixth factors weigh in favor of justiciability. The third factor looks to whether courts are called on to make policy determinations beyond the bounds of judicial discretion, but the bounds of judicial discretion may be read expansively or narrowly, depending on the judge. The fourth factor looks to whether resolution of the case expresses a lack of respect for the executive or legislative branches. The expression of respect, however, is highly subjective. With regard to the fifth and sixth factors, there is no unusual need for unquestioning adherence to any past political decisions in ATS cases involving PMCs, nor any serious potential for embarrassment stemming from different pronouncements made by various departments in such cases because official U.S. policies will not be implicated in many cases.

Since any one of the factors in the political question analysis can render a case nonjusticiable, the fate of ATS suits against PMCs will often depend on the exercise of courts' discretion. Courts should keep in mind, however, cases like *Bentzlin v. Hughes Aircraft*, which noted that, "generally, civilians injured at the hands of the military do not raise political questions,"²⁰⁸ and *Whitaker v. Kellogg Brown & Root*, which "recognize[d] that *Gilligan* and later cases suggest that a damages suit against the United States for unlawful conduct by military personnel would not be barred by political question doctrine in some circumstances, but these cases focus on injury to *civilians*."²⁰⁹

E. State Secrets Privilege

Although the state secrets privilege has barred one ATS suit against a PMC involved in the Central Intelligence Agency's covert rendition

205. 454 F. Supp. 2d 637, 638–39, 643 (S.D. Tex. 2006).

206. *Id.*

207. *Koohi v. United States*, 976 F.2d 1328, 1332 (9th Cir. 1992).

208. 833 F. Supp. 1486, 1498 (C.D. Cal. 1993).

209. 444 F. Supp. 2d 1277, 1281 n.4 (M.D. Ga. 2006) (citing *Gilligan v. Morgan*, 413 U.S. 1, 11 (1973) and *Koohi*, 976 F.2d at 1332–33). If a damages suit alleging unlawful conduct by military personnel would be justiciable, as suggested by *Koohi* and *Gilligan*, then a damages suit alleging unlawful conduct by military contractors would certainly seem justiciable as well.

program,²¹⁰ the privilege should not apply in most ATS cases against PMCs. The government can invoke the common law state secrets privilege to dismiss a suit if “the ‘very subject matter of the suit’ is secret”²¹¹ or to prevent disclosure of information if national security will be injured.²¹² The Ninth Circuit has interpreted the former scenario to apply only in cases where the plaintiff has a secret agreement with the government and the lawsuit would necessarily reveal this relationship.²¹³ Thus, this scenario would not apply to third-party alien plaintiffs seeking to sue PMCs under the ATS. The government or PMC defendants could, however, invoke the evidentiary state secrets privilege. In such cases, “the privilege may not be used to shield any material not strictly necessary to prevent injury to national security; and, whenever possible, sensitive information must be disentangled from nonsensitive information to allow for the release of the latter.”²¹⁴ If evidence shielded by the state secrets privilege is indispensable to the establishment of a prima facie case or a valid defense, then the case must be dismissed.²¹⁵

In *El-Masri v. United States*, the government successfully asserted the state secrets privilege in an ATS action against PMCs allegedly involved in the United States’ program of extraordinary rendition.²¹⁶ The Fourth Circuit ruled that establishment of a prima facie case would require “evidence that exposes how the CIA organizes, staffs, and supervises its most sensitive intelligence operations” as well as “the existence and details of CIA espionage contracts, an endeavor practically indistinguishable from that categorically barred by” *Totten v. United States*.²¹⁷ Additionally, a proper defense would necessarily require privileged evidence as to the CIA’s means and methods of intelligence gathering.²¹⁸ The court explained:

If, for example, the truth is that El-Masri was detained by the CIA but his description of his treatment is inaccurate, that fact could be established only by disclosure of the actual circumstances of his detention, and its proof would require testimony by the personnel involved. Or, if El-Masri was in fact detained as he describes, but the operation was conducted by some governmental entity other than the CIA, or another government entirely, that information would be privileged.²¹⁹

210. *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007).

211. *Mohamed v. Jeppesen Dataplan, Inc.*, 563 F.3d 992, 1000 (9th Cir. 2009) (citing *Totten v. United States*, 92 U.S. 105 (1875)).

212. *Id.* at 1000–01 (citing *United States v. Reynolds*, 345 U.S. 1 (1953)).

213. *Id.* at 1001–02 (discussing *Totten*).

214. *Ellsberg v. Mitchell*, 709 F.2d 51, 57 (D.C. Cir. 1983).

215. *Jeppesen*, 563 F.3d at 1006.

216. 479 F.3d 296 (4th Cir. 2007). As the Fourth Circuit explained, *Totten* established an absolute bar to enforcement of confidential agreements to conduct espionage. *Id.* at 306.

217. *Id.* at 309.

218. *Id.*

219. *Id.*

Moreover, “any of the possible defenses suggested above would require the production of witnesses whose identities are confidential and evidence the very existence of which is a state secret.”²²⁰ Following these considerations, the Fourth Circuit affirmed dismissal.²²¹

In stark contrast to *El-Masri* stands *Mohamed v. Jeppesen Dataplan, Inc.*, another case against a PMC providing logistical support to the CIA’s extraordinary rendition program. In *Jeppesen*, the Ninth Circuit rejected the district court’s finding that the very subject matter of the suit constituted a state secret.²²² Remanding the case, the Ninth Circuit emphasized the need to apply the evidentiary state secrets privilege “on an item-by-item basis, rather than foreclosing litigation altogether at the outset”²²³ and stressed that the evidentiary privilege “cannot be invoked to prevent a litigant from persuading a jury of the truth or falsity of an allegation by reference to non-privileged evidence.”²²⁴

As evidenced by *Jeppesen*, recognition of the state secrets privilege in *El-Masri* does not doom all ATS actions against PMCs. The circuits’ differing opinions indicate room for debate as to application of the state secrets privilege. Additionally, *El-Masri* and *Jeppesen* considered a rather unique fact pattern involving a secret CIA intelligence program supported by PMCs. The majority of PMCs, though, perform their duties in a more open context, governed by U.S. military standards that are publicly available.²²⁵ Take, for example, the September 2007 incident in which Blackwater contractors killed and injured dozens of Iraqi civilians in a public square.²²⁶ This incident, which occurred at a busy public intersection, hardly seems to implicate any state secrets.²²⁷ Though the military may not widely publicize information about PMC contracts, there is no reason to believe that the military hides this information for national security purposes. Similarly, the operations at Abu Ghraib have been extensively explored and exposed, without endangering any state secrets.²²⁸ Thus, the state secrets privilege should not present an insurmountable obstacle for most ATS plaintiffs suing PMCs.

220. *Id.* at 310.

221. *Id.* at 313.

222. *Mohamed v. Jeppesen Dataplan, Inc.*, 563 F.3d 992, 997 (9th Cir. 2009).

223. *Id.* at 1003.

224. *Id.* at 1005.

225. *See, e.g.*, CONG. BUDGET OFFICE, *supra* note 4; ELSEA ET AL., *supra* note 5; HUMAN RIGHTS FIRST, PRIVATE SECURITY CONTRACTORS, *supra* note 17; U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 22; Montreux Document, *supra* note 22.

226. *See Meyer, supra* note 15 (recounting the incident).

227. *See id.* (“That day in Baghdad, around the busy traffic circle at Nisoor Square, Iraqi citizens were going to lunch, stopping at the market, traveling with their families and children,” said Joseph Persichini Jr., assistant director in charge of the FBI’s Washington Field Office, which led the investigation.”) Though this incident received enormous attention, many similar incidents involving PMCs have come to light. *See, e.g.*, HUMAN RIGHTS FIRST, PRIVATE SECURITY CONTRACTORS, *supra* note 17.

228. *See, e.g.*, FAY, *supra* note 11.

The foregoing review of defenses reveals why plaintiffs may be unsuccessful in ATS actions against PMCs, but these defenses should affect a relatively small number of cases. When raised in the course of a lawsuit, forum non conveniens, the political question doctrine, and the state secrets privilege should be considered carefully in the context of each case, rather than as a blanket means of dismissing all ATS lawsuits against PMCs. Because the justifications for sovereign immunity have little application in the PMC context and substantial interests underlie ATS litigation, the government contractor defense should not extend to PMCs violating the law of nations or a U.S. treaty. Finally, little or no support exists for requiring alien plaintiffs to exhaust local remedies before suing PMCs under the ATS. Depending on the circumstances of the case, then, the ATS should be a viable means of holding PMCs accountable for their tort violations of the law of the nations and U.S. treaties.

III

THE IMPORTANCE OF TORT LIABILITY FOR PMCs UNDER THE ATS

Whereas the previous sections reviewed the legal bases for holding PMCs accountable under the ATS, this Section takes a step back to consider broader policy arguments for and against PMC accountability. Why should anyone other than potential litigants care whether PMCs are sued under the ATS? What do the government and the public have at stake in the fate of these cases? What are the consequences of holding PMCs liable under the ATS? The answers to these questions indicate that the value of allowing ATS lawsuits to go forward—at least where forum non conveniens, political questions, and state secrets are not implicated—outweighs the potential downsides of doing so.

A. Arguments Against Holding PMCs Liable Under the ATS

Several normative arguments can be made against holding PMCs accountable under the ATS, but many fall apart under close scrutiny. First, although courts often worry about the risk of uncontrolled litigation, the increase in ATS cases against PMCs is unlikely to be significant. The challenges and defenses discussed earlier in this Comment, in addition to other litigation strategies, will likely lead to dismissal in at least some cases. In other cases, would-be plaintiffs from distant countries like Iraq and Afghanistan will not have the time, finances, legal representation, or inclination to pursue their claims in U.S. courts. Furthermore, the intense scrutiny of PMCs over the last few years, coupled with recent military and governmental reforms, are likely to reduce the number of PMC-related tort violations of the law of nations and U.S. treaties.²²⁹

Second, from an economic standpoint, ATS liability may arguably lead to overdeterrence in the form of inefficient and overly risk-averse behavior by

229. See *supra* notes 21–26 and accompanying text.

PMCs, but the degree of such overdeterrence is unlikely to be significant. ATS lawsuits can be costly—involving expensive discovery, potential damage to corporate reputations, and possible punitive damages, on top of actual damages²³⁰—but as private companies focused on their profit margins, PMCs have plenty of incentive to find their way to the most efficient outcome. Additionally, as discussed in the preceding paragraph, PMCs are unlikely to see a tremendous increase in ATS litigation, so the risk of incurring such costs should be relatively small.

Third, although it may seem inequitable for a PMC to be sued without being able to implead its sovereign client,²³¹ such concerns are overstated. This argument assumes government wrongdoing or complicity, which may not always be the case. Where the government participated in the alleged tort, however, this so-called inequity may be diminished under the tort principle of comparative fault. If a portion of the fault is attributed to the government, the PMC's responsibility for damages may be correspondingly reduced. Even in the absence of a comparative fault calculation of damages, however, the concern with inequity is unnecessary. PMCs are sophisticated, repeat players that freely contract with the government, and they can incorporate the cost of any "inequitable" liability into their contract bids and contract terms.²³²

Fourth, critics may fear that tort liability will make PMCs less willing to provide their services to the U.S. government, but there is little indication that this will actually happen. PMCs may raise their prices, but few PMCs are likely to exit the market entirely. In July 2008, Blackwater exited the private security market after facing unprecedented scrutiny over its employees' actions in Iraq,²³³ but Blackwater was an exceptional case. More than any other PMC, Blackwater faced intense scrutiny and pressure from the media, Congress, and advocacy groups like Human Rights First.²³⁴ In addition to being at the center of a congressional investigation in 2008, Blackwater was targeted by U.S. Representative Henry Waxman, who asked the Internal Revenue Service, the Department of Labor, and the Small Business Administration to investigate the

230. GARY CLYDE HUFBAUER & NICHOLAS K. MITROKOSTAS, *AWAKENING MONSTER: THE ALIEN TORT STATUTE OF 1789*, at 7 (2003).

231. Abigail Hing Wen, Note, *Suing the Sovereign's Servant: The Implications of Privatization for the Scope of Foreign Sovereign Immunities*, 103 COLUM. L. REV. 1538, 1569 (2003).

232. See Alford, *supra* note 23, at 517–28 (discussing arbitration clauses and sovereign immunity waivers to allocate costs between sovereigns and the private parties with which they contract).

233. Elana Schor, *Blackwater to Leave Security Business Following Problems in Iraq*, *GUARDIAN.CO.UK*, July 22, 2008, <http://www.guardian.co.uk/world/2008/jul/22/usa.iraq>.

234. See, e.g., HUMAN RIGHTS FIRST, *PRIVATE SECURITY CONTRACTORS*, *supra* note 17, at 6–7 (profiling Blackwater and incidents involving Blackwater employees' use of force, and mentioning that "[i]n the aftermath of the Nisoor Square incident, intense media attention focused on Blackwater"); MAJORITY STAFF OF H. COMM. ON OVERSIGHT AND GOVERNMENT REFORM, 110TH CONG., *supra* note 13; newspaper articles *supra* note 21.

company for tax evasion and improper contracting practices.²³⁵ Since Blackwater's announced departure from the private security business, however, the U.S. government has reported no shortage of PMCs.

Fifth, critics may argue that ATS litigation is unnecessary in light of alternative methods of deterring PMC abuses, such as legislative regulation, criminal prosecution, or reforms within the military to ensure greater management of contractors. ATS litigation, however, serves broader purposes than mere deterrence. As argued further below, tort liability (1) forces perpetrators to directly acknowledge their victims and make restitution; (2) deters governments from contracting out functions that either should not be performed at all, such as torture, or that should be performed by state actors, such as particularly risky security details; and (3) recognizes that a legal forum should exist for tort violations of the law of nations and U.S. treaties, no matter where such violations occur.

Finally, ATS litigation against PMCs may be criticized for undermining the concept of sovereign immunity. Unless waived, sovereign immunity prevents courts from making judgments that would require payment from public funds.²³⁶ Some may argue that ATS litigation against PMCs effectively abrogates a government's sovereign immunity, because governments will eventually be forced to internalize the cost of contractors' liability via increased contract prices. As discussed in relation to the government contractor defense, however, sovereign immunity is not meant to allow the government to avoid damages where damages are due.²³⁷ Thus, PMC liability does not subvert the financial rationale underlying sovereign immunity.

B. Arguments for PMC Liability Under the ATS

Compared with the rather weak arguments against PMC liability, the justifications for holding PMCs accountable under the ATS are strong. The most persuasive of these arguments is the opportunity to provide legal redress, empowerment, and justice for tort victims. The *Ibrahim* court acknowledged, for example, that Iraqi victims who cannot resort to ATS litigation are unlikely to receive compensation elsewhere because the Iraqi legal system is still developing.²³⁸ This argument applies in other countries as well.²³⁹ The value of legal redress, however, extends beyond mere compensation. In addition to

235. Joseph Neff, *Security Firm Faces More Scrutiny*, THE NEWS & OBSERVER, Mar. 11, 2008, at A1.

236. See, e.g., *Dugan v. Rank*, 372 U.S. 609, 620 (1963).

237. See *supra* notes 182–184.

238. *Ibrahim v. Titan Corp.*, 391 F. Supp. 2d 10, 16–17 n.4 (D.D.C. 2005) (stating that no alternative methods of redress had been established as viable and assuming that “it is either this court or nothing”).

239. See, e.g., BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEP'T OF STATE, 2008 HUMAN RIGHTS REPORT: AFGHANISTAN (2009), <http://www.state.gov/g/drl/rls/hrrpt/2008/sca/119131.htm> (describing the “severe inadequacy of the judicial system”).

compensating for injuries, a judgment for damages may represent “a ‘spiritual victory’ over an oppressor, recogniz[ing] concrete damage to individuals . . . symbolic of a plaintiff’s loss.”²⁴⁰ Aside from damages, ATS plaintiffs may seek injunctive relief,²⁴¹ the restoration and promotion of a sense of agency,²⁴² “access to a narrative forum that enables the victim to name her experience,”²⁴³ and “a ‘controlled substitute for vigilantism’ or reprisals.”²⁴⁴ Where an entire community has been victimized, “litigation can generate a form of collective memory, particularly in the face of counternarratives that would deny the existence of violations or portray victims as subversives, deserving of punishment.”²⁴⁵ Indeed, alternative remedies and forms of deterrence may not include the opportunity to tell one’s story before a court of law, to confront and question wrongdoers, or to receive a final pronouncement by a neutral decision-maker. These elements of the legal process may be significant considerations for some tort victims.

The deterrence of future abuses is another important justification for tort liability in U.S. courts. As discussed earlier in this Comment, alien plaintiffs are unlikely to receive tort redress in countries like Iraq, and criminal prosecutions of PMC abuses have been rare thus far.²⁴⁶ Reforms to the U.S. government’s control and oversight of PMCs may help to prevent some abuses, but the U.S. government’s heavy reliance on PMCs may make it reluctant to take serious actions against PMCs for human rights abuses. For example, even after the September 16, 2007, shootings at Nisoor Square and accusations of tax evasion and weapons smuggling by Blackwater, the U.S. State Department extended its contract with Blackwater in 2008 for another year at a value of \$240 million.²⁴⁷ Similarly, the General Services Administration reviewed CACI’s task orders after the Abu Ghraib abuses came

240. Beth Van Schaack, *With All Deliberate Speed: Civil Human Rights Litigation as a Tool for Social Change*, 57 VAND. L. REV. 2305, 2322 (2004) (footnote omitted).

241. See *id.* at 2327–29 (discussing the possibility of injunctive relief in ATS cases and the injunctive relief sought in *Doe v. Unocal*, 67 F. Supp. 2d 1140 (C.D. Cal. 1999)).

242. *Id.* at 2318.

243. *Id.*

244. *Id.* at 2319.

245. *Id.* at 2320.

246. To date, there has been one PMC case filed under the Military Extraterritorial Jurisdiction Act for Blackwater’s September 16, 2007 shooting at Nisoor Square, see Editorial, *Contractors on Trial*, WASH. POST, Dec. 9, 2008, at A18 (reporting on indictment of five Blackwater employees involved in the incident), and Raheem Salman and Kimi Yoshino, *Blackwater Guards Are to Be Arraigned*, L.A. TIMES, Jan. 6, 2009, at A3 (reporting on the defendants’ arraignment) and one PMC case filed under the Uniform Code of Military Justice, see *Contractor Convicted in Rare Court-Martial*, MILITARY TIMES, June 23, 2008, http://www.militarytimes.com/news/2008/06/ap_contractor_court martial_062208/ (reporting on the military court conviction of an Iraqi-Canadian translator, Alaa “Alex” Mohammad Ali, who was charged with assault against another contractor but convicted only of lesser charges to which he pled guilty).

247. Brian Ross, *Despite Investigations, Blackwater to Keep Working in Iraq*, ABC NEWS, Apr. 4, 2008, <http://i.abcnews.com/Blotter/Story?id=4592370&page=1>.

to light, but the federal government ultimately decided not to suspend CACI.²⁴⁸ Financial liability, however, can provide corporate PMCs with an additional incentive to avoid tort actions. To the extent that PMCs are forced to internalize the cost of their torts, liability will likely produce more careful screening by corporate PMCs for new hires, greater investments in training, and greater attention to and compliance with the law of nations and U.S. treaty obligations.

Another justification for PMC liability under the ATS is the signal that liability sends to domestic and international audiences. PMCs under contract with the American government operate as *de facto* representatives of the American public when they operate abroad, and their lack of accountability in Iraq “has had the effect . . . of undermining Iraqi trust in the American forces, and in the wider American enterprise in Iraq, since many Iraqis who survive or witness negligent shootings make no distinction between an American in uniform and one in the paramilitary guise of a contractor.”²⁴⁹ Accountability under the ATS therefore reassures the public in America and abroad that the U.S. government’s judicial branch will hold PMCs responsible for their torts.

Liability also serves as a check on the potential abuse of governmental power. Given the lack of accountability for most PMC abuses thus far, the U.S. government can essentially circumvent customary international human rights law by contracting with PMCs.²⁵⁰ Government reviews of PMC abuses may reveal little to the public, and once the public grows tired of hearing about PMC abuses, national attention will turn to another topic. Rather than relying on the government or military to bring PMCs to criminal justice, alien tort victims could initiate suit against their tortfeasors under the ATS and thereby help to check any governmental abuses.

Finally, if tort claims against PMCs are to be adjudicated anywhere, the United States government has an interest in having them litigated in U.S. courts. Where allegations are directed toward American contractors acting under the direction and supervision of the U.S. military, for example, government policy and involvement may be called into question. In such cases, litigation in a U.S. court may provide a better opportunity for the U.S. government to intervene and raise objections, and the U.S. government may receive greater deference in its own courts than abroad.²⁵¹

248. Scott Shane & Ron Nixon, *In Washington, Contractors Take on Biggest Role Ever*, N.Y. TIMES, Feb. 4, 2007, § 1, at 1.

249. John F. Burns, *The Deadly Game of Private Security*, N.Y. TIMES, Sept. 23, 2007, at § 4, at 1; see also Martha Minow, *Outsourcing Power: How Privatizing Military Efforts Challenges Accountability, Professionalism, and Democracy*, 46 B.C. L. REV. 989, 1023 (2005) (arguing that “[t]he Iraqis do not distinguish between the civilian contractors and the U.S. military in judging the conduct of the U.S. occupation”).

250. Sharing this viewpoint, Martha Minow warns that, “by using private contractors, the government can avoid checks and balances in a democratic system” and that “[f]oreign policy can be shaped even more insidiously by reliance on private contractors.” Minow, *supra* note 249.

251. See *supra* note 187.

CONCLUSION

PMC-committed torts may be an unavoidable consequence of the privatization of military services, but the ATS can be a powerful tool for holding PMC tortfeasors accountable. Courts should carefully examine the facts of each particular case when presented with such challenges and defenses as *forum non conveniens*, failure to exhaust local remedies, the political question doctrine, the government contractor defense, and the state secrets privilege. In addition to providing alien plaintiffs with an opportunity to seek redress, ATS cases against PMCs have the potential to positively impact the conduct of PMCs and militaries throughout the world. As the United States continues to send its military and PMCs across the globe, we must remain steadfast in our commitment to justice for all.

