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## Wrapping Themselves in the American Flag: The Alien Tort Statute, Private Military Contractors, and U.S. Foreign Relations

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## WRAPPING THEMSELVES IN THE AMERICAN FLAG<sup>1</sup>: THE ALIEN TORT STATUTE, PRIVATE MILITARY CONTRACTORS, AND U.S. FOREIGN RELATIONS

### INTRODUCTION

A first-year student in South Asian studies asked the President:

My question is in regards to private military contractors. The Uniform Code of Military Justice does not apply to these contractors in Iraq. I asked your Secretary of Defense a couple months ago what law governs their actions. . . .

The President. I was going to ask him. Go ahead. [Laughter] Help. [Laughter]

Q. I was hoping your answer might be a little more specific. [Laughter] Mr. Rumsfeld answered that Iraq has its own domestic laws which he assumed applied to those private military contractors. However, Iraq is clearly not currently capable of enforcing its laws, much less against—over our American military contractors. I would submit to you that in this case, this is one case that privatization is not a solution. And, Mr. President, how do you propose to bring private military contractors under a system of law?

The President. Yes, I appreciate that very much. I wasn't kidding—[laughter]. I was going to—I pick up the phone and say, “Mr. Secretary, I've got an interesting question.” [Laughter] This is what delegation—I don't mean to be dodging the question, although it's kind of convenient in this case, but never—[laughter]. I really will—I'm going to call the Secretary and say you brought up a very valid question, and what are we doing about it? That's how I work. I'm—thanks. [Laughter]<sup>2</sup>

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1. The title comes from a comment made by Judge Donald Stephens during a pretrial hearing in a recent case involving Blackwater U.S.A. See Brian Bennett, *Outsourcing the War: Four Families Want to Know How Their Men, All Guns for Hire, Died in Iraq*, TIME, Mar. 26, 2007, at 40. In this case, Blackwater attempted to use U.S. sovereign immunity, saying that they “could no more be sued than the U.S. Army could for something that happened in a war zone.” *Id.* Judge Stephens responded that “Blackwater Security Consulting LLC is not the United States Government.” *Id.*

2. Remarks at the Paul H. Nitze School of Advanced International Studies and a Question-and-Answer Session, 42 WEEKLY COMP. PRES. DOC. 671, 677–78 (Apr. 10, 2006).

On December 24, 2006, Raheem Khalif was working at Prime Minister Nuri Kamal al-Maliki's compound in the Green Zone in Iraq as a body guard to Vice President Adil Abdul Mahdi.<sup>3</sup> Andrew J. Moonen, an off-duty Blackwater U.S.A. (Blackwater) employee, was in the Green Zone for a party.<sup>4</sup> Moonen, who had been drinking heavily, was stopped by Khalif and others as he tried to pass through the gate to the Prime Minister's compound.<sup>5</sup> During the confrontation, Moonen shot Khalif three times.<sup>6</sup> Khalif died as a result.<sup>7</sup> As of the writing of this Comment, no charges have been filed.<sup>8</sup>

Batoul Mohammed Ali Hussein, a clerk in the Iraqi government, came to Baghdad for the day on September 9, 2007 to drop off paperwork near the Green Zone.<sup>9</sup> Ms. Hussein exited a building at the same time a convoy guarded by Blackwater security entered the intersection in front of the building.<sup>10</sup> In order to clear the way, Blackwater employees yelled at construction workers to vacate the intersection.<sup>11</sup> When the workers threw rocks, the Blackwater employees opened fire, hitting Ms. Hussein.<sup>12</sup> According to eyewitness accounts, Ms. Hussein initially sustained only an

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3. Eric Schmitt, *Report Details Shooting by Drunken Blackwater Worker*, N.Y. TIMES, Oct. 2, 2007, at A10.

4. *Id.*; John M. Broder, *Ex-Paratrooper Is Suspect in Drunken Killing of Iraqi*, N.Y. TIMES, Oct. 4, 2007, at A10. Blackwater is one of several private military contractors working in Iraq. Renae Merle, *Census Counts 100,000 Contractors in Iraq*, WASH. POST, Dec. 5, 2006, at D1.

5. Broder, *supra* note 4; Schmitt, *supra* note 3.

6. *See* Schmitt, *supra* note 3.

7. *Id.*

8. Broder, *supra* note 4. There is, however, an FBI investigation into the matter. *Id.* Also, the Iraqi government publicly declared that Blackwater is banned from operating in Iraq, Joshua Partlow & Walter Pincus, *Iraq Bans Security Contractor*, WASH. POST, Sept. 18, 2007, at A1, and it asked that Blackwater be required to pay \$8 million dollars to the families of each person for whose death the contractor was responsible. Christian Berthelsen & Said Rifai, *The Brave Cabbie of Baghdad: Marani Oranis Drove the Perilous Streets to Support Her Daughters, Until She Was Shot to Death by Private Guards*, L.A. TIMES, Oct. 11, 2007, at A1.

9. Leila Fadel, *8 Deadly Days for Blackwater: 43 Shot, 16 Killed, as U.S. Touted Iraq Progress*, DALLAS MORNING NEWS, Sept. 30, 2007, at A26, available at [http://www.dallasnews.com/sharedcontent/dws/news/world/stories/DN-blackwaterrecap\\_30int.ART.State.Edition1.420b95f.html](http://www.dallasnews.com/sharedcontent/dws/news/world/stories/DN-blackwaterrecap_30int.ART.State.Edition1.420b95f.html). Coincidentally, Ms. Hussein arrived in the Green Zone the day before the United States government, in the persons of General David Petraeus and U.S. Ambassador Ryan Crocker, testified to Congress that things were getting better in Iraq. *Iraq Benchmarks: Hearings Before the S. Comm. on Armed Services*, 110th Cong. 173-74, 197 (2007) (statements of Gen. David H. Petraeus, former Commander of the Multi-National Force-Iraq, and Ryan C. Crocker, U.S. Ambassador to Iraq); Fadel, *supra*. Later that week, President Bush gave a television address in which he claimed "ordinary life is beginning to return." Address to the Nation on the War on Terror in Iraq, 43 WEEKLY COMP. PRES. DOC. 1204, 1206 (Sept. 13, 2007).

10. Fadel, *supra* note 9.

11. *Id.*

12. *Id.*

injury to her leg.<sup>13</sup> However, when she collected herself and began to move away, she was shot multiple times and died as a result.<sup>14</sup>

On September 16, 2007, Afrah Sattar was on a bus with her mother traveling to Baghdad to obtain documentation for an upcoming religious pilgrimage.<sup>15</sup> As the bus entered the intersection, Ms. Sattar observed Blackwater guards firing on a white car.<sup>16</sup> Blackwater employees shot and killed all of the white car's occupants, including Dr. Mushin and her family.<sup>17</sup> She and her son were shot and then possibly burned alive when the white car exploded.<sup>18</sup> Ms. Sattar watched as the Blackwater employees turned their attention from the car, approached the bus in which she was traveling, and opened fire, killing her mother with a bullet to the head.<sup>19</sup> The shootout between Blackwater and Iraqi civilians left at least eleven Iraqis dead.<sup>20</sup> Blackwater's only response at the time was that the victims were not civilians and that the attack was not unprovoked.<sup>21</sup>

Raheem Khalif, Batoul Mohammed Ali Hussein, Dr. Mushin, and Afrah Sattar's mother represent just four deaths resulting from the estimated 195 "escalation of force" incidents involving Blackwater alone.<sup>22</sup> Although Blackwater is one of several companies providing private military contractors (PMCs) in Iraq,<sup>23</sup> and estimates place the total number of contractors there at over 160,000,<sup>24</sup> Blackwater has a far higher rate of shootings than its primary

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13. *Id.*

14. *Id.*

15. Fadel, *supra* note 9.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. Aamer Madhani, *House: No Pass for Contractors*, CHI. TRIB., Oct. 5, 2007, at 1. Reports vary and eleven is at the low end of the estimates. *See id.*; Berthelsen & Rifai, *supra* note 8; *Blackwater USA Is Sued by Iraqis*, N.Y. TIMES, Oct. 12, 2007, at A10.

21. Fadel, *supra* note 9.

22. MAJORITY STAFF OF H. COMM. ON OVERSIGHT AND GOV'T REFORM, 110TH CONG., MEMORANDUM REGARDING ADDITIONAL INFORMATION ABOUT BLACKWATER USA 1 (Comm. Print 2007).

23. Merle, *supra* note 4.

24. P.W. Singer, *Can't Win With 'Em, Can't Go to War Without 'Em: Private Military Contractors and Counterinsurgency*, Policy Paper No. 4 BROOKINGS 2 (2007) [hereinafter Singer, *Can't Win With 'Em*]. Singer says that in 2006, the U.S. Central Command estimated the number to be around 100,000, which researchers have referred to as a "WAG," short for "wild ass guess." *Id.* He also claims that an internal Department of Defense census on the private contractor industry found almost 180,000 private contractors in Iraq. *Id.* Even this number is thought to be low given the fact that "a number of the biggest companies, as well as any firms employed by the Department of State or other agencies or NGOs, were not included in the census." *Id.*

competitor in the field.<sup>25</sup> Just how many Iraqi civilians have been wounded or killed by PMCs remains undetermined, in large part because the number of contractors rivals that of U.S. troops in Iraq, leading Iraqis to confuse contractors with U.S. military.<sup>26</sup> More importantly, there seems to be no clear avenue through which a victim of such an attack could redress her injuries. If the perpetrator were U.S. military, that soldier would be subject to prosecution for actions in Iraq under the Uniform Code of Military Justice (UCMJ).<sup>27</sup>

PMCs, however, seem to exist in a space that is outside the law. They are immune from prosecution under Coalition Provisional Authority (CPA) law,<sup>28</sup> and the military rarely court-martials civilians.<sup>29</sup> Further, there has been a paucity of PMC prosecutions for their actions in Iraq.<sup>30</sup> When Moonen killed Khalif last Christmas Eve, the State Department suggested that Blackwater pay off the family and negotiated a sum on its behalf.<sup>31</sup> The State Department then arranged Moonen's hasty departure,<sup>32</sup> and Blackwater billed him for his ticket home.<sup>33</sup> In a congressional hearing on October 2, 2007, U.S. Representative

25. James Risen, *State Dept. Tallies 56 Shootings Involving Blackwater on Diplomatic Guard Duty*, N.Y. TIMES, Sept. 28, 2007, at A12.

26. See Singer, *Can't Win With 'Em*, *supra* note 24, at 2, 5–6, 9. Also, according to the Department of Defense, the United States does not keep statistics on casualties involving Iraqis. See P.W. Singer, *Outsourcing War*, 84 FOREIGN AFF. 119, 122 (2005) [hereinafter Singer, *Outsourcing War*].

27. 10 U.S.C. §§ 801–946 (2006); see Heather Carney, Note, *Prosecuting the Lawless: Human Rights Abuses and Private Military Firms*, 74 GEO. WASH. L. REV. 317, 329, 331 (2006).

28. Coalition Provisional Authority Order No. 17 (revised), Status of the Coalition Provisional Authority, MNF-Iraq, Certain Missions and Personnel in Iraq § 4 (June 27, 2004), available at <http://www.cpa-iraq.org/regulations/> (follow “Order 17” hyperlink); see also Carney, *supra* note 27, at 330.

29. See Carney, *supra* note 27, at 331 & n.137; David M. Herszenhorn, *House's Iraq Bill Applies U.S. Law to Contractors*, N.Y. TIMES, Oct. 5, 2007, at A1 (explaining that although Congress recently amended the UCMJ to potentially subject PMCs to court-martial, no prosecutions had occurred under that provision).

30. Jonathan Finer, *Holstering the Hired Guns: New Accountability Measures for Private Security Contractors*, 33 YALE J. INT'L L. 259, 260 (2008); see also Katherine Jackson, Comment, *Not Quite a Civilian, Not Quite a Soldier: How Five Words Could Subject Civilian Contractors in Iraq and Afghanistan to Military Jurisdiction*, 27 J. NAT'L ASS'N ADMIN. L. JUDICIARY 255, 260–61 (2007) (“To date, one civilian contractor has been prosecuted for crimes committed abroad and none have been prosecuted for crimes committed in Iraq.”); Herszenhorn, *supra* note 29 (noting that only two criminal cases involving contractors have originated in Iraq since 2000).

31. See *Hearing on Blackwater USA: Hearing Before the H. Comm. on Oversight and Gov't Reform*, 110th Cong. (2007) [hereinafter *Blackwater Hearing*] (statement of Rep. Henry Waxman, Chairman, H. Comm. on Oversight and Gov't Reform) (transcript on file with author); Broder, *supra* note 4.

32. Warren P. Strobel, *U.S. Aided Blackwater in Aftermath of Killings*, STAR-LEDGER (Newark, N.J.), Oct. 2, 2007, at 1 (referencing *Blackwater Hearing*, *supra* note 31).

33. Broder, *supra* note 4; Jeremy Scahill, *Blackwatergate*, NATION, Oct. 22, 2007, at 4.

Carolyn Maloney said about Moonen: “If he lived in America, he would have been arrested, and he would be facing criminal charges. . . . But it appears to me that Blackwater has special rules.”<sup>34</sup> Blackwater founder Erik Prince later asserted: “[W]e . . . can’t do any more. We can’t flog him. We can’t incarcerate him.”<sup>35</sup>

And what of Blackwater itself? Does Blackwater suffer any consequences? Are PMCs in general held accountable by their employer, the U.S. government? After the September killings, Blackwater was briefly banned by the *Iraqi* government and asked to pay \$8 million in damages for each victim.<sup>36</sup> However, Condoleezza Rice’s calls to Prime Minister Nouri al-Maliki to express regret for the killings and her promises to change State Department policy regarding PMCs persuaded the Iraqi government to reinstate Blackwater’s contract.<sup>37</sup> In sum, PMCs seem to operate in a twilight zone where accountability and oversight have given way to profit, efficiency, and political expediency. The problem of PMC accountability and oversight is increasingly important as our government considers expanding its role in Iraq and expanding the “war on terror” to Iran.

This Comment addresses two related problems: (1) How can PMCs be held accountable for the criminal and tortious acts they commit abroad while under the employ of the U.S. government? (2) How can victims of PMC actions abroad seek justice and be compensated?

The first step in answering these questions is to determine whether it is better to use the tools of criminal law or the tools of tort law, or a combination of both, to regulate the conduct of PMCs doing business on behalf of the U.S. government. In Part I, this Comment will briefly explain the history of PMCs in the U.S. military and describe the need for some regulatory mechanisms for them. Part II will examine criminal law as a possible mechanism for regulating PMCs in the form of the Military Extraterritorial Jurisdiction Act (MEJA).<sup>38</sup> Part III will discuss tort law as a possible regulating mechanism in the form of the Alien Tort Statute (ATS),<sup>39</sup> pointing out the ATS’s limits as shown in several recent cases. Part IV will offer solutions to the state actor requirement, one of the major obstacles to using the ATS to regulate PMCs. Finally, it is the author’s hope that the use of the ATS to regulate private

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34. *Blackwater Hearing*, *supra* note 31 (statement of Rep. Carolyn Maloney, Member, H. Comm. on Oversight and Gov’t Reform).

35. *Id.* at 70–71 (testimony of Erik Prince, Chairman and CEO of Blackwater).

36. Berthelsen & Rifai, *supra* note 8; Sabrina Tavernise, *U.S. Contractor Banned by Iraq over Shootings*, N.Y. TIMES, Sept. 18, 2007, at A1.

37. Maj. Jeffrey S. Thurnher, *Drowning in Blackwater: How Weak Accountability over Private Security Contractors Significantly Undermines Counterinsurgency Efforts*, ARMY LAW., July 2008, at 64, 83.

38. 18 U.S.C. §§ 3261–3267 (2006).

39. 28 U.S.C. § 1350 (2000).

military contractors will benefit the United States as much as it will the victims of PMC abuses. This product of the Founders' generation can improve foreign relations by opening our courts to foreign victims of crimes committed by U.S. companies.

I. PMCS IN THE U.S. MILITARY: CAN'T WIN WITH 'EM, CAN'T GO TO WAR WITHOUT 'EM<sup>40</sup>

A. *The Rise of the PMC*

The topic today is an adversary that poses a threat, a serious threat, to the security of the United States of America . . . . This adversary is one of the world's last bastions of central planning. It governs by dictating five-year plans. From a single capital, it attempts to impose its demands across time zones, continents, oceans, and beyond. With brutal consistency, it stifles free thought and crushes new ideas. It disrupts the defense of the United States and places the lives of men and women in uniform at risk. . . . Perhaps this adversary sounds like the former Soviet Union, but that enemy is gone: our foes are more subtle and implacable today. You may think I'm describing one of the last decrepit dictators of the world. But their day, too, is almost past, and they cannot match the strength and size of this adversary. The adversary's closer to home. It's the Pentagon bureaucracy. . . . [U]nlike businesses, governments can't die, so we need to find other incentives for bureaucracy to adapt and improve. . . . Some might ask, How in the world could the Secretary of Defense attack the Pentagon in front of its people? . . . To them I reply, I have no desire to attack the Pentagon; I want to liberate it. We need to save it from itself.<sup>41</sup>

This is how Donald Rumsfeld opened one of his first speeches as Defense Secretary to a group of former corporate executives on September 10, 2001.<sup>42</sup> He then pinpointed his Department of Defense's (DOD) top priority: "a wholesale shift in the running of the Pentagon, supplanting the old DoD bureaucracy with a new model, one based on the private sector."<sup>43</sup> Figuring prominently in Rumsfeld's solution was an increase in the use of PMCs.<sup>44</sup>

40. Singer, *Can't Win With 'Em*, *supra* note 24.

41. JEREMY SCAHILL, *BLACKWATER: THE RISE OF THE WORLD'S MOST POWERFUL MERCENARY ARMY* 50 (2007) (internal quotation marks omitted) (quoting Donald H. Rumsfeld, U.S. Sec'y of Def., Remarks at the DOD Acquisition and Logistics Excellence Week Kickoff: Bureaucracy to Battlefield (Sept. 10, 2001), *available at* <http://www.defenselink.mil/speeches/speech.aspx?speechid=430>).

42. *Id.* at 49–50.

43. *Id.* at 50.

44. Christopher Cooper, *Iraq Reconstruction Work Picks Up Pace Again*, WALL ST. J., Apr. 16, 2004, at A2.

PMCs are “businesses that provide governments with professional services intricately linked to warfare; they represent, in other words, the corporate evolution of the age-old profession of mercenaries.”<sup>45</sup> PMCs are a \$300 billion industry, with operations all over the world.<sup>46</sup> They provide a variety of services for which the government would otherwise have to pay soldiers. For example, PMCs handle logistics, train local armies, and fight alongside American troops.<sup>47</sup> Thus, proponents claim they save money and increase efficiency while also offering cover to politicians sending troops to war.<sup>48</sup> At first glance it may seem counterintuitive that PMCs save the government money because the private soldier earns substantially more than the average enlisted man.<sup>49</sup> However, proponents argue that the difference narrows when training, benefits, and equipment are included in the equation.<sup>50</sup> Regarding the political benefits, when the government sends private fighters to obscure nations, and they are killed in combat, neither the fact that they were hired nor the fact that they died is likely to get mentioned in the media.<sup>51</sup> Further, PMCs reduce the need for reserve call-ups and help politically undesirable conflicts maintain a relatively low profile.<sup>52</sup>

While the use of mercenaries is not new,<sup>53</sup> the combination of the end of the Cold War and a general move toward privatization in the 1990s led to a

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45. Singer, *Outsourcing War*, *supra* note 26, at 120.

46. *Id.* at 119, 131; Ryan P. Logan, Note, *The Detainee Treatment Act of 2005: Embodying U.S. Values to Eliminate Detainee Abuse by Civilian Contractors and Bounty Hunters in Afghanistan and Iraq*, 39 VAND. J. TRANSNAT’L L. 1605, 1610 (2006).

47. Singer, *Outsourcing War*, *supra* note 26, at 122–23.

48. Carney, *supra* note 27, at 323; Jackson, *supra* note 30, at 259–62; Singer, *Can’t Win With ‘Em*, *supra* note 24, at 3–4.

49. Singer, *Outsourcing War*, *supra* note 26, at 129 (estimating that private soldiers make between two and ten times more than their counterparts).

50. See Jackson, *supra* note 30, at 261.

51. *Id.* at 261–62; P.W. Singer, *Warriors for Hire in Iraq*, SALON.COM, Apr. 15, 2004, <http://dir.salon.com/story/news/feature/2004/04/15/warriors/index.html> [hereinafter Singer, *Warriors for Hire*]. Singer also notes that PMC casualties are not reported, unlike U.S. military casualties, contributing to the sense that PMC deaths are not covered in the news. *Id.*; Singer, *Outsourcing War*, *supra* note 26, at 126. An informal survey led Singer to conclude that 200–300 private soldiers had died through April 2004, which “is more than the entire 82nd Airborne Division lost in Iraq over the past year.” Singer, *Warriors for Hire*, *supra*.

52. Singer, *Warriors for Hire*, *supra* note 51.

53. The history of private citizens working for the U.S. government in war dates back to George Washington, Logan, *supra* note 46, at 1609, and their rise in prominence dates to the Vietnam War, the end of the draft, and the beginning of the all-volunteer force, Singer, *Can’t Win With ‘Em*, *supra* note 24, at 2. Despite Army Chief of Staff General Creighton Abrams’s attempts to ensure “that the military would not go to war without sufficient backing and involvement of the nation,” war support was increasingly in the hands of private contractors instead of soldiers. *Id.*



significant rise in prominence of the PMC.<sup>54</sup> The ready availability of soldiers from downsized armies and the instability resulting from the end of the Cold War added fuel to the fire.<sup>55</sup> These highly trained soldiers, now unemployed, found jobs at PMCs, destabilizing “the governmental monopoly on the ability to make war and maintain sovereignty” and presenting “an opportunity for companies to offer experienced personnel and military services to the highest bidder.”<sup>56</sup> From Sierra Leone to the conflict between the Bosnians and Serbs, PMCs were there.<sup>57</sup> When the Philippines needed help in its fight with Islamic Guerillas, DynCorp worked on logistics; in Colombia, DynCorp worked on anti-narcotics and counter-guerilla operations.<sup>58</sup> When the United States helped train the former Soviet Republic of Georgia to fight Muslim terrorists, PMCs were there.<sup>59</sup>

### B. *PMCs in Iraq*

Simply put, “the war in Iraq would not be possible without [PMCs].”<sup>60</sup> While the end of the Cold War in the 1990s sparked tremendous growth in the industry, September 11th and the subsequent invasions of Afghanistan and Iraq established PMCs as a crucial element of the war effort.<sup>61</sup> During the invasion and occupation of Iraq under Secretary Rumsfeld’s leadership, “private military employees handled everything from feeding and housing U.S. troops to maintaining sophisticated weapons systems like the B-2 stealth bomber, F-117 stealth fighter, Global Hawk UAV, U-2 reconnaissance aircraft, M-1 Tank, Apache helicopter, and air defense systems.”<sup>62</sup> Secretary Rumsfeld’s edict about the privatization of the DOD translated to “more than half of its civilian workforce—as well as 58,727 military positions” being filled by

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54. Singer, *Outsourcing War*, *supra* note 26, at 120.

55. *Id.* Singer is careful to distinguish between different types of PMCs, stating:

The PM[C]s . . . are not all alike, nor do they all offer the exact same services. The industry is divided into three basic sectors: military provider firms (also known as “private security firms”), which offer tactical military assistance, including actual combat services, to clients; military consulting firms, which employ retired officers to provide strategic advice and military training; and military support firms, which provide logistics, intelligence, and maintenance services to armed forces, allowing the latter’s soldiers to concentrate on combat and reducing their government’s need to recruit more troops or call up more reserves.

*Id.* at 120–21.

56. Jackson, *supra* note 30, at 259.

57. P.W. SINGER, CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY 3–5 (2003).

58. Singer, *Warriors for Hire*, *supra* note 51.

59. *Id.*

60. Singer, *Can’t Win With ‘Em*, *supra* note 24, at 3.

61. *See* Singer, *Warriors for Hire*, *supra* note 51.

62. *Id.*

contractors.<sup>63</sup> It is estimated that “one out of every ten” soldiers working in Iraq is a PMC employee.<sup>64</sup> One-third of the monthly cost of the war in Iraq is paid to PMCs.<sup>65</sup> KBR Halliburton built the prisons at Guantanamo Bay.<sup>66</sup> Titan Corp. and CACI translated for and interrogated the prisoners at Abu Ghraib.<sup>67</sup>

This wholesale replacement of military personnel with private soldiers was unprecedented in our nation’s history.<sup>68</sup> Further, privatization created problems with which the United States was not ready to deal.<sup>69</sup>

### C. *PMC Abuse at Abu Ghraib*

Although there are numerous examples of the problems that PMCs cause the United States, the most prominent came to light at Abu Ghraib. Most Americans know of Lynndie England’s role in the humiliation of Iraqi prisoners,<sup>70</sup> but few people know the role PMCs played in those same abuses at Abu Ghraib. Reports show that CACI made up over half of all analysts and interrogators there, while the translators who facilitated the communications between interrogators, prisoners, and guards were employed by Titan.<sup>71</sup> Further, contractors were implicated in the rape of a teenage boy.<sup>72</sup> A witness claimed that Adel Nakhla, an employee of Titan Corp., raped the young boy.<sup>73</sup> CACI employee Steven Stephanowicz is alleged to have told military personnel to physically abuse prisoners before interrogations.<sup>74</sup> In addition, Stephanowicz lied about where he was, how the interrogations happened, and his “knowledge of abuse.”<sup>75</sup>

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63. See Martha Minow, *Outsourcing Power: How Privatizing Military Efforts Challenges Accountability, Professionalism, and Democracy*, 46 B.C. L. REV. 989, 1003 (2005).

64. Carney, *supra* note 27, at 327.

65. *Id.* Carney points out that individual salaries at PMCs range from “\$100,000 to \$200,000” and that former soldiers can earn “\$1000 a day,” in contrast to the range of “\$1193 to upwards of \$5054 a month” that an enlisted military member can make. *Id.* at 327–28.

66. Singer, *Warriors for Hire*, *supra* note 51.

67. Carney, *supra* note 27, at 328–29.

68. See Singer, *Warriors for Hire*, *supra* note 51.

69. See Minow, *supra* note 63, at 1004–05.

70. Laurie Goodstein, *A Soldier Hoped to Do Good, but Was Changed by War*, N.Y. TIMES, Oct. 13, 2006, at A16.

71. Carney, *supra* note 27, at 328–29.

72. Jackson, *supra* note 30, at 263.

73. *Id.*

74. Carney, *supra* note 27, at 329.

75. *Id.*

*D. Oversight and Regulation: PMCs Fall Between the Cracks*

The Abu Ghraib scandal exemplified the problems created by the interrelationship of private contractors and the U.S. military. According to reports, it is unclear whether the military was in charge of the PMCs or the PMCs were in charge of the military.<sup>76</sup> Military forces claimed to be “unaware of the civilian status of individuals or that the contractors refused to take commands.”<sup>77</sup> One report on the incident claimed that private contractors pressured the military and that “[t]here was little actual supervision of the contractors in the field.”<sup>78</sup>

Thus, in addition to the horror of the rape, sodomy, and general abuse that Abu Ghraib revealed, the United States was faced with the question of how to punish the abusers. For the military personnel, the method was clear; they were court-martialed and faced conviction.<sup>79</sup> However, the PMC employees were in a different category.<sup>80</sup> The CPA in Iraq placed the responsibility for disciplining contractors with the contractors.<sup>81</sup> Further, the CPA “exempted contractors from Iraqi law for matters relating to their contracts,” allowing that employees would be “subject to the laws of their home countries.”<sup>82</sup>

As a result, neither Stephanowicz nor Nakhla have been criminally prosecuted.<sup>83</sup> Prosecutors claimed that locating witnesses impeded the prosecution of Nakhla.<sup>84</sup> In addition, the CPA was disinclined to aid in investigations.<sup>85</sup> Finally, the Department of Justice seems to lack the will to pursue criminal prosecutions of private contractors.<sup>86</sup> However, Titan Corp. and CACI have faced civil lawsuits because of their participation in the abuses at Abu Ghraib.<sup>87</sup>

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76. *Id.*

77. *Id.*

78. *Id.*

79. Carney, *supra* note 27, at 329.

80. *See id.*

81. *Id.* at 328; *see* Singer, *Can't Win With 'Em*, *supra* note 24, at 11–12.

82. Carney, *supra* note 27, at 330 (citing Coalition Provisional Authority Order No. 17 (revised), *supra* note 28, at § 4).

83. *See* Jackson, *supra* note 30, at 263–64.

84. *Id.* at 263.

85. *See id.* at 263–64; *supra* notes 81–82 and accompanying text.

86. *See* Carney, *supra* note 27, at 332 (stating that “the U.S. Justice Department has not said publicly whether or how it will employ the law” (internal quotation marks omitted)); Jackson, *supra* note 30, at 257 (arguing that obstacles cited by “[i]nvestigators and potential prosecutors” as prohibiting criminal prosecution of contractors were not obstacles for military courts prosecuting military personnel for the same crimes).

87. *See* Saleh v. Titan Corp., 436 F. Supp. 2d 55 (D.D.C. 2006); Ibrahim v. Titan Corp., 391 F. Supp. 2d 10 (D.D.C. 2005). *See generally* Jackson, *supra* note 30, at 264 (“[V]ictims of these alleged crimes have had to resort to the civil legal system to be made whole by monetary means.”).

*E. PMCs Are Not Going Away: The Need for Accountability and Oversight*

Opinions differ on the role PMCs play and the value they provide the United States. Proponents argue that the use of contractors allows the military to focus on fighting military battles, reduce recruiting, increase retention, and reduce costs.<sup>88</sup> Perhaps most importantly, politicians gain political advantage by reducing the impact of the war on the general public.<sup>89</sup> Some claim that by artificially reducing the number of soldier deaths through the shift of responsibility from civilian soldiers to private contractors, the American public is misled into believing that the death toll in the conflict is lower than it actually is.<sup>90</sup> In the end, PMCs are now so fully integrated into the military that foreign policy must necessarily include them. As such, the U.S. government must address the crucial issues of oversight and accountability of PMCs.

## II. THE MILITARY EXTRATERRITORIAL JURISDICTION ACT

Although there have been several incidents involving PMCs that raised questions of accountability and oversight,<sup>91</sup> most prominently the aforementioned abuses at Abu Ghraib,<sup>92</sup> the Blackwater shooting of September 16, 2007 sparked renewed investigations into the oversight, regulation, and liability of PMCs working for the United States abroad.<sup>93</sup> After hearings conducted by U.S. Representative Henry Waxman regarding Blackwater's activities in Iraq, including testimony from Blackwater's founder Erik Prince,<sup>94</sup> the House of Representatives acted.<sup>95</sup> On October 4, 2007, the House passed an expansion of MEJA, attempting to close the loopholes that have allowed PMCs to escape prosecution for crimes committed while in Iraq working for

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88. Carney, *supra* note 27, at 323; Logan, *supra* note 46, at 1611.

89. See Logan, *supra* note 46, at 1611.

90. See, e.g., *id.*

91. See generally Karen DeYoung, *Other Killings by Blackwater Staff Detailed: State Dept. Papers Tell of Coverup*, WASH. POST, Oct. 2, 2007, at A1 (noting “[t]he State Department made little effort to hold Blackwater personnel accountable” for “escalation of force incidents”); T. Christian Miller, *Private Security Guards in Iraq Operate with Little Supervision*, L.A. TIMES, Dec. 4, 2005, at A1 (noting that private security contractors “involved in scores of shootings . . . [and] suspected of reckless behavior” were sent home rather than being prosecuted); Craig S. Smith, *The Intimidating Face of America*, N.Y. TIMES, Oct. 13, 2004, at A4 (noting that U.S. allies believe American private security forces “would do well to act a little gentler” because their aggressive behavior only serves to “breed resentment among allied soldiers . . . not to speak of Afghans”).

92. See, e.g., Saleh, 436 F. Supp. 2d at 56; Ibrahim, 391 F. Supp. 2d at 12.

93. Madhani, *supra* note 20.

94. *Blackwater Hearing*, *supra* note 31; see also Scahill, *supra* note 33, at 4.

95. Jonathan Weisman, *House Acts in Wake of Blackwater Incident: Measure Is Passed to Place Wartime Contractors Under U.S. Courts' Jurisdiction*, WASH. POST, Oct. 5, 2007, at A6.

the U.S. government.<sup>96</sup> Initially passed in 2000 and subsequently expanded after revelations of contractor involvement in the Abu Ghraib scandal, the House seemingly believed that MEJA could provide a mechanism for the oversight and regulation of PMCs in Iraq.<sup>97</sup>

The next sections detail how MEJA has evolved over the years in attempts by Congress to close its gaps and to find in it a mechanism to hold PMCs accountable. However, we will see that due to a combination of lack of enforcement and loose drafting, MEJA remains inadequate as a tool to regulate PMCs.

A. *MEJA 2000*<sup>98</sup>

Congress officially extended federal criminal law to civilians working for the DOD when it passed the Military Extraterritorial Jurisdiction Act of 2000 (MEJA 2000).<sup>99</sup> MEJA 2000 held certain civilian employees and contractors,

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96. MEJA Expansion and Enforcement Act of 2007, H.R. 2740, 110th Cong. (2007); *see* Weisman, *supra* note 95.

97. *See* Carney, *supra* note 27, at 331–32.

98. Military Extraterritorial Jurisdiction Act of 2000, 18 U.S.C. §§ 3261–3267 (2000) (amended 2004).

99. MEJA 2000 reads, in part, as follows:

§ 3261. Criminal offenses committed by certain members of the Armed Forces and by persons employed by or accompanying the Armed Forces outside the United States

(a) Whoever engages in conduct outside the United States that would constitute an offense punishable by imprisonment for more than 1 year if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States—

(1) while employed by or accompanying the Armed Forces outside the United States; or

(2) while a member of the Armed Forces subject to chapter 47 of title 10 (the Uniform Code of Military Justice),

shall be punished as provided for that offense.

(b) No prosecution may be commenced against a person under this section if a foreign government, in accordance with jurisdiction recognized by the United States, has prosecuted or is prosecuting such person for the conduct constituting such offense, except upon the approval of the Attorney General or the Deputy Attorney General (or a person acting in either such capacity), which function of approval may not be delegated.

(c) Nothing in this chapter may be construed to deprive a court-martial, military commission, provost court, or other military tribunal of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by a court-martial, military commission, provost court, or other military tribunal.

(d) No prosecution may be commenced against a member of the Armed Forces subject to chapter 47 of title 10 (the Uniform Code of Military Justice) under this section unless—

(1) such member ceases to be subject to such chapter; or

(2) an indictment or information charges that the member committed the offense with one or more other defendants, at least one of whom is not subject to such chapter.

*Id.* § 1321.

as well as their employees, criminally liable for acts that were a felony under U.S. law.<sup>100</sup> While not explicitly intended to regulate PMCs, MEJA 2000 did apply to those contractors who were hired by the DOD.<sup>101</sup> However, MEJA 2000's language was vague enough that it did not apply to contractors hired by any other governmental department.<sup>102</sup> This jurisdictional gap, which the Act was intended to close, left out employees of the State Department, the Justice Department, the Federal Bureau of Investigation, and the Drug Enforcement Agency (DEA).<sup>103</sup> Under MEJA 2000, most PMCs were effectively unpunishable under U.S. law for crimes committed abroad.<sup>104</sup> In the next section, this Comment will discuss how Congress sought to address this gap in jurisdiction through a revision of MEJA 2000 following PMC abuse at Abu Ghraib.

*B. MEJA 2004*<sup>105</sup>

The events at Abu Ghraib led to a revision of MEJA 2000 in an attempt to close the above mentioned jurisdictional gaps.<sup>106</sup> Because some of the people involved in Abu Ghraib were civilian contractors working for departments other than the DOD, such as the Central Intelligence Agency (CIA) and the Department of the Interior, they could not be prosecuted under MEJA 2000.<sup>107</sup> To address the gap, Congress passed an Act amending MEJA 2000 “to extend its jurisdictional coverage to employees and contractors of other federal agencies,” including “employees and contractors of ‘any provisional authority.’”<sup>108</sup> Unfortunately, jurisdiction was limited to those engaged in employment related to the support of a “mission” of the DOD.<sup>109</sup> The Act's ambiguity sparked questions about whether its limited jurisdictional extension actually closed the gaps in coverage that concerned its drafters.<sup>110</sup> Contractors could escape liability if their activities did not support a mission of the DOD, even if those activities would be illegal if committed in the United States.

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100. *Id.* § 1321(a); *see also* Carney, *supra* note 27, at 331–32; Maj. Glenn R. Schmitt, *Amending the Military Extraterritorial Jurisdiction Act of 2000: Rushing to Close an Unforeseen Loophole*, 2005 ARMY LAW. 41, 41–42.

101. Carney, *supra* note 27, at 332.

102. *Id.*

103. *See id.*; Schmitt, *supra* note 100, at 42 (suggesting that MEJA 2000 would not cover “persons or organizations under contract” with any government agency other than the DOD).

104. *See* Carney, *supra* note 27, at 332; Schmitt, *supra* note 100, at 42.

105. Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, sec. 1088, § 3267(1)(a), 118 Stat. 1811, 2066–67 (2004).

106. Carney, *supra* note 27, at 332.

107. *Id.*

108. Schmitt, *supra* note 100, at 43 (quoting 18 U.S.C. § 3267(1)(A) (2006) (as amended)).

109. 18 U.S.C. § 3267(1)(A)(i)(II).

110. *See* Carney, *supra* note 27, at 332.

C. *MEJA 2007?: House Bill 2740: MEJA Expansion and Enforcement Act of 2007*<sup>111</sup>

In response to the Blackwater shooting of September 16, 2007, the House of Representatives passed House Bill 2740 on October 4, 2007.<sup>112</sup> This most recent revision of MEJA reflects the House's desire to address specifically the issue of contractor accountability.<sup>113</sup> The Bill adds the following language after paragraph two of MEJA:

while employed under a contract (or subcontract at any tier) awarded by any department or agency of the United States, where the work under such contract is carried out in an area, or in close proximity to an area (as designated by the Department of Defense), where the Armed Forces is conducting a contingency operation.<sup>114</sup>

Significantly, the Bill explicitly includes contractors working under *any* department,<sup>115</sup> which indeed addresses some of the above mentioned concerns with respect to illegal activity committed abroad while under contract with the U.S. government.

At first glance, this legislation seems to have taken substantive steps toward closing the significant jurisdictional gaps in the previous versions of MEJA. However, upon closer inspection, it appears that MEJA 2007 remains ambiguous, providing contractors with the room they need to avoid liability. MEJA 2007 creates another loophole by leaving "close proximity" undefined in the clause "or in close proximity to an area (as designated by the Department of Defense)."<sup>116</sup> This ambiguity seems to allow for any range of interpretations regarding the applicability of the provision.

Further, no version of MEJA would apply to assaults by striking, beating, or wounding, in spite of the fact that such actions are a violation of international law when the victim is a prisoner.<sup>117</sup> Thus, if a DOD employee or contractor beat a prisoner while overseas, he or she would not be subject to liability under MEJA.<sup>118</sup> These offenses, although clearly punishable through

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111. H.R. 2740, 110th Cong. (2007).

112. See 110 CONG. REC. H11,214 (daily ed. Oct. 3, 2007) (statement of Rep. Conyers). The House and Senate have also introduced other bills in the same vein. See Transparency and Accountability in Military and Security Contracting Act of 2007, S. 674, 110th Cong. (2007); Transparency and Accountability in Security Contracting Act of 2007, H.R. 369, 110th Cong. (2007).

113. See H.R. 2740.

114. *Id.* § 2(a)(1)(C).

115. *Id.*

116. *Id.*

117. Anthony E. Giardino, *Using Extraterritorial Jurisdiction to Prosecute Violations of the Law of War: Looking Beyond the War Crimes Act*, 48 B.C. L. REV. 699, 732–33 (2007).

118. *Id.*

the employer, do not meet MEJA's requirement that they be punishable by a one-year minimum penalty.<sup>119</sup>

Finally, while more serious offenses are subject to MEJA, no contractors have been prosecuted under it during the "Global War on Terrorism," suggesting "that the Department of Justice lacks the desire and resources necessary to pursue such cases."<sup>120</sup> According to some scholars, the key issue is "whether Congress provides the resources and the Justice Department takes those resources and puts them in the field to conduct these investigations, and ultimately brings cases where they're warranted."<sup>121</sup> In sum, MEJA could work if there were adequate will and resources to enforce it.<sup>122</sup> However, until that moment is reached, criminal prosecution under MEJA cannot address the problems raised by PMCs, and victims of PMC abuse will have to seek alternative measures to redress their injuries.

### III. The Alien Tort Statute<sup>123</sup>

The families of the victims of the September 16, 2007 shooting sought redress of their grievances through civil litigation. On October 11, 2007, a lawsuit was filed in part under the ATS against Blackwater in the United States District Court for the District of Columbia, alleging "extrajudicial killing" and "war crimes."<sup>124</sup> The Center for Constitutional Rights, Susan Burke, and Shereef Akeel represent three families of the victims and a survivor.<sup>125</sup> While there have been other lawsuits in the past and there are currently other lawsuits

119. 18 U.S.C. § 3261(a) (2006); Giardino, *supra* note 117, at 733.

120. Giardino, *supra* note 117, at 733.

121. Marcia Coyle, *A Strategy for Blackwater: Three Key Legal Regimes to Rein in Iraq Contractors*, NAT'L L.J., Oct. 22, 2007, at 1 (internal quotation marks omitted). The article also notes that Congress included wording in the 2007 Defense Authorization Act that would make "the UCMJ . . . applicable to federal civilian and private contractor employees who closely support U.S. armed forces 'in time of declared war or a contingency operation.'" *Id.* However, as the article notes, the DOD views its mission as carrying out "national security initiatives" and not going "around prosecuting civilian contractors. To them, it's piling on here." *Id.* (internal quotation marks omitted).

122. *Id.* Coyle quotes an attorney as saying the following: "I think expansion of MEJA is good policy for the United States right now . . . . I don't represent any private security contractors. We know them and they generally favor the idea of having some recognized body of law applicable to them." *Id.* (internal quotation marks omitted). Further, "[the DOD] got this statute a year ago. It's not clear to me they ever wanted it." *Id.* (internal quotation marks omitted).

123. 28 U.S.C. § 1350 (2000).

124. Complaint at 11–12, *Estate of Atban v. Blackwater USA*, No. 1:07-cv-01831-RBW (D.D.C. Oct. 11, 2007).

125. *Democracy Now!: Family Members of Slain Iraqis Sue Blackwater USA for Deadly Baghdad Shooting*, (Democracy Now! broadcast Oct. 11, 2007), available at [http://www.democracynow.org/2007/10/11/exclusive\\_family\\_members\\_of\\_slain\\_iraqis](http://www.democracynow.org/2007/10/11/exclusive_family_members_of_slain_iraqis).



pending, “this is the first major case brought by Iraqi civilians against a private military company like Blackwater.”<sup>126</sup>

A. *The Alien Tort Statute*<sup>127</sup>—*Background and Development*

The ATS is one of the most promising civil measures that victims of PMC abuse can use to redress their injuries. The ATS states that “[t]he 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.”<sup>128</sup> Because there is little legislative history regarding the ATS during the First Congress, its intended use at the time of its creation remains somewhat unclear.<sup>129</sup> However, the proceedings of the Continental Congress show that one of the major concerns facing the United States that led to the adoption of the Constitution, as well as the Judiciary Act of 1789, was lack of compliance with treaties on the part of individual states.<sup>130</sup> When foreign nations argued that a U.S. state had violated a treaty and sought redress of that grievance, the United States, under the Continental Congress, had little authority to force the state into compliance.<sup>131</sup> Not surprisingly, foreign nations were skeptical about the United States’ willingness and ability to honor treaties.<sup>132</sup> When the Judiciary Act was passed, the federal government established authority over areas such as diplomacy and ambassadors.<sup>133</sup> In this light, the ATS can be seen as an important corollary to the Judiciary Act because it vested the federal government with jurisdiction over cases that were considered most likely to impact international relations and undermine foreign confidence in the United States’ compliance with its international obligations.

1. *Filartiga v. Pena-Irala*<sup>134</sup>

Before the *Filartiga* case, the ATS was rarely used and largely ignored in the nearly 200 years since its enactment.<sup>135</sup> *Filartiga* involved the kidnapping, detention, torture, and resultant death of Joelito Filartiga, and it alleged several violations, none of which were treaty-based.<sup>136</sup> Because of this, the court

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126. *Id.*

127. The ATS is sometimes referred to as the Alien Tort Claims Act (ATCA). The terms may be used interchangeably as they are essentially synonymous.

128. 28 U.S.C. § 1350 (2000).

129. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 718–19 (2004).

130. *Id.* at 716–17.

131. *See id.*

132. *See id.* at 716–17 & n.11.

133. *Id.* at 717.

134. 630 F.2d 876 (2d Cir. 1980).

135. Beth Stephens, *Filartiga v. Pena-Irala: From Family Tragedy to Human Rights Accountability*, 37 RUTGERS L.J. 623, 625 (2006).

136. *Filartiga*, 630 F.2d at 878, 880.

initially had to determine whether acts of torture violated international law.<sup>137</sup> In order to make this determination, the court looked to “the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law.”<sup>138</sup> The court determined “that the law of nations was to be interpreted as constantly evolving rather than a static body of law frozen in content at the time of the adoption of the ATCA in 1789.”<sup>139</sup>

After having determined that torture was a violation of international law and hence the law of nations, the court established that international law was a part of federal common law.<sup>140</sup> As such, ATS did not create new rights but rather gave the court the opportunity to adjudicate “rights already recognized by international law.”<sup>141</sup>

After *Filartiga*, courts and academics began to explore possible uses of the ATS, concluding that it may provide a basis for the enforcement of international law in U.S. courts.<sup>142</sup> Specifically, non-governmental organizations and plaintiffs’ attorneys brought international human rights cases into the courts under the ATS, alleging that governments, corporations, and individuals could be held liable for violations of international law.<sup>143</sup> While opinions differed about the credibility of such claims and their chances for success, the lawsuits continued to come, albeit slowly.<sup>144</sup>

## 2. *Sosa v. Alvarez-Machain*<sup>145</sup>

In 2004, the Supreme Court addressed the ATS in *Sosa v. Alvarez-Machain*.<sup>146</sup> In 1990, the DEA hired Jose Francisco Sosa and other Mexican nationals to kidnap Humberto Alvarez-Machain (Alvarez) and bring him back to the United States to face charges for the torture and murder of DEA agent Enrique Camarena-Salazar.<sup>147</sup> Alvarez was eventually acquitted of those charges and in 1993 brought suit against Sosa, DEA operative Antonio Garate-Bustamante, five Mexican civilians, the United States, and four DEA agents.<sup>148</sup>

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137. *Id.* at 880.

138. *Id.*

139. Lucien J. Dhooge, *The Alien Tort Claims Act and the Modern Transnational Enterprise: Deconstructing the Mythology of Judicial Activism*, 35 GEO. J. INT’L L. 3, 14 (2003) (citing *Filartiga*, 630 F.2d at 881).

140. *Filartiga*, 630 F.2d at 884–85.

141. *Id.* at 887.

142. See Stephens, *supra* note 135, at 628.

143. *Id.* at 627 & n.17.

144. See *id.* at 628.

145. 542 U.S. 692 (2004).

146. *Id.* at 697.

147. *Id.* at 697–98.

148. *Id.* at 698.

Alvarez sought damages from the United States under the Federal Tort Claims Act (FTCA)<sup>149</sup> and from *Sosa* under the ATS.<sup>150</sup> The district court dismissed the FTCA claim but awarded \$25,000 in damages on the ATS claim.<sup>151</sup> The Ninth Circuit affirmed the ATS claim, arguing that the ATS “not only provides federal courts with subject matter jurisdiction, but also creates a cause of action for an alleged violation of the law of nations.”<sup>152</sup> The Supreme Court granted certiorari “to clarify the scope of both the FTCA and the ATS.”<sup>153</sup>

*Sosa* argued, and Justice Souter writing for the Court eventually agreed, that Alvarez could claim no relief under the ATS because the statute is primarily jurisdictional, granting judicially-created causes of action only in limited circumstances.<sup>154</sup> Importantly, however, the Court concluded “that at the time of enactment the jurisdiction enabled federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law.”<sup>155</sup> While the Court ruled against Alvarez, its decision leaves open the use of the ATS for the prosecution of private military contractors such as Blackwater.

a. The Court’s Historical Analysis in *Sosa*

Before turning to Blackwater, however, this Comment will analyze the Court’s holding in *Sosa*, focusing on the role it assigns to the law of nations both in the past and today. The Court defined its historical understanding of the law of nations along three lines: (1) as the law that governs relations between nation states; (2) as the law that governs individuals outside the domestic context; and (3) as the law governing “a sphere in which these rules binding individuals for the benefit of other individuals overlapped with the norms of state relationships.”<sup>156</sup>

The Court quoted Vattel, Kent, Blackstone, and *Ware v. Hylton*<sup>157</sup> for the proposition that the law of nations regulates state to state interaction and as such is governed by “the executive and legislative domains, not the judicial.”<sup>158</sup> By contrast, Justice Souter allowed that the Judiciary governed the second category and defined it “as a body of judge-made law regulating the conduct of individuals situated outside domestic boundaries and consequently

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149. 28 U.S.C. §§ 1346(b)(1), 2671–2680 (2000).

150. *Sosa*, 542 U.S. at 698.

151. *Id.* at 699.

152. *Id.*

153. *Id.* Since this note focuses on the ATS, there will be no further discussion of the FTCA claim. The Court found that Alvarez had no claim based on either statute. *See id.*

154. *Id.* at 712, 714.

155. *Sosa*, 542 U.S. at 712.

156. *Id.* at 714–15.

157. 3 U.S. (3 Dall.) 199 (1796).

158. *Sosa*, 542 U.S. at 714.

carrying an international savor.”<sup>159</sup> Once again relying on Blackstone and cases such as *The Paquette Habana*,<sup>160</sup> the Court narrowed this category of the law of nations to “mercantile questions,” noting that the area gradually grew into international law.<sup>161</sup> Finally, Justice Souter concluded that the drafters of the ATS “probably” were thinking of the three offenses delineated by Blackstone: “violation of safe conducts, infringement of the rights of ambassadors, and piracy.”<sup>162</sup> These types of offenses were especially important because “[a]n assault against an ambassador, for example, impinged upon the sovereignty of the foreign nation and if not adequately redressed could rise to an issue of war.”<sup>163</sup>

Seeking further clarification of the law of nations, the Court next turned to the Continental Congress and the Constitutional Convention, finding “a distinctly American preoccupation with these hybrid international norms.”<sup>164</sup> The United States was preoccupied with finding a mechanism to bind the states to international agreements and to “vindicate rights under the law of nations,” including violations of treaties and offenses against ambassadors.<sup>165</sup> Although it was clear to Justice Souter that the United States sought a way to bind the states under international law and to punish infractions against ambassadors, the jurisdictional question remained: “There is no record of congressional discussion about private actions that might be subject to the jurisdictional provision, or about any need for further legislation to create private remedies; there is no record even of debate on the section.”<sup>166</sup> Given the lack of historical record on the jurisdictional question, the Court looked to modern scholarly articles for guidance,<sup>167</sup> finally concluding that “it is fair to say that a consensus understanding of what Congress intended has proven elusive.”<sup>168</sup>

#### b. Two Important Conclusions

The Court gleaned two propositions from its historical and academic research. First:

[T]he First Congress did not pass the ATS as a jurisdictional convenience to be placed on the shelf for use by a future Congress or state legislature that might,

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159. *Id.* at 715.

160. 175 U.S. 677 (1900).

161. *Sosa*, 542 U.S. at 715.

162. *Id.*

163. *Id.*

164. *Id.* at 715–17.

165. *Id.* at 716.

166. *Sosa*, 542 U.S. at 718.

167. *Id.* at 718–19.

168. *Id.*

someday, authorize the creation of causes of action or itself decide to make some element of the law of nations actionable for the benefit of foreigners.<sup>169</sup>

And second, “Congress intended the ATS to furnish jurisdiction for a relatively modest set of actions alleging violations of the law of nations.”<sup>170</sup>

Justice Souter wrote that the First Congress and drafters of the ATS recognized some offenses against the law of nations as being expressly criminal.<sup>171</sup> Because of this, the Court concluded that it was unlikely for the ATS to be limited to a jurisdictional statute.<sup>172</sup> Instead, the Court claimed it was likely that the First Congress would have allowed allegations of violations of the law of nations made by aliens to move forward without any further action by the Congress.<sup>173</sup>

On the second issue, Justice Souter again turned to Blackstone in search of principles of the law of nations: “[O]ffences against this law [of nations] are principally incident to whole states or nations,<sup>7</sup> and not individuals . . . .”<sup>174</sup> This is an important quote for the Court and a problematic one for ATS litigation because if ATS litigation is limited to only state actors, PMCs could not be held accountable. However, defining the law of nations as that law which governs states or nations and not individuals represents a severely limited reading of Blackstone’s *Commentaries*. In fact, it even ignores the Court’s own earlier analysis of the same text.<sup>175</sup>

Importantly, the Court eventually concluded that private remedies were necessary for certain offenses against the law of nations.<sup>176</sup> These common law offenses come from the law of nations,<sup>177</sup> but they do not necessarily involve whole states. Justice Souter concluded:

[T]he First Congress understood that the district courts would recognize private causes of action for certain torts in violation of the law of nations, though we have found no basis to suspect Congress had any examples in mind beyond those torts corresponding to Blackstone’s three primary offenses: violation of safe conducts, infringement of the rights of ambassadors, and piracy.<sup>178</sup>

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169. *Id.* at 719.

170. *Id.* at 720.

171. *Sosa*, 542 U.S. at 719.

172. *Id.*

173. *Id.*

174. *Id.* at 720 (alteration in original) (quoting WILLIAM BLACKSTONE, 4 COMMENTARIES \*68).

175. *See id.* at 714–15.

176. *Sosa*, 542 U.S. at 724.

177. *Id.* at 720–22.

178. *Id.* at 724.

Limiting the number of torts to the three that Blackstone placed among the “principal offenses,” however, is questionable: “Blackstone lists these violations as ‘principal offenses,’ implying the list is non-exclusive; at no point does he suggest otherwise.”<sup>179</sup> Further, violations such as “the plunder of a colony in Sierra Leone,” as noted by Attorney General Bradford, do not fit neatly into the three categories the Court emphasized.<sup>180</sup>

c. Bridging the Gap Between 1790 and Today

In order to bridge the gap between its historical understanding of the law of nations and the present day, the Court declared that “courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized.”<sup>181</sup> Implicit in this statement is a restriction on the use of the ATS. In fact, Justice Souter’s opinion cited a series of reasons calling for “judicial caution,” including the following: (1) “the prevailing conception of the common law has changed since 1789”;<sup>182</sup> (2) the role of the federal courts have changed in making common law since *Erie*;<sup>183</sup> (3) the creation of a private right of action is a legislative decision;<sup>184</sup> (4) new private causes of action for violations of international law might have serious implications for foreign relations;<sup>185</sup> and (5) the Judiciary has “no congressional mandate to seek out and define new and debatable violations of the law of nations, and . . . congressional understanding of the judicial role in the field ha[s] not affirmatively encouraged greater judicial creativity.”<sup>186</sup>

In spite of these arguments against the adaptation of the modern day law of nations to private rights, and over the objections of the U.S. government and Justice Scalia, the Court left open the possibility for “further independent judicial recognition of actionable international norms.”<sup>187</sup> The Court asserted: “[J]udicial power should be exercised on the understanding that the door is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today.”<sup>188</sup> Here, the Court attempted to balance its concern

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179. Aaron E. Garfield, Note, *Bridging a Gap in Human Rights Law: Prisoner of War Abuse as “War Tort,”* 37 GEO. J. INT’L L. 725, 737–38 (2006) (quoting WILLIAM BLACKSTONE, 4 COMMENTARIES \*68).

180. *Id.* at 738.

181. *Sosa*, 542 U.S. at 725.

182. *Id.*

183. *Id.* at 726 (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938)).

184. *Id.* at 727.

185. *Id.*

186. *Sosa*, 542 U.S. at 728.

187. *Id.* at 729.

188. *Id.*

for the role of the Executive and the Legislative Branches with that of the Judiciary. Acknowledging that *Erie* limited “judicial recognition of new substantive rules” did not mean that *Erie* barred the recognition of new substantive rules.<sup>189</sup> Acknowledging that the Executive has an important role in foreign affairs did not change the fact that “[f]or two centuries we have affirmed that the domestic law of the United States recognizes the law of nations.”<sup>190</sup> Justice Souter concluded that the Judiciary ought to be free to consider certain violations of the law of nations today, reasoning that “[i]t would take some explaining to say now that federal courts must avert their gaze entirely from any international norm intended to protect individuals.”<sup>191</sup>

The Court pointed to the First Congress as well as later Congresses to support its conclusion that the Judiciary is free to consider international norms.<sup>192</sup> Justice Souter’s opinion theorized that the First Congress would not have expected federal courts “to lose all capacity to recognize enforceable international norms simply because the common law might lose some metaphysical cachet on the road to modern realism.”<sup>193</sup> In addition, the Court claimed that later Congresses supported the arguments in *Filartiga* and *Tel-Oren v. Libyan Arab Republic*<sup>194</sup> when Congress passed the Torture Victim Protection Act (TVPA).<sup>195</sup> The TVPA included a reference to the ATS suggesting that it “should ‘remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law.’”<sup>196</sup> In fact, Congress “expressly ratified” and carried forth the Court’s holding in *Filartiga* that “United States courts have jurisdiction over suits by aliens alleging torture under color of law.”<sup>197</sup> William Casto<sup>198</sup>

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189. *Id.*

190. *Id.* The Court cites a series of cases supporting this proposition:

*Sabbatino*, 376 U.S. at 423, 84 S.Ct. 923 (“[I]t is, of course, true that United States courts apply international law as a part of our own in appropriate circumstances”); *The Paquette Habana*, 175 U.S., at 700, 20 S.Ct. 290 (“International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination”); *The Nereide*, 9 Cranch 388, 423, 3 L.Ed. 769 (1815) (Marshall, C.J.) (“[T]he Court is bound by the law of nations which is a part of the law of the land”).

*Id.* at 729–30.

191. *Sosa*, 542 U.S. at 730.

192. *Id.* at 730–31.

193. *Id.* at 730.

194. 726 F.2d 774 (D.C. Cir. 1984).

195. *Sosa*, 542 U.S. at 730–31 (citing Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992)).

196. *Id.* at 728 (quoting H.R. REP. No. 102-367, pt. 1, at 4 (1991)).

197. *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 104 (2d Cir. 2000).

commented on Congress's reaction to the Court's decision in *Filartiga* by noting that "[i]n enacting the TVPA, Congress approved, codified, and elaborated upon this new tort remedy. Rather than rejecting *Filartiga*, the Congress in effect endorsed *Filartiga*'s common law remedy by codifying it."<sup>199</sup> Further, the court in *Wiwa v. Royal Dutch Petroleum Co.*<sup>200</sup> stated:

The TVPA thus recognizes explicitly what was perhaps implicit in the Act of 1789—that the law of nations is incorporated into the law of the United States and that a violation of the international law of human rights is (at least with regard to torture) *ipso facto* a violation of U.S. domestic law.<sup>201</sup>

In sum, despite the fact that it ruled against Alvarez, the Court held “that ATS litigation is based upon a federal common law cause of action and involves judicial lawmaking” and “that creating the cause of action involves judicial discretion.”<sup>202</sup> What remains to be determined by the courts after *Sosa* is which norms of international law, other than torture, rise to standards of specificity equivalent to the violation of safe conducts, infringement of the rights of ambassadors, and piracy. Related to that question, as *Sosa*'s footnote twenty indicated, future courts will have to determine “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.”<sup>203</sup>

Unfortunately, these are perhaps the most important questions with respect to future contractor litigation under the ATS. Further, in the *Titan* cases, discussed in the next section, when the Supreme Court failed to answer the questions it raised in footnote twenty, it “closed the door” on some ATS litigation because it left open the possibility that: (1) PMCs and other private actors could not be liable for violations of the law of nations; and (2) that even if PMCs were found to be state actors, they would be immune from suit.<sup>204</sup>

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198. Casto authored an important article cited by the Court in *Sosa*: William R. Casto, *The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467 (1986).

199. William R. Casto, *The New Federal Common Law of Tort Remedies for Violations of International Law*, 37 RUTGERS L.J. 635, 638 (2006).

200. 226 F.3d 88 (2d Cir. 2000).

201. *Id.* at 105.

202. Casto, *supra* note 199, at 638.

203. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 n.20 (2004).

204. *Saleh v. Titan Corp.*, 436 F. Supp. 2d 55, 57–58 (D.D.C. 2006); *Ibrahim v. Titan Corp.*, 391 F. Supp. 2d 10, 14 & n.3 (D.D.C. 2005).



B. *The ATS After Sosa: The Titan Cases and the Problem of the State Actor Requirement*

*Ibrahim v. Titan Corp.*<sup>205</sup> and *Saleh v. Titan Corp.*<sup>206</sup> are two contractor cases that illustrate the problems that the Court's decision in *Sosa* created for ATS litigation with respect to the state actor requirement. Although the Court's decision in *Sosa* left the "door ajar" on the viability of the ATS, the *Titan* cases have sought to slam it shut.

In *Ibrahim*, plaintiffs were Iraqi national detainees and the spouses of dead detainees who brought action against private government contractors.<sup>207</sup> The PMCs, Titan and CACI, provided interrogators and interpreters to the United States.<sup>208</sup> Plaintiffs' claims were brought under the ATS and alleged torture.<sup>209</sup> Defendants claimed most prominently that "the law of nations' under the [ATS] does not cover torture by non-state actors."<sup>210</sup>

The court acknowledged that treaties, as well as other sources of international law, strongly condemned torture.<sup>211</sup> However, Judge Robertson noted that international law prohibited only "official (state) torture."<sup>212</sup> Here, he declared, the issue was "whether the law of nations applies to *private actors*" such as the PMCs in this case.<sup>213</sup> Judge Robertson looked to the Supreme Court's decision in *Sosa* for guidance on the issue.<sup>214</sup> The court

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205. *Ibrahim*, 391 F. Supp. 2d 10.

206. *Saleh*, 436 F. Supp. 2d 55.

207. *Ibrahim*, 391 F. Supp. 2d at 12.

208. *Id.*

209. *Id.* at 12–13.

Plaintiffs' allegations are broad and serious. They assert that defendants and/or their agents tortured one or more of them by: beating them; depriving them of food and water; subjecting them to long periods of excessive noise; forcing them to be naked for prolonged periods; holding a pistol (which turned out to be unloaded) to the head of one of them and pulling the trigger; threatening to attack them with dogs; exposing them to cold for prolonged periods; urinating on them; depriving them of sleep; making them listen to loud music; photographing them while naked; forcing them to witness the abuse of other prisoners, including rape, sexual abuse, beatings and attacks by dogs; gouging out an eye; breaking a leg; electrocuting one of them; spearing one of them; forcing one of them to wear women's underwear over his head; having women soldiers order one of them to take off his clothes and then beating him when he refused to do so; forbidding one of them to pray, withholding food during Ramadan, and otherwise ridiculing and mistreating him for his religious beliefs; and falsely telling one of them that his family members had been killed.

*Id.*

210. *Id.* at 13.

211. *Id.* at 14.

212. *Ibrahim*, 391 F. Supp. 2d at 14.

213. *Id.*

214. *Id.* at 13–14.

found that “[t]he Supreme Court has not answered” the question of whether the law of nations applies to private actors.<sup>215</sup>

Finding no answer from the Supreme Court, the court looked to the D.C. Circuit and found that the law of nations did not apply to PMCs or any other private actors.<sup>216</sup> In *Tel-Oren v. Libyan Arab Republic*, the court unanimously dismissed a case brought under the ATS alleging violations of the law of nations by private actors in a terrorist attack.<sup>217</sup> Of the three judges to write an opinion, Judge Edwards gave most credence to the idea that private actors could be held accountable for violations of the law of nations under the ATS.<sup>218</sup> However, Edwards could find “no consensus that private actors are bound by the law of nations.”<sup>219</sup> In spite of this, Judge Edwards found there were “a limited number of exceptions to this principle”<sup>220</sup> and “that torture by private parties acting under ‘color of law,’ as compared to torture by private parties ‘acting separate from any states [sic] authority or direction,’ would be actionable under the ATS.”<sup>221</sup>

Judge Robertson responded to Judge Edwards’s suggestion that PMCs such as Titan could be held liable under the ATS if they acted under color of law by foreclosing that option through sovereign immunity.<sup>222</sup> The court stated that “[f]or rather obvious reasons” the plaintiffs do not claim that Titan or CACI were state actors because “if defendants were acting as agents of the state, they would have sovereign immunity.”<sup>223</sup> The court noted that while the plaintiffs originally submitted a memo asserting that Titan was acting under color of law, they withdrew that memo at a later date.<sup>224</sup> For Judge Robertson, the withdrawal eliminated the need to continue the inquiry.<sup>225</sup>

In *Saleh*, Judge Robertson again addressed the issue of whether PMCs could be held liable for violations of the law of nations under the ATS.<sup>226</sup> Here, the plaintiffs suggested that the Supreme Court’s opinion in *Sosa* provided guidance on the issue and that the court in *Ibrahim* had not given it enough weight.<sup>227</sup> The argument claimed that *Sosa* “approved Judge Edwards’s view in *Tel-Oren* that torture by private parties would be actionable

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215. *Id.* at 14.

216. *Id.*

217. 726 F.2d 774, 775 (D.C. Cir. 1984).

218. *See id.* at 791–95.

219. *Ibrahim*, 391 F. Supp. 2d at 14.

220. *Id.* at 14 n.2.

221. *Id.* at 14 n.3 (quoting *Tel-Oren*, 726 F.2d at 793 (Edwards, J., concurring)).

222. *Id.*

223. *Id.*

224. *Ibrahim*, 391 F. Supp. 2d at 14 n.3.

225. *Id.*

226. *Saleh v. Titan Corp.*, 436 F. Supp. 2d 55, 57 (D.D.C. 2006).

227. *Id.*

under the ATS if the private parties were acting under color of law.”<sup>228</sup> Judge Robertson rejected that argument, stating that *Sanchez-Espinoza v. Reagan*<sup>229</sup> controlled and that “*Sosa* did not overrule that precedent.”<sup>230</sup> Further, the court rejected the argument that Titan was acting under color of law because the theory was not advanced by the plaintiffs’ assertions.<sup>231</sup> However, Judge Robertson admitted “that participation in a conspiracy with government actors does not confer government immunities.”<sup>232</sup>

In sum, the court’s decisions in the *Titan* cases turned on the problematic analysis of both the Supreme Court and D.C. Circuit precedent. In *Sosa*, the Court left unanswered the question of whether the law of nations applied to PMCs; in *Tel-Oren*, the court asserted that torture by a non-state actor was not a violation of the law of nations and that private actors could not be held liable under the ATS.<sup>233</sup> The effect of both decisions seems to be that violations of the law of nations under the ATS are limited to state actors, and thus, the ATS does not apply to PMCs.

Accordingly, torture is not a violation of the law of nations, but official torture is. One recent article put it this way: “The law of nations may not care about Tony Soprano [torturing people], but it does care if Denmark is torturing people.”<sup>234</sup> This view problematically creates a situation where a PMC could torture for governments without liability, so long as it is not a state actor.<sup>235</sup> Further, even if a contractor were assessed to be a state actor, Judge Robertson has stated that the PMC would be afforded sovereign immunity.<sup>236</sup>

The *Titan* cases compounded *Sosa*’s failure to address the question of PMC liability under the ATS and raised important questions regarding ATS litigation. First, is it true that the law of nations as envisioned by the writers of the ATS would not apply to PMCs or other private actors? Second, if a PMC were found to be working closely enough with a state entity to qualify as a state actor, is it true that the PMC would be offered sovereign immunity?

The next section seeks to answer both questions through an analysis of *Kadic v. Karadžić*,<sup>237</sup> 42 U.S.C. § 1983,<sup>238</sup> and some alternate interpretations of the ATS.

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228. *Id.* (citation omitted).

229. 770 F.2d 202 (D.C. Cir. 1985).

230. *Saleh*, 436 F. Supp. 2d at 57.

231. *Id.* at 58.

232. *Id.*

233. *See Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 791–95 (D.C. Cir. 1984) (Edwards, J., concurring).

234. Garfield, *supra* note 179, at 740.

235. *Id.*

236. *Ibrahim v. Titan Corp.*, 391 F. Supp. 2d 10, 14 n.3 (D.D.C. 2005).

237. 70 F.3d 232 (2d Cir. 1995).

238. 42 U.S.C. § 1983 (2000).

III. WHAT TO DO WITH THE STATE ACTOR REQUIREMENT?: LOOKING AT  
*KADIC*, 42 U.S.C. § 1983 JURISPRUDENCE, AND ALTERNATE INTERPRETATIONS  
OF THE ATS

A. *Kadic v. Karadžić*

*Kadic v. Karadžić* provided an excellent framework for addressing the issue of whether private actors are accountable under the ATS for violations of international law. Here, victims of the Bosnian-Herzegovina conflict brought an action under the ATS for violations of international law against Radovan Karadžić, who was the President of the self-proclaimed Bosnian-Serb republic of Srpska.<sup>239</sup> The allegations against Karadžić as a private actor included genocide, war crimes, and crimes against humanity.<sup>240</sup> The appellate court took up the issue of whether acts committed by non-state actors violate the law of nations.<sup>241</sup> Two important elements for future ATS litigation come from this decision: (1) the notion that private actors can be held accountable for violating international law; and (2) the application of the 42 U.S.C. § 1983 model to determine whether a private actor has engaged in official action for the purposes of jurisdiction under the ATS.<sup>242</sup>

The court held that the law of nations is not restricted to state action.<sup>243</sup> Rather, “certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals.”<sup>244</sup> The court convincingly cited an executive branch opinion and the Restatement (Third) of the Foreign Relations Law of the United States to support its argument.<sup>245</sup> The court asserted that the Executive Branch “has emphatically restated in this litigation its position that private persons may be found liable under the Alien Tort Act for acts of genocide, war crimes, and other violations of international humanitarian law.”<sup>246</sup>

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239. *Kadic*, 70 F.3d at 236.

240. *Id.*

The two groups of plaintiffs asserted causes of action for genocide, rape, forced prostitution and impregnation, torture and other cruel, inhuman, and degrading treatment, assault and battery, sex and ethnic inequality, summary execution, and wrongful death. They sought compensatory and punitive damages, attorney’s fees, and, in one of the cases, injunctive relief.

*Id.* at 237.

241. *Id.* at 236.

242. *Id.* at 239, 245.

243. *Id.* at 239.

244. *Kadic*, 70 F.3d at 239.

245. *Id.* at 239–40 (citing *Breach of Neutrality*, 1 Op. Att’y Gen. 57, 59 (1795) and *RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES* (1986)).

246. *Id.*

Perhaps more important than the Executive Branch and the Restatement (Third), however, is the court's use of case law to dispute Karadžić's arguments. Citing both *Filartiga* and *Tel-Oren v. Libyan Arab Republic*, the court read those decisions as either not reaching the question of whether "international law violations other than torture are actionable against private individuals"<sup>247</sup> or suggesting that there were certain crimes "to which the law of nations attributes individual responsibility."<sup>248</sup>

Finally, the court disputed Karadžić's notion that Congress intended the state-action requirement of the TVPA to apply to the ATS.<sup>249</sup> The court said that the opposite is instead the case.<sup>250</sup> Congress explicitly left open the possibility that the ATS would be used for other violations:

Claims based on torture and summary executions do not exhaust the list of actions that may appropriately be covered [by the Alien Tort Act]. That statute should remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law.<sup>251</sup>

Thus, if appellants demonstrated that Karadžić committed the crimes they alleged, nothing would prevent him from being found liable under the ATS even if he was an individual actor.<sup>252</sup>

After establishing that the ATS was applicable to private actors such as Karadžić for certain crimes, the court moved on to evaluate the liability of a private actor acting in concert with a foreign state under the ATS.<sup>253</sup> In a small but important section, the court addressed the use of 42 U.S.C. § 1983 to determine whether a private actor has engaged in official action for the purposes of jurisdiction under the ATS.<sup>254</sup> Under this statute, a private individual can be viewed as a state actor if that individual acted in concert with a state in carrying out an act that violates the law.<sup>255</sup> Such an individual "acts under color of law within the meaning of section 1983 when he acts together with state officials or with significant state aid."<sup>256</sup> The court ruled that appellants should have the chance to demonstrate whether Karadžić acted

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247. *Id.* at 240.

248. *Id.* (internal quotation marks omitted) (quoting *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 795 (D.C. Cir. 1984) (Edwards, J., concurring)).

249. *Kadic*, 70 F.3d at 241.

250. *Id.*

251. *Id.* (alteration in original).

252. *Id.* at 243.

253. *Id.* at 244–45. Although the court addressed the issue of whether Srpska is a state, making Karadžić a state actor, *id.*, this note only discusses the 42 U.S.C. § 1983 analysis.

254. *Kadic*, 70 F.3d at 245.

255. *Id.* (citing 42 U.S.C. § 1983 (2000)).

256. *Id.*

under color of law in terms of his interaction with Yugoslavia without further explanation of its use of § 1983.<sup>257</sup>

B. 42 U.S.C. § 1983 Jurisprudence and Sovereign Immunity for PMCs

1. 42 U.S.C. § 1983

For our purposes, it is important to examine § 1983 jurisprudence in light of *Kadic* to determine its possible application to PMCs. According to a recent article on corporate liability under the ATS, there are four tests to determine “when state and private involvement in a wrongful activity are so conflated that each actor is properly considered a state actor under § 1983.”<sup>258</sup> The four tests to determine whether there is state action are as follows: (1) “a private party partakes in a public function or enjoys powers traditionally . . . reserved to the State”; (2) “state compulsion obliges the private party to commit the wrongful act”; (3) the nexus between the state and the private actions is such that they are conflated with one another; and (4) the “joint action” test.<sup>259</sup>

According to the article, the Supreme Court acknowledges that “distinctions among these approaches are not always clear.”<sup>260</sup> Despite this confusion, however, § 1983 jurisprudence provides the basis for an answer to the Supreme Court’s question in *Sosa*’s footnote twenty about whether courts can hold individual private actors and companies accountable for violations of a given norm. Individual private actors or companies can be subject to litigation under the ATS for the violation of a given norm if they are found to be de facto state actors under § 1983 jurisprudence.<sup>261</sup>

The last section of the article applies the principles of § 1983 jurisprudence<sup>262</sup> to *Doe v. Unocal Corp.*<sup>263</sup> In *Unocal*, the plaintiffs brought suit under the ATS for offenses committed by the Burmese government on behalf of Unocal ranging from rape to slavery during the building of a natural gas pipeline.<sup>264</sup> Before declaring that the plaintiffs’ claim against Unocal proposing slavery as one of the international law offenses that provides individual liability failed, the court analyzed whether Unocal was operating

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257. *Id.*

258. Craig Forcese, *ATCA’s Achilles Heel: Corporate Complicity, International Law and the Alien Tort Claims Act*, 26 YALE J. INT’L L. 487, 502 (2001).

259. *Id.* (internal quotation marks and footnotes omitted).

260. *Id.*

261. *Id.* at 498–99.

262. *Id.* at 510–15.

263. 110 F. Supp. 2d 1294 (C.D. Cal. 2000), *aff’d in part, rev’d in part sub nom.* Doe I v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002), *reh’g granted en banc*, 395 F.3d 978 (9th Cir. 2003), *appeal dismissed per stipulation sub nom.* John Doe I v. Unocal Corp., 403 F.3d 708 (9th Cir. 2005).

264. *Id.* at 1297–98, 1303.

under color of law using § 1983 principles.<sup>265</sup> The court held that “claims that Unocal acted under ‘color of law’ for purposes of the ATCA fail as a matter of law.”<sup>266</sup> Some scholars claimed the court got it wrong in *Unocal* because it misapplied the joint action test<sup>267</sup> and failed to consider the nexus approach in its discussion of color of law.<sup>268</sup>

In spite of the district court’s final decision in *Unocal*, at least two of the four tests for determining whether a private actor can be held liable as a state actor seemingly apply to PMCs. PMCs are private actors that arguably partake in a public function or enjoy powers that are traditionally reserved to the state, and the nexus between PMCs and state action is such that they are conflated.

PMCs fight battles with U.S. military forces on the ground, serve in CIA paramilitary units, “maintain[] combat equipment, provide[] logistical support,” and fly on joint surveillance.<sup>269</sup> PMCs operate unmanned surveillance planes and participate with the CIA in the hunt for Osama bin Laden.<sup>270</sup> Reliance on PMCs for work that the state would normally do is such that when Halliburton officials threatened to leave Iraq because of security concerns, a Pentagon official stated that Halliburton’s withdrawal would result in a “complete collapse of the support infrastructure” for the CPA.<sup>271</sup>

Further, PMCs are routinely conflated with U.S. soldiers in Iraq.<sup>272</sup> Even U.S. military officials admit that PMCs damage the mission in Iraq when they mistreat, wound, rape, and kill Iraqis.<sup>273</sup> This is so because Iraqis believe that PMCs are U.S. military.<sup>274</sup> PMCs “defended the CPA headquarters in Najaf from being overrun by radical Shiite militia.”<sup>275</sup> Blackwater resupplied the military with ammunition and “ferr[ied] out a wounded marine.”<sup>276</sup> At Abu Ghraib, members of the military admitted that they were not certain who was in charge,<sup>277</sup> likely leading to confusion about which protocols were being followed and how to discipline those who were outside of that protocol.

In sum, if § 1983 principles were applied to PMCs, they could easily be considered state actors under both the public function/powers traditionally

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265. *Id.* at 1305–08; *see also* Forcese, *supra* note 258, at 511–12.

266. *Unocal*, 110 F. Supp. 2d at 1307.

267. *See, e.g.*, Forcese, *supra* note 258, at 512–13.

268. *Id.* at 513–14. Forcese also includes analysis of other elements that are not crucial to this discussion. *Id.* at 512–15.

269. Singer, *Warriors for Hire*, *supra* note 51.

270. *Id.*

271. *Id.* (internal quotation marks omitted).

272. *See* Singer, *Can’t Win With ‘Em*, *supra* note 24, at 6.

273. *See id.* at 8.

274. *Id.* at 8–9.

275. Singer, *Warriors for Hire*, *supra* note 51.

276. *Id.*

277. *See* Carney, *supra* note 27, at 329.

reserved to the state test and the nexus/conflation test. However, if the PMC is a state actor and its offenses do not reach a level of war crimes such that it is open to prosecution under international law, would the PMC be afforded sovereign immunity? According to the *Titan* cases, that would be so. Judge Robertson asserted that plaintiffs were careful not to claim that defendants were state actors because “they would have sovereign immunity under *Sanchez-Espinoza*.”<sup>278</sup>

## 2. Immunity

The court’s holding in the *Titan* cases is subject to scrutiny because of similar cases involving government contractors in the prison system and the immigration system. In *Richardson v. McKnight*,<sup>279</sup> the plaintiff sued government contractors working in a state prison, and the Court declared that while prison officials were protected by qualified immunity, government contractors were not.<sup>280</sup> Similarly, in *Jama v. INS*,<sup>281</sup> where plaintiffs sued both Immigration and Naturalization Service (INS) officials and government contractors working for the INS, the court suggested that while INS officials sued in their official capacities were protected by sovereign immunity, government contractors were not.<sup>282</sup>

In *Richardson*, an inmate brought a § 1983 claim against two private contractor prison guards, alleging that the restraints the guards used caused serious injury.<sup>283</sup> The defendants argued that they were entitled to qualified immunity from prosecution.<sup>284</sup> The Supreme Court ruled that the guards were not entitled to qualified immunity because neither the history nor the purpose of immunity supported extending it to private prison guards.<sup>285</sup>

In *Jama*, undocumented aliens were detained, pending determination of their asylum status, at an INS facility run by a private contractor.<sup>286</sup> The plaintiffs asserted claims under the ATS *inter alia* against five categories of defendants: (1) Esmor (the private contractor corporation); (2) Esmor officers; (3) Esmor Guards; (4) the INS; and (5) INS officials.<sup>287</sup> The court stated that while the INS and its officials (sued in their official capacities) were protected by sovereign immunity, the private contractor as a corporate entity and its

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278. *Ibrahim v. Titan Corp.*, 391 F. Supp. 2d 10, 14 n.3 (D.D.C. 2005).

279. 521 U.S. 399 (1997).

280. *Id.* at 401, 405.

281. 343 F. Supp. 2d 338 (D.N.J. 2004).

282. *See id.* at 373 & n.24.

283. Brief in Opposition at 1–2, *Richardson v. McKnight*, 521 U.S. 399 (1997) (No. 96-318).

284. *Richardson*, 521 U.S. at 401–02.

285. *Id.* at 412.

286. *Jama*, 343 F. Supp. 2d at 345.

287. *Id.* at 347.



officers were not.<sup>288</sup> The court reasoned that sovereign immunity attached only to government officials, because only they have an official capacity.<sup>289</sup>

*C. Alternate Interpretations of the ATS: State Actor Not Required*

Perhaps the most obvious way of maneuvering around the state actor requirement would be to reevaluate the Supreme Court's analysis of the issue. According to recent scholarship, "[t]he question is not whether the ATS can be applied against private actors, but why should it be applied to anything but private actors."<sup>290</sup> For example, private actors would have been most likely to violate the three norms *Sosa* associated with the ATS.<sup>291</sup> A closer look at piracy, violation of safe conducts, and offenses against ambassadors—the norms agreed to by the Supreme Court after an analysis of Blackstone's *Commentaries*—suggests that it would have been difficult for a state to have ever committed these violations of the law of nations.<sup>292</sup> Pirates are generally not state actors, although it is clear that piracy violated the law of nations.<sup>293</sup> An individual American citizen who punched an ambassador in the street in 1790 would not have to act on behalf of the state in order for his attack to violate the law of nations.

While the violation of safe conducts seems at first to be the one act that required a state actor, recent scholarship has suggested that the safe conducts branch of the trilogy of law of nations violations under the ATS is the most expansive.<sup>294</sup> Under the "safe conduct theory" of the ATS, the statute seeks to provide "redress of torts against aliens that the United States had a commitment under international law to protect."<sup>295</sup> Thus, "[c]laims for torture and maltreatment by increasing numbers of private U.S. and alien contractors—at Abu Ghraib, at Guantanamo Bay, and at immigration facilities in the United States—are heartland ATS claims, regardless of whether the tortfeasors are U.S. citizens, alien contractors, or corporations."<sup>296</sup> From this view of the ATS, the United States owes a duty to aliens in areas where the government has assumed responsibility or where the presence of U.S. troops gives the impression of responsibility. Under this reading, the United States

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288. *Id.* at 373 n.24.

289. *Id.* at 373 & n.24.

290. Garfield, *supra* note 179, at 755.

291. *Id.*

292. *Id.* at 755–56. However, it should be noted that in the eighteenth century the line between privateers (whom many considered to be state actors) and pirates was not clear. See, e.g., *Talbot v. Jansen*, 3 U.S. (3 Dall.) 133, 147–49 (1795).

293. See Garfield, *supra* note 179, at 755.

294. See, e.g., Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 COLUM. L. REV. 830, 871–908 (2006).

295. *Id.* at 907.

296. *Id.* at 907–08.

violates the paradigm of the eighteenth century understanding of the law of nations by allowing Titan, Blackwater, or DynCorp to get away with, condone, or otherwise turn a blind eye to torture and murder. Accordingly, then, the ATS in the eighteenth century would have required no state action.

#### CONCLUSION

The upswing in the privatization of the military under the Bush Administration and the heavy reliance on PMCs have created problems that the U.S. government was not prepared to handle. From torture at Abu Ghraib to the murder of innocent civilians just outside of the Green Zone in Iraq, PMCs have been on the front pages of the world newspapers, leaving the rest of the world with the impression that the United States is a lawless nation. Failure at all levels of government to address fully the problems of PMC oversight and accountability has reinforced that notion.

Whether a failure of drafting, as in the first two incarnations of MEJA, or a failure of will to enforce the law, the tools of criminal law have failed to address adequately the problems PMCs have created. While the ATS is by no means the perfect vessel through which regulation of PMCs can be accomplished, the ATS offers a means for aliens to redress the injuries they suffered at the hands of PMCs abroad. It is crucial that these victims be afforded their day in court and that our system evaluates their claims fairly in order for the United States to live up to the high ideals on which its founding was based. As such, the ATS, a product of the founding generation, can serve as one of the most important mechanisms to regaining the high ground.

Whether the courts follow modern scholarly analysis and recognize that PMCs are liable for violations of the law of nations under the ATS because there is properly no state actor requirement or they apply the principles of § 1983 jurisprudence to PMCs and establish that PMCs are state actors because of a nexus between them and the state, the result is the same. By offering aliens the use of our federal courts to pursue their claims for violations of the law of nations, the United States can fulfill one of the principal purposes behind the ATS, which is to instill confidence in foreign nations that the United States of America will honor its international obligations and be a trustworthy partner in the future.

#### POSTSCRIPT

On December 8, 2008, the Justice Department unsealed its case against five Blackwater security guards for the September 16, 2007 shootings that killed seventeen Iraqis in Baghdad's Nisour Square.<sup>297</sup> A sixth guard, Jeremy

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297. Ginger Thompson & James Risen, *Plea by Blackwater Guard Helps U.S. Indict 5 Others*, N.Y. TIMES, Dec. 9, 2008, at A12.

Ridgeway, pled guilty to manslaughter, describing “how he and the other guards used automatic rifles and grenade launchers to fire on cars, houses, a traffic officer and a girls’ school.”<sup>298</sup> The five other guards rejected Ridgeway’s claims but surrendered to federal authorities in Utah, believing they will face a more sympathetic, conservative jury.<sup>299</sup> Prosecutors plan to argue that MEJA<sup>300</sup> provides jurisdiction for “filing charges against the guards, who were hired by the State Department, not the Department of Defense.”<sup>301</sup>

Although the Justice Department has filed no charges stemming from the killings against Blackwater itself, Iraq’s government refused to grant the PMC a license to operate.<sup>302</sup> Further, the Iraqi government focused on Blackwater and the legal status of security contractors in general as a “central issue in the negotiations over the status-of-forces agreement.”<sup>303</sup> During these negotiations, Iraqi representatives eliminated the previously existing immunity granted to PMCs<sup>304</sup> under Paul Bremer and the Coalition Provisional Authority.

While it is promising that the Justice Department has followed through and brought charges against these Blackwater guards under MEJA, the ATS still has an important role to play. For example, in *Saleh v. Titan Corp.*, an action brought under the ATS, 250 Iraqi citizens used the U.S. courts to pursue claims of torture, rape, and war crimes, among other violations of international law.<sup>305</sup> Although the ATS portion of the lawsuit has been dismissed, plaintiffs are appealing that ruling in federal court.<sup>306</sup> Finally, in *Atban v. Blackwater*, plaintiffs are those injured or the families of those murdered on September 16, 2007 in Nisour Square.<sup>307</sup> They are suing Blackwater itself, not simply the individual employees, under the ATS in the District Court for the District of Columbia.<sup>308</sup>

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298. *Id.*

299. *Id.*

300. *See supra* Part II.B.

301. Thompson & Risen, *supra* note 297.

302. James Risen & Timothy Williams, *As Iraq Tries to Oust Blackwater, U.S. Lines Up to Other Security Options*, N.Y. TIMES, Jan. 30, 2009, at A8.

303. *Id.*

304. *Id.*

305. 436 F. Supp. 2d 55 (D.D.C. 2006).

306. Joint Brief of Appellants at 57, *Saleh v. Titan Corp.*, No. 08-7008 (D.C. Cir. Sept. 2, 2008).

307. *Estate of Atban v. Blackwater USA*, No. 1:07-cv-01831-RBW (D.D.C. Oct. 11, 2007).

308. *Id.*

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