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SUING PRIVATE MILITARY CONTRACTORS FOR TORTURE: HOW TO USE THE ALIEN TORT STATUTE WITHOUT GRANTING SOVEREIGN IMMUNITY-RELATED DEFENSES

Efrain Staino*

I. INTRODUCTION

The United States is currently engaged in two wars overseas and operates military prisons in Iraq, Afghanistan, and Guantanamo Bay, Cuba.¹ The requirements of these commitments have forced the U.S. government to rely on private contractors, to an unprecedented extent, to meet its increased global security demands.² As a result, private military contractors have been engaged in Iraq and Afghanistan as security forces, logistics personnel, interrogators, and translators, among other things.³ Their

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1. Eric Schmitt & Tim Golden, *U.S. Set to Build Big New Prison in Afghanistan*, N.Y. TIMES, May 17, 2008, at A1 (comparing the new prison being built by the United States in Afghanistan with the ones the United States runs at Guantanamo Bay and in Iraq).

2. John M. Broder & David Rohde, *State Department Use of Contractors Leaps in 4 Years*, N.Y. TIMES, Oct. 24, 2007, at A1 (reporting the quadrupling, from one to four billion, of the State Department's expenditures on private contractors due to the increased demand). Throughout this comment, I will use the terms private military contractor, government contractor, and private contractor interchangeably.

3. See *Ibrahim v. Titan Corp. (Ibrahim I)*, 391 F. Supp. 2d 10, 12–13 (D.D.C. 2005) (discussing interrogators and interpreters); Joshua Kurlantzick, *Outsourcing the Dirty Work: The Military and its Reliance on Hired Guns*,

involvement has been controversial. Allegations of atrocities committed by private military contractors have exposed weaknesses in our legal system's ability to hold the perpetrators accountable and deliver justice to the victims.⁴ The main questions for the courts to answer are whether, and to what extent, private contractors can be held liable for acts that amount to torture as defined by international law and incorporated into U.S. law.⁵ These questions give rise to a number of issues concerning the amount of official government involvement required for an act to be defined as torture and when, if ever, a private contractor is exempt from liability under state sovereign immunity or other related defenses.⁶

This comment will discuss the use of the Alien Tort Statute (ATS), also known as the Alien Tort Claims Act (ATCA), as a tool to hold private contractors working for the U.S. government accountable for acts of torture. It shows that federal courts can hold a private contracting corporation or its employees liable under the ATS for acts that amount to torture under international law without automatically granting the defendant's affirmative defense of sovereign immunity or the government contractor defense. To find the private contractor liable for torture, the plaintiff must argue

AM. PROSPECT, Apr. 30, 2003, http://www.prospect.org/cs/articles?article=outsourcing_the_dirty_work (discussing the U.S. military's increased dependence on private military contractors).

4. See *Ibrahim v. Titan Corp. (Ibrahim II)*, 556 F. Supp. 2d 1 (D.D.C. 2007), *aff'd in part, rev'd in part sub nom. Saleh v. Titan Corp. (Saleh II)*, 580 F.3d 1 (D.C. Cir. 2009); *Saleh v. Titan Corp. (Saleh I)*, 436 F. Supp. 2d 55 (D.D.C. 2006); *Ibrahim I*, 391 F. Supp. 2d 10.

5. See Torture Convention Implementation Act of 1994, 18 U.S.C. § 2340 (2006) (codifying torture as a criminal offense); Torture Victim Protection Act of 1991, Pub. L. No. 102-256, § 3(b), 106 Stat. 73, 73 (1992) (codified at 28 U.S.C. § 1350 note (2006)) (codifying torture as a tort creating civil liability); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter *Torture Convention*] (providing the international definition of torture).

6. This comment will not address the extent to which a private contractor corporation can be held liable for acts committed by its employees under the theory of *respondeat superior*. For a thorough analysis of this issue, see William R. Casto, *Regulating the New Privateers of the Twenty-First Century*, 37 RUTGERS L.J. 671, 694-99 (2006). Thus, the comment will not tackle the question of whether a potential plaintiff can sue the corporation as a whole or is limited to only suing the individual employee that committed the torture. The answer is obviously an important one for potential plaintiffs because the corporation will more likely be able to pay any damages awarded to them.

that there was government involvement in the commission of the act, but this argument also strengthens the defendant's immunity related defenses. Without the government's involvement, the plaintiff's torture claim will fail, and if defendant prevails on the affirmative defense, the contractor will receive impunity for the atrocities. Either outcome would leave the plaintiff without a legal remedy. This comment proposes that the solution to this problem is recognizing that the level of government or official involvement required for an act to meet the definition of torture is significantly lower than the level required for the private contractor to assert the affirmative defenses that are normally reserved for the government.

Part II of this comment discusses the history and current state of the ATS and focuses on torture as a violation of international law and a cause of action under the ATS.⁷ It then summarizes possible defenses and briefly presents some recent cases on point. Part III articulates the difficulties facing plaintiffs attempting to hold private parties accountable for torture.⁸ Part IV analyzes the difference between the state action requirement under the definition of torture and the requirements to assert the immunity related defenses.⁹ This comment proffers that there is a significant gap between the two state action requirements and that a private contractor could and should be found liable for torture under the ATS when operating within that gap.

Finally, Part V proposes a solution that will allow victims of torture at the hands of private contractors to seek justice in federal courts.¹⁰ This proposal would create civil liability for private contractors, which should act as a significant deterrent. This solution hinges on recognition that the requisite government involvement for torture is lower than that of sovereign immunity related defenses, and that a finding of the former does not automatically result in a finding of the latter. Applying this approach, courts should analyze the facts of each individual case to determine whether the private contractor's acts fall within the gap where they can be held liable for torture, but immunity is

7. See discussion *infra* Part II.

8. See discussion *infra* Part III.

9. See discussion *infra* Part IV.

10. See discussion *infra* Part V.

unavailable as a defense.

II. BACKGROUND: DEVELOPMENT OF THE ALIEN TORT STATUTE AND RECENT CASES APPLYING THE STATUTE

A. *Filartiga and the Resurgence of the Alien Tort Statute*

The ATS, enacted as part of the Judiciary Act of 1789,¹¹ creates federal subject matter jurisdiction for “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.”¹² For nearly two hundred years, plaintiffs rarely invoked the statute in federal courts.¹³ Then, in 1980, the Second Circuit sustained federal jurisdiction under the ATS in its landmark decision *Filartiga v. Pena-Irala*, giving new life to the old statute.¹⁴

The events leading up to *Filartiga* began in Paraguay in 1976.¹⁵ Police officers woke one of the plaintiffs, Dolly Filártiga, early one morning and instructed her to collect the body of her brother, who had been tortured to death by the police.¹⁶ Despite direct warnings by the police not to take any action, the Filártiga family attempted, to no avail, to pursue justice in Paraguayan courts.¹⁷ When the family learned that Peña-Irala, a high-ranking police officer directly involved with the murder, was in New York City, they followed him.¹⁸ Working with attorneys at the Center for Constitutional Rights, the family sued Peña-Irala under the ATS for torture, a violation of the law of nations.¹⁹ The district court dismissed the case, but, on appeal, the Second Circuit held that the right to be free from torture, including torture committed by the victim’s own government, was a

11. Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77 (codified as amended at 28 U.S.C. § 1350 (2006)).

12. 28 U.S.C. § 1350.

13. See Kenneth C. Randall, *Federal Jurisdiction over International Law Claims: Inquiries into the Alien Tort Statute*, 18 N.Y.U. J. INT’L L. & POL. 1, 4 n.15, 5 n.16 (1985) (listing twenty-one cases where plaintiffs asserted jurisdiction under the statute and only two cases where the courts sustained jurisdiction under the statute).

14. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

15. Beth Stephens, *Filartiga v. Pena-Irala: From Family Tragedy to Human Rights Accountability*, 37 RUTGERS L.J. 623, 624 (2006).

16. *Id.*

17. *Id.* at 625.

18. *Id.*

19. *Id.*

fundamental right under international law.²⁰ The court held that torture was a violation of the law of nations for which the ATS provided federal jurisdiction, thus allowing an alien to sue his or her torturer in federal court if personal jurisdiction is established.²¹

Following *Filartiga*, federal courts looked to international law to determine whether the defendant's alleged act constituted a violation of the law of nations so the courts could grant federal jurisdiction under the ATS.²² Courts went beyond torture to address other international law violations including war crimes, extrajudicial killings, genocide, forced disappearances, and summary execution.²³ Federal courts also addressed the issue of who can be sued under the ATS when hearing cases against corporations, former heads of state, private contractors, the United States, and local officials.²⁴ For over two decades, ATS litigation took place in the district and appellate courts, which upheld the core of *Filartiga* without guidance from the United States Supreme Court.²⁵

20. *Filartiga v. Pena-Irala*, 630 F.2d 876, 884–85 (2d Cir. 1980) (“[W]e conclude that official torture is now prohibited by the law of nations. . . . [I]t [is] clear that international law confers fundamental rights upon all people vis-a-vis their own governments.”).

21. *Id.* at 878 (“[D]eliberate 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.”).

22. See Stephens, *supra* note 15, at 627–28.

23. See *Cabello v. Fernandez-Larios*, 402 F.3d 1148 (11th Cir. 2005) (discussing extrajudicial killing, torture, crimes against humanity, and cruel, inhuman, or degrading punishment); *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000) (discussing summary execution, torture, and arbitrary detention); *Hilao v. Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996) (discussing summary execution, torture, and forced disappearance); *Kadic v. Karadzic*, 70 F.3d 232, 244 (2d Cir. 1995) (holding that subject matter jurisdiction was proper under the ATS against a private party accused of having committed genocide, war crimes, summary execution, and torture).

24. See *Jama v. U.S.I.N.S. (Jama II)*, 343 F. Supp. 2d 338 (D.N.J. 2004) (involving a private contractor running a detention facility for the United States); *Wiwa*, 226 F.3d 88 (involving a corporation); *Martinez v. City of Los Angeles*, 141 F.3d 1373 (9th Cir. 1998) (concerning local government officials); *Jama v. U.S.I.N.S (Jama I)*, 22 F. Supp. 2d 353 (D.N.J. 1998) (discussing U.S. officials and a private corporation); *Hilao*, 103 F.3d 767 (involving a former head of state).

25. Stephens, *supra* note 15, at 628 (“The lower courts were unanimous in upholding the core of the *Filartiga* decision: aliens could sue in federal court for

B. The Sosa Court Defines the Scope of the Alien Tort Statute and Leaves the Door Ajar for Future Litigation

The Supreme Court's first decision defining the scope of the ATS came in *Sosa v. Alvarez-Machain*.²⁶ Until then, most courts had followed *Filartiga*'s approach to ATS litigation and looked to international law to find a limited number of new causes of action under the ATS.²⁷ Critics, however, began questioning *Filartiga* when suits against multinational corporations became more frequent in the late 1990s.²⁸ The core of the critics' argument was that, because the ATS only provided courts with subject matter jurisdiction, Congress had to create an express statutory cause of action for a violation of international law.²⁹ Critics argued that without an express statute, the ATS had no real application and would not alone grant plaintiffs access to the federal courts.³⁰ Proponents of *Filartiga* disagreed and argued that the ATS had expressly created a new cause of action for violations of international law that allows plaintiffs to sue directly for violations of the ATS.³¹ In 2004, the Supreme Court resolved this dispute in *Sosa v. Alvarez-Machain* by rejecting both extremes.³² The Court determined that the ATS was purely a

a small set of egregious violations of international law.”).

26. 542 U.S. 692 (2004).

27. BETH STEPHENS, JUDITH CHOMSKY, JENNIFER GREEN, PAUL HOFFMAN & MICHAEL RATNER, INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS 16 (2d ed. 2008) (noting that while courts followed *Filartiga*'s lead, they “took seriously its requirements of careful scrutiny of ATS claims” and dismissed most of them).

28. *Id.* at 17 (noting that there was little attention when suits for human rights violations were filed against foreign individuals, who often were judgment proof, but when multinational corporations started to become the targets, critical voices became more common).

29. *Id.* (“[By the late 1990s,] scholars began to challenge the theory underlying *Filartiga*'s application of the ATS, arguing that the statute granted jurisdiction but did not create a cause of action and that the federal courts did not have the constitutional authority to derive a cause of action from either international law or domestic common law.”).

30. *See, e.g., Sosa*, 542 U.S. at 714 (rejecting defendant's argument that “the ATS was stillborn because there could be no claim for relief without a further statute expressly authorizing adoption of causes of action”).

31. *See e.g., id.* at 713 (rejecting the plaintiff's argument that “the ATS was intended not simply as a jurisdictional grant, but as authority for the creation of a new cause of action for torts in violation of international law”).

32. *See id.* at 714 (agreeing with the argument that “federal courts could entertain claims once the jurisdictional grant was on the books, because torts in violation of the law of nations would have been recognized within the

jurisdictional statute, but that Congress intended it to have practical effect at its inception based on causes of action provided by common law at the time.³³ The Court further explained that the ATS allows federal courts to use their common law powers to create a limited set of new causes of action for violations of the law of nations.³⁴

In *Sosa*, a Mexican physician, Humberto Alvarez-Machain (Alvarez), was abducted from Mexico and brought to the United States to stand trial on allegations that he had been involved in the torture and murder of a Drug Enforcement Administration (DEA) agent.³⁵ The DEA employed Mexican nationals, including Jose Francisco Sosa, to carry out Alvarez's abduction.³⁶ Alvarez was held overnight in a motel in Mexico and was then flown to the United States, where federal officers arrested him.³⁷ Alvarez fought his criminal conviction to the Supreme Court, and on remand, a district court eventually acquitted Alvarez of all charges.³⁸

Once back in Mexico, Alvarez brought a civil suit against Sosa, the United States, and others.³⁹ Alvarez sued Sosa under the ATS for a violation of the law of nations, claiming he had been arbitrarily arrested and detained in Mexico.⁴⁰ He sued the U.S. government under the Federal Tort Claims

common law of the time"); see also STEPHENS ET AL., *supra* note 27, at 19–20 (summarizing the *Sosa* Court's holding as stating that "[t]he ATS is a jurisdictional statute enacted on the assumption that the courts would use their common law powers to recognize a small number of common law claims for violations of international norms" (citing *Sosa*, 542 U.S. at 712–24)).

33. *Sosa*, 542 U.S. at 724 ("[A]lthough the ATS is a jurisdictional statute creating no new causes of action, the reasonable inference from the historical materials is that the statute was intended to have practical effect the moment it became law. The jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time.")

34. *Id.* at 725 ("[Nothing] has categorically precluded federal courts from recognizing a claim under the law of nations as an element of common law Still, there are good reasons for a restrained conception of the discretion a federal court should exercise in considering a new cause of action of this kind.")

35. *Id.* at 697–98.

36. *Id.* at 698.

37. *Id.*

38. *Id.*

39. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 698 (2004).

40. *Id.*

Act (FTCA),⁴¹ which provides a waiver of sovereign immunity and allows suit against the U.S. government for injury “caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment.”⁴² The case reached the Supreme Court on appeal from the Ninth Circuit, and the Court held the FTCA claim barred by the statute’s foreign country exception, which exempts the waiver of sovereign immunity for claims arising outside the United States.⁴³ Rejecting the Ninth Circuit’s argument that because the planning had taken place in the United States it did not fall within the foreign country exception, the Supreme Court held that the exception applies to “any injury suffered in a foreign country, regardless of where the tortious act or omission occurred.”⁴⁴

In the highly anticipated decision regarding the scope of the ATS, the Supreme Court ruled against Alvarez, but did not shut the door on ATS litigation, which some human rights activists had feared might happen.⁴⁵ Holding that the common law would provide the cause of action, the *Sosa* Court articulated a narrow test for when courts should recognize new causes of action under the ATS.⁴⁶ The test requires “any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms.”⁴⁷ According to *Sosa*, Congress intended the Judiciary Act of 1789 to apply to three offenses that were violations of the law of nations at that time: “[1] violation of safe conducts, [2] infringement

41. Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2671–80 (2006); see discussion *infra* Part II.E.1.

42. 28 U.S.C. § 1346(b)(1).

43. *Sosa*, 542 U.S. at 701–02 (citing the foreign country exception in 28 U.S.C. § 2680(k), which bars FTCA claims).

44. *Id.* at 702, 712 (rejecting the Ninth Circuit’s argument that the headquarters doctrine should apply to make the acts domestic and not foreign and holding that “the FTCA’s foreign country exception bars all claims based on any injury suffered in a foreign country, regardless of where the tortious act or omission occurred”).

45. See STEPHENS ET AL., *supra* note 27, at 20 (noting that human rights activists warily awaited the *Sosa* decision and hailed the ruling as a victory because they believed it endorsed the approach used by the lower courts since *Filartiga*, while critics of *Filartiga* argued that the Court had imposed additional limits on ATS litigation).

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

47. *Id.* at 725.

of the rights of ambassadors, and [(3)] piracy.”⁴⁸ Thus, federal courts can use common law powers to create a narrow set of new causes of action in violation of the law of nations, provided the courts use caution in exercising this discretion by ensuring that the violations are comparable to the limited international law violations recognized in 1789.⁴⁹ Applying this standard, the Court analyzed Alvarez’s arbitrary arrest and detention claim and held that “a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to support the creation of a federal remedy.”⁵⁰

Following the Court’s ruling in *Sosa*, district courts now have binding guidelines for how to determine whether the claim warrants the creation of a cause of action under the ATS.⁵¹ Lower courts cannot simply rely on old case law to conclude that a particular claim is not actionable under the ATS.⁵² Instead, a court should first analyze whether the alleged violation meets the *Sosa* standard of “a widely accepted, clearly defined international law norm,”⁵³ and then determine whether the particular defendant violated that norm. If the first step is met, the court should recognize a

48. *Id.* at 724.

49. *Id.* at 724–25.

50. *Id.* at 738.

51. *See id.* at 725 (providing the test for when a court should recognize a new cause of action); *Jama II*, 343 F. Supp. 2d 338, 358 (D.N.J. 2004) (“*Sosa* requires that this court revise its legal rulings and employ a different method of analysis in determining if plaintiffs have produced evidence to support an ATCA claim against any of the remaining defendants.”); *see also* William R. Casto, *The New Federal Common Law of Tort Remedies for Violations of International Law*, 37 RUTGERS L.J. 635, 635–36 (2006) (“[A]ll analyses of ATS litigation must flow from *Sosa*’s guidelines.”); Eugene Kontorovich, *Implementing Sosa v. Alvarez-Machain: What Piracy Reveals About the Limits of the Alien Tort Statute*, 80 NOTRE DAME L. REV. 111, 113 (2004) (“The test is historical, requiring a close examination of those ‘characteristics’ of the eighteenth century offenses that gave them their special status in the common law and the law of nations. Applying this test to a variety of purported new international norms will become a significant subject of litigation in the lower courts in the wake of *Sosa*, litigation that could result in conflicting decisions due to the Court’s scant description of the test it envisions.”).

52. Although the *Sosa* standard announces the scope of the ATS, it does not mark a significant departure from most of the ATS litigation conducted prior to *Sosa*, which would most likely have complied with the *Sosa* standard. STEPHENS ET AL., *supra* note 27, at 25.

53. *Id.* at 54 (articulating the *Sosa* standard).

new cause of action under the ATS and allow plaintiff to sue defendant for violating the international law norm.

C. Torture Is a Recognized Cause of Action Under the Alien Tort Statute

The *Sosa* decision settled what had largely been assumed since *Filartiga*—that torture is a recognized cause of action under the ATS. The *Sosa* Court held that federal courts may create new causes of action under the ATS and cited *Filartiga* as an example of where judicial recognition of a violation of the law of nations, namely torture, clearly warranted the creation of a cause of action under the ATS.⁵⁴ Furthermore, much of the ATS litigation in lower courts since *Filartiga* and *Sosa* has addressed torture and determined that it is a valid cause of action for a violation of the law of nations under the ATS.⁵⁵

In 1984, the United Nations adopted the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention).⁵⁶ The Torture Convention adds to the customary international law prohibition on torture and requires that its parties use domestic legal systems to punish those who commit acts of torture.⁵⁷ The United States ratified the Torture Convention

54. *Sosa*, 542 U.S. at 732 (quoting *Filartiga's* comparison of the torturer of today to the pirate of 1789, and citing *Filartiga's* application of torture as a cause of action as an example where the federal courts correctly recognized a "private claim[] under federal common law for violations of [an] international law norm").

55. See, e.g., *Arce v. Garcia*, 434 F.3d 1254, 1256, 1264 (11th Cir. 2006) (upholding a lower court's jury verdict finding two Salvadorian military leaders liable for torture under ATS); *Cabello v. Fernandez-Larios*, 402 F.3d 1148 (11th Cir. 2005) (finding the Chilean ex-military officer liable for torture under ATS); *Doe I v. Unocal Corp.*, 395 F.3d 932, 945 (9th Cir. 2002) ("We have recognized that torture, murder, and slavery are *jus cogens* violations and, thus, violations of the law of nations."); *vacated*, 395 F.3d 978, 979 (9th Cir. 2003) (en banc); *Hilao v. Estate of Marcos*, 103 F.3d 767, 778 (9th Cir. 1996) (stating that the defendant's actions, which included torture, were "violations . . . of a *jus cogens* norm of international law"); *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1179 (C.D. Cal. 2005) ("[T]he Court holds that the existence of the TVPA is strong evidence that the prohibition against torture is a binding customary international law norm."); see also STEPHENS ET AL., *supra* note 27, at 140 ("[E]very court to consider the issue has agreed that torture fits within [the ATS's] reach.").

56. Torture Convention, *supra* note 5.

57. DJ HARRIS, CASES AND MATERIALS ON INTERNATIONAL LAW 763 (6th ed. 2004).

in 1994,⁵⁸ and enacted the Torture Convention Implementation Act (Torture Act)⁵⁹ in its criminal code that same year, making it a criminal offense to commit torture outside the United States.⁶⁰ In 1992, Congress enacted the Torture Victim Protection Act (TVPA),⁶¹ providing both aliens and U.S. citizens a modern cause of action for claims against “[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation . . . subjects an individual to torture.”⁶² The TVPA is commonly viewed as Congress’ approval of *Filartiga* and a codification of its holding that torture, as a violation of the law of nations, provides a cause of action under the ATS.⁶³ Furthermore, the legislative history makes clear that the TVPA was not intended to replace the ATS, and courts have held that the TVPA does not limit the scope and applicability of the ATS.⁶⁴

The *Sosa* decision referred to the Restatement (Third) of the Foreign Relations Law of the United States (Restatement), which includes torture as a violation of international law.⁶⁵ The Court looked to the Restatement for

58. The United States ratified the Torture Convention on October 21, 1994. See United Nations Treaty Collection, Status of Multilateral Treaties Deposited with the Secretary General, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, <http://treaties.un.org/doc/Publication/MTDGS/Volume%20I/Chapter%20IV/IV-9.en.pdf> (last visited April 10, 2010).

59. Torture Convention Implementation Act of 1994, Pub. L. No. 103-236, § 506(a), 108 Stat. 382, 463 (1994) (codified at 18 U.S.C. §§ 2340-2340A (2006)).

60. 18 U.S.C. § 2340A.

61. Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 note (2006).

62. *Id.* § 1350 note 2(a).

63. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 731 (2004) (stating that federal courts and Congress have been in agreement with the decision of *Filartiga*, as evidenced by the enactment of the TVPA); *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 105 (2d Cir. 2000) (“The TVPA thus recognizes explicitly what was perhaps implicit in the Act of 1789—that the law of nations is incorporated into the law of the United States and that a violation of the international law of human rights is (at least with regard to torture) *ipso facto* a violation of U.S. domestic law.”); *Kadic v. Karadzic*, 70 F.3d 232, 241 (2d Cir. 1995) (“Congress enacted the Torture Victim Act to codify the cause of action recognized by this Circuit in *Filartiga*, and to further extend that cause of action to plaintiffs who are U.S. citizens.”); see also STEPHENS ET AL., *supra* note 27, at 80–81.

64. STEPHENS ET AL., *supra* note 27, at 75, 81–82 (stating that the lower courts have been unanimous in concluding that the TVPA does not alter the scope of the ATS and pointing to the *Sosa* Court’s understanding of this view).

65. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 702(d) (1987).

a definition of “arbitrary detention” under international law to determine whether Alvarez had stated a valid cause of action under the ATS.⁶⁶ Finding that Alvarez’s short detention did not satisfy the Restatement’s definition of “prolonged arbitrary detention,”⁶⁷ the Court rejected his claim as insufficient to constitute a violation of the law of nations under the ATS.⁶⁸ The Court’s reliance on the Restatement to determine if the violation warranted the creation of a cause of action under the ATS and the Restatement’s explicit reference to torture as a violation of international law should be sufficient to place torture as a cause of action within the *Sosa* standard.

D. The Definition of Torture Requires the Act to Be Committed with the Consent or Acquiescence of a Public Official—Nothing More

The Torture Convention provides the generally accepted definition of torture under international law:⁶⁹

torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person . . . when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.⁷⁰

Torture is, therefore, not limited to acts committed by public officials, but rather a private party could commit torture if there is “consent or acquiescence of a public official.”⁷¹ The

66. *Sosa*, 542 U.S. at 737.

67. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 702(e) (1987).

68. *Sosa*, 542 U.S. at 738 (“[A] single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to support the creation of a federal remedy.”).

69. See *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 326 (S.D.N.Y. 2003) (“The most commonly accepted definition [of torture] is that found in the Torture Convention.”); STEPHENS ET AL., *supra* note 27, at 141; Johan D. van der Vyver, *Torture as a Crime Under International Law*, 67 ALB. L. REV. 427, 432 (2003) (“The definitions of torture contained in international instruments are not identical. Even so, there is a tendency to regard the definition of torture contained in the Torture Convention as reflecting a consensus ‘representative of customary international law.’” (quoting *Prosecutor v. Delalic*, Case No. IT-96-21-T, Judgment, ¶ 459 (Nov. 16, 1998))).

70. Torture Convention, *supra* note 5, art. 1.

71. Antonio Marchesi, *Implementing the UN Convention Definition of*

exact meaning of “consent or acquiescence” may be debated, but it should be clear from its language that private parties can commit torture under the Torture Convention’s definition.

When signing the Torture Convention, the United States expressed an understanding that “the term ‘acquiescence’ requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his legal responsibility to intervene to prevent such activity.”⁷² This definition does not weaken the argument that a private individual is capable of committing torture under the Torture Convention’s definition. If anything, it strengthens it because, if awareness by the public official of the act amounting to torture is sufficient, the public official does not need to be directly involved in the private party’s commission of the act for it to be torture under international law.⁷³

Several of the circuit courts of appeals have interpreted the meaning of the term “acquiescence” under the Torture Convention in cases brought by asylum seekers who claimed that they would be tortured if sent back to their country of origin.⁷⁴ These courts have held that Congress intended the term “acquiescence” in the Torture Convention to mean awareness and “willful blindness,” and does not require proof that the public official had actual knowledge of the torture.⁷⁵

Torture in National Criminal Law (with Reference to the Special Case of Italy), 6 J. INT’L CRIM. JUST. 195, 211 (2008) (noting that Article 1 of the Torture Convention does not limit the definition of the actor to public officials and “[t]hus, on condition that it is inflicted ‘at the instigation of or with the consent or acquiescence of a public official,’ torture can be inflicted by private individuals as well”).

72. 8 C.F.R. § 208.18(a)(7) (2010).

73. See *Zheng v. Ashcroft*, 332 F.3d 1186, 1195 (9th Cir. 2003) (“The Senate Committee on Foreign Relations expressly stated that the purpose of requiring awareness, and not knowledge, ‘is to make it clear that both actual knowledge and ‘willful blindness’ fall within the definition of the term ‘acquiescence.’”).

74. See *Gomez-Zuluaga v. Att’y Gen.*, 527 F.3d 330, 350 (3d Cir. 2008) (holding that the Torture Convention as interpreted by Congress requires only “that the government in question is willfully blind to such activities” (quoting *Silva-Rengifo v. Att’y Gen.*, 473 F.3d 58 (3d Cir. 2007))); *Zheng*, 332 F.3d at 1196 (“One of the ‘understandings’ in the Senate resolution of ratification of the Convention Against Torture was that acquiescence of a public official requires ‘awareness’ and not ‘knowledge’ or ‘willful acceptance.’”); *Ontunez-Tursios v. Ashcroft*, 303 F.3d 341, 354–55 (5th Cir. 2002) (finding that willful blindness is sufficient to show acquiescence under the Torture Convention).

75. See cases cited *supra* note 74. While these cases differ from an ATS case

The following analysis will show how crucial this definition of the required level of state involvement is in assessing the ability to sue private contractors for their acts of torture committed while working for the U.S. government.

E. Defenses that Private Contractors Sued for Torture Under the ATS May Assert

1. Immunity Through Exceptions to the Federal Tort Claims Act

The U.S. government enjoys sovereign immunity, shielding it from civil suits.⁷⁶ The FTCA creates a waiver of the government's sovereign immunity, granting federal district courts jurisdiction to hear suits against the United States for torts committed by its employees while acting within the scope of their employment.⁷⁷ Under the Federal Employees Liability Reform and Tort Compensation Act of 1988,⁷⁸ commonly known as the Westfall Act, which amended the FTCA, the Attorney General certifies whether the employee/defendant was acting within the scope of his or her employment at the time of the alleged act giving rise to the lawsuit.⁷⁹ If the employee acted within the scope of employment, the United States substitutes itself for the employee as the defendant, and the lawsuit becomes a suit against the United States under the FTCA.⁸⁰ This effectively shields the employee from liability.⁸¹

because the plaintiff is not trying to show that a defendant has committed torture—which would be the case in litigation under the ATS—but instead show that there is a risk of torture if sent back, the circuit courts' reading of Congress's intended meaning of "acquiescence" is still instructive and should be applicable in ATS cases as well.

76. *See, e.g.*, *Fed. Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 475 (1994) ("Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit.").

77. 28 U.S.C. § 1346(b)(1) (2006).

78. *Id.* § 2679.

79. *See id.* § 2679(d)(1) ("Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.").

80. *Id.*

81. *See id.* § 2679(b)(1) ("Any other civil action or proceeding for money

The Westfall Act's legislative history strongly suggests its purpose was to provide immunity to government employees for acts of negligence or poor judgment, not for criminal acts or egregious conduct.⁸² It is, therefore, highly unlikely that the Westfall Act ever intended grave human rights violations to be within the scope of employment.⁸³

While the FTCA provides a limited waiver of sovereign immunity, the waiver is subject to several important exceptions.⁸⁴ Two of these exceptions are relevant to the factual situations discussed in this comment—the foreign country exception⁸⁵ and the combatant activities exception.⁸⁶ A third provision, known as the independent contractor exception, is not really an exception to the waiver of immunity, but in practice acts as such by restricting to which employees the FTCA applies.⁸⁷

The foreign country exception excludes “claim[s] arising in a foreign country” from the waiver of sovereign immunity.⁸⁸ The Supreme Court clarified in *Sosa* that the foreign country exception applies whenever the injury giving rise to the suit occurs outside the United States, regardless of whether the acts were planned in, or directed from, the United States.⁸⁹ Tortious acts committed in Iraq or another

damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.”)

82. STEPHENS ET AL., *supra* note 27, at 291–92 (arguing that “[t]he Westfall Act's legislative history indicates that the Act was not intended to apply to those who committed ‘egregious torts’” (quoting H.R. REP. NO. 100-700, at 5 (1988), reprinted in 1988 U.S.C.A.N. 5945, 5949)). *But see* Rasul v. Myers, 512 F.3d 644, 658–59 (D.C. Cir. 2008) (holding that alleged acts of torture against detainees at Guantanamo Bay were within scope of employment of military personnel), *vacated*, 129 S. Ct. 763 (2008).

83. *See* STEPHENS ET AL., *supra* note 27, at 291–96; *see also* discussion *infra* Part IV.B.1.

84. 28 U.S.C. § 2680.

85. *Id.* § 2680(k) (“The provisions of this chapter and section 1346(b) of this title shall not apply to . . . (k) Any claim arising in a foreign country.”).

86. *Id.* § 2680(j) (“The provisions of this chapter and section 1346(b) of this title shall not apply to . . . (j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.”).

87. *See id.* § 2671 (“[T]he term ‘Federal agency’ . . . does not include any contractor with the United States.”).

88. *Id.* § 2680(k).

89. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712 (2004) (“[T]he FTCA's foreign country exception bars all claims based on any injury suffered in a foreign country, regardless of where the tortious act or omission occurred.”).

foreign country by a U.S. government employee acting within the scope of his or her employment fall within the foreign country exception of the FTCA, even if the acts take place inside a U.S.-controlled military base.⁹⁰ If a plaintiff sues a government employee for tortious conduct, the United States may substitute itself for the employee under the Westfall Act. The United States can then claim sovereign immunity based on the foreign country exception to the FTCA and, thereby, both the employee and the government are effectively shield from liability for the tortious conduct, leaving the victim with no civil cause of action.⁹¹

The combatant activities exception bars suits against the federal government for “[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.”⁹² The rationale behind this exception is that, during a time of war, the government should not owe a duty of reasonable care to those it is fighting.⁹³ The private contractors discussed in this comment were operating at the Abu Ghraib prison in Iraq, which arguably could be considered a “combat zone” and, thus, the acts committed there could be labeled “combat activities.”⁹⁴ This exception also operates to shield both the employee and the United States from suit.

The independent contractor exception differs from the previous two exceptions in that it does not reinstate sovereign immunity. Instead, it acts as a bar to substitution of the U.S.

90. See Richard Henry Seamon, *U.S. Torture as a Tort*, 37 RUTGERS L.J. 715, 735 (2006) (“[T]he foreign country exception would immunize the United States for the torture that occurred at Abu Ghraib. Because the torture occurred in a foreign country, a claim based on that torture arose in a foreign country and falls within the exception. It does not matter whether the torture was authorized in Washington, D.C.”); see also *United States v. Spelar*, 338 U.S. 217, 219–22 (1949) (holding that the foreign country exception of the FTCA applied to acts that occurred at a military base in Canada, which was held by the United States on a ninety-nine-year lease).

91. See *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 420 (“If, however, an exception to the FTCA shields the United States from suit, the plaintiff may be left without a tort action against any party.”).

92. 28 U.S.C. § 2680(j).

93. *Koohi v. United States*, 976 F.2d 1328, 1337 (9th Cir. 1992) (stating that one purpose of the exception is 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”).

94. Seamon, *supra* note 90, at 734 (“[T]he Abu Ghraib prison lies in an area of active combat.”).

government for the contractor employee under the Westfall Act. Under the FTCA, “employees of the government,” who are subject to substitution, include “officers or employees of any federal agency.”⁹⁵ The FTCA excludes any contractors working for the United States from its definition of “federal agency.”⁹⁶ A private contractor’s employees working for the U.S. government are, therefore, not considered employees of the United States, and substitution under the Westfall Act is barred.⁹⁷

The Supreme Court has held, however, that a private contractor could potentially be considered a “federal agency” under the FTCA if the government controlled the contractor’s day-to-day activity.⁹⁸ This is a high standard and requires essentially absolute control.⁹⁹ Courts should analyze the facts of each case to determine whether the day-to-day operations of the contractor were under such strict government control that the independent contractor was, in effect, a “federal agency.”¹⁰⁰ If that level of control exists, the court would allow the government to substitute itself for the contractor’s employee under the Westfall Act, creating immunity for the employee and potentially also the contractor corporation, which makes it a very appealing defense.¹⁰¹

95. 28 U.S.C. § 2671. The definition also includes other categories, which are not relevant to a discussion about independent contractors.

96. *Id.*

97. See STEPHENS ET AL., *supra* note 27, at 328.

98. See *United States v. Orleans*, 425 U.S. 807, 814–15 (1976) (“A critical element in distinguishing an agency from a contractor is the power of the Federal Government ‘to control the detailed physical performance of the contractor.’ . . . [T]he question is not whether the [contractor, in this case a community action agency,] receives federal money and must comply with federal standards and regulations, but whether [the contractor’s] day-to-day operations are supervised by the Federal Government.”); *Logue v. United States*, 412 U.S. 521, 529–32 (1973) (finding insufficient day-to-day control by the government over a county jail contracted by the federal government to house federal prisoners to consider it a federal agency, stating that “we are not persuaded that employees of a contractor with the Government, whose physical performance is not subject to governmental supervision, are to be treated as ‘acting on behalf of a federal agency simply because they are performing tasks that would otherwise be performed by salaried employees of the Government’”).

99. See STEPHENS ET AL., *supra* note 27, at 328 n.77.

100. See cases cited *supra* note 98.

101. See 28 U.S.C. § 2679(d)(1) (describing the process by which the employee is substituted for the U.S. government as the sole remaining defendant). Under the FTCA, district courts must apply “the law of the place where the act or omission occurred,” *id.* § 1346(b), which is generally based on the *respondeat superior* laws of that place or the Restatement of Agency. See STEPHENS ET AL.,

2. Preemption from Suit Under the Government Contractor Defense

The government contractor defense is a common law defense. It was developed to limit the financial impact on the U.S. government from state tort law claims brought against government contractors manufacturing equipment for the U.S. military.¹⁰² The Supreme Court held in *Boyle v. United Technologies Corp.* that imposing state tort law liability on a government contractor for design defects in military equipment approved by the United States would lead to higher costs for the contractor, which would pass the costs on to the government.¹⁰³ This would create an indirect financial liability for the government by increasing the cost of procuring military equipment, a result the discretionary function exception to the FTCA's waiver of sovereign immunity intended to prevent.¹⁰⁴ The discretionary function exception restores the sovereign immunity for any claim "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."¹⁰⁵

In *Boyle*, the Court addressed whether the plaintiffs could hold a government contractor liable in a wrongful death

supra note 27, at 291–97 (discussing the implications of applying either rules of *respondeat superior* or rules under Restatement of Agency to determine scope of employment). It is possible that even if a private contractor's employee is found to be under day-to-day control of the government, this may not eliminate all liability for the private contractor corporation under the theory of *respondeat superior*. An analysis of this topic is beyond the scope of this comment. For a thorough analysis of this issue, see Casto, *supra* note 6, at 694–99.

102. See *Boyle v. United Techs. Corp.*, 487 U.S. 500, 511–12 (1988); STEPHENS ET AL., *supra* note 27, at 328–29. The government contractor defense is an affirmative defense that places the burden of establishing the elements of the defense on the contractor. *Ibrahim I*, 391 F. Supp. 2d 10, 18 (D.D.C. 2005).

103. *Boyle*, 487 U.S. at 511–12 ("The financial burden of judgments against the contractors would ultimately be passed through, substantially if not totally, to the United States itself, since defense contractors will predictably raise their prices to cover, or to insure against, contingent liability for the Government-ordered designs.").

104. *Id.* at 511 (equating suits against government contractors with suits against the government that would "produce the same effect sought to be avoided by the FTCA exemption").

105. 28 U.S.C. § 2680(a) (2006); see *Boyle*, 487 U.S. at 511 ("Military equipment to be used by our Armed Forces is assuredly a discretionary function within the meaning of [the FTCA exception in 28 U.S.C. § 2680(a)].").

action arising from the crash of a military helicopter.¹⁰⁶ The Court articulated a three-part test, holding that state law claims would be preempted “when (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.”¹⁰⁷ The Court held that, a finding of liability under state tort law for a government contractor under those circumstances would conflict with federal interests in the procurement of military equipment and be contrary to the rationale behind the discretionary function exception to the FTCA.¹⁰⁸

The *Boyle* Court limited its holding to the particular facts of the case, that is, state tort law liability for design defects in military equipment manufactured by a defense contractor.¹⁰⁹ Many courts have followed this approach, narrowly limiting this defense to contractors that manufacture military equipment.¹¹⁰ Some courts, however, have expanded the government contractor defense.¹¹¹ In *Hudgens v. Bell Helicopters/Textron*, the Eleventh Circuit applied the *Boyle* rationale to a service contract between a private contractor and the Army and found the government contractor defense warranted in that instance.¹¹² The court modified the *Boyle*

106. *Boyle*, 487 U.S. at 502–03, 509 (“This case requires us to decide when a contractor providing military equipment to the Federal Government can be held liable under state tort law for injury caused by a design defect.”).

107. *Id.* at 512.

108. *Id.* at 511 (“[P]ermitting ‘second-guessing’ of these judgments through state tort suits against contractors would produce the same effect sought to be avoided by the FTCA exemption.” (citation omitted)).

109. *Id.* at 502 (“This case requires us to decide when a contractor providing military equipment to the Federal Government can be held liable under state tort law for injury caused by a design defect.”).

110. *See, e.g.*, *Snell v. Bell Helicopter Textron, Inc.*, 107 F.3d 744, 746 n.1 (9th Cir. 1997) (“In the Ninth Circuit [the government contractor defense] is only available to contractors who design and manufacture military equipment.”); *Mitchell v. Lone Star Ammunition, Inc.*, 913 F.2d 242, 245 (5th Cir. 1990) (“[T]he government contractor defense only applies in cases of defective design, not in cases of defective manufacture.”).

111. STEPHENS ET AL., *supra* note 27, at 329.

112. *Hudgens v. Bell Helicopters/Textron*, 328 F.3d 1329, 1334 (11th Cir. 2003) (“We would be exceedingly hard-pressed to conclude that the unique federal interest recognized in *Boyle*, as well as the potential for significant conflict with state law, are not likewise manifest in the present case.”).

three-part test¹¹³ and concluded that the same reasoning that applies to a contract for the manufacturing of military equipment would apply to a contract for the maintenance of military equipment.¹¹⁴

Recently in *Saleh v. Titan Corp. (Saleh II)*,¹¹⁵ the D.C. Circuit dramatically expanded the government contractor defense to any private service contractor that, during wartime, is “integrated into combatant activities over which the military retains command authority.”¹¹⁶ Instead of relying on the discretionary function exception of the FTCA as the *Boyle* Court had done, the D.C. Circuit focused on the combatant activities exception and found that unique federal interests were implicated that warranted preemption of state tort law liability.¹¹⁷ The court limited the applicability of the defense to situations where the military retains command authority and operational control over the contractor employee, although the control does not have to be exclusive.¹¹⁸ The requirement of command authority and operational control is akin to the day-to-day control requirement articulated by *United States v. Orleans*¹¹⁹ and

113. *Id.* at 1335 (“[W]e rearticulate the defense’s three elements to foreclose liability under state tort law if (1) the United States approved reasonably precise maintenance procedures; (2) DynCorp’s performance of maintenance conformed to those procedures; and (3) DynCorp warned the United States about the dangers in reliance on the procedures that were known to DynCorp but not to the United States.”).

114. *Id.* at 1334 (“Holding a contractor liable under state law for conscientiously maintaining military aircraft according to specified procedures would threaten government officials’ discretion in precisely the same manner as holding contractors liable for departing from design specifications.”).

115. *Saleh II*, 580 F.3d 1, 9 (D.C. Cir. 2009). This case came to the D.C. Circuit on appeal by both the plaintiffs and defendant CACI after the district court in *Ibrahim II*, 556 F. Supp. 2d 1 (D.D.C. 2007), granted Titan’s motion for summary judgment based on the government contractor defense, but denied CACI the same motion. *Saleh II*, 580 F.3d at 4.

116. *Saleh II*, 580 F.3d at 9.

117. *Id.* at 7 (“[T]he policy embodied by the combatant activities exception is simply the elimination of tort from the battlefield. . . . And the policies of the combatant activities exception are equally implicated whether the alleged tortfeasor is a soldier or a contractor engaging in combatant activities at the behest of the military and under the military’s control.”). In a strong dissent, Judge Garland argued that the expansion of the defense was unprecedented and that holding the private contract liable for the alleged violations did not conflict with any unique federal interest. *Id.* at 23–24 (Garland, J., dissenting).

118. *Id.* at 8–10 (rejecting as too strict the district court’s test in *Ibrahim II*, 556 F. Supp. 2d at 5, which required “exclusive operational control”).

119. *United States v. Orleans*, 425 U.S. 807 (1976).

*Logue v. United States*¹²⁰ for determining whether a private contractor is a federal agency under the FTCA.¹²¹ Thus, although there are strong arguments that the expansion to include the combatant activities exception is unjustified, the key aspect for purposes of this comment's analysis is that the level of control by the military over the private contractor must be extremely high before the defense applies.

The unprecedented D.C. Circuit expansion appears to bring the government contractor defense closer to cases involving claims of torture under the ATS. In fact, the court indicates in dicta that if the defense preempts state tort law claims, it should also preempt tort claims based on international law.¹²² The policy behind the *Boyle* Court's holding—that a government contractor should not be held liable for tortious acts under *state law* if such liability would *present a significant conflict with unique federal policy or interests*¹²³—does not support this argument.¹²⁴ Under *Boyle*, state tort law should only be preempted when the defense contractor would be unable to comply with both its obligations under a federal contract and state tort law.¹²⁵

A private military contractor accused of committing torture and seeking to claim the government contractor defense would have to make two difficult arguments. First, the contractor must demonstrate that the defense extends beyond the preemption of state tort law to also include the preemption of the law of nations.¹²⁶ Despite the D.C. Circuit's statement in dicta, this would constitute an unprecedented

120. *Logue v. United States*, 412 U.S. 521 (1973).

121. *See supra* Part II.E.1.

122. *Saleh II*, 580 F.3d at 16.

123. *See Boyle v. United Techs. Corp.*, 487 U.S. 500, 512 (1988) (“In sum, we are of the view that state law which holds Government contractors liable for design defects in military equipment does in some circumstances present a ‘significant conflict’ with federal policy and must be displaced.”); *see also* *Hudgens v. Bell Helicopters/Textron*, 328 F.3d 1329, 1334 (11th Cir. 2003) (“[T]he question is whether subjecting a contractor to liability under state tort law would create a significant conflict with a unique federal interest.”).

124. *Saleh II*, 580 F.3d at 23 (Garland, J., dissenting) (“*Boyle* has never been applied to protect a contractor from liability resulting from the contractor's violation of federal law and policy. And there is no dispute that the conduct alleged, if true, violated both.”).

125. *Boyle*, 487 U.S. at 509 (stating that state law would not be pre-empted if “[t]he contractor could comply with both its contractual obligations and the state-prescribed duty of care”).

126. *See id.* at 502 (limiting the holding to preemption of state law).

expansion of the defense. Second, the contractor must show that a federal policy or interest significant conflicts with upholding the international prohibition against torture, which the United States has supported by ratifying the Torture Convention and by enacting criminal and civil statutes prohibiting the practice.¹²⁷ Thus, even if the defense were to be expanded beyond preemption of state tort law, arguably there is no unique federal interest that conflicts with holding private contractors liable for committing torture.

F. Government Contractor Cases in the District of Columbia: The Titan Cases

In 2009, the D.C. Circuit Court heard *Saleh II*, a case concerning human rights violations allegedly committed by two government contractors at the Abu Ghraib prison in Iraq.¹²⁸ The appeal stemmed from two cases in the District Court of the District of Columbia, *Ibrahim v. Titan Corp. (Ibrahim I)*¹²⁹ and *Saleh v. Titan Corp. (Saleh I)*,¹³⁰ which addressed government contractors' liability under the ATS for acts of torture. The two cases were based on virtually identical facts: Iraqi nationals were allegedly tortured, raped, assaulted, and killed, while detained at Abu Ghraib, by employees of two private contractors, CACI and Titan.¹³¹ At the time, the U.S. military was in charge of Abu Ghraib and the defendants were contracted to provide interrogation and interpretation services at the prison.¹³²

In both cases, the plaintiffs sued the defendants under the ATS, alleging torture in violation of the law of nations.¹³³

127. See *supra* note 5.

128. *Saleh II*, 580 F.3d 1, 9 (D.C. Cir. 2009).

129. *Ibrahim I*, 391 F. Supp. 2d 10 (D.D.C. 2005).

130. *Saleh I*, 436 F. Supp. 2d 55 (D.D.C. 2006).

131. *Id.* at 57 (“[T]he factual allegations of the two cases, [*Ibrahim I* and *Saleh I*] are virtually indistinguishable from one another.”); *Ibrahim I*, 391 F. Supp. 2d at 12–13 (stating the facts of the case).

132. *Ibrahim I*, 391 F. Supp. 2d at 12 (stating that defendants CACI International, Inc., CACI Incorporated-Federal, and CACI N.V. were employed by the U.S. military as interrogators, and defendant Titan Corporation was employed by the U.S. military to provide interpreters); see Sean D. Murphy, *U.S. Abuse of Iraqi Detainees at Abu Ghraib Prison*, 98 AM. J. INT’L L. 591, 593 (2004) (“After the U.S.-led invasion of Iraq in March 2003, U.S. military forces established and operated a series of detention facilities there, the largest of which was at the Abu Ghraib prison outside Baghdad.”).

133. See *Saleh I*, 436 F. Supp. 2d at 57 (claiming that torture by private parties acting under the color of law is a violation of the law of nations as

In addition, the plaintiffs asserted state common law claims of assault and battery, wrongful death, false imprisonment, intentional infliction of emotional distress, conversion, and negligence.¹³⁴ The court dismissed the ATS claims in both *Saleh I* and *Ibrahim I*, leaving only a small number of common law tort claims.¹³⁵ The two cases were consolidated for discovery and returned to the district court in 2007 as *Ibrahim v. Titan (Ibrahim II)*.¹³⁶ Stripped of any ATS claims, the court in *Ibrahim II* primarily focused on determining the factual basis for the defendants' assertion that the remaining state tort law claims should be preempted by the government contractor defense.¹³⁷

One significant difference between the *Ibrahim I* and *Saleh I* cases was the plaintiffs' theories behind the claim that defendant had committed torture. In *Ibrahim I*, the court dismissed the plaintiffs' claim of torture committed by a private contractor, holding that the definition of torture that is actionable under the ATS as a violation of the law of nations only applies to official state torture.¹³⁸ The court cited to the D.C. Circuit precedent in *Sanchez-Espinoza v. Reagan*¹³⁹ and *Tel-Oren v. Libyan Arab Republic*¹⁴⁰ in support of its holding that the law of nations does not apply to actions by private parties.¹⁴¹ The D.C. Circuit, however, decided both *Sanchez-Espinoza* and *Tel-Oren* prior to the Supreme Court's decision in *Sosa* and was, therefore, not guided by the *Sosa* standard. The *Ibrahim I* court took note of *Sosa*, but did not consider whether the defendant's acts met the Torture

described in the ATS); *Ibrahim I*, 391 F. Supp. 2d at 13–14 (claiming that torture by a private party is a violation of the law of nations as described in the ATS).

134. *Saleh I*, 436 F. Supp. 2d at 57; *Ibrahim I*, 391 F. Supp. 2d at 13.

135. *Ibrahim II*, 556 F. Supp. 2d 1, 2–3 (D.D.C. 2007), *aff'd in part, rev'd in part sub nom. Saleh II*, 580 F.3d 1 (D.C. Cir. 2009).

136. *Id.*

137. *Id.* (addressing common law tort allegations and possible defenses under FTCA and the common law government contractor defense); *see infra* Part IV.B.2.

138. *Ibrahim I*, 391 F. Supp. 2d at 14–15 (questioning “whether the law of nations applies to *private actors* like the defendants in the present case” and holding that “it is not actionable under the Alien Tort Statute’s grant of jurisdiction, as a violation of the law of nations”).

139. *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985).

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

141. *See Ibrahim I*, 391 F. Supp. 2d at 14 nn.1–3 (analyzing the court’s precedent regarding causes of action under the ATS for private actions).

Convention's definition of torture and whether that definition is the proper one to use for a cause of action of torture under the ATS pursuant to *Sosa*.¹⁴² Guided by the *Ibrahim I* decision, the plaintiffs in *Saleh I* used an alternative argument to hold the private contractor liable for torture under the ATS.¹⁴³ In footnote three of its decision, the *Ibrahim I* court cited Judge Edwards' opinion in *Tel-Oren*, that "torture by private parties acting under 'color of law' . . . would be actionable under the ATS."¹⁴⁴ Thus, the plaintiffs in *Saleh I* asserted that CACI and Titan acted under color of law when committing torture against them and, therefore, had committed a violation of the law of nations under the ATS.¹⁴⁵ The *Saleh I* court, however, rejected this argument stating that *Sanchez-Espinoza* holds that private action cannot create a cause of action under the ATS.¹⁴⁶ Again, the court did not analyze whether the scope of the internationally recognized definition of torture would include the acts allegedly committed by the defendants as required by the *Sosa* standard. Instead, the court concluded that *Sosa* had not overturned the controlling standard as defined by *Sanchez-Espinoza*.¹⁴⁷

In *Saleh II*,¹⁴⁸ the D.C. Circuit court conducted a similar analysis to that performed by the district court in *Ibrahim I*

142. As will be developed further in the analysis, the *Ibrahim I* court simply concluded that a private actor cannot commit torture. See *infra* Part IV.A.1. To come to this conclusion, however, the court relied on old D.C. Circuit precedent instead of the *Sosa* standard, which allows courts to create new causes of action for violation of a law of nations that is a widely accepted and clearly defined international norm. See STEPHENS ET AL., *supra* note 27, at 54 (interpreting the *Sosa* standard as requiring a violation to be "of a widely accepted, clearly defined international norm"). This comment argues that, under the *Sosa* standard, the court must focus on the scope of the applicable international law violation and perform a factual analysis to see if the acts of the private party conform to that definition. In this case, the acts must conform to the definition of torture under the Torture Convention, which is the internationally recognized definition of torture. See *supra* note 69.

143. *Saleh I*, 436 F. Supp. 2d 55, 57 (D.D.C. 2006).

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

145. *Saleh I*, 436 F. Supp. 2d at 57.

146. *Id.* at 58 ("*Sanchez-Espinoza* makes it clear that there is no middle ground between private action and government action, at least for purposes of the Alien Tort Statute.>").

147. *Id.* at 57. The court also emphasized the *Sosa* Court's "admonition that lower federal courts should be extremely cautious about discovering new offenses among the law of nations." *Id.* at 57-58.

148. *Saleh II*, 580 F.3d 1, 3-4 (D.C. Cir. 2009).

and *Saleh I* and concluded, citing both *Sanchez-Espinoza* and *Tel-Oren*, that a private party cannot commit torture.¹⁴⁹ Interestingly, the court cited parts of the Torture Convention's definition of torture to support the argument that private parties cannot commit torture, but in doing so distorted the true definition of the crime.¹⁵⁰ Instead of quoting the entire definition of torture, which includes that the "consent or acquiescence of a public official" is sufficient to constitute torture,¹⁵¹ the court selectively cited the Torture Convention as "limiting [the] definition of torture to [only] acts by 'a public official or other person acting in an official capacity.'"¹⁵²

Much of the remaining litigation in *Ibrahim I* and *II* related to state tort law claims and centered on the amount of control the U.S. military had asserted over the contractor's employees.¹⁵³ The issue was whether state tort law claims against the defendants should be preempted under the government contractor defense because, as the defendants' asserted, their employees were, in effect, agents of the government and not the contractor corporations.¹⁵⁴ Ruling on defendants' motion for summary judgment, the *Ibrahim II* court held that Titan's employees performed their duties under the exclusive operational control of the military, while CACI retained significant authority to manage its employees.¹⁵⁵ Therefore, the court granted the motion for summary judgment for Titan, but not for CACI, preempting all of the plaintiffs' remaining state tort law claims against Titan.¹⁵⁶ As mentioned earlier, the D.C. Circuit reversed the district court as to the CACI decision and upheld the Titan decision, thus granting both defendants' summary judgment motions.¹⁵⁷

After *Sosa*, courts should apply the *Ibrahim II* court's

149. *See id.* at 15.

150. *See id.*

151. Torture Convention, *supra* note 5, art. 1.

152. *Saleh II*, 580 F.3d at 15.

153. *See Ibrahim II*, 556 F. Supp. 2d 1, 8–10 (D.D.C. 2007), *aff'd in part, rev'd in part sub nom. Saleh II*, 580 F.3d 1; *Ibrahim I*, 391 F. Supp. 2d 10, 19 (D.D.C. 2005) (discussing defendants' assertion that "their employees were essentially on 'loan' to the military [and] integrated into the military hierarchy").

154. *Ibrahim II*, 556 F. Supp. 2d at 2.

155. *Id.* at 10.

156. *Id.* at 10–11.

157. *Saleh II*, 580 F.3d at 17.

thorough analysis of the level of government control over the private contractor to determine if a private party has committed torture under the Torture Convention's definition. The particular facts of these cases support a finding that the acts of the private contractors met the Torture Convention's definition of torture because the U.S. military retained command authority over both defendants and, thus, either consented or, at the very least, acquiesced to the acts committed by Titan and CACI employees.

III. IDENTIFICATION OF THE LEGAL ISSUES: THE STATE ACTION DILEMMA—TORTURE REQUIRES STATE ACTION, BUT STATE ACTION MAY GRANT PRIVATE CONTRACTORS AN AFFIRMATIVE DEFENSE

As the *Titan* cases illustrate,¹⁵⁸ the use of private contractors in the U.S. military has led to increased concern over how to hold private contractors accountable for human rights abuses committed while working for the United States. A violation of international human rights, such as acts of torture, typically requires some government involvement.¹⁵⁹ Governments, including the United States, however, enjoy general sovereign immunity, shielding them from civil suits for tortious acts committed by its officials and employees.¹⁶⁰ The United States has waived much of that sovereign immunity under the FTCA, although exceptions reinstate the sovereign immunity in some cases.¹⁶¹ Substantial government involvement in a private contractor's acts could potentially entitle the private contractor to the same immunity afforded the U.S. government or to the common law government contractor defense. Thus, the problem is that some government involvement is required to bring a cause of action for torture under the ATS, but too much government involvement could immunize the private party from liability altogether.¹⁶²

158. *Saleh II*, 580 F.3d 1; *Ibrahim II*, 556 F. Supp. 2d 1; *Saleh I*, 436 F. Supp. 2d 55 (D.D.C. 2006); *Ibrahim I*, 391 F. Supp. 2d 10.

159. See *supra* Part II.D.

160. See, e.g., *Fed. Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 475 (1994).

161. See *supra* notes 77, 84–86 and accompanying text; see also *Sosa v. Alvarez-Machain*, 542 U.S. 692, 700 (2004) (addressing the foreign country exception under 28 U.S.C. § 2680(k)).

162. In dicta the *Saleh II* court acknowledged this dilemma, but ignored the difference between the two that this comment highlights, stating: "Of course,

The solution to this problem, particularly in cases of torture, is recognizing that there is a significant gap between the required level and substance of government involvement. To allow a private contractor to assert sovereign immunity or the government contractor defenses, courts require almost absolute government control of the contractor, while the definition of torture only requires that the government official consented or acquiesced to the private contractor's acts. Accepting that one size does not fit all when considering the impact of private contractors acting with government involvement will enable plaintiffs to hold private contractors, who operated in this gap, liable under the ATS for torture.

IV. ANALYSIS: EFFECTIVELY SUING PRIVATE CONTRACTORS FOR TORTURE UNDER THE ALIEN TORT STATUTE— INTERPRETING THE DIFFERENT ASPECTS OF STATE ACTION

A. *Private Parties Can Be Held Liable for Torture Under the ATS*

1. *Applying the Sosa Standard*

In *Sosa*, the Supreme Court announced that the ATS was a purely jurisdictional statute, but federal courts have common law powers to create new causes of action for a limited number of international law violations that rest on an international norm that is “widely accepted and clearly defined.”¹⁶³ After *Sosa*, a court analyzing a violation of the law of nations in an ATS claim must apply the *Sosa* standard.¹⁶⁴

The *Sosa* Court, as well as other courts, has recognized torture as a valid cause of action under the ATS.¹⁶⁵ The

plaintiffs are unwilling to assert that the contractors are state actors. Not only would such an admission make deep inroads against their arguments with respect to the preemption defense, it would virtually concede that the contractors have sovereign immunity.” *Saleh II*, 580 F.3d at 15.

163. STEPHENS ET AL., *supra* note 27, at 50; *see Sosa*, 542 U.S. at 725 (“[W]e think courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized.”).

164. Casto, *supra* note 51, at 635–36 (“[A]ll analyses of ATS litigation must flow from *Sosa*’s guidelines.”).

165. *See supra* Part II.C.

crucial question is whether the definition of torture makes it possible for a private party to commit the crime.¹⁶⁶ The D.C. Circuit in *Saleh II* stated that there is no settled international norm that recognizes torture committed by private actors.¹⁶⁷ To support this, the court incorrectly cited the Torture Convention as “limiting [the] definition of torture to acts by ‘a public official or other person acting in an official capacity.’”¹⁶⁸ In fact, the Torture Convention makes an act torture if it is “inflicted by or at the instigation of or *with the consent or acquiescence* of a public official or other person acting in an official capacity.”¹⁶⁹

In rejecting the plaintiffs’ torture claims, the *Ibrahim I* court should not have relied solely on *Tel-Oren* and *Sanchez-Espinoza*, which predate *Sosa*, to determine whether a non-state actor can commit torture, and categorically conclude that it cannot because torture is reserved for acts committed by state actors.¹⁷⁰ Instead, the *Ibrahim I* court should have analyzed the facts underlying the plaintiffs’ complaint and, as required by *Sosa*, determined whether the allegation—in this case torture by a non-state actor—amounted to a violation of a “norm of international character accepted by the civilized world and defined with [clear] specificity.”¹⁷¹ The issue is not whether a private party can commit torture, but whether there has been a violation of the international prohibition against torture, which is widely accepted and clearly defined.

The Torture Convention provides the generally accepted definition of torture under international law.¹⁷² Under the Torture Convention, torture is not an exclusive state or official action; a private party can, if acting “with the consent or acquiescence of a public official or other person acting in an official capacity,”¹⁷³ commit torture.¹⁷⁴ District courts must

166. This comment does not address the question of what acts amount to torture, but focuses solely on whether acts that would amount to torture are considered torture if committed by a private party acting with some state involvement.

167. *Saleh II*, 580 F.3d at 15.

168. *Id.*

169. Torture Convention, *supra* note 5, art. 1 (emphasis added).

170. *Id.*

171. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004).

172. See STEPHENS ET AL., *supra* note 27, at 141 (“The Torture Convention contains the generally accepted international law definition of torture”); see also *supra* note 69; discussion *supra* Part II.D.

173. Torture Convention, *supra* note 5, art. 1.

follow the *Sosa* directive and should use this definition to assess whether or not a defendant has committed torture, independent of whether the law of nations in general applies to private parties.

2. *Other Courts Have Found Private Parties Capable of Violating the Law of Nations*

Courts have found private parties capable of violating the law of nations. In *Jama v. United States INS (Jama I)*,¹⁷⁵ the district court denied the defendant contractor's motion to dismiss, holding that a private contractor who had contracted with the INS to run a detention facility for asylum seekers was a state actor because the private contractor was performing governmental services.¹⁷⁶ The plaintiffs sued the private contractor under the ATS alleging mistreatment by the prison guards, who were employees of the contractor, including cruel, inhuman, and degrading treatment.¹⁷⁷ The *Jama I* court determined that, because the private contractor was effectively a state actor, its employees could be held liable for violation of the law of nations under the ATS.¹⁷⁸ The case returned to the district court six years later in *Jama II* on defendant's motion to dismiss the remaining claims.¹⁷⁹ By the time *Jama II* was decided, the district court had the guidance of *Sosa* to help determine whether the alleged violation of the law of nations created a cause of action under the ATS.¹⁸⁰ The district court held that the individual acts of the guards did not meet the rigorous *Sosa* standard, but there was sufficient basis for the plaintiffs to establish an ATS claim against the contractor and its officers for the collective acts of all the guards employed by the contractor.¹⁸¹

174. Marchesi, *supra* note 71, at 211.

175. *Jama I*, 22 F. Supp. 2d 353 (D.N.J. 1998).

176. *Id.* at 365–66 (“Thus they were state actors and it is unnecessary to address the question raised in *Kadic*, namely the extent to which non-state actors can be sued under the ATCA.”).

177. *Id.* at 358–59.

178. *Id.* at 363 (“[The contractor’s employees] were acting under contract with the INS and were performing governmental services. Thus they were state actors . . .”).

179. *Jama II*, 343 F. Supp. 2d 338 (D.N.J. 2004).

180. *Id.* at 357 (“The Supreme Court’s June 2004 opinion in [*Sosa*] requires that this court’s rulings in its 1998 Opinion concerning the ATCA be revisited.”).

181. *Id.* at 360–61 (granting summary judgment in favor of the individual guards employed by the contractor, but denying it for the contractor corporation

In *Jama II*, the acts of an individual contractor's employees did not amount to a violation of the law of nations under the ATS because the severity and extent of the individual violations did not meet the requirements under *Sosa*; the court, however, did not preclude the possibility that an employee could commit such a violation.¹⁸² By finding that the contractor and its officers could be held liable for the collective violation of all its employees because of the collective severity of the acts, and comparing the acts of the employees with the torture that took place in *Filartiga*, the court sent a clear signal—private contractors can violate the law of nations if the conduct is severe enough and there is sufficient state involvement.¹⁸³ Therefore, pursuant to the *Sosa* standard, courts have the power to create new causes of action under the ATS for these violations.

The Torture Convention's requirement that the party act with "consent or acquiescence of a public official or other person acting in an official capacity" is arguably analogous to the requirement in the TVPA and other federal statutes that a party act under "color of law." This is evident from Congress's use of the latter term when it codified the Torture Convention.¹⁸⁴ Prior to *Sosa*, the Second Circuit concluded in *Kadic v. Karadzic* that "[t]he 'color of law' jurisprudence of 42 U.S.C. § 1983 is a relevant guide to whether a defendant has engaged in official action for purposes of jurisdiction under the Alien Tort Act."¹⁸⁵ In reversing the lower court's denial of subject matter jurisdiction under the ATS, the Second Circuit held that "[a] private individual acts under color of law within

and its officers).

182. *Id.* (comparing the severity of the torture in *Filartiga* to the less serious individual acts of the contractor's employees).

183. *Id.* ("[The contractor] is, of course, responsible for the conditions in the Facility and, by virtue of the doctrine of respondeat superior, for the actions of the guards and its other employees on duty there. . . . [T]he court concludes that there is evidence on the basis of which the *Jama II* plaintiffs could establish an ATCA claim against [the contractor and its officers].").

184. In codifying the Torture Convention, Congress chose the wording "color of law" instead of "consent or acquiescence of a public official or other person acting in an official capacity" contained in the Torture Convention. See Torture Convention Implementation Act, 18 U.S.C. § 2340 (2006). For that reason, the two terms should be considered as interchangeable.

185. *Kadic v. Karadzic*, 70 F.3d 232, 245 (2d Cir. 1995). The court held that Radovan Karadzic, the leader of the Bosnian Serbs, could be held liable for international law violations requiring state action because "he acted in concert with the former Yugoslavia." *Id.*

the meaning of section 1983 when he acts together with state officials or with significant state aid.”¹⁸⁶ The court’s holding, therefore, lends strong support to the view that a private individual can violate the Torture Convention and that liability is not limited only to acts directly committed by state actors.

From the Torture Convention’s definition of torture, it is clear that a state actor does not need to be actively involved for a private party to commit torture—mere acquiescence by the state actor is sufficient.¹⁸⁷ Several circuit courts have addressed the meaning of the Torture Convention’s “acquiescence,” although in a somewhat different but applicable context.¹⁸⁸ Courts have consistently found that acquiescence does not require the public official to have actual knowledge of the specific torture; awareness, including willful blindness, that the victim is being tortured is sufficient.¹⁸⁹ This interpretation of the term “acquiescence” should also be used by courts facing a claim of torture under the ATS. Courts applying this interpretation would have to determine whether a public official either had knowledge of or was willfully blind to the acts committed by the private party that amounted to torture. If so, the private party’s acts would amount to torture under the Torture Convention and, therefore, warrant the creation of a cause of action under the ATS.

3. *The Titan Cases, and the Curious Absence of an Application of the Sosa Standard*

The *Ibrahim I* court never addressed whether the private contractor defendants had acted as state actors or under “color of law” because none of the plaintiffs made that claim.¹⁹⁰ Instead, the question for the court was solely

186. *Id.*; see also *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 104 (2d Cir. 2000) (“More recently, we held in *Kadic* that the ATCA reaches the conduct of private parties provided that their conduct is undertaken under the color of state authority or violates a norm of international law that is recognized as extending to the conduct of private parties.”(citation omitted)).

187. *Marchesi*, *supra* note 71, at 211.

188. See discussion *supra* Part II.D.

189. See cases cited *supra* note 74.

190. *Ibrahim I*, 391 F. Supp. 2d 10, 14 n.3 (D.D.C. 2005) (stating that the only plaintiff who had asserted that the defendants were acting under color of law subsequently withdrew that assertion).

whether the defendants had committed torture as private actors.¹⁹¹ Therefore, the court easily dismissed the claim of torture, holding that the law of nations does not apply to a private contractor under the D.C. Circuit precedent.¹⁹² The likely reason for the absence of a color of law claim was plaintiffs' fear that the court would hold that "if defendants were acting as agents of the state, they would have sovereign immunity under *Sanchez-Espinoza*."¹⁹³ The *Saleh II* court repeated this argument in dicta and, without providing much analysis to support it, stated that "[o]f course, plaintiffs are unwilling to assert that the contractors are state actors. Not only would such an admission make deep inroads against their arguments with respect to the preemption defense, it would virtually concede that the contractors have sovereign immunity."¹⁹⁴ This conclusion fails to consider the nuances of the Torture Convention's definition of torture,¹⁹⁵ which makes it clear that the plaintiffs could have asserted that defendants had committed torture under that definition without "virtually conced[ing] that the contractors have sovereign immunity."¹⁹⁶ This is the precise tension that can be resolved by recognizing that the required state involvement differs for torture and sovereign immunity.

The key question after *Sosa* is not whether the law of nations applies to a private actor, but whether the facts of the claim indicate that the private actor's conduct amounted to torture as internationally defined in the Torture Convention.¹⁹⁷ Had the plaintiffs in *Ibrahim I* decided to assert that the defendants had acted with some level of consent or acquiescence of military personnel at Abu Ghraib, the judge should have determined whether the defendants' acts met the Torture Convention's definition of torture, and not simply concluded that private parties can never commit

191. *Id.* at 14.

192. *Id.* (stating that in the D.C. Circuit the law of nations does not apply to private actors).

193. *Id.* at 14 n.3.

194. *Saleh II*, 580 F.3d 1, 15 (D.C. Cir. 2009).

195. This is evident from the court's incomplete and inaccurate citation of the Torture Convention's definition of torture. *See supra* text accompanying notes 150–52.

196. *Saleh II*, 580 F.3d at 15.

197. *See supra* note 51 and text accompanying note 47.

torture.¹⁹⁸ It is evident from reading the *Saleh I* decision that the D.C. District Court did not examine the facts under the applicable *Sosa* guidelines.¹⁹⁹ The district court had the opportunity in *Saleh I* to determine whether the private contractors had acted under color of law, but it simply dismissed the claim by stating that “*Sanchez-Espinoza* makes it clear that there is no middle ground between private action and government action, at least for purposes of the Alien Tort Statute.”²⁰⁰ This conclusion is puzzling because it completely fails to analyze the claim under the controlling *Sosa* standard.²⁰¹ The *Saleh I* (and later the *Saleh II*) court relied on precedent that had not determined whether the violation asserted by the plaintiffs was of a widely accepted and clearly defined international norm, which is the determination at the core of the *Sosa* standard.²⁰² Justice Scalia, sitting as Circuit Court judge in the D.C. Circuit, had stated in *Sanchez-Espinoza* that the law of nations “does not reach private, non-state conduct.”²⁰³ That is not the issue here, however. If the private party is acting with the consent or acquiescence of a state actor, as defined by the Torture Convention the act meets the definition of torture and must be recognized as a violation of the law of nations under *Sosa*.

In *Ibrahim II*, the court determined that the private contractors, Titan and CACI, were under extensive control by the U.S. military.²⁰⁴ The court found that Titan employees were “fully integrated into the military units” and were under “direct command and exclusive operational control of military

198. *Ibrahim I*, 391 F. Supp. 2d at 14. There is no indication from the court’s decision, however, that if given the opportunity, the judge would have performed this analysis. See *id.* (relying on precedent in the D.C. Circuit to conclude that torture can never be committed by private parties and never addressing whether the private actor had met the definition of torture); see also *Saleh II*, 580 F.3d at 15 (repeating the same argument).

199. See *Saleh I*, 436 F. Supp. 2d 55 (D.D.C. 2006).

200. *Id.* at 58; see also *Saleh II*, 580 F.3d at 15–16 (repeating the same argument).

201. See *Saleh I*, 436 F. Supp. 2d at 58.

202. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004); see also STEPHENS ET AL., *supra* note 27, at 54 (articulating the *Sosa* standard as requiring a violation to be “of a widely accepted, clearly defined international norm”).

203. *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 206–07 (D.C. Cir. 1985).

204. *Ibrahim II*, 556 F. Supp. 2d 1, 9–10 (D.D.C. 2007) (presenting facts that indicated that Titan employees were under almost complete control of the military, and CACI employees might have been under dual chain of command, one being military).

personnel.”²⁰⁵ This level of involvement by the military would surely meet the standard of “consent or acquiescence” under the Torture Convention.²⁰⁶ According to several circuit courts, acquiescence only means “willful blindness.”²⁰⁷ If a private contractor’s employee is “fully integrated” into the military, as the court found Titan’s employees to be, or even just partially under the chain of command, as was the case for CACI’s employees, it would surely be impossible for the employee to torture inmates to death without either the consent or willful blindness of the military. Thus, if the private contractor employees committed the acts under these circumstances, they amounted to torture under the Torture Convention and constitute a valid cause of action under the ATS.

B. Defenses That Should Be Unavailable to Private Contractors Who Commit Torture

1. Immunity Under the Federal Tort Claims Act

The FTCA creates a waiver of sovereign immunity and provides subject matter jurisdiction for federal courts to hear claims brought by plaintiffs against the United States for torts.²⁰⁸ The Westfall Act provides a process where the government assumes responsibility under the FTCA for the tortious acts of its employees if the acts are committed within the scope of his or her employment.²⁰⁹ The FTCA expressly excludes private contractors, so the government can generally not substitute itself for a government contractor’s employee, unless it asserts absolute control over the contractor’s day-to-day activity.²¹⁰ This is certainly a tougher standard than the one required to find “consent or acquiescence” under the Torture Convention’s definition of torture.²¹¹ Therefore, a

205. *Id.* at 10.

206. Torture Convention, *supra* note 5, art. 1.

207. *See supra* note 73–74.

208. 28 U.S.C. § 1346(b)(1) (2006); *see also supra* Part II.E.1.

209. 28 U.S.C. § 2679(d)(1).

210. *Id.* § 2671; *see discussion supra* Part II.E.1.

211. STEPHENS ET AL., *supra* note 27, at 328 n.77 (arguing that the level of control “may not be present even where the government exercises significant control over implementation of the contract”). Certainly, under the many circuit court definitions of “acquiescence” a significant level of control by the government would meet the required awareness or willful blindness. *See*

court performing a *Sosa* analysis under the Torture Convention would find sufficient consent or acquiescence of a government official long before it found that the government control reached the level of day-to-day control required to argue that the private contractor is “federal agency” under the FTCA.²¹²

The difference between the required state action under the Torture Convention and the day-to-day control required under *Orleans* and *Logue* is of utmost importance because the former allows a plaintiff to hold a private contractor liable for torture without the contractor being able to assert that sovereign immunity shields it from liability. In *Ibrahim I* and repeated in *Saleh II*, the court concluded that if the defendants were to be found liable for torture they would inevitably also enjoy sovereign immunity.²¹³ After *Sosa*, this conclusion is incorrect because the government involvement required to constitute torture must be based on the Torture Convention’s definition, which does not require a public official to impose a high level of day-to-day control over the private actor for the acts to amount to torture.²¹⁴

In addition, there is also a strong argument against allowing the United States to substitute itself for the employee under the Westfall Act in cases involving intentional human rights violations.²¹⁵ The Westfall Act was “intended to shield federal workers from suits which arise out of their performance of their official duties, not to give them license to commit intentional torts in the office.”²¹⁶ Shielding government employees or government contractors that commit torture would be contrary to that intent.

The combatant activities exception²¹⁷ and the foreign

Gomez-Zuluaga v. Att’y Gen., 527 F.3d 330, 350 (3d Cir. 2008) (holding that acquiescence in the Torture Convention as interpreted by Congress does not require the government to have actual knowledge of the torturous conduct, willful blindness is sufficient).

212. See discussion *supra* Part II.E.1; cases cited *supra* note 98.

213. *Saleh II*, 580 F.3d 1, 15 (D.C. Cir. 2009); *Ibrahim I*, 391 F. Supp. 2d 10, 14 n.3 (D.D.C. 2005) (“[P]laintiffs cannot allege that conduct is state action for jurisdictional purposes but private action for sovereign immunity purposes.” (citing *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 207 (D.C. Cir. 1985))).

214. See *supra* Part II.D–E.

215. STEPHENS ET AL., *supra* note 27, at 295–96.

216. *Id.* at 293 (quoting *Rutofsky v. Norman*, No. 95-2038, 1997 WL 299382, at *2 n.1 (6th Cir. June 4, 1997)).

217. 28 U.S.C. § 2680(j) (2006).

country exception of the FTCA²¹⁸ are only relevant if the contractor is found to be a federal agency under the FTCA.²¹⁹ An analysis of whether these two exceptions apply to these cases is beyond the scope of this comment. The crucial point, however, is that if either of these exceptions applies, and if the government is able to substitute itself for the private contractor's employee and claim sovereign immunity, it will leave the plaintiff with no cause of action.

2. Government Contractor Defense

In *Ibrahim II*, the district court held that the state tort law claims against Titan were preempted by the government contractor defense because Titan's employees were "under the direct command and exclusive operational control of the military chain of command."²²⁰ The circuit court in *Saleh II* slightly broadened the test, finding the government contractor defense applicable to CACI even though the military control was not exclusive.²²¹ Both courts' analyses resemble the *Orleans* and *Logue* test of government's day-to-day control over the contractor's activities, used to determine whether the private contractor was a "federal agency."²²² Under the FTCA, if a contractor's employee is found to be a government employee, the United States can be substituted for the employee *only* if it is found that the tortious act was committed within the scope of the contractor's employment.²²³ Both the *Ibrahim II* and the *Saleh II* court avoided this analysis under the FTCA by expanding the government contractor defense beyond its original application. Here, instead of basing the government contractor defense on the

218. *Id.* § 2680(k).

219. *Id.* § 2680(a) (limiting the scope of the FTCA to suits against "a federal agency or an employee of the Government").

220. *Ibrahim II*, 556 F. Supp. 2d 1, 9–10 (D.D.C. 2007) (allowing Titan to fall within the combatant activities exception of the FTCA because its employees were fully integrated into military units and received all orders from the military and, therefore, the state tort claim against Titan was barred under the government contractor defense).

221. *Saleh II*, 580 F.3d 1, 8 (D.C. Cir. 2009) ("[The] 'exclusive operational control' test does not protect the full measure of the federal interest embodied in the combatant activities exception. Surely, unique and significant federal interests are implicated in situations where operational control falls short of exclusive.").

222. See cases cited *supra* note 98; *supra* Part IV.B.1.

223. See 28 U.S.C. § 2679(d)(1).

policies behind the discretionary function exception of the FTCA as the Supreme Court did in *Boyle*, the courts based the defense on the policies behind the combatant activities exception.²²⁴ Not only is this expansion unprecedented,²²⁵ but it also removes the Westfall Act's requirement that an employee be immune from suit only if the tortious act was within the scope of employment.²²⁶ "It thus grants private contractors *more* protection than our soldiers and other government employees receive" under the Westfall Act.²²⁷

The common law government contractor defense is justified by the same policies that warrant exceptions to the waiver of sovereign immunity under the FTCA—that state tort law sometimes should not be allowed to conflict with important and unique federal interests.²²⁸ In *Boyle*, the Supreme Court held that preemption of state law "will occur only where . . . a significant conflict exists between an identifiable federal policy or interest and the operation of state law, or the application of state law would frustrate specific objectives of federal legislation."²²⁹ Courts should not extend that reasoning to cases involving human rights violations such as torture because there is no conflict between a law prohibiting torture and a federal interest. While a federal policy could be counter to a state product liability law, it could not be counter to a norm of international law recognized by the federal government. The U.S. government has ratified the Torture Convention, and enacted both the Torture Act and the TVPA, providing strong evidence that there is no federal interest in conflict with holding torturers liable for their acts.²³⁰

224. *Saleh II*, 580 F.3d at 4; *Ibrahim II*, 556 F. Supp. 2d at 10 ("The federal interest at stake in the present case is embodied, not by the discretionary function exception, but by the combatant activities exception.").

225. See *Saleh II*, 580 F.3d at 24 (Garland, J., dissenting) ("No other circuit court has gone as far as our circuit goes today.").

226. See 28 U.S.C. § 2679(d)(1).

227. *Saleh II*, 580 F.3d at 27 (Garland, J., dissenting).

228. See *Boyle v. United Techs. Corp.*, 487 U.S. 500, 511 (1988) (equating suits against government contractors with suits against the government that would "produce the same effect sought to be avoided by the FTCA exemption").

229. *Id.* at 507 (citations omitted).

230. *Saleh II*, 580 F.3d at 26 n.10 (Garland, J., dissenting) ("If anything, the cited statutes—all of which condemn torture—confirm that there is no conflict between state law and federal policy on that issue.").

Unlike the situations in *Boyle*²³¹ and *Hudgens*²³² where the federal interest related to the government's ability to procure equipment for its military at an affordable cost²³³ or have it properly maintained,²³⁴ there is no legitimate government interest in ensuring that the private contractors it employs are not held liable for torture. The *Saleh II* court argues that "[a]llowance of such suits will surely hamper military flexibility and cost-effectiveness, as contractors may prove reluctant to expose their employees to litigation-prone combat situations."²³⁵ It is hard to imagine what legitimate combat situations the court is referring to that would require private contractors to commit torture. The government can never legitimately require that the contractor violate a *jus cogens* norm in order to fulfill its contractual obligations with the government.²³⁶ Therefore, a situation should never arise where a contractor is forced to choose between failing to comply with contractual obligations to the federal government and violating international human rights law.²³⁷ Even if a contract required a violation of human rights law, strong public policy and federal interest argue against finding the government contractor defense available to such a contract.²³⁸

231. *Boyle*, 487 U.S. 500.

232. *Hudgens v. Bell Helicopters/Textron*, 328 F.3d 1329 (11th Cir. 2003).

233. *Boyle*, 487 U.S. at 506–07 (“The imposition of liability on Government contractors will directly affect the terms of Government contracts: either the contractor will decline to manufacture the design specified by the Government, or it will raise its price. Either way, the interests of the United States will be directly affected.”).

234. *Hudgens*, 328 F.3d at 1334 (“We thus hold that the government contractor defense recognized in *Boyle* is applicable to the service contract between the Army and DynCorp.”).

235. *Saleh II*, 580 F.3d at 8.

236. A *jus cogens* norm is “a norm from which no derogation is permitted.” Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 33.1.

237. *Boyle*, 487 U.S. at 509 (stating that state law would not be pre-empted if “[t]he contractor could comply with both its contractual obligations and the state-prescribed duty of care”).

238. STEPHENS ET AL., *supra* note 27, at 330 (“[T]he Supreme Court considered that the liability of a government contractor for work performed on a government contract was related to the issue of whether ‘what was done was within the constitutional power of Congress.’” (quoting *Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18, 20–21 (1940))).

V. PROPOSAL

Courts should apply the *Sosa* standard to any claim brought by a plaintiff under the ATS for a violation of the law of nations.²³⁹ The *Sosa* Court defined the scope of the ATS by articulating a narrow test, requiring “any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms.”²⁴⁰ The *Sosa* test limits a court’s power to create new causes of action to only the most widely recognized violations of international law.²⁴¹

A district court faced with an untested ATS challenge under the *Sosa* standard, as in the case of torture committed by private contractors working for the U.S. government, should apply the *Sosa* test to determine if the violation is of a widely accepted and clearly defined international law norm.²⁴² When suits allege torture committed by a private party,²⁴³ district courts should apply the Torture Convention’s definition of torture, which is widely accepted and clearly defined under international law.²⁴⁴ Courts cannot rely on pre-*Sosa* precedent if it limits its ability to create a cause of action warranted under *Sosa*’s holding.²⁴⁵

Applying the *Sosa* standard and the proper definition of torture, district courts should not dismiss ATS cases involving acts of torture on the basis that only state actors

239. See *supra* note 51.

240. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004).

241. *Id.* at 712 (“Although we agree the statute is in terms only jurisdictional, we think that at the time of enactment the jurisdiction enabled federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law.”).

242. See *id.* at 725.

243. Courts addressing ATS claims alleging torture by public officials do not have to go through the *Sosa* standard because the *Sosa* Court already recognized torture as a violation that meets the standard. See *id.* at 732, 737 (citing *Filártiga*’s application of torture as a cause of action, as an example where the federal courts correctly recognized a “private claim[] under federal common law for violations of [an] international law norm”).

244. STEPHENS ET AL., *supra* note 27, at 141; see also van der Vyver, *supra* note 69, at 432.

245. See *Jama II*, 343 F. Supp. 2d 338, 358 (D.N.J. 2004) (“*Sosa* requires that this court revise its legal rulings and employ a different method of analysis in determining if plaintiffs have produced evidence to support an ATCA claim against any of the remaining defendants.”); see also Casto, *supra* note 51, at 635–36 (“[A]ll analyses of ATS litigation must flow from *Sosa*’s guidelines.”).

can commit torture. Private actors can commit torture if they act “at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”²⁴⁶ Courts should recognize the gap that exists between the Torture Convention’s requirement of state involvement²⁴⁷ and the much higher day-to-day control or command authority, required for sovereign immunity under FTCA and the government contractor defense, respectively.²⁴⁸ The court’s obligation is, therefore, to determine to what extent a private party has acted according to the definition of torture, and then determine whether the government’s day-to-day control or command authority was less than absolute.

A proper analysis of ATS claims under the *Sosa* standard requires a court to first, accept that private parties can commit torture under the Torture Convention’s definition, and second, recognize that the level of state involvement differs for torture and sovereign immunity. This approach should result in a strengthening of human rights protection in U.S. courts. Plaintiffs would have a venue to seek relief for egregious human rights violations, and the U.S. government would be prevented from using private actors to circumvent liability for acts of torture. Such an approach would also act as a forceful deterrent to the thousands of private contractors working for the U.S. government, who would have notice that acts in violation of international human rights law will create liability—both for the individual torturer and the corporation that employs him or her. Impunity for human rights violations committed by the United States or parties working for it not only injures the victims and their families, it also

246. Torture Convention, *supra* note 5, art. 1; see Marchesi, *supra* note 71, at 211.

247. Torture Convention, *supra* note 5, art. 1.

248. *Saleh II*, 580 F.3d 1, 9 (D.C. Cir. 2009) (“During wartime, where a private service contractor is integrated into combatant activities over which the military retains command authority, a tort claim arising out of the contractor’s engagement in such activities shall be preempted.”); see cases cited *supra* note 98. Note that the D.C. Circuit’s expansion of the government contractor defense is unique to the D.C. Circuit and is heavily criticized. It is included here, not as a recognition of its accuracy, but to show that even if courts apply this expansive grant of protection to the private contractors, courts could still find a contractor liable for torture if the acts involve sufficient state action to be defined as torture, but the contractor is not fully “integrated into combatant activities over which the military retains command authority.” *Saleh II*, 580 F.3d at 9.

seriously harms the reputation of the United States as a staunch promoter of human rights around the world..

VI. CONCLUSION

Acts of torture require state involvement, but a finding of too much state involvement may provide sovereign immunity.²⁴⁹ This problem, however, has a solution. First, courts should accept that private parties can commit torture. Second, courts should recognize the gap between the required level of government involvement for torture and the sovereign immunity related defenses and determine whether the private party that committed the torture was operating in that area.²⁵⁰ Applying the *Sosa* standard to every claim under the ATS will ensure that courts properly comply with the original meaning of the statute. This will strengthen the continued pursuit for justice and accountability in U.S. courts that started with *Filartiga*, assuring a venue in which to hold human rights violators liable for their commission of heinous international crimes.

249. *See supra* Part V.

250. *See supra* Part IV.B.1.
