PRIVATE MILITARY CONTRACTORS & FOREIGN TORTS: INTERNATIONAL LAW AND THE U.S. 'POLITICAL QUESTION' QUESTION

by

Don Mayer*

INTRODUCTION: CIVILIAN CONTRACTORS IN U.S. WAR ZONES

The role of U.S. private military contractors (PMCs)[1] has greatly expanded since the end of the Cold War,[2] particularly since the start of the United States' "Global War on Terror" (GWOT)[3] in both Iraq and Afghanistan.[4] PMCs have been hired to train troops, maintain troop readiness, interrogate prisoners, gather intelligence, perform janitorial and food services, and to provide transportation, security management, and other logistical support. Most civilian contractors are not armed, but many are; the civilian employees of Blackwater Worldwide made front page news on at least two occasions – when four employees were dragged through the streets of Fallujah and two of their mutilated corpses hung from a bridge[5] and when 17 civilians were killed by Blackwater employees in Baghdad's Nisour Square.[6]

Despite such incidents, it is frequently argued that the U.S. military cannot operate at peak efficiency without the expertise of PMCs.[7] Advocates of mixed public and private forces contend that PMCs are increasingly needed as military combat becomes more technologically advanced and globalized.[8] Current estimates on the total number of contractor-employees in Iraq vary from 20,000 to 120,000, numbers which include U.S. citizens, Iraqi nationals, and citizens of other nations as well.[9] Because many PMC employees are not directly protected by U.S. military forces, they are often armed; incidents of civilians being killed or injured are more likely to arise. Even PMC employees who are not armed may commit intentional and negligent torts for which there is little or no accountability.[10] Part of the problem lies with international law, and the lack of functioning international forums to hold PMCs accountable for misdeeds; the other part lies with U.S. courts and institutions.

In the context of the 20th century and early 21st century law, both domestic and international, the rise of PMC involvement in state-sponsored hostilities has created a new set of accountability issues. We are used to thinking that governments have a near-exclusive monopoly on the use of force for national security. But throughout history, participants in war have often been mercenaries, and "the state monopoly over violence is the exception in history rather than the rule."[11] While a number of military and quasi-military functions have been privatized by Executive branch policy in the United States, the wars in Iraq and Afghanistan have been conducted without the use of hired troops, or what are traditionally known as "mercenaries." Other countries, such as Sierra Leone and Angola, have explicitly hired private armies, and in many modern conflicts, these private military companies have played a decisive role.[12]

Peter Singer, a pre-eminent expert on the privatization of military and quasi-military force, has commented that the increasing privatization of security and the use of violence have begun to "deprivilege" the state's role in the security sphere.[13] It has become accepted by the U.S. Congress and the U.S. President that individual employees of PMCs in Iraq or Afghanistan are not always under the direct supervision of military personnel, are not subject to the Uniform Code of Military Justice,[14] yet may (and allegedly do) commit crimes or torts in the course of their employment. For international law especially, this movement away from the state's monopoly on military and security actions is problematic. Even for U.S. domestic law, the outsourcing to PMCs of some functions traditionally done by military personnel creates a class of corporate actors that is difficult to account for in terms of military justice, domestic law, or international law. The essential problem is that no court seems to have jurisdiction to remedy tortuous harms, both intentional and negligent. One example of both a domestic and international law quandary is the torture of non-U.S. citizens at Abu Ghraib.[15]

U.S. PMCs and their employees can be (and allegedly have been) implicated in murder, assault, rape,[16] sex trafficking,[17] and sexual harassment in other nations. Numerous lawsuits filed in the United States have alleged other intentional torts and negligence.[18] Under *respondeat superior*, the PMCs have been named as defendants in such cases, and in negligence cases brought by military personnel and even PMC employees, a few have survived motions to dismiss despite numerous defenses available to PMCS.[19] One PMC, Blackwater Worldwide, has even sued the employees and their families for bringing a lawsuit alleging gross negligence in the direction of employees leading up to the desecration of their bodies by "insurgents" in Fallujah.[20]

While PMCs and their employees may intentionally or negligently cause harm while conducting business abroad, legal remedies are hard to find. A number of law review articles have pointed out lack of accountability in criminal proceedings, and some have looked at the lack of civil remedies as well. Most commentators believe that legal remedies in Iraq or Afghanistan are non-existent, and there is (as yet) no international or regional claims tribunal that would have jurisdiction.[21] Consequently, much of the litigation has taken place in U.S. courts, where plaintiffs (military personnel, U.S.

civilians, or Iraqi nationals) bring actions against U.S.-based PMCs or their individual employees. There are many defenses available to such lawsuits, including "state secrets,"[22] the military contractor defense,[23] and the "political question" doctrine.

Of all these defenses, the "political question" question is most intriguing, as several courts have held that it does not raise an insuperable bar to U.S. common law tort actions against U.S. PMCs or their employees with respect to actions in Iraq or Afghanistan; yet several courts believe that the political question defense merited dismissal before a complete course of discovery. In brief, the "political question" defense in these cases is that the judiciary may determine a case to be "non-justiciable" if it believes that hearing the case would impair the prerogatives of either the Executive or legislative branches.[24] But in just what sorts of cases the impairment clearly occurs is still indeterminate.

In this paper, we will first look at the international legal landscape and consider the various ways in which the torts of PMCs may also be crimes, and thus create criminal responsibility for PMCs or their employees in any non-U.S. judicial tribunal.[25] Next, we will review the various U.S. lawsuits against PMCs as they relate to the 'political question' question[26] then consider related defenses such as "state secrets" and the "military contractor defense." [27] Finally, we will consider the possibilities of creating greater accountability for PMC torts abroad, keeping in mind the Constitutional issues that the "political question" defense raises: in time of war, what control can Congress Constitutionally exercise over contractors hired by the Executive Branch?

While this paper ultimately advocates a Congressionally-created claims commission to which all U.S.-funded PMCs would be accountable, any such solution must be mindful of the ongoing debate as to the "unitary executive," Presidential prerogatives, and the difficulties of Congressional oversight on Executive branch conduct. For example, Congress has thus far not been able to get firm figures on the number of private contractors in Iraq or to rein in cost overruns by those contractors, or to deal effectively with the Executive Branch on cost overruns. [28]

INTERNATIONAL LAW, TORTURE, AND PMC TORTS ABROAD

The roots of international law "run deep in history."[29] Although it is sometimes unfavorably compared to the domestic law of nation-states for not having a powerful executive, an effective legislature, and a competent set of judicial tribunals, "international law has been practiced by lawyers for centuries."[30] Detailed peace treaties and alliances were concluded between Jews and the Romans, Syrians, and Spartans.[31] The Romans knew of a *jus gentium*, a law of nations, as a law "common to all men" that could be applied in Roman courts to foreigners when Roman law did not apply.[32] The Dutch jurist Hugo Grotius argued in his 1625 classic The Law of War and Peace that there were established legal rules that bound the sovereign states of Europe.[33]

There are thus various standards and prohibitions that have been applied for centuries to the conduct of sovereign states, whether through treaty or customary international law. While such standards and prohibitions are by no means unchanging, torture has long been condemned as contrary to the law of civilized nations,[34] but the condemnation has historically been aimed at governmental actions, not those of individuals or corporations. Other than the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment, the primary international human rights law conventions include the United National Universal Declaration of Human Rights,[35] the International Covenant on Civil and Political Rights,[36] the International Covenant on Economic, Social and Cultural Rights, [37] the Genocide Convention, [38] the Geneva Conventions,[39] and the Rome Statute of the International Criminal Court[40] were written with states in mind and ratified by nation-states.

Yet individuals within government (and even corporations working with the state) have occasionally been held criminally or civilly responsible, in both international and domestic fora, for violating the rights articulated in these conventions.[41] Still, as this paper will indicate, such occasions are rare – the exceptions that prove the rule that international law is still different from domestic law, where sovereigns can make and enforce law on its citizens and within its territory.

The "de-privileging" of states that Peter Singer has noted[42] is further complicated by the emergence of a number of "non-state" actors to whom these international agreements do not apply. Guerrilla forces, nationalist movements based on ethnicity or religion, transnational terrorist organizations, have all emerged as important actors on the world stage, which already has had the presence of multinational corporate actors and NGOs. In the case of "terrorist organizations,"[43] an obvious conundrum emerges: how to hold such groups accountable for criminal activities and mass torts (such as the 9/11 attacks on the World Trade Center and the Pentagon) without declaring war (traditionally declared by one state upon another) and without punishing those who are innocent of wrongdoing. If a nation-state agrees that torture is wrong, is it morally right – and consistent with international law – to torture to prevent further loss of innocent life by terrorist attacks? We must acknowledge that experienced interrogators understand the practical limits of obtaining useful information through torture,[44] yet we turn here to the legal dimensions not only of torture in the GWOT, but to torts generally. What kinds of torts, committed by private parties in the course of assisting the U.S. military abroad, are actionable, and where? Before we can explore how private litigants may seek accountability for torture and other intentional torts (or torts of

negligence), it will be useful to survey U.S. obligations under international law, then consider the possibilities of both criminal and civil actions for torture and torts that take place away from the United States under official U.S. supervision.

State Responsibility for Torture under International Law

Global norms have emerged gradually to prohibit piracy, slavery, genocide, and torture.[45] This does not mean that genocide, piracy, slavery, and torture no longer happen, but rather that the "community of nations" has come to a consensus that these practices are morally wrong and must be abolished. Customary international law, even without a formal convention, has come to recognize certain practices as repugnant to civilization, and torture is just such a practice. When "universal jurisdiction" is discussed for "crimes against humanity," genocide and torture are prime candidates, and torture has been recognized in U.S. law as a violation of peremptory norms of international law (jus cogens).[46]

The notion of "universal jurisdiction" competes with the more familiar bases of jurisdiction in international law based on territoriality and nationality. Historically, universal jurisdiction was exercised over serious crimes, such as piracy, that were difficult to prosecute using traditional bases of jurisdiction because they occurred beyond state borders, such as on the high seas. In modern times, universal jurisdiction has been founded on the outrageousness of certain crimes, sometimes termed "crimes against humanity" such as genocide and torture. The roster of crimes currently covered by "universal jurisdiction" includes, at a minimum, genocide torture, certain war crimes, and the more generic "crimes against humanity."[47]

International law of state responsibility provides that breaches of international law involve an obligation to make reparations.[48] In the human rights field, many international instruments oblige states parties to afford an effective remedy for violations of fundamental rights.[49] Increasingly, reparation in the form of some sort of restitution, compensation, or rehabilitation is being viewed as an important adjunct to international criminal law.[50] For example, the UN Commission on Human Rights recently adopted the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.[51]Arguably, then, the acceptance of universal criminal jurisdiction should entail the need for some exercise of universal civil jurisdiction for the same kinds of conduct. The kinds of torts that Blackwater has allegedly committed at Nisour Square and that CACI committed at Abu Ghraib are also crimes, and the lack of institutions to assert legal accountability criminally or civilly exposes significant issues for both U.S. domestic and international legal systems.

U.S. Implementation of International Obligations

It took over ten years for the United States to ratify the Convention Against Torture. The Convention specifies that under Article 2, "each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction."[52]This obligation is absolute and "no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture." Second, states are prohibited under Article 3 from returning any individual to a country where there are "substantial grounds" for believing that he or she would be in danger of being tortured." The Article 3 prohibition speaks directly to practices of 'extraordinary rendition." Some legal experts could doubtlessly be found that could create finely drawn distinctions and explain why the Executive Branch could authorize such actions and still be consistent with international law, but these explanations seem morally evasive and self-serving.[53]

The United States has also made it clear that its soldiers (and, presumably, its contractors as well) should not be held responsible for criminal acts abroad. The International Criminal Court ("ICC") was established by the Rome Statute, and was intended to create international jurisdiction over atrocity crimes.[54] From the start, however, the United States was not a party to the Rome Statute.[55] Moreover, during the formation of the ICC, the United States worked to preserve the right of the U.S. military to investigate and prosecute personnel according to procedures already in place, and to maintain the legitimacy of the Status of Forces Agreements ("SOFAs") with foreign governments."[56] The result of maintaining SOFAs allowed two nations to sign "bilateral non-surrender agreements between nations."[57] Thus, even though signatory states "must surrender [people] at the ICC's request," the ICC cannot request a U.S. citizen from a party state if the United States and a state that has ratified the ICC have a bilateral SOFA that forbids surrender of a U.S. citizen to the ICC.

U.S. Lawsuits Against Foreign Sovereigns for Torture

The Foreign Sovereign Immunities Act of 1976 (FSIA) has been interpreted by the Supreme Court to make clear that a tort by a "foreign sovereign" is not actionable in U.S. courts unless that tort takes place in the United States.[58] Whether the Saudi government's conduct as described in Saudi Arabia v. Nelson[59] amounts to torture, or some other tort, the Supreme Court majority was convinced that foreign policy considerations and Congressional intent had immunized torts by

foreign sovereigns unless they were committed on U.S. territory. By this principle, torture committed by the United States or by private contractors to whom torture was "outsourced" would be actionable only in the nation-state where the torture took place. But given the grant of immunity provided for U.S. military and also to U.S. contractors in Iraq and Afghanistan,[60] it is not clear that legal actions for torture (or other torts) will be successful in Iraqi and Afghani courts.[61]

Tort Lawsuits Against the United States in U.S. Courts

Despite its ratification of the Convention Against Torture, the United States has sometimes evaded its obligations. We will look to some cases in U.S. courts momentarily, but some preliminary remarks are in order. A lawsuit directly against the U.S. government – by either a U.S. citizen or a foreign national – would have to pass the hurdle of sovereign immunity. But the FSIA has provided an exception to sovereign immunity where the "foreign state has waived its immunity either explicitly or by implication. It is arguable that, by implication, any signatory to the Convention against Torture has waived its immunity for violations of its obligations. But the Supreme Court narrowly construes the FSIA, and has determined that waivers must be clear and intentional.[62] Still, even without such a clear waiver, an argument can be made that members of the U.S. military committing war crimes (or *jus cogens* violations of international law)[63] would not and should not have immunity.

The U.S. FSIA grants immunity to foreign sovereigns for torts committed within their own territory. Thus, if China commits an egregious act of torture within its territorial boundaries, it is no legal business of the United States or any other nation.[64] Given this concept that torts committed within one's own state retain immunity, arguably torts committed outside the nation-state would have lesser immunity or no immunity at all. Further, if the tort (like torture) amounts to a violation of *jus cogens* norms, the courts of any nation should not dismiss such complaints where the sovereign has acted beyond its own borders.

Yet the U.S. judiciary is apt to avoid holding the executive branch (which includes the military and the CIA) accountable for actions taken in the course of war, particularly with respect to actions involving "state secrets." In El-Masri v. Tenet[65] the plaintiff claimed to be the innocent victim of the United States' "extraordinary rendition" program.[66] A German citizen of Lebanese descent, El-Masri's ordeal began on New Year's Eve 2003, when he was seized by Macedonian authorities while attempting to cross the border between Serbia and Macedonian. The Macedonian authorities imprisoned him in a Skopje hotel room for 23 days, refused to let him contact a lawyer, a German consular officer, a translator or his wife.[67] They interrogated him continuously about his alleged association with Al Qaeda. He claims to have consistently denied this association.

El-Masri claims that on January 23, 2004, several men in civilian clothes entered his hotel prison room. By his account, he was forced to videotape a statement that he had not been mistreated, was driven blindfolded to an airstrip about an hour from Skopje, taken to a building where he was stripped, beaten, and sodomized with a 'foreign object,' dragged naked to a corner and had his blindfold removed then immediately was photographed with a blinding flash of a camera. He believes that seven or eight CIA "black renditions" men dressed him in a diaper, a tracksuit, and earmuffs, and again blindfolded him, shackled him, and dragged him to an airplane where he was injected with a sedative. He was flown at Kabul, Afghanistan, again beaten and placed in small, cold cell, detained for four months, repeatedly interrogated, and denied access to any German official. He and others began a hunger strike, but were forcibly fed by tubes. At some point, he believes, probably within three months of his abduction, the U.S. Secretary of State knew that he was the victim of mistaken identity. He was again blindfolded and flown from Kabul to Albania, where he was deposited by his captors on the side of an abandoned road. With the assistance of Albanian authorities, El-Masri eventually made his way back to his home in Germany only to find that his wife and four children, believing he had abandoned them, had left Germany to live in Lebanon. He asserts that he remains deeply traumatized by his abduction and treatment during his detention.[68]

El-Masri sued using threee separate causes of action. The first claim was against George Tenet and unknown CIA agents pursuant to the cause of action recognized by the Supreme Court in Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics[69] for violations of his Fifth Amendment due process rights.[70] El-Masri's second cause of action is brought against all defendants pursuant to the Alien Tort Statute (ATS)[71] for violations of international legal norms prohibiting prolonged arbitrary detention, while his final cause of action is brought pursuant to the ATS for each defendant's violation of international legal norms prohibiting cruel, inhuman, or degrading treatment.[72]

Even if this account is the whole truth and nothing but the truth, the U.S. judiciary will not hear a case that so closely involves what it regards as "state secrets." Once the El-Masri case was filed, the United States filed a statement of interest and a formal claim of state secrets privilege. As the court explains, the privilege is "an evidentiary privilege derived from the President's constitutional authority over the conduct of this country's diplomatic and military affairs and therefore belongs exclusively to the Executive Branch."[73] Only the head of the Executive Branch agency with control over the state secrets at issue may assert it, and must do so formally with the court; if the assertion is valid by the court's determination,

the government may effectively block discovery of any information that, if disclosed, would adversely affect national security.[74]

> More particularly, "the various harms, against which protection is sought by invocation of the privilege, include impairment of the nation's defense capabilities, disclosure of intelligence-gathering methods or capabilities, and disruption of diplomatic relations with foreign governments." . . . . Given the vitally important purposes it serves, it is clear that while the state secrets privilege is commonly referred to as "evidentiary" in nature, it is in fact a privilege of the highest dignity and significance.[75]

While the state secrets privilege may have "the highest dignity and significance," its assertion could sometimes contravene international law, and its application is wholly independent of the truth or falsity of the complaint's allegations.[76] In short, the "alien" could be telling the truth about U.S. rendition and torture, and the United States could be in violation of its international obligations, yet executive-invoked privilege ("state secrets") would prevail in U.S. courts. As the El-Masri court explained why neither admission nor denial of alleged facts could adequately protect "state secrets."

> While a public admission of the alleged facts would obviously reveal sensitive means and methods of the country's intelligence operations, a denial of the alleged facts would also be damaging, as it may raise an inference of veracity in those cases where the government does not deny similarly sensitive allegations but asserts the state secrets privilege instead. For this reason, the CIA has appropriately adopted the policy of neither admitting nor denying allegations regarding the means, methods, persons, entities or countries used in its foreign intelligence operations. In light of this sensible policy, and on the basis of the DCI's public and classified ex parte declarations, the Court finds the United States' privilege is validly asserted in this case.[77]

In effect, where the judiciary approves of a "state secrets" defense (based on executive privilege), U.S. obligations under *jus cogens* or extant treaties or conventions (such as the Convention Against Torture) would be negated. For actions against the United States government heard in U.S. courts, the government could also successfully defend on the basis that the Federal Tort Claims Act provides that the United States is exempt from liability for "any claim arising in a foreign country."[78] Federal courts have consistently found this statutory exemption applicable to the "tortious conduct of foreign based military personnel acting within the scope of their employment."[79] The state secrets privilege, as we will see, also applies to lawsuits in the United States brought by civilians against PMCs. In sum, it appears as though U.S. courts will not require its government to answer claims of torture undertaken abroad.

U.S. CIVIL COURTS AND PMC FOREIGN TORTS

Types of Cases

PMC foreign torts may include everything from intentional torts (wrongful death, torture, sexual assaults) to negligence. In U.S. courts, there are three types of cases involving foreign "conflict zone" torts and PMCs: where the U.S. government or military personnel sues the PMC or responsible employees for damages, where plaintiffs are employees of private contractors seeking damages for torts committed by other PMCs or their employees, and where non-U.S. citizens make tort claims against PMCs or their employees. There are also three categories of possible defendants: PMCs or their sponsors, PMC employees, and the U.S. government; where PMCs work closely with government oversight, both the government and the PMCs may be named as defendants. [80] In the majority of cases brought against PMCs for torts in Afghanistan or Iraq, the "political question" question was squarely presented, and was often dispositive.

The 'Political Question' Defense

The typical PMC conflict zone tort case involves a negligent PMC working with the military in logistics or supply. The military retains a general direction over the PMC (what supplies to be delivered, from what location to another, and when) but does not accompany the PMC or its employees. Through an act of negligence, a PMC employee (usually a U.S. citizen) is injured or killed. The plaintiff is either the injured ex-employee or heirs of the deceased employee. The defendant argues that the case should be dismissed on the basis that it poses a 'political question' – discovery into the contractual arrangements and directives of the Department of Defense would reveal that the PMC and the U.S. military are closely connected, enough so that further inquiries into the connection would invade the prerogatives of the Executive Branch. As noted in Baker v. Carr, the dominant Supreme Court decision on the 'political question' doctrine, a court should not hear a

case where there is a "textually demonstrable constitutional commitment of the issue to a coordinate political department."[81]

The political question doctrine is a function of the separation of powers doctrine from U.S. Constitutional law, and it "excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch."[82] In *Baker*, the Supreme Court identified six types of cases that present political questions: [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; [2] a lack of judicially discoverable and manageable standards for resolving it; [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[83]

The presence of at least one of the above factors is needed for the political question doctrine to be taken seriously by a court. Several courts have taken the first factor quite seriously, dismissing seemingly valid common law tort claims as non-justiciable. The following subsection considers some of the cases that where alleged PMC conflict zone torts have been dismissed as non-justiciable.

"Political Question" Doctrine Effective for Dismissal

While some courts have refused to grant a PMC defendant's motion to dismiss based on "political question," the majority do grant relief. This group of cases granting relief represents the first time since Baker v. Carr was decided that federal courts have dismissed on political question grounds where the defendant is not a government agency or institution. Generally, where the court expects that discovery will lead to revelations about military plans and strategies – usually in cases where the contractor is working closely with government personnel and planning – it is likely to dismiss based on the political question doctrine.

On October 11, 2006, the federal district court for the southern district in Texas issued its ruling in the case of *Kevin Smith-Idol v. Halliburton.* In 1985, as part of the Army's decision to supplement regular Army forces with contractors, the United States Army implemented the Logistics Civil Augmentation Program or LOGCAP. Under LOGCAP, the Army awarded Brown & Root Services (KBR) a contract to provide essential services in support of the military in Iraq. The plaintiff, Kevin Smith-Idol, left his then-current employment in the United States to work for KBR as a truck driver in Iraq. Smith-Idol was first transported to Kuwait and later assigned to deliver fuel from his station at Camp Anaconda, Iraq, to specified locations in the "Area of Operations." In April 8 of 2004, Smith-Idol's convoy "was deployed along the route to Camp Ridgway, an area known to be subject to constant enemy attacks and artillery fire. As a result, Smith-Idol was wounded."[84]

Because Smith-Idol believed that KBR knew (or should have known) of hostilities in the area to which he was sent, he claimed not only negligence, but also intentional infliction of physical and emotional injuries, and sought punitive damages.[85] But the court dismissed before discovery, noting the prior decision in *Fisher v. Halliburton, Inc.*,[86] and the applicability of the political question doctrine. Noting that the facts were not as developed as in *Fisher*, the court nonetheless observed that

> . . .the record does contain the identical governing contracts to those in *Fisher.* And as in *Fisher*, the LOGCAP contract and Task Order 59 expressly state that the Army had sole responsibility for force protection for civilian contractors. Even in the unlikely event that the court were to find that the act of deploying the convoy was the sole responsibility of the defendants, the adequacy of the force protection provided to that convoy and the myriad of other decisions made by the Army and the defendants relating to which route to take, the accuracy and timeliness of intelligence on the possible routes, and the manner in which the convoys should travel, could not be divided into discrete parts attributable to the defendants and the Army. Therefore, the court finds that it cannot try this case without an impermissible intrusion into powers expressly granted to the Executive by the Constitution.[87]

In *Fisher*, the same 1985 augmentation program (LOGCAP) and the same KBR contract with the Army[88] was the foundation for Military task orders 43 and 59, which defined KBR's specific tasks. These included the same kinds of transportation services at issue in Smith-Idol. In *Fisher*, KBR had hired the seven deceased drivers and ten injured drivers to help KBR provide transportation services. In April of 2004, upon arriving at the convoy staging area, the plaintiffs learned the planned route for that day had been changed. As the court explains,

The new route called for the convoys to deliver fuel to Baghdad International Airport (BIAP). BIAP was an unfamiliar destination for the drivers. Many drivers merely followed the vehicle directly in front of them, who in turn,

followed the Army's local Iraqi guide. According to the Army report of the incident, military personnel, including six gunners, accompanied the plaintiffs' convoy. Even so, the plaintiffs were the majority of the KBR manpower for the first of two convoys. The first convoy was attacked by anti-American forces and sustained heavy casualties. Six men were killed, eleven more were seriously wounded, and one man is still missing and presumed dead.[89]

As in *Smith-Idol*, the plaintiffs in *Fisher* alleged that KBR intentionally put plaintiffs in harm's way. They "knowingly and intentionally deployed the first April 9th civilian convoy as a decoy into an area they knew to be under attack to ensure the safe passage of the second convoy, and . . . had complete control over the decisions of when, where and how to deploy civilian convoys."[90] The defendants responded that the Army had control over the deployment and protection of convoys, and that their decisions are so interwoven with Army decisions that the court lacked jurisdiction over the case under the political question doctrine. The court agreed.[91]

These cases may well have turned on the language of the governing contract, which in effect said that the LOGCAP contract and Task Order 59 expressly state that the Army had sole responsibility for force protection for civilian contractors. Even if not, the court's language in *Smith-Idol* (doubting that the decisions of the Army and KBR could be divided into discretely attributable parts)[92] would also be dispositive, for it "intertwines" the operations of the military with the PMC in a way that forbids – out of respect for the Executive branch – a thorough investigation of the Commander in Chief's execution of military hostilities.

Similarly, in Whitaker v. KBR[93] a United States soldier was killed while escorting a military convoy operated by the private contractor. Whitaker's surviving family, as plaintiffs, alleged that the convoy was returning to Scania, Iraq, after completing a delivery in Al Kut, when one of KBR's drivers hit the guard rail of a bridge over the Tigris River and went off the bridge. Whitaker, who was driving an Army escort vehicle following that KBR rig, stopped his vehicle on the bridge. Then, another KBR driver struck Whitaker's vehicle from behind, knocking it close to the edge of the bridge where the guard rail had been destroyed. When Whitaker tried to get out of his vehicle, he fell off the bridge and into the Tigris River.[94] Whitaker drowned, despite rescue attempts by those on hand. The plaintiffs asked the court to hold KBR liable under the doctrine of *respondeat superior* for the negligence of its drivers.

But the court agreed with KBR, who argued the political question doctrine. As the court noted, plaintiffs' son was working in cooperation with government contractor employees, so the question was not a typical auto negligence tort; "[t]he question here is not just what a reasonable driver would do – it is what a reasonable driver in a combat zone, subject to military regulations and orders, would do. That question necessarily implicates the wisdom of the military's strategic and tactical decisions, a classic political question over which this Court has no jurisdiction."[95] Under these facts, the court noted, KBR was charged with the duty

> . . .to achieve military objectives in a wartime convoy operation that was planned and executed by the military. He was killed due to the alleged negligence of the government contractor's employees, which were performing their duties subject to the military's planning, orders, and regulations. The court noted, "It is well accepted that, in general, soldiers injured at the hands of the military raise political questions. The Court finds that a soldier injured at the hands of a contractor which is performing military functions subject to the military's orders and regulations also raises the same political questions. An examination of the purposes of the political question doctrine supports this conclusion.[96]

The *Whitaker* court went on to note that an important function of the political question doctrine is to prevent the courts from deciding questions that were intended by the Constitution to be left to the political branches. As the court stated, "[t]here is a textually demonstrable constitutional commitment of oversight and control of military force to the legislative and executive branches, and those political branches receive deference in the area of military affairs."[97] The court was persuaded that where contractors have partnered with government and subjected themselves to direct orders, regulations, and plans, the courts should defer to political branches in any liability questions that might arise. The *Whitaker* court was also convinced that there were no "judicially discoverable and manageable standards for resolving the questions."[98] The "garden variety road wreck" that plaintiffs presented was, to the court, a far more complex event, for "the wreck occurred in a combat zone during wartime while Plaintiffs' son, along with his Supply and Transport Troop and a group of civilian contractors, transported supplies from one military camp to another."[99] While other courts have agreed with this analysis in combat zone negligence cases,[100] not every court has.[101]

Intentional torts pass through the same analytic frame; where there is "integration" with military decisions, a political question is present, and dismissal is inevitable. The most intriguing U.S. lawsuit alleging intentional tort by a PMC is Ibrahim v. Titan and CACI.[102] In *Ibrahim*, plaintiffs were seven Iraqi nationals complaining that contractors working as interrogators at Abu Ghraib beat them, deprived them of food and water, subjected them to long periods of excessive noise, forced them to be naked for prolonged periods, threatened them with attack dogs, exposed them to cold for prolonged

periods, urinated on them, photographed them while naked, deprived them of sleep, and forced them to witness the abuse of other prisoners (including rape, sexual abuse, beatings and attacks by dogs). Allegations also included eye gouging, leg breaking, and electrocutions.[103]

Ibrahim and the other Iraqi plaintiffs brought claims under the Alien Tort Statute (ATS), the Racketeer Influenced Corrupt Organizations (RICO) act, government contracting laws, and the common law of assault and battery, wrongful death, false imprisonment, intentional infliction of emotional distress, conversion, and negligence. Judge Robertson observed at the outset of his opinion how serious the claims were, and used the word "tortured" in listing the actions at the heart of the complaint. He also noted that plaintiffs "apparently concede that they cannot sue the U.S. Government because of sovereign immunity."[104] He then dismissed the plaintiffs' claims under RICO and the ATS,[105] but considered the political question doctrine and determined (in his first reported decision in the case[106]) to wait for further discovery. Judge Robertson initially noted the importance of determining the degree of contractor integration with the military, and in his most recent decision on the case,[107] Titan was successful in getting these claims deemed non-justiciable as posing a "political question." That is, Titan's actions were tied closely enough to the government employees that it secured dismissal. CACI was not as successful; the distinction was that CACI's actions were more independent from operations planning by either the CIA or the U.S. armed forces. [108]

"Political Question" Doctrine as Ineffective for Dismissal

Unlike the cases like Fisher, Smith, Whitaker, or Smith-Idol, there have been some Iraq-based negligence claims against PMCs that have withstood motions to dismiss based on the "political question" doctrine. These cases survive motions to dismiss only because there is a seeming separation of duties and responsibilities between the regular military forces and the PMCs.

In *McMahon v Presidential Airways*,[109] the plaintiffs were family survivors of U.S. servicemen killed by the alleged negligence of a contractor providing air troop transport in Afghanistan. The court was clear that when a contractor "operates contractually according to civilian standards and when the pressure of direct combat is absent, it is more likely that ordinary standards of care apply and the political question doctrine is not implicated."[110] In *McMahon*, plaintiffs had alleged that soldiers were being transported by defendant in clear weather and that defendants were to operate the aircraft in compliance with Federal Aviation Regulation 135 and 32 CFR 861, in accordance with a plan that would ensure safe and reliable air transportation.[111] In the event the Defendants were required to carry cargo and passengers, they were to receive FAA approval and comply with FAA guidelines regarding cargo placement. As the court noted, "Defendants were required to fly as they normally would, according to commercial, civilian standards, in a foreign, albeit treacherous, terrain. Indeed, pursuant to the contract, the civilian personnel were entitled to refuse any mission that could not be completed safely."[112]

Accordingly, the Court could not conclude that the "transportation of the decedents involved any military strategy or state secrets implicating national security."[113]

> Ramifications may flow from allowing United States service personnel to sue private military contractors who operate on or near the battlefield, especially considering the extent to which our military forces now utilize private contractors in this manner. . . . .The extent to which for-profit corporations, performing traditional military functions, are entitled to protection from tort liability is an area of interest to the political branches. However, under the current state of the law, the political question doctrine is not a proper basis for dismissing this case when the allegations appear to only implicate negligence principles and not military tactics. Thus, dismissal is not warranted under the political question doctrine.[114]

In yet another case against KBR (*Carmichael v. Kellogg, Brown, and Root*),[115] plaintiff alleged that KBR and its driver had been negligent in transporting Sgt. Carmichael when the tractor-trailer driven by defendant's employee was being driven at an excessive speed and without proper control by defendant's employee, Richard Irvine.[116] Irvine was employed by both KBR and Halliburton. Irvine lost control of the vehicle while traveling from Logistics Support Area Anaconda to Al Asad, Iraq; consequently, Carmichael was partially ejected from the cab of the tractor. "His head and chest were pinned between the tractor and the ground. Six to seven minutes passed before rescuers could dislodge his body. During this time he experienced a loss of oxygen to his brain. As a result, he suffered massive injuries and is now in a permanent vegetative state."[117] Carmichael's wife, individually and as her husband's guardian, filed a lawsuit in state court, alleging negligence on the part of Irvine and his employers, and survived a motion to dismiss.[118]

In *Lessin v. Kellogg Brown & Root*,[119] a member of the United States Army was providing a military escort for a commercial truck convoy. While en route to Kuwait, one of the convoy trucks suffered an equipment malfunction. The truck stopped at the side of the route and Lessin attempted to assist the driver. While doing so, he was struck in the head by the ramp assist arm for the truck and suffered a traumatic brain injury. Plaintiff's theory of the case was that the military

contractor had been negligent in inspecting, maintaining, and repairing the truck that injured him, and/or in supervising the driver operating the truck. Alternatively, plaintiff alleged that the driver was negligent in using the ramp assist arm of the truck, and in failing to warn Lessin.[120] Defendants argued forcefully for application of the political question doctrine. The Court agreed that where the military's strategy, decision-making, or orders are inextricably linked to the claims asserted in a case, the "political question doctrine is implicated, and the case is inappropriate for judicial inquiry."[121] Yet unlike *Whitaker*, the *Lessin* court saw the incident as essentially a traffic accident, involving a commercial truck said to have been negligently maintained, as well as a civilian truck driver who was insufficiently trained.

> Claims of negligence arising from this type of incident are commonly adjudicated by courts, using well-developed judicial standards. While the actions taken by Lessin, a military officer, in assisting the truck will likely be relevant to causation, it is by no means clear that the policies or decisions of the military or of the executive branch itself will be implicated in this case. It does not follow, therefore, that the case will require initial policy decisions committed to the discretion of the political branches, or that adjudication of the case will evince a lack of respect for the political branches.[122]

For a negligence case against KBR's for failing to protect against a suicide bomber in FOB Marez, the court declined the defendant's first motion to dismiss by following *Lessin* and not *Whitaker*. The court deemed it too early in the proceedings to dismiss on political question doctrine without the benefit of "crucial facts" that were not before it. The plaintiffs alleged that the defendants had been warned of the high probability and likelihood of an attack at FOB Marez. The court reasoned that if the military had been warned that there was likely to be an attack but failed to warn defendants, "the case might be inexorably intertwined with constitute [sic] political questions."

> But this fact, like many others, remains to be established. Other relevant questions are whether defendants' contract required them to institute force protection procedures in operating the mess tent. If so, did defendants comply with their contract? Did defendants comply with the military's rules of engagement, standing orders, and other policies governing force protection and anti-terrorism procedures? Were defendants provided with advance warning of potential attacks by the military? The answers to these questions may elicit facts that answer the central inquiry: Were defendants entrusted with mess tent security, and did they negligently carry out their duties, or did the military retain responsibility for security of the mess tent?[123]

If KBR was entrusted with mess tent security and they negligently carried out their duties, then there is not necessarily a political question. But if the military had responsibility for security of the mess tent, "it is the military's conduct, not that of defendants, that the court would be called upon to analyze. This analysis would likely run afoul of the political question doctrine and the "complex, subtle and professional decisions" of the United States military, which the Constitution has entrusted to the political branches of government.[124]

For intentional torts by PMCs, Ibrahim remains an intriguing case that not only affirms the power of the political question doctrine to force dismissal of otherwise valid claims of torture, but also holds out the hope that for some residual class of intentional torts, some foreign plaintiffs may nonetheless find available remedies in U.S. courts. Recall that at Abu Ghraib, the interrogations were conducted by both military and civilian contractors, with varying degrees of supervision from military commanders in the field.[125] According to Ibrahim's allegations, these contractors included both CACI and Titan.

After reviewing Baker v. Carr and related cases,[126] Judge Robertson notes the Hamdi v. Rumsfeld[127] case and cites it for the proposition that

> The Constitution's allocation of war powers to the President and Congress does not exclude the courts from every dispute that can arguably be connected to "combat" as the Supreme Court's rejection of the government's separation of powers argument in Hamdi v. Rumsfeld makes clear. . . .An action for damages arising from the acts of private contractors and not seeking injunctive relief does not involve the courts in "overseeing the conduct of foreign policy or the use and disposition of military power."[128]

While the Ibrahim case clearly has "some relationship to foreign relations," the court notes, "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."[129] In his initial decision in the case, Judge Robertson noteed that if discovery collides with government claims to state secrecy, he would likely invite summary judgment motions from the defendants. Indeed, after further discovery, Judge Robertson considered the defendants' arguments under the "military contractor defense" and concluded that federal statutory law pre-empted the claims against one contractor, but not the other.[130] In so doing, he left the political question (which has Constitutional dimensions)

unanswered, preferring to conclude some of the claims using the more statutory-based military contractor defense. As we shall see in the section immediately below, because of differing command structures and differing degrees of "integration" with military personnel, Titan's motion for summary judgment was allowed, and CACI's was not.[131]

Reviewing the cases where the political question doctrine has been applied to PMC torts in conflict zones, it is clear that the political question defense is dispositive in some cases but not others. For cases of intentional tort, the political question may be averted by looking to "state secrets" or the "military contractor defense." For negligence torts, the courts' initial inquiries are likely to be fact-specific, and if the military's conduct is not inextricably bound up in plaintiff's allegations, there may well be no political question barrier to negligence lawsuits against PMCs, either by civilians or military personnel for torts in the zone of conflict. If the tight "integration" of public and private actors is not evident to the court, the military contractor defense may fail as well, leaving some opportunities for plaintiffs to recover in negligence cases.

Military Contractor Defense

Historically, sovereigns have invoked sovereign immunity when sued. Tort claims against the U.S. government are viable only where the federal government has waived its immunity. It has done so in the Federal Tort Claims Act[132] (FTCA), but the FTCA also delimits the kinds of cases where the United States has effectively waived its immunity. One of the most notable exceptions to the FTCA's waiver of sovereign immunity includes "[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war."[133] Most PMCs will concede that the exception does not apply directly to government contractors, but will almost always cite two cases in which the exception has been extended to government defense contractors.

The government contract defense was first articulated in Boyle v. United Technologies.[134] In Boyle, the estate of a Marine helicopter pilot sued a helicopter manufacturer for wrongful death caused by alleged product defects. The Supreme Court found Boyle's claims preempted as a matter of judge-made federal common law because "uniquely federal interests" were at stake – the rights and obligations of the United States under its contracts, civil liability for actions taken by federal officials in the course of their duty, and federal procurement of equipment. The Court then concluded that the application of state law liability theory presented a "significant conflict" with federal policies or interests, finding guidance in the "discretionary function" exception to the FTCA.[135] If the helicopter's design was a result of government policy decisions, even ones that made trade-offs between safety and combat effectiveness, liability should not be permitted.[136]To ensure that the design was a product of government discretionary decision-making, the Court remanded for a determination as to whether: (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States.[137]

The *Boyle* precedent was extended somewhat in *Koohi v. United States*.[138] In *Koohi*, heirs of the deceased passengers and crew of an Iraqi civilian aircraft (mostly Iraqi nationals) filed suit after the U.S.S. Stark shot down the aircraft during the so-called tanker war between Iran and Iraq.[139] All 290 persons aboard were killed when crewmembers of the Stark mistook the plane for an Iranian F-14 with the Aegis air defense weaponry system. The federal government and the manufacturer of the weapon system were both named as defendants; the plaintiff's theory against the manufacturer was for design defects, while the claim against the United States was for negligent operation of its warship. The Ninth Circuit relied on the Supreme Court's discussion of the government contractor defense in *Boyle* and found that the "combatant activities exception" to the FTCA should apply to the manufacturer, and thereby "shield from liability those who supply ammunition to fighting vessels in a combat area." [140] The court said that "during wartime encounters no duty of reasonable care is owed to those *against whom force is directed* as a result of authorized military action."[141]

In another case widely relied upon in this area of the law, *Bentzlin v. Hughes Aircraft Co.*[142], the plaintiffs' decedents had been killed by missiles fired by a U.S. Air Force aircraft, and the plaintiffs brought suit against the manufacturers of the missiles. Relying upon the Ninth Circuit's decision in *Koohi*, the court held that the combatant activities exception applied to the missile manufacturers in that case, noting that "[s]uch a defense for manufacturers of equipment that allegedly malfunctions during combat arises from the fact that certain federal interests implicated in war – such as secrecy of wartime strategy and military morale – would be undermined by state tort suits against such manufacturers."[143]

Thus, in both *Koohi* and *Bentzlin*, the lawsuits were based on injuries arising from the United States' use of weapons during combat. In reviewing both *Koohi* and *Bentzlin*, the court in Lessin v. Brown and Root[144] agreed with the analysis in Fisher v. Halliburton[145] which concluded that "each of these cases involved claims involving complex equipment acquired by the Government in its procurement process, which inevitably implicates nuanced discretion and sophisticated judgments by military experts."[146] Yet the *Lessin* court (where the plaintiff was a serviceman who suffered brain injuries allegedly because of the negligence of the contractor) determined that "military decision-making" was not implicated. *Koohi* and *Bentzlin* were distinguished on the basis that

> . . .instead of manufacturing weapons, which were then procured and utilized by the military in combat, Defendant itself provided a convoy service. Additionally, in *Koohi*, the court was also concerned with the lack of any duty of reasonable care owed to a perceived enemy during combat. This case, on the contrary, concerns the duty of care owed by a private corporation to United States citizens, and the concern noted by the court in *Koohi* is inapplicable to this case.[147]

The *Lessin* court declined to extend the combatant activities exception and thus KBR's motion to dismiss the case (as barred by the combatant activities exception to the FTCA) was denied. The court did note, however, that if additional fact warranted application of the exception, KBR could renew its motion.[148]

The federal district court for Northern Georgia in *Carmichael* also declined to apply the combatant activities exception from *Koohi*, noting that the plaintiff's husband was "not injured because by the United States because he was perceived as its enemy; rather, Sergeant Carmichael was a United States soldier/citizen injured (allegedly) by a private contractor."[149]

The Carmichael court also distinguished *Bentzlin*, whose most important feature was that the state tort law claims were based upon the Maverick missile's alleged defective condition. This would require some disclosure of the missile's design, which would also contravene the Government's interest in maintaining secrecy of its weaponry. The conflict between plaintiff's claims and the uniquely federal interest in preserving this secrecy would, under *Boyle*, require pre-emption of the state law claims. Moreover, in *Bentzlin* (unlike in *Carmichael*) the government had intervened in the case and moved to dismiss under the political question and state secrets doctrines. Because allowing Carmichael to proceed with her state tort law claims would not appear to hinder the government's interest in preserving military secrets, and because the government had not intervened and moved to dismiss under the political question or state secrets doctrines, the court denied the defendant's motion to dismiss.

The combatant activities exception was also aired in *Smith*, but KBR did not prevail there, either. The court was not persuaded by *Koohi*, which it distinguished because (1) *Koohi* involved "action by the United States military against a perceived enemy" whereas Smith involves action by a hostile actor against the United States military, because (2) the defendant in *Koohi* was sued for providing allegedly defective products, which is not true in the Smith case, (3) and because the plaintiffs in *Koohi* were not U.S. citizens but were "perceived enemy" mistakenly targeted by the United States military.

In Ibrahim v. Titan,[150] defendants asked the court to dismiss the plaintiffs' common law claims as preempted under an extension of the government contractor defense as expanded by *Koohi*. In his initial *Ibrahim* decision, Judge Robertson noted that the defense is an affirmative one, and that defendants must produce sufficient factual support to justify its application. Judge Robertson recounted that in *Koohi*, the FTCA's bar of lawsuits for "any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war,"[151] was understood to serve the purpose of recognizing that "during wartime encounters no duty of reasonable care is owed to those against whom force is directed as a result of authorized military action."[152] As he noted,

> Thus, guided by Boyle's reliance on the FTCA, the court found that imposing liability on the civilian makers of a weapons system used in an accidental shooting down of a civilian aircraft "would create a duty of care where the combatant activities exception is intended to ensure that none exists."[153]

Judge Robertson concluded that Titan and CACI were asking that Boyle's preemption analysis be expanded "beyond Koohi's negligence/product liability context to automatically preempt any claims, including these intentional tort claims, against contractors performing work they consider to be combatant activities." Noting that this would be the first time *Boyle* would be applied in this way, he declined to do so.

But he allowed further inquiry through discovery to determine whether allowing Ibrahim *et al.* to go forward would conflict with the purposes of the FTCA and "whether defendants have shown that they were essentially soldiers in all but name."[154] After noting that the FTCA's exception "seems to represent Congressional acknowledgment that war is an inherently ugly business for which tort claims are simply inappropriate,"[155] Judge Robertson nonetheless found it too early in the proceedings to determine if "defendants' employees were essentially acting as soldiers" or not. If they were, the FTCA exception might well apply. But, he notes that other than Titan's providing a "Statement of Work" the defendants have not met their factual burden of showing entitlement to the government contractor defense.[156]

> More information is needed on what exactly defendants' employees were doing in Iraq. What were their contractual responsibilities? To whom did they report? How were they supervised? What were the structures of

> command and control? If they were indeed soldiers in all but name, the government contractor defense will succeed, but the burden is on defendants to show that they are entitled to preemption.[157]

After further inquiry, Judge Robertson issued a second opinion,[158] in which depositions from military and Titan employees informed his decision to dismiss. Judge Robertson found that the Titan contract required Titan to provide "all personnel, equipment, tools, material, *supervision*, and other items and services . . . necessary to provide foreign language interpretation and translation services in support of" military operations in the Persian Gulf region."[159] In December 2003, Titan's Iraq operations employed 28 site managers for 3052 linguists the Titan interrogators. Thus, these site managers were generally not on-site with the linguists that they managed. For example, Titan's "on-site representative" was George Winkler, who lived in Baghdad's Green Zone and interacted with Titan interrogator-employees on benefits and other issues not related to interrogation. According to Winkler, once Titan linguists were on-site, their work assignments "were under the exclusive direction and control of the military unit commander or the OIC/NCOIC."[160]

By contrast, Major John Scott Harris oversaw the assignment of both military and civilian linguists within Iraq. Winkler swore under oath that Titan linguists were subject to their military unit commander's tasking "24 hours per day, seven days per week. . . . Titan supervisors played no role in the tasking of linguists or in supervising their work performance." During the period of November 2003 through January 2004, Winkler visited the 30-40 U.S. citizen Titan linguists employed at Abu Ghraib "about 2-3 times per week." During these visits he was "prohibited by the military from observing linguists performing their duties or from discussing their interrogations." Instead, Winkler would check in with each linguist to see how he or she personally was getting along and would deal with issues relating to benefits and pay. [161]

Judge Robertson determined that "serving as a translator for the interrogation of persons detained by the U.S. military in a combat zone is an activity that clearly has a 'direct connection with actual hostilities,'"[162] and that Titan therefore "satisfies the threshold inquiry for potential application of the combatant activities exception."[163] He noted as "dispositive" the question as to whether "Titan's interpreters were under the direct command and exclusive operational control of the military chain of command." In determining that they were, he chose to dismiss the claims of all Iraqi plaintiffs against Titan, based on the military contractor defense.[164]

Space limitations for this paper prevent a thorough analysis of why Judge Robertson retained the case against CACI, but suffice it to say that he concluded that the facts for CACI at Abu Ghraib were sufficiently different, and that they could be "construed as showing that CACI interrogators were subject to a dual chain of command, with significant independent authority retained by CACI supervisors. When the facts are construed in this manner, no federal interest requires that CACI be relieved of state law liability."[165]

Thus, the military contractor defense can be a potent obstacle for potential plaintiffs, especially in cases of intentional tort under seeming military control or supervision. Where such torts take place under conditions where "national security" or "military operations," the "state secrets" privilege is apt to be invoked, either by the Executive Branch or by the defendant.

State Secrets Privilege

While the military contractor exception to the FTCA is clearly within Congress' prerogative to re-define, the political question doctrine and the state secrets privilege occupy more problematic ground: the claimed area of executive privilege. While the Constitution entrusts foreign policy to the Executive branch and the Legislative branch, the Supreme Court has given considerable deference to the Executive branch when it has invoked the "state secrets privilege."[166]

The state secrets privilege was first enunciated in the 1953 case of Reynolds v. United States.[167] In *Reynolds*, the widows of three employees of the Radio Corporation of America (better known as RCA) sought accident reports on a B-29 Superfortress bomber that left Warner Robbins Air Force Base in Georgia on a secret mission in 1948. The plane crashed, with few if any official explanations; the widows wondered if there had been negligence. In bringing a lawsuit, they were rebuffed by the U.S. government, who told them (and the courts) that releasing details about the airplane or the mission would threaten national security. In 2000, the accident reports were declassified and released. They contained no secret information, but did contain information about the poor condition of the aircraft and the pilot's negligence in dealing with an engine on fire. In short, the privilege was invoked to cover up poor maintenance and negligence on the part of the pilot; the outcome for plaintiffs was that a wrong was done with no remedy at law.[168]

During the next fifty years, the state secrets privilege was invoked sparingly. Between1953 and 1976 – during the height of the Cold War – the government used it four times, but used it 23 times from 2001 – 2005.From a number of sources, it is abundantly clear that since September 11, 2001, the Executive branch of the U.S. government has invoked the "state secrets privilege" far more than any previous administration.[169]

Along with the El-Masri case described earlier,[170] the case of Mahar Arar has attracted worldwide attention, even if the case did not achieve wide publicity in the United States. Maher Arar, a Syrian-born Canadian citizen who was detained

in the U.S. in 2002 and sent against his will to Syria, where he says he was tortured until his release a year later. The Justice Department asserted the state secrets privilege in seeking to dismiss a lawsuit by Arar.[171] A Canadian government commission found after a two-year investigation that Arar had no connection with terrorists and awarded him compensation of 10 million dollars and an apology. He sued not only George Tenet but various unknown CIA agents for his extraordinary rendition and torture in Syria. He failed, for various reasons that rendered the state secrets privilege "moot," but the court no doubt could and would have dismissed his lawsuit for that reason as well. While Arar named no private entities as defendants, he did name ten "John Does," and PMC employees have allegedly been involved in extraordinary renditions.[172]

Thus, lawsuits against the United States or its private contractors by non-U.S. citizens for torture or extraordinary rendition have difficulty gaining traction because of the FTCA's exception for tort damage in a foreign country, [173] because the question is "political," or because state secrets privilege may be invoked. This is so despite the Alien Tort Statute (ATS) and despite the enactment of the Torture Victim Protection Act (TVPA).

The Insufficiencies of the Alien Tort Statute Claims and the Torture Victim Protection Act

Despite these varied defenses to PMC accountability for torts in conflict zones, some lawyers and commentators contend that the Alien Tort Statute[174] or the Torture Victim Protection Act are potentially effective means of redress. The Alien Tort Statute was included in the First Judiciary Act but was utilized only twice in its first 200 years of existence to establish federal subject matter jurisdiction.[175] Modern use of the statute and its association with human rights claims dates from 1980 and Filartiga v. Pena-Irala.[176] In that landmark decision, the court allowed two Paraguayan plaintiffs to bring an action against a Paraguayan defendant for the torture death of a relative. The Second Circuit relied upon the Alien Tort Statute, which provides: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[177]

Although the district court dismissed the action lack of subject matter jurisdiction, the court of appeals reversed and held that ". . .deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties. Thus, whenever an alleged torturer is found and served with process by an alien within our borders, § 1350 provides federal jurisdiction." [178]After reviewing various international agreements, including the Convention Against Torture, the court concluded that "although torture was once a routine concomitant of criminal interrogations in many nations, during the modern and hopefully more enlightened era it has been universally renounced. . . .There now exists an international consensus that recognizes basic human rights and obligations owed by all governments to their citizens."[179]

In the twenty years since *Filartiga*, U.S. federal courts have expanded the category of private rights based on serious violations of customary international law; these include claims of torture, genocide, war crimes, crimes against humanity, summary execution, arbitrary detention and disappearance. Courts have recognized that such claims may be brought not only against individuals acting under color of state authority,[180] but also individuals who were non-state actors, and claims against corporations.[181]

But recall that Judge Robertson dismissed the ATS portion of Ibrahim's claim,[182] and also dismissed Saleh's ATS claim against Titan.[183] In both opinions, he relied on prior cases[184] and took account of the Supreme Court's decision in Sosa v. Alvarez-Machain[185] to hold that the ATS did not apply to private actors. In *El-Masri*, the extraordinary rendition case described above,[186] the ATS claim was not even considered when the United States invoked the 'state secrets' privilege.

With the enactment of the Torture Victims Protection Act of 1991 (TVPA), the United States Congress codified a cause of action for torture under the ATS.[187] The Act creates a civil action for torture and states, "An individual who, under actual or apparent authority, or color of law, of any foreign nation ... subjects an individual to torture shall, in a civil action, be liable for damages to that individual."[188] Because the statute specifically requires that an alleged torturer act under "authority" of a foreign government, it would presumably not apply to U.S. contractors or bounty hunters accused of torture; indeed, no one has yet used the TVPA against PMC contractors to gain a hearing on the merits.

It is conceivable that Ibrahim and others might get an appellate court judge to find that private contractors acting in concert with the military (under "color of law") are engaged in torture contrary to Congressional statutes such as the ATS or the TVPA. But for now, it is clear enough that neither the ATS nor the TVPA provide inherently winning claims against PMCs for torts in conflict zones. Given the non-applicability of either the ATS or the TVPA to "private actions," it is fair to note a certain inconsistency at play here within the mix of applicable U.S. laws where intentional torts by U.S. PMCs are concerned: the contractors can often claim the cloak of immunity using the military contractor defense or state secrets, and can also compel dismissal using the political question doctrine, all on the premise that their actions are inextricably bound up with national security or military oversight and direction. Yet because they are "private actors," no causes of action under the ATS or the TVPA will proceed to trial.

NON-U.S. TRIBUNALS AND THEIR INADEQUACY

The International Criminal Court will not have jurisdiction over crimes and torts of U.S. PMCs in conflict zones.[189] There is no international civil court to which injured parties or surviving family members can bring claims. The U.S. courts are treacherous grounds, as well, largely because of the political question doctrine, but also because of "state secrets" and the military contractor exception to the FTCA. Neither the ATS nor the TVPA has thus far enabled foreign nationals to recover against U.S. PMCs for intentional torts.

It is conceivable that in time, there will be a sovereign and functioning government in Iraq. That government may undo the grant of immunity provided by the CPA to U.S. contractors, and criminal or civil proceedings may well be conducted. [190] By that time, however, the collectible assets of U.S. contractors would most likely no longer be in Iraq, and U.S. courts could be asked to enforce judgments of Iraqi courts. This in turn may depend on the status of the United States as a signatory to the proposed Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters.[191] Delving into the hypothetical possibilities is beyond the scope of this particular paper; but the reality remains that at present, the available remedies for U.S. PMC torts in conflict zones are mostly lacking in U.S. courts except for those few negligence cases (usually involving motor vehicles)[192] where the PMC is operating independently of military direction. The following section proposes a solution which may be feasible.

RECOMMENDATIONS TO THE U.S. GOVERNMENT

Congress should usefully consider a standard contract provision for all PMCs contracting with agencies of the U.S. federal government. The standard provision would require that torts of PMCs or their employees "arising out of the contractor's work for the United States" be heard in a claims commission where "state secrets," political questions, and the military contractor defense would explicitly be forbidden as bases for dismissal. They could be closed to public view yet be subject to meaningful oversight beyond the Executive Branch. U.S. government contractors in war zones would have to agree to this "forum selection clause" or be denied the government contract. As an explicit direction to the judiciary, potential plaintiffs could be listed to include U.S. servicemen, other contracting agents, PMC employees, and foreign nationals injured by the contractor's actions. The Federal Arbitration Act could also be amended, slightly, to provide that pre-dispute arbitration agreements between contractor and employee would not be enforceable; in this way, the intentional and negligent torts committed against PMC employees (including reported instances of rape)[193] would be heard in the claims commission rather than private arbitration, so that Congress could keep a more watchful eye on the performance and problems arising with the use of private contractors in conflict zones.

THE ULTIMATE 'POLITICAL QUESTION' QUESTION

The outcome of the federal appellate courts' decisions on PMC conflict zone tort liability is likely to leave some possibility of recovery in U.S. courts for negligence cases in which PMCs are demonstrably independent from military oversight or direction. That leaves a wide range of torts (including rape, assault, murder, and torture) that, while ostensibly remediable in U.S. courts by the Convention against Torture or the TVPA, are in practice immunized by a variety of exceptions and defenses that follow a hands-off judicial policy for contract torture or rendition under the guidance of military or CIA personnel, or the random killing of Iraqi civilians by contractors guarding State Department personnel. The common feature for these cases where 'political question,' state secrets, and military contractor defense are invoked is that military and security matters may be revealed in litigation, which would offend the Court's notions about separation of powers. This judicial perspective views the President as Commander in Chief, sometimes in tandem with Congress, but in any case pursuing the national interest in foreign and military policy. To the extent that PMCs are tightly wound into the Executive branch programs, policies, and directives, it matters not that they are corporations with a profit motive – they will not be held accountable if having a trial means peeling back layers of secrecy, military policy, government product specifications, or war-zone planning.

William Howell of Harvard University has written about the U.S. President's increasing tendency to claim unilateral power.[194] He points out that

> During the first 150 years of the nation's history, treaties (which require Senate ratification) regularly outnumbered executive agreements (which do not); but during the last 50 years, presidents have signed roughly ten executive agreements for every treaty that was submitted to Congress. With rising frequency, presidents are issuing national security directives (policies that are not even released for public review) to institute aspects of their policy agenda. Since Truman fatefully called the Korean War a "police action," modern presidents have launched literally hundreds of military actions without first securing a formal congressional authorization. Though the total number of executive orders has declined, presidents issued almost four times as many "significant" orders in the second half of the

> twentieth century as they did in the first. Using executive orders, department orders, and reorganization plans, presidents have unilaterally created a majority of the administrative agencies listed in the United States Government manual. [195]

In general terms, Howell is describing the very legal landscape that allows no-bid, cost-plus contracts to be awarded to private military and security companies without sustained and serious Congressional oversight. Some commentators have doubted that Congress even has the political will to oversee massive defense budgets – both known and unknown – because of the benefits that military-related spending brings to various states and Congressional districts.[196]

Perhaps the answer to the most critical 'political question' is already known: can Congress exercise meaningful oversight in matters of military and national security? The answer may well be a "no way." The military-industrial complex Eisenhower described[197] is alive and well, and for the time being seems untouchable as a political force. Blackwater Worldwide, so widely reviled at the time of the Nisour Square shooting, had its CEO publicly grilled by a Rep. Henry Waxman's House Oversight and Governmental Reform Panel in October, 2007.[198] But by May 2008, through public and private lobbying, Blackwater was back to "business as usual" as contractor for the U.S. government in Iraq.[199]

The ultimate political question is whether the Congress will re-assert authority over military operations abroad (or leave relatively unchecked this zone of Presidential power), and whether the Supreme Court will side with Congress, defer to the executive, or refuse to rule because the question is "political." In January of 2008, Congress responded to the many reports of fraud and mismanagement in war zone contracts since the invasions of Iraq and Afghanistan by including a Congressional "contracting commission" to investigate defense contracts. It is modeled after a similar commission that was headed by Harry Truman in the 1940s to uncover abuse in military contracts during World War II.[200]

In signing the bill – which was part of a much larger defense bill – President Bush issued a "signing statement" that singled out the commission and three other provisions that could "purport to impose requirements that could inhibit the president's ability to carry out his constitutional obligations."[201] President Bush's use of signing statements has generated considerable controversy and commentary,[202] but the courts have yet to rule on the impact and meaning of these statements. But the Supreme Court will eventually be asked to consider whether the President can sign a bill passed by Congress into law, but also make claims as to which parts of the law he considers constitutional and enforceable. If he directs the Executive Branch not to cooperate with the Congressional oversight commission on defense contractors, the Supreme Court may be called upon to adjudicate the conflicting constitutional claims: that the law as signed is the law, or that the law as signed with Presidential *caveats* is the correct constitutional view of the law. If the Court regards this as a political question, and refuses to enter the fray, then by default the Presidential view would prevail.

Any proposed solution to PMC non-accountability for conflict zone torts suggested in this paper would require a bill passed by Congress and signed by the President. It is nearly certain that President Bush would issue a "signing statement" similar to the one he issued for the oversight commission; whether his successor would do so is uncertain, but Presidents have had a recent history of working to protect the prerogatives of the Executive Branch.[203] Thus, any solutions to the non-compensability of negligent and intentional torts in war zones by U.S. PMCs must therefore be cognizant of political questions that transcend the "political question" doctrine. Another way to pose the dominant 'political question' here is how the U.S. legal system and the people of the United States will re-balance the separation of powers conceived in the U.S. Constitution; at present, the proliferation of state secrets, secret programs, and Department of Defense "black budgets" are relatively unchallenged by either Congress or the courts. Andrew Bacevic has observed that "[n]one of the Democrats vying to replace President Bush is doing so with the promise of reviving the system of check and balances.... The aim of the party out of power is not to cut the presidency down to size, not to reduce the prerogatives of the Executive Branch but to regain them."[204]

The political question doctrine has been largely unexamined by the Supreme Court since *Baker v. Carr*. Its now-frequent application in what would otherwise be routine negligence cases highlights its significance: if U.S. courts cannot consider negligence claims against PMCs from U.S. citizens for acts taking place in areas of armed conflict, it is even less likely that U.S. courts will consider intentional torts or even torture, whether the plaintiffs are U.S. citizens or "aliens."[205]

Systemically, then, the United States as a sovereign state among other sovereign states is not keeping its obligations under peremptory norms of international law or the various conventions that prohibit torture. This breach of obligation requires a worldview that places the U.S.-sponsored actions abroad – whether military or privately contracted – beyond the reach of legal accountability. Such unaccountability is enabled by a judicial deference towards the U.S. executive branch in all matters relating to the use of force as an instrument of foreign policy; this is by now a deeply ingrained pattern for federal judges, for the Executive Branch need only invoke 'state secrets' and insure that contractors work closely with official liaisons for all such matters to be well beyond judicial cognizance. Congress, if it is inclined to hold PMCs accountable for intentional and negligent torts in zones of conflict, must exercise its oversight of the Executive Branch in a way that the Court can find constitutional. Yet the Court may come to see a conflict between the Legislative and Executive

branch as itself a non-justiciable political question. More hopefully, the legacy of *Marbury v. Madison* suggests that the Court is more likely to guard its role as ultimate arbiter of what is and is not constitutional.

When news of the Abu Ghraib torture made worldwide news, President Bush granted an interview to the Arab Al Hurra TV network. "The America I know has sent troops into Iraq to promote freedom," said the President, ". . . good, honorable citizens that are helping Iraqis every day." The President also said, "It's important for the people of Iraq to know that in a democracy, everything is not perfect, that mistakes are made. But in a democracy as well those mistakes will be investigated and people will be brought to justice." Bush said America's open society and willingness to investigate "stands in sharp contrast to life under Saddam Hussein. His trained torturers were never brought to justice."[206]

The rule of law surely matters. The Supreme Court has often noted with approval John Adams' quotation: a government of laws, not men.[207] Adams attributed this thought to a work in 1656 by James Herrington, who wrote of the desirability of "an empire of laws and not of men."[208] Empire through military force and unilateral actions are antithetical to this concept, yet for universally condemned acts of torture the United States has recently set a course at odds with an empire of laws. When the U.S. government sends military force to liberate a nation from oppression to promote freedom and the rule of law, it may and must also lead by example. Disallowing Iraqi nationals recovery for U.S.- supervised torture is only justified by the most tortured logic and available precedents on 'political questions,' 'state secrets,' and the military contractor defense. The moral mandate, as well as the international legal obligation, is clear enough, but the fog of precedent on 'political questions' makes the path to justified recovery for PMC war zone torts a long and winding road.

FOOTNOTES

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* Professor in Residence, University of Denver, Daniels College of Business.

[1] Useful general sources include PETER SINGER, CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY (2003). *See also* Private Warriors, Frontline PBS, originally aired in June of 2005. The Frontline website can be found at http://www.pbs.org/wgbh/pages/frontline/shows/warriors/

Peter Singer uses the term 'privatized military firm.' *See* Peter Singer, *Corporate Warriors: The Rise and Ramifications of the Privatized Military Industry*, INTERNATIONAL SECURITY, Vol. 26, no. 3 (Winter 2001/2002).

> PMFs are profit driven organizations that trade in professional services intricately linked to warfare. They are corporate bodies that specialize in the provision of military skills, including tactical combat operations, strategic planning, intelligence gathering and analysis, operational support, troop training, and military technical assistance. *Id.* at 1.

See also COL. GERALD SCHUMACHER, A BLOODY BUSINESS: AMERICA'S WAR ZONE CONTRACTORS AND THE OCCUPATION OF IRAQ (2006) (a fairly sympathetic account of the difficulties that war zone contract employees face) and ROBERT YOUNG PELTON, LICENSED TO KILL: HIRED GUNS IN THE WAR ON Terror (2006)(a more critical account of the administrative and legal unaccountability of hired guns in conflict zones). Pelton writes that the old line of demarcation between mercenaries (who fight) and security contractors (who protect) is increasingly blurred, if indeed it ever existed. *Id*. at 5-6. With regard to contractors in Iraq, he writes that, as of 2006, "there has not been a single contractor charged for any crime that occurred in Iraq, though hundreds of soldiers have been court-martialed for offenses ranging form minor violations of military code to murder. Even if a particularly negligent or intentional attack on civilians was publicly exposed, it is unclear what legal avenues would be used to hold the perpetrators accountable." *Id*. at 341.

[2] Private contractors have been in use in the U.S. military since the American Revolution. The principal difference between present times and World War II is that PMCs may now be found carrying weapons as well as interrogating suspects near the field of battle. "In the first Gulf war, the ratio of private contractors to military personnel was one to sixty. This time it's approaching one to one. . . . Private contractors are being used to supply everything from pizzas to porta-potties; still the decidedly larger ratio is no doubt the result of the 20,000 or so serving in a quasi-military role – almost three times the number of British military forces currently in Iraq." Mark Hemingway, *Warriors for Hire: Blackwater USA and the rise of private military contractors*, THE WEEKLY STANDARD (Dec. 18, 2006) at 13.

[3] President Bush continues to use the phrases "the war on terror" and "the global war on terror." *See, e.g.*, President Bush Visits National Defense University, Discusses Global War on Terror, Oct. 23, 2007, http://www.whitehouse.gov/news/releases/2007/10/20071023-3.html. The phrase has been criticized on a number of grounds, including (1) that the conflict with Al-Qaeda should not be considered a "war", (2) that war cannot be declared on tactic (terror), (3) that it is misapplied to provide justifications for unrelated actions, such as the 2003 invasion of Iraq, and (4) that it is unlimited in scope or duration.

See Joan Fitzpatrick, *Speaking Law to Power: The War Against Terrorism and Human Rights*, 14 EUR. J. INT'L L. 241, 248 (2003) (critiquing the "war against terrorism" as much too open-ended).

[4] Estimates of current use: in excess of 100,000. DynCorp has a major contract for protecting Afghan president Hamid Karzai, and a role in creating a new Iraqi police force; Vinnel Corporation has a major contract for creating a new Iraqi police force; Erinys International has a major contract for protecting Iraq's oil pipeline. *See* Matthew Quirk, *Private military contractors: a buyer's guide ('The List')* ATLANTIC MONTHLY (Sept 2004) at 39.

[5] Joseph Neff, *Blackwater manager blamed for 2004 massacre in Fallujah*, RALEIGH NEWS & OBSERVER, July 8, 2007. Blackwater, based in North Carolina, sent two squads through Fallujah without maps, according to memos obtained by The News & Observer. Both of the six-man teams, named Bravo 2 and November 1, were sent out two men short, leaving them more vulnerable to ambush. . . .The Bravo 2 team members had protested that they were not ready for the mission and had not had time to prepare their weapons, but they were commanded to go, according to memos written by team members. . . .The team disregarded directions to drive through Fallujah and instead drove around it and returned safely to Baghdad that evening. . . .The November 1 team went into Fallujah and was massacred. . . .The Bravo 2 team memos, in emotional, coarse and damning language, placed the blame squarely on Blackwater's Baghdad's site manager, Tom Powell. *Id.*

[6] It should be noted that 24 Iraqi civilians were injured during that incident. The incident was not without consequences for Blackwater. See Jeremy Scahill, *Iraqis sue Blackwater for Baghdad killings*, THE NATION, Oct. 29, 2007. Available at http://www.thenation.com/doc/20071029/scahill/print. But see *infra* note 199 and accompanying text.

[7] See Regulating Private Military Companies: The Need for a Multidimensional Approach, http://www.fco.gov.uk/resources/en/pdf/pdf4/fco_pdf_pmclilly (last visited May 17,2008) (noting that such growth is not unique to the United States).

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

[9] See Travis Sharp, *Iraq Insider: How Many Private Contractors in Iraq?* May 2, 2007, at Iraq Insider http://theiraqinsider.blogspot.com/2007/05/how-many-private-contractors-in-iraq.html. Sharp notes:

> In a House Appropriations Defense Subcommittee hearing on March 29, 2007, both Secretary Robert Gates and DoD Comptroller Tina Jones confirmed that there are currently around 126,000 private contractors doing business in Iraq. Secretary Gates estimated that only 20 percent, or around 25,000, are U.S. citizens, although the remaining 101,000 Iraqi citizens and third party nationals work for companies operating under U.S. government contracts. *Id.*

The wide variance in numerical estimates itself implies a sober reality: that the war in Iraq has been conducted without clear accountability for who is doing what, or at what cost to the United States. See Steve Fainaru, *U.S. Pays Millions In Cost Overruns For Security in Iraq*, WASH. POST, Aug. 12, 2007, at A01."The size of this force and its cost have never been documented." *Id.* Jeremy Scahill is convinced the figure is well over 100,000, and represents a "shadow army" of as many as 160,000. "During the 1991 Gulf War, the ratio of troops to private contractors was about 60 to 1. Today, it is the contractors who outnumber U.S. forces in Iraq. As of July 2007, there were more than 630 war contracting companies working in Iraq for the United States. Composed of some 180,000 individual personnel drawn from more than 100 countries, the army of contractors surpasses the official U.S. military presence of 160,000 troops." Jeremy Scahill, *Flush with Profits from the Iraq War, Military Contractors See a World of Business Opportunities*, Aug. 10, 2007, The Independent. Available at http://www.indypendent.org/2007/08/10/the-mercenary-revolution-flush-with-profits-from-the-iraq-war-military-contractors-see-a-world-of-business-opportunities/

[10] *See infra*, notes 50-188 and accompanying text.

[11] Singer, *supra* note 1, at 5.

> For example, the overwhelming majority of forces in the Thirty Years' War (1618 - 1648) and the ensuing half-century of fighting were privately contracted, as were the generals who led them. Like the post-Cold War period, the seventeenth century was a time of systemic transition, when governments were weakened and military services available on the open market. During the following era of colonial expansion, trading entities such as the Dutch and English East Indies Companies operated as near-sovereign powers, commanding armies and navies larger than those in Europe, negotiating their own treaties, governing their own territory, and even minting their own money. These firms dominated in non-European areas considered beyond the accepted boundaries of the sovereign system,

such as on the Indian subcontinent, where local capabilities were weak and transnational companies the most efficiently organized units again, similar to many areas of the world today.

By the twentieth century, the state system and the concept of state sovereignty had spread across the globe. Norms against private armies had begun to build in strength as well. *Id*., at 6.

[12] *See generally* Tom Cohen, Mercenaries Battle Image, WASH. TIMES, Apr. 7, 1997, at A14 (describing the complaints of human rights groups and defense analysts over Papua New Guinea's use of mercenaries)**;** Jim Hooper, Peace in Sierra Leone**:** A Temporary Outcome?, Jane's Intel. Rev., Feb. 2, 1997, at 91 (tracing the conflict between the Liberian-backed Revolutionary United Front and the President of Sierra Leone)**;** Herbert M. Howe, Mercenaries in Africa: A Force for Good or Evil? Orlando Sentinel, Apr. 7, 1996, at G1 (describing the rise of Executive Outcomes, a South African mercenary organization).

[13] Singer, *supra* note 1, at 2.

[14] PMCs are not currently subject to the discipline of the UCMJ. See, however, a reasoned proposal that they should be: William C. Peters, *On Law, Wars, and Mercenaries: The Case for Courts-Martial Jurisdiction over Civilian Contractor Misconduct in Iraq*, 2006 BYU L. Rev. 367. See also Ian Kierpaul, *Comment: The Mad Scramble of Congress, Lawyers, and Law Students After Abu Ghraib: The Ruse to Bring Private Military Contractors to Justice*, 39 U. TOL. L. REV. 407 (2008). Kierpaul notes that Supreme Court precedent makes it unlikely that the UCMJ will not serve to adjudicate criminal acts by private contractors abroad. *Id*. at 412-14.

[15] *See* PHILIP GOUREVITCH AND ERROL MORRIS, STANDARD OPERATING PROCEDURE (2008), KAREN GREENBERG AND JOSHUA DRATEL, EDS., THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB (2005); MARK DANNER, TORTURE AND TRUTH: AMERICA, ABU GHRAIB, AND THE WAR ON TERROR (2004). *See also* SEYMOUR HERSH, CHAIN OF COMMAND: FROM 9/11 TO ABU GHRAIB (2004). All sources note the participation of private contractors along with U.S. military personnel in the violation of the international law. See International Committee of the Red Cross, Geneva, Switzerland, *Experts discuss legal framework governing private military and security companies*, April 17, 2008. Available at http://www.icrc.org/Web/Eng/siteeng0.nsf/html/humanitarian-law-news-170408.

As many as a third of all "interrogations" were conducted by private contractors. When the scandal broke, some plaintiffs tried to invoke the Military Extraterritorial Jurisdiction Act passed in 2000 as a basis for bringing suit. This attempt proved difficult when considering the legal status of the PMCs. *See* Ellen McCarthy & Renae Merle, *Contractors and the Law; Prison Abuse Cases Renew Debate*, WASH. POST, Aug. 27, 2004, at E01 ("Some legal experts say it's unclear whether CACI is covered ... the Military Extraterritorial Jurisdiction Act, as written, may not technically cover CACI's interrogators.") (quoting Professor Steven L. Schooner). *In accord*, Kierpaul, *supra* note 14, at 426-27.

[16] David Isenberg, No Justice on Contractor Rape, *United Press International*, April 18, 2008. The Isenberg article is also posted to The Cato Institute on April 21, 2008, available at http://www.cato.org/pub_display.php?pub_id=9342.

[17] Kierpaul, *supra* note 14, at 415. *See also* James Risen, *Controversial Contractor's Iraq Work is Split Up*, N.Y. TIMES, May 24, 2008, ("Like KBR, DynCorp, based in Falls Church, Va., has had serious problems in past contracting work, including allegations that its employees engaged in sex trafficking in Bosnia while working on a police training contract there in the late 1990s.")

[18] Because many PMC employees must be armed in a hostile operations zone (often having no coordinated protection from U.S. military forces), incidents of civilians being killed or injured are more likely to arise.

[19] See *infra* notes 109-124 and accompanying text.

[20] Family members of four Blackwater employees have alleged the company's negligence in their gruesome deaths in Fallujah. See Nordan v. Blackwater Security Consulting, 382 F. Supp. 2d 810 (2005). First filed by family members in Wake County Superior Court (Raleigh, N.C.), Blackwater promptly asked for removal to federal court, which was denied. The appeal of this denial was also denied. In Re: Blackwater Security Consulting, 460 F.3d 576 (2006). The effect of that ruling was to keep the case in Wake County (N.C.) Superior Court.

But Blackwater counter-sued the families, claiming that their decedents had signed contracts requiring them to arbitrate any claims arising out of their employment. See Mike Baker, *Families ask for money to continue lawsuit against Blackwater*, RALEIGH NEWS & OBSERVER, June 6, 2007. Blackwater has also asked for $10 million dollars in damages from the families, who as of June 2007 had spent more than $2.5 million to pursue their claims against Blackwater. *Id.*

[21] Mark Gibney, *The Evolving Architecture of International Law: On the Need for an International Civil Court*, 26 FLETCHER F. WORLD AFF. 47 (2002).

[22] See *infra*, notes 166-72 and accompanying text.

[23] See *infra*, notes 133-65and accompanying text.

[24] See *infra*, notes 81-108 and accompanying text.

[25] See *infra*, notes 29-61 and accompanying text.
[26] See *infra*, notes 84-131 and accompanying text.
[27] See *infra*, notes 133-72 and accompanying text.
[28] KBR's more than $ 10 billion in contracts with the U.S. government in Iraq "have been dogged by charges of preferential treatment, overbilling, cost overruns, and waste." Warren Hoge, *U.N. Criticizes Iraq Occupation Oil Sales*, N.Y. TIMES, Dec. 15, 2004, at A21. Indeed, the chief contracting officer for the Army Corps of Engineers has publicly accused the Army of granting preferential treatment to KBR (through its parent company, Halliburton) when awarding contracts in Iraq and Bosnia, thereby violating U.S. contracting regulations. Erik Eckholm, *A Top U.S. Contracting Official for the Army Calls for an Inquiry in the Halliburton Case*, N.Y. TIMES, Oct. 25, 2004, at A13. Yet, apparently in response to her decision to speak out, that contracting official has now been demoted. *See* Griff Witte, *Halliburton Contract Critic Loses Her Job*, WASH. POST, Aug. 29, 2005, at All. Likewise, the FBI has begun investigations concerning the legality of various Defense Department contracts in Iraq. But Congress has not been successful in reining in these abuses, and some would argue that the political will to do so is lacking. See Chalmers Johnson, *Evil Empire: Is Imperial Liquidation Possible for America?* TomDispatch.com, May 15, 2007. Available at http://www.truthout.org/article/chalmers-johnson-evil-empire. Johnson writes:

> Equally alarming, it is virtually impossible for a member of Congress or an ordinary citizen to obtain even a modest handle on the actual size of military spending or its impact on the structure and functioning of our economic system. Some $30 billion of the official Defense Department (DoD) appropriation in the current fiscal year is "black," meaning that it is allegedly going for highly classified projects. Even the open DoD budget receives only perfunctory scrutiny because members of Congress, seeking lucrative defense contracts for their districts, have mutually beneficial relationships with defense contractors and the Pentagon. President Dwight D. Eisenhower identified this phenomenon, in the draft version of his 1961 farewell address, as the "military-industrial-congressional complex." Forty-six years later, in a way even Eisenhower probably couldn't have imagined, the Defense budget is beyond serious congressional oversight or control." *Id.*

[29] MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW, 3d edition (1999) at 1.
[30] MARK W. JANIS AND JOHN E. NOYES, INTERNATIONAL LAW: CASES AND COMMENTARY, 2d edition (2001), at 1.
[31] JANIS, *supra* note 29, at 1.
[32] *Id.*
[33] *Id.*
[34] *See* Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. 1465 U.N.T.S. 85, G.A. Res. 39/46, 39 (1984), 23 I.L.M. 1027. The U.S. Senate gave its consent on October 27, 1990. S. Treaty Doc. No. 100-20, 136 Cong. Rec. D 1442 (1990). *See also* J. HERMAN BURGERS & HANS DANELIUS, A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT 1 (1988) (clarifying widespread misunderstanding that objective of Convention is to outlaw torture). Torture was outlawed prior to the existence of the Convention so the aim of the Convention was to strengthen existing prohibitions. *Id.*
In the United States,
[35] *Universal Declaration of Human Rights*, G.A. Res. 217 (III)A, U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948).
[36] International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 999 U.N.T.S. 171 (1966) .
[37] International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.
[38] Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, art. 2, S. Exec. Doc. O, 81-1, at 7 (1949), 78 U.N.T.S. 277, 280.
[39] Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.
[40] Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9 (1998), corrected through Jan. 16, 2002, at http://www.icc-cip.int/library/about/officialjournal/Rome_Statute_120704-EN.pdf.
[41] *See, e.g.*, Prosecutor v. Delalic, I.C.T.Y. Case No. IT-96-21-T (1998) (Trial Chamber Judgment) (convicting several individuals for war crimes including murder, torture, and rape). Perhaps the most well-known domestic trial was Israel's prosecution of the Nazi official Adolf Eichmann for war crimes and crimes against humanity. *See* HANNAH ARENDT, EICHMANN IN JERUSALEM (1997). As to corporations, see, for example, the *Zyklon B Case (Trial of Bruno Tesch and Two Others)*, U.N. War Crimes Comm'n ed., 1949), Vol. 1, No. 9 (prosecution of corporation that provided gas for death chambers). Available at http://www.ess.uwe.ac.uk/WCC/zyklonb.htm
[42] See *supra* note 13 and accompanying text.

[43] Somcharti Sucharitkul, *Applicable Law in International Terrorist Threats and Attacks and the consequences of Error in Personam*, 11 ANN. SURV. INT'L & COMP. L. 107, 111 (Spring, 2005). ("Peacetime terrorism is an internationally organized crime which clearly distinguishes itself from other common crimes which are contained in a single legal criminal system.") *See generally* Jessica Stern, TERROR IN THE NAME OF GOD: WHY RELIGIOUS MILITANTS KILL (2003)(Stern teaches at Harvard and had written on terrorists and terrorism long before 9-11; her 2003 book has useful policy recommendations for dealing with terrorists motivated by certain versions of Islamic fundamentalism.)

[44] See Anne Applebaum, *The Torture Myth*, WASH POST, Jan. 12, 2005, at A21 (noting numerous experienced interrogators who are convinced that torture in an ineffective and counterproductive method for gaining information and cooperation).

[45] Ethan A. Nadelman, *Global Prohibition Regimes: The Evolution of Norms in International Society*, 44 INT'L ORG 479 (Autumn 1990).

[46] See, e.g. Filartiga v. Pena-Irala, 630 F.2d 876, 890 (2d Cir. 1980) (holding that torturers are like pirates and slave traders and therefore are subject to universal jurisdiction); Scott A. Richman, Comment, *Siderman de Blake v. Republic of Argentina: Can the FSIA Grant Immunity for Violations of Jus Cogens Norms*?, 19 BROOK. J. INT'L L. 967, 974 (1993) (stating that customary international law recognizes universal jurisdiction over torture and other *jus cogens* violations). *But see* Regina v. Bartle and the Commissioner of Police for the Metropolis and others Ex Parte Pinochet, 38 I.L.M. 581, 627 (H.L. 1999) (holding that universal jurisdiction over torture did not exist until after enactment of Convention Against Torture).

[47] Donald Francis Donovan and Anthea Roberts, Note and Comment: *The Emerging Recognition of Universal Civil Jurisdiction*, 100 A.J.I.L. 142 (Jan. 2006).

[48] Factory at Chorzow (Ger. v. Pol.), Indemnity, 1928 PCIJ (ser. A) No. 17, at 29 (Sept. 13).

[49] *See, e.g.*, Universal Declaration of Human Rights, GA Res. 217A (III), Art. 8, UN Doc. A/810, at 71 (1948); International Covenant on Civil and Political Rights, Dec. 16, 1966, Art. 2(3), 999 UNTS 171.

[50] *See* Rome Statute of the International Criminal Court, July 17, 1998, Art. 75(2), 2187 UNTS 3 (Court may order convicted person to pay reparations); Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, GA Res. 40/34, annex, paras. 8-17 (Nov. 29, 1985) (addressing restitution, compensation, and assistance to victims).

[51] UN Comm'n on Hum. Rts. Res. 2005/35, UN Doc. E/CN.4/2005/L.10/Add.11; *see also, e.g.*, UN Comm'n on Hum. Rts., Sub-Comm'n on Prevention of Discrimination & Protection of Minorities, Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, UN Doc. E/CN.4/Sub.2/1993/8 (prepared by Theo van Boven); UN Comm'n on Hum. Rts., The Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, UN Doc. E/CN.4/2000/62, annex (prepared by M. Cherif Bassiouni).

[52] See Convention against Torture, *supra* note 24, art. 2, para. 1 ("Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.").

[53] *See, e.g.* John Yoo, *Transferring Terrorists*, 79 NOTRE DAME L. REV. 1183, 1229-31 (2004) (arguing that Article 3 does not apply to extraterritorial transfers). For a more measured view, see David Weissbrodt and Amy Bergquist, *Extraordinary Rendition and the Torture Convention*, 46 VA. J. INT'L L. 585 (Summer 2006). While Yoo had suggested that compliance with the Convention could be easily met through written assurances from nations to which detainees would be sent, Weissbrodt and Bergquist note that In light of the absence of any defensible justification for extraordinary renditions, such assurances seem to be sought not in good faith, but rather as a "legal nicety" to skirt criminal liability. *Id*. at 622.

[54] Kristin Fricchione, *Note, Casualties in Evolving Warfare: Impact of Private Military Firms' Proliferation on the International Community*, 23 WIS. INT'L L.J. 731, 760 (2005).

[55] *Id*., at 760-61.

[56] *Id*., at 760 (citing David Scheffer, Article 98(2) of the Rome Statute: America's Original Intent, 3 J. INT'L CRIM. JUST. 333, 335-36 (2005)).

[57] Heather Carney, *Note, Prosecuting the Lawless: Human Rights Abuses and Private Military Firms*, 74 GEO. WASH. L. REV. 317, 336 (2006).

[58] See Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1602-11 (1994). The Foreign Sovereign Immunities Act (FSIA) is a statutory provision that provides immunity from suit to foreign sovereigns, subject to several important exceptions. The statute provides, in pertinent part, that "subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter." *Id*. §1604. Furthermore, the statute broadly defines the term "foreign state" as including "a political subdivision of a foreign state or an agency or instrumentality of a foreign state." Id. §1603(a).

[59] Saudi Arabia v. Nelson, 507 U.S. 339 (1993), reversing 923 F.2d 1538 (11th Cir. 1991). The Court found that the essence of Nelson's complaint was that, as an employee of the government-owned hospital in Riyadh, he was taken into

government custody and tortured after repeatedly warning hospital officials about fire hazards in the administration of oxygen to patients. The court held, with two Justices dissenting, that Saudi Arabia had blanket immunity under 1604, and as the tort was committed outside the United States, the exception in 1605(a)(5) did not apply.

[60] See Coalition Provisional Authority Order Number 17 (revised), available at http://www.cpa-iraq.org/regulations/20040627_CPAORD_17_Status_of_Coalition__Rev__with_Annex_A.pdf
The CPA is officially described as a transitional regime under a United Nations mandate. Under the terms of Iraq's 2004 Transitional Administrative Law, the CPA's decrees remain in force unless superseded by new legislation. Order 17 says: "Contractors shall be immune from Iraqi legal process with respect to acts performed by them pursuant to the terms and conditions of a Contract or any sub-contract thereto," and defines contractors as "non-Iraqi legal entities or individuals not normally resident in Iraq, including their non-Iraqi employees."

[61] In October of 2007, the Iraqi cabinet passed a measure to rescind Order Number 17, yet Iraq's Parliament must still vote the measure into law. As of May 2008, it was unclear whether Parliament had done so or what effect the rescinding of Order 17 would have. The cabinet measure passed in October of 2007 does not specify what actions Iraq would take with respect to torts or crimes by military contractors prior to the rescinding of Order 17. See Human Rights Watch *Iraq: Pass New Law Ending Immunity for Contractors Iraq: Pass New Law Ending Immunity for Contractors*, Jan. 9, 2008. Available at http://hrw.org/english/docs/2008/01/09/iraq17703.htm

The status of contractors – as of May 2008 – is still being negotiated by the governments of Iraq and the United States, with the Iraqi Parliament having deep concerns about seeming too lenient towards the United States. See Karen DeYoung, *Iraq Wants U.S. to Compromise More on Security Deals*, WASH. POST, April 11, 2008, at A11. ("Iraq is resisting U.S. proposals for a pair of new bilateral security agreements, saying it expects Washington to compromise on "sensitive issues," including the right to imprison Iraqi citizens unilaterally, Foreign Minister Hoshyar Zebari said Monday. . . .Other problematic areas now being negotiated, Zebari said in an interview, are provisions in U.S. drafts to give American contractors immunity from Iraqi law and allow the United States to conduct military operations without Iraqi government coordination.") *Id.*

[62] *See, e.g.*, Gulf Resources America, Inc. v. Republic of Congo, 370 F.3d 65 (D.C. Cir., 2004), where the contractual waiver was held to be sufficiently explicit.

[63] *Jus cogens* is the concept that there is a body of 'higher law' of overriding importance for the international community. This idea has gained ground since its first embodiment in the 1969 Vienna Convention on the Law of Treaties, and was confirmed by the 1986 Vienna Convention on the Law of Treaties. In its judgment in the *Nicaragua Case* the International Court of Justice (ICJ) affirmed *jus cogens* as an accepted doctrine in international law. The prohibition on the use of force was (according to the ICJ) "a conspicuous example of a rule of international law having the character of *jus cogens*." States thus can be responsible in the international legal order beyond treaty obligations. For example, the International Law Commission (ILC) proposed that certain acts of nations could be international crimes as a breach by that state of an international obligation "essential for the protection of the fundamental interests of the international community."

Clearly, *jus cogens* (peremptory norms) are contrary to any unilateralist perspective on the rights of nation-states to act in their own perceived self-interest, even if such actions would include so-called "war crimes."

[64] This would be the logical result of the Supreme Court's decision in Saudi Arabia v. Nelson, 507 U.S. 339 (1993), *supra* note 59.

[65] El-Masri v. Tenet, 437 F. Supp. 2d 530 (E.D. Va. 2006), *aff'd* El-Masri v. United States, 2007 U.S. App. LEXIS 4796 (4th Cir. Va., Mar. 2, 2007), cert. denied, 128 S. Ct. 373; 169 L. Ed. 2d 258 (2007).

[66] As the El-Masri district court put it, rather dryly, "The complaint alleges that since the early 1990s the CIA has been operating interrogation centers in countries where the United States believes legal safeguards do not constrain efforts to interrogate suspected terrorists. This practice is commonly known as "extraordinary rendition." *El-Masri*, 437 F. Supp. 2d at 532.

[67] *Id*. at 533-34.

[68] *El-Masri*, 437 F. Supp. 2d at 534.

[69] 403 U.S. 388 (1971).

[70] El-Masri contends that Tenet and John Does 1-10 violated the Due Process Clause's prohibition against anyone acting under color of U.S. law (1) to subject any person held in U.S. custody to treatment that "shocks the conscience," or (2) to deprive any person of liberty in the absence of legal process. *El-Masri*, 437 F. Supp. 2d at 534-35.

[71] The ATS provides 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." 28 U.S.C. § 1350. *See also infra* notes 119-122 and accompanying text.

[72] Since the Supreme court's decision in Sosa v. Alvarez-Machain, the judicial standards for what is recognized as a violation of "the law of nations" has become somewhat more restrictive. Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

See Lucien J. Dhooge, *Lohengrin Revealed: The Implications of Sosa v. Alvarez-Machain for Human Rights Litigation Pursuant to the Alien Tort Claims Act*, 28 LOY. L.A. INT'L & COMP. L. REV. 393 (2006).
[73] *See United States v. Reynolds*, 345 U.S. 1, 7-8 (1953).
[74] *Ellsberg v. Mitchell*, 709 F.2d 51, 56 (D.C.Cir. 1983).
[75] El-Masri, 437 F. Supp. 2d at 536 (emphasis supplied)
[76] *Id*. at 538.
[77] *Id*. (DCI stands for Director of Central Intelligence.)
[78] 28 U.S.C. § 2680(k) (2000)
[79] *See, e.g*., Heller v. United States, 776 F.2d 92, 96 (3d Cir. 1985)(citing Pelphrey v. United States, 674 F.2d 243 (4th Cir. 1982); Manemann v. United States, 381 F.2d 704 (10th Cir. 1967); Meredith v. United States, 330 F.2d 9 (9th Cir. 1964); Burna v. United States, 240 F.2d 720 (4th Cir. 1957)).
[80] *See, e.g*. Ibrahim v. Titan Corp., 2007 U.S. Dist. LEXIS 81794 (D.D.C., Nov. 6, 2007). *See also* Saleh v. Titan, 436 F.Supp. 2d 55 (D.D.C. 2006).
[81] Baker v. Carr, 369 U.S. 186, 210 (1962).
[82] *Japan Whaling Assoc. v. American Cetacean Soc.*, 478 U.S. 221, 230 (1986)
[83] *Baker*, 369 U.S. at 217.
[84] Kevin Smith-Idol v. Halliburton, 2006 U.S. Dist. LEXIS 75574, at 3.
[85] *Id*. at 4.
[86] Fisher v. Halliburton, Inc., 454 F. Supp. 2d 637 (S.D. Tex. 2006).
[87] *Smith-Idol*, *supra* note 84 and accompanying text.
[88] Contract No. DAAA09-02-D-0007.
[89] 454 F. Supp. 2d 637 at 639.
[90] *Fisher, supra* note 86 at 639.
[91] *Id*. at 644. ("The court concludes that this case presents a non-justiciable political question. The case at bar meets not one, but three of the formulations described in *Baker v. Carr*."). In Woodson v. Halliburton, also involving the same KBR contract, the result was also the same. *See* Woodson v. Halliburton, 2006 U.S. Dist. LEXIS 70311(S.D. Tex., Sept. 28, 2006).
[92] *Smith-Idol*, *supra* note 84 at 5. ("Even in the unlikely event that the court were to find that the act of deploying the convoy was the sole responsibility of the defendants, the adequacy of the force protection provided to that convoy and the myriad of other decisions made by the Army and the defendants relating to which route to take, the accuracy and timeliness of intelligence on the possible routes, and the manner in which the convoys should travel, could not be divided into discrete parts attributable to the defendants and the Army. Therefore, the court finds that it cannot try this case without an impermissible intrusion into powers expressly granted to the Executive by the Constitution.") *Id.*
[93] Whitaker v. Kellogg, Brown, and Root, 444 F.2d 1277 (M.D. Ga. 2006).
[94] There aren't enough facts in the case to suggest contributory negligence on Whitaker's part, or what nation's laws apply in U.S. lawsuits alleging PMC negligence in Iraq. By disposing of the case on political question or other U.S. domestic law grounds, the *Whitaker* court does not need to address choice of law issues, much less contributory negligence.
[95] *Id*. at 1282.
[96] *Id*.
[97] *Id*. at 1280, citing Aktepe v. United States, 105 F.3d 1400, 1403 (11th Cir. 1997)("[T]he political branches of government are accorded a particularly high degree of deference in the area of military affairs.")
[98] *Whitaker*, 444 F. Supp. 2d at 1282.
[99] "The convoy operation was planned by the military, which determined the placement of vehicles in the convoy, the speed of the convoy, and the distance between vehicles in the convoy. Clearly, these circumstances differ dramatically from driving on an interstate highway or county road in the United States without any constraints other than ordinary skill, judgment, and prudence. The question here is not just what a reasonable driver would do – it is what a reasonable driver in a combat zone, subject to military regulations and orders, would do." *Id.*
[100] *See, e.g*., Lane v. Halliburton, 2006 U.S. Dist. LEXIS 63948 (S.D. Tex., Sept. 7, 2006); and Woodson v. Halliburton, 2006 U.S. Dist. LEXIS 70311 (S.D. Tex., Nov.15, 2006).
[101] See cases discussed *infra*, notes 109-24 and accompanying text.
[102] Ibrahim v. Titan Corp., 2007 U.S. Dist. LEXIS 81794 (D.D.C., Nov. 6, 2007). *See also* Saleh v. Titan, 436 F.Supp. 2d 55 (D.D.C. 2006). *See also* Ibrahim v. Titan Corp, 391 F.Supp. 2d 10 (2005).
[103] Ibrahim v. Titan Corp., 391 F. Supp. 2d 10, at 12. Other allegations included "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*. at 12-13.

[104] *Ibrahim*, 391 F. Supp. 2d at 12.

[105] The Alien Tort Statute (ATS) Tort Statute was part of the First Judiciary Act but was invoked only twice in its first 200 years of existence to establish federal subject matter jurisdiction. See William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists,"* 19 HASTINGS INT'L & COMP. L. REV. 221, 222-23 (1996). The original wording of the text stated: "That the district courts shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States." *Id.* at 225. Modern use of the statute and its association with human rights claims dates from 1980 and Filartiga v. Pena-Irala. Filartiga v. Pena-Irala, 630 F.2d 876, 876 (2d Cir. 1980). In that landmark decision, the court allowed two Paraguayan plaintiffs to bring an action against a Paraguayan defendant for the torture death of a relative. The Second Circuit relied upon the Alien Tort Statute, which states: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."

As to the ATS and its potential application to PMC torts in conflict zones, *see infra* notes 175-85 and accompanying text. Note that the ATS is also often referred to as the Alien Tort Claims Act, or ATCA.

[106] *Ibrahim*, 391 F. Supp. 2d at 16 and at 27-28.

[107] Ibrahim v. Titan; Saleh v. Titan, 2007 U.S. Dist. LEXIS (Nov. 6, 2007).

[108] *Id*. at 31. Judge Robertson allows summary judgment for Titan but not for CACI, on the basis that Titan's command and control structure was more tightly integrated with the U.S. military, and therefore the judicially-created "combatant activities exception" of the Federal Tort Claims Act pre-empted the plaintiffs' remaining state common law tort claims.

[109] McMahon v. Presidential Airways, 460 F. Supp. 2d 1315 (2006).

[110] *McMahon*, 460 F. Supp. 2d at 1325.

[111] *Id*. at 1324.

[112] *Id.*

[113] *Id*.

[114] *Id*.

[115] Carmichael v. Kellogg, Brown and Root, 450 F. Supp. 2d 1373 (2006).

[116] Carmichael, 450 F. Supp. 2d at 1374.

[117] *Id.*

[118] *Id.* at 1381.

[119] 2006 U.S. Dist. LEXIS 39403, No. H-05-01853 (S.D. Tex. June 12, 2006),

[120] *Id.* at 3.

[121] *Id.* at 8.

[122] *Id.* at 8-9.

[123] Smith v Halliburton, 2006 U.S. Dist. LEXIS 30530 at 12-13.

[124] *Smith*, 2006 U.S. Dist. LEXIS 30530 at 14-15.

[125] See MG Antonio M. Taguba, AR 15-6 Investigation of the 800th Military Police Brigade (May 27, 2004), http://www.aclu.org/torturefoia/released/TR3.pdf [generally known as the Taguba Report] at 2. See also Tara McKelvey, The Unaccountables, Amer. Prospect, Sept. 7, 2006, available at http://www.prospect.org/cs/articles?articleId=11951 (describing the torture of an Abu Ghraib detainee by an employee of Titan, Inc., which held a $369 million contract to supply civilian translators for the Army. McKelvey wrote in 2006 that "Titan, owned by L-3 Communications, extended the contract – now worth $1.05 billion, according to Joe Walker, spokesman for the Army's Intelligence and Security Command.")

[126] Ibrahim v. Titan, 391 F.Supp. 2d 10, 15 (2006). Judge Robertson cites Vieth v. Jubelirer, 541 U.S. 267, 277-78 (2004) which cites the six *Baker* tests and notes that "these tests are probably listed in descending order of both importance and certainty"). Each case requires "a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action." *Baker*, 369 U.S. at 211-12.

[127] Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

[128] *Ibrahim*, 391 F. Supp. 2d at 15, citing Luftig v. McNamara, 373 F.2d 664, 666 (D.C. Cir. 1967).

[129] *Ibrahim*, 391 F.Supp. 2d at 16.

[130] See *infra*, notes 150-165 and accompanying text.

[131] Ibrahim v. Titan, consolidated with Saleh v. Titan, 2007 U.S. Dist. LEXIS (Nov. 6, 2007).As of late May, 2008, the case was on appeal to the D.C. Circuit Court of Appeals. See In re CACI Premier Tech., Inc., 2008 U.S. App. LEXIS 6649 (D.C. Cir., Mar. 17, 2008).
[132] 28 U.S.C. § 2674 (2000).
[133] 28 U.S.C. § 2680(j)(2000).
[134] Boyle v. United Technologies, 487 U.S. 500 (1988).
[135] *Id*. at 511 – 513.
[136] *Id*.
[137] *Id*. at 512.
[138] Koohi v United States, 976 F.2d 1328 (9th Cir. 1992). *Koohi* extended *Boyle* to a case involving combatant activities.
[139] 976 F.2d at 1329-30.
[140] *Id.* at 1336.
[141] *Id.* at 1337 (emphasis added).
[142] 833 F. Supp. 1486 (C.D. Cal. 1993).
[143] *Bentzlin*, 833 F. Supp. at 1493.
[144] Lessin v. Brown and Root, 2006 U.S. Dist. LEXIS 39403.
[145] *Fisher v. Halliburton*, 390 F. Supp. 2d 610 (S.D. Tex. 2005).
[146] *Fisher*, 390 F. Supp. 2d at 615-16.
[147] *Lessin*, at 14.
[148] *Id*. at 14-15.
[149] *Carmichael*, 450 F. Supp. 2d at 1379.
[150] See *supra* note 102 and accompanying text.
[151] 28 U.S.C. § 2680(j) (2000)
[152] *Koohi*, 976 F.2d at 1337.
[153] *Ibrahim*, 391 F. Supp. 2d at 18.
[154] *Id*. at 20.
[155] *Id.* at 19-20.
[156] *Id.* at 22.
[157] *Id*. at 23-24.
[158] Ibrahim v. Titan; Saleh v. Titan, 2007 U.S. Dist. LEXIS 81794 (Nov. 6, 2007).
[159] *Id*. at 16 (emphasis in original).
[160] *Id*. at 18.
[161] *Id*. at 18-19.
[162] *Id*. at 25.
[163] *Id*. at 25-26.
[164] It should be strongly noted, however, that certain unofficial accounts describe some of Titan's more brutalizing interrogators as operating quite independently of military supervision. *See, e.g.*, McKelvey, *supra* note 125. *See also* the various books on Abu Ghraib, *supra* note 15.
[165] *Ibrahim, supra* note 158 at 30.
[166] The privilege for state secrets allows the government to withhold information from discovery when disclosure would be "inimical to national security." *Zuckerbraun v. General Dynamics Corp.*, 935 F.2d 544, 546 (2d Cir. 1991). The privilege may be invoked by the head of a governmental department with responsibility over the matter in question, and the head of the department must give personal consideration to the matter in question. *United States v. Reynolds*, 345 U.S. 1, 7-8 (1953). A government department may intervene in litigation to which it is not a party and assert the privilege, thereby preventing either party in the litigation from obtaining sensitive government information in discovery.
[167] *Reynolds*, 345 U.S. 1 (1953).
[168] Jackie Northam, Administration Employing State Secrets Privilege at Quick Clip, National Public Radio broadcast, Sept. 9 2005. Available at http://www.npr.org/templates/story/story.php?storyId=4838701
[169] *Id.*
[170] *See supra* notes 65-77 and accompanying text. The El-Masri case was dismissed based on the government's invocation of the 'state secrets' privilege.
[171] Arar v. Ashcroft, 414 F. Supp. 2d 250 (2006) ("The United States, invoking the state-secrets privilege, has moved for summary judgment under Fed. R. Civ. P. 56, with respect to Counts 1, 2 and 3 of the complaint. *See* Memorandum in Support of the United States' Assertion of State Secrets Privilege. The government has submitted declarations from former

Deputy Attorney General James B. Comey and former Secretary of the U.S. Department of Homeland Security Tom Ridge, attesting that foreign affairs considerations are involved in this case.") *Id.* at 287. *See also* a compelling account of Arar's "extraordinary rendition" in Jane Mayer, *Outsourcing Torture: the secret history of America's "extraordinary rendition" program*, NEW YORKER, Feb. 14, 2005. Available at http://www.truthout.org/article/jane-mayer-outsourcing-torture. (No longer available at New Yorker website.)

[172] The corporate defendants named in El-Masri's Complaint are Premier Executive Transport Services, Inc., which the Complaint describes as doing business in Massachusetts; Keeler and Tate Management LLC, described as doing business in Nevada; and Aero Contractors Limited, described as doing business in North Carolina. El-Masri v. United States, 479 F.3d 296, 300 (4th Cir., 2006).

[173] 28 U.S.C. §2680(k)(2000).

[174] 28 U.S.C. § 1350 (2000). Note that cases and commentators have over the years used different titles for this statutory provision, so that one might see it variously referred to as the Alien Tort Claims Act (ATCA), the Alien Tort Act (ATA), as well as the Alien Tort Statute (ATS). The Supreme Court seems to have settled on the last term, as does this paper.

[175] See Adra v. Clift, 195 F. Supp. 857 (D. Md. 1961) (a child custody dispute between two aliens); Bolchos v. Darrel, 3 F. Cas. 810 (D.S.C. 1795) (No. 1607) (suit for restitution of three slaves who were on board a Spanish ship seized as a prize of war).

[176] Filartiga v. Pena-Irala, 630 F.2d 876, 876 (2d Cir. 1980).

[177] 28 U.S.C. § 1350.

[178] *Filartiga*, 630 F.2d at 878.

[179] *Id*. at 884.

[180] Forti v. Suarez-Mason, 672 F. Supp. 1531, 1535, 1552 (N.D. Cal. 1987) (torture, summary execution and prolonged arbitrary detention).

[181] See, e.g., Doe v. Unocal, 963 F. Supp. 880, 883-884, 887 (C.D. Cal 1997) (denying motion to dismiss). This case resulted in a settlement in December 2004 after a decision by the Ninth Circuit that would have allowed the case to go forward. See also, Bowoto v. Chevron Texaco Corp., 312 F. Supp. 2d 1229, 1233 (N.D. Cal. 2004); Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 296 (S.D.N.Y. 2003); Wiwa v. Royal Dutch Petroleum, 226 F.3d 88, 92 (2d cir. 2000).

[182] *Ibrahim*, 391 F. Supp. at 10.

[183] Saleh v. Titan, 436 F. Supp. 2d 55 (D.D.C. 2006), at 56-58. Judge Robertson perfectly expresses the paradox here, a paradox which can only frustrate potential litigants who complain of U.S. PMC torts in conflict zones. He notes:

> It is certainly true. . .that participation in a conspiracy with government actors does not confer government immunities, but in the absence of supporting citation it is difficult to see how conspiratorial behavior, which by definition is secretive, can show the color of law. And the more plaintiffs assert official complicity in the acts of which they complain, the closer they sail to the jurisdictional limitation of the political question doctrine. See, Gonzalez-Vera v. Kissinger, 371 U.S. App. D.C. 242, 449 F.3d 1260, 2006 U.S. App. LEXIS 14175, No. 05-5017 (D.C. Cir., decided June 9, 2006); Schneider v. Kissinger, 366 U.S. App. D.C. 408, 412 F.3d 190 (D.C. Cir. 2005). *Id.*

[184] See Tel Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984), *cert. denied* 470 U.S. 1003 (1985). In *Tel Oren*, victims of a 1978 terrorist attack in Israel sued a number of parties, including several private organizations, for violations of the law of nations under the ATS. A three-judge panel unanimously dismissed the case with three separate opinions. On the whole, the opinions coalesce on the notion that violations of the law of nations do not reach private, non-state conduct. While there may be issues relating to private conduct under "color of law," they did not succeed with Judge Robertson in *Ibrahim.*

[185] Sosa v. Alvarez-Machain, 542 U.S. 692 (2004). Judge Robertson's view of *Sosa* (that the Court made clear that actionable torts under the ATS must, to violate the "the law of nations" be under color of law or state authority, is likely to not be the last word. But the D.C. Circuit Court of Appeals has not been overly friendly to expanding causes of action or classes of defendants under the ATS.

[186] See *supra* notes 65-77 and accompanying text.

[187] Torture Victim Protection Act of 1991, Pub. L. 102-256, 106 Stat. 73 (1992).

[188] Torture Victim Protection Act of 1991, Pub. L. No. 102-256(1)(a), 106 Stat. 73, 73-74 (1992).

[189] See *supra* notes 54-57 and accompanying text.

[190] See *supra* note 60-61 and accompanying text.

[191] Beth Van Schaack, *In Defense of Civil Redress: The Domestic Enforcement of Human Rights Norms in the Context of the Proposed Hague Judgments Convention*, 42 HARV. INT'L L.J. 141(2001)

[192] See *supra* notes 109-122 and accompanying text.

[193] Isenberg, *supra* note 16. ("Consider Dawn Leamon's story, which is chronicled in detail in the April 3 issue of The Nation. She says that while working for the U.S. contractor Kellogg Brown Root she was raped in Iraq earlier this year by a U.S. soldier and a KBR colleague.") *Id.* Isenberg notes that KBR requires arbitration of all disputes arising out of the contract relationship, and has insisted that Leamon has waived her right to take her claims to court. *Id.*

[194] William Howell, *Unilateral Powers: A Brief Overview*, 35 PRESIDENTIAL STUDIES QUARTERLY 3 (2005).

[195] *Id*. at 4.

[196] Chalmers Johnson, *Evil Empire: Is Imperial Liquidation Possible for America?* TomDispatch.com, May 15, 2006. Available at http://www.truthout.org/article/chalmers-johnson-evil-empire.

[197] Upon leaving the presidency in 1961, Dwight D. Eisenhower warned future generations against the dangers of a "military-industrial complex," and the "grave implications" of the "conjunction of an immense military establishment and a large arms industry." He said we must "guard against the acquisition of unwarranted influence, whether sought or unsought, by the military industrial complex. The potential for the disastrous rise of misplaced power exists and will persist. We must never let the weight of this combination endanger our liberties or democratic processes." *See* Dwight D. Eisenhower, Military-Industrial Complex Speech, The Avalon Project at Yale Law School (1961), *available at* http://www.yale.edu/lawweb/avalon/presiden/speeches/eisenhower001.htm.

With respect to the "immense military establishment" that Eisenhower spoke about, see CHALMERS JOHNSON, THE SORROWS OF EMPIRE (2004). Johnson states that:

> As distinct from other peoples on this earth, most Americans do not recognize – or do not want to recognize – that the United States dominates the world through its military power. Due to government secrecy, they are often ignorant of the fact that their government garrisons the globe. They do not realize that a vast network of American military bases on every continent except Antarctica actually constitutes a new form of empire. *Id.* at 1.

See also the website for Robert Greenwald's film, Iraq for Sale: The War Profiteers, at http://iraqforsale.org/about.php. The website lists numerous sources about lucrative no-bid, cost-plus contracts to Halliburton and other private contractors. *See generally* DAN BRIODY, THE HALLIBURTON AGENDA: THE POLITICS OF OIL AND MONEY (2004) (describing the history of Halliburton and Kellogg Brown & Root from its earliest days in Texas politics, to Vice President Cheney's work with Halliburton from 1995, on and the monopolization of billions of dollars of no-bid, cost-plus contracts for the occupation of Iraq.) *See also* Erik Eckholm, *White House Officials and Cheney Aide Approved Halliburton Contract in Iraq, Pentagon Says*, N.Y. TIMES, June 14, 2004, at A6.

[198] John M. Broder, *Chief of Blackwater Defends His Employees*, N.Y. TIMES, Oct. 2, 2007.

[199] James Risen, *Iraq Contractor in Shooting Case Makes Comeback*, N.Y. TIMES, May 18, 2007.

[200] Mary Clare Jalonick, *Senators will move ahead with wartime contracting commission despite Bush concerns.* Associated Press, Jan. 30, 2008.

[201] *Id.* "Under longstanding constitutional principles, the executive branch may protect from disclosure certain sensitive information, including national security information, as well as information about decisions whether to file criminal charges," the spokeswoman, Jeanie Mamo, said late Tuesday. "The signing statement provides notice that the commission's requests for information, if they are too broad, may run afoul of the Constitution."

[202] There are numerous law review articles on the phenomenon of Presidential signing statements, a practice which long precedes the current Administration. But most commentators agree that the use of signing statements has increased significantly during the Bush II presidency. A useful and measured view can be found in Walter Dellinger, *Memorandum for Bernard N. Nussbaum Counsel to the President*, 48 ARK. L. REV. 333 (1995).

[203] See Howell, *supra* note 194, at 3.

[204] See Johnson, *supra* note 197, quoting Andrew Bacevich, professor of international relations at Boston University. Johnson claims that U.S. militarism has become a habit that is unwittingly draining its economy and pushing it towards economic and moral bankruptcy. See also CHALMERS JOHNSON, THE SORROWS OF EMPIRE (2004) and *supra* note 177.

For a somewhat more measured view, see ANDREW BACEVICH, AMERICAN EMPIRE: THE REALITIES AND CONSEQUENCES OF U.S. DIPLOMACY (2002)(arguing that as a remaining 'superpower,' the United States is driven to eliminate barriers to the movement of trade, capital, and ideas, nurturing not only affluence but also democracy; pursuing openness has met with resistance, overcome with increasing frequency by the use of U.S. military power, which has emerged as a preferred instrument of U.S. 'statecraft' and has resulted in the progressive militarization of U.S. foreign policy).

[205] Mahar Arar, the Canadian citizen who was given "extraordinary rendition," is repeatedly described as an "alien" in the headnotes to the case, and is given status as an "alien" for purposes of interpreting the Alien Tort Claims Act and the Torture Victim Protection Act. *See* Arar v. Ashcroft, 414 F. Supp. 2d 250 (E.D.N.Y. Feb. 16, 2006).

[206] *In Interview With Arab TV, Bush Promises Full Investigation Of Prisoner Abuse in Iraq*. While House Bulletin, May 5, 2004. Available at

http://www.lexisnexis.com/us/lnacademic/results/docview/docview.do?docLinkInd=true&risb=21_T3848141533&format=GNBFI&sort=RELEVANCE&startDocNo=1&resultsUrlKey=29_T3848139980&cisb=22_T3848141535&treeMax=true&treeWidth=0&csi=160018&docNo=12.

[207] John Adams, *Novanglus Papers," no. 7*, in THE WORKS OF JOHN ADAMS, Charles Francis Adams, ed. vol. 4, p. 106 (1851).

[208] JAMES HERRINGTON, THE COMMONWEALTH OF OCEANA (1771) at 35. The phrase gained wider currency when Adams used it in the Massachusetts Constitution, Bill of Rights, article 30 (1780).